

MEDIATING LANHAM ACT CASES: THE ROLE OF EMPIRICAL EVALUATION

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In the past decade, the number of ADR programs has dramatically increased in both state and federal courts. Federal statutes such as the Civil Justice Reform Act of 1990¹ and the Alternative Dispute Resolution Act of 1998² increasingly call upon the federal courts to implement alternative dispute resolution (ADR) programs. In addition, as ADR is integrated into law practice, local leaders from the bar and bench are collaborating to create new programs. This push to create new ADR programs has occurred for a number of reasons, including improving the quality of justice, decreasing the time and cost burden on the courts of a skyrocketing caseload, and improving the lives of the litigants.³

Within this context, assessing the performance of court-related mediation programs is essential. Most broadly stated, these programs must be evaluated because of the effect they can have on the lives of countless individuals, including the litigants, lawyers, judges, and the many people directly or indirectly associated with the litigating

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¹ 28 U.S.C. § 471 (1990) (requiring each United States district court to develop a civil justice expense and delay reduction plan; as part of this plan, the act authorizes district courts to refer appropriate cases to designated ADR programs).

² 28 U.S.C. § 651 (1998) (authorizing each district court to require litigants in all civil cases to consider the use of the ADR process; it also provides the framework by which each district court should promulgate rules regarding ADR within its jurisdiction).

³ The Civil Justice Reform Act was passed to address “problems of cost and delay in civil litigation” and states, in part: “Evidence suggests that an effective litigation management and cost and delay reduction program should incorporate...utilization of alternative dispute resolution programs in appropriate cases.”[28 USC 23 § 471 (1990) and as amended by Section 102(5) of Public Law 101-650 (1990)] *See also*, JAY FOLBERG & ALISON TAYLOR, *MEDIATION: A COMPREHENSIVE GUIDE TO RESOLVING CONFLICTS WITHOUT LITIGATION* 4-7 (1986); Kim Dayton, *The Myth of Alternative Dispute Resolution in the Federal Courts*, 76 IOWA L. REV. 889 (1991); ELIZABETH PLAPINGER & MARGARET SHAW, *COURT ADR: ELEMENTS OF PROGRAM DESIGN* ix (1992).

parties. If such programs are going to be established (even if participation is voluntary) and public resources used (even if not delineated as a budget item) their impact must be assessed.

Moving beyond the basic “because there are people involved” proposition, there are two clear public policy reasons to study court-related mediation. First, it is important to ensure that such programs support, rather than supplant, the rule of law. Second, such programs must also be effective. The voluntary nature of many local programs (including the subject of this study) makes assessment doubly important because the programs will only be utilized if the legal community accepts them. While this first issue is the typical subject of law review articles, it is the second question – effectiveness – that was the driving force behind the 2000 study of the Lanham Act Mediation Program in the Federal District Court for the Northern District of Illinois and on which this article will focus.

WHAT THIS ARTICLE COVERS

This article considers the evaluation of court-related mediation by looking at one particular study and why it was conducted as it was. It will first describe the mediation program for cases arising under the Federal Trademark Act of 1946 (the "Lanham Act")⁴ in the Federal District Court for the Northern District of Illinois. It will then address the design issues in research of court-related programs and discuss the design and results of an evaluation of the Lanham Act Mediation Program within the context of this research. It will conclude with what can be learned by studying the study.

⁴ 15 U.S.C. § 1051 (1997). This includes cases involving trademark/service mark infringement, unfair competition, false advertising, trade disparagement and trademark dilution.

THE LANHAM ACT MEDIATION PROGRAM

The Lanham Act Mediation Program was the result of collaboration between the intellectual property bar and the judicial leadership in the U. S. District Court for the Northern District of Illinois (hereinafter the “District Court”). In 1996, upon request from a group of lawyers practicing in the trademark area, the District Court established a mediation program for cases arising under the Lanham Act. On September 30, 1996, rules were adopted, Local Rule 16.3,⁵ that implemented the program for all cases filed on or after January 6, 1997.

The rules provide that all Lanham Act cases will be assigned to the program, but that parties can decide whether to participate.⁶ Upon assignment, the Clerk is to send notification to plaintiff’s counsel.⁷ Plaintiff’s counsel in turn must notify his or her own client(s) as well as defense counsel that the case has been referred to the mediation program.⁸ Defense counsel must then notify his or her client(s).⁹ The lawyer for each party is required to file a certification with the District Court that he or she has complied with these notification procedures.¹⁰

The parties then must file a joint written notice indicating either: (1) that they want to participate in the mediation program, (2) that they do not want to participate, or (3) that they already are participating in another mediation program.¹¹ If the parties decline to participate, they must include a brief statement outlining their reasons for

⁵ U.S. Dist. Ct. Rules N.D. Ill., LR 16.3. The rules are available at www.ilnd.uscourts.gov/LEGAL/LanhamAct/LanhamActPrg.htm.

⁶ *Id.*

⁷ *Id.*

⁸ *Id.*

⁹ *Id.*

¹⁰ *Id.*

¹¹ *Id.*

doing so.¹² This statement shall not disclose the position of any individual party regarding participation in the program.¹³

During the time period covered in this study, the joint notification concerning participation in the program was to be filed either at the first scheduling conference or sixty days from filing of the complaint, whichever occurred earlier.¹⁴ Mediation is to be commenced within 45 days of filing the joint notification and completed within 30 days of commencement.¹⁵ Following mediation, the mediator is required to report the outcome to the District Court within ten days.¹⁶ For more information on time frames and other details, see the complete rules¹⁷.

The rules provide for the creation of a roster of neutrals and neutral organizations to serve as mediators.¹⁸ In general, qualifications for inclusion on the roster are five or more years practicing law in the Lanham Act area, or three or more years as a neutral.¹⁹ At the time of the study, there were 58 providers on the roster, of whom 56 were individuals.

ORIGIN OF THE STUDY

This study first started taking shape after informal reports were heard from the District Court that only three cases had been mediated in the Lanham Act Mediation program in 1998. This information did not agree with the perception of practitioners that

¹² *Id.*

¹³ *Id.*

¹⁴ Effective September 1, 1999, this rule was amended to require joint notification to be filed at the first scheduling conference or within 90 days of the filing of the complaint, whichever is earlier. Technically, this affected 69 cases within the study period. However, although the rule had been amended, the information regarding the rule that was sent to the attorneys by the Clerk's office upon filing did not change. These 69 cases are therefore treated in this study in the same manner as those filed before September 1, 1999.

¹⁵ U.S. Dist. Ct. Rules N.D. Ill., App. B.

¹⁶ *Id.*

¹⁷ *Supra* note 4.

many more mediations had taken place. Advocates of ADR were concerned that the low reported use of the program suggested that the program was a failure and discouraged the District Court and the bar from considering additional mediation programs. A working group²⁰ consisting of a United States magistrate judge and representatives from The Chicago Bar Association's Patent, Trademark and Copyright and Alternative Dispute Resolution Committees (one of whom became a magistrate judge during the course of the study) was formed to respond to these concerns.

The working group joined forces with the Center for Analysis of Alternative Dispute Resolution Systems (CAADRS), a non-profit organization that assists courts in Illinois in making more effective use of ADR, to evaluate the Lanham Act Mediation Program. Two study questions were defined: (1) How many mediations of Lanham Act cases had been conducted in the Northern District of Illinois? and (2) What did lawyers and neutrals think about the efficacy of mediation in Lanham Act cases? These study questions were designed with the goals of clearing up confusion about how much mediation was taking place, ascertaining the probable use of the program by attorneys, and providing workable suggestions for the future of the program.

Defining the questions was the first step in evaluating the program. The second step was to design the study.

¹⁸ U.S. Dist. Ct. Rules N.D. Ill., App. B.

¹⁹ *Id.*

²⁰ Working group members were Leslie A. Bertagnolli of Baker & McKenzie, Federal Magistrate Judge Geraldine Soat Brown, Federal Magistrate Judge Morton Denlow, William J. Nissen of Sidley & Austin, and Joseph V. Norvell of Brinks, Hofer, Gilson & Lione.

RESEARCH DESIGN ISSUES

The design of program evaluations depends on what the goals of the mediation program are and what information those evaluating it want to gain. The goals of the mediation program determine how its effectiveness is defined and therefore what characteristics of the program will be studied. If the goal of the program is to provide procedural justice, then effectiveness will be defined by such criteria as litigants' perception of fairness and satisfaction with the process. If it is achieving just outcomes, litigant satisfaction with the outcome and the durability of the resolution will be some of the items measured. If the goal is to minimize cost and time involvement for parties or the court, then the amount these are reduced will be the measure of effectiveness for that program.

How effectiveness is defined determines whether the evaluation will be comparative, quantitative, qualitative, or a combination of two or three of these. It will also influence the decision of which of the five data sources will be incorporated: data from the courts, parties, attorneys, mediators, and judges. Generally speaking, if the court's goals for a program include a comparative aspect – to decrease the time a case is on the docket, decrease court resource use per case, increase party satisfaction, or decrease litigant costs – the general approach taken in the evaluation is to compare cases that have been mediated to those that have not.

If the court's goal for the mediation program does not have a comparative aspect and is focused simply on the provision of another option, then the evaluation looks to determine how well the program is functioning, how it is viewed by litigants and attorneys, and how it can be improved. Comparison does come into play in longitudinal

studies that compare the effectiveness of the program over time to determine if an effective program is continuing to be so, or if a less effective program has improved.

Quantitative information is generally gathered from court records. This can include time to dispose of a case, number of motions filed, number of hearings, percentage of cases mediated, and settlement rates. Some quantitative information can also be elicited from lawyers and parties, particularly in terms of the cost to the parties for the litigation process (including mediation), but lawyers are often unwilling or unable to provide exact figures.

Qualitative information can be gathered from the parties, their attorneys, mediators and judges. Qualitative information generally deals with the attitudes of these groups regarding their mediation and mediation in general. Post-session satisfaction surveys are a frequent tool to obtain such information. Another, less frequently-used analysis, is the impact of mediation on the later behavior of the parties. This type of longitudinal study is generally comparative and looks at how mediation shapes the relationship between parties over time.

The Lanham Act Mediation Program was developed in response to interest from members of the bar and had as its main purpose to offer an alternative to litigation that would be satisfactory to those who participated. Therefore, it was determined that the evaluation of the program would not contain any comparative elements. It would focus instead on reaction to the program itself and to mediation in general. This focus lent itself to the gathering of both quantitative and qualitative information: quantitative in that the number of mediations had to be determined, qualitative for the purposes of gaining information on reaction to the program and mediation in general.

The above considerations define the general shape of the evaluation. Exactly how the study is to be carried out is often determined by practical considerations, such as the amount of resources available, the probability of obtaining results from a specific source, and the weighting of probable quantity of response with the probable quality of response from specific sources and data formats. The amount of resources available may determine whether to survey a sample population or the entire population involved, whether to include a specific data source, and how to obtain the data.

The number of lawyers and mediators affected by the Lanham Act Mediation Program was rather small – only about 1,000 lawyers and 56 mediators – so it was decided that all should be mailed a survey. On the other hand, two other groups who could have been surveyed on this question - judges and litigants – would not be surveyed. It was determined that neither group would have significant additional objective information on the question of how many mediations had been conducted. While their attitudinal information might have been interesting, the additional cost involved without adding to the first study question determined that they would not be surveyed in this study.

These decisions are influenced by the probability of obtaining quality results from a specific source. The less probable it is that a source will provide information that will enhance the results of the study or that a specific method of getting the information will do so, the less likely it will be pursued. For example, the design of the study of the Lanham Act Mediation Program did not include pulling the actual case files and analyzing the statements regarding why each case was not going to mediation. The time

required to do so was beyond what was available for this study. Rather than read each case file, this question was posed on the lawyer surveys.

The choice between quantity and quality of response usually influences the method of obtaining information. For example, checklist surveys are more likely to get a higher response rate than ones that require written responses because they are easier fill out; however, written responses can give a higher quality of response because they are less influenced by any preconceptions by those designing the study.

Another important issue when designing a study is who to involve in the effort. The study group should include people from a variety of backgrounds that can contribute different skills and knowledge. In this particular case, the working group included expertise from the bench, from members of the bar with substantive expertise in intellectual property, and from members of the ADR community who had expertise in mediation. They then brought in CAADRS who had research capabilities. The other essential player was Judicial Support Officer Ted Newman from the office of the Clerk of the Court, without whose knowledge and enthusiastic assistance this study would not have been possible.

STUDY METHOD

The concerns of the study regarding the use of the Lanham Act Mediation Program meant that effectiveness was defined in terms of the number of mediations and the resolution rate, which could be affected by the level of compliance with the court rule. This led to the first question regarding how many times was mediation being conducted. An examination of case characteristics, the results of the mediations, and how well the court rule governing the program was being followed was included in order to

put use of the mediation program in a useful context as well as give a better picture of the overall effective functioning of the program. The study was also concerned with determining the level of interest in the mediation program, which was measured through the second question regarding what lawyers and neutrals thought about the efficacy of mediation in Lanham Act cases. The latter would also assist in the goal of providing workable suggestions for the future of the program.

Much of the information needed to answer the first question could be obtained only through the examination of individual court dockets. This included case characteristics and the number of mediations. However, no system was in place for gathering statistics on the mediation program, which meant that review of court records could only give an incomplete picture of the number of cases sent to mediation. To fill out the picture, lawyers and mediators were asked to provide information on the cases they mediated.

To answer the second question – what the lawyers’ and mediators’ attitudes were toward mediation in Lanham Act cases – and to supplement court docket information for the first question, surveys were sent to lawyers who had filed Lanham Act cases between 1997 and 1999 and mediators who were on the program’s roster.

Before implementation of the study design, certain definitions were established to ensure clarity of what was being studied and what the results would be. Mediation was defined as a process separate from any process conducted by a sitting judge, e.g., a referral to a magistrate judge for a settlement conference is not considered to be mediation. A further distinction was made in the study between those mediators who are on the District Court’s roster and those who are not.

METHOD OF REVIEWING COURT DOCKETS

In mid-February 2000, CAADRS set out to study the 679 Lanham Act cases filed from the beginning of the program on January 6, 1997 to December 31, 1999, in two ways. First, PACER, the Federal Court's Public Access to Court Electronic Records, was searched for all Lanham Act cases that were filed during the time period under study (January 6, 1997-December 7, 1999). These were reviewed for evidence of the program's effectiveness, including information regarding attorney compliance, administration of the program (Court Clerk compliance), and evidence of mediation.

Then, all cases that were closed from January 1, 1997 to December 31, 1999, were reviewed for case characteristics, including evidence of mediation, settlement conferences, preliminary injunctions and motions for temporary restraining orders; the length of time they were open; and their disposition. This was done in order to better understand the context within which the Lanham Act Mediation Program was functioning. Closed cases had to be used to retrieve accurate information regarding the motions that had been filed and the manner in which cases were disposed.

SURVEY METHOD

CAADRS used data from the Clerk's office to mail surveys in February 2000 (see Appendix A) to 1,102 individual lawyers who had filed appearances in the 359 Lanham Act cases filed during the study period whose data was accessible. These surveys included only those cases that had not been closed before January 1, 1998, and had no activity after September 30, 1998. Closed cases had been archived by the Court and therefore were not accessible for the lawyer survey portion of the study. In late March

2000, CAADRS mailed surveys to the fifty-six individual neutrals on the District Court's roster (see Appendix B).

Cover letters for both surveys promised that identities of respondents would be kept confidential.²¹ Responses by fax were requested, and an option of mailing the survey response was offered.

In order to increase the number of responses to the survey beyond the 189 received and to get a more representative picture of lawyers' attitudes toward the program and mediation in general, members of the study group and certain Chicago Bar Association committee members made follow-up calls to about 110 of the lawyers who had not yet responded. These calls, made approximately two weeks after the deadline for the return of lawyers' surveys, brought in another thirteen surveys, for a total of 202, or 18.33% of the original survey recipients.²² The same method was used about one week after the deadline for the mediators' surveys. At that point twenty of fifty-six surveys had been received. These follow-up calls brought in twelve mediator surveys for a total of thirty-two, or 57% of the recipients.

²¹ Throughout the study, there was an underlying concern among lawyers that they would be identified as criticizing the Court. One lawyer called CAADRS anonymously and reported a negative interaction with a judge concerning mediation, but did not want his or her identity or the information used in the study. Speaking more generally, another lawyer opined that magistrate judges would report to District Court judges about lawyers who had refused to settle, and that District Court judges would take that information into consideration when ultimately deciding cases at trial.

Efforts were made to address those concerns at all phases of the study. Throughout the study, all individual identifying data was kept within the CAADRS office. Information was reported only without identifying information, even to the Working Group. The only exception, which was explained in the cover letters, was lists of non-responders who were contacted by bar association volunteers and urged to respond to the surveys. In addition, Judge Harris H. Agnew was selected to sign the cover letters that went with the surveys because he is a well-respected former state court judge from Rockford, Illinois who chairs the CAADRS Executive Committee, but who is not directly related to the Northern District.

²² See *infra* Data, Analysis, Findings and Recommendations, below, for discussion of the response rate.

DATA, ANALYSIS, FINDINGS AND RECOMMENDATIONS

As a supplement to the main study questions, the lawyers were asked a series of questions regarding their involvement with mediation, including their awareness of the Lanham Act program prior to receiving the survey, their use of mediation in their law practice, and their area of practice. This was intended to determine how well the program was being publicized and to get some idea of the background of the respondents. About three-quarters of the respondents, 109 (75.17%), indicated they were aware of the program. Only slightly more respondents, 114 (78.62%), said they use mediation in their law practice, with ninety-one (62.76%) of those stating they had participated in at least one mediation in the past year.²³ The overwhelming majority, 104 (71.72%), indicated they practiced in the trademark area, with thirty (28.85%) of those indicating that they practiced in other areas as well.

This information indicates two things: first, information regarding the program was not reaching all those who needed it; and second, that most lawyers who were involved in Lanham Act cases in the District Court were familiar with mediation and were well-versed in the area of trademark law. The second item provided some understanding of how much knowledge the respondents had regarding mediation and the use of mediation for trademark cases. It also allowed for a comparison of responses of those with little experience in these areas with those who had more.

²³ It is unclear whether this number is accurate. It is common practice in the Northern District of Illinois to refer to judicial settlement conferences as mediations, although this is not how the term was defined for purposes of this study. The term “mediation” can be used to describe traditional judicial settlement conferences where District Court judges try to settle cases on their own calls, as well as settlement conferences by magistrate judges and Bankruptcy judges for cases referred from District Court judges.

The responses to background information not only helped place the overall responses regarding mediation in perspective, but also led to a number of recommendations. The indication that there were a significant number of trademark attorneys in the Northern District of Illinois who have been involved in something called mediation outside the Lanham Act Mediation Program led to the recommendation that when the Court considers new or expanded programs, it should continue to explore ways to build on the private use of mediation. The Court also should attempt to track the use of private mediation for court cases and to look into what characteristics would lead a case to more likely be aided by mediation when deciding how to expand mediation programs.

STUDY QUESTION 1: HOW MANY MEDIATIONS OF LANHAM ACT CASES WERE CONDUCTED IN THE NORTHERN DISTRICT OF ILLINOIS?

The question of how many mediations were being conducted under the Lanham Act Mediation Program was at the heart of this study. Confusion and disagreement over the total was what had originally motivated the study. It was decided, therefore, to attack the question from three directions: a study of the court dockets, and then comparison information from lawyer and mediator surveys.

While the specific question was one of amount of mediation, the overarching question was how well the program was functioning. Along with gathering data to address the question of amount of mediation, the study looked at related questions, such as case characteristics, compliance with court filing requirements and resolution rate in mediation. Filing compliance was studied because there was an underlying assumption that requiring filing would increase use of mediation and if there was less than complete filing compliance, that would lead to a diminished use of mediation. Resolution rate was

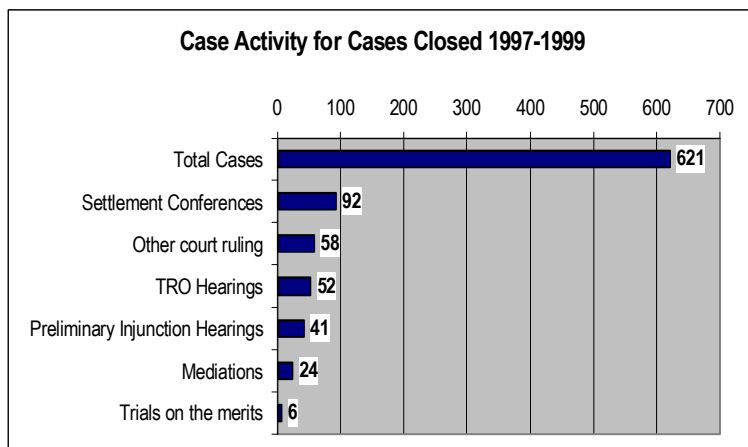
examined because if there was a low level of resolution, it would be a likely reason for attorneys not to use the mediation program.

Case Characteristics

Understanding the special characteristics of Lanham Act cases was essential to determining two things. The first was whether these cases were good candidates for mediation. There had been some concern about whether this was the case. If the cases were not good candidates, then the likely interest in mediating them would be minimal. The second was information as to how the cases are disposed of when not mediated. Placing the number of mediations in context would demonstrate the relative frequency of use of mediation and give a better picture of how well the mediation program was functioning over all.

An examination of court records for the 621 Lanham Act cases closed between 1997 and 1999 indicated four salient characteristics. First, the cases tended to close rather quickly. Second, the vast majority of cases were disposed of through unassisted settlement and very few were adjudicated. Third, an injunctive relief was sought in a significant minority of cases. Lastly, the Lanham Act cases were usually resolved by the parties themselves.

The median length of those cases closed between 1997 and 1999 was 4.3 months, with 16.75% closing within sixty days. Another 13.2% closed



within ninety days. This means that almost 30% of all Lanham Act cases during that time period were closed before mediation would likely have taken place (given the need for selecting the mediator and scheduling the mediation after the sixty days allowed to file the joint notice). Still, a significant proportion of cases were open long enough for mediation to be an option.

The most likely disposition for a Lanham Act case was unassisted settlement. This happened in 477 cases (76.81%). For those cases in which the parties did not reach settlement themselves, parties sought assistance with settlement more often than they turned to trial. The most frequent approach is the judicial settlement conference. These were held in ninety-two cases (14.81%). According to court records for this time period, mediation was sought in twenty-four cases (3.86%)²⁴, while arbitration was conducted in three (0.48%). Adjudication of these cases is also somewhat limited. Of cases closed between 1997 and 1999, only sixty-four (10.31%) were resolved by court action. Six of these were trials on the merits; the other fifty-eight were default judgments, summary judgments, or dismissals. Thus, while twenty-four mediations appears to be a small number, it compares favorably to adjudication.

Injunctive relief had been noted to be a significant factor in Lanham Act cases, and lawyers had often cited the need for it as a reason not to mediate. It was therefore considered important to determine the extent to which it was being sought. It was found that motions for injunctive relief were filed in 28.34% of all cases. There were a greater number of preliminary injunctions sought than temporary restraining orders (23.99% of

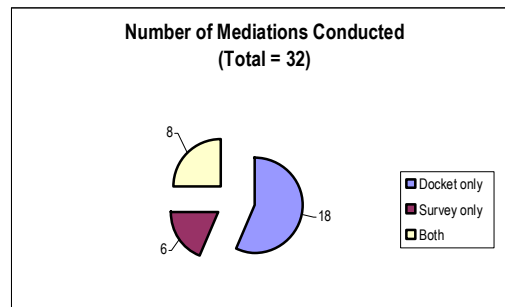
²⁴ See *infra* Use of Mediation, below. This number is incomplete, as will be discussed below. However, for accuracy in comparison, this number will be used when discussing the number of mediations relative to other court activities during this time period.

cases as compared to 14.65% of cases); however, a temporary restraining order was more likely to be ruled on and granted than a preliminary injunction. Overall, only forty-one (27.51%) of preliminary injunction motions were ruled on, with twenty-two being granted and nineteen being denied. Motions for temporary restraining orders were ruled on in fifty-two (57.14%) of the cases, with forty being granted.

Use of Mediation

The initial examination of dockets of cases closed in the years 1997-1999 (done to determine case characteristics and to compare the number of mediations to other case activities) revealed twenty-four mediations. This is not the correct subset of cases to determine how many occurrences of mediation had actually taken place since the advent of the Lanham Act Mediation Program. For that, the dockets of cases filed needed to be examined. A review of these cases showed that twenty-six mediations had been conducted. However, as stated above, the records were incomplete, so the survey responses from the lawyers and attorneys were used to flesh out a more accurate number.

Attorneys who responded to the survey indicated they participated in nineteen mediations, fourteen of which were not contradicted by other evidence²⁵. Of those fourteen, eight were among those



for which participation in mediation was mentioned in the court dockets. The dockets for

²⁵ Two that were reported to have been mediated in the 7th Circuit Court of Appeals were later found to have been reported in error. A check of court records by the Court Clerk indicated that one of the cases was never appealed and there was no record in the other case of a referral to mediation. Another three cases had contradicting information from other attorneys regarding the use of mediation. An examination of court dockets showed no evidence of mediation. These therefore were also eliminated from the count.

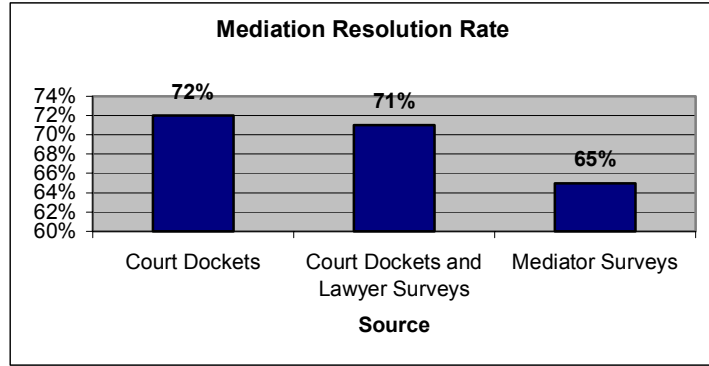
the other six cases made no clear mention of mediation; however, this does not negate the possibility that mediation was conducted in those cases (attorney responses included the names of the mediators and outcomes of the mediations, and court dockets are not often clear about whether mediation took place). When added to the twenty-six originally found in the case dockets, this brings the total number of mediations to thirty-two.

Mediators who responded to the survey stated they had mediated twenty-two cases. This is fewer than the number derived from a combination of court records and attorney surveys. However, two of the mediations in the court records were not among those enumerated by the mediators. Another eight were conducted by mediators outside of the District Court program. Adding those ten to the twenty-two mentioned by the mediators would bring the total number of mediations to thirty-two. It can therefore be stated with certainty that at least thirty-two mediations had been conducted since the inception of the Lanham Act Mediation Program, with twenty-seven of them occurring within the program itself.²⁶

Once the number of cases mediated was determined, the next logical question was how many mediations ended in agreement. This was a little more difficult to determine. Looking solely at data from court records, thirteen of the twenty-one in-program mediations led to agreement or partial agreement, five definitely did not, and the dockets for the other three cases were unclear as to how settlement was reached. If only those mediations were included for which the outcome is known, the resolution rate was 72.22%. Lawyer surveys indicated eight cases settled in mediation, two did not, one was

²⁶ The figure given is likely to be the smallest number of mediations that occurred. The incomplete response to the survey and the often ambiguous entries on the dockets mean that it is likely that even more mediations were conducted.

pending, and three had contradictory answers. If the cases from the dockets were combined with the six cases the attorneys marked as mediated that were not on the



dockets, there were seventeen with agreements, seven without agreements, and three for which the outcome was unknown, giving a resolution rate of 70.83%. The mediators reported that thirteen settled, two partially settled, and seven did not settle. This would be a 65% resolution rate if the partial settlements were not included in the calculation. Taking all this data together, the resolution rate in the program appears to be between 65% and 72%.

Compliance with Rules

Compliance with court rules was also examined in order to determine if the program was functioning as designed. For attorneys to comply, plaintiff’s counsel must notify his or her own clients as well as defense counsel that the case has been referred to the mediation program, then both plaintiff and defense counsel must file a joint written notice stating whether they are participating in the program or not.²⁷ As stated above, attorney compliance with the rule was assumed to correspond to the increased voluntary use of mediation. The assumption being that, if the lawyers talked the options over with their clients and informed the court of their decision regarding the use of mediation, they would be more likely to choose to mediate than if they did not. Compliance by the Clerk’s office, which entailed sending notification of assignment to the mediation

program to the plaintiff's counsel,²⁸ was examined for similar reasons: if the lawyers were informed about the option of mediation, they would be more likely to use it.

Mediator compliance with the requirement of filing a report regarding the outcome of the mediation was included in the study in the interest of discovering if the court was being fully informed of mediation program activity.

An examination of District Court records showed uneven compliance with court rules by all those involved. The Clerk's office had the highest level of compliance. In over 90% of the 679 cases filed between the beginning of the program and December 1999, it had mailed the court-required information regarding the Lanham Act Mediation Program to the plaintiff's attorney. The attorneys and mediators were found to have a much lower rate of compliance. The attorneys did not file the appropriate forms in 52% of cases; the mediators did not file reports in at least 50% of the cases they mediated.

The assumption of the study that compliance was an important issue that needed improvement led to the inclusion of a question regarding it on the lawyer survey. The lawyers were asked to suggest ways to increase compliance with District Court requirements that lawyers discuss mediation with their clients and file a joint statement with the District Court regarding their mediation intentions. This question was asked to provide lawyers an opportunity to make suggestions to the court that might not have been made through other channels. Ninety respondents answered this question. Note that the lawyers were asked "how" to increase compliance, not "whether" to. This affected the responses received and the usefulness of the responses, an issue that will be dealt with later.

²⁷ U.S. Dist. Ct. Rules N.D. Ill.

²⁸ U.S. Dist. Ct. Rules N.D. Ill.

The most frequently cited suggestions for increasing program compliance dealt with greater court involvement, with suggestions ranging from judicial enforcement to encouragement. Changing court rules accounted for another large percentage of the responses (thirty-two responses, equaling 35.55%), including sanctions and making the program mandatory. Another thirteen respondents (14.44%) thought that more information should be provided.

What the Results Mean

Based on the findings – that the majority of cases were open long enough to benefit from the program; that the amount of mediation occurring fell in the middle ground of a continuum of activities in a case, roughly on par with court rulings other than trial, and much higher than the rate that actually go to trial on the merits; that the settlement rate ranged in the respectable 65% and above range; and that compliance was an issue for all those involved in the mediation program. CAADRS was able to determine that the program was more successful than had been believed, but that there was room for improvement. This led to a number of recommendations to all involved in Lanham Act cases.

Because so many cases close quickly without court intervention, it was recommended that characteristics of cases that are likely to be protracted be identified and then judges would screen all cases for these characteristics. Appropriate cases could then be directed toward mediation. This would focus resources on the cases that are most likely to allow sufficient time for mediation, without making mediation a hurdle for cases that will resolve more quickly.

The greatest issue for improving program effectiveness was found to be achieving greater compliance with the court rule. The review of court records showed this to be lacking. Further, almost a quarter of all respondents stated that they did not know about the Lanham Act Mediation Program prior to receiving the survey. It was the assumption of the study that if the rules were complied with then: (1) lawyers would know about the program and discuss it with their clients and opposing counsel, (2) litigants would have an opportunity to consider mediation and (3) there would be reliable information about the program available to assist lawyers (and litigants) in making informed choices about mediation. In short, compliance would increase use of the program. Recommendations in connection with compliance were made to the lawyers, the mediators, the judiciary, and the Clerk's Office.

The key recommendation to the lawyers was to discuss the advantages and disadvantages of mediation with their clients and to fully comply with court filing requirements. It was also recommended that mediators comply fully with court filing requirements. Additionally, to increase mediator compliance with the local rule, mediators' filing of reports was suggested as a requirement for remaining on the court roster. The judiciary was recommended to insist on compliance with the rule and to voice support of the mediation program throughout the life of a Lanham Act case. This included insisting on compliance with the rule and its filing requirements, beginning with the first appearance of the parties before the Court and following up until the filing requirements have been met, suggesting that the parties consider utilizing the program at the first appearance, and identifying cases that are likely to last longer than four months

and encouraging mediation. Last, it was recommended that the Clerk's office ensure that information packets be sent for all Lanham Act cases.

Accessible information regarding the mediation program was also lacking, as noted by the relatively large percentage of respondents who did not know about it. The court's web site did not make all information on mediators, local rules, and procedures readily accessible.²⁹ It was therefore recommended that the Court Clerk amend its record-keeping system to enable it to: (1) produce reliable reports on numbers of mediations, (2) track resolution rates by mediator, referring judge and age of case and (3) to improve the court's web site. It was also recommended that there be a requirement for mediators to update their biographical information once a year in order to remain on the roster.

STUDY QUESTION 2: WHAT DO LAWYERS AND NEUTRALS THINK ABOUT THE EFFICACY OF MEDIATION IN LANHAM ACT CASES?

After addressing how much mediation was taking place, the other key questions were how the Lanham Act Mediation program was viewed by those it affected and how it might work better. It was decided, therefore, to ask the most direct participants – the lawyers who tried these cases and the mediators on the roster – for their experience and advice. Along with asking basic questions about the lawyers' and mediators' opinions about mediation, the surveys asked other questions to solicit input and advice about the program, and to gauge the likely use of the program.

Data from Lawyer and Mediator Surveys

Lawyers and mediators received different surveys that sought, for the most part, different information (see Appendices A and B). The only questions that were the same on both surveys were a pair of checklists regarding what made cases more or less

²⁹ The Court's Web site is www.ilnd.uscourts.gov.

appropriate for mediation. This section will first address this pair of questions. It then will discuss the remainder of the surveys separately, beginning first with the lawyer responses, then moving to those of the mediators.

Questions about Appropriateness for Lawyers and Mediators

The question of what cases were best and worst suited for mediation was at the heart of the second part of the study. This was addressed by a set of two checklists of characteristics that could make Lanham Act cases more amenable to mediation or more unsuitable for mediation. These were questions five and six on the lawyer survey, and six and seven on the mediator survey.

Question 5 for lawyers:

Based on your experience, what characteristics make some Lanham Act cases more **amenable** than other Lanham Act cases to mediation?

- 75% expense of litigation
- 50% interested in quick resolution
- 50% ongoing business relationship between parties
- 35% case likely to settle short of trial
- 23% early in the case, e.g. some discovery, but not completed
- 18% desire for informal proceeding
- 14% expertise of mediator
- 13% client interested in confidential proceeding
- 7% inexperienced counsel on other side
- 5% late in the case, e.g. discovery completed, ready for trial
- 11% other

Question 6 for lawyers:

Based on your experience, what characteristics make some Lanham Act cases more **unsuitable** than other Lanham Act cases for mediation?

- 64% injunctive relief important
- 47% establishment of legal precedent important
- 39% desire for formal proceeding governed by federal rules
- 32% inexperienced counsel on other side
- 25% late in the case, e.g. discovery completed, ready for trial
- 16% expertise of judge
- 14% early in the case, e.g. some discovery, but not completed
- 7% expense of mediation
- 7% ongoing business relationship between parties
- 1% interest in quick resolution
- 1% case likely to settle short of trial
- 23% other

The lawyers and the mediators received the same two lists. The lists, which were preceded respectively by the questions: “what makes a case amenable to mediation?” and “what makes a case unsuitable for mediation?” were similar but not identical. The lists were similar so as not to appear to steer respondents to particular answers, but differed

when it would have been obvious that a particular item would not be both a benefit and a detriment. Some items, such as “ongoing business relationship between parties” appeared on both lists under the assumption that some lawyers might find that litigation or mediation was the better venue in that situation. Some items coordinated, rather than matched, e.g., “desire for informal proceeding” and “desire for formal proceeding governed by federal rules.” A few appeared on only one list, with no parallel on the other. Examples included “client interested in confidential proceeding” and “injunctive relief important.”

Respondents were asked to check the top three indicators and circle the most favorable or least favorable for mediation. Of the 202 lawyers who responded to the survey, 115 responded to question five and 111 responded to question six. Not all circled a strongest indicator. Twenty-eight mediators responded to both question six and seven.

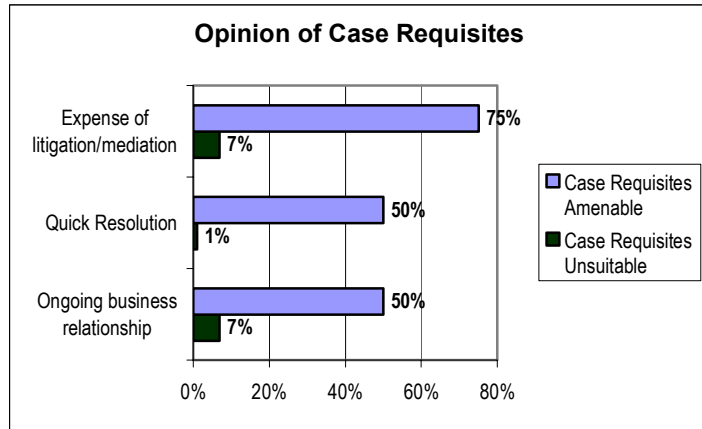
Lawyers’ Responses Regarding Appropriateness

The list of characteristics that make a case amenable to or unsuitable for mediation can be divided into three categories: case requisites, logistical issues, and expertise of those involved.

Case Requisites

This term applies to attorney assessment of case needs and client interests for each individual case. Case requisites included in these questions were: ongoing business relationship, quick resolution, expense of litigation/mediation, need for injunctive relief, establishment of legal precedent, desire for informal/formal proceeding, and interest in confidential proceeding.

Attorney responses indicated that their decision about whether to mediate was based primarily upon their assessment of case needs and client interests for each case.



The three most frequent responses for both questions reflected this viewpoint. The most frequently cited amenable characteristics for mediation (question five) were, in order: the expense of litigation (74.78%), a quick resolution (50.34%), and an ongoing business relationship (49.57%). These three were also the most often chosen as the most important factors that make a case amenable to mediation. Expense of litigation was selected most often as the most important factor (24.35% of responses). This was followed by ongoing business relationship and quick resolution (18.26% and 8.70% respectively). The perception of the respondents was that when these were their clients' interests, mediation would address them.

This viewpoint is further seen in their contrasting responses to question six regarding unsuitability. Only 7.21% of respondents cited expense as a reason not to mediate, 0.90% believed mediation was not the way to go if a quick resolution was necessary, and 7.21% thought that an ongoing business relationship would make a case unsuitable for mediation.

On the other hand, if attorneys believed court intervention to be necessary for an individual case, mediation was not considered to be suitable. Attorneys most frequently (63.96%) cited a need for injunctive relief as a reason not to mediate. Another 46.85%

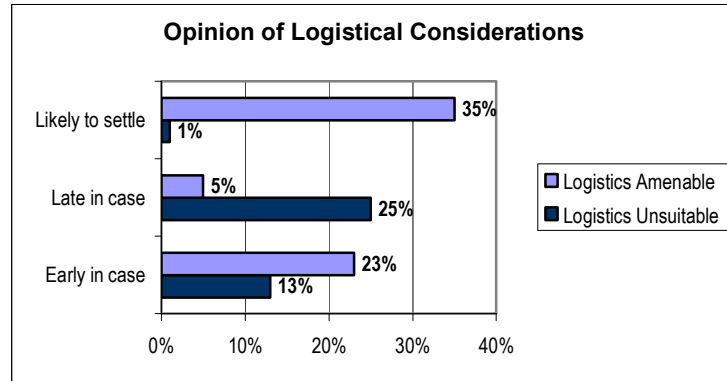
concluded that the need to establish legal precedent made mediation unsuitable, while 38.74% cited the desire for a formal proceeding governed by federal rules as a reason not to mediate. These were also selected as the most important factors that make a case unsuitable for mediation. Injunctive relief was selected most often as the most important factor (21.62% of cases), followed by need for legal precedent and a desire for formal proceeding (9.01% and 8.11%, respectively).

A client's interest in confidentiality, often touted as one of the great assets of mediation, was not deemed to be so by most attorneys responding to this survey. It ranked eighth in order of frequency of response, with only 13.04% of the respondents citing this as a characteristic that makes a case more amenable to mediation. This ranks it behind all choices except "inexperienced attorney" and "late in case."

One possible explanation for this lack of value being placed on confidentiality is that because these cases are already in the public domain by their very nature as lawsuits, they are not seen as confidential. On the other hand, it could be that lawyers see these mediations as akin to settlement conferences where offers of settlement are considered inadmissible and where the lawyers do not show their hands any more than they would with a judge. There may be other explanations as well. It is also important to look at how the question was phrased. It asked what characteristics make a case amenable for mediation, not what is important about mediation. It may be that clients are not looking to mediation specifically because they want a confidential process, but that confidentiality is a significant aspect once they opt for mediation.

Logistical Issues

The next most important group of characteristics according to the lawyers is logistical. Logistical considerations included whether it was: early in case, late in case, or likely to settle short of trial.



When attorneys cited

these characteristics, they were most likely to see mediation as a means to settle a case early on. If they viewed a case as likely to settle before trial, 34.78% of them saw that as a characteristic that made the case amenable to mediation, while only 0.90% considered it to be an unsuitable characteristic. Mediation early in the case was also viewed more favorably than mediation late in the case: 23.48% said that a young case was amenable to mediation, versus 13.51% who said that it was unsuitable. Conversely, only 5.22% of attorneys said that an old case was amenable to mediation, while 25.44% thought that it was unsuitable.

Expertise

The expertise of those involved in the case is also of some importance to those who responded. These included: whether there was an inexperienced attorney on other side, the expertise of the mediator, and the expertise of the judge.

Of those who thought the inexperience of the opposing attorney was an important characteristic, the vast majority believed that it was a detriment when it came to mediation: 31.53% considered it to be a characteristic that made a case unsuitable for mediation, while only 6.96% saw it as one that made it amenable to mediation. The respondents were split nearly evenly when it came to the expertise of the third party: 13.91% cited expertise of the mediator as a factor for mediation, while 16.22% cited expertise of the judge as a reason not to mediate.

Question 6 for mediators:	
Based on your experience, what characteristics make some Lanham Act cases more amenable than other Lanham Act cases to mediation?	
<u>93%</u>	expense of litigation
<u>50%</u>	interested in quick resolution
<u>46%</u>	ongoing business relationship between parties
<u>25%</u>	early in the case, e.g. some discovery, but not completed
<u>25%</u>	desire for informal proceeding
<u>21%</u>	expertise of mediator
<u>18%</u>	case likely to settle short of trial
<u>11%</u>	late in the case, e.g. discovery completed, ready for trial
<u>4%</u>	inexperienced counsel on other side
<u>4%</u>	client interested in confidential proceeding
<u>11%</u>	other

These responses demonstrate a marked continuity in thinking among the lawyers that responded to the survey; however, there was one striking divergence between those attorneys who had filed one Lanham Act case and those who had filed two or more. This was the difference in the percentage of respondents who selected “quick resolution” and “expense of litigation” as characteristics that make a case amenable to mediation. Those who had filed only one Lanham Act case during the survey period were significantly more likely to choose those two characteristics than those who had filed two or more (with 64.29% and 37.29% choosing “quick resolution” respectively, and 85.71% and 64.41% choosing “expense of litigation” respectively). In contrast, those who had filed more than one Lanham Act case were more likely to have selected “ongoing business relationship” as a reason to mediate than those who had filed only one (61.02% as compared to 37.50%). A possible interpretation of this divergence is that those lawyers

with greater Lanham Act experience place a higher value on the need for maintaining business relationships.

Mediators' Responses Regarding Appropriateness

Mediator responses differed little from those of attorneys. They too, focused on the interests of lower cost, quicker settlement and continued business relationship.

However, mediators were much more likely than attorneys to select expense of litigation

as a characteristic that makes a

case amenable to mediation

(with 92.86% of mediators

choosing this characteristic).

Selection rates for quick

resolution and ongoing business

Question 7 for mediators:

What characteristics make some Lanham Act cases **unsuitable** for mediation?

<u>64%</u>	injunctive relief important
<u>43%</u>	establishment of legal precedent important
<u>36%</u>	inexperienced counsel on other side
<u>32%</u>	desire for formal proceeding governed by federal rules
<u>32%</u>	early in the case, e.g. some discovery, but not completed
<u>11%</u>	case likely to settle short of trial
<u>8%</u>	late in the case, e.g. discovery completed, ready for trial
<u>4%</u>	expertise of judge
<u>4%</u>	ongoing business relationship between parties
<u>0%</u>	interested in quick resolution
<u>0%</u>	expense of mediation
<u>25%</u>	other

relationship were similar to those of the lawyers, at 50% and 46.43% respectively.

Mediators also agreed with attorneys when responding to the question of what makes a case unsuitable for mediation. A majority (64.29%) of mediators selected the need for injunctive relief, while 42.86% cited the need for a legal precedent and 32.15% selected the desire for a formal proceeding.

The similarity in response between mediators and lawyers served to reinforce the conclusions made regarding the suitability of Lanham Act cases for mediation.

Other Data from Lawyer Surveys

Along with the questions that matched the mediator questions, lawyers were asked about the efficacy of mediation in additional ways: by two fill-in-the-blank short answers and by asking if they would use the program again.

The final section of the survey included questions that were specific to the cases in which each surveyed lawyer had filed an appearance. While several of the case-specific questions were intended to address the first study question concerning the number of mediations conducted, some also related to their opinions and attitudes about mediation and the program. These included asking why they did not mediate cases that were not mediated, what factors they thought led to certain outcomes in cases that were mediated, a general opinion question about mediation, and a final question about their sense of their client's opinion of mediation.

Findings – Pros and Cons of Mediation

Two questions were asked about the benefits and disadvantages of mediation (questions seven and eight).³⁰ While appearing to be similar to the earlier questions about suitability for mediation (questions five and six), they are actually quite different. Simply put, the former questions asked what made cases good or bad, the latter two sought to answer what made mediation good or bad. In addition, questions seven and eight were open-ended, unlike the check-lists that were provided for questions five and six.

The open-ended character of these questions allowed the lawyers to answer according to their own understanding of mediation in general. Therefore, the responses addressed more aspects of mediation itself, such as outcomes, structure, and the ability of neutrals, than did the checklist questions. Also, unlike the checklists, they required a certain amount of interpretation by the researchers. Nevertheless, despite the open-ended nature of the questions, most responses were sufficiently similar to be readily grouped within specified categories.

³⁰ Respondents often offered more than one response for each question on the survey; therefore, the number of responses does not always equal the number of questions.

Analysis – Benefits and Disadvantages of Mediation

Attorneys were clearly concerned about time and money savings, as expressed earlier in the questions about appropriate cases, the concerns were seen again in their responses to questions seven and eight. Those questions provided an open-ended opportunity for them to list the advantages and disadvantages of mediation. Here, once again, the majority of the answers to both questions dealt with time and expense in one way or another.

Saves Time, Saves Money

When asked to list the advantages of mediation (question seven), 58.20% of respondents noted cost savings, while 48.36% listed time savings. However, mediation was not universally considered to save cost and time. The largest percentage of responses to question eight (regarding disadvantages of mediation) cited wasted resources: 15.18% of respondents answered that a disadvantage to mediation was wasted expense, while 16.07% listed wasted time as a disadvantage. Another 8.93% cited mediation's non-binding character as a disadvantage, possibly alluding to the fact that resources would be wasted if there were no settlement.

The possibility of not obtaining an agreement in mediation prompted many attorneys' concern about wasting time and money. When asked what the disadvantages of mediation were, the concern about wasting resources was often paired with one of two variables – the entrenchment of the parties and the inability of a mediator to push for settlement (31.43% of responses regarding wasting time and money). Both these variables are seen as obstacles to obtaining an agreement, which would make mediation a drain on resources rather than a tool for achieving settlement.

This concern with the uncertainty of reaching agreement through mediation was the largest area of disadvantage cited, with 40.36% of all respondents noting this in some way. Responses raising this concern included: that mediation was non-binding, parties did not have a real interest in settling, the mediator was not able to force a settlement, and issues over resources expended even if mediation did not work.

Need for Court Ruling

The discussion of other disadvantages, however, did not show the same similarities between question six (unsuitability) and question eight (disadvantages), as was seen in the responses regarding time and cost. As stated above, when asked what made a case particularly unsuitable for mediation, the majority of respondents chose “the need for injunctive relief.” In question eight, only ten, or 8.93%, cited this need, ranking it fourth in frequency of responses. Other procedural issues were even less evident in the responses to the disadvantages question. The establishment of legal precedent, which was the second greatest factor in determining whether a case was unsuitable for mediation, was cited as a disadvantage of mediation by only four respondents (3.57%), with thirteen other responses being more frequent.

Responses to the disadvantages question were more likely to discuss issues with the outcome of mediation than problems with its procedural aspects. Thus, the third most frequent disadvantage (after the potential for wasting time and money) mentioned by the attorneys is the perception that the result would be a compromise (thirteen responses, 11.61%). The idea of “splitting the baby” was mentioned by many of these attorneys, who noted that attorneys in these cases often do not want to meet in the middle. This contrasts with the responses of eight other attorneys, for whom a compromise outcome

was desirable. These lawyers spoke of a “balanced resolution,” “finding some middle ground” or a “resolution that satisfies the interests of the parties versus ‘winner takes all’.”

This difference could be because these questions were about mediation in general rather than specific to Lanham Act cases, or it could be an indication that procedural issues were not frequently an obstacle to mediation, even in Lanham Act cases. This latter assessment is borne out in court data that showed that only a minority of these cases are affected by the procedural issues that lawyers stated made them unsuitable for mediation.

Use of the Lanham Act Mediation Program

The lawyers were asked if they had used the Lanham Act Mediation Program and whether they would use it again. The former has been addressed above by the first part of the study, the latter is covered here. This question was intended to collect information on the motivations of lawyers regarding the use of mediation, which could be helpful to referring judges and to counsel as they worked through the litigation process.

A number of respondents who hadn’t used the program answered the second half of the question. The most frequently cited reasons for not having used the program (thirty-six responses) dealt with willingness of parties to participate (twelve responses, 33%) and lack of opportunity (twelve responses, 33%).

Only six respondents offered reasons for using the program again, but they provided a total of twelve reasons to do so. Again, they cited time and money savings (two each), along with other reasons.

General Feedback

The final question (number eleven) asked for general feedback about the program. While this question was asked in an effort to pick up any input that might not have been caught in the other questions, it did not seem to provide new information. There were twenty-nine respondents, nine of whom (31.03%) indicated that they thought it was a good program. Three (10.34%) suggested it be promoted more and another three suggested it be made mandatory. There were fifteen other items of feedback, each coming from one respondent.

Case-Specific Questions for Lawyers

The lawyer surveys followed up the general questions with a series of questions about each specific Lanham Act case in which the lawyer had been involved. The series of questions was repeated for each case.

One of the purposes of these questions was to ascertain additional information about how many cases were actually being mediated and what the resolution rate was. For example, asking for the name of the mediator was another way of weeding out “mediations” that were actually settlement discussions conducted by judges. Other questions sought more information to determine how practitioners view mediation, such as how lawyers were making decisions about which cases to mediate and their opinions on mediation. Recognizing that this study did not survey clients, the survey asked the lawyers what they thought their clients’ opinions of the mediation were. This would both serve to determine why the mediation program is used and help to create recommendations for the future.

Reasons Not to Mediate

Because each case is unique, this question asked lawyers to address why they had or had not chosen to mediate a particular case. In order to obtain more detail about lawyers' motivations to mediate, they were asked what prompted them to mediate their particular case. There were 220 responses for 183 cases as to why the case was not mediated. The most frequent reason given for not mediating (seventy-eight responses, 35.45%) was that the case settled on its own. Another thirty-seven respondents (16.82%) indicated that they utilized a settlement conference. These two answers together accounted for more than half the responses (52.27%). When they are added to the other ways in which cases were closed short of trial they account for more than 57%.

Two groups of respondents (totaling 16.36%) indicated that someone in the case other than the lawyer answering the survey did not want to mediate. There were twenty-seven respondents (12.27%) who said opposing counsel refused and nine (4.09%) who said their clients were not interested.

One in five respondents indicated they did not mediate the case because of the need for something that they thought they could not obtain through mediation such as satisfactory results, finality, injunctive relief or summary judgment. There were also ten responses that related to the lawyer's lack of knowledge about the program or initiative.

Reasons to Mediate

Nineteen attorneys explained their reasons for mediating their case. The most frequent response, by seven respondents (36.84%), was a desire to settle. Five respondents (26.32%) indicated they thought it was required by rule and three each (15.79%) reported a desire to cut costs or the unreasonable position of the other party.

Two (10.53%) cited aspects of the case (i.e., the nature of the case or that neither had a strong case) in their decision to mediate. Two others (10.53%) said the case was on appeal, which is not the level at which the Lanham Act Mediation Program functions. One each (5.26%) indicated a need to demonstrate a good faith effort to settle, or that they simply always consider mediation.

Reasons for Settlement

The lawyers' response to the question about resolution rate is covered above under the first part of the study. In talking about cases that settled, ten respondents suggested six factors that led to agreement. Several respondents suggested multiple factors. Half the respondents (five) said hard work was a factor. Four out of ten credited an effective mediator, while three mentioned the desire to settle. Three others mentioned specific factors in the mediation: business pressures, discussion of merits, and identifying bases for settlement.

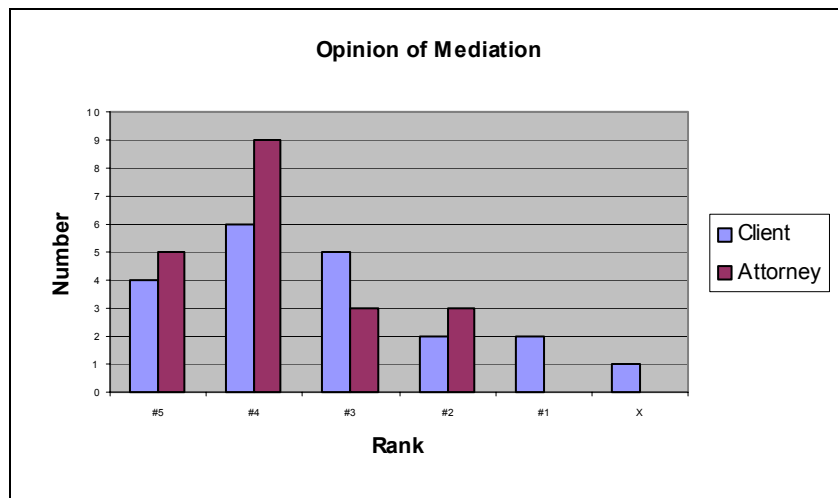
In talking about cases that did not settle in mediation, five other respondents listed six factors. Five out of six factors were problems with someone else at the mediation table. They included: other side unreasonable (two responses), other side not interested (one response), client not ready (one response), and poor mediator (one response). One lawyer also indicated that a disagreement over a tangential issue stopped the case from settling.

Opinions on Mediation

The lawyers were then asked about their opinion of mediation and what they thought their client's opinion was. The options ranged from 1 through 5, with 1 defined as "a waste of time" and 5 defined as "very valuable." For the client question,

respondents could indicate that the client did not participate. Posing the question this way was intended to get another view of the lawyers’ level of satisfaction or dissatisfaction with the mediation, again translating into probable future use as well as information on how well the program is currently functioning.

The twenty lawyers who responded were overwhelmingly positive about the mediation experience, with 70% giving it a “4” or a “5” rating. Three each (15% each) rated it as a “3” or a “2.” No lawyer rated his/her experience as a waste of time (a “1” rating).



The lawyers indicated that they thought their clients liked the mediation, but not quite as much, with half of the twenty respondents rating the mediation as a “4” or a “5.” Five respondents rated it as a “3” and one said the client did not participate. There were also two each who ranked it as a “1” or a “2”, for a total of 20% giving it this low rating.

Data from Mediator Surveys

Mediation Practice

Mediators were asked in how many of the cases that they mediated, did they think that the Lanham Act Mediation Program was the reason mediation was selected. This

question was intended to explore mediators' perceptions of the effectiveness of the program at getting parties to the mediation table. Nine of the thirty-two responding mediators (28.13%) had mediated cases within the Lanham Act Mediation Program. These mediators indicated that they thought the program was the reason in more than four out of five cases (seventeen of twenty-one, or 80.95%).

Factors Leading to Agreement

The survey then asked all mediators what they saw as common factors that lead to agreements in these cases. This question was intended to provide additional insight as to criteria of cases that were most amenable to mediation, which could be used to help guide judges on when to encourage mediation. There were twenty-five responses to this open-ended question. By far the most frequently named answer was the cost of litigation. This answer was provided by eleven respondents (44%). When combined with the three mediators who mentioned speed of resolution, more than half (56%) of the responding mediators mentioned cost and time.

Almost all of the other nineteen responses (some mediators gave more than one factor) could be grouped as party-related issues. These included factors such as a desire to settle, having realistic participants, and an accurate analysis of the strength or weakness of the case. Taken together, these two groups of responses would seem to indicate that the recipe for settlement is when people decide that their time and money are worth spending on mediation, and then have a mindset for resolution.

Recommendations

The next open-ended question was "What recommendations do you have to improve the program?" As with the open-ended question to the lawyers, this was

intended to capture any items that might not have fit into the other categories. Of the twenty-four comments offered by nineteen respondents, more than two-thirds, seventeen (70.83%), were directly related to actions by the court. Again, they mirrored the lawyer responses in focusing on encouragement and the possibility of making the program mandatory.

Feedback

The final mediator question was a request for any other ideas or feedback about the program. This was intended to give another opportunity for general reflection on the program. There were seven responses, most of which were encouraging or positive, with a few suggestions such as improved communications.

FINDINGS AND RECOMMENDATIONS FOR STUDY QUESTION 2: WHAT DID LAWYERS AND NEUTRALS THINK ABOUT THE EFFICACY OF MEDIATION IN LANHAM ACT CASES?

WHAT THESE FINDINGS MEAN

When to Encourage Mediation

The responses to these questions indicate that lawyers' strongest motivation was to help their clients. They wanted to save time and money, maintain business relationships, or improve the outcome of their case. This appears to translate into a willingness to use mediation if they feel it will help their clients and a reluctance to do so if the probability of settlement seems low.

Based on this, it was recommended that judges encourage mediation when one or more of the following characteristics are present. First, when the case involves an on-going business relationship. Second, when the case is likely to settle short of trial, but is also likely to take some time to settle. Third, when mediation can improve the outcome of the case, *e.g.*, along with reducing the negative by eliminating the uncertainty of trial,

the mediation can also increase the positive by adding value to the outcome. Lastly, when the mindset of the participants are reasonable and disposed toward settlement.

When Not to Mediate Cases

It was found that lawyers do not want to mediate if they can accomplish the same goals without it or if mediation would have a negative impact on their case. They understandably want to avoid mediation if it wastes expense or time. If the case could settle on its own or through a judicial settlement conference, they did not see a reason to mediate.

The survey also revealed concerns with the non-binding nature of mediation, the possible negative outcomes such as having to compromise and procedural issues such as having to reveal information. Lawyers also wanted to avoid mediation if the lawyer on the other side was inexperienced or if the judge had substantive expertise. They did not like mediation if there were troublesome individuals involved, such as inflexible clients or poor mediators, and, of course, it was a problem if opposing counsel refused to mediate.

In short, lawyers indicated an unwillingness to mediate when it would not help their clients. It was therefore recommended that judges not encourage mediation when there is such significant emotional investment in a case that a party is unable to negotiate meaningfully or when the individuals involved (lawyers and/or clients) are unwilling to be flexible or to attempt mediation. Further, judges should not recommended mediation when the parties can accomplish the same goals without it or when a party truly needs something that only the court can provide such as injunctive relief, legal precedent, or a formal proceeding.

These recommendations were accompanied by some limitations. While the survey results indicated that lawyers and mediators thought that cases that required things that only a court could provide, such as injunctive relief, legal precedent, or a formal proceeding, were not suitable for mediation, court data showed that in reality Lanham Act cases usually settle. This indicates that lawyers would benefit from learning what can be obtained in mediation that might be equally valuable, or more valuable to their clients. To put it in mediation terms, they could learn new methods for addressing their clients' underlying needs and interests.

Certainly not every case is amenable to mediation, and the only effective way to deal with some cases is with the coercive power of the court. Nonetheless, these issues warrant some additional thought.

Injunctive relief – Through mediation, parties can agree on the terms of temporary restraining orders or preliminary injunctions, which can then be entered by the court as agreed orders if needed.

Formal proceeding – Although mediation can be conducted in a more or less formal manner, by its very nature mediation is more informal than a court hearing. If the need for formality arises because of strategic needs such as discovery issues, those can be handled with the judge prior to mediation. If the lawyer simply has a need for the familiarity of a more formal process, that could be addressed by educational efforts.

Legal precedent – Clearly this is only available through a court ruling, but with only six cases during this entire study going to a trial on the merits, it is a rare event in Lanham Act practice.

Because a disconnection was seen between what lawyers were stating and what the reality of the cases was, the study found that more education was needed. Lawyers as individuals and as the organized bar were encouraged to create and utilize continuing legal education opportunities to develop their mediation advocacy skills and their ability to serve their clients' interests through mediation. It was also suggested that the Court support such efforts.

Reasons for Mediation Settlement

According to lawyers and mediators, settlement is achieved when participants decide that their time and money are worth spending on mediation, and all parties have a mindset for resolution. If someone at the table does not share that mindset, the case will not settle. This indicates that a mandatory program would not be a good method for obtaining a higher settlement rate. This is one reason that it was recommended that the court maintain the voluntary nature of the program even though a small minority (about 10%) of respondents suggested making the program mandatory.

General Opinions

Lawyers and mediators were positive about the program. Lawyers who said they had used it overwhelmingly said they would use it again. This, along with their responses to the question regarding their mediation experiences and their positive attitude toward mediation expressed throughout the survey responses, was taken to be an indicator of program success and it was recommended that the program continue.

What the Study Did Not Find

While it may be unusual to address what a study did not find, there were some items that would be considered conventional wisdom in the mediation field that did not come up in this study. There are no particular recommendations related to these “non-findings.”

First, almost no one mentioned confidentiality in mediation as a benefit of the process. As discussed in the study, there are many possible reasons for this. Second, only

two respondents mentioned a decreased burden on the District Court as a benefit of mediation.

FACTORS THAT CAN INFLUENCE EVALUATION RESULTS

The results of an evaluation and the information extracted from the results is influenced by a number of factors, including what questions are asked, how they are phrased, and the response rate.

The questions that are selected are very important in determining the overall results of an evaluation. An example of this was seen when an internal processing error during the Lanham Act study led to a draft survey being mistakenly distributed to a subset of the lawyers.³¹ Fifty-four lawyers initially responded to the draft survey. Almost three-quarters of those who responded indicated that cases in which one or more parties had a significant emotional investment, an option not included on the final draft, were unsuitable for mediation. Seventeen of those lawyers with cases involving emotional investment selected it as the strongest determinant of unsuitability, more than all the other choices combined.

³¹ The draft version went to the 270 lawyers with more than one Lanham Act case. The only differences between that version and the final version were some changes in the check-off lists under questions five and six regarding characteristics of cases that were amenable and unsuitable for mediation. A total of fifty-four lawyers responded to that version. Each was then faxed a letter explaining the error with a request that they fill out the correct version and return it. A total of thirty-two lawyers returned a corrected survey.

The lists differed in several respects. For the “amenable” question, the draft version of the survey listed four items that did not appear on the final version: significant emotional investment in the case by one or more parties, motion for preliminary injunction pending, counterfeit case, and potential case of first impression. Instead, the final version listed: interested in quick resolution, expense of litigation, desire for informal proceeding, and expertise of mediator.

Changes from the draft to the final version of the survey list for the “unsuitable” question were a bit more varied. Where the draft listed “motion for preliminary injunction pending” and “counterfeit case,” the final version simply listed “injunctive relief important.” The draft language “potential case of first impression” was changed to “establishment of legal precedent important.” Four other items were added: “interest in quick resolution,” “expense of mediation,” “desire for formal proceeding governed by federal rules,” and “expertise of judge.” “Significant emotional investment in the case by one or more parties” was deleted from the final version.

This resulted in an interesting finding regarding lawyer understanding of the usefulness of mediation for disputes involving emotional issues. Mediation's utility in resolving these types of disputes has been demonstrated in many studies.³² It is unknown whether the lawyers' inclination to the contrary indicates a need for additional education of the legal community about the uses of mediation, a special insight into Lanham Act cases, or has some other meaning.

More significantly, this error provided a reminder of how the assumptions of researchers – as communicated through survey language – can shape evaluation outcomes. This item was apparently considered important by the lawyers who responded to the incorrect draft, but was removed from the final checklist because it was assumed that emotion was less likely than other factors to be significant in business disputes. When not given this option, the lawyers were guided to answer with different criteria, thus changing the survey findings.

Despite the fact that the responses were a result of an error, they were utilized when analyzing the findings and making recommendations regarding the program. Using valid information, even if it was not derived from the official study design was deemed to be important. For that reason, input, collected from the Chicago Bar Association's Patent, Trademark, and Copyright Committee members, was used in designing the recommendations as well as the responses that were received from the surveys.

³² See, for example, Kelly, *A Decade of Divorce Mediation Research: Some Answers and Questions*, 34 FAM & CONCILIATION CTS REV 373, 380 (1996) (noting that many studies have shown that a high level of anger is not a barrier to settlement). See also Whiting, *Family Disputes, Nonfamily Disputes, and Mediation Success*, 11 MEDIATION Q 247 (1994) (finding that family disputes are more likely to reach agreement in mediation than nonfamily disputes, and that compliance is higher for mediated family cases than mediated nonfamily cases).

This too, can hinge on assumptions. What external information should be included and what should not? And how should it be used? These are questions with which ADR program evaluators often struggle and which can affect survey conclusions. For example, in forming recommendations, the data was viewed through the lens of what was known more generally about what worked in mediation – information that did not derive from the study design. It was especially important to do so here because mediation practice is not yet well established in northern Illinois, so not all lawyer and mediator opinions expressed in the surveys were necessarily based on extensive experience. The recommendations, therefore, reflected an integration of court data, survey data and informed analysis.

How a question is asked is also important. In this study, a survey question that was asked was phrased, “What would increase compliance with court rules...”, not “Should there be efforts to increase compliance...?” These two questions are very different. The question asked was undergirded by an assumption that was not necessarily shared by lawyers who had filed Lanham Act cases – that compliance should be increased. This affected the findings in two ways. First, it could not be determined whether the lawyers believed compliance was a problem. Second, the responses could not be assumed to imply complete support for the program.

These issues played a major role in determining that two rather frequent suggestions by the lawyers - applying sanctions (which would be unnecessarily burdensome) and making mediation mandatory - would not be given much weight when recommendations were developed. These issues, along with the data that showed that most cases close relatively quickly and an understanding that mandatory mediation

generally results in low settlement rates (a piece of the informed analysis mentioned above), led to the decision not to recommend these frequently-suggested, two options.

Response rate can also influence findings, but in a different manner. This factor is important in determining how well survey results can be generalized to the wider population. Generally, the higher the response rate, the greater the probability that the responses reflect the opinions and beliefs of the entire population. However, other things can influence this. The relatively low percentage of respondents – 18.33% – was one limitation of the study. However, it was offset by other factors. Those who did respond covered more than half (61%) of the cases involved in the study period. Although a higher response rate would have given more weight to the findings, there are a number of factors that influenced the return rate, and a number of factors that compensate to some degree for it.

Court rules require each individual lawyer who appears in a case to file those appearances with the court.³³ It therefore is very common for a number of attorneys to file appearances on behalf of a single party. Because court records do not distinguish levels of involvement among the lawyers who are listed for each case, it was necessary to send surveys to all lawyers who had filed appearances with the court and ask them if they had significant responsibility for a Lanham Act case during the study period. The vast majority of respondents did have significant responsibility for at least one case. Of the 250 cases that were addressed in the returned surveys, 219 (87.60%) were from lawyers who had significant responsibility for them. In addition, while the vast majority of lawyers to whom the survey was sent had filed an appearance in only one Lanham Act case, they made up only a minority of respondents. Over 55% of the respondents

confirmed that they had two or more cases in the study period, as compared to 45% of those with only one case. Taken together, this would indicate that the lawyers with the greatest depth of knowledge in Lanham Act cases were those most likely to participate in the study.

Another measure of the credibility of the results is that there was no significant difference between the ratio of surveys sent to attorneys who represented plaintiffs, to those who represented defendants, and to those who represented both with the ratio of the surveys that were returned. Attorneys representing plaintiffs returned 52% of the surveys received; those representing defendants returned 39%, and those representing a mix of the two returned 9%. This compares to 45%, 47% and 6% respectively for the surveys that were mailed out (with 1% being unknown).

One factor that reduced the overall participation in the study was that one high-volume client did not authorize at least one of their law firms to participate in the study. This client and firm accounted for twenty-five cases and fourteen lawyers included in the survey mailing.

CONCLUSION

This study set out to address two issues: (1) the perception that the Lanham Act Mediation Program was being underutilized, and (2) the effectiveness of the program.

In terms of the first issue, there were decidedly more mediations conducted than were reported to, or by, the District Court. This under-reporting is not the fault of any single group of participants in the program, but it can be improved by the efforts of all concerned.

³³ U.S. Dist. Ct. Rules N.D. Ill., LR 83.16

In terms of the second issue, the Lanham Act Mediation Program in the Northern District of Illinois is sufficiently effective that it should be continued and reasonably simple efforts should be made to improve its functioning and record keeping. Even with those efforts, however, use of the program should not be expected to expand significantly. The nature of Lanham Act cases and of trademark practice in the Northern District of Illinois makes any significant change unlikely, barring establishment of a mandatory program, which is not advisable. Additionally, the program's strengths and weaknesses and the characteristics specific to trademark practice should be taken into consideration when considering it as either a model for other programs, or a reason not to attempt others.

Beyond these narrow conclusions, the study offered an opportunity to examine the impact of evaluation on court ADR programs as well as to contemplate the role of the evaluators in influencing the outcome of a study. It also pointed to future topics of study.

The lack of knowledge on the part of the court and the mediation program participants regarding what was occurring in the program demonstrates the importance of tracking the use of a court program and evaluating its effects. Without tracking the program and without evaluating it, there was no way to ensure that it was doing justice or operating effectively. This study demonstrated that the program was in some ways working better than believed, but also pointed out some areas for improvement.

The actual execution of the study demonstrated that even with a well-conceived design, the results may not be completely certain. Despite examining all case dockets and surveying lawyers and mediators, such a basic item as the exact number of mediations could not be ascertained.

This study also was a reminder that the assumptions of researchers play a role in determining the outcome of an evaluation. What the mediation world thinks is important about mediation is not necessarily what the participants value. For example, while the respondents overwhelmingly endorsed the conventional wisdom that mediation saves time and money, they also rejected mediation's effectiveness in highly emotional cases as well as confidentiality as an important characteristic of the mediation process.

As the study was being concluded, it became clear that there were additional issues that should be studied in the future. These additional study areas were recommended to the court along with the many recommendations on the mediation program's structure and functioning.

First, there should be a follow-up study in one year (less complex than the current study) to see if the recommendations of this study have been implemented and what impact, if any, there has been.

Second, a more narrowly focused study should look at timing issues, especially identifying characteristics of cases that will last longer than four months. Part of this study should be a further definition of "not too early and not too late" in terms of the timing of mediation. In this study, or another related study, cases that have settled should be examined to identify common characteristics of cases that settle in mediation.

A pilot program could then be implemented where cases would be screened for these characteristics and appropriate cases directed toward mediation. This would focus resources on the cases that are most likely to allow sufficient time for mediation, without making mediation a hurdle for cases that would likely resolve more quickly.

A third study that might be undertaken would analyze whether lawyer and mediator opinions about what cases work best in mediation are correct. For example, is mediation really best when a case involves parties with an ongoing relationship? While this would seem intuitively correct, it may or may not be. This may require attempting a direct study of litigants, which would probably be best accomplished by labor-intensive efforts such as telephone contacts with the lawyers, which would be followed up by surveys to the litigants.

These future study possibilities provide perhaps the strongest conclusion to take away from this study: evaluative efforts do not end at the conclusion of the study. Evaluation is an ongoing process that reveals new avenues of examination as each effort comes to an end. Only by continuing the process is the court assured that the program will remain a viable and effective avenue for obtaining justice.