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Mediation of Civil Cases: Neither Panacea Nor Anathema (A Prescription for Change in Procedural Rules)

LAWRENCE C. MANN†

I. INTRODUCTION

The literature on court-annexed mediation and arbitration contains both a large number of claims in support of alternative dispute resolution (ADR) and a number of assertions that those claims are unfounded.¹ Few studies have attempted to explain their results in terms of case management or negotiation theory. An explanation of the operation of one mediation program, based on the study of several thousand cases, may help to place both the criticisms and alleged benefits of these programs into perspective.

This Article reviews preliminary findings from a study of more than five thousand civil cases scheduled for mediation in the Third Judicial Circuit Court of the State of Michigan.² The thesis of this Article is that mediation and other programs aimed at facilitating attorney negotiation encourage the prompt and fair disposition of civil cases. As a subordinate position, I contend that ADR has involved inflated expectations of the putative benefits of mediation and arbitration programs. Such programs have not and cannot provide a "quick fix" for problems such as delayed civil cases. Under appropriate circumstances, court-annexed efforts to facilitate negotiation may point toward a new orientation in civil case management and related procedural rules. In most courts, the rules of civil procedure may not provide a sufficient battery of procedural resources

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1. See Edwards, *Alternative Dispute Resolution: Panacea or Anathema*, 99 HARV. L. REV. 668 (1986); Pearson, *An Evaluation of Alternatives to Court Adjudication*, 7 JUST. SYS. J. 420 (1982).

2. See Mann & Vrooman, *Mediation, A Summary of the Findings of the Mediation Study Team* (1988) (available from the authors and the Third Judicial Circuit Court in Detroit, Michigan).

aimed at facilitating attorney negotiations. In the future, procedural rules must provide increased encouragement and assistance to attorneys in performing what appears to be a primary aspect of their work—settling cases. This conception of case management and procedural rules somewhat contradicts the dominant view expressed in the court administration literature and the legislative history of the Federal Rules of Civil Procedure.

The civil case management doctrine essentially consists of a series of principles that have resulted from the application of common sense³ to specific aspects of court delay.⁴ These principles are also reflected in procedural rules that seek to give courts the power to manage civil litigation. For example, it is argued that early and continuous judicial control over the caseload process⁵ and “centralized administration of a strict continuance policy”⁶ will yield a more prompt resolution of civil actions. Federal Rule of Civil Procedure 16 largely embodies this principle.

Although data from relatively recent studies seem to validate these principles,⁷ some broader questions remain unanswered. For example, why does early and continuous judicial control result in decreased disposition times for some cases? Is “judicial” control essential, or can some other form of court action be substituted,

3. Judges and attorneys are accustomed to focusing on narrow, piecemeal issues in a two-sided manner. This approach to decision making may not be suited to administrative policy decisions involving polycentric issues. See H. JACOB, *EMPIRICAL THEORIES ABOUT COURTS* 204-05 (K.O. Boyum & L. Mather 1983). See also R. NIMMER, *THE NATURE OF SYSTEM CHANGE: REFORM IMPACT IN THE CRIMINAL COURTS* 19-26 (1978). Nimmer provides an excellent discussion of the contemporary, intuitive assumptions that pervade the court reform movement. He focuses on the criminal courts, but the central assumptions in both the civil and criminal court reform areas substantially overlap.

4. The mediation program at the core of this study is a case in point. The Third Judicial Circuit Court has a history of problems associated with delay in civil litigation, not the least of which was a trial disposition time in excess of four years. The court has been the subject of several studies. T. CHURCH, A. CARLSON, J. LEE & T. TAN, *JUSTICE DELAYED: THE PACE OF LITIGATION IN URBAN TRIAL COURTS* (Nat'l Center for State Courts 1978) [hereinafter *JUSTICE DELAYED*]; B. MAHONEY, L. SIPES & J. ITO, *IMPLEMENTING DELAY REDUCTION AND DELAY PREVENTION PROGRAMS IN URBAN TRIAL COURTS: PRELIMINARY FINDINGS FROM CURRENT RESEARCH* (Nat'l Center for State Courts 1985) [hereinafter *IMPLEMENTING DELAY REDUCTION*]; Shuart, Smith & Planet, *Settling Cases in Detroit: An Examination of Wayne County's "Mediation" Program*, 8 JUST. SYS. J. 307 (1983) [hereinafter *Settling Cases in Detroit*].

5. Caseload is “the continuum of activities through which cases move within a court” M. SOLOMON, *CASEFLOW MANAGEMENT IN THE TRIAL COURT* 4 (ABA Comm. on Standards of Judicial Administration 1973).

6. Friesen, *Cures for Court Congestion: The State of the Art of Court Delay Reduction*, 23 JUDGE J. 4 (Winter 1984).

7. See Flanders, *Case Management and Court Management in United States District Courts, District Court Study Series* (Federal Judicial Center 1977); Connolly & Planet, *Controlling The Caseload—Kentucky Style: How to Speed up Litigation Without Slowing Down Justice*, 21 JUDGE J. 8 (Fall 1982).

with similar effect, for large numbers of cases? Answers to such questions are clearly beyond this Article. Nevertheless, the expanding body of literature and the Third Judicial Circuit's relative success with mediation indicate a pathway toward real answers to the hard questions.

The data generated through the study of the Third Judicial Circuit's mediation program, along with literature from various disciplines, demonstrate that mediation is a valuable processing tool that, under appropriate conditions, can prompt negotiations behavior and resultant settlements in civil cases. Indeed, court-annexed mediation may provide an important complement to the "early and continuous judicial control" concept of civil case management. The limits of the study design, and therefore the data generated, do not permit the definitive conclusion that mediation causes more prompt dispositions in civil cases. There is little doubt, however, that mediation facilitates and stimulates negotiation and case settlement.

The relative success of the Third Judicial Circuit's program, however, must be placed in context. References to ADR abound in the literature. Conferences regarding the so called liability insurance crisis, delay reduction in metropolitan courts, and tort reform all have paid some attention to dispute resolution approaches either as an alternative to litigation or as an aid in reducing the disposition times of civil suits.⁸ It is claimed that such programs have reduced backlogs and eliminated delay in civil case resolution. The study of the Third Judicial Circuit's program, therefore, sought to obtain a base of information from which inferences could be drawn about the validity of the various claims made regarding it. Related research questions involved are: (i) whether mediation has a differential impact on relationship to case type; and (ii) whether mediation has a greater impact on case settlement than judicially-conducted case settlement conferences.

Part II of this Article reviews relevant literature and provides a framework for analysis and explanation. Part III discusses the scope of the empirical research and the mediation procedures in the Third Judicial Circuit. Parts IV and V review the data and draw conclusions regarding its implications.

The data and relevant literature demonstrate that mediation/arbitration programs have their most significant impact on the segment of cases that are destined to settle or otherwise terminate relatively early. That is, such programs encourage the expedited

8. *But see* Edwards, *supra* note 1, at 668. After noting the proliferation of mechanisms for alternative dispute resolution, Edwards states: "There is reason for concern, however, that the bandwagon may be on a runaway course. Popularity and public interest are not sure signs of quality endeavor. This is certainly true of ADR, because the movement is ill-defined and the motives of some ADR adherents are questionable." *Id.*

settlement or abandonment of cases of which attorneys and litigants realize are simply not worth the costs and attendant risks associated with ADR processes. This conclusion does not mean that mediation does not have or promise significant benefits to the remaining segment of cases. The segment of cases that are actually mediated appear to be profoundly affected by the process. This effect is measured by: (i) the extent to which cases settle during or shortly after mediation, but before trial; and (ii) the dollar value involved in case settlements. Both indices suggest that mediation can facilitate productive bargaining in civil cases well in advance of judicial involvement in the settlement process.

II. WHAT WE THINK WE KNOW ABOUT CIVIL LITIGATION: A REVIEW OF RELEVANT LITERATURE

"Lawsuit, n. a machine which you go into as a pig and come out as a sausage."⁹

Court delay and popular frustration with the legal process are not new phenomena.¹⁰ Nevertheless, our awareness of delay and the civil litigation process arguably has never been greater. From the publication of two seminal studies in related areas,¹¹ understanding of the behavior of civil cases, attorneys, judges, and litigants has increased.¹² Although it is not possible to divide the literature into discrete categories, for ease of analysis, the literature discussion is organized on the basis of: (A) case filings and attorney behavior; (B) adjudicative and administrative behavior; and (C) civil case processing theory and methodology.

A. Case Filings and Attorney Behavior

If a "dispute" is any set of circumstances in which the perceived and articulated interests of the respective participants diverge,¹³ the

9. A. BIERCE, *THE DEVIL'S DICTIONARY* 194 (1911). Bierce defines a litigant as "[a] person about to give up his skin for the hope of retaining his bones." *Id.* It is my belief that these definitions, although one-sided, capture the popular frustration with the civil justice system.

10. See A. VANDERBILT, *THE CHALLENGE OF LAW REFORM 3-75* (1955) (an historical review of efforts to avoid delay in the courts).

11. Rosenberg & Sovern, *Delay and the Dynamics of Personal Injury Litigation*, 59 COLUM. L. REV. 1115 (1959). Rosenberg studied accident litigation with respect to claims handling and the survivability of claims that were filed in court. He found a positive relationship between several variables and case "durability." See also H. ZEISEL, H. KALVEN & B. BUCHHOLZ, *DELAY IN THE COURT* (1959) [hereinafter *DELAY IN THE COURT*].

12. See Rosenberg, *Civil Justice Research and Civil Justice Reform*, 15 LAW & SOC. REV. 473 (1981), for an evaluation of recent empirical research.

13. See Galanter, *Reading the Landscape of Disputes: What We Know and Don't Know (And Think We Know) About Our Allegedly Contentious and Litigious Society*, 31 UCLA L. REV. 4 (1983); Miller & Sarat, *Grievances, Claims & Disputes: Assessing the Adversary*

landscape of disputes would resemble a pyramid with only the very tip of the pyramid representing those disputes that result in lawsuits.¹⁴ In recent years, the rate of lawsuits filed per capita has increased. However, there is no reliable data indicating whether the percentage of disputes resulting in lawsuits has similarly increased.¹⁵ Therefore, it is uncertain whether the increase in filings per capita is simply reflective of the fact that the entire pyramid of disputes has expanded.¹⁶

Contemporaneous with the expansion of court filings is a shift in the composition of the civil docket from contract, property, and debt collection disputes to cases involving family law and tort.¹⁷ Moreover, there is a perceived shift in the work of the judiciary. The work of the courts may have changed over time in that fewer

Culture, 15 LAW & SOC. REV. 525, 527 (1981). The definition in the text is a paraphrase of the definition used by the above cited authors. Injuries occur in society that give rise to grievances. When a grievance is articulated, it becomes a claim. A dispute is the result of a denied claim.

14. Galanter, *supra* note 13, at 12-13.

15. There are approximately eight million lawsuits filed each year. The Civil Litigation Research Project (CLRP) found that 11.2% of the disputes in its study resulted in the commencement of a lawsuit. Trubek, Sarat, Felstiner, Kritzer & Grossman, *Costs of Ordinary Litigation*, 31 UCLA L. REV. 72, 85-87 (1983) [hereinafter *Costs of Ordinary Litigation*]. Although longitudinal data regarding the number of disputes is not available, Lempert used population statistics as a surrogate. Lempert found an increase in disputes over time with particularly sharp increases arising from expanding automobile usage and accidents. Lempert, *More Tales of Two Courts: Exploring Changes in the "Dispute Settlement Function" of Trial Courts*, 13 LAW & SOC. REV. 91 (1978).

16. Although beyond the scope of this Article, the postulated expansion of the dispute pyramid is consistent with the anecdotal observation that there certainly seems to be more to fight about in today's society. New prohibitions and new statutory, regulatory, and constitutional entitlements abound. Caution should be exercised, however, because the disputing pyramid is subject to contraction as well as expansion. Galanter, *supra* note 13, at 19. Further, the suggestion that the disputing pyramid may have expanded should not be confused with the assertion that American society is overly litigious or that we are currently experiencing an unprecedented litigation explosion. Indeed, Galanter makes a significant argument to the contrary. *Id.* at 54-71.

17. ARTHUR YOUNG & CO., AN EMPIRICAL STUDY OF THE JUDICIAL ROLE IN FAMILY AND COMMERCIAL DISPUTES, FINAL REPORT at V-1 (May 1980); Friedman & Percival, *A Tale of Two Courts: Litigation in Alameda and San Benito Counties*, 10 LAW & SOC. REV. 267 (1976) [hereinafter *Tale of Two Courts*]. An interesting research question, which for methodological reasons will probably escape a definitive answer, is whether tort and family law cases involve bargaining patterns, discovery practices, or other features that distinguish them from property and commercial actions. It can be argued that the stakes involved in tort actions, the uncertainty of the governing legal rules, the open-ended nature of damages for pain and suffering, and the existence of silent parties asserting liens against any potential recovery create a set of "bargaining counters" or "bargaining endowments" that radically differ from the rules of law for property and contract related disputes.

cases are resolved through an adjudicative act.¹⁸ Ninety percent or more of all civil cases settle prior to trial,¹⁹ and a substantial portion of the cases that do reach trial settle prior to a verdict. There is also evidence that cases involving relatively larger stakes tend to remain on the civil docket longer than smaller cases.²⁰

The frequency of settlement in civil litigation has led to an increased interest in the study of attorney behavior, as well as negotiation—the principal activity of attorneys.²¹ From the work of several authors, a model of attorney behavior has emerged that may be a key to understanding civil case behavior. Litigation is a bargaining process in which the participants in a dispute routinely use the legal system to engage in a form of “private ordering.”²² The filing of a complaint, the rules of procedure, the substantive rules of law, the anticipated outcome of trial, and even the right of appeal become bargaining chips in this conflict.

For most civil cases, the courts, along with the substantive and procedural rules, provide a context for negotiations yielding a private dispute resolution. Negotiation is an interactive process in which each adversary may engage in a range of behaviors designed to achieve his goals. This range of behaviors may involve any number of tactics designed to alter the perceptions of an adversary, including an appeal to normative standards, projections as to the trial outcome, intimidation, and oppression.

Each adversary, therefore, uses the procedural and substantive rules as “bargaining counters.”²³ For example, the defense attorney who succeeds in obtaining the right to depose the plaintiff’s expert witness without exposing her own expert witnesses to

18. See ARTHUR YOUNG & Co., *supra* note 17, at V-1; *Tale of Two Courts*, *supra* note 17, at 284-86 (noting a decline in contested cases). But see Lempert, *supra* note 15, at 133. Lempert persuasively argues that, although the mix of judicial business may have changed over time, there is no evidence to suggest that courts are functionally less important today as dispute settlers. Caution also should be exercised because all but one of the courts included in the Arthur Young study had jurisdictional ceilings of less than \$10,000.00. See also Clark, *Adjudication to Administration: A Statistical Analysis of Federal District Courts in the Twentieth Century*, 55 S. CAL. L. REV. 65, 77 (1981).

19. *Costs of Ordinary Litigation*, *supra* note 15, at 87.

20. Rosenberg & Sovern, *supra* note 11, at 1137-38.

21. Kritzer, *Adjudication to Settlement: Shading in the Gray*, 70 JUDICATURE 161 (1986); Menkel-Meadow, *Toward Another View of Legal Negotiation: The Structure of Problem Solving*, 31 UCLA L. REV. 754 (1984); Mnookin & Kornhauser, *Bargaining in the Shadow of the Law: The Case of Divorce*, 88 YALE L.J. 950 (1979); *Costs of Ordinary Litigation*, *supra* note 15.

22. Eisenberg, *Private Ordering Through Negotiation: Dispute-Settlement and Rulemaking*, 89 HARV. L. REV. 637, 639 (1976). Eisenberg argues that adjudication related negotiation, rather than principally involving threat, bluff, and horse trading, consists “largely of the invocation, elaboration, and distinction of principles, rules and precedents.” *Id.*

23. Galanter, *supra* note 13, at 32-34.

deposition has accomplished somewhat of a coup. The conventional wisdom tells us that the defense attorney has thereby enhanced her ability to prevail at trial or, at the very least, has greatly increased the apprehension of opposing counsel with respect to possible trial outcomes. This increase in apprehension relates directly to the risk assessment made by the plaintiff's counsel in this example, and very well may cause her to initiate a procedure such as a motion to disqualify one of the defendant's witnesses. All of these moves and countermoves have a direct bearing on the respective assessments of the plaintiff and defense counsel, their willingness to pursue an actual trial, and their dollar evaluations of the case.

Throughout the process described in the above example, attorneys, and hence their clients, make investment decisions regarding money expended in pursuit of litigation goals (or other goals that may have motivated commencement of the suit in the first instance), and decisions regarding the investment of attorney time.²⁴ This interactive investment model is depicted in Figure 1.²⁵ The model counts for the interactive nature of attorney investment decisions²⁶ in which an action by one attorney gives rise to a reciprocal counteraction by his opponent.²⁷

As the cost and complexity of trial increases, the possible outcome of the trial becomes a source of bargaining that can be used at other phases of the process. An enlarged right of appeal, for example, is not merely a possibility that is encountered at a late stage of the proceedings, but it is also a source of counters and stratagems throughout the process.²⁸

The implications of this model are far reaching. A direct conclusion may be that scarce resources might be better allocated to facilitating the negotiation behavior of attorneys and litigants. A corollary conclusion is that too much attention has been given to shaping procedural rules in a coercive sense and providing a date certain for trial.²⁹ Restated, negotiation is not a formless, unstructured

24. Although attorney time certainly can be evaluated in terms of money, the model characterizes them separately. Quantification of time in monetary terms proved difficult. See *Costs of Ordinary Litigation*, *supra* note 15, at 76.

25. The model in Figure 1 was developed by the CLRP. *Id.* at 107.

26. The CLRP model accounts for factors that will influence the conduct initiated by an attorney participant and the reaction of opposing counsel. These factors include risk preference, anticipated return, and case characteristics.

27. Trubek found that "no more than half the time lawyers spend on cases can be attributed to . . . procedural events," and that events were a surrogate for the effect of strategic interaction. *Costs of Ordinary Litigation*, *supra* note 15, at 107.

28. Galanter, *supra* note 13, at 46-47; see Engel & Steele, *Civil Cases and Society: Process and Order in the Civil Justice System*, 2 AM. B. FOUND. RES. J. 295, 308-17 (1979).

29. The conventional wisdom long has held that a key to the disposition of civil cases is the certainty of a trial date. According to this view, a firm trial date forces disputants to conclude their bargaining or proceed to trial. See SOLOMON, *supra* note 5, at 5. But see Flanders, *supra* note 7, at 33. Flanders found limited support for the

COSTS OF ORDINARY LITIGATION

A CAUSAL MODEL OF LITIGATION INVESTMENT

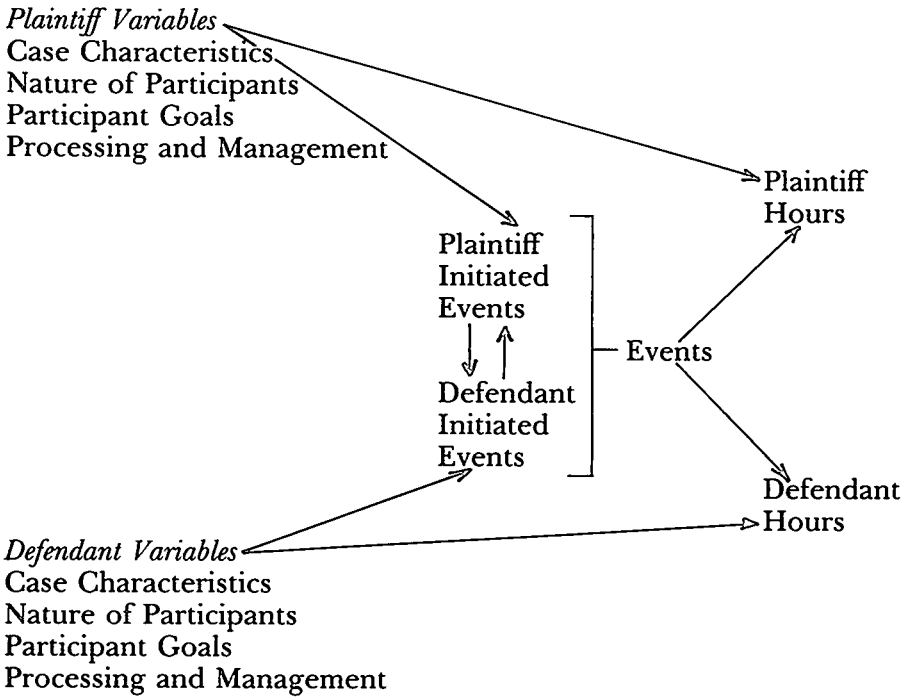


FIGURE 1

process,³⁰ and attention might better be placed on developing events substantially prior to trial that facilitate negotiations.³¹

notion that a specific trial date speeds the disposition of civil cases. The sample size, however, was too small to support any hard conclusions. The interactive model of attorney negotiations suggests that increased emphasis should be placed on facilitating negotiations through both formal and informal means. *See infra* Part V of this Article.

30. Menkel-Meadow, *supra* note 21, at 817-18.

31. One group of commentators state:

But if in the world of ordinary litigation judges rarely reach formal decisions on the merits, the parties negotiate, albeit "in the shadow of the law," judges actively intervene to encourage settlement, and settlement is the rule, not the exception, then perhaps the whole reform debate falls wide of the mark. Perhaps the right approach is not to reach for wholly new institutional alternatives to a hypothetical process of adjudication, but to understand the non-adjudicative dimensions of litigation, to see how and why they work, and to seek to make this dimension of the litigation process even more central and effective.

Costs of Ordinary Litigation, *supra* note 15, at 122.

B. *Adjudicative and Administrative Behavior*

With the pressure of increased civil case filings has come greater scrutiny of the role of the judiciary. Because dispositions are far more likely to occur through settlement rather than through an adjudicative event,³² the courts are now less often viewed as arenas within which the judiciary resolves disputes by screening facts through a series of normative rules. Increasingly, the courts and the judiciary are seen as caseflow managers.³³ In this new paradigm, the judge sits at the end of a sequence of events to screen and evaluate the process of a case and nudge it toward settlement when possible. Thus, the courts are viewed as mechanical systems in which disputes are steered and managed from commencement toward a disposition, removing them from the active docket.³⁴ Within this paradigm, there is no qualitative distinction between a disposition resulting from a verdict and one resulting from settlement.³⁵

Most judges spend the majority of their workhours in trial. Only a small portion of time is allocated to motion and pretrial conferences.³⁶ Judges vary with respect to the proportion of time they allocate to and in the level of assertiveness with which they encourage settlement. The measurement of judicial impact on case settlement is difficult because most cases settle; therefore, measurement must be derived from participant observation or through an examination of the content of the settlement without the benefit of a control group.³⁷

32. *But see* Kritzer, *supra* note 21, at 163-65. The routine settlement of cases does not mean settlement free from judicial involvement. Judicial actions and orders short of a dispositive order are common in a substantial portion of the cases. Kritzer states: "[T]he settlement of many (if not most) cases relies upon the adjudication of others; to decouple those that settle from those that are adjudicated misses the fundamental reality underlying the workings of the system." *Id.* at 165.

33. The amendment of Federal Rule of Civil Procedure 16 in 1983 was based on a view of the trial judge as an efficient case manager who makes an appropriate intervention early in the life of a case. "[W]hen a trial judge intervenes personally at an early stage to assume judicial control over a case and to schedule dates for completion by the parties of the principal pretrial steps, the case is disposed of by settlement or trial more efficiently and with less cost and delay . . ." Flanders, *supra* note 7, at 17. *See also* Amendments - FED. R. CIV. P. 16 advisory committee's note, 97 F.R.D. 165, 207 (1983) [hereinafter Advisory Committee's Note].

34. The perception of the role of the judge in civil litigation may have changed. The empirical studies, however, shed little light on the historic practices of the judiciary or the allocation of judicial time.

35. Some authors have expressed discomfort with the ratio of settlements to adjudications and the relative prominence of settlement. *See* Resnik, *Managerial Judges and Court Delay: The Unproven Assumptions*, 23 JUDGE J. 8 (Winter 1984); Fiss, *Against Settlement*, 93 YALE L.J. 1073 (1984).

36. J. KAKALIK & R. ROSS, COSTS OF THE CIVIL JUSTICE SYSTEM 12-13 (Rand Inst. Civil Justice 1983). *See also* *Costs of Ordinary Litigation*, *supra* note 15, at 92, for a discussion of attorney allocation of time.

37. For example, the attorneys and the parties could be interviewed. The set-

Several studies have attempted to examine the impact of judicial intervention on the settlement process.³⁸ Only five to ten percent of civil cases reach trial; the vast majority of cases settle. Settlement, however, does not necessarily occur free of direct or indirect judicial involvement. Judicial rulings on evidentiary, venue, discovery, and other motions may motivate the settlement of a particular case, and may even impact related or similar cases.

Kritzer found evidence of judicial involvement in 31% of the dispositions that occurred in the Civil Litigation Research Project (CLRP) sample.³⁹ The most significant observation connected to these studies is that excessive amounts of judicial time spent in nurturing settlements is nonproductive.⁴⁰ The data indicates that judges who are more interventionist oriented are involved in roughly the same number of trials and settlements as the judges who are less active in their attempts to settle civil cases.⁴¹ Moreover, most cases involve relatively little discovery⁴² and presumably routine bargaining.⁴³

It would be a mistake, however, to conclude that civil case settlement patterns are somehow immune to efforts to expedite settlement prior to trial. There is some support for the proposition that arbitration/mediation programs⁴⁴ and case screening programs⁴⁵ expedite civil case dispositions.

tlement amount may be directly related to the intervention of the judge in altering perceptions or providing a solution that had not been entertained.

38. M. ROSENBERG, *THE PRETRIAL CONFERENCE AND EFFECTIVE JUSTICE: A CONTROLLED TEST IN PERSONAL INJURY LITIGATION* (Colum. U. Press 1964); Kritzer, *The Judge's Role in Pretrial Case Processing: Assessing the Need for Change*, 66 JUDICATURE 28 (1982) [hereinafter *The Judge's Role*].

39. Kritzer, *supra* note 21, at 164.

40. ROSENBERG, *supra* note 38, at 28-29. Rosenberg's study indicated that pretrials involved large amounts of judge time without appreciable savings as measured by the number or timing of settlements. See also Flanders, *supra* note 7, at 37-39.

41. Flanders, *supra* note 7, at 37-39. But see Church, *The "Old and the New" Conventional Wisdom of Court Delay*, 7 JUST. SYS. J. 395, 399-405 (1982).

42. Flanders, *supra* note 7, at 27; *Costs of Ordinary Litigation*, *supra* note 15, at 91.

43. See *The Judge's Role*, *supra* note 38, at 38. Kritzer makes the distinction between "mass production" or routine cases and civil cases involving the allocation of substantially greater resources and attention.

44. See Weller, Ruhnka & Martin, *Compulsory Civil Arbitration: The Rochester Answer to Court Backlogs*, 20 JUDGE J. 36 (1981). This study involved mandatory arbitration for cases with less than \$6,000 in controversy. Weller found a precipitous drop in prehearing settlements and a reduction in the amount of time cases awaited hearing after having been prepared. See also E. LIND & J. SHAPARD, *EVALUATION OF COURT-ANNEXED ARBITRATION IN THREE FEDERAL DISTRICT COURTS* 76-77 (Federal Judicial Center 1981). Lind and Shapard found that in two of the three courts studied, arbitration led to more rapid dispositions, primarily of cases that did not reach arbitration.

45. Planet, Smith, Olson & Connolly, *Screening and Tracking Civil Cases; Managing Diverse Caseloads in the District of Columbia*, 8 JUST. SYS. J. 338 (1983).

C. Civil Case Processing Methods and Procedures

Delayed cases, although chronic, are not inevitable. Church,⁴⁶ Mahoney,⁴⁷ and Flanders⁴⁸ are principally responsible for the development of a general, structural profile of relatively fast and relatively slow courts. Both Church and Mahoney studied several metropolitan court systems, including the Third Judicial Circuit. Both compared the median times of disposition for civil cases and tort cases and the median time to trial. The Third Judicial Circuit was found to be a relatively slow court. The Church study found that the median time to disposition for all cases was nine hundred four days, and the median time to trial was 1,231 days.⁴⁹ Mahoney's study found a median time to jury trial in Wayne County, Michigan, of 1,127 days.⁵⁰

Church and Mahoney both found wide disparities from the slowest to the fastest courts studied. Neither Church nor Mahoney directly addressed whether the case mix or composition of the civil dockets of the courts studied might somehow account for the observed disparities in disposition times.⁵¹ Flanders partially addressed this issue when he observed that slower courts tend to dispose of all cases in a relatively slow manner with the more complex cases providing the slowest disposition times, whereas the relatively fast courts disposed of all civil cases in a relatively fast manner, including the more complex cases.⁵² Flanders found the factors distinguishing fast and slow courts included:

- The fastest courts are those with the most exacting controls.
- In the fastest courts, the amount of lost or unused time is minimized.
- In the fastest courts, more actions leading to disposition are accomplished during the time the case is on the docket, even though it remains there for less time than it would in a slower court.
- In the fastest courts, the interval between each individ-

46. JUSTICE DELAYED, *supra* note 4.

47. See IMPLEMENTING DELAY REDUCTION, *supra* note 4.

48. *Id.* at 8.

49. JUSTICE DELAYED, *supra* note 4, at 94.

50. IMPLEMENTING DELAY REDUCTION, *supra* note 4, at 8.

51. The authors noted the possibility that some courts may be slower because of the percentage of complex or serious cases filed. *Id.* at 12.

52. Flanders, *supra* note 7, at 18-19. Flanders concluded that case complexity alone did not account for the observed disparities in case processing time. Flanders' conclusion that case complexity bears only a slight relationship to delay (if any) was based on his observation that relatively fast courts process all cases relatively fast. This reasoning does not account for the possibility that complex cases pose more serious problems for slower courts and may well have had an historic role in the development of a case backlog.

ual action is less than in slower courts. Yet in all courts, even the fastest, there is considerable time between court actions.

- Finally, this data indicates that there is a great deal of unused time in slower courts, time that reasonably could be reduced through more docket control by the court.⁵³

Flanders noted that huge disparities in case preparation time, the allocation of judge time in monitoring civil cases, and the court's role in settlement distinguished fast from slow courts.⁵⁴

Flanders, Church, and Mahoney do not offer a definitive theory explaining case management and case behavior, but one lesson appears clear: the habits, customs, and inclinations of the bench and bar are causative factors in creating or eliminating delay in civil case processing.⁵⁵ This approach to explaining delayed courts has been branded as abstract, teleological,⁵⁶ and lacking in explanatory power.⁵⁷ Notwithstanding these criticisms, the "legal culture" concept correctly focuses on commonly held perceptions and norms as an influence in case dispositions. The dispelling of some myths with respect to several structural variables, including the size of court and number of judges, and an accompanying shift toward a more norm-centered view of the civil justice system, is an important contribution to our understanding of courts.

Court systems throughout the United States have developed numerous approaches to processing civil cases. These include computer docketing, case screening and case evaluation, private justice

53. *Id.* at 19. Because the factors observed by Flanders occur notwithstanding variation in case type and complexity, Flanders argues that the litigation culture is probably the principal factor affecting civil case disposition times. Thus, for Flanders, the aggregate will and habits of participants in the legal process determine the amount of time necessary to process civil disputes.

54. Faster courts generally had automatic procedures assuring strict monitoring of cases. In addition, judges spent little time in conference and had little connection to settlement efforts. *Id.* at ix.

55. Church, in defining the term "local legal culture," states: "[B]oth speed and backlog are determined in large part by established expectations, practices, and informal rules of behavior of judges and attorneys." JUSTICE DELAYED, *supra* note 4, at 54 (emphasis omitted).

56. Grossman, Kritzer, Bulmiller & Dougal, *Measuring the Pace of Civil Litigation*, 65 JUDICATURE 86, 112 (1981).

57. One group of commentators characterizes the concept as abstract and untested. *Id.* There has not been an empirical validation that participants within delayed court systems hold norms that differ significantly from participants within systems that are not delayed. *Id.* at 93. Moreover, there is at least the suggestion that in urban areas with both state and federal courts, "it seems unlikely that the range of informal influences, the characteristics unique to particular courts, and the motivations of court personnel and attorneys can be lumped together into a single residual category dubbed 'local legal culture.'" *Id.* at 102.

systems, and mediation and arbitration.⁵⁸ Mediation has been trumpeted, including by the Third Judicial Circuit, as a key element in reducing both civil case delay and backlog.⁵⁹ The reality, however, is that most of the mediation programs have not substantially, if at all, reduced civil case processing times.⁶⁰ While diversion, screening and evaluation, and mediation and arbitration are valuable tools that may provide assistance in expediting civil cases and advancing the socially worthy goal of rendering more prompt justice, such programs have not been a "quick fix"⁶¹ remedy for the problem of civil case delay.

Pearson found that mediation and arbitration programs have generally failed to accomplish many of the goals set for them.⁶² Voluntary programs have not substantially affected the delay and cost issues because only a relatively small number of cases have been submitted to them.⁶³ In addition, such programs have not demonstrated a substantial cost savings. Noting the Third Judicial Circuit as a possible exception, Pearson concludes that "[d]espite the expectations of many, mediation and arbitration appear to have negligible effects on civil trial calendars."⁶⁴

Similar observations also have been made with respect to compulsory arbitration in Rochester County, New York.⁶⁵ Although the Rochester program greatly reduced attorney preparation time and

58. For a general review of arbitration programs, see Hensler, *What We Know and Don't Know About Court-Administered Arbitration*, 69 JUDICATURE 270 (1986). See also P. EBENER & D. BETANCOURT, COURT-ANNEXED ARBITRATION: THE NATIONAL PICTURE (Rand Inst. Civil Justice 1985) [hereinafter COURT-ANNEXED ARBITRATION]. In most state courts, arbitration is limited to cases involving \$15,000 or less. Arbitration programs are primarily utilized for smaller claims. *Id.* at 9-17.

59. See *Settling Cases in Detroit*, *supra* note 4, at 307-08.

60. Pearson, *supra* note 1, at 436.

61. IMPLEMENTING DELAY REDUCTION, *supra* note 4, at 2.

62. Pearson, *supra* note 1, at 426. The author states:

[M]ediation and arbitration fail to achieve many of the performance goals posited for them by those concerned with court congestion and cost savings. In particular, voluntary mediation and arbitration programs frequently fail to attract sizable numbers of disputants and have negligible impact on court caseloads. While mediation and arbitration program costs vary greatly with the size of caseload, most programs are generally more expensive per case than courts.

Id. The Third Judicial Circuit's program differs markedly from the programs reviewed by Pearson. In addition to being mandatory, the program apparently involves negligible costs for most litigants given the amounts involved in the disputes subject to mediation. Moreover, the vast majority of the programs have a ceiling of \$15,000. The Third Judicial Circuit's program is unique in that it applies to the full range of civil cases filed in the circuit court involving a minimum of \$10,000.

63. *Id.* See also Christensen, *Private Justice: California's General Reference Procedure*, 1 AM. B. FOUND. RES. J. 79 (1982).

64. See Pearson, *supra* note 1, at 438.

65. Weller, Ruhnka & Martin, *supra* note 44, at 41-43.

the use of pretrial discovery, "[t]otal case processing time was not reduced."⁶⁶ Apparently the observed reduction in elapsed time from the "note of issue" to final disposition was offset by an expansion in the time used by attorneys to prepare their cases prior to the "note of issue." The Rochester experience illustrates that the civil justice process is a complex system with adaptive mechanisms.⁶⁷ Whether it be compulsory arbitration in Rochester or mandatory mediation in the Third Judicial Circuit, such programs do not by themselves provide a "quick fix" for delayed or congested civil case dockets.

Most, if not all, of the literature reviewing structural variables or dispute resolution approaches share a lack of any strong association between a key structural variable and case disposition patterns. This absence of a definitive association enhances the importance of investigation based on the interaction of the participants within the civil justice system; the role and beliefs of judges and the interaction of attorneys with the courts are of primary concern.

III. BACKGROUND

A. *Mediation in the Third Judicial Circuit*

The Third Judicial Circuit has general subject matter jurisdiction over civil matters involving \$10,000 or more in controversy.⁶⁸ The geographic area encompassed by the court is co-extensive with the boundaries of Wayne County, Michigan, which includes the city of Detroit. Approximately 20,000 civil cases are filed in the court each calendar year, excluding domestic cases.⁶⁹ The thirty-five judges who currently constitute the bench are elected for six-year terms on a nonpartisan ballot.

In 1984, judges operated on the basis of a hybrid master calendar system.⁷⁰ Each case filed in the court received an alphanumeric

66. *Id.* at 43.

67. See Engel & Steele, *Civil Cases and Society: Process and Order in the Civil Justice System*, 2 AM. B. FOUND. RES. J. 295 (1979). The civil justice system has interactive components. It maintains a dynamic equilibrium through feedback loops that are affected by external forces. One such external force may be law office economics. This view of the civil justice system leads Engel and Steele to conclude: "A particular desired state of affairs cannot be created simply by selecting attractive procedures or structures from other settings or from one's own imagination with the expectation that they will function automatically in the desired manner." *Id.* at 333. They identify two paradigms of civil justice: mechanistic and organic. *Id.* at 338.

68. See MICH. CONST. art. VI, § 13 (1963); MICH. COMP. LAWS ANN. § 600.601 (West 1981).

69. Domestic cases involve divorce and all issues arising therefrom, including child custody, division of marital assets, and alimony.

70. Cases filed in the court are assigned by means of a "blind draw" to a pre-trial judge who is responsible for the case until the settlement conference during the thirtieth month. Settlement conference judges may hold a case for a brief pe-

designation, identifying it by date of filing and by case type. For example, malpractice cases were customarily designated as "NM," and cases involving products liability (personal injury) were designated "NP."⁷¹ The case type designations were made at the plaintiff's counsel's election at the time each case was filed. During the fifteenth month, cases were screened and evaluated by law clerks to determine whether they met the circuit court's jurisdictional threshold.⁷²

A search for alternatives by the Wayne County bench and bar was prompted by delayed civil cases and sharp debate regarding the impact of a new no-fault automobile insurance and liability statute.⁷³ In the early 1970s, a committee comprised of representatives from the plaintiff's bar, the defense bar, and the bench was established. This committee was responsible for the original mediation rule, which was aimed at eliminating the backlog and expediting a glut of automobile accident case filings. Other civil cases were also eligible for mediation, but only by stipulation of the parties. After a brief period of claimed success,⁷⁴ mediation fell into disuse.⁷⁵

Mediation was resurrected in 1979. In 1984, mediation in the Third Judicial Circuit was governed by a local court rule.⁷⁶ The Mediation Tribunal Association (MTA) is now responsible for the day-to-day administration of the program. The MTA is an independent corporation that has a board of directors comprised of the Chief Judge of the court and one representative each from the Detroit Defense Counsel Association (DDCA) and the Detroit Chapter of the American Trial Lawyers Association (ATLA). Funding for MTA is

riod to facilitate settlement. If the settlement conference does not produce a settlement, cases are assigned to the next available trial judge. Recently, the court initiated a program intended to shift from a hybrid master to an individual calendar. Ultimately, the same judge will carry a case on her docket from filing through trial.

71. For a description of the various categories, see Appendix.

72. Screening is conducted on the basis of written guidelines that focus on whether the case involves a sufficient amount in controversy and whether the case should be selected for early mediation. In 1984 screening occurred in the fourteenth month. Early mediation hearings were usually scheduled in the eighteenth month.

73. See Bowles, *Mediation: New Dimension in Decision-Making*, 51 MICH. B. J. 176 (1972); Miller, *Mediation in Michigan*, 56 JUDICATURE 290 (1973).

74. The program was credited with a role in reducing disposition time from forty-eight to thirty-six months.

75. Factors contributing to disuse, which are frequently mentioned by those familiar with the original mediation program, are insufficient financial resources, inefficient use of judicial time, and inefficient docketing. *But see Settling Cases in Detroit*, *supra* note 4.

76. Authorization to operate under local rules that deviate from the rules contained in the Michigan General Court Rules was obtained from the Michigan Supreme Court. The mediation rule now applicable to the entire state of Michigan borrows liberally from the Third Judicial Circuit's local rule.

derived from a fee that is levied on each party to a civil action subject to mediation.⁷⁷ As a freestanding corporation, MTA is not subject to the vagaries of county and state funding and is free from the threat of fund diversion.⁷⁸

The administrative operation of the MTA is substantially computerized. Routinely, case records are downloaded from the court's mainframe computer to a computer operated by the MTA. The MTA can thereby operate independent of the administrative operation of the circuit court and can routinely establish the mediation docket and issue appropriate notices. The docket involves two tracks. During the case evaluation process, pleadings are screened to identify cases that are likely to involve less than \$10,000 in controversy. These cases are scheduled for early mediation, which occurs in the eighteenth month. Cases believed clearly to involve more than \$10,000 in controversy and complex issues comprise the later mediation docket. Later mediation cases are scheduled for hearing in the twenty-seventh month.

The MTA clerk oversees the mediation docket. The clerk's duties include selecting individuals to sit on a mediation panel from the mediator lists, and assigning cases to specific panels of mediators. No one can be selected as a mediator without at least five years of trial experience.⁷⁹ Generally, mediators with relatively less trial and mediation experience are assigned to early mediation panels.⁸⁰

All civil cases, excluding domestic cases and cases primarily involving equitable relief, that are filed in the Third Judicial Circuit are mediated. In reference to the Wayne County program, the term "mediation" is something of a misnomer. The program does not involve some of the features associated with the typical conception of mediation. Mediation is usually described as a voluntary process in which one or more mediators facilitate the efforts of disputants to reach a resolution of their dispute.⁸¹ The Third Judicial Circuit's program is more aptly described as a sophisticated form of case

77. The fee is \$75.00. See MICH. WAYNE COUNTY CIR. CT. R. 403.8 (1984).

78. This has raised some debate regarding the allocation of substantial surpluses generated by the program each year. In 1986, MTA made a substantial contribution to the court, which facilitated the purchase of much needed computer hardware.

79. Both plaintiff and defense mediators must have at least five years of trial experience in the Third Judicial Circuit. Retired judges are frequently selected as neutrals.

80. Later mediation evaluates almost all of the professional malpractice and products liability cases. This assignment system generally results in the more complex cases being assigned to the more experienced mediators. The mean mediation amount for cases mediated early was \$18,354 (1,538 cases). The mean mediation for cases mediated later was \$77,878 (1,583 cases).

81. Pearson, *supra* note 1, at 423.

evaluation. Each case is evaluated by a tripartite panel, which consists of one plaintiff attorney, one defense attorney, and a neutral attorney. The panel reviews mediation briefs filed on behalf of each party, holds a hearing of approximately thirty minutes, and immediately renders a dollar valuation for the case.⁸²

During the study, more than twenty case mediations were observed. Most hearings lasted less than thirty minutes.⁸³ In that brief period of time, the weaknesses of each adversarial position quickly became the focus of discussion. Adversarial presentations of each litigant's case were made, and the panel spoke with each attorney separately.⁸⁴ After the presentations, the mediation panel deliberated in private. Those deliberations involved assessments of the weaknesses in the positions taken by the advocates, and evaluations of the amount necessary to settle the case in view of the competing expectations of the attorneys. Some of the mediators also considered intangibles, such as the trial abilities of the lawyers.

After the mediation hearing and private deliberations by the panel, an evaluation is rendered, including not only a dollar amount but also a "characterization" of the decision. The mediators are required to select one of the following characterizations: equity non-unanimous, equity unanimous, liability non-unanimous, liability unanimous, party not mediated, remain in circuit court non-unanimous, non-unanimous panel, unanimous panel. Mediation panels render a unanimous result in more than 80% of the cases.

Both equity characterizations result in removal of the case to the district court. The non-unanimous characterizations eliminate the future possibility of sanctions against a party who rejects the evaluation. The mediation rule authorizes sanctions, including reasonable attorney fees, when a party rejects a *unanimous* result and does not improve his position through trial. The rejecting party must improve his position by a factor of 10% after costs and interest (if any) on the verdict have been calculated.⁸⁵

B. *Scope of the Study*

The initial focus of the mediation study was to evaluate the Third Judicial Circuit's mediation program. Direct measurement of the impact of mediation on case dispositions is difficult because

82. See *infra* Part IV for further discussion of the mediation hearing.

83. Some of the hearings lasted only fifteen minutes. One hearing involving an exploding truck tire and allegedly defective wheel and rim assembly lasted almost one hour.

84. In most cases the panel spoke in private with each attorney immediately after the oral presentations.

85. MICH. CT. R. 2.403(0) (1985). The prevailing view is that sanctions have not played a significant role in driving the system. See Miller, *supra* note 73, at 294; *Settling Cases in Detroit*, *supra* note 4, at 309.

there is little, if any, reliable data on disposition patterns during the years immediately prior to the institution of the mediation program. Even if reliable data regarding disposition patterns were available, the measurement task would still be difficult because other confounding variables, such as the institution of a case screening and evaluation program and several "crash programs"⁸⁶ conducted in the 1970s, undeniably have had some impact on disposition patterns. Measurement is further confounded by a probable shift in the attitudes about delay held by the bench, bar, and court administrators.⁸⁷ Therefore, the many claims regarding the positive impact of the mediation program on the court's backlog cannot be supported by empirical data.

Because of these limitations, the descriptive data is used to "map"⁸⁸ the caseload process in the Third Judicial Circuit. Through graphic depiction of case terminations, the temporal relationship between the mediation event⁸⁹ and case dispositions is demonstrated. The disposition pattern of mediation, as compared with disposition patterns for other events, provides a basis for understanding the relative significance of the mediation event. This

86. In late 1979, the Wayne County Circuit Court engaged in what was commonly known as the "crash program." This program involved borrowing judges from other courts and the imposition of strict time limits for pretrial events. The program is credited with reducing the time from filing to trial from forty-eight months to thirty months. See Gilmore, *Comment Upon The 'Old' and 'New' Conventional Wisdom Of Court Delay*, 7 JUST. SYS. J. 413, 413-14 (1982). See also Dunn, *Mediation—A Viable Method of Alternative Dispute Resolution*, 65 MICH. B. J. 894 (1986) (time to trial in 1977 reached fifty months).

87. The establishment of bench and bar cooperation in the mediation program and various other programs instituted by the court reflect increasing concern with the issue of delay. Attitudinal shifts, changes in personnel, and changes in substantive and procedural rules illustrate that courts are dynamic, everchanging systems that render laboratory like controls impossible. Although several survey instruments in addition to the data derived from the court's computer was originally intended to be used, the expense associated with the extensive use of questionnaires required that this portion of the study be postponed. Confining the preliminary study to cases and case characteristics means that a number of important factors cannot be accounted for, including relationship of participants, accountability of attorneys, role perception of participants, and experience of participants. See Menkel-Meadow, *Legal Negotiation: A Study of Strategies in Search of a Theory*, 1983 AM. B. FOUND. RES. J. 905 (1983).

88. "Mapping" refers to the use of graphics and standard descriptive statistics to develop an appreciation of what the case processing system is actually doing at different points along the time continuum from filing to disposition. From such a baseline, it is then possible to theorize regarding the events, transactions, and factors that affect the case processing system.

89. The terms "event" and "mediation event" are repeatedly used throughout this Article. The CLRP has developed a model of attorney behavior that conceptualizes procedural events "as a surrogate for the effect of strategic interaction in litigation." *Costs of Ordinary Litigation*, *supra* note 15, at 106. This perspective proves helpful in theorizing about why mediation encourages case dispositions.

comparison, along with literature from several disciplines, then provides the basis for some informed speculation regarding the impact of mediation on civil cases.

Initially, a population of civil cases consisting of all cases scheduled for mediation during a fixed time period was extracted from the court's mainframe computer and recorded on magnetic tape. The tape format incorporates fifty-six original variables⁹⁰ for each of the 5,615 civil cases scheduled for mediation during the first six months of calendar year 1984.⁹¹ The tape format also allows subsets of the population of cases to be defined according to one or more variables and compared to the key variable—disposition age. In addition, cross sections of cases along any point in the case disposition continuum can be isolated and compared on the basis of any of the variables. For example, the case type and mediation evaluation amount for cases that terminated within one month of mediation can be compared with the case type and amount for cases when the mediation award was rejected and the case involved further negotiations or trial.

The preliminary empirical results of the study do not directly affirm the thesis that the Third Judicial Circuit's mediation program expedites civil case settlement. Rather, the data suggests that mediation *can* have this effect on the civil case settlement process. Moreover, consideration of mediation's impact on attorney behavior patterns fits comfortably within the existing models of attorney litigation interaction. These models, along with the data, suggest a new conception of civil case processing that focus on facilitating the strategic negotiation behaviors of adversaries significantly in advance of possible trial dates.⁹² Much of what is known or theorized regarding attorney use of the mediation process and negotiation behaviors is derived from the published and unpublished work of others.

C. *Summary of Findings*

The original foci of the mediation study were as follows:

90. The term "original variables" designates the variables that were a part of the data maintained on the court's computer. "New variables" designates the variables that were created by using arithmetic calculations. For example, the new variable "dispage" was created by subtracting the date of filing from the date of disposition. For further discussion of the tape format and variables, see Appendix.

91. Family law (divorce, child custody, division of marital assets, etc.) cases and suits involving primarily equitable relief are not part of the data set as they are not subject to the mediation procedures described in this Article.

92. In stating that a "new" conception of civil case processing is appropriate, I do not mean to imply that I am the first to approach civil litigation from a perspective that emphasizes strategic negotiations behavior. Indeed, my interest in the issue flows from the work of several authors cited within this Article.

(1) How does the docket operate in terms of the number of cases that mediate early, mediate late, and do not mediate?

(2) Within the categories of early, late, and not mediated, is there a settlement pattern that may be linked to the event of mediation?

(3) Do all case types behave similarly in the pretrial phase with regard to mediation?

(4) Are there case types that are unresponsive to mediation?

There is a positive correlation between the event of mediation and case dispositions. The significance of mediation is not limited to the hearing. Mediation's impact cannot be measured merely in terms of the number of cases that accept or reject the mediation evaluation. Rather, mediation or receipt of a notice indicating that mediation has been scheduled operates as a trigger to negotiations and decision making, resulting in case dispositions.

During the early phase of the research, it was anticipated that the data would demonstrate that disposition patterns covariate with case type. That proposition cannot be substantiated given the two-track mediation system. The case types of real estate, products liability, and medical malpractice behave differently, but their distinct patterns do not mean that they are substantially less responsive to mediation. These three case types are not screened at fifteen months by case evaluators for possible early mediation scheduling. They are exclusively set for late mediation; they are presumed to involve sufficient complexity and a sufficient amount in controversy. This explains, at least in part, why their mean disposition ages were substantially greater than those types with a more even distribution between early mediation and later mediation. Case screening procedures likely result in the docketing of a larger percentage of the less durable cases for early mediation.

Case typology and evaluation procedures do not completely explain the magnitude of the difference in mean disposition ages for early and later mediated cases. Attorney interviews and relevant literature from several disciplines, including anthropology, court administration, and dispute resolution, suggest that the time of mediation—early versus late—is the principal variable related to case life span.

The most significant finding regarding disposition behavior patterns by case type is that the mediation events signal the beginning of bargaining and case settlement in the majority of cases scheduled for mediation. This finding suggests that genuine efforts to commence negotiations and settle may be delayed when, because of the two-track mediation system, mediation is deliberately delayed in cases where bargaining might otherwise have commenced.

The correlation of the mediation event to case disposition is

positive, but the more profound questions concerning attorney behavior, attorney use of the mediation process in a strategic sense, and why this correlation exists require further research. Civil litigation can be viewed as a game in which attorneys engage in interactive, strategic behavior. Counsel for plaintiff and defendant use the rules of law and procedure to develop bargaining chips. Mediation, in a strategic sense, is an important event. Litigants elect to undergo or avoid mediation for strategic reasons. In mediated cases, the evaluation frequently provides a dollar amount that is acceptable to the disputants or an acceptable range for further negotiation. Shuart's work in studying the Wayne County mediation program documents this range finding function.

The mediation hearing incorporates additional important features. It is an adversary proceeding. However, it is also a classroom. More than twenty mediation hearings were observed. The mediators in each hearing quickly isolated the weakest elements of plaintiff's and defendant's case. The discussion of relative strengths and weaknesses was candid and forceful. Frequently, the mediator designated as representing one side of the dispute (either plaintiff or defendant) would lead the mediation panel in the dissection of both the plaintiff and the defense positions. The panel critique of individual presentations appears to teach attorneys about the strengths and weaknesses of their cases. This direct, informative, and candid pedagogical element of the case evaluation process may largely explain why the mediation program is beneficial. In the words of the former Chief Judge of the Third Judicial Circuit, Richard Dunn, "What attorney wouldn't want three experienced trial attorneys to evaluate his case?"

IV. PRESENTATION OF THE DATA

A. Description and Distribution

Figure 2 is a pie chart depicting the percentage and number of cases mediated early, mediated later, and not mediated. Roughly 41% of the cases scheduled for mediation either settle or terminate prior to mediation. The remaining cases are evenly split between early mediation and later mediation.

CASES MEDIATED EARLY, LATER, OR NOT AT ALL: N=5298

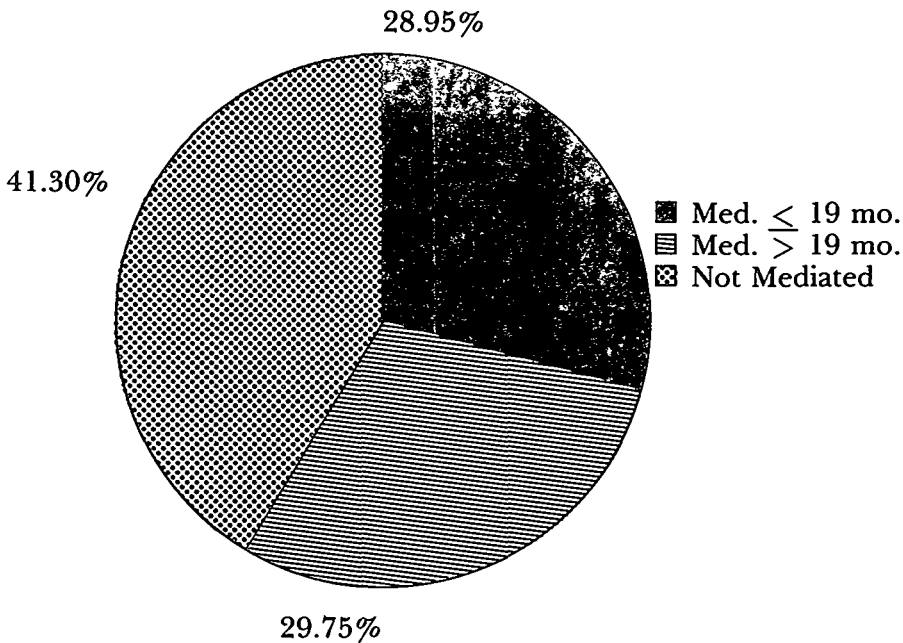


FIGURE 2

Figure 3 depicts the disposition patterns of early mediation (MedE), later mediation (MedL), and not mediated (Nomed) cases, but excludes slightly more than 1,000 cases that were mediated and then removed to the district court for lack of sufficient amount in controversy.⁹³

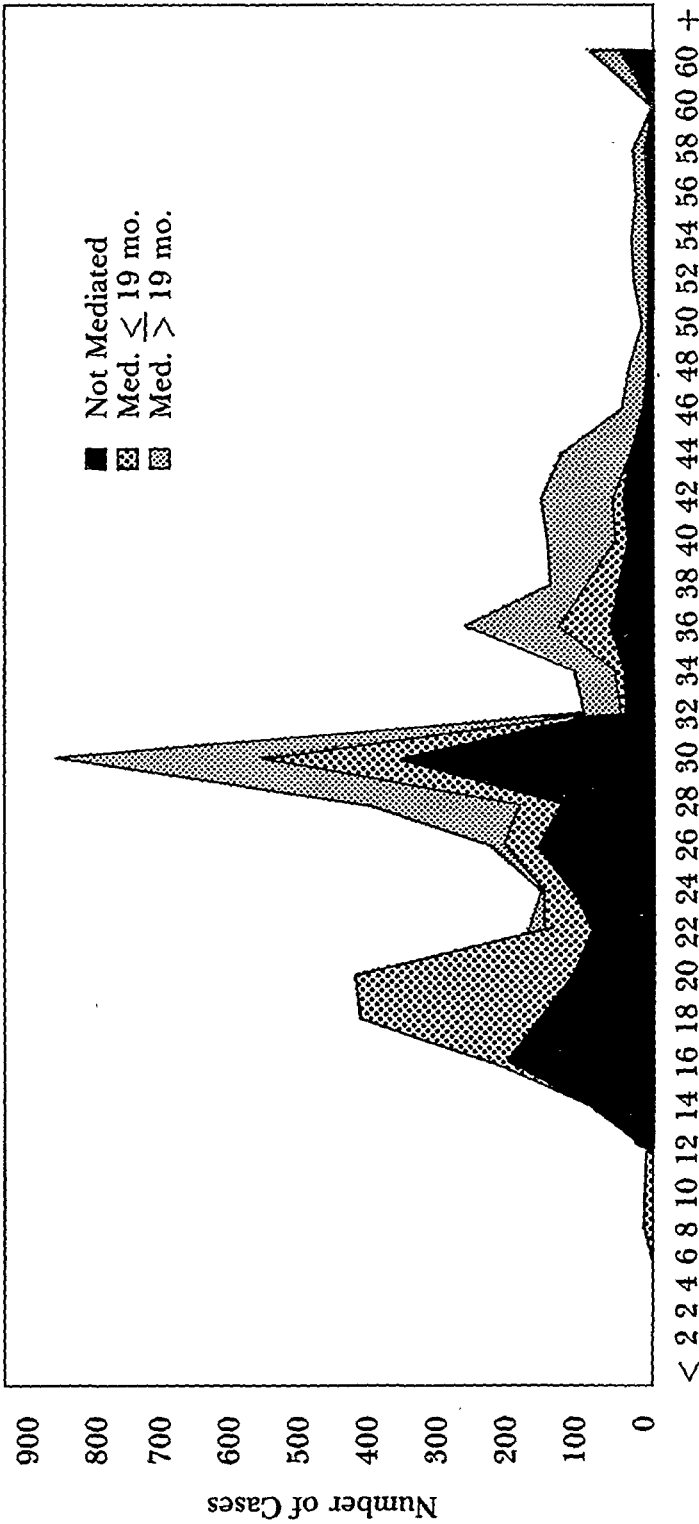
Dispositions in each category occur in close relationship to the issuance of the mediation notice. Each of the three categories, however, has a distinct life, with the Nomed cases being the most dissimilar. Dispositions crest at four points: early mediation, later mediation, final pretrial conference, and trial. Dispositional activity⁹⁴ increases from issuance of each of the mediation notices and

93. Cases that are evaluated as involving less than \$10,000 are routinely scheduled for removal to the district court.

94. "Dispositional activity" and "dispositional transaction" include settlement, removal to the district court, and the dismissal of abandoned cases. Many of the cases routed to early mediation do not meet the jurisdictional requirement of \$10,000 or more in controversy. Eleven hundred fifty-nine cases were removed to the district court. In addition, another segment of the scheduled cases was abandoned.

Early mediation is the first regularly scheduled event on the docket that requires the appearance of counsel. Thus, it is the first event requiring that counsel report either the settlement or the abandonment of a case.

DISPOSITION AGE, 4139 NON-REMOVAL MEDIATION-ELIGIBLE CASES



Age in Months
FIGURE 3

crests in close proximity to the mediation event. The crests at the thirty-sixth and forty-second months depict those cases that either settle on the courthouse steps or proceed to trial.⁹⁵

The darkened portion of Figure 3 represents the cases scheduled for mediation but not mediated. An indeterminable number of Nomed dispositions were unrelated to either receipt of the mediation notice or anticipation of the mediation event. This segment of cases was abandoned or settled prior to the issuance of a mediation notice.⁹⁶ For example, the majority of cases scheduled for early mediation were issued a notice of mediation in the fourteenth month. A portion of the cases receiving this notice had already ceased to be active civil actions.⁹⁷ Thus, the entry of an order closing abandoned cases is not related to mediation. Rather, the notice of mediation stimulated the attorneys to report closed cases to the mediation tribunal and, hence, the court. In this respect, mediation serves a docket cleaning function.⁹⁸ For purposes of this discussion, the most important segment consists of the cases that do not settle or otherwise terminate prior to receipt of the notice of mediation. That segment potentially involves the conscious choice to negotiate a settlement prior to the mediation event. Settlement subsequent to receipt of a mediation notice is presumed to imply consideration of the potential cost and impact of mediation in the process of reaching the settlement outcome.⁹⁹

95. The court operates a system commonly known as "spin off." Cases that do not settle during the settlement conference (thirtieth month) are assigned to the trial "spin off" calendar. As judges become available, cases are moved from "spin off" and assigned for trial. Theoretically, the first case on the list is entitled to the first available judge. Older cases are given preference. If it becomes obvious that a case will not be assigned to a trial judge within two weeks (*e.g.*, a thirty-month case is on the list with numerous thirty-six-month cases), the case will be removed from the "spin off" docket and given new settlement conference and trial dates six months in the future. Trials, therefore, usually occur in the thirtieth, thirty-sixth, and forty-second months.

96. An order recording a final disposition predated the scheduling of mediation in 8.23% of the cases that were not mediated. This subgroup of cases should not have been scheduled for mediation. Removing these cases from the data set provides a clearer picture of the impact of mediation on the active civil case docket.

97. Not infrequently, cases are abandoned or settled without notice to the court. These cases should be distinguished from closed cases that are inadvertently scheduled for mediation.

98. Prior to the reinstatement of the mediation program in 1979, thousands of settled and abandoned cases remained on the active docket. During the same period in the late 1970s, the court also instituted new audit procedures designed to identify "dead" cases. Variances in the way in which different courts maintain data, and the habits of attorneys in regularly reporting dispositions from one court to another, make cross-court studies difficult, which rely upon data maintained by courts.

99. "Conscious choice" means a decision to settle that was made after receipt of the notice and, therefore, with knowledge that mediation was impending. Shuart suggests that "the scheduling process alone focuses the parties on settlement, and

Figure 4 illustrates the relationship between the timing of the mediation event and the disposition of those cases that were actually mediated. Figure 4 underrepresents this relationship for two reasons. First, the order closing a case is frequently filed substantially later than the date on which a settlement was actually consummated.¹⁰⁰ Thus, the bars indicating case terminations should shadow the mediation event more closely than depicted in Figure 4. Second, for the later mediation, the settlement conference usually occurs within ninety days of the mediation. In those situations in which the mediation valuation is rejected (and the case proceeded beyond mediation toward the final pretrial in the thirtieth month), the graph does not provide useful information regarding the role of pretrial conferences on case settlement patterns. Nevertheless, it is argued that there is significant reason to believe that the mediation substantially influences many of these cases.

A review of several thousand cases suggests that a significant number of the cases surviving mediation were greatly influenced by the mediation event.¹⁰¹ All of the cases in which the disposition date was the same as the settlement conference dates were reviewed. In slightly more than 10% of these cases, the settlement conference was never convened because the settlement conference judge received notice that the case had settled.¹⁰²

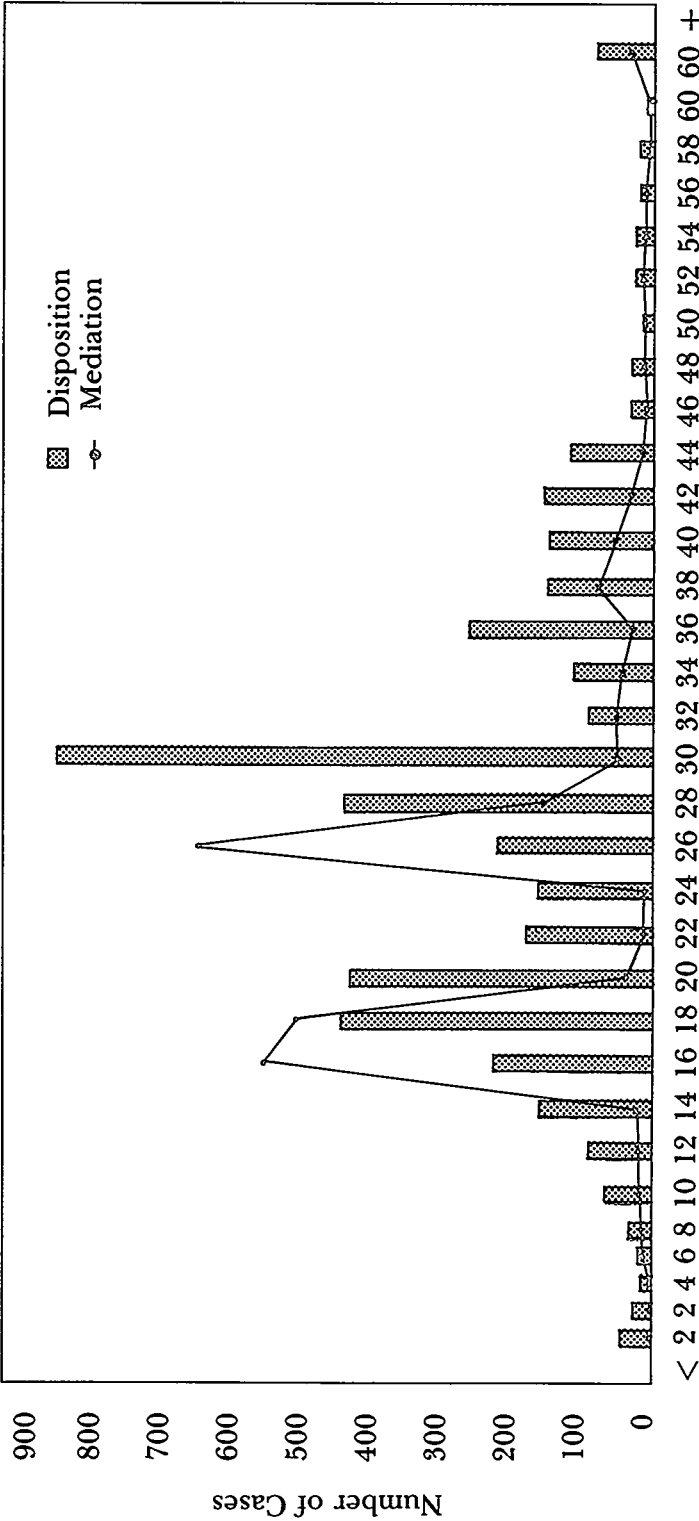
may cause many parties and their attorneys to opt for immediate settlement negotiations rather than pay the mediation fee or prepare the summaries." *Settling Cases in Detroit*, *supra* note 4, at 313. *But see infra* Part V, section A., in which it is argued that the determination to avoid mediation is not merely avoidance of the fee but is a reflection of a strategic choice that is related to the perceived content of the mediation event.

100. This observation was partially corroborated by a review of the disposition dates for all cases that were recorded as having settled at the final pretrial conference. Frequently, a settlement recorded at the pretrial conference actually occurred several months prior to the conference. *See* Appendix for discussion regarding cleaning the data.

101. This observation is also supported by the study conducted by Shuart. *See Settling Cases in Detroit*, *supra* note 4, at 314-15, and accompanying text.

102. More than one thousand cases had identical settlement conference and disposition dates. The case records, however, demonstrated that settlement conferences were not actually convened in a substantial number of the cases. Rather, the cases had settled as much as several months prior to the final pretrial conference.

AGE AT MEDIATION (2449) & DISPOSITION (4575) NON-REMOVAL CASES



Age in Months
FIGURE 4

B. Case Type, Size of Stake, and Trial Frequency

Table 1 indicates the mean disposition ages for seven case types; Table 2 contains the trial frequency for nine case types.

MEAN DISPOSITION AGE
(in months)

<u>CASE TYPE</u>	<u>NOT MEDIATED</u>	<u>EARLY MEDIATION</u>	<u>LATER MEDIATION</u>	<u>ALL CATEGORIES</u>
Real Estate	31.24	9.0 *	36.35	27.11
Contract	27.82	23.74	36.55	27.48
General Civil	30.76	24.74	38.28	30.06
Auto P/I	24.94	23.80	35.15	25.13
Malpractice	32.63	18.83*	34.64	32.99
Personal Injury	26.67	24.26	36.42	26.84
Products	36.20	11.0 *	35.31	33.49
Column Total	28.00	23.95	35.95	27.65

* Less than 10 cases in this cell.

TABLE 1

NUMBER OF TRIAL BY CASE TYPE AND
PERCENTAGE OF TOTAL FOR CASE TYPE

<u>CASE TYPE</u>	<u>NUMBER</u>	<u>NUMBER TO TRIALS</u>	<u>% CASE TYPE</u>	<u>% TRIALS</u>
Real Estate	142	9	6.3	2.8
Contract	920	46	5.0	14.7
General Civil	651	53	8.1	17.0
Auto P/I	1,650	48	2.9	16.0
Malpractice	442	52	11.8	17.0
Personal Injury	1,180	61	5.2	19.6
Products	218	32	14.7	10.2
Dramshop	33	4	12.1	
Other Damage	62	6	9.7	
Totals	5,298	311		

TRIAL AND TRIAL PERCENTAGES BY FIVE VARIABLES: (1) terminated prior to mediation; (2) removed prior to mediation; (3) not mediated; (4) mediated by nineteen months; and (5) mediated after nineteen months.

TABLE 2

Early mediated and later mediated cases comprise two discrete tracks with some parallel development. Early mediated cases represent the court's attempt to identify cases that should be screened for amount in controversy or placed on a "fast" track. Therefore, caution should be exercised in comparing the data generated for early

mediated cases with that for later mediated cases. Even the composition of the early mediation and later mediation dockets substantially differ. More than 90% of the malpractice and product liability cases are scheduled for later mediation. The bulk of the early mediation docket consists of contract, auto personal injury, personal injury, and general civil case types.

The mean disposition age for mediated early cases was 23.95 months, and mean median mediation evaluation amount is approximately \$18,354. The mean disposition age for later mediated cases was 35.95 months, and the mean mediation amount was \$77,878.¹⁰³ The apparent larger stakes connected with later mediation cases arguably means that they have the tendency to remain on the active civil docket for longer periods of time than the early mediation cases, irrespective of the mediation program. Considerable caution must be exercised with regard to this observation because the designation as an early mediated or later mediated case may account for some portion of the difference in the mean disposition age statistic. Otherwise stated, the distinct pattern of dispositions for mediated early cases may be, at least in part, the product of the division of cases into early and later mediation categories. The shared, system-wide value judgment that some cases are more complex, involve substantially larger stakes, and are therefore entitled to more extended (and thus more "serious") treatment, may influence mediator and participant perceptions, the magnitude of the mediation evaluation, and subsequent negotiation behavior.¹⁰⁴

Although caution is warranted, the relative difference observed in the dollar amount of mediation evaluations for product liability and malpractice case types, as compared with the other case types, is consistent with the data reported by other observers regarding settlements and jury verdicts.¹⁰⁵ Product liability and malpractice

103. The mediation amount statistics were derived from a slightly different version of the data set. The data set from which Figures 1-4 were derived contained 5,298 cases. The data set from which the mediation amount statistics were derived contained 5,319 cases. Given the size of the total population, the addition of twenty-one cases does not alter the perception of the mediation system nor render the data regarding dollar amount unreliable.

104. The history of the mediation program also underscores the need for caution in comparing cases mediated in the two mediation tracks. It must be remembered that the plaintiff and defense bars were substantially responsible for the development of the program and its timetable. It is arguable that the program, at its inception in 1979, merely adopted already settled expectations concerning how long it takes to resolve automobile personal injury cases as compared with medical malpractice or products liability cases.

105. See R. HENSLER, *TRENDS IN TORT LITIGATION* 14-18 (Rand Inst. Civil Justice 1988). Median and mean jury awards for products liability and malpractice cases rose sharply from 1960 to 1984. The median doubled and the increase in the mean varied from 200% to 1000%. This sharply contrasts with the data for automobile personal injury cases. In both Cook and San Francisco Counties, the auto personal

cases do involve relatively higher stakes. On the basis of this fact, it can be argued that they are far more likely to involve more tenacious and protracted bargaining and higher frequency of trial. The preliminary data appears to support this hypothesis.

Although products liability and malpractice account for merely six hundred sixty of the 5,298 cases in the population (12%), they account for 27.2% of the total trial activity.¹⁰⁶ Thus, a product liability case was roughly five times more likely to reach trial than an automobile injury case, and almost three times more likely to reach trial than a contract or personal injury case.

C. Summary of Data

The data establishes that mediation is the principal docket event associated with the settlement of civil cases. Since most civil cases settle prior to trial, it is not likely that mediation caused the settlement of a substantial number of cases that otherwise would not have settled. The evaluation of Wayne County's mediation program turns on whether the program currently provides or promises benefits that justify the time and resources necessary for its existence. The mediation process cannot be evaluated merely on the basis of the number of cases that accept the result reached by a mediation panel. Rather, the mediation process serves a number of purposes, including: (i) screening the docket for abandoned cases and cases not properly filed in the circuit court; (ii) triggering the decision to initiate and/or complete settlement discussions prior to mediation; and (iii) providing an independent dollar valuation that is frequently acceptable to the parties or at least is an influence on the settlement amount ultimately negotiated. The number of dispositions achieved during the mediation process, as reflected by the acceptance of the mediators' valuation of a case, is merely one measurement of the impact of mediation on the caseflow process.¹⁰⁷

Mediation appears to have a variable impact that depends, in part, on case type and/or size of stake. The "mediation game" has a dual dynamic—one set of rules applies to the majority of the early mediated and relatively smaller cases, and a second set of bargaining rules or behavior patterns applicable to the so called "serious cases."

injury median was less than \$40,000. The median for product liability and malpractice exceeded \$150,000. It should be noted, however, that the Rand data was drawn from a limited number of jurisdictions.

106. The trial statistic does not indicate whether the cases were tried to completion. It merely indicates that three hundred eleven cases reached the point when trial was commenced, from the perspective of the trial judge.

107. Significantly, two-thirds of the attorneys responding to Stuart's survey believed that mediation valuations are "generally reasonable." *Settling Cases in Detroit*, *supra* note 4, at 320.

Notwithstanding this variation, mediation is a trigger of case dispositions irrespective of case type and size of stake. Although the product liability, malpractice, and general civil case types have a docket life significantly greater than other case types, they nevertheless display a fairly similar disposition pattern in relationship to mediation. This pattern suggests that participants are using the mediation process to settle or otherwise dispose of civil cases notwithstanding variance in case type.

Most significant for purposes of this Article is the "range finding" function of mediation. Shuart found that the mediation dollar valuation had a continuous impact when the mediation result was initially rejected by one or more parties. "[N]o fewer than ten percent of the cases which rejected mediation settled within forty days of the mediation hearing."¹⁰⁸ In confronting the dilemma of estimating the impact of mediation as compared with that of the settlement conference, Shuart assumed that any settlement achieved prior to the midpoint between the two events was more related to mediation than the settlement conference.¹⁰⁹ In addition, Shuart found that 25% of the cases subsequently settled for amounts within 10% of the mediation valuation, and another 10% of the cases settled for an amount within 25% of the mediation valuation. Cultural anthropologists have found that the negotiation process involves common features across cultures, including finding a viable range of value within which effective bargaining can occur.¹¹⁰ The effectiveness of mediation is directly linked to its ability to provide rationally based, viable dollar ranges to the litigants.

As discussed subsequently, the range finding function that is so critical to the negotiations process is better conducted by persons other than the judges who preside over the actual cases in controversy.

V. IMPLICATIONS OF THE DATA

A. *Civil Litigation: An Investment Decision*

The previously discussed graphics do not explain why settlement occurs in close relationship to the mediation event. A theory, or model, of case and attorney behavior provides a partial explanation. Although several models of civil litigation have received some

108. *Id.* at 315-16.

109. Shuart states: "Typically, the shortest period between a mediation hearing and a settlement conference is ninety days. Therefore, a settlement before the midway point can reasonably be attributed to the past event rather than the impending future event." *Id.* at 316 n.12. Shuart did not distinguish between early mediation and later mediation cases. Her assumption seems arbitrary and simplistic when bargaining behavior is considered.

110. See Gulliver, *Negotiations as a Mode of Dispute Settlement: Towards a General Model*, 7 LAW & SOC. REV. 667, 684-87 (1973).

attention in legal journals, the interactive model developed, in part, through the work of the CLRP is useful in explaining litigant investment decisions and their relationship to the mediation event.¹¹¹ The CLRP model treats events as surrogates for the effect of attorney interaction. Events in the life of a civil case, whether a pretrial conference or a motion for summary judgment, provide opportunities for and reflect attorney/client strategic decision making.

Mediation is distinct from attorney initiated events in that it is not a by-product of the stimulus response pattern associated with litigant maneuvering. The issue is not whether to negotiate or bargain. Rather, mediation is an anticipated index point in the civil case processing pathway, requiring that each attorney prepare and evaluate her case in relation to it. The interjection of the mediation event into the civil case processing path, therefore, causes an adaptive alteration in the strategic behavior of attorneys.¹¹² From this perspective, mediation induces case dispositions by requiring case preparation and evaluation and strategic decision making substantially prior to a possible trial date.

The foregoing theory of the influence of mediation on attorney behavior suggests the ironic proposition that mediation, in some cases, may cause attorneys to refrain from raising the issue of settlement until mediation has been completed. Anecdotal evidence gleaned from discussions with participant attorneys supports this hypothesis. The results of informal interviews conducted with more than twenty attorneys who regularly mediate cases suggest that when the exposure of the defendants is substantial, as measured by potential verdict size, defense attorneys are frequently choosing to avoid settlement discussions prior to the mediation hearing. Rather than initiate settlement discussions prior to mediation and risk being confronted with dollar amounts already placed on the "table," defense counsel may be opting to achieve the best possible mediation result and then "bargain downward."

If this negotiation behavior occurs more frequently in cases that are perceived to involve higher stakes, then ironically the mediation program, by scheduling the so called serious cases for mediation later in time, discourages early settlement discussion, and thereby arguably reinforces the delayed disposition of a segment of the "serious" cases. Conversely, mediation may encourage defense counsel to attempt to accomplish an early settlement when the perceived possible impact of mediation is negative in that it poses the potential of inflating settlement discussion.¹¹³

111. See *supra* notes 24-31 and accompanying text.

112. See *supra* notes 13-31 and accompanying text.

113. This phenomena occurs when a sufficient, but less than optimal, offer has been made. The risk of a bad mediation encourages acceptance of the offer. Lind and Shapard, after reviewing arbitration as practiced in three federal courts, noted

These observations are consistent with the perspective that civil litigation involves an interactive system providing a framework of strategic choices for litigants. From this perspective, it is to be anticipated that the participants within the system will mold and use reforms to effectuate their aims. This process of adaptation may limit the effectiveness of the reforms.¹¹⁴ Engel and Steele affirm this feature of the civil justice system in stating: "A particular desired state of affairs cannot be created simply by selecting attractive procedures or structures from other settings or from one's own imagination with the expectation that they will function automatically in the desired manner."¹¹⁵

The CLRP model of attorney behavior also provides a partial explanation of case behaviors and disposition patterns in relationship to mediation for cases that terminate prior to mediation. Mediation affects case disposition not simply because it is a mandatory event requiring that attorneys evaluate their cases and consider settlement. Rather, the content and result of the event also have an impact on the observed disposition patterns. Investment-based negotiations strategy, combined with the pressure created by mediation to evaluate a case, result in settlements and other dispositions in the nonmediated category.

Shuart found that a segment of the not mediated category opted to settle and thereby avoid payment of the mediation fee.¹¹⁶ The CLRP model suggests an enlarged view of this phenomenon. The decision to settle a case reflects an evaluation of the risks and benefits associated with the content of the mediation process. From this perspective, litigants make strategic choices regarding not only the direct economic costs associated with mediation, but also the indirect costs of participation in the mediation process. Indirect costs consist of the potential impact that mediation may have on the bargaining pattern in each case subsequent to the mediation evalua-

that in two of the three courts, arbitration resulted in more rapid dispositions, primarily of cases that did not reach arbitration. LIND & SHAPARD, *supra* note 44, at 76-77.

114. See Luskin, *Building a Theory of Case Processing Time*, 62 JUDICATURE 115, 126 (1978). Luskin states:

For example, a decision to reduce the length of adjournments that, according to a simulation, should result in shorter case processing time may not do so if there are participants who prefer longer case processing times and who find ways to adapt the system to their own goals. Over time, the average length of adjournment might decrease, but the number of adjournments might rise.

Id. Luskin suggests that some participants have an interest in longer case processing times.

115. See Engel & Steele, *supra* note 67, at 333.

116. *Settling Cases in Detroit*, *supra* note 4, at 313. The Mediation Tribunal Association collects a fee of \$75.00 per party for each mediated case. See MICH. CT. R. 2.403(H)(i) (West 1985); MICH. WAYNE COUNTY CIR. CT. R. 403.8.

tion.¹¹⁷ The predicted outcome of the mediation event, as perceived by each attorney, becomes an element influencing the decision to either mediate a case or forego mediation through settlement. Therefore, the decision to avoid mediation may involve a constellation of factors, including cost, attorney time, and the potential gain or diminution of bargaining strength that may result from mediation.

Once the mediation dollar valuation of a case has been rendered, a new normative standard (clothed in objectivity) is presented that, in many cases, will provide a focal point for negotiations. From this perspective, avoidance of mediation reflects an assessment of the risk of a "bad" mediation weighed against the possible gain to be achieved through mediation. The content of the mediation process, as defined by its perceived potential impact on the negotiation process, affects attorneys' and clients' decisions to settle cases prior to mediation.¹¹⁸

The advisability of adopting mediation as a mechanism to reduce congestion, fight delay, and to expedite civil case processing is contingent on the source of congestion and delay. There is no empirical support for the proposition that mediation causes cases to settle that otherwise would have proceeded to trial. Moreover, the literature and the previously discussed data strongly suggest that the primary impact of mediation/arbitration programs is on the segment of cases that leave the docket prior to the mediation or arbitration hearing. Thus, these programs cannot find justification principally as a remedy for, or prevention against, delay in the courts. Such justification assumes that the source of delay is that segment of cases that settle prior to court-annexed mediation or arbitration. This assumption seems quite dubious.

The Third Judicial Circuit's experience is instructive. It is doubtful that mediation cleared up the backlog of delayed civil cases when it was reinstated in late 1979. The perception that mediation was somehow instrumental in attacking the backlog of civil cases (a perception that is apparently widely shared by many persons associated with the mediation program), is probably attributable to the initial infusion that the system received when numerous cases, which

117. Indeed, mediation may pose an impediment to settlement negotiations. Participant attorneys report that "bad" mediation poses obstacles to settlement negotiations in that it causes unduly small or inflated expectations. *Settling Cases in Detroit*, *supra* note 4, at 320.

118. Engel and Steele discussed the operation of feedback loops in civil litigation. As civil cases progress through the five stages postulated by them, they are influenced not only by this temporal movement but also by nonsequential effects. These nonsequential effects are manifested through feedback loops. Engel & Steele, *supra* note 67, at 317-32.

were carried on the active civil docket, were noticed for mediation and subsequently dismissed as settled or abandoned.

The "not mediated" category contains cases that were abandoned prior to transmission of a mediation notice and cases in which the relative merits, as perceived by the participants, required that mediation be avoided. Mediation is the first regularly scheduled, and therefore first anticipated, docket event requiring the appearance of attorneys. For some cases, it is the first instance in which one or more of the attorneys rigorously evaluates the merits of the positions taken in the pleadings. Some attorneys are not making a systematic analysis of their cases until an external event requires it.¹¹⁹ Thus, when the mediation program was first reinstated, it is likely that the civil docket experienced surges of dispositions related to this aspect of mediation.

Mediation in the Third Judicial Circuit, however, has not been a prophylactic against the development of a delayed civil docket and the problem of delayed civil cases. After several years of uninterrupted mediation activity, the court in 1986 experienced somewhat of a crisis. Civil trials were regularly being conducted in the fortieth month.¹²⁰ The median disposition time for all civil cases in the data set is currently not much different from median disposition time observed by Church.¹²¹ The consistency of the median time to trial statistic over several years suggests a system at equilibrium, albeit a system that has incorporated and adapted mandatory mediation.

Although mandatory mediation in the Third Judicial Circuit has not met some of the goals posited for it, the current benefits and the promise of future benefits may justify the program. The wide acceptance of mediation by the bar and its usage as a trigger of case dispositions establishes mediation related events as a key link in the settlement/negotiation process. The data suggests that mandatory mediation has routinized the interactive negotiations process in relationship to regularly scheduled, and therefore predictable, docket

119. See Brazil, Kahn, Newman & Gold, *Early Neutral Evaluation: An Experimental Effort to Expedite Dispute Resolution*, 69 JUDICATURE 279, 279-80 (1986).

120. Unpublished court documents and discussions with administrative personnel indicate that the median time to trial for negligence and general civil cases was 39.8 and 40.5 months, respectively.

121. See JUSTICE DELAYED, *supra* note 4, at 11-13. The authors found a "median tort disposition time" of seven hundred eighty-eight days and a "median time to trial" of 1,231 days. "Median tort disposition time" is the median length of time from commencement of an action to the entry of an order closing it. "Time to trial" is the period from commencement of an action to the commencement of a jury trial. By 1983 the trial statistic was 1,127 days, and the median time to disposition was seven hundred twenty-one days. See IMPLEMENTING DELAY REDUCTION, *supra* note 4, at 8-9. In 1986, employees charged with the administration of the court found that jury trials were regularly being conducted in the thirty-seventh to thirty-ninth months.

events.¹²² Interpretation of the data, which is admittedly value laden, suggests that mandatory mediation, as measured by its future promise, provides a direction toward more cost effective civil case processing simply by providing a reliable vehicle and format for attorney negotiations.

The proposition that mediation causes cases that were actually mediated to settle at an earlier point in time currently lacks empirical support. Nevertheless, the centrality of the mediation process in the settlement dynamic within the Third Judicial Circuit means that mediation *can* ultimately be used to expedite the settlement process. The data from this study and Shuart's work unequivocally establish that the participant attorneys are making creative use of mediation. Thus, the case analysis, feedback, and range finding features of mediation can be used to facilitate substantive discussion and negotiation for a large segment of civil cases.

The possible future benefits of mediation are directly related to cross-cultural aspects of negotiations and strong evidence of participant (attorney) satisfaction in relationship to the mediation program. Negotiation involves a successive process of disagreement and finding agreement, resulting in further definition. At the threshold of bargaining, the parties must find a range of possible agreement within which to identify further difference.¹²³ For example, in a personal injury case in which the plaintiff attorney's evaluation of her case is \$1 million and the defense attorney's assessment of plaintiff's case is one thousand dollars, productive bargaining is not possible. In most civil cases, the attorneys eventually reach a mutually agreed upon (although perhaps not explicit) understanding that the case actually fits within a dollar range. Once a range develops, the disagreement-agreement cycle can begin anew until some narrowing of the bargaining range has been achieved.

122. Attorney negotiations basically involve a "norm-centered" model of dispute negotiations when the invocation and elaboration of norms prevail. See Eisenberg, *supra* note 22, at 639. Mediation provides a neutral forum for negotiation and a standard or norm as expressed by the valuation amount. Thus, litigants are not dependent on whether they are fortunate in drawing a judge that is skilled in fostering settlement. It is also free of the possibility that a judge will engage in inappropriate conduct promoting settlement. This routinization of the bargaining process fits comfortably with Brazil's conclusions that attorneys want crisp analysis from judges in pretrial or settlement procedures. Brazil indicated that attorneys want a judge who "is active rather than passive; analytical rather than emotional or coercive; learns the facts and law involved in the dispute . . . [and] offers explicit assessments of parties' positions and specific suggestions for ways to reach solutions." Brazil, *Settling Civil Cases: What Lawyers Want From Judges*, 23 JUDGE J. 14, 16 (Summer 1984).

123. See Gulliver, *supra* note 110, at 684-85; H. ROSS, SETTLED OUT OF COURT, THE SOCIAL PROCESS OF INSURANCE CLAIMS ADJUSTMENT 144 (2d ed. 1980). Under normal circumstances, an acceptable range of value is a necessary precondition to a negotiated settlement.

Shuart found substantial satisfaction with the Wayne County mediation process.¹²⁴ Indeed, participant satisfaction can be inferred from the data and graphics presented in Part IV. Dispositions would not cluster in relationship to mediation related events if attorneys and participants were not actively using the process to settle or otherwise conclude their cases.

Shuart's findings fit comfortably within Brazil's work in identifying what attorneys want from judges in pretrial or settlement conferences and the mediation process as measured by what it delivers. Attorneys want analysis of their cases. Brazil surveyed almost 1,900 litigators, and his research identified the judicial techniques that trial attorneys viewed as most helpful in achieving settlement. The respondents overwhelmingly viewed judicial intervention as helpful. Significantly, trial attorneys want analytical evaluation rather than formulas or expressions of personal opinion.¹²⁵

Mediation provides an analytical evaluation from a tripartite panel whose members have no perceived interest in the outcome of the cases before them. Apparently, for most cases, an analytical evaluation is the end result.¹²⁶ The evaluation includes a dollar valuation of each case. The dollar valuation has proven significant. The graphics presented in Part IV of this Article, and the data developed by Shuart regarding the relationship of the amount of the mediation valuation to the dollar amount of actual settlements, demonstrate that the dollar valuation has a significant impact on the

124. Shuart evaluated five areas: (1) hearing format; (2) case evaluation as a settlement technique; (3) role of the penalty provision; (4) costs; and (5) redundancy of multiple settlement devices. Ninety percent of the respondents believed that information conveyed through the process was sufficient for valuation purposes. *Settling Cases in Detroit*, *supra* note 4, at 318-19. "[O]nly four of the 120 attorneys surveyed stated that some cases are too complex for this type of abbreviated proceeding." *Id.* at 320. Seventy-five percent believed that useful disclosure occurred, and two-thirds agreed that valuations were reasonable. *Id.*

The critical issue concerning improvements in the system was the strength of the mediation panels. Forty-seven percent urged that changes be made in the mediator selection process. *Id.* at 319.

125. W. BRAZIL, *SETTLING CIVIL SUITS: LITIGATORS' VIEWS ABOUT APPROPRIATE ROLES AND EFFECTIVE TECHNIQUES FOR FEDERAL JUDGES* (ABA Judicial Admin. Div. 1985).

126. The mediation hearing and the mediator evaluation involve not only an evaluation of the law and factual circumstances of each case, but also certain intangibles, including the trial ability of counsel and the probable difficulty in explaining the case to the finder of fact. Based on informal interviews of mediators, there was sharp debate on the issue of whether mediators should actively consider trial counsel capability as a factor.

Future studies must examine the composition of mediation panels with respect to issues such as potential gender and race bias. Assuming that mediator perceptions of the aforementioned intangibles are determinants of mediation outcome, an imbalance in the make-up of panels quite likely yields "second class" justice for some attorneys and litigants.

negotiation process. Attorneys are using the mediation event as a "range finding" mechanism.

The wide acceptance of the program provides the court and mediation tribunal with new means of affecting bargaining and the timing of civil case dispositions. Mediation induces case dispositions by providing both a prod and an incentive to evaluate and prepare a case for negotiation. The difference between prodding a case toward disposition through the threat of possible imposition of sanctions and an approach based on incentives is more than semantical. Indeed, the one-sided emphasis on active, forceful case management and judicial control may reflect the difference between a "mechanistic" versus a "holistic" approach to civil justice and civil case management.

B. *Toward a New Paradigm*

The central tenets of the "mechanistic paradigm" in case management theory and practice are now widely proclaimed in the professional journals and have been incorporated into the operation of many trial courts.¹²⁷ This paradigm depicts civil cases as objects to be classified and shepherded from their commencement to their removal from the active docket.¹²⁸ The people associated with each case, including the clients and particularly the attorneys, are individuals who must be kept "on their toes."¹²⁹ Critical to modern case management theory is the proposition that the court must require that "lawyers must complete their work in a timely fashion."¹³⁰

127. The mechanistic paradigm holds that civil cases can be processed expeditiously if courts watch their cases closely and control the development of cases toward trial by establishing deadlines for case preparation. "The degree of control is closely associated with the time required for each stage of a case, which also varies greatly among courts." Flanders, *supra* note 7, at 17.

128. Judicial control therefore involves the strictly management function of maintaining pressure toward disposition. See SOLOMON, *supra* note 5, at 4-5.

129. The literature is replete with assertions that maintaining a sense of urgency among attorney participants is critical to proper and expeditious case management. See Flanders, *Modeling Court Delay*, 2 L. & POL'Y 305, 315 (1980). Flanders states:

To summarize, the outlines of effective management are these. For every case, civil or criminal, someone in the court has a sustained responsibility to assure that it moves expeditiously to completion. There is always a scheduled next date by which certain specified tasks are to be completed, and that next date is always quite short in relation to what the lawyers think is desirable or possible [T]he schedule is established and enforced.

Id. See also Connolly & Planet, *supra* note 7, at 57 (scheduling that requires "counsel to look at their file about every two weeks since that period is about their maximum sense of urgency"); Friesen, *supra* note 6, at 4-7 (keeping attorneys on their toes). But see NIMMER, *supra* note 3, at 5 ("In the absence of [a theoretical framework] . . . , reform planning proceeds under traditional or intuitive assumptions about behavior modification.").

130. Flanders, *supra* note 7, at 17.

Historically speaking, the development of the Federal Rules of Civil Procedure altered the process of civil litigation and placed attorneys more in control of individual cases. Discovery and the timing of discovery were placed almost completely in the hands of the litigants. This trend was balanced by the adoption of procedures that provided the judiciary with an ability to manage civil cases.

Federal Rule of Civil Procedure 16 was adopted for the purpose of civil case management.¹³¹ The Wayne County Circuit Court's experience with pretrial conferences greatly influenced the promulgators of the federal civil procedure rules.¹³² It was believed that the pretrial procedures would aid in removing extraneous disputes from the docket and expedite trial.¹³³ The conventional wisdom developed that "inexorable progress" toward trial was the most effective "stimulant of fair settlements," and that the pretrial procedures facilitated this end. In addition, although Rule 16 did not expressly refer to settlement, it came into wide usage as a settlement tool.¹³⁴

Rule 16, as amended in 1983, requires the entry of a pretrial scheduling order. The amendments represent an attempt to *require* federal trial judges to personally intervene in and thereby manage civil cases.¹³⁵ The current version of Rule 16 expressly mentions facilitating settlement as an aim, and also includes a provision expressly authorizing sanctions.¹³⁶

Several studies indicate that mandatory pretrial conferences do not shorten disposition time nor produce more frequent settlements, and are generally an inefficient use of judicial time.¹³⁷ There

131. See 6 C. WRIGHT & A. MILLER, FEDERAL PRACTICE AND PROCEDURE, CIVIL § 1521 (2d ed. 1990).

132. *Id.* § 1521.

133. *Id.* § 1522.

134. *Id.*

135. The extensive amendments to Rule 16 in 1983 made judicial case management an express goal. The new rule requires the convening of a pretrial conference and entry of a pretrial order, but allows the trial judge to exclude certain cases from unnecessary pretrial conferences. The promulgators of the amendments heavily relied upon Flanders when they stated:

Empirical studies reveal that when a trial judge intervenes personally at an early stage to assume judicial control over a case and to schedule dates for completion by the parties of the principal pretrial steps, the case is disposed of by settlement or trial more efficiently and with less cost and delay than when the parties are left to their own devices.

Advisory Committee's Note, *supra* note 33, at 207 (citation omitted).

136. Prior to the 1983 amendments, the power to impose sanctions was viewed as an inherent power of the court. See WRIGHT & MILLER, *supra* note 131, § 1531; Advisory Committee's Note, *supra* note 33, at 213.

137. See ROSENBERG, *supra* note 38, at 17-18. See also J. RYAN, A. ASHMAN, B. SALES & S. DUBOW, AMERICAN TRIAL JUDGES 177-91 (1980) (the authors found that over 75% of the judges studied intervened in some manner, with 10% intervening aggressively. Judges were more likely to intervene when they had a relatively high self perception of competence in settling cases and when attorneys were relatively

is also support for the proposition that more "activist" judges who expend relatively larger amounts of time encouraging settlement dispose of fewer cases than less "activist" judges.¹³⁸ Hence, some theorists advocate that removal of judges from the management and settlement process and the associated savings in judicial time are worthwhile goals.

The express language of Rule 16 acknowledges that pretrial conferences are an inefficient use of judicial time in many cases. Subsection 16(b) provides that the court shall enter scheduling orders in all cases "[e]xcept in categories of actions exempted by district court rule as inappropriate . . ."¹³⁹ The Rule also allows the district court to delegate the entry of pretrial orders to a magistrate.¹⁴⁰ Rule 16 thereby attempts to strike a flexible balance between the benefits of judicial intervention and the inefficiency of too much intervention.¹⁴¹ Rule 16 also envisions that the trial judge will play a helpful (but undefined) role in facilitating the settlement process.¹⁴² This joinder of the settlement function with early, forceful

less skilled); Wall & Schiller, *Judicial Involvement in Pre-Trial Settlement: A Judge is Not a Bump on a Log*, 6 AM. J. TRIAL ADVOC. 27, 35-37 (1982) (Wall & Schiller found that the judges studied participated significantly in 34% of the settlement proceedings. Lawyers perceived that a substantial number of the judicial techniques which were frequently used were unethical.).

138. Flanders, *supra* note 7, at 37-39.

139. FED. R. CIV. P. 16(b). See Advisory Committee's Note, *supra* note 33, at 207 (mandatory scheduling orders represent "a degree of judicial involvement that is not warranted in many cases"). Rule 16 permits exemption of certain categories of cases in which the burdens of scheduling orders exceed the administrative efficiencies that would be gained.

140. The rule expresses a preference for judicial involvement but permits delegation to a magistrate. FED. R. CIV. P. 16(b).

141. It is believed that the time lost in a strictly management function will be offset by a net savings in time to disposition. As stated by Miller:

But, we honestly believe that time expended in scheduling and management will be offset by time economies you will experience later on in these cases.

Once again, we lack empiric evidence on the subject, but the available data indicate that management conducted early in the action will produce efficiencies later in the proceedings . . . The hope is that by robbing Peter to pay Paul in terms of allocating time, there will be a net savings for all concerned.

Miller, *The August 1983 Amendments to the Federal Rules of Civil Procedure; Promoting Effective Case Management and Lawyer Responsibility*, 1984 FED. JUD. CENTER 29.

142. Regarding the settlement process, the Advisory Committee comments acknowledge the reality of settlement but provide little direction. In regard to Rule 16(c)(7), the Advisory Committee states:

Clause (7) explicitly recognizes that it has become commonplace to discuss settlement at pretrial conferences. Since it obviously eases crowded court dockets and results in savings to the litigants and the judicial system, settlement should be facilitated at as early a stage of the litigation as possible. Although it is not the purpose of Rule 16(c)(7) to impose settlement

(but removed) case management is problematic.

The conception of the trial judge embodied in Rule 16 appears eclectic and contradictory. With regard to the settlement process, the rule provides little guidance. Brazil's data indicates that attorneys want analytical input and an analytical evaluation of their cases from judges. How can judges be removed from involvement in the case management and settlement process yet allocate the time essential to a careful, analytical appraisal of the cases before them? Additional questions are raised by literature, which suggest that: judges may not make good mediators;¹⁴³ three mediators obtain better results than one mediator;¹⁴⁴ the mediation results appear to track with mediator experience.¹⁴⁵ Absent a substantial allocation of time devoted to settlement, it is difficult to understand how it is that judges are to develop the experience requisite to serving capably as case evaluators and mediators. A probable result is that settlement efforts under Rule 16 in many instances will involve "a mere exchange of legalistic contentions without any real analysis of the particular case."¹⁴⁶

It should also be kept in mind that judges are not necessarily subject matter experts. Indeed, federal judges sitting in diversity may possess a very narrow understanding of the substantive state law governing contract, property, and various tort actions. Perhaps judges ought to be insulated from a broad role in the settlement

negotiations on unwilling litigants, *it is believed that providing a neutral forum for discussing the subject might foster it.*

Advisory Committee's Note, *supra* note 33, at 210 (emphasis added). See also Miller, *supra* note 141, at 26. Miller, the Reporter for the Rules Committee, indicated that the committee was not able to formulate a thorough rule because of the controversy as to the proper role of the judge in settlement negotiations.

143. Eckhoff, *The Mediator, the Judge and the Administrator in Conflict Resolution*, 10 ACTA SOCIOLOGICA 148, 161-66 (1967). Eckhoff suggests that the demands of judging and a perceived lack of neutrality may make it difficult for a judge effectively to mediate civil cases.

144. Weller, *Commentary on "An Evaluation of Alternatives to Adjudication,"* 7 JUST. SYS. J. 445 (1982). Weller compares the results of compulsory arbitration programs in California and Pennsylvania and concludes that mediation hearings conducted by panels of three mediators resulted in fewer appeals than those conducted by individual mediators.

145. See Pearson, Thoenne & Vanderkooi, *The Decision to Mediate: Profiles of Individuals Who Accept and Reject the Opportunity to Mediate Contested Child Custody and Visitation Issues*, 6 J. DIVORCE 1 (Fall 1982). This finding refers to traditional mediation practices and not a case evaluation model. Nevertheless, the experience of the mediators is one variable that probably correlates with acceptance or rejection of a mediation valuation in Wayne County, Michigan. The greater the perceived/actual experience and subject matter expertise, the more likely the mediation result will form a bargaining norm or standard, thereby influencing negotiations. This view is widely held within the Wayne County Mediation Tribunal Association.

146. See Advisory Committee's Note, *supra* note 33.

process and procedures developed that aim exclusively at facilitating settlement.

The pretrial procedure envisioned by Rule 16 also has been subject to substantial criticism on other grounds. Judicial pretrials offer reduced procedural safeguards; decisions made in chambers may not be subject to review until a final decision on the merits has been rendered. And there is little evidence to support the proposition that increased pretrial activity settles cases more cheaply or more quickly.¹⁴⁷

The mediation data suggest that mandatory mediation may provide a worthy alternative to pretrial conferences in a broad range of cases.¹⁴⁸ The structure of the mediation program incorporates advantages that are not offered by Rule 16. The tripartite panel offers both the plaintiff and defendant the promise that the case appraisal process will include consideration of each advocate's position. The tripartite panel also operates completely free of direct judicial involvement. Thus, the program does not involve a reallocation of judicial energy from adjudicatory functions to case management or settlement related activity.

The past decade of experience with court-annexed mediation suggests a prescription for change in the content of procedural rules and the manner in which procedural rules are perceived. The civil justice system is a participatory, interactive system in which individuals and groups operate interdependently, and settled norms govern much of individual and group behavior. Docket management initiatives aimed solely at pushing attorneys to resolve cases is insufficient. A more strategic and two-sided (holistic) approach would aim at facilitating the development of commonly understood and accepted standards and the negotiations of the actors within the system. Reform generally does not occur as a result of the engrafting of the "grand idea" onto an existing process.¹⁴⁹ Rather, change occurs when "a reform creates incentives or alters the environment

147. Resnik, *supra* note 35, at 8-11.

148. Cases that settle prior to mediation/arbitration provide obvious savings for the litigants, if not the court system. In these cases, no judicial time is expended. Also, obvious time savings are reaped with respect to cases in which mediation valuations are accepted during the mediation or shortly thereafter. More research needs to be directed at the stakes/complexity issue in order to determine the relationship, if any, between the size of stake and case complexity, and the impact of mediation on the various strata of tort and other litigation.

149. The mediation program is a primary example of this phenomenon. Originally, it was believed that mediation would greatly help to clear a congested docket and would provide a prophylactic against delay. After a short period of claimed success in the early 1970's, the program fell into disuse. The reconstituted program was greatly improved by this early failure. Notwithstanding the current success of the program, the data and interviews suggest that mediation has affected the civil case docket in an unanticipated manner. No one foresaw that attorneys would begin to utilize mediation as creatively as current practice suggests.

sufficiently to induce altered behavior.”¹⁵⁰ Mediation may provide such incentive when it demonstrably facilitates the settlement process. Given this view of the civil justice system, rule makers might better focus on drafting rules that incorporate incentives that can be maximized by proper preparation of civil cases. These new rules would seek to encourage prompt case preparation by offering incentives, which in turn yield tactical advantages. The mediation rule in effect in the Third Judicial Circuit is an example of this approach to rule making.

Rule 16 envisions that the provision of a neutral forum within which to discuss settlement is beneficial.¹⁵¹ The rule, however, falls short of the kind of case appraisal and attorney feedback truly needed to facilitate case settlement. Rule 16 was amended to encourage the early and continuous judicial management of civil cases throughout all of the district courts.¹⁵² Notwithstanding this intent, relegating court-initiated settlement efforts exclusively to the pre-trial conference means that the quantity and quality of those efforts, and the end result in terms of the quality of case appraisal, will vary with the skill, personality, and work style of each federal trial judge.¹⁵³ Moreover, the judge in a particular case is not necessarily the person most likely to be viewed by participants as qualified to provide a neutral and analytical case appraisal. Rule 16 thereby subordinates the facilitation of settlement to a case management paradigm. A more two-sided approach is required if the case settlement

150. NIMMER, *supra* note 3, at 63.

151. See Advisory Committee's Note, *supra* note 33, at 210.

152. Miller recognized that judicial settlement and case management practices vary greatly. Miller states:

There are three significant apprehensions regarding new rule 16. The first is the same as one articulated with regard to rules 7 and 11—if a judge is not disposed to manage, will he pay attention to rule 16? Certainly there are federal judges who do not manage their dockets aggressively; they have various reasons for this attitude, which by and large reflect their own style or conception of judging. But since younger judges seem more in tune with the need for management, the number of reluctant judges is dwindling as new judges also are heavily encouraged in this direction by the Federal Judicial Center [T]here are judges who probably will reject the orientation of rule 16, but they should be relatively few in number.

Miller, *supra* note 141, at 28.

153. Freeing settlement from the “firm judicial control” mind set requires that rules governing court-initiated settlement efforts take into account the interactive process engaged in by attorneys as they seek to resolve civil cases through settlement, and the feedback loops associated with the acceptance and use of events such as mandatory mediation. Settlement should be a declared and formal part of the litigation game. This approach envisions changes in the preparation of civil cases by attorneys based on their desire to use the mediation event to their best advantage, rather than case preparation principally in anticipation of the close of discovery, the imminence of trial, or the wrath of the court.

process is to be taken seriously.¹⁵⁴

An anecdote that was reported during one of the informal attorney interviews provides an example of the benefit of a two-sided approach to procedural rules. The mediation program in the Third Judicial Circuit, as a matter of custom, allows the parties to a civil action to stipulate to a "special mediation" in lieu of the normal mediation procedure required by Michigan Court Rule 2.403.¹⁵⁵ Under this rule, the attorneys can stipulate to the selection of a special mediation panel. The plaintiff attorney chooses the plaintiff mediator and the defendant chooses the defense mediator. Customarily, the two mediators selected by the plaintiff and defendant then select a neutral mediator. The special mediation rule was developed in order to allow attorneys in complex cases to select panels they believed most capable of facilitating a settlement. In one case involving an automobile product liability/design defect claim and a road design claim, the plaintiff's attorney allowed the defense attorney to select both the defense mediator and the neutral mediator. This approach was intended to result in a panel that would be receptive to the defendant's arguments. Subsequent to the mediation, the plaintiff's attorney was able to negotiate a settlement that was almost 50% greater than the mediation result.¹⁵⁶ This example reflects a creative use of the mediation process to influence and persuade an adversary as to the appropriate range of value in a specific case.

The two-sided approach advocated herein is not based on the perspective that mediation by itself provides a basis for system-wide change in civil justice practice and procedure. Rather, it proceeds from the standpoint that mediation is a helpful, necessary complement to existing procedural approaches. In the context of the Third Judicial Circuit, mediation should be a significant element of any strategy aimed at delayed cases. For example, for a later mediated case, movement of the mediation event to a point earlier in time could serve to induce attorneys to prepare cases to capitalize on the mediation event.¹⁵⁷ Another example might be the development of

154. MICH. CT. R. 2.403(B)(1)(a) provides that a case may be submitted to mediation "on written stipulation of the parties." The rule thereby affords the litigants some latitude in tailoring the mediation procedure to meet the particularized needs of specific cases.

155. Some attorneys indicated that they do not utilize the special mediation rule because they do not want their adversary to interpret their desire to use the rule as an indication that the adversary's case or argument is in any way deserving of special attention. For these attorneys, initiating settlement or suggesting that a special mediation was appropriate indicated that they were unsure of the strength of their cases or fearful of their opponents' cases.

156. The mediation against the automobile manufacturer was \$750,000. That defendant settled the case for approximately \$1.1 million.

157. This measure appears appropriate because the literature indicates that case

several docket tracks in which the plaintiff, upon filing, would have the option to make an election for early mediation and early settlement conference dates.¹⁵⁸ From this perspective, procedural rules provide a menu of approaches to civil cases. This menu would focus the attorneys on prompt preparation and creative processes that facilitate negotiated solutions. This notion, at least in part, underpins the current approach to modern rules governing discovery.

Nothing stated here should be construed to mean that current pretrial practices and judicial management approaches are without value. Rather, the aim of this discussion is to indicate that these practices merely reflect a part of the picture. Further reform is necessary to achieve efficient and prompt administration of the civil justice system in urban trial courts.

VI. CONCLUSION

Neither the results of this study nor the literature definitively explain why mediation has an impact on settlement negotiations. Perhaps the simple reason is that the manner in which mediation is scheduled, combined with the comprehensive review and evaluation of a case required by mediation, have caused attorneys to use the mediation event as a focus for settlement negotiations.

The nominal costs and complete lack of judicial time involved in the Wayne County, Michigan, approach to mediation make it a program worthy of increased study and consideration by the bench and bar. This program avoids many of the potential problems associated with present case management functions served by the judiciary. Mediation does not raise the specter of heavy-handed judges coercing attorneys and litigants into settlements, or making unreviewable personal evaluations or judgments about a case that may affect the conduct of a trial.

It appears clear that mandatory mediation and arbitration programs are not a cure-all. Court administrators, attorneys, judges, law makers and others concerned with the delay, costs, and other

type is not a significant variable in explaining delay. See Flanders, *supra* note 7. Flanders indicates that relatively fast courts terminate all types of civil cases in a relatively fast manner. In addition, case type is not a sufficiently precise variable because any case type may contain relatively complex and difficult cases requiring additional hours of judicial time. *Id.* at 72-73. In the mediation study, products liability and malpractice case types accounted for an inordinate percentage of the trial activity. It cannot be argued, however, that those case types inherently require twenty-seven months for discovery and mediation.

158. With respect to this suggestion, it can be argued that such election would be fruitless in a system in which trials are routinely conducted in the thirty-sixth month or later. However, the large number of settlements achieved at or near the mediation hearing suggest that the "courthouse steps" settlement phenomenon may not play a substantial role in mediated cases. This issue should be tested by examining mediated high-stake cases against a control group of nonmediated cases.

burdens associated with litigation cannot rely on these programs as remedies that can be uniformly applied in all circumstances. Consideration of mandatory mediation must include a careful assessment of the goals sought to be achieved. Mediation can substantially expedite the resolution of lower tier civil lawsuits involving money damages. The overwhelming majority of these cases are destined to settle or otherwise terminate prior to trial. Mediation can also provide a stimulant and inducement to bona fide negotiation, even for the tier of civil actions involving relatively high stakes. It appears clear that attorneys welcome the crisp analysis and range finding that mediation can provide. There is no empirical evidence, however, that mediation has caused cases to settle that otherwise would have proceeded to trial.

Undoubtedly, further research needs to be conducted into the mediation process and its relative impact on various types of civil cases. Mediator behavior also needs to be explored in order to better understand what types of behavior best facilitate serious bargaining and case settlement. The fruits of such research might provide the basis for substantial change in our perception of procedural rules and the manner in which attorneys are trained. The fruits of the study discussed in this Article suggest that the advisability of looking to the trial judge as the main settlement facilitator is questionable.

APPENDIX

This Appendix consists of two subparts. Part I is a general summary of the data collection process. Part II is a description of the procedures used to identify and eliminate incorrect data.

Part I — Methodology

The Third Judicial Circuit Court's computer was the source of data for the mediation study. A magnetic tape containing biographies for 5,615 civil cases was developed.¹ This population included all civil cases scheduled for mediation during the period from January through June, 1984. The tape was derived from the court's computing system on May 15, 1986.

The magnetic tape contains twenty-seven variables for each case within the population. These variables include case identification number, filing date, disposition date, mediation amount, disposition type, and case type. The format of the magnetic tape allowed subpopulations of cases to be isolated and analyzed.

The variables for each case were formatted in a repeating record format on the magnetic tape.² The repeating record format allowed each case or any set of cases to be selected and analyzed. Thus, at any point from filing to disposition, cross-sections that identified each case on the basis of any of the variables could be developed. For example, the identity of each case that settled prior to early mediation could be determined, and this subset of cases could then be analyzed by case type, number of parties, or number of partial dispositions.

Frequency tables were initially generated for all original variables. Assessment of the frequency tables resulted in the creation of new variables. For example, the filing date for each case was subtracted from its disposition date to create a new variable—"dispage." Dispage means the disposition age of the case, as measured from the time of filing to the date an order was entered that removed the case from the active civil docket.³

The frequency tables also identified a group of cases that appeared to be abnormal, *e.g.*, cases that displayed a negative number

1. A second magnetic tape was generated containing the biographies of approximately 6,300 civil cases that were scheduled for mediation in the first six months of calendar year 1985. That data set has not been analyzed yet.

2. "Repeating record format" means that each case, as recorded on the magnetic tape, has the same number of lines (records) that are placed in a fixed order. Each record begins with the identification number of the case to which the record is related. Each record also contains a record number indicating whether it, for example, is record number 1, record number 6, or record number 9.

3. Although stays resulting from interlocutory appeals or bankruptcy proceedings also remove a case from the active docket, such cases are not closed. To the degree possible, therefore, such cases were eliminated from the data set.

for disposition age. These cases were reviewed manually and recoded with proper dates if they met the original criteria for the population.

Five thousand four hundred twenty-nine cases remained in the population after the aforementioned procedures were conducted.

A systems file was created containing 5,429 cases, with sixty-one variables for each case. New frequency tables, multiple cross-tabs, bivariate, and standard descriptive statistics were generated. The creation of new variables and the development of graphics depicting the case processing path further identified groups of cases that required segregation from the main data set, including: (1) cases that were removed to the district court because their alleged damages did not meet the jurisdictional floor of \$10,000; and (2) cases that had disposition dates that were less than or equal to their mediation notice dates. Both groups of cases are significant in their relationship to the mediation process, but must be explained separately.

Removed cases, for purposes of the circuit court's docket, are dead cases. That is, removal to the district court completely eliminates the circuit court's jurisdiction. From a case management perspective, this termination pathway is as important to the proper administration of the court as any of the other possible case termination routes. Removal of a case does not, however, resolve the underlying dispute.

The group of cases containing a disposition date that occurred prior to the mediation date are significant because they relate to the "docket cleaning" function of the mediation process. This subset of cases arguably did not belong within the population of cases studied. Had appropriate orders been entered in these cases, they would never have been scheduled for mediation. The fact that they were issued mediation notices indicates that appropriate dispositional orders were not entered. Final orders were entered in these cases because issuance of the notice of mediation compelled the attorneys to inform the court of their disposition.

In addition to the statistical data, background information pertaining to the history of the mediation process, the structure of the Mediation Tribunal Association, and the history of the court were collected through a series of personal interviews with several experienced court managers, county executives, and attorneys.

Part II — Data Cleaning

Review of frequency tables raised suspicion as to the reliability of the disposition date variable in a number of cases. In addition, it was necessary to determine whether the case type variable in the court's computer system corresponded with this evaluation's case

typology. For example, that the case type code "NM" (malpractice) actually involved a doctor, a health care professional other than a doctor, or an attorney as a party defendant.

Time of disposition, of course, is a "fuzzy" variable for several reasons. In many instances, the time recorded in the court's records and in the court's computer does not represent the point in time when a case actually settled or otherwise terminated. A review of the "case prints"⁴ demonstrated that attorneys frequently notified the court several months after a settlement had been consummated.

In order to determine whether the disposition dates, and in some cases the mediation dates, were accurate, case identification numbers were generated for all suspect cases. Three hundred forty-seven cases were identified that appeared to have disposition ages of less than thirteen months. Of this subgroup, one hundred two cases required an alteration of the disposition date. Four of the cases that were recorded as terminated were actually open and awaiting trial.

Date variables were used to further identify cases that were likely to have an incorrect disposition date variable. Two temporary variables—"latemed" (mediation later than disposition) and "lateconf" (settlement conference later than disposition)—were created. Any case in which the mediation or settlement conference occurred subsequent to a disposition was labeled as suspect. Each of the suspect cases was checked against its case print. This procedure produced one hundred twenty-two cases with a latemed variable. The disposition dates for one hundred fourteen of these cases were corrected. Four cases were identified that were not actually mediated. The mediation date variable for these cases was corrected. In nine cases where the disposition date was corrected, the case was also removed. Three cases were stayed, and two cases were open and awaiting trial.

A similar procedure was utilized for every case in which there was a lateconf variable. One thousand six cases were identified; and the filing date, mediation date, conference date, and disposition date for each case was screened. Disposition dates were corrected in two hundred ninety-four cases. The settlement conference date was corrected in fifty-four cases. In eighteen of the cases, a media-

4. A case print is a computer generated docket sheet that documents events occurring in the life of a civil case. The date of filing, disposition, motions, etc. are all recorded in a case print. In addition, the format for the entry of data provides an area within which the clerk or other court employee making an entry can make additional comments. Such comments are known as "free field comments." Customarily, the court's computer records contain this information, as well as a history of docket events. Frequently, free field comments will explain why a particular event code was entered in a case. For example, in cases where an order was entered at the settlement conference, the comments frequently indicated that the court received notice that a case had settled several months or several days prior to the settlement conference.

tion date was entered where there previously was none. In a substantial number of cases, the order disposing of the case was filed many months after the event which signaled an end to the case. This time ranged as long as twelve months. Indeed, there were several cases in which the time from dispositive event to entry of the order was slightly more than twelve months. There were also numerous cases in which the time lag involved five to seven months. Frequently, the settlement conference consisted of nothing more than notice to the court that the attorneys would not be appearing because the case had been resolved.

The cases identified by the *lateconf* and *latemed* variables were removed from the system's file. The cases remaining in the systems file were assumed to have reliable dates. A 5% sample was drawn from this group in order to verify this assumption. The sample size was two hundred cases. Evaluation of these cases confirmed that the vast majority of the cases in the sample had correct filing, disposition, and mediation dates. Eight cases were identified as having incorrect disposition dates. The disposition date variable for these cases was recoded. No errors were identified for filing date, mediation date, or settlement conference date. An additional sixty-three cases were drawn from the batch of cases in which the dates were presumed to be correct. Manual evaluation of these cases resulted in four corrections of the disposition date variable.

The manual evaluation of the previously described cases revealed that some "disposition types" were suspect. For example, occasionally a case in the population would have either a divorce decree or an order restoring a drivers license as the final order closing the case. Since driver restorations and divorce proceedings are not subject to mediation, no case in the data set could legitimately be closed on that basis. In addition, stays resulting from interlocutory appeals and from bankruptcy proceedings were frequently associated with incorrect disposition dates.

The case identification number for each case in which a suspect disposition occurred was generated. Three hundred thirty-nine cases were identified. Manual evaluation resulted in the correction of thirty-six disposition dates. Thirty additional cases were corrected by eliminating the recorded disposition date and recoding the case as "open." In total, sixty-six disposition dates were corrected.

In total, 2,014 cases were evaluated by comparing the case print for each case with the information recorded on the magnetic tape. The sample of two hundred cases presumed to be "good" had an error rate of less than 5%. It is therefore concluded that the error rate for the population (the total population included 2,014 screened cases as well as the cases subject to the sampling procedure) was substantially less than 5%.

Case Type Evaluation

Since there was an interest in examining the disposition patterns for mediated civil cases across several case types, there was a two-fold task of determining what this evaluation meant by case type, and then determining whether that definition conformed to the case type code used in the court's computer for the population of cases. A sample of one hundred twenty-nine cases was drawn for the following case types: contract (12); products liability (6); malpractice (7); general civil (8); personal injury (13); and auto personal injury (19). A review of the case files for these cases found one case in the product liability case type that arguably was a premises liability case.⁵ The malpractice category disclosed five medical and two legal malpractice claims. The general civil category involved several premises liability cases, with one case involving an alleged failure to pay benefits under an automobile insurance contract. The personal injury case type involved almost exclusively premises liability cases. One products liability case was also filed as a personal injury case. All of the cases filed under the auto personal injury case type involved alleged injuries arising from an automobile accident.

Given the size of our data set, the case type sample was somewhat small; a sample size of four hundred to five hundred cases would have been more desirable. Notwithstanding this problem, it is felt that, in most cases, the case type designated by the attorney filing the case was generally related to the substance of the dispute. The initial fear that attorneys may have been manipulating their choice of case type designation for some strategic purpose was unwarranted.

5. Although a fork lift truck was implicated in the accident, the thrust of the case involved the alleged negligence of the owner of the premises where the fork truck was supplied and operated. Premise liability cases would be more appropriately filed in personal injury or other general civil case types.