

**Alternative Dispute Resolution Programs, Are They Working?: The Case of Travis County
Settlement Week Program**

By

Kaye Woodard

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Faculty Approval:

Pat Shields
Greg L. Hull

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Chapter One

Introduction

[A]s a litigant I should dread a lawsuit beyond almost anything else short of sickness and death.-
Judge Learned Hand¹

The American legal system is premised upon the belief that disputes and grievances are best resolved in court by using adversarial and competitive tactics.² America is the most litigious society in the world, with its citizens seeking their lawyers “at the merest whisper of an insult or injury.”³ As problems that were once seen as personal and handled privately found their way into the courtroom, courts were forced to take on roles once filled by communities, families and churches.⁴ Rapid population growth, formation of new legal rights, increased case complexity, and participants with lower tolerances for grievances took their toll on the courts;⁵ they became overburdened, facing dramatic increases in case filings,⁶ complexity, length, and cost, and

¹Daniel A. Fulco, “Delaware’s Response to Inefficient, Costly Court Systems and a Comparison to Federal Reform.” *Delaware Journal of Corporate Law* 20 (1995): 937-964, 937.

²Kenneth Lasson, “Lawyering Askew: Excesses in the Pursuit of Fees and Justice,” *Boston University Law Review* 74 (November 1994): 723-775, 733-4.

³Lasson, 737.

⁴Ibid, 737.

⁵Jay Folberg, Joshua Rosenberg, and Robert Barret, “Use of ADR in California Courts: Findings & Proposals.” *University of San Francisco Law Review* 26 (Spring 1992): 343-443, 348.

⁶Sharon Jennings, “Court-Annexed Arbitration and Settlement Pressure: A Push Towards Efficient Dispute Resolution or ‘Second Class’ Justice?” *Ohio State Journal on Dispute*

dramatic decreases in available judicial resources.⁷ Each year more and more cases were being filed in federal and state courts.⁸ The overburdened courts experienced serious judicial inefficiency,⁹ and that, coupled with rising costs and delays, incited frustration and cynicism with the system of American justice.¹⁰

The legal system faced a “crisis of confidence.”¹¹ More litigants expressed concerns that the courts were not offering the best resolution for their disputes.¹² Participants perceived the court system as “overly formalistic, cumbersome, destructive of relationships, alienating, humiliating, slow, and expensive.”¹³ To combat this crisis scholars noted the need for alternative

Resolution 6 (1991): 313-332, 313.

⁷Kim Dayton, “The Myth of Alternative Dispute Resolution in the Federal Courts?” *Iowa Law Review* 76 (July 1991):889-957, 889 (In 1990, the total number of weighted civil filings increased from 207 per judgeship in 1955 to 448 per judgeship, the median length of time from issue to trial increased from 9.1 months in 1955 to 14 months, and over ten percent of all pending cases are more than three years old).

⁸Lasson, 733

⁹Marla Moore, “Mandatory Summary Jury Trials: Too Hasty a Solution to the Growing Problem of Judicial Inefficiency?” *Review of Litigation* 14 (Spring 1995): 495-518, 516.

¹⁰Dayton, 890.

¹¹Folberg, et al, 351 (“A system that channels disputes toward a litigation process that is slow, complex, expensive, and felt to be outside the control of the litigants creates tension and a loss of public confidence.”).

¹²Lucy V. Katz, “ Compulsory Alternative Dispute Resolution and Voluntarism: Two-Headed Monster or Two-Sides of the Coin?” *Journal of Dispute Resolution* 1993 (1993): 1-55, 4.

¹³*Ibid*, 4; and Linda R. Singer, “The Quiet Revolution in Dispute Settlement,” *Mediation Quarterly* 7, no. 2 (Winter 1989): 105-113, 106 (Our legal system is “strewn with the disappointed hopes of those who find [it] too complicated to understand, too quixotic to command respect, and too expensive to be of much practical use.”).

processes:

Resolving disputes in a peaceful manner is a paramount obligation of government to its people. To offer the most effective, responsive and appropriate methods for resolving disputes. Our justice system must be able to offer alternative dispute resolution programs along with adjudication. Delay, cost of litigation, complexity of the court process, insensitivity to litigants and lack of access weaken the current court system. Because disputes differ widely in nature, adjudication is not always the most appropriate means of resolving all cases. In the future, the court system should offer a range of options for resolving disputes.¹⁴

Courts experimented with other methods of resolving disputes because traditional litigation was no longer adequate.¹⁵ The alternative processes were to provide an “escape” from traditional litigation by implementing tailored and individualized mechanisms for resolving disputes.¹⁶ Many of the alternative processes had been used informally for years, but the court’s experimentation marked the beginning of modern Alternative Dispute Resolution (ADR).¹⁷ Table 1.1 outlines some of the key terms associated with these “extrajudicial” procedures and with the ADR movement.¹⁸

¹⁴Folberg, et al, 352.

¹⁵Jennings, 313.

¹⁶Katz, 4.

¹⁷Stephen B. Goldberg, Frank E. A. Sanders, and Nancy H. Rogers, *Dispute Resolution: Negotiation, Mediation, and Other Processes*, 2d ed., Law School Casebook Series (Boston: Little, Brown and Company, 1992), 6.

¹⁸*Black’s Law Dictionary*, 6th ed. (1990), and Tex. Civ. Prac. & Rem. Code, Chapter 154.

Table 1.1
Glossary

adjudication	The legal process of resolving a dispute. The formal giving or pronouncing a judgment or decree in a court proceeding.
alternative dispute resolution	The procedures for settling disputes by means other than litigation; e.g., by arbitration, mediation, mini-trials.
arbitration	A process of dispute resolution in which a neutral third party (arbitrator) renders a decision after a hearing at which both parties have an opportunity to be heard. Where arbitration is voluntary, the disputing parties select the arbitrator who has the power to render a binding decision.
mediation	Private, informal dispute resolution process in which a neutral third person, the mediator, helps disputing parties to reach an agreement.
mini-trial	A private, voluntary, informal form of dispute resolution in which the attorneys for each disputant make a brief presentation of his or her best case before officials for each side who have authority to settle. Usually, a neutral, third-party advisor is present at the hearing. Following the attorneys' presentations, the principals attempt to settle the dispute. The neutral third-party may be asked to render a non-binding advisory opinion regarding the outcome of the dispute if it were litigated.
moderated settlement conference	A forum for case evaluation and realistic settlement negotiations. Each party and counsel for the party present the position of the party before a panel of impartial third parties. The panel may issue an advisory opinion regarding the liability or damages of the parties or both. The advisory opinion is not binding on the parties.
settlement ratios	The number of cases that produce a settlement agreement.
summary jury trial	A forum for case evaluation and development of realistic settlement negotiations. Each party and counsel for the party present the position of the party before a panel of jurors. The number of jurors on the panel is six unless the parties agree otherwise. The panel may issue an advisory opinion regarding the liability or damages of the parties or both. The advisory opinion is not binding on the parties.

Overview of the Problem

Almost twenty years have passed since the beginning of the modern ADR movement, and still the debate surrounding its use continues. Introduced as a cure for problems that ailed the American legal system, proponents claimed that ADR would ease the overburdened courts, while critics worried about the quality of justice and the premature push to use ADR in every court.¹⁹ Originally the ADR programs were experimental and purely voluntary, used only to provide a choice to traditional litigation. But, even before the results of the experimental programs could be ascertained, ADR's popularity grew, and many wanted it permanently placed in the legal system.

Citing the need for justice and efficiency, legislators and judges aggressively sought to instill ADR programs in every court;²⁰ their vigorous efforts pervaded the legal system and culminated as mandates imposing its use.²¹ Quickly, ADR was "transformed" from an alternative to an "integral" part of the legal system,²² becoming almost "institutionalized" in the system it was supposed to reform.²³

Afterwards, scholars "seriously questioned" whether ADR achieved its goal of lessening

¹⁹Katz, 3.

²⁰Ibid, 6.

²¹Dayton, 892.

²²Katz, 1.

²³Stevens H. Clarke, Elizabeth D. Ellen and Kelly McCormick, *Court-Ordered Mediation in North Carolina: An Evaluation of Its Effects* (Chapel Hill, N.C. :Institute of Government, The University of North Carolina at Chapel Hill, 1995), 3; and Eric K. Yamamoto, "ADR: Where Have the Critics Gone?" *Santa Clara Law Review* 36 (1996): 1055-1067, 1060.

the burdens on the court, whether the courts mandated these programs prematurely, and whether evaluations sufficiently determined its impact.²⁴ The ADR programs were in place, but were they working?

While there seems to be an abundance of literature on ADR, the evaluations and studies are plagued by many of the same problems as other program or policy research.²⁵ What are the appropriate ways to evaluate the programs? How should success be measured? And, are the results scientifically valid? Primarily, the literature contains concerns about the methodologies used to evaluate the programs, the lack of standards in the research, the use of single-program studies and the absence of longitudinal data.²⁶

Although many studies have been conducted on the effectiveness of these ADR programs, the findings are varied, conflicting,²⁷ incomplete,²⁸ and anecdotal.²⁹ Criteria vary between programs, thus defining a successful program is difficult. To assess whether ADR programs are successful, the results should be viewed in light of the program's purposes, asking why ADR is used and what it is supposed to accomplish.³⁰ Evaluations cannot occur in the absence of

²⁴Yamamoto, 1058.

²⁵Ibid, 1062.

²⁶Katz, 46, 55.

²⁷Dayton, 916 (Arbitration program study showed no empirical "reality" about reducing expense and delay.); and Folberg, et. al, 399 (ADR program found to be cost effective and more satisfactory.).

²⁸Dayton, 895.

²⁹Ibid, 957.

³⁰Lynn A. Kerbeshian, "ADR: To Be Or . . . ?" *North Dakota Law Review* 70 (1994): 381-434, 381.

direction concerning what the program is supposed to accomplish.³¹ If the programs are not achieving the specified goals, they can be improved, modified or eliminated.

ADR has been mandated in many jurisdictions nationwide. Thus, previous evaluations of its overall impact, questioning whether or not to use ADR, seem almost moot.³² While ADR's impact is still important, process evaluations, or those measuring implementation of the programs, have become more relevant.³³ Implementation is defined by Bingham and Felbinger as the process by which a program or policy is operated, and process evaluation examines the "means by which a program or policy is delivered to clients."³⁴ These process evaluations provide an "alternative" value by "providing useful information to decision-makers and consumers."³⁵ Findings from these studies may serve as a guide for other programs, or can be used solely to answer questions about the program being studied.³⁶

This project is designed to provide insight into the problems facing ADR researchers, to add to the body of knowledge in the field, and hopefully to provide a course of action for improving and modifying ADR programs. It is only by doing so that the question of whether or

³¹Bingham and Felbinger, 4.

³²Yamamoto, 1056 (Questioning whether decline in critical ADR scholarship was due to the fact that policy makers seem to "care little for chasing after facts about ADR because 'that train has already left the station.'")

³³Richard D. Bingham and Claire L. Felbinger, *Evaluation in Practice: A Methodological Approach* (White Plains, NY: Longman, 1989), 4.

³⁴Bingham and Felbinger, 4.

³⁵Kerbeshian, 384.

³⁶Bingham and Felbinger, 11.

not ADR is working can truly be answered.

Research Focus

The focus of this study is Travis County Settlement Week (Settlement Week) in Austin, Texas. This ADR program offers free mediation services twice yearly, partially fulfilling the statutory requirements for mandatory ADR. This program was chosen as the subject of study because it has experienced decreasing settlement rates over the last two years, and program sponsors are concerned with this decline. By assessing the program, the researcher attempts to determine if Settlement Week is working. If the program is not working as evidenced by the data, the project will serve as a guide to determining why it is not working and to recommend change.

Purpose of Research

The purpose of this research is threefold. First, this study provides an overview of the history of the modern ADR movement and traces the problems that have occurred in its evaluation. Second, this study describes a practical ideal type which is used as a tool for evaluating other ADR programs in an effort to develop standardized research and evaluation procedures. Finally, this ideal type is used to assess a mediation program in Austin, Texas, and to make recommendations for change.

Chapter Two of this study provides the historical background of ADR, and provides definitions. Further, the chapter examines program evaluation literature, describes the current state of ADR evaluations, and details a practical ideal type to assess ADR programs. Chapter Three describes the research setting and Settlement Week background information. Chapter Four

details the methodology used to conduct the study. Chapter Five provides the analysis of the findings. Chapter Six provides a summary and conclusion, and makes recommendations for change and further study.

Chapter Two

Literature Review

Emphasis of Literature Review

To provide an accurate picture of the current state of ADR, this study examines the history of ADR, its program evaluations, criteria for measuring success, and areas of concern in program design. Emphasis is placed on mediation literature because the focus of this research is a mediation program. Primarily, the literature addresses the various elements of the program and notes potential problem areas.

The literature examines the compulsive and coercive nature of ADR as compared to other dispute resolution methods,³⁷ the level of pressure to pursue other dispute resolution tools that participants encounter,³⁸ and the rigidity that participants face when using dispute methods other than traditional litigation.³⁹ The literature also examines the perceptions of ADR.

The perception that ADR works “encouraged even greater use of it in the federal courts,” and persuaded Congress to devote “significant public resources to encouraging the implementation of ADR programs in the federal courts on a more widespread basis,” but critics claim the perception about the value of ADR lacks solid empirical justification.⁴⁰ This perception

³⁷Katz, 1.

³⁸Ibid.

³⁹Jennings, 318 (If the program is to be effective it cannot replace existing obstacles with new ones.).

⁴⁰Dayton, 915, and Rosenberg, 1487.

that ADR does not work has caused serious concern. Opponents worried that in the rush to join the ADR parade, many judges and commentators have overlooked the “serious legal and practical objections to ADR that litigants have raised, occasionally successfully, in the courts,”⁴¹ and that the quality of justice may be jeopardized.

Those favoring ADR “ambitiously claim” that it is “better, faster and cheaper than formal litigation,” but often, the “successes claimed are anecdotal” and the research is inconclusive.⁴² Others have observed the “dearth of empirical support for the various claims concerning ADR and the critical need for an objective, empirical evaluation of ADR to determine its actual effect on civil litigation in the federal courts.”⁴³ Each of these positions makes it clear that ADR’s evaluation period is far from over.

Historical Background

The process of settling grievances with alternative dispute resolution (ADR) is touted by many to be an answer for the problems facing the court system;⁴⁴ its use has been “well

⁴¹Dayton, 895; and Jennings, 323(ADR is assumed, but not shown to reduce costs and time.).

⁴²Bianchi, 175.

⁴³Dayton, 895-6.

⁴⁴Ibid, 892.

received.”⁴⁵ The widespread perception among scholars, legislators,⁴⁶ judges,⁴⁷ and the bar, is that ADR “is a realistic and practical solution to the problem of delayed and costly justice that ensnares our federal courts.”⁴⁸ Its proponents believe ADR is useful in avoiding trial (by increasing settlement ratios), reducing the elapsed time to termination of lawsuit, reducing litigation costs, and decreasing the expenditure of judicial resources.⁴⁹

Informal methods of dispute resolution, like arbitration, mediation, and negotiation have been used for many years, and other alternatives to formal litigation, such as small claims courts and arbitration associations, have been intact since the early 1900's.⁵⁰ Now ADR is used frequently to settle disputes for businesses, families, communities, landlords and tenants, schools, law enforcement agencies, and to formulate rules and international policy.⁵¹

The ADR movement encouraged the use of “extrajudicial dispute resolution procedures,” incorporating established methods of dispute resolution with those newly developed, and ensuring that all procedures “shared the basic objective of encouraging litigants to resolve their disputes

⁴⁵Loren K. Allison and Eric. H.J. Stallhut, “Arbitration and the ADA: A Budding Partnership.” *Arbitration Journal* 48 (October 1993): 53-60, 53.

⁴⁶Dayton, 893 (Bipartisan legislation enacted to authorize funds for courts not using ADR).

⁴⁷Ibid, 892 (Chief Justice Rehnquist, Justices Brennan, Kennedy, and White, and many federal district court judges support widespread adoption of ADR procedures).

⁴⁸Ibid, 893-4.

⁴⁹Ibid, 914.

⁵⁰Carl Bianchi, “Alternative Dispute Resolution: Is the Jury Still Out?” *Journal of State Government* 61 (September/October 1988): 174-176, 174.

⁵¹Singer, 109.

outside the courtroom.”⁵² As the popularity of ADR increased, other innovative methods were also introduced.⁵³

Widespread Use

Many programs began as experimental programs designed to test a particular form of ADR’s effectiveness in reducing court overload, but many quickly became compulsory.⁵⁴ Court-annexed arbitration originally was experimental and administered by local rule, but its use was subsequently mandated by state and federal legislators.⁵⁵ At the Federal level, ADR has been institutionalized in various agencies to serve as a model for private dispute resolution.⁵⁶ As President Clinton pushed for civil justice reform, he expressed the need for such procedures.⁵⁷ Now, many federal laws have ADR requirements.⁵⁸

In 1990, Congress passed the Civil Justice Reform Act (CJRA) to combat concerns of

⁵²William D. Underwood, “Divergence in the Age of Cost and Delay Reduction: The Texas Experience with Federal Civil Justice Reform.” *Texas Tech Law Review* 25 (1994): 261-333, 309-10.

⁵³Katz, 3 (Summary jury trials, conciliation, and private judging are recent innovations). Jennings, 313 (Use of procedures called multidoor courthouses where there are several ADR options available at one place.).

⁵⁴Carl Tobias, “Recalibrating the Civil Justice Reform Act,” *Harvard Journal on Legislation* 30 (Winter 1993): 115-133, 116.

⁵⁵Jennings, 314.

⁵⁶Carl Tobias, “The Clinton Administration and Civil Justice Reform,” *Federal Rules Decisions* 144 (February 1993): 437-445, 444.

⁵⁷Tobias, “The Clinton Administration,” 437

⁵⁸Americans With Disabilities Act. 42 U.S.C. §12101, et. seq.

litigation abuse, increasing costs and delay, and shrinking access to federal courts.⁵⁹ The CJRA allows rules for referral of appropriate cases to “alternative dispute resolution programs that . . . the court may make available, including mediation, minitrial and summary jury trial.”⁶⁰ With the law in its favor, courts are now taking a more active role in the ADR movement. Previously, courts would not enforce orders to mediate; now, they are requiring it and other forms of ADR with enthusiasm.⁶¹

ADR is also mandated at the state level. In Texas, which has one of the most modern ADR statutes, courts are authorized to refer any dispute for alternative dispute resolution procedures (e.g. mediation, minitrials, moderated settlement conferences, summary jury trials, or arbitration.)⁶² All Texas’s ADR programs are designed “for more cases to settle, for cases to be settled earlier in the process, and for settlements to maximize fairness and creativity.”⁶³

Of the programs implemented in the various jurisdictions, mediation is one of the most common forms of ADR. Mediation is used in domestic relations, contracts, small claims, and other dispute arenas,⁶⁴ and it employs neutral third parties to facilitate agreement between the

⁵⁹Ibid., and Tobias, “Recalibrating,” 116.

⁶⁰Civil Justice Reform Act of 1990. 28 U.S.C. §§471-482.

⁶¹Katz, 21, (Judges taking more active roles in settlements. The U.S. Claims Court has instituted settlement proceedings to reduce its docket); and 45 (There is no compulsion to mediate, only to attend.).

⁶²Katz, 44, and Tex. Civ. Pract. & Rem. Code §§154.001-073.

⁶³Ibid.

⁶⁴Bianchi, 175.

conflicting parties.⁶⁵ Formal mediation by trained professionals emerged in the 1970's.⁶⁶ Since that time, mediation has taken on new importance, especially in family disputes.⁶⁷ Now it is mandated by courts and legislators.⁶⁸

The focus on problem solving and its processes rather than creating a specific solution⁶⁹ marks the advent of what supporters propose is a "social movement."⁷⁰ The end result (e.g. settlement) is less important. Instead, mediation is designed to provide an opportunity for a "fuller expression of clients' concerns than would occur with ordinary litigation, thus reducing the frustration some clients express regarding the judicial process."⁷¹ Some noted benefits of mediation induce maintaining ongoing relationships,⁷² encouraging parties to take more

⁶⁵Morris L. Medley and James A. Schellenberg, "Attitudes of Indiana Judges Toward Mediation," *Mediation Quarterly* 11, no. 4 (Summer 1994): 329-337, 330 (In Indiana mediation is defined as: " a process in which a neutral third person, called a mediator, acts to encourage and to assist in the resolution of a dispute between two (2) or more parties. This is an informal and nonadversarial process. The objective is to help the disputing parties reach a mutually acceptable agreement between or among themselves on all or any part of the issues in dispute. Decision-making authority rests with the parties, not the mediator. The mediator assists the parties in identifying issues, fostering joint problem-solving, exploring settlement alternatives, and in other ways consistent with these activities.").

⁶⁶Morris L. Medley and James A. Schellenberg, "Attitudes of Attorneys Toward Mediation," *Mediation Quarterly* 12, no. 2 (Winter 1994): 185-198, 185.

⁶⁷Benjamin, 92.

⁶⁸Medley, "Attorneys," 184-85.

⁶⁹Benjamin, 105.

⁷⁰Carol Bohmer and Marilyn L. Ray, "Regression to the Mean: What happens When Lawyers Are Divorce Mediators," *Mediation Quarterly* 11, no. 2 (Winter 1993): 109-122, 111.

⁷¹Medley, "Attorneys," 192.

⁷²Dayton 410; Linda S. Crawford, "The Americans with Disabilities Act: ADR: A Problem-Solving Approach for Business," *Dispute Resolution Journal* 50 (April/June 1995):

responsibility for their conflicts,⁷³ producing agreements with higher compliance rates,⁷⁴ and helping attorneys and clients understand the strengths and weaknesses of their case.⁷⁵

Supporters claim that mediation is well suited for conflicts where there are questions of subjective fact, cultural differences, communication problems, or participants are representing themselves.⁷⁶ But critics voice concerns about the lack of standards for mediation,⁷⁷ the fairness of mediated agreements,⁷⁸ and the absence of legal precedent.⁷⁹ It is a common belief that participation in mediation will leave participants with no legal recourse if the settlement does not materialize, but instead will only add to the costs of the trial.⁸⁰

Mediation, like other forms of ADR, began as a way to informally resolve disputes, but it is now the center of a massive movement and the traditional legal system is no longer the last resort for conflict resolution.

55-60, 59; whiting 248.

⁷³Medley, "Attorneys," 196.

⁷⁴Ibid; Nina R. Meierding, "Does Mediation Work? A Survey of Long-Term Satisfaction and Durability Rates for Privately Mediated Agreements," *Mediation Quarterly* 11, no. 2 (Winter 1993): 157-170, 157; and Kent E. Menzel, "Judging the Fairness of Mediation: A Critical Framework," *Mediation Quarterly* 9, no. 1 (Fall 1993): 3-20, 7.

⁷⁵Medley, "Attorneys," 196.

⁷⁶Dayton, 410.

⁷⁷Medley, "Attorneys," 197

⁷⁸Menzel, 4.

⁷⁹Crawford, 58.

⁸⁰Jennings, 318.

Legal Paradigm Shift

The advent of the ADR movement has brought on what many hail to be a legal paradigm shift.⁸¹ Disputes that were once viewed as “either legal or interpersonal problems are now seen more holistically and systematically.”⁸² Proponents state that ADR shifts the process from one of assuming adversarial positions to one that is focused on problem solving; what is decided is less important than how it was decided.⁸³ Thus, ADR is seen as less alienating and is able to protect ongoing relationships.⁸⁴ The supporters also purport that ADR breaks settlement barriers.⁸⁵ For instance, since settlement facilitation is mandated by court, neither party has to show “weakness” in proposing settlement, so consensus can be reached faster.⁸⁶ This quick settlement fulfills the need for speedy resolution and efficiency.⁸⁷

Claims are common that ADR enhances settlement potential by helping parties develop a more accurate perception of their case.⁸⁸ Judges describe ADR as an effective way:

⁸¹Robert D. Benjamin, “The Physics of Mediation: Reflections of Scientific Theory in Professional Mediation Practice,” *Mediation Quarterly* 8, no. 2 (Winter 1990): 91-113, 91.

⁸²Ibid.

⁸³Ibid, 105.

⁸⁴Bohmer and Ray, 110.

⁸⁵Folberg, et. al, 380.

⁸⁶Jennings, 317-8.

⁸⁷Katz, 5.

⁸⁸Folberg, et. al, 380, and Jennings 317-8 (Objective input of third party deflates unrealistic expectations of parties and counsel, and forces attorneys to evaluate their cases in preparation for hearing so as to be in a position to consider settlement.).

(1) to educate the parties about the relative costs and benefits of settlement; (2) to give the parties a more accurate evaluation of their case's worth; (3) to help the parties resolve relationship problems that might otherwise interfere with settlement; and (4) to allow the parties to tailor settlements that best meet their individual or corporate needs.⁸⁹

If tailored correctly, the ADR programs are claimed to reduce transaction costs, produce better outcomes, preserve relationships, and increase compliance.⁹⁰

Criticisms of the ADR Movement

As the ADR movement gained momentum, its ramifications were questioned. Opposition claimed the movement had brought elements of compulsion and coercion that were not present with previous dispute resolution methods,⁹¹ arguing that participants were pressured to pursue alternative methods instead of going to trial.⁹² Primarily, legal scholars were concerned with the constitutionality of mandated ADR,⁹³ the rigidity of the ADR system,⁹⁴ the procedural components of ADR,⁹⁵ and the quality of justice received in ADR.⁹⁶

⁸⁹Folberg, et. al, 365.

⁹⁰Singer, 111.

⁹¹Katz, 1.

⁹²Ibid.

⁹³Moore, 501 (Problems with due process arise when there is no trial available), and Jennings, 318-9 (Sanctions can be imposed for not complying with order for ADR.).

⁹⁴Jennings, 318.

⁹⁵Bianchi, 175(There are no court rules or standards to regulate the process.); Moore, 500; and Jennings, 329 (ADR may cause side litigation over procedures used in the process itself.).

⁹⁶Ibid, 175 (Critics worry that ADR may tip the scales from one side to other, and cause an imbalance of power).

Other commentators claimed not all cases were suitable for ADR and that the procedures and outcomes lacked “institutional competence to make public law” or ability to set precedent.⁹⁷ Participants worried that ADR might even be more expensive than traditional litigation. Logically, if the case does not settle, then the cost and time of ADR is added to that of litigation.⁹⁸ Court analysts speculate that about the same number of cases that are resolved through mediation or arbitration might have settled before formal trial anyway, without the expense of ADR.⁹⁹

One judge contends that ADR as instituted “destroys the value the American system traditionally placed on the right to vindication of one’s position through an orderly procedure and rational decision subject to appellate review.”¹⁰⁰ Some critics have cautioned that ADR is not “merely a supplement for adjudication,” it has become its replacement.¹⁰¹ Finally, there is the underlying premise that ADR does not really fulfill its promise of cost savings and efficiency.¹⁰²

Some legal observers contend that ADR is merely a “perceived panacea” for what ails the legal system.¹⁰³ Whether ADR is the solution to the problems of formal court litigation is still an

⁹⁷Lamont E. Stallworth and Martin H. Malin, “Workforce Diversity,” *Dispute Resolution Journal* 49 (June 1994): 27-39, 38.

⁹⁸Moore, 507.

⁹⁹Jennings, 317 (The settlement rate is reported to be between 90-95% for traditional litigation.).

¹⁰⁰Katz, 6.

¹⁰¹Joshua D. Rosenberg and H. Jay Folberg, “Alternative Dispute Resolution: An Empirical Analysis,” *Stanford Law Review* 46 (July 1994): 1487-1551, 1487.

¹⁰²Katz, 6.

¹⁰³Dayton, 955.

open question.¹⁰⁴ The consensus of scholars, however, is a call for more research and more evaluation.¹⁰⁵

ADR Evaluations

ADR scholars claim the “scant empirical literature that exists at best paints an incomplete picture of the effect ADR” on the legal system.¹⁰⁶ Observers claim the “dearth of empirical support for the various claims concerning ADR” has created “the critical need for an objective, empirical evaluation of ADR,” and made it impossible to determine its actual effect on civil litigation.¹⁰⁷ Claims that ADR is more cost effective and efficient are countered by assertions that ADR adds more steps to the legal process, and more cost.¹⁰⁸

One of the first studies on ADR in federal courts, an evaluation of court-annexed arbitration, was conducted by the Federal Judicial Center. The study suggested that while there was “evidence the annexation program offered some benefits, on balance it was impossible, without further study, to conclude these benefits justified the added costs associated with the program.”¹⁰⁹ The literature includes many other studies on ADR programs, but their focus, findings and measures of success are varied. Table 3.2 provides a summary of process and impact

¹⁰⁴Bianchi, 174.

¹⁰⁵Katz, 46, 55.

¹⁰⁶Dayton, 895.

¹⁰⁷Ibid, 895-6.

¹⁰⁸Ibid, 914.

¹⁰⁹Ibid, 914.

ADR evaluations by type, findings, key variables, and comments, thus, further highlighting variations in results of ADR studies.

**Table 2.1
Summary of Studies Evaluating the ADR Process and Impact**

Study	Type of Study	Findings	Key Variables	Comments and Conclusions
Elwell and Carlson (1990)	impact	<ul style="list-style-type: none"> *satisfying purpose it was created *slight decrease in time to dispose of case 	<ul style="list-style-type: none"> *procedure *disposition time *purpose *case type 	Attempted to see if program was achieving its stated goal.
Dayton (1991)	impact	<ul style="list-style-type: none"> *has not significantly reduced overall delay *has not significantly decreased incidence of civil trials *has not significantly influenced pending caseloads 	<ul style="list-style-type: none"> *caseloads *costs *ADR *non-ADR 	Claims concerning ADR's potential to reduce costs and delays are greatly exaggerated.
Bohmer and Ray (1993)	impact	<ul style="list-style-type: none"> *using lawyers in divorce proceedings did not significantly effect the outcome 	<ul style="list-style-type: none"> *attorney or non-attorney *divorce outcome 	Georgia focuses on outcome rather than process, and stated need for more outcome research.
Whiting (1994)	formative	<ul style="list-style-type: none"> *family disputes had higher success rates than non-family disputes *multiple issue cases had higher success rates than single issue cases 	<ul style="list-style-type: none"> *type of relationship *number of issues *mediation success or failure 	Importance of ongoing relationship proved to be a statistically significant determinate of mediation success.
Clarke, Ellen and McCormick (1995)	impact	<ul style="list-style-type: none"> *satisfying to litigants *no effect on compliance with agreements *no statistically significant drop in fees *shortened disposition times 	<ul style="list-style-type: none"> *case outcomes *program effects *cost *satisfaction *compliance 	Participants were satisfied with experience. Since the costs of the program were virtually nothing, it was recommended that the program be continued.
Ledgerwood (1996)	formative	<ul style="list-style-type: none"> *achieved stated goals 	<ul style="list-style-type: none"> *client satisfaction *litigation and relitigation rates *involvement 	Used stated goals to: <ol style="list-style-type: none"> (1) provide a vehicle to assist parties to resolve disputes themselves (2) to increase client satisfaction (3) to reduce rate of contested litigation and relitigation (4) to increase involvement of the parties in the process of resolving disputes

Empirical studies are complicated by inabilities in gathering data on cost and time savings,¹¹⁰ formulating control groups, and compiling comparable data.¹¹¹ Usually studies are conducted solely on satisfaction levels of the participants.¹¹² Lack of research in part stems from the difficulty in measuring and evaluating the success rates of ADR.¹¹³ The inability to properly design an evaluations and to establish criteria for success are some of the problems facing researchers. Kerbeshian noted that,

[o]bstacles in research design and methodology are frequently encountered in social science research. The strongest studies utilize a control group, but identifying controls and randomizing subjects is difficult. The task of selecting reliable and valid instruments for defining and measuring program goals and the corresponding changes in behavior, attitudes, and values of the subjects is challenging. Qualitative methods, such as case studies and self-reports, provide perspective but also have limited generalizability. These research caveats are applicable to attempts to evaluate, measure, and predict the effects of ADR.¹¹⁴

¹¹⁰Katz, 46.

¹¹¹Dayton, 916.

¹¹²Katz, 48-9.

¹¹³Folberg, et. al, 389 (“...useful cost-benefit analysis of mandatory ADR requires not just a determination of whether a process is likely to be cost-effective, but also an understanding of the extent of that cost effectiveness. The amount of case process savings for the parties is difficult to measure. The out-of-pocket costs of ADR can range from zero (where attorneys do not participate) to several thousand dollars (the vast majority of that cost being attorney’s fees for the time spent preparing for and participating in the process). Similarly, the savings from early, ADR-enhanced settlement may range from a few dollars to millions of dollars in attorneys’ fees. In addition, because many cases will settle (although later in the process) without ADR, and because ADR can be helpful even in those cases that do not settle, analysis is necessarily an approximation. Perhaps the most telling statistic from the federal court study, referred to above, is that approximately ninety percent of the attorneys and parties required to participate in ADR believe that the federal court’s mandatory ADR program should be not only retained, but significantly expanded.”).

¹¹⁴Kerbeshian, 384.

Program evaluations is important because it uses “scientific methods to estimate the successful implementation and resultant outcomes of programs or policies for decision making purposes.”¹¹⁵ Good evaluations involve “ the systematic process of gathering empirical data to test hypothesis indicated by a program’s intent.”¹¹⁶ Process evaluations, or formative evaluations, are useful in studying ADR programs. This type of evaluation monitors daily tasks or assesses program activities and participant satisfaction.¹¹⁷ Some of the relevant questions include:

- What is done to whom and what activities are actually taking place?
- How could it be done more efficiently?
- Are the clients satisfied with the service?¹¹⁸

Process evaluations use subjective measures and usually require staff and participant involvement.¹¹⁹ Bingham and Felbinger state that the value of these evaluations should not be underestimated. Making sure the program is run correctly is a precept to assessing the impact of the program.¹²⁰

In public administration research outcomes can sometimes be problematic and difficult to measure.¹²¹ ADR research is faced with this problem as well. The value of evaluation lies in

¹¹⁵Bingham and Felbinger, 3.

¹¹⁶Ibid, 3.

¹¹⁷Ibid, 4.

¹¹⁸Ibid, 4.

¹¹⁹Ibid, 5.

¹²⁰Bingham and Felbinger, 5.

¹²¹Patricia M. Shields, “Pragmatism as Philosophy of Science, A Tool for Public Administration,” Draft to appear in *Research in Public Administration*, ed. J. White, 30.

providing useful information to policy makers and participants.¹²² Kerbeshian contends that the evaluators must be able to “describe intended results and propose questions that will provide corresponding information.”¹²³ Much of the early ADR research was concerned with the impact of the program, focusing on whether the objectives of the program were being met, not on how the program operates.

Research on the effectiveness of mediation is plagued by the same problems facing the other forms of ADR. Questions still exist on the proper way to evaluate the process.¹²⁴ Scholars state that mediation research has no “comprehensive critical framework” in place to assess the agreements,¹²⁵ and when assessed, the feedback is not provided to the mediators. Instead, the mediator is not asked to return.¹²⁶ Further, research on success rates is inconclusive because of the varying definitions of success.¹²⁷ These conflicting measures of success make the data on the effectiveness of mediation difficult to gather and assess. Currently, satisfaction rate is the easiest and most common method of mediation evaluation.¹²⁸

¹²²Kerbeshian, 384.

¹²³Ibid, 384.

¹²⁴Ibid,3-4.

¹²⁵Ibid, 4.

¹²⁶Kerbeshian, 401.

¹²⁷Kerbeshian, 384.

¹²⁸Folberg, et. al, 364.

Criteria for Success

In measuring success, Kerbeshian suggests that the answer depends on the purpose of ADR, the definitions of success or failure, and attainment of the selected criteria.¹²⁹ Without addressing these factors, it is difficult to say with certainty that any ADR program is successful. Researchers have attempted to define success by using such criteria as client satisfaction, settlement rate, efficiency, and cost.¹³⁰ Whether any of these are valid for determining success is still controverted.¹³¹

Although client satisfaction is probably the most common criterion for measuring ADR programs, and in some instances, it is the only data collected,¹³² it may not be the best indication of whether a program is successful when used alone. Client satisfaction has been reported to provide insight into the participant's "perceived control of the process,"¹³³ and satisfaction levels have also been "closely linked" with participants perceptions of fairness.¹³⁴ Critics claim that satisfaction is an "unacceptable criterion of social justice, one that ADR should not be expected to achieve," and that satisfaction levels do not accurately reflect social costs, participant expectations, or settlement fairness.¹³⁵

¹²⁹Kerbeshian, 428.

¹³⁰Ibid, 385-395.

¹³¹Ibid, 383.

¹³²Katz, 48-9.

¹³³Kerbeshian, 385.

¹³⁴Ibid, 385.

¹³⁵Kerbeshian, 429.

Settlement rates are also used to evaluate programs, typically under the “assumption that settlement is beneficial to the participants.”¹³⁶ Ostensibly, ADR is oriented toward settlement,¹³⁷ and in many programs, settlement in ADR before trial is a common goal.¹³⁸ Arguably, if the case is settled before trial, then the dockets will be cleared.¹³⁹ But in the rush to settle, observers question if the participants rights are impaired and the fairness of the agreement jeopardized.¹⁴⁰

The figures for settlement rates may also be misleading. Rates may be inflated for various reasons and self-reports may be inaccurate.¹⁴¹ Parties that reach an agreement may still claim that they made “little or no progress.”¹⁴² Further, parties that do not reach an agreement during the session may reach an agreement soon after the ADR event.¹⁴³ Some argue that the settlement rates do not accurately signify success, since the trial settlement ratios are frequently high as well.¹⁴⁴ Reports indicate about 90% of all cases are settled without adjudication.¹⁴⁵

Time and cost estimates are also used to measure success, but the accuracy of these

¹³⁶Ibid, 400.

¹³⁷Ibid, 420.

¹³⁸Ibid, 390.

¹³⁹Jennings, 317.

¹⁴⁰Ibid, 313.

¹⁴¹Kerbeshian, 390.

¹⁴²Ibid, 391.

¹⁴³Ibid.

¹⁴⁴Katz, 52.

¹⁴⁵Harry T. Edwards, “ Alternative Dispute Resolution: Panacea or Anathema?” *Harvard Law Review* 99 (January 1986): 668-684, 670.

estimates is debated.¹⁴⁶ The Federal Judicial Center published one report of ten mandatory court-annexed arbitration programs, attempting to evaluate whether arbitration reduced the time from filing to disposition.¹⁴⁷ Dayton notes that while the report “strongly corroborates” earlier studies showing the participants belief that the programs helped reduce expense and delay, it provided “little indication” that any of those beliefs are “grounded in empirical reality.”¹⁴⁸

Program Design

When designing any ADR program certain steps must be taken to ensure the quality of the procedural components of ADR,¹⁴⁹ the justice that is received in ADR,¹⁵⁰ the ADR facilitator, and the screening process for cases suitable for ADR.¹⁵¹ An effective program “must remove traditional obstacles to settlement without substituting new ones.”¹⁵² Careful design guarantees that programs and their procedures are not overformalized or perceived as unfair. If the process

¹⁴⁶Kerbeshian, 388.

¹⁴⁷Dayton, 915-16 (The study used data on participant satisfaction and attorney and litigant attitudes to ascertain if ADR had “achieved its goals.”)

¹⁴⁸Ibid, 916.

¹⁴⁹Bianchi, 175 (There are no court rules or standards to regulate the process.); Moore, 500; and Jennings, 329 (ADR may cause side litigation over procedures used in the process itself).

¹⁵⁰Ibid, 175 (Critics worry that ADR may tip the scales from one side to other, and cause an imbalance of power).

¹⁵¹Stallworth and Malin, 38.

¹⁵²Jennings, 318.

is too complicated, the ADR session may not be as productive.¹⁵³ Further, if the participants perceive the procedure as unfair, they may become alienated with the system, and fail to resolve the case.¹⁵⁴ Jennings argues that “fairness and a degree of informality are necessary to foster settlement.”¹⁵⁵

Design must also take into consideration the element of coercion; this is the center of the debate over mandatory and voluntary ADR.¹⁵⁶ Robert Coulson, president of the American Arbitration Association, commented:

Mandatory ADR verges on coercion. It hasn't simplified things; it's made them more complex. Even when voluntary, the process is coercive.¹⁵⁷

Courts are still deciding the issue of mandatory ADR.¹⁵⁸ However, mandating ADR procedures does not require mandating outcomes. Folberg states that the courts can only require participation in the ADR, the participants “need not reach agreement or actively participate,” therefore, it is only “marginally coercive.”¹⁵⁹

Determining which types of cases are most successful with ADR and when conditions are

¹⁵³Jennings, 318.

¹⁵⁴Ibid, 318.

¹⁵⁵Ibid, 318.

¹⁵⁶Katz, 52.

¹⁵⁷Kerbeshian, 420.

¹⁵⁸Ibid, 425.

¹⁵⁹Folberg, et. al, 395.

optimal for ADR can also enhance its effectiveness.¹⁶⁰ Considering the nature of the dispute, the relationship between the disputants, the amount in dispute, cost and speed can determine cases suitable for ADR.¹⁶¹ Lieberman and Henry argue that a “typology of disputes” will determine which kinds of cases are “amenable to ADR and which ones should be left to traditional devices of adjudication.”¹⁶² Eliminating these cases and allowing for cases that are suitable leads to a better allocation of resources.¹⁶³ This allocation may include providing a choice of ADR method or offering combinations of various types of ADR.¹⁶⁴ In addition to providing procedural safeguards and adequate screening procedures, legal researchers recommend that ADR include meaningful participation on behalf of all the parties to be effective.¹⁶⁵

As the literature indicates, the debate surrounding the ADR movement is far from over. Calls for more research and rigorous standards and for better evaluation procedures have been made. This study attempts to answer that call by designing a practical ideal type for ADR programs, one that can be used to assess programs and their processes and to contribute to the empirical data. The practical ideal type is useful because it provides “benchmarks with which to

¹⁶⁰Kerbeshian, 429.

¹⁶¹Jeffrey W. Stempel, “Reflections on Judicial ADR and the Multi-Door Courthouse at Twenty: Fait Accompli, Failed Overture, or Fledgling Adulthood?” *Ohio State Journal on Dispute Resolution* 11 (1996): 297-395, 326-30.

¹⁶²Jethro K. Lieberman and James F. Henry, “Lessons from the Alternative Dispute Resolution Movement.” *University of Chicago Law Review* 53 (Spring 1986): 424-439, 437.

¹⁶³Kerbeshian, 430.

¹⁶⁴Ibid, 429-30.

¹⁶⁵Ibid, 431.

understand (and improve) reality.”¹⁶⁶

Conceptual Framework

This study provides a descriptive analysis of ADR and its programs by designing a practical ideal type for ADR programs. Using mediation as the program example, the ideal type serves as a benchmarking tool for understanding and improving ADR programs.¹⁶⁷ The focus of the research project is the Travis County Settlement Week mediation program; the ideal type will be used to assess this program and to make recommendations for improvement or modification. The assessment will also serve as a test to see if the ideal type is truly practical for the field of study.

The ideal type was designed using six broad categories taken from the literature: 1) mediation procedure; 2) mediator skill; 3) case profile; 4) participant involvement; 5) ADR method; and 6) stated goals. Based on the literature, these areas are typically considered when deciding whether a program is successful or unsuccessful, and should be considered when making recommendations for change in the program.

The categories are operationalized based on the following definitions: mediation procedure is the process used for the settlement week mediations; mediator skill describes the necessity of education for the mediation and the level of expertise;¹⁶⁸ case profile describes the

¹⁶⁶Shields, 30.

¹⁶⁷Ibid, 29-30.

¹⁶⁸The program sponsors had indicated that these were areas of concern in previous Settlement Weeks, therefore the hypotheses are operationalized accordingly.

participants perceptions about the suitability and timing of mediation for their case, and also provides the program's profile of the demographic characteristics of the case (e.g. nature of the dispute and dollar amount and when mediation was attempted); participant involvement describes the level of preparation for the mediation and willingness to attend; ADR method indicates which ADR mechanism is used; and stated goals are the formal objectives of the program. Although the "desirability of promoting settlement" is "challenged" as a criteria for success, for purposes of this research an effective program, or a successful program, is one that promotes settlement.¹⁶⁹

Since this research is evaluative, it incorporates working hypotheses and subhypotheses formed from the categories. These hypotheses serve as guides for conducting the research and collecting evidence, and imply that if the practical ideal type is found in the program it will be successful.

Working Hypotheses

WH1: As indicated by the literature, effective mediation programs contain **procedures** that promote settlement.

SH1A: **Procedures** that are perceived as fair promote settlement.

SH1B: **Procedures** that are perceived as **uncomplicated** promote settlement.

SH1C: **Procedures** that are perceived as **non-coercive** promote settlement.

SH1D: **Procedures** that are perceived to have **additional value to settlement** may promote settlement

¹⁶⁹Kerbeshian, 383.

- WH2: As indicated by the literature, effective mediation programs use **skilled mediators** to promote settlement.
- SH2A: **Mediators** that are perceived as not needing additional **education** about the case promote settlement.
- SH2B: **Mediators** that are perceived as having a high level of **expertise** promote settlement.
- WH3: As indicated by the literature, effective mediation programs use **case profiles** to determine if case is appropriate for settlement.
- SH3A: Participant perceptions provide **case profiles** that determine **suitable cases** for settlement..
- SH3B: Participant perceptions provide **case profiles** that determine if **timing of mediation** is appropriate for settlement.
- SH3C: **Case profiles** used by the **program** determine suitable cases for settlement
- WH4: As indicated by the literature, effective mediation programs contain elements of **participant involvement** to promote settlement.
- SH4A: **Participant involvement** that is perceived as **voluntary** promotes settlement.
- SH4B: **Participant involvement** that includes **preparation** before mediation promotes settlement.
- WH5: As indicated by the literature, effective mediation programs contain **choices** of ADR method that promote settlement.

SH5A: Providing perceived *alternative choices* to mediation promotes settlement.

WH6: *Effective* mediation programs have *stated goals*.

The working hypotheses will enable the researcher to describe and test for a practical ideal type for mediation programs and serve as a guide to modify any existing program. The questionnaire was the primary research tool chosen to test these hypotheses. The Travis County Settlement Week was the program within which the research was carried out. The following chapter provides the historical background of this program and details the problems that it faces.

Chapter Three

Research Setting

Texas, like other states, has implemented various programs to comply with orders requiring ADR. In Travis County, there are many ADR programs, some are found in the court system and others in private arenas like the Dispute Resolution Center. The focus of this study is the Travis County Settlement Week, a free mediation program that was held in Austin, Texas, September 22-26, 1997. Texas law requires that every county conduct two Settlement Weeks each year;¹⁷⁰ this program fulfills that obligation.

Program Background

Settlement Week was instituted in 1989, and has been administered by the Travis County ADR Coordinator's Office since the office's inception in 1992.¹⁷¹ The ADR office coordinates the event as a public service with the Travis County District Court and County Judges, and the Travis County Bar Association. McGahan noted this program was originally designed to educate people about the mediation process, and as the program developed it became quite successful in facilitating settlement.

Settlement Week is held twice each year in Austin, Texas, and is designed to "allow parties in lawsuits in Travis County the opportunity to make a concentrated effort to settle their

¹⁷⁰Tex. Civ. Prac. & Rem. Code, Chapter 155.

¹⁷¹Sydni McGahan, interview by author, Austin, Texas, 11 August 1997. McGahan is the Travis County ADR Coordinator, and has been associated with the ADR programs in Travis County since 1989. Interview questions and responses are provided in Appendix A.

cases with the aid of a trained, neutral mediator.”¹⁷² The program uses volunteer mediators that meet minimum mediation qualifications to “facilitate discussions between parties that might lead to settlement of the case,” and while their role is neutral, it is designed to “help the parties come to their own agreement.”¹⁷³ Participants are provided a three-hour time slot to mediate their case; there are typically about 200 slots available during the week.

The mediation process is flexible, with the mediators using varying styles to conduct the sessions. The parties and the mediator can agree on any rules that will “aid the parties in exploring the issues and resolving the dispute.”¹⁷⁴ The typical process may involve (1) an introduction; (2) a brief explanation of the case by both sides; (3) a question period about the process, positions and what the parties hope to gain from the settlement; (4) a caucus period where the mediator consults with each side privately; and (5) a joint session to see if settlement has been reached.¹⁷⁵ If the case settles, the mediator will help the parties prepare a Settlement Agreement outlining the specific terms and provisions of the parties agreement. If the case does not settle, it will still be pending on the court’s docket to be set for trial.

McGahan reported that since its inception, of the 5800 cases submitted during the previous Settlement Weeks in Travis County, over 70 percent were settled in whole or part.¹⁷⁶ In

¹⁷²Travis County Settlement Week Information Sheet, 4 (See Appendix B).

¹⁷³Ibid, 5.

¹⁷⁴Ibid.

¹⁷⁵Ibid.

¹⁷⁶McGahan also indicated that approximately 90 percent of the cases that did not settle during Settlement Week settled shortly afterwards, before going to trial.

1995, the figures started dropping. Table 3.1 illustrates these settlement rates as reported by Travis County.

**Table 3.1
Settlement Week Results**

Date	Cases	Settlement Rate
September 1995	271	39%
March 1996	282	46%
September 1996	300	53%
March 1997	224	46%
September 1997*	222	37%

*This Settlement Week is the focus of this study.

Program Changes

In 1995, the county issued a local rule requiring all cases to go to mediation before being set for trial.¹⁷⁷ The order's stated purpose is "to promote the resolution of cases prior to trial through the use of alternative dispute resolution processes, to test the effectiveness of ADR in helping parties reach an acceptable settlement of their disputes, and to reduce the backlog of cases on the docket." McGahan indicated that shortly after this standing order to mediate was implemented, the settlement rates from Settlement Week began to fall, but other settlement rates

¹⁷⁷Order Concerning Mediation of Cases Set on the Merits, Travis County District Clerk's File No. 121,012 (See Appendix C). Travis County also has a process that allows cases to be excused from this requirement to attend ADR. This "easy out" process sets the case on the ADR docket after a request has been made. The party then files a motion to be excused from ADR, which the judge grants or denies. McGahan indicated that since ADR is not suitable for every case, the parties are never forced to pursue ADR, and this process allows the parties to be excused from the requirement. (See Travis County Local Rules, 17.4 (1995)).

outside the program had increased. Sponsors were concerned about this drop in Settlement Week's performance.¹⁷⁸ An ADR task force was formed to address program issues.

McGahan and the others indicated that the Settlement Week might be used on "dog cases," or those cases with no possibility of settlement, as a way of getting their ticket punched, so the case can be set on the docket.¹⁷⁹ All agreed that this "ticket punching" phenomena needed to be avoided if possible. Areas of consideration included profiling cases to make sure the cases were suitable for the program, assuring mediation quality, providing choices in ADR methods, and assessing whether the program was still needed. Primarily, the task force was concerned with what would be lost if the program was not available, and whether it was providing some other value to the legal community. The task force called for a reassessment of the program. The sponsors questioned if and how the settlement rates could be improved, if there were fundamental problems with the program, or if the program should be eliminated.

This study attempts to answer those questions using the practical ideal type to assess the Settlement Week program, and to make recommendations based on the findings. The next chapter presents the methodology used to conduct the study.

¹⁷⁸Travis County ADR Task Force, interview by author, Austin, Texas, 20 August 1997. Members of the task force included Sydni McGahan, Mike Schless and Barbara Hannon. These members discussed problems with the Settlement Week program. Mike Schless is a former judge from County Court No. 3, and now conducts private mediations. Barbara Hannon is a chairperson with the State Bar of Texas ADR section. Some of the Concerns from that meeting are transcribed in Appendix D.

¹⁷⁹See Kerbeshian, 432 (ADR should not be perceived as a mechanism for eliminating cases and clients of little value.).

Chapter Four

Methodology

This study describes and tests a practical ideal type for ADR programs. The study is evaluative in nature, thus the research emphasis includes survey research, analysis of existing data and document analysis as the research tools. This chapter discusses these research methods and outlines the methodology for the study. The working hypotheses found in the conceptual framework are also operationalized.

Survey Research

Babbie states that survey research is an appropriate methodology to use in evaluative research.¹⁸⁰ The method is used predominantly when the unit of analysis is an individual. In this particular study the units of analysis are individuals involved in the Settlement Week. Survey research, Babbie explains, is good for collecting data in a population that is too large to observe directly, and can serve as “excellent vehicles for measuring attitudes.”¹⁸¹ This study has a population that is too large to observe directly, and it also assesses the attitudes of the population, therefore, survey research is appropriate.¹⁸² Yin contends this method is also appropriate because

¹⁸⁰Earl Babbie, *The Practice of Social Research*, 7th ed. (New York: Wadsworth Publishing Co., 1995), 257.

¹⁸¹Ibid, 257.

¹⁸²It was impractical for the researcher to attend each mediation session and to use the observations as data. Further, the confidential nature of the proceedings prohibited using this technique.

it addresses a contemporary problem, and is concerned with events that the researcher cannot control.¹⁸³

Survey research may be administered three ways: self-administered questionnaires, interview surveys, and telephone surveys.¹⁸⁴ This study employed both questionnaire and interview surveys. The questionnaires were used to gather the participants attitudes about the ADR program and to provide background information on the case. The interview surveys provided historical information on the Settlement Week program, as well as the staff perceptions about problems with the program. Babbie indicates that strengths and weaknesses of survey research. Table 4.1 illustrates the pros and cons of using this methodology.¹⁸⁵

Table 4.1
Strengths and Weaknesses of Survey Research

Strengths	Weaknesses
useful in describing characteristics of large population	surveys may be superficial in their coverage of responses
make large samples feasible	the research may not deal appropriately with the context of social life
flexible	inflexible
standardized questionnaire provides strength for measurement	may create artificiality in connection with experiments
reliability is high	validity is low

¹⁸³Robert K. Yin, *Case Study Research: Design and Methods 2d ed.*, Applied Social Research Methods Series, vol. 5 (Thousand Oaks, Ca.: Sage Publications, 1994), 4.

¹⁸⁴Babbie, 258-69.

¹⁸⁵Ibid, 273-4.

Survey research was appropriate for several reasons. First, it was useful for describing the characteristics of the large population. Second, it was flexible. This study attempted to combat weaknesses of the method by using a combination of open and closed ended questions in the questionnaire. The closed ended provided the data for measurement purposes. The open ended provided opportunity for expression, thus allowing for something more than an approximate indicator of the participant's attitudes.

The questionnaires provide details about the mediation process, which elements work and which ones do not, and attitudes about the program. The interview questions also allow program administrators to offer explanations of why the program is or is not working. The study also assesses aggregate data and documents provided and compiled by the Travis County ADR section.

Survey Instrument

The survey questionnaire consisted of 66 questions, open and closed ended questions. (See Appendix E for the complete survey instrument.)¹⁸⁶ The responses primarily consisted of yes and no questions. The participants were also given opportunity for elaboration with the open ended questions. The open ended questions were necessary to help with the benchmarking of this program. Categories were provided in some instances to provide case background. No names were placed on the survey instruments, thus ensuring confidentiality in responses, and case numbers were requested for the Travis County records, but were not reported in the findings also

¹⁸⁶The questionnaire was created by the researcher and the ADR task force. Sixty six questions were used as evidence in the research, and three questions were used for Travis County records.

to ensure confidentiality.

Four surveys were placed in each Settlement Week packet, and two hundred packets were available. The surveys could be filled out by each party and their representative. Since the questionnaire was given to every participant in the Settlement Week program, the entire population was represented in the initial sample.¹⁸⁷ The questionnaires were returned to the ADR coordinator's office after they were completed. No mailing was necessary. This process was designed to encourage more participants to fill out the survey. The questionnaire was six pages in length. One of the problems with the instrument was that it was reported by some of the participants to be too long, so some responses were not completely answered. The survey was pre-tested on Sydni McGahan, Judge Hart and Barbara Hannon.¹⁸⁸

Data Analysis and Document Analysis

This study also used document analysis and existing data analysis to formulate triangulation in the study, therefore giving a broader range of historical data and attitudes.¹⁸⁹ The documents consisted of the Settlement Week Information Sheet, previous evaluation sheets from Settlement Week, and the Standing Order to mediate. These documents provided an unobtrusive way to gather data on the program.¹⁹⁰ These sample documents provided background information as well as sources of evidence for the practical ideal type of an ADR

¹⁸⁷Babbie, 195.

¹⁸⁸ADR task force. See Chapter 3.

¹⁸⁹Yin, 91.

¹⁹⁰Babbie, 312.

program.

Operationalization of Hypotheses

The sources of evidence for the hypotheses are primarily found in the participant questionnaire. The task force open-ended interview questions also provide evidence for the hypotheses. The members were asked their perceptions of the process, and

- 1) what suggestions they had for improvement;
- 2) what case types are suitable for this process, and whether the settlement week should limit the participants to those cases;
- 3) how does participant involvement affect settlement;
- 4) whether mediation is the best method to offer, or should there be a choice of method; and
- 5) what would they recommend to enhance settlement week.

This information is corroborated with existing data found in the previous ADR evaluations. See Table 4.2 for the details of operationalizing the hypotheses.

The criteria for this case study is settlement rate based on the primary function of the program. Although the literature suggests settlement rate is not the only measure of the success, determining what is the appropriate measure of success is beyond the scope of this study. Conducting more research on what should be the measure of success is recommended. The weakness of the study is the transferability to other programs. Since it is an assessment of the Settlement Week and its characteristics specific to that program, its findings may be limited.

**Table 4.2
Operationalization of Hypotheses**

Category	Hypothesis	Source*
mediation procedure	•SH1A fair •SH1B uncomplicated •SH1C noncoercive •SH1D additional value	•Q 14, 15, 16 •Q 19, 20, 25, 26, 27, 28 •Q 31, 32, 37, 38 •Q 21, 22, 23, 24, 29, 30
mediator skill	•SH2A education •SH2B expertise	•Q 54, 55 •Q 52, 53, 56
case profile	•SH3A suitable cases •SH3B timing •SH3C program profile	•Q 33, 34, 35, 36, 39, 40 •Q 6, 41, 42 •Q 3,4, 5, 8, 9, 10, 11
participant involvement	•SH4A voluntary •SH4B preparation	•Q 31, 32 •Q 43, 44
ADR method	•SH5A alternative choice	•Q 49, 60, 61, 62, 63, 64
stated goals	•WH6 stated goals	•Document Analysis •Interviews

*Note Q 12, 50 and 59 provide overall ratings for the Settlement Week mediation, the mediation, and mediation. Questions 13 and 51 detail the narrative responses. Questions 17 and 18 provide the satisfaction rate and narrative responses. Questions 45 and 46 indicate whether participants would participate in Settlement Week again; questions 47 and 48 indicate what changes are recommended for the program; questions 57 and 58 indicate if the participants would recommend the mediator again; and questions 65 and 66 indicate if the participants would recommend the mediation process. These responses will be used as evidence for the various categories.

Presentation of Results

The results of this study are presented in narrative form. Simple statistical analysis was performed using Statistical Package for the Social Sciences (SPSS). The variables were coded with dummy variables of 1 and 0 for yes and no responses, and numerical coding for the other categorical responses. (See Appendix F for the variable descriptions and coding, and Appendix G for narrative responses..) The open ended questions responses are presented in narrative. Some tables and charts may be used to further illustrate the narrative.

Chapter Five

Analysis of Findings

The purpose of this chapter is to present the results of the collected data. The hypotheses premised that, according to the literature if the program contained certain elements, then it would be a successful program. In this case, the successful program would be one that promoted settlement. The hypotheses guided the data collection. Simple descriptive statistics, comparisons of means, and cross tabulations are used to analyze the findings. The results of the data are presented in tabular and narrative form. Table 5.3 to 5.7 illustrate the findings.

Survey Response Rate

Surveys were provided to Settlement Week participants. Eight hundred copies were available, and 385 were returned, making the response rate 48%. Babbie indicates that at least 50% response is necessary for “adequate analysis and reporting.”¹⁹¹ While there is a risk of an unrepresentative sample,¹⁹² the percentage is close enough to 50 % that the responses will still be useful for assessing the program. Also, it is possible that the results will not be as useful for other programs. Further, the questionnaire was considered by the participants to be too long, therefore the response rate in this case is reasonable.

¹⁹¹Babbie, 262.

¹⁹²Ibid, 261.

Background Characteristics

The Settlement Week participants fell in six categories: plaintiff, plaintiff's attorney, defendant, defendant's attorney, claims adjustor, and other.¹⁹³ The data indicates that the respondents may not be a representative sample of the population.¹⁹⁴ The sample included responses from 28 percent of the defendant attorneys and 25 percent of the plaintiffs. The plaintiff attorneys, defendants and claims adjustors were not equally represented. The responses to all questions should be viewed in light of this finding. However, The responses will still be useful in providing characteristics for this participants in this Settlement Week. (For more detailed information See Table 5.1).

The background responses provided a profile for the Settlement Week cases:

- 1) 65.3 percent are personal injury (auto and other);
- 2) 53.1 percent are over 2 years old;
- 3) 36.4 percent used Settlement Week to comply with the standing order to mediate;
- 4) 57.0 percent of the original demands are 10,000-50,000;
- 5) 76.0 percent of the cases had offers during Settlement Week; and
- 6) 65.2 percent of the offers during Settlement Week are 1-10,000.

¹⁹³In this Settlement Week the only other type of participant is an interested party.

¹⁹⁴Using chi square for goodness of fit. (5, $\chi^2=104.84$, $p>.05$).

Table 5.1
Profile of Settlement Week Cases

Question	Characteristics*	Percentage
Briefly describe the nature of the dispute. (n=340)	Collection	3.5
	Construction	.9
	Contract Dispute	5.6
	DTPA	3.5
	Employee's rights	3.5
	Family Law	5.6
	Medical malpractice	1.2
	Personal injury (auto)	60.3
	Personal injury (other)	5.0
	Property Damage	4.1
	Real Estate	.3
	Suit on note	.3
Worker's compensation	1.5	
Other	4.7	
Are you a: (n=370)	Plaintiff	25.1
	Plaintiff Attorney	18.9
	Defendant	13.5
	Defendant Attorney	28.1
	Claims Adjustor or Insurance Rep.	13.2
	Other	1.1
When did this action or cause arise? (n=341)	less than 6 months	6.7
	6 months to 1 year	8.8
	over 1 year to 2 years	31.4
	over 2 years to 3 years	34.9
	over 3 years	18.2
Why did you choose to participate in Settlement Week? (n=294)	client could not afford private mediation	5.4
	to comply with standing order to mediate	36.4
	attorney suggested using process	31.3
	recommendation from participant	4.8
	process was easy to use	14.6
	other	7.5
What was the demand? (n=358)	less than 10,000	13.1
	10,000-50,000	57.0
	50,000-100,000	14.2
	Over 100,000	11.7
	Other	3.9
Was there an offer? (n=354)	Yes	76.0
	No	24.0
If yes, how much? (n=264)	1-10,000	65.2
	10,000-50,000	22.0
	50,000-100,000	2.3
	Over 100,000	1.5
	No settlement	6.8
	Non-monetary	2.3

*Bad faith, Breach of warranty, Foreclosure, Legal malpractice, and Products liability were not represented in these responses.

Overall Perceptions

Overall, participants responses to Settlement Week were positive. The respondents overwhelmingly agreed that they were satisfied with the program (93.7%), and almost all stated they would participate in Settlement Week again (98.3%). Only a small percentage would recommend changes in the program (14.7%). All means for overall perceptions were 3.00 or greater. This indicates the ratings for Settlement Week mediation, the mediator, and mediation as a dispute resolution tool were above average. (See Table 5.2 for mean ratings for these variables.)

Table 5.2
Perception Mean Ratings

Variable	Mean Rating	N	Standard Deviation
Settlement Week Mediation	3.00*	360	.855
Mediator	3.33*	335	.774
Mediation as a Dispute Resolution Tool	3.34*	342	.736

*Results significant using t-test at $p < .05$.¹⁹⁵

¹⁹⁵Using test value of 2, and a scale of 0-4, with 0=poor, 1= below average, 2= average, 3= above average, and 4=excellent. (Settlement Week mediation, $t=21.50$, $df=359$), (Mediator, $t=32.44$, $df=355$), and (Mediation, $t=33.65$, $df=341$).

Mediation Procedure

The first working hypothesis stated that effective mediation programs contain procedures that promote settlement. The subhypotheses further explained that these procedures should be fair, uncomplicated, noncoercive and provide additional value. (See Table 5.3 for the evidence.)

Table 5.3
Mediation Procedure Evidence

Hypothesis	Source	Overall Yes	P %*	PA %	D %	DA %
SH1A: Fair (sample size)	Do you think Settlement Week was fair?	98.9% (n=362)	98.0 (n=88)	100 (n=66)	95.7 (n=44)	100 (n=101)
	Were you satisfied that this Settlement Week was confidential?	98.6% (n=366)	97.8 (n=90)	100 (n=69)	95.7 (n=44)	99.0 (100)
SH1B: Uncomplicated	Do you think this Settlement Week mediation provided a simple way to handle cases?	96.4% (n=361)	97.7 (n=86)	97.1 (n=67)	89.1 (n=41)	97.1 (n=99)
	Do you think this Settlement Week mediation saved money in this case?	59.3% (n=258)	72.9 (n=37)	35.3 (n=35)	64.6 (n=12)	43.3 (n=51)
	Do you think this Settlement Week mediation saved time in this case?	57.6% (n=262)	66.1 (n=38)	67.4 (n=31)	38.9 (n=14)	59.8 (n=49)
SH1C: Noncoercive	Was your participation in this Settlement Week voluntary?	88.6% (n=350)	95.0 (n=76)	95.5 (n=63)	80.4 (n=37)	90.9 (n=90)
	Did you feel any pressure to achieve any certain outcome during this Settlement Week mediation?	14.6% (n=355)	16.9 (n=14)	14.7 (n=10)	11.6 (n=5)	17.0 (n=17)
SH1D: Additional Value	Did this Settlement mediation prove useful in the disposition of your case?	69.8% (n=341)	74.4 (n=61)	77.8 (n=49)	54.6 (n=24)	64.3 (63)
	Did this Settlement Week mediation enable you to gain more information about your case?	66.7% (n=360)	70.2 (n=59)	72.1 (n=49)	75.6 (n=34)	61.8 (n=63)
	Did this Settlement Week mediation help foster better relations between the parties?	48.7% (n=333)	45.1 (n=37)	47.6 (n=30)	58.5 (n=24)	37.4 (n=34)

*P=Plaintiff, PA=Plaintiff Attorney, D=Defendant, and DA=Defendant Attorney.

As indicated by the table and the narrative responses, most of the participants thought the procedures were fair (98.9%) and were satisfied that their mediation was confidential (98.6). Unfair responses were based on reports that the other party did not want to settle and that the settlement amounts were too high or did not cover all the costs. (See Appendix G for narrative responses.)

The respondents also perceived the procedures as uncomplicated (96.4%). Participants thought the process was complicated when their case did not settle, when they thought the case should not have been mediated, and when they thought the case was complicated. Almost 60% indicated the process saved time and money. The time estimates varied from 1 hour to several years, and the cost estimates from \$300 to \$40,000. Plaintiff attorneys were less likely to think the mediation saved money (35.3%) and defendants were less likely to think it saved time (38.9%).

Further, nearly 90% of the participants claimed their mediation was voluntary, and only 15% thought they were pressured to achieve an outcome. The primary response of parties not voluntarily participating was that the mediation was required by court, or required by local rule. Additionally, 70% of the parties thought the mediation was useful to the disposition of their case, and 67% were able to gain information about their case. Defendants did not respond as favorably; only 55% thought it was useful. However, data also showed that the majority (52.9%) did not think the mediation helped foster relations between the parties. The reported values of mediation were that it allowed parties to meet face to face, that it provided a forum to discuss issues, that it provided opportunity to discuss strengths and weaknesses of the parties' positions, and created an atmosphere of settlement. When the case did not settle, the participants said the

process helped them narrow the issues and move closer to settlement. Several participants stated the process was not useful because the case did not settle, and because some participants did not wish to settle or fully participate.

Based on these responses, participants found Settlement Week's procedures to be fair, uncomplicated, noncoercive and to possess additional value. Therefore, the evidence shows that the program contains procedures that, according to the literature, should promote settlement.

Mediator Skill

The second working hypothesis stated that mediation programs used skilled mediators to promote settlement. The hypothesis also stated that mediators perceived as not needing additional education and having a high level of expertise promote settlement. (See Table 5.4 for evidence.)

**Table 5.4
Mediator Skill Evidence**

Hypothesis	Source	Overall Yes	P %	PA %	D %	DA %
SH2A: Education (sample size)	Was it necessary to educate the mediator about the facts of the case?	68.5% (n=343)	64.6 (n=53)	77.9 (n=49)	66.7 (n=28)	73.9 (n=71)
SH2B: Expertise	Did the mediator's level of expertise affect the outcome of the mediation?	48.2% (n=332)	64.1 (n=50)	48.4 (n=31)	40.0 (n=16)	47.3 (n=44)
	Do you think it was necessary to have an attorney mediator for this case?	85.1% (n=355)	83.5 (n=71)	86.8 (n=59)	82.9 (n=34)	90.1 (n=91)

Participants responded favorably to the volunteer mediators. The mean rating for the mediators was above average. (See Table 5.2). A large portion (93%) said they would recommend the mediator to someone else. While 69% of those surveyed indicated that it was necessary to educate the mediator, they also indicated that it was reasonably expected that they would have to do so, and that it only positively affected the outcome. Further, the participants stated the education process allowed the mediators to evaluate strengths and weaknesses of each case and to facilitate settlement.

The parties were mixed on whether the mediator's expertise affected the outcome (48.2%). The majority of plaintiffs responded that it was a factor (64.1%). However, the narrative responses indicated that the level of expertise again was a positive factor for the outcomes. The responses suggested that mediators were knowledgeable, competent, and

experienced. Participants reported that the mediator's were useful in facilitating settlement or moving the parties closer to settlement. Further, 85% of the participants thought it was necessary to have an attorney to mediate. These responses did not indicate, however, whether the participants viewed attorneys as having higher levels of expertise as non-attorney mediators.

The findings provide mixed support for the hypotheses. The responses indicate that the program uses mediator's that are perceived as needing education, but the narrative responses indicated this was not a factor in the outcome. The level of expertise also did not affect the outcome. The responses were favorable in that they purported that the education process and the level of expertise were a positive factor in the mediation even though they did not directly affect the outcome.

Case Profile

The hypothesis stated that effective mediation programs use case profiles to determine if a case is appropriate for settlement. Further the subhypotheses claimed that the participant perceptions provide case profiles to determine suitable cases for mediation as well as the timing for mediation, and that the profiles used by the program indicate which cases may be suitable for settlement. (See Table 5.5 for the evidence for the first two hypotheses.)

**Table 5.5
Case Profile Evidence**

Hypothesis	Source	Overall Yes	P %	PA	D %	DA %
SH3A: Suitable Cases (sample size)	Do you think this case was appropriate for mediation?	87.0% (n=362)	98.8 (n=85)	98.5 (n=67)	74.5 (n=35)	86.0 (n=86)
	Did you expect this case to settle?	57.0% (n=352)	66.3 (n=55)	62.1 (n=41)	52.2 (n=24)	52.6 (n=51)
	If this Settlement Week mediation had not been conducted, do you think the result would have been the same?	69.2% (n=305)	56.6 (n=43)	63.6 (n=35)	71.4 (n=25)	75.0 (n=63)
SH3B: Timing	Was this the first settlement attempt?	51.1% (n=374)	49.4 (n=45)	41.4 (n=29)	60.4 (n=29)	58.7 (n=61)
	If this mediation had been conducted earlier, do you think the result would have been the same?	70.7% (n=328)	63.2 (n=48)	90.2 (n=37)	90.2 (n=37)	67.7 (n=63)

The participants' perceptions were not indicative of the settlement rate. Most responded that their case was appropriate for mediation (87%), and the majority expected their case to settle (57%). Defendants were less likely to think it was appropriate (74.5%). If there had been no mediation, 69% stated the result would have been the same. Those reporting that it would not have been the same stated that the different result would have been going to trial.

The results were divided on first settlement attempts. Only 51% had attempted to settle before Settlement Week. And, 71% of the clients in Settlement Week reported that the results would have been the same if the mediation had been conducted earlier. Those that did not agree

stated they had more information than before, they had a new cause of action or they were in a better position to assess their case than they would have been if they had participated in mediation earlier.

The program profile established that of the cases presented at Settlement Week, 65.3 percent (n=340) were personal injury (both auto and other), and 36.4 percent (n=294) participated in Settlement Week to comply with the standing order to mediate. The demands ranged from \$10-50,000 (57%, n=358), and of the 76 percent receiving offers, 65.2 percent were estimated at \$1-10,000 (n=264). Most of the cases were over two years old (53%, n=341).

Based on participant responses about their expectations of the case and the timing, the evidence indicates that the participants thought the cases would settle. According to the literature, case profiles aid in determining suitable cases for settlement. However, the program's case profile indicated a problem area. The case profile allowed for a high percentage of personal injury cases as compared to the other types of cases that could be represented in Settlement Week. (See Table 5.1 for listing of possible cases.) Further, the profile showed that there was a disparity in demands to offers, that the age of the case was more than two years, and that there was a high percentage of people using Settlement Week to comply with the standing order to mediate. Programs must have sufficient case profiles to screen out cases that may not be appropriate for mediation or ripe for settlement. Based on the evidence presented, the program's profile system may not be adequate to establish which cases are suitable for settlement.

Participant Involvement

The hypothesis stated that effective mediation programs contain elements of participant involvement to promote settlement was not supported by the evidence. Also, participation that was voluntary and involved preparation was claimed to promote settlement. (See Table 5.6 for evidence.)

Table 5.6
Participant Involvement Evidence

Hypothesis	Source	Overall Yes	P %	PA %	D %	DA %
SH4A: Voluntary (sample size)	Was your participation in Settlement Week voluntary?	88.60% (n=350)	95.0 (n=76)	95.5 (n=63)	80.4 (n=37)	90.9 (n=90)
SH4B: Preparation	Did you prepare for this mediation?	89.6% (n=352)	85.7 (n=72)	98.5 (n=66)	65.9 (n=29)	98.0 (n=95)

Of those surveyed, nearly 90% participated voluntarily and were prepared for the mediation. Only 66% of the defendants reported that they prepared for the mediation. The narrative responses that indicate problems with the participant claim at least one side was not prepared or willing to participate in real settlement negotiations. These findings indicate that the program contained elements of participant involvement that was both voluntary and prepared.

ADR Method

This hypothesis proposed that effective mediation programs contain choices of ADR method to mediation to promote settlement. Currently, Settlement Week only offers mediation sessions. One of concerns the sponsors expressed was that Settlement Week should provide a choice. (see Table 5.7 for evidence.)

Table 5.7
ADR Method Evidence

Hypothesis	Source	Overall Yes	P %	PA %	D %	DA %
SH5A: ADR Method (sample size)	Would you have preferred a choice among other ADR methods?	18.8% (n=298)	19.4 (n=13)	7.7 (n=13)	16.5 (n=4)	16.5 (n=15)
	Do you think mediation was the best choice for this case?	79.6 (n=338)	88.9 (n=72)	95.5 (n=63)	64.9 (n=24)	75.8 (n=72)

The program does not offer choices, but 81% indicated they would not have preferred one, and 80% said mediation was the best choice for the case. More plaintiff attorneys thought it was the best choice (95.5%). Almost all of the respondents would recommend the mediation process to someone else (98.8%). Therefore, based on the responses, the participants do not perceive choice as necessary. Those who would have taken other options to Settlement Week claimed that they would have paid a private mediator (43%, n=293), and the majority of respondents who would have chosen another method did not choose another ADR tool, but instead stated they would have gone to trial (72.9%, n=262).

Stated Goals

This category hypothesized that effective mediation programs should have stated goals. The evidence reveals that when the program began in 1989, the purpose was to educate the public about mediation and its process because it was a relatively new form of formal dispute resolution. Now, mediation is no longer a new process, but the program has not changed its purpose. At this time, Settlement Week has no formal goals. The Standing Order indicates that ADR is used “to promote the resolution of cases prior to trial through the use of alternative dispute processes, to test the effectiveness of ADR in helping parties reach an acceptable settlement of their disputes, and to reduce the backlog of cases on the docket.”¹⁹⁶ The Information Sheet refers to Settlement Week’s past successes with settling cases.¹⁹⁷ The Information Sheet also states that mediation can help the parties achieve a “quicker resolution of [their] case” and can “avoid the substantial costs of continuing litigation.”¹⁹⁸ These goals have not been incorporated formally into the Settlement Week program.

In order to determine if the program is effective, goals have to be established. Determining the focus of the program, whether it be promoting settlement or some other objective is paramount to determining whether the program is effective. According to the literature, cost reduction and reduction of caseload are just some of the stated program goals. One program in St. Louis goals indicate ADR is used: “a) to provide a vehicle to assist parties to resolve disputes themselves; b) to increase client satisfaction with the dispute resolution process;

¹⁹⁶Standing Order, 1.

¹⁹⁷Information Sheet, 1.

¹⁹⁸Ibid, 4.

c) to reduce the rate of contested litigation and relitigation; and d) to increase the involvement of parties in the resolution of their disputes.”¹⁹⁹ In this case, the evidence does not indicate the program has taken steps to formalize Settlement Week’s objectives.

Concerns with Findings

Because the sample may not be representative, the findings may be unresponsive and limited only to this Settlement Week. Further, these findings are not necessarily indicative of all ADR programs. The evidence collected showed that some of the categories may have had unusually high response rates, thus skewing the results. In this study, the results indicated that the program contained the majority of the elements from the hypotheses, and only a few areas were denoted as problem areas. Table 5.8 illustrates these conclusions. Addressing those areas outside the framework should enable Settlement Week sponsors to improve their program.

¹⁹⁹Deborah A. Ledgerwood, “Family Mediation in St. Louis County: Steeled Against the Critics?” *Journal of the Mississippi Bar* 52 (November/December 1996): 351-355, 352.

Table 5.8
Support for Hypotheses

Category	Hypothesis	Support
mediation procedure	•SH1A fair •SH1B uncomplicated •SH1C noncoercive •SH1D additional value	•Strong •Strong •Strong •Strong
mediator skill	•SH2A education •SH2B expertise	•Mixed •Mixed
case profile	•SH3A suitable cases •SH3B timing •SH3C program profile	•Strong •Strong •Weak
participant involvement	•SH4A voluntary •SH4B preparation	•Strong •Strong
ADR method	•SH5A alternative choice	• None
stated goals	•WH6 stated goals	• None

The following chapter details recommendations for the program based on these findings, presents explanations for the lack of support for the hypothesis, discusses the limitations of the study, and presents future research opportunities.

Chapter Six

Summary and Conclusion

The purpose of this study was to provide an overview of ADR, to describe a practical ideal type for ADR programs, and to assess Settlement Week program using the ideal type. In completing these tasks, the researcher attempted to add to the field of study by designing a model for ADR program evaluations. However, the usefulness of the ideal type for other programs is still not known. The study's objective was also to determine if Settlement Week was working, and if it was not, why. The data indicated that the settlement rate dropped, but the findings indicated that the Settlement Week contains elements that literature suggested would make it a successful program. But is the program working? Information from sources outside the scope of the evidence collected may be necessary to interpret the findings and to answer this question.

Explanation of Findings

Settlement Week sponsors posed several questions for this evaluation. The sponsors were concerned about the procedures used during Settlement Week, the quality of the volunteer mediators, their screening process, the level of participant involvement, and the necessity for choice between ADR methods. These concerns are addressed in the findings.

Based on the working hypotheses, Settlement as designed was perceived as fair, uncomplicated, noncoercive, and providing alternative value. The mediator's were thought of as requiring only necessary education about the case, and their level of expertise did not negatively affect the outcome. The participants used the program voluntarily and were prepared. The literature indicated that these elements were necessary for successful programs. But, the

settlement rate for this program dropped. Using the current definition of success, Settlement Week is not considered a successful program.

The findings also indicated that the type of cases that are found in Settlement Week are predominantly personal injury cases, at least two years old, and that participants are using Settlement Week to comply with the standing order to mediate. This is one of the main areas of concern for the program. The literature emphasized that determining suitable cases amenable to settlement would allow for a better allocation of resources. Clearly, Settlement Week has a high percentage of personal injury cases, which may not be suitable for settlement because of liability disputes or difficulty in dealing with insurance companies. If patrons are only using Settlement Week to comply with the standing order, the resources are not being allocated for other users (e.g. those persons using the program because they can not afford a private mediator).

The program also does not provide a choice in method. The participants in this study did not deem choice necessary. If mediation was not to be used, the participants would have simply gone to trial. The value of Settlement Week, as denoted by those surveyed, is that it provides an opportunity to meet the opposing party, sometimes for the first time, to exchange positions, and to narrow the issues, and if the case does not settle, it brings parties closer to settlement. Further, if used correctly, it provides a forum for those who can not afford other ADR methods. These alternative values may indicate that the program is more successful than evidenced by the settlement rate, but that changes may be needed.

Recommendations

Using the evidence collected, the literature and the conceptual framework as a guide, this

study has several recommendations for change. Table 6.1 presents changes, along with justifications, necessary to make Settlement Week more effective.

**Table 6.1
Recommended Program Modifications**

Category	Change	Reason
Procedure	No changes necessary with procedures. Work on improving defendant perception of Settlement Week.	Data indicated the procedures were satisfactory. However, defendants did not think it was as useful or save time as compared to other participants.
Mediator	No changes necessary.	Data indicated that participants were satisfied with mediators.
Case Profile	<p>1) Screen cases so that personal injury cases will not constitute the majority of cases in Settlement Week.</p> <p>2) Allocate the percentage of cases for Settlement based on need (50%) and open selection process (50%).</p> <p>(3) Work on improving defendant perception of mediation.</p>	<p>1) Adequate screening process allows for more cases that are amenable to settlement to be represented. Personal injury cases may be less likely to settle than other cases.</p> <p>2) Allow allocation of resources to those that use settlement week because they cannot afford ADR, and thus it gives value to community. Further, it may avoid ticket punching by giving the opportunity for meaningful participation instead of just to comply with the order.</p> <p>(3) Again, defendants were less likely to think that mediation was appropriate for their case</p>
Participant Involvement	Address participant involvement of defendants..	Data indicated that almost all participants were preparing for case, but defendants reported a lower rate. It may be necessary o study if defendants are participating in Settlement Week only because plaintiff requested the mediation, or if they believe that mediation is helpful in reaching an agreement.
ADR Method	No changes necessary.	Data indicated that participants did not desire a choice.
Stated Goals	Adopt objectives.	Address other values of program. Settlement rate may not be good indicator of value. Use goals like those found in the St. Louis program.

Further Study

Many of the hypotheses were supported by the evidence, thus the study provided the information necessary for the suggested changes. Further, the ideal type was useful in providing a benchmark for Settlement Week, although its value in other areas is still unknown. Because this study did not fulfill all its objectives, additional study is recommended.

First, the ideal type has not been tested sufficiently to determine its value as an evaluation tool since this study may have had an unrepresentative sample. Second, the study must address what makes a program successful is still questionable. Using program goals may assist with this definition. Finally, if changes are made based on recommendations, a follow up study is necessary to assess their impact.

Conclusion

Settlement Week may be more effective than the sample responses indicate. However, it is not working towards any formal goal or objective other than achieving higher settlement rates. At this time, eliminating the program is not recommended because the participants stated that it was useful in many ways. Looking at the program in terms of these additional values will reveal the value to the community and the loss that will be effected if the program is discontinued. The most important recommendation is that the sponsors decide why the program is used and what it is supposed to accomplish. Without these stated objectives, the true value of the program can not be ascertained.

Appendix A

Interview with Sydni McGahan August 11, 1997

1. **When is Settlement Week?**
 - twice a year, September and March
2. **Process:**
 - send out information sheets to all members of the bar in Travis County
 - get information back and screen cases
 - set up calendar
 - schedule volunteers
 - about 200 slots per settlement week
3. **Any other studies:**
 - no
4. **Goals:**
 - educate Travis County about ADR and its usefulness
 - is this still necessary
 - for local rules
5. **Evaluate according to goals: Survey, data analysis**
 - problems with dropping settlement rate
 - how it is changed, more "dog" cases
 - lots of insurance cases
 - lots of ticket punching to fill standing order to mediate
6. **Access to records/stats**
 - docket
 - relitigation (trial de novo)
 - costs
 - time involved (disposition)
7. **What led to this program? History?**
 - 1989
 - to fill requirements for ADR
 - to teach about ADR
 - standing order to mediate in 1995, then settlement rates dropped
 - now questioning to keep it, change it, forget it, add options
8. **If cases come from mediation is there a difference in trial**
 - standing order to mediate on all
9. **How do they learn about process?**
 - packets sent out

Appendix B



Office of the District Judges
Office of the County Judges
PO Box 1748
Austin, Texas 78767

RE: Settlement Week, SEPTEMBER 22-26. Your response is requested no later than 4:30 PM on FRIDAY, JULY 26, 1997.

Dear Member of the Bar:

The previous Settlement Weeks in Travis County have been a great success, with over 70% of nearly 5800 cases submitted having been settled, either in whole or in part. As required by statute, (Chapter 155, Tex. Civ. Prac. & Rem. Code), we have two Settlement Weeks per year. During Settlement Week, attorneys in selected cases are ordered to appear with their clients and representatives with full authority to settle and to conduct negotiations in the presence of a court-appointed mediator. Failure to comply fully with the mediation order, including the presence of all parties with full settlement authority, may result in Court Ordered Sanctions against counsel. These sanctions may include appearing before the duty judge that day. We are enclosing an information sheet which we hope you will share with your clients explaining more about the mediation process.

FAILURE TO COMPLY STRICTLY WITH THE SUBMISSION PROCEDURES MAY RESULT IN YOUR CASE NOT BEING SET FOR MEDIATION. THESE PROCEDURES ARE LISTED ON THE SUBMISSION SHEET.

The ADR Coordinator will prepare and send to the submitting attorney the Order of Referral to Mediation. *IMMEDIATELY upon receipt of a conformed copy of the Order of Referral to Mediation, the submitting attorney shall provide a copy of the same to all parties.*

The District and County Court Judges of Travis County strongly encourage, as an aid to the mediation, that participating attorneys exchange settlement demands and responses within a reasonable time before the time of the Mediation Conference.

Attorneys may be contacted by the mediator assigned to the case, at that time the mediator may request a *position paper* outlining the issues in the case. All attorneys are required to submit the position paper to the mediator as directed. You need only prepare a position paper of one is requested.

If you have any specific question concerning our next Settlement Week, please contact the ADR Office at 473-9366. The Settlement Week Committee and the district and county court judges thank you for your participation.

Very truly yours,

Joseph H. Hart
Judge, 126th Judicial District Court
Local Administrative Judge

J. David Phillips
Judge, County Court at Law #1
Local Administrative Judge

SETTLEMENT WEEK SUBMISSION SHEET
MUST BE RETURNED BY 4:30 PM on FRIDAY, JULY 26, 1997

PLEASE READ CAREFULLY! Changes have been made to the submission sheet. Failure to comply strictly with these submission procedures may result in your case not being set for mediation.

1. Obtain agreement by all parties to submit case or set a hearing.
2. Obtain three alternative times during Settlement Week which are agreeable to all attorneys, parties and authorized insurance representatives.
3. Complete all areas of the Submission Sheet. *Failure to do so may result in your case being rejected.*

Mail to: Sydni McGahan, Travis County ADR Manager, PO BOX 1748, Austin, TX 78767
OR Deliver to: Sydni McGahan, Travis County ADR Manager, Travis County Courthouse, 1000 Guadalupe, Room 307. (Do not mail to this address, I will not receive it.) OR: Fax to: Sydni McGahan at (512) 708-4484 or (512) 708-4552 or (512) 473-9332

Cause Number: _____ District or County Court Number: _____
Full Style of Case: _____

List names of all parties and attorneys who will be attending actual mediation session. Attach additional pages if needed.

Client Name: _____	Client Name: _____
Pltf/Pet Atty: _____	Def/Resp Atty: _____
Address: _____	Address: _____
Zip: _____	Zip: _____
Phone#: _____	Phone#: _____
Fax#: _____	Fax #: _____
	Adjuster: _____

⇒ **NOTE:** It will no longer be acceptable for parties to appear by phone. Everyone must be present during the mediation, this includes attorneys, clients and insurance representatives.

Name of person and phone number to contact with questions regarding submission: _____

PLEASE MARK THE FOLLOWING SPECIAL REQUESTS TO WHICH ALL PARTIES HAVE AGREED

_____ An attorney mediator will be assigned to your case unless you request otherwise. Would you prefer a non-attorney mediator?

_____ Do you consent to an observer attending your mediation? (An observer is a person seeking additional mediation experience, but who will not participate in the mediation unless invited to do so by the mediator and the parties.)

_____ Do you request co-mediation? (A team may consist of any combination of Attorney-Mediators and/or Non-Attorney Mediators, all of whom will have completed at least a 40 hour basic mediation training course.)

_____ If case evaluation is available would you prefer your case be set for case evaluation before a Visiting Judge?

_____ Do you need a Spanish speaking mediator? You are responsible for getting your own interpreters

Please indicate at least three alternative times for the Mediation Session which are agreeable to all attorneys, parties and authorized insurance representatives; Mark 1st, 2nd, and 3rd choices.

Mon., Sept. 22, 1997	_____ 8:30-11:30	_____ 12:00-3:00	_____ 3:30-6:30
Tues., Sept. 23, 1997	_____ 8:30-11:30	_____ 12:00-3:00	_____ 3:30-6:30
Wed., Sept. 24, 1997	_____ 8:30-11:30	_____ 12:00-3:00	_____ 3:30-6:30
Thurs., Sept. 25, 1997	_____ 8:30-11:30	_____ 12:00-3:00	_____ 3:30-6:30
Fri., Sept. 26, 1997	_____ 8:30-11:30	_____ 12:00-3:00	_____ 3:30-6:30

- Date this suit was filed: _____
- Have all essential parties appeared and answered? _____
- If not explain: _____
- Is any party in bankruptcy? _____ If so, has the stay been lifted by the bankruptcy court, permitting this case to proceed to mediation? _____
- DISCOVERY: _____ complete _____ in progress _____ not started
- SETTLEMENT NEGOTIATIONS: (check the appropriate space and provide the latest offer and demand if negotiations have been initiated.)

_____ Negotiations initiated: last offer _____ last demand _____
 _____ No negotiations

Approximate amount of claim \$ _____

PLEASE CHECK THE ONE CATEGORY WHICH BEST DESCRIBES THIS CASE:

- | | | |
|------------------------------------|-------------------------------|--------------------------|
| _____ Bad Faith | _____ Breach of Warranty | _____ Collection |
| _____ Construction | _____ Contract Dispute | _____ DTPA |
| _____ Employee's Rights | _____ Family Law | _____ Foreclosure |
| _____ Legal Malpractice | _____ Medical Malpractice | _____ Products Liability |
| _____ Personal Injury (auto) | _____ Personal Injury (other) | _____ Property Damage |
| _____ Real Estate | _____ Suit on note | _____ Worker's Comp. |
| _____ Other (please specify) _____ | | |

PLEASE CHECK ANY OF THE FOLLOWING CIRCUMSTANCES THAT DESCRIBE THIS CASE:

- _____ Requires statutory construction
- _____ Involves governmental policy
- _____ Involves highly technical or scientific questions
- _____ Multiple plaintiffs or defendants (more than 3 of either). If multiple parties, do you feel this case is appropriate for mediation with a 3 hour time limit? _____

By submitting a case, the submitting attorney certifies to the court that all parties concur with three alternative times and agree to submitting the case for mediation during Settlement Week. IMMEDIATELY UPON RECEIPT OF A CONFORMED COPY OF THE ORDER OF REFERRAL TO MEDIATION, THE SUBMITTING ATTORNEY SHALL PROVIDE A COPY OF SAME TO ALL PARTIES.

Submitted by: _____ (Please Print)

Signature: _____

If you would like to make a voluntary contribution of \$25.00 per side per case to cover the extra costs of Settlement Week please make check payable to the TRAVIS COUNTY BAR ASSOCIATION, Reference Settlement Week. Mail your check to Sydni McGahan, P O Box 1748, Austin Texas 78767.

WHAT PARTIES NEED TO KNOW ABOUT SETTLEMENT WEEK

WHAT IS "SETTLEMENT WEEK"?

Twice each year, a one week period is set aside to allow parties in lawsuits in Travis County the opportunity to make a concentrated effort to settle their cases with the aid of a trained, neutral mediator.

WHO ORGANIZES SETTLEMENT WEEK?

The Travis County ADR Coordinator's Office organizes Settlement Week. Settlement Week is a public service project of the Travis County District and County Judges, the Travis County Bar Association and the Dispute Resolution Center.

HAVE PAST SETTLEMENT WEEKS BEEN SUCCESSFUL?

Yes, very much so. Of nearly 5800 cases submitted during the previous Settlement Weeks in Travis County, over 70% were settled in whole or part.

WHO DECIDES WHETHER A CASE IS MEDIATED IN SETTLEMENT WEEK?

Any one of the attorneys representing a party in a case may set that case for mediation. Upon such request, a judge will order the parties and their attorneys to appear at the mediation. In the event agreement to mediate in Settlement Week cannot be obtained from all parties, a motion may be filed and a hearing set before a Judge.

WHY SHOULD I WANT MY CASE MEDIATED?

In a mediation, rather than a trial, you have greater control over the outcome of your case. The mediator's job is not to issue a decision, but to help the parties come up with solutions that will aid settlement. Often you can achieve a better result by agreement than one that is imposed by a judge or jury. In addition, you can achieve a quicker resolution of your case and avoid the substantial costs of continuing litigation. Unlike a trial, a mediation is a private, confidential proceeding.

DOES IT COST ME ANYTHING TO HAVE MY CASE MEDIATED?

There is no fee for the mediation. The mediators donate their services free of charge. Your own attorney's fee will vary depending upon what your attorney charges for preparation and representation at the mediation. However, we do accept voluntary contributions to cover the extra costs of Settlement Week of \$25.00 per side per case. The submitting attorney shall notify each party or his or her attorney of this. If you want to make a voluntary contribution, make check payable to TRAVIS COUNTY BAR ASSOCIATION, REFERENCE SETTLEMENT WEEK. You may attach the check to the submission sheet or mail to Sydni McGahan, Travis County ADR Coordinator, PO BOX 1748, Austin, TX 78767.

HOW LONG DOES A MEDIATION LAST?

The time allotted is three hours per case. Because of space constraints, the Committee cannot let you go over this limit in the room to which you have been assigned. However, if your discussion is going well after the time allotted, you can arrange to continue the

mediation elsewhere, either right then or later. You may also check with the information table on the first floor of the Courthouse to inquire if other rooms are available.

WHO IS THE MEDIATOR?

Trained mediators who meet minimum qualifications volunteer during Settlement Week to facilitate discussions between the parties that might lead to settlement of the case. The mediator is a neutral person whose role is to help the parties come to their own agreement.

DOES THE MEDIATOR KNOW THE ATTORNEYS IN MY CASE OR MIGHT HE OR SHE HAVE A CONFLICT OF INTEREST?

When volunteers sign up to mediate a particular case, they are told to avoid any case wherein their association with another attorney or a party may create a bias in favor of either side; however it will not be unusual for a mediator to be acquainted with one or more of the attorneys in the case. Ordinarily, this should not present a problem. If you are worried about the possibility of a conflict of interest or bias on the part of the mediator, discuss it with your attorney. The Settlement Week Coordinator can assist with such problems either before the scheduled mediation or at the Courthouse.

WHAT HAPPENS DURING THE MEDIATION?

The mediation process is a flexible one; the parties and the mediator can agree on any ground rules that will aid the parties in exploring the issues and resolving the dispute. Typically, after introductions, each side will briefly explain their case. The mediator will ask questions of the attorneys or the parties in order to determine what each side hopes to gain in a settlement, and discussions will focus on various positions for bringing about an agreement. The mediator may use a technique called "caucusing" in which each side is consulted privately. Everything you tell the mediator in a caucus is confidential unless you authorize the mediator to disclose a specific offer or other information to the other side.

WHAT HAPPENS IF WE SETTLE THE CASE?

The mediator will help you prepare a Settlement Agreement memo which describes the specific terms of the agreement that the parties have reached. The parties' attorneys will follow through with the Court in whatever way is necessary.

WHAT HAPPENS IF WE DON'T SETTLE THE CASE?

Your case will still be pending on the court's docket. Of course, you will have other opportunities before trial to engage in further settlement negotiations or to use other dispute resolution techniques such as private mediation or arbitration. Your attorney can explain these to you.

WHAT DO I NEED TO DO TO GET READY FOR MEDIATION?

If the mediator requests, attorneys should prepare a position paper to be submitted to the mediator assigned to the case. You should think seriously about your case: its costs, its strengths and weaknesses, and what your goals are in continuing or concluding the litigation. It may be helpful to you if you spend some time discussing the issues with your attorney before the mediation. The most important thing is to go into the process with an open mind and positive attitude.

SETTLEMENT WEEK
MEDIATOR APPLICATION FORM

NAME: _____

FIRM/EMPLOYER: _____

ADDRESS: _____

ZIP CODE: _____

PHONE: _____

FAX: _____

QUALIFICATIONS: (CHECK ALL THE FOLLOWING WHICH APPLY TO YOU)

_____ Attorney Mediator _____ Non-Attorney Mediator

_____ Have had a 40-hour mediation training and have mediated at least 5 cases on my own.

_____ Served as a lead mediator at Settlement Week in past years.

_____ Have had a 40-hour mediation training and have mediated less than 5 cases on my own.

_____ I would like to observe only.

MEDIATION FORMAT PREFERENCE: (CHECK ALL THE FOLLOWING WHICH APPLY TO YOU)

_____ Mediate on my own.

_____ Co-mediate. (A co-mediator is a person who has completed at least a 40-hour basic mediation training course and has actively mediated cases.)

_____ I do not wish to have an observer present. (An observer is a person seeking additional mediation experience, but who will not participate in the mediation unless invited to do so by the mediator and the parties.)

RETURN BY *July 25, 1997* TO:

Sydni McGahan
Travis County ADR Coordinator
PO Box 1748, Rm.: 307
Austin, Texas 78767

EXHIBIT "A"

SETTLEMENT WEEK PROCEDURE

1. Participation in the Conference.
 - a) The parties, their insurance representatives (if any) and their attorneys are required by this Order to attend and participate in the mediation.
 - b) In the case of the parties who are not individuals, an authorized representative of the party with full authority to make a binding decision regarding settlement is required to attend.
 - c) Parties covered by insurance also are required to have present an authorized representative of the insurance carrier with full authority to make a binding decision regarding settlement.
 - d) If the insurance representative with full authority to settle is located more than 200 miles from Travis County, a local representative of the insurance carrier with limited authority to settle may appear at the Settlement Week conference, provided that the person with full authority to settle the matter is readily available by telephone during the entire time of the conference.
 - e) **FULL AUTHORITY** means authority to make a binding settlement in conformity with the party's good faith evaluation of the case.
 - f) The actual parties to the litigation are expected to be active participants in the process, and mediators may interact with the litigants and insurance representatives directly.
2. Role of the Mediator.
 - a) The mediation conference will be conducted before a mediator who will preside over the settlement negotiations.
 - b) Mediators will discuss and identify the issues with the participants. There will be no formal presentations of evidence. Witnesses will not be called. Exhibits need not be offered; however, attorneys are advised that they may bring any materials that they deem helpful to the negotiations. The use of such materials will not create issues of admissibility.
 - c) At some point during the mediation, the mediator may meet separately with each group of litigants.
 - d) Mediators will not make any rulings on the merits of the case. Their function will be to facilitate negotiations between the parties.
3. Each mediation conference will be scheduled for three hours. If the participants wish to continue their negotiations beyond this period, they may do so if all parties, attorneys and the mediator agree to the continuation. Mediations that exceed the prescribed time period will need to move to a new location. The mediator may check with the ADR Coordinator for available space, since all courtrooms will be scheduled for mediation conferences throughout the day.
4. The parties will be encouraged to reduce their agreements to writing at the conclusion of the mediation. Forms will be available for this purpose. The duty Judge and a court reporter will be available, if necessary, to record settlement agreements.
5. All participants in the mediation will complete evaluation forms at the conclusion of each conference.

Appendix C

August 22, 1995

TRAVIS COUNTY DISTRICT CLERK'S

FILE NO. 121,012

IN THE DISTRICT COURTS OF

TRAVIS COUNTY, TEXAS

ORDER CONCERNING MEDIATION OF CASES SET ON THE MERITS

In order to promote the resolution of cases prior to trial through the use of alternative dispute resolution processes, to test the effectiveness of ADR in helping parties reach an acceptable settlement of their disputes, and to reduce the backlog of cases on the docket, the District Courts of Travis County, Texas adopt the following plan.

1. The setting of a case for trial on the merits on the jury docket or on the more than half day non-jury docket [Local Rule 2.4(a)] automatically refers that case to pre-trial mediation, as provided in paragraph 2 below. The setting of a case for trial does not, however, automatically refer the case to pre-trial mediation in any of the following instances:
 - a. When counsel for one or more of the parties files notice that the dispute was submitted to mediation or another ADR process prior to the date the setting was obtained.
 - b. When all parties to a case agree to another type of ADR procedure authorized by the Texas Alternative Dispute Resolution Procedures Act, Tex. Civ. Prac. & Rem. Code § 154.001 et seq.

- c. When any party to a case files a motion objecting to the referral and the court hearing the motion finds that there is a reasonable basis for the objection. If the court so finds, the court may, in its discretion, cancel the automatic referral to mediation. If all or most of the parties object to mediation, those objections will be weighed carefully. The court, however, may still require mediation if the judge determines that mediation is advisable in spite of the objections. The ADR Coordinator will carefully track all cases referred to mediation over objection and regularly report those statistics so that the judges can periodically assess the efficacy of referral to mediation over objection.
 - d. The following types of cases are exempt from this order: 1) Administrative appeals challenging an agency order or rule; and 2) Cases brought by the Department of Protective and Regulatory Services under the Family Code. In any exempt case a party may still file a motion to refer the case to ADR.
 - e. Parties in cases set before an associate judge shall comply with this order if the case would come within the terms of this Order if the case were set before a district judge.
2. Payment of the mediator shall be by agreement of the parties and the mediator.⁸⁰ Failing agreement, the court

shall set a fee pursuant to statute. If one or more of the parties cannot afford the cost of mediation and the court finds a reasonable basis for that objection, the court may refer the case to the ADR Coordinator with the instruction to assist the parties in the selection of a mediator from the list of mediators or mediation centers, such as the Dispute Resolution Center, which have volunteered to perform mediations on a nominal fee or pro bono basis. If the parties are unable to obtain a pro bono or nominal cost mediation they will report this fact to the ADR Coordinator and the court which heard the objection.

3. The mediation or other ADR procedure should be completed not less than 45 days for a jury trial, or 15 days for a non-jury trial, prior to the beginning of trial. Upon agreement of the parties or order of the court, the time for completion may be changed. Failure to comply with the time prescribed in this paragraph may result in the case being moved to the bottom of the list of cases set for the same date, as in Local Rule 3.4, or may result in striking the setting or other appropriate order.
4. The parties may select by agreement any mediator who is on the list of mediators maintained by the ADR Coordinator's office or who is otherwise qualified pursuant to the Texas Alternative Dispute Resolution Procedures Act, Tex. Civ. Prac. & Rem. Code § 154.001

et seq. If the parties do not agree on a mediator they must either request the ADR Coordinator to make a random selection of mediators from that list or request the court to assign a mediator.

5. After a mediator is selected, the parties shall present a proposed order setting out the mediator, the date, time; and place of the mediation, and any special provisions such as those relating to payment or authority. The parties shall comply with the Supreme Court Order regarding judicial appointments and fees and complete the required local forms.
6. The setting of a case and the corresponding referral to pre-trial mediation or other ADR procedure does not automatically stay discovery under the Texas Rules of Civil Procedure. Upon agreement of the parties or order of the court after notice and hearing, discovery may be stayed.
7. Nothing in this order prevents a case from being submitted to ADR at any time by the agreement of the parties, by motion of one of the parties pursuant to Tex. Civ. Prac. & Rem. Code § 154.001 et seq., or on the court's own motion.
8. When making an announcement for either a jury setting or a more than one-half day setting during the announcement period as set out in Local Rules 3.1 and 3.2, the attorneys representing all parties shall include in their announcement of time a statement as to

whether or not mediation or another approved ADR procedure has been completed.

9. Within 5 days of the conclusion of the mediation, the mediator shall file a written report of the date that the mediation was held and whether or not the case settled. The mediator shall not indicate the terms of any settlement or otherwise elaborate on the proceedings.
10. All notices, motions and reports shall be filed with the District Clerk, with copies sent to the ADR Coordinator.
11. This order is effective from September 1, 1995, and applies to all settings, whenever obtained, on or after January 1, 1996. The Local Administrative Judge shall appoint a committee of the bench and bar, and name its chair, to evaluate this experimental project for the purpose of considering whether to promulgate local rules for automatic referral to mediation. The committee shall carefully follow the cases referred under this order and report its recommendations by September 1, 1996.

SIGNED this 23rd day of August, 1995.

Mary Pearl Williams *John K. Dietz*

MARY PEARL WILLIAMS
Judge, 53rd District Court

JOHN DIETZ
Judge, 250th District Court

W. Jeanne Meurer

W. JEANNE MEURER
Judge, 98th District Court

Pete Lowry

PETE LOWRY
Judge, 261st District Court

Joseph H. Hart

JOSEPH H. HART
Judge, 126th District Court

Jon Wissner

JON WISSER
Judge, 299th District Court

Wilford Flowers

WILFORD FLOWERS
Judge, 147th District Court

Bob Perkins

BOB PERKINS
Judge, 331st District Court

Mike Lynch

MIKE LYNCH
Judge, 167th District Court

F. Scott McCown

F. SCOTT MCCOWN
Judge, 345th District Court

Paul Davis

PAUL DAVIS
Judge, 200th District Court

Margaret A. Cooper

MARGARET A. COOPER
Judge, 353rd District Court

Suzanne Covington

SUZANNE COVINGTON
Judge, 201st District Court

Appendix D

ADR Task Force Concerns August 22, 1997

1. What is case screening criteria?
2. Analysis of this settlement Week
 - benchmark
 - questionnaire
3. Purposes it serves
 - mediators
 - judges
 - parties
 - litigators
 - does it give value
4. Does it give value to county
 - case flow management?
5. Parties resolve disputes
6. Is it finished? What would be lost without settlement week?
7. Fees
8. Settlement Rates
9. Disposition of cases? Ultimate goal?
10. Attorney or non attorney?
11. J. Hart suggests attracting cases with meaningful chance of resolution.
12. Ticket punching?
 - is it standing order
 - what needs to be changed
13. Settlement Week typical of cases in Travis County?
 - standing order okay?
14. mediation only or other choices?
15. mediator quality
16. avoid dog cases

Appendix E

Settlement Week Questionnaire

Background

1. Cause Number: _____
2. Mediation Date: _____
3. Briefly describe the nature of the dispute:
 Bad Faith Breach of Warranty Collection Construction Contract Dispute
 DTPA Employee's Rights Family Law Foreclosure Legal Malpractice
 Medical Malpractice Products Liability Personal Injury (auto) Personal Injury (other)
 Property Damage Real Estate Suit on note Worker's Comp.
 Other, please specify _____
4. Are you a:
 Plaintiff Plaintiff's Attorney Defendant Defendant's Attorney
 Claims Adjustor or Insurance Representative Other
5. When did this action or cause arise? _____
6. Was this the first settlement attempt?
 yes no
7. a. If no, when was the first attempt? _____
b. What settlement techniques did you use? _____
8. Why did you choose to participate in Settlement Week?
 client could not afford private mediation to comply with standing order to mediate
 attorney suggested using process recommendation from participant
 process was easy to use other, please elaborate _____
9. What was the demand?
 less than 10,000 10,000-50,000 50,000-100,000 Over 100,000
 other

10. Was there an offer?
 yes no
11. If yes, how much?
 1-10,000 10,000-50,000 50,000-100,000 Over 100,000
 No settlement Nonmonetary, please describe _____

Settlement Week Mediation

12. How would you rate this Settlement Week mediation?
 Excellent Above Average Average Below Average Poor
13. If you selected "average, below average, or poor" was your answer based on any of the responses listed below?: (Please check all that apply.)
 Mediation was conducted too early.
 Mediation was conducted too late.
 At least one party opposed to the mediation did not want to settle this case.
 At least one party was inadequately prepared.
 All parties necessary to the negotiations were not actually in attendance or readily available.
 A party or representative with adequate knowledge of the case was not in attendance or readily available.
 Neither lead counsel nor counsel with adequate knowledge of the case was actually in attendance.
14. Do you think this Settlement Week mediation was fair?
 yes no
15. If no, why not? _____
16. Were you satisfied that this Settlement Week mediation was confidential?
 yes no
17. Were you satisfied with your experience during Settlement Week?
 yes no
18. If no, why not? _____

19. Do you think this Settlement Week mediation provided a simple way to handle cases?
___ yes ___ no
20. If no, why not? _____
21. Did this Settlement Week mediation prove useful in the disposition of your case?
___ yes ___ no
22. If yes, how? _____
23. Did this Settlement Week mediation enable you to gain more information on your case?
___ yes ___ no
24. Did this Settlement Week mediation help foster better relations between the parties?
___ yes ___ no
25. Do you think this Settlement Week mediation saved money in this case?
26. If yes, how much? _____
27. Do you think this Settlement Week mediation saved time in this case?
28. If yes, how much? _____
29. What part of this Settlement Week mediation was most useful?

30. What part of this Settlement Week mediation was least useful?

31. Was your participation in this Settlement Week mediation voluntary?
___ yes ___ no
32. If no, please explain _____
33. Do you think this case was appropriate for mediation?
___ yes ___ no
34. If no, why not? _____
35. Did you expect this case to settle?
___ yes ___ no

36. Why or why not? _____
37. Did you feel any pressure to achieve a certain outcome during this Settlement Week mediation?
 yes no
38. If yes, from whom:
 client attorney mediator judge other, who? _____
39. If this Settlement Week mediation had not been conducted, do you think the result would have been the same?
 yes no
40. If no, why not? _____
41. If this mediation had been conducted earlier, do you think the result would have been the same?
 yes no
42. If no, why not? _____
43. Did you prepare for this mediation?
 yes no
44. If yes, did this preparation include:
 discussions with attorney/client talking to opposing party/counsel reviewing case
 preparing opening settlement other, please elaborate _____
45. Would you participate in a Settlement Week mediation again?
 yes no
46. If no, why not? _____
47. Would you recommend any changes for the Settlement Week mediations?
 yes no
48. If yes, what changes would you recommend? _____
49. If Settlement Week mediations were not available, what would you have done with this case?
 no mediation paid private mediator requested pro bono mediator
 mediated at Dispute Resolution Center other, please elaborate _____

Mediator

50. How would you rate your mediator?

excellent above average average below average poor

51. If you selected average, below average or poor, was your answer based on the mediator:

(Please check all that apply.)

not appearing neutral/impartial

not having adequate knowledge of the subject matter

not having adequate knowledge of the mediation process

attempting to impose his or her own evaluation of the case

not treating all participants with respect

not having control over the mediation

other, please elaborate _____

52. Did the mediator's level of expertise affect the outcome of the mediation?

yes no

53. If so, how? _____

54. Was it necessary to educate the mediator about the facts of the case?

yes no

55. If yes, how did this affect the outcome of the mediation? _____

56. Do you think it was necessary to have an attorney mediator for this case?

yes no

57. Would you recommend this mediator to anyone else?

yes no

58. Why or why not? _____

Dispute Resolution Method

59. How would you rate mediation as a tool to resolve disputes?
 excellent above average average below average poor
60. Do you think mediation was the best choice for this case?
 yes no
61. If you had not mediated, is it because you would have:
 settled tried the case used another ADR method other, explain _____

62. Would you have preferred a choice among other ADR methods?
 yes no
63. What other method would you choose?
 arbitration (binding) arbitration (non-binding) mini-trials negotiations
 settlement conferences trial other, please elaborate _____

64. Why? _____

65. Would you recommend the mediation process to others?
 yes no
66. If no, why not? _____

Additional Comments

Please list any additional comments you have about this Settlement Week mediation or the mediation process in general.

Appendix F

Travis County Settlement Week Variable Description

Number	Name	Description	Codes*
1	Dispute	Type of Dispute	1=bad faith 2=breach of warranty 3=collection 4=construction 5=contract dispute 6=DTPA 7=employee's rights 8=family law 9=foreclosure 10=legal malpractice 11=medical malpractice 12=products liability 13=personal injury (auto) 14=personal injury (other) 15= property damage 16=real estate 17=suit on note 18=worker's compensation 19=other
2	Party	Participant	1=plaintiff 2=plaintiff's attorney 3=defendant 4=defendant's attorney 5=claims adjuster/insurance representative 6=other
3	Action	Cause Arise	1=less than 6 months 2=6 months to one year 3=over one year to 2 years 4=over 2 years to 3 years 5=over 3 years
4	Attempt	First Settlement	0=no 1=yes
5	Reason	Choosing SW	1=client could not afford private mediation 2=to comply with standing order to mediate 3=attorney suggested using process 4=recommendation from participant 5=process was easy to use 6=other
6	Demands	Demands	1=less than 10,000 2=10,000-50,000 3=50,000-100,000 4=over 100,000 5=other
7	Offer	Offers	0=no 1=yes

Travis County Settlement Week Variable Description

8	Offer2	Offers2	1=1-10,000 2=10,000-50,000 3=50,000-100,000 4=Over 100,000 5=no settlement 6=other
8	SWRate	Rating Mediation	0=Poor 1=Below Average 2=Average 3=Above Average 4=Excellent
9	SWRate2	Response	1=mediation too early 2=mediation too late 3=one party did not want to settle 4=one party not prepared 5=not all in attendance 6=party or representative with knowledge not available or in attendance 7=no lead counsel available or in attendance
10	Fair	Fairness of Settlement	0=no 1=yes
11	Confidential	Confidentiality	0=no 1=yes
12	Satisfaction	Satisfaction Level	0=no 1=yes
13	Simple	Process Simple	0=no 1=yes
14	Useful	Useful to Disposition	0=no 1=yes
15	Information	Gain Information	0=no 1=yes
16	Relation	Foster Better Relations	0=no 1=yes
17	Money	Saved Money	0=no 1=yes
18	Time	Time Savings	0=no 1=yes
19	Voluntary	Voluntariness of Participation	0=no 1=yes
20	Appropri	Appropriate for Mediation	0=no 1=yes
21	Expect	Expectations of Settlement	0=no 1=yes

Travis County Settlement Week Variable Description

23	Pressure	Pressure to Achieve Outcome	0=no 1=yes
24	Pressure2	Pressure Source	1=client 2=attorney 3=mediator 4=judge 5=other
25	Named	If No Mediation Conducted	0=no 1=yes
26	Earlymed	Mediation Conducted Early	0=no 1=yes
27	Preparat	Preparation for Mediation	0=no 1=yes
28	Prepara2	Preparation Type	1=discussions with client/attorney 2=talking to opposing party/counsel 3=review case 4=preparing opening statement 5=other
29	Particip	Participate in SW Again	0=no 1=yes
30	Changes	Recommendations for Change	0=no 1=yes
31	Options	Other Options	0=no mediation 1=paid private mediator 2=requested pro bono mediator 3=mediated at DRC 4=other
32	Mediator	Rate Mediator Skill	0=Poor 1=Below Average 2=Average 3=Above Average 4=Excellent
33	Mediat2	Responses to Skill	1=not neutral/impartial 2=no adequate knowledge of subject matter 3=no knowledge of mediation process 4=own evaluation imposed 5=not treating parties with respect 6=not having control over mediation 7=other
34	Expertis	Mediator's Level of Expertise	0=no 1=yes
35	Educate	Educating Mediators	0=no 1=yes
36	Attorney	Attorney Mediators	0=no 1=yes

Travis County Settlement Week Variable Description			
37	Recommen	Recommend Mediation	0=no 1=yes
38	Tool	Tool to Resolve Disputes	0=Poor 1=Below Average 2=Average 3=Above Average 4=Excellent
39	Best	Mediation as Best Choice	0=no 1=yes
40	Nomed2	If No Mediation, Why	1=settled 2=tried the case 3=used another ADR method 4=other
41	Prefferre	Preference in Choice	0=no 1=yes
42	Method	Other Methods	1=arbitration (binding) 2=arbitration (non-binding) 3=mini-trials 4=negotiations 5=settlement conferences 6=trial 7=other
43	Recommec2	Recommends Mediation Process	0=no 1=yes

***Note:** Missing variables are coded 010=multiple answers; 020=blank answers; and 030=answer not necessary.

Appendix G

Questionnaire Narrative Responses

7b. What settlement techniques did you use?

- all of them
- demand letter/packet (33)
- negotiations (28)
- review of facts
- attorney correspondence/discussion (12)
- offer made (17)
- telephone calls/oral communications (21)
- DTPA notice
- claims adjustor (8)
- discovery (2)
- letters (5)
- Soviet (2)
- direct, prior to attorney involvement
- denial (3)
- good faith (2)
- mediation (7)

8. Why did you choose to participate in Settlement Week?

- to quickly facilitate settlement
- court ordered (2)
- cost /free mediation (3)
- past experience successful (3)
- settlement week
- interested third party
- need to understand process
- inexpensive way to get parties to focus on claims
- good mediation usually
- cost effective for size and nature of case (2)
- to try to resolve (2)
- all parties should take advantage of settlement week
- unknown
- works well in most cases
- wanted to settle
- opposing counsel initiated and we agreed (6)

9. What was the demand?

- no demand before mediation (2)
- environmental compliance
- custody

10. Was there an offer?

11. If yes, how much?

- custody (3)
- job transfer (4)
- no settlement
- issues were narrowed. . .clients are now talking to each other
- visitation

12. **How would you rate Settlement Week mediation?**
- defendant failed to negotiate
13. **If you selected "average, below average, or poor" was your answer based on any of the responses listed below?:**
- (Please check all that apply.)**
- unrealistic plaintiff attorney
 - plaintiff did not have documentation
 - demand was higher than jury could award
 - our party was unsure of his desires
 - not a good case for mediation
 - opposing counsel not knowledgeable about facts or law
 - none of the above (2)
14. **Do you think this Settlement Week mediation was fair?**
15. **If no, why not?**
- plaintiff had obvious fraudulent claim . . .the mediator should have recognized this fact
 - did not cover all the costs
 - other party did not want to settle
 - settlement was too high
 - what was "fair" was not an issue for defendant's counsel, but it appeared to be a very good means to settle disputes
17. **Were you satisfied with your experience during Settlement Week?**
18. **If no, why not?**
- plaintiff's unrealistic in their demands
 - defendant's attitude
 - insurance company will not pay any money
 - predetermined offer without authority to negotiate
 - I have no experience
 - insurance adjustor unreasonable
 - dissatisfied with the outcome. . .but mediator did excellent job
 - settlement too high
 - no final offer
 - insurance company agreed to mediator and then made no offer
 - the other party which initiated the settlement mediation was unwilling to make a fair settlement
 - defendant's failed to come off its initial settlement position
 - claim of plaintiff so poor that this was a tremendous waste of time and money
 - at least one party was inadequately prepared
 - conducted too early (2)
 - mediator did a good job . . .all state was unfair and should not have agreed to mediate
 - waste of time, plaintiff's lawyers fault
 - case did not progress
 - I knew it couldn't be settled
 - no settlement (3)
 - no settlement, mediation process was well done, no agreement
19. **Do you think this Settlement Week mediation provided a simple way to handle cases?**

20. If no, why not?

- no... too much variance among mediators, some very good; many are not
- no experience
- did not understand enough facts
- not a simple case
- mine did not settle
- most do not wish to settle
- this case should not have been mediated

21. Did this Settlement Week mediation prove useful in the disposition of your case?

- mediator was very productive

22. If yes, how?

- advanced discussions of issues (5)
- got parties talking (5)
- clear the air
- value of claim is the same regardless if you have an attorney
- no settlement (4)
- inexpensive, quick
- setting parameter and narrowed issues (6)
- positions explained (4)
- compromise
- court appearance not necessary
- depends if it settles
- waste of time
- helped resolve where impasse was
- opposing party reluctant to settle
- partial settlement (2)
- not a good case for the process
- delineated trial vs. settlement options
- made progress toward settlement (3)
- discuss possible negotiations (4)
- less time incurred
- it provides a basis
- settlement (24)
- neutral setting
- settlement amount was inappropriate (2)
- strength/ weaknesses realized (4)
- counterclaim was an issue
- provides a forum requiring serious settlement discussion (2)
- meritless case
- can resolve case earlier
- finally received offer from other side

23. Did this Settlement Week mediation enable you to gain more information on your case?

- more information on our bad points

25. Do you think this Settlement Week mediation saved money in this case?

26. **If yes, how much?**

- expense of litigation (10)
- we have not settled, but less than expected
- hours, physically and emotionally
- did not settle
- not likely but possible
- no if it does not settle
- saved money for attorney and stress for client
- difficult to assess (5)
- mediation fees (13)
- \$300-600 (6)
- \$500-1500 (20)
- \$2000-3000 (17)
- \$3000-6000 (17)
- \$6000-8000
- \$10,000-15,000 (12)
- \$18,000 (2)
- \$20,000-40,000 (2)

27. **Do you think this Settlement Week mediation saved time in this case?**

28. **If yes, how much?**

- none (2)
- did not settle
- settled in 30 minutes
- talked it out
- none, if it does not settle
- unknown (3)
- 2-5 hours (5)
- 7-10 hours (5)
- 20-25 hours (4)
- 30-50 hours (7)
- 60-80 hours (3)
- 100's of hours
- half day (2)
- 1-3 days (12)
- 4-5 days (6)
- 7-10 days (3)
- 1 week (4)
- 2-3 weeks (6)
- several weeks (2)
- months (6)
- 1-3 months (7)
- 3-6 months (6)
- 6 months- 1 year (6)
- 1-4 years
- brought the case to conclusion in a brief mediation
- yes because he was trying to reach an agreement
- mediation fee
- time of going to court (10)
- intangible
- it could have if the other party had been reasonable

29. What part of this Settlement Week mediation was most useful?

- outcome (3)
- information/fact exchange (22)
- useful prep for trial
- forced scheduling (2)
- objective person
- informal conversation
- mediation (9)
- opening statements (6)
- face to face meeting/confrontation (39)
- discussion of issues (19)
- splitting up/caucusing (3)
- discussion of strengths/weaknesses (13)
- not useful at all (4)
- had an opportunity to meet a mediator which I never used before
- satisfying local rules (2)
- most of it
- impartial participants
- both parties better able to understand each other
- attempting to settle (2)
- the end
- waste of time since no settlement reached
- being able to hear the issues on both sides in a non-adversarial environment
- efficiency (2)
- effort was seamless
- professionalism and hard work (2)
- confirmed other party was unreasonable
- gay support
- settled (9)
- making mediation available at a small cost (11)
- skills and intelligence of mediator (2)
- economical
- convenience
- saving time (2)
- to get parties to work it out
- joint sessions (2)
- having party responsible for paying present
- atmosphere of settlement (2)
- getting the other side to hear an explanation of theories of liability and getting it to think in terms of paying money
- volunteer mediator (12)
- nothing in particular
- overall helpful (2)
- after four years, it is over
- forcing me to closely review the case
- caused insurance company to offer policy limits before trial setting
- one party not present
- running back and forth
- mediator working with unwilling parties (2)
- suggestions by mediator on how to resolve (4)
- compromise
- questionnaire
- client has better understanding of system
- negotiation (4)
- mediator understood issues
- getting it over (2)

30. What part of this Settlement Week mediation was least useful?

- being separated (3)
- not enough time (5)
- discussion about settlement (2)
- opening statement (2)
- lack of control
- lack of neutrality
- lack of reality
- talking numbers
- closing statement
- facilities
- lawyers talking
- not enough information to make evaluation
- waiting
- opposing party's unwillingness to negotiate (2)
- top offer already expended
- no settlement (8)
- negotiation (4)
- uninformed opposing party
- see no downside (3)
- opposing party unreasonable/unrealistic (2)
- opposing attorney (3)
- past
- argument
- mediator
- waste of time
- listening to opposing party
- confidential
- other party did not want to settle
- these forms (4)
- not sure
- mediator analyzing opposing sides theories
- having to meet face to face (3)
- pushing by mediator
- all useful (5)
- no real progress
- not a good case for mediation
- hours of the scheduled mediation
- offers money
- the other party was ignorant of the facts
- defense posture
- adjustors
- recalcitrant insurance adjustor
- case that needed to be settled or should be settled did not
- paying for parking
- lack of records
- other party's intentions
- small increment increase in fines
- being forced into it

31. Was your participation in this Settlement Week mediation voluntary?

32. If no, please explain.

- referred by opposing attorney. . . not able to decline due to local rules
- settlement week
- pursuant to local rules
- required by court (23)
- sanctions
- not a good case for mediation
- other party submitted (2)
- except under local rules we would have been obligated to mediate at some point
- mandatory but highly desirable

33. Do you think this case was appropriate for mediation?

34. If no, why not?

- defendant wanted a doctor's letter
- settlement not possible (2)
- too early (2)
- other party too unreasonable
- not going to settle
- will require more time
- not a good case for mediation
- parties need to meet outside
- minor
- involved denial of claim
- parties did not understand the case
- no discovery (3)
- neither party was willing to compromise
- parties of other end of spectrum (5)
- it should have settled prior
- liability dispute (5)
- serious injury, high damages and no liability
- issues were narrowed prior to mediation and all information exchanged
- previous with experience with attorney and this type of case

35. Did you expect this case to settle?

- hopefully
- all state insurance company was on other side

36. Why or why not?

- hope
- other parties claim poverty (2)
- insurance company was not very compromising at first (2)
- party wants trial
- not a good case for mediation
- simple case
- too complicated
- economically a settlement makes sense
- high medical bills
- did not expect party to be reasonable...note the party. . .not his attorney. . . is the unreasonable one
- state is not known to settle (2)
- this insurance company normally does not settle
- too much different
- neither party has any money resources

- unrealistic expectation of client/attorney (5)
- other party insane
- facts indicated settlement appropriate
- believed I had conclusive facts
- emotional involvement of parties too high
- lack of medical documents
- clear concise facts
- felt we could reach a fair agreement
- very minor problem (2)
- they were wrong and poor and had to settle
- not financially possible at this time
- main issue is agreed on . . . it is time frame that is problem
- other party's too bitter and angry
- no liability issues (3)
- limited damages (2)
- did not think other side would accept offer
- yes because case was small (4)
- plaintiff not prepared for trial which is in next 2 weeks
- I thought the offer was more than fair
- costs of litigation, risks of litigation
- claim was reasonable and justifiable (4)
- mediation process was well done
- parties too litigious to settle
- parties too far apart (12)
- small, no sense to spend more money (4)
- demand too high for problem experienced
- high cost of compliance
- at this point we were not able to offer the full meds.
- city is on other side
- I did not feel that the other party would agree to pay
- liability dispute (11)
- too many issues (2)
- other side had up to this time been obstinate
- factual dispute (3)
- party appeared to want mediation (3)
- other party's claim unreasonable/unrealistic (6)
- bad feelings of parties
- other party does not understand his position
- not enough information from other side before mediation
- family law matters are best left for parties to agree
- no earlier willingness to compromise
- settlement of issues
- only negotiating figures
- insurance co. will not award money (2)
- written discovery was done. . .we knew issues . . both sides and mediator were experienced
- to save time and money
- damage dispute
- good liability, good damages, good plaintiff
- previous experience with attorney
- thought it might be possible

37. **Did you feel any pressure to achieve a certain outcome during this Settlement Week mediation?**

38. **If yes, from whom:**

- other attorney
- insurance company
- my own desire to settle
- time constraint
- self (6)
- due diligence for medical bills to be paid
- client, but it still helped

39. **If this Settlement Week mediation had not been conducted, do you think the result would have been the same?**

40. **If no, why not?**

- result of trial very unpredictable (2)
- would not have had opportunity to talk (5)
- couldn't really afford private mediator (2)
- needed a mediator
- did not settle
- no one was bringing both sides together
- no . . . a lot more money to pursue
- probably would have gotten more . . . but spent more to get it
- I do not believe case can be settled at this time
- more time in court . . . more frustration
- the process was necessary for the results
- it is good to have a mediation
- more expense would have been involved (3)
- would have gone to trial (9)
- would not have settled (2)
- more ill feeling now
- don't know (2)
- no offer had been made until now
- too many bad feelings
- offered policy limits
- state farm does not want to settle because of injuries
- probably would have hired mediator
- we would have gotten full restitution
- clients needed mediation process
- parties working toward a creative compromise that would not be ordered by judge
- it would have drug out too long (2)
- jury might have awarded more damages
- litigation expense (2)
- extra hours needed to try case
- parties were much more cooperative in mediation
- started the parties discussion on settlement
- mediator truly facilitated it
- I don't think other side would have made an offer

41. **If this mediation had been conducted earlier, do you think the result would have been the same?**

42. **If no, why not?**

- too far away from trial (2)
- state farm will not settle because of injuries
- too soon
- two parties are in agreement

- less depositions
- other claim
- case was ripe for settlement
- different counsel
- less chance to settle
- needed other case resolved first
- litigation expense had grown too high
- possible that party and his attorney would have been less demanding
- no one would have been knowledgeable enough to mediate
- would settle for less
- parties positions had already been solidified, too much bad blood
- depositions/discovery incomplete (11)
- needed time for temporary orders to work (2)
- other party would not have been willing to settle
- everyone was sick of discovery by this point
- the parties would not have incurred attorneys fees and costs
- the risk of loss was a reality, I was already prepared for trial
- not settleable
- medical treatment not complete
- not ready (2)
- too far apart
- same offer
- could have saved considerable cost (2)
- met with treating physician
- earlier would be better
- an additional party
- we all know more know

43. **Did you prepare for this mediation?**

44. **If yes, did this preparation include:**

- conference with adjustor (2)
- speaking with witnesses
- went to accident scene
- preparing special notebook
- position statement
- audit completed by CPA as to partnership
- talk to expert
- review file
- preparing materials for Settlement Week

45. **Would you participate in a Settlement Week mediation again?**

46. **If no, why not?**

- good approach for some cases
- not fruitful enough to justify time or expense (2)

47. **Would you recommend any changes for the Settlement Week mediations?**

48. If yes, what changes would you recommend?

- offer non-requesting party right to refuse
- cookies and coke
- better parking
- let us know that cases are not chosen
- bilingual mediator with Spanish speaking parties
- more experienced mediators. . . make actual effort to get them
- too many mediators are mediocre at best
- wait until both parties are ready to mediate instead of just plaintiff
- less paperwork
- make sure it is mediateable
- more mediators
- more availability
- some cases not selected
- matching mediations specifically with the type of cases
- more information
- mediators more aggressive
- options to continue later in the week
- make mandatory for county courts as well
- more often (2)
- ask for a position paper beforehand from all parties (2)
- more client participation
- no need for attorney mediator
- 2 hour mediation on small limit cases
- three hour time limit good
- longer sessions (5)
- do it in same room together
- forget this form
- questionnaire too long (7)
- adverse parties not to agree to mediation unless they are going to offer a settlement
- pay the mediator
- tax cases
- improve parking
- include more cases

49. If Settlement Week mediations were not available, what would you have done with this case?

- trial (29)
- let lawyers handle (2)
- depends on case
- paid private mediator. . . not sure if client could have afforded this
- not mediated
- negotiated before trial
- this would have been the attorneys decision
- ongoing attorney to attorney discussion
- discovery and MST
- except for court order
- more settlement talks (2)

50. How would you rate your mediator?

51. **If you selected average, below average or poor, was your answer based on the mediator:**

- claim was fraudulent, mediator should have known this
- with more experience, he will be a fine mediator
- told me "they are not at bottom"
- my first mediation
- not too enthusiastic. . .aggressive
- refused to relate counter offer to other party while in caucus, said issues were unimportant details
- no problem
- needed to go to financial ability earlier
- no experience to compare
- could have been more forceful, needed a litigator
- parties unwilling, mediator good
- not pushing hard enough (3)
- did not add much help parties evaluate case. . . just took messages between parties. . .no real discussion with parties in conferences to review pros/cons of case
- case did not last long enough to get feel for mediator

52. **Did the mediator's level of expertise affect the outcome of the mediation?**

53. **If so, how?**

- showed outstanding judgment
- although the mediator was knowledgeable and fair the insurance company would not allow her to make progress
- subject background knowledge and competence (16)
- lots of options
- felt sure it was confidential
- helped (4)
- knowledgeable (6)
- offered alternatives (2)
- facilitates settlement (3)
- made other party realize settlement potential
- practical experience(6)
- you could tell experience level made both sides settle
- finesse
- reasonable and realistic input
- good discussions (2)
- although the case did not settle, mediator got us a better offer
- cut it off when it was obvious it was failing
- patient (2)
- unbiased
- positive (2)
- good communicator
- board certified and trial experience
- amount of time spent mediating was minimal due to fact that neither party would move on liability analysis
- clarified issues (4)
- did not settle
- getting plaintiff to accept payment structure
- an experienced mediator would have intervened before the attorneys started arguing and tension levels escalated to the point where the mediation became extremely difficult
- mediator considered all participants concerns
- competence to support arguments
- prepared
- kept it moving
- tried to be fair and impartial
- would have been helpful to have bilingual mediator
- he knew the legal issues, risks and probable outcome

- knew what she was doing
- cut to heart of matter (2)
- it made me feel the very best possible effort had been made to resolve a dispute. . . the other party was resistant too
- let us talk
- knew when to speak and when not to
- excellent (2)
- she bargained with each side (2)
- believe a varied perspective played a part
- having expertise with Travis County Court system
- not his fault that case did not settle
- too little experience to facilitate

54. Was it necessary to educate the mediator about the facts of the case?

55. If yes, how did this affect the outcome of the mediation?

- no difference (33)
- mediator did a good job, but settlement was not possible
- always necessary to educate the mediator about the facts
- describe the case
- fostered settlement
- have a fair settlement
- good to show a person with no knowledge about the facts
- mediator better understood our position
- settled
- did nothing . . . parties settled in 30 minutes
- did not help a lot since it was complicated case
- made it faster
- better understanding
- helped to determine what was reasonable
- impartial
- smoother flow (2)
- more appropriate suggestions
- did not expect him to have facts
- helped (8)
- just explained facts and she understood right away
- made negotiation made informed
- enabled mediator to discuss practical issues
- helped evaluate weaknesses
- think facts showed clearly that one side was more in the right
- most effective
- unsuccessful
- knew when to declare an impasse (2)
- positively (6)
- good (4)
- exceptional
- quick study
- helped to educate parties and mediator (2)
- able to have a personal insight
- he was a last minute substitute, but he got up to speed quickly
- had better understanding of case

57. Would you recommend this mediator to anyone else?

58. Why or why not?

- experienced trial attorney (2)
- slow, interrupted, rude
- he settled the case
- for probate work
- he was okay . . . only did what he was suppose to do
- persistent . . . yet understanding
- credentials
- facilitate resolution
- hard working
- only a small amount
- only giving the facts
- intelligent (5)
- patient (2)
- trustworthy (3)
- did not really need much help
- handled mediation in a professional appropriate manner (3)
- handled responsibilities adequately
- seemed interested
- no reason
- he listened to both sides
- fair way to find solution
- fair yet objective
- retired judge
- diplomatic
- not "snowed" by either side
- good listener/communicator (3)
- tried to get feel for both sides (2)
- good lawyer
- good opportunity to focus on settlement
- even handed. . . able to move parties toward resolution
- mood
- depends
- although not forceful would recommend her for simple cases where parties are not too far apart and fairly reasonable. . . mediator knows law and juries well enough to be helpful and she has a good personality that should complement her mediator skills
- excellent (2)
- good mediator (7)
- very little legal action in Austin
- good experience (3)
- efficient (4)
- friendly (4)
- realistic
- good background (2)
- thought provoking
- not in this type of case . . . needs more experience
- good abilities
- experienced (2)
- knowledgeable (19)
- practical
- helpful (2)
- sincere (2)
- respectful to parties
- open-minded (2)
- nice combination of understanding legal realities without talking about them much
- strong, impartial mediator
- very positive (2)

- get the job done (2)
- credible
- cut through the tape
- opinionated when requested, and neutral when requested
- narrowed issues
- focused parties (2)
- not aggressive
- need litigator (2)
- methods are solid and effective
- unbiased
- effective (2)
- very calm, matter of fact manner, not intimidating to client (2)
- great service
- courteous (2)
- prepared, concise, organized
- too little experience in area (2)
- imposes own views
- separated parties
- fair (12)
- compassionate (2)
- presented both sides
- good demeanor (5)
- good job (16)
- not his fault this case did not settle (2)

60. **Do you think mediation was the best choice for this case?**

-no, but it was requested by court

61. **If you had not mediated, is it because you would have:**

- mt
- discussions
- trial (2)
- settled at courthouse steps
- we would have mediated at some point
- written and verbal negotiation
- city is defendant, hard to settle with government

63. **What other method would you choose?**

- SJT
- trial
- no need for a third party
- 3 on panel -MSR

64. **Why?**

- I think mediation is the best method because it gives client a voice and lets them hear from a neutral party
- ability to come to resolution with understanding of why
- different methods work better in some cases
- this in my opinion was the only other alternative
- feel juries are conservative
- had great results
- settlement conferences quicker. . . get an opinion
- settlement conference . . . opinions offered . . . essentially what the mediation did
- arbitration is quick, economical, fair and final

- similar to mediation
- arbitration . . . a reasonable person with enforcement powers might have settled this today
- it is fair
- more fruitful
- not all cases are subject to mediation
- no experience
- save courts time on this type of case
- I will never arbitrate again
- it would give both sides an opportunity to state their respective cases to a neutral 3rd party without being bound by that decision
- sides too far apart
- this case needs to be tried
- save time/cost
- parties have a chance to air their case and get feedback about what may happen if they took the risk of going to court
- not binding
- assurance of results
- not sure
- best alternatives (2)
- gives adverse idea about value of case
- it gives the parties a third party view of the situation, so they can use that view to settle prior to trial
- let judge hear both sides and make a final decision
- opportunity to have quasi judicial proceeding
- forces lawyer to communicate better
- final outcome

65. **Would you recommend the mediation process to others?**

- yes, for a case that could be settled

66. **If no, why not?**

- helpful (2)
- waste of time because lawyer could do this type of bargaining on his own
- it works
- time
- only if voluntary
- helped to have parties solve problems together
- promote cooperation

Please list any additional comments you have about this Settlement Week mediation or the mediation process in general.

- mediator was knowledgeable and impartial
- insurance carriers should be required to bring their fully policy limits authority whether they pay or not
- I believe they wasted everyone's time by not negotiating
- shorter evaluation forms (9)
- form should not identify case number
- this was not a case to judge settlement
- mediator was good and fair
- nice job by mediator . . . no chance to settle
- I think we were fortunate to get a good mediator since it took so long and was complicated
- excellent mediator (2)
- courteous, knowledgeable and persistent without being overbearing
- mediator was great . . . did not have a good case to work with
- another case where the insurance company brought very little money to the table in light of the client's total specials . . . case did not settle . . . but at least we gave it a try
- this is an excellent tool for dispute resolution
- I was very surprised that this case settled
- I am most appreciative of mediator forbearance, patience and perseverance

- made significant strides
- feel this form is too time consuming and cumbersome
- despite what parties may say about the attorney mediators, not knowing about issues-mediators understand the process . . . the process is the issue
- each party should exchange a position paper stating their positions and offer to settle the dispute
- this is definitely a fine way of talking things out and seeing both sides
- great program
- thank you for your assistance
- keep up the good work
- I think all cases should go to court
- I appreciate mediator's patience and perseverance
- your organization is excellent . . . no wast of time . . . room and mediator assigned . . . I am from San Antonio . . . this was great
- find a way to pay at least mediator's parking fee
- I think basic common people would benefit from mediation, but when your hate for an individual is so great and overpowering take it to the judge
- mediator did a good job. . . this case had no chance to settle
- sw would be far more successful if mediation was not required before trial
- we need something that will bring the parties along at a more rapid rate
- mediator was excellent
- for cases like this (completely meritless) mediation probably does not help where plaintiff's expectations are unrealistic
- good tool, saves time and expense
- unfortunately I believe this mediation was suggested merely to fulfill the mandatory requirement before trial . . . unless parties are willing to participate results are unlikely
- unfortunately the defendant did not appear to be serious about resolving the matter
- this is the first time I've ever been involved in a mediation attempt. . . I found the whole experience satisfying
- I was very pleased with the way the mediation turned out. . . the mediators showed great composure, good judgment and wisdom
- very good mediator . . . confident to the point. . .she had control of the situation
- very impressed with mediator, would use again
- this was all new to me and for a first time person it seem organized and might lead in some instances to resolve
- judge . . .with these large insurance companies we are just pawns in a large game . . .the insurance companies simply are not paying in these car wreck cases because we are in the end-game of tort reform
- I feel that it is good if two sides reach an agreement in the case
- Allstate is overbearing and ultimately will be burned
- defendant was inflexible

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