

Evaluation of ADR in United States Attorney Cases

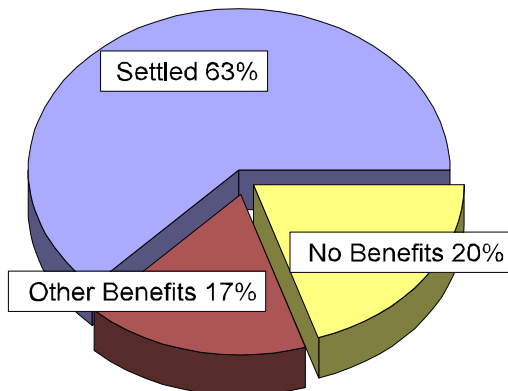
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To measure the effectiveness of alternative dispute resolution (ADR), we conducted a study of 828 civil cases in which Assistant United States Attorneys used ADR over the past five years. This research is based upon evaluation forms completed by AUSAs upon the completion of a case. The evaluation forms measure information on many aspects of the ADR process, including timing, fees paid to the neutral, whether the ADR was mandatory or voluntary, estimated time and money savings, and success of the process.

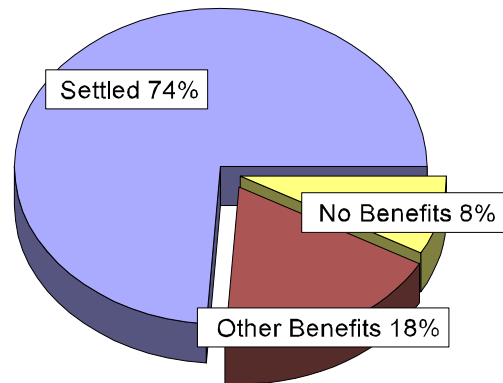
Overall, ADR was successful in settling almost two-thirds of the cases where it was used. AUSAs reported that the process had other benefits, even where the case did not settle, in another 17 percent of the cases. These benefits included gaining insight into the plaintiff's case, preventing future disputes, and narrowing of the

Effectiveness of ADR



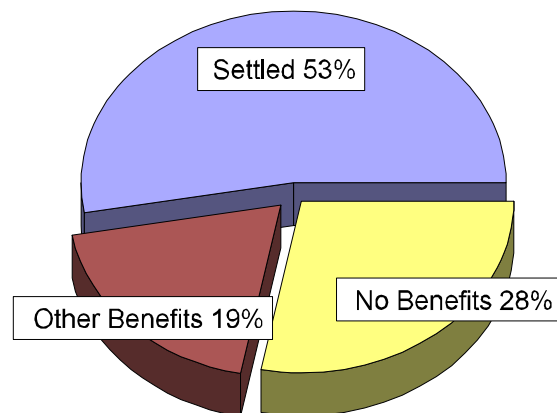
issues in the case. Thus, ADR added value in four-fifths of the cases where it was used. This information is shown in the chart below.

ADR in Medical Malpractice Cases



There were significant differences in ADR effectiveness depending on the type of case in which it was used. ADR was most effective in

ADR in Title VII Cases



medical malpractice cases, settling almost three out of every four cases where it was used. This information is shown in the chart above.

In contrast, ADR was least effective in settling Title VII employment discrimination cases. Nonetheless, ADR was successful in settling slightly more than half of these cases, as shown in the following chart.

It is unclear why Title VII cases settled less frequently, particularly given the reported success of ADR in these cases in other contexts. For example, in administrative Title VII cases at the Postal Service and Air Force, ADR successfully settles between 70 and 80 percent of cases in which it is used. There are many possible explanations. One difference may be that by the time an employment discrimination case reaches the Department of Justice, the parties have already had an opportunity to settle at the administrative level and refused to do so. Negotiations may have been going on unsuccessfully for a year or more. While medical malpractice and other tort cases also can have lengthy administrative processes, the personal feelings in these cases may not be as strong as in Title VII, and thus the delay is not as harmful to settlement.

In general personal injury tort cases, ADR was successful almost as often as in medical malpractice, and it was valuable in almost nine-tenths of the cases where it was used. Specifically, 71 percent of these cases settled in ADR, benefits to ADR were reported in another 17 percent of the cases, and there was no benefit in 12 percent of the cases.

AUSAs were asked to report the costs of ADR, which are set forth in the following table.

COSTS OF ADR	
Average fees paid to the mediators ¹	\$867*
Average time spent in preparation	12 hours
Average time spent in mediation	seven hours

*Note that fees for mediators now come out of a central Department of Justice budget, rather than individual budgets.

The above figures varied somewhat depending upon the type of case in which ADR was used. The average Title VII mediation was the most expensive at \$1007, and the average motor vehicle tort mediation was the least expensive at \$375. This difference may reflect the relative complexity of these types of cases. AUSAs reported that medical malpractice mediations required the most preparation time, an average of 17 hours per case, while motor vehicle torts required only five hours of preparation.

AUSAs reported benefits from ADR that far exceed these costs. Reporting forms asked AUSAs to estimate savings in time and money in each case where ADR was used, and these savings are summarized below.

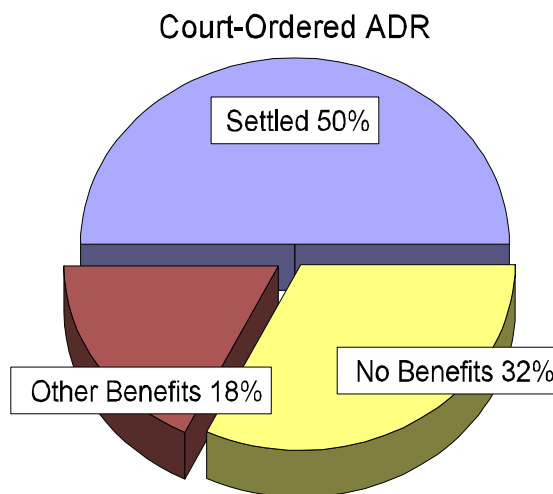
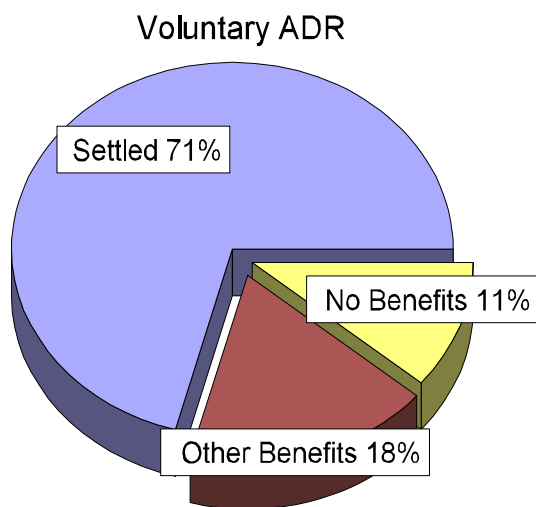
BENEFITS FROM ADR	
Average Litigation Costs Saved	\$10,700
Average Staff Time Saved	89 hours
Average Litigation Time Saved	6 months

On the reporting forms, "Staff time saved" is defined as "the number of hours you and others (including paralegals) would have spent on this case if ADR had not been used." "Litigation time saved" is "the number of months it would have taken to achieve final resolution of the case if ADR had not been used." "Litigation costs saved" means "the amount of money you would have spent on transcripts, witness fees, A.L.S., travel, etc. to prepare and litigate this case if ADR had not been used." (These computations were obtained from prior forms, revised in 1997 to accommodate concerns of civil chiefs.) Thus, even though many of these cases would have settled anyway, the AUSAs believed it would have taken longer and cost more to settle them without the use of ADR.

These figures also varied somewhat depending on the type of case. The greatest savings of time and money were realized in Title VII cases, where average staff time saved was 104 hours and

average litigation costs saved were \$17,683. Thus, while the ADR settlement rate in these cases was relatively low, the savings realized were relatively high. Medical malpractice cases also reported high savings rates. The average staff time saved in these matters was 111 hours and the average litigation costs saved were \$13,317. As noted above, these cases can be among the most complex on the docket, requiring considerable time and resources to litigate if they do not settle. The lowest savings rates were reported in motor vehicle tort cases, where the average staff time saved was 56 hours and average litigation costs saved were \$8,433. These cases are generally relatively straightforward to litigate if settlement does not occur.

We compared success rates of ADR in cases where ADR was mandated by the court with cases where its use was voluntary. As shown in the charts below, ADR was more effective when it was used voluntarily.



This finding is interesting, and it differs from other research on the topic which has found that mandating ADR does not decrease its effectiveness. *See* Stephen B. Goldberg and Jeanne M. Brett, *Disputants' Perspectives on the Differences between Mediation and Arbitration*, 6 NEGOTIATION J. (1990); Craig A. McEwen and Richard J. Maiman, *Mediation in Small Claims Court: Consensual Processes and Outcomes*, in *MEDIATION RESEARCH* (Kenneth Kressel, Dean G. Pruitt and Associates, 1989); and Jessica Pearson and Nancy Thoennes, *Divorce Mediation: Reflections on a Decade of Research*, in *MEDIATION RESEARCH* (Kenneth Kressel, Dean G. Pruitt and Associates, 1989). There are a number of factors that could explain this disparity other than voluntariness. For example, perhaps the mediators AUSAs use in voluntary cases are more skilled than those in court-ordered programs. It is also possible that the cases where AUSAs voluntarily choose to use mediation are more amenable to settlement than those where mediation is ordered by the court. Nonetheless, the difference is stark. Also, a number of AUSAs noted on the reporting forms that they were displeased when the court ordered them to use mediation in a case where they did not believe it would be effective.

Differences also exist in the effectiveness of ADR depending on the time in the case when it is used. ADR was significantly more likely to lead to settlement when it occurs closer to the time of trial, as shown below.

ADR SETTLEMENT RATE BY TIME OF USE	
Fewer than 90 days before trial	72 percent of cases settled
90 or more days before trial	53 percent of cases settled

On the other hand, however, savings were much greater the earlier ADR was used in the case, as shown below.

ADR SAVINGS BY TIME OF USE		
	Fewer than 90 days before trial	90 or more days before trial
Litigation costs saved	\$5125	\$10,000
Litigation time saved	three months	six months
Staff time saved	73 hours	89 hours

Thus ADR is more likely to result in settlement if it is used later, but ADR leads to greater savings if it is used earlier. The relative importance of these various factors will depend upon the nature of each individual case.

There is some evidence that ADR is particularly effective in larger-dollar cases. To study this, we examined the universe of cases where ADR was used and the case was eventually settled. In these cases, either ADR was successful in settling the matter or ADR was unsuccessful, but settlement occurred later. Of these cases, different results were found depending on the size of the eventual settlement. Where the settlement was for less than \$30,000, ADR was successful 78 percent of the time. Where the case settled for between \$30,000 and \$120,000, ADR was

successful 85 percent of the time. Where the case settled for more than \$120,000, ADR was successful 90 percent of the time.

Finally, AUSAs who completed the survey described the advantages ADR can provide. Here are some quotes from AUSAs on the value of ADR in cases where settlement occurred:

- “Mediation helped patch up an employee/employer relationship, preventing other foreseeable disputes.”
- “The settlement was better and more carefully designed than what a court would have ordered.”
- “This case would not have been resolved without ADR. When we started, the parties could not even stand to be in the same room together.”
- “It was great to bring the plaintiff and the agency counsel together to discuss what allegedly happened. It also encouraged the agency to realize the actual risks of trial.”

AUSAs also reported a number of benefits from ADR even when the case did not settle. Here is a sample of these statements:

- “Mediation gave us free discovery and insight into plaintiff’s position.”
- “Mediation gave the plaintiff a reality check and moved negotiations much closer.”
- “Mediation showed the court the good faith conduct of the government in dealing with the pro se plaintiff.”
- “ADR allowed us to express our sadness at plaintiff’s loss while maintaining our view that VA care was adequate.”

We are currently conducting further study using LIONS data that should provide additional information on the effectiveness of ADR, and we will publish this research as soon as it becomes available.

ABOUT THE AUTHOR