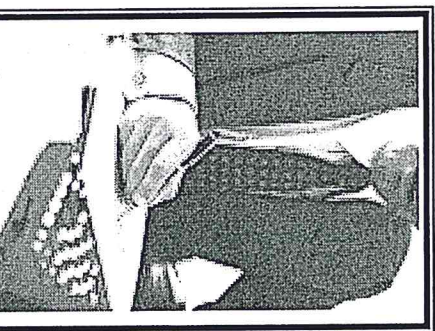


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CHAPTER ELEVEN ~ MONITORING AND EVALUATING COURT-CONNECTED MEDIATION PROGRAMS

By Jason T. Noel

"Citizens bring their disputes to our courts to obtain resolutions in a peaceful, fair forum. Most expect that their disputes will be subject to an adversary process of determining who wins and who loses. One alternative to the traditional system is mediation. For those exposed to mediation in a court setting, the belief is that mediation is an integral part of the judicial system. They should therefore be confident in the fact that the justice system is vouching for the integrity of the mediation process, i.e., the court would refer disputants only to qualified mediators or mediation programs that meet minimum standards. Without routine monitoring and periodic evaluation of program performances, courts cannot carry through on their obligation to provide quality resolution to the people who use the justice system."



~ Chief Justice Thomas Moyer, Supreme Court of Ohio

Quoted from Melinda Ostermeyer & Susan Keilitz,

Monitoring and Evaluating Court-Based Dispute Resolution Programs:

A Guide for Judges and Court Managers

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I. Introduction

Courts are continually striving to improve the efficiency and effectiveness of their mediation programs. To ensure improvements in program operations, courts need to base any changes on data that are systematically collected and analyzed – in other words, through proper evaluation and monitoring procedures in their programs.⁶¹⁸ Evaluation is key in determining whether a mediation program is successful in meeting its goals. Taking time at the outset to plan and design an evaluation of the program will help ensure that relevant information will be available to court managers and decision makers to assess the effectiveness of the mediation program and to determine whether the program needs adjustment or should be canceled.⁶¹⁹

State courts must be responsive to the forces that are demanding more efficient and effective performance.⁶²⁰ Shrinking budgets pose a strong challenge to today's judges and court managers. Courts must be accountable for their programs, because the public sector is particularly vulnerable to scrutiny, criticism and withdrawal of support for ineffective and financially

⁶¹⁸ See Melinda Ostermeyer & Susan L. Keilitz, MONITORING AND EVALUATING COURT-BASED DISPUTE RESOLUTION PROGRAMS: A GUIDE FOR JUDGES AND COURT MANAGER, 4 (National Center for State Courts, 1997).

⁶¹⁹ See THE PERFORMANCE INDICATORS FOR ADR PROGRAM EVALUATION, 1-2 (Dispute Systems Design Working Group Administrative Conference of the United States, November 1993).

⁶²⁰ See Ostermeyer & Keilitz, *supra* note 1, 4. See also Craig A. McEwen, EVALUATING ADR IN ADMINISTRATIVE AGENCIES, 4-5 (1993) (stating that there are many possible uses for empirical research about mediation: to meet the requirements of a granting agency; to advance knowledge about dispute resolution; to persuade skeptics to fund or support such programs; and to assist in adjusting and improving mediation programs).

wasteful policies and programs.⁶²¹ Ensuring the quality of justice during a period of fiscal constraints, growing responsibilities and decreasing confidence in the justice system is a complex management undertaking.⁶²² It requires meaningful information about the court's business, not only to manage daily operations but also to assess how well the court is performing its functions and planning effectively for the future. Therefore, efficient collection of information in the decision-making process is vital to court management.⁶²³

⁶²¹ *See id.* *See also* McEwen, *supra* note 3, 6-7 (Governmental, foundational and granting agencies require empirical evaluations to encourage accountability and increase understanding of mediation. The interests and judgments of important groups such as administrators, advocacy and interest groups or legislators shape policy choices. Evidence from evaluation research may be used to improve the quality of work-life, have anecdotal and political support, increase scarce resources and embody central public values. In sum, circumstances surrounding evaluation research can serve to justify or defend a program based on systematic data).

⁶²² *See id.* at 4.

⁶²³ *See id.*

Program monitoring or evaluation efforts are often directed at determining the following:⁶²⁴

- The extent to which mediation is utilized by the appropriate target populations or caseloads;
- Whether or not mediation services are provided in accordance with program goals, policies, procedures and standards, and within legal requirements;
- Whether administrative and policy changes should be made to improve delivery of services;
- The perception of litigants, judges, attorneys and administrators about the effectiveness of mediation techniques and the efficiency of program operations;
- Whether mediation results in higher-quality resolution of disputes; and
- The extent to which resources are expended and/or saved through the use of mediation processes.

Evaluations conducted in court-connected mediation programs are sometimes used to demonstrate the program's effectiveness to an outside audience or to identify ways to improve the effectiveness of the program.⁶²⁵ The purpose of an evaluation is to determine whether or not, or the extent to which, a program is achieving its underlying goals.⁶²⁶

⁶²⁴ See *id.* at 4-5.

⁶²⁵ See EVALUATING ADR PROGRAMS, A HANDBOOK FOR FEDERAL AGENCIES 2 (Administrative Conference of the United States, Dispute Systems Design Working Group, 1995); For further discussion, see THE PERFORMANCE INDICATORS FOR ADR PROGRAM EVALUATION (November 1993) (describing some of the more common goals of ADR programs, as well as indicators of success measures used to determine whether program goals have been met).

⁶²⁶ See Bureau of Justice Assistance (1997) (Recognizing that state court systems were being strained beyond their capabilities, the Bureau of Justice Assistance (BJA), U.S. Department of Justice and the National Center for State Courts (NCSC) initiated an ambitious program, the Trial Court Performance Standards Project. The objective of the program was to increase the capacity of the nation's trial courts to provide fair and efficient adjudication and disposition of cases. The program's goals included the development of a set of standards and a measurement system that would define

Moreover, programs often depend on unique designs and function in varying contexts.⁶²⁷ Therefore, learning about the nature and role of these factors in the performance of a program helps give evaluators insights about how a program can be modified to improve performance. Evaluating mediation programs can determine whether to further pursue that program or how to most efficiently implement such a program.⁶²⁸ Routine monitoring through collection and reporting of data about cases or case flow allows assessment of court-connected mediation practices and the opportunity to make changes in response to the findings.⁶²⁹ Many court administrators are in the market for some research about their mediation programs. Consequently, evaluation costs weigh heavily into their decisions about which model or program to pursue. This chapter helps court-connected mediation programs sort through the myriad of issues and choose the evaluation criteria that best fit their needs and finances.

and measure effective trial court performance. Endorsed by the Conference of Chief Justices, the Conference of State Court Administrators and the National Association for Court Management and incorporated into the standards of the National College of Probate Judges, the system's performance standards are now widely viewed as a blueprint for improving the administration of justice in state trial courts).

⁶²⁷ See Ostermeyer & Keilitz, *supra* note 1, 7.

⁶²⁸ See EVALUATING ADR IN ADMINISTRATIVE AGENCIES, *supra* note 8, 3.

⁶²⁹ See Ostermeyer & Keilitz, *supra* note 1, 4.

II. Monitoring and Evaluation: Applications

Monitoring refers to collecting and analyzing data in order to assess ongoing mediation program operations.

M *Evaluating* or *Evaluation* refers to the comparison of cases, typically the comparison of cases referred to mediation with similar cases not referred to mediation. Monitoring can be initiated at the start of the program operation and continue throughout the life of the program. Procedures put in place for monitoring can serve as the basis for evaluation initiatives that should be undertaken periodically.⁶³⁰

Monitoring and evaluating have common characteristics. Both allow judges and court managers to make judgments about how the mediation program is performing and what changes might be necessary to improve performance. Information derived from evaluation can be used to refine monitoring processes, while information derived from monitoring can provide a foundation for evaluation projects to proceed more efficiently and at less cost.⁶³¹

⁶³⁰ See *id.* at 9-10.

⁶³¹ See *id.* at 9.

A. MONITORING

Data from monitoring systems helps identify whether a mediation program is working effectively so that courts can make appropriate decisions about the continued use of its programs. Monitoring helps identify which aspects of a program contribute to its success and provides evidence of success that can be used in public awareness efforts.

Moreover, monitoring promotes continuous improvement of program operations by providing vital information about practices and policy issues and by requiring program planners to focus on the original goals set out for the mediation program.

Monitoring also serves a case management purpose. It can provide information about the volume of cases referred to mediation, the types of cases and parties that are using mediation, the time cases are pending in mediation and the proportion of cases that are resolved through mediation. This information helps to answer various questions about day-to-day program operations. Such answers to these questions can be used to screen cases more effectively and to detect barriers to the mediation process that could be alleviated by revising procedures or recruiting mediation providers.⁶³²

⁶³² See *id.*

Another important purpose of monitoring is measuring the quality of a mediation process. Are litigants and attorneys satisfied with mediation? Do they believe that mediation is a fair process? Is the mediation practice what the court expects it to be, or are providers substituting it for another process? Information on these issues might point to the need for more effective recruitment and training of mediation providers.

Managers of statewide programs can monitor for consistency across local jurisdictions. Information about consistencies and variations can be utilized to make improvements in underperforming programs, and valuable advice gained in individual programs can be shared with others.⁶³³ The monitoring system should provide information on when essential elements of quality are missing, should document some of the successes and should also provide some information on how to improve the program.⁶³⁴

⁶³³ See *id.* at 10.

⁶³⁴ See MONITORING THE QUALITY OF COURT-CONNECTED MEDIATION PROGRAMS, THE TENTATIVE PLAN, Sponsored by the Socio-Legal Program on Dispute Resolution at The Ohio State University, 1 (1996).

B. EVALUATION

Evaluation differs from monitoring in that evaluation can be used to draw inferences about the reasons for particular outcomes. It may be aimed at: (1) determining whether the outcomes of a program are consistent with the program's declared goals; (2) determining whether the program is running the way it was intended to; and/or (3) determining whether changes in the program would improve its usefulness.⁶³⁵ The reasons and specifics for which an evaluation is conducted and the form it takes depend on evaluation needs and constraints and include budgetary conditions and each court's particular mission or goals.

On one end of the continuum, evaluations may be comprehensive in nature, rely on a significant degree of professional evaluation expertise, involve a great deal of planning and take a rather lengthy time to complete. At the other extreme, evaluations can provide merely a "snapshot" of where a program is at, examine a particular area within a program or capture the impact of specific changes in program coverage and administration. Such evaluations may involve less planning and outside evaluation expertise and take a relatively short period of time to complete. Or, the nature and form of an evaluation can fall somewhere in between these two ends. Evaluating the effectiveness of having a mediation program consists of comparing mediated and non-mediated cases. Evaluation is used to determine if mediation has particular advantages over the existing process and whether it achieves the goals the court has set for it.

⁶³⁵ See THE PERFORMANCE INDICATORS FOR ADR PROGRAM EVALUATION, *supra* note 8, 3.

C. ADVANTAGES AND RISKS OF MONITORING AND EVALUATION

Information gathered from monitoring and evaluation usually causes changes, whether positive or negative.

Courts need to consider the potential positive and negative ramifications that might result from such findings.⁶³⁶

1. Advantages

There are several advantages to monitoring and evaluating mediation performance.⁶³⁷

- It helps to identify the need for program improvements and offer the opportunity to turn an unsuccessful program into a successful one;
- Systematic information from evaluation is more reliable than isolated conclusions; consequently, the probability of success is higher in resolving identified problems using such procedures;
- Consistency of information gathered facilitates comparisons among different jurisdictions and within a statewide program; and
- The credibility for evaluation findings is crucial for public and political support for such programs.

⁶³⁶ See Ostermeyer & Kellitz, *supra* note 1, at 10-11.

⁶³⁷ See *id.* at 11.

2. Risks and/or disadvantages⁶³⁸

Judges and court managers need to be aware of the potential for negative consequences as a result of monitoring and evaluation. Possible risks include:⁶³⁹

- Relying only on a few factors will offer a distorted picture of the program;
- Current methods used to measure cost savings for the court and litigants are inadequate and overstate possible unfavorable findings;
- Programs favored by the court may lose support or funding sources; and
- There may be scant political support for addressing identified needs or problems from key stakeholders.

Additionally, and perhaps most importantly, budget and resource constraints can dampen the optimism of many evaluation programs.⁶⁴⁰ Therefore, the court and its evaluation team will need to develop strategies for dealing with these concerns. In addition to budget and resource concerns, organizational opposition and operational difficulties need to be addressed.⁶⁴¹ Successful evaluation requires the cooperation and support of policy-makers, court managers and staff and those from whom data will be obtained. Any anticipated lack of cooperation along these lines will need to be identified and

⁶³⁸ *See id.* at 11.

⁶³⁹ *See id.*

⁶⁴⁰ *See* EVALUATING ADR PROGRAMS, A HANDBOOK FOR FEDERAL AGENCIES, *supra* note 8, 5.

⁶⁴¹ *See id.*

addressed.⁶⁴²

Users of evaluation research should not expect that the data gathered will make policy decisions for them.⁶⁴³

While policy questions undoubtedly motivate evaluation research, the research itself will not answer them. Such questions may profit from the evidence attained, but they require complex political and value judgments using multiple and sometimes inconsistent criteria.⁶⁴⁴ Evaluation research does not evaluate; program decision makers have that job. Instead, evaluation research is used to make evaluative decisions based on the evidence gathered.

Evaluation research by itself will not provide all the information needed about the degree to which a mediation program is delivering high-quality dispute resolution.⁶⁴⁵ There are reasons for that limitation. First, not everyone will agree as to what high quality means. There might be disagreement about what to measure. For instance, while some argue that participant satisfaction is a major indicator of the quality of justice, others disagree. A second limitation in

⁶⁴² See *id.* at 4-5.

⁶⁴³ See *id.*

⁶⁴⁴ See *id.*

⁶⁴⁵ See MONITORING THE QUALITY OF COURT-CONNECTED MEDIATION PROGRAMS, THE TENTATIVE PLAN, *supra* note 18 (concerning the Court Mediation Database Project, a cooperative effort by the Supreme Court of Ohio Dispute Resolution Committee and the Socio-Legal Program on Dispute Resolution at The Ohio State University College of Law). In many instances, the indicators that are measured in monitoring initiatives may only roughly approximate the quality criterion of a mediation program. For instance, parties' and lawyers' perceptions of fairness in exit surveys may not accurately reflect the fairness of the process. Additionally, no practical and reliable method is available to monitor some aspects of quality. For instance, it is hard to secure data on judicial timesavings, judicial satisfaction with the mediation programs and changes in public perceptions of the justice system as a result of the mediation programs).

assessing program quality is the kinds of data collected through empirical research limit the angles of vision of the program.⁶⁴⁶ For example, questionnaires completed by disputants and observations of mediation sessions tell us nothing about the extent of mediator training or of the ethical standards for mediators.⁶⁴⁷

It is up to each court to decide how its evaluation should be designed to address significant issues, and this may be done through picking and choosing those measurements that are most appropriate to its program. Those who seek evaluation research should expect it to answer clearly narrow, factual questions (e.g., Do mediation participants see the process as fair or not? How long does it take for cases in mediation to reach conclusion?). Additionally, care should be taken to introduce comparisons and assertions of causation into the findings (e.g., Do mediation cases take less time than those cases following the regular administrative track? Does the addition of mediation cause the agency backlog to decrease?). The difficulty or ease of answering these questions depends on the design of the court's research project. Moreover, the degree of confidence courts want to have in these comparisons and causal claims affects substantially the costs and complexity of the research.⁶⁴⁸

⁶⁴⁶ See *id.*

⁶⁴⁷ See *id.*

⁶⁴⁸ See McEwen, *supra* note 4, 10-11.

III. Planning and Implementation

Implementing a monitoring and evaluation project requires planning and cooperation among those involved in the project, from court initiative and leadership, to participation from the bar and citizens in the community. The following outlines the necessary steps of a monitoring or evaluation project. First, a small group of key participants is essential. This ensures that decisions are made based on diverse perspectives and that necessary resources and information are secured. Once the court establishes the goals of the program and the objectives for the monitoring and evaluation project (see Chapter 3), specific measures of performance and sources from which data will be derived can be identified. An implementation plan will keep the collection and analysis of data. The final steps include preparing a report, disseminating the findings, implementing recommendations to improve the mediation program and assessing and revising the procedures for continued monitoring and evaluation.⁶⁴⁹

The timing of program evaluation depends on two central issues: *program maturity* and *baseline data*. Evaluations need to be responsive to the maturity of the program considered. This is due to the fact that programs typically go through an unsettled early-implementation phase, and outcomes that are measured during this period are very likely to be different from those of the mature program.⁶⁵⁰ To learn about its long-term potential, a program must be evaluated in its mature state. In fact,

⁶⁴⁹ See Ostermeyer & Keilitz, *supra* note 1, 24.

⁶⁵⁰ See Elizabeth Rolph & Erik Moller, EVALUATING AGENCY ADR PROGRAMS: A USER'S GUIDE TO DATA COLLECTION AND USE, 2 (1994).

some judges have given support for the idea that, in order for a program to be considered mature, it must be in existence for at least three years.⁶⁵¹ In sum, program evaluators must give proper judgment to the maturity of a program.

Evaluations depend on some point of comparison. For example, is this program better than the old way of doing the job, or is it better than an alternative program?⁶⁵² For this point of comparison, it is necessary to collect baseline data before such a program is implemented.⁶⁵³ Therefore, it is important that evaluation planning begin before the program is implemented, and at this time baseline data for the evaluation should also be collected.⁶⁵⁴

⁶⁵¹ Interview with Robert W. Rack, Jr. Chairman, Supreme Court Committee on Dispute Resolution Committee, Senior Conference Attorney, Sixth Circuit U.S. Court of Appeals (1999).

⁶⁵² See Ostermeyer & Keilitz, *supra* note 1, 4.

⁶⁵³ *See id.*

⁶⁵⁴ *See id.*

Planning Steps for a Prototypical Monitoring or Evaluation Program:

1. Develop a profile of the program
2. Secure program planners
3. Identify program goals
4. Establish monitoring or evaluation objectives
5. Determine general sources for data
6. Set up an implementation plan
7. Develop and identify performance measures
8. Decide on form used in data collection
9. Collect data
10. Analyze and interpret data obtained
11. Discuss conclusions and recommendations
12. Prepare a final report and disseminate findings
13. Implement recommendations

A. DEVELOP A PROFILE OF THE PROGRAM

A profile of the program should include a history of the development of mediation in the court, the administrative procedures used and the philosophical approach for providing such services. A program profile assists planners in identifying issues related to the administration and delivery of services that a court might need to monitor. Developing a profile assists program planners in identifying issues that are not readily apparent to someone working with the program on a daily basis. Especially in statewide systems, the program profile helps to identify the specific level of mediation activity occurring throughout the state. The profile also helps courts to focus on a 'systems approach' to improving operations, rather than concentrating on narrow issues that might interest only a select few.⁶⁵⁵

B. SECURE PROGRAM PLANNERS

The evaluation program should have primary planners who undertake the initial steps, including developing the monitoring or evaluation goals, selecting measures for assessing performance and identifying the basic resources through which data can be collected. Additionally, it may be necessary to secure individuals who will be involved in the actual day-to-day implementation of monitoring and evaluation. These individuals can assist the court in addressing essential questions, identifying the best methods for data collection and analysis and in writing the report. Additionally, there needs to be a group of planning participants who are influential enough to shape policy and to secure necessary

⁶⁵⁵ See *id.* at 67-69.

funding for the program, as well as those individuals who are knowledgeable about the daily operations of the court and the mediation program.

C. SET PROGRAM GOALS

Judges and court managers need to define the goals of the program, because the greater the consideration given to program goals from the start, the more efficient and effective monitoring or evaluation will be.⁶⁵⁶ Understanding the program's goals is essential for determining what information will be required to assess the program's performance. For example, if a goal of mediation is to reduce case disposition time, the court should track dates for case filing, mediation referral, various judicial conferences and disposition. If it is to encourage citizens to resolve their own disputes, the court will need to survey the opinions of litigants. If a program goal is to resolve through mediation a given number of cases or a particular proportion of the case load, the court must track the number of cases referred to and disposed by mediation.

Moreover, the court may, and usually does, have more than a single goal that it desires to achieve through the use of mediation. While some goals are relatively straightforward and are easily measured, others are complex and are more difficult to assess. The following are commonly adopted goals of mediation.⁶⁵⁷

⁶⁵⁶ See *id.* at 16.

⁶⁵⁷ See *id.* at 16-18.

- Reduce backlog of older cases;
- Reduce case disposition time;
- Expedite particular categories of cases;
- Save judicial resources (i.e., time spent on motions, hearings and trials);
- Reduce litigant costs;
- Produce high litigant satisfaction;
- Produce high attorney satisfaction;
- Produce high judicial satisfaction;
- Increase “pre-empt” dispositions (i.e., prior to judicial intervention, etc.);
- Streamline litigation;
- Find the best forum for resolving the presented and underlying issues;
- Empower citizens to resolve their own disputes while developing conflict resolution skills to reduce future conflict;
- Produce better outcomes; and
- Involve the bar and the public in effective problem solving and the administration of justice.

Example

Developing Program Goals:

**Furthering the Efficiency and Effectiveness
of Monitoring and Evaluation**

- Reducing case disposition time: Track dates for case filing, ADR referral, and final disposition
- Empowering citizens to resolve their own disputes:
conduct surveys of the opinions of litigants
- Resolving through mediation a given number of cases or a particular proportion of the caseload: Track the number of cases referred to and settled through mediation

D. ESTABLISH MONITORING OR EVALUATION OBJECTIVES

Judges and court managers should define the objectives or reasons before engaging in any monitoring or evaluation initiative. Specifically, what does the court hope to achieve through monitoring or evaluation? It is rare that a single monitoring or evaluation project effectively accomplishes a large number of objectives. Therefore, it is important for a court to establish the monitoring or evaluation objectives before undertaking any large data collection and analysis effort. Possible objectives can include:⁶⁵⁸

- Assessing whether mediation is fulfilling its programmatic goals;
- Rating mediator and/or administrative performance;
- Learning the opinions of mediation participants about the mediator or the mediation process, policies or procedures;
- Identifying whether the use of mediation has had a positive impact on the way mediation participants deal with other conflicts;
- Isolating the impact of specific procedures and policies or comparing administrative procedures;
- Determining cost and time reduction/avoidance figures;
- Deciding future resource allocation;
- Securing input from key participants about current or future operations;
- Educating judges, attorneys and citizens about current operations; and
- Fulfilling funding or legislative mandates.

⁶⁵⁸ See *id.* at 18.

E. SET UP AN IMPLEMENTATION PLAN

Once the framework for the evaluation project has been identified, a time line for the project's implementation will need to be devised. Courts will need to develop time frames for collecting and analyzing the data. A variety of tasks will need to be completed, and unless a detailed plan exists to keep the project on track, it can stray from its original objectives.

After designating the objectives of the monitoring or evaluation project, a planning group should focus on key questions that it hopes will be answered by an analysis of the data. These key questions serve as the basis for determining more detailed information that must be collected, such as dates, case characteristics and case activity. The specific sources from which the information will be derived (e.g., case files, litigants), and the manner in which data will be collected (e.g., case reporting forms, interviews) should be mapped out for each key question.

The implementation plan also establishes time frames for collecting and analyzing the data. Data collection forms and procedures will have to be developed, as well as specialized database and/or statistical software used for data analysis.

Finally, the plan should allow time for writing a draft report and for revising the draft based on feedback. Discussions about the findings and recommendations with individuals involved in the mediation program will assist in accurate interpretation of the data. Soliciting the views of several individuals will shed light on differing interpretations of the data. These diverse interpretations should be included in the final report, as well as recommendations for program improvement.

F. ASSESS THE MONITORING OR EVALUATION SYSTEM

After program recommendations are implemented, there needs to be an assessment of changes in the monitoring system, along with ongoing monitoring or evaluation of the retooled program. It is important to periodically assess whether the evaluation system continues to meet the court's needs. Periodic updates to the system will also generate renewed interest by decision makers and by other individuals participating in monitoring or evaluation.

IV. Identifying Data for Evaluation Purposes

In determining whether mediation is successful, courts need to look at various measures of success. Relying only on a few measures can be misleading and could ignore other equally important effects.⁶⁵⁹ At a minimum, courts need to

measure the basic information on case disposition time, court and litigant costs, fairness and user satisfaction. Other relevant measures include disposition rates and performance of mediators. In choosing information to be measured, courts should consider:

- Type of dispute;
- Amount of claims;
- Final amount of award/settlement;
- Disposition time;
- Disposition rates;
- Litigant costs;
- Court costs;
- Perceptions of fairness;
- Participant satisfaction; and
- Mediator performance.

⁶⁵⁹ See McEwen, *supra* note 4, 10-11, 18.

V. Data Collection

Systematic data collection is essential to obtain relevant and accurate information for program monitoring and evaluation. Information needs to be consistently collected and uniformly analyzed before conclusions can be made about program operations or effectiveness. Two types of data are used to measure performance: quantitative data and qualitative data. Quantitative data is information to which a numerical value can be applied in order that the data can be counted and calculated. Examples include the number of cases settled, the number of days a case is pending and the number of motions filed. Qualitative data is information that cannot be quantified or counted. Examples include information gathered from observations of mediation sessions, interviews with program administrators and open-ended survey questions. Because qualitative data cannot be assigned a numerical value, it cannot be used to produce statistical comparisons like quantitative data. Qualitative data is extremely useful to clarify responses and is helpful when interpreting quantitative data.

A. DATA SOURCES

Quantitative and qualitative data are usually gathered from the following sources:⁶⁶⁰

- Mediators;
- Mediation program participants, litigants and attorneys;
- Judges and court personnel;
- Records of court case files, mediation documents, MIS data; and
- Non-court groups, such as local bar mediation committees, citizen groups, insurance companies, legal aid societies, special awareness associations, oversight committees, and funding sources.

B. DATA COLLECTION METHODS/ DEVELOPING DATABASE FOR TRACKING REPORTS

Several methods can be used for collecting data from these sources. Before that, courts have to consider a number of issues when determining the most effective data collection approach. For example, which approach is the most expedient? Which provides the most reliable and consistent data? Which is the most appropriate for the mediation process being monitored and evaluated? Ultimately, however, cost is a great consideration courts face when choosing data collection methods.

⁶⁶⁰ See Ostermeyer & Keilitz, *supra* note 1, 34-35.

For most of the data collection methods and sources, data elements should be assigned a numerical code.

Coding allows for more efficient collection, maintenance and analysis of the data. It is also integral for statistical analysis and for maintaining anonymity of individuals and cases.⁶⁶¹ Types of sources include:

- Written surveys;
- In-person survey distribution;
- Survey distribution through the mail;
- Interviews;
- Observation;
- Case file review;
- Data collection forms; and
- MIS and mediation database systems.

⁶⁶¹ See *id.* at 55-56.

C. CONFIDENTIALITY

Since monitoring and evaluating entails collecting data from a variety of sources, parties and attorneys expect that mediation proceedings, information derived from non-court mediation files and responses to surveys and interviews will remain confidential. Parties may wish to limit public scrutiny of official case files that will later become part of the public record. Therefore, it is essential that courts develop and implement policies and procedures to safeguard the anonymity of individuals and the confidentiality of information that they provide, both during the data collection process and after the reporting of evaluation findings.⁶⁶²

Courts need to consider the following issues when developing policies about confidentiality relating to mediation data collection, analysis and reporting.⁶⁶³

- Are there legislative or other safeguards ensuring the anonymity of participants in monitoring or evaluation projects and the confidentiality of the information that they provide?
- What monitoring or evaluation information is a matter of public record and what information is not available for public review?

⁶⁶² See *id.* at 62.

⁶⁶³ See *id.* at 45.

- Is it necessary to link monitoring or evaluation information to a specific case? For instance, if the mediation program is monitoring the individual performance of mediators through user surveys, both the mediator and program participants should be identified so that follow-up inquiries can be performed if the participants expressed negative reactions to the specific mediator or process. However, if only the general trends in mediator performance are being evaluated, then only aggregate data are needed and it is not necessary to track who participates in evaluations.
- How sensitive is the information being collected, and to what extent would it be of interest to the media or other groups? Additionally, what steps or procedures would be taken to safeguard the data if an outside entity requested access to it?

Regardless of the policies a court establishes, procedures should be decided upon before the actual data collection has begun. Additionally, participants in the study should be made aware of the policies. Courts should make every effort to maintain the confidentiality of evaluation information so that evaluation participants will be more willing to engage openly and honestly in the data collection endeavor.⁶⁶⁴

⁶⁶⁴ See *id.* at 45

Confidentiality of mediation communications must be strictly adhered to and supported by all involved judges, court personnel and mediators, as breach of that trust will lead to fear and distrust of the process on the part of litigants and their counsel. Judges, mediator and mediation staff need to agree on a policy concerning confidentiality. The policy adopted by the pilot courts was that no mediation communication would be reported to or discussed with the judge or any other person except as to the following:⁶⁶⁵

- When the mediation occurred;
- Whether an agreement was reached; and
- The terms of the agreement.

The Ohio Mediator Privilege Statute, O.R.C. § 2317.023 (B), states in part (see Chapter 9): “A mediation communication is confidential. Except as provided in division (C) of this section, no person shall disclose a mediation communication in a civil proceeding or in an administrative proceeding.”⁶⁶⁶

⁶⁶⁵ See IMPLEMENTATION MANUAL FOR COMMON PLEAS COURT CIVIL AND CRIMINAL MEDIATION (The Supreme Court of Ohio Committee on Dispute Resolution, 1999).

⁶⁶⁶ See *id.* at 7-2.

VI. Analyzing Available Data

Analyzing data can be as simple as recording the number of cases referred to mediation, or as complex as determining cause-and-effect relationships.⁶⁶⁷ However, complex data analysis is often not necessary for program monitoring, and, moreover, courts can do this type of analysis on their own. For instance, knowledge of the number of cases referred to mediation in a typical year and the number that actually participated in a mediation process can help a court determine how many mediators are needed the following year if the caseload remains steady.

On occasion, other, more advanced evaluative methods will need to be conducted by experts more familiar with analytical equations and statistical software packages.⁶⁶⁸ The following is intended to give judges and court managers an understanding of the types of simple and complex data analysis that might be conducted.

⁶⁶⁷ See *id.* at 49.

⁶⁶⁸ See *id.*

A. PROVIDING DESCRIPTIONS

In analyzing data, courts should provide descriptions of the compositions of caseloads and the types of litigants included in the studies. For instance, the number of cases referred to mediation; whether litigants were individuals, businesses, or governmental entities. Additionally, results of the data can be described in numbers and percentages, i.e., How many cases were settled through mediation? What was the average disposition time of cases referred? What were the satisfaction rates of attorneys and litigants? Monitoring and evaluation programs should always include periodic assessment of descriptive information in order to detect changes and program needs.

B. DETERMINING CORRELATIONS AND RELATIONSHIPS

It can be helpful to determine if specific factors are related to other factors. For example, does the area of expertise of the mediation provider have an impact on the level of satisfaction of attorneys participating in mediation? Or, does the type of case referred to mediation have a significant impact on case disposition rates? Such correlations can provide courts with important information, such as the most appropriate allocation of program resources and successful mediators for certain cases.⁶⁶⁹

⁶⁶⁹ See *id.* at 74-75.

C. MAKING COMPARISONS BETWEEN PROGRAMS

Comparisons can be between groups of cases or among cases in the same group. Additionally, mediated and non-mediated cases can be compared to determine whether mediation has advantages over the traditional litigation process.⁶⁷⁰ To compare different types of cases referred to mediation, the court will need to establish subgroups of cases referred to mediation.

1. Comparisons within groups of cases referred to mediation

Data collected through most monitoring systems can be used to compare outcomes and characteristics within the group of cases referred to mediation. These comparisons can be extremely useful in evaluating how well mediation performs for particular cases or under different conditions. For example, outcomes in cases can vary depending on the litigation stage at which the mediation process took place. Alternatively, variation in the performance of individual mediators and whether their approach was facilitative or evaluative might influence outcomes and participant satisfaction. Courts need to compare all of these dimensions within the group of mediation cases.

⁶⁷⁰ See *id.*

In many cases, a court may not have the resources to examine all of the cases in mediation. In that situation, a sample of the cases is sufficient to display trends or variations among cases, especially if the mediation caseload is about 500 cases or more.⁶⁷¹ A sampling of cases may be necessary for time-consuming activities, such as surveys of litigants, attorneys and mediators. The greater the detail in the subgroups, the better the examination of variations can be. For example, if the court wants a detailed picture of which types of cases fare better or worse in mediation, factors that might be examined include the case type, the amount claimed, the number of parties, the type of party, the age of case at referral and the litigation stage at referral.⁶⁷²

2. Comparisons between groups of mediated and non-mediated cases

Sampling a smaller group of cases or creating subgroups of cases can also be useful when comparing cases referred to mediation and cases not referred to mediation. Each group, mediation and non-mediation, should have the same overall composition. To ensure that the two groups of cases are sufficiently similar on both case characteristics and litigation conditions, courts need to assign similar cases either to the mediation process or to the traditional process.

⁶⁷¹ See *id.* at 51.

⁶⁷² See *id.*

However, in some situations, be it for practical or political reasons, a court cannot establish contemporaneous groups of mediated and non-mediated cases through random assignment. For instance, if a court desires to begin monitoring or evaluating an existing mediation program, it does not make sense to interrupt the existing process by randomly referring cases to mediation. This would cause great confusion. However, it may still be possible to establish a comparison group of non-mediated cases. A non-mediated group could be composed of cases that are similar to the cases in the mediation program but were filed in a period before the mediation program was initiated. Alternatively, a non-mediated group could be composed of cases that are like the cases in the mediation program but are filed in another jurisdiction or in another similar court that does not offer mediation services. A statewide systems approach might use this method to assess mediation in another jurisdiction.

VII. Evaluator Selection

Evaluation projects can be financially burdensome and time-consuming. Since courts may lack the expertise or the time needed to engage in in-depth evaluation and monitoring, it may be necessary to have a professional evaluator conduct such data analysis. Therefore, it is necessary for courts to make an informed decision when choosing an evaluator.

The following is a recommended checklist:⁶⁷³

- Check whether the evaluator is familiar with the terminology;
- Define clearly the scope of the work;
- Request a tentative evaluation proposal from potential evaluators;
- Request a detailed resume;
- Request a list of prior evaluation projects;
- Review recent written products by the evaluator;
- Check references of potential evaluators; and
- Engage in specific contracts with the selected evaluator.

In selecting an evaluator, or evaluators, the objectivity of such an evaluator is a critical qualification.⁶⁷⁴ Experience in conducting program evaluations is also helpful. Sufficient technical expertise is especially important in designing the data collection process and analyzing the data. Finally, an understanding of the organization or the context in which the program operates is also helpful to the evaluator, as are good interpersonal and management skills.⁶⁷⁵

⁶⁷³ See *id.*

⁶⁷⁴ See EVALUATING ADR PROGRAMS, A HANDBOOK FOR FEDERAL AGENCIES, *supra* note 8, 2.

⁶⁷⁵ See Ostermeyer & Keilitz, *supra* note 1, 4.

VIII. Reporting⁶⁷⁶

A. REPORTING FORMAT

The court may want to seek a comprehensive report that includes a full description of the mediation program, its goals, the reasons for engaging in the monitoring or evaluation effort, the purposes of the study, the methodology of the study and the findings, conclusions and recommendations. This comprehensive report can serve as a basis for tailoring other reports for distribution to certain audiences, such as the legislature, bar, community organizations, business community and other national organizations with an expressed interest in judicial administration and dispute resolution.

B. DISTRIBUTION OF FINDINGS

Courts will need to devise a plan for disseminating the findings of the monitoring or evaluation project. Consideration should be given to target audiences. Additionally, it is important to inform individuals outside the court's jurisdiction about court-based mediation monitoring and evaluation projects. Submitting articles to national judicial administration or mediation-related journals and other national organizations can help reach these groups.⁶⁷⁷

⁶⁷⁶ See *id.* at 20-21.

⁶⁷⁷ See *id.* at 52.