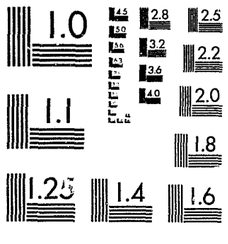


nij

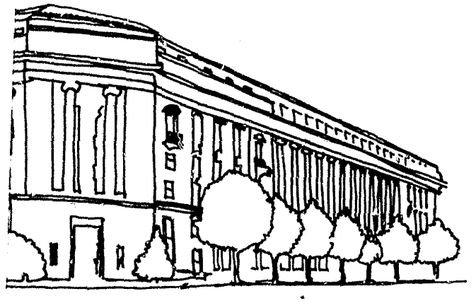
U.S. Department of Justice
National Institute of Justice
Office of Development, Testing, and Dissemination

Highlights from the *ISSUES & PRACTICES* Report on

The Use of Mediation and Arbitration in Small Claims Disputes

The use of mediation and arbitration for small claims cases is one technique being explored to revitalize small claims courts. This *Highlights* summarizes from the full study

- **major findings and recommendations for program development**
- **key options in program organizations, costs, and operation**
- **case studies from six programs throughout the country**



ISSUES & PRACTICES, a publication series of the **National Institute of Justice**

About the National Institute of Justice

The National Institute of Justice is a research branch of the U.S. Department of Justice. The Institute's mission is to develop knowledge about crime, its causes and control. Priority is given to policy-relevant research that can yield approaches and information State and local agencies can use in preventing and reducing crime. Established in 1979 by the Justice System Improvement Act, NIJ builds upon the foundation laid by the former National Institute of Law Enforcement and Criminal Justice, the first major Federal research program on crime and justice.

Carrying out the mandate assigned by Congress, the National Institute of Justice:

- Sponsors research and development to improve and strengthen the criminal justice system and related civil justice aspects, with a balanced program of basic and applied research.
- Evaluates the effectiveness of federally funded justice improvement programs and identifies programs that promise to be successful if continued or repeated.
- Tests and demonstrates new and improved approaches to strengthen the justice system, and recommends actions that can be taken by Federal, State, and local governments and private organizations and individuals to achieve this goal.
- Disseminates information from research, demonstrations, evaluations, and special programs to Federal, State, and local governments; and serves as an international clearinghouse of justice information.
- Trains criminal justice practitioners in research and evaluation findings, and assists the research community through fellowships and special seminars.

Authority for administering the Institute and awarding grants, contracts, and cooperative agreements is vested in the NIJ Director. An Advisory Board, appointed by the President, assists the Director by recommending policies and priorities and advising on peer review procedures.

Reports of NIJ-sponsored studies are reviewed by Institute officials and staff. The views of outside experts knowledgeable in the report's subject area are also obtained. Publication indicates that the report meets the Institute's standards of technical quality, but it signifies no endorsement of conclusions or recommendations.

James K. Stewart
Director

National Institute of Justice

James K. Stewart, *Director*

William DeJong, *Author*

Maureen A. O'Connor, *Government Project Monitor*

March 1983

Prepared for the National Institute of Justice, U.S. Department of Justice by Abt Associates, Inc., under contract number J-LEAA-013-78. Points of view or opinions stated in this document are those of the author and do not necessarily represent the official position or policies of the U.S. Department of Justice.

I. Contents of this Document

The Use of Mediation and Arbitration in Small Claims Disputes is part of the National Institute of Justice's series of reports for the criminal justice professional. Based on site visits to six small claims mediation/arbitration programs, an extensive review of the research literature, and expert opinion, the report compares the policies and procedures of the six programs visited, cites the advantages and disadvantages of various program options, and makes recommendations for program development and operations. The report is designed to serve as a guide to judges, court administrators, and policymakers who may wish to develop or modify similar programs.

The sections below set forth the "highlights" of the full report. Section II explains the goals of mediation/arbitration programs. Section III gives brief descriptions of the six programs reviewed in the full report, Section IV reviews the report's major findings, and Section V explains how copies of the full report can be obtained.

II. Small Claims Mediation/Arbitration Programs: Purposes

Small claims courts were created in the early part of this century to increase citizen access to justice for minor civil claims, including debt collections, landlord/tenant disputes, and complaints regarding poor workmanship and services, and to give litigants fuller participation in the resolution of their disputes. Ironically, these courts, which emerged as a response to deficiencies in the regular court system, now are criticized for the same deficiencies--excessive delays, high costs to litigants, cumbersome procedures, and inaccessibility to ordinary citizens.

Small claims courts do follow informal rules of procedure, giving the presiding judge wide latitude in handling cases and fostering a somewhat higher level of litigant participation. But many cases require a compromise solution or represent the culmination of a long history of problems between the parties. The courts, with their "winner-take-all" orientation, their narrow focus on the complaint at hand, and their traditional split between civil

and criminal divisions, may be ill-suited to handle many of these cases effectively.

One technique under exploration to address this problem and revitalize the small claims courts is the use of mediation or arbitration as an alternative to regular trial. Mediation program staff schedule meetings between the two disputing parties and a neutral hearing officer who facilitates communication and aids the disputants in reaching a mutually acceptable resolution. Mediation can involve varying degrees of intervention that range from merely providing the disputing parties with a meeting place and ground rules for discussion to actively recommending possible solutions to the conflict. By definition, mediators do not have the power to impose a settlement upon the parties. In comparison, arbitrators do have the power to impose settlements that are binding in court. An arbitrator initially may seek to mediate the dispute. But when the parties do not arrive at a settlement, the arbitrator conducts a hearing and imposes an award that, following judicial review, becomes a judgment of the court.

The use of mediation/arbitration for small claims matters is intended to address several goals, including:

(1) Increasing the efficiency of case processing. Programs designed to meet this goal generally are aimed at reducing court backlog. Courts with this primary goal typically turn to arbitration, where lawyer-arbitrators serve essentially as surrogate judges. For both mediation and arbitration programs, the delay between filing and a scheduled hearing is typically shorter than the delay for a regular trial.

(2) Reducing court system costs. Adding a mediation/arbitration program is far less costly than expanding the roll of judges. Lawyer-arbitrators typically volunteer their time, and existing court space can be used for arbitration rooms. Mediation programs, especially those that rely on post-filing referrals from the court clerk or from the bench, also are inexpensive to operate.

(3) Allowing judges to provide added attention to cases on the regular civil docket. To the extent that a mediation/arbitration project reduces their caseloads, judges may be able to give additional attention to regular civil cases involving more complex legal issues or matters of fact. Some observers have cautioned, however, that mediation/arbitration programs may not have this impact if their success leads to an overall

increase in the number of filings. There is also the risk that some judges, who find small claims cases to be unchallenging or stressful, will use an alternative forum as a "dumping ground" for as many cases as possible. This possibility is especially troublesome if cases are sent indiscriminately to alternative programs when trial adjudication might be needed. Such a practice would lead to less efficient use of judicial time.

(4) Improving the quality of justice. Even if sufficient judicial personnel are available to handle the caseload, certain cases can be handled better through mediation. Mediation sessions afford the parties far more time for discussion than do hearings before a judge; participants are more relaxed; and the parties are better able to explore the breadth of their dispute, not just the particular complaint at issue. With a mediation hearing, litigants are more fully involved in resolving their dispute, being led by a skilled hearing officer to negotiate a mutually acceptable settlement. In some cases, arbitration may provide these same advantages, but it resembles more closely a regular court trial. It is important to note, however, that not all small claims matters are necessarily best suited to an alternative forum. A regular court trial may be more appropriate for cases involving assertion of certain types of consumer rights, complex legal issues, or parties with widely divergent power.

(5) Improving collection of judgments. A recent evaluation of the Small Claims Mediation Program in Maine showed that mediated settlements are more likely to be paid than judgments of the court: 71 percent of mediation agreements were reported paid in full, compared with 34 percent reached through adjudication.*

Policymakers planning a small claims mediation/arbitration program must consider carefully the court's needs. Not all courts have long delays, large court backlogs, or an understaffed bench. Moreover, the need for such a program depends on the skills and predilections of the particular judges. Some judges are talented mediators and eagerly assist the parties in reaching a settlement. Others, however, feel uncomfortable with the conflict of trying to remain impartial while helping the parties settle the dispute.

*Craig A. McEwen and Richard J. Maiman, "Small Claims Mediation in Maine: An Empirical Assessment," Maine Law Review 33 (1981): 261.

The enabling legislation for small claims courts typically gives the courts wide latitude for experimenting with innovative ways to handle small claims. Thus, in most states, a mediation/arbitration program can be established by rule or consent of the court. Funding is the most critical problem to be addressed in initiating such a program, although mediation/arbitration programs have proven their worthiness in several jurisdictions and have become institutionalized in local, county, or state budgets. Others have been funded in part through filing fee surcharges assessed against all small claims complainants.

III. Program Sites

Brief descriptions of the six mediation/arbitration programs studied are presented below. Listed after each description is the name of a contact person who can provide further information about the program. Table 1 summarizes key features of these programs: program sponsorship, physical location, sources of small claims referrals, types of agreements, court enforcement of agreements, estimated annual budget, estimated annual caseload, and total cost/case estimate.

1. Small Claims Mediation Program, Ninth District Court, Portland, Maine

This program, sponsored by the Maine Council for the Humanities and Public Policy, began as a small experiment in Portland's Ninth District Court. It has grown to encompass over a dozen courts throughout Maine and is now funded through the state court budget. Under this program, small claims litigants in court for their hearing may be asked by the presiding judge to submit their dispute to mediation. If both parties consent, they go immediately to another room in the courthouse with a lay mediator and try to resolve their case without adjudication. If they cannot reach a satisfactory agreement, the case goes to the judge that day for a regular trial.

Contact for Further Information: Honorable Robert Donovan
Maine District Court
P.O. Box 412
Portland, Maine 04112

Table 1

Key Features of Small Claims Mediation/Arbitration Programs

PROGRAM	PROGRAM SPONSORSHIP	PHYSICAL LOCATION	SOURCES OF SMALL CLAIMS REFERRALS	STRUCTURE OF AGREEMENTS	COURT ENFORCEMENT OF AGREEMENTS	TOTAL BUDGET (PER YEAR)	TOTAL CASELOAD (PER YEAR)	TOTAL COST/ CASE ESTIMATE
Mediation Programs								
Portland, ME	Court	Courthouse	Bench	Monetary and Equitable Relief	Court Order	$25,000	not available	---
Pinellas County, FL	Court**	Courthouse	Bench, Filing Desk (pre-filing referrals) Walk-ins, other	1. Bench referral: Monetary Relief 2. Pre-filing referral: Monetary and Equitable Relief	1. Court Stipulation*** 2. None	$152,000 (est.)+	3,729+	$41
Atlanta, GA	Independent	Residential Area	Filing Desk (pre-filing referrals), Walk-ins, others	Monetary and Equitable Relief	None	$160,000 (est.)++	1,881++	$85
San Jose, CA*	Court**	Local High School	Filing Desk (post-filing referrals)	Monetary and Equitable Relief	Court Order	$20,000 (est.)+++	1,669+++	$12
Arbitration Programs								
Nassau County, NY	Court	Courthouse	Bench	Monetary Relief	1. Arbitrator Award: Court Order 2. Pre-hearing Settlement: Court Stipulation***	not available	1,000 (est.)	---
Manhattan, NY	Court	Courthouse	Bench	Monetary Relief	1. Arbitrator Award: Court Order 2. Pre-hearing Settlement: Court Stipulation***	not available	not available	---

*Unsuccessfully mediated cases proceed to arbitration if both parties consent.

**Program is court-sponsored, but receives funding from multiple sources.

***If terms of the agreement are breached, a monetary settlement becomes a court order.

+Budget for first nine months of 1980 was $114,000. Caseload figure is for calendar year 1979.

++Budget figure is for calendar year 1980. Caseload total for 15-month period (March 1978-May 1979) was 2,351 cases.

2. Citizen Dispute Settlement Program, Pinellas County, Florida

The Pinellas County Citizen Dispute Settlement (CDS) Program began in 1977 with funding from the U.S. Department of Justice and is now funded through a variety of sources, including the county court budget, court filing fee surcharges, the State of Florida, and the Florida Bar Association. The program operates out of courthouses in both St. Petersburg and Clearwater. Small claims disputants are referred to CDS for mediation by court clerks prior to filing and by judges who preside at small claims pretrial conferences. With both types of referrals, disputants can avoid a court trial if a mutually agreeable settlement is reached through CDS mediation.

Contact for Further Information: Una C. McCreary
Citizens Dispute Settlement Program
150 Fifth Street North
St. Petersburg, Florida 33701

3. Neighborhood Justice Center of Atlanta (NJCA), Inc.

The Atlanta NJC was originally funded by the Department of Justice, but now receives funds from the City of Atlanta, Fulton County, private foundations, and income earned by the executive director from consulting work. An independent corporation, the NJCA has a diverse caseload and has established a small claims case referral system with the local State Court of Fulton County. At the court filing desk, claimants are given the option of filing their small claim in court for a trial before a magistrate or filing with the NJCA for an informal mediation hearing. If a mutually satisfying settlement cannot be reached through mediation, parties are free to seek recourse in the courts.

Contact for Further Information: Edith B. Primm
Neighborhood Justice Center of Atlanta, Inc.
1118 Euclid Avenue, N.E.
Atlanta, Georgia 30307

4. Arbitration Program of the Manhattan (New York County) Small Claims Court

Since 1954 the New York County Small Claims Part of the Civil Court of the City of New York has provided disputants with the option of arbitration. During evening court hearings, referrals to arbitration are made by the presiding judge with the consent of both parties. Arbitration awards are converted into judgments of the court and cannot be appealed. Because lawyers volunteer their time to serve as arbitrators, the costs of this program are minimal.

Contact for Further Information: Phoenix Ingraham, Chief Clerk
Civil Court of the City of New York
111 Centre Street
New York, New York 10013

5. Night Small Claims Arbitration Program, Nassau County, New York

The Nassau County District Court has developed a small claims arbitration project modeled primarily after the program operated by the Civil Court of the City of New York. The Nassau County Court operates five facilities. Citizens throughout the county can elect to have their small claims case handled at an evening session in Mineola, which is centrally located in the county, or at a daytime session at one of the other four facilities. At Mineola, the disputants have the option of choosing either arbitration by a volunteer attorney arbitrator or a regular trial.

Contact for Further Information: Arthur F. Gange, Chief Clerk
District Court of Nassau County
272 Old Country Road
Mineola, New York 11501

6. Neighborhood Small Claims Court Program, San Jose, California

This program, which began as a joint experiment of the San Jose-Milpitas Municipal Court (now the Santa Clara County Muncipal Court) and the Santa Clara County Bar Association, receives its funding primarily from private foundations. Under the program, small claims disputants can have their case mediated and/or arbitrated by volunteer attorneys during an evening session conducted at a local high school. Small claims matters brought by individual plaintiffs are referred to the program by the court clerk after filing. Cases are initially mediated by an attorney. If the mediation hearing does not result in a settlement of the case, the disputants may have their case arbitrated by another attorney that same evening or may proceed to a court trial. The arbitrator's decision is binding unless the case is appealed for court trial within five days of the decision.

Contact for Further Information: Honorable Robert Beresford
2004 Adele Place
San Jose, California 95125

IV. Major Findings and Recommendations of the Study

Listed here are the major findings and recommendations to emerge from the study of small claims mediation/arbitration programs. A full description of these findings and recommendations can be found in The Use of Mediation and Arbitration in Small Claims Disputes.

A. Program Development

1. Because the enabling legislation in most states gives the courts broad powers to experiment with different methods of handling small claims disputes, it should be possible to establish a mediation/arbitration program in most jurisdictions by rule or consent of the court without specific legislative authorization.

2. In general, small claims arbitration programs are designed primarily to increase court efficiency, whereas mediation programs give greater emphasis to improving the quality of justice.

3. Mediation and arbitration programs that operate within or in conjunction with the court system need the continual involvement and support of the judiciary.

4. Strong support from the local bar for a mediation/arbitration program can be obtained if the program organizers work actively for the bar's participation.

B. Court Sponsorship

1. The primary motive for establishing an arbitration program for small claims cases is to move cases through the adjudicative process more quickly. While court-sponsored arbitration programs typically achieve this goal, an independent arbitration program, or one located outside the courthouse, would be cumbersome and therefore would not serve the court's need for greater efficiency.

2. There are several advantages to having a small claims mediation program sponsored by the court and located in the courthouse:

- A court-sponsored program requires a smaller operating budget than one that is independently operated.
- The prospects for continued funding are greater if the program is supported by the regular court budget or by a filing fee surcharge.
- Judicial support is more likely for a court-run program.
- Respondents may be more likely to attend a mediation session sanctioned by the court. The power of the court can be brought to bear against non-appearing parties.
- A mediation settlement can be reviewed immediately by a judge for correctness and evenhandedness and declared a formal order of the court.
- If the mediation effort fails, the complainant does not need to file the case a second time.
- After a failed mediation, it might be possible in some jurisdictions for the parties to proceed immediately to adjudication (either a court trial or arbitration) without further delays or extra trips to the courthouse.

C. Referral Sources

1. Small claims arbitration programs, which are designed primarily to maximize the efficiency of the court, can rely exclusively on bench referrals as an administrative convenience.

2. For a court-operated mediation program, a reliance on post-filing referrals from the clerk's office makes the most sense.

Bench referrals for such a program bring two disadvantages: (1) the delay between filing and the hearing date is greater if cases eventually going to mediation are added to the regular court docket; and (2) parties may feel they have less choice regarding the use of mediation when a judge, rather than a clerk, suggests the alternative.

One important disadvantage can be cited for pre-filing referrals from the clerk's office: if the case is not filed with the court, any mediation settlement that is reached cannot be made an order of the court.

The one disadvantage of post-filing referrals from the clerk's office is that litigants who do not reach a settlement may be required to return

another day for a court trial. Some jurisdictions, however, may be able to schedule cases in a way that avoids that inconvenience.

D. Selection of Cases

1. If the mediation/arbitration program receives only post-filing referrals from either the court clerk or the bench, the court's jurisdictional claim limit restricts the program's caseload. Several commentators recommend a claim limit of $1,000 with future increases tied to the inflation rate. Similarly, the caseload of such programs will also be defined by any case exclusions imposed by the court. It is recommended that business plaintiffs or collection agencies not be barred from either the small claims courts or these alternative programs.

2. Unless a mediation program's caseload is severely backlogged, the staff should strive to accommodate every case brought before it. The mediation process is not sufficiently understood at this time to warrant application of firm screening criteria. Typically, case-by-case screening is not attempted by arbitration programs.

E. Informed Choice

1. With court-sponsored programs, court and program personnel must make clear to litigants that the choice between a trial and a mediation/arbitration hearing is theirs to make and that they will suffer no adverse consequences as a result of their decision.

2. To guarantee that litigants are properly informed about the alternative forum, a written explanation should be drafted, either for the parties to read or to guide judges, clerks, or program intake counselors in their oral summaries of the program.

F. Case Scheduling

1. Programs should experiment with evening and/or Saturday sessions.

2. Hearing officers experience varying pressure to dispose of cases quickly, depending on the number of parties queued up to have their cases heard. Programs can minimize the severity of this problem through intelligent scheduling.

G. Hearing Procedures

1. Court-operated programs should experiment with offering mediation and arbitration in succession. With this procedure, if mediation fails, the parties can choose to have their case immediately arbitrated by a second hearing officer.

2. A court setting for the hearing is preferred, due to the lower costs of using courthouse facilities, the greater opportunity for judicial oversight, and the greater convenience to litigants.

3. Hearing officers should begin each hearing with a comprehensive opening statement that informs disputants of the ground rules and procedures to be followed.

4. Arbitration proceedings are more formal and therefore more similar to regular small claims trials than are mediation sessions. In either case, litigants and hearing officers must understand completely how the rules of evidence for the alternative forum may differ from those applied at a regular trial.

5. Attorneys' participation in mediation and arbitration hearings should be limited to advising their clients. They should not be allowed to speak for them or to cross-examine the opposing party.

H. Agreements

1. If an arbitrator can bring the disputants to a settlement prior to conducting the formal arbitration hearing, it should be made an order of the court. In court-sponsored mediation programs, any mediated settlement should be made an order of the court.

2. Judicial review of arbitration awards and mediation settlements is essential when they are made orders of the court.

3. Litigants should be allowed to appeal imposed arbitration awards for a trial de novo in the small claims court. Settlements reached through mediation need not be appealable, for such settlements were reached by mutual consent of the parties and were not imposed by a hearing officer or judge.

I. Program Administration

1. The administrative judge of the court or other court administrative personnel typically establish policy for a court-sponsored arbitration program.

2. Court-sponsored mediation programs typically invest policy-making power in a central authority (e.g., coordinating judge, project director). Independent programs may have a large, diverse board of governors, in part to solidify the program's relationship with the courts and other government bodies.

3. Court-sponsored arbitration programs generally do not require any full-time administrative staff.

4. The size of a mediation program's administrative staff is determined in large part by the diversity of the program's caseload and its referral sources. Programs that primarily handle small claims disputes and receive most referrals directly from the court require a relatively small staff and may be able to rely solely on part-time personnel.

5. The program staff should routinely monitor hearing officers' conduct of mediation/arbitration hearings.

6. All mediation/arbitration programs should implement a small-scale evaluation of their effectiveness in bringing parties to a fair and long-lasting resolution of their dispute.

J. Hearing Officers

1. For court-run small claims arbitration programs, all hearing officers should be attorneys with extensive legal experience, especially if an arbitration award cannot be appealed. Screening of arbitrator applicants can be conducted by the local bar association.

2. For mediation programs, mediators of varied backgrounds, including attorneys, are best.

3. A small claims court whose small caseload or limited budget may preclude the establishment of a full-fledged program can still provide an alternative forum to litigants by combining the role of small claims administrator/clerk and mediator into a single staff position. This individual would handle all small claims filings and act as mediator when so instructed by the presiding judge.

4. The ideal number of hearing officers for a given mediation/arbitration program depends on the size and diversity of the program's caseload, how frequently the hearing officers can hold sessions without becoming stale in their approach, and their level of compensation.

5. Attorney hearing officers should serve pro bono. Non-attorneys should be paid, even if it is only a nominal fee.

6. Extensive training should be given to all hearing officers, including attorneys and other professionals.

K. Program Costs

1. Program staff will have to devote time to securing financial backing. For the greatest program stability, it is best for the program to receive support directly from the court budget. In addition, the program can be funded through a filing fee surcharge assessed against all small claims plaintiffs.

2. The costs for a court-sponsored arbitration program cannot be precisely estimated, but they are minimal: (a) lawyer arbitrators can serve such programs without compensation; (b) if the sessions are conducted in the evenings, existing court facilities can be used at low cost; (c) the record-keeping required is not significantly greater for cases going to arbitration than for those that do not; and (d) in most jurisdictions, existing court personnel can administer the program on a part-time basis.

3. The bulk of the budget expenditures for mediation programs is for staff salaries, fringe benefits, and mediator fees. Obviously, the costs of the program are far less if volunteer lawyer-mediators are used. The costs for such a program are also lower when the program exclusively handles small claims cases referred by the court; a diverse caseload from multiple sources necessitates a large intake staff. A careful selection of program options should enable a court-operated small claims mediation program to keep its costs between $15 and $35 per case.

V. Availability

The Use of Mediation and Arbitration in Small Claims Disputes can be bought or borrowed from the National Institute of Justice/National Criminal Justice Reference Service.

1. To purchase:

   National Institute of Justice
   National Criminal Justice Reference Service
   Box 6000
   Department F
   Rockville, Maryland 20850
   Price: $8.50

2. Document loan:

   National Institute of Justice
   National Criminal Justice Reference Service
   Document Loan Program
   Box 6000
   Rockville, Maryland 20850
   Phone: (301) 251-5500

The National Institute of Justice publishes a series of documents on specialized topics of interest to criminal justice practitioners, policymakers, and researchers. A list of available documents can be obtained from the National Criminal Justice Reference Service.

U.S. GOVERNMENT PRINTING OFFICE: 1983 - 381-934 - 814/5167

END