

## MEDIATION CAN BRING GAINS, BUT UNDER WHAT CONDITIONS?

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This article was originally published in *Dispute Resolution Magazine*, Volume 9, No. 2, Winter 2003, a quarterly publication of the American Bar Association Section of Dispute Resolution.

Does mediation save courts and litigants time and money? Does it increase the satisfaction of those using the court system? These are the questions that have most interested courts when considering the implementation or continuation of mediation programs. But these questions will invariably lead to ambiguous conclusions because they are based on the assumption that all mediation programs are the same. The questions: “Can mediation save time and money? Can it increase the satisfaction of those using the court system?” are more productive and change the answer from “we don’t know” to the resounding “yes!” that mediation practitioners have long desired. In order to fully understand the answer to those questions, however, the focus of the research regarding the effectiveness of mediation should shift from *whether* mediation saves time, reduces cost, and increases satisfaction to a more constructive examination of *under what circumstances* it is most likely to do so.

A survey of 62 studies that evaluate the effectiveness of more than 100 court mediation programs has underlined the importance of making this shift.<sup>1</sup> The studies portray programs of varied structures and processes, and with cases that differ from one to the next. And, logically, these studies come to different conclusions. Some find that mediation does save time, reduce costs, and increase satisfaction, while others find that it does not, and still others find that it has a

negative effect on time and money. These results do not provide an answer to the usual question of what the impact of mediation is on time, cost, and satisfaction, but point instead to the importance of variances in program, case, and process characteristics in determining the effectiveness of mediation. Taken together, however, the studies do not provide much information as to what impact those characteristics have. Knowing this can assist in broadening the positive effects of mediation by allowing courts and lawyers to make more informed decisions about how to structure programs. This article will briefly summarize the findings of the survey and then explore what can be done to improve the research in order to assist in making mediation more consistently effective.

### SURVEY FINDINGS

The survey was undertaken to answer that perennial question of whether mediation really is quicker, less expensive, and more satisfying than other dispute resolution mechanisms and then to discover under what circumstances it is most effective. The vast majority of known evaluations of court-related mediation of large civil, family, small claims, victim-offender, and workers’ compensation cases completed after 1990 were collected for review.<sup>2</sup> Although a few earlier, seminal studies were included to provide history and context for the survey, the intent of this survey was to focus on the present, not past, performance of court mediation

### SUMMARY

A survey of the findings regarding pace, cost, and satisfaction of more than 60 studies of court mediation programs concluded that there is no clear answer as to what benefits mediation brings. The article argues that more attention needs to be paid to the circumstances under which mediation is most effective, rather than whether mediation is effective.

programs in general. For the purposes of the survey, the concept of effectiveness was limited to the measures just mentioned. Other possible measures, such as settlement rate, just outcomes, and better relationships, were not included.

### Satisfaction with Mediation

The studies indicate that litigants like mediation and its outcome, and that they like it more when they settle the case than when they do not. Combined, they show that more than 70% of parties are satisfied with the mediation process and that a similar percentage is satisfied with its outcome. Comparison across case types indicates that parties to civil case mediations may be less satisfied than parties to the other types of cases examined by the studies: satisfaction rates for parties to civil cases averaged more than ten points lower than those for the other case types. Unfortunately, there were too few studies of each type to fully assess the meaning of these numbers.



A high percentage of parties were also convinced of the fairness of the mediation process and any agreement that resulted from it. In total, more than 80% of parties thought the process was fair and of those who resolved their case at mediation, 70% believed their agreement was fair. Interestingly, there were no differences across case types as to the perception of whether the process was fair. Too few studies examined whether parties viewed their agreement as being fair to be able to make meaningful comparisons across case types.

There was also agreement among the studies that examined the relationship between party satisfaction with the mediation process and resolution of the case. Not surprisingly, of the thirteen studies that looked at this relationship, all but one found that those whose case settled were significantly more likely to be satisfied than those whose case did not settle.

### Comparative Results

Not all studies included in the survey make comparisons between programs or cases. Those that do were assessed as to the validity of their findings.<sup>3</sup> Upon evaluation of the comparative studies, seventeen studies were retained for analysis. The findings of these studies differ as to the effectiveness of the mediation programs they examined. The studies do not agree, for example, as to whether the programs increased satisfaction and perception of fairness for parties who participated in mediation as compared to those who did not. Of the nine studies included in the survey that made these comparisons, six found higher rates of satisfaction and perceived fairness for at least some parties to mediation,<sup>4</sup> while three found there

to be no difference. There was even less agreement regarding the impact of mediation on the pace of litigation and cost to the court and litigant. The nine studies that examined the efficiency of the programs were almost equally divided as to whether those programs reduced the amount of time a case was on the docket and the amount of activity for each case, or the cost of the lawsuit to the litigant.<sup>5</sup>

What the survey did not reveal is the cause of these conflicting findings. An attempt was made to determine this by looking at different program characteristics, including whether it was mandatory or voluntary, who the mediators were, and whether the mediation was provided free to the parties or for a fee. This attempt was unsuccessful. The differing outcomes of the programs could not be attributed to program differences as identified in the studies and no particular feature of a program could be pointed to with certainty as contributing to its lesser or greater effectiveness. This was due in large part to the small number of well-designed studies, and in some part to the fact that many of the studies do not provide information on the characteristics of the programs they are evaluating.

A few studies that conducted intra-program comparisons – comparisons between cases regarding how their characteristics effect time, money, and satisfaction – found more often than not that such differences did exist. Already mentioned is the increase in satisfaction based on whether the case settled in mediation. In addition, studies found different impacts based on such variables as timing of referral,<sup>6</sup> demographic makeup of the litigants,<sup>7</sup> willingness to try mediation,<sup>8</sup> and litigant perception of the cost of mediation.<sup>9</sup> Aside from

examination of the effect settlement has on satisfaction, however, too few studies involved this type of analysis to make it possible to draw conclusions about these other variables.

### IMPROVING THE RESEARCH

Knowing that programs vary in both structure and effectiveness, the next step in the research should be to examine these differences. In general terms, one cannot accurately measure the effects of an intervention without knowing first what that intervention is. Knowing how programs are structured, the characteristics of cases being mediated, and what process is being used can give those using mediation – courts, lawyers, mediators, and parties – the information they need to make mediation most effective. This requires improvements in the quality of the research and consistency in the collection and analysis of program, case, and process data. The following are four recommendations on how to achieve these goals.

#### Describe Program Characteristics

If we are to understand better how program characteristics are implicated in the varying outcomes of mediation, studies need to focus more on how programs are designed and function. The first step in doing so is to determine the characteristics of the mediation program, such as timing of referral, who the mediators are, how voluntary the program is, and especially what is meant by “mediation,” since the term is now used for a variety of processes, some of which place decision-making responsibility on the neutrals or do not include the litigants in the sessions. The second step is to determine if the program is functioning as designed. For example, if a court rule states that cases are to be



referred to mediation within a specified time frame, whether the cases actually are being referred within that time frame should be verified. This information would help all those involved - referring judges, members of the bar, and outside researchers - to understand the program better, to know what exactly is being measured, and to determine what the results of the study really mean.

Equally important is to understand the design and functioning of the traditional program to which mediation is being compared. This would further place in context the comparative results of the study and allow for more objective understanding of how effective mediation is. The inclusion of this information in program evaluations would allow them to be used in aggregate to compare programs for which mediation proved to be more effective to those for which it did not and thus establish which characteristics are related to more positive outcomes in comparison to others.

### Compare Case Characteristics

For similar reasons, more attention needs to be paid to the role that specific case characteristics may play in the effectiveness of mediation. The impact of mediation on a particular case can be different depending on the characteristics of the participants, the case type and complexity, and the manner with which each case arrives at the mediation table. As noted above, studies that have made such comparisons have found them to provide fruitful information. More consistent comparisons made on such variables as when in the life of the case it went to mediation, the attributes of the mediator, the complexity of the case, and the issues involved would provide valuable information to the courts and attorneys

to assist them in making decisions about which cases to send to mediation, when to send them, and whom to select as mediator. In other words, knowing what cases are most likely to benefit from mediation will enhance the effectiveness of mediation programs and litigant experience of the court system.

### Examine Process Characteristics

To date, most research has focused on what the impact is of getting parties to the mediation table without examining what happens once they are there. This may be an instance of examining the forest and missing the trees. Mediation is a highly varied process with elements that differ from one program to the next, and indeed from one mediator to the next. Some programs exclude the lawyers and others the parties. Some include joint discussion of the case; some only work with the parties separately. Many of these characteristics also vary from mediator to mediator and even among cases mediated by the same individual. Then, of course, there are the debates regarding what style of mediation to use, what skills should be emphasized, and what the goal of the mediation should be. Whatever the goals of a specific program are, knowing what happens within the mediation process is essential to assessing the strength of the program.

### Improve Data Collection and Analysis

As difficult as these changes may be, they will also have to be accompanied by sound research design. Without good research design and analysis, courts cannot rely on evaluation results when determining how to improve their programs and best use mediation. Good research design begins with the incorporation of data collection for evaluation purposes into courts' routine functions. Ideally, this would be

done with a certain level of consistency across programs. Despite the onerous sound of this, an effort is currently under way to achieve this goal. The American Bar Association Section of Dispute Resolution's Research and Statistics Task Force is in the process of determining the minimum data that courts should be collecting for a consistent quality of mediation evaluation. The hope is to disseminate this as a best practices report. Another effort to improve the quality of research is coming from the Theory to Practice Project, which is funded by the Hewlett Foundation. The attempt here is to bring practitioners and researchers together to assist in making evaluation more relevant to the practice of mediation.

Sound research design does not end with the decision regarding what data to collect. Care must be taken as well to ensure that the results of the evaluation are reliable and valid. In addition, sound and consistent research should include appropriate and sufficient information for those both in the program and outside of it to understand how the study was designed, what factors were involved and what the statistical significance of the results was. To obtain good research results, some courts have developed partnerships with outside researchers. Widespread use of these partnerships may be the most constructive manner for courts to improve the evaluations of their programs.

Those undertaking these changes are facing a reality in which the practical may stand in the way of the ideal. The structure of the programs can limit the research design and the possible data that can be collected. Also, time and funding are often difficult to come by; indeed,



courts often put mediation programs in place precisely to save time and money. Conducting a comprehensive study involves a great amount of resources, which courts and the organizations that research them generally do not have. This may place limitations on the type of study that can be conducted and the questions that can be answered. Despite these obstacles, research should be improved. Reliance on poor research can lead to improper and possibly detrimental program design and implementation.

## CONCLUSION

Taken together, these recommendations can lead to a more sophisticated understanding of how and when mediation is most effective. The tendency has been to equate one mediation program with another and to assume the effectiveness of them all. There is in fact a multitude of ways that programs are designed and implemented with varying degrees of effectiveness. Refocusing the research onto the conditions under which mediation is most effective will better inform courts, lawyers, and litigants about the best way to use mediation. As the focus shifts, mediation research may well provide the necessary information to ensure that mediation becomes more consistently effective across all programs.

methodology was, whether external factors were accounted for, the sample size, attrition rate, and sufficient information regarding the data to be able to determine the statistical relevance of the results.

<sup>4</sup> Some studies compared satisfaction among parties who participated in mediation. One study found women to be more likely to be satisfied with mediated results than with adjudicated ones, while there was no difference in men's satisfaction between the outcomes of the two processes. Another found Hispanics to be more likely to be satisfied with mediation, but whites to be equally satisfied with either process.

<sup>5</sup> The studies included in the comparisons of satisfaction and time and money can be found on the chart of "Selected Studies" on p. \_\_\_\_.

<sup>6</sup> See, for example, Wissler, Roselle. "Court-Connected Mediation in General Civil Cases: What We Know from Empirical Research," OHIO STATE JOURNAL ON DISPUTE RESOLUTION 17(3): 641-703 (2002).

<sup>7</sup> See, for example, Hermann, Michele et al. THE METROCOURT PROJECT FINAL REPORT. University of New Mexico Center for the Study and Resolution of Disputes, 1993.

<sup>8</sup> Kobbervig, Wayne. MEDIATION OF CIVIL CASES IN HENNEPIN COUNTY: AN EVALUATION. Minnesota Judicial Center, 1991.

<sup>9</sup> Daniel, Johnnie. ASSESSMENT OF THE MEDIATION PROGRAM OF THE U.S. DISTRICT COURT FOR THE DISTRICT OF COLUMBIA. Administrative Conference of the United States, April 1995.

<sup>1</sup> The survey was undertaken as a part of the Center for Analysis of Alternative Dispute Resolution Systems' mission to assist courts in Illinois to make more appropriate use of mediation. An annotated bibliography of the studies included in the survey can be found on CAADRS' Web site at [www.caadrs.org](http://www.caadrs.org).

<sup>2</sup> Five studies were sought but not obtained after repeated attempts to do so.

<sup>3</sup> Assessment was based on provision of sufficient information to determine what the

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