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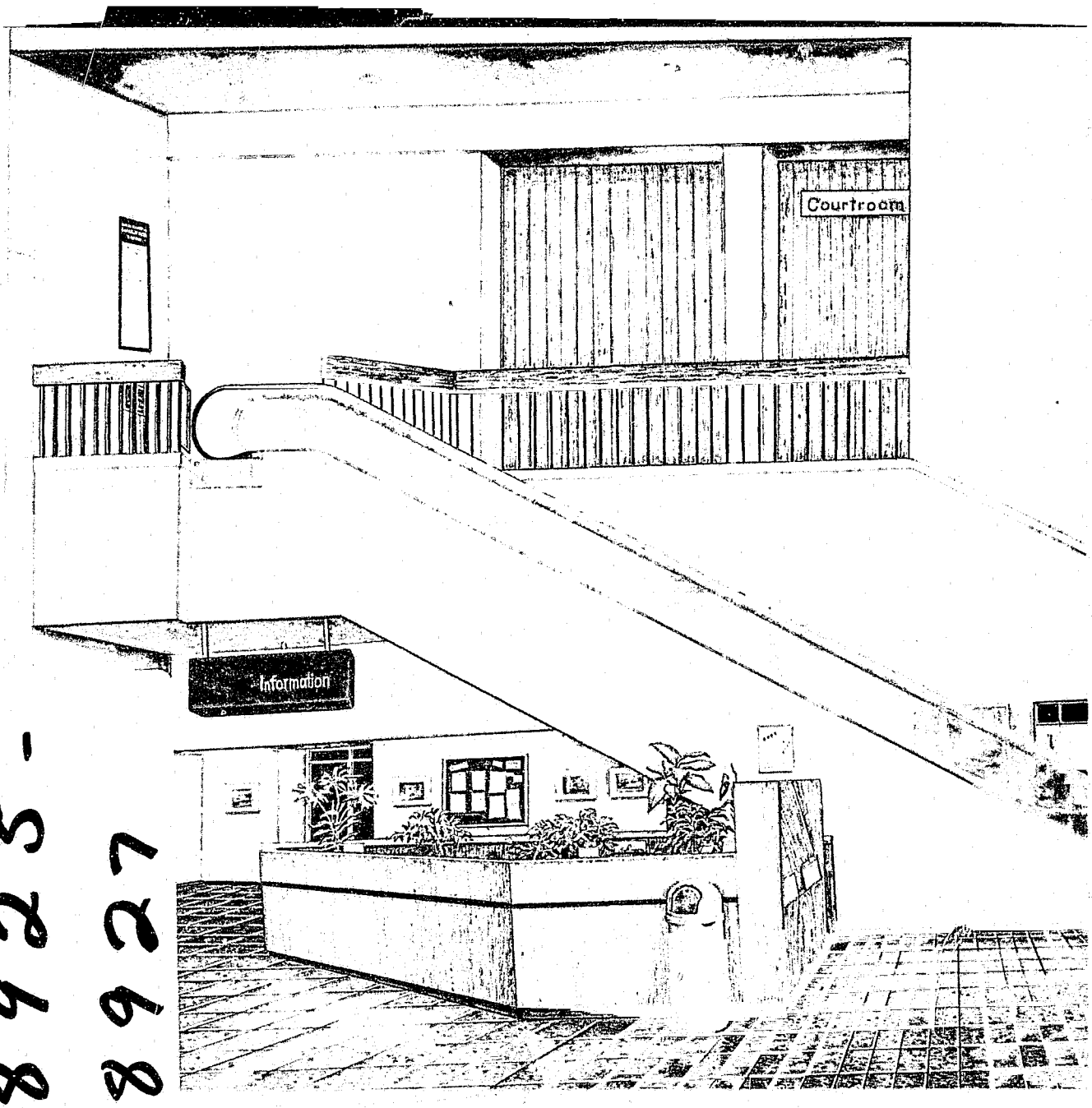

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FEATURES

DEPARTMENTS

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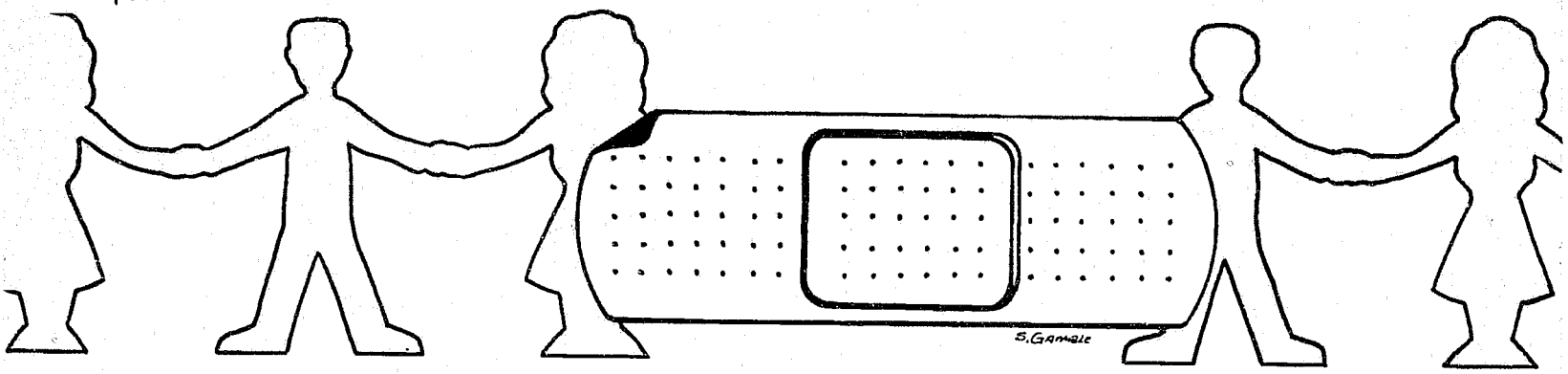

A Court Manager's Guide to the Alternative Dispute Resolution Database

Susan Keilitz

EDITOR'S NOTE: *The National Center for State Courts created the ADR program database under a grant from the State Justice Institute (SJI). The views expressed in this article are those of the author and do not necessarily represent the policies or positions of SJI.*

Susan Keilitz is a senior staff attorney with the National Center for State Courts. Dr. Roger Hanson, a senior staff associate at the National Center for State Courts, provided constructive comments and guidance to the author. Littleton Tazewell, a student at the Marshall-Wythe School of Law, helped conduct the survey through which the information in the database was collected.

Alternative dispute resolution (ADR) has become an established method for many state judicial systems to meet the growing demands placed on them and is likely to remain an attractive option. Because courts will be considering and instituting ADR processes, judges, court managers, and others need information about the number, location, and size of existing ADR programs, how they operate, and which aspects of the programs warrant replication. Without the benefit of others' experience, practitioners risk adopting procedures and processes that are inappropriate for their court or that have proven ineffective. They also may use scarce resources reinventing rules and procedures whose merits already have been established instead of adapting existing programs to suit their situations.

The National Center for State Courts (NCSC), with the support of the State Justice Institute, has created a readily accessible source of comprehensive information concerning basic features of ADR programs. The database was established principally to assist courts that are considering the use of ADR, planning ADR initiatives, implementing new programs, or modifying existing ones. To accomplish this, the database contains details

about the structure and operations of individual programs. Through the database, court managers can find out efficiently and economically what others have done and learn more about the practical applications of ADR.

This article has three objectives. First, to identify what information about ADR programs is available from the database. Second, to offer examples of questions regarding the design and implementation of an ADR program that the database can address. Finally, to explain to potential users how to obtain information from the database.

What information is available?

The NCSC ADR database contains basic information on 1,100 programs, thanks to the guidance of individuals knowledgeable about ADR and the courts and the efforts of many ADR program directors who provided information about their programs.[1] These programs initially were identified through various sources inside and outside the courts.[2] For each of the 1,100 programs, the database includes the program name, address, and telephone number; the types of cases handled; the court's jurisdiction; and whether the program is operated by the court.

To gather more-detailed information, the directors of each of these programs were asked to complete a 35-item survey supplemented by questions aimed at three commonly used ADR processes: mediation, case evaluation/advisory settlement, and arbitration. The survey was designed to obtain information on characteristics of the individual courts as well as details about how the programs are structured, funded, and operated. The directors of approximately 600 programs completed and returned the survey.

Examples of the information available for most of these programs are: the types of ADR services provided for each casetype handled (mediation, arbitration, case evaluation, summary jury trial, or ombudsman); the population size of the jurisdiction served; program authorization (i.e., by statute or court rule); the year of initiation; funding sources; the referral process; the caseload size; who serves as mediators or arbitrators; the number of hours of training required; and whether there is a written program evaluation.

The supplemental survey questions solicited details about the ADR process itself. For example, for mediation programs information is available about the number of sessions held per case, whether the sessions are confidential, the requirements for mediators, and whether attorneys participate in the mediation sessions. For court-annexed arbitration programs, the items include monetary limits for program eligibility, how arbitrators are chosen, whether one or more arbitrators hear the cases, and whether there are sanctions for appellants who do not improve their position at trial.

20 questions court managers might ask when planning or implementing an ADR program

The NCSC ADR database can help court managers at all stages of program development, from conception to implementation to modification. Managers who are just beginning to think about initiating a program may want to learn of the many different kinds of cases to which ADR has been applied. Some managers will have considered the possible applications, narrowed the scope of the proposed program, and started drafting program rules. Others will have moved on to building a staff and will need to know how many people to hire and what their qualifications should be. Still others may be planning to modify an existing program and want to know if their idea has been tried elsewhere. Nearly all will have some constraints on how extensive the program can be, such as scarce funds, a lack of facilities, or a small or nonexistent staff.

The following questions illustrate some of the ways court managers can use the ADR database. They are loosely organized in four areas: obtaining an overview of ADR programs, planning the program's structure, anticipating staff requirements, and establishing rules and policies.

Overview of ADR programs

1. What kinds of cases should the ADR program handle?

When court managers start planning, they need to decide what the scope of the proposed ADR program will be. A key factor in determining the program's scope is the range of cases that the program will cover. If a wide range of cases is covered, the program could become overloaded and its resources stretched beyond the point of effectiveness. Some types of cases also might not fare well under ADR or might be considered inappropriate for an ADR process. For example, objections have been raised to mediating cases in which domestic violence or child abuse is an issue. Despite this fact, 40 court-operated ADR programs do handle domestic violence cases, and 18 use ADR to resolve cases of child abuse and neglect. Court managers planning an ADR program for domestic relations cases might contemplate including these cases in the program if they can learn what procedures and guidelines have been established to protect the interests of all the parties. **Table 1** presents the number of programs that handle each type of case designated in the database.

2. What kinds of ADR services should the program provide?

The types of cases targeted for the ADR program will have some bearing on the kinds of services that will be most effec-

Table 1
Number of Programs by Casetypes Handled

	Court operated	Court referred	Total
Custody/visitation	171	137	309
Child support	120	80	201
Spousal maintenance	97	58	156
Property division	94	86	181
Visitation enforcement	53	40	93
Child abuse and neglect	18	9	27
Domestic violence	40	41	82
Minor criminal	32	131	166
Contract	192	127	326
Tort	193	88	286
Small claims	74	133	213
Landlord/tenant	58	149	219
Other	138	151	299

tive and appropriate for the court. For example, mediation most commonly has been used in domestic relations, small claims, and neighborhood justice programs, whereas arbitration has been promoted as an efficient means to resolve general civil litigation. However, interest in mediating more complex civil litigation is on the rise, and court planners might wish to discuss it with others who have experience with civil mediation. Another consideration is the availability of individuals or organizations who can provide the service. Are there sufficient numbers of individuals who have mediation skills or can readily acquire them? Is there a community agency or private dispute resolution provider who can offer low-cost mediation to disputants referred by the court? Is there a large-enough pool of attorneys who would serve as arbitrators and what incentives would be offered for their services? For programs in jurisdictions of similar size, court managers can learn from the database what kinds of ADR services are provided for each type of case, who the individuals are who perform the service, and what their qualifications are.

3. Are written evaluations of existing programs available?

If pressures such as budgetary cycles or legislative session schedules make planning time short, or if resources cannot be devoted to calling or visiting programs, program planners may have to rely on written reports about existing programs. Research findings reported in the literature on dispute resolution may not readily translate as guides to program implementation because they often address questions that are aimed at the effects of a particular ADR process or at developing theories of dispute resolution. Program evaluations conducted by or at the request of individual courts, on the other hand, are likely to contain practical information about program development and operations, such as how to obtain the cooperation of the bar, enlist volunteer mediators, or coordinate the activities of the ADR program with the overall management of the court.

Ninety-seven programs in the database have such an evaluation. These evaluations are not likely to be published and distributed, so the information in the ADR database allows court managers to tap into resources that otherwise would be difficult to track down.

4. Should information be obtained from established or more recently instituted programs?

Well-established programs may supply extensive documentation of the program's evolution, but they may not have veteran staff who can relate the reasons for making changes or how modifications were accomplished. Relatively new programs are in the midst of implementation, and their current staff are more likely to be those who helped plan the program. The staff on newer programs not only will have fresh memories about the problems encountered along the way but also may have developed innovative solutions not considered or tried by the more-established programs. The database reports the year programs were initiated, so court managers can select both mature and fledgling programs for review.

5. Which states have instituted several ADR programs?

After a decade of progress, the pattern of ADR program adoption is still uneven (**Table 2**).[3] Several states, such as California, Florida, Hawaii, New Jersey, New York, and North Carolina, have launched major ADR initiatives. Others have been more cautious, less enthusiastic, or less able to commit resources to ADR. Court managers seeking to institute ADR processes, either statewide or locally, might find it useful to consult with court managers and ADR program directors in states with more ADR activity. For example, these states may have ironed out problems in coordinating and consolidating resources throughout the state. On the other hand, an individual court that would be pioneering with ADR in its state might want to contact programs in states that have not ventured far into ADR. Directors of these programs might pro-

Table 2
Number of ADR Programs Operating in the States

Number of states						
20						
15			Connecticut Delaware District of Columbia Georgia Hawaii Idaho Kansas Kentucky			
10			Louisiana Maine			
5		Alabama Alaska Arkansas Indiana Iowa	Maryland Missouri Montana New Mexico Rhode Island	Arizona Colorado Minnesota Oklahoma	Florida Illinois Massachusetts North Carolina	
0	Mississippi Nebraska West Virginia Wyoming	Nevada New Hampshire North Dakota Puerto Rico	South Dakota Tennessee Vermont Wisconsin	South Carolina Texas Utah Washington	Ohio Oregon Pennsylvania Virginia	California Michigan New Jersey New York
	0	1	2-10	11-25	26-100	More than 100

vide insights into how a single court can marshal support for its initiatives when the remainder of the state's judicial system is directing attention and resources elsewhere.

Program structure

6. Under what authority should the program operate?

ADR programs may be authorized by statute, supreme court rule, local court rule, or some combination of the three. In some states, enabling legislation may be a prerequisite for any ADR initiative. In others, the supreme court may have autonomy to promulgate rules allowing statewide or local court ADR programs. In still others, individual courts may have the authority to establish a program through a local court rule. The database will tell the court manager how selected programs are authorized and in many cases provide citations to the statute or court rule. If legislation is required or desirable, the court manager can borrow ideas for draft bills and strategies for gaining support. When the time comes to draft court rules, the court manager can find out how other court rules were developed, how well they functioned in practice (i.e., were they broad enough or too restrictive), and what modifications might improve program operations.

7. Should the court operate the program or refer cases to it?

Courts that operate ADR programs exercise more control over the process and those involved in it, but this control comes at the expense of allocating court resources to daily operations and program administration. On the other hand, the court may have no choice but to operate the program if potential ADR service providers are not already established in the community. The availability of court-employed ADR practitioners and court facilities for the program's daily operations should be considered in deciding whether the court will operate the program, but the decision need not rest on these issues alone. The database

The size of the caseload will have ramifications for planning considerations such as budget requirements, administrative staff size, space availability, and the number of ADR practitioners needed.

can put court managers in touch with many court-operated programs that provide mediators and arbitrators through service contracts or use volunteers as well as programs in which mediation sessions or arbitration hearings are held outside the court.

Equally important is whether the court has sufficient staff for program administration. For court-operated programs in jurisdictions of a given size, the ADR program database can tell court managers the number of administrative and professional staff carrying out the program. Finally, for guidance on finding or developing potential ADR service providers in the community, the database can direct court managers to courts that refer cases to one or more such ADR providers and to community programs whose caseloads consist largely of court referrals.

8. Should the program be mandatory or voluntary?

Mandatory programs will sweep more cases into the ADR program, while voluntary programs may not be worth instituting because participation in such programs has been low. Unfortunately, mandatory and voluntary programs cannot be categorized easily because the terms as they relate to ADR programs are subject to interpretation. Most ADR programs are considered to be mandatory if all cases meeting certain criteria must be referred to the program. Some programs may be called mandatory, however, if a judge may order the parties to participate in an ADR process or attend an ADR orientation session. Both of these latter programs might also be considered to be voluntary; in the first instance, "voluntary" applies to the judge's behavior, and in the second instance the parties may choose whether to participate in an ADR process after they attend the orientation session.

To avoid misinterpreting the terms, the ADR database reports four types of referral processes: (1) automatic for all eligible cases; (2) mandatory at the discretion of the individual judge; (3) by court order on motion of one of the parties; and (4) by party stipulation. Court managers can contact programs based on the referral process to find out how smoothly the process works, whether it results in manageable caseloads, and what procedures or guidelines for referral have proven effective.

9. What size caseload is the program expected to have?

The size of the caseload will have ramifications for planning considerations such as budget requirements, administrative staff size, space availability, and the number of ADR practitioners needed. The potential caseload size will be affected by the size of the jurisdiction and the program's scope (i.e., what types of cases the program will handle and whether it is mandatory for all cases). To obtain information that will help estimate the size of a proposed program's caseload, court managers can search the ADR program database to find jurisdictions similar in size and examine the caseload, the types of cases handled, and the referral process used.

10. How should the program be funded?

If money is no object, a court manager can decide the scope and structure of the ADR program before determining what sources of funds will support the program. In most jurisdictions, however, funding issues must be settled first and the program designed to fit the budget. The court manager, therefore, will want to find out initially what the possible sources of funds are. Common sources are state judiciary budgets, local government, bar associations, and surcharges on court filing fees. Many programs are funded in whole or in part from fees paid by the parties. Of the 346 court-operated programs reporting fee policies, two-thirds provide ADR services for no fee, almost one-third charge a fixed rate, and a handful assess fees on a sliding scale. Court managers considering user fees as a funding source can learn what guidelines might be used to set the fees, what procedures are set up for collecting them, and whether charging fees has discouraged program participation.

11. Should the hearings or sessions be held in the courthouse or elsewhere?

In many instances, courts must conduct ADR programs outside the court because space within the courthouse is unavailable. Where options exist, one factor to consider is the court's ability to supervise the quality and pace of the alterna-

tive process. When hearings or sessions take place in the courthouse, will the parties have more of a sense that serious and deliberate consideration is being given to their dispute? Will the court be able to maintain control over the scheduling and completion of hearings and sessions? When the ADR process takes place outside court facilities, the court may be less able to influence the dignity of the proceedings and monitor the progress of the cases. In practice, however, these concerns often take a backseat to other considerations, because nearly half of the 368 court-operated programs reporting the location of hearings and sessions hold them outside the court. Court managers, therefore, have numerous sources of information about the problems and benefits associated with the location of the ADR program.

Staff requirements

12. How many staff will be needed to handle the program's expected caseload?

A rough estimate of the number of staff required for the ADR program can be made by comparing program caseloads to the number of professional and administrative staff reported in the ADR database. For example, the average number of professional staff for programs with fewer than 100 referrals in the past year is 4.7, with 0.9 administrative staff. For programs with caseloads between 100 and 500, the average number of professional staff does not increase, but the average number of administrative staff goes up to 1.4. Curiously, the average number of professional staff drops to 2.9 in programs with caseloads between 500 and 1,000. For caseloads over 1,000, the number of professional staff jumps to 15.4, while the average number of administrative staff increases only to 2.2. To refine the projection of staff requirements, court managers will want to find out the caseloads and number of staff for the individual programs that are similar in scope to the type of program they are considering.

13. Who should be the ADR practitioners (e.g., mediators or arbitrators)?

The ADR database addresses four issues related to this question: whether the ADR practitioners are court employees, whether they are volunteers, what their occupational backgrounds are, and what qualifications might be established for them. As in the question of where the ADR process should take place, another issue in deciding who will provide the ADR services is how the court will supervise and monitor the provision of those services. Given that two-thirds of the court-operated programs in the database rely on individuals outside the courts for ADR services, many courts apparently have established procedures for accomplishing this task.

Court managers can draw on the experiences of these courts in deciding whether the ADR practitioners should be court employees. If the court has limited funds to pay for the ADR program's services and chooses not to charge fees, court managers can seek volunteers to provide the ADR services. To learn who those volunteers might be and how to set up a system for enlisting and organizing their services, court managers can obtain a list of the programs that use volunteers. The database also indicates the occupational background of paid and volunteer practitioners, who might be sitting or retired judges, attorneys, social service professionals, or lay members of the community.

Some questions have been raised about which profession or discipline is more skilled in particular ADR processes or more knowledgeable about certain subjects. Must arbitrators be members of the bar to gain the confidence of the parties' attorneys? Do mediators trained in the social sciences have adequate knowledge about potential tax consequences to assist divorcing parties in reaching property settlements? Most states require arbitrators to be members of the bar, but the qualifications for mediators vary widely. Reports on individual programs in the database will indicate the program's qualifications for mediators and arbitrators. Court managers might consult with program directors to find out whether particular qualification criteria have proven reasonable and valid.

Some questions have been raised about which profession or discipline is more skilled in particular ADR processes or more knowledgeable about certain subjects.

14. How much training should be required?

In conjunction with qualifications of ADR practitioners, training is becoming an important issue for courts as they

look for means to ensure that the ADR services are of consistently high quality. Perhaps because 40 hours constitute a standard work week, this figure is commonly cited as an appropriate and practical amount of training. Of the 298 programs reporting that some training is required for mediators, however, only 88 require 40 hours—41 require more than 40 hours and 121 require less. Court managers seeking to reduce training costs to the courts or financial burdens on potential practitioners who would pay for their training may find it useful to talk with directors of programs that require fewer hours of training. They may discover that fewer hours of training can be as effective as the standard 40 hours. Or they may learn that significant difficulties arise when practitioners have less training and that even more than 40 hours should be required.

The ADR process

Questions 15 through 17 apply to mediation programs, while questions 18 through 20 apply to arbitration programs.

15. How many sessions should a court manager expect to schedule for each case referred to mediation?

Knowing the approximate number of sessions that will be required to resolve the cases referred to mediation will help the court manager determine the program's potential impact on court resources. The more sessions each case requires, the more space and mediator time will be needed. These requirements will influence the program budget, the scheduling of sessions, and the pace of case resolution. If the parties will have to pay for the services, the number of sessions held may increase their fees. Of the 210 court-operated programs reporting the average number of sessions held per case, 126 complete the mediation in one session. In the 84 programs with more than one session, the average number of sessions is 2.6. Closer estimates can be made from information on the average number of sessions held in each of the programs that have characteristics similar to those of the proposed program.

16. What should the role of the mediators be?

Two issues to consider regarding the role of the mediator are whether the mediation sessions will be confidential and whether the mediator can either impose an outcome on the parties or make recommendations regarding the outcome to the court. Seventy-five percent of the court-operated programs reporting on confidentiality indicate that sessions are confidential; in half of these programs confidentiality is preserved by local court rule. Courts that have promulgated a rule addressing confidentiality in mediation can provide guidance on how well the rule actually protects the interests of the parties. The mediator can impose a solution to the dispute in 25 percent of the court-operated programs reporting on this issue; in 16 percent mediators are authorized to recommend how the court should rule on the matter. What are the potential benefits and pitfalls of placing mediators in either of these positions? Some programs may have policy guidelines that will bring to light situations unanticipated in the program-planning stage.

17. Should attorneys participate in or be allowed to observe mediation sessions?

Because the goal of mediation is for the parties to resolve their dispute through a nonadversarial process, some practitioners have questioned whether the presence of the parties' attorneys in the mediation session might be counterproductive and inappropriate. If the attorneys play their traditional advocacy role during mediation, will they inhibit the free exchange of information and offers of compromises that parties might make to reach an agreement? While these concerns about attorney participation in mediation may be valid, they do not appear to be widespread among court-operated programs. A higher percentage of programs report that attorneys participate actively in mediation sessions (38 percent) than report that attorneys do not participate at all (29 percent). In 27 percent of the programs, the parties' agreement governs whether attorneys take part in the mediation session.

18. Should judges be given the discretion to refer cases to arbitration that do not meet the criteria set out in the court rule or statute?

If cases that were not targeted by the program planners come into the program through judicial referral, the number of cases that need to be processed will likely rise, and the types of cases in arbitration may be more complex than the planners anticipated. These effects on the arbitration caseload's size and composition may significantly affect program management, including such issues as the size of the staff, the amount of space allocated for hearings, the number of arbitrators needed to cover all the hearings, and the level of experience required of the arbitrators. In addition, permitting judicial referrals may limit the ability of the program to meet its goals.

For example, the planners might reasonably expect the pace of arbitrated cases to speed up. However, the expanded caseload could prevent staff from scheduling hearings early enough in the litigation process to encourage quicker settlements; the increased complexity of the cases could make them less amenable to arbitration and the arbitration decisions more likely to be appealed. In considering the potential impact of incorporating judicial referrals into the court's rule or policy, court managers might seek advice on instituting guidelines or limits on judicial referrals to arbitration.

19. Should the cases be heard by a panel of arbitrators or by a single arbitrator?

Three primary issues to weigh regarding the number of arbitrators are the available pool of people who can serve as arbitrators, the amount of funds the program has available to pay the arbitrators (unless the parties will pay the arbitrators or the arbitrators will serve pro bono), and the possible effects on the appeal rate of having more than one person decide the case.

The availability of arbitrators will be determined in part by the qualifications set for them. The majority of programs require arbitrators to have been members of the bar for a specified number of years; the higher the number of years, the smaller the pool of arbitrators, but the greater their expertise.[4] By talking to directors of programs with higher and lower requirements, court managers can gain a perspective on the relative advantages of both. To compare the potential costs of having a single arbitrator or a panel, court managers can obtain figures from the directors of programs using one or the other model. Finally, if more than one arbitrator decides the case, the parties may be more likely to accept the decision and end the dispute. Court managers also can explore whether using a panel affects the appeal rate.

20. What, if any, disincentives to appeal should the court establish?

Because one of the goals of arbitration is to close cases that otherwise might have languished on the court's docket, high appeal rates from arbitrators' decisions are undesirable. To discourage appeals, many arbitration programs collect fees upon appeal and impose sanctions on parties who do not improve their position in a subsequent trial. To understand how effective these measures might be and whether they merit the administrative burdens they create, court managers can contact the directors of programs that have adopted them.

How to obtain information from the database

The NCSC ADR database was created with Ashton Tate's DBase-IV database management software package. Program applications designed expressly for the ADR database can produce reports in two standard formats. One is a list of the names of the programs, their directors, courts, addresses, telephone numbers, and the types of cases handled. To produce this standard report, criteria for selecting programs are designated. For instance, a standard format list of court-operated small claims programs, alphabetized by state, can be produced. The second standard format is called an edit report, which summarizes the information in the database for each program. These individual program reports are three to four pages long. Although individual program reports can be produced by specifying program characteristics, printing a large number of these reports at one time is impractical. Time and equipment use can be saved by first reviewing a list of programs that meet the specified criteria and then selecting the programs for which full reports are desired.

In addition to the standard format reports, the database can generate customized reports that contain specific items of information about programs with particular characteristics. For example, a court manager might want to look at child support mediation programs in courts of general jurisdiction serving a population of between 100,000 and 300,000 to find out information about staffing, funding, and program size. The database will find programs meeting these criteria and report designated characteristics such as whether the ADR practitioners are court employees, whether the parties are charged a fee, what case referral process is used, and the size of the caseloads.

Information from the database can be obtained free from the Information Service at NCSC headquarters at the address and phone number shown below. A member of the Information Service staff will discuss with you how the database is organized, what kinds of information the database can provide, what kinds of information you might need, and which types of reports will be most useful. If you have not yet reached a point in the planning process where you can specify what kinds of program details you need, Information Service staff will send you a copy of the survey used to collect the information in the database. After the survey has been reviewed, Information Service staff will work with you to design and produce one or more reports tailored to meet your needs.

If you are involved in an ADR program and did not receive a database survey, contact the *Information Service, National Center for State Courts, 300 Newport Ave., Williamsburg, VA., 23187-8798, (804) 253-2000.* **scj**

Notes

1. An advisory committee helped design the database and define its scope. The following individuals generously provided their time to this effort: *chair*, Sue K. Dosal, state court administrator, Minn.; Peter Adler, director of ADR program, Hawaii Judiciary; Bill Drake, vice-president, National Institute for Dispute Resolution; Franklin E. Freeman, administrative director, North Carolina Administrative Office of the Courts; Charles E. McAffery, trial court administrator, Atlantic County, N.J.; Larry Ray, director, ABA Standing Committee on Dispute Resolution; Margaret L. Shaw, director, Institute for Judicial Administration; Kathy Shuart, ADR program coordinator, North Carolina Administrative Office of the Courts; and Nancy Thoennes, Center for Policy Research.
2. The Institute for Judicial Administration shared lists of programs it identified in California, Illinois, and Ohio.
3. See Susan Keilitz, Geoff Gallas, and Roger Hanson, "State Adoption of Alternative Dispute Resolution, Where Is It Today?" vol. 12, no. 2 *State Court Journal*, 1988.
4. See introduction to vol. 14, no. 2, *Justice System Journal*, 1989-90 (forthcoming).