

# Court-Connected Mediation in General Civil Cases: What We Know from Empirical Research

ROSELLE L. WISSLER\*

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I. INTRODUCTION

Accompanying the expansion of court-connected mediation programs for general jurisdiction civil cases<sup>1</sup> are questions about the general effectiveness of such programs and the specific program characteristics that enhance or diminish their effectiveness.<sup>2</sup> This Article reports original empirical research on court-connected general civil case mediation in nine Ohio courts, reviews the findings of other studies, and assesses what answers research has provided to these questions.

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\* Research Fellow, Lodestar Mediation Clinic, Arizona State University College of Law. The Author thanks C. Eileen Pruett and Connie Strittmatter for their assistance and Bob Dauber, Craig McEwen, and Bobbi McAdoo for their comments.

<sup>1</sup> As used in the present Article, "civil cases" does not refer to small claims or domestic relations cases and "mediation" does not include judicial settlement conferences. See generally 1 SARAH R. COLE ET AL., *MEDIATION: LAW, POLICY, PRACTICE* 5-12, apps. B & C (2d ed. 2001 & Supp. 2001); ELIZABETH PLAPINGER & DONNA STEINSTRAS, *FED. JUDICIAL CTR. & CPR INST. FOR DISPUTE RESOLUTION, ADR AND SETTLEMENT IN THE FEDERAL DISTRICT COURTS: A SOURCEBOOK FOR JUDGES AND LAWYERS* 15-17 (1996); JUDITH FILNER ET AL., *THE NAT'L INST. FOR DISPUTE RESOLUTION, CONFLICT RESOLUTION INSTITUTE FOR COURTS*, 1995: *COMPENDIUM OF STATE COURT RESOURCE MATERIALS* 8-10 (1995) (showing the scope of dispute resolution services in state courts).

<sup>2</sup> See *infra* notes 66, 70 and accompanying text.

## WHAT WE KNOW FROM EMPIRICAL RESEARCH

The Article first describes the mediation programs in the Ohio courts studied. It then reports the findings regarding the participants' assessments of mediation, the session outcomes, and the impact on the time and cost of resolution. Throughout the Article, the findings of other studies of civil mediation programs in a number of state and federal trial courts are noted.<sup>3</sup>

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<sup>3</sup> JOHNNIE DANIEL, ADMIN. CONFERENCE OF THE U.S., ASSESSMENT OF THE MEDIATION PROGRAM OF THE U.S. DISTRICT COURT FOR THE DISTRICT OF COLUMBIA (1995); SHARON L. ESTEE, THE JUDICIAL COUNCIL FOR THE U.S. COURTS FOR THE NINTH CIRCUIT, U.S. JUDICIAL COUNSEL, CIVIL MEDIATION IN THE WESTERN DISTRICT OF WASHINGTON: A BRIEF EVALUATION (1987); MICHAEL FIX & PHILIP J. HARTER, THE URBAN INST., HARD CASES, VULNERABLE PEOPLE: AN ANALYSIS OF MEDIATION PROGRAMS AT THE MULTI-DOOR COURTHOUSE OF THE SUPERIOR COURT OF THE DISTRICT OF COLUMBIA (1992); JAMES S. KAKALIK ET AL., AN EVALUATION OF MEDIATION AND EARLY NEUTRAL EVALUATION UNDER THE CIVIL JUSTICE REFORM ACT (1996); WAYNE KOBBERVIG, MEDIATION OF CIVIL CASES IN HENNEPIN COUNTY: AN EVALUATION (1991); RICHARD J. MAIMAN, MASSACHUSETTS SUPREME JUDICIAL COURT, AN EVALUATION OF SELECTED MEDIATION PROGRAMS IN THE MASSACHUSETTS TRIAL COURT (1997); CRAIG A. MCEWEN, AN EVALUATION OF THE ADR PILOT PROJECT: FINAL REPORT (1992) (copy on file with author) [hereinafter MCEWEN, FINAL REPORT]; KEITH SCHILDT ET AL., MAJOR CIVIL CASE MEDIATION PILOT PROGRAM: 17TH JUDICIAL CIRCUIT OF ILLINOIS, PRELIMINARY REPORT (1994), available at <http://www.caadr.org/downloads/niustudy.pdf>; KARL D. SCHULTZ, FLA. DISPUTE RESOLUTION CTR., FLORIDA'S ALTERNATIVE DISPUTE RESOLUTION DEMONSTRATION PROJECT: AN EMPIRICAL ASSESSMENT (1990); DONNA STIENSTRA ET AL., THE FED. JUDICIAL CTR., REPORT TO THE JUDICIAL CONFERENCE COMMITTEE ON COURT ADMINISTRATION AND CASE MANAGEMENT: A STUDY OF THE FIVE DEMONSTRATION PROGRAMS ESTABLISHED UNDER THE CIVIL JUSTICE REFORM ACT OF 1990, at 215–53 (1997) (reporting the findings of the Western District of Missouri's "Early Assessment Program"); *id.* at 255–83 (reporting the findings of the Northern District of West Virginia's "Settlement Week"); Timothy F. Averill, *Assessing the Orleans Parish Civil District Court Pilot Mediation Program* 43 LA. B.J. 150 (1995); Stevens H. Clarke & Elizabeth Ellen Gordon, *Public Sponsorship of Private Settling: Court-ordered Civil Case Mediation*, 19 JUST. SYS. J. 311 (1997); Howard Herman, Preliminary Report of Responses to Mediation Questionnaires, Address at the American Bar Association Section of Dispute Resolution 2001 Annual Meeting, (Apr. 2001) (handout on file with author); Craig A. McEwen, *An Evaluation of the ADR Pilot Project*, 7 ME. B.J. 310 (1992) (examining the process where third parties used mediation, neutral evaluation, and a combination of both approaches); James G. Woodward, *Settlement Week: Measuring the Promise*, 11 N. ILL. U. L. REV. 1 (1990). Other reviewed reports of civil mediation programs, whose data were limited primarily to settlement rates, are located in COURT-ANNEXED MEDIATION: CRITICAL PERSPECTIVES ON SELECTED STATE AND FEDERAL PROGRAMS (Edward J. Bergman & John G. Bickerman eds., 1998) [hereinafter COURT-ANNEXED MEDIATION]. Specifically, these reports include Mike Amis et al., *The Texas ADR Experience*, in COURT-ANNEXED MEDIATION, *supra*, at 369; Edward J. Bergman, *Mediation Program of the U.S. District Court, District of New Jersey*, in COURT-ANNEXED MEDIATION, *supra*, at 277; John G. Bickerman, *The Mediation Program of the United States District Court for the District of Columbia*, in COURT-ANNEXED MEDIATION, *supra*, at 1; Frederic R. Dichter, *A Study of the Northern*

Next, the Article examines the relationships between various case, party, and program characteristics, on the one hand, and settlement and participants' perceptions, on the other hand. How these various factors contribute to, or detract from, mediation's effectiveness has received relatively little attention in prior studies. The Article concludes by summarizing what is known about general civil case mediation from empirical research and discussing the implications for program design and future research.

## II. EMPIRICAL RESEARCH ON GENERAL CIVIL CASE MEDIATION

### A. Overview of the Ohio Mediation Studies

This Article reports the findings of empirical studies of court-connected civil case mediation programs in the general division of nine Ohio courts of common pleas.<sup>4</sup> Two of the studies involved a pilot mediation program in five courts.<sup>5</sup> The third study involved a "Settlement Week" mediation program in four courts.<sup>6</sup>

Mediation in the pilot courts was available on an ongoing basis, whereas mediation in the Settlement Week courts took place during only one or two weeks a year, when the courts curtailed their civil docket.<sup>7</sup> In all of the

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*District of Oklahoma Settlement Program*, in COURT-ANNEXED MEDIATION, *supra*, at 337. Some of the studies involved only one court, whereas others involved multiple courts (some of which reported overall findings across all courts studied, while others reported separately the findings for each individual court).

<sup>4</sup> See generally OHIO REV. CODE ANN. § 2305.01 (West Supp. 2001) (setting jurisdiction of courts of common pleas).

<sup>5</sup> These studies were conducted by The Supreme Court of Ohio Office of Dispute Resolution Programs under a grant from The Ohio Office of Criminal Justice Services. C. Eileen Pruett, Frank Motz, Margaret Brunyansky, and Crevon Tarrance were involved in the implementation, operation, and evaluation of the pilot mediation programs. The present Author was a research consultant and analyzed the data for the projects.

<sup>6</sup> This study was a collaborative effort between The Supreme Court of Ohio Committee on Dispute Resolution and The Ohio State University Socio-Legal Program on Dispute Resolution and was supported by the William and Flora Hewlett Foundation. C. Eileen Pruett, Nancy H. Rogers, Jeanne Clement, L. Camille Hébert, Laura Williams, Charles E. Wilson, and the late Andrew I. Schwebel were involved in the design and distribution of the questionnaires. The present Author was a research consultant and analyzed the data for the project.

<sup>7</sup> See generally HAROLD PADDOCK, SETTLEMENT WEEK: A PRACTICAL MANUAL FOR RESOLVING CIVIL CASES THROUGH MEDIATION (1990); Kathleen M. Maloney, *Settlement Week in Ohio*, OHIO LAW., May-June 1996, at 14 (describing Ohio Settlement Week procedure).

courts, mediation was offered at no cost to the parties.<sup>8</sup> None of the courts imposed financial penalties or disincentives for failure to reach a settlement. The mediators had access to the pleadings before the mediation session in all courts,<sup>9</sup> although the Settlement Week mediators received the case file right before the session. The mediators reported to the court whether or not mediation produced a settlement, but did not report the content of the discussions.<sup>10</sup>

### 1. *Data Sources*

The findings presented in this Article are drawn primarily from questionnaires completed by the mediators, parties, and attorneys who participated in mediation. The questionnaires were distributed to the parties and attorneys at the end of the mediation session in all cases mediated during the study periods and typically were completed before the participants left the courthouse.<sup>11</sup> In each court, about half of the parties who completed a

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<sup>8</sup> In some of the other civil mediation programs that have been empirically studied, mediation is offered at no cost to the parties; in other programs, the parties must pay a mediation fee. *See, e.g.,* KAKALIK ET AL., *supra* note 3, at 18; STIENSTRA ET AL., *supra* note 3, at 263; Clarke & Gordon, *supra* note 3, at 318; McEwen, *supra* note 3, at 310.

<sup>9</sup> In one court, the attorneys were required to submit a short memo on their position with regard to legal and factual issues and, in complex cases, might be asked to submit expert depositions. STARK COUNTY, OHIO, CT. C.P. LOCAL R. 16.08(A) (1997), <http://www.court.co.stark.oh.us/locrules.asp> (last visited Mar. 26, 2002). Other civil mediation programs typically required the attorneys to provide the mediator, before the session, a copy of the answer and complaint, a short summary of the case, a short statement regarding their position on liability and damages, or some combination of these items. *See, e.g.,* ESTEE, *supra* note 3, at 17; KAKALIK ET AL., *supra* note 3, at 32 tbl.4.4; SCHILDT ET AL., *supra* note 3, at 6; STIENSTRA ET AL., *supra* note 3, at 228, 266–67; McEwen, *supra* note 3, at 310. The mediator sometimes conducted legal research in preparation for mediation in some programs. *See, e.g.,* ESTEE, *supra* note 3, at 18; STIENSTRA ET AL., *supra* note 3, at 228.

<sup>10</sup> PADDOCK, *supra* note 7, at 71 (presenting a sample mediator's report); CLINTON COUNTY, OHIO, CT. C.P. LOCAL R. 28D(2)(h), *reprinted in* THE SUPREME COURT OF OHIO, IMPLEMENTATION MANUAL FOR COMMON PLEAS COURT CIVIL AND CRIMINAL MEDIATION, at A-73 app. (1999) [hereinafter IMPLEMENTATION MANUAL]; Montgomery County, Ohio, Ct. C.P., General Administrative Order of Referral to Civil Mediation Program (Sept. 11, 1996), *reprinted in* IMPLEMENTATION MANUAL *supra*, at A-92 app.; Hamilton County, Ohio, Ct. Com. Pl., General Order of Referral to Common Pleas Mediation Service (Feb. 20, 1998) (on file with the Ohio State Journal on Dispute Resolution); STARK COUNTY, OHIO, CT. C.P. LOCAL R. 16.11 (1997), <http://www.court.co.stark.oh.us/locrules.asp> (last visited Mar. 26, 2002).

<sup>11</sup> Questionnaires were completed in 649 cases mediated from 1992 through 1994 in the four Settlement Week courts, in 688 cases mediated between 1997 and 1998 in the

questionnaire were plaintiffs and about half were defendants. Similarly, attorneys in each court who completed a questionnaire were also fairly evenly split between plaintiff and defense attorneys. The questionnaires obtained information about the characteristics of the case, the mediation session, and the outcome of mediation, as well as the parties' and attorneys' perceptions of the mediation process and the mediator.<sup>12</sup>

Two additional data sources were used in the first-phase pilot courts. In 938 of the cases assigned to mediation (88%), the mediators completed a log form that tracked additional information about the timing of the mediation referral and the mediation session, the time spent in mediation, and the disposition of the case. Program personnel also compiled information from the courts' case files in 1811 cases that were part of the pilot study (*i.e.*, 1060 cases assigned to mediation and 683 cases assigned to non-mediation).<sup>13</sup> The information obtained included characteristics of the cases, the scheduled dates of various litigation events, and the form of case disposition.

## 2. Analyses

Some of the findings—for example, those that describe the process, outcome, and participants' perceptions—represent the mean or average response for the nine courts.<sup>14</sup> Other findings, such as those that report the relationship between program characteristics and settlement or party assessments, are based on meta-analyses. Meta-analysis first examines the relationship in question *within* each court, and then essentially “averages”

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three courts in the first phase of the pilot mediation program, and in 393 cases mediated between 1998 and 2000 in two courts in the second phase of the pilot program. Data collected using a different version of the questionnaire at the beginning of the first phase of the pilot program were not included in the findings reported in this Article. Data from additional courts involved in the second phase of the pilot program were not included because one of the courts was a municipal court and because data collection in the other courts was incomplete. See *infra* p. 703 app. for the number and percentage of questionnaires completed by each group of participants in each court.

<sup>12</sup> The participant questionnaires used in the two phases of the pilot court programs were essentially the same, with only a few additional questions in the second phase. The questionnaires used in the Settlement Week courts included a more limited set of questions.

<sup>13</sup> This information was used for a set of analyses comparing mediation and non-mediation cases. See *infra* notes 94–101 and accompanying text.

<sup>14</sup> That is, first the average response was calculated for each court, and then those averages were summed and divided by nine (or by the number of courts with data for that item). RICHARD P. RUNYON & AUDREY HABER, *FUNDAMENTALS OF BEHAVIORAL STATISTICS* 90 (5th ed. 1984). Each court was given equal weight in the average, regardless of the number of cases per court.

those relationships over all of the courts.<sup>15</sup> Thus, meta-analysis takes into consideration the strength, direction, and degree of statistical significance of the effect found in each court, and provides measures that indicate the overall strength and direction of the effect ( $r$ ) and its statistical significance ( $p$ )<sup>16</sup> across all courts in the present studies.<sup>17</sup>

### B. Description of the Ohio Mediation Programs

In order to interpret the participants' perceptions and mediation's outcomes and impacts, we need to know something about the way in which mediation was implemented and about the cases in the programs under study.<sup>18</sup> Accordingly, in this section, we describe the structure of the mediation programs, the mediators, the cases, and the mediation sessions.

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<sup>15</sup> The meta-analytic methods used are those described by ROBERT ROSENTHAL, *META-ANALYTIC PROCEDURES FOR SOCIAL RESEARCH* 88–91 (1984). For each analysis, the aggregate effect size was calculated by first computing the effect size (Pearson  $r$ ) for each court, transforming each  $r$  into its equivalent Fisher  $Z_r$ , averaging the  $Z_r$ 's across the courts, then converting the mean  $Z_r$  back to an  $r$ . Similarly, the aggregate  $p$  level for each analysis was calculated by first computing the  $p$  level for each court, transforming each  $p$  into its equivalent standard normal deviate ( $Z$ ), averaging the  $Z$ 's across the courts, then converting the mean  $Z$  back to a  $p$  value. *Id.*

<sup>16</sup> To determine whether an observed relationship among two variables is a "true" relationship or if it merely reflects chance variation, tests of statistical significance must be conducted. The Pearson  $r$  statistic assesses whether the two variables are significantly associated with one another, but not whether one factor causes the other. The value of  $r$  (the correlation coefficient) indicates the strength of the relationship and ranges from +1.00 to -1.00, with .00 representing no relationship between the variables. The conventional level of probability for determining the statistical significance of findings is the .05 level (*i.e.*,  $p < .05$ ). RUNYON & HABER, *supra* note 14, at 140–42, 230. As a rough guide to interpreting the size of the effects,  $r = .10$  is considered a small effect,  $r = .30$  is considered a medium effect, and  $r = .50$  is considered a large effect. ROBERT ROSENTHAL & RALPH L. ROSNOW, *ESSENTIALS OF BEHAVIORAL RESEARCH* 361 (1984).

<sup>17</sup> Meta-analysis is particularly helpful in ascertaining the overall effect of a particular factor when the pattern of findings differs greatly across the courts (*e.g.*, when the factor is related to an increased likelihood of settlement in some courts but to a decreased rate of settlement, or has no significant relationship with settlement, in other courts). Other civil mediation studies could not be included in the meta-analyses because they generally did not conduct statistical significance tests or did not report the necessary information.

<sup>18</sup> *See, e.g.*, Craig A. McEwen, *Toward a Program-Based ADR Research Agenda*, 15 *NEGOTIATION J.* 325, 331–33 (1999).

### 1. Case Referral to Mediation

In all courts, cases could enter mediation at the court's nomination or at the nomination of one of the parties.<sup>19</sup> In the pilot courts, recently filed cases also were randomly selected<sup>20</sup> for mediation.<sup>21</sup> In the pilot courts, a majority

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<sup>19</sup> If one party requested mediation, all the courts ordered mediation in that case and typically did not disclose the source of the referral. *See* Hamilton County, Ohio, Ct. C.P., General Order of Referral to Common Pleas Mediation Service (Feb. 20, 1998) (on file with the Ohio State Journal on Dispute Resolution); Montgomery County, Ohio, Ct. C.P., General Administrative Order of Referral to Civil Mediation Program (Sept. 11, 1996), *reprinted in* IMPLEMENTATION MANUAL *supra* note 10, at A-92 app; STARK COUNTY, OHIO, CT. C.P. LOCAL R. 16.04 (1997), <http://www.court.co.stark.oh.us/locrules.asp> (last visited Mar. 26, 2002); Maloney, *supra* note 7, at 15; Maloney, *supra* note 7, at 15. Criteria used by the judges in the pilot courts for referring cases to mediation included: whether the parties had a continuing relationship, the amount of money at issue, whether liability was at issue, the nature of the case, and potential cost savings to the parties. IMPLEMENTATION MANUAL, *supra* note 10, at 4–11. In the Settlement Week courts, administrators reviewed party-nominated cases and referred those they thought would have the most productive mediation sessions. Factors considered by the administrators included case type, whether liability was contested, and the status of discovery, negotiations, and pending motions. PADDOCK, *supra* note 7, at 45–48, 50–51.

<sup>20</sup> Other recently filed cases were randomly assigned to a non-mediation group. Hamilton County, Ohio, Ct. C.P., General Order of Referral to Common Pleas Mediation Service (Feb. 20, 1998) (on file with the Ohio State Journal on Dispute Resolution); CLINTON COUNTY, OHIO, CT. C.P. LOCAL R. 28(A)(1), *reprinted in* IMPLEMENTATION MANUAL, *supra* note 10, at A-73 app.; Montgomery County, Ohio, Ct. C.P., General Administrative Order of Referral to Civil Mediation Program (Sept. 11, 1996), *reprinted in* IMPLEMENTATION MANUAL *supra* note 10, at A-92 app. *See infra* notes 94–101 and accompanying text; Stark County, Ohio, Ct. C.P., Order Establishing Random Selection of Mediation Cases, *reprinted in* IMPLEMENTATION MANUAL, *supra* note 10, at A-145 app.

<sup>21</sup> Most of the civil mediation programs that have been empirically studied involved mandatory referral to mediation at the request of one party or on the judge's own initiative and, thus, represented a mixture of voluntary and mandatory case referrals. Where participation in mediation was a result of court initiation, some courts automatically referred certain types of cases to mediation without further review. In other courts, the judge reviewed eligible cases and selected those to be referred, and in yet other courts, the judge referred cases only after consulting with the attorneys. Mediation in these civil programs seldom involved purely voluntary referral that required the agreement of both parties. Even when both sides had to agree, there could be strong judicial "encouragement" to use mediation. The mode of case referral and other program design features varied not only among mediation programs, but also among courts within a program and among judges within a court. *See* DANIEL, *supra* note 3, at 1–2; ESTEE, *supra* note 3, at 12–16; FIX & HARTER, *supra* note 3, at 83; KAKALIK ET AL., *supra* note 3, at xxviii tbl.S.1, 30; KOBBERVIG, *supra* note 3, at 6–7; MAIMAN, *supra* note 3, at 19–21; SCHILDT ET AL., *supra* note 3, at 6; SCHULTZ, *supra* note 3, at 20–21; STIENSTRA ET



of the cases (73%) that had a mediation session had been referred by a judge, either at the request of one of the parties or on the judge's own initiative,<sup>22</sup> while the remaining 27% had been randomly assigned to mediation. In the Settlement Week courts, a majority of the cases (68%) that had a mediation session had been referred to mediation at the request of one or both parties, and only 32% had been referred on the judges' own initiative.<sup>23</sup>

## 2. *Timing of Mediation Referrals and Sessions*

In the pilot courts, the median length of time between case filing and referral to mediation was approximately four months,<sup>24</sup> the median length of time between referral and the first mediation session was 2.5 months,<sup>25</sup> and the median length of time between when the case was filed and when mediation took place was eight months.<sup>26</sup> In the Settlement Week courts, the

AL., *supra* note 3, at 226–27, 262, 264; Amis et al., *supra* note 3, at 372, 380; Averill, *supra* note 3, at 150; Bergman, *supra* note 3, at 278; Bickerman, *supra* note 3, at 4–5; Clarke & Gordon, *supra* note 3, at 317; Dichter, *supra* note 3, at 352; McEwen, *supra* note 3, at 310; Woodward, *supra* note 3, at 8.

<sup>22</sup> In the pilot courts, no distinction was made between these two types of cases in the “judge-referred” category on the mediator questionnaires because the mediator typically did not know the source of the mediation referral. Forty percent of the attorneys in the second-phase pilot courts indicated that they or their client had requested mediation.

<sup>23</sup> Looking at the subset of Settlement Week cases in which attorneys on both sides had answered this question about the mode of referral, in only 14% of the cases did both sides request mediation.

<sup>24</sup> The *median* is the value corresponding to the fiftieth percentile (*i.e.*, half of the cases had four months or less between filing the answer and mediation referral, and half had more than four months). RUNYON & HABER, *supra* note 14, at 95. The time from case filing to mediation referral was statistically significantly shorter (on average, about six months shorter) in cases randomly assigned to mediation than in judge-referred cases ( $r = -.429, p < .001$ ;  $r$ 's in each court ranged from  $-.598$  to  $-.122$ ). This is because mediation referrals tended to occur within a month or two after the answer was filed in randomly assigned cases; in other cases, referrals tended to take place at an initial pre-trial conference. See *e.g.*, IMPLEMENTATION MANUAL, *supra* note 10, at 4–10 to 4–13; Montgomery County, Ohio, Ct. C.P., General Administrative Order of Referral to Civil Mediation Program (Sept. 11, 1996), *reprinted in* IMPLEMENTATION MANUAL *supra* note 10, at A-92 app. For all cases, the median length of time between filing the answer and referral to mediation was approximately two months.

<sup>25</sup> The time from referral to the first mediation session was significantly longer (by almost two months) in randomly assigned than in judge-referred cases ( $r = .338, p < .001$ ;  $r$ 's in each court ranged from  $.013$  to  $.541$ )

<sup>26</sup> The time from case filing to the first mediation session was significantly shorter (by four months on average) in cases randomly assigned to mediation than in judge-

median length of time between when the case was filed and when mediation occurred was 10.5 months. With regard to the timing of mediation in relation to the scheduled trial date, the mediation session was held within three months of the scheduled trial date in 62% of the pilot court<sup>27</sup> cases and 46% of the Settlement Week cases.<sup>28</sup>

### 3. Status of Motions and Discovery

At the time of the mediation session, motions to dismiss or for summary judgment, as well as other motions, were pending in only a few cases (7% and 6% of the cases, respectively). A majority of attorneys (73%) reported that discovery was in progress; 21% said they had completed discovery prior to the mediation session and a small number (6%) had not started discovery.<sup>29</sup> Forty-three percent of attorneys said that party depositions had been completed, but only 5% said that expert depositions had been completed prior to mediation.<sup>30</sup>

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referred cases ( $r = -.259$ ,  $p < .001$ ;  $r$ 's in each court ranged from  $-.46$  to  $-.082$ ). The median length of time between filing the answer and mediation was almost seven months.

<sup>27</sup> These figures do not include data from one court in which mediation-track cases did not go onto the judges' dockets for scheduling until after they had a mediation session.

<sup>28</sup> The timing of the mediation referrals and sessions in the present courts is within the range of timing reported in most other civil mediation studies (*i.e.*, generally from three to nine months between filing and referral and from one to six months between referral and mediation). See KAKALIK ET AL., *supra* note 3, at 31; KOBBERVIG, *supra* note 3, at 6-7; MCEWEN, FINAL REPORT, *supra* note 3, at 4; Clarke & Gordon, *supra* note 3, at 320. In one court, mediation took place sooner for cases randomly assigned to mandatory mediation, with the initial session held about one month after the answer was filed. STIENSTRA ET AL., *supra* note 3, at 223. A few other courts had a far longer interval between case filing and referrals. *E.g.*, SCHILDT ET AL., *supra* note 3, at 15 tbl.2; SCHULTZ, *supra* note 3, at 5-6; Woodward, *supra* note 3, at 31. With regard to the timing of mediation in relation to the scheduled trial date, in some courts, cases were eligible for mediation only if the scheduled trial date was more than three months away; in other courts, the cases had to be set for trial before they were eligible for referral to mediation. See, *e.g.*, DANIEL, *supra* note 3, at 20; FIX & HARTER, *supra* note 3, at 83; STIENSTRA ET AL., *supra* note 3, at 266.

<sup>29</sup> Not surprisingly, more discovery had been conducted the more time had passed between case filing and the mediation session ( $r = .323$ ,  $p < .001$ ;  $r$ 's in each court ranged from  $.13$  to  $.44$ ) and the closer the mediation session was to the scheduled trial date ( $r = .30$ ,  $p < .001$ ;  $r$ 's in each court ranged from  $.07$  to  $.53$ ).

<sup>30</sup> The courts in some civil mediation studies required all dispositive or significant motions to be heard before mediation took place. See, *e.g.*, McEwen, *supra* note 3, at 310; Woodward, *supra* note 3, at 8. In most courts, mediation typically took place when most or all discovery had been completed. Some studies, however, noted that mediation

#### 4. *Number of Mediation Sessions*

Mediation did not take place in 18% of the cases referred to mediation. Most of these cases (81%) settled after referral to mediation but before the session was held.<sup>31</sup> Most of the cases in which mediation took place (91%) had one mediation session, 8% had two sessions, and 1% had three sessions.<sup>32</sup>

#### 5. *Length of Mediation Sessions*

A single initial mediation session generally was scheduled for two or more hours in the pilot courts and for one hour in the Settlement Week courts.<sup>33</sup> In the pilot courts, most of the sessions (77%) lasted between thirty-one minutes and three hours; 20% were longer and only 3% were shorter.<sup>34</sup> In the Settlement Week courts, most of the sessions (85%) also lasted from

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occurred when either little or no discovery had been conducted or at an intermediate stage of discovery. See DANIEL, *supra* note 3, at 20; FIX & HARTER, *supra* note 3, at 115; KOBBERVIG, *supra* note 3, at 6–7; STIENSTRA ET AL., *supra* note 3, at 237, 266; Dichter, *supra* note 3, at 341; Woodward, *supra* note 3, at 8.

<sup>31</sup> Two percent of the cases settled as a result of telephone conferences with the mediator, 7% were dismissed prior to mediation, 3% were removed from the mediation track, and 7% did not have a mediation session for other reasons. The proportion of cases referred to mediation that did not have a session, as well as the fact that most of these cases had settled, is consistent with the findings of other civil mediation studies. See KAKALIK ET AL., *supra* note 3, at 32; KOBBERVIG, *supra* note 3, at 14, 17; MCEWEN, FINAL REPORT, *supra* note 3, at 27; STIENSTRA ET AL., *supra* note 3, at 265. *But cf.* STIENSTRA ET AL., *supra* note 3, at 229 (noting far more cases terminated between referral and mediation).

<sup>32</sup> Other civil mediation studies also tended to report that most cases had only one session. See KAKALIK ET AL., *supra* note 3, at 103, 136, 171 (three courts); STIENSTRA ET AL., *supra* note 3, at 266 (one court); Clarke & Gordon, *supra* note 3, at 319. But some courts reported that over half of the cases had more than one session. See DANIEL, *supra* note 3, at 40; KAKALIK ET AL., *supra* note 3, at 69 (one court); STIENSTRA ET AL., *supra* note 3, at 229 (one court).

<sup>33</sup> Maloney, *supra* note 7, at 15; Montgomery County, Ohio, Ct. C.P., General Administrative Order of Referral to Civil Mediation Program (Sept. 11, 1996), *reprinted in* IMPLEMENTATION MANUAL *supra* note 10, at A-92 app. Other civil mediation studies reported that programs allotted from one to three hours for the initial mediation session. See, e.g., STIENSTRA ET AL., *supra* note 3, at 229, 262; Woodward, *supra* note 3, at 8.

<sup>34</sup> Sessions in the first-phase pilot courts ranged from fifteen minutes to seven hours, with a mean of two hours.

thirty-one minutes to three hours,<sup>35</sup> but only 2% were longer and 13% were shorter.<sup>36</sup>

## 6. Case Characteristics<sup>37</sup>

Over half (52%) of the mediated cases were personal injury cases involving an automobile accident, 17% were other types of personal injury cases, 12% were contract or "business" cases,<sup>38</sup> 7% were workers' compensation cases, and 12% were other types of cases.<sup>39</sup> The mediators were also asked to rate the cases on a number of dimensions.<sup>40</sup> The parties'

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<sup>35</sup> Settlement Week sessions ranged from less than thirty minutes to five hours.

<sup>36</sup> In most other civil mediation studies, the average mediation session length was between two and three hours. MCEWEN, FINAL REPORT, *supra* note 3, at 19; SCHILDT ET AL., *supra* note 3, at 19; STIENSTRA ET AL., *supra* note 3, at 229, 262, 267; Clarke & Gordon, *supra* note 3, at 319. However, the average session length was just over four hours in one court, ESTEE, *supra* note 3, at 42, was three to six hours in another court, KOBBERVIG, *supra* note 3, at 30, and varied widely among the four courts in another study (from ninety minutes to four and five hours, to eight hours), KAKALIK ET AL., *supra* note 3, at xxviii tbl.S.1.

<sup>37</sup> Certain types of cases were excluded from the pilot mediation program; these varied across the courts, but most commonly were habeas corpus, foreclosure, declaratory relief, quiet title, and pro se cases. See, e.g., CLINTON COUNTY, OHIO, CT. C.P. LOCAL R. 28(C), reprinted in IMPLEMENTATION MANUAL, *supra* note 10, at A-73 app.; Montgomery County, Ohio, Ct. C.P., General Administrative Order of Referral to Civil Mediation Program (Sept. 11, 1996), reprinted in IMPLEMENTATION MANUAL *supra* note 10, at A-92 app. "Most of these cases were made ineligible due to concern that the only relief prayed for was a legal ruling from the judge or the type of case was one that concluded so quickly that a mediation session would be impossible." IMPLEMENTATION MANUAL, *supra* note 10, at 4-9. Other mediation programs excluded a variety of different case types from mediation. See, e.g., ESTEE, *supra* note 3, at 5, 13-16; MAIMAN, *supra* note 3, at 19; Clarke & Gordon, *supra* note 3, at 317; McEwen, *supra* note 3, at 310.

<sup>38</sup> The pilot court questionnaires used the category "contract" (19% of the cases); the Settlement Week questionnaires used the category "business" (5% of the cases).

<sup>39</sup> This is comparable to the case makeup noted in most other civil mediation studies—most cases were personal injury (particularly car accident cases) or contract cases. See, e.g., ESTEE, *supra* note 3, at 21; FIX & HARTER, *supra* note 3, at 87; KAKALIK ET AL., *supra* note 3, at 60, 94, 127, 162 (four courts); KOBBERVIG, *supra* note 3, at 12; SCHILDT ET AL., *supra* note 3, at 14; SCHULTZ, *supra* note 3, at 3; Averill, *supra* note 3, at 150; Clarke & Gordon, *supra* note 3, at 317; Woodward, *supra* note 3, at 27. In three courts, civil rights cases made up a sizeable minority of the mediation program caseload. KAKALIK ET AL., *supra* note 3, at 94, 127, 162.

<sup>40</sup> Each dimension was rated on a five-point scale, with "1" labeled "not at all," "3" labeled "somewhat," and "5" labeled "a great deal." The percentages reported here are the percentage of ratings of "4" or "5." It is unclear to what extent these ratings reflect the

initial positions were rated as substantially disparate in most of the cases (85%).<sup>41</sup> The mediators said that liability was strongly contested in 43% of the cases and that 21% of the cases involved complex issues.<sup>42</sup> The parties' relationship<sup>43</sup> at the start of the mediation session was seen as highly contentious in 25% of the cases,<sup>44</sup> whereas the attorneys' relationship was seen as highly contentious in only 14% of the cases.

### 7. Party Characteristics and Mediation Experience

About half of the parties were in court as individuals (53%) and about half were in court representing a business or organization (47%). Looking only at parties who were in court as individuals,<sup>45</sup> about half of the parties were male (54%) and about half were female (46%). Seventeen percent of the parties identified themselves as a member of a minority group. The

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nature of the cases being rated or the general perspective of the mediator doing the rating. For instance, the mediator in one court gave by far the largest percentage of "high" ratings on four of the five dimensions; either the cases in this court were more complex and the relationships were more contentious, or this mediator applied a different standard when making the ratings.

<sup>41</sup> In another study, 53% of the attorneys rated the differences in the bottom line as great. DANIEL, *supra* note 3, at 36.

<sup>42</sup> In another study, 8% of the mediators and 14% of the attorneys rated the complexity of the legal issues as high. KAKALIK ET AL., *supra* note 3, at 331, 355.

<sup>43</sup> Information about the nature of the parties' relationship was not obtained in the present studies. It is worth noting that other civil mediation studies reported that only a minority of parties were involved in an ongoing personal relationship. FIX & HARTER, *supra* note 3, at 93; Clarke & Gordon, *supra* note 3, at 317. This is consistent with the predominance of car accident cases in many civil mediation program caseloads. See *supra* notes 38–39 and accompanying text.

<sup>44</sup> In one other study, both the mediators and the attorneys rated the difficulty in relations between the parties and/or the attorneys as being high in 16% of the cases. KAKALIK ET AL., *supra* note 3, at 331, 355. In another study, however, attorneys rated the parties' hostility as being high in 58% of the cases. DANIEL, *supra* note 3, at 35.

<sup>45</sup> The demographic data reported here are for individual litigants only because, in the Settlement Week courts, these questions were asked only of litigants who were in court as individuals. Analyses conducted using data from the pilot courts revealed statistically significant differences between individual and business litigants on all of the demographic characteristics, with individual litigants more likely to be female ( $r = .15, p < .001$ ), to be a member of a minority group ( $r = .13, p < .001$ ), and to have a lower level of education ( $r = .38, p < .001$ ) than business representatives. Individual litigants also were significantly more likely than business representatives to be in the role of plaintiff ( $r = .67, p < .001$ ). This latter finding is consistent with that of other studies, likely due to the high proportion of auto accident and other personal injury cases. See, e.g., Clarke & Gordon, *supra* note 3, at 317; Woodward, *supra* note 3, at 28.

parties represented a range of levels of education, from less than a high school diploma to a graduate or professional degree. Over half of the parties (55%) had no prior mediation experience; only 18% had considerable prior mediation experience.<sup>46</sup> Over half of the parties had received considerable preparation for mediation by their attorneys (57%), whereas only 6% had received no preparation from their attorneys.<sup>47</sup>

### 8. *The Mediators' Training and Experience*

In the pilot courts, the mediators were attorneys<sup>48</sup> who were employed as half-time or full-time, salaried, in-house mediators by the courts.<sup>49</sup> All mediators had over forty hours of general mediation training, and most had over forty hours of training specifically in the mediation of civil cases. All of the mediators previously had mediated more than twenty-five civil cases.<sup>50</sup> Some of the mediators had substantial mediation training and experience in the areas of family or labor law. Others had less mediation experience, but either had many years of civil litigation experience or had been a magistrate. In 73% of the cases, the mediators reported being familiar with the substantive issues in the case from their prior work experience.

In the Settlement Week courts, the mediators were attorneys who volunteered their time to mediate several cases.<sup>51</sup> Seventy percent of the mediators had fewer than seven hours of mediation training, 20% had from seven to nineteen hours of training, and only 10% had twenty or more hours

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<sup>46</sup> By contrast, few attorneys had no prior mediation experience (8%) and over half (53%) had a considerable amount of experience.

<sup>47</sup> Parties in court representing a business had substantially more prior mediation experience than did individual parties ( $r = .50, p < .001$ ), but they received less preparation for mediation by their attorneys ( $r = -.10, p < .001$ ).

<sup>48</sup> The qualifications for mediators in the first-phase pilot courts included being a practicing attorney for at least five years, with experience in civil litigation. IMPLEMENTATION MANUAL, *supra* note 10, at 6-1 to 6-2, A-85 to A-88 app., A-123 to A-124, A-158 to A-162. The second-phase pilot courts did not require mediators to be attorneys, although all of the mediators at the time the research was conducted were attorneys. Personal communication with C. Eileen Pruett, Coordinator, Office of Dispute Resolution Programs, The Supreme Court of Ohio (Dec. 10, 2001).

<sup>49</sup> In four of the five pilot courts, one mediator handled all or virtually all of the cases per court; the fifth court had two mediators.

<sup>50</sup> Some of the mediators had mediated substantially more than twenty-five cases, but the highest category on the mediator profile form was "twenty-five or more cases." Personal communication with C. Eileen Pruett, *supra* note 48.

<sup>51</sup> Maloney, *supra* note 7, at 14.

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of training.<sup>52</sup> Twenty-seven percent of the mediators previously had mediated fewer than four cases, 44% had mediated from four to fifteen cases, 22% had mediated sixteen to fifty cases, and 8% had mediated more than fifty cases. The mediators had been practicing law, on average, for twenty years. In 69% of the cases, the mediators reported being familiar with the substantive issues in the case<sup>53</sup> from their own prior work experience.<sup>54</sup>

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<sup>52</sup> Almost half of the mediators (48%) said their training included role play with feedback. A training program was provided for attorneys who had no previous mediation training. *Id.* at 15; see OHIO SETTLEMENT WEEK MEDIATOR TRAINING MANUAL, THE SUPREME COURT OF OHIO COMMITTEE ON DISPUTE RESOLUTION (1992) [hereinafter TRAINING MANUAL].

<sup>53</sup> In at least some of the Settlement Week courts, program administrators tried to match mediators with cases based on subject matter and case difficulty. Maloney, *supra* note 7, at 14.

<sup>54</sup> Virtually all of the other civil mediation studies involved programs in which the mediators were attorneys; few had both attorney and non-attorney mediators. See MAIMAN, *supra* note 3, at 19–21 (three courts); Averill, *supra* note 3, at 150, 153. The attorney mediators typically had substantial litigation experience or had been a magistrate or a judge. The studies were almost evenly split between whether the mediators were paid or whether they served pro bono; in only one court was the mediator a member of court staff rather than being on a court roster. STIENSTRA ET AL., *supra* note 3, at 224. The mediator training requirements ranged from none to forty hours across the different courts; two programs monitored new mediators' initial mediation sessions. See MAIMAN, *supra* note 3, at 19–21; SHULTZ, *supra* note 3, at 22. See also DANIEL, *supra* note 3, at 2; ESTEE, *supra* note 3 at 54–55; KAKALIK ET AL., *supra* note 3, at 33; MCEWEN, FINAL REPORT, *supra* note 3 at 5, 18; SCHILDT ET AL., *supra* note 3, at 3; STIENSTRA ET AL., *supra* note 3, at 261–62; Bergman, *supra* note 3, at 318; Bickerman, *supra* note 3, at 8; Clarke & Gordon, *supra* note 3, at 318; Dichter, *supra* note 3, at 340; McEwen, *supra* note 3 at 310; Woodward, *supra* note 3, at 8. One study involving four courts reported that mediators were knowledgeable about the area of law in 75% to 98% of the cases. See KAKALIK ET AL., *supra* note 3, at 33.

### 9. Mediator Actions<sup>55</sup>

The mediators *assisted* the parties in evaluating the case (such as by reality testing, using risk analysis, or asking other questions to help the parties evaluate the case) in 89% of the cases. In contrast, the mediators evaluated the merits of the case *for* the parties in 31% of the cases.<sup>56</sup> The mediators assisted the parties in evaluating the *value* of the case in 66% of the cases. The mediators suggested possible settlement options in 69% of the cases and recommended a particular settlement in 28% of the cases.<sup>57</sup> The mediators kept their views of the case silent in 40% of the cases.<sup>58</sup>

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<sup>55</sup> The findings in this section are based on the mediators' reports of their actions. The percentages sum to more than 100% because the mediators were asked to indicate all actions that applied. There was not always complete agreement between the mediators' reports and the parties' and attorneys' reports of what the mediators did. Some of this apparent discrepancy, however, might be attributed to the mediators using different approaches in caucuses with each side. As a result, their global reports might not match the experience of one side or the other. *See, e.g.*, Thomas B. Metzloff et al., *Empirical Perspectives on Mediation and Malpractice*, 60 LAW & CONTEMP. PROBS. 107, 122-23 (1997) (noting medical malpractice mediators discussed different things in caucus depending upon whether the party was a plaintiff or an insurer).

<sup>56</sup> These findings are based only on data from the pilot courts, where the mediator questionnaire had both of these questions. In the Settlement Week courts, this distinction (*i.e.*, between *assisting* the parties in case evaluation or evaluating the case *for* the parties) could not be made because there was only one general question that asked whether the mediators evaluated the merits of the case (which they said they did in 71% of the cases).

<sup>57</sup> Although most of the pilot court mediators showed considerable variability in these actions across their cases, one mediator tended to be directive in most cases (*i.e.*, recommending a particular settlement and evaluating the case for the parties in 88% of the cases), while another mediator tended to be non-directive in most cases (*i.e.*, recommending a settlement and evaluating the case for the parties in fewer than 3% of the cases).

<sup>58</sup> In the two other civil mediation studies that used fairly detailed measures, about one-third of mediators said they evaluated the strengths and weaknesses or legal merits of the case, about one-fourth said they estimated the value or likely outcome of the case, and just over one-third said they kept silent their views on the case merits or value. MCEWEN, FINAL REPORT, *supra* note 3, at 19; Herman, *supra* note 3, at 8-11. In another study involving four courts, mediators said they gave an evaluation of the case value or legal issues in 15% to 69% of the cases. KAKALIK ET AL., *supra* note 3, at 32. Other studies noted variation in approach among mediators and over the course of the mediation session. *See, e.g.*, ESTEE, *supra* note 3, at 43-44; Dichter, *supra* note 3, at 340.



## 10. *Attendance at Mediation*

Parties (or insurance company representatives) who had settlement authority, as well as their attorneys, were required to attend the mediation session in all courts.<sup>59</sup> Both the plaintiff and defense attorneys were present in virtually all cases (99% and 98%, respectively). The plaintiff attended mediation in most cases (89%).<sup>60</sup> The defendant was present in half of the cases, and the insurance company representative was present in about two-thirds of the cases (65%).<sup>61</sup> The defense attendance figures should be interpreted with caution, however, as they likely are underestimates.<sup>62</sup>

## 11. *Participation in the Mediation Session*

The mediation process generally included an initial joint session in which both sides presented the facts of the case, followed by separate caucuses with

<sup>59</sup> CLINTON COUNTY, OHIO, Ct. C.P. LOCAL R. 28(E)(1)(A), *reprinted in* IMPLEMENTATION MANUAL, *supra* note 10, at A-73 app.; PADDOCK, *supra* note 7, at 49; Montgomery County, Ohio, Ct. C.P., General Administrative Order of Referral to Civil Mediation Program (Sept. 11, 1996), *reprinted in* IMPLEMENTATION MANUAL *supra* note 10, at A-92 app.; STARK COUNTY, OHIO, Ct. C.P. LOCAL R. 16.07(A) (1997), <http://www.court.co.stark.oh.us/locrules.asp> (last visited Mar. 26, 2002); Hamilton County, Ohio, Ct. Com. Pl., General Order of Referral to Common Pleas Mediation Service (Feb. 20, 1998) (on file with the Ohio State Journal on Dispute Resolution). If the parties or their attorneys did not attend mediation, the court could impose sanctions. *Id.* Similarly, most other civil mediation studies noted that the programs required attorneys and parties with settlement authority to attend mediation. *See, e.g.,* KAKALIK ET AL., *supra* note 3, at 32 (two courts); SCHILDT ET AL., *supra* note 3, at 6; STIENSTRA ET AL., *supra* note 3, at 266; Bergman, *supra* note 3, at 319; Clarke & Gordon, *supra* note 3, at 317; Dichter, *supra* note 3, at 352; McEwen, *supra* note 3, at 310. *But see* KAKALIK ET AL., *supra* note 3, at 32 (in two other courts, 65% and 11% of mediators, respectively, required parties to be in the room during mediation).

<sup>60</sup> Ninety-six percent of the plaintiffs attended mediation in the pilot courts and 81% attended in the Settlement Week courts.

<sup>61</sup> Most other civil mediation studies reported that one or both parties were present in most of the cases. *See* ESTEE, *supra* note 3, at 39; MCEWEN, FINAL REPORT, *supra* note 3, at 20; STIENSTRA ET AL., *supra* note 3, at 250, 266 (two courts). *But cf.* Woodward, *supra* note 3, at 34 (parties generally were not present).

<sup>62</sup> The questionnaire wording did not clearly permit distinguishing when the party's or the insurance company representative's presence was not applicable (*e.g.*, as in many car accident cases, where the insurance company representative had settlement authority) versus when they were absent. Defense attendance appeared to be higher in the pilot courts than in the Settlement Week courts (defendants, 65% vs. 30%; insurers, 72% vs. 57%).

each side.<sup>63</sup> All Settlement Week courts and one pilot court had a requirement that the parties negotiate in good faith.<sup>64</sup> The mediators reported that the parties spoke a considerable amount during the mediation session in 37% of the cases and an intermediate amount in 35% of the cases. Similarly, 70% of the parties said that they spent from some time to a great deal of time speaking on behalf of their side. The mediators said the attorneys spoke a considerable amount in 89% of the cases. When comparing the mediators' ratings of the amount of time the parties and attorneys in the same case talked during the session, we see that the attorneys spent more time talking than the parties in 63% of the cases, the parties and attorneys spent about the same amount of time talking in 31% of the cases, and the parties spent more time talking in 6% of the cases.<sup>65</sup>

### C. Evaluation of General Civil Case Mediation

A major question accompanying the implementation of general civil case mediation programs is the effectiveness of the mediation process for these types of cases. The criteria most commonly suggested for evaluating the effectiveness of dispute resolution programs<sup>66</sup> can be grouped into three

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<sup>63</sup> TRAINING MANUAL, *supra* note 52, at B1; BEVERLY DRAINE FOWLER ET AL., PLANNING MEDIATION PROGRAMS: A DESKBOOK FOR COMMON PLEAS JUDGES 2-7 to 2-10 (2000), available at [http://www.sconet.state.oh.us/dispute\\_resoution/deskbook](http://www.sconet.state.oh.us/dispute_resoution/deskbook). This is typical of the mediation process used in the other civil mediation programs studied. See, e.g., ESTEE, *supra* note 3, at 43; KAKALIK ET AL., *supra* note 3, at 32; MCEWEN, FINAL REPORT, *supra* note 3, at 21; STIENSTRA ET AL., *supra* note 3, at 228-29, 267; Clarke & Gordon, *supra* note 3, at 319.

<sup>64</sup> PADDOCK, *supra* note 7, at 49; IMPLEMENTATION MANUAL, *supra* note 10, at A-104 to A-105 app. A few of the other civil mediation studies noted that the programs had a requirement of good-faith participation during mediation. See MCEWEN, FINAL REPORT, *supra* note 3, at 4; Bergman, *supra* note 3, at 318.

<sup>65</sup> In another study, 82% of the parties said they actively participated in mediation. SCHILDT ET AL., *supra* note 3, at 30. In a second study, the attorneys did most of the talking and negotiating in 55% of cases, the parties and attorneys were equally active in 34% of the cases, and the parties did most of the talking in 11% of the cases. See MCEWEN, FINAL REPORT, *supra* note 3, at 20. A third study reported that the attorneys tended to do most of the negotiating and the parties did little negotiating. Clarke & Gordon, *supra* note 3, at 319.

<sup>66</sup> See, e.g., DISPUTE SYS. DESIGN WORKING GROUP, ADMIN. CONFERENCE OF THE U.S., EVALUATING ADR PROGRAMS: A HANDBOOK FOR FEDERAL AGENCIES, 2-6 app. A (1995) [hereinafter DISPUTE SYSTEMS DESIGN]; E. ALLAN LIND & TOM R. TYLER, THE SOCIAL PSYCHOLOGY OF PROCEDURAL JUSTICE 93, 107-08, 208-20 (1988); MELINDA OSTERMEYER & SUSAN L. KEILITZ, MONITORING AND EVALUATING COURT-BASED DISPUTE RESOLUTION PROGRAMS: A GUIDE FOR JUDGES AND COURT MANAGERS 27-33 (1997); ELIZABETH ROLPH & ERIK MOLLER, EVALUATING AGENCY ALTERNATIVE

general categories: the quality of the procedures,<sup>67</sup> the quality of the outcomes,<sup>68</sup> and the efficiency of the procedures.<sup>69</sup> In addition to questions about mediation's general impact are questions regarding which specific program characteristics enhance or detract from mediation's effectiveness in

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DISPUTE RESOLUTION PROGRAMS: A USERS' GUIDE TO DATA COLLECTION AND USE 13 (1995); Wayne D. Brazil, *Comparing Structures for the Delivery of ADR Services by Courts: Critical Values and Concerns*, 14 OHIO ST. J. ON DISP. RESOL. 715, 725-29 (1999); Robert A. Baruch Bush, *Defining Quality in Dispute Resolution: Taxonomies and Anti-Taxonomies of Quality Arguments*, 66 DENV. U. L. REV. 335, 348-50 (1989); John P. Esser, *Evaluations of Dispute Processing: We Do Not Know What We Think and We Do Not Think What We Know*, 66 DENV. U. L. REV. 499, 525 (1989); Marc Galanter, ". . . A Settlement Judge, Not a Trial Judge:" *Judicial Mediation in the United States*, 12 J.L. SOC'Y 1, 8-12 (1985); David Luban, *The Quality of Justice*, 66 DENV. U. L. REV. 381, 401-17 (1989); Blair H. Sheppard, *Third Party Conflict Intervention: A Procedural Framework*, in 6 RESEARCH IN ORGANIZATIONAL BEHAVIOR 141, 169 (Barry M. Staw & L.L. Cummings eds., 1984); Tom R. Tyler, *The Quality of Dispute Resolution Procedures and Outcomes: Measurement Problems and Possibilities*, 66 DENV. U. L. REV. 419, 423-34 (1989). See generally NATIONAL STANDARDS FOR COURT-CONNECTED MEDIATION PROGRAMS Standards 2.2, 2.4, 8.0, 11.1, 16.0 & associated cmts. (Ctr. for Dispute Settlement & The Inst. of Judicial Admin. 1990); Sharon Press, *Florida's Court-Connected State Mediation Program*, in COURT-ANNEXED MEDIATION, *supra* note 3, at 55 app. D. Not all commentators would agree on the specific criteria or on their order of relative importance. See, e.g., Bush, *supra* note 66, at 374-77. Nor are all criteria equally important for evaluating mediation programs in different dispute contexts. For example, the impact of mediation on the parties' relationship may be of less importance in general civil cases which involve few ongoing relationships, see *supra* note 43, than in divorce cases involving children.

<sup>67</sup> Criteria considered relevant to assessing the quality of the mediation process include (1) the fairness of the process; (2) the opportunity for the parties to participate in the process and in the determination of the outcome; (3) the thoroughness of the process in terms of considering all information relevant to the dispute and generating options for its resolution; (4) the mediator's impartiality, equal consideration and respectful treatment of both sides and understanding of the issues; and (5) the lack of pressure or coercion to settle. See *supra* note 66. See also Tom R. Tyler & E. Allan Lind, *Procedural Justice*, in HANDBOOK OF JUSTICE RESEARCH IN LAW 65, 74-76 (Joseph Sanders & V. Lee Hamilton eds., 2000).

<sup>68</sup> Criteria considered relevant to assessing the quality of mediation outcomes include the fairness of the agreement; the extent to which the dispute is resolved comprehensively and finally; and the impact of the dispute resolution process and the outcome on the disputants (on their relationship, their handling of future disputes, and their evaluations of the courts), on directly and indirectly affected third parties, and on the community in a broader social and political sense. See *supra* note 66.

<sup>69</sup> Criteria considered relevant to assessing the efficiency of dispute resolution include the cost and time involved in resolving the dispute from both the parties' and the court's perspective, such as litigation fees, the time to resolution, and the time involvement of judges and court staff. See *supra* note 66.

resolving general civil cases.<sup>70</sup> The main issues related to program design include the method of selecting and referring cases to mediation,<sup>71</sup> the qualifications of the mediators and how they conduct the session,<sup>72</sup> and the structure of the mediation session.<sup>73</sup>

The data obtained in the Ohio civil mediation studies enable us to examine many of these questions. The presentation of findings in the next several sections is organized according to the above general categories. First, we discuss the findings regarding the general effectiveness of mediation in terms of participants' assessments of the mediation process and the mediator, the outcomes of mediation, and mediation's impact on the time and cost of dispute resolution. Then we examine the relationship between program design factors and both the likelihood of settlement and participants' perceptions of mediation. Throughout, the findings of studies of general civil mediation programs in other courts are also noted.

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<sup>70</sup> See, e.g., DISPUTE SYSTEMS DESIGN, *supra* note 66, at app. A at 6–9; NATIONAL STANDARDS FOR COURT-CONNECTED MEDIATION PROGRAMS Standards 4.0–6.0; ROBERT J. NIEMIC ET AL., GUIDE TO JUDICIAL MANAGEMENT OF CASES IN ADR 12–15, 17–19, 21–30, 38–39, 48–52, 56–61, 63–66, 68–74 (2001); OSTERMEYER & KEILITZ, *supra* note 66, at 27–33; Connie J.A. Beck & Bruce D. Sales, *A Critical Reappraisal of Divorce Mediation Research and Policy*, 6 PSYCHOL. PUB. POL'Y & L. 989, 1046 (2000); Deborah Hensler, *A Research Agenda: What We Need To Know About Court-Connected ADR*, DISP. RESOL. MAG., Fall 1999, at 15; Susan Keilitz et al., *Civil Dispute Resolution Processes*, in STEVENS CLARKE ET AL., NATIONAL SYMPOSIUM ON COURT-CONNECTED DISPUTE RESOLUTION RESEARCH 1, 31–33 (Susan Keilitz ed., 1994); Diane E. Kenty, *RAND Report Provides Insights for State Court ADR Programs*, DISP. RESOL. MAG., Summer 1997, at 18–19; McEwen, *supra* note 18; Craig A. McEwen, *Mediation in Context: New Questions for Research*, DISP. RESOL. MAG., Summer 1997, at 16–17 [hereinafter McEwen, *Mediation in Context*]; Craig A. McEwen & Elizabeth Plapinger, *RAND Report Points Way to Next Generation of ADR Research*, DISP. RESOL. MAG., Summer 1997, at 10.

<sup>71</sup> These issues include the mode of referral of cases to mediation (e.g., voluntary or mandatory and which of various options for either approach), the timing of the referral and of the mediation session (e.g., in relation to filing, trial date, discovery and motions; “ripeness” or “readiness”), the type of case (e.g., subject matter, size of claim, complexity, nature of parties' relationship, other disputant characteristics), and how the mediation program fits into the usual case management process (e.g., whether or not to suspend deadlines or the usual discovery process and pre-trial conferences until after mediation). See *supra* note 70.

<sup>72</sup> These issues include the mediators' background, training, experience, and subject matter expertise; the “style” or approach the mediators use in conducting the session; and the structure of their relationship to the court. See *supra* note 70; see also Brazil, *supra* note 66, at 745–47.

<sup>73</sup> These issues include the amount of time allotted for sessions and whether there should be any attendance or “good faith” participation requirements. See *supra* note 70.

### 1. *Participants' Assessments of the Mediation Process and the Mediator*<sup>74</sup>

Litigants had highly favorable assessments of the mediation session and the mediator. A majority of the litigants not only felt that the mediation process was very fair (72%), but that they had a sufficient chance to tell their views of the dispute (84%) and also had considerable input in determining the outcome (63%).<sup>75</sup> Most of the parties said they were not pressured by the mediator (80%) or by people other than the mediator (85%) to accept a settlement. Virtually all of the parties said the mediator treated them with respect (97%), and most said the mediator was neutral or impartial (89%) and understood their views of the dispute (83%). Most of the parties (79%) said they would recommend mediation to a friend or colleague with a similar problem, but just over half (55%)<sup>76</sup> said they were satisfied with their experience with the mediation process in the present case.<sup>77</sup> It is worth noting

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<sup>74</sup> In the pilot courts, all questions assessing the parties' and the attorneys' perceptions of mediation were asked on a five-point scale, where "1" was labeled "not at all," "3" was labeled "somewhat," and "5" was labeled "a great deal." In the Settlement Week courts, some questions were asked on four-point scales with each point labeled (for example, "very unfair," "somewhat unfair," "somewhat fair," "very fair") while others had only "yes" or "no" response options. In an effort to make comparable the responses to different wordings of this question, we report the percentage of participants in the pilot courts who gave a rating of either "4" or "5" and the percentage in the Settlement Week courts that gave a rating of "very" or answered "yes." This approach, which excludes participants who gave a rating of "somewhat," provides a more conservative picture of participants' perceptions.

<sup>75</sup> See *infra* p. 663 tbl.1. In cases that reached a full settlement in mediation, 74% of the parties said they had considerable input in determining the outcome.

<sup>76</sup> In cases that settled in mediation, 71% of the parties reported being satisfied.

<sup>77</sup> Parties in cases that settled generally had more favorable assessments of the mediator and the mediation process than parties in cases that did not settle ( $p$ 's < .001). Settlement did not, however, affect parties' assessments of whether the mediator treated them with respect. Also, parties in cases that settled reported *more* pressure from the mediator and from others to settle ( $p$ 's < .001).

that 10% or fewer of the parties gave negative ratings<sup>78</sup> on any of these dimensions.<sup>79</sup>

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<sup>78</sup> That is, ratings of "1" or "2" in the pilot courts and "no" or "very unfair," for instance, in the Settlement Week courts. See *supra* note 74.

<sup>79</sup> These findings are consistent with those of virtually all other studies of civil mediation, in which most of the parties gave the mediation process and the mediator high ratings on these dimensions. See DANIEL, *supra* note 3, at 52–54, 64; FIX & HARTER, *supra* note 3, at 137–53; KAKALIK ET AL., *supra* note 3, at 42–43; KOBBERVIG, *supra* note 3, at 23, 26; MAIMAN, *supra* note 3, at 35; SCHILDT ET AL., *supra* note 3, at 23–24; SCHULTZ, *supra* note 3, at 9; Clarke & Gordon, *supra* note 3, at 323; Herman, *supra* note 3, at 3, 18. One exception to these findings was that one study found that 64% of litigants felt they had no control over the outcome of the session, and 63% of the litigants felt they had no control over the handling of the session. Clarke & Gordon, *supra* note 3, at 324.

Four studies provide some basis for comparison of parties' perceptions of mediation with parties' perceptions of the traditional negotiation and litigation process. This evidence is only suggestive, however, because none of the studies consistently used pure random assignment of cases to mediation, and three of the studies did not conduct statistical analyses to ascertain whether there were statistically significant differences in assessments between mediation and non-mediation litigants. Further, it is not always clear which dispute resolution process the litigants are assessing (*i.e.*, mediation, negotiation, a ruling on a dispositive motion, or trial). With these cautions noted, the pattern of findings across the studies suggests that litigants in mediation assessed the fairness of the process similarly to or somewhat more positively than litigants in the more traditional process.

In one study, litigants in the mediation group were apparently more likely (by 8% to 16%, depending on the dimension being assessed) than those in the "traditional" litigation group to say that the process was fair, that they were given an adequate opportunity to express their views, and that they were satisfied with the handling of their case. See KOBBERVIG, *supra* note 3, at 23, 25–26. In a second study, examining only cases that settled, litigants in the mediation group and those in the non-mediation group did not appear to differ in their ratings of satisfaction with the process, whether justice was served by the process, or whether they felt pressured by the court to resolve their case without trial. Mediation parties, however, were apparently more likely than non-mediation parties to say that the full story was told in the process. See FIX & HARTER, *supra* note 3, at 137–53.

The third study found no statistically significant differences between mediation and non-mediation parties' scores on a scale measuring several dimensions of the fairness of the procedures and satisfaction with case outcomes. See Clarke & Gordon, *supra* note 3, at 323–24. In the last study, findings varied across the four courts. In two courts, mediation and non-mediation litigants did not appear to differ in their assessments of the fairness of and satisfaction with the overall court management of their case. In one court, litigants in mediation cases appeared to give more favorable ratings, while in another, mediation litigants appeared to give less favorable ratings. See KAKALIK ET AL., *supra* note 3, at 42–43. The authors urged caution in interpreting these data, as they were based on an 11% response rate and fewer than 100 respondents. *Id.* at 24, 42–43.

WHAT WE KNOW FROM EMPIRICAL RESEARCH

*Table 1. Participants' Assessments of the Mediation Process and the Mediator*

<i>Parties</i>			
Very fair process	72%	Mediator was neutral	89%
Had chance to tell views	84%	Mediator understood my views	83%
Had input into outcome	63%	Mediator treated me with respect	97%
Not pressured by mediator	80%	Would recommend mediation	79%
Not pressured by others	85%	Satisfied with experience	55%
<i>Attorneys</i>			
Very fair process	89%	Mediator was neutral	97%
Would recommend mediation	85%	Mediator was effective	88%

Attorneys also had favorable assessments of the mediation process and the mediator. Most of the attorneys said the mediation process was very fair (89%). Virtually all of the attorneys said that the mediator was neutral or impartial (97%) and most said the mediator was effective in engaging the participants in a meaningful discussion of the case (88%). Most of the attorneys said they would recommend mediation to other attorneys in a similar type of case (85%).<sup>80</sup> It is worth noting that, similar to the litigants, 10% or fewer of the attorneys gave negative ratings on any of these dimensions.<sup>81</sup>

<sup>80</sup> Attorneys in cases that settled generally had more favorable assessments of the mediator and the mediation process than did attorneys in cases that did not settle ( $p$ 's < .05).

<sup>81</sup> These findings are consistent with those of other civil mediation studies in which most of the attorneys gave the mediation process and the mediator high ratings on most of these and other dimensions, including whether the mediation process was thorough and permitted sufficient opportunity to present their case, whether the benefits outweighed the costs, and whether the mediator was prepared and knowledgeable about the issues in the case and did not put too much pressure on the parties to accept a settlement. See DANIEL, *supra* note 3, at 46–54, 101; ESTEE, *supra* note 3, at 33; KAKALIK ET AL., *supra* note 3, at 43; KOBBERVIG, *supra* note 3, at 23, 26; MAIMAN, *supra* note 3, at 36; STIENSTRA ET AL., *supra* note 3, at 217, 268, 279; SCHILDT ET AL., *supra* note 3, at 23–27, 30; SCHULTZ, *supra* note 3, at 9; Averill, *supra* note 3, at 153; Herman, *supra* note 3, at 18; Woodward, *supra* note 3, at 38–39.

Five studies of general civil mediation provide some basis for comparison of attorneys' perceptions of mediation with attorneys' perceptions of other dispute resolution processes, although they suffer from the same problems as noted above. The pattern of findings across the studies suggests that attorneys' assessments of mediation generally did not differ from assessments of other processes.

In one study, attorneys who participated in Settlement Week mediation and those who participated in judicial pre-trial mediation did not appear to differ in their

## 2. *The Outcomes of Mediation*

Mediation had a moderate impact on improving the parties' understanding. Twelve percent of the parties felt that mediation helped them to understand the other side's views a great deal better, and 70% felt they gained a somewhat better understanding of the other's views. About half of the parties (49%) thought mediation gave them a better understanding of the strengths and weaknesses of their own case.<sup>82</sup>

The attorneys indicated to what extent mediation facilitated the accomplishment of various objectives.<sup>83</sup> Fifty-nine percent of the attorneys said mediation allowed the parties to become more involved in the resolution of the case. About half of the attorneys said mediation enabled them to meet and talk with opposing counsel, to identify the strengths and weaknesses of their client's case, and to better understand and evaluate the other side's position. Forty-four percent of the attorneys said mediation promoted the timely definition of issues. About one-third of the attorneys reported that mediation improved the parties' relationship and improved their working relationship with opposing counsel.<sup>84</sup> Only 19% of the attorneys said mediation encouraged timely discovery.<sup>85</sup>

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assessments of various dimensions of the process and the third party. *See* Woodward, *supra* note 3, at 38–39. Two studies found little difference between attorneys who participated in mediation and those in the “traditional” litigation process in their assessments of the fairness of and their satisfaction with the court's management of their case. *See* KAKALIK ET AL., *supra* note 3, at 42–43 (three courts); STIENSTRA ET AL., *supra* note 3, at 281 (one court). In one court in the latter study, attorneys in mediation had marginally more favorable ratings. *Id.* In another study, the findings were mixed, with attorneys in mediation appearing to have somewhat more favorable assessments than non-mediation attorneys on some dimensions and somewhat less favorable assessments on others. *See* KOBBERVIG, *supra* note 3, at 23, 26. The final study did not involve a comparison group, but simply asked attorneys to gauge their satisfaction with mediation relative to their other court experiences; almost two-thirds said they were at least somewhat more satisfied with mediation. *See* Averill, *supra* note 3, at 153.

<sup>82</sup> This finding is comparable to that of another study in which 43% of the parties said mediation helped them better understand the issues in their case and 41% said mediation helped them better understand their options in terms of settlement and further litigation. DANIEL, *supra* note 3 at 73, 75.

<sup>83</sup> *See infra* p. 665 tbl.2.

<sup>84</sup> Because a number of attorneys who said that mediation did not improve their relationship noted that it already was good, this percentage probably under-represents the extent of improved relations between attorneys.

<sup>85</sup> The overall relative ordering of the ways in which mediation was most helpful was generally similar to that found in three other civil mediation studies. *See* DANIEL, *supra* note 3, at 71–85; KAKALIK ET AL., *supra* note 3, at 47; STIENSTRA ET AL., *supra* note 3, at 249, 278. In those studies, from half to three-fourths of the attorneys tended to



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*Table 2. Attorneys' Assessments of Whether Mediation Facilitated:*

Greater involvement of parties in case resolution	59%
Talking with opposing attorney	51%
Identifying strengths and weaknesses of client's case	50%
Understanding and evaluating other's position	50%
Promoting timely definition of issues	44%
Improving attorneys' relationship	34%
Improving parties' relationship	32%
Encouraging timely discovery	19%

Of the cases that had a mediation session, 45%<sup>86</sup> reached a full settlement in mediation.<sup>87</sup> The mediators reported that 3% of the cases reached a settlement on some of the issues, 41% made some progress toward settlement, and 12% made no progress. In cases that did not settle, the

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see mediation as being helpful in moving parties toward settlement, allowing parties to be more involved in the resolution of the case, improving communication between the parties and between the attorneys, and encouraging parties to be more realistic. Relatively few attorneys said mediation was helpful in encouraging earlier discovery or in scheduling discovery and motions. An intermediate number of attorneys said mediation was helpful in improving the parties' relationship and in enabling them to identify the strengths and weaknesses of their client's case, to evaluate the other side's position, and to clarify or narrow issues.

<sup>86</sup> The rate of settlement was 54% in the pilot courts and 34% in the Settlement Week courts. Any one or more of the ways in which the two programs differed could explain this apparently higher settlement rate in the pilot courts (*e.g.*, mediators with more experience, *see supra* note 50 and accompanying text; earlier sessions, *see supra* note 26; higher rate of defense attendance, *see supra* note 62 and accompanying text). *See infra* notes 124–61 and accompanying text.

<sup>87</sup> The settlement rate in most other civil mediation studies was between 34% and 63%. ESTEE, *supra* note 3, at 31; FIX & HARTER, *supra* note 3, at 85; KAKALIK ET AL., *supra* note 3, at 79, 146, 182 (three courts); KOBBERVIG, *supra* note 3, at 33; MAIMAN, *supra* note 3, at 34 (two courts); MCEWEN, FINAL REPORT, *supra* note 3, at 27; SCHILDT ET AL., *supra* note 3, at 14; SCHULTZ, *supra* note 3, at 4–5; STIENSTRA ET AL., *supra* note 3, at 272; Averill, *supra* note 3, at 150; Bergman, *supra* note 3, at 283; Bickerman, *supra* note 3, at 26; Clarke & Gordon, *supra* note 3, at 321; Dichter, *supra* note 3, at 342; Herman, *supra* note 3, at 17; Woodward, *supra* note 3, at 31. Several courts had a substantially higher settlement rate. MAIMAN, *supra* note 3, at 34 (71% in one court); Amis et al., *supra* note 3, at 372, 377, 379 (80% or higher in several Texas courts). One court had a substantially lower settlement rate. KAKALIK ET AL., *supra* note 3, at 112 (21%).

mediator followed up by phone in 38% of the cases and scheduled another mediation session in 18% of the cases.<sup>88</sup>

The reason given most frequently for non-settlement by the mediators, in 59% of the cases that did not settle, was that there was a serious disagreement over the evaluation of the case.<sup>89</sup> The mediators cited unresolved factual issues as the reason for non-settlement in over one-third (35%) of the cases, and missing information or incomplete discovery as the reason in one-fourth of the cases. Unresolved legal issues prevented settlement in 21% of the cases. An unreasonable party hindered settlement in 21% of the cases and an unreasonable attorney in 7%. In only a small percentage of cases did the mediators say the reason for non-settlement was that one or more of the attorneys were not prepared for mediation (2%) or that the lack of financial resources prevented settlement (2%).

Most of the settlements (82%) involved only monetary provisions. Eighteen percent of the settlements either had only non-monetary provisions or had non-monetary provisions in addition to the monetary provisions. The dollar amount of settlements ranged from \$100 to \$600,000, with a mean of almost \$26,000 and a median of almost \$12,000.<sup>90</sup> The most typical non-monetary provisions were the performance of needed repairs, the exchange or return of property, an agreement to do or not do specific things (*e.g.*, to pay bills for certain future expenses, not to trespass, not to seek re-employment with this employer), a letter of apology, the dismissal of other

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<sup>88</sup> The present studies did not examine the rate of finality of the resolution. One other civil mediation study found no statistically significant difference in compliance with mediated versus unassisted negotiated settlements. Clarke & Gordon, *supra* note 3, at 325. A second study found no difference in full compliance between cases that were in the mediation group and cases in the traditional litigation process (when examining all disposition types combined). FIX & HARTER, *supra* note 3, at 106–07. Mediation cases, however, showed somewhat greater partial compliance and somewhat less non-compliance. This study also found no apparent difference between mediation and non-mediation cases in reports of subsequent disputes. *Id.* With regard to the rate of appeal, a third study reported that parties in mediation cases appeared to file fewer appeals than did parties in non-mediation cases in three courts, but did not differ in a fourth court. KAKALIK ET AL., *supra* note 3, at 71, 105, 138, 173.

<sup>89</sup> Noting that disagreement over case evaluation was cited as the most frequent reason for non-settlement might help to put the frequency of mediator evaluations into context. See *supra* notes 55–57 and accompanying text. Disagreement over case evaluation also was the most frequently cited reason for non-settlement in three other studies of general civil mediation. See ESTEE, *supra* note 3, at 35; SCHILDT ET AL., *supra* note 3, at 21; Woodward, *supra* note 3, at 41.

<sup>90</sup> These figures are for the first-phase pilot courts. In the Settlement Week courts, where mediators were asked to check the appropriate dollar amount category rather than to provide the exact amount, 58% of the settlements were under \$15,000, 36% were in the \$15,000 to \$50,000 range, and 6% were over \$50,000.

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claims or an agreement not to pursue future claims, a payment schedule, and the confidentiality of the agreement.

The low percentage of non-monetary settlement provisions reflects the high percentage of car accident and other personal injury cases in the caseload of these mediation programs. Although only 16% of personal injury case settlements involved non-monetary provisions, a majority of mediated settlements in contract cases (64%) had non-monetary terms.<sup>91</sup> Whether the settlement involved only monetary provisions, or had non-monetary provisions instead of or in addition to monetary terms, varied significantly with the type of case.<sup>92</sup>

Assessments of the outcome of mediation were positive, although less favorable than assessments of the process. Fifty-six percent of the parties whose cases reached a full settlement in mediation thought the settlement was very fair and 22% thought it was somewhat fair. Fifty-one percent of the parties in cases that settled in mediation said they were very satisfied with the final outcome, and 40% said they were somewhat satisfied with the outcome. Most of the attorneys (75%) in cases that reached a full settlement in mediation thought the settlement was very fair, and 22% thought the settlement was somewhat fair.<sup>93</sup>

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<sup>91</sup> These findings are consistent with assumptions regarding differences between car accident and contract cases in terms of the nature of the dispute and the relationship between the disputants. See *supra* note 43.

<sup>92</sup>  $r = -.426, p < .001$  ( $r$ 's in each court ranged from  $-.351$  to  $-.501$ ). Other case types could not be included in the analysis due to their small numbers in some of the courts.

<sup>93</sup> These assessments of the outcome are comparable to those in other civil mediation studies, although the ratings varied considerably across the studies. Fifty-one percent of litigants in one study and 77% in another thought the outcome of mediation was fair, and from 41% to 90% of litigants in several studies were satisfied with the mediated settlement. See DANIEL, *supra* note 3, at 64; SCHILDT ET AL., *supra* note 3, at 26, 28; Clarke & Gordon, *supra* note 3, at 323. Over 80% of the attorneys said the mediated outcome was fair, and from 47% to 83% were satisfied with the settlement. DANIEL, *supra* note 3, at 64; SCHILDT ET AL., *supra* note 3, at 26, 28; STIENSTRA ET AL., *supra* note 3, at 280; Averill, *supra* note 3, at 153.

In two studies, parties in mediation and in non-mediation cases did not appear to differ in their assessments of the outcome. FIX & HARTER, *supra* note 3, at 142; KAKALIK ET AL., *supra* note 3, at 404. Similarly, in a second study, attorneys' ratings of the fairness of the outcome did not appear to differ for mediation and non-mediation cases. KAKALIK ET AL., *supra* note 3, at 369. One study found that attorneys in mediated cases were somewhat more satisfied with the outcome than were attorneys in the "traditional" litigation process, but that their assessments of the fairness of the outcome did not differ. STIENSTRA ET AL., *supra* note 3, at 280–81.

Other civil mediation studies examined additional assessments of mediation outcomes. In one study, about 62% of the parties and attorneys said that the issue initiating the case had been corrected; half of the attorneys thought that litigation would

### 3. Mediation's Impact on the Time and Cost of Resolution<sup>94</sup>

The type of disposition did not appear to differ between mediation and non-mediation cases.<sup>95</sup> Virtually all cases in both the mediation and non-mediation groups were settled or dismissed<sup>96</sup> (96% and 94%, respectively). Few cases went to trial: 3% of mediation cases and 2% of non-mediation cases. A small number of cases were resolved in arbitration (2% of mediation

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have yielded the same results as mediation did. SCHILDT ET AL., *supra* note 3, at 28, 29. In another study, half of the parties said the mediated settlement met their needs, and 44% of the attorneys said mediation helped them design a settlement that met their client's needs better than a court decision might have done. See DANIEL, *supra* note 3, at 64, 84. In two studies, respectively 34% and 28% of attorneys said that the parties explored resolutions in mediation that they would not likely have gotten through a trial or a motion. See STIENSTRA ET AL., *supra* note 3, at 278; Herman, *supra* note 3, at 16.

<sup>94</sup> We did two things in an effort to increase the comparability of cases in the mediation and non-mediation groups. First, all statistical analyses of differences between mediation and non-mediation cases in this section were conducted using only cases randomly assigned to those two groups (*i.e.*, excluding cases that entered mediation by party or judge nomination). Second, the analyses were conducted on only the subset of case types eligible for mediation in all of the first-phase pilot courts—personal injury, other torts, workers' compensation, and contract cases. This was necessary because, in two of the courts, cases first were randomly assigned to mediation or non-mediation, and the cases not eligible for mediation subsequently were excluded from mediation. As a result, the groups were not comparable because the non-mediation group included certain types of cases that had been excluded from the mediation group.

<sup>95</sup> "Mediation cases" included all cases referred to mediation, whether or not they had a mediation session. The findings regarding the type of termination should be interpreted with caution because of inconsistencies in the way this information was recorded in different cases. For example, the disposition of "trial" was recorded not only if the case was resolved by trial but also, in some instances, if the case was settled or dismissed after the jury was impaneled. This information was clarified where possible, but resources did not permit a second review of all case files. Due to the small number of cases in several of the disposition types, statistical significance tests could not be conducted.

<sup>96</sup> The categories of "dismissed" and "settled" were combined for reporting the findings because of inconsistencies in the way this information was recorded (*i.e.*, cases that were settled and subsequently dismissed sometimes were recorded as "dismissed" rather than as "settled"). This misclassification was more likely to occur for non-mediation cases than for mediation cases, which would produce an under-estimate of settlements and an over-estimate of dismissals for non-mediation cases. For cases referred to mediation, for which the disposition information was more reliable, 73% of cases settled and 23% were dismissed. Resources did not permit a second review of the case files to re-categorize dispositions. The case record form did not indicate the reason for dismissal, so voluntary dismissals could not be distinguished from dismissals following a judicial ruling on a motion.

and 4% of non-mediation cases). Two percent of cases in each group had some other form of disposition.<sup>97</sup>

The length of time between when cases were filed and when they terminated<sup>98</sup> did not differ for cases randomly assigned to mediation versus non-mediation.<sup>99</sup> There also were no differences between mediation and non-

<sup>97</sup> In most other civil mediation studies that included a comparison group of non-mediation cases, cases referred to mediation appeared to have a somewhat higher settlement rate, or a somewhat lower rate of trial or judgment on a dispositive motion, or both, than did non-mediation cases. ESTEE, *supra* note 3, at 27; KAKALIK ET AL., *supra* note 3, at 71, 138, 174 (three courts); KOBBERVIG, *supra* note 3, at 20; MCEWEN, FINAL REPORT, *supra* note 3, at 6–7; STIENSTRA ET AL., *supra* note 3, at 216. Several other studies, however, found no difference between mediation and non-mediation cases in the rate of settlement or trial. See FIX & HARTER, *supra* note 3, at 101–02; KAKALIK ET AL., *supra* note 3, at 105 (one court); Clarke & Gordon, *supra* note 3, at 321. And in one study, the settlement rate of cases in Settlement Week mediation appeared to be lower than that of cases in judicial pre-trial mediation. Woodward, *supra* note 3, at 31. The latter findings, however, might reflect the fact that, because most of the cases in Settlement Week had already been through mandatory pre-trial judicial mediation, these remaining unsettled cases might be more resistant to settlement than the full set of cases in the pre-trial mediation group. *Id.* at 32. Most of the above findings should be interpreted with caution, however, because of the lack of random assignment to dispute resolution procedures and the lack of statistical significance tests. See *supra* note 79. Because few cases go to trial, it is difficult to detect statistically significant differences in trial rates unless the study involves a large number of cases. See Marie Provine, *Managing Negotiated Justice: Settlement Procedures in the Courts*, 12 JUST. SYS. J. 91, 103 (1987).

<sup>98</sup>  $r = -.055$ ,  $p = .108$  ( $r$ 's in each court ranged from  $-.108$  to  $.014$ ). Similar findings were obtained for the length of time between when the answer was filed and case termination ( $r = -.007$ ,  $p = .488$ ). The "termination date" used in these analyses was the date of settlement recorded on the case record form or, if that was not available, the date the final judgment was entered. This approach was adopted in an effort to minimize problems comparing mediation and non-mediation time-to-disposition that arose due to (a) differences in the length of time between settlement and final entry dates in these two sets of cases (an artifact of differences in the way this information was reported to the courts), and (b) the lack of a settlement date in many non-mediation cases. Because this approach could not totally correct for these problems, the findings on time-to-disposition differences between mediation and non-mediation cases should be interpreted with caution.

<sup>99</sup> The findings of other civil mediation studies with regard to mediation's impact on the time to disposition are mixed. In two studies, mediation cases terminated about two to three months faster than non-mediation cases. See KAKALIK ET AL., *supra* note 3, at 34 (one court, marginally faster); Clarke & Gordon, *supra* note 3, at 321. In other studies, there were no differences in disposition time for mediation and non-mediation cases. KAKALIK ET AL., *supra* note 3, at 34 (two courts); KOBBERVIG, *supra* note 3, at 19. And in yet other courts, the disposition time for mediation cases was several months longer than for non-mediation cases. ESTEE, *supra* note 3, at 27–28 (for the subset of cases in

mediation cases in the number of motions filed<sup>100</sup> or decided.<sup>101</sup> Given that only a small fraction of filed cases were referred to mediation, it is not likely

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which the issue had been joined); KAKALIK ET AL., *supra* note 3, at 34 (one court; but the cases in mediation in this court were more “difficult” than the non-mediation cases). Some of the above findings should be interpreted with caution, however, because of the lack of random assignment to dispute resolution procedure and the lack of statistical significance tests. *See supra* note 79.

In one study, the overall pattern of shorter disposition times in mediation cases (by about two months) was primarily due to cases that settled; cases in the mediation group that did not settle had about a two-month longer disposition time than cases in the non-mediation group (possibly related to discovery being suspended during the mediation process). MCEWEN, FINAL REPORT, *supra* note 3, at 8–9 (using time from pre-trial order rather than from filing); McEwen, *supra* note 3, at 311. Another civil mediation study found that whether mediation cases were resolved more quickly than non-mediation cases depended on the timing of the mediation session; cases in mandatory mediation had shorter disposition times than non-mediation cases by almost three months, but voluntary cases (whose mediation sessions occurred two to three months later than in mandatory cases) did not. STIENSTRA ET AL., *supra* note 3, at 215–16, 243–44.

<sup>100</sup>  $r = -.006$ ,  $p = .310$ ;  $r$ 's in each court ranged from  $-.19$  to  $.155$ . ( $r$ 's in each court ranged from  $-.19$  to  $.155$ .)

<sup>101</sup>  $r = .02$ ,  $p = .310$  ( $r$ 's in each court ranged from  $-.069$  to  $.150$ .) The evidence regarding mediation's impact on motions based on several other civil mediation studies is mixed. Two studies also found mediation did not reduce the number of motions and orders processed or filed. KAKALIK ET AL., *supra* note 3, at 71, 105 (two courts); Clarke & Gordon, *supra* note 3, at 322. In two other courts, a majority of attorneys estimated that mediation had no effect on the number of motions filed. STIENSTRA ET AL., *supra* note 3, at 277; Herman, *supra* note 3, at 5. Some studies reported mediation cases had fewer motion hearings or fewer motions filed. KAKALIK ET AL., *supra* note 3, at 138 (one court); McEwen, *supra* note 3, at 311. And in one court, more motions had been filed in mediation cases. KAKALIK ET AL., *supra* note 3, at 173 (although the mediation cases were more difficult cases).

Based on the findings of other studies, mediation's impact on discovery also is unclear. One study reported fewer discovery requests and fewer requests to extend discovery deadlines in mediation cases than in non-mediation cases. MCEWEN, FINAL REPORT, *supra* note 3, at 8; McEwen, *supra* note 3, at 311. In another study, in three courts, mediation did not appear to reduce the percentage of cases in which discovery motions were filed, but motions were filed in a smaller percentage of mediation cases in one court. KAKALIK ET AL., *supra* note 3, at 71, 105, 138, 173. A third study found no differences between mediation and non-mediation cases in the number of interrogatories and depositions, although attorneys in non-mediation cases were more likely to report unnecessary discovery. STIENSTRA ET AL., *supra* note 3, at 251. In four studies, a majority of attorneys in mediation cases estimated there was little or no change in the amount of discovery that was needed or conducted. KAKALIK ET AL., *supra* note 3, at 47 (four courts); STIENSTRA ET AL., *supra* note 3, at 277; Clarke & Gordon, *supra* note 3, at 332; Herman, *supra* note 3, at 4.

that mediation had a substantial impact on court caseloads.<sup>102</sup> Nonetheless, the courts felt that mediation reduced docket time, staff time, and judicial time.<sup>103</sup>

We further examined, only for cases that had a mediation session, the effect of the timing of the mediation referral and the mediation session on the time to disposition. Not surprisingly, for cases that settled in mediation, the time from case filing to termination was shorter if the mediation referral and session occurred sooner after the case was filed.<sup>104</sup> Importantly, also for cases that did not settle in mediation, the time to disposition was shorter when the time between filing and referral and between filing and mediation was shorter.<sup>105</sup> And as one would expect, the time from case filing to disposition was shorter (on average almost five months shorter) for cases that settled in mediation than for those that did not.<sup>106</sup>

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<sup>102</sup> One study, in which fifteen percent of the total civil docket entered ADR, noted no discernible impact on the overall court docket. Fewer mediation cases, however, reached the trial list. McEwen, *supra* note 3, at 310–11. The potential impact that mediation could have on a court's civil caseload is likely to vary greatly depending on the percentage of cases referred to mediation, which in other studies ranged from six percent to virtually all pending cases. See FIX & HARTER, *supra* note 3, at 83–84; STIENSTRA ET AL., *supra* note 3, at 265; Amis et al., *supra* note 3, at 373; Bickerman, *supra* note 3, at 9.

<sup>103</sup> E-mail from C. Eileen Pruett, Coordinator, Office of Dispute Resolution Programs, The Supreme Court of Ohio, to Roselle L. Wissler, Research Fellow, Lodestar Mediation Clinic, Arizona State University College of Law (Oct. 30, 2001, 10:45 EST) (on file with author). Because the courts in the present studies did not record whether various pre-trial conferences were held, we could not assess this directly. In another study, judges also felt that the mediation program reduced their workload by reducing the hearings and conferences held on motions, discovery, and settlement. STIENSTRA ET AL., *supra* note 3, at 233. A second study, noting that it was hard to assess mediation's impact on the judge's caseload, provided data that the present Author used to calculate that mediation saved, on average, about fifteen hours per case of judges' calendar time that had been set aside for cases that settled in mediation. See SCHULTZ, *supra* note 3, at 8–12. Several studies have examined the costs to the courts to operate civil mediation programs. See, e.g., KAKALIK ET AL., *supra* note 3, at 38–40; STIENSTRA ET AL., *supra* note 3, at 217–18, 225–26, 256–57, 264.

<sup>104</sup> Referral:  $r = .842$ ,  $p < .001$  ( $r$ 's in each court ranged from .83 to .86); session:  $r = .938$ ,  $p < .001$  ( $r$ 's in each court ranged from .91 to .97).

<sup>105</sup> Referral:  $r = .72$ ,  $p < .001$  ( $r$ 's in each court ranged from .62 to .81); session:  $r = .814$ ,  $p < .001$  ( $r$ 's in each court ranged from .76 to .86).

<sup>106</sup>  $r = .312$ ,  $p < .001$  ( $r$ 's in each court ranged from .24 to .41). Court scheduling practices also had an impact on disposition time for cases that had a mediation session. In the court in which mediation-track cases did not go onto the judge's docket for scheduling of pre-trial conferences or trial until after mediation took place, cases that did not settle in mediation had a nine-month longer disposition time than did cases that settled in mediation. In the other courts, the difference in disposition time between cases that settled in mediation and those that did not was only 2.5 months.

In addition, we examined the effect of the timing of the referral and the mediation session on the number of motions filed and decided in cases that had a mediation session. Not surprisingly, for cases that settled in mediation, fewer motions were filed<sup>107</sup> and decided<sup>108</sup> when the time between filing and referral and between filing and mediation was shorter. Importantly, also for cases that did not settle in mediation, fewer motions were filed<sup>109</sup> and decided<sup>110</sup> when the interval between filing and referral and between filing and mediation was shorter.

About half of the attorneys thought mediation reduced their client's costs (48%)<sup>111</sup> as well as their and their clients' time involvement (51%).<sup>112</sup> Attorneys' estimates of how much mediation decreased their clients' costs ranged from \$125 to \$80,000 (averaging around \$6000), whereas estimates of how much mediation increased costs ranged from \$200 to \$10,000 (averaging around \$1000).<sup>113</sup> Attorneys in cases that settled in mediation

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<sup>107</sup> Referral:  $r = .282, p < .001$  ( $r$ 's in each court ranged from  $-.03$  to  $.448$ ); session:  $r = .391, p < .001$  ( $r$ 's in each court ranged from  $.304$  to  $.456$ ).

<sup>108</sup> Referral:  $r = .354, p < .001$  ( $r$ 's in each court ranged from  $.019$  to  $.523$ ); session:  $r = .436, p < .001$  ( $r$ 's in each court ranged from  $.330$  to  $.553$ ).

<sup>109</sup> Referral:  $r = .479, p < .001$  ( $r$ 's in each court ranged from  $.210$  to  $.784$ ); session:  $r = .479, p < .001$  ( $r$ 's in each court ranged from  $.145$  to  $.827$ ).

<sup>110</sup> Referral:  $r = .606, p < .001$  ( $r$ 's in each court ranged from  $.288$  to  $.906$ ); session:  $r = .576, p < .001$  ( $r$ 's in each court ranged from  $.247$  to  $.889$ ).

<sup>111</sup> In a majority of other civil mediation studies, the largest percentage of attorneys (40% to 76%) thought that mediation reduced their client's litigation costs, 17% to 33% said mediation did not affect their costs, and 10% to 33% said mediation increased their client's litigation costs. See DANIEL, *supra* note 3, at 86–87; KAKALIK ET AL., *supra* note 3, at 38 (three courts); MAIMAN, *supra* note 3, at 36; STIENSTRA ET AL., *supra* note 3, at 247, 275; SCHULTZ, *supra* note 3, at 7–8. In three courts, however, a majority of attorneys thought mediation had either no effect on litigation costs or increased costs. FIX & HARTER, *supra* note 3, at 111; KAKALIK ET AL., *supra* note 3, at 38 (one court); Clarke & Gordon, *supra* note 3, at 332.

<sup>112</sup> In one civil mediation study, a majority of attorneys did not think mediation reduced the time they worked on cases. Clarke & Gordon, *supra* note 3, at 332. In three courts in another study, attorneys in mediation cases and in non-mediation cases did not differ significantly in their reports of hours worked per case. KAKALIK ET AL., *supra* note 3, at 36. In the fourth court, attorneys in mediation reported working more hours, but the mediation cases were more difficult than the non-mediation cases. *Id.* In these courts, however, the pattern of mean and median hours might suggest that while mediation did not consistently reduce the hours spent on "typical" cases (across the four courts, the median hours spent ranged from forty hours fewer to thirteen hours more in mediation cases), it did reduce the hours spent on "high cost" cases (the mean hours spent ranged from twenty-one to 296 hours fewer in mediation). *Id.* at 75, 108, 141, 178.

<sup>113</sup> A similar pattern appeared in two other courts in which attorneys were asked to provide dollar estimates of cost reductions and increases due to mediation: the median



## WHAT WE KNOW FROM EMPIRICAL RESEARCH

were more likely to say mediation reduced the costs and time to resolve the case than were attorneys in cases that did not settle.<sup>114</sup> Thirty-six percent of the parties thought mediation reduced their costs, and 44% thought mediation reduced their time spent pursuing this matter.<sup>115</sup> Parties who settled in mediation were more likely to say mediation reduced their costs and time than were parties in cases that did not settle.<sup>116</sup>

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estimated cost savings ranged from about \$10,000 to \$15,000, and the median estimated cost increases ranged from \$1000 to \$1500. STIENSTRA ET AL., *supra* note 3, at 247, 269. In another study, attorneys estimated, on average, that the cost of mediated settlements was half or less than the cost of settling the same case through litigation. SCHILDT ET AL., *supra* note 3, at 23. In a third study, attorneys' fees in cases that settled did not differ between cases in mediation and in "traditional" litigation, but fees in both sets of settled cases were lower (by about half) than in tried cases. Clarke & Gordon, *supra* note 3, at 324. The pattern of findings in a fourth study that compared the legal fees and litigation costs in mediation versus non-mediation cases suggests that mediation did not reduce costs for "typical" cases (across the four courts, the median costs ranged from \$600 less to \$4600 more in mediation than in the "traditional" litigation process) but did reduce the costs in "high cost" cases (the mean costs ranged from \$9000 less to almost \$50,000 less in mediation). KAKALIK ET AL., *supra* note 3, at 75, 108, 141, 178. This interpretation is consistent with data from a study of medical malpractice mediation, in which researchers calculated the average defense costs to be \$5000 for mediation, compared to \$35,000 for trial. Metzloff et al., *supra* note 55, at 126–27.

<sup>114</sup>  $r = .691$ ,  $p < .001$  ( $r$ 's in each court ranged from .60 to .85). Estimates of cost and time savings were combined into a single scale for this analysis (alphas ranged from .73 to .93). Chronbach's alpha indicates the reliability and internal consistency of a scale. Its values range from a low of .00 to a high of 1.00. EDWARD G. CARMINES & RICHARD A. ZELLER, RELIABILITY AND VALIDITY ASSESSMENT 44–47 (1979). Other civil mediation studies also found that attorneys in cases that settled in mediation were more likely to report cost and time savings than were attorneys in cases that did not settle. KOBBERVIG, *supra* note 3, at 31; STIENSTRA ET AL., *supra* note 3, at 269, 273, 275.

<sup>115</sup> These figures are comparable to those of another civil mediation study, in which from 20% to 47% of parties across several courts thought mediation reduced their litigation costs. MAIMAN, *supra* note 3, at 35. In another study, however, most parties thought mediation was faster and less expensive than if the case had been settled by litigation. SCHILDT ET AL., *supra* note 3, at 22 (also noting that a majority of parties were insurance company representatives who did have experience with litigation and, thus, a basis for making comparative judgments).

<sup>116</sup>  $r = .64$ ,  $p < .001$  ( $r$ 's in each court ranged from .455 to .748). Estimates of cost and time savings were combined into a single scale for this analysis (alphas ranged from .61 to .87). Another civil mediation study also found differences in parties' estimates of mediation's cost savings depending on whether their case had settled in mediation. KOBBERVIG, *supra* note 3, at 31.

### D. *The Relationship Between Various Characteristics and the Likelihood of Settlement*<sup>117</sup>

Examining which case and mediation program characteristics are related to an increased likelihood of settlement is important for several reasons. Settlement is a criterion of mediation's effectiveness because it presumably (although not necessarily) indicates whether the dispute has been resolved.<sup>118</sup> In addition, cases that settle in mediation are resolved more quickly and potentially at less cost than cases that do not settle.<sup>119</sup> Importantly, parties and attorneys in cases that settle tend to have more favorable assessments of the mediation process.<sup>120</sup> Thus, determining which characteristics are related to increased settlement can help in the design of more effective civil mediation programs. The characteristics examined in the present studies included case characteristics, the timing and manner of case referral, mediator qualifications and style, and preparation for and participation in the mediation session. Meta-analyses were conducted to assess the relationship between a given characteristic and the likelihood of settlement across the courts in the present studies.<sup>121</sup> The findings are summarized in Table 3 at the end of this section.<sup>122</sup>

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<sup>117</sup> The measure of "settlement" used for these analyses was the outcome of the mediation session as indicated on the mediators' questionnaires. The small number of cases in which a partial settlement was reached were excluded from these analyses so that comparisons could be more cleanly drawn between cases that reached a full settlement and those that did not settle. Of course, even in cases that do not settle at the session, mediation can pave the way for a later settlement by clarifying issues and reducing animosities.

<sup>118</sup> See *supra* notes 66, 68 and accompanying text. See also John P. McCrory, *Mandated Mediation of Civil Cases in State Courts: A Litigant's Perspective on Program Model Choices*, 14 OHIO ST. J. ON DISP. RESOL. 813, 831-33 (1999). Settlement is a major criterion used by legislatures in making funding decisions regarding court mediation programs. Robert Rack, *Thoughts of a Chief Circuit Mediator on Federal Court-Annexed Mediation: Issues of Institutionalization and Quality Assurance*, 17 OHIO ST. J. ON DISP. RESOL. 609, 613 n.21 (2002).

<sup>119</sup> See *supra* notes 106, 114, 116 and accompanying text.

<sup>120</sup> See *supra* notes 77, 80.

<sup>121</sup> See *supra* notes 15-17 and accompanying text. Meta-analysis is a particularly useful procedure because it first determines the relationship of a particular factor to settlement *within* each court and then calculates the overall relationship across the courts. Drawing accurate conclusions about the relationship between a particular characteristic (e.g., timing of referral) and settlement by simply comparing the settlement rates in courts that differed on that characteristic is extremely difficult because mediation programs differ on multiple characteristics, any of which could either mask or enhance the effects of other factors. See e.g., Beck & Sales, *supra* note 70, at 1044; Deborah R. Hensler, *In*

## 1. Case Characteristics

The type of case, using general case categories like personal injury-auto cases, other torts, and contracts, was not related to the likelihood of settlement in mediation.<sup>123</sup> Other case characteristics,<sup>124</sup> however, were related to settlement. Settlement was more likely if the disparity in the parties' positions at the start of mediation was smaller than if the disparity was larger.<sup>125</sup> Settlement also was more likely if the issues in the case involved little complexity than if they were highly complex<sup>126</sup> and if liability was less at issue than if it was strongly contested.<sup>127</sup> The contentiousness of the relationship between the parties<sup>128</sup> or the attorneys<sup>129</sup> at the start of mediation was not related to settlement.<sup>130</sup> Of these case characteristics, the

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*Search of "Good" Mediation, in HANDBOOK OF JUSTICE RESEARCH IN LAW, supra note 67, at 231, 249.*

<sup>122</sup> In helping to interpret the  $r$ 's of the meta-analyses, which indicate the strength of the relationship, *supra* note 16,  $r = .10$  represents an increase in the settlement rate by ten percentage points (e.g., from 40% to 50%),  $r = .20$  represents an increase of twenty percentage points (e.g., from 40% to 60%), and  $r = .30$  represents an increase of thirty percentage points (e.g., from 40% to 70%). ROSENTHAL, *supra* note 15, at 131. The conventional level of probability for determining the statistical significance of findings is the .05 level (i.e.,  $p < .05$ ). See *supra* note 16.

<sup>123</sup>  $r = -.009, p = .50$  ( $r$ 's in each court ranged from  $-.099$  to  $.044$ ).

<sup>124</sup> These measures were based on the mediators' ratings of the case. If the mediators had rated these characteristics at the beginning rather than at the end of the mediation session, one would have greater confidence in these being *predictive* relationships. It is possible that the mediators' ratings were influenced to some degree by their knowledge of whether the case did or did not settle (i.e., in cases that did not settle, the parties' positions might have been judged to be more disparate *because* they did not settle).

<sup>125</sup>  $r = -.334, p < .001$  ( $r$ 's in each court ranged from  $-.563$  to  $-.165$ ).

<sup>126</sup>  $r = -.08, p < .01$  ( $r$ 's in each court ranged from  $-.151$  to  $-.022$ ).

<sup>127</sup>  $r = -.067, p < .05$  ( $r$ 's in each court ranged from  $-.184$  to  $.007$ ).

<sup>128</sup>  $r = -.001, p = .156$  ( $r$ 's in each court ranged from  $-.162$  to  $.141$ ).

<sup>129</sup>  $r = -.017, p = .159$  ( $r$ 's in each court ranged from  $-.202$  to  $.149$ ).

<sup>130</sup> Several other studies of civil mediation also did not find differences in the rate of settlement among general case type categories. See KAKALIK ET AL., *supra* note 3, at 53; SCHULTZ, *supra* note 3, at 12-14; McEwen, *supra* note 3, at 311. In one study, however, personal injury cases appeared to have a higher rate of settlement than contract cases. SCHILDT ET AL., *supra* note 3, at 14. The findings of one study suggested that differences in the rate of settlement might be found by looking at sub-types of cases within these broad case categories. For instance, within personal injury cases, car accident, damages, and negligence cases appeared to have a higher settlement rate than medical malpractice and product liability cases. SCHULTZ, *supra* note 3, at 13.

one that had by far the strongest relationship with settlement was how far apart the parties' initial positions were.

Settlement also was more likely if the parties reported they had more preparation for mediation by their attorneys.<sup>131</sup> The likelihood of settlement was not related to the extent of the parties' or attorneys' prior experience with mediation.<sup>132</sup>

## 2. Mode of Case Referral

In the pilot courts, cases were more likely to settle if they entered mediation at the judge's own initiative or at a party's request than if they were randomly assigned to mediation.<sup>133</sup> It is unclear what might explain these findings: the greater willingness to settle of parties who sought mediation, the judges' ability to select cases that would most benefit from mediation, differences in the timing of the mediation referral or session,<sup>134</sup> or some other difference between the two groups of cases.<sup>135</sup> In the Settlement Week courts, settlement was not related to<sup>136</sup> whether cases entered

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With regard to other case characteristics, the likelihood of settlement did not appear to be related to the dollar amount of the claim, the complexity of legal issues, the complexity of liability evidence, or the complexity of damages evidence. Woodward, *supra* note 3, at 44–45. A study of medical malpractice mediation found no differences in settlement rates by injury type or practice area but suggested that settlement was more likely when liability was less strongly disputed. Metzloff et al., *supra* note 55, at 142–43. One study suggested that cases in which the government was a party had lower settlement rates than cases involving only private parties. See Bickerman, *supra* note 3, at 9. Some of these findings should be interpreted with caution, however, because they were not based on statistical significance tests.

<sup>131</sup>  $r = .096, p < .001$  ( $r$ 's in each court ranged from .053 to .140).

<sup>132</sup> Parties:  $r = .019, p = .15$  ( $r$ 's in each court ranged from -.064 to .066); attorneys:  $r = .009, p = .187$  ( $r$ 's in each court ranged from -.047 to .140).

<sup>133</sup>  $r = .144, p < .001$  ( $r$ 's in each court ranged from .090 to .256).

<sup>134</sup> See *supra* notes 24, 26. But see *infra* note 139 and accompanying text.

<sup>135</sup> Across the courts, there were no consistent statistically significant differences between randomly assigned and judge-referred cases on other case characteristics that were measured in the present studies (e.g., disparity of parties' positions, issue complexity). In some courts, discovery was further along in judge-referred cases (likely due to the fact that the mediation sessions occurred later in those cases, see *supra* notes 24, 26).

<sup>136</sup>  $r = .004, p = .147$  ( $r$ 's in each court ranged from -.139 to .192).

mediation at the nomination of both parties, one party, or at the judge's nomination.<sup>137</sup>

### 3. *Timing of Mediation*

Cases were more likely to settle if mediation was held sooner after the case had been filed.<sup>138</sup> The likelihood of settlement was not related to whether mediation took place within three months of the scheduled trial date or occurred earlier.<sup>139</sup> The likelihood of settlement was not related to the status of discovery.<sup>140</sup> Cases were *less* likely to settle if a motion to dismiss

<sup>137</sup> The findings of other civil mediation studies regarding the relationship between the mode of referral and settlement are mixed. Two studies found no differences in settlement rates between mandatory and voluntary referral. ESTEE, *supra* note 3, at 51; KAKALIK ET AL., *supra* note 3, at 53. Nor were there differences in settlement rates depending on the type of mandatory referral, specifically, whether cases were automatically or presumptively referred versus selectively referred after judicial review and consultation with the attorneys. ESTEE, *supra* note 3, at 51. In two other studies, however, the rate of settlement appeared somewhat higher in cases that entered mediation voluntarily rather than by random assignment. MCEWEN, FINAL REPORT, *supra* note 3, at 27 (42% vs. 34%); STIENSTRA ET AL., *supra* note 3, at 244 (48% vs. 33%). Because the mode of referral was confounded with the timing of mediation and presumably, the status of discovery, as in the present studies, it is not clear whether these differences can be attributed to the voluntary selection of mediation or to its timing. *See, e.g.*, STIENSTRA ET AL., *supra* note 3, at 215–16, 243–44.

<sup>138</sup>  $r = -.088$ ,  $p < .05$  ( $r$ 's in each court ranged from  $-.237$  to  $.012$ ). We further examined this relationship by categorizing the length of time from filing to mediation into four groups (less than six months, six to nine months, nine to twelve months, and over one year). Although few of the differences between these arbitrarily drawn categories were statistically significant, cases in which the mediation session occurred within six months of filing generally tended to have either a similar or a somewhat higher rate of settlement than cases in the other categories, and cases in which the mediation session occurred a year or more after filing generally tended to have either a similar or a somewhat lower rate of settlement than cases in the other categories.

<sup>139</sup>  $r = .197$ ,  $p = .19$  ( $r$ 's in each court ranged from  $-.165$  to  $.684$ ). The lack of statistical significance probably was due to the fact that the relationship found across the four Settlement Week courts (*i.e.*, settlement was more likely if trial was more than three months away,  $r = -.12$ ,  $p < .05$ ;  $r$ 's in each court ranged from  $-.165$  to  $-.058$ ) was in the opposite direction of the relationship found in the pilot courts (*i.e.*, settlement was more likely if trial was scheduled within three months;  $r = .679$ ,  $p < .001$ ;  $r$ 's in each court were  $.674$  and  $.684$ ). It is unclear why the effects were so different in these two sets of courts. One pilot court was excluded from these analyses because it did not set cases for trial until after the mediation session took place.

<sup>140</sup>  $r = .076$ ,  $p = .14$  ( $r$ 's in each court ranged from  $-.084$  to  $.397$ ). This analysis used the attorneys' report of the status of discovery and took into consideration the status of

or for summary judgment was pending<sup>141</sup> and if other motions<sup>142</sup> were pending.<sup>143</sup>

#### 4. Mediator Qualifications<sup>144</sup>

With regard to the effects of mediator training, neither the hours of training<sup>145</sup> nor whether the training involved role play<sup>146</sup> was related to the likelihood of settlement in mediation. With regard to prior mediation experience, settlement was more likely if the mediator previously had

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discovery for both sides in a given case. Similarly, no relationship between discovery and settlement was found when the analysis was based on the mediators' rating of discovery status ( $r = -.099$ ,  $p = .156$ ;  $r$ 's in each court ranged from  $-.203$  to  $.007$ ).

<sup>141</sup>  $r = -.084$ ,  $p < .05$  ( $r$ 's in each court ranged from  $-.198$  to  $.015$ ).

<sup>142</sup>  $r = -.070$ ,  $p < .05$  ( $r$ 's in each court ranged from  $-.252$  to  $.030$ ).

<sup>143</sup> In two other civil mediation studies that used very broad measures of mediation session timing, the likelihood of settlement was higher when mediation took place within eighteen or twenty-four months of filing than in "older" cases. See SCHILDT ET AL., *supra* note 3, at 15; Woodward, *supra* note 3, at 33. In the latter study, a factor other than timing, however, could account for the lower settlement rate in the older cases. Most of the older cases had already been through mandatory pre-trial judicial mediation; thus, the remaining unsettled cases that subsequently went to Settlement Week might consist of cases that were more resistant to settlement. Woodward, *supra* note 3, at 32. Nonetheless, this study suggested a more specific indicator of timing that seemed to be related to settlement: cases in which offers or demands had been exchanged before mediation occurred appeared to have a higher settlement rate than did cases in which no such exchanges had taken place. *Id.* at 46.

Findings regarding the relationship between discovery status and the likelihood of settlement in other civil mediation studies are mixed. One study reported no apparent relationship between the status of discovery and the likelihood of settlement. SCHILDT ET AL., *supra* note 3, at 19. Another study found no relationship between whether discovery had taken place and attorneys' assessments of the appropriateness of the mediation timing. STIENSTRA ET AL., *supra* note 3, at 237. In two other studies, a majority of attorneys said the timing of mediation was appropriate, regardless of the status of discovery; however, fewer attorneys said that mediation took place too early when discovery was substantially completed than if it was in an earlier stage. DANIEL, *supra* note 3, at 23; STIENSTRA ET AL., *supra* note 3, at 272. The findings of another study suggested a link between discovery and settlement. In a program in which formal discovery was suspended until mediation was completed, cases in which mediators found informal means to exchange information were more likely to settle than cases in which no informal discovery took place. MCEWEN, FINAL REPORT, *supra* note 3, at 11.

<sup>144</sup> The analyses regarding training and prior mediation experience are based on the Settlement Week mediators only.

<sup>145</sup>  $r = -.108$ ,  $p = .209$  ( $r$ 's in each court ranged from  $-.410$  to  $.074$ ).

<sup>146</sup>  $r = -.109$ ,  $p = .352$  ( $r$ 's in each court ranged from  $-.118$  to  $.058$ ).

mediated more rather than fewer cases.<sup>147</sup> With regard to the legal experience of the mediators, neither whether the mediators were familiar with the substantive issues in the case from their legal practice<sup>148</sup> nor the number of years in law practice<sup>149</sup> was related to the likelihood of settlement.<sup>150</sup>

### 5. Mediator Actions During the Session<sup>151</sup>

With regard to the approach the mediators used during mediation, cases were more likely to settle if the mediators recommended a particular settlement than if they did not make a specific recommendation.<sup>152</sup> Cases were also more likely to settle if the mediators evaluated the merits of the case *for* the parties than if they did not,<sup>153</sup> but settlement was not related to whether the mediators *assisted* the parties in evaluating the merits of the case (such as by reality testing or asking questions).<sup>154</sup> Cases were more likely to settle if the mediators assisted the parties in evaluating the *value* of the case than if they did not.<sup>155</sup> Cases were more likely to settle if the mediators disclosed their views about the case than if they kept their views silent.<sup>156</sup>

<sup>147</sup>  $r = .133, p < .05$  ( $r$ 's in each court ranged from  $-.045$  to  $.402$ ). In specific, settlement was more likely if the mediators had mediated sixteen or more cases than if they had mediated fewer cases. (The questionnaire provided categories of zero to three cases, four to fifteen, sixteen to fifty, and over fifty cases.)

<sup>148</sup>  $r = .007, p = .184$  ( $r$ 's in each court ranged from  $-.200$  to  $.195$ ).

<sup>149</sup>  $r = .016, p = .234$  ( $r$ 's in each court ranged from  $-.063$  to  $.097$ ).

<sup>150</sup> In another civil mediation study, the likelihood of settlement was not related to the kind of preparation mediators made for the session. MCEWEN, FINAL REPORT, *supra* note 3, at 21.

<sup>151</sup> The analyses in this section used the mediators' reports of their actions during the mediation session.

<sup>152</sup>  $r = .204, p < .001$  ( $r$ 's in each court ranged from  $.069$  to  $.483$ ).

<sup>153</sup>  $r = .087, p < .01$  ( $r$ 's in each court ranged from  $.016$  to  $.124$ ).

<sup>154</sup>  $r = .058, p = .107$  ( $r$ 's in each court ranged from  $-.056$  to  $.188$ ). The Settlement Week questionnaire did not distinguish between whether the mediator evaluated the merits of the case *for* the parties or *assisted* the parties in evaluating the case merits; in those courts, case evaluation was not related to the likelihood of settlement ( $r = -.023, p = .298$ ;  $r$ 's in each court ranged from  $-.035$  to  $-.001$ ). In one other study, there appeared to be no overall relationship between the mediators' evaluating the case (value, liability, or other issues) and the likelihood of settlement: evaluation increased settlement in one court, decreased it in a second court, and had no effect in two other courts. See Hensler, *supra* note 121, at 256.

<sup>155</sup>  $r = .172, p < .01$  ( $r$ 's in each court ranged from  $.121$  to  $.220$ ).

<sup>156</sup>  $r = -.087, p < .01$  ( $r$ 's in each court ranged from  $-.359$  to  $.172$ ).

The likelihood of settlement was not related to<sup>157</sup> whether or not the mediators suggested possible settlement options.<sup>158</sup>

### 6. Parties' and Attorneys' Participation and Cooperation<sup>159</sup>

Settlement was more likely in cases where opposing counsel were more rather than less cooperative during the mediation session.<sup>160</sup> Settlement also was more likely in cases in which the mediators reported that the parties and the attorneys spent more time talking during mediation than in cases in which they talked less.<sup>161</sup> The likelihood of settlement was not related, however, to whether the parties spoke more, less, or the same amount as the attorneys.<sup>162</sup>

### 7. Summary

The characteristic that had by far the strongest relationship with increasing the likelihood of settlement in mediation was having a smaller degree of disparity in parties' initial positions. The following characteristics

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<sup>157</sup>  $r = .042, p = .334$  ( $r$ 's in each court ranged from  $-.155$  to  $.486$ ).

<sup>158</sup> Another study of civil mediation found that settlement was more likely if the mediators were more active; did not withhold their views about the case value, merits, or likely court outcome; focused on settlement discussions rather than on case presentation; and involved the parties and not just the attorneys in the process. MCEWEN, FINAL REPORT, *supra* note 3, at 21; McEwen, *supra* note 3, at 311. A second study found a somewhat higher settlement rate when the mediators were magistrate judges compared to when they were local attorneys, but could not determine whether that difference might be a product of the magistrates being more evaluative or their evaluations carrying more weight with the parties. Dichter, *supra* note 3, at 342. Another study suggested that settlement was more likely if the mediator suggested solutions, helped participants to negotiate, defused unrealistic expectations, carried messages between the parties, and provided a suitable negotiation environment. Woodward, *supra* note 3, at 51.

<sup>159</sup> There were too few cases in which the plaintiff was absent, and the interpretation of the defendant's or insurer's absence was too questionable, to examine the relationship between the presence or absence of the parties and settlement.

<sup>160</sup>  $r = .253, p < .001$  ( $r$ 's in each court ranged from  $.112$  to  $.355$ ; ratings were made by the attorneys).

<sup>161</sup> Parties:  $r = .054, p < .01$  ( $r$ 's in each court ranged from  $-.132$  to  $.194$ ); attorneys:  $r = .060, p < .05$  ( $r$ 's in each court ranged from  $-.019$  to  $.144$ ); ratings were made by the mediators.

<sup>162</sup>  $r = .022, p = .078$  ( $r$ 's in each court ranged from  $-.125$  to  $.128$ ). Another civil mediation study found that settlement was marginally more likely to occur in cases in which parties did most of the talking than in cases where parties and attorneys shared evenly in the discussion or than in cases where the attorneys did most of the talking. MCEWEN, FINAL REPORT, *supra* note 3, at 22.



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were associated with an increase in the rate of settlement of more than fifteen percentage points: greater cooperation between the attorneys during the session, the mediator recommending a particular settlement, and the mediator assisting the parties in evaluating the value of the case. Additional case and program characteristics that had statistically significant, although smaller, relationships with the likelihood of settlement are listed below in Table 3.

<i>Table 3. Factors Significantly Related to an Increased Likelihood of Settlement</i>	<i>r</i>
Less disparity in parties' initial positions	.334
Greater cooperativeness of opposing counsel during mediation session	.253
Mediator recommended a particular settlement	.204
Mediator assisted parties in evaluating value of case	.172
Case entered mediation by judge referral or party request rather than by random assignment	.144
Mediator previously had mediated a larger number of cases	.133
Parties had more preparation for mediation by their attorneys	.096
Fewer months between case filing and mediation session	.088
Mediator evaluated merits of case for parties	.087
Mediator did not keep views of case silent	.087
Motion to dismiss or for summary judgment was not pending	.084
Issues in the case were less complex	.080
Non-dispositive motions were not pending	.070
Liability was less strongly contested	.067
Attorneys spent more rather than less time talking during mediation	.060
Parties spent more rather than less time talking during mediation	.054
<i>Note:</i> To facilitate the interpretation of the findings, the wording of the factors has been rephrased to show the extent to which each was related to an <i>increased</i> likelihood of settlement. Accordingly, the signs of the correlation coefficients (which are dependent on the question wording) have been changed as appropriate.	

### *E. The Relationship Between Various Characteristics and Participants' Assessments*

Participants' assessments of the mediation process are considered to be indicators of the quality of dispute resolution procedures.<sup>163</sup> In addition, parties' perceptions of the fairness of the process have been shown, in other contexts, to be related to compliance with the agreement and to general

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<sup>163</sup> See *supra* note 66 and accompanying text.

perceptions of the courts.<sup>164</sup> Thus, determining which characteristics are related to more favorable assessments of mediation, and which are related to negative perceptions, can help inform the design of civil mediation programs that will be viewed as fair.

The participants' assessments examined below include the parties' and attorneys' perceptions of the fairness of the mediation process and the parties' perceptions of whether the mediator pressured them to accept a settlement.<sup>165</sup> The characteristics examined below include the manner of case referral to mediation, mediator qualifications and style, and selected characteristics of the cases, the parties, and the mediation session.<sup>166</sup> Meta-analyses were conducted<sup>167</sup> to assess the relationship between each characteristic and participants' assessments across the courts in the present studies.<sup>168</sup> The findings are summarized in Table 4 at the end of this section.

### 1. *Mode of Case Referral*

In the pilot courts, whether the case had been randomly assigned to mediation or whether it was referred at the request of a party or the judge was not related to parties' or attorneys' assessments of the fairness of the

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<sup>164</sup> See LIND & TYLER, *supra* note 66, at 107–08, 208–20; Tyler & Lind, *supra* note 67, at 74–76.

<sup>165</sup> This latter assessment was not available in the Settlement Week courts. Overall, parties who felt more pressured to settle by the mediator felt the mediation process was less fair than did parties who felt less pressured ( $r = -.186$ ,  $p < .001$ ;  $r$ 's in each court ranged from  $-.224$  to  $-.149$ ).

<sup>166</sup> These particular perceptions were selected because of their centrality to evaluating the quality of the mediation process, and these characteristics were chosen because of their importance to issues of mediation program design. It was beyond the scope of the present Article to examine the relationships between all of the participant assessments and all of the case and program characteristics for which data were obtained in the present studies.

<sup>167</sup> See *supra* notes 15–17 and accompanying text.

<sup>168</sup> Because participants' assessments of mediation were more favorable when the case settled in mediation than when it did not settle, see *supra* notes 77, 80, and because some characteristics produced a higher rate of settlement, see *supra* notes 123–62 and accompanying text, we first examined whether the case, mediator, and program characteristics had a different relationship with participants' perceptions depending on whether or not the case had settled in mediation. In virtually all of the analyses, there were no statistically significant interactions (*i.e.*, the relationship between the characteristic in question and parties' perceptions did not vary depending on whether or not the case had settled). In the few analyses in which there was a statistically significant interaction, we examined the data separately for cases that settled and for those that did not, and report below where the patterns were substantially different.

mediation process.<sup>169</sup> Nor was how the case came to mediation related to parties' perceptions of whether the mediator had pressured them to settle.<sup>170</sup> It is possible, however, that the effect of party request was masked in the above analyses because these cases were combined with, and could not be distinguished from, judicially selected cases. In the second-phase pilot courts, attorneys who said they or their client requested mediation viewed the mediation process as more fair than did attorneys who had not requested mediation.<sup>171</sup> In the Settlement Week courts, however, neither attorneys' nor parties' assessments of the fairness of the mediation process were related to whether their side had requested mediation.<sup>172</sup> It is unclear what might account for the different pattern of findings in the pilot courts than in the Settlement Week courts. A meta-analysis combining both groups of courts showed that, overall,<sup>173</sup> attorneys who requested mediation viewed the process as more fair than did attorneys who had not requested mediation.<sup>174</sup>

## 2. Mediator Qualifications<sup>175</sup>

None of the mediators training or experience qualifications were related to participants' perceptions of mediation's fairness. The number of cases the mediators had previously mediated was not related to parties' or attorneys' assessments of the fairness of the mediation process.<sup>176</sup> The mediators' hours

<sup>169</sup> Parties:  $r = .012$ ,  $p = .281$  ( $r$ 's in each court ranged from  $-.057$  to  $.054$ ); attorneys:  $r = .012$ ,  $p = .288$  ( $r$ 's in each court ranged from  $-.032$  to  $.071$ ).

<sup>170</sup>  $r = .057$ ,  $p = .084$  ( $r$ 's in each court ranged from  $-.023$  to  $.125$ ).

<sup>171</sup>  $r = .135$ ,  $p < .001$  ( $r$ 's in each court were  $.12$  and  $.15$ ).

<sup>172</sup> Parties:  $r = -.004$ ,  $p = .409$  ( $r$ 's in each court ranged from  $-.336$  to  $.243$ ); attorneys:  $r = -.005$ ,  $p = .117$  ( $r$ 's in each court ranged from  $-.097$  to  $.082$ ).

<sup>173</sup>  $r = .048$ ,  $p < .05$ .

<sup>174</sup> Two other civil mediation studies did not find differences in participants' assessments when comparing cases in mandatory and voluntary referral programs. KAKALIK ET AL., *supra* note 3, at 53; STIENSTRA ET AL., *supra* note 3, at 252. Another civil mediation study found that a priori attitudes toward mediation appeared to affect satisfaction with the process. Both litigants and attorneys who reported that they were initially reluctant to participate in mediation were less satisfied with mediation, regardless of whether the case settled, than were those who were initially enthusiastic about mediation. KOBBERVIG, *supra* note 3, at 28.

<sup>175</sup> The analyses with regard to mediator training and mediation experience were based on the Settlement Week mediators only.

<sup>176</sup> Parties:  $r = -.010$ ,  $p = .425$  ( $r$ 's in each court ranged from  $-.304$  to  $.202$ ); attorneys:  $r = -.056$ ,  $p = .245$  ( $r$ 's in each court ranged from  $-.389$  to  $.130$ ).

of mediation training<sup>177</sup> and whether that training involved role play<sup>178</sup> also were not related to parties' or attorneys' assessments of the fairness of the mediation process. Whether the mediators had expertise in the subject matter of the case was not related to parties' or attorneys' assessments of the fairness of the mediation process.<sup>179</sup> Similarly, parties' perceptions of pressure from the mediator to settle were not related to the mediator's substantive expertise.<sup>180</sup>

### 3. Mediator Actions During the Session<sup>181</sup>

If the mediators recommended a particular settlement, parties felt more pressured by the mediator to accept a settlement<sup>182</sup> and felt the mediation process was less fair<sup>183</sup> than if the mediators did not recommend a specific settlement. Parties also felt more pressured to settle if the mediators suggested possible options for settlement than if they did not, but the effect of this mediator action was much smaller.<sup>184</sup> This finding, however, is due only to cases that did not settle; in cases that settled, whether the mediators suggested settlement options was not related to parties feeling pressured.<sup>185</sup> The mediators' suggesting settlement options was not related to parties' perceptions of the fairness of the mediation process.<sup>186</sup>

If the mediators evaluated the merits of the case, parties did not feel more pressured by the mediator to settle<sup>187</sup> and, importantly, felt the mediation process was more fair than if the mediators did not evaluate the merits of the case.<sup>188</sup> If the mediators kept their views of the case silent, parties felt *less*

<sup>177</sup> Parties:  $r = -.034$ ,  $p = .382$  ( $r$ 's in each court ranged from  $-.140$  to  $.069$ ); attorneys:  $r = -.026$ ,  $p = .316$  ( $r$ 's in each court ranged from  $-.219$  to  $.174$ ).

<sup>178</sup> Parties:  $r = .007$ ,  $p = .409$  ( $r$ 's in each court ranged from  $-.173$  to  $.104$ ); attorneys:  $r = -.018$ ,  $p = .456$  ( $r$ 's in each court ranged from  $-.127$  to  $.031$ ).

<sup>179</sup> Parties:  $r = .002$ ,  $p = .490$  ( $r$ 's in each court ranged from  $-.138$  to  $.248$ ); attorneys:  $r = .008$ ,  $p = .464$  ( $r$ 's in each court ranged from  $-.165$  to  $.128$ ).

<sup>180</sup>  $r = -.043$ ,  $p = .100$  ( $r$ 's in each court ranged from  $-.048$  to  $-.040$ ).

<sup>181</sup> The analyses in this section used the *parties'* reports of the mediator's actions during the mediation session.

<sup>182</sup>  $r = .249$ ,  $p < .001$  ( $r$ 's in each court ranged from  $.143$  to  $.323$ ).

<sup>183</sup>  $r = -.083$ ,  $p < .001$  ( $r$ 's in each court ranged from  $-.178$  to  $.036$ ).

<sup>184</sup>  $r = .042$ ,  $p < .05$  ( $r$ 's in each court ranged from  $-.030$  to  $.119$ ).

<sup>185</sup> Cases that did not settle:  $r = .115$ ,  $p < .01$ ; cases that settled in mediation:  $r = .035$ ,  $p = .75$ .

<sup>186</sup>  $r = .031$ ,  $p = .063$  ( $r$ 's in each court ranged from  $-.054$  to  $.193$ ).

<sup>187</sup>  $r = -.031$ ,  $p = .326$  ( $r$ 's in each court ranged from  $-.209$  to  $.079$ ).

<sup>188</sup>  $r = .097$ ,  $p < .001$  ( $r$ 's in each court ranged from  $-.131$  to  $.292$ ).

pressured by the mediators to settle than if the mediators disclosed their views.<sup>189</sup> Whether the mediators kept silent about their views of the case did not affect parties' assessments of the fairness of the mediation process.<sup>190</sup>

The mediators' actions had somewhat different effects on the attorneys' assessments of the fairness of the mediation process. If the mediators suggested possible settlement options, attorneys felt the mediation process was more fair than if the mediators did not suggest options.<sup>191</sup> Attorneys' assessments of the fairness of the mediation process were not related to whether the mediators recommended a specific settlement,<sup>192</sup> evaluated the merits of the case,<sup>193</sup> or kept their views of the case silent.<sup>194</sup> However, if the mediators helped the parties evaluate the merits of the case (by using reality testing, risk analysis, or asking other questions)<sup>195</sup> or assisted the parties in assessing the value of the case,<sup>196</sup> attorneys viewed the mediation process as more fair than if the mediators did not assist in those forms of evaluation.<sup>197</sup>

#### 4. Parties' and Attorneys' Participation and Cooperation

Parties who said they spent more time talking while presenting their side during mediation felt more pressured by the mediator to settle than did parties who reported they spent less time talking during mediation.<sup>198</sup> However, the opposite relationship was found with regard to their attorney's participation—parties who said their attorney spent more time talking in presenting their side during mediation felt *less* pressured by the mediator to settle than did parties who reported their attorney spent less time talking during mediation.<sup>199</sup> Parties who said they<sup>200</sup> or their attorney<sup>201</sup> spent more time talking in presenting their side during mediation thought the mediation

<sup>189</sup>  $r = -.071, p < .01$  ( $r$ 's in each court ranged from  $-.096$  to  $-.042$ ).

<sup>190</sup>  $r = .020, p = .140$  ( $r$ 's in each court ranged from  $-.124$  to  $.083$ ).

<sup>191</sup>  $r = .156, p < .001$  ( $r$ 's in each court ranged from  $.055$  to  $.260$ ).

<sup>192</sup>  $r = -.004, p = .43$  ( $r$ 's in each court ranged from  $-.096$  to  $.044$ ).

<sup>193</sup>  $r = .046, p = .106$  ( $r$ 's in each court ranged from  $-.033$  to  $.147$ ).

<sup>194</sup>  $r = .016, p = .48$  ( $r$ 's in each court ranged from  $-.138$  to  $.198$ ).

<sup>195</sup>  $r = .115, p < .01$  ( $r$ 's in each court were  $.098$  and  $.132$ ).

<sup>196</sup>  $r = .129, p < .05$  (data from only one court).

<sup>197</sup> One other civil mediation study found no relationship between mediator evaluation and attorneys' assessments of the fairness of the mediation process. Hensler, *supra* note 121, at 256–57.

<sup>198</sup>  $r = .079, p < .01$  ( $r$ 's in each court ranged from  $-.006$  to  $.197$ ).

<sup>199</sup>  $r = -.104, p < .001$  ( $r$ 's in each court ranged from  $-.196$  to  $-.045$ ).

<sup>200</sup>  $r = .089, p < .001$  ( $r$ 's in each court ranged from  $.030$  to  $.136$ ).

<sup>201</sup>  $r = .067, p < .01$  ( $r$ 's in each court ranged from  $-.008$  to  $.157$ ).

process was more fair than did parties who reported they or their attorney spent less time talking.<sup>202</sup> In addition, if opposing counsel cooperated more with each other during mediation, parties felt the mediation process was more fair.<sup>203</sup> The attorneys' level of cooperation, however, was not related to parties' perceptions of mediator pressure.<sup>204</sup>

If attorneys rated the opposing counsel as more cooperative, they were more likely to view the mediation process as fair.<sup>205</sup> Attorneys' perceptions of mediation's fairness, however, were not related to the amount of time they<sup>206</sup> or their client<sup>207</sup> talked to present their side during mediation.

### 5. Party Characteristics

First, we examined two major ways of classifying litigants: (1) whether parties were in court as plaintiffs or defendants, and (2) whether they were in court representing a business or as an individual. Defendants felt more pressured to settle by the mediator than did plaintiffs,<sup>208</sup> but they felt the mediation process was more fair.<sup>209</sup> Parties in court representing a business felt more pressured to accept a settlement by the mediator than did parties in court as individuals,<sup>210</sup> but they nonetheless felt that the mediation process was more fair.<sup>211</sup> It is unclear what might explain the apparent contradictions between these assessments of fairness and mediator pressure.

Next, we examined whether there was a relationship between the amount of party preparation for, or prior experience with, mediation and their assessments. Parties who had more prior experience with mediation felt more pressured to settle by the mediator than did parties with less prior

<sup>202</sup> The parties' assessments of fairness and mediator pressure were not related to whether they spoke more or less than their attorneys. Fairness:  $r = .018$ ,  $p = .125$  ( $r$ 's in each court ranged from  $-.042$  to  $.090$ ); pressure:  $r = -.007$ ,  $p = .370$  ( $r$ 's in each court ranged from  $-.123$  to  $.166$ ).

<sup>203</sup>  $r = .065$ ,  $p < .05$  ( $r$ 's in each court ranged from  $.041$  to  $.106$ ).

<sup>204</sup>  $r = -.050$ ,  $p = .113$  ( $r$ 's in each court ranged from  $-.073$  to  $-.031$ ).

<sup>205</sup>  $r = .431$ ,  $p < .001$  ( $r$ 's in each court ranged from  $.304$  to  $.584$ ).

<sup>206</sup>  $r = .045$ ,  $p = .057$  ( $r$ 's in each court ranged from  $-.009$  to  $.108$ ).

<sup>207</sup>  $r = .029$ ,  $p = .084$  ( $r$ 's in each court ranged from  $-.025$  to  $.135$ ).

<sup>208</sup>  $r = .086$ ,  $p < .01$  ( $r$ 's in each court ranged from  $-.014$  to  $.244$ ).

<sup>209</sup>  $r = .138$ ,  $p < .001$  ( $r$ 's in each court ranged from  $-.053$  to  $.269$ ). One other civil mediation study also found defendants viewed the mediation process as more fair than did plaintiffs. MAIMAN, *supra* note 3, at 40. Another study, however, reported general agreement between plaintiff and defendant assessments. Clarke & Gordon, *supra* note 3, at 323.

<sup>210</sup>  $r = .095$ ,  $p < .01$  ( $r$ 's in each court ranged from  $.014$  to  $.271$ ).

<sup>211</sup>  $r = .175$ ,  $p < .001$  ( $r$ 's in each court ranged from  $.045$  to  $.270$ ).

experience,<sup>212</sup> but they felt the mediation process was more fair.<sup>213</sup> Parties who reported more preparation for mediation by their attorneys felt *less* pressured to settle by the mediator<sup>214</sup> and felt that the mediation process was more fair than did parties with less preparation.<sup>215</sup> Interestingly, attorneys who did more to prepare their clients for mediation<sup>216</sup> and who themselves had more prior mediation experience<sup>217</sup> also felt the mediation process was more fair.

Finally we examined, only for parties who were in court as individuals, whether there was a relationship between party demographic characteristics and their assessments.<sup>218</sup> Male parties felt more pressured by the mediator to settle than did female parties,<sup>219</sup> but male and female litigants did not differ in their assessments of the fairness of the mediation process.<sup>220</sup> The parties' race was not related to their assessments of whether the mediator had pressured them to settle,<sup>221</sup> but white parties were more likely to say the mediation process was fair than were minority parties.<sup>222</sup> The parties' education level was not related to whether they felt pressured to settle by the mediator<sup>223</sup> or whether they felt the mediation process was fair.<sup>224</sup>

## 6. Summary

Greater party preparation for mediation contributed to more favorable assessments by both parties and attorneys. The greater cooperativeness of opposing counsel during mediation contributed to parties', and especially to

<sup>212</sup>  $r = .096, p < .01$  ( $r$ 's in each court ranged from  $-.007$  to  $.276$ ).

<sup>213</sup>  $r = .194, p < .001$  ( $r$ 's in each court ranged from  $.167$  to  $.270$ ).

<sup>214</sup>  $r = -.067, p < .01$  ( $r$ 's in each court ranged from  $-.095$  to  $-.019$ ).

<sup>215</sup>  $r = .160, p < .001$  ( $r$ 's in each court ranged from  $.095$  to  $.230$ ).

<sup>216</sup>  $r = .129, p < .001$  ( $r$ 's in each court ranged from  $.093$  to  $.163$ ).

<sup>217</sup>  $r = .071, p < .05$  ( $r$ 's in each court ranged from  $.047$  to  $.118$ ).

<sup>218</sup> In the Settlement Week courts, demographic information was obtained only from litigants who were in court as individuals. To be able to examine party demographic differences across the largest number of courts, the analyses in this section were based only on individual parties. See *supra* note 45.

<sup>219</sup>  $r = .064, p < .05$  ( $r$ 's in each court ranged from  $.006$  to  $.137$ ).

<sup>220</sup>  $r = -.040, p = .352$  ( $r$ 's in each court ranged from  $-.17$  to  $.213$ ).

<sup>221</sup>  $r = .037, p = .081$  ( $r$ 's in each court ranged from  $-.097$  to  $.12$ ).

<sup>222</sup>  $r = .128, p < .001$  ( $r$ 's in each court ranged from  $-.078$  to  $.287$ ).

<sup>223</sup>  $r = -.014, p = .421$  ( $r$ 's in each court ranged from  $-.162$  to  $.075$ ).

<sup>224</sup>  $r = -.033, p = .221$  ( $r$ 's in each court ranged from  $-.398$  to  $.149$ ). One other civil mediation study also found no gender, age, or education differences in parties' assessments of the fairness of the mediation process. MAIMAN, *supra* note 3, at 40.

attorneys', perceptions that the mediation process was fair. Greater attorney participation in the mediation session was related to more favorable assessments by parties, whereas greater party participation had mixed effects. When mediators recommended a particular settlement, parties felt more pressured to settle and viewed the mediation process as less fair. The mediators' evaluating the case contributed to both parties' and attorneys' perceptions that the mediation process was fair, and did not make parties feel more pressured to settle. Additional characteristics that were significantly related to participants' assessments are listed below in Table 4.



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*Table 4. Factors Significantly Related to Participants' Perceptions*

Factors	Parties, less pressured <i>r</i>	Parties, process more fair <i>r</i>	Attorneys, process more fair <i>r</i>
Greater cooperativeness of opposing counsel during mediation session	<i>ns</i>	.065	.431
Mediator did <i>not</i> recommend a particular settlement	.249	.083	<i>ns</i>
Mediator evaluated merits of case for parties	<i>ns</i>	.097	<i>ns</i>
Mediator assisted parties in evaluating value of case			.129
Mediator assisted parties in evaluating merits of case			.115
Mediator suggested settlement options	(.042)	<i>ns</i>	.156
Mediator kept views of case silent	.071	<i>ns</i>	<i>ns</i>
Party spent more rather than less time talking during mediation	(.079)	.089	<i>ns</i>
Attorney spent more rather than less time talking during mediation	.104	.067	<i>ns</i>
Party had more preparation for mediation by attorney	.067	.160	.129
Party had more prior experience with mediation	(.096)	.194	
Attorney had more prior experience with mediation			.071
Attorney requested mediation			.048

*Notes: ns = not statistically significant. Cells left blank indicate the relationship between those two items could not be ascertained because one or both of the questions were not asked. To facilitate the interpretation of the findings, the wording of the factors has been rephrased to show the extent to which each was related to more favorable perceptions. Accordingly, the signs of the correlation coefficients (which are dependent upon the question wording) have been changed as appropriate. Coefficients listed in parentheses indicate that factor was related to parties feeling more rather than less pressured to settle.*

### III. SUMMARY AND CONCLUSION: IMPLICATIONS OF THE RESEARCH FINDINGS FOR MEDIATION PROGRAM DESIGN AND FUTURE RESEARCH

#### A. *The Effectiveness of Court-Connected Mediation in General Civil Cases*

Across a number of studies, most parties and attorneys consistently said the mediation process was very fair and they would use mediation again or would recommend it to others.<sup>225</sup> Most parties also gave high ratings on more specific dimensions shown to contribute to procedural justice, saying that they had sufficient opportunity to tell their side of the story, they participated actively in the process, they had considerable input in determining the outcome of the dispute,<sup>226</sup> and they were not pressured by the mediator or by others to settle. Further, they felt the mediator was neutral, understood their views and the issues in the case, and treated them with respect.<sup>227</sup>

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<sup>225</sup> Some argue that relying on parties' assessments to evaluate the quality of the mediation procedure may be misleading, because parties' positive perceptions may reflect their lowered expectations or their lack of awareness of what they are entitled to or what other procedures might offer. See, e.g., Bush, *supra* note 66, at 358–60; Luban, *supra* note 66, at 405–07; Tyler, *supra* note 66, at 432–33. By this reasoning, however, parties should rate the mediation process as more fair than attorneys do, and parties in court as individuals should give higher fairness ratings than repeat-player business representatives do. But the reverse was in fact observed.

<sup>226</sup> The difference between the present findings and those of another study, in which a majority of parties did not feel they had control over the handling of the mediation session or the outcome, likely is due to the lower party participation in that study (where the lawyers did most of the talking during mediation). Clarke & Gordon, *supra* note 3, at 324. In the present study, parties who reported speaking more during mediation felt they had more input in determining the outcome than did parties who spoke less ( $r = .21, p < .001$ ;  $r$ 's in each court ranged from .130 to .280). The amount of time parties said their attorneys talked during mediation also was related to the parties' sense of having input in determining the outcome, but to a lesser degree than their own participation ( $r = .062, p < .01$ ;  $r$ 's in each court ranged from -.031 to .148).

<sup>227</sup> For discussions of concerns about party participation, mediator coercion, and procedural justice in court-connected general civil case mediation, see generally Nancy A. Welsh, *The Thinning Vision of Self-Determination in Court-Connected Mediation: The Inevitable Price of Institutionalization?*, 6 HARV. NEGOT. L. REV. 1 (2001) [hereinafter Welsh, *Self-Determination*]; Nancy A. Welsh, *Making Deals in Court-Connected Mediation: What's Justice Got To Do With It?* 79 WASH. U. L.Q. 787 (2001). Future studies need to compare court-connected mediation with private, non-court-based mediation in order to ascertain whether party participation, settlement coercion, and procedural justice differ between the two settings.

The mediation process, however, was not necessarily viewed more favorably than the traditional litigation process. Parties and attorneys appeared to assess mediation somewhat more positively than the litigation process in some studies, but gave similar ratings in others.<sup>228</sup> A majority of attorneys in several studies, however, said that mediation provided greater party involvement in the resolution of their case. Additional studies that randomly assign cases to dispute resolution procedure, that use statistical significance tests to compare the groups, and that clearly indicate which “resolution process” (e.g., negotiation, ruling on a dispositive motion, or trial) the participants are assessing would be needed to determine whether mediation provides a “better” dispute resolution process.

Despite participants’ overall positive assessments of mediation, some differences in assessments between groups of litigants in the present courts raise questions for future research. Why were parties’ assessments of the mediation process and the mediator less favorable than attorneys’ perceptions? Did parties have different expectations for the nature of the process than attorneys, did they have higher expectations that a settlement would be reached, or did they expect the mediator to make a decision and declare who was “right”?<sup>229</sup> Attorneys had more mediation experience than parties did, so their expectations might have been more in line with the reality of the mediation process. This explanation is consistent with the finding that parties who had more mediation experience or more preparation for mediation by their attorney saw the mediation process as more fair. More mediation experience also could explain why defendants and business representatives saw mediation as more fair than did plaintiffs and individual defendants. But if this is so, then why did defendants, business representatives, and parties who generally had more mediation experience feel more pressured to settle? In addition, among litigants in court as individuals, why did male parties feel more pressured than female parties (but did not rate mediation as less fair) and why did minority parties feel the mediation process was less fair (but did not feel more pressured)? Future research needs to examine the relationship between parties’ assessments of mediation and their expectations, goals, and objectives.

A majority of attorneys reported that mediation improved communication between the parties and the attorneys, but few reported

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<sup>228</sup> The lack of differences, especially when the question was framed in terms of the fairness of the court’s management of the case, might reflect mediation’s relatively brief appearance (several hours) during the long course of litigation (months or years). See Clarke & Gordon, *supra* note 3, at 324.

<sup>229</sup> See, e.g., Jessica Pearson & Nancy Thoennes, *Divorce Mediation: An Overview of Research Results*, 19 COLUM. J.L. & SOC. PROBS. 451, 466 (1985) (finding that parties with “faulty preconceptions” about the divorce mediation process were dissatisfied).

improved relationships. The latter finding, however, must be interpreted in the context of general civil cases, few of which involved personal or acrimonious relationships. Mediation had only a moderate impact on the parties' understanding of their own cases, the other side's views, or their options for settlement or further litigation. No comparative data on these dimensions are available for the negotiation process.<sup>230</sup>

Across a large number of studies of court-connected programs, generally between one-third and two-thirds of cases<sup>231</sup> settled in mediation.<sup>232</sup> The nature of the mediated agreements varied with the type of case: most personal injury (predominantly car accident) case settlements involved only monetary terms, but a majority of contract case settlements included non-monetary provisions. This is consistent with assumptions regarding differences between these types of cases in terms of the nature of the dispute and the relationship between the disputants. Future research needs to examine systematically the relationships among case type, dispute and party characteristics, attorney fee arrangement,<sup>233</sup> and the terms of the mediated agreement. In several studies, fewer than half of the attorneys said that the parties explored resolutions in mediation that they would not likely have

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<sup>230</sup> The most relevant comparison for mediation is unassisted negotiation rather than trial, because the majority of filed cases are resolved by settlement and few are tried. *See, e.g.,* Robert A. Baruch Bush, "What Do We Need a Mediator For?": *Mediation's "Value-Added" for Negotiators*, 12 OHIO ST. J. ON DISP. RESOL. 1, 5-6 (1996); Clarke & Gordon, *supra* note 3, at 321; Marc Galanter & Mia Cahill, "Most Cases Settle": *Judicial Promotion and Regulation of Settlements*, 46 STAN. L. REV. 1339, 1339-40 (1994); Hensler, *supra* note 70, at 16; Herbert M. Kritzer, *Adjudication to Settlement: Shading in the Gray*, 70 JUDICATURE 161, 162-64 (1986); Craig A. McEwen & Roselle L. Wissler, *Finding Out if It Is True: Comparing Mediation and Negotiation Through Research*, 2002 J. DISP. RESOL. (forthcoming 2002) (manuscript on file with author); Frank E. A. Sander, *The Obsession with Settlement Rates*, 11 NEGOTIATION J. 329, 331 (Oct. 1995).

<sup>231</sup> It is interesting to note that the settlement rate in a study of non-court-connected general civil case mediation was 78%. Jeanne M. Brett et al., *The Effectiveness of Mediation: An Independent Analysis of Cases Handled by Four Major Service Providers*, 12 NEGOTIATION J. 259, 261 (1996). It is unclear what might explain this higher rate of settlement. *Id.* at 261-62.

<sup>232</sup> In the present studies, reaching a settlement had a positive effect on parties' and attorneys' perceptions of the *process* and the mediator, suggesting that process assessments are not independent of the fact of resolution.

<sup>233</sup> Attorneys who had an hourly fee arrangement were more than twice as likely to make offers or demands in negotiation that included non-monetary provisions as were attorneys with a contingent fee arrangement. HERBERT M. KRITZER, *THE LAWYER AS NEGOTIATOR: WORKING IN THE SHADOWS* 18-19, 32 (Disputes Processing Research Program, Working Paper No. 4, Series 7, 1986). These findings may be due in part to the attorneys' case selection process, *i.e.,* that contingent fee attorneys normally turn down cases which are not amenable to a monetary recovery. *Id.* at 19.

gotten through a trial or motion and felt that mediation helped them design a settlement that met their client's needs better than a court decision might have. Future research needs to compare systematically the content of mediated and negotiated settlements to determine whether mediation produces "better" or more creative agreements.<sup>234</sup>

Across a number of studies, a majority of parties and most attorneys assessed the outcome as fair. Why were parties' ratings of the fairness of the outcome lower and less consistent across the studies than their ratings of the fairness of the mediation process, and why were they lower than the attorneys' ratings? Did parties' expectations regarding the outcome differ from those of the attorneys (e.g., did they expect a "total victory" with no concessions on their part, or did they have to give up more than they wanted to or thought they would have to in order to reach a settlement)? In the present courts, parties who had more prior mediation experience and more preparation for mediation by their attorneys felt the outcome was more fair than did parties who had less experience or preparation, suggesting that these factors might play a role.<sup>235</sup> Were parties less than completely satisfied with the settlement because it did not meet their needs? Several studies found that half or more of the parties and attorneys said the mediated settlement met their (or their client's) needs and that the issue initiating the action had been corrected. As one study showed, "fairness" was only one of several factors that influenced parties' decisions to accept a settlement.<sup>236</sup> Future research needs to examine why parties decide to settle and what norms they apply in determining whether an agreement is fair. Comparative data on participants' assessments of the outcome in mediation versus non-mediation cases are limited and suggest no consistent differences in perceptions of fairness or

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<sup>234</sup> The inclusion of non-monetary provisions does not necessarily suggest those settlements better meet the parties' needs or are more "creative." A structured settlement that includes, for instance, immediate payment for expenses the plaintiff incurred to date and future payments for possible surgeries or for the children's college education might meet the plaintiff's needs entirely even though involving only monetary terms.

<sup>235</sup> Experience:  $r = .15, p < .001$  ( $r$ 's in each court were .130 and .179); preparation:  $r = .086, p < .05$  ( $r$ 's in each court were .060 and .113). Interestingly, attorneys who had more prior mediation experience also felt the outcome was more fair ( $r = .120, p < .01$ ;  $r$ 's in each court were .112 and .129).

<sup>236</sup> A majority of parties rated as "important" the following factors (listed in order of their importance) in helping them decide what settlement they would agree to: what would be "right" or "fair" under the circumstances, principles of law, what the court or a jury would likely decide, what their lawyer told them to do, what they would get if they settled the case before trial, and what would end the case the fastest. FIX & HARTER, *supra* note 3, at 118–28. Litigants in mediation and in the usual litigation process did not differ in these ratings. *Id.*

satisfaction. Additional studies need to compare participants' assessments of mediated and negotiated agreements.

The majority of studies found that mediation cases tended to have a somewhat higher rate of settlement, or a somewhat lower rate of trial or judgment on a dispositive motion, or both, than did non-mediation cases; some studies, however, found no differences. The studies were fairly equally divided among whether mediated cases were resolved faster, slower, or in about the same amount of time as non-mediation cases. The timing of the mediation referral and session played a major role in the speed of case disposition (for both cases that settled and those that did not), as did whether the case settled in mediation. The longer time to disposition of mediated cases in a court that did not schedule pre-trial conferences or trial until after mediation took place suggests the need for further research on the impact of the courts' local rules and case management practices regarding deadlines and the scheduling of litigation events.<sup>237</sup>

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.<sup>238</sup> Consistent with finding little or no reduction in the amount of discovery,<sup>239</sup> attorneys' reports of hours worked and litigation costs in mediation cases did not tend to differ from non-mediation cases, at least not for the typical case. The present

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<sup>237</sup> See also McEwen, *supra* note 18, at 331–33.

<sup>238</sup> A majority of attorneys said mediation generally did not change the volume of discovery being done because case circumstances usually required full discovery before the case was ready for mediation. Bobbi McAdoo, *A Report to the Minnesota Supreme Court: The Impact of Rule 114 on Civil Litigation Practice in Minnesota*, 25 HAMLIN L. REV. (forthcoming 2002) (December 1997 report at 15 app. C on file with author); Barbara McAdoo & Art Hinshaw, *The Challenge of Institutionalizing Alternative Dispute Resolution: Attorney Perspectives on the Effect of Rule 17 on Civil Litigation in Missouri: Supreme Court ADR Committee Report*, 67 J. DISP. RESOL. (forthcoming Summer 2002) (manuscript at 14 app. E, on file with author).

<sup>239</sup> Research has shown that, on average, discovery was the activity that took the largest percentage of the lawyers' time, whereas attorneys spent only three hours per case on settlement discussions (which is also the length of the typical mediation session). HERBERT M. KRITZER, *THE FORM OF NEGOTIATION IN ORDINARY LITIGATION* 10, 20 (Disputes Processing Research Program, Working Paper No. 2, Series 7, 1985). Unless attorneys change their practice in mediation cases, particularly in regard to discovery, mediation's impact on time or cost savings likely will remain limited. *Id.* at 27–28; McEwen & Plapinger, *supra* note 70, at 11. Additional research is needed to examine the relationship between attorneys' discovery and settlement practice and their fee arrangement. See McEwen, *Mediation in Context*, *supra* note 70, at 16–17.

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. In general, over half of the attorneys, but fewer than half of the parties, thought mediation saved time and money, with both parties and attorneys in settled cases reporting greater savings.<sup>240</sup> Judges felt mediation saved them time by reducing the number of pre-trial hearings and conferences. Additional research is needed on the use of discovery, settlement discussions, and pre-trial conferences in the usual course of litigation, and how mediation affects and is affected by those practices.<sup>241</sup>

Few studies have examined the impact of general civil case mediation beyond the mediation session. These studies found that mediated agreements did not increase compliance or reduce subsequent disputing compared to non-mediation resolutions but did result in fewer filed appeals. Future studies need to follow mediated cases some time after the mediation session to examine the finality of mediated agreements and participants' views of the settlement at that time.<sup>242</sup> In addition, studies need to investigate the broader impacts of mediation beyond the instant case—on the parties' general evaluations of the court system, on their (and their organization's) handling of future disputes, on the attorneys' practice of law (*e.g.*, discussion with clients, negotiation with opposing counsel, future ADR use), and on the community.<sup>243</sup> Existing research and anecdotal evidence does suggest that attorneys who had used mediation were more likely to recommend mediation to clients, that attorneys who were initially reluctant or suspicious of new mediation programs came to accept and even like mediation, and that attorneys who had used mandatory mediation were more likely to use

<sup>240</sup> Research shows that the anticipated time and cost savings of mediation is a reason that both parties and attorneys choose mediation. FIX & HARTER, *supra* note 3, at 110; McAdoo, *supra* note 238 (December 1997 report at 14 app. C on file with author); McAdoo & Hinshaw, *supra* note 238 (manuscript at 13 app. E on file with author).

<sup>241</sup> See also Beck & Sales, *supra* note 70, at 1044–45; McEwen, *supra* note 18, at 331–33.

<sup>242</sup> In a community mediation context, there was no correlation between measures of short-term mediation success (*i.e.*, settlement and immediate satisfaction with the agreement) and long-term success (*i.e.*, satisfaction with the agreement after about six months, compliance, and the parties' relationship). Dean G. Pruitt, *Process and Outcome in Community Mediation*, 11 NEGOTIATION J. 365, 372–73 (1995). In the small claims context, whether plaintiffs felt the dispute really was settled was strongly related to compliance. Roselle L. Wissler, *Mediation and Adjudication in Small Claims Court: The Effects of Process and Case Characteristics*, 29 LAW & SOC'Y REV. 323, 350 (1995); see also Kenneth Kressel & Dean G. Pruitt, *Themes in the Mediation of Social Conflict*, 41 J. SOC. ISSUES 179, 194 (1985); Welsh, *Self-Determination*, *supra* note 227, at 87–90.

<sup>243</sup> McEwen, *supra* note 18, at 335–36.

mediation voluntarily in cases where it was not required.<sup>244</sup> Two-thirds of attorneys who had participated in Settlement Week mediation said their perceptions of ADR's utility to their law practice had been improved because of that experience, compared to fewer than one-third of attorneys who had participated in judicial pre-trial mediation.<sup>245</sup>

### B. *The Relationship of Program Characteristics to Settlement and Participants' Perceptions*

What cases are most likely to settle in mediation?<sup>246</sup> Most studies did not find differences in settlement rates between broad case categories. One study's findings of apparent differences in settlement rates among case-type sub-categories needs to be replicated in future research. The present studies demonstrated the importance of other case characteristics, especially the degree of disparity in the parties' initial positions and, to a lesser extent, the complexity of the issues and whether liability was contested. In general civil cases, the above are better indicators of conflict intensity<sup>247</sup> than the parties' relationship because few cases involve personal relationships. Before we can know which cases will benefit most from mediation,<sup>248</sup> we need to have a better understanding of the nature of different types of disputes, including

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<sup>244</sup> STIENSTRA ET AL., *supra* note 3, at 233; James Alfini et al., *What Happens When Mediation Is Institutionalized?: To the Parties, Practitioners, and Host Institutions*, 9 OHIO ST. J. ON DISP. RESOL. 307, 318, 327 (1994); Craig A. McEwen et al., *Lawyers, Mediation and the Management of Divorce Practice*, 28 LAW & SOC'Y REV. 149, 155, 177 (1994); Nancy H. Rogers & Craig A. McEwen, *Employing the Law To Increase the Use of Mediation and To Encourage Direct and Early Negotiations*, 13 OHIO ST. J. ON DISP. RESOL. 831, 842, 845 (1998); Roselle L. Wissler et al., *Resolving Libel Disputes Out of Court: The Libel Dispute Resolution Program*, in REFORMING LIBEL LAW 286, 306 (John Soloski & Randall P. Bezanson eds., 1992); Roselle L. Wissler, *When Does Familiarity Breed Content? A Study of the Role of Different Forms of ADR Education and Experience in Attorneys' ADR Recommendations*, 2 PEPP. DISP. RESOL. L.J. (forthcoming 2002) (manuscript on file with author).

<sup>245</sup> Woodward, *supra* note 3, at 43.

<sup>246</sup> See NATIONAL STANDARDS FOR COURT-CONNECTED MEDIATION PROGRAMS Standard 4.1 & cmt. (Ctr. for Dispute Settlement & The Inst. of Judicial Admin. 1990).

<sup>247</sup> Research on mediation in other types of cases found that mediation was less successful in resolving the case when the intensity of conflict was greater. See, e.g., Kressel & Pruitt, *supra* note 242, at 185, 186.

<sup>248</sup> For a discussion of which types of cases should not go to mediation, see, e.g., NATIONAL STANDARDS FOR COURT-CONNECTED MEDIATION PROGRAMS Standard 4.2 & cmt.; Frank E.A. Sander & Stephen B. Goldberg, *Fitting the Forum to the Fuss: A User-Friendly Guide to Selecting an ADR Procedure*, 10 NEGOTIATION J. 49, 60-61 (1994).



their context,<sup>249</sup> the litigants' typical goals and the common impediments to settlement,<sup>250</sup> and the relationship between these characteristics and settlement. Future studies also need to examine the effect of other factors (e.g., the disputants' estimates of success, the clarity of key evidence, the importance of the issues to the parties)<sup>251</sup> on settlement and the contribution that pre-mediation screening conferences make in selecting cases for mediation.<sup>252</sup>

What is the impact of how cases are referred to mediation?<sup>253</sup> A slight majority of studies reported no difference in settlement rates between mandatory and voluntary referral (and one study found no difference among several modes of mandatory referral), but two studies found a higher rate of settlement with voluntary referral.<sup>254</sup> The fact that none of the studies found a *higher* settlement rate under mandatory referral suggests that compulsory mediation does not compel settlement. Parties' and attorneys' perceptions of the fairness of the mediation process generally were not related to whether the mediation referral was voluntary or mandatory. Given that the effects of the mode of mediation referral on settlement were mixed and that few studies examined participants' perceptions, additional research is needed before clear conclusions can be drawn.

How does the timing of the mediation session affect settlement?<sup>255</sup> When mediation was held sooner after the case was filed, settlement was more

<sup>249</sup> In medical malpractice cases, for instance, any malpractice payment must be reported to the National Practitioner Data Bank, and most insurers have a "no nuisance value" settlement policy. Knowing this context may help to explain the lower settlement rate in medical malpractice cases than in other civil cases, both in mediation and in the usual course of litigation, and why disputed liability plays a major role in the likelihood of settlement of malpractice cases. Metzloff et al., *supra* note 55, at 107, 132, 135, 144, 147-49.

<sup>250</sup> See, e.g., Sander & Goldberg, *supra* note 248, at 51-59. In a study of private civil mediation, cases were less likely to settle if they involved either the "jackpot syndrome" or if settlement was not in the financial interest of one of the parties. Brett et al., *supra* note 231, at 262-63.

<sup>251</sup> See, e.g., Sheppard, *supra* note 66, at 173.

<sup>252</sup> See, e.g., MAIMAN, *supra* note 3, at 19-25.

<sup>253</sup> See NATIONAL STANDARDS FOR COURT-CONNECTED MEDIATION PROGRAMS Standards 5.1-5.2 & associated cmts.

<sup>254</sup> This apparent difference might be due to differences in the timing of the mediation session rather than to the mode of referral. A study of private general civil case mediation found no difference in settlement rates between cases that voluntarily chose mediation and those that were required to mediate by a contract clause or by the court. Brett et al., *supra* note 231, at 262.

<sup>255</sup> See NATIONAL STANDARDS FOR COURT-CONNECTED MEDIATION PROGRAMS Standard 4.4 & cmt.

likely, fewer motions were filed, and case disposition time was shorter, even in cases that did not settle in mediation. No overall relationship was found between mediation's proximity to the trial date and the likelihood of settlement. The findings regarding the relationship between discovery status and settlement were mixed. Settlement was less likely if motions were pending. One study found that settlement was more likely when offers or demands had been exchanged. Such measures of timing, which might be better indicators of "ripeness" for mediation than merely the length of time in the system, as well as more finely detailed measures of discovery status, need to be employed in future studies. Attorneys' assessments of whether mediation occurred at the right time or was "too early" appeared to be influenced more by their expectations regarding timing or by local legal and court management practices than by the actual timing of mediation.<sup>256</sup> Future studies need to examine the impact on settlement of the interactions among mediation timing, the scheduling of other litigation events, local legal practice, and local ADR culture.

Should attorneys (or the courts) prepare parties for mediation? When parties in the present courts had more preparation for mediation by their attorneys, the case was more likely to settle, the parties felt less pressured to settle and viewed the mediation process as more fair, and the attorneys also felt mediation was more fair than when parties were less prepared. Future research needs to replicate the present findings and examine in more detail the relative effectiveness of different aspects of preparation (*e.g.*, discussing the strengths and weaknesses of the case, the range of settlements that might be proposed, what settlement would meet the parties' needs, the nature of the mediation process, the pros and cons of not settling in mediation).<sup>257</sup> Studies suggest that attorneys might not be able to adequately prepare their clients for mediation because some have had little or no mediation experience themselves<sup>258</sup> and because they find it difficult to deflate their clients' unrealistic expectations while maintaining their confidence.<sup>259</sup> Court

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<sup>256</sup> More than twice as many attorneys in a court in which mediation generally occurred after discovery was completed said mediation took place "too early" as in another court in which mediation occurred within a month or two after the case was filed. STIENSTRA ET AL., *supra* note 3, at 237, 271.

<sup>257</sup> Parties and attorneys were not asked to elaborate on what "preparation for mediation" entailed. The fact that prior mediation experience did not have the same effects that preparation had suggests that "preparation" involved more than an explanation of mediation.

<sup>258</sup> Wissler, *supra* note 242, at 10–11, 15–16.

<sup>259</sup> See, *e.g.*, McEwen et al., *supra* note 244, at 166.

mediation programs should explore ways in which they can assist in preparing the litigants, and the attorneys, for mediation.<sup>260</sup>

What is the effect of participation and cooperation during the mediation session? Settlement was more likely in cases in which parties and attorneys spoke more during mediation. Parties who said they talked more during the session were more likely to say the mediation process was fair than were parties who talked less, but they also felt more pressured by the mediator to settle. By contrast, parties who said their attorneys talked more during mediation felt the process was more fair and felt *less* pressured by the mediator to settle than did parties whose attorneys spoke less.<sup>261</sup> Greater cooperation during the mediation session between opposing counsel was related to an increased likelihood of settlement and to parties' and, especially, to attorneys' perceptions of the fairness of the mediation process. Future research needs to replicate these findings and to examine the role of attorneys in mediation, attorney-client dynamics, and what mediators can do to enhance participation and cooperation during the session.<sup>262</sup>

What qualifications should the mediators have?<sup>263</sup> The only mediator qualification that was related to an increased likelihood of settlement was if the mediator previously had mediated more than sixteen cases. Mediation experience, however, was not related to parties' or attorneys' assessments of mediation. The following mediator characteristics were not related to settlement or to participants' perceptions: the hours of mediation training, whether that training involved role play, the number of years in law practice, whether mediators had expertise in the subject matter of the dispute,<sup>264</sup> and the type of preparation mediators undertook for the session. These findings suggest that these general qualifications might not reflect the critical dimensions of mediator effectiveness. Accordingly, future research needs to examine specific mediator characteristics, such as listening and interpersonal

<sup>260</sup> See NATIONAL STANDARDS FOR COURT-CONNECTED MEDIATION PROGRAMS Standards 1.6, 3.1, 3.2, 10.1, 10.3, 11.2 & associated cmts.

<sup>261</sup> These seemingly paradoxical findings in parties' perceptions of pressure would be consistent with the possibility that mediators direct their reality testing at parties when they more actively participated, but at attorneys when they participated more. Whether parties spoke more or less than their attorneys spoke was not related to settlement or to parties' perceptions.

<sup>262</sup> See Beck & Sales, *supra* note 70, at 1045; McEwen, *supra* note 18, at 335–36.

<sup>263</sup> See NATIONAL STANDARDS FOR COURT-CONNECTED MEDIATION PROGRAMS Standards 6.1, 6.2, 6.3 & associated cmts.

<sup>264</sup> This is counter to attorneys' intuition: most felt that substantive expertise was an important mediator qualification. McAdoo, *supra* note 238 (December 1997 report at 19 app. C on file with author); McAdoo & Hinshaw, *supra* note 238, at 19 app. E.

skills, information-gathering ability, and creativity,<sup>265</sup> as well as the extent to which these and other mediator characteristics might interact with case or party characteristics.<sup>266</sup> In addition, studies need to examine the effect of the mediator's relationship with the court (e.g., a member of court staff or on a court roster) and the mediator's pay status (e.g., pro bono or paid by the court or the parties) on participants' perceptions.<sup>267</sup>

What is the impact of certain mediator actions or "style"?<sup>268</sup> Across several studies, settlement tended to be more likely if the mediators were more active and disclosed their views about the case.<sup>269</sup> But actions that were related to increased settlement were not necessarily also related to more favorable party perceptions. For instance, if the mediators recommended a particular settlement, cases were more likely to settle, but parties felt more pressured to settle and felt the mediation process was less fair than if the mediators did not recommend a specific settlement. If the mediators evaluated the case, parties felt the mediation process was more fair and, importantly, did not feel more pressured to settle.<sup>270</sup> If the mediators kept

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<sup>265</sup> See, e.g., NATIONAL STANDARDS FOR COURT-CONNECTED MEDIATION PROGRAMS Standard 6.1 & cmt.; Margaret S. Herman et al., *Defining Mediator Knowledge and Skills*, 17 NEGOTIATION J. 139, 147–51 (2001); Rack, *supra* note 118, at 614–16.

<sup>266</sup> See, e.g., McEwen, *supra* note 18, at 334–35.

<sup>267</sup> See, e.g., Brazil, *supra* note 66; McCrory, *supra* note 118 (examining different models of the mediators' relationship with the court).

<sup>268</sup> See FLA. R. FOR CERTIFIED & CT.-APPOINTED MEDIATORS 10.200–10.230, 10.300–10.370 (2000), available at <http://www.flcourts.org/osca/divisions/adr/Certrules.htm> (last visited Mar. 26, 2002); NATIONAL STANDARDS FOR COURT-CONNECTED MEDIATION PROGRAMS Standards 6.1, 8.1, 11.1 & associated cmts.; *The Standards of Conduct for Mediators*, in STEPHEN B. GOLDBERG ET AL., DISPUTE RESOLUTION: NEGOTIATION, MEDIATION AND OTHER PROCESSES 651–52, 655–56 (3d ed. 1999); Press, *supra* note 66, at 92–98. For the debate on whether mediators should evaluate, see generally James J. Alfini, *Evaluative Versus Facilitative Mediation: A Discussion*, 24 FLA. ST. U. L. REV. 919 (1997); Lela P. Love, *The Top Ten Reasons Why Mediators Should Not Evaluate*, 24 FLA. ST. U. L. REV. 937, 942–43 (1997); Jeffrey W. Stempel, *Beyond Formalism and False Dichotomies: The Need for Institutionalizing a Flexible Concept of the Mediator's Role*, 24 FLA. ST. U. L. REV. 949 (1997).

<sup>269</sup> A study of private mediation in general civil cases, however, found that settlement was not related to whether the mediator evaluated the case or gave an advisory opinion. Brett et al., *supra* note 231, at 261.

<sup>270</sup> Although for the present Article, meta-analyses across the courts in the present studies were not conducted to examine the effect of mediator evaluation on other party perceptions, prior analyses provide some insight into why mediator evaluation contributed to procedural fairness and not to perceived coercion. In at least some of the courts, when the mediator had evaluated the merits of the case, litigants felt they had more chance to tell their views of the dispute and had more input in determining the

their views of the case silent, parties felt less pressured to settle but did not feel that the mediation process was more fair. Mediator actions that were related to parties' perceptions of fairness were not necessarily also related to attorneys' views of fairness, and vice versa.

Further research is needed to explore the effects of these and other mediator tactics during the mediation session. The effects of the mediators' recommending a particular settlement, suggesting possible settlement options, and evaluating the case were different; what specific mediator actions constituted each of these? To what extent does the effect of the mediators' approach vary with when or how they make their comments (*e.g.*, in joint session or in caucus, earlier or later in the session, only at the request of the parties)?<sup>271</sup> How does what the mediators do, and the effect that their actions have, vary depending on the nature of the dispute or the goals, expectations, and other characteristics of the parties and attorneys?<sup>272</sup> How do repeat players affect the mediation process, especially when there is a single staff mediator? Future research also needs to look at a broader array of mediator actions and approaches beyond those that are the subject of the evaluative-facilitative debate.<sup>273</sup>

### C. Conclusion

Many of the questions regarding mediation in general jurisdiction civil cases lack clear answers because they have been examined in only a small

outcome, and that the mediator had a better understanding of their views, treated them with more respect, and was more impartial. Roselle L. Wissler, Evaluation of Settlement Week Mediation 30 (Oct. 1997) (unpublished report to The Supreme Court of Ohio Committee on Dispute Resolution, on file with the Ohio State Journal on Dispute Resolution); Roselle L. Wissler, An Evaluation of the "Twelve-Court" Civil Pilot Mediation Project 23 (Nov. 2000) (unpublished report to The Supreme Court of Ohio Committee on Dispute Resolution, on file with the Ohio State Journal on Dispute Resolution).

<sup>271</sup> Some of the attorneys who had checked "mediator evaluated case merits" on the questionnaire added the comment "only after the parties requested it."

<sup>272</sup> See Alfini, *supra* note 268, at 314; McEwen, *supra* note 18, at 333-35; Carrie Menkel-Meadow, *The Many Ways of Mediation: The Transformation of Traditions, Ideologies, Paradigms, and Practices*, 11 NEGOTIATION J. 217, 236 (1995) (book review) (noting that mediation in different contexts performs different tasks, and one model of mediation does not fit all contexts).

<sup>273</sup> Pruitt, *supra* note 242, at 367-68, 372 (actions such as suggesting new ideas, proposing agendas, and using pressure tactics); Kenneth Kressel et al., *The Settlement-Orientation vs. the Problem-Solving Style in Custody Mediation*, 50 J. SOC. ISSUES 67, 72-77 (1994); NATIONAL STANDARDS FOR COURT-CONNECTED MEDIATION PROGRAMS Standard 6.1 & cmt.; Rack, *supra* note 118, at 622 n.50.

number of studies, different studies find different patterns of effects, or the studies suffer from methodological weaknesses.<sup>274</sup> To provide the additional information needed to assess the effectiveness of the mediation process and to determine the characteristics of mediation programs that will maximize their effectiveness, future research will need to use, on the one hand, more systematic, controlled studies involving the random assignment of cases to mediation and to non-mediation and, on the other hand, more observations of mediation sessions. Studies will need, on the one hand, to include a broader range of data sources and measures over longer periods of time and, on the other hand, to use more fine-grained measures to obtain more detailed information in certain areas. And research will need to examine not only the mediation process but also aspects of the “traditional” litigation process within which it takes place. Some of these research approaches will be more difficult or more costly to use, but they will enable us to draw clearer inferences about and have a more complete picture of the effectiveness of mediation in general jurisdiction civil cases.

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<sup>274</sup> See Keilitz *et al.*, *supra* note 70, at 33; Beck & Sales, *supra*, note 70, at 1044; Kenneth Kressel & Dean G. Pruitt, *Conclusion: A Research Perspective on the Mediation of Social Conflict*, in *MEDIATION RESEARCH: THE PROCESS AND EFFECTIVENESS OF THIRD-PARTY INTERVENTION* 394, 400–01 (Kressel & Pruitt *et al.* eds., 1989).

WHAT WE KNOW FROM EMPIRICAL RESEARCH

APPENDIX

<i>Number of Questionnaires Completed and Response Rate</i>			
<b>Court</b>	<b>Number of Mediator Questionnaires<sup>275</sup></b>	<b>Number of Party Questionnaires (Response Rate)<sup>276</sup></b>	<b>Number of Attorney Questionnaires (Response Rate)</b>
<i>Pilot program—phase one</i>			
Clinton	83	162 (87%)	169 (94%)
Stark	417	452 (49%)	430 (50%)
Montgomery	188	386 (81%)	407 (88%)
<i>Pilot program—phase two</i>			
Hamilton	292	622 (79%)	619 (90%)
Mahoning	101	155 (77%)	208 (98%)
<i>Settlement Week</i>			
Franklin	422	464 (54%)	854 (89%)
Hamilton	79	79 (45%)	100 (59%)
Lucas	109	115 (56%)	192 (79%)
Richland	39	67 (69%)	78 (93%)

<sup>275</sup> The percentage of cases in which the mediators completed a questionnaire could not be calculated because we did not have access to information about the number of cases mediated.

<sup>276</sup> The party and attorney response rates were calculated by the case (rather than by the participant) because some cases involved multiple parties or multiple attorneys for a party.

