

EMPIRICAL PERSPECTIVES ON MEDIATION AND MALPRACTICE

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Mediated settlement conferences are new to North Carolina. I feel confident that this procedure will be cost effective in the long run and I appreciate your efforts to make it successful. Although this case did not settle, I hope that it helped you and your insured assess the strength of your case and streamline the preparation for trial. It is also possible that the conference will serve as a basis for settlement efforts prior to trial.

Letter from a mediator to a medical malpractice insurer following a mediation that ended in an impasse.

I

INTRODUCTION

Doctors have long been interested in developing alternatives to the traditional litigation system for handling medical malpractice disputes.¹ As part of the extensive tort reform measures undertaken in response to the perceived malpractice crisis in the early 1970s, several states enacted special administrative mechanisms to screen malpractice disputes, while other states passed statutes to facilitate the use of binding arbitration.² Until fairly recently, however, there had not been much attention paid by health care professionals to the potential use of mediation in the malpractice context. As interest in this form of alternative dispute resolution (“ADR”) has exploded in the past decade, its potential use in resolving malpractice cases has been increasingly suggested.³

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1. See, e.g., PHYSICIAN INSURERS ASS'N AM., *A COMPREHENSIVE REVIEW OF ALTERNATIVES TO THE PRESENT SYSTEM OF RESOLVING MEDICAL LIABILITY CLAIMS* (1989); Kirk B. Johnson et al., *A Fault-Based Administrative Alternative for Resolving Medical Malpractice Claims*, 42 VAND. L. REV. 1365 (1989).

2. For an overview of the screening panel experience, see Jona Goldschmidt, *Where Have all the Panels Gone? A History of the Arizona Medical Liability Review Panel*, 23 ARIZ. ST. L.J. 1013 (1992). For a discussion of the use of binding arbitration in medical malpractice cases, see Thomas B. Metzloff, *The Unrealized Potential of Malpractice Arbitration*, 31 WAKE FOREST L. REV. 203 (1996).

3. See Catherine S. Meschievitz, *Mediation and Medical Malpractice: Problems with Definition and Implementation*, 54 LAW & CONTEMP. PROBS. 196 (Winter 1991). For a discussion of different ADR methods and their application in malpractice, see Thomas B. Metzloff, Comment, *Alternative Dispute Resolution Strategies in Medical Malpractice*, 9 ALASKA L. REV. 429 (1992).

Mediation should be considered seriously. It is a less formal ADR method than arbitration, and it offers the potential for an early intervention to resolve a dispute without resort to trial or indeed without resort to litigation at all. In theory, mediation can provide creative solutions to problems by identifying and exploiting the parties' possibly differing interests.⁴ Numerous reports regarding the success of mediation-based programs in a wide variety of contexts recently have led several states to experiment with court-ordered mediation.⁵

A paradox is inherent in this development. In its simplest form, disputing parties voluntarily agree to mediate; their participation is not coerced. Further, while a resolution may in some cases be suggested by the mediator, the parties retain the power to accept or reject any proposed resolution of the dispute. In contrast to conventional litigation or arbitration, an outcome cannot be imposed on the parties. Nonetheless, when a court orders the parties to mediation, an element of coercion has been injected; the parties are then required to meet and explore settlement options.

In the malpractice context, the appropriateness of using mediation may be questioned. Mediation is often thought of as being most appropriate when the parties have an interest in maintaining a long-term relationship. For example, regardless of any personal animosity, divorcing parents involved in a child custody dispute have an interest in developing a workable plan for sharing parenting responsibility. Mediation attempts to capitalize on this joint interest by offering a process designed to identify the parties' respective interests in the hopes of arriving at a solution that maximizes both parties' interests. In contrast, the parties in a malpractice claim lack an interest in maintaining a long-term relationship. The plaintiffs typically have suffered serious injuries and are seeking large sums in compensation. Physicians are concerned with their reputations, and often are unwilling to admit any liability on their part. Any future relationship is rarely anticipated between the parties.

Nonetheless, several commentators have supported the increased use of mediation in malpractice disputes.⁶ Focusing upon studies showing that anger, confusion regarding what had happened, desire for revenge, and other subjective factors often motivate plaintiffs to file malpractice claims,⁷ proponents suggest that malpractice disputes provide fertile ground for mediation's potential benefits as opposed to other ADR methods like arbitration that focus on the legal merits of the dispute.⁸

4. For background information on the process of mediation, see generally ROBERT A. BARUCH BUSH & JOSEPH P. FOLGER, *THE PROMISE OF MEDIATION: RESPONDING TO CONFLICT THROUGH EMPOWERMENT AND RECOGNITION* (1994).

5. See, e.g., FLA. STAT. ch. 44 (1995 & Supp. 1996); TEX. CIV. PRAC. & REM. CODE ANN. § 154.023 (West Supp. 1977).

6. See Meschievitz, *supra* note 3; Comment, *Mediation and Medical Malpractice Disputes: Potential Obstacles in the Traditional Lawyer's Perspective*, 1990 J. DISP. RESOL. 371; Comment, *Healing Angry Wounds: The Roles of Apology and Mediation in Disputes between Physicians and Patients*, 1987 MO. J. DISP. RESOL. 111.

7. See, e.g., FRANK SLOAN ET AL., *SUING FOR MEDICAL MALPRACTICE* (1993).

8. See Edward A. Dauer & Leonard J. Marcus, *Adapting Mediation to Link Resolution of*

To date, there are only anecdotal reports about the possible utility of mediation-based ADR strategies for malpractice. This article will report on a major empirical study conducted on the use of court-ordered mediation in the North Carolina court system. Our analysis is based upon extensive collection of court data, direct observation of malpractice mediations, surveys of attorneys and mediators, and reviews of closed claim files from malpractice insurers. Our purpose is to analyze whether this model of dispute resolution is well-suited to malpractice cases.

Obtaining a firm understanding of the potential utility of this ADR method is important to the ongoing debate over alternatives available for improving how malpractice disputes are resolved. Mediation clearly has a number of potential advantages as an ADR strategy. As operated in North Carolina and elsewhere, court-ordered mediation is relatively inexpensive, at least from the court's perspective. The court's primary involvement is to order the parties to conduct the mediation session at their own expense. The mediator working with the parties schedules the mediation which usually occurs at one of the lawyer's offices. While not a cost-free program, court-ordered mediation places fewer demands on court administrative resources than other ADR options such as non-binding arbitration, which is often conducted at the public's expense at the courthouse. If mediation can be proven effective for malpractice claims, other courts could readily implement similar programs. For those courts already employing mediation-based alternatives, empirically valid information may suggest program enhancements.

Many of the issues addressed in this article apply equally to the study of any court-related ADR program. What is the impact of this ADR form on the time to resolution of the cases involved? How does the program affect the rate of trial? Does it change the likelihood that a plaintiff will obtain compensation? What does it cost? Are the litigants generally satisfied with the process?

Other questions focus more directly on issues of particular significance in the malpractice context. Is the process of mediation well suited to the dynamics of malpractice disputes? Should all malpractice cases be subjected to this procedure, or is it better suited to some types of malpractice cases, such as those in which the primary issue is the amount of damages to be paid? What specific skills do successful mediators in malpractice cases possess? What mediator characteristics are important to the parties? How are some of the special attributes of malpractice litigation—such as the reporting requirement of the National Practitioner's Data Bank—manifested and dealt with in malpractice mediations?

Part II explains the origins and procedures of the North Carolina mediation program. Part III describes the methodology of the study, focusing on the different data sources developed and the types of information collected. Part

IV then describes our results, and Part V explores a number of key policy issues relating to the use of mediation in the malpractice context.

II

THE NORTH CAROLINA MEDIATED SETTLEMENT CONFERENCE PROGRAM

In 1991, North Carolina became one of the first states in the country to adopt an extensive program of court-ordered mediation available for use in virtually all civil cases involving claims of \$10,000 or more.⁹ Based largely upon a similar program already in operation in Florida,¹⁰ the initiative permitted the courts in each of several pilot judicial districts to require the parties in any civil case to attend a "mediated settlement conference" ("MSC") conducted by a certified mediator. The program potentially applied to all superior court civil cases which, in North Carolina, included virtually all medical malpractice cases.¹¹ The purpose of the MSC program was to "determine whether a system of mediated settlement conferences may make the operation of the superior courts more efficient, less costly, and more satisfying to the litigants."¹²

As had been done with previous ADR efforts in North Carolina, the program was initiated on a pilot basis in a limited number of judicial districts.¹³ The original group of pilot judicial districts included eight districts comprising thirteen of the state's 100 counties. Based upon initial anecdotal reports of the program's success, the pilot phase was expanded as of July 1, 1994 to include four other judicial districts, including three large urban counties covering the cities of Charlotte, Raleigh, and Asheville. Based upon both anecdotal and empirical studies supporting the program, the North Carolina General Assembly authorized all judicial districts to utilize the MSC program as of January 1, 1996.¹⁴

Under both the statute and implementing rules, each judicial district

9. For general background on the North Carolina program, see Comment, *Good Faith Mediation: Improving Efficiency, Cost, and Satisfaction in North Carolina's Pre-trial Process*, 18 CAMPBELL L. REV. 281 (1996); Comment, *An End to Settlement on the Courthouse Steps? Mediated Settlement Conference in North Carolina Superior Courts*, 71 N.C. L. REV. 1857 (1993).

10. See FLA. STAT. ch. 44 (1995 & Supp. 1996).

11. Jurisdiction in civil matters is divided in North Carolina between the Superior Court and the District Courts. Generally speaking, the North Carolina District Courts have jurisdiction over claims involving up to \$10,000 as the amount in controversy. See N.C. GEN. STAT. § 7A-243 (1995). Court-based mediation was not applied to the District Courts because the state has long utilized an extensive court-ordered arbitration program in many judicial districts that applies predominately to the smaller stakes disputes found in the District Courts. For information on the North Carolina court-ordered arbitration program and its impact, see STEVENS H. CLARKE ET AL., COURT-ORDERED ARBITRATION IN NORTH CAROLINA: AN EVALUATION OF ITS EFFECTS (1989); George K. Walker, *Court-Ordered Arbitration Comes to North Carolina and the Nation*, 21 WAKE FOREST L. REV. 901 (1986).

12. 1991 N.C. Sess. Laws 207 (codified as N.C. GEN. STAT. § 7A-38 (1995)).

13. See *id.* A similar approach was taken with respect to the court-ordered arbitration program in North Carolina. See CLARKE, *supra* note 11.

14. N.C. GEN. STAT. § 7A-38.1(d) (1995). The empirical research was undertaken by Stevens H. Clarke at the Institute for Government at the University of North Carolina. See STEVENS H. CLARKE, ET AL., COURT-ORDERED CIVIL CASE MEDIATION IN NORTH CAROLINA: AN EVALUATION OF ITS EFFECTS (1996).

maintained significant discretion respecting the operation of the MSC program. The primary choice was whether to order any or all cases to mediation. Each judicial district retained the option to be selective and to send only some cases to mediation; alternatively, a district could send all of its cases without making any determination that each case was suitable or that the parties desired to participate.¹⁵ In fact, the large majority of districts involved in the program routinely ordered all civil cases, including malpractice cases, to mediation. Each district maintained the authority to act upon the parties' motion to exempt cases from mediation. Each judicial district also maintained significant discretion as to when to order a case to mediation. The following are key features of the MSC program.

A. Qualification of Mediators

The mediator is required to be a neutral person who acts "to encourage and facilitate a resolution" of the matter.¹⁶ The program anticipated that cases would usually be handled by a mediator who was certified by the State. In order to be certified, a person has to meet certain minimum eligibility requirements. Although certification for the MSC program initially was limited to experienced North Carolina lawyers, in 1994 the rules were amended to permit non-attorney mediators to be certified.¹⁷ In addition, an applicant has to complete a forty-hour training course relating to the mediation process.¹⁸ The training courses are conducted by private entities whose course of instruction is approved by the state's Administrative Office of the Courts. Other than having to observe two MSCs prior to certification, mediators are not required to have any particular level of experience in facilitating mediation sessions. No efforts are made to create areas of specialization among mediators; any certified mediator is available to be appointed to mediate any type of case. Interest in being certified as a mediator under the program has been high; there has never been a shortage of available mediators. Currently, more than 660 attorneys are certified as mediators.¹⁹ Additional training sessions are regularly offered and the list of certified mediators has continued to expand.

15. See N.C. R. IMPLEMENTING MEDIATED SETTLEMENT CONFERENCES IN SUPER. CT. ACTIONS Rule 1.

16. N.C. GEN. STAT. § 7A-38 (1995).

17. In order to be certified, a non-attorney has to have extensive experience in mediation as well as have completed the same training course required of attorneys. In addition, non-attorneys are required to take a short course dealing with basic court procedures. As a practical matter, very few non-attorney mediators have been selected by parties or appointed by courts; none of the mediators in the cases that we studied were non-attorney mediators.

18. N.C. R. IMPLEMENTING MEDIATED SETTLEMENT CONFERENCES IN SUPER. CT. ACTIONS Rule 9.

19. See NORTH CAROLINA ADMINISTRATIVE OFFICE OF THE COURTS, THE REPORT OF THE NORTH CAROLINA SUPREME COURT DISPUTE RESOLUTION COMMITTEE ON THE MEDIATED SETTLEMENT CONFERENCES PILOT PROGRAM (1995); REPORT OF THE DISPUTE RESOLUTION COMMISSION FOR FISCAL YEAR 1996-97, at 2.

B. Selection of Mediators

The initial set of rules provided that the court would make a preliminary appointment of a mediator at the same time that the case was ordered to mediation.²⁰ The parties had the right to override the selection by agreeing on another mediator. In order to encourage the parties to select their own mediator, this procedure was subsequently modified. Under the modified procedure, at the time the case is sent to mediation, the parties are given twenty-one days to agree upon their own mediator.²¹ If no one is selected, the court then appoints a certified mediator. The parties are given significant leeway in terms of their selection. They are not limited to certified mediators; virtually anyone can serve as a mediator if jointly agreed upon by the parties.²²

The courts provide some information about the available mediators, but, in general, the drafters of the program place significant reliance on the free market to operate effectively. Mediators regularly advertise, and if they are privately appointed, they may charge whatever rate the parties agree upon; fees for court-appointed mediators are capped at \$100 per hour (plus an additional \$100 for travel and preparation). In cases in which they are selected by the parties, most mediators currently charge between \$100 and \$175 per hour.

C. Timing of the Mediation

The rules do not prescribe a preferred timetable for when the MSC should be held. When cases are ordered to mediation varies somewhat from district to district as each court attempts to integrate mediation into ongoing case management programs. If it chooses, a district could order a case to mediation before expert witnesses are deposed or even designated by the parties. Another district might elect to order mediation only on the eve of trial after the completion of discovery.

D. Attendance Requirements

Under the mediation program, all parties and their attorneys are required to attend.²³ In addition, in contexts such as malpractice where insurance policies are commonly involved, the rules initially required the attendance of a representative of the doctor's insurance carrier with "full authority to settle the claim."²⁴ Given the ambiguity of the term "full authority to settle," the

20. See N.C. R. IMPLEMENTING MEDIATED SETTLEMENT CONFERENCES IN SUPER. CT. ACTIONS Rule 1.

21. See *id.* Rule 3.

22. See *id.* Almost all of the mediators identified in our study were certified mediators. One exception was a retired state court judge who had been active in arbitrating and mediating civil cases. With his reputation well established, he did not feel the need to complete the training requirement. He relied on party selection rather than court appointments.

23. Similar attendance requirements are common in court-ordered ADR, even if controversial. See *G. Heileman Brewing Co. v. Joseph Oat Corp.*, 871 F.2d 648 (7th Cir. 1989) (en banc).

24. N.C. R. IMPLEMENTING MEDIATED SETTLEMENT CONFERENCES IN SUPER. CT. ACTIONS Rule 4 (1991) (amended 1995).

requirement was recently modified. Sanctions were authorized for failure of a party to attend, but beyond attendance there is no explicit requirement of any “good faith” participation.²⁵ The purpose of the attendance requirements is to ensure that those with both personal and financial stakes in the case are physically present to hear the other side’s presentation and to react to the mediator’s questions and comments. Initially, the mediator was not given the authority to excuse physical attendance of the required parties; the court itself retained that authority. The rules were recently relaxed to permit the mediator, with the consent of the parties, to excuse the presence of any of the parties or the insurance representative.²⁶

E. Conduct of the Session

Unlike trials or other more formal ADR methods, the expectations about how the mediation session is to proceed are not explicitly set forth in the rules. The rules simply provide that the mediator is “in control” of the conference.²⁷ The mediator is authorized to work with the parties to structure the session. Typically, an opening joint session in which all parties are present is followed by a series of private caucuses in which the mediator meets with just one side or, occasionally, with just the party or the attorney. In fact, the only required element to the mediation process is the initial recitation by the mediator concerning the process of the mediation, the applicable confidentiality provisions, and the handling of the mediator’s fee.²⁸ The MSC continues until such time as an agreement is reached, the session is adjourned to a later date, or the mediator declares an impasse. There is no minimum or maximum length established in the rules.

III

METHODOLOGY

Our research was based upon four primary sources of data, each of which is described below. In combination, these sources provide a rich supply of information upon which to draw both to assess objectively how the court-ordered mediation process works as well as to describe with confidence its subjective dynamics.

A. Court Data

We attempted to collect data from court records in all malpractice cases ordered to mediation pursuant to the North Carolina MSC program from the beginning of the program in early 1992 through cases filed by December 31, 1995. This cut-off date served both to maximize the number of cases in our

25. *See id.* Rule 5.

26. *See id.* Rule 4.

27. *Id.* Rule 6.

28. *See id.* Rules 6, 7.

sample, as well as to avoid any confounding impact caused by the statewide expansion of the MSC program as of January 1, 1996. All counties involved in the pilot program (including the four additional judicial districts that were added to the pilot program as of July 1, 1994) were included.²⁹

Identification of cases created an initial obstacle. The state does not separately code malpractice cases in such a way as to permit ready identification. Fortunately, many of the individual districts separately tracked malpractice cases. Through the cooperation of the court's administrative personnel, we were able to obtain complete listings of malpractice cases in several of the larger counties. These listings facilitated our court data collection efforts as well as our efforts to observe a significant number of mediations. Given the lack of a state-wide comprehensive list, we are unable to state with certainty that all malpractice cases were in fact located. Efforts were made to identify additional cases through review of insurer records. This review largely confirmed the accuracy of our court-based identification.

With respect to mediation, all judicial districts that we studied with one exception routinely filed all orders and reports relating to the mediation.³⁰ Most court files contained the initial order to mediation, the form appointing the mediator, requests for extensions of the mediation deadline or exemption from the process, and the subsequent report of the mediator indicating the result of the mediation. The mediator's report also contained information on the location of the mediation, the length of time of the mediation, and the amount charged by the mediator, although in some cases, mediators did not provide all the information requested on the form. This information permitted us to collect data regarding when the case was ordered to mediation, whether the parties selected or the court appointed the mediator, the date of the mediation, the cost paid by the parties to the mediator, the number of persons attending the mediation, the length of the session, and the result of the mediation. Court files also permitted us to collect data on other important procedural events such as the filing of discovery motions, discovery schedules, motions for summary judgment, and trial results (if any).³¹ To date, we have collected court data on a total of 318 cases that were ordered to mediation, an estimated eighty-five percent of all malpractice cases ordered to mediation during the period of time covered.³²

29. The counties involved from the outset of the program (with the name of any major city included in parentheses) were Bladen, Brunswick, Chatham, Columbus, Cumberland (Fayetteville), Forsyth (Winston-Salem), Guilford (Greensboro), Halifax, Haywood, Jackson, Orange (Chapel Hill), Stokes, and Surry. The four counties which were added to the pilot program as of July 1, 1994 were Buncombe (Asheville), Mecklenburg (Charlotte), Wake (Raleigh), and Wayne.

30. In Cumberland County, the mediation orders and reports were not filed. Nonetheless, we identified nine cases through other means in which we were able to collect the necessary data and therefore included them in the study. Other cases were not included as a result of our inability to determine from court records whether a mediation was ordered or the result of the mediation.

31. A similar methodology was used in a prior study of North Carolina malpractice cases. See Thomas B. Metzloff, *Resolving Malpractice Disputes: Imaging the Jury's Shadow*, 54 LAW & CONTEMP. PROBS. 43 (Winter 1991).

32. This estimate is based upon information from a prior study of malpractice cases during the late

B. Direct Observations of Malpractice Mediations

While review of court files was sufficient to obtain objective information relating to several aspects of the mediation program, it did not provide any insight into the dynamics of the mediation process. Mediators are not required to submit a narrative detailing the issues raised in the mediation or the strategies used to attempt to overcome obstacles to settlement. In order to better understand these dynamics, we observed a significant number of malpractice mediations. Determining when the MSC sessions were being held was not a simple task. While the courts ordered the parties to conduct the mediation, the court did not schedule the date of the mediation. Accordingly, after obtaining the names of cases ordered to mediation either from the courts or from malpractice insurers or other attorneys, we called the attorneys, claims adjuster, or the mediator involved in the case to determine the date and request permission to attend.³³ In only one case were we refused permission to attend.

To date, we have observed a total of forty-two mediations, one of the largest number of actual observations in any study of court-ordered mediation.³⁴ Attending a mediation was usually a day-long commitment given that they typically last at least four hours and are held throughout the state. In each observation, the observer followed the mediator, attending both the joint sessions and the private caucuses taking notes on what transpired. The observer was permitted to attend all parts of the mediation in all but one case. After attending the mediation, each observer wrote a lengthy narrative description of the mediation and coded a detailed form relating to key issues, including whether certain topics were discussed, what techniques were used, and the level of the parties' participation.

C. Insurance Reviews

In order to obtain a better understanding of how the participants viewed the mediation process, we also attempted to review closed claims files from

1980s. *See id.*

33. As a result of the methods by which we had to identify possible observations, the cases we observed were not a random sample of the cases actually mediated. We did over-sample, for example, mediations conducted by one malpractice insurer who routinely sent us information on upcoming mediations. Nonetheless, we obtained a wide range of exposure to different mediators attending mediation sessions throughout the state. We observed twenty different mediators, including all of the mediators in the study who mediated five or more malpractice cases. We observed mediations from eleven of the seventeen counties involved in the program. The settlement rate in the cases we observed was comparable to the overall population. Accordingly, we are not aware of any bias resulting from the subset of observed cases.

34. In addition, we observed six other cases that were voluntarily mediated (as opposed to court-ordered) from counties not authorized to mandate mediation. The primary purpose of observing these mediations was to familiarize ourselves with any possible differences that might occur. We have not included these voluntary mediations in our data set because of the possibility that such cases involved different dynamics, such as the willingness of both sides to explore settlement. In fact, all but one of the voluntary mediations we observed resulted in an agreement at the mediation, a much higher percentage than observed in the larger universe of court-ordered mediations.

insurers and health care providers who were responsible for defending malpractice claims. Insurer files are a particularly reliable source of information. Malpractice insurers have a contractual responsibility to defend such cases and, as repeat players in the process, it is in their best interest to gather all relevant information and make an objective assessment of its significance. Under the MSC rules, an insurance representative “with authority” was required to be present. As a result, the insurance files provided a detailed accounting of how the insurers prepared for the mediation sessions and provided insights on the impact of the sessions on the subsequent resolution of the case. The files thus provide information on the critical question whether a settlement subsequent to the mediation was in fact the direct result of the mediation or a function of independent developments in the case.

By reviewing the insurance file, we also were able to confirm objective information relating to the resolution of the case. For example, court files often are resolved either by a dismissal with prejudice or a dismissal without prejudice. A dismissal with prejudice precludes the plaintiff from refileing the claim. A dismissal without prejudice leaves open the possibility that the claim will be refiled within twelve months.³⁵ To some extent, the former dispositions are ambiguous. Usually, if the plaintiff is paid money in settlement, the defendant will insist upon the filing of a dismissal with prejudice. Nonetheless, not all dismissals with prejudice indicate cases in which a settlement was paid. On occasion, a plaintiff will agree to a dismissal with prejudice in return for the defendant’s agreement not to seek sanctions or court costs. It is vitally important to distinguish between cases in which plaintiffs received payments and cases that were dropped without payment. Insurance reviews provide definitive information on whether there was in fact a settlement and also permit a determination of the amount paid in settlement. To date, we have been able to review files in forty-seven cases that were actually mediated. These do not represent a random sample, as not all insurers permitted access, nor do some insurers maintain sufficient records to provide valuable information.

D. Surveys

In order to assess several pertinent issues, surveys were prepared and sent to the participants in the mediations. The primary surveys reported on in this article were sent to the attorneys and mediators who had participated in one or more malpractice mediations. Both of these surveys focused on the participant’s views on a number of key issues, such as whether courts should routinely refer all malpractice cases to mediation.

Our response rate was quite high. Of 103 defense lawyers surveyed, a total of seventy-two responded (seventy percent). Of 145 plaintiffs’ lawyers surveyed, a total of forty-five responded (thirty-one percent). Our return rate

35. See N.C. R. Civ. P. 41(a).

among “repeat” players—attorneys who had been involved in five or more mediations—was higher; we obtained responses from at least one of the attorneys in more than eighty-five percent of cases that actually went to mediation. We also surveyed all seventy-eight mediators who had conducted any malpractice mediations, and have received thirty-two responses to date (forty percent). Our response rate among the more experienced mediators was again higher, in part because we conducted telephone follow-up interviews with those mediators who were more active in the malpractice field.

IV

ASSESSING THE MEDIATION PROCESS

Before commenting on our results, it is useful to provide a short description of what ideally a system of court-ordered mediation could accomplish. During the discussions on the merits of establishing such a program, supporters of court-ordered mediation often made a variety of claims about how the process might work. The central claim was that court-ordered mediation could resolve a high percentage of cases either at the MSC itself or in the period immediately following the session as the parties continued fruitful discussions begun at the session. While no particular percentage was established as a benchmark, anecdotal reports of settlement rates generally for all types of cases approaching eighty percent or higher were reported as obtainable based upon experiences in Florida. Mediation sessions could be conducted earlier in the litigation, potentially offering the parties significant cost savings over traditional settlements at the courthouse steps. MSCs were also touted as a way to involve the parties directly in the decisionmaking process as the mediators explored nonmonetary solutions in the creative environment of mediation. From the court’s vantage point, mediation promised the early resolution of a large percentage of cases so that attention could be better spent on those truly intractable cases that could not be resolved at mediation. At least in the malpractice context, were these potential benefits realized?

How does a typical court-ordered mediation proceed in a malpractice case? The following description of typical formats and patterns of malpractice mediations is based primarily upon our direct observation of forty-two mediations, together with descriptive information gained from our review of court records in 202 malpractice cases in which mediations were held.

A. Number and Length of Sessions

As noted above, the rules do not prescribe the location, length, or number of sessions to be held. One possibility would be that in complex cases such as malpractice, multiple sessions would be expected because the parties would grapple with a series of issues and then adjourn to obtain additional facts or to reflect upon the arguments made by the opposition. This dynamic did not occur regularly. With few exceptions, court-ordered mediations were one-shot

affairs: ninety-four percent of the mediations involved a single session. The parties conducted more than one session in only eight of 143 mediated cases in which the information is available (six percent). More than two sessions were held in only one case. Whatever magic could be accomplished in the mediation had to be worked at the initial session.

One reason why multiple sessions were not more frequent was the difficulty involved in convening the required parties. On average, malpractice mediations involved a total of seven different participants. The largest mediation in our study involved twenty-three participants. Numerous mediators and attorneys remarked to us how difficult it was to schedule the mediations; the thought of reconvening was, absent compelling reasons, no doubt daunting. A more basic reason might be the fact that the parties met with one another in the first place only because they were ordered to do so. For all practical purposes, once the required session was held, the parties had little motivation to go to the trouble of scheduling an additional session. This is not to say that the negotiations necessarily ended; rather, the norm was for follow-up discussions, if any, to occur without reconvening the mediation.

The length of the sessions varied significantly. As set forth in Table 1 below, sessions ran from a few minutes to all day affairs. Based upon 162 mediated cases in which information on length was available, the average length was 3.7 hours; the median length was 3.3 hours, indicating a large number of relatively brief sessions. Successful mediations typically took longer than average as the parties worked toward resolution. Indeed, the length of the session was largely determined by the defendant's willingness to continue the session by discussing further existing settlement offers. Another factor influencing the length of the session was the number of parties involved. In more complex, multi-party disputes (for example, a dispute involving both a private physician and a hospital), the mediations were longer, reflecting the obvious need for each party to describe the issues relevant to them and the need for more complex "shuttle diplomacy" as the mediator moved between the parties.

TABLE 1
LENGTH OF MEDIATIONS IN MALPRACTICE CASES
(N = 162)

| Total Mediation Time | # Of Cases | Percent |
|------------------------------|------------|---------|
| 0.5 Hours To 1 Hour | 9 | 5.6% |
| 1.1 Hours To 2 Hours | 26 | 16.0% |
| More Than 2 Hours To 3 Hours | 44 | 27.2% |
| More Than 3 Hours To 4 Hours | 31 | 19.1% |
| More Than 4 Hours To 5 Hours | 21 | 13.0% |
| More Than 5 Hours To 6 Hours | 13 | 8.0% |
| More Than 6 Hours To 7 Hours | 9 | 5.6% |
| More Than 7 Hours | 9 | 5.6% |

MEAN LENGTH: 3.7 HOURS

MEDIAN LENGTH: 3.3 HOURS

NOTE: Time is expressed to the nearest .1 hour. If multiple mediations were held, the total time involved in all mediations is reported. Only cases for which the information on length of the mediation is known are included.

Mediator style also affected the session's length. Some mediators are more willing to declare an impasse than others whose style is to continue to seek progress toward settlement even if in rather small steps. Many of the shorter sessions were cases in which the defendants were adamant about not offering a settlement, the mediator accepted the position, and quickly declared an impasse.

B. The Structure of the Mediation Session

Unlike trials or more formal ADR methods, the expectations of what issues are to be presented in a mediation are not explicitly set forth in the rules. The mediator is authorized to structure the session as he or she deems best, typically combining joint sessions with private caucuses.

Despite the potential for creative structuring, however, mediations tend to follow a rather set pattern. The opening session typically begins with the mediator giving the parties a pep talk of sorts. During this opening soliloquy, the mediator often invokes the perceived power of mediation, urging the parties to listen carefully to one another. The parties are often told that this session constitutes their "best chance to settle" the matter without enduring the rigors of trial. Plaintiff's counsel speaks next making an opening statement. After the defense responds, the mediation then breaks into a series of private caucuses where the mediator meets separately with the different parties and their attorneys, again usually beginning with the plaintiff. It is often the case that the parties then remain separated for the remainder of the session.

The length of the opening session depends primarily on how the plaintiff's attorney chooses to approach the mediation. Some opening sessions are quite short as the parties prefer to move almost immediately into the private sessions. Other plaintiffs' attorneys treat the opening session in a fashion similar to that of an opening statement at trial. They use the opportunity to present a detailed overview of their case, sometimes complete with exhibits or summaries of the alleged negligence of the physician. This difference in approach is reflected in the wide variation in time spent in the initial opening statement. Observed times ranged from a few cases with an opening session of only fifteen minutes, to several cases in which the opening session exceeded two hours. Even the most lengthy of openings seldom provided the parties with new information. Rather, the purpose of lengthy openings was either to educate the mediator about the merits of the case or to demonstrate to the opposing party the ability of the attorney to present the salient facts.

Following the opening statement, the parties typically break into private sessions during which the mediator shuttles back and forth between the groups of parties. The typical pattern is simply to have the mediator go back and forth between the opposing parties. In cases with multiple defendants represented by different attorneys, typically each defendant group is treated separately. On occasion, where there are common interests between the defendant groups, the mediator meets with the defendants jointly.

One of the potential benefits of mediation is the opportunity for the mediator to work directly with the parties to explore settlement options. One way to accomplish this goal would be for the mediator to meet with the parties in the absence of their attorneys. In fact, this dynamic rarely occurred, perhaps because the mediators were themselves attorneys and uncomfortable with communicating with a party without his or her counsel present. A mediator met with the parties without their attorneys present in only one of the forty-two observed cases. Instead of creating a situation in which the parties could directly confront each other, the mediators almost unanimously opted for separate meetings in order, apparently, to maintain greater control over the exchange of information, ideas, and emotions.

Separate meetings were more common between the mediator and the lawyers involved. In slightly more than one-third of the observed sessions, the mediator had a separate meeting with the plaintiff's attorney without the plaintiff present. Often the purpose of a lawyer-only conversation was to discuss specific problems that the lawyer was having with his or her client (such as where the plaintiff might not agree with the attorney's analysis of what figure would constitute a fair settlement), or to discuss a particular problem relating to the client (such as possible contributory negligence or issues relating to damages such as the plaintiff's life expectancy that were perceived as difficult to discuss in the plaintiff's presence). Mediators met less frequently with just the defendant's attorneys; in only nineteen percent of the observed cases was this dynamic noted. The purpose here was usually to see if the defense attorney believed it would be possible to obtain additional settlement

funds from the insurance company or else to discuss possible allocation questions among different defendants. In sixteen percent of the cases, the mediator had a separate meeting with all the attorneys without any clients or insurers present. This typically happened toward the end of the litigation to discuss a particular problem relating to one of the parties or to clarify plans for future negotiations.

C. Mediator Style

What does the mediator do to pursue settlement? This is to some extent a matter of style. While a full exploration of the mediator approaches to common problems is beyond the scope of this article, several general patterns emerged. A few mediators assumed a commanding presence in the mediation, offering opinions about how a party's case would likely be received by a jury should the matter be tried. Other mediators avoided any direct comment on the merits, but were still directly involved with the parties in analyzing the merits of the case or formulating offers. Fully half of the mediators we observed at some point in the session expressed a specific opinion about the amount of a party's offer or how the offer should be presented. This assertive mediator personality occasionally went so far as the mediator offering an opinion as to what a fair settlement value should be. In twelve percent of the cases we observed, the mediator offered an opinion about the merits of the case. Such assertive behavior typically did not occur until the lawyers themselves had discussed the value of the case at some length. In fact, attorneys on occasion asked the mediator to provide an evaluation. In one case, the defense counsel repeatedly asked the mediator to opine as to a "fair settlement" in the case based upon his past experience in malpractice cases. The offering of such an opinion is problematic; the mediation process is premised in large part upon the mediator working with both parties to explore the strengths and weaknesses of the case. Indeed, a recently enacted ethics code for mediators strictly prohibits them from expressing an opinion on the merits of a case.³⁶

More commonly, however, the mediators adopted a more passive, exploratory role in the mediation. Indeed, in some cases in which the parties are clearly intent on settling, the mediator's role is entirely passive and consists of simply shuttling the respective offers and demands between the parties. The specific approach taken by mediators is a function of a number of variables

36. See STANDARDS OF PROFESSIONAL CONDUCT ADOPTED BY N.C. DISPUTE RESOLUTION COMM'N. This rule is more restrictive than the corresponding ethics rule in Florida, which prohibits a mediator from offering a personal or professional opinion "as to how the court in which the case has been filed will resolve the dispute." FLA. R. CERT. & CT-APPTD. MEDIATORS 10.070; see Robert B. Moberly, *Ethical Standards for Court-Appointed Mediators and Florida's Mandatory Mediation Experiment*, 21 FLA. ST. U. L. REV. 701 (1994). For further discussion of the mediator's ethical duties relating to offering evaluations on the merits of the case, see James J. Alfini, *Evaluative Versus Facilitative Mediation: A Discussion*, 24 FLA. ST. U. L. REV. 919, 921-26 (1997); Robert B. Moberly, *Mediator Gag Rules: Is it Ethical for Mediators to Evaluate or Advise?*, 38 S. TEX. L. REV. 669 (1997).

including the issues in dispute, the parties' approach to the dispute, the mediator's style, and specific factual issues raised in the case. Nonetheless, mediators commonly use several techniques. Table 2 lists these techniques and how frequently we observed them.

TABLE 2
TECHNIQUES COMMONLY USED BY MEDIATORS IN MALPRACTICE CASES
(N = 40)

| Technique Used By Mediator | # Of Cases | Percent |
|---|------------|---------|
| Explored Risk Of Litigation With Plaintiff | 18 | 45% |
| Explained Strength Of Other Side's Case | 17 | 43% |
| Explored Likely Jury Verdicts | 16 | 40% |
| Discussed How A Jury Might Respond To Facts | 14 | 35% |
| Explored Risk Of Litigation With Defendant | 13 | 33% |
| Advised Party How To Present/Structure Offer/Demand | 11 | 28% |
| Explored "Worst Case Scenario" | 8 | 20% |
| Educated Party About Associated Legal Requirements | 7 | 18% |
| Discussed Likely Emotional Impact Of Trial | 6 | 15% |
| Discussed Expense Of Litigation With Plaintiff | 3 | 8% |
| Discussed Expense Of Litigation With Defendant | 3 | 8% |
| Discussed Potential Of Adverse Publicity | 2 | 5% |
| Discussed Loss Of Income Associated With Trial | 2 | 5% |
| Discussed Possibility Of Delay (Appeals, Etc.) | 1 | 3% |

Mediators most often explored likely jury verdicts with both parties. It was a common litany at some point early in the respective private sessions for a mediator to ask a question such as "If this case were tried ten times, what would happen?" A similar technique, couched in terms designed to highlight the risks of litigation, was to ask the parties to identify their "worst case scenario." These types of questions provided an easy entree for the mediator to describe (or at times overstate) the inherent uncertainty associated with jury trials. The risk of trial was especially emphasized with the plaintiffs; mediators often discussed the vagaries of the jury process and the difficulty malpractice plaintiffs have in prevailing, sometimes even with good claims. Similar discussions were held with defendants, but with less frequency. This disparity may well be a function of the mediator's perception that there was a greater need to deflate the opinions of the plaintiff than to raise the fears of the defendant physicians. In part, this perception is supported by the fact that virtually all malpractice defendants are represented by attorneys with extensive experience in malpractice litigation. Plaintiffs are far more often represented by attorneys with limited medical malpractice experience.

The list of mediator techniques indicates the difficulties that mediators

often have in developing a strategy for promoting settlement with physicians. While some mediators attempted to discuss the costs of litigation with defendants, in fact, this was an unproductive tactic; physician litigation expenses are covered by malpractice insurance. Some mediators attempted to point out the adverse publicity associated with a trial or discuss the loss of income, but as noted in Table 2 these were not common tactics. The mediator function of "educating a party" was usually directed at plaintiffs, perhaps because the mediator believed that the defense counsel and insurer had already realistically informed the physician of likely outcomes. The mediator's focus on plaintiffs may also reflect the fact that the decision concerning how much money the doctor would pay in settlement (as opposed to whether to offer any money in the first place) rested with the *insurer*, not the physician. Mediators seemed to have little to directly discuss with insurers who are experienced repeat players.³⁷

D. Involvement of Parties

A critically important issue is the extent to which the parties themselves are involved in the mediation process. One of the promised benefits of a mediation-based approach is the opportunity for the parties to participate directly and raise concerns of personal importance regardless of their legal significance.

1. *Involvement of Plaintiffs.* The plaintiffs (or a representative such as a parent in cases in which the injured party was unable to attend due to the seriousness of the alleged injury) were routinely present in the mediations. Indeed, in all cases we observed, the plaintiff was present. In cases in which the patient had died or was severely injured, the plaintiff is often the patient's parent. Presence, however, did not equate with active participation. Indeed, few plaintiffs were involved at all during the opening joint sessions, which were conducted almost exclusively by the attorneys. In only one of the forty-two cases that we observed did the plaintiff substantially participate in the joint session.

Plaintiffs were more regularly involved during the private sessions, although perhaps not to the extent that one might expect in a mediation-based process. In about one-third of the cases observed, the plaintiffs had substantial involvement in the private sessions. In another fifty percent of the cases, they had minor involvement (such as responding to a question by the mediator or raising one or two concerns), while in about fifteen percent, the plaintiffs did not participate at all even in the private sessions.

How significant was the involvement by plaintiffs in the observed mediations? Ultimately, this is not an easily answered question. Simply on the

37. See Marc Galanter, *Why the "Haves" Come Out Ahead: Speculations on the Limits of Legal Change*, 9 L. & SOC'Y REV. 95 (1974) (discussing the concept of "repeat players" in litigation).

basis of direct participation, plaintiff involvement was limited and probably less extensive than predicted by supporters of the program. Based upon our observations, in only about one in seven mediations was the plaintiff directly and substantially involved in extensive “venting” activities such as directly expressing anger at the health care providers. But one cannot dismiss the potential benefits to the plaintiff personally from other events occurring during the mediation. Even for plaintiffs who do not participate verbally, there is a potentially valuable educational function associated with mediation. Plaintiffs are present and listening to the presentations of the defendants without having the information filtered by their attorney. They also can listen to the types of questions and concerns raised by the mediator during the joint as well as private sessions. Also, there is ample time to discuss the case privately with their own attorney while the mediator is meeting with the defendant and their representatives. As we were not privy to such private discussions, we are not aware of what typically occurs, but it is clear that there is the possibility for significant and valuable discussions with plaintiffs and their own counsel.³⁸ Also, in the joint sessions, considerable “vicarious” venting of plaintiff emotions is possible in presentations made by the plaintiff’s attorney. Some plaintiffs may be more comfortable with listening as their attorney describes the seriousness of their injuries or the alleged incompetence of the physicians who treated them. We certainly observed cases in which the plaintiff’s attorneys, especially during private sessions, spoke at great length about the difficulties the plaintiff was experiencing or expressed the plaintiff’s anger as to how they were treated. It is, of course, not possible to determine whether a lawyer’s description is a function of a plaintiff’s felt need to express particular concerns or the lawyer’s own sense of how best to present the case.

2. *Involvement of Defendant Doctors.* Our results with respect to the involvement of doctors in the mediation sessions revealed a number of interesting differences. The most significant difference is that the defendant physician was sometimes not even present at the mediation, despite the fact that the rules clearly anticipated and arguably required the presence of all parties. Physicians were not present in eight of the thirty-six MSCs that we observed in which a physician was named as a defendant.³⁹ The absence of the defendant was not impermissible per se, as the rules permit absence if agreed to by the attorneys for all parties with the concurrence of the mediator.⁴⁰ We are aware of at least ten other cases in addition to the cases we observed in which the court records report the physician as absent. Because mediators only infrequently completed the part of the form that notes absences, we cannot

38. We intend as one of the next steps in this research to interview individual plaintiffs or plaintiff representatives (such as parents) who attended the mediations.

39. In four cases, there was no physician defendant as the claim was solely against a hospital. In two other cases, the physician defendant had died.

40. See N.C.R. IMPLEMENTING MEDIATED SETTLEMENT CONFERENCES IN SUPER. CT. ACTIONS Rule 4.

report a firm percentage of physician absence with confidence nor detail any trend in attendance patterns. It is clear, however, that physicians were absent with some degree of frequency.

The reasons given for the doctor's absence vary. Sometimes, it was simply a question of physical proximity; the doctor, perhaps an intern at the time of the alleged malpractice, has moved to another state and it did not seem worth the trouble to travel back to North Carolina for the conference. Other stated reasons included the doctor's busy schedule or travel plans. In other cases, the absence resulted from a judgment call by the insurer and defense attorney that the presence of the doctor would be counter-productive, where, for example, the doctor was sufficiently angry about the suit that it would not be conducive to promoting settlement to have the doctor present or that the plaintiff bore such ill will toward the physician as to make the doctor's presence an obstacle to resolution. Absence of a party to some extent limits the mediator's ability to conduct the MSC.

In the cases in which the physician was present, the physicians' level of involvement varied. As a general matter, doctors were less directly involved in the mediation than were plaintiffs. During the joint sessions, physicians, like the plaintiffs themselves, were largely passive. Of twenty-eight observed cases in which a defendant physician was present, in fourteen the doctor did not participate at all in the joint session. Of those that did participate, only three participated substantially in the joint session.

In the private sessions, the physicians were predictably more active. In seven of twenty-two cases, they participated substantially. In some of these cases, such participation involved the physician explaining why he or she was not negligent, or discussing items such as the impact of the reporting requirement relating to the National Practitioner's Data Bank on their willingness to settle. In another twelve cases, the physicians participated, but only to a minor extent. In the remaining three cases, the physicians did not participate at all in the private sessions.

E. Mediator Preparation

An interesting issue is the extent to which mediators prepare for the sessions. Given the often complex factual background involved in such cases, one might expect that parties would routinely want the mediators to spend a few hours familiarizing themselves with the basic facts and allegations in the case. An opposing view is that since the mediator is not being called upon to make a decision or express an opinion on the merits, such preparation would not be productive. We found that only in a few cases did the parties provide the mediator with memoranda summarizing the facts of the case or key documents in advance of the session. In more than eighty-five percent of the observed cases in which we were able to ascertain if such materials were sent, the mediators performed no advance preparation. Indeed, some mediators we observed made a special point of remarking that they intentionally did not want

any advance information, instead preferring that each side make an initial presentation to explain their position for the benefit of both the mediator and the opposing party. This fact is striking in that, without such preparation, the mediator's ability to comment directly on the merits of the case—even to the extent of pointing out possible strengths or weaknesses without expressing an opinion directly on the merits—is limited. The working assumption of most mediators is that their specific knowledge about the facts of the case and its merits is not relevant to the task at hand. This may reflect the fact that few mediators have any substantive medical training.⁴¹

F. Cost Information

Any assessment of the merits of the mediation process requires some measure of its cost. Proponents of the program praise its cost effectiveness. Certainly, from the court's perspective, the MSC program is relatively inexpensive, consisting primarily of the administrative costs associated with sending out the various notices and tracking results. But what is a fair measure of the entire cost to the parties?

The most obvious direct expense is the parties' payment to the mediator. This is largely a function of the length of the mediation, since most mediators charge an hourly rate for conducting the mediations. Based upon the mediator reports filed with the courts in the cases we analyzed, the average payment to the mediator was \$520 per case, which is approximately \$100 per hour times the average length of the mediation plus a \$100 preparation charge (to cover travel time and preparation charges) as permitted by the rules. The average amount has been increasing marginally over the years, which primarily reflects the fact that mediators selected by the parties can establish their own rates, and the rates for the mediators most in demand (who are often asked to mediate malpractice disputes) has been increasing.

There are other costs. The defendant's insurer must also pay for the defense lawyer's time in scheduling, preparing for, and attending the mediation. A fair assessment of the costs must also include some amount attributable to the time of the insurance claims adjuster, who must also prepare and attend the session, and any defendant physician who attends. Similar types of expenses are incurred on the plaintiff side, even if the plaintiff does not actually pay his or her attorney an hourly fee.

What is a fair valuation of these expenses? It is easier to determine the costs from the defense perspective since defense attorneys typically bill by the hour. In order to estimate these costs, we reviewed defense attorney billing records in sixteen cases in which a mediation was held to determine the amount of time spent preparing for and attending the mediation. That analysis indicated that defense attorneys spent an average of 10.1 hours in connection with the mediation. The average is only slightly more than double the amount

41. We are aware of only one certified mediator who has a degree in both law and medicine.

of hours actually spent in the mediation itself. This figure indicates that the preparation is modest, consisting of one or two meetings or telephone conversations with the insurance representative and the physician to plan strategy, and any travel required to attend the mediation. The average amount charged by the defense attorneys for MSC-related activities was \$1,110. Our review of insurer closed claims files indicated that the claims adjuster spent approximately the same amount of time or more preparing for the session as did the defense counsel, in part because some of the preparation related to conferring with defense counsel. Assuming an internal rate of \$50 per hour for these salaried employees, the adjuster's time represents an additional cost of about \$500. Similarly, for the defendant's physician, assuming \$100 per hour (a conservative assessment) for the average time of the mediation plus an hour travel time, one can assume approximately \$650 in additional costs. Summing these three amounts, each separately represented defendant incurs approximately \$2,260 in added expense for the mediation in addition to the direct charge for the mediator's services. In general, the amount of time expended by plaintiff's counsel is comparable, and indeed, may even exceed that of the defense, as plaintiffs' attorneys often prepare a more extended presentation of their theory of the case. Thus, for a simple case with a single defendant, an average total charge for all costs fairly attributable to the process (assuming the attendance of all required parties) averages about \$5,000.

In the context of malpractice litigation, how does one assess this level of expense? Is it a mere "drop in the bucket," or is it in fact a major expense that requires some justification? Although this figure has probably increased in the past several years, a study of malpractice cases in North Carolina from the late 1980s indicated that the average total defense costs paid in a typical trial case was about \$35,000.⁴² Compared with this benchmark, forcing the parties to mediate in an effort to avoid trial constitutes an "extra" expenditure on the magnitude of between five and ten percent. While reasonable minds can differ on how to interpret the magnitude of this marginal expense, our own view is that it is neither a draconian assessment nor an insignificant amount. If it were to be shown that mediation was typically unproductive, courts should not lightly force the parties to bear this expense without some indication of substantial benefit in most cases.

V

COURT-ORDERED MEDIATION AS A CASE MANAGEMENT TOOL

Proponents of mediation hoped it would provide an early intervention to help focus settlement discussions, and otherwise assist in the prompt resolution of a significant percentage of referred cases. This section reports our findings on whether this hope is being realized.

42. See Metzloff, *supra* note 31, at 55.

A. The Timing of the Mediation

An essential element to achieving the full measure of mediation's promise is conducting the mediations at a relatively early stage in the litigation process. As noted above, the North Carolina rules did not explicitly establish any timing target. The rules provide ambiguous guidance: on the one hand, one of the rules notes that the order may be issued "as soon as practicable after the time for filing of answers has expired,"⁴³ while, on the other hand, a different rule notes that the conference itself should be held "after an opportunity to conduct discovery."⁴⁴ The hope was to conduct the sessions well before the traditional "court house step" settlements on the eve of trial. The earlier these sessions could be meaningfully held, the more potential savings to the litigants and courts. Local practices among the various judicial districts varies.

TABLE 3
TIMING OF MEDIATION RELATIVE TO FILING DATE
(N= 164)

| Filing To Mediation | # Of Cases | Percentage |
|--------------------------------|------------|------------|
| Less Than Six Months | 5 | 3.0% |
| Six To Nine Months | 36 | 22.0% |
| Nine Months To One Year | 50 | 30.5% |
| One Year To Fifteen Months | 28 | 17.1% |
| Fifteen To Eighteen Months | 16 | 9.8% |
| Eighteen Months To Two Years | 13 | 7.9% |
| More Than 2 Years After Filing | 16 | 9.8% |

MEDIAN: 353 DAYS

MEAN: 431 DAYS

At least in the malpractice context, it does not appear that this benefit has been fully realized. Indeed, the trend is toward greater delay in conducting the mediation sessions. Table 3 indicates that, on average, the mediations were not held until more than a year after the case was filed.⁴⁵

43. N.C. R. IMPLEMENTING MEDIATED SETTLEMENT CONFERENCES IN SUPER. CT. ACTIONS Rule 1.

44. *Id.* Rule 3.

45. This figure may be somewhat inflated due to the skewing effect associated with the start-up of the MSC program in a particular judicial district. Each district had the authority to order already filed cases to mediation, but some districts opted not to apply it retroactively and instead used it only for newly filed cases. In those districts in which it was applied retroactively, it was often used for malpractice cases that had been pending for two years or more. Thus, some of the late mediations relative to the filing date are a function of administrative discretion and do not indicate any inherent delay in the operation of the program. By the same token, Table 3 reports only on cases in which the ordered mediation has in fact been held. There remain eighteen pending cases ordered to mediation in which the required mediation has not yet been conducted, many of which were ordered to mediation

Another means of evaluating how promptly mediations are held is to compare the date of mediation with the date upon which mediation was ordered by the court. Table 4 shows that on average, the mediation was held five months after the initial court order. This indicates that delays are in fact common. Courts typically establish a completion date for the mediation approximately three to four months after the date of the order. As shown in Table 4, however, slightly less than half of the malpractice mediations are completed within this expected time frame. Indeed, about ten percent of the cases are not mediated until more than ten months after the MSC order. The presence of such a large cohort of cases that are not mediated promptly after the court order reveals that the courts are fairly tolerant of the parties' requests for extensions of MSC deadlines.

TABLE 4
TIMING OF MEDIATION RELATIVE TO DATE ORDERED TO MEDIATION
(N= 159)

| Period Of Time From Date Of Msc Order To Date Mediation Held | # Of Cases | Percent |
|--|------------|---------|
| Within 60 Days | 16 | 10.1% |
| 61 To 120 Days | 56 | 35.2% |
| 121 To 180 Days | 42 | 26.4% |
| 181 To 240 Days | 13 | 8.2% |
| 241 Days To 300 Days | 14 | 8.8% |
| 301 Days To 365 Days | 10 | 6.3% |
| More Than 1 Year After MSC Order | 8 | 5.0% |

MEAN: 161 DAYS

MEDIAN: 134 DAYS

More disturbing is the trend toward greater delay in promptly completing the MSC revealed by the court data. This trend is clearly shown in Table 5, which denotes the average number of days from the date of the court order sending the case to mediation, to the date of the actual mediation separated by year of filing. For cases filed in 1991 and 1992 (which typically were the first wave of cases ordered to mediation at the initiation of the program), the mediations were held on average within about three months of the court order. Requests for extensions were only infrequently made; less than one in five cases generated an extension request. Over time, extension requests have risen

well over a year ago. Once mediated, these cases would further increase the mean and median reported in Table 3.

dramatically, and, with them, significant delays in conducting the mediations. In the cases we reviewed, extension requests were routinely granted by courts; court data reveals only a handful of extension requests that were refused. For cases filed in 1995 (the last set of cases in our study), extension requests were commonplace, with more than forty-five percent of the cases receiving extensions.⁴⁶ Indeed, this percentage is understated, in that in one district, mediations are scheduled to occur within a month or two of the trial after the close of discovery; extension requests in that judicial district are infrequent because of the upcoming trial. Overall, for 1995 cases, the average mediation was not held until 196 days after the court order was filed, a seventy-three percent increase over the average figure for 1991 and 1992 cases.⁴⁷ This trend represents a clear manifestation of how, over time, attorneys and parties can undercut the initial program goals of a court-ordered ADR program.⁴⁸ At least for malpractice, the hope that court-ordered mediation can serve as an early ADR intervention to promote settlement has not been realized. In the large majority of cases, the court-ordered mediation is being held only after the bulk of discovery has been completed, often after the parties have obtained extensions on the court-imposed deadline for completing the mediation.

46. The most common reason for seeking an extension is the perceived need by one or more parties to conduct additional discovery, particularly depositions of the plaintiff's expert witnesses. Other reasons include scheduling problems with the lawyer's trial schedule. In some cases, extensions were requested because the mediator was too busy to conduct the session by the court-designated deadline. While there are well over 600 certified mediators, there is a much smaller cohort of mediators who are regularly sought after for malpractice cases. Twelve mediators handled more than 60% of the mediations in our study.

47. In fact, the extent of the growing delay is probably understated in Table 5 because it does not include those cases ordered to mediation that at the current time have not yet been mediated. Many of these cases were ordered to mediation well over a year ago and the mediation still has not occurred.

48. See Carrie Menkel-Meadow, *Pursuing Settlement in an Adversary Culture: A Tale of Innovation Co-opted or "The Law of ADR,"* 19 FLA. ST. U. L. REV. 1 (1991).

TABLE 5
CHANGES IN LENGTH OF TIME BETWEEN THE DATE A CASE
WAS ORDERED TO MEDIATION AND WHEN MEDIATION OCCURRED
(N=158)

| Year Case Filed | # Of Cases | Median (Days) | Mean (Days) | % Request Extension |
|------------------------|------------|------------------|----------------|------------------------|
| Cases Filed In 1991 Or | | | | |
| Earlier | 15 | 87 | 87 | 13.3% |
| Cases Filed In 1992 | 25 | 116 | 130 | 20.0% |
| Cases Filed In 1993 | 32 | 115 | 146 | 50.0% |
| Cases Filed In 1994 | 42 | 164 | 179 | 50.0% |
| Cases Filed In 1995 | 44 | 167 | 196 | 45.5% |
| <i>All Cases</i> | <i>158</i> | <i>135</i> | <i>161</i> | <i>42.2%</i> |

NOTE: This table includes all malpractice cases in which information was available on when the case was ordered to mediation compared to the date the mediation was held.

Forcing mediation too early in the litigation was a concern expressed repeatedly by defense attorneys in response to our survey. In response to an open-ended survey question about what should be done to improve mediation, twelve defense counsel expressly noted that malpractice mediations should be held later in the case. It was conventional wisdom among defense attorneys, often accepted as true by plaintiffs' counsel, that the mediation should not be held until essentially all discovery, particular the depositions of the plaintiff's experts, was completed.⁴⁹ To the extent that one of the problems ADR is intended to solve is the high cost of litigation, permitting mediation to occur only after the completion of expensive expert discovery is counter-intuitive. It is also unclear why discovery is needed to explore settlements; malpractice insurers have in all cases carefully reviewed the medical records and submitted the case to expert consultants for review. One possible explanation for preferring a greater delay is that defense attorneys may have a financial interest in delaying the mediation until after most of the discovery is completed. Another explanation is the perceived desirability in some cases for conducting the deposition of the plaintiff's expert in order to assess how well the expert is capable of presenting the liability issue. Exploring settlement value in some cases appears to be as much a function of how well the plaintiff's attorney and experts can present the case as it is an objective assessment of the

⁴⁹ The following comment is typical of defense attorneys who noted an express concern with timing:

You need to do the mediation later on rather than earlier. If you do it too early (within the first six months), all you're going to get is posturing unless it is an open and shut case. If it is a damages only case, you can mediate it whenever. Automatic calendaring by courts is always early—no one is ready to do it.

merits of the case.

B. The Disposition of Mediated Cases

An obviously important factor in assessing mandatory mediation is understanding how court-ordered mediation affects the resolution profile of cases. Table 6 presents a flow chart of cases in which mediations were held. The results are somewhat obscured by the fact that some cases are still pending.

TABLE 6
DISPOSITION RESULTS IN MEDIATED MALPRACTICE CASES
(N = 202)

| Cases In Which Mediation Held | 202 Cases (100%) |
|---|------------------|
| <u>Dispositions In Mediated Cases</u> | |
| 1. Agreement Or Partial Agreement At MSC | 50 (24.8%) |
| 2. Impasse Reported At MSC | 152 (75.2%) |
| <u>Subsequent Disposition Of Impassed Mediations</u> | |
| 152 Cases (100%) | |
| 1. Trial Commenced After Impasse At MSC | 45 (29.6%) |
| 2. No Trials Commenced After Impasse At MSC | 107 (70.4%) |
| <u>Resolution Of Impassed MSC Cases Not Tried</u> | |
| 107 Cases (100%) | |
| 1. Dismissed By Court On Summary Judgment Or Motion To Dismiss | 6 (5.6%) |
| 2. Case Was Subsequently Settled With Plaintiff Receiving A Monetary Payment | 68 (63.6%) |
| 3. Case Was Dropped By Plaintiff | 23 (21.5%) |
| 4. Case Is Still Pending | 10 (9.3%) |

NOTE: For subsequent dispositions, it is assumed that a case with a voluntary dismissal with prejudice represents a settlement unless other information is available (such as from insurance company reviews or direct information from attorneys) that no compensation was paid. It is also assumed that a voluntary dismissal without prejudice indicates that the case was dropped and that there was no payment.

1. *The Non-Mediated Cases: Exemptions and the Scheduling Effect.* An initial fact worth noting is that a large number of cases ordered to mediation are never mediated. The exact numbers of non-mediated cases cannot be accurately determined at this point because some of the cases are still pending (and, as a result, a mediation may still be held), and also because additional follow-up is still needed on cases in which it is unclear from the court record whether a mediation was held. Nonetheless, it is clear that about one-third of the cases ordered to mediation were not, in fact, mediated. What is the

significance of such a high percentage of cases in which no mediation occurred despite the court's order?

One possible explanation may be that courts are exempting cases from mediation at the parties' request. In fact, however, exemptions account for only a small number of the non-mediated cases: only six cases were granted exemptions, representing less than two percent of the total cases ordered to mediation.⁵⁰ With the exception of one judicial district, North Carolina courts were generally unwilling to grant exemptions. In Forsyth County (which had the most cases in our study), the judge responsible for administering the program considered a request to exempt a case from mediation early in the MSC program's history. In their motion to exempt, the parties asserted that there was "no chance" that the case would be voluntarily resolved.⁵¹ Given the experimental nature of the program, the judge denied the request. The case subsequently settled at the mediation, and, based upon this experience, no exemption requests have been granted since that time in that district. Not surprisingly, few requests for exemption were made once it became generally known such requests would not be granted. It remains unclear if in fact few parties wish to be exempted or, rather, the attorneys believe that courts are generally unwilling to grant exemption requests and therefore do not bother to make the request.⁵²

If judicial exemptions are only rarely granted, what then accounts for the large number of non-mediated cases? The bulk of cases that were not mediated consisted almost equally of cases that were dismissed without prejudice, usually indicating that the plaintiff was dropping the case, or dismissed with prejudice, usually indicating receipt of a monetary payment. Together, a total of eighty-two cases, representing almost one-quarter of the total cases ordered to mediation, were dismissed by the parties prior to the mediation being held. An interesting issue is whether the mediation program is directly responsible for these resolutions. If a large number of these dismissals were in fact directly caused by the court's mediation order, it would be strong evidence of a substantial "scheduling effect," in which the mere fact of the court's ADR order served as a catalyst for the parties to resolve the case without a direct mediator or court intervention.

Undoubtedly, some of these resolutions were directly triggered by the court ordering the mediation. There were several cases in which the mediator filed a report indicating that he or she was called the day before a scheduled

50. A few additional cases were granted exemptions in situations where a case was mediated, then dismissed without prejudice and subsequently refiled. In that situation, courts were more willing to exempt the refiled case from the mediation requirement given that the parties had previously mediated. *See, e.g., Nesnow v. Morris*, 93-CVS-0477, refiled as 95-CVS-0823 (Orange County).

51. *Patterson v. Wake Forest*, 91-CVS-3777 (Forsyth County).

52. In those cases that were exempted, the results indicated that the parties' judgment that mediation would not be useful was appropriate. In two cases, the matter ultimately went to trial. Two cases were dismissed by the court, one for the plaintiff's failure to prosecute, the second on defendant's motion for summary judgment. In one case, plaintiff dismissed the case without prejudice, and did not refile it. The last case was still pending long after the case was exempted from the MSC.

mediation and told that either the case had been settled or the plaintiff was dismissing the case so that there was no need to conduct the mediation. Others were just as certainly not related. Several dismissals occurred at almost the same time as the court order was mailed by the court to the parties; it is hard to believe that the mere receipt of an order to mediate at some point within the next few months would trigger an immediate decision to settle or drop the case. Moreover, in several of these cases, a discovery motion or summary judgment motion was pending which also could have served as a catalyst for a dismissal. In the absence of a control group,⁵³ it is not possible to quantify further any scheduling impact, other than to acknowledge that our results are consistent with a possibly meaningful scheduling effect.

2. *The Resolution Process in Mediated Cases.* Of more importance is what happened to those cases that were in fact mediated. Is court-ordered mediation, as examined in our study, a successful approach for resolving medical malpractice cases? This is not an easy question to answer, largely because of the difficulty of defining success. If success is limited to situations in which the case is resolved at the mediation session itself (either through settlement or the plaintiff agreeing to drop the case), then mediation is not a particularly successful strategy for malpractice cases. As set forth below in Table 6, of the 202 cases that were actually mediated, only fifty cases were fully or partially resolved⁵⁴ at the conference itself. This agreement rate is lower than the rate found by other empirical researchers evaluating the impact of the MSC program on all types of cases.⁵⁵

In the remaining 152 cases, the mediator reported that the MSC ended in an impasse. Forty-five of the cases were subsequently tried,⁵⁶ and thirty-six proceeded to verdict as against at least one defendant.⁵⁷ Defendants prevailed in thirty cases (83.3%). Plaintiffs prevailed in only six of the cases (although

53. We expect to incorporate a control group into this study at a later point in the project. Information related to court dispositions is currently being collected for malpractice cases in judicial districts that did not have the authority to require mediations that are physically adjacent to districts that were involved in the MSC program.

54. Six of the cases reflected partial agreement at the MSC. These were usually cases in which a settlement was reached as to one defendant, such as a hospital, but in which the mediation was impasse with respect to another defendant, typically a doctor. To give the program the full benefit, partial agreements are combined with complete agreements.

55. See, e.g., Clarke, *supra* note 14, at 70 (indicating that 76 of 171 mediations (44.4%) resulted in agreement at the mediation).

56. This figure includes any case in which a trial was commenced. Trial itself is not a resolution of a case, but rather a process that ultimately may lead to a resolution. Cases that are in trial may have a number of different outcomes. The case may be dismissed by the plaintiff prior to verdict or settled by the parties during trial. The judge may grant summary judgment or a motion for a directed verdict during trial. The trial may result in a hung jury, necessitating further court activity. Even if the case results in a verdict, the parties may still settle without a judgment being entered by the court.

57. In the nine cases that did not proceed to verdict, three cases were dropped by the plaintiff during the middle of the trial. Two cases were settled during the trial, one during jury voir dire and one after two weeks of trial. The Court granted summary judgment to the defendant in one case and directed a verdict in another. One case resulted in a hung jury and was settled prior to retrial. In one case, the result is unknown and the court file was sealed.

others were settled during trial), in amounts ranging from \$15,000 to \$2.97 million. This low success rate is consistent with earlier studies of jury verdicts in the North Carolina courts.⁵⁸ What is significant is the high rate of trials despite the mediation. The trial rate associated with all cases ordered to mediation was about fifteen percent; the trial rate associated with cases which in fact went to mediation was 22.3%. Indeed, these trial rates may be slightly understated, given that several cases remain pending, some of which will almost certainly be tried. An earlier study of North Carolina malpractice cases, which serves as a useful comparison group for this purpose, indicated an overall trial rate of 13.2%.⁵⁹ This comparison clearly indicates that the mediation program has not in fact lowered the trial rate among malpractice cases. Assuming that one of the goals of this program was to reduce the trial rate among malpractice cases, it has not been realized.

Of the 107 non-trial cases that reached an impasse through mediation, ten cases are still pending. The remainder of the cases were resolved as follows: six were resolved by the court granting summary judgment or pursuant to motions to dismiss; sixty-eight were settled as evidenced either by a court order approving a settlement (required in the case of minors or some guardianship situations) or a voluntary dismissal with prejudice in which it is assumed that plaintiff received a monetary settlement;⁶⁰ and twenty-three were dropped by the plaintiff without any monetary payment, usually evidenced in court by the filing of a voluntary dismissal without prejudice.⁶¹

Proponents of the program argue that any appropriate measure of the program's true success must take into account not only those cases that were settled at the mediation itself but also those cases that were settled or otherwise resolved following an impasse as a direct result of discussions begun at the mediation. The point of the mediation is not just to settle cases that day; it is to "start the ball rolling" toward a final resolution. This point raises a difficult empirical issue—how can researchers be sure that the mediation in fact played a meaningful role in the ultimate resolution of cases resolved after an impasse was declared? Proponents tend to credit any post-mediation resolution short of trial as having been caused by the mediation. Such an assumption is by no

58. See, e.g., Metzloff, *supra* note 31 at 50 (reporting a plaintiff's success rate for cases proceeding to verdict of 18.8%).

59. See *id.* at 49.

60. In many instances, we have been able to confirm whether a monetary payment was made in cases terminated as a result of a voluntary dismissal with prejudice. Confirmations were obtained in numerous cases from our review of insurers' closed claims files. In addition, we have obtained such information confirming resolutions directly from attorneys involved in 38 cases.

61. It is not possible in all cases to determine from the court records whether a voluntarily dismissal without prejudice indicates a final resolution of the case. Under North Carolina law, a plaintiff may refile a case that has been voluntarily dismissed without prejudice within one year. In each case, we checked court records to determine if the case had been refiled, but in some instances the one year grace period for refileing had not expired. In some cases, our review of insurance files provided definitive information. In any event, if a case was refiled, it is clear that the mediation did not play a significant role in its resolution, as the final resolution would then be a year or more after the mediation was initially held.

means accurate; it may well be that settlement was caused by intervening events, such as the filing of a motion for summary judgment or an impending trial. Mediator claims to success also must be evaluated carefully. First, mediators are not privy to information on ultimate dispositions, and any claim that the session was “useful” is obviously self-serving. After a mediation reaches an impasse, mediators typically are no longer involved in the case and are unaware of further court activities. Moreover, mediators have a strong financial self-interest to claim credit for the process working successfully. In short, researchers must develop some defensible alternative methods for determining when the mediation is a “proximate cause” of the subsequent resolution in order to evaluate fully the mediation program.

Given the wealth of our data, we were able to analyze the result in all cases reaching an impasse and make a determination as to whether the mediation process should be credited as a “success” in assisting in the resolution.⁶² This judgment, based upon a set of working assumptions set forth below, permits us to determine an overall “success rate” for court-ordered mediation in the malpractice context. Table 7 sets out our overall findings.

62. We use the term “success” with some hesitancy. It may well be that a case that settles at mediation—and is thus labeled successful—would have in fact settled at about the same time without the mediation. Similarly, the fact that a mediation is deemed “unsuccessful” under our assumptions does not mean that the mediation was worthless. The parties may have had a productive session and made significant progress toward a settlement, but then not been able to bridge the final gap prior to starting trial. The point is that trying to determine whether a mediation session is helpful to the parties is inherently subjective, and views on this topic may vary among the participants. Our goal is to use a more systematic measure of whether the outcome of the mediation is consistent with its policy goals. Thus, if the case ultimately went to trial following mediation, the mediation was not successful in terms of its defined objective of assisting parties in resolving disputes short of trial. Again, this label does not imply that use of mediation in such a case was unhelpful, worthless, or otherwise inappropriate.

TABLE 7
DETERMINING THE SUCCESS OF MALPRACTICE MEDIATION
(N = 197)

| <u>I. "Successful" Mediations</u> | | |
|--|-----|---------|
| 1. Agreement Or Partial Agreement At Msc | 50 | (25.4%) |
| 2. Cases Settled After Msc And Related | 35 | (17.8%) |
| 3. Cases Dropped After Msc And Related | 2 | (1.0%) |
| TOTAL: | 87 | (44.2%) |
| <u>II. "Unsuccessful" Mediation</u> | | |
| 1. Cases That Went To Trial After Msc | 45 | (22.8%) |
| 2. Dismissed By Court After Msc | 6 | (3.0%) |
| 3. Case Settled And Unrelated To Msc | 33 | (16.8%) |
| 4. Dropped By Plaintiff And Unrelated | 21 | (10.7%) |
| 5. Still Pending At Least 6 Months After Msc | 5 | (2.5%) |
| TOTAL: | 110 | (55.8%) |

NOTE: This table excludes all cases in which an MSC resulted in an impasse and the case is still pending, unless the case was still pending more than six months after the MSC, at which time it has been considered to be "unsuccessful."

Certain resolutions are easily credited to the mediation process. If a case was resolved at the MSC or a partial agreement was reached, the case is counted in the "success" column. If a case went to trial (regardless of the outcome at the trial), the case is placed in the "unsuccessful" column. Trial indicates that the parties were unable to reach a common understanding of the value of the case, and that the mediation had failed to bridge that gap. Similarly, cases resolved by the court on a motion for summary judgment or a motion to dismiss after a mediation reached an impasse were assigned to the "unsuccessful" column.

The more difficult task is determining if the mediation was in fact a proximate cause of cases that were settled or dropped before trial. In those cases in which we examined the insurer's closed claim file, we were able to directly assess whether the mediation was related to the subsequent resolution. In other cases, we analyzed certain variables in making the determination.

The most important variable was the amount of time that elapsed from the date of the conclusion of the mediation until the final resolution of the case. For example, if the case were settled within a few weeks of the mediation, it is certainly a fair assumption to credit the mediation with being a direct cause of the settlement. If, however, the case were not settled until a year later (perhaps within a week or two of a scheduled trial), any direct link between the

mediation and the settlement would be highly tenuous.⁶³ Table 8 shows the time to disposition following impasse in 87 mediated cases that were reported as reaching an impasse but were subsequently resolved. Significantly, only about half of the cases reaching an impasse were resolved within six months of the mediation. Our working assumption is that resolutions that occurred within six months of the mediation were related to the MSC while those occurring more than six months after the mediation were not related, absent strong indication to the contrary.

TABLE 8
TIME TO TERMINATION AFTER IMPASSE
(N = 87)

| Time To Disposition Subsequent To Msc | # Of Cases | Percent |
|--|------------|---------|
| Within 60 Days Of Msc | 10 | 11.5% |
| Within 61 To 120 Days Of Msc | 17 | 19.5% |
| Within 121 To 180 Days Of Msc | 15 | 17.2% |
| Within 181 To 240 Days Of Msc | 15 | 17.2% |
| More Than 240 Days After Msc | 30 | 34.5% |

NOTE: This table examines all cases in which a mediation was held, an impasse was declared, and the case was subsequently terminated.

Another variable is the presence of any post-mediation intervening events, such as the filing of motions, additional discovery, or further factual developments. The more court activity that occurred following the impasse, the more likely it is that subsequent events played a direct role in the ultimate outcome. Another important variable is how the time of resolution compares to the scheduled trial date. Many court files contained an order establishing a set date for the trial of the case. If the resolution occurred within a few days of the scheduled trial, it was more likely to have been a traditional “on the courthouse steps” resolution than one related to the mediation. Another variable relates to the mediation itself. The longer the mediation, the greater likelihood that the negotiations begun at the session played a role in the

63. An example will help illustrate the type of case-by-case review that we performed to generate Table 7. In one case, the parties had each made a settlement offer prior to the mediation and were about \$15,000 apart in a relatively minor malpractice case. Following the mediation (in which the plaintiffs increased their demand and the defendants in fact refused to offer the amount previously offered), the parties did not negotiate further. Some additional discovery was performed. Immediately prior to the scheduled trial, the plaintiff filed for a dismissal without prejudice and dismissed their attorney. Prior to refiling, the plaintiff accepted the defendant’s slightly increased offer. The case was terminated 10 months after the mediation, which had lasted only two hours. In this case, given the time lag, the lack of progress at the mediation, and the additional court activity, we considered this settlement as an “unrelated” one, thereby rating this MSC as “unsuccessful.”

subsequent resolution.

In each of the cases settled or dropped after impasse without a trial being commenced, we analyzed the variables described above to determine whether the result should be credited as a success for the mediation process. This evaluation resulted in roughly half of the post-mediation settlements being deemed related (and therefore a success for the mediation process) and the other half being deemed unrelated. For cases that were dropped, only a small percentage were deemed related. Most of the dismissals occurred well after the mediation, usually on the eve of a scheduled trial.

Table 7 reports our overall findings and indicates a success rate for mediation of about forty-four percent, consisting primarily of cases resolved at the mediation and settlements that were found to be related to the mediation. In fifty-six percent of the cases, the mediation was found to be unsuccessful, consisting of those cases that went to trial, were dismissed by the court, and those other resolutions found to be unrelated according to the above criteria.

Significantly, this overall assessment of success is closely matched by the results of our direct observation of the forty-two malpractice mediations that we attended. In six cases (fourteen percent) the matter was resolved at the mediation. In another thirteen cases (thirty-one percent), it appeared to us based upon our observation that "substantial progress" had been made even though the case did not settle at the mediation itself. Our determination of substantial progress was a function of whether multiple settlement offers were made, as well as such factors as the length of the session and whether the parties reported an interest in further negotiations. This resulted in a combined "success rate" in the cases actually observed of forty-five percent, almost identical to the overall success rate as determined above. In the majority of cases, however, (twenty-three of forty-two cases, or fifty-five percent), we observed that no significant progress was made. The closed claims insurance files confirmed this judgment in several of these cases. Most cases involved situations in which the defendants were disinclined to make a settlement offer of any kind. Nothing that occurred during mediation altered this view. Either the plaintiff eventually dropped the case, or it proceeded to trial.

VI

MEDIATION AND MALPRACTICE: SPECIAL ISSUES OF CONCERN

The above findings provide information relevant to assessing a number of important policy issues relating to the use of court-ordered mediation and, more generally, its use in the medical malpractice context.

A. Judicial Administration of Mediation: Should All Malpractice Cases Be Routinely Ordered to Mediation?

The North Carolina MSC program does not require courts to refer all cases to mediation; it provides courts with the discretion to do so. In the majority of

judicial districts studied, the courts routinely ordered all cases to mediation and did not screen or otherwise try to determine which cases were better suited to the process. Similarly, most districts did not encourage parties to seek exemptions on a case-by-case basis. In light of our findings that the mediation is “successful” (as defined above) in less than half of malpractice cases, should courts screen cases to avoid forcing parties to conduct mediation sessions that may accomplish little?⁶⁴

Three questions in our survey of lawyers addressed this key issue. First, we asked the attorneys whether malpractice cases were more, less, or just as likely to settle at mediation in comparison with other types of cases. Second, we asked the lawyers whether they thought the use of MSCs in medical malpractice cases was more, less, or just as appropriate as in other cases. Third, and most directly, we asked the attorneys whether malpractice cases should be “routinely referred” to mediation. Table 9 sets forth the results.

64. One immediate objection to screening is that it would require additional court time and effort. At least in North Carolina, this objection is not compelling. Under existing procedural rules, the court is required to conduct a discovery conference in malpractice cases early in the litigation. N.C.R. CIV. P. 26(f)(1). What is surprising is that the issue of whether to conduct a mediation or even when to conduct it is almost never explicitly raised in this mandatory discovery conference. Formal “discovery scheduling orders” are routinely filed in the cases we reviewed. These orders establish specific time limits relating to the designation of experts and place overall limits on discovery. These orders infrequently mentioned mediation. It would be a simple task to include mediation among the topics to be discussed at the discovery conference.

TABLE 9
ATTORNEY SURVEYS:
ISSUES RELATING TO REFERRAL PRACTICE IN MALPRACTICE CASES
 N = 117 ATTORNEY RESPONDENTS; 72 PREDOMINATELY DEFENSE ATTORNEYS/
 45 PREDOMINATELY PLAINTIFF'S ATTORNEYS

Q. Compared To Other Types Of Cases, Are Medical Malpractice Cases (1) More Likely To Settle As A Result Of The Msc; (2) Less Likely To Settle As A Result Of The Msc; Or (3) Just As Likely To Settle As A Result Of The Msc As Other Types Of Cases?

| | Defense Attorneys | | Plaintiff Attorneys | | Overall | |
|--------------------------|-------------------|-------|---------------------|-------|---------|-------|
| Less Likely To Settle | 33 | 45.8% | 20 | 44.4% | 53 | 45.3% |
| More Likely To Settle | 6 | 8.3% | 1 | 2.2% | 7 | 6.0% |
| Just As Likely To Settle | 30 | 41.7% | 21 | 46.7% | 51 | 43.6% |
| No Response | 3 | 4.2% | 3 | 6.7% | 6 | 5.1% |

Q. In Your Opinion, Generally Is The Use Of Mediated Settlement Conferences In Medical Malpractice Cases (1) More Appropriate; (2) Less Appropriate; Or (3) Just As Appropriate As In Other Types Of Cases?

| | Defense Attorneys | | Plaintiff Attorneys | | Overall | |
|---------------------|-------------------|-------|---------------------|-------|---------|-------|
| More Appropriate | 11 | 15.3% | 9 | 20.0% | 20 | 17.1% |
| Less Appropriate | 12 | 16.7% | 7 | 15.6% | 19 | 16.2% |
| Just As Appropriate | 48 | 66.7% | 27 | 60.0% | 75 | 64.1% |
| No Response | 1 | 1.4% | 2 | 4.4% | 3 | 2.6% |

Q. Should All Malpractice Cases Routinely Be Referred To Mediation?

| | Defense Attorneys | | Plaintiff Attorneys | | Overall | |
|-------------|-------------------|-------|---------------------|-------|---------|-------|
| Yes | 52 | 72.2% | 34 | 75.6% | 86 | 73.5% |
| No | 19 | 26.4% | 9 | 20.0% | 28 | 23.9% |
| No Response | 1 | 1.4% | 2 | 4.4% | 3 | 2.6% |

The results indicate that attorneys are generally optimistic about the program and supportive of routine referral. On the question of whether all malpractice cases should be routinely referred to mediation, a large majority, approximately seventy-five percent, indicated that such cases *should* be routinely referred. Moreover, despite our objective findings that the program

is successful less than half the time, and that its settlement rate appears to be much less than other types of cases, about half the lawyers think that malpractice cases are just as likely or more likely to settle at mediation. Similarly, a clear majority—over seventy-percent—of the attorneys believe that the use of MSCs is just as appropriate or more appropriate for malpractice cases as other types of cases. As reported in Table 9, about sixty-five percent of the respondents thought that malpractice cases were just as appropriate for referral as other types of cases. The remaining attorneys split about evenly between those attorneys believing that mediation was more appropriate in malpractice and those that thought it less appropriate than in other types of cases. Together, these findings strongly suggest that attorneys in general (with some significant dissent) are in favor of routine referral.

Why do the attorneys favor routine referral despite the low rate of success? Many believed that mediation offered a meaningful potential for a “better resolution” of the case, and that the costs of an unsuccessful mediation were more than overcome by that potential. As noted by one respondent, “I believe a less adversarial forum is ‘healthy’ for all parties in malpractice cases, and can assist in the healing process for both plaintiff and doctor.” Part of the answer relates to the adversarial nature of the litigation process. Without routine referral, many lawyers believe that appropriate cases would not be referred. The following quote from an attorney is indicative of the views of those attorneys who prefer routine referral:

Malpractice cases take so long to try, you should take a crack at trying to resolve them. Malpractice cases need “to be put on the anvil” because the benefits of settlement (even if not likely) are so substantial from the court’s perspective. If it is late enough in the game (after sufficient discovery), there is a pretty good shot at settlement unless it is one where they just won’t pay.

The high percentage of attorneys favoring routine referral is not as strong an endorsement of the program as it seems at first blush. Many attorneys who indicated their support for routine referral qualified their position by noting in their written comments that they also recognized the importance of liberal “opt-out” provisions. As noted above, courts have been quite reticent in granting exemptions. Thirteen attorneys expressly supported opt-out provisions in their open-ended written comments. The following comment is illustrative:

If you are going to refer all cases to mediation, I wouldn’t exempt malpractice cases. Judges should be willing to exclude cases from mediation when they get a strong signal from attorneys they respect that it won’t do any good. I recently had a case that was a companion case to one that had been previously tried and won by the defendants. It was ordered to mediation and we had to spend a day on it that was a total waste of time and money.

In addition, many attorneys who supported routine referral differentiated between malpractice cases in which liability was contested from cases in which liability was clear. Thus, even though they may have voted in favor of routine referral, their written answers made clear that their opinions related primarily to cases in which the extent of damages was the primary issue in dispute. If

liability was strongly contested, mediation was “often a waste of time.”

Other attorneys qualified their answers by agreeing to routine referral only at the “appropriate time,” which usually was after all or at least most of the discovery had occurred. The survey responses repeatedly reference the problems of trying to mediate malpractice cases too early in the litigation process. The following comment is typical: “It must be done at a time when the case is ready—often (plaintiffs) experts must be deposed before there is realistic appraisal—malpractice insurers want to know if you can prove your case.”

If courts were to use discretion in ordering malpractice cases to mediation, what would be the basis for deciding? Are there any objective bases upon which to screen disputes, or would courts have to rely on the judgment of the parties regarding the value of mediation? Several possible variables suggest themselves. These include the type of injury or area of medical practice, on the theory that perhaps the mediation would predictably be more productive in cases of either more serious or less serious injuries, or that claims against certain types of physicians, for example, obstetricians, might be more susceptible to resolution.

As part of our study, we reviewed the injury alleged in the complaint according to a standard ranking system. Information on severity of injury was collected on each case according to a nine-point scale commonly used in various closed claims studies of malpractice litigation.⁶⁵ An analysis of mediation outcomes by type of injury or area of practice has not at this point in our analysis revealed any statistically significant differences.⁶⁶ It is perhaps not surprising that severity of injury is not a good predictor of success; an earlier study of North Carolina malpractice suits did not find any statistically significant differences in trial rates based upon severity.⁶⁷ Difficult issues of liability or causation can arise regardless of the type of injury involved. Similarly, the types of emotional concerns believed to be well-suited to mediation can arise in any kind of case. Arguably, those cases involving less serious injuries, and as a result less extensive damages, might be more amenable to settlement, as the cost of litigation might predispose both parties to resolve the case without trial. Nonetheless, our results do not indicate that the likelihood of settlement at mediation is significantly different for less serious injuries.

Numerous attorneys mentioned that mediation was especially useful in cases in which liability was clear and the primary issue in controversy was the amount of damages. In such cases, concerns regarding a physician’s willingness

65. See, e.g., U.S. GENERAL ACCOUNTING OFFICE, *Medical Malpractice: Characteristics of Claims Closed in 1984*, at 24 (1987).

66. We are currently interviewing those attorneys with a large number of malpractice cases to obtain their opinions about the utility of mediation in particular cases. These “case specific” surveys will permit a more refined analysis of questions such as this one relating to referral practices. For example, we are specifically asking the extent to which the mediation was useful in the case.

67. See Metzloff, *supra* note 31, at 65.

to permit settlement at all have usually been overcome; the question is how much money to pay in settlement, not whether settlement is justified. Our direct observations generally support this sentiment; in the cases in which liability was not contested, the sessions were often productive. The difficulty in using this factor as a dividing line for referral is obtaining quality information on whether the liability issue in the case is in fact seriously disputed. The parties will themselves often disagree on an assessment of the issue, with the plaintiff usually suggesting that liability is clear or at least likely, and with the defendant giving a more negative assessment of the strength of the liability claim. Given that the mediation itself is not well suited to a merits-based assessment of the liability issue, it is appropriate to continue to consider how courts could identify cases in which the parties' assessment of liability is widely divergent, and consider exempting such cases from the mediation requirement.

B. Should Mediators Express Their View of the Merits of the Case?

Our analysis provides some insights into the difficult question of whether mediators should be encouraged or even allowed to offer their views on the merits or value of cases.⁶⁸ As discussed above, a sizeable minority of mediators we observed did in fact make merits-based assessments. Moreover, our survey results indicate that a majority of attorneys want mediators to perform an evaluative function. As noted in Table 10, almost seventy-percent of attorney respondents were of the opinion that mediators should express their opinions in appropriate cases.⁶⁹ However, many respondents made clear the opinions should be provided only in private caucuses. For example, one attorney noted that opinions were appropriate, "but only privately to each party and in confidence; sometimes, that's why the participants come to mediation under

68. For a useful discussion of the evaluative versus facilitative goals of court-ordered mediation, see James J. Alfini, *Evaluative Versus Facilitative Mediation: A Discussion*, 24 FLA. ST. U. L. REV. 919 (1997). For a helpful conceptual framework of the differences in approach, see Leonard L. Riskin, *Understanding Mediators' Orientations, Strategies, and Techniques: A Grid for the Perplexed*, 1 HARV. NEGOTIATION L. REV. 7 (1996).

69. The following is a sampling of the comments of those attorneys in favor of mediators expressing their views on the merits:

"The best mediators express opinions—I select mediators whose opinions I value and I want to hear them."

"Medical malpractice cases need the 'nudge' of the mediator more than other cases to have a chance to settle. The mediator has almost always been agreed on by the parties because both sides respect them, so offering an opinion should not upset any one."

The following comment, while not necessarily typical, is an interesting exposition on the question:

I talked to my partner who does a lot of mediation in a widespread group of complex cases about this and he said "Hell, that's what everybody wants." If you don't indicate the range, you won't be successful. You're going to have to pick a number and drive the parties to it. As a mediator, I am focusing on the merits. I recently said to the defense, "off the record, are you guys going to walk out of here with a zero or are some of you going to get hit?" In every case that I've had in mediation that was successful, the mediator came up with the number with whatever "label" they put on it. It is better if the mediator does this later on in the mediation so that it appears that it is a function of "osmosis" from what's happened. If the parties ask me to say what I think it is worth, then I'll do it with both sides present if they agree. If plaintiff's counsel asks me and if the other side agrees and you want my opinion, I'll give it to you. Unless both of you want my opinion, I'm not going to give it.

the guise of so many other stated reasons.” Others thought opinions should be given only if both sides explicitly agreed that it would be useful.

TABLE 10
ATTORNEY SURVEYS:
SHOULD MEDIATORS EXPRESS OPINIONS ON THE MERITS
(N = 117 ATTORNEY RESPONDENTS)

Q. In Your Opinion, Should A Mediator Express His Or Her Views Or Judgments About The Merits Of The Case During The Mediation In A Medical Malpractice Case?

| | Defense Attorneys | | Plaintiff Attorneys | | Overall | |
|-------------|-------------------|-------|---------------------|-------|---------|-------|
| Yes | 46 | 63.9% | 33 | 73.3% | 79 | 67.5% |
| No | 24 | 33.3% | 11 | 24.4% | 35 | 29.9% |
| No Response | 2 | 2.8% | 1 | 2.2% | 3 | 2.6% |

Since the majority of attorneys think it appropriate for mediators to express substantive views on the merits, it follows that most attorneys would value mediators having direct experience with malpractice litigation. In theory, if mediators are not able to express opinions on the merits, there is little reason for them to have substantive expertise in the area being litigated. Their role would be to improve communication and overcome the personal obstacles to resolution. One need not know anything about the medical issues involved in a case to understand the nature of the plaintiff's anger or the reputational interests of the doctor.

We did not ask an objective question relating to this point, but we did ask attorneys to state what traits or skills they valued most in a mediator in a medical malpractice case. Among those attorneys who responded, substantive expertise relating to malpractice litigation or medical knowledge was highly valued. A total of twenty-six of seventy-five attorneys (34.7%) mentioned medical malpractice or medical expertise as a desirable trait.⁷⁰ Medical or malpractice expertise was listed more often than other traits such as perseverance, objectivity, fairness, or general litigation experience. Table 11 provides an illustration of comments received from attorneys relating to substantive expertise.

70. Numerous other comments arguably related to experience but were not counted because they focused more generally on mediators having experience in “complex litigation” or experience with personal injury suits. For example, one attorney simply listed “experience” as a desired trait. This was not counted as it did not explicitly list malpractice experience or knowledge of medicine.

TABLE 11
ILLUSTRATION OF COMMENTS RELATING TO DESIRED SKILLS
AND TRAITS IN MEDIATORS

The Following Written Comments Were Provided In Response To The Question "What Qualities Are Most Important To You In A Mediator For A Medical Malpractice Case?"

"Prior experience trying medical malpractice cases."

"Exposure to like cases; comprehension of difficulties in proof/evidence and medical standards and damages."

"Sufficient experience to understand medical evidence and issues."

"Experience with medical malpractice cases."

"Knowledge of the medicine involved."

"Former judge, senior attorney who has handled or heard a number of medical malpractice cases."

"Someone who has experience with malpractice cases either as a lawyer or judge."

"Some experience in trial of negligence cases is essential—some experience in trial of medical cases is helpful."

"Sufficient intelligence to understand the *medical* as well as the legal issues."

"Knowledge of medicine and law applicable to medical malpractice cases."

"Experience with medical cases as a judge or practicing attorney. Mediators who know these cases through mediation only are less helpful."

"The quality of being able to grasp the precise medical issues that are being disputed."

"Ability to understand the medical issues and speak intelligently about them with the doctor; ability to listen to both sides, synthesize the information and point out weaknesses from an 'objective' standpoint; ability to kindly but firmly ask the hard questions that a jury will ask."

For those opposed to mediators giving their opinion, a major theme sounded was the legitimacy of the basis for their opinion. Some noted that without any assurances that the mediators were experienced in malpractice matters, their opinions may not be reliable. Others noted that given the nature of the mediation process, the mediator usually "does not know enough [about] the facts to be helpful." Others pointed out the possible negative impact of a mediator expressing an opinion; the party that is the beneficiary of the mediator's assessment can become inflexible and further progress may be thereby impeded.

The implications of the attorney's interest in medical or malpractice expertise is potentially significant. In some counties, courts are responsible for appointing the mediators because the parties frequently fail to agree on a mediator. These courts should be more deliberate in appointing mediators with relevant expertise for malpractice mediations. Another implication is that mediators and the parties should be more interested in pre-mediation preparation. At this point, few mediators are provided any information on the

case before the mediation. If at least some forms of evaluation are desired, preparation may well be necessary. A serious concern is the disjunction that our research reveals between the theory of mediation as a facilitative process (as exhibited in the ethics rules prohibiting direct evaluation), and the desire of attorneys and the actual practice of some mediators.

C. Understanding the Settlement Process in Malpractice Cases: The Role of the National Practitioner Data Bank.

One of the most interesting issues involved in our study relates to the impact of the National Practitioner Data Bank (“Data Bank”) on the settlement dynamic in medical malpractice cases. The Data Bank was first put into operation in September 1990 by the federal government to collect information about malpractice payments paid by, and disciplinary actions taken against, individual physicians.⁷¹ Its basic purpose was to provide a central repository of information so that hospitals and other permitted users could query the Data Bank to obtain accurate information about physicians for purposes such as credentialing. The proponents of the Data Bank apparently did not anticipate that the reporting requirement might have a negative impact on the settlement process in malpractice cases. Nonetheless, a number of mediators and attorneys in our study suggested that physicians who were upset by the thought of being reported to the Data Bank, and concerned with the consequences of such reporting, might refuse to permit settlement of even malpractice disputes in which liability was probable and the plaintiff was willing to be reasonable respecting the amount of damages. The potential importance of this negative impact is highlighted by the fact that many malpractice insurers—currently including all the major insurers in North Carolina—afford insured physicians the right to veto any settlement.⁷²

Identifying any adverse impact the Data Bank reporting requirement may have is likely to be difficult. In cases of clear liability, even the negative impact of the Data Bank probably will not overcome the logic of settlement. Also, the Data Bank is not likely to have anything but a marginal impact on the decision to avoid settlement in cases where the physician and the insurer perceive there is no liability. Most malpractice insurers have a “no nuisance value” settlement policy; as is clear from the generally high trial rates in malpractice cases, malpractice insurers are willing to litigate. Accordingly, any observable impact of the Data Bank will be largely concentrated on those cases in which liability is questionable. Because of our direct observation of the malpractice settlement process through the prism of court-ordered mediation, we were able to assess more directly the extent to which the Data Bank creates a significant

71. For a useful description of the origins and purpose of the National Practitioner’s Data Bank, see Ilene D. Johnson, *Reports to the National Practitioner Data Bank*, 265 JAMA 407 (1991). For early assessment of its operations, see Fitzhugh Mullan et al., *The National Practitioner Data Bank—Report from the First Year*, 268 JAMA 73 (1992).

72. See Samuel R. Gross & Kent D. Syverud, *Getting to No: A Study of Settlement Negotiations and the Selection of Cases for Trial*, 90 MICH. L. REV. 319, 361 (1991).

obstacle in settlement negotiations.

Evidence from our study reveals that the Data Bank's reporting requirement is in fact a major issue in many malpractice cases. The Data Bank was a significant issue in twenty-five percent of the cases in which a defendant doctor subject to the reporting requirement was involved (eight of thirty-two cases).⁷³ In fact, this percentage significantly understates the importance of the Data Bank issue. In several of the cases, liability was clear, and, predictably, the Data Bank was not a concern. In nearly fifty percent of the cases in which liability was an issue, the Data Bank was expressly referenced (eight of seventeen cases). In each of these cases, the affected doctor discussed the Data Bank as a major issue in the settlement of the case. Often, the doctor spoke personally to the mediator about the impact of the Data Bank.

Simply because a point is raised in a mediation does not necessarily mean it is a serious issue. Indeed, there would appear to be little reason for a physician *not* to raise an objection to settlement based upon the Data Bank. It provides a principled basis for opposing a settlement, and indicates that the physician has a strong reason to contest liability, perhaps in hopes that the plaintiff will lower the settlement demand. There are other indications from our study, however, that physician concern with the Data Bank was genuine. In our survey of attorneys, we asked whether the Data Bank constituted an obstacle to the settlement of malpractice claims. The results indicated clearly that defense counsel believed it to be a serious issue. As set forth in Table 12, half of all the attorney respondents indicated that the Data Bank was "a significant issue in most cases." Another third indicated that it was a "significant issue in some cases." Overall, only twelve percent indicated that it was "rarely a significant issue."⁷⁴

73. This excludes cases in which only a hospital was a defendant or in which the defendant doctor was deceased.

74. Indeed, even this response overstated the position. From the written comments provided, several of the attorneys in this group indicated that they did not believe it was a significant issue because they were attorneys for hospitals and thus their clients did not face the reporting requirement.

TABLE 12
ATTORNEY SURVEYS:
IMPACT OF NATIONAL PRACTITIONER'S DATA BANK
(N = 117 ATTORNEY RESPONDENTS)

Q. Based On Your Experience, To What Extent Does The Reporting Requirement Established By The National Practitioner's Data Bank Constitute An Obstacle To Settlement Of Medical Malpractice Claims?

| | Defense Attorneys | | Plaintiff Attorneys | | Overall | |
|---------------------------------|-------------------|-------|---------------------|-------|---------|-------|
| Significant Issue In Most Cases | 38 | 52.8% | 20 | 44.4% | 58 | 49.6% |
| Significant Issue In Some Cases | 24 | 33.3% | 12 | 26.7% | 36 | 30.8% |
| Rarely A Significant Issue | 8 | 11.1% | 6 | 13.3% | 14 | 12.0% |
| No Response | 2 | 2.8% | 7 | 15.6% | 9 | 7.7% |

The written comments respecting the Data Bank also supported the view that the Data Bank is generally perceived by attorneys as a major obstacle to the settlement of malpractice claims.⁷⁵ Typical comments such as the Data Bank is a “very compelling factor” (emphasis in original) and that it “creates very serious problems” were common.⁷⁶ One defense counsel wrote that being

75. One view expressed by a few defense lawyers was that the Data Bank was an issue, but that it was a concern that they were able to address with their clients in appropriate cases. Even some of these comments, however, noted that physician concern with the Data Bank was increasing. The following comment makes the point well:

Most carriers have a veto by the doctor in their policy now—that's the market. They didn't used to let them do that. I've always been able to massage a difficult defendant to accept it by convincing them that they will have a lot of distinguished company in the Data Bank—it won't impact their practice. Going into the Data Bank is not a problem unless they are a repeat offender or recidivist. You can make the Data Bank not a factor. It is getting a little worse; doctors are more cognizant of it today. What they hate is that they have to report it every time they apply to a hospital or a PPO and they are reminded of it. I write them a little blurb as favorable and as benign as possible about their case that they can use.

76. The following comments are illustrative:

The impact of the National Practitioner's Data Bank is a tremendous obstacle to settlement in any medical malpractice cases other than those of clear liability. I have represented many physicians in responding to inquiries from the Data Bank and from the North Carolina Board of Medical Examiners following settlement of a lawsuit and I can confirm that the administrative hassles occasioned by settlement are not worth it if liability is questionable.

Even before the Data Bank, over 75% of malpractice cases were tried in our experience. Many that settled did so because, at the 11th hour, defense would offer and plaintiff was willing to accept “nuisance” settlement to avoid/offset litigation expenses. Now, [because of the Data Bank] those case are the *most* difficult ones to settle.

(Emphasis in original).

reported to the Data Bank is “[r]egarded as a permanent black mark by the health care provider.” The point made by several attorneys is that there is little incentive for a physician to settle voluntarily and be reported. As long as the case offers some reasonable chance of success on the issue of liability, a trial, even with its attendant costs, is preferable. As one attorney noted, “[d]octors [who do not pay the expense of trial] would rather ‘roll the dice’ re settlement or trial since a win at trial is great, whereas a loss at trial is no worse than reporting a settlement.”

Perhaps even more telling are the views of fourteen plaintiffs’ lawyers that added written comments. None of the plaintiffs’ attorneys questioned the legitimacy of the Data Bank concerns raised by physicians;⁷⁷ they acknowledged the reality of the obstacle to settlement created by the Data Bank. As one plaintiff’s attorney put it, the Data Bank is an “[a]dditional hurdle on a track where hurdles abound . . . often, this is the last straw.” Several of the written comments noted the extent of the problem. As one plaintiff’s lawyer put it, “[m]ost physicians will do anything to avoid being listed in the Data Bank—especially younger doctors. It has resulted in many more problems than it has solved.” In the words of another plaintiff’s attorney, the Data Bank is a “[b]ig stumbling block and the public is hurt because of it.”

Numerous attorneys mentioned the fact that the impact of the Data Bank was more keenly felt by younger doctors who were more concerned with the growing trend toward managed care. Faced with a business environment in which alliances with various health care providers is necessary, younger doctors were more concerned with the long-range impact of having been reported to the Data Bank. Older physicians who did not anticipate any change in the structure of their practice could more easily ignore the Data Bank’s impact.

Mediators also noted the obstacles to settlement created by the Data Bank. About half of the mediator respondents reported that the Data Bank was a “significant issue most of the time.” When asked for strategies to overcome physician objection, the mediators had few concrete proposals. In the cases we observed, one approach was simply to suggest to the plaintiff that they drop the individual physician and seek to settle only with the health care provider. In general, mediation was not particularly effective as a means to overcome the Data Bank problem; in none of the eight cases that we observed in which the Data Bank issue was raised as a problem did the mediation directly result in a settlement.

VII

CONCLUSION

What conclusions can one fairly reach about the potential of court-ordered mediation in the malpractice context as revealed by the results of the North

77. One plaintiff’s attorney noted that the Data Bank issue could on occasion be used as a bargaining tool to put pressure on a hospital (which does not have to report to the Data Bank) to settle in a case in which both a hospital and individual defendant were sued.

Carolina study? One reaction is to question whether the term “mediation” is in fact appropriately used in conjunction with this program. While some of the potential benefits commonly associated with mediation were observed in some cases, the program as it has evolved is usually nothing more than a structured, traditional settlement conference conducted by a neutral third party. The parties themselves participate only infrequently and creative solutions are rarely considered. Lawyers talking about money is the norm. There remains much opportunity to consider how more creative forms of mediation could be employed in the malpractice context.

Questioning the fairness of the term mediation is not an indictment of the utility of the program but rather a concern with whether the expectations that may be raised by use of the term match the reality of the process. With respect to program performance, the results are mixed. Certainly, the MSC program as implemented in North Carolina passes the medical profession’s “Hippocratic Oath” test—it does no harm. By starting with this observation, we do not mean to damn the program with faint praise. It is significant that lawyers, on both the plaintiff and defense side, are generally satisfied with the program. Some cases are settled by means of this procedure. When they are settled, they appear to be settled sooner than they otherwise would have been. In light of the serious concerns raised by some critics of court-imposed ADR, demonstrating that such programs do not decrease overall quality, or impose burdensome expense on the parties, is important. The costs of the program, while perhaps higher than they seem at first blush, are not extraordinary given the overall scope and expense associated with malpractice litigation.

Yet the program is by no means a panacea for the problems associated with managing malpractice cases. As a case management tool, the process appears to be an effective way to handle those malpractice cases in which both parties have a genuine desire to settle. Many cases are resolved directly as a result of the mediation. On the other hand, for those cases in which the parties are not inclined to settle, there is little evidence that the mediation program is able to transform the dispute or significantly alter the parties’ understanding or approach to the case. Only rarely is new information learned by a party in the mediation. There are numerous cases in which the MSC exercise can fairly be described as worthless. Mediation seldom provides the parties with important new insights that cause them to revisit their basic understanding of the merits of the case or its settlement value.

Based on the experience in North Carolina, courts should not conclude that court-ordered mediation by itself is the solution. In part, our study reveals that there are important and difficult issues related to how courts should manage court-ordered mediation programs. The North Carolina courts have perhaps not been as active as they should have been in managing the program effectively. Over time, the MSC has been pushed further back in the litigation process, limiting its potential to significantly reduce litigation expenses. Courts have also not considered whether screening mechanisms might be developed to use court-ordered mediation in a more effective manner. Our study indicates

that more selective use of this process might well be justified. At a minimum, the study suggests that courts should be more receptive to parties' requests to be exempted from the mediation process.