

Demonstrating the Possibilities of Providing Mediation Early and by Court Staff: The Western District of Missouri's Early Assessment Program

In early 1991, a group of attorneys in Kansas City, Missouri met to consider how their local federal court could best help litigants resolve their disputes. While many of these attorneys might have been interested in this question under any circumstances, they were driven in this instance by the requirements of the Civil Justice Reform Act of 1990.¹ Under that statute, their court had been designated a demonstration district and given the explicit responsibility to experiment with alternative dispute resolution.

Prompted by the statute's promise of additional funding if the court adopted a program by January 1, 1992, these attorneys had a strong incentive to design an ADR program with dispatch. They were also motivated by their own belief that ADR might be a useful addition to the court's procedures and by the judges' keen interest in understanding whether ADR could deliver the benefits claimed by its advocates.

From the attorneys' deliberations, undertaken in close consultation with the court, emerged a new and innovative ADR program, the Early Assessment Program. Unique among federal district courts, this program relies not on private sector mediators but on a mediator who is a member of the court staff. Also unlike many other federal district court programs, in this one the ADR session occurs very early in the case.

Why did the attorneys and judges in Missouri Western design this kind of ADR program? What problems were they trying to solve and what benefits did they hope to gain? Have they been successful? How has the bar reacted to the program? What is its future? In this paper, we try to answer these and other questions.²

Why did Missouri Western adopt the Early Assessment Program?

In designing an ADR program for the district, the advisory group of attorneys and judges did not start from scratch. The court had had an arbitration program in place for

¹ Pub.L. 101-650, Sec. 104, as amended Pub.L. 104-33, §1, Oct. 3, 1995, 109 Stat. 292 (the CJRA).

² This paper is based on research carried out at the Federal Judicial Center to assist the Judicial Conference in meeting the CJRA's requirement to submit a report to Congress on the experience of the demonstration programs. The views expressed are, however, my own and not the Center's nor the Conference's. For a full description of the study's methods and findings, see *Report to the Judicial Conference Committee on Court Administration and Case Management: A Study of the Five Demonstration Programs Established Under the Civil Justice Reform Act of 1990* (Federal Judicial Center, January 24, 1997). This paper is written with special thanks to my colleagues Molly Johnson and Patricia Lombard, who were my full partners in the study of the demonstration districts, and to the judges and staff of the Western District of Missouri, whose assistance made our study possible.

nearly ten years, so it already had some experience with ADR.³ Also, the advisory group had studied the court's caseload and overall condition and had concluded that delay was not a serious problem in the district. The group recognized, as well, that most cases in the district, like those in other districts, were resolved either through settlement or some other method short of trial.

Nonetheless, both the judges and advisory group believed that cases could—and should—be resolved earlier and that by doing so litigation costs might be lowered. To achieve earlier resolutions, they decided parties should be encouraged to do several things early in the case:

- meet with and consider the views of the other side;
- hear a neutral assessment of the facts and issues in the case; and
- gain an appreciation for the projected costs if the case were to proceed through the traditional litigation process.

How could the court prompt attorneys, and perhaps more importantly their clients, to undertake these steps? And, in light of the CJRA's requirement that the court experiment with ADR, how could these steps be built into an ADR procedure? The answer, the judges and attorneys agreed, was to design a program that provided case assessment, planning, and settlement assistance very early in the litigation. Several decisions followed.

First, they decided that cases should be required to participate in some form of ADR and that a variety of ADR options should be available to litigants. Thus, the court agreed to expand its ADR offerings to include mediation, early neutral evaluation, and settlement conferences with the magistrate judges.

Second, to provide assistance much earlier in a case, the judges and attorneys determined that the initial event—labeled the “early assessment meeting”—should be held within thirty days after completion of responsive pleadings. At this meeting, they agreed, the person conducting the session should:

- help the parties identify an appropriate ADR method for the case and schedule the first session within ninety days;
- assist the parties in devising a plan for exchanging important information or conducting key discovery so they would be better equipped to hold meaningful settlement discussions earlier in the case;
- offer to serve as mediator if the parties felt prepared to mediate the case at the first session.

³ The court's program was one of ten mandatory pilot arbitration programs authorized by 28 U.S.C. §§ 651-658.

Third, the judges and attorneys agreed that clients should be required to attend the initial meeting. Although there was some reluctance to take this step, the majority believed that client participation and education would be critical for achieving earlier case resolution.

Having established the early assessment meeting as the key feature of the plan, the advisory group attorneys and judges faced the question of who would conduct the meetings. The attorneys thought it could be a magistrate judge or a member of the court staff, but most importantly they did not want the program to rely on volunteer attorneys. They wanted someone whose time would be dedicated to the program, and thus they recommended that the court create the position of Early Assessment Program Administrator. Because this person would be serving not only as the administrator but also, when requested by the parties, as a mediator, the attorneys and judges recognized that the court would have to appoint someone with administrative, legal, and mediation skills.

In designing the program, the attorneys and judges also confronted the question of whether cases assigned to the new ADR program should continue on the court's traditional pretrial path while involved in the ADR effort. Several judges believed that dual processing could result in duplication of effort and that cases should go through the early assessment process before being made subject to traditional pretrial case management procedures.⁴ Others thought the traditional procedures should not be suspended during the EAP process, which is the approach the court adopted.

Although the judges and advisory group attorneys had little difficulty agreeing on the key features and the purpose of the Early Assessment Program, a few judges continued to have reservations about the need for an ADR program or the desirability of a mandatory program. This reluctance led to another feature that distinguishes the program from many others. The hesitant judges were persuaded to adopt the program by a judge who argued that if it were designed as an experiment it would help them resolve a longstanding question: Does ADR really make a difference—particularly, does it bring about earlier dispositions?

Thus, the judges and advisory group agreed to establish the program as a true experiment, in which cases would be randomly assigned to one of three comparison groups: 1) a group of cases required to participate in the program; 2) a group that could volunteer to participate; and 3) a group that would follow a traditional litigation path without participating in the EAP. By comparing the outcomes of cases in the three

⁴ The Western District of Missouri, like nearly all federal district courts, operates on an individual, not master, calendar—i.e., each newly-filed case is assigned to a single judge, who is responsible for it until the case is terminated.

groups, the judges hoped they could determine with some certainty whether the program actually succeeded in meeting its goals.⁵

How does the Early Assessment Program work?⁶

The Early Assessment Program was authorized by a general order on October 31, 1991 and became effective January 1, 1992 for cases filed in the Kansas City division after that date. It remains in effect today and is still authorized by general order.

Selection of cases. All civil cases except certain enumerated case types (e.g., Social Security cases and prisoner petitions) are eligible for the EAP. When an eligible civil case is filed, the intake clerk takes the next card from a deck containing an equal number of randomly shuffled cards labeled “A”, “B”, and “C” and assigns it to the case. “A” cases must participate in the EAP, “B” cases may volunteer to participate, and “C” cases are not permitted to participate. Because participation is randomly determined, cases of every type participate in the early assessment process.

After filing, the EAP office tracks the docket activity for “A” and “B” cases to determine the appropriate time to communicate with them regarding the Early Assessment Program. Although the general order specifies that the process should begin after responsive pleadings, in fact the parties are contacted as soon as there is any docket activity indicating that a defendant is meaningfully engaged with the case (e.g., a motion to dismiss).

For “A” cases, when there is evidence that a defendant has joined the case, the EAP administrator sets a time for the initial assessment meeting and notifies the attorneys. For “B” cases, the EAP office sends invitations to participate in the program, with strong encouragement to do so. If the administrator thinks a case is an especially good candidate for the program, he may also talk with the attorneys by telephone to urge their participation. If he thinks a case very unlikely to benefit from the EAP, which is rare, he may choose not to send an invitation to participate, as permitted by the general order.

Because of the importance of random assignment for evaluating the program’s effects, the court does not allow cases to move from one group to another unless there are unusual circumstances. For example, if an “A” case involves an issue of national significance that requires a judicial decision, the EAP administrator allows it to opt out of the program. Such exceptions are rare. Parties who disagree with the program administrator’s denial of a request to change groups may file a written motion appealing

⁵ Because cases in each group are equally subject to all conditions other than the experimental condition, the program design permits one to conclude that any observed difference between the groups—e.g., in disposition time—are due to the experimental condition.

⁶ Information reported in this section is based on interviews with judges and court staff, examination of the court’s rules and orders, and analysis of information contained in the database maintained by the EAP office.

the decision to the judge assigned the case. Absent special circumstances, however, the court does not reassign cases.

Preparation for the first EAP session. Attorneys are not required to do much paperwork for the first EAP session. There is not, for example, a requirement to submit a statement of facts or a summary of settlement efforts. The program administrator reports that attorney preparation for the meeting varies considerably, but that most have undertaken a modest amount of discovery before coming to the meeting.

Nature of the first EAP session. As originally designed, the program expected attorneys to come to the first EAP session to engage in a discussion about the case and to make plans for discovery and the use of ADR. The program also anticipated that some parties might choose to mediate with the program administrator, but this was not expected to be the choice in most cases.⁷ In practice, however, most parties have asked the EAP administrator to serve as mediator, and most have proceeded to mediation at the first EAP session.⁸ Thus, a program that looked more like Early Neutral Evaluation when first conceived in actuality provides a fairly classic form of mediation. And it provides this service shortly after a defendant is engaged in the case.

The EAP sessions are held in the administrator's office at the courthouse and generally begin with all party representatives and attorneys together in one room.⁹ The administrator describes the ground rules and what will happen during the session, explaining that there are not many rules but that courtesy toward other participants is required. He also sets a relaxed tone and encourages informality by suggesting use of first names and by asking clients to participate.

The administrator briefly describes the other ADR options available at the court and asks the parties to let him know if they have questions about these options or would like to use one of them. He then tells the parties they may also elect to mediate their case with him.

The purpose of the session, the parties are told, is to help them evaluate their case, understand the other side's view of it, and lay the groundwork for settlement by identifying the information they need. The program administrator emphasizes that everything that occurs during the meeting is confidential and that he will work with the parties, if they wish, until settlement is achieved. Parties and counsel are asked to make

⁷ Expecting that many parties would choose to mediate with a private sector attorney, the court trained a cadre of attorneys to serve as mediators for the court's program.

⁸ Between January 1, 1992, when the program began, and August 31, 1996, when we completed our study, twenty-nine cases had chosen a process other than mediation with the EAP administrator. Most selected mediation with a private sector attorney; none selected arbitration, which had been the court's mainstay ADR program.

⁹ This description is based on conversations with the program administrator and observation of EAP sessions.

a note of any additional information that might be needed before the case can be evaluated or settled and to remain flexible and not lock into a position.

After the program administrator's introductory comments, the substance of the meeting begins with the plaintiff's presentation of the facts of the case, followed by the defendant's presentation of his or her view of the facts. The initial story is often told by the attorneys, although the parties themselves frequently add comments after their attorneys have introduced the issues. The presentation of facts is followed by a discussion of the legal issues involved. The program administrator often interjects clarifying questions about the facts or the applicable law, explores what kind of discovery has been done prior to the meeting, and asks what further discovery would be necessary for the parties to be able to evaluate and resolve the case. In private caucuses, he helps the parties explore the strengths and weaknesses of each side's case and asks them to discuss the costs that might be incurred if the case goes to trial. Finally, he asks the parties to let him know if they think another ADR option would work for their case.

Nearly all parties elect at this point to mediate the case with the program administrator, and the session moves into a series of private caucuses with each side. At these caucuses, the program administrator attempts to determine the parties' interests, their settlement requirements, and the extent of settlement authority possessed by the client representative for each party. He also examines whether some other events must take place before settlement potential can be determined (e.g., a ruling on a pending motion or further discovery activity).

If this series of caucuses does not end with a settlement, the administrator schedules, in consultation with the parties, the next events that will take place in the case, such as further discovery. He also sets a date and time for a second EAP meeting, which like the first is aimed at resolution of the case. By this time, several hours will have gone by in the typical case. In the unusual case, the program administrator and parties will have spent a day together.

Size of the EAP caseload. Because of the random assignment of cases to the Early Assessment Program, the number of cases in the program is to some extent determined by the number of eligible cases filed—i.e., one-third of the eligible cases must be in the program. Beyond that, some portion of another one-third of the cases—those that may volunteer—will be in the program.¹⁰

Between January 1, 1992, when the program began, and August 31, 1996, when we completed our study, 3,066 cases were eligible for assignment to a group. Table 1 shows the distribution of assignments and the close-to-equal numbers in each group, as would be expected from random assignment of the cases.

¹⁰ The court, whose main division is located in Kansas City, Missouri, has six judgeships and approximately 2500 civil filings annually, nearly 50% of which are prisoner petitions.

Table 1
Number of Cases Assigned at Filing to Each of Three Groups Established
by the Early Assessment Program, January 1, 1992 to August 31, 1996
Western District of Missouri, Kansas City Division

| Group | Number of Cases |
|--|-----------------|
| Automatically assigned cases (Group "A") | 1011 |
| Voluntary cases (Group "B") | 1017 |
| Control cases (Group "C") | 1038 |
| Total eligible cases | 3066 |

The program administrator held 845 initial meetings in these cases (see Table 2), about two-thirds of them in "A" cases and about one-third in "B" cases. He held a second, and in a few instances a third, meeting in a little more than half the cases, for a total of 456 followup meetings. The number of cases in which a session is held is considerably less than the number assigned to the program because, as is typical of civil caseloads, a substantial number of cases terminate early and thus do not make it to the point of an EAP session.

Table 2
Number of Assessment Sessions Held in Cases Assigned to Groups "A" and "B"
in the Early Assessment Program, January 1, 1992 to August 31, 1996
Western District of Missouri, Kansas City Division

| Type of Session | Number of Cases |
|----------------------------------|-----------------|
| Initial early assessment meeting | 845 |
| Followup meetings | 456 |
| Total | 1301 |

Because of the considerable amount of time given to each session, as well as the time spent preparing for them and managing the program, the program administrator is fully occupied by the program in its current size. Should the court decide to assign a larger portion of the caseload to the Early Assessment Program or should the civil filings increase substantially, more resources would clearly be needed.

Administration of the EAP. The court has given the EAP administrator broad discretion for setting program goals and deciding how to manage it. In addition to scheduling cases, holding EAP sessions, and reporting to the court on the status of the

program, he manages a staff of two persons who handle daily administrative matters and maintain statistics that permit evaluation of the program. The administrator also spent considerable time during the first year speaking to the bar to acquaint them with the new program.

Budget information provided by the court and summarized in Table 3 shows that the annual cost for the program is fairly substantial—approximately \$216,000 in Fiscal Year 1996. By far the greatest portion of the program’s cost is in staff salaries and benefits, reflecting in part the court’s decision that the program administrator should be a person of considerable experience and reputation. Apart from salaries and benefits, the cost of daily operations is minimal, but moving the office into previously unassigned space after the appointment of new judges added significant rental costs for housing the program. On a per case basis, the cost of maintaining the program for the four years of our study was \$700 per case that participated in the Early Assessment Program.¹¹

Table 3
Estimated Start-Up and Annual Costs of Early Assessment Program
Western District of Missouri, Kansas City Division

| Budget Category | Start-Up Expenditures | FY96 Estimated Costs |
|-----------------------------------|-----------------------|----------------------|
| Computer equipment | \$4,400* | |
| Salaries and benefits | | \$197,361 |
| Rent to GSA | | 15,000* |
| Operations (paper, postage, etc.) | | 4,000* |
| Total | \$4,400* | \$216,361* |

* Estimated

¹¹ This figure could be calculated a number of different ways. We multiplied the FY96 program cost by 4.5 (years) and then divided by the number of cases that were required to participate in the EAP plus the number that volunteered to participate during the four-and-a-half year period. This somewhat over-estimates the cost per case because program costs were lower in the early years than they are now (though as staff costs rise in the future, the cost per case will likely rise as well unless more cases are handled by the program). Our figure is a very substantial over-estimate if, as could be argued, all “B” cases, not just the volunteers, should be included in the calculation. Though not all “B” elect to participate, the program nonetheless incurs the administrative costs for them. On the other hand, it could also be argued that our cost per case is an under-estimate because only cases that go to an EAP session should be included in the calculation. We do not favor this approach because of the program’s administrative responsibilities for other cases. Our figure is, we believe, a reasonable compromise.

Has the Early Assessment Program done what the judges and advisory group wanted it to do?¹²

The answer is clearly yes, considering both objective and subjective evaluations of the program.

Earlier case resolution and more settlements. Judging by the most objective of measures—the number of days from filing to termination—the Early Assessment Program results in earlier case resolution. Cases that are required to participate in the program terminate in 7.0 months while those not permitted to participate terminate in 9.2 months. Further, cases that participate in the Early Assessment Program are somewhat more likely to be resolved by settlement, while cases that do not participate are more likely to be resolved by trial or other judgment. Although the age at termination is reduced for all case types subject to the Early Assessment Program, the reduction is greatest for contracts and, especially, civil rights cases.

In many cases—38% of those that participate in the EAP session—case resolution comes immediately—i.e., at the session itself (see Table 4). Another 19% are resolved within a month of the session and an additional 17% within the next two months.

Table 4
Proximity of Case Resolution to the Early Assessment Session in Cases Terminated After at Least One EAP Session, January 1, 1992 to August 31, 1998
Western District of Missouri, Kansas City Division

| Timing of Case Termination | % of Cases (N=605) |
|----------------------------|--------------------|
| At EAP session | 38.0 |
| 1-31 days after session | 19.0 |
| 32-91 days after session | 17.0 |
| 92+ days after session | 26.0 |

Possible reductions in litigation costs. In moving cases to earlier disposition, the court and advisory group attorneys hoped the EAP process would also reduce litigation costs. Table 5 shows that a little over two-thirds of the attorneys who participated in an EAP session reported that the EAP reduced litigation costs. The median estimated savings per

¹² Findings reported in this section are based on a survey of attorneys. At case closing, questionnaires are sent to all attorneys who participate in an EAP session. The response rate for cases included in this study (those filed after January 1, 1992 and terminated by December 31, 1995) was 74%.

party was \$15,000.¹³ Estimates ranged as high as \$950,000, with twenty-four attorneys estimating client savings of \$100,000 or more.

Table 5
Attorney Estimates of the EAP's Impact on Their Client's Total Litigation Costs¹⁴
Western District of Missouri, Kansas City Division

| | % of Attorneys Selecting Response (N=847) | Median Per Party | Mean Per Party |
|--------------------------|---|---------------------|-------------------|
| Decreased client's costs | 69.0 | \$15,000 N=383 | \$32,007 N=383 |
| Increased client's costs | 10.0 | \$1,500 N=67 | \$3,552 N=67 |
| No effect | 21.0 | NA | NA |

The median estimated total litigation costs in these cases, all of which had terminated, was \$10,000. If these estimates are reliable, they indicate that the EAP is saving clients more than half of what their case would have cost.¹⁵ The client savings may, then, be considerable, although they come at a cost to the court of about \$700 per case. Caution must be used, however, in reaching conclusions about the EAP's effect on costs, not only because the findings are based on attorney estimates but because we lack comparable information about cases that did not participate in the EAP.

The attorneys who reported that the EAP process increased their client's litigation costs did not report nearly as great an effect as the attorneys who said it saved costs. As Table 5 shows, the median estimated cost increase was \$1,500. Those who reported increased costs were more likely to have gone to trial or to have reported that the EAP session was held too early, that a party did not participate in good faith, or that a subject matter expert would have been preferred. A slightly larger proportion of attorneys in the

¹³ The question was as follows: "Please consider for a moment what your client's *total litigation costs* through settlement, judgment, or other disposition (including attorneys' fees and expenses) would have been if this case had *not been assigned* to the Early Assessment Program. Compared to these costs, what effect do you think participation in the Program had on your client's total litigation costs?" The choices were no effect, increased costs, and decreased costs.

¹⁴ Median savings are reported per party, not per questionnaire respondent. That is, when more than one attorney responded for a single party, the attorneys' estimates are averaged.

¹⁵ One reason to be cautious about the estimates, apart from the fact that they are estimates, is the relatively low number of attorneys responding to the question: about 380 out of potentially 1300 respondents provided estimates of cost savings and total litigation costs.

most costly cases (litigation costs over \$50,000) also reported that the EAP increased costs.

Several written comments suggested the EAP can increase cost and time when it is used for the wrong kinds of cases. The two or three kinds of cases the attorneys thought unsuitable for the EAP process included cases involving legal issues only, cases where attorneys are very experienced and have worked together before, cases where there is no agreement on liability, and government cases. Just as many attorneys, however, said they thought every case should be required to go through the EAP process, and several expressed disappointment that, because of the random assignment process, other cases they were representing could not participate.

These comments suggest that some screening might be helpful to identify cases not suitable for the EAP. The incidence of problems is, however, so low that the time needed to screen cases might not be worth the gain—though for the individual party disadvantaged by the process this is obviously not an acceptable conclusion.

Overall, these findings suggest the EAP may provide substantial savings in litigation costs and very seldom increases litigation costs. We caution that these are attorney estimates of cost savings, but we also note that they are consistent with the nature of the disposition in these cases. Compared to cases that did not participate in the EAP process, cases that did participate more often terminated before issue was joined and by settlement, whereas non-participating cases more often terminated with a judgment, either by trial or motion, and thus incurred the additional costs required by those procedures.

Ways in which the EAP is helpful in a case. In designing the Early Assessment Program, the attorneys and judges wanted a process that would prompt earlier settlements by requiring parties to meet face-to-face early in the case to confront, in essence, the reality of their situation—i.e., to assess the strengths and weaknesses of both sides and to appreciate the costs of proceeding.

The program appears to be providing exactly the kind of assessment the advisory group and court hoped it would (see Table 6). Over three-quarters of the attorneys who participated in an early assessment meeting reported that the session encouraged the parties to be more realistic about their positions. Around two-thirds also said the session allowed them to better understand and evaluate the other side's position, prompted earlier definition of the issues, and allowed them to identify strengths and weaknesses in their own client's case.

This assessment, in turn, appears to be helpful in reducing cost and delay. Where, for example, the attorneys reported that the EAP encouraged parties to be more realistic or allowed them to evaluate the other side's position, they were also much more likely to report that the program reduced litigation time and cost. In contrast, those who said the program had a detrimental effect in these areas were more likely to say the program increased cost and slowed down their case.

Perhaps one of the most striking features of Table 6 is the very small percentage of attorneys who reported that the EAP session was detrimental in any way. Altogether, it

appears that the session has a positive outcome and that what happens in it is very close to what the program’s creators wanted—i.e., the EAP session gives parties a better understanding of their own and their opponents’ case, prompts earlier definition of issues, encourages the parties to be more realistic about their respective positions, and engages the clients in resolution of the case.

Table 6
Attorney Ratings of the EAP’s Helpfulness in Providing Several Kinds of Assistance
Western District of Missouri, Kansas City Division¹⁶

| Assistance EAP is Intended to Provide | % of Attorneys Saying the EAP | | |
|--|-------------------------------|-----------------|---------------|
| | Was Helpful | Was Detrimental | Had No Effect |
| Encouraging the parties to be more realistic about their respective positions in this case (N=1301) | 77.0 | 4.0 | 20.0 |
| Allowing the parties to become more involved in the resolution of this case than they otherwise would have been (N=1301) | 72.0 | 1.0 | 26.0 |
| Enabling you to meet and talk with the opposing attorney (N=1304) | 71.0 | 1.0 | 28.0 |
| Allowing you to better understand and evaluate the other side's position (N=1296) | 68.0 | 1.0 | 31.0 |
| Prompting early definition of the issues (N=1300) | 67.0 | 1.0 | 33.0 |
| Encouraging the parties to consider methods other than litigation to resolve their dispute (N=1297) | 66.0 | 1.0 | 33.0 |
| Allowing you to identify the strengths and weaknesses of your client's case (N=1303) | 65.0 | 1.0 | 34.0 |
| Providing an opportunity to evaluate the other side's attorney (N=1297) | 63.0 | 1.0 | 36.0 |
| Improving communications between the attorneys in this case (N=1299) | 60.0 | 3.0 | 38.0 |
| Improving communications between the parties in this case (N=1296) | 55.0 | 5.0 | 40.0 |
| Improving relations between the parties in this case (N=1297) | 42.0 | 8.0 | 50.0 |
| Encouraging earlier discovery (N=1284) | 38.0 | 2.0 | 60.0 |

Even when attorneys reported that the program had none of the effects listed above, they were nonetheless more likely than not to say the Early Assessment Program reduced the time and cost of litigating their case, suggesting that other practices under the EAP are also instrumental in resolving the case. One of these, as Table 7 shows, is the requirement

¹⁶ Helpful=Very helpful and somewhat helpful. Detrimental=Very detrimental and somewhat detrimental.

that parties attend the EAP session. Over-two thirds of the attorneys reported that the presence of their client in the early assessment meeting helped resolve the case. Although the court and advisory group debated whether this requirement was wise and were concerned about its impact on litigation costs, attorney responses clearly support mandatory party attendance at EAP sessions.

Table 7
Attorney Reports of Effect of Party Presence on Case Resolution
Western District of Missouri, Kansas City Division

| Client Was | % of Attorneys Selecting Response (N=1289) | Helped Resolution | Hindered Resolution | Had No Effect |
|------------|--|-------------------|---------------------|---------------|
| Present | 91.0 | 70.0 | 1.0 | 29.0 |
| Absent | 9.0 | 3.0 | 7.0 | 90.0 |

Attorneys’ written comments reveal some of the reasons why they think client attendance is important:

“Some questions came up that I did not know the answer to, and having my client there, who did know the answers, helped move things along.”

“I think the presence of each client and/or insurance company representative is critically important to an early resolution of the case. They gain a personal impression of the opposing party, counsel, and an unbiased assessment of facts, issues, and problems with their position.”

“I think it is *essential* to have clients at these meetings. Without the clients, the lawyers can simply posture to each other. With them, the clients are faced with the reality about the facts, the law and the risks.”

“There are times the client does not want to hear what their lawyer is telling them. Having a third party (Plan Administrator) give his thoughts on the case can certainly get the client’s attention and bring them back to earth.”

These comments represent many others that pointed out why attorneys considered client attendance essential and why it should, in the view of a number of attorneys, continue to be mandatory. There were, however, several other attorneys who criticized the court’s requirement, noting that in their cases party attendance had simply increased costs because the party had had to come some distance for the meeting. Clearly the weight of opinion and experience, however, is on the side of the advisory group, which thought that an early settlement would be more likely if the clients were involved in the EAP sessions.

Timing of the EAP session. Of particular interest are the attorneys’ responses regarding the timing of the EAP session. Conventional wisdom holds that meaningful

settlement discussions cannot occur until some discovery has been done. However, in this court where the ADR process occurs very early, only 11% of the attorneys reported that it began too early in their case (see Table 8).¹⁷ Written comments indicate that a number of attorneys thought the session would have been more productive if there had been more discovery. Illustrative of the dozen or so attorneys who mentioned this problem is one who wrote, “The first meeting comes too early. Make sure some discovery—interrogatories, documents, and depositions of parties—have occurred before the first meeting. Without this basic discovery, it is very difficult to realistically evaluate the case.”

Table 8
Attorney Ratings of How Well the Early Assessment Program Functions
Western District of Missouri, Kansas City Division¹⁸

| Program Function | % of Attorneys Selecting Response | | |
|--|-----------------------------------|----------|----------------------------|
| | Agree | Disagree | Neither Agree Nor Disagree |
| The EAP process began too early (N=1301) | 11.0 | 63.0 | 26.0 |
| Administrator was effective in getting parties to engage in meaningful discussion of the case (N=1305) | 81.0 | 8.0 | 11.0 |
| Administrator was well prepared to discuss the case with the parties (N=1301) | 82.0 | 4.0 | 14.0 |
| Administrator treated all parties fairly (N=1304) | 92.0 | 4.0 | 4.0 |
| Administrator put too much pressure on the parties to settle | 9.0 | 66.0 | 26.0 |

On the other hand, several attorneys suggested that discovery should be stayed during the EAP process because additional costs are incurred when the parties have to meet the requirements of the judge’s scheduling order while participating in the EAP. “Since the best intentioned parties,” wrote one, “have nothing to gain by costly discovery if serious discussions are underway, the threat of falling behind schedule perhaps motivates discovery to satisfy the court’s schedule.... Cases assigned to the early assessment program should receive an automatic stay of discovery.” Only a handful of attorneys noted this problem, but it coincides with the concern of some judges that cases might find it burdensome to run on both the EAP and litigation tracks simultaneously.

¹⁷ An interesting contrast is provided by the settlement week program in the Northern District of West Virginia (another of the courts included in our study of the five CJRA demonstration districts). In West Virginia Northern, where mediation sessions are held near or after completion of discovery, 24% of the attorneys thought the session had occurred too early.

¹⁸ Agree=Strongly agree and agree. Disagree=Strongly disagree and disagree.

The role of the EAP administrator. Both the attorneys and judges identified the EAP administrator as a critical factor in the program's success. Over 80% of the attorneys who participated in an early assessment meeting reported that he is well prepared and effective in getting the parties to engage in meaningful discussion of the case (see Table 8). Over 90% said he treats all parties fairly, but a small percentage noted that he puts too much pressure on parties to settle. Written comments, of which there were many, often praised the kind of assistance the administrator provides. The judges, as well as several attorneys in their written comments, noted that an important factor in his success is his long experience in litigation before appointment to the court's position. The judges' decision to hire an attorney with experience and credibility in the community appears to have been a wise one.

Should the court continue to provide the Early Assessment Program?

As might be expected from the findings above, nearly all (96%) of attorneys who have participated in an EAP session think the program should be continued. Further confirmation of their positive evaluation can be found in the several hundred written comments, which lean heavily in favor of the program. Below are some examples:

“The Early Assessment Program is an outstanding concept. It reduces litigation costs for both parties. It shortens the time for resolution of the dispute and thereby reduces stress and pressures generated by delayed justice. It permits the parties to participate in a forum where they can state their positions to each other and to a third person. It permits the parties to obtain justice, to resolve their differences and to maintain their dignity. It does all these things with a very significant savings to the federal court system.”

“The presence of a neutral, employed by the courts and thus without apparent agenda other than to help the parties resolve the issues, has a powerful impact on my clients and seems to similarly affect opposing parties.”

“The *only* dissatisfaction I have with the Program is that it is currently selective in the cases that can participate. I have several cases I wish could be part of the program, but which were assigned to the control group. I look forward to the day when *all* cases can at least opt into the Program.”

“*Early Assessment* is the *best thing* I have seen in the judicial system in 15 years. Why? Gets the attorneys to talk. Makes parties realistic about the case.”

“I was extremely skeptical, as this was my first mediation. The result was excellent for all three parties, and I suspect that some \$300,000 in legal fees was saved in total, plus taking a couple of years of litigation out of the system. This mediation collapsed the time required to learn a case. The

clients were there at the beginning, rather than getting involved late in the case. The lawyers were required to give a fair assessment to the value of their case initially, rather than a year or two down the road after wasting substantial sums on conflicts between and among lawyers and not grappling with the real issues.”

“This program is the fairest, most efficient compulsory/voluntary mediation/arbitration assessment program I have been involved in as a trial lawyer. Mr. Snapp is the right man, in the right job. His patience, preparation and peoples skills make the program worth having even if its cost were assessed to the members of the federal bar in the Western District as part of their dues. Please find some way to continue this program.”

“Based upon my experience with this client and this kind of litigation, I can say with certainty that this case would have settled with or without EAP. But because of EAP, it settled sooner, and my client saved legal fees.”

These comments and the ratings shown in Table 6 reveal very substantial support for the court’s Early Assessment Program by those who have participated in it. A number of the comments also identify one of the principal reasons for the program’s effectiveness—its current administrator/mediator. Our evaluation is, then, really two evaluations, one of the advisory group’s theory that an early meeting of the parties to assess the case would prompt earlier settlements, and the other an evaluation of the individual who has carried out the advisory group’s design. Our findings provide support for the theory and show that it has been realized largely through its successful application by the program administrator.

This conclusion leads to some important and unanswered questions. Would the early assessment process have the same effect if a different mediator, or more mediators, conducted the sessions? To the extent the program depends on one individual’s skills and charisma, is it likely to be viable in the long run? These questions are related to several others we asked the judges.

Is there particular value in using a staff mediator rather than private sector mediators?¹⁹

From the judges’ point of view there are indeed advantages to having in-house staff conduct the mediations. First, the quality and reputation of the person conducting the mediations is very important for gaining the confidence of the bar, and several judges thought it might be difficult to develop a qualified panel of private sector attorneys and convince litigants of their skills. As one judge said, “The strength of a program like this

¹⁹ The discussion below is based on interviews with the district and magistrate judges in the Western District of Missouri in the summer of 1996.

depends on the perception of the bar. Do they perceive it as another hurdle? That would doom it. Or do they perceive it as really helpful? That is crucial, but would the perception exist if the court used a pro bono panel? Can the court do the work necessary to develop a quality panel and convince the bar of its quality?"

Second, several judges noted, because the court would not be able to closely monitor a large group of mediators, neither the judges nor the parties would have as much confidence in them as they have in the court's administrator. As one said, "We wouldn't know how good they are."

The judges also said they believe the cost savings to litigants of using in-house staff makes parties more likely to agree to mediation. Referring to both the cost savings and the reputation of the present program administrator, one judge said, "The easier you make it and the more you eliminate uncertainty, the more likely it will be used."

Several judges pointed out as well that because ADR is the program administrator's full-time job, he not only has excellent skills but has fewer scheduling problems than would be encountered by attorneys trying to balance ADR responsibilities with their own workloads.

In addition to these advantages, one judge pointed out that many parties, particularly in small cases, want to "hear the advice of a judge" and might perceive the program administrator as having "close to the same clout" as a judge, whereas private attorneys would have less. Another judge noted that the administrator "has his finger on the pulse of the court" through his regular contact with the judges and would be able to give parties a better idea of how a judge would react in a case.

In comparing full-time, in-house staff to the option of having magistrate judges perform the ADR service, most judges indicated that because the magistrate judges are heavily involved in civil cases and criminal pretrial matters, they would not have time to hold early assessment meetings in the number of cases currently assigned to the program. Two judges said it would be more costly to "beef up" the magistrate judge staffing than to support separate staff devoted to handling ADR. And one magistrate judge pointed out that the magistrate judges have varying skill levels with respect to mediation and therefore not all of them would be suited to this task.

Generally, the judges agreed that using in-house staff to provide mediation is a valuable feature of their program and that, given adequate funding, they would continue this practice.²⁰

²⁰ An important, and unanswered, question is the relationship between the court program and ADR development in the private sector. At the time the court implemented its program, mediation was in its infancy in Kansas City. Has the court program undermined, by making unnecessary, private sector development of mediation? Or has it changed the culture and created demand, by educating attorneys and litigants, and thus enhanced the growth and quality of private sector mediation? And, if the private sector were more developed, would the court feel more comfortable relying on it to provide mediators?

Can the court retain and expand the EAP program?

If there is one drawback, from the court's point of view, to relying on the program administrator for most of the mediations it is the limit on how many cases he can handle, a limit that is close to being reached. Because the program has proven successful and the court plans to continue it, the judges are faced with the question of how to expand it to all eligible civil cases. It is clear that a single administrator could not handle all the cases this would bring into the program.

The judges noted several ways in which the court might provide mediation service to more cases. One would be to reinstitute the original EAP plan, under which the program administrator would direct more cases to other forms of ADR. Some judges expressed some concern that because this aspect of the program had never been fully implemented, the court had disappointed the attorneys who signed on to be neutrals and had not given other forms of ADR a fair try. At the same time, the judges recognized two compelling reasons why most cases are mediated by the program administrator. First, there is no fee for his assistance, whereas the parties would have to pay the attorney neutrals in other ADR processes, and second, he has an excellent reputation. As one judge said, the reason parties choose mediation with the administrator is "because he's cheap and he's good."

Another way to expand the service, said several judges, might be to rely on magistrate judges or bankruptcy judges to perform some EAP functions. However, they noted, since most of these judges already carry full workloads and because mediation sessions are time-consuming, this is not a completely adequate solution either. Further, creation of an additional magistrate judge position would be more costly than hiring another staff mediator.

A third suggestion was that the court hire another mediator to assist the current program administrator. The drawbacks to this solution, the judges recognized, are its budget implications and the difficulties of getting sufficient funds to hire qualified staff. If funding were received, however, and more mediators appointed to the staff, would this change the nature of the program? Though the judges did not raise this issue, an important question for the court in considering a larger staff would be whether the program could remain effective if it became less identified with its current mediator.

The same question pertains to the court's temporary solution—and perhaps long-term solution if no others emerge—to the need for more mediators. For the time being, the program administrator will try to convince more litigants to use attorneys from the court's roster to mediate their cases.

Is this program unique? Could other courts provide such a program?

The court and the advisory group believe there is nothing especially unique about the Western District of Missouri that suggests their Early Assessment Program could not be established in other courts. Some of the judges had misgivings about ADR and some

members of the attorney advisory group had doubts about some aspects of the program. If there is anything in particular that characterized both, it was their willingness to experiment.

At the same time, the program's design and success depend, at this time, on the skills of the court's single administrator/mediator. While this study demonstrates that he has been effective in achieving the goals established for the demonstration program, it is important to keep in mind that these results would not necessarily be found if a different mediator conducted the sessions. Nonetheless, while the judges believe they have hired an exceptional person for their program, they also believed other such persons can be found.

The program designed by the court is unique among federal district court ADR programs in that it uses court staff, rather than private-sector attorneys or magistrate judges to conduct the ADR sessions. Other courts that might consider such a program would have to decide whether to give court staff the degree of responsibility this court has given its program administrator. The court's decision to do so, while singular among district courts, is not without precedent in the federal system. Nearly all the courts of appeals provide settlement assistance through mediators who are members of the court staff.

The court's program is also unusual in the timing of the early assessment session. Conventional wisdom has held that ADR is unlikely to be effective until the parties have completed some or all discovery, but limited discovery has not, apparently, been a deterrent to early resolution under the EAP. The program is also unusual among district court mediation programs in that participation is mandatory in cases assigned to the program. While several attorneys suggested that under certain circumstances cases should be permitted to withdraw, few attorneys objected to the mandatory nature of the program.

Absent any other considerations about whether to adopt a process like the Early Assessment Program, the one most likely to be decisive in many courts is the demand such a program would make on a court's budget. Without additional appropriations, many courts would not be able to establish a program and hire the experienced staff needed to gain the confidence of bench and bar.

What should other courts keep in mind if they consider adopting a program like the EAP?

The judges in the Western District of Missouri would make several recommendations to courts who might consider adopting an early assessment program. First, they note, success requires support from the judges and a commitment to the program over a long enough period to give it a fair try. It also requires involvement of the bar from the outset in designing the program and over the long haul in monitoring and refining it.

Most important of all, the judges emphasized, the program requires a capable program administrator and mediator who is backed by the court and who can gain the confidence of the bar. When asked what qualities courts should look for in a program administrator—or, in essence, a staff mediator—the judges unanimously emphasized the importance of selecting someone with substantial litigation experience.

“Don’t just hire someone with academic credentials and little experience,” said one judge, and a second said, “You can’t do it on the cheap; you need experience.” Extensive litigation experience is particularly important, said one judge, when a program is just being established. Because the court’s program administrator had substantial experience, he has been able to gain the respect of the bar. He also knows, said one judge, “how and where to push parties.” Other important characteristics cited by the judges were trustworthiness, patience, maturity, a sense of values, vigor, and someone “who has walked both sides of the street.”

In the end, however, said one judge, courts must realize that a program like the EAP is “not a panacea. Courts cannot just pass a local rule and expect immediate success. It takes a lot of work and commitment.”