

Lawyers' Client-Inclusive Negotiations: The “New Mediation”?

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ABSTRACT

When proponents initially urged the courts to institutionalize mediation for the resolution of general civil cases, they argued that the procedure would be superior to trial—and also to lawyers’ settlement negotiations—in terms of parties’ exercise of self-determination, satisfaction with outcomes, and opportunity for voice. These claims, however, rested on certain assumptions, particularly regarding the implementation of mediation and lawyers’ settlement negotiations. In mediation, the parties were to take center stage, with the mediator assisting them by facilitating their communication and negotiation so that they could reach a customized resolution. Lawyers’ settlement negotiations in general civil litigation, meanwhile, were assumed to be lawyer-only affairs that excluded the clients. Since then, scholars and other observers have often written about how much mediation has evolved. In the contemporary legal landscape, one of the models used frequently in the courts (and by private providers as well) is an evaluative, lawyer-and-caucus-dominated procedure. The evolution of lawyers’ practice in settlement negotiations has not received commensurate attention. Data has begun to suggest, however, that a substantial percentage of these negotiations may include the clients. We propose that this “client-inclusive” approach

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to lawyers' settlement negotiations might outperform—or at least match the performance of—the lawyer-dominated evaluative model of mediation, using many of the same criteria initially used to promote mediation. Paradoxically, just as arbitration has evolved into the “new litigation” and mediation has become the “new arbitration,” lawyers' client-inclusive negotiations could represent the “new mediation.” If this is so, courts should also evolve by considering the use of “client-inclusive” negotiations to satisfy judicial orders to participate in mediation and law schools should prepare students to competently implement this procedure.

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INTRODUCTION

Although studies indicate that a majority of Americans believe the number of civil jury trials to be increasing or remaining constant,¹ the

1. AM. SOC'Y OF TRIAL CONSULTANTS TRIAL CONSULTANT ADVISORY GRP. IN COLLABORATION WITH THE CIV. JURY PROJECT AT N.Y.U. SCH. OF L., 2017 PUBLIC SURVEY I: PUBLIC OPINIONS OF CIVIL JURY TRIALS (2017), <https://civiljuryproject.law.nyu.edu/wp-content/uploads/2017/01/ASTC-CJP-Public-Survey-I-Public-Opinions-of-Civil-Jury-Trials-December-2017.pdf> [<https://perma.cc/A9Z2-3DPJ>] (“Around a fifth of this sample

civil trial is undoubtedly vanishing² and case dispositions are much more likely to be the result of negotiated or mediated settlements,³ default judgments,⁴ and judicial rulings on dispositive motions.⁵ Negotiation has played a significant role in civil litigation for a very long time. Mediation, which involves a third-party mediator facilitating communication and negotiation among the parties and their lawyers, has also become a firmly established practice in both federal and state court practice. In fact, it has been noted as the dominant approach within the federal courts' "alternative" dispute resolution landscape.⁶

Yet we still know surprisingly little about how mediation compares, from the litigant perspective, with the other common means that are used to resolve litigated matters. When mediation advocates and judges urged the institutionalization of mediation in the 1980s and 1990s for the resolution of general civil cases, and then the adoption

recognized the number of jury trials had declined over the years. Twice as many (41%) believed the number of jury trials stayed the same over time, while over a third (38%) of respondents thought the number had actually increased."); Patricia Kuehn and Alexis Forbes, *Public Opinions of Civil Jury Trials*, 29 *THE JURY EXPERT* 17, 18-19 (2018) ("The majority of respondents were unaware the number of jury trials has declined. Over three-quarters of the sample thought civil jury trials had either stayed the same or gone up.").

2. Marc Galanter, *The Vanishing Trial*, 10 *DISP. RESOL. MAG.* 3, 3 (2004); Marc Galanter, *The Vanishing Trial: An Examination of Trials and Related Matters in Federal and State Courts*, 1 *J. EMPIR. LEG. STUD.* 459, 460 (2004); Marc Galanter & Angela Frozena, *The Continuing Decline of Civil Trials in American Courts*, POUND CIVIL JUSTICE INSTITUTE: 2011 FORUM FOR STATE APPELLATE COURT JUDGES, <https://www.poundinstitute.org/wp-content/uploads/2019/04/2011-Forum-Galanter-Frozena-Paper-1.pdf> [<https://perma.cc/KK97-G4VX>].

3. Gillian K. Hadfield, *Where Have All the Trials Gone? Settlements, Nontrial Adjudications, and Statistical Artifacts in the Changing Disposition of Federal Civil Cases*, 1 *J. EMPIR. LEG. STUD.* 705, 705 (2004); Theodore Eisenberg & Charlotte Lanvers, *What Is the Settlement Rate and Why Should We Care?*, 6 *J. EMPIR. LEG. STUD.* 111, 113 (2009).

4. Chris Guthrie, *Procedural Justice Research and the Paucity of Trials*, 2002 *J. DISP. RESOL.* 127, 128-29 (2002) [hereinafter Guthrie, *Procedural Justice*] (data regarding percentage of cases that settle or are resolved through dispositive motion); Chris Guthrie, *Understanding Settlement in Damages (and Beyond)*, 1 *J. DISP. RESOL.* 89, 89 (2004) ("Roughly two-thirds of all cases settle (and most of the rest are resolved through motions)."); Nancy A. Welsh, *Bringing Transparency and Accountability (with a Dash of Competition) to Court-Connected Dispute Resolution*, 88 *FORDHAM L. REV.* 2449, 2471-72 (2020) [hereinafter Welsh, *Bringing Transparency*] (data tables); Nancy A. Welsh, *But Is It Good: The Need to Measure, Assess and Report on Court-Connected ADR*, 22 *CARDOZO J. OF CONFL. RESOL.* 427, 433-43 (2021) [hereinafter Welsh, *But Is It Good*] (summarizing state courts' reporting of defaults and other forms of disposition); see also Dwight Golann, *Abandoned Medical Malpractice Claims: Their Surprising Frequency, Apparent Causes, and Potential Remedies*, 30 *HEALTH AFF.* 1343, 1343 (2011) (discussing high percentage of malpractice claims in which plaintiffs dropped their cases without decisions or recovery).

5. Guthrie, *Procedural Justice*, *supra* note 4, at 129.

6. Donna Stienstra, *ADR IN THE FEDERAL DISTRICT COURTS: AN INITIAL REPORT*, FED. JUDICIAL CTR. (Nov. 16, 2011), <https://www.fjc.gov/sites/default/files/2012/ADR2011.pdf> [<https://perma.cc/4G84-HT3L>].

of mandatory mediation schemes in the 1990s and early 2000s, they often contrasted a generally facilitative⁷ model of mediation with trials.⁸ They utilized this comparison to advocate for mediation as a process that would improve the litigants' capacity to articulate their priorities and create agreements that would be tailored and more personally satisfying than the outcomes reached through trial. Evaluation data from the time seemed to support many, although certainly not all, of these claims.⁹

As the implications of Marc Galanter's research findings regarding the "vanishing trial" became better-known, however, some commentators began recommending that policy makers and researchers shift their analysis towards comparing mediation with the method that was understood to resolve the majority of general civil cases. That procedure was negotiation—i.e., bilateral negotiation between the lawyers, unaccompanied by their clients.¹⁰ This version of negotiation represents the classic—or "traditional"—picture of lawyer-dominated negotiation in the context of general civil litigation.¹¹

By the late 1990s and early 2000s, there was growing awareness among dispute resolution researchers that the mediation model used to resolve general civil cases was not always facilitative or focused on enabling the litigants to communicate more effectively with each other. For certain types of litigated matters—personal injury, medical malpractice—defendants often were not present in mediations.¹² Frequently, the lawyers representing the litigants dominated the discussion. They, not the litigants, did most of the talking.¹³ The practice

7. Leonard L. Riskin, *Understanding Mediators' Orientations, Strategies, and Techniques: A Grid for the Perplexed*, 1 HARV. NEGOT. L. REV. 7, 23–24 (1996) [hereinafter Riskin, *Understanding Mediators*] (distinguishing mediators' facilitative interventions from their evaluative interventions); Leonard L. Riskin, *Decisionmaking in Mediation: The New Old Grid and the New New Grid System*, 79 NOTRE DAME L. REV. 1, 30 (2003) [hereinafter Riskin, *Decisionmaking in Mediation*] (replacing the terms "facilitative" and "evaluative" with the terms "elicitive" and "directive").

8. See *infra* text and notes Part I.

9. See *infra* text and notes Part I.

10. See Donald G. Gifford, *The Synthesis of Legal Counseling and Negotiation Models: Preserving Client-Centered Advocacy in the Negotiation Context*, 34 UCLA L. REV. 811, 813, 842 (1987) (describing the legal "negotiation process" as one that "usually consists of multiple encounters between the lawyers punctuated with repeated counseling sessions between the lawyers and their clients" and observing that "[t]he primary explanation...for the lawyer's dominance of negotiation counseling is that it is the lawyer and not the client who actively participates in the activity which is the subject matter of the counseling sessions, the negotiations. It is the lawyer who implements at negotiations the decisions reached during the counseling sessions." (emphasis added)).

11. See *infra* text and notes Parts II, IV.

12. See *infra* text and notes Part I.

13. See *infra* text and notes Part I.

of holding joint sessions was on the decline while mediators' use of caucuses (i.e., separate meetings with the litigants) was on the increase, which meant that even if the litigants were present, they were less likely to be in the same room or engage in direct dialogue with each other.¹⁴ Mediators, meanwhile, often engaged in reality-testing, which included offering their assessments of the litigants' cases and settlement options.¹⁵ Thus, in this model of mediation, they tended to use interventions that were more evaluative and law-focused than what was expected in the facilitative model of mediation.¹⁶

According to many mediation advocates, however, even this lawyer-dominated and more evaluative model of mediation continued to offer advantages over the traditional bilateral negotiation conducted exclusively by lawyers.¹⁷ Assuming that litigants accompanied their lawyers to mediation, they could observe the resolution process for their cases.¹⁸ Litigants could express themselves directly, at least at certain junctures. Their underlying interests and norms could be discussed and presumably factored into the outcomes, creating the potential for more satisfactory resolutions. The mediator could manage

14. See *infra* text and notes Part I.

15. See *infra* text and notes Part I.

16. Riskin, *Understanding Mediators*, *supra* note 7, at 24; Riskin, *Decisionmaking in Mediation*, *supra* note 7, at 30.

17. See, e.g., Craig A. McEwen & Roselle L. Wissler, *Finding Out If It Is True: Comparing Mediation and Negotiation Through Research*, 2002 J. DISP. RESOL. 131, 134–38 (2002) (observing that entirely relying on attorneys to resolve cases “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”) [hereinafter McEwen & Wissler, *Finding Out*]; Rodney Max, *Insights from a National Mediator*, 2013 Annual AAJ-PAPERS 14, Attachment III (2013) (“The neutral [mediator], while there to facilitate the negotiations, is also there as an advocate for the process . . . The mediator is going to work as hard for the process as the attorneys are going to work for their respective parties.”); *Negotiate Early? Too Late! ‘Guided Choice’ Offers Neutrals For Initial Talks*, 34 ALTERN. TO HIGH COST LITIG. 41, 41 (2016) (“The earlier the mediator gets involved, the earlier the dispute is likely to settle—and to settle on terms that are in the parties’ best interests.”); Robert D. Lang, *ADR: A Smart Solution for Crowded Court Dockets*, N.Y. ST. B. J., 23, 29 (2014) (“It is no surprise that direct negotiation between such adversaries, when it comes time to settle cases, is neither smooth nor easy. Adding a mediator to the mix is often a necessary and welcome method by which such cases can be resolved.”); see also, Greg Herman, *The Role of a Family Law Attorney in Settlement Negotiations*, 53 FAM. L.Q. 71, 73 (2019) (“The success of mediation can be traced to several aspects of the process. For one, a third party can break an impasse that has caused negotiations to come to a halt. For another, the process injects a fresh viewpoint in the negotiations. . . . Hearing a neutral, independent, and trusted professional give opinions and insight can cause reality to be injected into the equation.”).

18. See Nancy A. Welsh, *Making Deals in Court-Connected Mediation: What’s Justice Got To Do with It*, 79 WASH. U. L.Q. 787, 838–45 (2001) [hereinafter Welsh, *Making Deals*].

the process in a procedurally fair manner and, in a sense, represent the court's acknowledgement of the litigants' right to access a neutral third party. Due to the presence of these procedural elements, litigants would perceive the mediation procedure as fairer and as offering them more control than bilateral negotiation that was conducted outside their presence by their lawyers.¹⁹

Empirical research and academic articles, however, have hinted that the image of lawyers' negotiation practices may be undergoing a transformation in a way that would affect this comparison between settlement negotiations and the lawyer-dominated, more evaluative model of mediation. More specifically, some studies have *begun* to suggest that litigants' presence and participation in settlement negotiations may be more prevalent than many academics and practitioners have presumed.²⁰ Indeed, in the course of more closely exploring cases that underwent negotiation in a longitudinal dataset created by one of the authors (Shestowsky), which includes data across three state courts from different states,²¹ we discovered that many—nearly 50%—of lawyers' settlement negotiations included clients. We found two primary variations of this phenomenon. First and most obviously, in some portion of litigated cases, non-lawyer clients accompanied their lawyers to negotiations. In other cases, lawyers and clients (or client representatives) were one and the same person. The crux of both variations is that it may be more common for litigants to attend negotiations than past literature or common understanding of legal practice would have us expect. We label this variant the “client-inclusive” form of negotiation.

Findings from other empirical research conducted by one of the authors (Shestowsky), once again using the aforementioned

19. See *infra* text and notes Part III; Robert A. Baruch Bush, “What Do We Need a Mediator For?": Mediation's “Value-Added” for Negotiators, 12 OHIO ST. J. ON DISP. RESOL. 1, 34 (1996) [hereinafter Bush, “What Do We Need a Mediator For?”]; Welsh, *Making Deals*, *supra* note 18, at 821.

20. See *infra* text and notes Part IV.

21. This dataset was created by surveying litigants from three courts located in different states and is described in detail in several articles that report and analyze the data. See Donna Shestowsky, *The Psychology of Procedural Preference: How Litigants Evaluate Legal Procedures Ex Ante*, 99 IOWA L. REV. 637, 663 (2014) [hereinafter Shestowsky, *The Psychology of Procedural Preference*]; Donna Shestowsky, *How Litigants Evaluate the Characteristics of Legal Procedures: A Multi-Court Empirical Study*, 49 U.C. DAVIS L. REV. 793, 828, 831 (2016); Donna Shestowsky, *When Ignorance Is Not Bliss: An Empirical Study of Litigants' Awareness of Court-Sponsored Alternative Dispute Resolution Programs*, 22 HARV. NEGOT. L. REV. 189 (2017); Donna Shestowsky, *Inside the Mind of the Client: An Analysis of Litigants' Decision Criteria for Choosing Procedures*, 36 CONFL. RESOL. Q. 69 (2019); Donna Shestowsky, *Great Expectations? Comparing Litigants' Attitudes Before and After Using Legal Procedures*, 44 LAW & HUM. BEHAV. 179 (2020) [hereinafter Shestowsky, *Great Expectations?*].

multi-court dataset, are also relevant to this issue. After litigants' cases had been filed in court but before they had used any procedure to reach a disposition, litigants were asked to evaluate the attractiveness of procedural options for resolving their cases,²² including the jury trial, bench trial, judicial decisions without trial, binding arbitration, non-binding arbitration, mediation, and two variations of lawyers' settlement negotiations: one that *excluded* the litigants and the other that *included* them.²³ The survey described mediation as including the litigants and in primarily facilitative, rather than evaluative or lawyer-dominated, terms.²⁴

Mediation (which, once again, was described in primarily facilitative terms²⁵) and lawyers' negotiations *in which the litigants accompanied their lawyers*²⁶ were among their most preferred procedures.²⁷ They viewed lawyers' negotiations that *excluded* the clients as significantly less desirable than the form of negotiation that included both

22. Donna Shestowsky, *The Psychology of Procedural Preference*, *supra* note 21, at 663 (the procedural choices were labelled as: (1) Attorneys Negotiate without Clients, (2) Attorneys Negotiate with Clients Present, (3) Mediation, (4) Judge Decides without Trial, (5) Jury Trial, (6) Judge Trial, (7) Binding Arbitration, and (8) Non-binding Arbitration, and included short descriptions).

23. *Id.* at 656.

24. *Id.* at 701 ("Mediation: A mediator (a neutral third person) facilitates the discussion between opposing lawyers and clients to help them settle the case. The mediator has no power to decide the outcome. Instead, the mediator helps the lawyers and clients communicate their different perspectives, discuss their needs and interests, and explore ways to resolve the case in a way that is acceptable to both clients. The outcome could be based on the law, or it could be based on some other rules or principles that the clients and/or their lawyers find relevant or important. If the clients agree on an outcome that they both find acceptable, that is the outcome for the case.").

25. Of course, it would be very difficult for a mediation to be facilitative (or elicitive) without the parties being in attendance. In contrast, a mediation could be largely evaluative with or without the parties' presence. The research reporting on the extent and effects of party participation, in Part III of this Article, does not indicate whether the facilitative or evaluative model of mediation was used. Given the possibility of a correlation between facilitative mediation and party participation, it may then be asked what variable or factor is truly important in explaining parties' perceptions and preferences—their presence at the mediation or the model of mediation being used.

26. Shestowsky, *The Psychology of Procedural Preference*, *supra* note 21, at 701 ("Attorneys Negotiate with Clients Present: The lawyers negotiate with each other on behalf of their clients, in order to settle their clients' case. The negotiations may be done in person (face-to-face) with lawyers and clients present, or by phone, with lawyers and clients on the phone at the same time. The clients are present and may participate in the negotiation discussions. The outcome could be based on the law, or it could be based on some other rules or principles that the clients and/or their lawyers find relevant or important. If the clients agree on an outcome that they both find acceptable, that is the outcome for the case.").

27. *Id.* at 656 (also reporting that judge trials were among the procedures they viewed as most attractive).

clients and lawyers.²⁸ Thus, litigants preferred to be present at the settlement procedure that would be used for their case, but were apparently indifferent as to whether or not a mediator would be involved.

These results regarding litigants' *ex ante* preferences, along with hints regarding a change in the relevant cast of characters in lawyers' negotiation, motivate the following question: On a post-experience (or *ex post*) basis,²⁹ how would the *client-inclusive* variant of negotiation compare to the *lawyer-dominated and more evaluative* version of mediation? In this Article, we present the idea that if individuals settle their cases through client-inclusive negotiation, they are likely to consider it a better approach than—or at least match the performance of—resolving their cases through mediation that is lawyer-dominated and more evaluative. Specifically, we propose that parties engaged in client-inclusive negotiation are likely to perceive the process as fairer, granting them greater personal control over the outcome, and resulting in a more satisfactory resolution.

Overall, then, we urge that when parties attend lawyers' client-inclusive negotiations, the procedure should match or outperform the lawyer-dominated and more evaluative version of court-connected (and private) mediation on several very important metrics—i.e., procedural fairness, outcome control and outcome satisfaction—the same metrics that were used to advocate for the institutionalization of mediation in the courts. Somewhat ironically, just as arbitration has become the “new litigation”³⁰ and lawyer-dominated evaluative

28. *Id.* at 701 (“Attorneys Negotiate without Clients: The lawyers negotiate with each other on behalf of their clients, in order to settle their client’s case. The negotiations may be done in person (face-to-face), but are more often done by phone, fax, or email. The clients are never present at any of the negotiation discussions. The outcome could be based on the law, or it could be based on some other rules or principles that the clients and/or their lawyers find relevant or important. If the lawyers agree on an outcome that their clients find acceptable, that is the outcome for the case.”).

29. For a review of the literature that distinguishes between *ex ante* and *ex post* evaluations, and the importance of this distinction, see Donna Shestowsky & Jeanne Brett, *Disputants’ Perceptions of Dispute Resolution Procedures: An Ex Ante and Ex Post Longitudinal Empirical Study*, 41 CONN. L. REV. 63 (2008); Shestowsky, *The Psychology of Procedural Preference*, *supra* note 21; Donna Shestowsky, *Great Expectations?*, *supra* note 21; Donna Shestowsky, *Disputants’ Preferences for Dispute Resolution: Why We Should Care and Why We Know So Little*, 23 OHIO ST. J. ON DISP. RESOL. 549 (2008).

30. See Thomas Stipanowich, *Arbitration: The “New Litigation,”* 2010 U. ILL. L. REV. 1, 8 (2010) (“Early in the twentieth century...Arbitration was popularly touted as a more efficient, less costly, and more final method for resolving disputes; there was little or no discovery, motion practice, judicial review, or other trappings of litigation. By the beginning of the twenty-first century, however, it was common to speak of U.S. business arbitration in terms similar to civil litigation—‘judicialized,’ formal, costly, time-consuming, and subject to hardball advocacy.”).

mediation has become the “new arbitration,”³¹ so too client-inclusive negotiation represents—or at least may be in the process of becoming—the “new mediation.”

We hope our hypothesis will inspire self-reflection among lawyers, mediation professionals, and judges and encourage a fresh wave of much-needed rigorous empirical research on dispute resolution matters. Should this research eventually substantiate our hypothesis, courts would do well in terms of procedural justice metrics to acknowledge this model of client-inclusive negotiation as an acceptable—and potentially even superior—alternative to the lawyer-dominated and more evaluative model of mediation.³² Law schools, meanwhile, would do well to prepare students to include their clients in negotiations in a manner that advances the clients’ perception that they and their cases have been treated in a procedurally fair manner, that they have exercised appropriate control over any resulting settlement agreement, and that the settlement agreement is sufficiently satisfactory.

This Article proceeds as follows. Part I briefly reviews the literature originally urging courts’ institutionalization of mediation, the studies comparing mediation and trial or litigation,³³ and the evolution of court-connected mediation. Part II reviews the theoretically

31. See Jacqueline Nolan-Haley, *Mediation: The “New Arbitration,”* 17 HARV. NEGOT. L. REV. 61, 61 (2012) (“Mediation once offered disputing parties a refuge from the courts. Today it offers them a surrogate for arbitration. As lawyers become increasingly involved representing parties in mediation, the boundaries between mediation and arbitration are blurring. Lawyers generally control the mediation process, considering it the functional equivalent of a private judicial settlement conference. Legal mediation has taken on many of the features traditionally associated with arbitration: adversarial posturing by attorneys in the name of zealous advocacy, adjudication by third party neutrals, and the practice of mediator evaluation. While mediation advances toward an arbitration model, arbitration is becoming the “new litigation.”); Robert A. Baruch Bush, *Substituting Mediation for Arbitration: The Growing Market for Evaluative Mediation and What It Means for the ADR Field*, 3 PEPP. DISP. RESOL. L. J. 111, 111 (2002) (“Indeed, old hands in the ADR field observe that mediation has begun to replace arbitration as the ‘process of choice’ in the ADR (Alternative Dispute Resolution) ‘market,’ including institutional users like courts and major private consumers of ADR like businesses”).

32. See Rebecca Hollander-Blumoff, *Fairness Beyond the Adversary System: Procedural Justice Norms for Legal Negotiation*, 85 FORDHAM L. REV. 2081, 2093 (2017) (making a similar suggestion and thanking Judith Resnik for the suggestion); see also Michael Newman & Faith Isenhath, *Effective Negotiation Practices and Strategies*, 58 FED. L. 16, 17 (2011) (“Aside from mediation, attorneys should also consider the benefits of having an in-person meeting with opposing counsel and their clients as a negotiation strategy to reach an early resolution of the dispute.”).

33. These early studies were conducted before mediation became—and was viewed as—an integral part of litigation. Thus, they compared mediation’s substantive and procedural effects to those produced by trial and litigation (which *was* assumed to include negotiation). See *infra* text and notes Part I.

and empirically-grounded commentary offering a comparison of mediation and lawyers' bilateral negotiation, while Part III expands upon and reviews more recent empirical findings. These findings shed light on the extent of parties' participation in mediation and the relationship between such participation and parties' perceptions of the process, while others compare the outcomes produced by, and parties' perceptions of, mediation and negotiation. Part IV describes the basis for perceiving hints of change in our conceptions of bilateral negotiation as it is used by lawyers to resolve general civil cases. In Part V, we offer reasons why client-inclusive negotiation is likely to outperform the lawyer-dominated and more evaluative model of mediation in terms of litigant perceptions of fairness, satisfaction, and control. The Article then concludes with a call for a new generation of data collection and reporting from the courts, as well as rigorous empirical research on litigant perceptions of court-connected ADR.

I. INSTITUTIONALIZING MEDIATION AND COMPARING IT TO TRIAL AND THE LITIGATION PROCESS

Mediation advocates and judges urging the institutionalization of court-connected mediation in the 1980s and 1990s often assumed procedural characteristics that we now know are associated with procedural fairness.³⁴ The litigants would be present and could express what was important to them, identifying their underlying interests and the norms that should guide any resolution.³⁵ Thus, the litigants would have "voice."³⁶ The mediator would be an impartial third party who could ask questions, elicit what the litigants cared about, and demonstrate understanding of what they had said. Thus, the litigants would know that they had received trustworthy consideration and that their case had obtained neutral and dignified treatment from the

34. Welsh, *Making Deals*, *supra* note 18, at 794–96, 820–26, 830–38; E. ALLAN LIND & TOM TYLER, *THE SOCIAL PSYCHOLOGY OF PROCEDURAL JUSTICE* (1988); Tom R. Tyler, *Social Justice: Outcome and Procedure*. 35 INT. J. PSYCHOL. 117 (2000).

35. Nancy A. Welsh, *The Thinning Vision of Self-Determination in Court-Connected Mediation: The Inevitable Price of Institutionalization?*, 6 HARV. NEGOT. L. REV. 1, 19 (2001) [hereinafter Welsh, *The Thinning Vision*]; Janet M. Rifkin & JoAnne Sawyer, *Alternative Dispute Resolution—From A Legal Services Perspective*, 30 NLADA BRIEFCASE 20, 22 (1982) ("Participation in the resolution of their own disputes can give clients a sense of control over their own lives in contrast to the feeling of being victims of [a] legal process they do not understand."); Roselle L. Wissler & Art Hinshaw, *The Initial Mediation Session: An Empirical Examination*, 27 HARV. NEGOT. L. REV. 1, 3–6 (2021) (describing the "traditional" understanding of joint session and litigants' role in it) [hereinafter Wissler & Hinshaw, *The Initial Mediation Session*].

36. Welsh, *Making Deals*, *supra* note 18, at 820–22.

mediator.³⁷ The mediator's role would involve guiding or facilitating³⁸ the communication and negotiation between the litigants to ensure it remained respectful and productive. Consequently, the litigants might even feel that they had been provided with fair consideration and respectful treatment from one another.³⁹ All of these characteristics—voice, trustworthy consideration, application of neutral principles, and even-handed and dignified treatment—are foundational to procedural justice perceptions,⁴⁰ and perceptions of procedural justice have been found to increase both perceptions of substantive justice and outcome compliance.⁴¹

Mediation advocates and judges also emphasized that mediation, unlike trial, would allow litigants to develop their own solutions, controlling the outcome of their case.⁴² Mediators generally refer to this form of outcome control as “party self-determination,” a fundamental principle underlying the mediation process.⁴³ Litigants who exercised self-determination in reaching an agreement would likely find their outcome sufficiently satisfactory, leading to higher compliance rates.⁴⁴

37. Welsh, *Making Deals*, *supra* note 18, at 823–25; Wissler & Hinshaw, *The Initial Mediation Session*, *supra* note 35, at 3–6 (describing the traditional understanding of mediation).

38. Riskin, *Understanding Mediators*, *supra* note 7, at 27–29 (distinguishing mediators' facilitative interventions from their evaluative interventions); Riskin, *Decisionmaking in Mediation*, *supra* note 7, at 30 (replacing the terms “facilitative” and “evaluative” with the terms “elicitive” and “directive”).

39. See, e.g., Tina Nabatchi et al., *Organizational Justice and Workplace Mediation: A Six-Factor Model*, 18 INT. J. CONFL. MGMT. 148, 164 (2007) (presenting research indicating that in the transformative model of mediation, the disputants cared more about whether the other disputant extended trustworthy consideration than whether such consideration was extended by the mediator).

40. See LIND & TYLER, *supra* note 34; Tom R. Tyler, *Psychological Models of the Justice Motive: Antecedents of Distributive and Procedural Justice*, 67 J. PERS. SOC. PSYCHOL. 850, 863 (1994); Tom R. Tyler, *Procedural Justice and the Courts*, 44 COURT REV. 26 (2007) [hereinafter Tyler, *Procedural Justice*].

41. See E. Allan Lind, *Procedural Justice, Disputing, and Reactions to Legal Authorities*, in EVERYDAY PRACTICES AND TROUBLE CASES 177, 192 (Austin Sarat et al. eds., 1998); Dean G. Pruitt et al., *Long-Term Success in Mediation*, 17 LAW & HUM. BEHAV. 313 (1993); Dean G. Pruitt et al., *Goal Achievement, Procedural Justice and the Success of Mediation*, 1 INT. J. CONFL. MANAG. 3 (1990); Craig A. McEwen & Richard J. Maiman, *Small Claims Mediation in Maine: An Empirical Assessment*, 33 ME. L. REV. 237 (1981).

42. Welsh, *The Thinning Vision*, *supra* note 35, at 16–18; SARAH R. COLE ET AL., 1 MEDIATION: LAW, POLICY, AND PRACTICE § 4.2 (2024).

43. Welsh, *The Thinning Vision*, *supra* note 35, at 3 (“Ethical codes for mediators describe party self-determination as ‘the fundamental principle of mediation,’ regardless of the context within which the mediation is occurring.”).

44. Note, *Protecting Confidentiality in Mediation*, 98 HARV. L. REV. 441, 444 (1984) (observing that mediation may produce a “more satisfactory and lasting resolution to the dispute”); Mark P. Brewster et al., *An Overview of the Texas Bar Foundation Symposium on Cost Control at the Courthouse Held September 30, 1987, Corpus Christi*,

These agreements even had the potential to be creative and harness the available integrative potential within the parties' circumstances.⁴⁵

Evaluations of court-connected mediation in the early and mid-1990s generally affirmed that litigants perceived the process as fair,⁴⁶

Texas, 19 ST. MARY'S L. J. 507, 526 (1987); Linda Silberman & Andrew Schepard, *Court-Ordered Mediation in Family Disputes: The New York Proposal*, 14 N.Y.U. REV. L. & SOC. CHANGE 741, 742 (1986); see also Craig A. McEwen & Richard J. Maiman, *Mediation in Small Claims Court: Achieving Compliance Through Consent*, 18 LAW & SOC'Y REV. 11, 42–44 (1984) [hereinafter McEwen & Maiman, *Mediation in Small Claims Court*] (finding that defendants' compliance with outcomes was influenced by award size, characteristics of defendant, the specificity of settlement terms or payment arrangements, reciprocal obligations, the perceptions of the obligated party regarding the fairness of the outcome, the length of past relationships; suggesting, overall, that defendants are more likely to comply with mediated outcomes because "consent is a powerful adjunct to command in securing compliance . . . [,] enlist[ing] a sense of personal obligation and honor . . . [and] more open than command to the establishment of reciprocal obligations and of detailed plans for carrying out the terms of an agreement.").

45. See Leonard L. Riskin, *Mediation and Lawyers*, 43 OHIO ST. L. J. 29, 44 (1982) ("These assumptions [of lawyers], plainly, are polar opposites of those which underlie mediation: (1) that all parties can benefit through a creative solution to which each agrees; and (2) that the situation is unique and therefore not to be governed by any general principle except to the extent that the parties accept it."); Forrest S. Mosten, *Unbundling of Legal Services and the Family Lawyer*, 28 FAM. L. Q. 421, 436 (1994) ("Mediation is often favored because it allows clients the opportunity to privately order their own lives by negotiating directly with each other, basing their settlement on their own goals, needs, and values, and utilizing creative possibilities for solutions that go well beyond the limitations of the law and court jurisdiction."); John W. Cooley, *A Classical Approach to Mediation—Part I: Classical Rhetoric and the Art of Persuasion in Mediation*, 19 U. DAYTON L. REV. 83, 124 (1993) ("It is [the] mediator's motivational skills and creativity-fostering which determine the quantity and quality of potential solutions generated by this process."); Robert H. Mnookin, *Why Negotiations Fail: An Exploration of Barriers to the Resolution of Conflict*, 8 OHIO ST. J. ON DISP. RESOL. 235, 248 (1993) ("To the extent that a neutral third party is trusted by both sides, the neutral may be able to induce the parties to reveal information about their underlying interests, needs, priorities, and aspirations that they would not disclose to their adversary. This information may permit a trusted mediator to help the parties enlarge the pie in circumstances where the parties acting alone could not.").

46. Roselle L. Wissler, *Court-Connected Mediation in General Civil Cases: What We Know from Empirical Research*, 17 OHIO ST. J. ON DISP. RESOL. 641, 661–62, 690–91 (2002) [hereinafter Wissler, *Court-Connected Mediation in General Civil Cases*] (reporting that in a study of mediation in Ohio courts, a majority of litigants felt "that the mediation process was very fair (72%)" and that in many other studies that had been conducted, most parties said mediation was "very fair" and gave the mediation process "high ratings"); JOHNNIE DANIEL, ADMIN. CONFERENCE OF THE U.S.A., ASSESSMENT OF THE MEDIATION PROGRAM OF THE U.S. DISTRICT COURT FOR THE DISTRICT OF COLUMBIA 52–54, 64 (1995) ("The attorneys were asked to indicate the extent to which they agreed or disagreed with the statement: The mediator treated all parties fairly. Almost half, 49%, of the attorneys reported that they very strongly agreed with the statement. [23%] selected the next highest level of agreement with the statement."); 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* 137–53 (1992) [hereinafter FIX & HARTER, *HARD CASES*]; JAMES S. KAKALIK ET AL., *AN EVALUATION OF MEDIATION AND EARLY NEUTRAL EVALUATION UNDER THE CIVIL JUSTICE*

that they felt they had the opportunity to be heard and participate in the discussion⁴⁷ as well as provide “considerable input” into the outcome,⁴⁸ and that they perceived the mediators to be neutral, respectful and understanding of their views and the issues.⁴⁹ These evaluations also found that litigants’ compliance with mediated outcomes was greater than their compliance with adjudicated outcomes.⁵⁰

REFORM ACT [hereinafter KAKALIK ET AL., AN EVALUATION] 42-43 (RAND Corporation, 1996) (“Lawyers for about nine out of ten cases in all programs felt that the overall management of the case was fair. A slightly smaller percentage of litigants felt that the *ADR process* was fair, with the lowest percentage in PA(E), where litigants usually did not attend the mediation session (Table 4.16).”); WAYNE KOBBERVIG, MEDIATION IN CIVIL CASES IN HENNEPIN COUNTY: AN EVALUATION 23, 26 (1991) (74% of litigants answered that mediation was “fair” or “very fair.”); Stevens H. Clarke & Elizabeth Ellen Gordon, *Public Sponsorship of Private Settling: Court-Ordered Civil Case Mediation*, 19 JUST. SYS. J. 311, 323 (1997) [hereinafter Clarke & Gordon, *Public Sponsorship*] (“Litigants who participated in mediated settlement conferences generally spoke favorably of the experience. A majority thought mediators were competent and fair, felt mediation procedures were fair, understood what was going on, had a chance to tell their side of the story, thought that the conferences were the best way to handle cases like theirs, and would recommend the program to a friend.”); Roselle L. Wissler, *The Effectiveness of Court-Connected Dispute Resolution in Civil Cases*, 22 CONFLICT RESOL. Q. 55, 65–68 (2004) [hereinafter Wissler, *The Effectiveness of Court-Connected Dispute Resolution*] (“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.”).

47. Wissler, *Court-Connected Mediation in General Civil Cases*, *supra* note 46, at 661–62, 690–91 (reporting that in study of mediation in Ohio courts, majority of litigants felt that they had “sufficient chance to tell their views of the dispute (84%) and that in many other studies, most parties said “they had sufficient opportunity to tell their side of the story” and “they participated actively in the process” and gave the mediation process “high ratings”); Wissler, *The Effectiveness of Court-Connected Dispute Resolution*, *supra* note 46, at 65–68.

48. Wissler, *Court-Connected Mediation in General Civil Cases*, *supra* note 46, at 661 (“A majority of the litigants... [felt they] had considerable input in determining the outcome (63%).”); Wissler, *The Effectiveness of Court-Connected Dispute Resolution*, *supra* note 46, at 65 (“A majority of litigants felt they had control over the process or had input in determining the outcome.”).

49. Wissler, *The Effectiveness of Court-Connected Dispute Resolution*, *supra* note 46, at 58 (“Most litigants thought the mediator was neutral and had a good understanding of their dispute.”); *see also* Joan Kelly, *Family Mediation Research: Is There Empirical Support for the Field?*, 22 CONFL. RESOL. Q. 3, 9, 13, 19, 23 (2004) [hereinafter Kelly, *Is There Support for the Field*] (“Most parents expressed satisfaction with aspects of the process, saying they felt heard and understood (74%), were given a chance to talk about what they really wanted (87%), and were treated with respect (83%).”).

50. *See, e.g.*, Craig A. McEwen & Richard J. Maiman, *Small Claims Mediation in Maine: An Empirical Assessment*, 33 ME. L. REV. 237, 260 (1981) [hereinafter McEwen & Maiman, *Small Claims Mediation in Maine*]; McEwen & Maiman, *Mediation in Small Claims Court*, *supra* note 44, at 42–44; Mark S. Umbreit et al., *The Impact of Victim-Offender Mediation: Two Decades of Research*, 65 FED. PROB. J. 29, 31 (2001) (“Looking across the studies, it appears that approximately 89% of the contracts are reported as complete . . . 81% of participating youth completed their contracts contrasted with 57% of those not in the VOM program.”); Mark S. Umbreit et al., *Victim-Offender*

Lawyers tended to agree with their clients' assessments⁵¹ and perceived mediators to be effective in "engaging the participants in meaningful discussion of the case."⁵² Research supported the idea that both litigants and their lawyers tended to be satisfied with the outcomes achieved in mediation.⁵³ Parties' perceptions of process fairness and their outcome satisfaction did not differ when the mediation procedure was court-ordered as opposed to voluntary.⁵⁴

Mediation: Three Decades of Practice and Research, 22 CONFL. RESOLUT. Q. 279, 298 (2004) (concluding that offenders who participate in programs that offer them more process control and the opportunity to shape the outcome are more likely to comply with the outcome and are less likely to re-offend than those who experience more adjudicative procedures); Tom R. Tyler, *Citizen Discontent with Legal Procedures: A Social Science Perspective on Civil Procedure Reform*, 45 AM. J. COMP. L. 871, 878 (1997) ("Further, parties were more likely to comply with mediated settlements. In mediated cases 71% fully complied, while only 34% fully complied in adjudicated cases. Interestingly, 53% fully complied in cases in which there was an unsuccessful mediation, followed by adjudication."); Wissler, *The Effectiveness of Court-Connected Dispute Resolution*, *supra* note 46, at 59–60 ("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.").

51. See, e.g., Deborah Thompson Eisenberg, *What We Know and Need to Know About Court-Annexed Dispute Resolution*, 67 S.C. L. REV. 245, 248 (2016) [hereinafter Eisenberg, *What We Know and Need to Know*] ("ADR research reveals that the majority of participants like mediation and believe the process is fair. Likewise, most attorneys have become comfortable with mediation as an option for their clients, reporting high satisfaction with mediation processes and outcomes."); Wissler, *Court-Connected Mediation in General Civil Cases*, *supra* note 46, at 663 (reporting that "[a]ttorneys also had favorable assessments of the mediation process and the mediator" and "would recommend mediation to other attorneys in a similar type of case").

52. Wissler, *Court-Connected Mediation in General Civil Cases*, *supra* note 46, at 690–91 (reporting that 88% of the attorneys said the mediator was "effective in engaging the participants in a meaningful discussion of the case" while "a majority of attorneys in several studies...said that mediation provided greater party involvement in the resolution of their case").

53. See, e.g., Wissler, *Court-Connected Mediation in General Civil Cases*, *supra* note 46, at 667 (reporting that in an Ohio study 56% of the parties reaching full settlement in mediation thought the settlement was very fair and 22% thought it was somewhat fair; regarding satisfaction with the final outcome, 51% said they were very satisfied and 40% said they were somewhat satisfied; 75% of the attorneys in cases that reached full settlement in mediation thought the settlement was very fair and 22% thought it was somewhat fair); Wissler, *The Effectiveness of Court-Connected Dispute Resolution*, *supra* note 46, at 66 ("Most attorneys felt that the mediated settlement was fair or were satisfied with it.").

54. See, e.g., Wissler, *Court-Connected Mediation in General Civil Cases*, *supra* note 46, at 661–62, 697 (reporting that "[p]arties' and attorneys' perceptions of the fairness of the mediation process generally were not related to whether the mediation referral was voluntary or mandatory" but also calling for additional study on this point); 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, 584 (1997) ("For parties who reached an agreement in mediation, the mandatory or voluntary nature of the process did not affect the size or nature of the outcome or parties' evaluations of and compliance with their agreement"); KAKALIK ET AL., AN EVALUATION, *supra* note 46 (finding that mandatory referral generated a greater volume of cases when compared to

When researchers specifically compared litigants' perceptions of mediation to "traditional litigation" or "litigotiation"⁵⁵ (the combination of litigation and negotiation), the results were mixed but generally positive.⁵⁶ Despite the methodological shortcomings of the available studies at the time,⁵⁷ researchers Craig McEwen and Roselle Wissler concluded that "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 [i.e., "litigotiation"]."⁵⁸

However, as early as 1991 in "early adopter" jurisdictions and much more broadly by the late 1990s to early 2000s, commentators and researchers noted that court-connected mediation appeared to be adapting to the needs and expectations of lawyers and repeat players in general civil litigation.⁵⁹ These perceptions of mediation's evolution were only

voluntary use, but no significant differences on any other measures); Jessica Pearson & Nancy Thoennes, *Divorce Mediation: Reflections on a Decade of Research*, in *MEDIATION RESEARCH: THE PROCESS AND EFFECTIVENESS OF THIRD-PARTY INTERVENTION* 14, 18, 19 (Kenneth Kressel et al. eds, 1989); Shahla F. Ali, *Practitioners' Perception of Court-Connected Mediation in Five Regions: An Empirical Study*, 51 *VAND. J. TRANSNAT'L L.* 997, 1008 (2018) ("The survey results found no statistically significant difference in perceptions of outcome fairness among court mediation practitioners across voluntary and mandatory mediation programs. Nearly an identical proportion of practitioners working in voluntary (81[%]) and mandatory (82[%]) programs believed that outcomes arrived at through their court mediation programs were either very fair or fair.").

55. Marc Galanter, *Law 940: Litigotiation*, https://media.law.wisc.edu/m/fwfm/gargoyle_14_1_1.pdf [<https://perma.cc/L4TX-U6Y4>]; Marc Galanter, *Worlds of Deals: Using Negotiation to Teach About Legal Process*, 34 *J. LEGAL EDUC.* 268, 268 (1984).

56. Wissler, *Court-Connected Mediation in General Civil Cases*, *supra* note 46, at 690–91 (reporting that for general jurisdiction civil cases: "Parties and attorneys appeared to assess mediation somewhat more positively than the litigation process in some studies, but gave similar ratings [to the litigation process] in others."); McEwen & Wissler, *Finding Out* *supra* note 17, at 141–42; Kelly, *Is There Support for the Field*, *supra* note 49, at 9, 13, 19, 23 (2004) (reporting that "[t]hose who used custody mediation were substantially more satisfied than parents using other court processes" and "[m]ediation clients in the private sector were significantly more satisfied on almost all measures of process and outcome than were those using adversarial divorce processes"); Wissler, *The Effectiveness of Court-Connected Dispute Resolution*, *supra* note 46, at 58–59 (2004).

57. See McEwen & Wissler, *Finding Out*, *supra* note 17, at 141–42 n.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.)").

58. *Id.* at 141–42.

59. See Welsh, *The Thinning Vision*, *supra* note 35, at 23–27; James J. Alfini, *Trashing, Bashing, and Hashing it Out: Is This the End of 'Good Mediation'?* 19 *FLA. ST. U. L. REV.* 47 (1991) [hereinafter Alfini, *Trashing, Bashing, and Hashing it Out*]; Bobbi

sometimes based on researchers' direct observations of mediation.⁶⁰ Rather, most seemed to be based on the responses of parties and lawyers to post-experience evaluation instruments and surveys. Lawyers in particular reported that substantial time was being spent in caucus rather than joint session, with the parties in different rooms and mediators "shuttling" between them.⁶¹ Litigants therefore had less opportunity for

McAdoo & Nancy A. Welsh, *The Times They Are A 'Changin'—Or Are They? An Update on Rule 114*, 65 HENNEPIN LAWYER 8 (July-August 1996). *But see* Bobbi McAdoo, *All Rise, The Court Is in Session: What Judges Say About Court-Connected Mediation*, 22 OHIO ST. J. ON DISP. RESOL. 377, 381 (2007) [hereinafter McAdoo, *All Rise, The Court is in Session*] ("It is important to acknowledge upfront, however, that given the lack of data and the conflicting results of much of the existing data, it is difficult to know with certainty whether this different paradigm, which still exists in the rhetoric, ever lived in practice.").

60. Debbie De Girolamo, *The Mediation Process: Challenges to Neutrality and the Delivery of Procedural Justice*, 39 OXFORD J. LEGAL STUD. 834, 834 (2019) (observing that "studies in an anthropological ethnographic tradition involving immersive study of mediation are limited"). *But see* STACY LEE BURNS, MAKING SETTLEMENT WORK: AN EXAMINATION OF THE WORK OF JUDICIAL MEDIATORS (2000) (for her ethnographic study of retired judges conducting mediations). Researchers' direct observation of mediations became more common later. *See, e.g.,* Grace E. D'Alo, *Accountability in Special Education Mediation: Many a Slip 'Twixt Vision and Practice?*, 8 HARV. NEGOT. L. REV. 201 (2003); James Allen Wall et al., *The Effects of Neutral, Evaluative, and Pressing Mediator Strategies*, 29 CONFL. RESOLUT. Q. 127 (2011); Eisenberg, *What We Know and Need to Know*, *supra* note 51, at 245; TAMARA RELIS, PERCEPTIONS IN LITIGATION AND MEDIATION: LAWYERS, DEFENDANTS, PLAINTIFFS, AND GENDERED PARTIES (2009) [hereinafter RELIS, PERCEPTIONS IN LITIGATION AND MEDIATION]; Roselle L. Wissler & Gary Weiner, *How Do Mediator Actions Affect Mediation Outcomes?*, 24 DISP. RESOL. MAG. 26 (2017) (reporting on a synthesis of mediation-related research); Lorig Charkoudian, et al., *What Works in Alternative Dispute Resolution? The Impact of Third-Party Neutral Strategies in Small Claims Cases*, 37 CONFL. RESOLUT. Q. 101, 115 (2019) (combining real-time behavioral observation of Maryland small claims court dispute resolution sessions with pre- and post-intervention questionnaires, the study found that: neutrals eliciting participant solutions had the broadest range of positive impacts; greater percentage of time spent in caucus was associated with negative outcomes; and neutrals offering solutions had long-term negative associations); Lorig Charkoudian et al., *What Works in Custody Mediation? Effectiveness of Various Mediator Behaviors*, 56 FAM. CT. REV. 544, 551 (2018) (using behavioral observation and pre-mediation and post-mediation questionnaires, researchers found mediators' reflecting and eliciting strategies were associated with positive outcomes while directing strategies had significant negative effects and proportionally greater time in caucus was associated with increased participant trust in the mediator but more negative attitudes among participants); Caroline Harmon-Darrow & Lorig Charkoudian, *Mediator Approach and Mediator Behavior: A Secondary Data Analysis of Day of Trial and Child Access Mediation in Maryland*, 38 CONFL. RESOL. Q. 371, 379-81 (2021) (finding, based on observations, that mediator's self-identified approach does not fully predict their actual interventions but that some self-reported approaches are more predictive than others).

61. Alfini, *Trashing, Bashing, and Hashing it Out*, *supra* note 59, at 66-67 (describing trashers' "extreme caucusing methodology" as starting with orientation and 5-10 minute opening statements by attorneys in joint session, followed by all or majority of the rest of mediation spent in caucus); Elizabeth Ellen Gordon, *Attorneys' Negotiation Strategies in Mediation: Business as Usual?*, 17 MEDIATION Q. 377, 382 (2000) [hereinafter Gordon, *Attorneys' Negotiation Strategies*] ("Observations suggest that mediation conferences typically involve extensive caucusing, a structure that supports bargaining rather than open information exchange or direct communication between the parties."); Bobbi McAdoo & Art Hinshaw, *The Challenge of Institutionalizing*

direct dialogue.⁶² For some types of cases, defendants often did not attend their mediation.⁶³ More generally, lawyers were doing most of the talking.⁶⁴ Lawyers, meanwhile, seemed to prefer mediators who were

Alternative Dispute Resolution: Attorney Perspectives on the Effect of Rule 17 on Civil Litigation in Missouri, 67 MO. L. REV. 473, 523 (2002) [hereinafter McAdoo & Hinshaw, *The Challenge of Institutionalizing Alternative Dispute Resolution*] (reporting that approximately 62% of lawyers perceive that mediators usually or always use caucuses almost exclusively but approximately 3% of lawyers perceive that mediators usually or always use joint session almost exclusively; also reporting that about 85% of lawyers indicated that mediators ask each side to present an opening statement in joint session); Thomas B. Metzloff et al., *Empirical Perspectives on Mediation and Malpractice*, 60 LAW & CONTEMP. PROBS. 107, 119 (1997) [hereinafter Metzloff et al., *Empirical Perspectives*] (describing the structure of mediation sessions within North Carolina's mediated settlement conference program for all malpractice claims from 1992 to 1995, which typically involve a series of private caucuses). The use of caucus has been the subject of much academic and professional discussion since the mid-2000s and some empirical research. See, e.g., Eric Galton & Tracy Allen, *Don't Torch the Joint Session*, 21 DISP. RESOL. MAG. 25 (Fall 2014); Lynne S. Bassis, *Face-to-Face Sessions Fade Away: Why Is Mediation's Joint Session Disappearing?*, 21 DISP. RESOL. MAG. 30 (Fall 2014); Thomas J. Stipanowich, *The International Evolution of Mediation: A Call for Dialogue and Deliberation*, 46 VICT. U. WELLINGTON L. REV. 1191, 1204 (2015) (based on experienced commercial mediators' survey responses, suggesting regional differences in mediators' use of caucus; about 53% of California mediators reported that they "always" or "usually" begin their mediations in caucus; for U.S. mediators practicing outside California and for non-U.S. mediators, the percentages were 37% and 32% respectively); ABA SECTION OF DISPUTE RESOLUTION, REPORT OF THE TASK FORCE ON RESEARCH ON MEDIATOR TECHNIQUES 44, 47 (2017) (reporting, based on synthesis of mediation research that pre-mediation use of caucus to develop trust has a "greater potential for positive effects than negative effects on both settlement and related outcomes and disputants' relationships and perceptions of mediation[;]" in contrast, caucusing during mediation has "the potential to increase settlement and related outcomes, especially in labor-management disputes" but also has "the potential for negative effects on disputants' perceptions and relationships"); see also Wissler & Hinshaw, *The Initial Mediation Session*, *supra* note 35, at 6–9 (surveying mediators and noting a decline in the use of joint opening sessions and joint sessions generally, as well as changes in mediators' purposes for holding a joint opening session).

62. Welsh, *Making Deals*, *supra* note 18, at 809-10; see also Wissler & Hinshaw, *The Initial Mediation Session*, *supra* note 35, at 36 (observing that "parties' opening statements are not as central to the initial mediation session as they once were. . . there is less chance for each side to explain its positions and perspective directly to the other party and to hear the other's views unfiltered by the mediator, especially as expressed by the disputants themselves, than would have been the case historically" but also finding that in some respects, parties talked more when in initial caucuses rather than initial joint sessions); Roselle L. Wissler, *Representation in Mediation: What We Know from Empirical Research*, 37 FORDHAM URB. L. J. 419, 444 (2010) [hereinafter Wissler, *Representation in Mediation*] (mediators rated litigants' participation in domestic relations mediation as more active when only the opposing party had counsel or when neither side was represented compared to when both were represented).

63. See Tamara Relis, *Consequences of Power*, 12 HARV. NEGOT. L. REV. 445, 455-57 (2007) (describing the absence of defendant doctors from mediation sessions); Relis, *Perceptions in Litigation and Mediation*, *supra* note 60, at 88; Metzloff et al., *supra* note 61, at 123–25 (1997) (observing that in eight of 36 observed mediation sessions, the physicians who were named as defendants were not present, despite existence of rules that anticipated presence of all parties).

64. Elizabeth Ellen Gordon, *Why Attorneys Support Mandatory Mediation*, 82 JUDICATURE 224, 227 (1999) (reporting that in observed mediations, lawyers dominated

experienced attorneys with relevant substantive expertise, valuing them for their case evaluations and predictions of litigation challenges and likely settlements.⁶⁵ It is important to acknowledge that many of the *parties* also judged the mediation process as fairer when mediators provided an evaluation of the merits of their case.⁶⁶ Mediators were using interventions that ranged from assisting the parties' evaluation of cases through reality testing and risk analysis to providing their own case evaluations or suggesting settlement options.⁶⁷

negotiation, the minority of clients who did "play active roles" were "supporting rather than starring players," and that three-quarters of responding attorneys disagreed with the statement: "Litigants should be the most active participants in mediation, with attorneys standing by to offer legal advice."; Metzloff et al., *Empirical Perspectives*, *supra* note 61, at 123–25 (1997) (discussing the limited involvement of plaintiffs and defendants during medical malpractice mediation sessions); *see also* Wissler, *Representation in Mediation*, *supra* note 62, at 447–50. *But see* Bobbi McAdoo, *A Report to the Minnesota Supreme Court: The Impact of Rule 114 on Civil Litigation Practice in Minnesota*, 25 HAMLINE L. REV. 401, 435 (2002) [hereinafter McAdoo, *A Report to the Minnesota Supreme Court*] (reporting on a study finding that nearly 80% of attorneys perceived that mediators always or frequently encourage clients to participate in the mediation process).

65. Welsh, *Making Deals*, *supra* note 18, at 805–06 (citing McAdoo, *A Report to the Minnesota Supreme Court*, *supra* note 64, at 38 (reporting that 84.2% of lawyers surveyed perceive that the most important qualification for mediators is "substantive experience in the field of law related to case"); Gordon, *Attorneys' Negotiation Strategies*, *supra* note 61, at 228 (noting that attorneys prefer mediators who are experienced trial lawyers); McAdoo & Hinshaw, *supra* note 61, at 524, tbl. 33 (reporting that 87% of lawyers indicated that a mediator should know how to value a case and 83% indicated that a mediator should be a litigator); Metzloff et al., *Empirical Perspectives*, *supra* note 61, at 144–45 (reporting that almost 70% of attorneys want mediators to provide opinions on the merits of medical malpractice cases and that attorneys highly valued mediators who possessed substantive expertise in medical malpractice); Bobbi McAdoo & Nancy A. Welsh, *Does ADR Really Have a Place on the Lawyer's Philosophical Map?*, 18 HAMLINE J. PUB. L. & POL'Y 376, 390 (1997) [hereinafter McAdoo & Welsh, *Does ADR Really Have a Place*] (reporting that the majority of Hennepin County lawyers that were interviewed wanted mediators to give their view of settlement ranges); Wissler, *Court-Connected Mediation in General Civil Cases*, *supra* note 46, at 656, 684–85 (reporting that in Ohio courts "if the mediators helped the parties evaluate the merits of the case (by using reality testing, risk analysis, or asking other questions) or assisted the parties in assessing the value of the case, attorneys viewed the mediation process as more fair than if the mediators did not assist in those forms of evaluation"); FIX & HARTER, *HARD CASES*, *supra* note 46, at 127 (1992) (noting that, "[t]he most important factor to the plaintiffs' lawyers [in deciding on settlement] was what would happen in an unassisted settlement" while "[t]he defendants' bar looked to what a court would do, with settlements ranking closely behind"); *see also* Dorcas Quek Anderson, Eunice Chua & Ngo Tra My, *How Should the Courts Know Whether a Dispute is Ready and Suitable for Mediation? An Empirical Analysis of the Singapore Courts' Referral of Civil Disputes to Mediation*, 23 HARV. NEGOT. L. REV. 265, 291 (2018) (finding that whether a mediator has legal training has "a significant association with effectiveness and recommendation ratings," with reduced ratings when a mediator was not legally trained).

66. Wissler, *Court-Connected Mediation in General Civil Cases*, *supra* note 46, at 684.

67. Kimberlee K. Kovach & Lela P. Love, *Mapping Mediation: The Risks of Riskin's Grid*, 3 HARV. NEGOT. L. REV. 71, 99 (1998) (reporting that mediators employed by the Civil Appeals Management Plan of the United States Court of Appeals for the Second

Despite the claim that the use of mediation would encourage parties' development of creative solutions, research suggested that the settlements resulting from general civil mediation sessions "never" or "rarely" included more non-monetary elements than the settlements reached without mediation,⁶⁸ and other findings indicated that mediations were less likely than trials to result in non-monetary outcomes for plaintiffs.⁶⁹ An empirical study, meanwhile, suggested that parties who settled in mediation or during the traditional litigation process did not differ in the factors they identified as important in helping them make decisions regarding settlement.⁷⁰ The identified factors included "what would be 'right' or 'fair' under the circumstances,

Circuit evaluate strengths and weaknesses of cases); McAdoo, *A Report to the Minnesota Supreme Court*, *supra* note 64, at 39 (reporting on a study finding that approximately 30% of lawyers perceived that mediators frequently or always predict court outcomes, and about 68% perceived that mediators frequently or always propose realistic settlement ranges); McAdoo & Welsh, *Does ADR Really Have a Place*, *supra* note 65, at 390, n. 71 (stating that Hennepin County lawyers reported that they "perceive mediators to 'frequently or always predict' court outcomes about one-third of the time and 'propose realistic settlement ranges' about two-thirds of the time"); Metzloff et al., *Empirical Perspectives*, *supra* note 61, at 121 (reporting that half of the mediators who were observed expressed opinions about parties' offers, while 12% opined regarding the case's merits); *see also* James A. Wall & Suzanne Chan-Serafin, *Friendly Persuasion in Civil Case Mediations*, 31 CONFL. RESOL. Q. 25 (2014) (based on transcripts from 50 cases in which mediators used evaluative and directive strategies and attained agreement, finding that mediators did not offend disputants because they complemented their strategies with tactical approaches of establishing legitimacy, shifting strategies from round to round, using ratchet approach to nudge disputants toward agreement, and working to reduce disputants' aspirations); James A. Wall, Jr. & Suzanne Chan-Serafin, *Do Mediators Walk Their Talk in Civil Cases?*, 28 CONFL. RESOLUT. Q. 3, 3 (2010).

68. McAdoo & Hinshaw, *The Challenge of Institutionalizing Alternative Dispute Resolution*, *supra* note 61, at 520 (reporting that when asked whether their "settlement agreements reached through mediation included more non-monetary elements (e.g., apology, change in practices, new job assignments) than settlements reached without mediation," 39% of lawyers responded "never," 38% responded "rarely," 19% responded "sometimes," 3% responded "usually," and 0% responded "always"); *see also* Lisa Blomgren Bingham et al., *Dispute Resolution and the Vanishing Trial: Comparing Federal Government Litigation and ADR Outcomes*, 24 OHIO ST. J. ON DISP. RESOL. 225, 226 (2008-2009) ("ADR outcomes were not significantly different from litigated outcomes, indicating that the process was neutral, favoring neither private parties nor the government").

69. *See* Gordon, *Attorneys' Negotiation Strategies*, *supra* note 61, at 377 (reporting that 29.6% of plaintiffs whose cases were disposed through trial received some type of nonmonetary relief while that was true for only 11.4% of plaintiffs settling at mediated settlement conferences); *see also* Barbara McAdoo, *The Future of ADR: Have They Come for the Right Reason?*, 3 J. ALT. DISP. RESOL. EMP. 8, 10 (2001) ("In litigation, money is the substitute (i.e., remedy) for every 'wrong.' Is [money] the only language trial lawyers have?"). Thanks to Clark Freshman for his observation that both mediated and negotiated outcomes may tend to be monetary because these are actually better for the parties and more administrable, while also responding to the needs of lawyers working on a contingency fee basis.

70. Wissler, *Court-Connected Mediation in General Civil Cases*, *supra* note 46, at 693 n.236 (2002) (citing FIX & HARTER, *HARD CASES*, *supra* note 46, at 118-28).

principles of law, what the court or a jury would likely decide, what their lawyer told them to do, what they would get if they settled the case before trial, and what would end the case the fastest.”⁷¹

Observers noted that mediation was “developing an uncanny resemblance to the judicially-hosted settlement conference,”⁷² even when parties were included. The mediation model in question, characterized by lawyer dominance⁷³ and an evaluative approach, appeared to essentially replace the settlement judge with a mediator who possessed expertise and offered informed guidance to the lawyers and their clients. This guidance aimed to assist them in evaluating their options, and in some cases, even provided a legal “second opinion,” all with the intention of helping the parties determine their best alternative to a negotiated agreement.⁷⁴

II. CHANGING FOCUS AND COMPARING MEDIATION TO LAWYERS’ BILATERAL SETTLEMENT NEGOTIATIONS

Around this same time, commentators and researchers started to shift their attention towards comparing mediation with the procedure they assumed was being used most frequently to settle general civil disputes⁷⁵—i.e., unassisted, lawyer-driven

71. *Id.*

72. Welsh, *The Thinning Vision*, *supra* note 35, at 25.

73. Jeff Trueman, *Mediation in the World of Commercial Dispute Litigation: An Inside Look at the Challenges for Counsel, Mediators, and Insurance Claims Professionals*, 63 WASH. U. J. OF LAW & POL’Y 207, 208 (2020) (concluding, based on qualitative research, that “with increasing frequency, mediators and parties do not control the process—attorneys and insurance claims professionals do”).

74. Welsh, *Making Deals*, *supra* note 18, at 816 n.108.

75. See, e.g., Bush, “What Do We Need a Mediator For?,” *supra* note 19, at 6 n.7 (1996) (asserting that “of those cases that are brought to court, the large majority end in a negotiated settlement of some kind”) (citing Marc Galanter, *Reading the Landscape of Disputes: What We Know and Don’t Know (And Think We Know) About Our Allegedly Contentious and Litigious Society*, 31 UCLA L. REV. 4 (1983)); Herbert M. Kritzer, *Adjudication to Settlement: Shading in the Gray*, 70 JUDICATURE 161, 162–64 (1986) (explaining that, of roughly 1650 federal and state court cases, only 7% were tried to a verdict, 15% ended in another form of judicial determination, 9% settled following a ruling on a motion and the rest (69%) were otherwise settled); David M. Trubek et al., *The Costs of Ordinary Litigation*, 31 UCLA L. REV. 72, 89 (1983) (noting that roughly 8% of civil suits filed in state and federal courts went to trial, 22.5% were resolved by judicial action such as summary judgment or dismissal and the remainder were settled); JONATHAN M. HYMAN ET AL., CIVIL SETTLEMENT: STYLES OF NEGOTIATION IN DISPUTE RESOLUTION (1994) 26–27 (explaining that New Jersey lawyers surveyed about recently completed civil cases indicated that 75% were resolved by settlement.). Researchers were relying on available data to assert the prevalence of settlement in federal civil litigation. See, e.g., Marc Galanter & Mia Cahill, “Most Cases Settle”: *Judicial Promotion and Regulation of Settlements*, 46 STAN. L. REV. 1339, 1340–42 (1994) (noting that roughly two-thirds of cases settle); Kevin M. Clermont & Theodore Eisenberg, *Litigation Realities*, 88 CORNELL

negotiation.⁷⁶ A very limited amount of empirical research had focused on comparing the outcomes achieved through negotiation

L. REV. 119, 136-137 (2002) (describing “the continuing dominance of settlement” with “at least 66.7%” of federal civil cases settling in fiscal 2000). *But see* Gillian K. Hadfield, *Where Have All the Trials Gone? Settlements, Non-Trial Adjudications and Statistical Artifacts in the Changing Disposition of Federal Civil Cases*, USC CLEO Research Paper No. C04-12 (2004), at 4, 25 (describing settlements as “negotiated in the shadow of a trial or in the shadow of a pretrial motion” but also observing that failure of data to clearly distinguish between “negotiated settlement and unilateral default or abandonment of a claim has substantial implications for the normative evaluation of the vanishing trial” and based on corrected Administrative Office disposition data, estimating that of all “final terminations” of federal civil cases in 2000, 59.7% were settled while 8% ended due to default and 5.2% were abandoned). More recently, researchers have reviewed federal courts’ docket entries to distinguish “party resolution” involving “mutuality and compromise” from “unilateral, bare bones disposition.” *See, e.g.*, Charlotte S. Alexander, Nathan Dahlberg & Anne M. Tucker, *Settlement as Construct: Defining and Counting Party Resolution in Federal District Court*, 119 Nw. L. REV. 65, 68 (2024) (using SCALES labeling protocol to find that almost 57% of federal civil cases in sample reached disposition through “party resolution” while noting that this percentage included both docket entries using “only unilateral, bare-bones voluntary dismissal language (‘Voluntary dismissal only’) and those that have some indication of mutuality and compromise, even if they also use the language of voluntary dismissal and Fed. R. Civ. P. 41 (‘Settlement’);” researchers concluded that failure to include both categories “almost certainly excludes party resolution events”); Alexandra D. Lahav, Peter Siegelman, Charlotte Alexander & Nathan Dahlberg, *No Adjudication*, at 34 (July 29, 2024), available at <https://ssrn.com/abstract=4909655> (relying on SCALES data and labeling to report that “of the Complaint-Only cases, 47% end in settlement” while “[o]f the cases that had both a Complaint and an Answer but no dispositive motion, the settlement rate is much higher: 86% of these end in settlement”). There is great need for data regarding civil litigation dispositions and means used to reach such dispositions. *See also* Nancy A. Welsh, *Magistrate Judges, Settlement, and Procedural Justice*, 16 NEV. L.J. 983 (2016) (noting that online data published by Administrative Office of the Courts does not indicate what percentage of federal cases reach disposition as a result of settlement); Welsh, *Bringing Transparency*, *supra* note 4, at 2449 (noting several state courts that do not report regarding the number of cases resolved through settlement, whether achieved through negotiation or mediation); Welsh, *But Is It Good*, *supra* note 4, at 437 (surveying state courts’ public data and finding that only 13 states report annually regarding dispositions reached through settlement).

76. Stevens Clarke and Elizabeth Gordon were among the very few researchers at this point who explicitly compared mediation to negotiation; among the key differences between the two processes, they identified that “[i]n conventional negotiation, the parties and their attorneys usually did not meet and negotiate face-to-face or in the same setting; instead, attorneys made offers and counteroffers over the telephone or by letter and relayed them to their clients. . . and the litigant did not have as good an opportunity as in mediation to be heard directly by the other side, nor to hear directly from the other side.” Later, they observed that “much of [conventional settlement negotiation] is conducted by their [litigants’] attorneys in their absence. Clarke & Gordon, *Public Sponsorship*, *supra* note 46, at 311, 319, 323. Several years earlier, when Michael Fix and Phillip J. Harter compared mediated and non-mediated civil cases and found that lawyers in civil matters overwhelmingly disagreed (77%) with the statement “There is not much difference between mediation and unassisted settlement negotiations,” they reasoned that this was because the lawyers perceived mediation “to add a qualitatively different dimension to the settlement negotiations than the typical lawyer-lawyer discussions.” FIX & HARTER, *HARD CASES*, *supra* note 46, at 115.

and mediation. Some of these studies—done largely, but not exclusively,⁷⁷ in the context of divorce litigation—compared settlement terms. Some observed little difference between negotiated and mediated outcomes⁷⁸ while one study in the landlord-tenant context identified a limited but meaningful degree of difference.⁷⁹ A few studies also had examined parties' *perceptions* of the outcomes produced by mediation as compared to negotiation. Studies in the general civil litigation context found no significant difference in parties' assessments of the outcomes achieved through mediation as compared to conventional settlement (which had been presumed by researchers to involve lawyers' negotiation on their clients' behalf).⁸⁰ Regarding compliance with

77. See, e.g., Clarke & Gordon, *Public Sponsorship*, *supra* note 46, at 321 (general civil cases); Joel Kurtzberg & Jamie Henikoff, *Freeing the Parties from the Law: Designing an Interest and Rights Focused Model of Landlord/Tenant Mediation*, 1997 J. DISP. RESOL. 53, 97-99 (1997) [hereinafter Kurtzberg & Henikoff, *Freeing the Parties*] (landlord-tenant cases).

78. See, e.g., ELEANOR E. MACCOBY & ROBERT H. MNOOKIN., DIVIDING THE CHILD: SOCIAL AND LEGAL DILEMMAS OF CUSTODY 151 [hereinafter MACCOBY & MNOOKIN, DIVIDING THE CHILD] (1992) (finding that in contested cases involving disputes over child custody, mediation and settlement through other means resulted in very similar outcomes; for cases settled with mediation, there was a slight increase in the rate of joint physical custody awards and a small drop in awards to mothers); JANETTE WEBB, *Behavioral Studies of Third-Party Intervention*, in INDUSTRIAL RELATIONS: A SOCIAL PSYCHOLOGICAL APPROACH 309, 312-21 (Geoffrey M. Stephenson & Christopher J. Brotherto eds., 1979) (discussing the experimental study of mediation vs. negotiation); NANCY THEONNES ET AL., EVALUATION OF THE USE OF MANDATORY DIVORCE MEDIATION, 120-35 (1991) (comparing adjudicated vs. negotiated/mediated outcomes in divorce and child custody); Clarke & Gordon, *Public Sponsorship*, *supra* note 46, at 321 (1997) (in assessing "what parties won or lost" in general civil cases, finding mediated settlements were "indistinguishable" from conventional settlements).

79. See, e.g., Kurtzberg & Henikoff, *Freeing the Parties*, *supra* note 76, at 97-99 (comparing outcomes in agreements between landlords and tenants and finding that although both mediated agreements and non-mediated agreements granted possession to the landlord, mediated agreements were more likely to include terms favorable to the tenant—e.g., rent abatement, the opportunity for the tenant to retain possession if certain conditions were fulfilled, etc. and some agreements "contained creative benefits for tenants").

80. Clarke & Gordon, *Public Sponsorship*, *supra* note 46, at 324 (reporting "no significant differences in entire-case satisfaction [involving case outcomes and procedures or costs and time] between mediated and conventional settlement"); FIX & HARTER, *HARD CASES*, *supra* note 46, at 140 (describing the overall difference as "undramatic" but noting that "for those who reached agreement, the plaintiffs in mediation are slightly more satisfied and less dissatisfied than those in litigation [who apparently reached settlement through "unassisted negotiation"]"; precisely the opposite is true for the defendants"); Carol J. King, *Burdening Access to Justice: The Cost of Divorce Mediation on the Cheap*, 73 ST. JOHN'S L. REV. 375, 440-41 (1999) (comparing party satisfaction in mediation, attorney-negotiated settlements, direct party-to-party negotiation, and adjudication and reporting that 72.7% of the parties that reached an agreement through mediation agreed or strongly agreed that they were satisfied with mediated agreements while only one-third of the parties with lawyer-negotiated outcomes were satisfied with those outcome).

the settlements reached in mediation as compared to negotiation, a single study conducted in the general civil litigation context found no appreciable difference in parties' rate of compliance with their mediated settlements as compared to their negotiated settlements.⁸¹

Academics Deborah Hensler,⁸² Roselle Wissler (alone⁸³ and with Craig McEwen⁸⁴), Robert Baruch Bush,⁸⁵ and Bobbi McAdoo,⁸⁶ as well

81. Clarke & Gordon, *Public Sponsorship*, *supra* note 46, at 325 (1997) (finding compliance to be "virtually the same").

82. Deborah Hensler, *A Research Agenda*, 6 DISP. RESOL. MAG. 15, 16 (1999) (hypothesizing that "lawyers and parties [may] instinctively compare the outcomes of ADR with the outcomes of trial, forgetting that, in most instances, their disputes would have been resolved without trial. Psychological research teaches us that individuals over-estimate the likelihood of low-probability-high-negative-consequence events. Organizational researchers tell us that business decisions often are based on 'worst case' scenarios. Since every lawsuit has a small probability of going to trial and since the costs of trial can be enormous, it would not be surprising for those costs to loom large in individuals' subjective calculus of savings associated with ADR.").

83. Wissler, *Court-Connected Mediation in General Civil Cases*, *supra* note 46, at 691 n.230, 693–94 ("The most relevant comparison for mediation is unassisted negotiation rather than trial, because the majority of filed cases are resolved by settlement and few are tried" and "[f]uture research needs to compare systematically the content of mediated and negotiated settlements to determine whether mediation produces 'better' or more creative agreements," including participants' assessments of their mediated and negotiated settlement agreements.).

84. McEwen & Wissler, *Finding Out*, *supra* note 17, at 131, 143 ("[W]e believe the central comparison must be between unaided bilateral settlement in the context of litigation and such negotiation assisted by mediation" and observing that while "[e]mpirical data also indicate that some civil mediation programs deliver significant elements of procedural justice, even in comparison to lawyered negotiation or regular litigation processes[. . .] 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.).

85. Bush, "What Do We Need a Mediator For?", *supra* note 19, at 3 n.5, 5–6 ("[T]he point here is to examine whether mediation has value to negotiators even when and perhaps precisely because it is fundamentally different from other processes. This will help determine whether mediation has any unique value to offer negotiators that is not duplicative of other dispute resolution processes." And: "Many dispute resolution scholars, including myself, have presented and analyzed mediation as 'an alternative to adjudication.' In fact, we are now coming to see that this comparative framework is itself misconceived. The 'standard' method of case disposition, to which mediation or any other alternative process should be compared, is not adjudication or trial at all, but rather settlement either by direct party negotiations or, where parties have lawyers, by negotiation between lawyers. A solid body of research tells us that throughout the country the vast majority of disputes are settled before a legal claim is ever filed; and of those cases that are brought to court, the large majority end in a negotiated settlement of some kind, and fewer than 10% are adjudicated to a verdict.").

86. McAdoo, *All Rise, The Court Is in Session*, *supra* note 59, at 378–79, 399 n.92, 426 n.263 (observing that there is very little research comparing parties' perceptions of mediation to negotiation without mediation, especially in general civil cases that are not family or small claims matters and observing that the positive party perceptions

as arbitrator and mediator John Philips,⁸⁷ were strong advocates for a comparative shift in assessing mediation. They recommended comparing mediation not to trials or even “litigotiation” but to the procedure that was most commonly used to reach settlement in civil litigation—negotiation. In 1996, Baruch Bush presciently observed:

...[I]f a process is being proposed as an “alternative” method of resolution, to what should it be compared? The answer, clearly, is that it should be compared to the standard method of resolution, not to an exceptional method used in a tiny fraction of cases. Viewed in proper perspective, mediation and other third-party processes are alternatives not to court, but to unassisted settlement efforts, including party-to-party, lawyer-to-party and lawyer-to-lawyer negotiation.⁸⁸

Hensler, meanwhile, was particularly forceful in her call for rigorous research to determine “what in fact the ADR revolution has wrought” and cautioned that “[t]he urge to protect the infant innovation from too careful scrutiny needs to give way to hard assessment of potential gains and losses from the new vision of legal dispute resolution.”⁸⁹ According to Hensler, the effects of the “infant innovation” required “comparison with old-fashioned negotiation.”⁹⁰

Commentators hypothesized the advantages that mediation possessed when compared to its consensual cousin, negotiation. In the context of general civil litigation, they generally assumed the use of “old fashioned” bilateral negotiation, where lawyers negotiated without

of mediation regarding opportunity to present case, input into resolution and lack of pressure/coercion have not been compared to traditional bilateral negotiation. And: “Given the small number of cases presently going to trial in our court system, however, until there is sufficient data to conclude that mediation *compared to unassisted negotiation* results in more and better settlements, settlement goals alone are suspect [as a basis for establishing or ordering participation in a mediation program].”).

87. John R. Phillips, *Mediation as One Step in Adversarial Litigation: One Country Lawyer’s Experience*, 2002 J. DISP. RESOL. 143, 151 (2002) (“Further, that RAND report, along with most studies measuring either procedural or outcome fairness of mediation, fails to compare satisfaction with mediation to the largest and therefore most meaningful control group which is one comprised of disputes resolved by negotiated settlement between the lawyers in the absence of the parties. There is a dearth of research regarding procedural fairness of mediation generally and almost none comparing it to unassisted negotiation, which is surprising because by far the most likely disposition of a dispute, if mediation is not mandated, is settlement by direct negotiation rather than trial or adjudication.”).

88. Bush, “*What Do We Need a Mediator For?*”, *supra* note 19, at 5–6.

89. Hensler, *A Research Agenda*, *supra* note 82, at 15–17 (arguing that “the available data suggests that when savings occur, it is because they are accompanied by other changes in case management, for example, imposing strict time guidelines where such did not exist (or were not consistently implemented) previously, or limiting discovery” and “We may find that ADR does more to empower lawyers, than to empower clients”).

90. *Id.* at 15.

their clients being present. In 1998, for example, Nancy Rogers and Craig McEwen suggested that requiring clients to attend mediations could help to overcome “the lawyers’ conventional wisdom that clients should be excluded from the give and take of negotiations.”⁹¹ In 1999, as Jean Sternlight described mediation’s potential advantages for parties, she observed:

Represented clients normally play a very limited role in negotiations that do not involve mediation. Presumably they explain their interests and bottom line to their attorney, *but they do not typically attend negotiation sessions* nor are they necessarily consulted frequently as the negotiation progresses. . . . By contrast, mediation is an opportunity for the parties to come face-to-face with one another, with the opposing side’s attorney, and sometimes with expert or other witnesses for the opposing side.⁹²

Baruch Bush was unique in acknowledging the potential existence of other “configurations” of negotiation that could also be compared to mediation—e.g., “party-to-party” and “lawyer-to-party”⁹³—but even he did not list “lawyer/party pair-to-lawyer/party pair” as an option.

Bush’s 1996 article identifying the “value-added” of mediation provides an example of a comparison of mediation and negotiation that primarily relied on the premise of bilateral negotiation conducted by lawyers without their clients present. Furthermore, this comparison was built upon the assumption of a mediation model that was

91. Nancy H. Rogers & Craig A. McEwen, *Employing the Law to Increase the Use of Mediation and To Encourage Direct and Early Negotiation*, 13 OHIO ST. J. ON DISP. RESOL. 831, 852 (1998).

92. Jean R. Sternlight, *Lawyers’ Representation of Clients in Mediation: Using Economics and Psychology to Structure Advocacy in a Nonadversarial Setting*, 14 OHIO ST. J. ON DISP. RESOL. 269, 332-33 (1999) (emphasis added). *See also* Clarke & Gordon, *supra* note 46, at 319, 323. FIX & HARTER, *HARD CASES*, *supra* note 46, at 115. McEwen & Wissler, *Finding Out*, *supra* note 17, at 140-41. *See also* Tom R. Tyler, *A Psychological Perspective on the Settlement of Mass Tort Claims*, 53 LAW & CONTEMP. PROBS. 199, 203 (1990) (noting that in settlement conferences, “the lawyers, and sometimes the judge, meet to discuss and settle cases. Clients typically are not present at these conferences and remain uninvolved in discussions and/or negotiations about case settlements. When lawyers emerge from the conferences, they present ‘good’ settlements to their clients and assume that the favorability of the settlements will ensure client satisfaction.”); Jeremy A. Matz, *We’re All Winners: Game Theory, The Adjusted Winner Procedure and Property Division at Divorce*, 66 BROOK. L. REV. 1339, 1361 (2001) (observing that “negotiation often occurs between the two lawyers, who later communicate updates to their respective clients, which can lead to communication problems, rumors, and confusion”).

93. Bush, “*What Do We Need a Mediator For?*”, *supra* note 19, at 27-29; *see also* Jeffrey Z. Rubin & Frank E. A. Sander, *When Should We Use Agents? Direct vs. Representative Negotiation*, 4 NEGOT. J. 395, 397, 399, 401 (1988) (“Above all, the choice of whether to negotiate directly or through surrogates is an important one, with significant ramifications. It therefore should be addressed explicitly by weighing some of the considerations advanced above.”).

facilitative, party-focused, and dialogue-driven. Starting with these models of negotiation and mediation, he urged that in comparison to negotiation, mediation provided litigants with a “greater degree of participation in decisionmaking” and a “fuller opportunity to express themselves and communicate their views, both to the neutral and to each other,”⁹⁴ thus improving the informational environment, assisting both parties’ decision-making, and affecting their perceptions of process control.⁹⁵ He further urged that this greater degree of party participation and direct dialogue in mediation would ultimately enhance the parties’ self-determination:

The result is a qualitatively different deliberation and decision-making process, which enables parties to accept or reject terms of agreement with clarity, as they see fit, and thus to effectuate their desires in conflict situations more fully. Along with others, I have described this as the “value of self-determination” in mediation. People value the experience of self-determination. They believe they know what is best for themselves and they want the opportunity to effectuate it, in conflict as in other aspects of their lives. The evidence presented today shows that mediation provides that opportunity, to an even greater degree than negotiation.⁹⁶

Although Bush does not state this directly, his observations imply that mediation, compared to negotiation, should be superior from the litigants’ viewpoint on metrics such as process fairness, outcome

94. Bush, “What Do We Need a Mediator For?”, *supra* note 19, at 19–20 (arguing that “[p]arties’ favorable attitudes toward mediation stem largely from how the process works, and two features in particular are responsible. Those features are: (1) the greater degree of participation in decisionmaking that parties experience in mediation; and (2) the fuller opportunity to express themselves and communicate their views, both to the neutral and to each other, that they experience in the process. Because of these features, parties find mediation highly valuable, even when no settlement is reached, and even when a mediated settlement embodies a less favorable outcome than they could have obtained in court.”).

95. *Id.* at 25–26 (perceiving “two main theoretical answers to the question of mediation’s value to negotiators: (1) the assistance mediation provides can help cure inherent problems in the negotiation process by improving the quality of information, communication and hence party decisionmaking; and (2) this kind of enhancement of negotiation is something that parties really value and want not only or primarily because it produces better outcomes (though it probably will), but also because it simultaneously increases the ‘process control’ that leads parties to prefer negotiation in the first place”).

96. *Id.* at 27–29; see generally Robert A. Baruch Bush & Peter F. Miller, *Hiding in Plain Sight: Mediation, Client-Centered Practice, and the Value of Human Agency*, 35 OHIO ST. J. ON DISP. RESOL. 591, 606 (2020) (suggesting that mediation has moved away from promoting self-determination, but that practitioners of the transformative model of mediation have taken steps to correct their practices in ways that place primary value on client agency).

control, and outcome satisfaction. Also, while Bush focused most of his attention on the advantages derived from the parties' participation, he observed that the presence of a mediator could be salutary. The parties might be more able and willing to hear and understand each other—thus reducing the negative consequences of cognitive bias that impede settlement—due to their trust in the neutral third party.⁹⁷

Bush also discussed researchers' findings regarding the perceptions of the lawyers who participated in family mediation sessions alongside their clients.⁹⁸ According to Bush, these lawyers valued mediation over unassisted negotiation because they found, among other things, that "it increases clients' sense of participation in and control over their case, which is frequently attenuated in lawyer-lawyer negotiation," "provides a setting for communication between the parties that settlement (negotiation) does not, a setting in which parties can and do discuss and explain needs and problems and express anger and disappointment . . . , not just exchange demands and positions," in which clients can feel that "another person has heard their side of the story(.) that the other side . . . has heard their side" and in which "(suspicions and) misconceptions that clients tend to have about the other side" are cleared up. . . [M]ediation offers more of the 'process control' that parties value in consensual processes generally."⁹⁹

97. Bush, "What Do We Need a Mediator For?", *supra* note 19, at 13 n.23 (1996) (citing DAVID A. LAX & JAMES K. SEBENIUS, *THE MANAGER AS NEGOTIATOR: BARGAINING FOR COOPERATION AND COMPETITIVE GAIN* (1986), at 172–76, to suggest that "a mediator can: (1) facilitate information flow and communication '(b)y acting as a selective conduit of information'; (2) 'help a negotiator understand the interests and predicaments' of the other side; (3) 'foster each negotiator's creativity' in putting forward novel proposals; (4) 'reduce (their) vulnerability' to perceptions of weakness by the other side that lead to 'excessive claiming'; and (5) 'blunt conflict escalation . . . by enhancing trust (and) convey to each negotiator a more sympathetic understanding of his counterparts'"); see also Lee Ross & Constance Stillinger, *Barriers to Conflict Resolution*, 7 NEGOT. J. 381 (1991) (discussing the role mediators can play in reducing reactive devaluation and similar cognitive biases).

98. Craig A. McEwen, Nancy H. Rogers & Richard J. Maiman, *Bring in the Lawyers: Challenging the Dominant Approaches to Ensuring Fairness in Divorce Mediation*, 79 MINN. L. REV. 1317 (1995).

99. Bush, "What Do We Need a Mediator For?", *supra* note 19, at 22–23; see also Wissler, *Court-Connected Mediation in General Civil Cases*, *supra* note 46, at 664–65 (reporting research finding that 59% of attorneys in general civil mediation indicated that mediation facilitated greater involvement of the parties in case resolution). Other research, however, found that attorneys infrequently perceived their clients as exercising more control in the consensual process of mediation than in the traditional litigation process. See, e.g., McAdoo, *A Report to the Minnesota Supreme Court*, *supra* note 64, at 430, tbl. 11 (reporting that few attorneys perceived that mediation has the effect of "providing greater client satisfaction" (26.1%) or "providing greater client control" (28.3%)); Bobbi McAdoo & Art Hinshaw, *The Challenge of Institutionalizing Alternative Dispute Resolution*, *supra* note 61, at 515, tbl. 26 (2002) (reporting that a minority of attorneys perceived mediation as having the effect of "provid[ing] greater client

If we unpack this description, we see that Bush (and the family lawyers in the study he cited) apparently assumed a model of *mediation* that involved the parties' participation and voice as well as consideration of the parties' interests and norms that they felt should guide resolution—not primarily discussion of what would happen, procedurally and substantively, should their case go to trial. Meanwhile, they assumed a model of bilateral *negotiation* that excluded the parties and their voice and therefore largely excluded their interests and preferred norms. This model of negotiation—what Bush calls “lawyer-lawyer negotiation”—also was one in which the clients were likely to perceive that they had less control over the outcome of their case. In the contest between these particular models of mediation and negotiation, mediation came out on top.

One of the authors of the present Article (Welsh) joined Bush in hypothesizing mediation's advantages over negotiation with her 2001 article focusing on the court-connected general civil context. Like Bush, she presupposed that bilateral negotiation meant lawyer-to-lawyer negotiation. Unlike Bush, however, she did not assume either a purely facilitative model of mediation or an increased sense of self-determination or outcome control for the parties. Rather, Welsh assumed that a substantial percentage of court-connected mediation was characterized by a reduced role for litigants, dominance by their lawyers, evaluative interventions by lawyer-mediators with substantive expertise, and marginalization of the joint session.

Welsh specifically focused on process fairness considerations and asserted, rather baldly, that court-connected mediation could provide litigants with a procedurally fair process—or an experience of justice—while bilateral negotiation between the lawyers could not deliver this result and was not expected to do so.¹⁰⁰ Indeed, Welsh asserted, “Empirical studies of litigants' experiences in the negotiated resolution of their cases. . . suggest that the courts would not find much procedural

satisfaction” (30%) or “provid[ing] client with a greater sense of control” (31%)) (cited in Nancy A. Welsh, *Disputants Decisions Control in Court-Connected Mediation: A Hollow Promise Without Procedural Justice*, 2002 J. DISP. RESOL. 179, 181 (2002)).

100. Since writing this Article (*Making Deals*), Welsh has urged that it is possible for negotiators to behave in a manner consistent with procedural fairness considerations. See Nancy Welsh, *Perceptions of Fairness*, 87 MARQ. L. REV. 753 (2004); Nancy Welsh, *The Reputational Advantages of Demonstrating Trustworthiness: Using the Reputation Index with Law Students*, 28 NEGOT. J. 117 (2012).

justice in court-connected negotiation if they chose to look for it.”¹⁰¹ She based this assertion largely on research by RAND that had compared litigants’ perceptions of trial, court-connected arbitration, judicial settlement conferences, and traditional bilateral negotiation used to resolve personal injury lawsuits in New Jersey.¹⁰² The litigants in this study had rated judicial settlement conferences and bilateral negotiated settlement (not involving third-party neutrals) as significantly less procedurally fair than either trial or court-connected arbitration.¹⁰³ The researchers posited that litigants’ absence from the judicial settlement conferences played a significant role in explaining their much less favorable procedural fairness perceptions, noting “litigants whose cases were resolved by [judicial] settlement conferences and who were, by and large, not allowed to see the process were less likely to take it on faith that the process was dignified.”¹⁰⁴ The researchers also noted that litigants perceived that they had participated much more in trials than in the bilateral settlement of their cases.¹⁰⁵ Although the researchers never clarified whether litigants were excluded from their lawyers’

101. Welsh, *Making Deals*, *supra* note 18, at 831.

102. *Id.* at 831-32.

103. *Id.* at 832, 838 (citing E. Allan Lind et al., *In the Eye of the Beholder: Tort Litigants’ Evaluations of Their Experiences in the Civil Justice System*, 24 L. & Soc’y REV. 953, 963, n.11, 965-66 (1990) and further noting that “only five of the fifty-three settlement conference litigants included in the final analytic sample reported in *In the Eye of the Beholder* indicated that they attended the conference.”).

104. E. ALLAN LIND ET AL., THE PERCEPTION OF JUSTICE: TORT LITIGANTS’ VIEW OF TRIAL, COURT-ANNEXED ARBITRATION, AND JUDICIAL SETTLEMENT CONFERENCES 72 (1989), <https://www.rand.org/content/dam/rand/pubs/reports/2006/R3708.pdf> [<https://perma.cc/NRK2-VXQC>]. *But see* Jean-Francois Roberge, “Sense of Access to Justice” as a Framework for Civil Procedure Justice Reform: An Empirical Assessment of Judicial Settlement Conferences in Quebec (Canada), 17 CARDOZO J. OF CONFL. RESOL. 323, 323 (2016) (reporting that litigants and lawyers participating in settlement conferences conducted by Quebec trial court judges—who were using a facilitative integrative problem-solving approach—evaluated the process as fair-minded and providing them with a sense of access to justice).

105. E. Allan Lind et al., *supra* note 103, at 982 (“ADR advocates’ assumptions about negative consequences of the formality of the trial process are contradicted by our findings that litigants view trials as more understandable and as offering more participation than bilateral settlements. Our findings suggest also that there is a need to reconsider how litigants view settlement processes: it may be settlement, rather than trial, that is seen as difficult to understand and that diminishes feelings of participation.”); *see also* Shestowsky, *Great Expectations?*, *supra* note 21, at 188–89 (reporting on a multi-court field study finding a significantly better fit between litigants’ ex ante and ex post ratings for adjudication compared to settlement procedures and suggesting that the finding might reflect litigants’ relatively greater understanding of adjudication; also reporting that for litigants who personally attended their procedure, those who settled evaluated their procedure as fairer compared to those who adjudicated. By contrast, for litigants who did not attend, there was no statistically significant difference in ratings for settlement versus adjudication.).

bilateral negotiations, Welsh joined Bush in making such an assumption regarding the usual meaning of this term.

Focusing on the court-connected context, Welsh urged that—from a procedural fairness perspective—mediation should be understood as substantially superior to lawyers’ bilateral negotiations for three reasons that are relevant here. First and most important, the litigants¹⁰⁶ were likely to attend mediation and thus would be able to participate directly or witness their lawyers’ participation as well as the mediator’s behavior and demeanor. In lawyers-only negotiation, by contrast, litigants were neither able to participate nor observe.¹⁰⁷ Second, in this context, the mediator was present as a neutral third party and served, essentially, as a neutral representative of the court and an authority figure.¹⁰⁸ There was no such third party in negotiation. Third,

106. It was more likely that the plaintiff would attend than the defendant, in certain types of cases, such as personal injury and medical malpractice cases. See TAMARA RELIS, PERCEPTIONS IN LITIGATION AND MEDIATION, *supra* note 60, at 88.

107. Welsh, *Making Deals*, *supra* note 18, at 838-45. See also McEwen & Wissler, *Finding Out*, *supra* note 17, at 140-41 (citing RAND study and reanalysis in Lind et al., *supra* note 103 for finding a “suggestion 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 themselves. Mediation that involves parties as well as counsel, thus, might well be viewed more favorably than *bilateral negotiation that often occurs between lawyers*” (emphasis added)); Sternlight, *Lawyers’ Representation of Clients in Mediation: Using Economics and Psychology to Structure Advocacy in a Nonadversarial Setting*, *supra* note 92, at 332-33 (observing that “while many mediation proponents may not have used such a theoretical explanation, mediation is often successful because it assists parties in surmounting significant barriers to successful negotiation. Two features are key. First, as compared to nonfacilitated negotiations, mediation possesses the additional feature of a mediator—a third-party neutral whose role is to help the participants discuss their dispute and potentially work out a solution. Second. . . mediation potentially allows represented parties to play a direct role in the negotiation. . . Represented clients normally play a very limited role in negotiations that do not involve mediation. Presumably they explain their interests and bottom line to their attorney, but they do not typically attend negotiation sessions nor are they necessarily consulted frequently as the negotiation progresses. In fact, even the attorneys typically do not engage in face-to-face meetings, but rather often conduct their negotiations by phone or by letter. By contrast, mediation is an opportunity for the parties to come face-to-face with one another, with the opposing side’s attorney, and sometimes with expert or other witnesses for the opposing side.”).

108. Welsh, *Making Deals*, *supra* note 18, at 833. But see Girolamo, *The Mediation Process: Challenges to Neutrality and the Delivery of Procedural Justice*, *supra* note 60, at 850-53 (concluding, based on observations of mediations in 2006-2007 and an ethnographic review, that mediators do not maintain neutrality because they shift roles throughout the process, including taking on the roles of devil’s advocate and counselor, and thus they cannot objectively be said to provide procedural justice; also noting that parties want an outcome, that they don’t speak in terms of justice, that they also don’t speak in terms of procedural justice; acknowledging, however, that the parties accept/perceive that the mediators are neutral—and thus the parties must perceive

Welsh operated on the assumption that the mediator, in the capacity of a neutral representative, would ensure that the parties had opportunities to express themselves. The mediator would take the time to demonstrate genuine understanding and sincere consideration of the parties' perspectives before sharing any evaluations of their case or settlement options and would generally treat the parties even-handedly and with respect.¹⁰⁹ Negotiating lawyers bore no such obligation to let each other speak, demonstrate an even-handed understanding of what their counterpart had to say, or treat each other respectfully. Even if they did behave in this way, their clients would not be present to observe it. Thus, according to Welsh, mediation would provide litigants with the opportunity to determine for themselves that they had received "voice," sincere consideration of what they communicated, and even-handed and dignified treatment. A negotiation involving only the lawyers would not.

III. EMPIRICAL FINDINGS REGARDING CURRENT MEDIATION STRUCTURE, PARTY PARTICIPATION AND PERCEPTIONS, AND OUTCOMES

Bush's and Welsh's hypotheses on mediation and negotiation drew on then-available research, scholarly observations, and their own assumptions about the structures of both procedures. Since then, research has focused on mediations' structure—particularly the extent to which pre-mediation communications, joint sessions, and caucuses are used—as well as the incidence and effects of litigants' attendance and opportunity to speak. In addition, some empirical research explores the differences between outcomes achieved through mediation and negotiation.

some form of procedural justice; finally noting that the parties perceive some form of procedural justice even though they also perceive pressure/coercion by the other side—which apparently they do not attribute to the mediator or the mediation process).

109. Welsh, *Making Deals*, *supra* note 18, at 834; *see also* Roselle L. Wissler, *Mediation and Adjudication in the Small Claims Courts: The Effects of Process and Case Characteristics*, 29 LAW & SOC'Y REV. 323, 344-47 (1995) (reporting findings that a set of procedural characteristics accounted for 65% of the variance in litigants' procedural fairness judgments of mediation and adjudication. "In addition, evaluating the third party as neutral and as understanding the dispute accounted for 48% of the variance in procedural evaluations."); Nabatchi et al., *Organizational Justice and Workplace Mediation: A Six-Factor Model*, *supra* note 39, at 164 (describing research indicating that in the transformative model of mediation, the disputants cared even more about whether the other disputant extended trustworthy consideration).

A. *The Interaction of Joint Session and Caucus with Party Participation in Mediation*

Recent research by Roselle Wissler and Art Hinshaw, based on a sample of over 1,000 court-connected and private mediations, analyzes respondent-mediators' descriptions of their most recent mediation.¹¹⁰ The study explores how frequently mediations begin with joint sessions or caucuses, the overall use of joint sessions, activities in initial joint sessions, and differences in party participation between joint sessions and caucuses. This work responds to reports of the decline of joint sessions in private commercial cases and the rise of caucus-only mediations, reportedly driven by lawyers' preferences.¹¹¹ Notably, a national survey found that approximately 53% of California mediators "always" or "usually" began mediations in caucus rather than joint session,¹¹² compared to 37% of mediators outside California.¹¹³ A separate survey of 205 JAMS civil and commercial mediators revealed that only 45% regularly began mediations with a joint session.¹¹⁴ Regional differences were also apparent, with mediators in the Southwest and Northwest regions significantly less likely to initiate mediations with joint sessions compared to other regions.¹¹⁵

Wissler and Hinshaw observed that a majority of the general civil mediations in their sample—71%—began with an initial joint session in person or by phone.¹¹⁶ Only 26% of these cases began with the opposing parties and their lawyers in caucus.¹¹⁷ However, in 46% of the civil cases, while the parties began in joint session, they never

110. Wissler & Hinshaw, *The Initial Mediation Session*, *supra* note 35, at 13.

111. Galton & Allen, *Don't Torch the Joint Session*, *supra* note 61, at 25; Bassis, *Face-to-Face Sessions Fade Away: Why Is Mediation's Joint Session Disappearing?*, *supra* note 61, at 30.

112. Stipanowich, *The International Evolution of Mediation: A Call for Dialogue and Deliberation*, *supra* note 61, at 1204.

113. *Id.*

114. Jay Folberg, *The Shrinking Joint Session: Survey Results*, DISP. RESOL. MAG., Winter 2016, at 13-16 (surveying 205 private civil and commercial JAMS mediators and reporting that 45% regularly began mediation in joint session currently but that 80% did so when they started conducting mediations).

115. *Id.* (finding 68.5% of the respondents from the East/Central regularly used an initial joint session, compared to 34% of those in the Northwest and 23.6% in Southwest).

116. Wissler & Hinshaw, *The Initial Mediation Session*, *supra* note 35, at 15 tbl. 1, 35 tbl. 10. 64% of the family cases began with an initial joint session in person or by phone. *Id.*

117. *Id.* at 15 tbl. 1. 33% of the family cases began with the opposing parties and their lawyers in caucus. *Id.*

came together again after they began to caucus.^{118,119} Sometimes opposing parties and their lawyers never came together at any point in the mediation. This was true for 23% of the civil cases that were part of Wissler's and Hinshaw's research sample.¹²⁰

Wissler's and Hinshaw's findings regarding the continued use of the initial joint session are generally consistent with other research conducted in a Massachusetts state court, involving a smaller sample but similarly finding that privately-conducted torts, contracts, and commercial mediations began with a joint session.¹²¹ Wissler and Hinshaw also reported, however, that today's initial joint sessions in mediation "often are a shadow of their traditional selves, especially in civil cases"¹²² because they are much less likely to include opening statements by the parties, discussion of substantive matters or direct exchanges between the two sides.

Turning to the extent of party participation in mediation, Wissler reported in her 2002 review of empirical court-connected mediation research that most *lawyers* perceived that "mediation allowed the parties to become more involved in the resolution of the case."¹²³ It is not clear what procedure lawyers had in mind when they made this evaluation or what the lawyers were using for their comparison. It could have been trial, but another possibility was that lawyers were assuming lawyers' bilateral negotiations, in which clients would have no or little opportunity to participate directly.¹²⁴ Wissler acknowledged the lack of comparative data on negotiation.¹²⁵

118. *Id.* at 35 tbl. 10. In 28% of the civil cases, the parties did return to joint session. *Id.*

119. In contrast, in 54% of the family cases, there was both a joint opening session and a later joint session. *Id.* In 12% of the family cases, the parties did not return to joint session. *Id.*

120. *Id.* This was also true for 29% of the family cases.

121. Dwight Golann, *If You Build It Will They Come? An Empirical Study of the Voluntary Use of Mediation, and Its Implications*, 22 CARDOZO J. OF CONFLICT RESOL. 181, 182, 185, 194-95 (2021) (analyzing the implications that a "large majority of the surveyed mediations included a traditional 'joint session'").

122. Wissler & Hinshaw, *The Initial Mediation Session*, *supra* note 35, at 40.

123. Wissler, *Court-Connected Mediation in General Civil Cases*, *supra* note 46, at 664 ("[59%] of the attorneys said mediation allowed the parties to become more involved in the resolution of the case").

124. Indeed, other research commentary supports this hypothesis. *See, e.g.*, FIX & HARTER, *HARD CASES*, *supra* note 46, at 115 (in comparison of mediated and non-mediated civil cases, finding that lawyers in civil matters overwhelmingly disagreed (77%) with the statement "There is not much difference between mediation and unassisted settlement negotiations," and hypothesizing that the lawyers perceived mediation "to add a qualitatively different dimension to the settlement negotiations than the typical lawyer-lawyer discussions").

125. Wissler, *Court-Connected Mediation in General Civil Cases*, *supra* note 46, at 691-92 ("A majority of attorneys reported that mediation improved communication

Wissler's more recent research with Art Hinshaw, again relying on general civil mediators' self-reports, explores the influence of joint sessions and caucus upon the extent of the parties' participation in the mediation process and found that parties were more likely to make or supplement an opening statement if they began their mediation in a joint session rather than in caucus.¹²⁶ On all other measures, however, greater party participation was observed in initial caucuses than in initial joint sessions. For example, while 68% of parties responded to the mediator when they were in initial joint sessions, a much larger percentage—91%—responded to the mediator when they were in initial caucuses. During initial joint sessions, 41% of the parties asked questions or responded to the other side. When they were in initial caucuses, a larger percentage of the parties—56%—engaged with the mediator in order to convey information or questions to the other side.¹²⁷

This pattern suggests that parties can and do express themselves in mediation, even when the process is conducted largely in caucus. As applied to the procedural justice framework, the parties still have voice and may perceive that they received sincere consideration from the mediator, along with even-handed and respectful treatment. However, with regard to self-determination and the ability to tailor resolutions to their interests, it may be significant that parties' expressions are mediated—addressed to, interpreted by, and conveyed through the mediator—rather than directly communicated to the opposing party. This dynamic warrants further empirical investigation.

Finally, Wissler and Hinshaw have examined the extent to which parties are involved in mediators' pre-mediation communications and the effects of such involvement. In particular, they have found that when at least one of the parties is present for pre-mediation communications with the mediator—held prior to or on the same day as (but before) the first formal mediation session—it is significantly

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

126. Wissler & Hinshaw, *The Initial Mediation Session*, *supra* note 35 (reporting data from survey of more than 1,000 mediators in civil and family cases across eight states).

127. *Id.* at 26.

more likely that there will be discussion of the parties' interests or goals for the mediation.¹²⁸ Party participation in the pre-mediation communications held prior to the first day of mediation is rare in civil cases, however. Where both parties in civil cases had legal representation, one or both parties were present in only 20% of the communications with the mediator held prior to the day of mediation.^{129,130} Even if the parties were present, though, they did not necessarily speak. Only about one-third of the civil litigants spoke in these pre-session meetings.¹³¹ This research reveals that parties' *presence* in pre-mediation communications makes it more likely that their interests and goals will be discussed. This research does not reveal, however, whether parties' *participation* makes it even more likely that their interests and goals will be discussed.

B. *Parties' Participation and Resulting Perceptions of Process Fairness, Outcome Control and Satisfaction with Outcome*

Instead of relying on assumptions about the effects of party participation in mediation, Wissler conducted empirical research to examine whether parties' perceptions of voice, procedural fairness, outcome control, and outcome fairness vary based on their level of participation relative to that of their lawyers. Her analysis of self-report data from litigants who participated in general civil mediation sessions revealed that once mediation sessions begin, even though litigants tend to view their lawyers as speaking more than they do,¹³² they nonetheless often

128. In civil cases, when at least one of the parties was present during communications held prior to the day of mediation or on the same day but prior to the first formal mediation session, mediators were more likely to explore the parties' *interests*. This was also true for family cases when at least one of the parties was present for communications held on the same day as, but before, the first formal mediation session. In family cases, when at least one of the parties was present during communications held prior to the day of the first mediation, mediators were more likely to explore the parties' *goals* for the mediation. Roselle L. Wissler & Art Hinshaw, *What Happens Before the First Mediation Session? An Empirical Study of Pre-Session Communications*, 23 CARDOZO J. OF CONFLICT RESOL. 143, 176-177, 182, 187 (2022) (examining civil and family mediations).

129. *Id.* at 162.

130. The occurrence of party presence in these pre-mediation meetings was higher for family law cases, where one or both parties were present in 62% of cases. *Id.*

131. *Id.* In contrast, almost two-thirds of the parties in family mediations spoke.

132. Wissler, *Representation in Mediation*, *supra* note 62, at 448 ("A majority of parties said their lawyer spent a considerable amount of time speaking for their side (64%) and talked more than they did (57%)."); *see also* Wissler, *Court-Connected Mediation in General Civil Cases*, *supra* note 46, at 658 (based on survey data from parties, lawyers, and mediators in Ohio, "the mediators reported that the parties spoke a considerable amount during the mediation session in 37% of the cases and an intermediate amount in 35% of the cases. Similarly, 70% of the parties said that they spent from

feel they have considerable opportunity to share their views of the dispute—i.e., sufficient opportunity for voice.¹³³ Indeed, half of the represented parties who reported that they did not speak for their side “at all” nonetheless reported that “they had been given a considerable chance to share their views of the dispute.”¹³⁴ However, the amount that parties talked mattered to some degree. A *much* higher percentage —91%—of the parties who reported that “they spent a ‘great deal’ of time speaking for their side” felt they had a considerable chance to tell their views.¹³⁵ The more parties talked and the more they perceived that they had talked more than their lawyers, the more they also perceived that they had a chance to tell their views in mediation.¹³⁶ Meanwhile, the amount that the parties reported their *lawyers* talked was *not* related to how much of a chance they felt they had to share their views.¹³⁷ Based on these results, Wissler suggested that although many parties felt that their views had been expressed through their lawyers, “it is something other than how much their lawyer talks that contributes to parties’ sense of voice.”¹³⁸

Wissler also found a significant positive correlation between voice opportunity ratings (“had chance to tell views”) and perceptions of

some time to a great deal of time speaking on behalf of their side. The mediators said the attorneys spoke a considerable amount in 89% of the cases. When comparing the mediators’ ratings of the amount of time the parties and attorneys in the same case talked during the session, we see that the attorneys spent more time talking than the parties in 63% of the cases, the parties and attorneys spent about the same amount of time talking in 31% of the cases, and the parties spent more time talking in 6% of the cases.”).

133. Wissler, *Representation in Mediation*, *supra* note 62, at 447-51 (57% of litigants reported that their lawyer talked more than they did, while 32% reported that they talked the same amount as their lawyer, and 11% indicated they talked more than their lawyer; 77% of litigants felt they had a considerable chance to tell their views even though only 25% said they spent a considerable amount of time talking; among parties who said they did not speak at all, half nonetheless “felt they had a considerable chance to tell their views of the dispute”).

134. *Id.* at 448-49 (also noting that “Among parties who said their lawyer spoke ‘a great deal’ for their side during mediation, 77% felt they had a considerable chance to tell their views of the dispute.”).

135. *Id.* at 449.

136. *Id.* at 451, tbl. 2 (noting that the correlation between “had chance to tell views” and “amount party talked” was $r = .31, p < .001$, and the correlation between “had chance to tell views” and “party talked more than lawyer” was $r = .23, p < .001$).

137. *Id.* (noting that the correlation between “had chance to tell views” and “amount lawyer talked” was not statistically significant).

138. Wissler, *Representation in Mediation*, *supra* note 62, at 451-52 (emphasis added); see also Shestowsky, *How Litigants Evaluate the Characteristics of Legal Procedures: A Multi-Court Empirical Study*, *supra* note 21, at 828, 831 (in a study exploring litigants’ ex ante preferences for procedure characteristics, finding that, of all the examined options for what the process would entail, parties preferred one in which their lawyers presented to a third party in the presence of the parties).

procedural fairness ("fair process"), outcome control ("input into the outcome"), and fairness of their settlement ("fair settlement").¹³⁹ How much the parties spoke for themselves *and* how much their lawyers spoke on their behalf were also positively correlated with parties' perceptions of the procedural fairness and outcome control provided by mediation.¹⁴⁰ However, whereas ratings of the amount that *both* the parties and their lawyers talked had small (but statistically significant) correlations with procedural fairness, the correlation between the amount that the *parties* talked and their perceptions of outcome control¹⁴¹ was notably stronger than was observed between the amount that their *lawyers* talked and their perceptions of outcome control.¹⁴² Wissler failed to find a statistically significant relationship between parties' perceptions of how much they or their lawyers talked and the fairness of their settlements.¹⁴³

With this research, Wissler also discerned an interesting and potentially quite important distinction between litigants' "voice" and the extent of their "participation" in mediation. Specifically, the correlation between parties' perceptions of "had a chance to tell views" (i.e., voice) and "fair process" was notably stronger than the relationship between their perceptions of the *amount* they talked and "fair process."¹⁴⁴ Wissler also found that the more litigants spoke in general

139. Wissler, *Representation in Mediation*, *supra* note 62, at 451, tbl. 2 (2010) (sharing correlations between "fair process" and "chance to tell views" $r = .42, p < .001$; between "had input into outcome" and "chance to tell views" $r = .35, p < .001$; between "fair settlement" and "chance to tell views" $r = .19, p < .001$).

140. Wissler, *Representation in Mediation*, *supra* note 62, at 447-51, tbl. 2. Regarding "fair process," this result is consistent with the findings of other procedural fairness research. See Welsh, *Making Deals*, *supra* note 18, at 841-46. See also Lisa B. Bingham et al., *Exploring the Role of Representation in Employment Mediation at the USPS*, 17 OHIO ST. J. ON DISP. RESOL. 341 (2002) (finding that complainants accompanied in mediation by a union or association representative were more satisfied than were those with other types of representatives, including lawyers, but as to their own participation and the fairness of mediation, those with any type of representative were less satisfied than those who had represented themselves).

141. Wissler, *Representation in Mediation*, *supra* note 62, at 451, tbl. 2 (correlations between "had input into outcome" and "amount party talked" $r = .21, p < .001$, between "had input into outcome" and "party talked more than lawyer" $r = .11, p < .001$).

142. *Id.* (correlations between "had input into outcome" and "amount lawyer talked" $r = .06, p < .05$).

143. *Id.* (correlations between "fair settlement" and "amount party talked" $r = .06, p < .10$, between "fair settlement" and "amount lawyer talked" $r = .07, p < .10$).

144. See Wissler, *Representation in Mediation*, *supra* note 62, at 450-51 ("[For civil cases,] parties' sense of voice was much more strongly related to their assessments than was their amount of participation, which is similar to the pattern seen above in the present domestic relations study"); correlations between "fair process" and "had chance to tell views" ($r = .42, p < .001$), between "fair process" and "amount party talked" ($r = .09, p < .001$) *id.* at 451, tbl. 2; see also Nancy A. Welsh, *Do You Believe in Magic: Self-Determination and Procedural Justice Meet Inequality in Court-Connected Mediation*,

civil mediation sessions, the more likely they were to feel pressured to settle; in contrast, the more parties' attorneys spoke during mediation, the less likely the parties were to feel pressured to settle.¹⁴⁵ Taken together, these results suggest a difference and potential tension between the opportunity for voice that is important to perceptions of procedural fairness and the sort of extensive back-and-forth participation that is associated with self-determination or outcome control.¹⁴⁶

In pursuit of procedural fairness, perhaps it is most important to ensure that parties have the opportunity during mediation to express what happened or what is important for the mediator and others to understand and to receive from the mediator (and perhaps others) trustworthy consideration and even-handed, respectful treatment, and it is less important that the parties participate directly and actively in the bargaining exchanges that take place in negotiation and mediation.¹⁴⁷ Wissler's findings also raise substantial

70 SMU L. REV. 721, 743 (2017) (discussing a potential distinction between "voice" and "participating in the back-and-forth or bargaining of negotiation and mediation").

145. This was also true in domestic relations mediation sessions. See Wissler, *Representation in Mediation*, *supra* note 62, at 449-50; see also Wissler, *Court-Connected Mediation in General Civil Cases*, *supra* note 46, at 685-86 (in a study of Ohio courts, "[p]arties who said they spent more time talking while presenting their side during mediation felt more pressured by the mediator to settle than did parties who reported they spent less time talking during mediation. However, the opposite relationship was found with regard to their attorney's participation—parties who said their attorney spent more time talking in presenting their side during mediation felt *less* pressured by the mediator to settle than did parties who reported their attorney spent less time talking during mediation. Parties who said they or their attorney spent more time talking in presenting their side during mediation thought the mediation process was more fair than did parties who reported they or their attorney spent less time talking"); *id.* at 699 n.261 ("These seemingly paradoxical findings in parties' perceptions of pressure would be consistent with the possibility that mediators direct their reality testing at parties when they more actively participated, but at attorneys when they participated more. Whether parties spoke more or less than their attorneys spoke was not related to settlement or to parties' perceptions."); Roselle L. Wissler, *Party Participation and Voice in Mediation*, 18 DISP. RESOL. MAG. 20 (2011); ABA SECTION OF DISPUTE RESOLUTION, *supra* note 61.

146. See Wissler, *Representation in Mediation*, *supra* note 62, at 451, tbl. 2 (reporting higher correlations between ratings for "chance to tell views," "amount party talked" and "party talked more than lawyer" and ratings for "had input into the outcome" than for perceptions regarding the amount their lawyer talked and "had input into the outcome").

147. See E. Allan Lind et al., *In the Eye of the Beholder: Tort Litigants' Evaluations of Their Experiences in the Civil Justice System*, *supra* note 105, at 969, 972 (finding that in a variety of dispute resolution procedures other than mediation, tort litigants' sense of control over the way their case was handled was strongly related to procedural fairness judgments, while how much they felt they "participated in the process of disposing" of their case was not). Meanwhile, other commentary and research has suggested that parties may exercise meaningful (although perhaps thinner) self-determination in choosing among predetermined options or in choosing to veto a single

questions about whether more extensive party participation—even as it enhances parties' perceptions of their input into settlement outcomes—will be positively related to an enhanced perception that such outcomes are fair.¹⁴⁸

C. *Parties' Comparative Perceptions of Process and Outcomes in Mediation vs. Negotiation*

In 2002, Wissler called for research that would answer questions such as “why parties decide to settle and what norms they apply in determining whether an agreement is fair” and parties’ “assessments of mediated and negotiated agreements.”¹⁴⁹ Two years later, she reviewed the small number of research studies explicitly comparing cases that settled as a result of mediation versus those that settled through negotiation and noted no “consistent overall differences” in parties’ process assessments.¹⁵⁰

The small number of more recent studies comparing settlements reached in mediation versus their lawyers’ bilateral negotiation have continued to focus on differences in the terms contained in the settlement agreements, parties’ *ex post* perceptions¹⁵¹ of their settlement outcomes, and compliance. This research has been done in the context of divorce and child custody, general civil, and small claims litigation.

proposed solution. See Welsh, *The Thinning Vision*, *supra* note 35, at 44-46 (describing this “thinner” definition of self-determination); Shestowsky, *How Litigants Evaluate the Characteristics of Legal Procedures: A Multi-Court Empirical Study*, *supra* note 21, at 828, 831 (reporting an *ex ante* empirical study that found that “maintaining veto power over a third-party suggestion was as much decision control that litigants desired and [that] they were indifferent between having this type of power and delegating decision-making authority to a third party or group of third parties”).

148. Wissler, *Representation in Mediation*, *supra* note 62, at 451, tbl. 2 (showing that “chance to tell views” ratings were significantly positively correlated with how fair they believed the settlement was, but finding only a marginally significant positive correlation between parties’ self-reported amount of talking and how fair they believed the settlement was). Asking parties whether an outcome was “fair” is not necessarily going to yield the same results as asking whether the outcome was “satisfactory.”

149. Wissler, *Court-Connected Mediation in General Civil Cases*, *supra* note 46, at 641, 693-694 (“Future research needs to compare systematically the content of mediated and negotiated settlements to determine whether mediation produces ‘better’ or more creative agreements.” *Id.* at 693. “Future research needs to examine why parties decide to settle and what norms they apply in determining whether an agreement is fair. Comparative data on participants’ assessments of the outcome in mediation versus non-mediation cases are limited and suggest no consistent differences in perceptions of fairness or satisfaction. Additional studies need to compare participants’ assessments of mediated and negotiated agreements.” *Id.* at 693-94.).

150. Roselle L. Wissler, *The Effectiveness of Court-Connected Dispute Resolution in Civil Cases*, *supra* note 46, at 66.

151. For a study comparing litigants’ *ex ante* perceptions, however, see Shestowsky, *The Psychology of Procedural Preference*, *supra* note 21, at 674-75.

As before, some studies have found little difference between negotiated and mediated outcomes.¹⁵² Others have identified some meaningful degree of difference in particular types of disputes.¹⁵³ Studies in child custody and small claims contexts also have reported heightened compliance and agreement stability.¹⁵⁴

IV. POSSIBLE EVOLUTION OF LAWYERS' BILATERAL SETTLEMENT NEGOTIATIONS

As should be evident at this point, published work by researchers and commentators who have compared the negotiation and mediation of general civil cases have generally presumed that bilateral settlement includes only the lawyers.¹⁵⁵ This working assumption

152. See, e.g., Ralph A. Peeples et al., *It's the Conflict, Stupid: An Empirical Study of Factors that Inhibit Successful Mediation in High Conflict Custody Cases*, 43 WAKE FOREST L. REV. 505, 518 (2008) (empirically comparing mandatory mediation, lawyers' negotiation and court orders in terms of custody outcomes; finding many similarities but also finding that mediation fared better in terms of time to custody resolution event and agreement stability).

153. See, e.g., Kelly, *Is There Empirical Support for the Field?*, *supra* note 49, at 9, 13, 19, 23 (reporting higher percentages of some form of joint custody or sharing parental rights and responsibilities as a result of mediation compared to lawyers' negotiation; also reporting that mediated divorce agreements appear more likely than negotiated agreements to contain detail about visitation arrangements and about child support); see also Lin Adrian & Solfrid Mykland, *Creativity in Court-Connected Mediation: Myth or Reality?*, 30 NEGOT. J. 421, 435 (2014) (finding, based on a comparison of the elements of parties' claims in civil cases in Norway and Denmark to the terms contained in their mediated agreements, that mediation resulted in "creative" agreements a substantial percentage of the time in certain types of cases—specifically, inheritance, divorce and property disputes—and suggesting that "[m]ediators and parties may apply a wider frame to these kinds of disputes because disputants in these cases are more likely than those in contractual disputes to have interests in addition to money").

154. Peeples et al., *It's the Conflict, Stupid: An Empirical Study of Factors that Inhibit Successful Mediation in High Conflict Custody Cases*, *supra* note 152, at 528 (empirically comparing the custody outcomes produced by mandatory mediation, lawyers' negotiation and court orders and while finding many similarities, also finding that mediation produced better results in terms of time to custody resolution event and stability of agreement); Lorig Charkoudian et al., *What Difference Does ADR Make? A Comparison of ADR and Trial Outcomes in Small Claims Court*, 35 CONFL. RESOL. Q. 7, 34 (2017) (study reporting that small claims litigants in Maryland who settled in ADR were less likely to return to court for an enforcement action twelve months later as compared to all other groups, including cases that negotiated a settlement without ADR).

155. In addition to those cited in the text of this Article, see Clarke & Gordon, *Public Sponsorship*, *supra* note 46, at 319, 323 ("In conventional negotiation, the parties and their attorneys usually did not meet and negotiate face-to-face or in the same setting; instead, attorneys made offers and counteroffers over the telephone or by letter and relayed them to their clients. . . and the litigant did not have as good an opportunity as in mediation to be heard directly by the other side, nor to hear directly

may have been based on personal experience or considered simply a matter of common knowledge. Indeed, as indicated *supra*, a review of the relevant literature regarding legal negotiation suggests a widespread assumption that such negotiations generally exclude the clients.¹⁵⁶ Even today, there are lawyers and commentators who view

from the other side... Much of [conventional settlement negotiation] is conducted by their [litigants'] attorneys in their absence."); FIX & HARTER, *HARD CASES*, *supra* note 46, at 115 (finding that lawyers in civil matters overwhelmingly disagreed (77%) with the statement "There is not much difference between mediation and unassisted settlement negotiations," the researchers surmised that the reason for this reaction was because the lawyers perceived mediation "to add a qualitatively different dimension to the settlement negotiations than the typical lawyer-lawyer discussions."); McEwen & Wissler, *Finding Out*, *supra* note 17, at 140-41 (finding in the RAND study's analysis and the *Eye of the Beholder* reanalysis a "sugg[est]ion 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 themselves. Mediation that involves parties as well as counsel, thus, might well be viewed more favorably than bilateral negotiation that often occurs between lawyers."); Tyler, *A Psychological Perspective on the Settlement of Mass Tort Claims*, *supra* note 91, at 203 (noting that in settlement conferences, "the lawyers, and sometimes the judge, meet to discuss and settle cases. Clients typically are not present at these conferences and remain uninvolved in discussions and/or negotiations about case settlements. When lawyers emerge from the conferences, they present 'good' settlements to their clients and assume that the favorability of the settlements will ensure client satisfaction."); *see also* Matz, *We're All Winners: Game Theory, The Adjusted Winner Procedure and Property Division at Divorce*, *supra* note 92, at 136 (observing that "negotiation often occurs between the two lawyers, who later communicate updates to their respective clients, which can lead to communication problems, rumors, and confusion").

156. *See* Donald G. Gifford, *The Synthesis of Legal Counseling and Negotiation Models: Preserving Client-Centered Advocacy in the Negotiation Context*, 34 UCLA L. REV. 811, 813, 842 (1987) (describing the legal "negotiation process" as one that "usually consists of multiple encounters between the lawyers punctuated with repeated counseling sessions between the lawyers and their clients" and observing that "[t]he primary explanation...for the lawyer's dominance of negotiation counseling is that it is the lawyer and not the client *who actively participates in the activity which is the subject matter of the counseling sessions, the negotiations*. It is the lawyer who implements at negotiations the decisions reached during the counseling sessions."); Ronald J. Gilson & Robert H. Mnookin, *Disputing Through Agents: Cooperation and Conflict Between Lawyers in Litigation*, 94 COLUM. L. REV. 509, 509 (1994) (noting that "[a] distinctive characteristic of our formal mechanisms of conflict resolution is that clients carry on their disputes through lawyers"); Carrie Menkel-Meadow, *Whose Dispute Is It Anyway?: A Philosophical and Democratic Defense of Settlement (In Some Cases)*, 83 GEO. L. J. 2663, 2688-89 (1995) (referencing "totally lawyer-dominated, bilateral negotiations in which parties may have little participatory role"); Jacqueline M. Nolan-Haley, *Lawyers, Clients, and Mediation*, 73 NOTRE DAME L. REV. 1369, 1379 (1998) ("Traditional lawyering in negotiation undervalued client presence and participation; lawyers simply did not bring clients to the bargaining table. Thus, the literature on legal negotiation focused largely on lawyer-to-lawyer dynamics."); McEwen & Wissler, *Finding Out*, *supra* note 17, at 140-41 (describing "lawyered negotiation" as a process that is "carried on outside the view and with little direct participation of parties"); JULIE MACFARLANE, *THE NEW LAWYER: HOW SETTLEMENT IS TRANSFORMING THE PRACTICE*

the exclusion of clients from settlement negotiations as generally advantageous.¹⁵⁷ Charles Craver, for example, has counseled: “When lawyers represent individual clients, it is generally preferable not to have those persons present during negotiation sessions”¹⁵⁸ and has supplied a wide variety of reasons for this position.¹⁵⁹

OF LAW 71 [hereinafter MACFARLANE, *THE NEW LAWYER*] (2008) (“The major ingredient of this settlement system is the primacy of lawyers. They produce the deals, while the clients are limited to initial instructions and the after-the-fact ratification.”); Rebecca Hollander-Blumoff, *Just Negotiation*, 88 WASH. U. L. REV. 381, 420-21 (2010) (“In legal negotiation, however, the legal disputant is typically not a party to the substance of the negotiation. Clients are not always—or even often—present during the process of the negotiation of a settlement, leaving such negotiation to the attorneys they have hired.”); COLE ET AL., *supra* note 42, at § 3:11 (“[I]n lawyered negotiation, communication necessarily assumes a ‘telephone’ form—from one client to her lawyer to opposing lawyer and then to his client and back again. This process means filtering, translation, shortening and distortion of the information, motives, preferences, and alternatives developed in negotiation.”) and § 3:12 (“Negotiation by lawyers typically excludes clients from first-hand participation in or observation of settlement processes and precludes their direct access to ‘legal authorities’ and to the other parties in the dispute”). It would be possible to argue that lawyers’ practices have not changed, that clients have frequently participated in settlement negotiations across the time periods we analyze in the Article, and that no one has previously sought data on this phenomenon. But we have not found any evidence of this argument—and as suggested by the sources cited in this footnote, we have found instead that most commentators and lawyers have assumed that the clients are generally absent when their lawyers negotiate on their behalf.

157. H. WARREN KNIGHT ET AL., CALIFORNIA PRACTICE GUIDE ALTERNATIVE DISPUTE RESOLUTION § 2:54 (2012) (“It is usually advantageous for the client not to be present during settlement negotiations.”); David A. Hoffman, *Mediation and the Art of Shuttle Diplomacy*, 27 NEGOT. J. 263, 303 (2011) (“Outside the presence of their clients, the lawyers tend to be more candid, and the conversation can proceed more efficiently because the lawyers do not feel as much need to impress the clients or the opposing party.”); Laura Kaster, *Improving Lawyer Judgment by Reducing the Impact of “Client Think”*, 67-APR DISP. RESOL. J. 56, 58 (arguing that clients may negatively affect settlement outcomes). *But see* Shawn P. Davisson, *Privatization and Self-Determination in the Circuits: Utilizing the Private Sector Within the Evolving Framework of Federal Appellate Mediation*, 21 OHIO ST. J. ON DISP. RESOL. 953, 987-88 (2006) (discussing that a client’s presence can foster posturing by the lawyer which can lead to better outcomes for the client); Deborah R. Hensler, *Suppose It’s Not True: Challenging Mediation Ideology*, 2002 J. DISP. RESOL. 81, 81-100, 90 (2002) (reviewing results of large-scale field research by RAND showing that litigants rarely attended judicial settlement conferences and noting that “[S]itting outside the judge’s chambers, [the litigants] wondered what was going on behind closed doors, and sometimes distrusted their lawyers’ descriptions of the proceedings”).

158. CHARLES B. CRAVER, *EFFECTIVE LEGAL NEGOTIATION AND SETTLEMENT* 211 (8th ed. 2016).

159. Craver notes that that clients can inadvertently reveal information verbally and non-verbally, reduce lawyers’ ability to use certain negotiating techniques, and make it difficult to protect information regarding settlement authority limits. *Id.* at 211-12; *see also* RUSSELL KOROBKIN, *EFFECTIVE LEGAL NEGOTIATION AND SETTLEMENT NEGOTIATION THEORY AND STRATEGY* 275, 277, 279 (2nd ed. 2009) (observing that using a lawyer to negotiate as an agent enables the lawyer to “make credible commitments not

There are hints in the literature, however, that this widespread assumption regarding the exclusion of clients from legal negotiation may be somewhat misplaced. Lawyers and commentators who support a “client-centered” model of legal counseling¹⁶⁰—as contrasted with the “authoritarian” or “collaborative” approaches¹⁶¹—care very much about their clients’ involvement with decision-making and thus may look quite favorably upon clients’ direct participation in settlement negotiations. In 2012, Julie Macfarlane wrote about the “new lawyer,” describing “the emergence of a hybrid skill” in which lawyers continue to dominate negotiation but now also involve their clients.¹⁶² Collaborative Law, which evolved as a distinct approach to lawyering, specifically requires the involvement of clients with their lawyers in “four-way meetings.”¹⁶³ Indeed, Collaborative Law, as well as

to accept an agreement that appears to exceed his reservation price if his settlement authority is limited by a principal who is not present during the bargaining”).

160. See, e.g., Katherine R. Kruse, *Fortress in the Sand: The Plural Values of Client-Centered Representation*, 12 CLINICAL L. REV. 369, 369 (2006) (describing this as “the most prevalent theory of lawyering taught in law school clinics”); see also DAVID A. BINDER & SUSAN C. PRICE, *LEGAL INTERVIEWING AND COUNSELING: A CLIENT-CENTERED APPROACH* (1977).

161. ROBERT F. COCHRAN ET AL., *THE COUNSELOR-AT-LAW: A COLLABORATIVE APPROACH TO CLIENT INTERVIEWING AND COUNSELING* §§ 1-2 to 1-4 (1999) (describing authoritarian, client-centered, and collaborative legal counseling approaches); see also Leonard R. Riskin, *The Represented Client in a Settlement Conference: The Lessons of G. Heileman Brewing Co. v. Joseph Oat Corp.*, *supra* note 153, at 1076-77 (contrasting traditional and participatory lawyer-client relationships); Robert A. Baruch Bush, *Mediation Skills and Client-Centered Lawyering: A New View of the Partnership*, 19 CLINICAL L. REV. 429, 448-50 (2013) (suggesting that client-centered lawyering and transformative mediation share fundamental premises because an “important aim for the client-centered lawyer is to conduct the representation in a manner that supports and facilitates client participation and empowerment”); Jeswald W. Salacuse, *The Effect of Advice on Negotiations: How Advisors Influence What Negotiators Do*, 32 NEGOT. J. 103 (2016) (identifying three models of the advisor-negotiator relationship: (1) advisor as director; (2) advisor as servant; and (3) advisor as partner).

162. See Julie Macfarlane, *ADR and the Courts: Renewing Our Commitment to Innovation*, 95 MARQ. L. REV. 927, 932 (2012) (noting that “lawyers are sometimes obliged to bring their clients to and enable them to participate in a settlement discussion with a judge or a mediator. . . . The evolving practice is a convergence between the traditionally dominant role of the lawyer, who has historically conducted negotiation at arm’s length from the client, and a client-only process that dispenses with lawyers altogether.”).

163. See Stu Webb, *Collaborative Law: A Practitioner’s Perspective on Its History and Current Practice*, 21 J. AM. ACAD. MATRIM. LAW, 155, 162 (2008) (observing that “One of the great lessons from working with the collaborative process is the power that comes from getting the interested parties together in one room in a non-adversarial context. While this is not the normal practice in adversarial settings, the ability to solve problems in a group setting can be dramatic.”); JULIE MACFARLANE, *THE EMERGING PHENOMENON OF COLLABORATIVE FAMILY LAW (CFL): A QUALITATIVE STUDY OF CFL CASES 1*, 29-30 (2005), https://www.justice.gc.ca/eng/rp-pr/fl-famil/2005_1/pdf/2005_1.pdf [<https://perma.cc/KUV3-L9DY>] (describing “exclusion of clients from

Integrative Law¹⁶⁴ and Cooperative Law,¹⁶⁵ seem to have drawn from the same theory that supported advocacy for the courts' institutionalization of a facilitative model of mediation—e.g., that consensual settlement is a healthy pursuit, that clients should attend and participate in the settlement discussions with counsel, that clients' needs and interests are relevant, that creative solutions are possible, and that party self-determination should be protected. Meanwhile, in significant respects, the lawyer-dominated and evaluative model of mediation practice has diverged from that theory.

Data are also beginning to suggest that lawyers' negotiation practices are not monolithic, and that in a significant percentage of cases, lawyers may be inviting their clients to join them during settlement discussions with the other side. In 2007, John Barkai and Elizabeth Kent reported that 24% of the Hawaii state court cases reaching disposition by settlement included a face-to-face negotiation attended by both lawyers and parties; about a decade earlier, the clients were included in face-to-face negotiations in just 17% of the cases.¹⁶⁶ The authors of the present Article, when analyzing an existing dataset of procedures that ultimately resolved state court cases, discovered unexpectedly that clients attended 50% of the negotiations.¹⁶⁷ The clients

direct participation" as one of the consistent characteristics of lawyer-to-lawyer negotiation and noting that four-way meetings "appear to eliminate" this characteristic. Collaborative law is described as "emerg[ing] in the early 1990s."); see also Pauline H. Tesler, *Collaborative Law: A New Paradigm for Divorce Lawyers*, 5 PSYCHOL. PUB. POL'Y & L. 967, 974 (1999).

164. See Sheila R. Foster & Brian Glick, *Integrative Lawyering; Navigating the Political Economy of Urban Redevelopment*, 95 CALIF. L. REV. 1999 (2007); J. KIM WRIGHT, *LAWYERS AS CHANGEMAKERS: THE GLOBAL INTEGRATIVE LAW MOVEMENT 4* (2016) (describing the integrative law movement as "encompass[ing] some forms of mediation, restorative justice, collaborative practice, and even elements of positive psychology and social neuroscience").

165. See John Lande, *Practical Insights from an Empirical Study of Cooperative Lawyers in Wisconsin*, 2008 J. DISP. RESOL. 203, 227 (2008).

166. See Elizabeth Kent & John Barkai, *Let's Stop Spreading Rumors About Settlement and Litigation: A Comparative Study of Settlement and Litigation in Hawaii Courts*, 29 OHIO ST. J. ON DISP. RESOL. 85, 109 (2014) (reporting that 24% of Hawaii state court cases that reached disposition by settlement in 2007 included a face-to-face negotiation attended by both lawyers and parties, based on survey responses of 58 lawyers representing clients in such cases; for 1996, the percentage was 17%); see also John Barkai et al., *A Profile of Settlement*, 42 CT. REV. 34, 38 (2006). In a qualitative research project involving practicing lawyers' descriptions of recent negotiations, five of the 14 negotiations described in detail (thus, roughly one third) included the clients in all or part of the procedure. See John Lande, *Framework for Advancing Negotiation Theory: Implications from a Study of How Lawyers Reach Agreement in Pretrial Litigation*, 16 CARDOZO J. CONFLICT RESOL. 1, 22-23, 26, 28-31, 41-44 (2014) (note that several of these cases involved Collaborative Law and four-way meetings).

167. This finding is based on negotiations that successfully resolved cases. It is possible that the level of client attendance would differ for cases that underwent

attended these negotiations either because they accompanied their lawyers to the negotiation or because the lawyer and client (or client representative) were the same person.¹⁶⁸ As referenced earlier, it is also noteworthy that in 2014, a study of state court litigants conducted by one author of the present Article (Shestowsky) found that litigants, when asked to evaluate procedures for their case *ex ante*, preferred three procedures to all the others they were asked to assess.¹⁶⁹ Significantly, one of those preferred options was negotiation *in which the litigants accompanied their lawyers*.¹⁷⁰ Lawyers' negotiations that *excluded* their clients did *not* make the list.¹⁷¹

V. THE BENEFITS OF CLIENT-INCLUSIVE NEGOTIATION COMPARED TO LAWYER-DOMINATED EVALUATIVE MODEL OF MEDIATION

If clients accompany their lawyers to negotiation, could this influence their perceptions of the process fairness offered by negotiation, their control over the outcome, or their satisfaction with the outcome? Could clients' attendance at their lawyers' bilateral negotiations affect their perceptions of this inclusive form of negotiation as compared to the attorney-dominated and more evaluative model of mediation? We conclude that the answer to these questions is likely to be "yes."

Why would this be so? First and most important, let us consider the impact of client-inclusive negotiation on parties' perceptions of outcome satisfaction and outcome control. If litigants attend the negotiation alongside their lawyers, they have the opportunity (at least theoretically) to speak, explain their views, and reveal their needs, interests, and preferences in each other's presence. For obvious reasons, this is even more likely to be true if the lawyer and client (or client representative) are the same person. As a result, the settlement should better reflect the litigants' needs, interests, and

unsuccessful negotiation. This dataset, which developed from a multi-year survey study of litigants from three courts located in different states, is described in detail in several articles. See Shestowsky, *The Psychology of Procedural Preference*, *supra* note 21; Shestowsky, *How Litigants Evaluate the Characteristics of Legal Procedures: A Multi-Court Empirical Study*, *supra* note 21; Shestowsky, *When Ignorance Is Not Bliss: An Empirical Study of Litigants' Awareness of Court-Sponsored Alternative Dispute Resolution Programs*, *supra* note 21; Shestowsky, *Inside the Mind of the Client: An Analysis of Litigants' Decision Criteria for Choosing Procedures*, *supra* note 21; Shestowsky, *Great Expectations?*, *supra* note 21, at 179.

168. Unfortunately, the number of cases in the dataset that reached disposition through negotiation was too small to permit the analyses that we urge here.

169. For a list of the procedures that litigants were evaluated under, see Shestowsky, *The Psychology of Procedural Preference*, *supra* note 21, at 656.

170. The other two procedures were judge trial and mediation. *Id.* at 673-74.

171. *Id.* at 637.

preferences because these factors should be less likely to be lost in translation than would be the case if the litigants were forced to rely on either shuttling mediators' interpretations or their own lawyers' recap of negotiations with the other side.

If our assumption is correct that litigants are likely to communicate directly in each other's presence during negotiations, resulting in outcomes that better align with their needs, interests, and preferences, it follows that litigants who participate in negotiations alongside their lawyers (or serve as lawyer-clients themselves) are more likely to perceive a sense of control over the settlement outcome as compared to their experience in lawyer-dominated mediation. Moreover, even if litigants do not characterize the resulting settlement as "fair," they should nonetheless be more likely to find the outcome satisfactory under this procedure.

Second, we turn to the litigants' perceptions of procedural fairness. When litigants attend the negotiation with their lawyer (or are one-and-the-same individual) and have the chance to voice what matters to them in the presence of the opposing party, they are likely to perceive that they had a voice. This perception of voice is a critical component of procedural fairness. Indeed, as discussed *supra*, whether or not litigants ultimately speak for themselves, research in other contexts suggests that when parties attend mediation sessions and are able to observe their lawyers speaking effectively on their behalf, they tend to view the procedures more favorably along procedural justice dimensions.¹⁷² Building on this concept, if the parties listen respectfully to one another as they share their perspectives on the dispute, they are more likely to feel that their views were sincerely considered and that they were treated with dignity—two additional elements that foster experiences of procedural fairness.¹⁷³ Procedural justice research conducted by Lisa Blomgren Amsler and her colleagues suggests that parties engaged in the transformative model of mediation—which deliberately minimizes the mediator's role—tend to prioritize

172. See E. ALLAN LIND ET AL., *supra* note 104; Wissler, *Representation in Mediation*, *supra* note 62, at 447-51, 470-71 (also urging that "[s]tudies need to examine what it is that lawyers can do to facilitate parties' participation and to ensure that parties feel their views are expressed, even if they choose not to participate"). But see Shestowsky, *Great Expectations?*, *supra* note 21, at 179 (finding in *ex post* study that for those litigants who settled their cases, there were no significant differences in fairness perceptions between litigants who attended versus those who did not; 21.9% of the settlement group resolved through mediation and 59.9% through negotiation).

173. See Wissler, *Representation in Mediation*, *supra* note 62, at 451, tbl. 2 (reporting a positive correlation between "had chance to tell views" and "treated with respect" $r = .26, p < .001$).

receiving respectful treatment from one another over respectful treatment from the mediator.¹⁷⁴

Third—and this point is of critical importance—we suspect that lawyers who currently encourage their clients to attend and actively participate in negotiations do so because they believe their clients' involvement will contribute positively to the process rather than hinder efforts to reach a settlement. It is essential for lawyers to possess the skills necessary to make this assessment on a case-by-case basis, determining whether a client's participation should be limited to an initial presentation of their views or should include more extensive involvement in the dynamic process of negotiation. Lawyers also need to understand their clients' interests¹⁷⁵ and stand ready to help their clients prepare to listen carefully and express themselves and their needs in a manner that will make it more likely that they will be both heard and understood and their needs will be addressed appropriately.¹⁷⁶ The negotiation—and its outcome—will only be as procedurally fair, customized, and satisfactory as the human beings enacting the procedure.

174. See Nabatchi et al., *Organizational Justice and Workplace Mediation: A Six-Factor Model*, *supra* note 39, at 164 (involving parties' voluntary use of transformative mediation to resolve workplace disputes). Lisa Blomgren Amsler has suggested that this may be particularly the case for parties participating in the transformative model of mediation because the model intentionally heightens party voice and suppresses the role of the mediator. Email from Lisa Blomgren Amsler to Nancy Welsh and Donna Shestowsky (Oct. 9, 2022).

175. Lawyers should not be presumed to understand their clients' interests and needs. See, e.g., William M. O'Barr & John M. Conley, *Lay Expectations of the Civil Justice System*, 22 LAW & SOC'Y REV. 137 (1988); Tamara Relis, *It's Not About the Money! A Theory on Misconceptions of Plaintiffs' Litigation Aims*, 68 U. PITT. L. REV. 701 (2007); Deborah R. Hensler, THE REAL WORLD OF TORT LITIGATION, IN EVERYDAY PRACTICES AND TROUBLE CASES 156-66 (Austin Sarat et al. eds., 1998) (contrasting tort plaintiffs' desire to vindicate their rights and to use the legal system with lawyers' focus on monetary concerns); Gordon, *Attorneys' Negotiation Strategies in Mediation: Business as Usual?*, *supra* note 61, at 377, 384 ("[M]ost attorneys (56.1%) feel that litigants are not necessarily involved in these suits to satisfy some sense of justice; instead, they think litigants are concerned about money."); see generally MICHAELA KEET ET AL., LITIGATION INTEREST AND RISK ASSESSMENT: HELP YOUR CLIENTS MAKE GOOD LITIGATION DECISIONS (2021).

176. Parties in mediation have expressed appreciation for this sort of coaching from mediators. See, e.g., Nancy A. Welsh, *Stepping Back Through the Looking Glass: Real Conversations with Real Disputants About Institutionalized Mediation and Its Value*, 19 OHIO ST. J. ON DISP. RESOL. 573, 644 (2004). Research specific to mediation has found that "[p]arties who had more preparation for mediation, compared to parties with less preparation, thought that the mediation process was more fair; that they had more chance to tell their views and more input into the outcome; and that the mediator was more impartial, understood their views better, and treated them with more respect. Notably, parties who had more preparation felt less pressured to settle than did parties who had less preparation. In addition, parties who received more preparation for mediation were more likely to settle and were more likely to think the settlement was fair." Wissler, *Representation in Mediation*, *supra* note 62, at 432-33.

Our analysis naturally leads to the question of whether client-inclusive negotiation should be mandated or left to the parties' discretion. Does it matter whether client-inclusive negotiation is undertaken in an entirely voluntary fashion, at the urging of the lawyer or client or both, without any encouragement from the court? If the procedure is undertaken entirely voluntarily, are the participants more likely to engage in a manner that is consistent with some of the original goals motivating the institutionalization of court-connected mediation? Are the lawyers more likely to prepare their clients to participate effectively in the negotiation, because they have affirmatively chosen a process that will not include a mediator who can serve as coach, referee, scapegoat, or source of a "mediator's proposal?"¹⁷⁷

Lawyers certainly are capable of structuring negotiations and other processes to be productive, fair, and dignified. They regularly play the important role of counselor, not just advocate. And there are many documented instances where lawyers have played a constructive role in voluntarily promoting and participating in processes that uphold values such as procedural fairness, outcome control, and outcome satisfaction, among others.¹⁷⁸

But, of course, there are counterindications regarding the effects that lawyers have on their clients and the civil justice system. Lawyers have played a central role in the evolution of mediation. They will play an even more essential role in client-inclusive negotiation. Can we assume that they will decide to undertake client-inclusive negotiation *only* if they have a good relationship with their client, fully understand their client's interests, needs and goals, and will encourage both their client's voice and ability to consider what the other party has to say? Or should we anticipate alternative motivations or behaviors? Research involving transformative mediation in the USPS context found that employees were least likely to be satisfied with the fairness of the mediation process and with their own participation in

177. As we shared earlier drafts of this Article, some lawyers and mediators suggested that lawyers are now making strategic disclosures in mediation to set the stage for a "mediator's proposal," in which the mediator develops their own proposed settlement and tests it with the parties on a double-blind basis. See Andrew J. Horowitz, *The Mediator's Proposal: How to Make Effective Use of this Conflict Resolution Tool*, 23 No. 16 LAWYERS J. 12 (2021).

178. See, e.g., 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 DISP. RESOL. 1 (1998); Tina Nabatchi & Lisa B. Bingham, *Transformative Mediation in the USPS Redress Program: Observations of ADR Specialists*, 18 HOFSTRA LAB. & EMP. L. J. 399, 403-04 (2001); Lisa Blomgren Bingham et al., *Dispute System Design and Justice in Employment Dispute Resolution: Mediation at the Workplace*, 14 HARV. NEGOT. L. REV. 1 (2009).

the process when they were accompanied by lawyers.¹⁷⁹ Should we assume that lawyers will undertake client-inclusive negotiation only (or at least primarily) to achieve the potential of the process to deliver both procedural fairness and self-determination—or will they use this negotiation variation in a *pro forma* fashion and simply to avoid the time and cost of mediation?

These questions are both reasonable and essential. Nevertheless, based on our review of the existing literature and the promising potential of client-inclusive negotiation, we recommend that both lawyers and litigants be afforded the option to choose this approach as a fully compliant alternative to court-mandated mediation. Importantly, we also urge rigorous comparative data collection and analysis by the courts,¹⁸⁰ as well as thorough academic empirical research, to compare the effects on parties of participating in client-inclusive negotiation and lawyer-dominated evaluative mediation, in terms of their perceptions of process fairness, outcome control, and outcome satisfaction. We agree wholeheartedly with the conclusion of the 2017 report of the American Bar Association Dispute Resolution Section's Task Force on Research on Mediator Techniques that "more and better empirical research" on mediation is needed "and until we have it, we should be careful in making broad claims about 'best' techniques"¹⁸¹ in mediation—as well as any claims of certainty regarding how mediation stacks up against other procedures.

CONCLUSION

In this Article, we have traced the evolution of both mediation and lawyers' bilateral negotiation in litigated matters. Neither procedure appears to be today what it was understood to be when mediation was first introduced in the courts. In many general civil cases, mediation consists largely of shuttle diplomacy, dominated by lawyers' participation and preferences—what we have described here as the lawyer-dominated, more evaluative model of mediation. Some contemporary research, meanwhile, hints that parties may be involved in lawyers' bilateral negotiations more than was true in the past—either because the lawyers are also the parties or because clients are

179. See Bingham et al., *Exploring the Role of Representation in Employment Mediation at the USPS*, *supra* note 139, at 368, 371.

180. See Welsh, *Bringing Transparency*, *supra* note 4; see also Welsh, *But Is It Good*, *supra* note 4.

181. Roselle L. Wissler & Gary Weiner, *The Report of the Section's Task Force on Research on Mediator Techniques Offers a Few Clues*, 24 No. 1 DISP. RESOL. MAG. 26 (2017); ABA SECTION OF DISPUTE RESOLUTION, *supra* note 61.

accompanying their lawyers to the negotiation. The growing adoption of online dispute resolution, both in private dispute resolution and in the courts,¹⁸² further facilitates client participation. Technologies such as cell phones and video platforms like Zoom make it easier for clients to be “present” during negotiations conducted by their lawyers. However, the responsible use of these technologies may necessitate the development and implementation of specific safeguards to ensure procedural integrity and party engagement.¹⁸³

When conducted as we have proposed, client-inclusive negotiations have the potential to enhance parties’ experiences by fostering greater control over the outcome, perceptions of procedural fairness, and outcome satisfaction. Indeed, we argue that this client-inclusive form of lawyers’ bilateral negotiation is better positioned than the lawyer-and-caucus-dominated, more evaluative model of mediation to deliver these benefits to the parties. Others have declared arbitration as the “new litigation”¹⁸⁴ and lawyer-dominated evaluative mediation

182. Deborah Thompson Eisenberg et al., *What Matters to Employment Attorneys When Considering Online or In-Person Mediation?*, 41 *ALTERN. TO HIGH COST LITIG.* 151 (2023) (reporting results from a survey study of employment lawyers regarding their comparative perceptions of online versus in-person mediation); see also Andrea C.F. Wolfs et al., *Justice via Chat? How Litigants’ Preferences and Attorneys’ Recommendations Influence the Choice to Use Online Dispute Resolution*, *PSYCH., PUB. POL’Y, & L.* (2024) (reporting the results of a laboratory experiment showing that attorney recommendations influence laypeople’s choices between online and in person mediation modalities but that the impact of attorneys’ recommendation is muted when attorneys recommend text-based mediation).

183. See Orna Rabinovich-Einy, *Process Pluralism in the Post-Covid Dispute Resolution Landscape*, 10 *TEX. A&M L. REV.* 55, 63-73 (2022) (reviewing courts’ experience with online procedures during COVID-19 and ultimately urging that “to fulfill their potential, online proceedings, whether asynchronous or synchronous, need to adhere to the principles of process pluralism” which includes “adopting processes that meet both procedural and substantive aspects of justice—a goal that must be evaluated continuously and may require procedural reforms over time”); Jean R. Sternlight & Jennifer K. Robbennolt, *In-Person or Via Technology?: Drawing on Psychology to Choose and Design Dispute Resolution Processes*, 71 *DEPAUL L. REV.* 537, 592-607 (2020) (providing examples of how decisionmakers can draw on psychology to fulfill their goals in designing and using technology for dispute resolution, taking into account the characteristics of the users and the nature of the disputes or tasks); Nancy A. Welsh, *ODR: A Time for Celebration and Procedural Safeguards*, *LAW, TECHNOLOGY & ACCESS TO JUSTICE* (June 27, 2016), <https://web.archive.org/web/20220929174624/https://law-tech-a2j.org/odr/odr-a-time-for-celebration-and-procedural-safeguards/>; Jennifer Shack & Donna Shestowsky, *Implementing ODR in Family Court: Insights from the First Neutral Program Evaluation in the United States*, in *THE FAMILY DISPUTE RESOLUTION HANDBOOK* (Peter Salem & Kelly Browe Olson eds., 2024) (summarizing findings from the first neutral evaluation of a family court online dispute resolution system in the United States and concluding that some parties were excluded from ODR due to design features of the platform).

184. See Stipanowich, *Arbitration: The “New Litigation,”* *supra* note 30, at 8–9.

as the “new arbitration.”¹⁸⁵ As we have argued, client-inclusive negotiation may be emerging as the “new mediation.”

This proposition, however, remains speculative, grounded in the limited evidence currently available. Data collection and analysis through program evaluation,¹⁸⁶ as well as rigorous academic empirical research, are essential to move our conclusions from hypotheses to findings and then to action. We look forward to what comes next.

185. See Nolan-Haley, *supra* note 31, at 73-74.

186. See generally Welsh, *But Is It Good*, *supra* note 4; Welsh, *Bringing Transparency*, *supra* note 4; Nancy A. Welsh, *We Need Good Data to Know Whether What We Are Doing — and Espousing — Is Good*, in THEORIES OF CHANGE FOR THE DISPUTE RESOLUTION MOVEMENT: ACTIONABLE IDEAS TO REVITALIZE OUR MOVEMENT (John Lande, ed., 2020).

