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To: Jim Greiner
From: Chelsea Simpson
RE: James S. Kakalik et al., *An Evaluation of Mediation and Early Neutral Evaluation Under the Civil Justice Reform Act*, Institute For Civil Justice (1996).
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Title: An Evaluation of Mediation and Early Neutral Evaluation Under the Civil Justice Reform Act
Authors: James S. Kakalik, Terence Dunworth, Laural A. Hill, Daniel McCaffrey, Marian Oshiro, Nicholas M. Pace, and Mary E. Vaiana
Location: Southern District of New York, Eastern District of Pennsylvania, Western District of Oklahoma, Southern District of Texas, Southern District of California, Eastern District of New York.
Sample: NY(S): 299 cases, PA(E): 300 cases, OK(W): 300 cases, TX(S): 300 cases, CA(S): 312 cases, NY(E): 312 cases.
Timeline: 1992–1993.
Target group: Litigants in civil cases
Intervention type: Mediation
Research papers: N/A
Partners: Judicial Conference Committee on Court Administration and Case Management, and Administrative Office of the United States Courts

Abstract

In an effort to reduce delays and improve efficiency, overloaded federal courts began to experiment with Alternative Dispute Resolution (ADR) strategies in the early 1990s to encourage some parties to settle without need for a court hearing. To test the effectiveness of two such ADR interventions—mediation and early neutral evaluation—researchers studied case outcomes in four federal district courts with mediation programs and two with early neutral evaluation programs. The researchers ultimately found that both mediation and early neutral evaluation programs increased the likelihood of a monetary settlement, but there was no other significant difference in time to resolution, cost, perception of fairness, or satisfaction.

I. Policy Issue

After significant debate about how best to reduce delay and costs in federal courts, Congress passed the Civil Justice Reform Act (CJRA) of 1990, which in part created a pilot program to test and evaluate six principles of pretrial case management. One of these was the promotion of Alternative Dispute Resolution (ADR), which included mediation and early neutral evaluation programs.

At the time of this study, both mediation and early neutral evaluation were relatively new to federal courts. In early neutral evaluation programs, litigants presented the legal and factual basis of their case to a neutral court representative at a nonbinding conference early in the process. The representative did not render a decision but discussed settlement and helped simplify issues before a court adjudicated the case. In mediation, a third-party mediator primarily focused on helping parties reach settlement on some or all issues. The mediator did not render a decision and would generally not evaluate the case, except in an advisory manner. There were also many differences in the way courts implemented these programs: for instance, some made the process mandatory, some voluntary, and some left it to judicial referral. The mediator could be a court officer, a lawyer, or even a trained non-lawyer, and the timing and length of the sessions varied.

Many believed that these processes were faster and cheaper than court adjudication, but little empirical evidence existed at the time of this study. The authors criticized previous research as too reliant on anecdotal data, and thus inadequate to make definitive policy recommendations. Did the use of mediation and early neutral evaluation lower costs for litigants, lower costs for courts, or reduce time to resolution?

II. Context of Evaluation

Although this study collected data from districts in various parts of the country, only the mediation programs in the Southern District of New York and the Eastern District of Pennsylvania had an experimental design with random assignment of cases. Thus, the researchers only gathered sound empirical data from two northeastern states, the population of which may not be broadly representative.

The researchers did not discuss demographics, income levels, or other characteristics of each district's population. Both the Southern District of New York and the Eastern District of Pennsylvania excluded pro se cases from the mediation program, and thus higher-income litigants who could afford counsel may be overrepresented in the sample. Both districts also excluded some civil rights cases, which may have resulted in underrepresentation of minority litigants.

III. Details

Researchers studied mediation programs in the Southern District of New York, the Eastern District of Pennsylvania, the Western District of Oklahoma, and the Southern District of Texas. They studied neutral evaluation programs in the Southern District of California and the Eastern District of New York. Within each district, researchers compared approximately 150 representative cases referred to the program with a

comparison pool of 150 cases that were not referred. Only the Southern District of New York and the Eastern District of Pennsylvania randomly assigned cases between the groups, creating experimental conditions. For the other districts, researchers chose cases as similar as possible to the ADR cases for the comparison group. Data sources included court records, docket information, CJRA advisory group records, mailed surveys, and interviews.

Researchers evaluated the cases in each group for the following factors: time to disposition, cost of litigation (mainly dependent on lawyer work hours), court costs, monetary outcomes, and perceived fairness of case management.

There were some differences between the Southern District of New York and the Eastern District of Pennsylvania mediation programs. Because only these districts used random assignment, only their programs are discussed in detail here.

Southern District of New York

In the Southern District of New York, a judge assigned each case to an expedited, standard, or complex "track," depending on the nature of the case and anticipated extent of discovery and motion disputes. The court limited eligibility to cases in which litigants sought only money damages, and excluded all Social Security cases, tax matters, prisoners' civil rights cases, and pro se cases. The court referred all expedited cases automatically for mediation, as well as a random selection of two-thirds of standard and complex cases. Once referred, parties' attorneys were required to attend mediation, and the mediator could also order attendance of the parties. In the first two years of the program, the district found 1,256 cases eligible for mediation. The authors noted that this was a fairly low number, as judicial designation of a "track" did not occur in most cases.

Typical sessions lasted three to four hours, and there were often multiple sessions. Attorneys served pro bono as voluntary mediators. The median time from filing to mediation referral was almost nine months, longer than the court's stated guideline of scheduling it within 150 days after the last responsive pleading.

Eastern District of Pennsylvania

The Eastern District of Pennsylvania randomized cases by referring odd docket number cases to the mediation program, when those cases were eligible. As the program was new and still developing, the court's eligibility criteria changed over the course of the study period. The court originally excluded Social Security cases, cases involving a prisoner, cases eligible for arbitration, and any other case a judge chose to exclude. Over time, it also began to exclude class actions, pro se cases, some civil rights cases, and all labor, tax, property, and bankruptcy cases. This refinement of eligibility requirements resulted in fewer cases mediated each year, dropping from 1,600 cases in 1991 to 1,000 in 1992 and 800 in 1993. Judges also referred a small number of cases with even docket numbers to the mediation program.

The mediation session typically lasted one hour and occurred three to four months after the first filing. Unlike in the Southern District of New York, multiple sessions were rare.

The court required lead counsel to attend, and the client needed to be available by telephone or in person. As in New York, the program focused on honing the key issues of the case and promoting settlement.

IV. Results and Policy Lessons

In the Southern District of New York, the authors noted that comparison group cases were more likely to proceed to trial than those in the ADR group, but they did not test for statistical significance. The difference in time to resolution between mediation and comparison cases was not statistically significant. There was also no statistically significant difference in lawyer hours per litigant, lawyer satisfaction with the court's management of the case, or lawyer views on fairness. However, researchers noted that monetary outcomes were significantly more likely in mediation cases (n = 119, p = 0.018). Due to a low response rate from litigants, the researchers excluded their data from the statistical analysis.

In the Eastern District of Pennsylvania, the authors found no statistically significant difference in time to resolution in the mediation and control groups. There was also no statistically significant difference in lawyer work hours, likelihood of monetary outcomes, lawyer perception of fairness, or lawyer satisfaction with case management. Fewer than 100 litigants responded to the surveys, so researchers again excluded litigant data from the analysis.

Finally, the authors noted some statistically significant findings in the other four district programs studied, although these were quasi-experiments and did not involve random assignment. In the Southern District of Texas, researchers found that it took significantly longer to close mediation cases than control cases (n = 278, p = 0.000), which researchers believed was due to judges disproportionately recommending difficult cases to the mediation program. They also found that a monetary outcome was significantly more likely in mediation cases than control cases in the Western District of Oklahoma (n = 242, p = 0.007) and the Southern District of Texas (n = 217, p = 0.002).

The authors ultimately concluded that the study's one major finding was that cases were more likely to reach a monetary settlement in mediation and early neutral evaluation programs than in formal court adjudication. However, they cautioned that most of their results were not significant and that they could not justify a strong policy recommendation.

V. Quality of the Study

While this study attempted to analyze data from diverse regions across the country, it was severely limited by the fact that the ADR programs were not standardized and only two randomly assigned cases. The majority of the study's data was therefore derived from quasi-experiments in four of the six districts, in which researchers tried to create a comparison pool that resembled the ADR pool as much as possible. This makes the scientific validity of the data highly questionable for those districts, as researchers may have not foreseen important variables in picking 'similar' cases.

Low response rates on the survey also posed a problem, as the researchers did not receive enough litigant responses to warrant statistical analysis. Lack of standardization among the programs also detracted from the study—for instance, in the two districts that randomized, one often engaged in multiple mediation sessions while the other typically held just one. In the Eastern District of Pennsylvania, the type of cases eligible for the mediation program also changed dramatically over the years of the study, which could have seriously affected the data.

Finally, the findings for the two courts that randomized cases may not be generalizable. Both were in northeastern states, likely with unrepresentative demographics, and the study may underrepresent minorities and low-income litigants (via exclusion of some civil rights and all pro se cases).