

# The Effectiveness of Court-Connected Dispute Resolution in Civil Cases

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This article reviews the empirical research on mediation and neutral evaluation, two court-connected dispute resolution processes in which the third party does not have decision-making power. Mediation has been used in small claims cases, general jurisdiction trial cases, and appellate cases; neutral evaluation has been used primarily in general jurisdiction cases. Because the program structure and the nature of the mediation process differ across the three court levels, the research findings are presented separately for each type of court as well as for each dispute resolution process.

I review the data sources and methodology used in the studies examined here, describe the dispute resolution process and the structure of the programs in order to provide a context for interpreting the research, present the empirical findings regarding program outcomes, and report findings regarding the impact of program structure on outcomes.<sup>1</sup>

## Mediation in Small Claims Cases

The findings of ten small claims mediation studies are discussed in this section (Goerd, 1993; Hermann, LaFree, Rack, and West, 1993; McEwen and Maiman, 1981; Maiman, 1997; Olexa and Rozelle, 1991; Raitt, Folberg, Rosenberg, and Barrett, 1993; Roehl, Hersch, and Llaneras, 1992; Russell, 1998; Vidmar, 1984; Wissler, 1995). Five of the studies relied primarily on telephone or in-person interviews with participants, which averaged thirty minutes in length and were conducted from immediately after the session up to four months later (Hermann, LaFree, Rack, and West, 1993; McEwen and Maiman, 1981; Roehl, Hersch, and Llaneras, 1992; Vidmar, 1984; Wissler, 1995), and three studies relied

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instead on participant exit questionnaires (Goerdt, 1993; Maiman, 1997; Russell, 1998). Two studies included a follow-up questionnaire or interview to obtain information on compliance (Hermann, LaFree, Rack, and West, 1993; Russell, 1998), and one also interviewed litigants prior to mediation (Vidmar, 1985). Several studies supplemented participant data with observations of mediation sessions (Hermann, LaFree, Rack, and West, 1993; McEwen and Maiman, 1981; Roehl, Hersch, and Llaneras, 1992; Vidmar, 1985) or information from mediator questionnaires or reports (Hermann, LaFree, Rack, and West, 1993; McEwen and Maiman, 1981) or from court records (McEwen and Maiman, 1981; Vidmar, 1985). Two studies relied solely on information from court records or court personnel (Olexa and Rozelle, 1991; Raitt, Folberg, Rosenberg, and Barrett, 1993).<sup>2</sup>

Seven of the studies included a comparison group of tried cases for one or more outcome measures (Goerdt, 1993; Hermann, LaFree, Rack, and West, 1993; McEwen and Maiman, 1981; Olexa and Rozelle, 1991; Roehl, Hersch, and Llaneras, 1992; Vidmar, 1986; Wissler, 1995). Only one study essentially randomly assigned cases to either mediation or trial (Roehl, Hersch, and Llaneras, 1992). Accordingly, the comparative findings should be interpreted with caution. Several studies, however, reported that mediation versus adjudication differences in outcomes generally remained when the case and litigant characteristics on which these two groups differed were taken into consideration (McEwen and Maiman, 1987; Vidmar, 1986; Wissler, 1995).

### *Program Structure*

The small claims court divisions in the programs studied handled civil actions involving debt or damages below eight hundred dollars to five thousand dollars. In most cases, neither litigant had counsel (Hermann, LaFree, Rack, and West, 1993; McEwen and Maiman, 1981; Roehl, Hersch, and Llaneras, 1992), although in most courts they had the right to retain counsel (but see Goerdt, 1993). Some mediation programs were administered by court staff (Goerdt, 1993; Maiman, 1997), while others were administered by an outside organization (Goerdt, 1993; Hermann, LaFree, Rack, and West, 1993; Maiman, 1997; Wissler, 1995). In all programs, mediation took place in the courthouse at no cost to the litigants.

Mediation was held on the date of trial in most programs (Goerdt, 1993; McEwen and Maiman, 1981; Maiman, 1997; Olexa and Rozelle, 1991; Raitt, Folberg, Rosenberg, and Barrett, 1993; Roehl, Hersch, and

Llaneras, 1992; Russell, 1998; Wissler, 1995), and cases that did not settle in mediation generally had a trial the same day. In a few programs, however, mediation took place before the scheduled trial date (Hermann, LaFree, Rack, and West, 1993; Raitt, Folberg, Rosenberg, and Barrett, 1993; Vidmar, 1984). Mediation typically involved a single session that averaged between thirty and sixty minutes (Goerdt, 1993; McEwen and Maiman, 1981; Olexa and Rozelle, 1991; Roehl, Hersch, and Llaneras, 1992; Vidmar, 1985; Wissler, 1995; but see Raitt, Folberg, Rosenberg, and Barrett, 1993; Russell, 1998). The mediator generally did not receive information about the case prior to the session.

In some programs, litigants in cases in which both parties appeared for trial were required to attend mediation or were so “strongly encouraged” that few refused (Goerdt, 1993; McEwen and Maiman, 1981; Olexa and Rozelle, 1991; Roehl, Hersch, and Llaneras, 1992; Russell, 1998; Vidmar, 1985; Wissler, 1995; but see Hermann, LaFree, Rack, and West, 1993). In other programs, however, mediation was voluntary, and both litigants had to agree to use mediation (Goerdt, 1993; McEwen and Maiman, 1981; Maiman, 1997; Olexa and Rozelle, 1991; Raitt, Folberg, Rosenberg, and Barrett, 1993; Wissler, 1995).

The mediators generally were volunteers (Goerdt, 1993; Hermann, LaFree, Rack, and West, 1993; Maiman, 1997; Olexa and Rozelle, 1991; Roehl, Hersch, and Llaneras, 1992; Russell, 1998; Wissler, 1995; but see Goerdt, 1993; Raitt, Folberg, Rosenberg, and Barrett, 1993). They were either laypeople or a combination of lawyers, law students, and laypeople (Goerdt, 1993; Roehl, Hersch, and Llaneras, 1992; Wissler, 1995). Most programs provided mediation training (Goerdt, 1993; Hermann, LaFree, Rack, and West, 1993; Maiman, 1997; Russell, 1998; Vidmar, 1985; Wissler, 1995; but see Roehl, Hersch, and Llaneras, 1992) that ranged from sixteen to over forty hours (Goerdt, 1993; Hermann, LaFree, Rack, and West, 1993; Olexa and Rozelle, 1991; Russell, 1998).

In a number of programs, the mediator training stressed a facilitative mediation model (Olexa and Rozelle, 1991; Roehl, Hersch, and Llaneras, 1992), a principled negotiation model (Wissler, 1995), or a model that explicitly avoided assessing the legal merits of the case (Hermann, LaFree, Rack, and West, 1993). But in one program, the nonlawyer mediators took special law classes (Vidmar, 1985). Observers described the mediations in the latter program as being fairly legalistic and directive and focused largely on factual and legal issues (Vidmar, 1985). Observers in another program noted that the style of different mediators varied from

restrained to very active, and the sessions typically focused more on issues relating to the claim and responsibility than on broader issues (McEwen and Maiman, 1981).

### *Outcomes*

A variety of outcomes has been examined in this research.

***Settlement Rate.*** Virtually all studies examined the rate of settlement in mediation. Most studies reported a settlement rate between 47 and 78 percent (Goerdt, 1993; Hermann, LaFree, Rack, and West, 1993; McEwen and Maiman, 1981; Maiman, 1997; Olexa and Rozelle, 1991; Raitt, Folberg, Rosenberg, and Barrett, 1993; Roehl, Hersch, and Llaneras, 1992; Russell, 1998; Vidmar, 1985), but a few reported a lower (25 percent; Raitt, Folberg, Rosenberg, and Barrett, 1993) or higher settlement rate (84 to 95 percent; Goerdt, 1993; Maiman, 1997; Raitt, Folberg, Rosenberg, and Barrett, 1993).<sup>3</sup>

***Participants' Assessments.*** The seven studies that examined litigants' assessments of the process, the neutral, and the outcome reported highly favorable views. A majority of litigants felt that the mediation process, session, or procedures were fair (Goerdt, 1993; Maiman, 1997; Roehl, Hersch, and Llaneras, 1992; Wissler, 1995) and that mediation gave them full opportunity to present their case (McEwen and Maiman, 1981; Maiman, 1997; Wissler, 1995) and take part in its resolution (Maiman, 1997; Wissler, 1995). Most litigants thought the mediator was neutral and had a good understanding of their dispute (Hermann, LaFree, Rack, and West, 1993; McEwen and Maiman, 1981; Maiman, 1997; Roehl, Hersch, and Llaneras, 1992; Wissler, 1995). A majority of litigants felt that the mediated agreement was fair (Goerdt, 1993; Hermann, LaFree, Rack, and West, 1993; McEwen and Maiman, 1981; Roehl, Hersch, and Llaneras, 1992; Wissler, 1995). In two studies, almost twice as many litigants whose case went to trial after not settling in mediation said they would prefer to use mediation rather than trial in a future case (Roehl, Hersch, and Llaneras, 1992; Wissler, 1995), but one study found no differences in their process preferences (Hermann, LaFree, Rack, and West, 1993).

The studies that included a comparison group of adjudicated cases generally found that litigants in mediated cases had more favorable assessments of the process and the third party than did litigants in tried cases (Hermann, LaFree, Rack, and West, 1993; McEwen and Maiman, 1981; Roehl, Hersch, and Llaneras, 1992; Wissler, 1995), but one study found

no differences (Goerdt, 1993). In four studies, litigants felt the mediated agreement was more fair than the adjudicated decision (Goerdt, 1993; Hermann, LaFree, Rack, and West, 1993; McEwen and Maiman, 1981; Roehl, Hersch, and Llaneras, 1992), but two studies found no differences (Vidmar, 1985; Wissler, 1995).

*Impact on the Litigants' Relationship.* The findings of the three studies that examined this outcome present a mixed picture. In one study, litigants in mediation were about as likely to think that the process had not improved their relationship as to think it had (Maiman, 1997). In a second study, litigants had less negative views of the other party, and those involved in an ongoing relationship felt the dispute had a less negative impact on their relationship if they settled in mediation than if they did not settle in mediation or only went to trial (Wissler, 1995). In a third study, litigants reported being less angry and upset at the end of mediation than did litigants at the end of trial (McEwen and Maiman, 1981).

*Macrojustice.* Several studies explored case outcomes and found fairly consistent differences between mediated and adjudicated cases in the nature of the outcome and the dollar amount received. Mediated agreements were more likely than judicial decisions to include nonmonetary provisions (Hermann, LaFree, Rack, and West, 1993; Wissler, 1995), the immediate payment of at least some of the money (McEwen and Maiman, 1981; Roehl, Hersch, and Llaneras, 1992; Wissler, 1995), and installment payments (McEwen and Maiman, 1981; Hermann, LaFree, Rack, and West, 1993; Wissler, 1995). In cases with monetary outcomes, plaintiffs were more likely to receive at least some money in mediated cases than in tried cases (McEwen and Maiman, 1981; Roehl, Hersch, and Llaneras, 1992; Vidmar, 1985). Two studies found that mediated agreements represented a smaller percentage of the plaintiff's claim than adjudicated decisions (McEwen and Maiman, 1981; Roehl, Hersch, and Llaneras, 1992), but two other studies found no differences (Hermann, LaFree, Rack, and West, 1993; Vidmar and Short, 1984).

*Durability of Settlement.* Eight studies assessed compliance with the mediated agreement, typically between one and six months after mediation, and found the rate of full compliance to be between 62 and 90 percent (Hermann, LaFree, Rack, and West, 1993; McEwen and Maiman, 1981; Olexa and Rozelle, 1991; Raitt, Folberg, Rosenberg, and Barrett, 1993; Roehl, Hersch, and Llaneras, 1992; Russell, 1998; Vidmar, 1984; Wissler, 1995). Of the subset of studies that involved a comparison group

of tried cases, most found a higher rate of full or partial compliance with mediated agreements than with trial decisions (Hermann, LaFree, Rack, and West, 1993; McEwen and Maiman, 1981; Olexa and Rozelle, 1991; Roehl, Hersch, and Llaneras, 1992; Vidmar, 1984), but one found no differences (Wissler, 1995). There were no differences, however, between litigants whose case settled in mediation and litigants whose case was resolved at trial in their perceptions of whether the dispute was really settled (Roehl, Hersch, and Llaneras, 1992; Wissler, 1995) or in their reports of subsequent problems with the other party (Roehl, Hersch, and Llaneras, 1992).

#### *Impact of Program Structure on Outcomes*

The few studies to examine outcomes in relation to structural elements of programs found virtually no effects of structure.

*Mode of Referral.* Both studies that examined the impact of the mode of referral found no differences in the rate of settlement between cases that entered mediation voluntarily and cases ordered to mediation (McEwen and Maiman, 1981; Wissler, 1995). The mode of referral also did not result in differences in the size or nature of the mediated outcome (Wissler, 1995), compliance with the agreement (McEwen and Maiman, 1981; Wissler, 1995), improvement in the litigants' relationship (Wissler, 1995), or litigants' assessments of the process, mediator, or outcome (Wissler, 1995).

*The Mediators.* The single study to examine the effect of different types of mediators found that whether the mediator was a volunteer attorney, a court law clerk, or a volunteer layperson did not affect the settlement rate (Roehl, Hersch, and Llaneras, 1992). The only differences that independent observers reported between the lawyer and lay mediators was that lawyers were more likely to have a better understanding of the dispute and to refuse to hear some evidence.

*Case Characteristics.* The likelihood of settlement did not vary with general case-type categories in two studies (Roehl, Hersch, and Llaneras, 1992; Wissler, 1995), but another study found differences, with settlement most likely in cases involving unpaid bills and private sales and least likely in traffic accident cases (McEwen and Maiman, 1981). The findings of the latter study, however, might in part reflect that cases in which the defendant admitted owing some or all of the plaintiff's claim were more likely to settle than if the defendant denied all liability (Hermann, LaFree, Rack, and West, 1993; Roehl, Hersch, and Llaneras, 1992; Vidmar, 1984; but

see Wissler, 1995). Four studies found no relationship between settlement and the contentiousness, nature, or length of the relationship between the litigants (McEwen and Maiman, 1981; Roehl, Hersch, and Llaneras, 1992; Vidmar, 1984; Wissler, 1995).<sup>4</sup>

### Mediation in General Jurisdiction Civil Cases

The findings of twenty-seven general civil mediation studies are discussed in this section (Amis and others, 1998; Averill, 1995; Bergman, 1998; Bickerman, 1998; Clarke and Gordon, 1997; Daniel, 1995; Dichter, 1998; Estee, 1987; Fix and Harter, 1992; Hann and Baar, 2001; Herman, 2001; Kakalik and others, 1996, chaps. 5–8; Kobbervig, 1991; McEwen, 1992a; Macfarlane, 1995, 2003; Maiman, 1997; *Report on Mediation*, 2002; Schildt, Alfini, and Johnson, 1994; Schultz, 1990; Stienstra, Johnson, and Lombard, 1997, chaps. 5, 6; Wissler, 2002; Woodward, 1990). A majority of the studies relied on questionnaire data from litigants, attorneys, and usually also from mediators (Clarke and Gordon, 1997; Daniel, 1995; Hann and Baar, 2001; Herman, 2001; Kakalik and others, 1996, chaps. 5–8; Kobbervig, 1991; Macfarlane, 1995; Maiman, 1997; *Report on Mediation*, 2002; Schildt, Alfini, and Johnson, 1994; Schultz, 1990; Wissler, 2002). Several studies surveyed attorneys but not litigants (Averill, 1995; Estee, 1987; Stienstra, Johnson, and Lombard, 1997, chaps. 5, 6; Woodward, 1990). Instead of or in addition to questionnaires, several studies used litigant and attorney interviews (Fix and Harter, 1992; Macfarlane, 1995; Schildt, Alfini, and Johnson, 1994) or focus groups (Hann and Baar, 2001; Macfarlane, 2003). Several studies relied exclusively on court or mediation program records (Amis and others, 1998; Bergman, 1998; Bickerman, 1998; Dichter, 1998); most other studies used these records to supplement information from participants. Three studies included observations of mediation sessions (Clarke and Gordon, 1997; Stienstra, Johnson, and Lombard, 1997, chaps. 5, 6).<sup>5</sup>

Fifteen of the studies included a comparison group of nonmediation cases for one or more outcome measures (Clarke and Gordon, 1997; Estee, 1987; Fix and Harter, 1992; Hann and Baar, 2001; Kakalik and others, 1996, chapters. 5–8; Kobbervig, 1991; McEwen, 1992a; Macfarlane, 1995; Schildt, Alfini, and Johnson, 1994; Stienstra, Johnson, and Lombard, 1997, chaps. 5, 6; Wissler, 2002). Only four of these studies randomly assigned mediation-eligible cases to either a mediation or a nonmediation group (Kakalik and others, 1996, chaps. 5, 6; McEwen, 1992a;

Stienstra, Johnson, and Lombard, 1997, chap. 5; the last two studies had a third group of cases that entered mediation voluntarily, which were analyzed separately). One study compared mediation cases to a sample of nonmediation cases that were closed prior to the implementation of the mediation program (Hann and Baar, 2001). Several additional studies that had randomly assigned cases to be eligible for referral to mediation nonetheless involved an element of party or judicial selection in which some of those cases ultimately went to mediation (Clarke and Gordon, 1997; Kobbervig, 1991; Macfarlane, 1995). Comparisons from Kakalik and others (1996, chap. 8) were not included in this review because the authors reported the mediation cases were more complex and tougher to settle than the nonmediation cases. Because mediation and nonmediation cases in other studies that did not use random assignment also might differ from each other in important ways, the comparative findings should be interpreted with caution. An additional caution is that some studies did not report statistical significance tests for some or all of the comparisons; accordingly, some apparent differences might not be statistically significant or true differences.

### *Program Structure*

General jurisdiction civil courts typically handled all civil actions other than small claims, domestic relations, and probate cases. Different programs excluded different types of cases from mediation, such as prisoner petitions, social security, and declaratory relief (Estee, 1987; Kakalik and others, 1996, chaps. 5–8; Stienstra, Johnson, and Lombard, 1997, chaps. 5, 6), motor vehicle claims (Macfarlane, 1995; Maiman, 1997), or medical malpractice cases (McEwen, 1992a). Most of the programs were administered by the court, but a few were administered by an outside organization (Kobbervig, 1991; Maiman, 1997). Although most programs offered mediation at no cost, litigants paid some or all of the mediator and administrative fees in some programs (Clarke and Gordon, 1997; Hann and Baar, 2001; Kakalik and others, 1996, chaps. 7, 8; Kobbervig, 1991; McEwen, 1992a; Maiman, 1997; Schultz, 1990).

The mediation session was held, on average, within six months after filing in some programs (Hann and Barr, 2001; Kakalik and others, 1996, chaps. 6, 7; Macfarlane, 1995; Stienstra, Johnson, and Lombard, 1997, chap. 5), between seven and twelve months after filing in other programs (Clarke and Gordon, 1997; Kakalik and others, 1996, chap. 8; McEwen, 1992a; Wissler, 2002), and a year or more after filing in yet



other programs (Estee, 1987; Kakalik and others, 1996, chap. 5; Schildt, Alfini, and Johnson, 1994; Woodward, 1990). In some programs, a majority of cases had completed most or all discovery before the mediation session (Daniel, 1995; Dichter, 1998; Fix and Harter, 1992; Kobbervig, 1991; Stienstra, Johnson, and Lombard, 1997, chap. 6; Woodward, 1990), but in other programs, mediation occurred earlier in the discovery process, sometimes even before it had started (Hann and Baar, 2001; Macfarlane, 1995, 2003; Stienstra, Johnson, and Lombard, 1997, chap. 5; Wissler, 2002). A few programs noted they required all dispositive or significant motions to be heard before mediation took place (McEwen, 1992a; Stienstra, Johnson, and Lombard, 1997, chap. 6; Woodward, 1990). The mediator typically received information about the case prior to the session (Daniel, 1995; Estee, 1987; Kakalik and others, 1996, chaps. 5–7; McEwen, 1992a; Schildt, Alfini, and Johnson, 1994; Schultz, 1990; Stienstra, Johnson, and Lombard, 1997, chaps. 5, 6; Wissler, 2002; but see Kakalik and others, 1996, chap. 8).

Most programs involved mandatory referral of eligible cases to mediation on an automatic basis, on a judge's order, or at the request of one party. In only a few programs was mediation totally voluntary, requiring both parties to request or agree to use it (Estee, 1987; Maiman, 1997; Schildt, Alfini, and Johnson, 1994; *Report on Mediation*, 2002). Other programs assessed both parties' willingness to mediate prior to referral or permitted parties to opt out after referral (Bickerman, 1998; Daniel, 1995; Estee, 1987; Kakalik and others, 1996, chaps. 7, 8; Kobbervig, 1991; Macfarlane, 1995, 2003). The attorneys and litigants or persons with settlement authority were required to attend mediation in most programs (Bergman, 1998; Clarke and Gordon, 1997; Dichter, 1998; Estee, 1987; Kakalik and others, 1996, chaps. 5, 7, 8; McEwen, 1992a; Macfarlane, 1995; Schildt, Alfini, and Johnson, 1994; Stienstra, Johnson, and Lombard, 1997, chaps. 5, 6; Wissler, 2002; but see Kakalik and others, 1996, chap. 6; Woodward, 1990).

Most cases had a single mediation session in most programs (Clarke and Gordon, 1997; Hann and Baar, 2001; Kakalik and others, 1996, chaps. 6–8; McEwen, 1992b; Macfarlane, 2003; Stienstra, Johnson, and Lombard, 1997, chap. 6; Wissler, 2002), but half or more of the cases had more than one session in several programs (Daniel, 1995; Kakalik and others, 1996, chap. 5; Stienstra, Johnson, and Lombard, 1997, chap. 5). The length of the average mediation session was two to three hours in most programs (Clarke and Gordon, 1997; Hann and Baar, 2001; McEwen,

1992b; Macfarlane, 1995, 2003; Schildt, Alfini, and Johnson, 1994; Stienstra, Johnson, and Lombard, 1997, chaps. 5, 6; Wissler, 2002), but was less than two hours in one program (Kakalik and others, 1997, chap. 6) and from four to eight hours in other programs (Estee, 1987; Kakalik and others, 1996, chaps. 5, 7, 8; Kobbervig, 1991).

The mediators served partially or fully pro bono in some programs (Bergman, 1998; Bickerman, 1998; Daniel, 1995; Dichter, 1998; Estee, 1987; Kakalik and others, 1996, chaps. 5, 6; Schildt, Alfini, and Johnson, 1994; Stienstra, Johnson, and Lombard, 1997, chap. 6; Wissler, 2002; Woodward, 1990), were paid by the parties in other programs (Clarke and Gordon, 1997; Hann and Baar, 2001; Kakalik and others, 1996, chaps. 7, 8; Kobbervig, 1991; McEwen, 1992a; Maiman, 1997; Schultz, 1990), and were employed by the court in a few programs (Stienstra, Johnson, and Lombard, 1997, chap. 5; Wissler, 2002). The mediators in most programs were attorneys who had substantial litigation experience or had been a magistrate or a judge; only a few programs used both attorney and lay mediators (Averill, 1995; Kakalik and others, 1996, chap. 7; Macfarlane, 2003; Maiman, 1997). The mediators either had prior mediation training or experience or were trained by the program (Averill, 1995; Bergman, 1998; Bickerman, 1998; Clarke and Gordon, 1997; Daniel, 1995; Dichter, 1998; Kakalik and others, 1996, chaps. 5, 7, 8; McEwen, 1992b; Maiman, 1997; *Report on Mediation*, 2002; Schildt, Alfini, and Johnson, 1994; Schultz, 1990; Stienstra, Johnson, and Lombard, 1997, chap. 6; Wissler, 2002; Woodward, 1990).

Two programs adopted primarily a facilitative, nonevaluative approach (Macfarlane, 2003; Schildt, Alfini, and Johnson, 1994). In several programs, some of which were labeled “facilitative” (Kakalik and others, 1996, chaps. 6–8), mediators engaged in one or more of the following actions in from roughly one-fourth to three-fourths of the cases: evaluated the strengths and weaknesses of each side’s case, suggested settlement options, predicted the outcome, or assessed or recommended the settlement value of the case (Herman, 2001; Kakalik and others, 1996, chaps. 5, 6, 8; McEwen, 1992b; Wissler, 2002; but see Kakalik and others, 1996, chap. 7). Several studies noted the mediators’ approach varied among the mediators (Estee, 1987; McEwen, 1992b; Wissler, 2002) and over the course of a session (Dichter, 1998).

### *Outcomes*

This research emphasizes settlement rates, participant satisfaction, and time and cost savings.

*Settlement Rate.* Virtually all studies examined the rate of settlement in mediation. The settlement rate in most studies was between 27 and 63 percent (Averill, 1995; Bergman, 1998; Bickerman, 1998; Clarke and Gordon, 1997; Daniel, 1995; Dichter, 1998; Estee, 1987; Fix and Harter, 1992; Hann and Baar, 2001; Herman, 2001; Kakalik and others, 1996, chaps. 5, 7, 8; Kobbervig, 1991; McEwen, 1992a; Macfarlane, 1995; Maiman, 1997; *Report on Mediation*, 2002; Schildt, Alfini, and Johnson, 1994; Schultz, 1990; Stienstra, Johnson, and Lombard, 1997, chaps. 5, 6; Wissler, 2002; Woodward, 1990), but a few studies reported a lower (13 to 22 percent; Kakalik and others, 1996, chap. 6; Macfarlane, 2003) or higher settlement rate (71 to 80 percent; Amis and others, 1998; Maiman, 1997). Of the eight studies that included a comparison group of non-mediation cases, half found that cases referred to mediation tended to have a somewhat higher rate of settlement, or a somewhat lower rate of trial or judgment on a dispositive motion, than did cases not referred to mediation (Kakalik and others, 1996, chaps. 5, 7; McEwen, 1992a; Stienstra, Johnson, and Lombard, 1997, chap. 5), but half found no differences (Clarke and Gordon, 1997; Kakalik and others, 1996, chap. 6; Kobbervig, 1991; Wissler, 2002).

*Participants' Assessments.* The sixteen studies that examined litigants' assessments of the process, the neutral, and the outcome found highly favorable views. Most litigants said the mediation process was fair (Clarke and Gordon, 1997; Herman, 2001; Kakalik and others, 1996, chaps. 5–8; Kobbervig, 1991; Maiman, 1997; *Report on Mediation*, 2002; Schildt, Alfini, and Johnson, 1994; Schultz, 1990; Wissler, 2002) and gave them sufficient opportunity to present their case (Clarke and Gordon, 1997; Daniel, 1995; Fix and Harter, 1992; Kobbervig, 1991; Macfarlane, 1995; Maiman, 1997; *Report on Mediation*, 2002; Wissler, 2002). A majority of litigants felt they had control over the process or had input in determining the outcome (Maiman, 1997; Schildt, Alfini, and Johnson, 1994; Wissler, 2002; but see Clarke and Gordon, 1997). Most litigants thought the mediator was neutral (Clarke and Gordon, 1997; Daniel, 1995; Macfarlane, 1995; Maiman, 1997; *Report on Mediation*, 2002; Schildt, Alfini, and Johnson, 1994; Wissler, 2002), did not pressure them to settle (Macfarlane, 1995; Schildt, Alfini, and Johnson, 1994; Wissler, 2002), understood their views and the issues in dispute (Hann and Baar, 2001; Maiman, 1997; *Report on Mediation*, 2002; Wissler, 2002), and treated them with respect (*Report on Mediation*, 2002; Wissler, 2002). A majority of litigants felt the mediated settlement was fair (Kobbervig, 1991; Macfarlane, 1995; Schildt, Alfini, and Johnson, 1994; Wissler, 2002) or were satisfied with it

(Daniel, 1995; Fix and Harter, 1992; Maiman, 1997; Schildt, Alfini, and Johnson, 1994).

The twenty studies that examined attorneys' assessments consistently reported high ratings of the mediation process and the mediator. Most attorneys said the mediation process was fair (Averill, 1995; Herman, 2001; Kakalik and others, chaps. 5–8; Kobbervig, 1991; Macfarlane 1995; Maiman, 1997; *Report on Mediation*, 2002; Schildt, Alfini, and Johnson, 1994; Schultz, 1990; Stienstra, Johnson, and Lombard, 1997, chap. 6; Wissler, 2002; Woodward, 1990) and gave sufficient opportunity to present the issues (Daniel, 1995; Fix and Harter, 2002; Kobbervig, 1991; Macfarlane, 1995; Maiman, 1997; *Report on Mediation*, 2002; Woodward, 1990). Most said they would recommend mediation to others or would use mediation again (Averill, 1995; Daniel, 1995; Estee, 1987; Hann and Baar, 2001; Herman, 2001; Macfarlane, 1995; Maiman, 1997; Schildt, Alfini, and Johnson, 1994; Stienstra, Johnson, and Lombard, 1997, chap. 5; Wissler, 2002). A majority of attorneys said the mediator was neutral (Daniel, 1995; Macfarlane, 1995; Maiman, 1997; *Report on Mediation*, 2002; Schildt, Alfini, and Johnson, 1994; Stienstra, Johnson, and Lombard, 1997, chap. 5; Wissler, 2002; Woodward, 1990), understood the issues (Hann and Baar, 2001; Maiman, 1997; *Report on Mediation*, 2002), was well prepared (Daniel, 1995; Stienstra, Johnson, and Lombard, 1997, chap. 5), and was effective in engaging the parties in a meaningful discussion (Daniel, 1995; Stienstra, Johnson, and Lombard, 1997, chap. 5; Wissler, 2002). Most attorneys felt that the mediated settlement was fair (Kobbervig, 1991; Macfarlane, 1995; Schildt, Alfini, and Johnson, 1994; Wissler, 2002) or were satisfied with it (Averill, 1995; Fix and Harter, 1992; Maiman, 1997; Schildt, Alfini, and Johnson, 1994; but see Daniel, 1995).

The subset of studies that compared participants' assessments in mediation and nonmediation cases produced mixed findings. Across all disposition types, two studies found no consistent overall differences in litigants' assessments between mediation and nonmediation cases (Clarke and Gordon, 1997; Macfarlane, 1995), but one study found that litigants in mediation cases had somewhat more favorable assessments (Kobbervig, 1991). Two studies found no consistent overall differences in litigants' assessments between cases that settled as a result of mediation versus negotiation (Clarke and Gordon, 1997; Fix and Harter, 1992). One study found no consistent overall differences in attorneys' assessments between mediation and nonmediation cases (Kobbervig, 1991).<sup>6</sup>

*Impact on the Litigants' Relationship.* The four studies that examined this outcome found that a minority of litigants (from 5 to 43 percent) thought that mediation improved their relationship with the other party (Hann and Baar, 2001; Herman, 2001; Macfarlane, 1995; Maiman, 1997). In two of the studies, a majority of the litigants felt that mediation had no effect on their relationship, and few felt mediation made their relationship worse (Herman, 2001; Macfarlane, 1995). A majority of attorneys thought that mediation either had no effect on or did not improve the litigants' relationship (Herman, 2001; Kakalik and others, 1996, chaps. 5–8; Stienstra, Johnson, and Lombard, 1997, chaps. 5, 6; Wissler, 2002).

*Efficiencies in Dispute Processing.* Five studies reported that mediation cases terminated faster than nonmediation cases (Clarke and Gordon, 1997; Hann and Baar, 2001; Kakalik and others, 1996, chap. 5; McEwen, 1992a; Stienstra, Johnson, and Lombard, 1997, chap. 5). However, four studies found no differences in disposition time (Kakalik and others, 1996, chaps. 6, 7; Kobbervig, 1991; Wissler, 2002), and one reported longer disposition times for mediation cases (Estee, 1987). The findings were mixed with regard to whether a majority of attorneys did (Daniel, 1995; Kakalik and others, 1996) or did not (Kakalik and others, 1996, chaps. 5, 6; Stienstra, Johnson and Lombard, 1997, chap. 6) think mediation reduced the time to disposition.

*Macrojustice.* The single study (Clarke and Gordon, 1997) to compare mediated and litigated outcomes found that plaintiffs were more likely to receive some money in cases that settled in mediation than in cases that went to trial, but the amount of money received in mediated settlements was smaller. No differences were found between settlements reached in mediation versus in bilateral negotiation.

*Transaction Cost Savings.* Three studies found no differences between mediation cases and nonmediation cases, when examining all disposition types combined, in the number of attorney work hours or in legal fees and litigation costs (Kakalik and others, 1996, chaps. 5–7). Another study found that attorneys' fees in cases that settled in mediation did not differ from those in cases that settled through negotiation, but that fees in both groups of settled cases were lower than in tried cases (Clarke and Gordon, 1997). The studies that obtained attorneys' views on costs were split between whether half or more of the attorneys (Hann and Baar, 2001; Kakalik and others, 1996, chaps. 7, 8; Macfarlane, 1995; Maiman, 1997;

Schultz, 1990; Stienstra, Johnson, and Lombard, 1997, chaps. 5, 6) or fewer than half of the attorneys (Clarke and Gordon, 1997; Daniel, 1995; Fix and Harter, 1992; Kakalik and others, 1996, chaps. 5, 6; Maiman, 1997; Wissler, 2002) thought that mediation reduced litigation costs.

Four studies found no differences between mediation and nonmediation cases in the number of interrogatories, depositions, or discovery motions filed (Kakalik and others, 1996, chaps. 5, 6, 8; Stienstra, Johnson, and Lombard, 1997, chap. 5), but two studies reported less discovery and fewer discovery requests and discovery motions filed in mediation cases (Kakalik and others, 1996, chap. 7; McEwen, 1992a). Five studies found no differences between mediation cases and nonmediation cases in the number of motions filed or decided (Clarke and Gordon, 1997; Kakalik and others, 1996, chaps. 6–8; Wissler, 2002), but two studies reported fewer motions in mediation cases (Kakalik and others, 1996, chap. 5; McEwen, 1992a). A majority of attorneys in several studies estimated there was little or no change in the amount of discovery needed or conducted (Clarke and Gordon, 1997; Herman, 2001; Kakalik and others, 1996, chaps. 5–8; Stienstra, Johnson, and Lombard, 1997, chap. 6) or in the number of motions filed (Stienstra, Johnson, and Lombard, 1997, chap. 6; Herman, 2001).

*Durability of Settlement.* The three studies that examined compliance found that the rate of compliance with mediated agreements was generally 90 percent or greater (Clarke and Gordon, 1997; Fix and Harter, 1992; Macfarlane, 2003). In one study, the rate of compliance with mediated agreements did not differ from the rate of compliance with negotiated settlements, although compliance with both types of settlements was greater than compliance with a trial verdict (Clarke and Gordon, 1997). In another study, mediation and nonmediation cases did not differ in the rate of full compliance or in reports of subsequent disputes (Fix and Harter, 1992).

#### *Impact of Program Structure on Outcomes*

Structural elements in these programs had a mixed effect on outcomes.

*Timing.* Two studies found that cases were more likely to settle if mediation was held sooner after the case had been filed (Schildt, Alfini, and Johnson, 1994; Wissler, 2002), while two other studies found no relationship between mediation timing and the likelihood of settlement (Schultz, 1990; Stienstra, Johnson, and Lombard, 1997, chap. 6). In cases with

earlier sessions, fewer motions were filed and decided (Wissler, 2002), and the time to disposition was shorter (Stienstra, Johnson, and Lombard, 1997, chap. 5; Wissler, 2002). Three studies reported no relationship between the status of discovery and the likelihood of settlement (Schildt, Alfani, and Johnson, 1994; Stienstra, Johnson, and Lombard, 1997, chap. 6; Wissler, 2002), but in another study, there appeared to be a link (McEwen, 1992b). Settlement was less likely if dispositive or other motions were pending (Wissler, 2002).

*Mode of Referral.* Two studies found no differences in settlement rates by mode of referral to mediation (Estee, 1987; Wissler, 2002), and two other studies found that cases that entered mediation voluntarily settled at a higher rate than cases ordered to mediation (McEwen, 1992b; Stienstra, Johnson, and Lombard, 1997, chap. 5). Litigants' assessments of the fairness of the mediation process were not related to whether their side had requested mediation (Wissler, 2002), but attorneys who requested mediation had more favorable assessments of mediation (Stienstra, Johnson, and Lombard, 1997, chap. 5; Wissler, 2002).

*The Mediators' Approaches.* All three studies that examined this issue found that settlement was more likely if the mediators were more active and disclosed their views about the strengths and weaknesses of the case, case settlement value, or likely court outcome than if they did not (McEwen, 1992b; Wissler, 2002; Woodward, 1990). In the single study that examined the impact of mediator actions on participants' assessments (Wissler, 2002), litigants were more likely to feel the mediation process was fair and did not feel more pressured to settle when the mediators evaluated the case merits than when they did not. However, litigants were more likely to feel pressured to settle by the mediator and were less likely to feel the mediation process was fair if the mediators recommended a particular settlement than if they did not.

*The Mediators.* Both studies that examined the impact of mediator experience on settlement found that mediators who had mediated more cases had a higher rate of settlement than those with less experience (Hann and Baar, 2001; Wissler, 2002). Mediation experience, however, was not related to litigants' or attorneys' assessments of the fairness of the mediation process (Daniel, 1995; Wissler, 2002). The amount of mediation training was not related to settlement (Wissler, 2002) or to litigants' or attorneys' assessments of the fairness of mediation (Daniel, 1995; Wissler, 2002). And the mediator's familiarity with the substantive issues in the case was

not related to the likelihood of settlement or to litigants' and attorneys' assessments of the fairness of the mediation process (Wissler, 2002).

*Case Characteristics.* Several studies found no differences in settlement rates among general case type categories (Kakalik and others, 1996; McEwen, 1992a; Macfarlane, 1995; Schultz, 1990; Wissler, 2002). Two studies found differences in settlement rates by case type: personal injury cases appeared to have a higher rate of settlement than contract cases in one study (Schildt, Alfini, and Johnson, 1994) but a lower rate in the other study (Macfarlane, 2003). Other studies suggested that differences in the rate of settlement might be found by looking at subtypes of cases within these broad case categories (Hann and Baar, 2001; Schultz, 1990). Participants' assessments of the process (Schildt, Alfini, and Johnson, 1994) or the outcome (Schultz, 1990) did not vary by case type. Nor was the monetary value of the case related to the likelihood of settlement (Macfarlane, 1995).

Several other case characteristics were related to the increased likelihood of settlement in mediation: less disparity in the parties' positions at the start of mediation (Wissler, 2002), liability being contested to a lesser degree (Wissler, 2002), and fewer named parties (Hann and Baar, 2001). Greater party preparation for mediation was related to an increased likelihood of settlement, to litigants' feeling less pressured by the mediator to settle, and to litigants' and attorneys' viewing the mediation process as fairer (Wissler, 2002). The complexity of the issues was not related to settlement in two studies (Schildt, Alfini, and Johnson, 1994; Woodward, 1990), but another study found a higher settlement rate in less complex cases (Wissler, 2002). The contentiousness of the litigants' relationship was not related to the likelihood of settlement (Macfarlane, 1995; Wissler, 2002). Greater cooperativeness of opposing counsel during mediation, however, was related to an increased likelihood of settlement and to litigants' and attorneys' viewing the mediation process as fairer (Wissler, 2002).

### Mediation in Appellate Cases

The findings of fifteen appellate mediation studies are discussed in this section (Aemmer, 1997; Birnbaum and Ellman, 1976; Cohen and Mashburn, 1999; Eaglin, 1990; FitzGibbon, 1993; Ganzfried, 1997; Hanson, 1991; Hanson and Becker, 2002; McNally, 2000; Note, 1979; Partridge and Lind, 1983; Riselli, 2001; Steelman and Goldman, 1986; Task Force, 2001; Torregrossa, 2002).<sup>7</sup> Only one study surveyed litigants (Task Force, 2001);<sup>8</sup>



seven studies used attorney questionnaires (Eaglin, 1990; Hanson, 1991; Hanson and Becker, 2002; Note, 1979; Partridge and Lind, 1983; Steelman and Goldman, 1986; Task Force, 2001). A few studies supplemented these data sources with mediator logs (Eaglin, 1990; Task Force, 2001) or observations of mediation sessions (Eaglin, 1990; Hanson and Becker, 2002). All studies obtained data from court or program records.

Six of the studies included a comparison group of nonmediation cases for one or more outcome measures. Five of these studies had essentially randomly assigned mediation-eligible cases to either a mediation or a nonmediation group (Aemmer, 1997; Eaglin, 1990; Hanson, 1991; Partridge and Lind, 1983; Steelman and Goldman, 1986). The remaining study compared mediation cases to a sample of nonmediation cases that were closed prior to the implementation of the mediation program (Note, 1979). The comparative findings should nonetheless be interpreted with caution because some studies did not report tests of statistical significance for some or all of the comparisons.

### *Program Structure*

Appellate mediation programs typically excluded prisoner petitions and cases in which parties were not represented by counsel (Aemmer, 1997; Cohen and Mashburn, 1999; Eaglin, 1990; Hanson, 1991; Hanson and Becker, 2002; McNally, 2000; Partridge and Lind, 1983; Riselli, 2001; Steelman and Goldman, 1986; Torregrossa, 2002). State court programs, which involved domestic relations cases as well as general civil cases, typically also excluded appeals involving custody, paternity, or termination of parental rights (Cohen and Mashburn, 1999; FitzGibbon, 1993; McNally, 2000; Steelman and Goldman, 1986) or juveniles (Hanson, 1991; Steelman and Goldman, 1986). All programs were administered by the court, and virtually all offered mediation at no cost to the parties (but see McNally, 2000; Task Force, 2001). Several programs noted that they attempted to settle not only the appeal but also related matters at both the trial and appellate levels (Aemmer, 1997; McNally, 2000; Riselli, 2001; Task Force, 2001).

The initial mediation session was held in most programs within one to two months after the notice of appeal had been filed (Birnbaum and Ellman, 1976; Cohen and Mashburn, 1999; Eaglin, 1990; Hanson, 1991; Hanson and Becker, 2002; Partridge and Lind, 1983; Steelman and Goldman, 1986; Task Force, 2001), but was held four to five months after filing in a few programs (FitzGibbon, 1993; Steelman and Goldman, 1986). Mediation

typically took place before briefing and oral argument (but see Steelman and Goldman, 1986). The mediator generally received information about the case prior to the session (Aemmer, 1997; Birnbaum and Ellman, 1976; Cohen and Mashburn, 1999; Eaglin, 1990; Ganzfried, 1997; Hanson and Becker, 2002; Note, 1979; Task Force, 2001; Torregrossa, 2002).

Mediation was totally voluntary, requiring the agreement of both parties, in only one program (Stelman and Goldman, 1986). All other programs involved mandatory referral of eligible cases to mediation on an automatic basis, on a judge's order, or at the request of one party. A few programs sought attorney input prior to referral or permitted parties to opt out after referral (FitzGibbon, 1993; Task Force, 2001; Torregrossa, 2002). Counsel's participation in mediation generally was required (Aemmer, 1997; Birnbaum and Ellman, 1976; Cohen and Mashburn, 1999; Eaglin, 1990; FitzGibbon, 1993; Ganzfried, 1997; Hanson, 1991; Note, 1979; Partridge and Lind, 1983; Steelman and Goldman, 1986; Torregrossa, 2002). Most programs also required the participation of litigants or persons with settlement authority (Birnbaum and Ellman, 1976; Cohen and Mashburn, 1999; Hanson, 1991; Riselli, 2001; Steelman and Goldman, 1986; Task Force, 2001; Torregrossa, 2002) or their availability for consultation (Note, 1979). Other programs welcomed or encouraged, but did not require, litigant participation (Aemmer, 1997; McNally, 2000; Steelman and Goldman, 1986).

Some programs, especially those in courts that covered a large geographical area, held mediation sessions primarily by telephone to minimize litigants' costs (Aemmer, 1997; Eaglin, 1990; Hanson and Becker, 2002; Riselli, 2001), while others tended to hold in-person sessions (Cohen and Mashburn, 1999; FitzGibbon, 1993; Hanson, 1991; McNally, 2000; Note, 1979; Steelman and Goldman, 1986; Task Force, 2001; Torregrossa, 2002). The length of the typical initial mediation session was sixty to ninety minutes in some programs (Eaglin, 1990; Partridge and Lind, 1983), but in other programs it was as short as thirty minutes (FitzGibbon, 1993) or as long as four to six hours (McNally, 2000; Task Force, 2001). The mediator generally engaged in extensive follow-up with the attorneys to monitor the progress of negotiations and to hold additional caucuses or joint sessions as the negotiations continued (Aemmer, 1997; Eaglin, 1990; FitzGibbon, 1993; McNally, 2000; Torregrossa, 2002). Accordingly, appellate mediation in a single case could span weeks or months (FitzGibbon, 1993).

The mediators were employed by the court in most programs; in two programs, however, the mediators served partially or fully pro bono (Ganzfried, 1997; Task Force, 2001). The mediators consisted of attorneys with substantial prior litigation experience (Aemmer, 1997; Ganzfried, 1997; Hanson and Becker, 2002; Partridge and Lind, 1983; Riselli, 2001), sitting or retired judges (Birnbaum and Ellman, 1976; Cohen and Mashburn, 1999; FitzGibbon, 1993; Hanson, 1991; Steelman and Goldman, 1986), or a combination of attorneys and judges (Note, 1979; Torregrossa, 2002). Sitting judges who served as mediators were automatically disqualified from hearing the case (but see Steelman and Goldman, 1986). Only one program used experienced nonattorney mediators, comprising a majority of that program's mediators (Task Force, 2001). Some programs noted that the mediators had prior mediation experience or received mediation training (Ganzfried, 1997; Hanson, 1991; Hanson and Becker, 2002; Riselli, 2001; Task Force, 2001).

Although variation in mediator approach within a program was noted, in most programs the mediators tended to engage participants in a discussion of the strengths and weaknesses of the case, the litigants' interests, various settlement options, and the risks and benefits of settlement and non-settlement (Aemmer, 1997; Birnbaum and Ellman, 1976; Eaglin, 1990; FitzGibbon, 1993; Ganzfried, 1997; Hanson, 1991; Hanson and Becker, 2002; McNally, 2000; Task Force, 2001; Torregrossa, 2002). A few studies noted that the mediators sometimes (FitzGibbon, 1993; Partridge and Lind, 1983) or frequently (Note, 1979) predicted the outcome of the appeal.

### *Outcomes*

This research focused mainly on settlement rates, attorney's assessments, and efficiencies of dispute processing.

***Settlement Rate.*** All studies examined the rate at which cases were settled, withdrawn, or voluntarily dismissed prior to the submission of briefs, oral argument, or a judicial decision on the merits.<sup>9</sup> In most programs, between 29 and 47 percent of the cases were resolved before argument (Aemmer, 1997; Birnbaum and Ellman, 1976; Eaglin, 1990; FitzGibbon, 1993; Ganzfried, 1997; Hanson and Becker, 2002; McNally, 2000; Note, 1979; Partridge and Lind, 1983; Steelman and Goldman, 1986; Task Force, 2001; Torregrossa, 2002), but several programs had a higher rate of preargument disposition, ranging from 56 to 76 percent (Cohen and Mashburn, 1999; Hanson, 1991; Riselli, 2001; Steelman and Goldman,

1986). Most of the subset of studies that included a comparison group of nonmediation cases found that cases assigned to mediation were 10 to 20 percent more likely than cases not assigned to mediation to be resolved before briefing or argument (Aemmer, 1997; Eaglin, 1990; Hanson, 1991; Note, 1979; Partridge and Lind, 1983; Steelman and Goldman, 1986), but one study reported no differences in two programs (Stelman and Goldman, 1986).

*Participants' Assessments.* The only study to obtain litigants' assessments found they gave high ratings to the mediator's impartiality and knowledge, as well as to the fairness, confidentiality, and opportunity for participation the mediation process provided (Task Force, 2001). The six studies that obtained attorneys' assessments consistently found high ratings of the mediator and the mediation process. Most attorneys felt that the mediator was neutral (Hanson and Becker, 2002; Task Force, 2001), did not apply undue settlement pressure (Note, 1979; Partridge and Lind, 1983), and was knowledgeable about mediation and the subject matter (Task Force, 2001). Most attorneys supported the continuation of the mediation program (Hanson, 1991; Note, 1979), preferred participation in the program to the usual appeals process (Eaglin, 1990; Partridge and Lind, 1983), and would use mediation again or recommend it to others (Hanson and Becker, 2002; Task Force, 2001). Most attorneys reported that the mediation agreement was clear, workable, and fair to both sides (Hanson and Becker, 2002).

*Efficiencies in Dispute Processing.* In five of the studies that examined this outcome, the time from filing the appeal to case disposition (for all modes of disposition combined) was one to three months shorter for cases assigned to mediation than for cases not assigned to mediation (Eaglin, 1990; Hanson, 1991; Note, 1979; Partridge and Lind, 1983; Steelman and Goldman, 1986).<sup>10</sup> One study, however, found no reduction in the time to disposition in two programs (Stelman and Goldman, 1986).

*Transaction Cost Savings.* The single study to compare cases assigned to mediation with cases not assigned to mediation did not find differences in attorneys' reports of time spent on the appeal or transcript and reproduction costs in any of the three programs examined (Stelman and Goldman, 1986). With regard to the potential for cost savings for the courts, several studies calculated that the mediation program resolved a number of cases equal to the caseload of one to two judges and their staff (Eaglin, 1990; Hanson and Becker, 2002; Partridge and Lind, 1983).

*Impact of Program Structure on Outcomes*

The structural elements examined in these programs had limited effects on outcomes.

*In-Person Versus Telephonic Mediations.* Although no data were provided to support their conclusions, one program noted that experimental telephone conferences “were found to be effective” (Eaglin, 1990, p. 14), another reported that their “experience” suggested that in-person mediations were more productive than those conducted by telephone (Torregrossa, 2002, p. 1070), and a third program reported “no appreciable difference” in settlement rates between in-person and telephonic mediations (Riselli, 2001, p. 60).

*Case Characteristics.* Four studies found no substantial differences in the likelihood of settlement in mediation based on the subject matter of the case (Eaglin, 1990; FitzGibbon, 1993; Hanson and Becker, 2002; Note, 1979), but one study (Task Force, 2001) found differences that family law and probate cases were more likely to settle than contract and personal injury cases, which in turn were more likely to settle than employment and insurance cases. One study found that participation in alternative dispute resolution (ADR) in an earlier stage of the case reduced the likelihood the appeal would settle in mediation (Task Force, 2001). Another study found that the presence of a decision maker in mediation affected settlement, such that settlement was least likely when neither side had a decision maker present and most likely when both sides did (McNally, 2000). Settlement rates were not related to several other case characteristics, including the number of parties (Note, 1979), whether the plaintiff sought monetary or other relief (Note, 1979; Partridge and Lind, 1983), or whether the appeal was from an agency or a court decision and, if the latter, whether from trial or summary judgment (Note, 1979).

### Neutral Evaluation in General Jurisdiction Civil Cases

The findings of four neutral evaluation studies are discussed in this section (Fitzhugh, 1998; Kakalik and others, 1996, chaps. 9, 10; Rosenberg and Folberg, 1994).<sup>11</sup> All studies obtained information from court or program records; three also reported data from questionnaires completed by litigants, attorneys, and evaluators (Kakalik and others, 1996, chaps. 9, 10; Rosenberg and Folberg, 1994). One study supplemented questionnaire

data with interviews, focus groups, and observation of sessions (Rosenberg and Folberg, 1994).

All four studies included a comparison group of cases not assigned to neutral evaluation. Only one study randomly assigned eligible cases to neutral evaluation (Rosenberg and Folberg, 1994). One study used a comparison group of cases that were managed by a magistrate judge but did not go to neutral evaluation (Kakalik and others, 1996, chap. 10). Two studies used a comparison group of cases that were closed prior to the implementation of the neutral evaluation program (Fitzhugh, 1998; Kakalik and others, 1996, chap. 9). Comparisons from the latter study were not included in this review, however, because the court instituted earlier and more intensive case management at the same time as the neutral evaluation program; accordingly, any differences between the outcomes of the two groups of cases could not be attributed to the program alone. Because the other studies did not report tests of statistical significance for some or all of the comparisons, the comparative findings should be interpreted with caution.

### *Program Structure*

Neutral evaluation generally involved the discussion of settlement possibilities, accompanied by the evaluator's assessment of the strengths and weaknesses of each side's case and a prediction of the likely trial outcome (Fitzhugh, 1998; Rosenberg and Folberg, 1994). If a settlement was not reached, the evaluator typically explored case management issues, such as information sharing, discovery, and motions (Fitzhugh, 1998; Kakalik and others, 1996, chap. 9; Rosenberg and Folberg, 1994). Different programs excluded different types of cases, most commonly those involving prisoner petitions, social security, bankruptcy, or injunctive relief (Fitzhugh, 1998; Kakalik et al., 1996, chap. 9; Rosenberg and Folberg, 1994). All programs were administered by the court, and most offered neutral evaluation at no cost to the litigants (but see Fitzhugh, 1998).

In two programs, the neutral evaluation session was held in a majority of cases four to five months after the case was filed (Kakalik and others, 1996, chap. 9; Rosenberg and Folberg, 1994), but in another program the session was held on average a year after filing (Kakalik and others, 1996, chap. 10). Most cases had a single session in most programs, but about half of the cases had two or more sessions in one program (Kakalik and others, 1996, chap. 9). In all programs, a majority of the sessions lasted two to six

hours. The evaluators received information about the case prior to the session in all programs.

All programs primarily involved mandatory referral of cases to neutral evaluation; parties in one program could opt out, but few did (Rosenberg and Folberg, 1994). The attorneys and litigants or persons with settlement authority typically were required to attend the session in all programs.

In two programs, the evaluators were attorneys with substantial litigation experience who served pro bono (Kakalik and others, 1996, chap. 10; Rosenberg and Folberg, 1994). In another program, the evaluators were magistrate judges who were supervising discovery (Kakalik and others, 1996, chap. 9). In the fourth program, the evaluators were paid by the parties (Fitzhugh, 1998). One court provided a two-day training for evaluators who did not have prior ADR training or experience (Fitzhugh, 1998), and another provided a several-hour training program and written materials for new evaluators (Rosenberg and Folberg, 1994).

Across programs and across evaluators within a program, the evaluator's approach ranged from mediation to "hard-nosed" settlement tactics (Fitzhugh, 1998; Rosenberg and Folberg, 1994, p. 1495). In two programs, the evaluators gave an evaluation to each side in two-thirds to three-fourths of the cases (Kakalik and others, 1996, chaps. 9, 10). In another program, evaluators reported they assessed the strengths and weaknesses of the parties' positions in 80 percent of the cases, but they went further and predicted the trial outcome in 45 percent of cases, estimated the costs of trial in 35 percent, and recommended a specific settlement value in 29 percent of cases (Rosenberg and Folberg, 1994). This study also reported that a majority of evaluators gave their evaluation in the course of settlement discussions, while 20 percent gave their evaluation only after negotiations bogged down, and 5 percent offered their evaluation at the start of the session (Rosenberg and Folberg, 1994).

### *Outcomes*

Once again, standard outcomes have been examined.

***Settlement Rate.*** All four studies examined the rate of settlement as a result of neutral evaluation, which ranged from 23 percent to 51 percent. The single study to compare the trial rate for cases assigned to neutral evaluation with that of cases not assigned to neutral evaluation found that neutral evaluation cases were slightly less likely to have a trial (Kakalik and others, 1996, chap. 10).

*Participants' Assessments.* The three studies that reported participants' assessments consistently found them to be highly positive. Most litigants and attorneys thought the neutral evaluation process was fair (Kakalik and others, 1996, chaps. 9, 10; Rosenberg and Folberg, 1994) and worth the resources they devoted to it (Rosenberg and Folberg, 1994). In one study, a majority of litigants and attorneys thought the evaluator listened carefully to them and understood their perspectives, was an expert in the subject matter in their case, accurately analyzed the legal and factual issues, and was interested in exploring creative solutions, and a majority of attorneys thought the evaluator was neutral and well prepared (Rosenberg and Folberg, 1994). In two studies, most litigants and attorneys thought the neutral evaluation program was good and should be continued (Kakalik and others, 1996, chaps. 9, 10).

*Impact on the Litigants' Relationship.* In the two studies that examined this outcome (Kakalik and others, 1996, chaps. 9, 10), 41 percent and 46 percent of attorneys, respectively, said that neutral evaluation helped to improve the relationship between the parties; an equal or larger percentage of attorneys said neutral evaluation had no effect on the parties' relationship. Few attorneys, however, thought neutral evaluation had a detrimental effect on the parties' relationship.

*Efficiencies in Dispute Processing.* Both of the studies that examined the length of time from filing to disposition found no differences between cases assigned to neutral evaluation and cases not assigned to neutral evaluation (Fitzhugh, 1998; Kakalik and others, 1996, chap. 10). Slightly more attorneys thought that neutral evaluation had no effect on disposition time than thought it reduced disposition time (Kakalik and others, 1996, chaps. 9, 10; Rosenberg and Folberg, 1994); few thought it increased disposition time (Kakalik and others, 1996, chaps. 9, 10).

*Transaction Cost Savings.* The single study to examine objective measures of costs found no differences between cases assigned to neutral evaluation and cases that were not assigned to neutral evaluation in attorneys' reports of hours worked and fees and costs (Kakalik and others, 1996, chap. 10). The same study reported that fewer motions were filed in cases assigned to neutral evaluation than in cases not assigned to neutral evaluation (Kakalik and others, 1996, chap. 10). In three studies, about half of the attorneys thought neutral evaluation reduced litigation costs, whereas roughly one-fourth thought it increased costs (Kakalik and others, 1996, chap. 10; Rosenberg and Folberg, 1994).



### *Impact of Program Structure on Outcomes*

Few studies examined whether structural elements were related to outcomes.

*Timing.* The one study that examined the effect of the timing of the neutral evaluation session found it was not related to litigants' or attorneys' satisfaction with the session (Rosenberg and Folberg, 1994).

*The Evaluators' Approach.* The single study that examined the effects of the evaluators (Rosenberg and Folberg, 1994) found that attorneys were more satisfied with the neutral evaluation process when the evaluator spent more time preparing for a session. Attorneys also were more satisfied with the neutral evaluation process when the evaluators spent less time in private caucuses, gave an evaluation of the case, made suggestions to facilitate and organize discovery, and gave their views on litigation procedure. Attorneys generally were more satisfied with the process when their expectations about how the session would be conducted were closer to the actual approach used. The timing of the evaluation also made a difference: litigants and attorneys were less satisfied with neutral evaluation if the evaluators gave their case assessments before beginning settlement discussions, rather than during the discussions or after negotiations bogged down.

*Case Characteristics.* The single study to examine the impact of case characteristics (Rosenberg and Folberg, 1994) found that litigants' and attorneys' satisfaction with neutral evaluation was not related to the type of case, the amount of the claim, or the number of parties. Litigant and attorney preparation for the session was not related to their satisfaction with neutral evaluation, but the degree of attorney cooperation during the session was.

### Comparison of Outcomes in Mediation and Neutral Evaluation in General Jurisdiction Civil Cases

Only one study has compared the outcomes of mediation and neutral evaluation in a single court (Stienstra, Johnson, and Lombard, 1997, chap. 4).<sup>12</sup> This study relied on questionnaire data from attorneys and neutrals, as well as court record data. Mediation and neutral evaluation were two of several ADR processes administered by the court from which the parties could choose or to which they could be referred by a judge or assigned by a clerk. The attorneys and litigants were required to attend the

session in both processes. The neutrals received training through the court and served pro bono for the first four hours of the session; the parties split the neutral's fees if additional time was needed.

There were no differences between mediation and neutral evaluation, or any of the other processes, in the following outcomes: whether the case settled; attorneys' perceptions of the fairness of the procedures and whether the benefits of ADR outweighed the costs; and attorneys' estimates of the effect of ADR on the time to disposition, litigation costs, the cost to prepare for and participate in the session, the amount of discovery conducted, or the number of motions filed. Because cases were not randomly assigned to dispute resolution processes, however, it is unclear whether there were no underlying differences in the effectiveness of the processes or whether parties or judges correctly matched cases to the processes for which they were best suited.

Data from this study and several other multioption or screening conference programs do not reveal a consistent preference for one process over the other. More cases selected, or were referred to, neutral evaluation than mediation in one study (Stienstra, Johnson, and Lombard, 1997, chap. 4), but the pattern was reversed in another study (Stuart and Savage, 1997). And two studies of a single program in different years reported opposite findings: in the first, more cases selected case evaluation (Lowe and Keilitz, 1992), while in the second, more cases selected mediation (Maiman, 1997). In addition, one study found that most tort cases selected case evaluation, whereas most contract cases selected mediation (Lowe and Keilitz, 1992).

## Conclusion

In small claims, general civil, and appellate court settings, the empirical research indicates that mediation and neutral evaluation settle cases and that participants view the process and outcome as fair. On these dimensions, as well as with regard to compliance, improving the parties' relationship, and reducing the time and cost of resolution, however, the findings are mixed with regard to whether mediation and neutral evaluation outperform or simply do as well as traditional litigation. In addition, the pattern of findings differs across the three court levels.

In small claims cases, a majority of studies find that compared to trial, mediation receives more favorable assessments from litigants, reduces the rate of noncompliance, and at least in cases that settle, has more positive

effects on the parties' relationship. In general civil jurisdiction cases, a majority of studies find no differences between mediation cases and non-mediation cases in participants' assessments, transaction costs, the amount of discovery, and the number of motions filed. The findings are mixed with regard to whether mediation does or does not increase the rate of settlement or reduce the trial rate, reduce the time to disposition, and enhance compliance compared to the traditional litigation process. The few studies of neutral evaluation in general civil cases suggest it does not reduce the time to disposition or transaction costs, but might reduce the number of motions and trials. In appellate cases, a majority of studies find that mediation reduces the rate of cases that go to oral argument and reduces the time to disposition compared to cases that are not assigned to mediation. Mediation does not, however, appear to reduce transaction costs in appellate cases.

The impact that program structural elements have on outcomes also varies across studies. The mode of referral to mediation does not affect the likelihood of settlement or participants' assessments in some studies, but in others the voluntary use of mediation has positive effects. Earlier sessions reduce the time to disposition and the number of motions filed, and in some studies also increase the likelihood of settlement; but in other studies, timing has no impact on settlement. With regard to mediator qualifications, a majority of studies find that more mediation experience is associated with more settlements, but mediation training and subject matter expertise do not affect settlement rates. A majority of studies find that when the neutral plays a more active role, the settlement rate increases. The impact of the neutral's approach on participants' assessments seems to vary depending on what the mediators do, when they do it, and what approach was expected. A majority of studies find that neither the general case type category nor the litigants' relationship is related to settlement, but some studies suggest that other case characteristics might play a role.

To date, some mediation outcomes have been examined in many studies, but other outcomes have been assessed in only a few studies. The neutral evaluation process has received scant empirical attention. Our ability to draw clear conclusions about the relative effectiveness and efficiency of court-connected mediation, neutral evaluation, and traditional litigation is limited by the small number of studies with reliable comparative data based on the random assignment of cases to dispute resolution processes and the use of statistical significance tests. The variation in findings across studies and across court levels also might reflect the use of different measures in different studies or differences in program design or the court

context in which different programs operate. Only a handful of studies have systematically varied and assessed elements of program structure, and the litigation context's impact on the efficiency and effectiveness of court-connected mediation and neutral evaluation has seldom been considered. Future studies need to address these gaps in the research.

## Notes

1. If multiple studies were conducted on a single program, only the most recent study is included here. If multiple reports were written for a single study, only one report was cited for any given proposition, even if several of the reports contained the same finding, so that readers can more easily discern the number of studies supporting a particular finding. If a single report included data from multiple programs and reported differences among the programs in their structure or outcomes, that report is cited for each proposition it supported and thus would appear multiple times for a single issue.

For brevity, throughout the article "most programs" means "most programs for which empirical data are available." The features of these programs are the ones most relevant for interpreting the research findings discussed. Describing "the" structure of some programs was difficult because different mediators or evaluators in a single program, and different judges in a single court, often adopted different practices with regard to the ADR process. Studies that presented findings for different types of dispute resolution processes combined (such as "multidoor courthouse" programs) were not included because the effects attributable to the different processes could not be ascertained. Studies of programs that involved a single category of case or party, such as programs involving only medical malpractice cases or cases in which a state agency was a party, were not included to maximize the comparability across the studies reviewed.

The few studies that have systematically examined the impact of different program structures on outcomes were included in this review. No conclusions about the relationship between program characteristics and program outcomes based on comparisons across programs were included because such comparisons are likely to be misleading, given that mediation programs often differ on multiple characteristics, any of which could mask or enhance the effects of a particular factor (Beck and Sales, 2000; Hensler, 1999).

2. Several studies incorporated data from more than one program or from more than one court (Goerd, 1993; McEwen and Maiman, 1981; Maiman, 1997; Raitt, Folberg, Rosenberg, and Barrett, 1993; Wissler, 1995). To increase the comparability of the studies reviewed, the findings from Roehl, Hersch, and Llaneras (1992) discussed in this article are based only on the small claims cases, not the special civil or justice center cases, included in that study.

3. The wide range of reported settlement rates in this and subsequent sections could in part be due to different studies measuring settlement in different ways. Some studies categorized as settled only cases in which a full settlement was

reached by the end of the mediation session, others included settlements that occurred after mediation but before trial, and other studies did not clearly define their use of the terms *settled* or *resolved*.

4. It was beyond the scope of this article to review the research findings regarding the effect of litigant characteristics on mediation outcomes. Readers are referred to a number of small claims mediation studies (Hermann, LaFree, Rack, and West, 1993; McEwen and Maiman, 1981; Maiman, 1997; Roehl, Hersch, and Llaneras, 1992; Vidmar, 1984; Wissler, 1995) and several general civil mediation studies (Clarke and Gordon, 1997; Maiman, 1997; Wissler, 2002) that have examined the impact of litigant characteristics, including gender, race, education, income, and goals; familiarity with mediation and litigation; status as an individual litigant or business representative; and role as plaintiff or defendant.

5. Several studies incorporated data from more than one program or from more than one court (Amis and others, 1998; Clarke and Gordon, 1997; Hann and Baar, 2001; Kakalik and others, 1996; McEwen, 1992a, 1992b; Stienstra, Johnson, and Lombard, 1997; Wissler, 2002). For the two studies that reported the findings pertaining to each program in a separate chapter (Kakalik and others, 1996; Stienstra, Johnson, and Lombard, 1997), the findings are referenced by chapter.

6. Litigants' and attorneys' views of the court's overall management of the case (for example, Kakalik and others, 1996; Stienstra, Johnson, and Lombard, 1997) were not discussed in this review because of the impossibility of attributing those assessments specifically to the mediation process.

7. For brevity, all appellate programs reviewed in this section are referred to as "mediation programs" and all third parties as "mediators," even though some programs used different labels (such as Civil Appeals Management Plan, settlement conference, or preargument conference; staff or conference attorney, settlement conference judge). The process used in most programs, based on the limited description typically provided, appeared to be consistent with the term *mediation*, but in a few programs (Birnbaum and Ellman, 1976; Cohen and Mashburn, 1999; Note, 1979; Partridge and Lind, 1983; Steelman and Goldman, 1986), it was not entirely clear whether the process should be considered evaluative mediation, neutral evaluation, or some other process. Programs whose primary goal was something other than settlement, such as improving brief quality, were not included in this review.

8. The findings from McNally (2000) discussed in this article are based only on data from the permanent program. One study (Stelman and Goldman, 1986) reported separate findings for programs in three different states.

9. Most studies did not report separately the percentage of cases that settled, but only reported the combined percentage of cases with these different dispositions. Some studies did not clearly define their use of the terms *settled* or *disposed*. In addition, some studies assessed the rate of disposition before briefing, others before oral argument, and others before a decision was rendered. These measurement differences could in part explain the variation in "settlement" rates observed in different studies.

10. In examining time to disposition, as well as the transaction costs reported in the following section, none of the studies included the length of time or costs incurred after case disposition in the appellate court but before the final resolution of the case, such as would occur with further trial or appellate proceedings. One study noted that roughly one-quarter of trial court judgments were reversed, and most of those cases were remanded to the trial court (Task Force, 2001). Another study reported that most of the cases that settled in mediation also resolved related matters at both the trial and appellate levels (Riselli, 2001). If there were differences between mediation and nonmediation cases in the breadth or finality of case resolution at this stage, then the findings would underestimate the impact of mediation on litigation time and costs (Aemmer, 1997; Partridge and Lind, 1983).

11. Kakalik and others (1996) reported the findings pertaining to two different programs in separate chapters; the findings are referenced by chapter. To increase the comparability of the studies reviewed, studies of two neutral evaluation programs were not included because the consequences for accepting or rejecting the evaluation in those programs were different than in most neutral evaluation programs and more akin to court-connected non-binding arbitration.

12. This study was not included in the mediation or neutral evaluation sections because it reported only whether there were differences among the dispute resolution processes in the outcomes, not what those outcomes were (for example, the percentage of settled cases) for each process. Other studies of mediation (Herman, 2001) and neutral evaluation (Rosenberg and Folberg, 1994) in the same court, however, were discussed in those sections of the article.

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