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MEDIATION'S EFFECTS: TEST, DON'T GUESS

By:

James A. Wall & Kyle R. Holley

As it glides down a broad valley, a river occasionally cuts a second channel, so that its water flows in parallel conduits. The second channel behaves in a manner quite different from the main artery (usually it runs faster) and it can modify the nature of the main river (decreasing its volume). Analogously, the civil court system has opened a second channel – mediation – in which the process/flow is quite different from that in the main civil-case channel. As such, the mediation channel is perhaps modifying the primary system.

The literature convincingly indicates that the court system now has two channels – the trial route as well as mediation – and we will describe the mediation channel quite thoroughly. Specifically, we will delineate how the mediators, attorneys, and clients behave. Additionally, we will note the effects of the mediators' strategies, the mediation outcomes, and how the mediators think. When describing the mediation channel, we will also point out how it differs from the main legal channel. For example, it is less formal, and at times there can be no agreement.

Our description of the mediation channel will make up the bulk of the chapter, while the delineation of how mediation affects the main court system will be briefer as it is more challenging to construct. Consider now the mediation system. We first delineate its process and then will present the theoretical overview.

Mediation Process

In the mediations we observed, the mediator, plaintiff, defendant, and their attorneys met at an agreed-upon time and location. Typically, the mediator arrives first and when the other

parties arrive, the plaintiffs and their attorney are escorted to one room and the defendants and their attorney to another.

Initially, the mediator goes to each room for introductions and then brings all parties together in a central room. This is the “joint” session. Here, the mediator thanks the disputants for their attendance, describes his background, discusses the value of mediation, and indicates how the mediation will be conducted. Next, the plaintiff attorney presents its case, the defense attorney does the same; questions are asked and answered.

Ending the opening joint session, the mediator tells the plaintiffs and defendants to go to their respective rooms, and the mediation begins. The mediator usually meets privately with the plaintiffs, first. After a discussion and obtaining an opening demand, the mediator then ambles over to the defendant’s room. Here, he discusses the case, presents the plaintiff’s offer, and requests a counter offer. Thereafter, the mediator commutes between the plaintiff and defendant’s rooms until there is a settlement or firm deadlock.

Theoretical Framework

Having described the operational procedure of the mediation, we now turn to the theoretical framework (Figure 1). Here, we draw upon systems and control theory to note that mediation is a decision making process that operates in an environment.

This institutional environment is the U.S. civil court system which can allow or require cases to be sent to mediation. The cases themselves are civil ones (e.g., automobile injuries, contract disputes, medical malpractice claims, personal injuries) rather than criminal.

In addition to directing cases to mediation, the overall court system sets norms for all parties. The mediation is voluntary; therefore, the mediator can choose whether to accept the case. While in the mediation, disputants can, at any time, withdraw from the mediation. The

mediator is required to be neutral, cannot give legal advice, and cannot dictate an agreement. But the mediator does control the process. On the other side, the disputants are required to bargain in good faith, respect the law and mediator, and allow the mediator to control the process.

Within the mediation are at least three decision makers: one mediator, and two or more disputants (e.g., plaintiffs, defendants, and attorneys). As depicted by control theory, the mediator has goals (e.g., agreement and disputant concessions) and compares them to the current state. If there is a discrepancy (e.g., no agreement), the mediator employs various techniques to improve the current state.

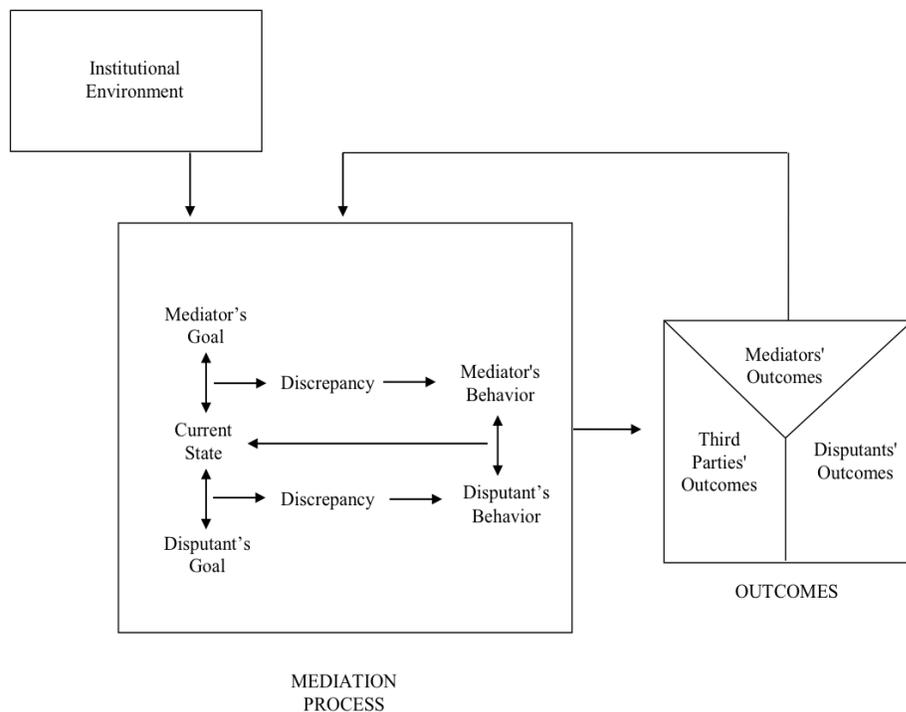


Figure 1
Theoretical Framework

The plaintiffs and defendants engage in parallel patterns of behavior. They also have goals (e.g., a large payment from the opponent) and compare them to the current state (e.g., a modest offer). When finding a discrepancy, the plaintiffs and defendants adopt tactics to modify

the current state. Typically, these behaviors entail comments to the mediator and messages or offers to the opponent.

The interactive mediation process between the mediator, plaintiff, and defendant has potential consequences for parties not physically at the mediation but are affected by the deliberations (e.g., children in divorce mediations). As indicated in Figure 1, these outcomes feed back to affect the behavior of the interacting parties. For example, if a mediator's pressing causes the disputants to leave the mediation and go to trial, then the mediator is apt to reduce the pressing.

Research Strategy

When studying civil case mediations, we utilize a process called triangulation, (Figure 2) which entails three components: literature reviews, interviews, and observations of mediations.

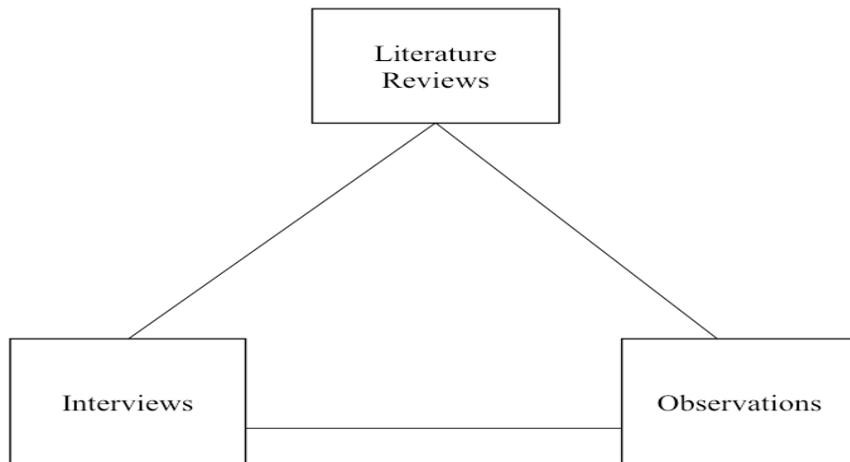


Figure 2
Triangulation Research Strategy

Reading and understanding the literature allows us to determine what is currently known about civil case mediation, such as what questions are important and which ones remain unanswered. The literature also indicates which testable hypotheses can be developed about behaviors and outcomes in the mediations.

Interviews with attorneys, judges, and mediators allow us to describe mediations, to tentatively conclude what is known about the mediation process, and to develop testable hypotheses. Also, a comparison of the interview responses with the literature enables us to identify gaps and misperceptions in our knowledge.

Turning to our observations of actual mediations, this approach allows us to test hypotheses, answer questions about mediations, correct some misperceptions, and identify areas in which there is agreement among the literature, the interviews, and our observations.

A few words about our observation approach: it was meticulous and rather unique. An observer accompanied the mediator through every phase of the mediation, starting with a discussion before the mediation and concluding with a post-mediation interview. In the pre- and post-mediation sessions, the observer recorded the mediators' comments. In the joint and separate sessions, the observer recorded exactly what the parties said – in sequence – as well as the demands, concessions, and agreements.

As the mediators moved from room to room, they were asked questions about their behavior as well as their thinking. Their responses were recorded accordingly.

The disputants' and mediators' comments were subsequently coded by two raters using the categories in Tables 1 and 2. When differences occurred, the raters conferred at mutually acceptable classifications.

Table 1

Plaintiffs' and Defendants' Techniques (Sample Listing)

<i>Technique</i>	<i>Description</i>
Notes strength of own case	Disputant strengthens own case or argues that it is strong.
Indicates weakness of opponent's case	Weaknesses in the other's case are cited or the other is claimed to be weak in some way.
Notes relative advantage in trial	Disputant indicates that it has an advantage or strength in the trial or with the judge, jury, location, etc.
Gives information	The disputant gives information to the mediator for the mediator or the other party. Includes stating one's own preferences.
Asks for information	Disputant asks for information from the other disputant or the mediator.
Weakens self	Disputant cites or admits a weakness of its own.
Criticizes other	The disputant criticizes the other's action, concession, attitude, posture, etc.
Empathy/understanding for mediator	Disputant expresses empathy or understanding for the mediator.
Praise mediator	Praise, compliments or nice statements about the mediator.

Table 2

Mediators' Techniques (Sample Listing)

<i>Techniques</i>	<i>Description</i>
Points out weakness of disputant's case	The mediator weakens the disputants' case, or mentions a weakness of the disputants' case.
Indicates strength of opponent's case	Mediator supports, strengthens or argues the case of the other disputant. Includes mentioning the other has a strong case.
Notes costs and risks of trial for the disputant	Mention of the risk or cost of trial to the disputant. Can entail mention of uncertainty and speculations of what the judge, arbitrator, or judge might do. Includes other's advantage in trial.
Asks for information	Mediator collects or asks for information from the disputants, documents, or third parties. Includes having the disputants state their points of view.
Weakens other	Mediator mentions a weakness of the other disputant or weakens the other in some way.
Criticizes disputant	Mediator criticizes a disputants' action, attitude, or person.
Criticizes other	Mediator criticizes or mentions a negative aspect of the other.
Strengthens disputant	The mediator supports, strengthens, or argues the case for the disputant.
Shows empathy or understanding for disputant	Mediator shows empathy or understanding for the disputant. Includes saying the other has this.

Our analyses of the mediators', plaintiffs', and defendants' statements, offers, concessions, agreements, and deadlocks allowed us to accurately describe the mediation process and determine the causal patterns within.

We can draw the following conclusions about civil case mediations based on the aforementioned observations, analyses, literature reviews, and interviews with mediators, judges, and attorneys.

Research Results

Goals. With regard to the mediators' goals (Figure 1), our research indicates they are of two types: primary and operational. Primary goals are settlement of the case, as well as clients' and attorneys' satisfaction. Also, many mediators wish to attain repeat business. Turning to the operational goals – those that the mediators believe underpin the attainment of the primary goals – we found three: client control, reduced client and attorney aspirations, and the heightening of clients' anxiety about trial.

Of signal importance are the goals we found to be absent. No mediators mentioned transformation goals, that is, the goals of improving the relationship between the parties or improving the attorneys' or clients' negotiation skills.

Finding no mention of these goals, we asked the mediators specifically if they pursued these objectives. Their responses across the board was, "No." When asked why, they replied that the plaintiffs and defendants would likely not meet again so there was no reason to improve their relationships. While the attorneys might interact in the future, the mediators felt they were capable of maintaining an amicable working relationship. Therefore, there was no need to improve the relationship.

As for improved negotiation skills, the mediators consistently held that attorneys had sufficient negotiation skills. Thus the mediators did not believe it was their responsibility to improve the skills of negotiation-challenged attorneys.

Mediators' behaviors. With these primary and operational goals in their sights, mediators engage (Figure 1) in behaviors to accomplish them. The literature indicates that mediators have approximately one hundred techniques to choose from and researchers have conceptually – but not empirically – categorized them into about two-dozen strategic groups.¹

As the above statements imply, the literature describing the mediators' behaviors is voluminous. Yet, our research indicates that much of the mediators' behavior can be condensed to a vector of assertiveness. Some mediators are very assertive, attempting to press parties off positions, trying to reduce aspirations, emphasizing the risks of trial, or noting the strength of the opponent and the high cost of a trial. Other mediators are less assertive, allowing the parties to make their own calculations and chart their own courses.

Mediation outcomes. What are the effects of the mediators' behaviors? The literature on various types of mediation indicates that mediation leads to a high level of agreement as well as to a high level of participant satisfaction.² This literature is consistent with our observational studies; however, the literature in general does not indicate which techniques are most effective. Rather, it reports that mediation results in a high agreement rate and disputant satisfaction.

Which specific techniques are most effective? The quest for an answer reveals the value of triangulation. Our conversations with plaintiffs, defendants, attorneys, and judges revealed that most believed assertive mediator behavior engendered more agreements. Yet the mediators often cautioned that such assertiveness probably would lower parties' satisfaction.

Our research mirrors these thoughts. In an observational study of 100 mediations, we

¹ James A. Wall Jr. & Timothy C. Dunne, *Mediation Research: A Current Review*, 28 NEGOTIATION J. 217, 236 (2012).

² James A. Wall Jr., *Mediation: An Analysis, Review, and Proposed Research*, 25 J. CONFLICT RESOL. 157 (1981); James A. Wall Jr. & Ann Lynn, *Mediation: A Current Review*, 37 J. CONFLICT RESOL. 160 (1993); James A. Wall Jr., John B. Stark & Rhetta L. Standifer, *Mediation: A Current Review and Theory Development*, 45 J. CONFLICT RESOL. 370 (2001); Wall & Dunne, *supra* note 1.

found that assertive mediators – those using an evaluative or pressing strategy – attained a higher rate of settlement (69% and 59%, respectively) than did those who employed a neutral strategy (28%).

The evaluative and pressing strategies did result in lower party satisfaction (6.0 and 5.7, respectively on a 7-point scale) than did a neutral (6.2) strategy.³ Yet, as a comparison among the above numbers reveals, the difference in satisfaction was not as great as that for agreements.

The literature, we find corroborates strongly with our interviews and our observational studies. As Figure 3 reveals, the literature from studies of mediations in very diverse fields indicate that mediator assertiveness is strongly associated with disputant agreement. Only one study found that assertiveness hinders agreement. Note also that only two studies indicate that assertiveness reduces disputants' satisfaction.⁴

³ James A. Wall Jr., Timothy C. Dunne & Suzanne Chan-Serafin, *The Effects of Neutral, Evaluative, and Pressing Mediator Strategies*, 29 CONFLICT RESOL. Q. 127 (2011).

⁴ *Id.*; Roselle L. Wissler, *Court-Connected Mediation in General Civil Cases: What We Know from Empirical Research*, 17 OHIO ST. J. ON DISP. RESOL. 641, 684-85 (2002).

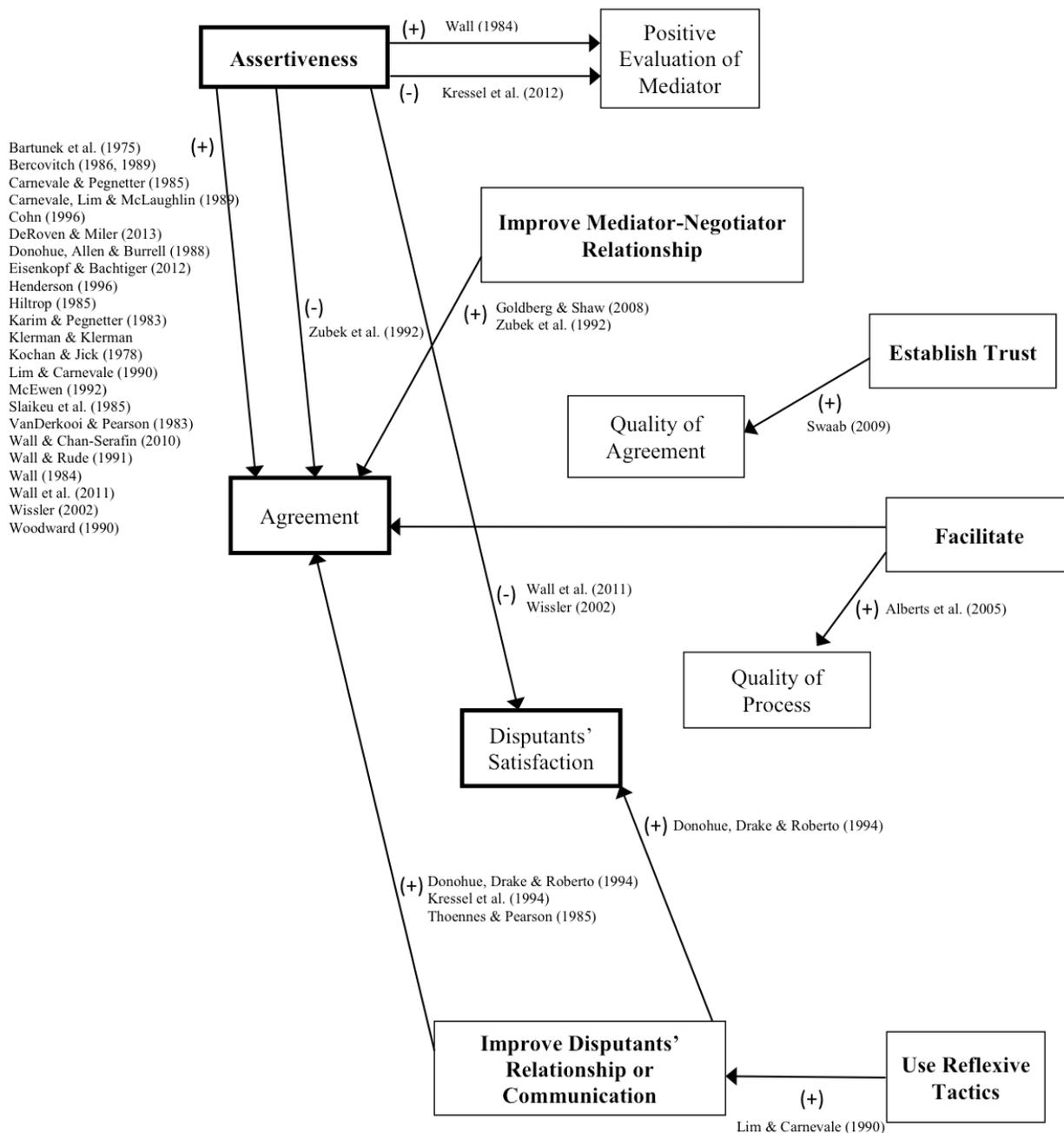


Figure 3
Effects of Mediators' Behaviors

Mediation Outcomes versus Trial Outcomes

The preceding discussion of the mediation outcomes – and the mediator behaviors that

spawned them – brings us to a pivotal question. How do the mediation outcomes compare to the outcomes in the regular legal system? Specifically,

1. Are mediations quicker?
2. Are mediations less costly?
3. Are there more settlements in mediation than in the central legal system (i.e., trial)?
4. Are clients more pleased with mediation than with trials?

The first two questions can be answered affirmatively. While no empirical studies have focused specifically on these queries, reports from attorneys, judges, and clients, as well as opinions voiced in the literature, report mediation is more expedient and less costly than trials. Such reports correlate quite well with simple reasoning.

Consider first, speed. Based on our observations and discussions with mediators, the average civil case mediation requires less than eight hours. Probably, the same case, with jury selection, opening statements, evidence presentation, statements by parties, cross-examinations, jury deliberations, etc. will take at least three days in trial.

Turning to cost, (question 2) we again can make some rudimentary comparative calculations. The mediation costs below were based on discussions with mediators we have observed and interacted with over the years. For an average case, the mediation costs would be approximately:

Administrative fee	\$400
8 hours, mediator costs	\$3,200
8 hours, defense attorney costs	\$2,000
8 hours, plaintiff attorney costs	\$2,000
Value of plaintiff's time	\$800
Value of defendant's time	\$800
Total	<u>\$11,200</u>

(These costs do not include depositions, preparation costs, etc., which would occur in the

mediation or the trial.)

For the trial, the costs would be at least:

Court fees	\$300
3 days defense attorney costs	\$6,000
3 days plaintiff attorney costs	\$6,000
Value of plaintiff's time	\$2,400
Value of defendant's time	\$2,400
Total	<u>\$17,200</u>

Admittedly, these are rough estimates, but they make the point that trials – because they require more time – are more expensive than mediation. If some readers disagree, we encourage them to pose a case in which the mediation costs more than a trial.

Moving to the next two questions – are there more settlements in mediation, and are clients more pleased with mediation? – the answer to both is that we do not know.

To ferret out the answers we need to conduct some studies; that is, we should test, not guess. Consider question 3, Are there more settlements in mediation – that is, a higher percentage of settlements – than in the cases that remain in the regular court system. Since mediations have a settlement rate of roughly 70%, one's initial answer is affirmative. Yet, we know that only about 2% of the filed cases in the legal system go to trial. So now we are not so sure. We need to gather some data to answer this question.

Study 1, depicted in Figure 4, is a simple one designed to answer this question.

Study 1

<u>Year</u>	<u>Not Mediated</u>				<u>Mediated</u>			
	Cases Filed	Cases Scheduled For Trial	Cases Settled Before Trial	Cases Settled/ Cases Scheduled For Trial	Cases Filed	Cases Scheduled For Trial	Cases Settled Before Trial	Cases Settled/ Cases Scheduled For Trial
2010	x	x	x	%	x	x	x	%
2011	x	x	x	%	x	x	x	%
2012	x	x	x	%	x	x	x	%
2013	x	x	x	%	x	x	x	%
2014	x	x	x	%	x	x	x	%
2015	x	x	x	%	x	x	x	%
2016	x	x	x	%	x	x	x	%
2017	x	x	x	%	x	x	x	%
2018	x	x	x	%	x	x	x	%
2019	x	x	x	%	x	x	x	%
2020	x	x	x	%	x	x	x	%

Figure 4
Study 1

It entails tracking filed cases that do not go to mediation versus those which do. Researchers would look at the number of cases filed in each year, the number scheduled for trial, and those settled before trial. The percentage of the trial-scheduled cases which settled in the non-mediated channel (Column 5) versus the percentage of trial-scheduled cases which settled in the mediation channel (Column 9) would answer the question: Are there a higher percentage of settlements in mediated versus non-mediated cases?

For the question, “Are clients more pleased in mediated cases than in those which do not go to mediation?” the study (as shown in Figure 5) is less arduous to conduct.

Study 2

Mediated	Settled Without Mediation	Tried
Settled		
Not Settled		

Dependent Variable
- Clients' satisfaction

Figure 5
Study 2

In Study 2, researchers could interview clients (and perhaps attorneys) after the cases were mediated, after non-mediated cases were settled, or after non-mediated cases went through in trial. During the interview (or surveys) they could measure the parties' satisfaction with the procedure. Subsequently, the responses in the three conditions could be compared to determine if clients are more pleased with mediation over trials, or if they are more pleased with mediation than in cases that settled without mediation. This study would also allow researchers to

determine if clients are more satisfied in mediations that settled than in those where there is not settlement.

The Effect of Mediation on the Legal System

To this point, we have said the civil court system has opened a second channel to handle mediation cases. In the mediations, the mediator interacts with the parties and when doing so has goals that are pursued. The mediators' behaviors are generally effective, resulting in a high level of agreement and satisfaction, as well as in lower costs and speedier handling of the cases. The most effective mediator behaviors appear to be assertive ones, in that they significantly increase agreements, with a somewhat minor decrease in satisfaction. It appears rather evident that mediations are quicker than trials and less costly. With regard to the number of settlements, we know the settlement rate in mediations is high but we do not know if it is higher than for non-mediated cases. We need a study to answer this question.

Also, we know that clients and attorneys are quite satisfied with mediation; however, we do not know if their satisfaction in mediated cases is higher than for cases that are not mediated. Another study is called for to answer this question.

Having established that mediation is working rather well, we can turn to its effect on the regular legal system.

When we asked mediators, judges, and attorneys about this effect, the predominant answer was mediation reduces the number of cases that must be tried in the regular system. In the literature we also find such opinions but very little hard evidence and a high level of variance.⁵ Some attorneys say a large percentage of their cases go to mediation, while others

⁵ Janine Robben, *Oregon's Vanishing Civil Jury Trial: A Treasured Right, or a Relic?*, OR. ST. B. BULL. (Nov. 2009) available at <http://www.osbar.org/publications/bulletin/09nov/jurytrial.html>; Teresa G. Campbell & Sharon L. Pizzuti, *The Effectiveness of Case Evaluation and Mediation in Michigan Circuit Courts*, REP. TO THE ST. CT. ADMIN. OFF., MICH. SUP. CT. (Oct. 31, 2011),

hold that very few do so.

When we examine the hard data, we conclude that mediation is probably not having a significant impact, nation-wide, on the number of cases going to trial. Consider that in 2012, there were 303,820 civil filings in U.S. district courts⁶ and 15,883,105 in state courts.⁷ The total is about 16 million. As for the number of mediations in the U.S., there is no overall report and the best guess we can locate is 250,000.⁸

To us, it seems impossible that this small number of mediations is having a significant impact upon the number of trials in the overall system. To test this conclusion and provide data to resolve this issue, we propose a simple study. As depicted in Figure 6, Study 3 would measure/record the number of civil cases filed, civil trials, and mediations over a set number of years. A simple comparison between the number of mediations and the number of civil cases (via some lagged correlations) would allow researchers to determine if mediation were reducing the number of trials.

<http://courts.mi.gov/Administration/SCAO/Resources/Documents/Publications/Reports/The%20Effectiveness%20of%20Case%20Evaluation%20and%20Mediation%20in%20MI%20Circuit%20Courts.pdf>; Richard G. Spier, Remarks at the Oregon Law Institute CLE on Mediation Tools and Techniques for Lawyers: Is mediation overused? (Oct. 19, 2012) (article available at <http://www.mediate.com/articles/SpierR3.cfm>).

⁶ Federal Judicial Case Load Statistics 2014 Tables – US District Courts - Civil, (March 31, 2014), <http://www.uscourts.gov/statistics-reports/federal-judicial-caseload-statistics-2014-tables>

⁷ Civil Case Load, Court Statistic Project, <http://www.courtstatistics.org/civil.aspx>.

⁸ James A. Wall Jr. & Suzanne Chan-Serafin, *Civil Case Mediations: Some Observations and Conclusions*, THE JURY EXPERT 5, 5 (Sept. 2009), <http://www.thejuryexpert.com/wp-content/uploads/WallChan-SerifinTJESep2009Volume21No5.pdf>.

Study 3

Year	Civil Cases Filed	Civil Case Trials	Mediations
2010	x	x	x
2011	x	x	x
2012	x	x	x
2013	x	x	x
2014	x	x	x
2015	x	x	x
2016	x	x	x
2017	x	x	x
2018	x	x	x
2019	x	x	x
2020	x	x	x

Figure 6
Study 3

A second question concerning the effect of mediation on the overall legal system is, “Does mediation reduce the time between filing of cases and their resolution?” Here again, we believe there is not a significant effect because there are very few mediations relative to the number of filed civil cases. However, a test of this query is simple to propose but rather difficult to conduct (Figure 7).

In such an investigation – Study 4 – researchers would record the mediations over a number of years as well as the time between the filing of a case and its resolution in trial. A comparison between these figures (probably with a lagged correlation) would answer our question.

Study 4

Year	Mediations	Time Between Filing and Resolution in Trial
2010	x	x
2011	x	x
2012	x	x
2013	x	x
2014	x	x
2015	x	x
2016	x	x
2017	x	x
2018	x	x
2019	x	x
2020	x	x

Figure 7
Study 4

A final and most interesting question as to the effect of mediation on the overall legal system is, “Does mediation improve the clients’ evaluation of the legal system?”

Many of the mediators we interviewed and observed stated that one of their goals was to improve this evaluation, and they felt their mediation behavior accomplished this goal. Are these mediators correct? Is the evaluation of the legal system more positive for plaintiffs and defendants who go through mediation versus those who do not?

The literature and our studies do imply this is the case. Together, they indicate that disputants are generally satisfied with mediation, and it therefore seems logical to assume that their satisfaction with the mediation would be extrapolated to a positive evaluation of the overall legal system.

This effect, however, may not be a strong one, because mediators in their joint sessions and caucuses tend to deride the legal system. Specifically, they hold that trials are time consuming, costly, risky, controlled by strangers, and occasionally very unfair. Such denigration perhaps reduces the clients' positive extrapolations.

This deductive background sets the stage for a simple study to test for the positive effect. In it, researchers can ask plaintiffs and defendants who utilized mediation how satisfied they were with the procedure. Their responses can, in turn, be compared to those of disputants who went to trial (without previously utilizing mediation).

A related and important question is whether or not mediation raises the general public's evaluation of the overall legal system. We think not, and advise that the question not be tested. Our reasoning is that the number of parties utilizing mediation – percentage wise – is quite small and therefore the chances of their positive evaluation propagating the legal system or the public's attitudes is miniscule.

Conclusion and Discussion

When we examine and reflect upon the two channels of the legal system, we can conclude mediation is flowing quite well. Cases which enter mediation are handled expeditiously; therefore, there is less delay and expense than in trials. In the mediations, mediators utilize a wide variety of techniques and those mediators who are more assertive tend to produce a higher level of agreements. Overall, mediators attain settlements about 70% of the

time, and disputants tend to be very satisfied with the process.

In this mediation channel, there are a couple of questions that need to be tested. Namely, is there a higher percentage of settlements in mediations than in the overall legal system, and is there a higher level of client satisfaction in mediation than in trials? We have proposed studies to answer these two questions.

When we consider the effect of mediation on the overall court system, we have more questions than answers. Mediation does reduce the number of cases that go to trial, and it probably does expedite cases that go to trial after mediation. However, mediation it seems does not significantly reduce the number of cases going to trial. This short hypothesis needs to be tested, and we propose a study to do so.

Another question that merits research is whether or not mediation reduces the time between the filing of cases in the overall legal system and their resolution.

Finally, we ask if mediation improves the clients' evaluation of the legal system. We believe that it does; yet, this hypothesis should be tested. As to whether or not mediation improves the general public's view of the legal system, we hold that it does not. And the conclusion seems so self-evident that it merits no test.

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