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White Space-The Sequel

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White Space-The Sequel

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White Space—The Sequel

by K.K. DuVivier

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The year 2003 is slated to be a year of sequels: *Matrix II and III (Matrix Reloaded and Matrix Revolutions)*, *Fast and Furious II*, and *Terminator 3*, just to name a few. This column, too, is a sequel of sorts, a follow-up of my 1992 column entitled "White Space."[1] Just as an artist must be conscious of the "negative space" surrounding a form,[2] a legal writer should be aware of the white areas on a page of prose, the space between and around the words.

My earlier article on white space discussed using the physical pattern of paragraphs on a page to reflect the organization of your ideas and communicate the concepts through the paragraph structure, as well as through words. Key words stand out and have more impact when juxtaposed against empty space. Sentence and paragraph length can direct readers' attention to focal points. Closely grouping information implies connections, whereas more distance implies separation. Dedicating more space to a concept emphasizes it, while less space de-emphasizes.

This column discusses white space as addressed by *The Redbook.*[3] Aside from the "purposeful" use of white space to enhance meaning,[4] *The Redbook* describes some of the document design considerations that allow you to use the white space on a page to make your memo or brief either inviting—or "offputting."[5]

Word processors revolutionized the world of typing. Typewriters locked most documents into two options only: evenly, mono-spaced pica type of 10 characters per inch or elite type of 12 characters per inch. With word processing, there are almost limitless choices for font type, size, justification, and spacing—both vertical and horizontal.

Font Type

Most newspapers and books use serif typeface. Generally, serif type is easier to read for blocks of text because the little "feet" on the letters help differentiate them. Two of the most common serif typefaces are Times New Roman and Garamond. San serif typefaces do not contain the extra strokes on each letter and are good for short passages or single lines, such as headings. Helvetica or Arial are two common sans serif typefaces.

Typewriters provided the same amount of horizontal space for each letter, and mono-spaced types such as `Courier` do the same. In contrast, a proportional typeface, which varies the space for an "i" and a "w," is more efficient. Consequently, when page limits are an issue, a proportional, serif font such as Times New Roman or Garamond generally will provide more words per page.

Size

The rules for the federal appellate courts require 14-point type as the national standard for briefs.[6] The *Practitioner's Guide to the United States Court of Appeals for the Tenth Circuit* ("*Practitioner's Guide*") provides a bit of leeway, stating that the "Court prefers 14 point as required by Fed. R. App. P. 32(a)(5)(A), but 13 point is acceptable."[7] In Colorado state courts, "no less than 12 point font may be used for all documents."[8]

Even within the same point size, typefaces vary in height. Some lowercase letters are higher than others, and some types of the same font size may have more condensed letters. Consequently, because of these variables, a passage typed in Garamond will take up less space than a passage typed in the same font size of Times New Roman.

> *Example:* This sentence is in 12-point Times New Roman.
>
> *Example:* This sentence is in 12-point Garamond.

Don't be tempted to try to eke more pages out of a brief by putting extensive text into footnotes. Although some courts al-

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K.K. DuVivier will be happy to address them through the *Scrivener* column. Send your questions to: kkduvivier@law.du.edu or call her at (303) 871-6281.

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low smaller typeface for footnotes, judges read a lot of briefs, and attempts to circumvent their page-limit rules rarely will go unnoticed.

Justification

Justification describes how letters line up along the side of a page: a fully justified text forms a block on both the right and left sides of a page. Although printers generally use full justification for newspapers and books, left justification is better for most briefs and memos, and is dictated by the Colorado courts.[9] Not only can you avoid problems of stretching out words and citations by using only left justification, but readers can use the visual cues along the right margin to determine the end of a sentence or paragraph.

Spacing

Indent the first line of each paragraph. This visually marks the beginning of each new paragraph and idea. Furthermore, your document is more professional-looking if you use the tab to make these indents uniform.

Most court rules require that memos and briefs submitted to a court be double-spaced vertically.[10] Always follow the court's requirements. In addition, think about how the document will appear to readers. Printed materials do not leave headings dangling at the bottom of a page. If you end a page of your brief or memo with an "orphan" heading that has no related text on the page, it may look as though you did not proof the document. Adjust page breaks so that no single line or heading is separated from the remaining paragraph. Many word processors have a setting called "widows and orphans" or "keep together" that can help eliminate this problem automatically.

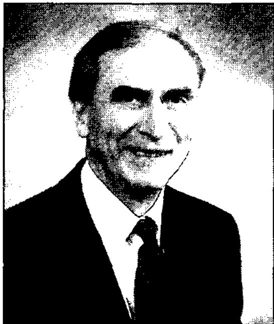
Conclusion

Legal writers must focus first on the words they choose to convey their messages. However, good writers also are conscious of the subliminal message conveyed by the white space that surrounds the words on a page. Mono-spaced typewriter-like typeface may convey the impression that you are inflexible or out of date. Too small a type size, tighter spacing, or excessive footnotes may imply you are either ignorant of the rules or trying to circumvent them, and therefore untrustworthy. Cramped pages without paragraph breaks or dangling headings unrelated to any text may suggest disorganization.

The *Practitioner's Guide* states, "[T]he judges uniformly prefer a shorter, well edited brief to one that pushes the limits."[11] White space is a valuable tool for conveying consideration for your readers. It can enhance your meaning, at the same time giving your readers a break and a chance to absorb the words. Furthermore, your brief should project a visual impression of confidence that you know and comply with the rules and that your thoughts and arguments are clear and well organized.

NOTES

1. DuVivier, "White Space," 21 *The Colorado Lawyer* 441 (March 1992).
2. Edwards, *Drawing on the Right Side of the Brain* 100 (Los Angeles, CA: J. P. Tarcher, Inc., 1979).
3. Garner, *The Redbook, A Manual of Legal Style* (St. Paul, MN: West Group, 2002).
4. *Id.* at § 4.6.
5. *Id.* at § 4.1.
6. Fed. App. Rule 32.
7. *Practitioner's Guide to the United States Court of Appeals for the Tenth Circuit* at § VI(B)(2). The *Guide* can be accessed on the Tenth Circuit website: http://www.ck10.uscourts.gov, then click on Tenth Circuit Rules and Forms and Tenth Circuit Practitioner's Guide.
8. C.R.C.P. Chap. 2, Rule 10.
9. *Id.*
10. *Id.*
11. *Practitioner's Guide, supra*, note 7. ■



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Assessing Whether Mediation Benefits the Courts

by Nancy Thoennes

This column is sponsored by the CBA Alternative Dispute Resolution Committee. The articles printed here describe recent developments in the evolving field of ADR, with a particular focus on issues affecting Colorado attorneys and ADR providers.

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About The Author:

This month's article was written by Nancy Thoennes, Ph.D., of the Center for Policy Research—(303) 837-1555, nthoennes@qwest.net.

This article evaluates the use of mediation in domestic cases in Colorado's Tenth Judicial District. It documents that the early use of mediation is associated with fewer unexpected delays and interruptions, resulting in savings to courts in time and resources.

Proponents of mediation assume that it benefits the judicial system by increasing settlement rates and reducing relitigation, thereby saving the courts time, resources, and money. Surprisingly, there has been little meaningful empirical research in Colorado or elsewhere on whether this assumption is true.

This article provides a start toward determining whether mediation benefits the courts. The article examines a study of cases in Colorado's 10th Judicial District ("10th J.D."), which was authorized by the Colorado Judicial Department. The study compares groups from two periods of time: 1999–2000 (the mediation group) and 1996–1997 (the comparison group). It focuses on the following questions, each of which has a potential impact on the courts' involvement in the resolution of cases:

1. How effective is mediation in producing settlements in cases with disputes over parenting time and responsibilities?

2. If used early in the case, does mediation reduce the amount of time spent on these cases by courts?

3. Does mediation reduce relitigation?

As discussed in this article, the results suggest that mediation can be a valuable tool to courts seeking to relieve crowded dockets and move cases forward efficiently. Thus, the routine use of early mediation is likely to be of benefit to the courts.

Research Overview

The study of the 10th J.D. described in this article was undertaken in an effort to determine whether the alternative dispute resolution ("ADR") services administered by the Colorado Office of Dispute Resolution ("ODR") of the Office of the State Court Administrator produce measurable benefits to the state's courts. The study, entitled "Mediating Disputes Involving Parenting Time and Responsibilities in Colorado's 10th Judicial District: Assessing the Benefits to Courts," was completed in August 2002.[1]

Various ADR approaches are used in a wide range of civil and family cases in Colorado. Nonetheless, the most common ODR case is a domestic relations case that is sent to mediation either pre- or post-decree. The 10th J.D. study focused strictly on domestic relations mediation and, even more specifically, on pre-decree cases with minor-age children and where there was a dispute over issues involving parenting time and responsibilities. The mediated cases studied involved instances of the use of mediation early in the life of the case, which may be of particular benefit.[2]

Prior Research

Previous research has attempted to assess the impact mediation has on court systems.[3] Unfortunately, determining whether ADR results in cost avoidance for courts has proven to be difficult. Courts do not maintain information on

the amount of time expended on individual cases by court clerks, referees, judges, law clerks, and other court personnel. As a result, some studies have acknowledged the difficulties involved in generating cost-avoidance estimates, argued that ADR is unlikely to be more costly than other types of case resolution, and focused on more easily documented benefits of ADR. For example, a report to the Conciliation Court of the State of Arizona regarding mandatory divorce mediation concluded:

> Although it is not possible to make accurate cost estimates, it is expected that the shift from ordered decrees to stipulated decrees should also be reflected in a cost savings for the court system. Approving agreements generally requires less court time than hearing testimony and making decisions.[4]

A few studies have attempted to draw conclusions regarding cost savings associated with court-affiliated ADR, while acknowledging the difficulty of doing so. These studies have generally imputed cost benefits based on proxy measures of savings, such as the number of court hearings, trial rates, or number of motions filed. A 2002 review of these studies in civil, non-domestic cases found:

> The studies were fairly equally divided about whether mediated cases were resolved faster, slower, or in about the same amount of time as non-mediation cases.... The studies tended to find no difference in the number of motions filed or decided in mediation cases compared to non-mediation cases, although several studies reported fewer motions in mediation cases. Similarly, the studies tended to find no impact of mediation on the amount of discovery, although a few studies noted reduced discovery.[5]

A recent study conducted by the North Carolina Administrative Office of the Courts concluded that, although mediation did not change overall case processing time, it produced significantly higher numbers of stipulations and significantly lower trial rates. According to the researchers,

> ... on the whole, custody and visitation cases disposed of when a mediation program is operative—without regard to the particular model of program administration—are significantly less likely to go to trial and significantly more likely to result in agreement, than are such cases disposed of when there is no mediation program in operation.[6]

An early study of custody and visitation mediation used estimates from court administrators in California, Colorado, and Oregon on the amount of bench time required to handle contested and non-contested custody and visitation cases.[7] Depending on the jurisdiction, the analysis from this early 1980s study then projected savings to the court of $560 to $2,700 for each custody or visitation dispute diverted to mediation.[8]

Early Mediation

The longer a contested case is allowed to remain in the litigation track before being diverted to mediation, the greater the potential it has to make use of court resources. Thus, if mediation is to produce the maximum possible savings of time, it must be used early in the case. This observation is corroborated by research, including a study of civil mediation in Ohio courts:

> The present findings that cases with earlier mediation referrals and sessions had filed fewer motions and had conducted less discovery again suggests the impact that mediation timing can have on mediation's effectiveness in reducing costs.[9]

In a similar vein, a study of custody-visitation mediation in two Virginia courts compared cases referred to mediation soon after filing with cases in a similar court that made referrals later in the process. According to the research, late-stage referrals were less likely to produce settlements in mediation and required nearly five times the number of hearings.[10]

10th J.D. Research

After consultation with the ODR Director and discussions with several administrators in urban courts, the 10th J.D. in Pueblo, Colorado, was selected by the researchers for study. The mediation program operating in the 10th J.D. has strong judicial support and is a well-organized and well-respected program. The 10th J.D. had a volume of domestic relations mediation cases sufficient to generate a sample from a relatively compressed time frame. For example, in the 2001 fiscal year, the 10th J.D. mediated 283 cases.

Mediation and Non-Mediation Samples

Generating a comparison group against which mediation cases could be evaluated presented the biggest research challenge. It was not feasible to generate experimental and control groups by randomly assigning mediation or no mediation as cases were filed with the court. The possibility of generating a sample of non-mediated cases from a different jurisdiction was considered, but ultimately rejected due to concerns about the accurancy of the comparison. Additionally, the comparison group could not be generated from cases filed in the 10th J.D. prior to the introduction of mediation. This is because mediation has been part of the legal landscape in the 10th J.D. for nearly a dozen years, although it was used infrequently or inconsistently for many of those years.

Given these constraints, the study focused on a comparison of (1) early and systematic use of mediation, typified by the 10th J.D. during 1999–2000, versus (2) the absence or infrequent use of mediation, typified by the 10th J.D. during 1996–1997. In 1996–1997, case handling in the 10th J.D. resembled current case processing in many Colorado jurisdictions: Most cases were never sent to mediation and the few cases that received mediation typically were offered only late-stage mediation, after being in the system for many months.

A preliminary analysis of the two groups showed few practically, or statistically, significant differences in terms of demography or legal representation. Annual earnings of the parties were comparable, as were the lengths of the marriages, the number of children, and the ages of children. Approximately 34 percent of the mediation group and 24 percent of the comparison group included at least one parent who was without any legal counsel. Both parents were represented for at least some of the time the case was active approximately 66 percent of the time in the mediation group and 76 percent of the time in the comparison group. In both groups, mothers were more likely to have had some legal representation than were fathers.

Outcome Measures And Results

Seven items served as proxy measures for the amount of time spent on the case by the court: (1) settlement rates; (2) length of time the case was open at the court; (3) number of motions filed; (4) number of continuances; (5) evidence of a stipulation; (6) time scheduled by the court to hear the case; and (7) evidence the case returned to court. Following is a summary of findings for each of these issues in the 10th J.D. study.

Settlement Rates

Increased settlement rates are an important way to create savings for courts.

Unless programs regularly produce settlement agreements, it is unlikely that there will be any significant savings for the court in time or money. In the 10th J.D. study, 39 percent of the couples who mediated were able to produce a full agreement on all the issues in dispute. Another 55 percent produced partial agreements. Given that some parties had financial disputes and all had disputes over parenting issues, the fact that 94 percent made progress or resolved their problem is noteworthy. (For more on settlements, *see* "Evidence of Stipulation," *below*.)

Length of Time Case Was Open

The length of time a case remains open at court is one rough indicator of the amount of resources consumed by a case. The average length of time elapsing between filing and final orders was 334 days in the mediation group. In the comparison group, cases took, on average, almost 18 percent longer—for an average of 395 days. The difference in the average number for each group is statistically significant at 0.05. These figures suggest that the use of mediation early in the dispute process can help courts to close cases more quickly.

Number of Motions Filed

The number of motions filed probably has a less dramatic impact on the court than do hearings because many filings do not require judicial time or action. However, motions still consume time and resources. Over the life of the case, the comparison group averaged 3.6 motions per case, and only 8 percent had no motions filed. In the mediation group, the average was 2.4 motions per case, and 21 percent had no motions filed. If motions translate into additional expenditures of resources by the court, it is significant that the mediation cases averaged less than half of the number of motions found among comparison group cases.

Number of Continuances

The number of continuances granted represents another measure of court time consumed. Some continuances are initiated by the court. However, continuances that are the result of a request of the parties are especially disruptive to the court because time that was allocated for a case cannot be used for that case and another time must be found. In the comparison group, 31 percent of the cases had continuances and 19 percent had a continuance at the request of the parties. In the mediation group, 15 percent had continuances, with 6 percent of continuances at the request of one of the parties. These figures suggest that mediation can help keep the court on schedule and reduce delays.

Evidence of Stipulation

Evidence of a stipulation is another indicator that the court may be spending less time on a case. Couples mediating in 1999–2000 were more likely than couples in the comparison group to present a stipulation to the court on: (1) parental responsibilities (94 percent in the mediation group stipulated compared to 83 percent in the comparison group); (2) residence of the child (92 percent versus 85 percent, respectively); and (3) child support (91 percent and 77 percent, respectively).

Time Scheduled for Court Hearings

The amount of time scheduled for court hearings is one of the most direct measures of the time expended by the court on cases. This information typically is found on the minute order. Not all cases end up

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"Nothing but good can result from an exchange of information and opinions between those whose circumstances and morals admit no doubt of the integrity of their views."
Thomas Jefferson to Elbridge Gerry, 1797.

Chuck Kall

using the amount of time indicated by the minute order—for example, parties may even present a stipulation at the time of the hearing. Nonetheless, the court must set this time aside. Thus, the time scheduled for court hearings directly pertains to the efficient use of the scarcest of court resources: judicial time.

In this study, approximately one-quarter of the mediation cases, and one-third of the comparison cases, had information available on the minute orders regarding the amount of time scheduled for court hearings. The results show significantly more time being scheduled in the comparison group relative to the mediation group. An average of 3.6 hours was to be set aside to hear the comparison group case, versus 2.0 hours in the mediation group. Thus, on average, approximately 45 percent less time was set aside for the mediation group. Less than 5 percent of the mediation group had hearings scheduled for a full day (seven or more hours), compared with nearly one-quarter of the comparison group.

Incidence of Relitigation

The incidence of relitigation among mediation and comparison group cases is another indicator of resources consumed. To the extent that cases return to the court, they cost the court time and money. However, some returns to court are neither avoidable nor time-consuming. For example, as the parties' children grow older, the parties may choose to allocate parenting time differently. It is difficult to determine whether a request for a modification is simply the entry of a new stipulation or a request for hearing time to resolve an issue in dispute. Despite these limitations to the data, there is evidence that comparison group cases experience more relitigation relative to mediation cases.

The analysis of relitigation is restricted to filings within the first two years following the promulgation of final orders. In the two years following the receipt of final orders, 38 percent of the comparison group had been back to court, compared with 24 percent of the mediation group. The mediation group had significantly fewer post-decree filings related to child support contempt, modifications of parenting time, and other types of modifications.

Influence of Legal Representation on Outcomes

The sample sizes in the present study are too small to allow for a detailed analysis of patterns for subgroups of disputants.[11] The small study size was due to the fact that the maximum uniformity possible was built into the mediation and comparison groups in the sample selection—for example, the study used only pre-decree marital dissolution cases. Nonetheless, the study briefly explored the influence that legal representation had on the outcome patterns noted earlier.

The study re-analyzed each of the major outcomes using only cases in which both parents had an attorney for at least some part of their case. A total of 66 percent of the mediation and 76 percent of the comparison cases fell into this category. The results show that mediation cases continued to score better on most measures. Specifically, relative to the comparison group, the mediation group continued to show fewer motions filed, fewer hours scheduled for hearings, and fewer cases returning to court within two years.

Conclusion

The purpose of the 10th J.D. study was to address a few key questions related to whether mediation, if used early in the dispute process, provides savings to courts in time and resources. There can be no definitive answers to these questions, given the limitations of the study (including the lack of a true control group), small sample sizes, and limited information available in court files. Nevertheless, a quick summary of the answers to the key questions posed by the 10th J.D. study provides preliminary evidence of benefits from mediation.

Mediation is quite effective at producing settlements. Approximately 39 percent of all parents who mediated in the 10th J.D. produced a full agreement on all of the issues in dispute. Another 55 percent produced partial agreements. In other words, 94 percent of the parties made progress or resolved their problem in mediation.

Further, there is evidence that mediation reduces the workload on the court. The early use of mediation is associated with fewer motions being filed. It also results in cases requiring less time to be scheduled for hearings. The mediation group was more likely than the control group to present stipulations to the court on child-related issues, thus reducing the demands placed on judges. Mediation cases had fewer continuances relative to comparison group cases and fewer continuances due to a motion by one of the parents. This suggests that mediation produces a smoother, more timely flow of cases, with a reduction in unexpected delays and interruptions.

Finally, there is evidence that mediation cases experience less relitigation. Two years post-decree, the mediation cases were twice as likely to have stayed out of court than cases in the comparison group.

All of these patterns suggest that mediation—when used early[12] and properly—can be a valuable tool to courts seeking to relieve crowded dockets and move cases efficiently. As a result, the routine use of early mediation should be encouraged.

NOTES

1. The full report of this study is available at http://www.courts.state.co.us/chs/court/mediation/mediatingdisputes.pdf.
2. For a discussion of recent studies focusing on the uses of ADR early in the life of a case, *see* Adams and Cook, "The Case for Early ADR Intervention," 31 *The Colorado Lawyer* 11 (Dec. 2002).
3. *See, e.g.*, Kakalik *et al.*, "An Evaluation of Mediation and Early Neutral Evaluation Under the Civil Justice Reform Act," Rand Institute for Civil Justice (1996) and Maiman, "An Evaluation of Selected Mediation Program in the Massachusetts Trial Court," Massachusetts Supreme Judicial Court (1997).
4. Trost and Braver, "Mandatory Divorce Mediation: Two Evaluation Studies, Part I: The Impact of Mandatory Mediation on the Court System," Final Report to the Conciliation Court of the State of Arizona (1987) at 16.
5. Wissler, "Court-Connected Mediation in General Civil Cases: What We Know From Empirical Research," 17:3 *Ohio State J. on Disp. Res.* 641 (2002).
6. Donnelly and Ebron, "Child Custody and Visitation Mediation Programs in North Carolina: An Evaluation of its Implementation and Effects," N. Carolina Admin. Office of the Cts. (Jan. 2000) at 29.
7. Pearson and Thoennes, "The Benefits Outweigh the Costs," Vol. 4, No. 3 *Family Advocate* 28 (Winter 1982).
8. *Id.*
9. Wissler, *supra*, note 5 at 695.
10. Fairbanks and Street, "Timing is Everything: The Appropriate Timing of Case Referrals to Mediation, A Comparative Study of Two Courts," Final Report to the State Justice Institute (June 26, 2001). For more information on the State Justice Institute, *see* http://www.statejustice.org.
11. The 1999–2000 mediation group consisted of a sample size of ninety-two cases; the 1996–1997 comparison group had a sample size of 100 cases.
12. *See* Adams and Cook, *supra*, note 2.