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Finding Out If It Is True: Comparing Mediation and Negotiation through Research

*Craig A. McEwen**
*Roselle L. Wissler***

I. INTRODUCTION

Although court-based mediation programs for civil cases have expanded significantly over the last fifteen years or so,¹ empirical research on them has lagged behind. We still know too little about the complex relationships among litigation activities (lawyers' advice to clients, negotiation, trial preparation, trials), court case management techniques (deadlines, discovery limits, case conferences, judicial involvement), the structure of mediation programs (scheduling, mode of case selection and referral, mediator style), and the effectiveness of mediation in achieving various goals.² Future research should build on existing work to help us understand these relationships and their implications for civil case mediation programs and, as Professor Hensler emphasizes,³ the parties' experience of procedural justice.

Thus, we join Professor Hensler both in raising questions about civil mediation and in the belief that policy choices about it should be informed by empirical data bearing on procedural justice and other aspects of civil case dispute resolution rather than by assumptions derived from mediation – or adjudication – ideologies. In all of this work, however, we believe the central comparison must be between unaided bilateral settlement in the context of litigation and such negotiation assisted by mediation.

In this article, we first use existing research evidence to contextualize more clearly the place of civil case mediation in the litigation process. When we understand civil mediation as part of adversarial litigation – rather than as distinct from it – we see the importance of comparing mediation and unassisted negotiation. Next, we discuss research and commentary on the barriers to negotiation and on the

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1. Nancy H. Rogers, Craig A. McEwen & Sarah R. Cole, *Mediation: Law, Policy, Practice* 5-12 (2d ed., Clark Boardman Callaghan 2001).

2. See Craig A. McEwen, *Toward a Program-Based ADR Research Agenda*, 15 *Negot. J.* 325, 331-35 (1999).

3. See generally Deborah R. Hensler, *Suppose It's Not True: Challenging Mediation Ideology*, 2002 *J. of Dis. Res.* 81 (2002).

ways in which mediation might help overcome them. This work provides a more pragmatic and empirically grounded perspective on the potential value of mediation than does “mediation ideology” and suggests a wide range of “hypotheses” to guide future research. Finally, we reexamine briefly the research about preferences for mediation and the modest body of existing studies that do contrast litigant experiences with mediation and unaided negotiation in the context of litigation. This reexamination hints that “it may in fact be true” – that is, participation in mediation may enhance parties’ perception of procedural justice. Before we can be confident in the answer to this question, however, research is needed that carefully compares the experiences of parties in mediation with those in unassisted negotiation.

II. CONTEXTUALIZING MONEY DAMAGE CASE MEDIATION

Early in her paper, Professor Hensler sets out in italics a fundamental opposition between “adversarial litigation with the chance of adjudication” and “mediation under court auspices.”⁴ Later, she notes that she is “not arguing against negotiating civil legal disputes. For the purposes of this paper, I assume that courts order litigants to mediation when bilateral bargaining has failed.”⁵ Neither this strong opposition nor this assumption, however, accord well with much of the descriptive evidence about the highly varied civil mediation programs in the United States. Indeed, court-sponsored civil mediation appears to be part of an adversarial litigation process with a chance for adjudication, and it is at least as likely to be invoked to facilitate serious negotiation as to follow up on unsuccessful bargaining.⁶

4. *Id.* at 77.

5. *Id.* at 78 n. 3.

6. See generally Donna Stienstra et al., *Report to the Judicial Conference Committee on Court Administration and Case Management: A Study of the Five Demonstration Programs Established Under the Civil Justice Reform Act of 1990* 215, 255 (Fed. Jud. Ctr. 1997); Sharon L. Estee, *Civil Mediation in the Western District of Washington: A Brief Evaluation* 12-16 (Jud. Coun. 1987); Craig A. McEwen, *An Evaluation of the ADR Pilot Project*, 7 Me. B. J. 310 (Sept. 1992); James S. Kakalik et al., *An Evaluation of Mediation and Early Neutral Evaluation Under the Civil Justice Reform Act* 30 (RAND 1996); Stephens H. Clarke & Elizabeth Ellen Gordon, *Public Sponsorship of Private Settling: Court-Ordered Civil Case Mediation*, 19 Just. Sys. J. 311 (1997); Michael Fix & Phillip J. Harter, *Hard Cases, Vulnerable People: An Analysis of Mediation Programs at the Multi-Door Courthouse of Superior Court of the District of Columbia* 83 (Urban Inst. 1992); Keith Schildt et al., *Major Civil Case Mediation Pilot Program: 17th Judicial Circuit of Illinois* 6 (1994) (can be found at the following website <<http://www.caadr.org/studies>> (last updated December 4, 2001)); Johnnie Daniel, *Assessment of the Mediation Program of the U.S. District Court for the District of Columbia* 1-2 (Admin. Conf. of the U.S. 1995); Wayne Kobbervig, *Mediation of Civil Cases in Hennepin County: An Evaluation* (1991); Roselle L. Wissler, *Court-Connected Mediation In General Civil Cases: What We Know From Empirical Research*, 17 Ohio St. J. on Dis. Res. __ (forthcoming 2002) (manuscript at 14-16).

In practice, mediation is a formal step in the court management of civil cases and should be thought of as assisting negotiation in the context of that litigation.⁷ Further, attorneys generally participate in these mediation sessions with clients,⁸ providing some assurance that legal rights are protected and advice is provided about legal rules and options.⁹ Indeed, in many civil mediation programs, attorneys are required to provide the mediator a copy of the answer and complaint, a short summary of the case, a short statement regarding their position on liability and damages, or some combination of these items.¹⁰ Mediation sessions typically begin with a discussion of the facts and legal issues in a joint session, followed by separate caucuses with each side.¹¹ The empirical reality of much civil court mediation appears to be firmly grounded in the context of the law and legal rights, not far removed from it as Professor Hensler worries that it might be.¹² Because civil case mediation occurs in the midst of a "litigotiation" process that seldom ends in trial,¹³ its most likely role is to facilitate settlements that would otherwise have occurred rather than to substitute for a trial.¹⁴ Therefore, we should be skeptical of focusing our comparisons of "what parties want" on their choice or assessments of mediation and trial.¹⁵ In this context, the significant research and policy questions turn on

7. See also Herbert M. Kritzer, *The Lawyer as Negotiator: Working in the Shadows*, Paper 4 at 2, 19 (Dis. Proc. Res. Prog. Working Paper Series 7 Jan. 1986) (concluding that there is no clear boundary between negotiation and litigation and that mediation should not be viewed as an alternative to litigation); Marc Galanter, ". . . A Settlement Judge, Not a Trial Judge:" *Judicial Mediation in the United States*, 12 J. of L. & Soc. 1 (1985) ("There are not two distinct processes, negotiation and litigation: there is a single process of disputing in the vicinity of official tribunals" which he labeled "litigotiation.").

8. Attorneys and parties typically are required to attend mediation. See e.g. Stienstra et al., *supra* n. 6, at 266; McEwen, *supra* n. 6, at 310; Clarke & Gordon, *supra* n. 6, at 317; Kakalik, *supra* n. 6, at 32; Schildt, *supra* n. 6, at 6; Wissler, *supra* n. 6, manuscript at 30-31.

9. See a parallel argument regarding divorce mediation in Craig A. McEwen et al., *Bring in the Lawyers: Challenging the Dominant Approaches to Ensuring Fairness in Divorce Mediation*, 79 Minn. L. Rev. 1317, 1360-61 (1995).

10. See e.g. Estee, *supra* n. 6, at 17; Stienstra et al., *supra* n. 6, at 228, 266-67; McEwen, *supra* n. 6, at 310; Kakalik, *supra* n. 6, at 32; Schildt, *supra* n. 6, at 6; Wissler, *supra* n. 6, manuscript at 8. The mediator may even be expected to conduct legal research in preparation for mediation in some programs. See e.g. Estee, *supra* n. 6, at 18; Stienstra et al., *supra* n. 6, at 228.

11. See e.g. Stienstra et al., *supra* n. 6, at 229; Wissler, *supra* n. 6, manuscript at 32.

12. Hensler, *supra* n. 3. Further, in one study, a majority of parties assigned to mediation said that in deciding what they would agree to in settling the case, they relied on principles of law, what the court or jury would likely decide, and what they would get if the case settled before trial. Moreover, their ratings of the importance of these factors were not lower than the ratings of parties who were assigned to the traditional litigation process. Fix & Harter, *supra* n. 6, at 118-27.

13. The majority of filed cases are resolved by settlement, and fewer than ten percent are tried. See e.g. Herbert M. Kritzer, *Adjudication to Settlement: Shading in the Gray*, 70 *Judicature* 161, 162-64 (1986); Marc Galanter & Mia Cahill, "Most Cases Settle": *Judicial Promotion and Regulation of Settlements*, 46 *Stan. L. Rev.* 1339, 1339-40 (1994).

14. See also Clarke & Gordon, *supra* n. 6, at 321.

15. "[L]awyers and parties instinctively compare the outcomes of ADR with the outcomes of trials, forgetting that, in most instances, their disputes would have been resolved without trial." Deborah Hensler, *A Research Agenda: What We Need To Know About Court-Connected ADR*, 6 *Dis. Res. Mag.*

comparisons between lawyer-assisted mediation and lawyer-driven negotiation, not between mediation and adjudication.¹⁶

III. THE CHALLENGES OF UNASSISTED SETTLEMENT

In challenging “mediation ideology” and arguing against the imposition of mediation in the civil litigation process, Professor Hensler contends that the ideal ADR program should “look to lawyers, not mediators, to resolve most lawsuits before trial.”¹⁷ This view, which places the burden solely on attorneys to educate clients about procedural options and to manage negotiation efficiently, neglects some of the very real barriers to successful negotiation that highly competent but busy practitioners face. As a result of these practical, strategic, and cognitive barriers, lawyers in civil practice report large gaps between their aspirations for quick settlements with a problem-solving component and their actual achievement of these goals.¹⁸ Research about the barriers to negotiated settlement and studies of lawyers in both negotiation and mediation provide some hints about how mediation in general, and court-mandated mediation in particular, could help provide incentives and resources for lawyers to do their work more effectively.¹⁹ This work provides a source for ideas about the potential values of mediation that is richer and more empirically grounded than “mediation ideology.”

Getting negotiations started can be problematic – both sides may be reluctant to suggest settlement discussions first because that might indicate weakness of will

15, 16 (Fall 1999). Because most litigants conclude their cases without trials, we also must be cautious about generalizing limited research evidence about perceptions of trials to perceptions of the adversarial litigation experience generally.

16. See Hensler, *supra* n. 15, at 16 (“But in the court setting, ADR does not substitute for trial, but rather adds one or more procedures for facilitating settlement to the lawyer-driven negotiation process. The question is: under what circumstances does ADR reduce costs and time to disposition, by comparison with old-fashioned negotiation?”). See also Robert A. Baruch Bush, “What Do We Need a Mediator For?": Mediation's "Value-added" for Negotiators, 12 Ohio St. J. on Dis. Res. 1, 6 (1996); Rogers et al., *supra* n. 1, at subsection 4:04.

17. Hensler, *supra* n. 3, at 96.

18. Jonathan M. Hyman et al., *Civil Settlement: Styles of Negotiation in Dispute Resolution* 154-68 (N.J. Admin. Off. of the Cts. 1995).

19. See generally Rogers et al., *supra* n. 1, at subsection 4:04; Jean R. Sternlight, *Lawyer's Representation of Clients in Mediation: Using Economics and Psychology to Structure Advocacy in a Nonadversarial Setting*, 14 Ohio St. J. on Dis. Res. 269, 332-45 (1999); Craig A. McEwen, *Improving on Negotiation: The Potential of Mediation*, 3 Me. L. Rev. 11, 18-19 (1995); Kenneth Arrow et al., *Barriers to Conflict Resolution* (W.W. Norton 1995); Robert H. Mnookin, *Why Negotiations Fail: An Exploration of Barriers to the Resolution of Conflict*, 8 Ohio St. J. on Dis. Res. 235 (1993); Dean G. Pruitt & Peter J. Carnevale, *Negotiation in Social Conflict* 81-99, 169-71 (Brooks/Cole 1993); Bush, *supra* n. 16, at 8-14; Jeffrey Z. Rubin, *Negotiation: An Introduction to Some Issues and Themes*, 27 Am. Behav. Scientist 135 (1983); Roger B. Myerson, *Analysis of Incentives in Bargaining and Mediation, Negotiation Analysis* 67, 83 (H. Peyton Young ed., U. of Mich. Press 1991).

or of case.²⁰ There is additional hesitation over what the first proposal should be in money damage cases, knowing that it will place a floor or ceiling on what the parties may ultimately get or pay out.²¹ In disputes involving corporations, the cultures of corporate management and the ways in which disputing is organized also may work against readiness to negotiate, and outside counsel may have little incentive to engage in early and serious negotiation.²² In addition, the sheer press of multiple cases, court deadlines, and client calls can get in the way of scheduling negotiation or moving it forward.²³ Because it takes (at least) two to negotiate, the recalcitrance or busyness of one party can undermine efforts to negotiate effectively – even good attorneys may be stymied by an opposing counsel who does not reciprocate.

A mediation program that requires parties to request mediation and both sides to agree to its use does not reduce these barriers – the attorneys are still subject to the same time pressures and concerns about signaling weakness, now in the context of proposing the use of mediation.²⁴ Moreover, making ADR options voluntary does not guarantee voluntariness in dispute resolution. The need for cooperation in starting and sustaining negotiation or mediation effectively limits party choice of resolution method.²⁵ Indeed, one party by virtue of laziness, self-interest,

20. See e.g. Robert J. Condlin, *Bargaining in the Dark: The Normative Incoherence of Lawyer Dispute Bargaining Role*, 51 Md. L. Rev. 1, 3-16 (1992); Craig A. McEwen et al., *Lawyers, Mediation and the Management of Divorce Practice*, 28 L. & Soc. Rev. 149, 157-59 (1994); Rubin, *supra* n. 19, at 138; Wayne D. Brazil, *Settling Civil Suits: Litigators' Views About Appropriate Roles and Effective Techniques for Federal Judges* 45 (ABA 1985).

21. See e.g. Howard Raiffa, *The Art and Science of Negotiation* 127-28 (Belknap Press 1982).

22. Craig A. McEwen, *Managing Corporate Disputing: Overcoming Barriers to the Effective Use of Mediation for Reducing the Cost and Time of Litigation*, 14 Ohio St. J. on Dis. Res. 1, 9-14 (1998).

23. See McEwen, *supra* n. 20, at 156-58. See also James G. Woodward, *Settlement Week: Measuring the Promise*, 11 N. Ill. U. L. Rev. 1, 36 (1990) (over one-third of attorneys reported no communication of offers or demands in the first two years after the case was filed); Herbert Kritzer, *The Form of Negotiation in Ordinary Litigation*, Paper 2 at 17, 20 (Dis. Proc. Res. Prog. Working Paper Series 7 Dec. 1985) (attorneys reported no exchange of offers and counter-offers in almost one-fourth of cases and only one or two exchanges in a majority of the cases; half of the attorneys spent three or fewer hours per case in settlement discussions).

24. See e.g. Marguerite Millhauser, *The Unspoken Resistance to Alternative Dispute Resolution*, 3 Negot. J. 29, 31-32 (1987); Kakalik, *supra* n. 6, at 52. Civil litigators who said that clients or other attorneys think suggesting ADR is a sign of weakness were significantly less likely to discuss ADR with clients and with opposing counsel and were significantly less likely to use voluntary ADR programs. Roselle L. Wissler, *A Survey of Arizona Attorneys Regarding Their Use of and Attitudes Toward ADR in Civil Cases: Preliminary Data* 25 (July 2001) (a report to the Arizona Supreme Court ADR Advisory Committee, on file with authors). Some attorneys were unwilling to communicate their interest in using an alternative process to opposing counsel, even through an intermediary, out of fear of signaling weakness. Roselle L. Wissler et al., *Resolving Libel Cases Out of Court: How Attorneys View the Libel Dispute Resolution Program*, 75 Judicature 329, 332 (1992). Brazil, *supra* n. 20, at 45, 137.

25. For various reasons, both sides often are not interested, at the same point in time, in using mediation. Wissler, *supra* n. 24, at 330, 332; Roselle L. Wissler, *The Effects of Mandatory Mediation: Empirical Research on the Experience of Small Claims and Common Pleas Courts*, 33 Willamette L. Rev. 565, 591 (1997) (in only twenty percent of cases in which a party request initiated mediation did both sides request it).

disorganization, or succumbing to one or another of the negotiation barriers can effectively force the other party to continue litigation, and, perhaps, ultimately to undergo trial. Mandated mediation²⁶ can take the burden off parties to initiate discussions about the content or procedure of settlement and can create a deadline for starting the process.²⁷

Once negotiation has begun, there rarely are clear deadlines to help move it along – it occurs in fits and starts as other cases move to the top of the pile.²⁸ Nor is the process clearly structured; it may proceed by letters, phone calls and faxes or e-mails. Delays are built in because discussions follow an inefficient route from lawyer to lawyer and then from each back to clients, and miscommunication can occur because the parties' positions are translated by their own attorneys for opposing counsel, who in turn translate them to their clients.²⁹ Depending on how it is structured, mandated mediation could keep the process moving by setting deadlines and creating a negotiation event that induces clients and lawyers to focus seriously on the case.³⁰ Further, it can put all the parties in a room together with a sense of opportunity lost if the time is not used to probe settlement earnestly. When the parties are together, communications also are speedier and less is lost in translation – positions can be articulated and questioned directly by all involved. Thus, mediation events themselves – almost regardless of the role the mediator plays in the event – arguably can assist with a series of strategic and logistical barriers that seem to be inherent in lawyered negotiation.

Mediators also could contribute to the substance of negotiations by helping parties overcome strategic and cognitive barriers that often make agreement hard to achieve in unassisted negotiation.³¹ Parties may make excessively high demands or low offers as a result of optimistic overconfidence about the merits of their own position or efforts to “anchor” the endpoints of the bargaining range to their strategic

26. In some civil mediation programs, mandatory mediation is initiated following the request of one party, generally without the disclosure of that request to the other side. See e.g. McEwen, *supra* n. 6, at 310; Wissler, *supra* n. 6, manuscript at 15; Woodward, *supra* n. 23, at 7; Fix & Harter, *supra* n. 6, at 83. It is unclear whether Professor Hensler would regard these as “mandatory” or “voluntary” referrals.

27. See e.g. James B. Eaglin, *The Pre-Argument Conference Program in the Sixth Circuit Court of Appeals: An Evaluation* 9 (Fed. Jud. Ctr. 1990) (most attorneys said they would not have initiated settlement discussions if they had not been involved in the mediation program). Of course, courts can and do use other mechanisms to move along negotiations, such as case management practices and requiring opposing counsel to discuss settlement or ADR possibilities. See e.g. Stienstra et al., *supra* n. 6, at 38-42, 90-94, 140-43; Minn. R. 114.03-.04 (2001); Ca. R. Ct. 1590.1 (2001); N.D. Cal. Amended Gen. Order 34 (July 1, 1992); Ariz. R. Civ. P. 16(g)(2) (2002). As we discuss later in this section, however, mediation can also assist with the content of the negotiations in ways that some of these other mechanisms cannot.

28. McEwen, *supra* n. 20, at 172-74.

29. McEwen, *supra* n. 20, at 159.

30. In two reports of research, most mediators and attorneys said the attorneys and parties were prepared for mediation and participated in good faith. Stienstra et al., *supra* n. 6, at 238; Wissler, *supra* n. 6, manuscript at 33, 49.

31. See sources cited, *supra* n. 19.

advantage.³² Parties in conflict typically do not recognize the strengths of the other side's case and the weaknesses of their own. Although responsible lawyers attempt to deflate unrealistic expectations, they also find it difficult to do so while maintaining the confidence of their clients, who want them to be vigorous advocates, not critics.³³ In this context, mediation could provide opportunities for reality testing as parties – who typically remain isolated from one another during litigation – hear each other's sides as well as face tough questions from mediators in caucuses or joint sessions.³⁴ It could also reduce some of the posturing that often accompanies negotiation,³⁵ to the degree that parties are more reluctant to make extreme proposals in the presence of a third party. Accordingly, mediators should be able to help parties bring more realistic offers to the table.

In addition, unassisted negotiations can easily proceed on the basis of limited or unreliable information. Commonly, negotiators do not fully or accurately disclose all relevant information to the other side, and they presume that the other side does likewise.³⁶ Further, parties frequently distrust settlement proposals from the other side because they assume that any such gesture advances only opposing interests.³⁷ Mediation has the potential to increase the amount of information exchanged and to reduce misunderstanding and distrust.³⁸ In caucuses, the parties may be willing to disclose to the mediator information that is important to improving the settlement terms.³⁹ The mediators themselves can then put these ideas on the table, reducing the likelihood that proposals will be devalued and allowing the parties to make concessions without loss of face.⁴⁰ Mediators also can assist settlement by reframing the issues and potential outcomes, such as by broadening them to include “nonlegal” and non-monetary issues when they are important to the resolution of the dispute⁴¹

32. Pruitt & Carnevale, *supra* n. 19, at 52, 90-91, 94-95.

33. McEwen, *supra* n. 19, at 11; McEwen, *supra* n. 20, at 166.

34. Across several studies of civil mediation, a majority of attorneys said mediation was helpful in encouraging the parties to be more realistic about their positions, and between one-third and two-thirds said mediation helped them identify the strengths and weaknesses of both their client's and the other side's case. Wissler, *supra* n. 6, manuscript at 46; Stienstra et al., *supra* n. 6, at 249, 278; Daniel, *supra* n. 6, at 71-85.

35. See e.g. Pruitt & Carnevale, *supra* n. 19, at 52; McEwen, *supra* n. 20, at 161; Mnookin, *supra* n. 19, at 248.

36. Rubin, *supra* n. 19, at 137; Mnookin, *supra* n. 20, at 240.

37. Social psychologists refer to this phenomenon as “reactive devaluation.” See Pruitt & Carnevale, *supra* n. 19, at 88-89; Mnookin, *supra* n. 19, at 246; Brazil, *supra* n. 20, at 44.

38. In several studies, a majority of attorneys said civil case mediation improved communication between the parties and between the attorneys. Wissler, *supra* n. 6, manuscript at 20-21; Stienstra et al., *supra* n. 6, at 249, 278.

39. See e.g. Carnevale & Pruitt, *supra* n. 19, at 170; Mnookin, *supra* n. 19, at 248.

40. See e.g. Rubin, *supra* n. 19, at 138-39; Mnookin, *supra* n. 19, at 249.

41. See e.g. Carnevale & Pruitt, *supra* n. 19, at 95-99, 170; Mnookin, *supra* n. 19, at 248-49. Such issues often are ignored when lawyers negotiate with one another on behalf of clients; even in-house corporate counsel may view negotiation narrowly through legal lenses that focus on money outcomes rather than on crucial business relationships. McEwen, *supra* n. 22, at 9-14.

or by emphasizing the benefits of resolving the dispute and the costs of not settling.

For all of these reasons and more, then, it is easy to imagine that mediation could produce some efficiencies in negotiation that might reduce time and even the costs of the process and could also enhance the nature of the settlement reached. But such results are not inevitable and are likely to depend significantly on the structure of the mediation programs, on the attitudes and practices of lawyers in relation to them, on court caseloads and management approaches, as well as on other factors.⁴² We have much more to learn about the degree to which mediation may assist lawyered negotiation, what the characteristics are of programs that do this most effectively for which kinds of cases,⁴³ and how parties respond to these processes.⁴⁴ In this research, serious attention needs to be paid to the roles of lawyers in making mediation or negotiation work effectively.⁴⁵ Ideally, such research also would enable good comparisons between the experiences of parties in “normal” litigation and those of parties in mediation-assisted litigation.

IV. PREFERENCES FOR MEDIATION: EVALUATING THE EVIDENCE AND ITS IMPLICATIONS

It is difficult to discern litigants’ views about mediation from the low rate of voluntary use of mediation programs that Professor Hensler notes.⁴⁶ Research suggests that although a majority of attorneys report that their clients, especially first-time litigants, seldom initiate discussion of using mediation or other alternative processes,⁴⁷ they also indicate that their clients willingly use ADR, and few say their

42. See e.g. McEwen, *supra* n. 6, at 311; Clarke & Gordon, *supra* n. 6, at 321; Stienstra et al., *supra* n. 6, at 215-16; Kakalik, *supra* n. 6, at 34; Fix & Harter, *supra* n. 6, at 101-02; Kobbervig, *supra* n. 6, at 19-20; Wissler, *supra* n. 6, manuscript at 55-61; McEwen, *supra* n. 22, at 3-4. These mixed research findings (some documenting time or cost savings in mediation and others finding no such benefits) suggest that the design of the mediation program and its implementation – particularly, perhaps its links to the case management practices in courts – are very important to its effects. Such program factors include serious enforcement of mandates for mediation and the timing of the mediation referral and mediation session. See e.g. Clarke & Gordon, *supra* n. 6, at 320; Stienstra et al., *supra* n. 6, at 215-16, 243-44; Wissler, *supra* n. 6, manuscript at 59-61.

43. McEwen, *supra* n. 2, at 331-33; Wissler, *supra* n. 6, manuscript at 64-77.

44. For a review of the existing research on civil case mediation, see Wissler, *supra* n. 6.

45. Craig A. McEwen & Elizabeth Plapinger, *RAND Report Points Way to Next Generation of ADR Research*, 3 Dis. Res. Mag. 10, 11 (1997); Wissler, *supra* n. 6, manuscript at 76-77, 87-88. See generally Roselle L. Wissler, *When Does Familiarity Breed Content? A Study of the Role of Different Forms of ADR Education and Experience in Attorneys’ ADR Recommendations*, 2 Pepp. Dis. Res. L. J. (forthcoming 2002).

46. Hensler, *supra* n. 3, at 81.

47. Bobbi McAdoo, *A Report To The Minnesota Supreme Court: The Impact Of Rule 114 on Civil Litigation Practice in Minnesota*, 25 Hamline L. Rev. (forthcoming 2002) (manuscript at 26-27, Appendix C at 11). Bobbi McAdoo & Art Hinshaw, *The Challenge of Institutionalizing Alternative Dispute Resolution: Attorney Perspectives on the Effect of Rule 17 on Civil Litigation in Missouri*, 67 Mo. L. Rev. (forthcoming 2002) (manuscript at 23-24).

clients refuse to employ ADR.⁴⁸ To the extent that voluntary mediation use indicates anything about preferences for dispute resolution procedures, it probably tells us more about attorneys' preferences than about those of litigants.⁴⁹ More likely, however, it says less about lawyers' preferences and more about the routines and economics of law practice, the difficulty of overcoming strategic barriers to mediation use and the inertia of following the usual litigation route as discussed earlier,⁵⁰ and the varying structures of and court support for mediation programs.⁵¹

Certainly, this pattern of low voluntary use has been a motivating factor in efforts to create mandatory mediation. Although it is likely that some of the advocacy for mandates has come from mediators and mediation programs seeking business, it is not at all clear that "mediation ideology" has driven the development of most civil, court-based mediation programs dealing with the vast majority of money-damages cases. Indeed, much more pragmatic concerns – the inefficiencies and slowness of litigation and the negotiation that occurs in its midst – are likely to be at work.⁵² These are the same forces that have led to the rising interest of judges and courts in the management of their dockets.⁵³ Mandated mediation becomes another tool employed pragmatically to respond to these barriers to negotiation.⁵⁴

V. STARTING THE COMPARISON: EVIDENCE ABOUT THE LITIGATION EXPERIENCE WITH AND WITHOUT MEDIATION

We already do know something about the way parties experience mediation and negotiation in the context of litigation, although, as Professor Hensler notes, the

48. Richard C. Reuben, *The Lawyer Turns Peacemaker*, 82 ABA J. 54, 57 (Aug. 1996); McAdoo, *supra* n. 47 (manuscript at Appendix C at 7); McAdoo & Hinshaw, *supra* n. 47 (manuscript at Appendix E at 5). *But cf.* Michael L. Prigoff, *Professional Responsibility: Should There Be a Duty to Advise on ADR Options? No: An Unreasonable Burden*, 76 ABA J. 51 (Nov. 1990).

49. Wissler et al., *supra* n. 24, at 331-32. Research shows that a key factor in litigants' willingness to use ADR is their attorneys' recommendation and encouragement. *Id.* See also Jessica Pearson et al., *The Decision to Mediate*, 6 J. Divorce 17, 29 (Fall/Winter 1982).

50. Nancy H. Rogers & Craig A. McEwen, *Employing the Law to Increase the Use of Mediation and to Encourage Direct and Early Negotiations*, 13 Ohio St. J. on Dis. Res. 831, 843-45 (1998); Clarke & Gordon, *supra* n. 6, at 331-32; McEwen, *supra* n. 20, at 155; McEwen, *supra* n. 22, at 24-26.

51. Kakalik et al., *supra* n. 6, at 52.

52. See e.g. Stienstra et al., *supra* n. 6, at 221, 259-61; Clarke & Gordon, *supra* n. 6, at 314-15; Schildt, *supra* n. 6; McEwen, *supra* n. 6, at 310.

53. See generally Judith Resnik, *Managerial Judges*, 96 Harv. L. Rev. 376 (Dec. 1982). Perhaps the fundamental observation driving that movement is one that we all can acknowledge – deadlines motivate busy people (and parties who find delay to be in their interest) to act.

54. Thus, in addition to what Professor Hensler describes as "mediation ideology," there is also advocacy of a more pragmatic view of mediation intervention. For example, see generally Jeffrey Stempel, *Symposium: Beyond Formalism and False Dichotomies: The Need for Institutionalizing A Flexible Concept of the Mediator's Role*, 24 Fla. St. U. L. Rev. 949 (1997).

procedural justice research tradition turned to new directions before serious work was undertaken about perceptions of mediation. Nonetheless, some studies of civil mediation do more than measure parties' general satisfaction by focusing on their ratings of the fairness of the mediation process and on several of the dimensions of procedural justice that Professor Hensler highlights.⁵⁵ These ratings are high in virtually all studies.⁵⁶ Most of the parties say the mediation process was fair, that they had sufficient opportunity to tell their side of the story, that they had control of or input into the outcome,⁵⁷ and that the mediator was neutral, did not pressure them to accept a settlement, understood their views and the issues in the case, and treated them with respect. Most would recommend mediation to a friend or colleague with a similar dispute.⁵⁸

The RAND study of tort cases in three jurisdictions cited by Professor Hensler provides some suggestive comparative data on this matter.⁵⁹ That study examines tort litigants' perceptions of procedural justice in settlement conferences, adjudication and arbitration as well as in bilateral negotiation. The original analysis compares litigant responses to the three third-party processes and finds higher procedural fairness ratings for trial and arbitration than for judicial settlement conferences. A reanalysis of the data compares each of the third-party processes to unassisted negotiation and concludes that, in comparison to negotiation, the average procedural fairness scores were higher for litigants who went to trial or arbitration but the same or lower for those whose cases were sent to settlement conferences.⁶⁰ The findings of these two analyses when viewed together might suggest that processes carried on outside the view and with little direct participation of parties (lawyered negotiation and pre-trial settlement conferences) are seen as less procedurally fair than processes that include both third parties and the parties

55. Hensler, *supra* n. 3, at 91. See also E. Allan Lind & Tom R. Tyler, *The Social Psychology of Procedural Justice* 93, 107-08, 208-20 (Plenum Press 1988).

56. See e.g. Wissler, *supra* n. 6, manuscript at 39-42; Clarke & Gordon, *supra* n. 6, at 323; Kakalik, *supra* n. 6, at 43; Fix & Harter, *supra* n. 6, at 137-53; Schildt, *supra* n. 6, at 23-24; Kobbervig, *supra* n. 6, at 23, 26; Karl D. Schultz, *Florida's Alternative Dispute Resolution Demonstration Project: An Empirical Assessment* 9 (FL Dis. Res. Ctr. 1990).

57. One exception to these findings was that, in one study, a majority of litigants felt they had no control over the handling of the session or its outcome. Clarke & Gordon, *supra* n. 6, at 324.

58. It is worth noting that whether the case entered mediation at the request of both parties, one party, or solely on the judge's initiative did not affect the litigants' assessments on these dimensions. Wissler, *supra* n. 25, at 596-97. Kakalik, *supra* n. 6, at 53, also reported finding no differences "in any measures" between cases in mandatory or voluntary referral programs.

59. Cited by Hensler, *supra* n. 3, at 89. See E. Allan Lind et al., *The Perception of Justice: Tort Litigants' Views of Trial, Court-Annexed Arbitration, and Judicial Settlement Conferences* 79, 85 (RAND 1989).

60. E. Allan Lind et al., *In the Eye of the Beholder: Tort Litigants' Evaluations of Their Experiences in the Civil Justice System*, 24 L. & Society Rev. 953, 965 (1990).

themselves. Mediation that involves parties⁶¹ as well as counsel, thus, might well be viewed more favorably than bilateral negotiation that often occurs between lawyers.⁶²

Four other studies of general civil mediation not noted by Professor Hensler provide some basis for comparison of parties' perceptions of mediation with parties' perceptions of the traditional negotiation and litigation process. This evidence also remains only suggestive, since none of the studies consistently used pure random assignment of cases to mediation in comparison to traditional litigation, and several experienced other limitations as well.⁶³ Despite these problems, the pattern of findings across the studies suggests that litigants in mediation assessed the fairness of the process similarly to or somewhat more positively than litigants in the more traditional process.

In one study, seventy-four percent of litigants in the mediation group said the process was fair, and eighty-four percent felt they were given an adequate opportunity to express their views in mediation. By contrast, sixty-six percent of litigants in the "traditional" litigation group felt the process was fair, and sixty-eight percent felt they had an adequate opportunity to express their views.⁶⁴ In another study, examining only cases that settled, litigants in the mediation group and those in the non-mediation group did not appear to differ in their ratings of satisfaction with the process, whether justice was served by the process, or whether they felt pressured by the court to resolve their case without trial. Mediation parties, however, were apparently more likely than non-mediation parties to indicate that the full story was told in the process.⁶⁵ A third study found no statistically significant differences between mediation litigants' and non-mediation litigants' scores on a scale measuring several dimensions of the fairness of the procedures and satisfaction

61. Across several studies of civil mediation, a majority of attorneys said mediation allowed greater party involvement in the resolution of their case. Wissler, *supra* n. 6, manuscript at 46; Stienstra et al., *supra* n. 6, at 249, 278; Daniel, *supra* n. 6, at 71-85.

62. Some researchers have argued that informal procedures such as mediation might, in fact, lead to greater perceived justice than trials because these procedures often allow people greater opportunities to participate in some significant sense in the dispute resolution process and because they allow third parties more freedom to display "particularistic attention" to the disputants and their dispute. In turn, participation in the process and feeling that the third party cared about their dispute and considered their views are factors that research has shown to be related to perceptions of procedural justice. Tom R. Tyler & E. Allen Lind, *Procedural Justice*, in *Handbook of Justice in Law* 65, 83-85 (Joseph Sanders & V. Lee Hamilton eds., Kluwer Academic/Plenum Press 2000).

63. In one of these studies, two courts randomly assigned cases to mediation and two did not. In two other studies, cases were randomly assigned to a group that was eligible for mediation, but then judicial selection played a role in their ultimate referral to mediation. Three of the studies did not conduct statistical analyses to ascertain whether there were statistically significant differences in assessments by mediation versus non-mediation litigants. Finally, in some instances it was not clear which dispute resolution process the litigants were assessing (i.e., mediation, negotiation, a ruling on a dispositive motion, or trial).

64. Kobbervig, *supra* n. 6, at 23, 25-26.

65. Fix & Harter, *supra* n. 6, at 137-53.

with case outcomes.⁶⁶ In the last study, across the four courts it examined, mediation and non-mediation litigants generally did not differ in their assessments of the court's management of their cases, although the findings varied among the courts.⁶⁷ Taken together, these data do not fully answer the central question about the experience of justice by parties in mediation as compared to the usual "litigotiation" process for civil cases. Nonetheless, they do hint at the possibility that parties do find mediation as or more procedurally just than the formal and informal alternatives. Reading the evidence this way thus suggests that "It may be true." But the data remain inconclusive, as Professor Hensler suggests. Clearly, we need further research that carefully compares the experiences of parties in mediation with those in unassisted negotiation and that examines their perceptions of procedural justice in particular events in the long process of litigation as well as their sense of fairness, justice and satisfaction in the legal process as a whole.

VI. SUMMARY AND CONCLUSION

Our knowledge of the variety of civil mediation programs, of the ways that they are organized and employed by lawyers and courts, and of their impact on cases, attorneys' practices, and parties remains underdeveloped despite the rapid growth of such programs. Professor Hensler's Article appropriately challenges us to look to research rather than rhetoric in evaluating mediation and its alternatives in money damage cases. One of the important lessons of existing research is that much civil mediation occurs in the context of litigation, takes account of rules and law, and is interwoven with negotiation. Research about civil case settlement processes and barriers to negotiation suggests a variety of ways in which mediation could assist in making settlement processes more efficient and effective. Empirical data also indicate that some civil mediation programs deliver significant elements of procedural justice, even in comparison to lawyered negotiation or regular litigation processes. Nonetheless, to address adequately important policy questions about the value and utility of mandated mediation in civil cases, we need significantly more research that focuses on the crucial comparison between unassisted lawyer-driven negotiation and settlement efforts aided by mediation delivered in variously structured mediation programs.

66. Clarke & Gordon, *supra* n. 6, at 323-24.

67. In two courts, mediation and non-mediation litigants gave similar ratings of the fairness of and satisfaction with the overall court management of their case. In one court, mediation litigants gave apparently higher ratings of the fairness of overall court management of their case (76% vs. 55%) and their satisfaction with that management (59% vs. 45%) than did non-mediation litigants. In the fourth court, mediation litigants gave apparently lower ratings of the fairness of the overall court management of their case (72% vs. 89%) but not of their satisfaction with that management (63% vs. 60%). Kakalik et al., *supra* n. 6, at 42-43. The authors urge caution in interpreting these data, as they are based on an eleven percent response rate and fewer than 100 respondents. *Id.* at 24, 42-43.