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Institutionalization: What do empirical studies tell us about court mediation?

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COURT ADR

In the 25 years since the Pound Conference, federal and state courts throughout the country have adopted mediation programs to resolve civil disputes. This increased use of mediation has been accompanied by a small but growing body of research examining the effects of certain choices in designing and implementing court-connected mediation programs.

This article focuses on the lessons that seem to be emerging from the available empirical data regarding best practices for programs that mediate non-family civil matters.[1] Throughout the article, we consider the answers provided by research to three questions: (1) How does program design affect the success of the institutionalization of mediation? (2) In what ways do design choices affect the likelihood of achieving settlement of cases? and (3) Which program design choices affect litigants' perceptions of the procedural justice provided by court-connected mediation? Because these issues of institutionalization, settlement and justice are so important to the success and quality of court-connected mediation, they must be considered carefully in deciding both how to structure new court-connected mediation programs and how to improve existing programs.

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Design and institutionalization

Most court-connected mediation programs seek successful institutionalization, which we define here as regular and significant use of the mediation process to resolve cases. Voluntary mediation programs rarely meet this goal because they suffer from consistently small caseloads. In contrast, programs that make mediation mandatory (at the request of one party or on a judge's own initiative) have dramatically higher rates of utilization.

Significantly, mandatory referral does not appear to adversely affect either litigants' perceptions of procedural justice or, according to most studies, settlement rates. Further, judicial activism in ordering parties into mediation triggers increased voluntary use of the process, as lawyers begin to request it themselves in anticipation of court referral. An additional benefit of exposing lawyers to mediation is that they are more likely to discuss and recommend the process to their clients.

Good program design can maximize the use of court-connected civil mediation programs and enhance litigants' perceptions of procedural justice.

Another program design option involves requiring lawyers to consider mediation as an integral part of their usual litigation planning. For example, some courts require lawyers to discuss the potential use of mediation or other ADR processes and report the results of that discussion to the court early in the life of a case. Other courts require lawyers to discuss ADR with their clients. These court rules face less lawyer opposition than mandatory case referral and can give lawyers more control over the logistics of mediation (e.g., choice of mediator and timing). Adopting these rules (combined with active judicial support and willingness to order mediation when deemed appropriate) tends to increase requests to use mediation.

The local legal and mediation cultures influence how quickly mediation is integrated into the court system, as well as which program design features are more (or less) acceptable. Knowledgeable leadership from the bar and the judiciary contribute to the growth of mediation programs.

Thus, mediation programs that obtain the input and support of the bench and the bar and that involve mandatory consideration or mandatory referral are more likely to be successfully institutionalized. Mandatory case referrals can increase use of mediation without compromising settlement rates or perceptions of justice.

Which cases should mediate

Many courts have adopted civil mediation programs in order to encourage and obtain the settlement of cases. And, importantly, both lawyers and litigants view mediation more favorably and as more procedurally just when settlement is achieved.

Although it has been suggested that

certain general categories of civil cases (e.g., employment, contract) are "best" handled by mediation, there is no empirical support for this notion. Neither settlement rates nor litigants' perceptions of the procedural justice provided by mediation vary with case type. (There is some limited evidence, however, that medical malpractice and product liability cases may be somewhat less likely to settle than other types of tort cases.)

Interestingly, the level of acrimony between the litigants in non-family civil cases does not seem to affect the likelihood of settlement in mediation. Not surprisingly, the cases most likely to settle in mediation are those in which the litigants' positions are closer together, the issues are less complex, or the issue of liability is less strongly contested. Litigants' perceptions of procedural justice do not seem to vary with the tenor of the relationship between the litigants or with these other case characteristics.

Thus, because no case characteristics have been identified for which mediation has detrimental effects, mediation programs do not need to exclude certain types of cases. Some programs may be tempted to exclude the cases that seem likely to reach settlement on their own, without the assistance of a mediator. This choice, however, is likely to limit not only the rate of settlement achieved but also the opportunity to improve litigants' perceptions of the procedural justice of the settlement process and to enhance their views of the courts.[2]

When to mediate

Without a statute or court rule to the contrary, mediation tends to occur late in the life of a case and often after all discovery is completed. Holding mediation sessions sooner after cases are filed, however, yields several benefits. Cases are more likely to settle, fewer motions are filed and decided, and case disposition time is shorter, even for cases that do not settle in mediation.

Local litigation customs and case management practices affect lawyers' comfort with the early use of mediation, and the chance of settlement is reduced somewhat if lawyers lack critical information about their cases. Discovery does not have to be completed, however, for cases to settle. In addition, the status of dispositive and other motions tends to affect the likelihood of settlement in mediation. If motions are pending, settlement is less likely. Litigants' perceptions of the procedural justice provided by mediation, meanwhile, do not seem to vary with the timing of the session.

Thus, program designers should consider scheduling mediation sessions to be held at some reasonable point before discovery is completed but only after dispositive or other critical motions have been decided.

Who the mediators should be

Mediation is most likely to be successfully institutionalized if the mediators are drawn from the pool that is preferred by lawyers: litigators with knowledge in the substantive areas being mediated. But neither mediators' knowledge of the subject matter of the dispute nor the number of years they have practiced law[3] has proved to be related to settlement or to litigants' perceptions of procedural justice.

One characteristic of the mediators, namely having more mediation experience, is related to more settlements. However, several aspects of mediator training, such as the number of hours of training or whether it included role play, tend not to affect settlement. None of these mediator characteristics seem to be related to litigants' perceptions of the procedural justice of mediation.

Thus, program design options that maximize each mediator's level of experience, such as the use of in-house mediators or a limited roster, may enhance the success of the program more than a roster with many mediators who get no or few cases to mediate. Matching mediators to cases based on subject matter expertise makes lawyers more comfortable with the process, but not doing so has not been shown to have detrimental effects on settlement or on litigants' perceptions of justice.

What the mediators should do

The approach that mediators ought to use (facilitative, evaluative, transformative) has been the subject of much debate. Both active facilitation and some types of evaluative interventions tend to produce more settlements as well as heighten perceptions of procedural justice.[4]

For example, when mediators disclose their views about the merits or value of a case, cases are more likely to settle and litigants are more likely to assess the mediation process as fair. By contrast, when mediators keep silent about their views of the case, cases are less likely to settle and litigants' views of procedural justice are not enhanced. But when mediators recommend a particular settlement, litigants' ratings of the procedural fairness of the process suffer, notwithstanding an increased rate of settlement.

When litigants or their lawyers participate more during mediation, cases are more likely to settle than when they participate less. Moreover, the litigants evaluate the mediation process as more fair. In addition, when the lawyers behave more cooperatively during mediation sessions, both the likelihood of settlement and litigant perceptions of procedural fairness increase.

Thus, the training, ethical guidelines and monitoring tools applicable to court-connected mediation programs should encourage mediators to facilitate participation by both litigants and their lawyers and to enhance the amount of cooperation during the session. Programs need not discourage all evaluative interventions, but should restrict those, such as recommending particular settlements, that reduce litigants' perceptions of the fairness of the mediation process.

Although it has been suggested that certain general categories of civil cases — such as employment and contract — are "best" handled by mediation, there is no empirical support for this notion.

Roles for lawyers

In civil mediation sessions, lawyers generally speak on their clients' behalf and, consequently, do more of the talking. Neither settlement nor litigants' perceptions of procedural justice tend to be harmed by this allocation of responsibility between the lawyer and client. As noted earlier, greater participation by both lawyers and clients is beneficial. Litigants' presence during the session is important for several reasons, most notably because litigants who are not present view the dispute resolution process as less fair. Lawyers also perceive that their clients' presence changes the lawyers' role in settlement, makes the clients' interests more relevant and influences ultimate outcomes.

Preparation for the mediation session also is important. The more lawyers prepare their clients for mediation, the greater the likelihood of settlement in mediation and the greater the litigants' perception of procedural fairness. As noted earlier, greater cooperation among the lawyers during mediation also has these benefits. Interestingly, both greater client preparation and more cooperation among lawyers lead attorneys as well as their clients to view the mediation process as more fair.

Thus, court-connected mediation programs should encourage litigants to attend and participate in mediation sessions. Attorneys should be expected to prepare their clients for mediation, and mediation programs should provide information to assist their preparation. Lawyers should adopt a cooperative rather than a contentious approach during the session.

Advice for program designers

In this article, we have presented empirical data that address the effects that important program design choices have on institutionalization, settlement and perceptions of justice. We assume that court-connected mediation programs are concerned about all three of these issues, although courts' desire to institutionalize mediation or encourage settlement should never overwhelm their commitment to justice. The research suggests that the following program design options can enhance one or more of these three components without diminishing any of the others:

To maximize the use of court-connected civil mediation programs

- Enlist the bench and bar in developing a program that fits the local legal culture.
- Obtain on-going judicial support for referring cases to the program.
- Make mediation use compulsory if one side requests it, or require attorneys to consider mediation early in the litigation process.

To increase the likelihood of settlement in mediation

- Schedule sessions fairly early in the life of a case.
- Require that critical motions be decided before the session.
- Adopt a system that ensures that the mediators get enough cases to keep their mediation skills sharp.

To heighten litigants' perceptions that the program provides procedural justice

- Require litigants to attend the session and invite them, along with their attorneys, to participate.
- Urge lawyers to adopt a cooperative approach and prepare their clients for mediation.[5]
- Restrict more extreme evaluative interventions such as recommending a specific settlement.

Finally, research has not kept pace with the rate of implementation of court-connected civil mediation programs. To contribute to our knowledge regarding the impact of these and other program design choices, program designs should include a research component that permits their evaluation.

Endnotes

[1] The program design effects observed in the small number of studies conducted to date might reflect circumstances particular to the courts studied. Accordingly, the effects reported in these studies and described in this article might not be found in other courts.

For studies regarding attorneys' perceptions and the effects of program design on institutionalization, see Julie Macfarlane, *Culture Change? A Tale of Two Cities and Mandatory Court-Connected Mediation*, 2002 J. Of Disp. Resol. 241(2002) (also addresses effect of mandated early use of mediation on settlement); Bobbi McAdoo, *A Report to the Minnesota Supreme Court: The Impact of Rule 114 on Civil Litigation Practice in Minnesota*, 25 Hamline L.R. 403 (2002); and Bobbi McAdoo & Art Hinshaw, *The Challenge of Institutionalizing Alternative Dispute Resolution: Lawyer Perspectives on the Effect of Rule 17 on Civil Litigation in Missouri*, 67 Missouri L. R. 473 (2002).

For studies regarding the effects of program design on settlement and perceptions of procedural justice, see James Kakalik et al., *An Evaluation of Mediation and Early Neutral Evaluation Under the Civil Justice Reform Act* (1996); Craig McEwen, *An Evaluation of the ADR Pilot Project*, 7 Me. B.J. 310 (1992); Donna Stienstra et al., *The Fed. Judicial Ctr., Report to the Judicial Conference Committee on Court Administration and Case Management: A Study of the Five Demonstration Programs Established Under the Civil Justice Reform Act of 1990*, at 215-83 (1997); and Roselle Wissler, *Court-Connected Mediation in General Civil Cases: What We Know From Empirical Research*, 17 Ohio St. J. on Disp. Resol. 641 (2002).

For a review of research regarding the effects of process characteristics on perceptions of procedural justice, see Nancy Welsh, *Making Deals in Court-Connected Mediation: What's Justice Got To Do With It?* 79 Wash. U. L. Q. 787 (2001).

[2] Litigants have concerns about the procedural fairness of attorneys' traditional negotiation of settlements because they generally are excluded from the negotiation and, as a result, are not convinced that such negotiation represents a careful and thorough dispute resolution process. In contrast, litigants tend to view mediation as procedurally just.

[3] All mediators studied were lawyers; the effect of their litigation experience was not examined.

[4] The effects of transformative interventions have not been examined in the court context.

[5] This approach and that immediately preceding will contribute not only to more favorable perceptions of mediation but also to more settlements.