

Renovating the Multi-Door Courthouse: Designing Trial Court Dispute Resolution Systems to Improve Results and Control Costs

Barry Edwards, Esq.*

CONTENTS

I.	Where Does Mediation Fit in Trial Courts?	283
II.	Empirical Analysis of a Model Adr Program	289
III.	Empirical Findings on Mediation Outcomes	294
	A. Potential Influences on Likelihood of Mediated Settlement	295
	1. Type and Complexity of Case Mediated	295
	2. Passage of Time	297
	3. Judicial Influence	298
	4. Attorneys Involved	299
	5. Administrative Effort	301
	6. Mediator Selection	302
	B. Results of Multiple-Variable Analysis of Mediation Outcomes	303
	1. Complexity and Some Subjects Correlated to Impasse	306
	2. Waiting to Mediate Weakly Correlated to Settlement	307
	3. Judicial Assignment Plays Limited Role	308
	4. Attorney Settlement Rates in Other Cases Affects the Likelihood of a Particular Case Settling	308
	5. Scheduling Problems Foretell Impasse	309
	6. Choice of Mediator is Highly Significant	310
	7. If At First You Don't Succeed . . . Try Again?	314
	C. The Cost of Mediated Settlements	316

* Barry Edwards is the Director for the Center for Legal Solutions, a Georgia non-profit corporation.

	D. Should Courts Focus on Settlement Rates?	317
	E. Predicting Mediation Outcomes	320
IV.	Design Defects in the Multi-Door Courthouse	321
V.	How to Renovate the Multi-Door Courthouse	330
	A. Spacious Lobbies Needed	332
	B. Open Door to Voluntary Mediation	333
	C. Escalators	344
	D. Improved Courtrooms	345
VI.	Conclusion	347

Faced with swelling dockets and tightening budgets, court systems across the country must deliver services ever more efficiently. Chief Justice De Muniz of the Oregon Supreme Court recently advised the American Bar Association: "Presently, 49 states are facing, or will soon face, severe revenue shortfalls in their current and coming fiscal year budgets, with revenue gaps predicted to last through the decade. . . . [R]evenue shortfalls in many states are so great that proposed cuts to judicial budgets can imperil the judiciary's constitutional responsibility to administer justice impartially, completely and without delay."¹ While the financial crises afflicting state court systems is in some ways unprecedented, the sentiment that the way courts resolve disputes takes too much time and money is sadly familiar.

This article will suggest dramatic renovations to the prevailing model by which courts attempt to resolve disputes and produce justice. Central to this enterprise is identifying signs that a case is likely (or unlikely) to settle through mediation. A primary concern of this analysis is devising efficient trial court operations. Accordingly, this work draws insights from econometrics and management literature; the author has endeavored to use a bare minimum of technical jargon. Section One of this article surveys the literature, particularly empirical research on mediation programs in trial courts. Section Two describes the data assembled for this article. The real world observations studied here are more reliable and representative than pilot project data used in prior research. This research considers the regular practice of mediation rather than the artificial conditions of a pilot study. Section Three analyzes the data to identify factors that correlate to settlement or impasse in mediation and provides a basic cost analysis of mediated settlements.

1. Paul De Muniz, *Prepared Remarks to ABA Task Force on Preservation of the Judicial System* (Feb. 9, 2011), available at <http://www.ncsc.org/Newsroom/~media/Files/PDF/Newsroom/De%20Muniz%20Remarks.ashx>.

Section Four identifies the primary defects in the prevailing model of trial court dispute resolution systems. The final section of this article suggests several specific revisions to the blueprint for dispute resolution that has prevailed since 1976.

The author hopes this article will help trial courts effectively resolve frequent disputes that concern ordinary people. Typical cases may not raise novel issues for appellate courts or academics, but they do involve great personal hardships that our courts must be designed to solve. Resolving these cases is necessary not only to alleviate a multitude of hardships, but also to allow congested trial courts to focus proper attention on those novel cases that truly require judges and juries.

I. WHERE DOES MEDIATION FIT IN TRIAL COURTS?

Mediation and other ADR procedures have been institutionalized in federal and state courts as a means of addressing public dissatisfaction with the courts.² Whether, and under what circumstances, ADR methods work effectively have been popular research topics. Despite much work, we do not know enough to effectively incorporate mediation into trial courts. The dearth of reliable data has been a frequent refrain in academic literature.³

2. For background on the history and growth of alternative dispute resolution in the United States, see Bobbi McAdoo & Nancy A. Welsh, *Look Before You Leap and Keep on Looking: Lessons from the Institutionalization of Court-Connected Mediation*, 5 NEV. L. J. 399 (2005); Deborah Hensler, *Our Courts, Ourselves: How the Alternative Dispute Resolution Movement is Re-Shaping Our Legal System*, 108 PENN. ST. L. REV. 165, 169–94 (2003); Richard Birke & Louise Teitz, *The Path that Brought America to Uniform Laws and Mediation in Cyberspace*, 50 AM. J. COMP. L. 181, 182–201 (2002); Patrick Fn'Piere & Linda Work, *On the Growth and Development of Dispute Resolution*, 81 KY. L. J. 959, 961–73 (1993).

Whether court programs are a genuine alternative to litigation is a prevalent theme in historical analysis of ADR. See Kimberlee Kovach, *Privatization of Dispute Resolution: In the Spirit of Pound, but Mission Incomplete: Lessons Learned and a Possible Blueprint for the Future*, 48 S. TEXAS L. REV. 1003, 1003–23 (2007) (discussing how implementation of ADR has strayed from original vision of private community centers). For a broader perspective on ADR history, see Valerie Sanchez, *Toward a History of ADR: The Dispute Processing Continuum in Anglo-Saxon England and Today*, 11 OHIO ST. J. OF DISP. RES. 1 (1996); Robert Benham & Ansley Barton, *Alternative Dispute Resolution: Ancient Models Provide Modern Inspiration*, 12 GA. ST. U. L. REV. 623 (1996).

3. See Carrie Menkel-Meadow, *Empirical Studies of ADR: The Baseline Problem of What ADR is and What it is Compared to*, in OXFORD HANDBOOK OF EMPIRICAL LEGAL STUDIES (Peter Cane & Herbert Kritzer, eds.) (forthcoming), <http://ssrn.com/abstract=1485563>; Ralph Peeples, Catherine Harris & Thomas Metzloff, *Following the Script: An Empirical Analysis of Court-Ordered Mediation of Medical Malpractice*

The bulk of empirical research on ADR programs is based on pilot programs operated in federal district courts. The RAND Corporation's Institute for Civil Justice published a seminal, multi-volume study of federal ADR pilot programs.⁴ This study tracked six federal district court ADR programs enacted pursuant to the Civil Justice Reform Act of 1990 ("CJRA").⁵ The RAND study found that "the CJRA pilot programs, as the package was implemented, had little effect on time to disposition, costs, or attorneys' satisfaction or views of fairness."⁶ The authors cautioned that the six programs studied varied widely in terms of types of cases referred to ADR, the process utilized, the qualification of neutrals, the timing of referral, neutral compensation, etc.⁷

The Federal Judicial Center subsequently produced a more favorable report on the federal pilot programs. According to the Federal Judicial Center, ADR programs can save significant time and court costs when programs are carefully designed, presided over by

Cases, 2007 J. OF DISPUT. RESOL. 101, 102–03 (2007) (noting absence of data on pre-trial settlements not based on surveys); Thomas Stipanowich, *ADR and the "Vanishing Trial": The Growth and Impact of "Alternative Dispute Resolution"*, 1 J. OF EMP. L. STUD. 843, 846 (2004) (citing paucity of useful, reliable information on ADR); Hensler, *supra* note 2, at 192 (2003) (noting that few empirical studies actually report what happens in court-annexed mediation); Frank Sander, *Some Concluding Thoughts*, 17 OHIO ST. J. ON DISPUTE RESOL. 705, 706 (2002) (remarking "how little we know about many issues that are basic to ADR"); Deborah Hensler, *ADR Research at the Crossroads*, 2000 J. DISP. RESOL. 71, 78 (2000) (calling for renewed commitment to empirical research on ADR to test fundamental beliefs about ADR).

4. KAKALIK ET AL., RAND CORP., AN EVALUATION OF MEDIATION AND EARLY NEUTRAL EVALUATION UNDER THE CIVIL JUSTICE REFORM ACT (1996), available at http://www.rand.org/content/dam/rand/pubs/monograph_reports/2007/MR803.pdf; KAKALIK ET AL., RAND CORP., JUST SPEEDY AND INEXPENSIVE? AN EVALUATION OF JUDICIAL CASE MANAGEMENT UNDER THE CJRA (1996), available at http://www.rand.org/pubs/research_briefs/RB9027.html; KAKALIK ET AL., RAND CORP., IMPLEMENTATION OF THE CJRA IN PILOT AND COMPANION DISTRICTS (1996); KAKALIK ET AL., RAND CORP., AN EVALUATION OF JUDICIAL CASE MANAGEMENT UNDER THE CJRA (1996), available at http://www.rand.org/content/dam/rand/pubs/monograph_reports/2007/MR802.pdf.

5. 28 U.S.C. §§ 471 – 482. Although federal law requires all district courts to implement ADR plans, federal law does not require all district courts to operate ADR programs.

6. For an accessible summary by the authors of the RAND Report, see J. Kakalik et al., *Just, Speedy, and Inexpensive? An Evaluation of Judicial Case Management Under the Civil Justice Reform Act*, 49 ALABAMA L. REV. 17, 39 (1997); see also Kim Dayton, *The Myth of Alternative Dispute Resolution in the Federal Courts*, 76 IOWA L. REV. 889, 914–29 (1992) (strongly critical of federal ADR programs based on empirical data from district court programs).

7. Kakalik et al, *supra* note 6, at 44. According to the report, differences in case management variables accounted for half of the explained variance in the pilot programs.

judges committed to alternative dispute resolution, and adequately supported by full-time staff.⁸

Professors Rosenberg and Folberg published a thoughtful analysis of the Northern District of California's Pilot ADR Program.⁹ The purpose of that Court's pilot program was to determine the effectiveness of early neutral evaluation ("ENE") as an alternative dispute resolution method. The authors' primary findings sound a familiar theme: participants viewed the process favorably, but the program had little apparent impact on the court system.

There are also some exceptional studies of pilot state court ADR programs, including pilot mediation programs in North Carolina,¹⁰ California,¹¹ and Ohio.¹² Generally, the reports on state court pilot mediation programs arrive at conclusions similar to those drawn from the district court programs: participants' positive impressions about mediation are not confirmed by statistical analysis of docket volume, number of motions filed, hearings scheduled or time to resolve cases, or any other measure of court efficiency.

8. DONNA STIENSTRA ET AL., REPORT TO THE JUDICIAL CONFERENCE COMMITTEE ON COURT ADMINISTRATION AND CASE MANAGEMENT: A STUDY OF FIVE DEMONSTRATION PROGRAMS ESTABLISHED UNDER THE CIVIL JUSTICE REFORM ACT OF 1990, 5, 15 (Federal Judicial Ctr., 1997) *available at* [http://www.fjc.gov/public/pdf.nsf/lookup/0024.pdf/\\$file/0024.pdf](http://www.fjc.gov/public/pdf.nsf/lookup/0024.pdf/$file/0024.pdf) (last visited January 10, 2013). This substantial report, which only in part evaluated mediation, is based largely on participant evaluations.

9. Joshua Rosenberg & Jay Folberg, *Alternative Dispute Resolution: An Empirical Analysis*, 46 STAN. L. REV. 1487 (1994).

10. In a rare attempt to systematically study mediation conduct, the authors of the North Carolina medical malpractice mediation study attended 50 medical malpractice mediations. See Ralph Peeples, Catherine Harris & Thomas Metzloff, *Following the Script: An Empirical Analysis of Court-Ordered Mediation of Medical Malpractice Cases*, 2007 J. OF DISP. RESOL. 101, 103 (2007). The authors of the North Carolina medical malpractice mediation study have also published findings of their study of the factors inhibiting mediated settlement of high-conflict child custody cases in North Carolina. See Ralph A. Peeples, Suzanne Reynolds & Catherine T. Harris, *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 (2008). North Carolina's pilot Mediated Settlement Conference Program reportedly showed little overall effect on court workloads and an overall positive response from participants. See Stevens H. Clarke & Elizabeth Ellen Gordon, *Public Sponsorship of Private Settling: Court-Ordered Civil Case Mediation*, 19 JUST. SYS. J. 311 (1997).

11. The Judicial Council of California published a significant study of pilot mediation programs in California state courts. See JUDICIAL COUNCIL OF CALIFORNIA, EVALUATION OF EARLY MEDIATION PILOT PROJECTS (2004) (finding that the effectiveness of pilot mediation programs depends on specific procedures of program and the context in which the program is established).

12. For an exceptional empirical analysis of pilot mediation programs in Ohio, see Roselle L. Wissler, *Court-Connected Mediation in General Civil Cases: What We Know from Empirical Research*, 17 OHIO ST. J. ON DISP. RESOL. 641 (2002).

Studying the likelihood of settlement in federal or state court pilot mediation programs is problematic because people behave differently when their behavior is being monitored.¹³ Social science experiments are plagued by biased results that occur when the behavior of subjects under observation is directly or indirectly influenced by those conducting the experiment. "The Hawthorne Effect," a famous lesson in the study of operations, is derived from a series of research experiments conducted by Elton Mayo in 1927.¹⁴ Mayo set out to test the effect of varying intensities of lighting on worker productivity at the Hawthorne Works of Western Electric Company to determine ideal factory lighting conditions. He increased lighting intensity and productivity increased. He decreased lighting intensity . . . and productivity still increased. Mayo found that worker productivity increased regardless of how he varied lighting. Subsequent interviews revealed that Hawthorne factory workers worked harder because they were motivated by the esteem and favorable treatment associated with participating in scientific research. The study, not lighting, increased productivity.¹⁵

Data from pilot ADR programs, particularly participant survey responses, is likely to suffer from the Hawthorne Effects and experimenter bias. Pilot mediation programs are typically championed by enthusiastic proponents of mediation.¹⁶ Similarly, case management conferences conducted in mediation pilot programs in California state courts were facilitated by judges and the director of the office of alternative dispute resolution.¹⁷ That survey respondents would praise these pilot programs should come as no surprise. Survey respondents tend to supply answers that they believe the researcher wants to

13. The RAND ICJ Report, for example, shares an interesting finding on the effect of public reporting required by the CJRA on time to disposition. According to Kakalik et al., *supra* note 6, at 43, the number of cases pending in federal district courts more than three years has dropped by about 25% since the CJRA required the Director of the Administrative Office of the United States Courts to prepare semiannual public reports disclosing, for each judge, the number and names of cases that have not been terminated within three years after filing. These findings suggest an added benefit of the approach to docket management suggested herein.

14. See DONALD COOPER & PAMELA SCHINDER, *BUSINESS RESEARCH METHODS*, 7th Ed. 138-39 (2001).

15. Rosenthal's authoritative work outlines a number of reasons the experimenter may unknowingly bias his or her research subjects. See ROBERT ROSENTHAL, *EXPERIMENTER EFFECTS IN BEHAVIORAL RESEARCH* 38-140 (1966).

16. For example, the Northern District of California's Pilot ENE Program was directed by Judge Wayne Brazil, an outspoken advocate of mediation. See, e.g., Wayne Brazil, *Should Court-Sponsored ADR Survive?* 21 OHIO ST. J. DISP. RESOL. 241, 242 (2006) (Brazil responds to the title question with "an emphatic yes").

17. JUDICIAL COUNCIL OF CALIFORNIA, *supra* note 11, at 6.

hear.¹⁸ Positive results validate research grants and may mean continued government funding for a new court program.

Pilot program mediators also have a financial incentive to validate pilot mediation programs. Building a good relationship with the program director may lead to referrals.¹⁹ Court-connected mediation programs are a key source of fee-generating income.²⁰ For all of these reasons, the reliability of existing empirical research on mediation is a serious concern.

The significant gap between survey responses and reality is apparent in Rosenberg and Folberg's study. Those surveyed about their experience with ENE gave strongly favorable reports: when asked if they would use ENE again, most responded affirmatively. At the same time, however, when given the opportunity to voluntarily participate in the pilot ENE program, no one opted to use ENE.²¹

The evidence produced to date suggests that the overall impact of ADR programs on trial court dockets has been limited.²² The case for mediation as a method of settling cases is strongest in specialized industries.²³ It is difficult to demonstrate the overall effect of court-connected mediation programs on court dockets for a number of reasons. When a case settles in mediation, one may only speculate whether the parties would have continued to trial but for the mediated settlement. If mediated settlements are more durable than involuntary resolutions from litigation, one would expect to see long-

18. See ROBERT SOMMER & BARBARA SOMMER, A PRACTICAL GUIDE TO BEHAVIORAL RESEARCH: TOOLS AND TECHNIQUES 156–57 (5th ed. 2002) (outlining general limitations of research based on questionnaires); see also Peebles et al., *supra* note 10, at 101 (observing much empirical work on ADR based on questionnaire data of limited utility).

19. For perspective on the financial and marketing pressures facing mediators, see Urska Velikonja, *Making Peace and Making Money: Economic Analysis of the Market for Mediators in Private Practice*, 72 ALB. L. REV. 257 (2009).

20. Hensler, *supra* note 3, at 77 (noting that main source of demand for mediation fee generating work is the courts).

21. Rosenberg & Folberg, *supra* note 9, at 1536.

22. See Lela P. Love, *Preface to the Justice in Mediation Symposium*, 5 CARDOZO J. CONFLICT RESOL. 59, 59 (2004) (noting ironically that symposium to celebrate mediation instead highlights gap “between what mediation promised and what it delivered”); Deborah R. Hensler, *Suppose It's Not True: Challenging Mediation Ideology*, 2002 J. DISP. RESOL. 81, 81 (2002) (observing that evidence to support mediation proponents' claims “has failed to materialize”).

23. A good example is the norm of ADR in the construction industry. See Douglas A. Henderson, *Mediation Success: An Empirical Analysis*, 11 OHIO ST. J. ON DISP. RES. 105 (1996) (suggesting, based on a study of over 500 construction industry mediations, that mediation is likely more effective in the industry because builders need prompt resolution of disputes that arise during ongoing projects).

term benefits in docket management from a concerted court effort to facilitate voluntary settlements.²⁴

Analyzing the effect of a process like mediation too broadly, however, obscures useful distinctions that may be made among the multitude of cases subject to mediation. The pertinent question is not whether mediation programs should be implemented, but rather how mediation programs can be applied most effectively.²⁵ The issue is not simply comparing traditional litigation and its alternatives, but rather placing ADR methods, particularly mediation, in the general design of court interactions that begins with an individual filing a complaint with a clerk of court.

This article will attempt to identify specific circumstances and conditions in which mediation is most likely to settle litigation. Though primarily an empirical analysis, this article will offer some specific practical suggestions for court administration and academic research.

24. Though ADR proponents frequently claim that parties are more likely to comply with mediated settlements than court decrees, there is little empirical basis for this claim. The evidence that mediated settlements repair or reconcile relationships, prove more durable or have fewer compliance issues does not exist. According to Golan, "there appears to be no empirical data on the issue." Dwight Golan, *Is Legal Mediation a Process of Repair – or Separation? An Empirical Study, and its Implications*, 7 HARV. NEGOT. L. REV. 301, 303 (2002). Golan's survey of mediators found that relationship repairs are uncommon events, occurring in less than 20% of cases. *Id.* at 311; see also Wissler, *supra* note 12 at 695 n. 242 (citing finding of community mediation studies that there is no correlation between short-term mediation success and long-term success, including compliance, with mediated agreement); Clarke & Gordon, *supra* note 10, at 322 (N.C. pilot program found no greater compliance with mediated settlements).

25. As Stipanowich, *supra* note 3, at 875, observed: "[A]fter nearly three decades of experimentation with court-connected ADR, there is still much we do not know" (calling specifically for more definitive information on such issues as the impact of judicial mandates versus party autonomy, the timing of ADR in the litigation process, impact of different neutral intervention strategies and compensation provided mediators). See also John Lande, *The Movement Toward Early Case Handling in Courts and Private Dispute Resolution*, 24 OHIO ST. J. ON DISP. RESOL. 81, 129 (2008) (concluding that variations of ADR should be tailored to particular circumstances and that research should focus on design options, rather than attempting to prove the general utility or appeal of ADR); Jennifer Shack, *Mediation Can Bring Gains, But Under What Conditions?*, 9 DISP. RESOL. MAG. 11 (2003) (summarizing state of mediation studies, stating that focus of research should be examination of the circumstances under which mediation produces best results), available at <http://aboutrsi.org/pfimages/MediationCanBringGains.pdf> (last visited February 4, 2010); Sander, *supra* note 3, at 706–08 (proposing research agenda for evaluating mediation).

II. EMPIRICAL ANALYSIS OF A MODEL ADR PROGRAM

Georgia's Cobb County Superior Court is an exceptional court for academic research. The county is a fair demographic representation of the whole country and the superior court's docket reflects the broad range of disputes that citizens expect courts to resolve. As in many trial courts in the United States, the court requires ADR in a broad array of cases.²⁶

Studying this court is also exceptionally practical. The Cobb County Clerk's Office makes all pleadings, with the exception of some financial disclosures in domestic relations cases, freely accessible through the clerk office's web site.²⁷

Cobb County is a suburban county located on the northwest side of Atlanta. Cobb County is somewhat more family-oriented, racially diverse, affluent, and politically conservative than the United States generally, but in many ways the county is representative of the United States. Table 1 compares Cobb County to the United States on several demographic measures.

In Georgia, superior courts have general jurisdiction over all cases and exclusive jurisdiction over cases involving divorce (among other subjects reserved for superior courts).²⁸ More than 1,000 new cases are filed in Cobb County Superior Court in an average month, the equivalent of one case every ten minutes of every business day. Not only does the court receive many cases, its docket is diverse.²⁹ The court receives a high volume of cases in the areas of domestic

26. A current version of the Court's local rule governing ADR is available at <http://sca.cobbcountyga.gov/downloads/ADR/ADROrder.pdf>. For additional background on the development of ADR programs in Georgia, see Douglas Yarn & Gregory Todd Jones, *GEORGIA ALTERNATIVE DISPUTE RESOLUTION: PRACTICE AND PROCEDURE IN GEORGIA* § 12:14, at 392-94 (3d ed. 2006) (outlining origins and authority for court-connected ADR in Georgia).

27. The web site is available at <http://www.cobbsuperiorcourtclerk.org>. The site went online on December 1, 1999, and according to the Clerk's Office, it was the first time in Georgia history the public had a system designed to give them free remote access to copies of Superior Court Records. A search form on the site enables one to quickly locate all filings of a particular type of document, such as mediation reports, within defined time periods. This study would not have been feasible without open access to the Court's digitized records.

28. See GA CONST. art. VI, § 4, ¶ 1.

29. These docket assessments are based on cases filed in Cobb County Superior Court in a sixteen month period from March 2006 to July 2007. Some types of cases appeared less than twenty times during this period: receiver (1), appointment-general (3), qualification (1), certiorari (4), construct will (1), motion (9), partition (6), writ of possession (9), visitation (11), mandamus (10), quiet title (19), set aside (15), compel witness (14), calendar (17), and workers' compensation (13).

TABLE 1: DEMOGRAPHIC COMPARISON OF COBB COUNTY
AND THE UNITED STATES

Demographic Variable	Cobb County	United States
Average Household Size	2.70	2.61
High School Graduates	90.1%	84.5%
Foreign Born	14.7%	12.5%
In Labor Force (16 yo +)	72.5%	65.2%
Per Capita Income	\$33,793	\$27,466
Individuals Below Poverty Level	9.2%	13.2%
Owner Occupied Housing Units	71.8%	67.1%
White	63.7%	74.3%
Black or African American	22.8%	12.3%
Hispanic or Latino (Any Race)	11.2%	15.1%

Source: U.S. Census Bureau, 2006-2008 American Community Survey 3-Year Estimates

relations, civil complaints, property disputes, and non-adversarial filings for court administration.³⁰

This study explores the outcomes of civil cases filed between 2005 and 2007. Every mediation session arising out of cases filed these years was identified and analyzed to produce an original dataset on 2,414 instances of mediation.³¹ Drawing from existing theories of mediation, the author recorded a range of details about each mediation session. These variables, which are described in detail in the next section, span the following general categories: case type and complexity, time elapsed before mediation, presiding judge, attorney involvement, administrative effort, and mediator-related variables. The analysis was purposely limited to factors that can be identified before a mediation session takes place. A number of technical notes about the sample data follow. These notes are intended to disclose possible limitations in the data and to assist anyone who wishes to improve upon or replicate this study.³²

30. Cobb County also served by state, magistrate, juvenile, and probate courts; therefore, the superior court's docket is somewhat specialized in those cases in which superior courts have exclusive jurisdiction.

31. Four sessions are dropped from regression analysis below because mediator-related variables could not be coded. This study is based on a substantially larger case sample than the work of Rosenberg & Folberg, *supra* note 9, at 1492, which was based on 326 ENE sessions.

32. The original datasets used in this analysis are available for review and replication purposes on the author's web site, www.poliscidata.com/replication.

All the mediation sessions studied here took place between litigants.³³ The case sample excludes cases in which the parties opted for case evaluation and did not attempt to mediate a settlement. For the relatively small number of cases in which parties opted for case evaluation, the issue is somewhat complicated by the fact that case evaluation may or may not include mediation.³⁴ Cases in which a party failed to attend mediation were also excluded. Cases consolidated for mediation were treated as one mediation session. Consolidated matters typically involved an effort to mediate contempt actions along with modification actions pending between the same parties.³⁵ Other consolidated mediation sessions attempt to resolve multiple complaints filed by a plaintiff against numerous defendants arising out of a single incident. Consolidated mediation sessions should be viewed as a single instance rather than multiple instances to avoid exaggerating the influence of independent variables.³⁶

Multiple efforts to mediate a particular case were treated as separate events. For example, if the first effort to mediate a case resulted in an agreement to continue mediation and the next session resulted in a full settlement, the study recorded the sessions as two distinct events. Subsequent mediation sessions often involved a different cast of participants than the initial mediation session (e.g. new attorneys) and were separated by several months or more. Averaging repeated mediation attempts would obscure the influence of factors that precluded full settlement in the first instance and contributed to settlement in the latter. To assess whether settlement prospects increased in parties' subsequent mediation efforts, repeated efforts were coded separately. The likelihood of settlement in subsequent mediation sessions is given special consideration in section three.

33. The Cobb Superior Court Program does not accept "walk-in" cases from the community. Accordingly, this study's findings may not apply to conflicts outside the court setting. Whether the determinants of settlement identified applied outside the court context is beyond the scope of this paper.

34. Case evaluation sessions were excluded when the resulting reports indicated that the session did not involve an effort to mediate a settlement and included when reports indicated the parties made an effort to mediate. For additional information on case evaluation, including a comparison of case evaluation and mediation, see Rosenberg & Folberg, *supra* note 9, at 1489-92.

35. Under Georgia law, contempt claims must be filed in a separate case. See, e.g., *Darroch v. Willis*, Case No. S-09-A-1623, 286 Ga. 566 (2010), available at <http://www.gasupreme.us/sc-op/pdf/s09a1623.pdf>.

36. Recording multiple consolidated mediations sessions would skew analysis of variables such as the time duration of mediation sessions. A four-hour attempt to mediate two cases consolidated for mediation would appear as eight hours of mediation time, distorting a simple calculation of program activity.

Most of the mediation reports upon which this study is based are handwritten. Deciphering handwritten reports from hundreds of different mediators presented some challenges. In some cases, names were cross-checked against other documents in the case file. Also, mediators occasionally did not fill out all blanks on the report; in other cases, reports were not accessible or available on the Cobb County Superior Court web site. These gaps in the data are not believed to be systematic.³⁷

Additional information on Cobb County Superior Court activity was assembled to determine how mediation generally fits into docket management. For this purpose, information on all the cases filed from March 2006 to July 2007 was assembled in a database collected from the clerk's web site.³⁸ This comparison database includes information on the type of case, commencement date and disposition date (if resolved), and presiding judge.

Data compiled by the state's governing agency, Georgia Commission on Dispute Resolution, was also used to compare the Cobb County Superior Court's mediation program to other court-connected ADR programs in Georgia. The Commission is responsible for monitoring and reporting on court-connected alternative dispute resolution programs. The Office's Annual Reports 1997 – 2005 compiled the number of cases that have been referred to ADR programs and recorded how those cases were resolved.³⁹ The data is broken down by court type and geography.

In this study, the dependent variable is the outcome of mediation sessions. Mediators reported one of four possible outcomes: impasse, agreement to continue negotiations another time, partial settlement, or full settlement. As detailed in Table 2, the dependent variable was coded "1" for full settlement, ".5" for partial settlement or agreement

37. Settlement rates in the sample data are in line with historic reported averages of Cobb County Superior Court Program recorded by the Georgia Office of Dispute Resolution.

38. Those interested in "data mining" for purposes of legal analysis are encouraged to consult sources that describe these research techniques and their implications in detail. See Paul Ohm, *Computer Programming and the Law: A New Research Agenda* (2009), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1370411.

39. Georgia Office of Dispute Resolution, *ANNUAL REPORTS*, available at http://www.godr.org/index.php?option=com_content&view=article&id=69&Itemid=74 (last visited January 10, 2013). Note that the GODR's 2005 Annual Report includes state-wide ADR activity data summaries for prior years 1997-2004; the 1997-2004 Annual Reports are no longer available for download on the Office's web site.

to continue mediating,⁴⁰ or “0” for impasse. A mediation session reported as an impasse was not revised if the parties subsequently mediated a settlement. No effort was made to verify whether a reported full settlement actually terminated the litigation or prevented future litigation between the same parties.⁴¹

The overall settlement rate during the time period sampled is in line with historic settlement rates for the Cobb County Superior Court ADR Program reported by the Georgia Office of Dispute Resolution (GODR): 1997 (44%), 1998 (35%), 1999 (51%), 2000 (46%), 2001 (49%), 2002 (50%), 2003 (49%), 2004 (48%), and 2005 (52%).

TABLE 2: DESCRIPTIVE SUMMARY OF MEDIATION SESSION OUTCOMES

Variable	Coding	Mean	Min.	Max.	Mode
Result	0 = impasse .5 = partial settlement or agreement to continue mediation 1 = full settlement	0.53	0	1	1

A variety of statistical techniques were used to analyze the relationship between independent and dependent variables. Details and references on statistical measures are included in the footnotes to preserve the continuity of the text while, at the same time, identifying the quantitative basis of the findings.⁴²

40. Partial settlements frequently occurred when the parties settled some issues, such as child custody, but could not resolve other issues, such as the division of marital property or responsibility for marital debt. A partial settlement or agreement to continue mediation efforts is regarded as a midpoint between full settlement and impasse. The data, for example, indicate that the average time to close cases with midpoint mediation outcomes is less than that of impasses and greater than that of fully settled cases.

41. In some cases, settlement may be the beginning, rather than the conclusion of a conflict. See Owen M. Fiss, *Comment: Against Settlement*, 93 YALE L. J. 1073, 1082 (1984). Whether mediated settlements are more durable and suffer fewer enforcement problems is discussed at *supra* note 24. Whether settlement rates provide an appropriate yardstick for assessing mediation quality is considered in Section I.D.

The author attempted to ascertain whether any of the mediation sessions studied here became the subject of an ethics complaint before the state mediation agency, but such data was not available. This assessment of outcomes could be improved by discounting complaints subsequently filed. An adjusted outcome measure would capture both quantity and quality of settlements to help courts maximize settlement rates while minimizing complaints.

42. It is important to note that our dependent variable is not normally distributed in a familiar “bell curve” pattern. There is no subtle measure for cases that narrowly missed settlement, nor cases that narrowly reached settlement. The outcome is simply “0,” “.5” or “1”.

This study is not based on a pilot mediation program. It was conducted without the involved participants and mediators' advance knowledge that their mediation sessions would later be studied.⁴³ Unlike prior works, this study is not tainted by experimenter bias. We have studied a general mediation program under normal operating conditions without generating expectations or drawing attention to our work.⁴⁴ Accordingly, this article offers a unique contribution to ongoing research on how courts can most effectively resolve disputes. On the whole, the data is believed to be a representative sample of litigation and dispute resolution in state courts.

III. EMPIRICAL FINDINGS ON MEDIATION OUTCOMES

The purpose of this section is not to identify the cause or causes of settlement or impasse in mediation sessions. As is often said, correlation does not prove causation. Instead, we are simply looking for reliable signs that a case is likely or unlikely to settle through mediation. The predictive power of statistically significant variables does

This type of dependent variable is not unusual in social science research. Working with non-normal dependent variables does, however, require a measure of statistical significance other than the familiar R-Squared test common in empirical legal studies. The preferred method of testing the statistical significance with nominal dependent variables is probit and logit regression analysis. For further reading on logistic regression analysis, see SCOTT MENARD, *APPLIED LOGISTIC REGRESSION ANALYSIS* (1995).

Regression analysis can identify the relationship between normally distributed independent variables and a binary dependent variable but analyzing the strength of such a relationship requires a different set of statistical tools that analyze the strength of the relationship between normally distributed independent and dependent variables. For example, a scatterplot will not show a clear linear relationship between a normally distributed independent variable (e.g. the duration of time parties spend mediating) and a binary dependent variable; the scatterplot will simply show parallel bands at 0, .5, and 1. The primary issue is the usefulness of "R-Squared" as a measure of the goodness of fit, or statistical significance of relationship, between binary dependent and normally distributed independent variables. While some may be accustomed to analyzing R-Squared statistics in empirical work, "[t]he conventionally computed R^2 is of limited value in the dichotomous response models." DAMODAR GUJARATI AND DAWN PORTER, *BASIC ECONOMETRICS* 546 (5th ed. 2009).

43. In contrast to pilot program evaluation, critical evaluation of existing, funded mediation programs is generally not embraced by those who stand to lose support as a result of negative evaluations. See Hensler, *supra* note 2, at 74, 77 (noting that empirical and critical analysis are unwelcome in some quarters, and that program administrators especially fear cost-benefit assessments).

44. This is not to suggest that randomized tests are inherently flawed. Randomized testing is an effective tool for testing the effect of policy. See IAN AYRES, *SUPER CRUNCHERS: WHY THINKING BY THE NUMBERS IS THE NEW WAY TO BE SMART* 49-68 (2008). The point is that randomized testing does not hold all other factors equal when experimenters provide the test group more motivation, talent, and determination than the control group.

not require us to comprehend the precise mechanisms of correlation. It is useful to simply identify probabilities that we may use to improve likely outcomes.

As discussed further below, time spent mediating increases the likelihood of settlement. Therefore, duration of a session helps explain why a particular session results in impasse or settlement, but does not help predict the likelihood of settling a case because the duration of a session cannot be known ahead of time. The duration of mediation sessions is also not subject to direct control.⁴⁵ Therefore, we need to identify predictive factors to steer litigants to appropriate dispute resolution methods.

A. *Potential Influences on Likelihood of Mediated Settlement*

This section describes independent variables of interest, summarizes some relevant prior findings, and this study's method for quantifying these variables for statistical analysis.

1. *Type and Complexity of Case Mediated*

In contrast to the duration of a mediation session, the parties' pleadings indicate the subject matter in dispute at the outset of litigation. If certain types of cases are more likely to settle through mediation than others, courts can focus resources on the types of cases that are best suited for mediated settlements. The Cobb County Superior Court's Clerk's Office specified the type of each case in this study.⁴⁶ Docket sheets also indicate whether the Court appointed a guardian ad litem to represent the interests of minor children.

In addition to coding data on case type, this study incorporated an effective measure of case complexity. In each case, pleadings are numerically indexed by order of filing. As the complexity of a case increases, so does the volume of pleadings filed by the parties. The number of pleadings filed prior to mediation sessions studied here

45. Courts may encourage parties to negotiate in good faith over a certain period of time, subsidize the cost of mediation in part or whole, or train mediators to keep negotiations going, but mediation participants cannot be required to participate for any fixed length of time because of the voluntary nature of mediation.

46. This table is based on case types identified by the clerk's office, not an independent review of pleadings. Some case types had too few instances of mediation to calculate a statistically significant settlement rate (number of instances in parentheses): annulment (1), appeal from magistrate court (1), child support (3), foreign judgment (3), and set aside (2). Oversampling rarer case types in further research could help refine the correlation of case type and the likelihood of settlement. For reasons developed in Section Four, however, excessive refinement of dispute resolution systems is a liability, rather than a benefit, for most courts.

TABLE 3: DESCRIPTIVE SUMMARY OF CASE TYPE
AND COMPLEXITY VARIABLES

Variable	Coding	Mean	Min.	Max.	Mode	Exp. Effect
Divorce	1 = yes; 0 = no	.57	0	1	1	+
Complaint	1 = yes; 0 = no	.14	0	1	0	-
Modification	1 = yes; 0 = no	.14	0	1	0	-
Contempt	1 = yes; 0 = no	.02	0	1	0	-
Visitation	1 = yes; 0 = no	.005	0	1	0	+
Custody	1 = yes; 0 = no	.03	0	1	0	-
Damages	1 = yes; 0 = no	.03	0	1	0	-
Legitimation	1 = yes; 0 = no	.03	0	1	0	+
Paternity	1 = yes; 0 = no	.01	0	1	0	+
Separate Maintenance	1 = yes; 0 = no	.01	0	1	0	+
Child Support	1 = yes; 0 = no	.003	0	1	0	-
Guardian Ad Litem Appointed	1 = appointed; 0 = not	.09	0	1	0	-
Number of Pleadings Filed	# of pleadings filed prior to mediation, other than notices	25.30	6	284	16	-

ranged from six to 284 with a standard deviation of 18.97.⁴⁷ It is a particularly apt complement to coding case types because cases of the same type can vary in complexity. Regardless of its causes, case complexity can be expected to decrease the prospects of successful mediation.

Prior studies have considered whether some types of disputes are more amenable to settlement through mediation than other types are.⁴⁸ Conventional wisdom holds that settlement is less likely in cases where only a monetary settlement is involved than cases in which some kind of ongoing relationship may exist.⁴⁹ Rosenberg and

47. This count of pleadings excluded Notices of Mediation issued by the Court to parties. The effect of issuing these notices on the likelihood of settlement is analyzed in detail separately below.

48. Frank E. A. Sander & Lukasz Rozdeiczer, *Matching Cases and Dispute Resolution Procedures: Detailed Analysis Leading to a Mediation-Centered Approach*, 11 HARV. NEGOT. L. REV. 1, 20 (2006) (emphasizing need to match case to an ADR forum based on case characteristics; "fitting the . . . fuss to the forum").

49. In Wissler's study of Ohio pilot mediation programs, mediator survey responses revealed that "serious disagreement over the evaluation of the case" was the

Folberg, however, concluded that there was little difference in the outcomes among the various types of cases in their study.⁵⁰ Likewise, Wissler found that case categories are not significantly related to the likelihood of mediated settlement. Wissler also did not find that disparity in parties' initial settlement offers, case complexity, or disputed liability correlated to a decreased likelihood of mediated settlement.⁵¹ Peeples et al. likewise found no relationship between amount in controversy and rate of settlement.⁵²

2. *Passage of Time*

There is a significant difference of opinion on whether it is better to mediate promptly or to wait until parties have had an opportunity to conduct discovery and define legal issues involved in a particular case. In practice, mediation is frequently delayed until parties complete pre-trial discovery.⁵³

To analyze how the passage of time relates to the likelihood of settlement, the author calculated the number of months elapsed between the initiation of litigation and mediation for cases in the data sample.

TABLE 4: DESCRIPTIVE SUMMARY OF MONTHS WAIT VARIABLE

Variable	Coding	Mean	Min.	Max.	Mode	St. Dev.	Exp. Effect
Months Wait	Months passed from case filing to mediation	8.32	0	46	5	5.79	+

Although cases are referred to mediation by rule, the actual time elapsed from the start of litigation to mediation ranged from zero to forty-six months. On average, cases were mediated 8.32 months after initial filing.

most frequent cause of impasse. Those programs attempted settlement of civil, non-domestic cases, and 82% of settlements involved only monetary provision. Wissler, *supra* note 12, at 666.

50. Rosenberg & Folberg, *supra* note 9, at 1512.

51. Wissler, *supra* note 12, at 675 n. 130 (federal pilot mediation program studies do not show significantly different settlement rates among types of cases, but may identify case types too broadly).

52. Peeples et al., *supra* note 3, at 106–07. The authors did note that the settlement rate in medical malpractice cases was less than half the average rate of settlement in North Carolina mediations.

53. McAdoo & Welsh, *supra* note 2, at 418.

Rosenberg and Folberg produced interesting findings on the timing of ENE sessions. According to the attorneys they surveyed, a certain amount of time must pass for a particular case to be "ripe" for settlement.⁵⁴ However, the study did not find widespread agreement as to the right time to conduct an ENE session. The only event that appeared to influence the attorneys' opinions was whether the attorneys had previously met to discuss settlement. Attorneys found ENE sessions more satisfying when they had taken an opportunity to discuss settlement on their own prior to convening an ENE conference, though the study found no statistical correlation between the success of the process and how early in the litigation it took place.⁵⁵

Wissler found that conducting mediation sessions soon after a lawsuit was filed increased the likelihood of reaching a mediated settlement.⁵⁶ Her study also found that the likelihood of settlement was not related to status of discovery, and that pending motions decreased the likelihood of settlement.⁵⁷ Wissler also found a greater likelihood of settlement in cases where offers or demands had been exchanged prior to mediation.⁵⁸

3. *Judicial Influence*

Can differing attitudes among judges with respect to mediation affect the likelihood of mediated settlements? One might expect that mediation benefits from judicial endorsement. Presumably, the perception and support of judges is an important ingredient in ADR programs; numerous studies have surveyed judges and advocated educating judges about the effective use of ADR.⁵⁹

Local rules in the subject court provide an opportunity for a natural experiment because cases are assigned on a rotational basis. Each judge is assigned a similar mix of cases and no judge is more likely to receive cases based on their likelihood of mediated settlement. The judge initially assigned to each case in the sample was

54. Rosenberg & Folberg, *supra* note 9, at 1516 (referring to ENE).

55. *Id.* at 1517-18, 1536.

56. Wissler, *supra* note 12, at 677-78 n. 143 (citing federal pilot mediation program studies showing mediation settlement rates higher in cases mediated within eighteen to twenty-four months of filing than the rate in "older" cases).

57. *Id.*

58. *Id.*

59. 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 (2007). For example, one jurist commented: "Uncertainty breeds resolution." *Id.* at 416.

TABLE 5: DESCRIPTIVE SUMMARY OF JUDICIAL ASSIGNMENT VARIABLES

Variable	Coding	Mean	Min.	Max.	Exp. Effect
Ingram	1 = judge assigned; 0 = not	0.11	0	1	+/-
Bodiford	1 = judge assigned; 0 = not	0.14	0	1	+/-
Staley	1 = judge assigned; 0 = not	0.10	0	1	+/-
Robinson	1 = judge assigned; 0 = not	0.12	0	1	+/-
Schuster	1 = judge assigned; 0 = not	0.12	0	1	+/-
Grubbs	1 = judge assigned; 0 = not	0.08	0	1	+/-
Kreeger	1 = judge assigned; 0 = not	0.10	0	1	+/-
Nix	1 = judge assigned; 0 = not	0.10	0	1	+/-
Flournoy	1 = judge assigned; 0 = not	0.11	0	1	+/-

coded to detect any statistically significant effects of judicial assignment on mediated settlement rates.⁶⁰ While judicial assignment can be expected to exert direct and indirect effects on the likelihood of mediated settlement, we have no a priori expectations whether these effects will be positive or negative for any particular judge.

4. Attorneys Involved

Some believe that attorneys obstruct the process of settlement. Indeed, mediation theory is in part based on belief that the adversarial process and mindset is not conducive to settlement. On the other hand, attorneys may help parties evaluate the strengths and weaknesses of their case, negotiate with an improved understanding of outcomes, and draft necessary settlement documents.

Are some attorneys more inclined to settle cases at mediation than others? If so, to what extent do the participating attorneys' tendencies influence the eventual success of a mediation session? To

60. Judge LaTain Kell was appointed to the court in November 2007 by Governor Sonny Perdue and other judges reassigned many cases that failed to settle through mediation to him. To discern the effect of judicial assignment, the initial judicial assignment was determined and the corrected data is reported herein.

measure this influence, the identity of the primary attorneys involved in each case was coded, along with the rate at which their other cases in the sample settled through mediation. The cases studied involved 1,947 different attorneys whose participation ranged from one to ninety cases.⁶¹

TABLE 6: DESCRIPTIVE SUMMARY OF ATTORNEY-RELATED VARIABLES

Variable	Coding	Mean	Min.	Max.	Mode	St. Dev.	Exp. Effect
Number Lawyers	Number of lawyers participating at mediation session	1.886	0	9	2	.669	-
Attorney Settlement Rate	Average mediation settlement rate of named attorneys	.462	0	1	.481	.183	+
Attorney Power Imbalance	Absolute value of difference between the actual number of attorneys in mediation session and the number two (the typical number of attorneys in a session, where each party has one attorney)	.284	0	7	0	.617	-
Attorney Sessions	Number of other mediation sessions by all named attorneys in data sample	33.174	0	212	0	34.195	-

The influence of attorneys raises an interesting question of power dynamics. What happens when there is only one attorney? Does power imbalance result in disproportionate number of settlements in favor of the represented party? A number of authors have expressed concern that power imbalances among participants

61. The raw data on attorneys' average settlement rate in other sessions in the sample exaggerates variability in cases where attorneys, or self-represented parties, participated in very few other cases in the sample. If attorneys participated in no other cases, an average settlement rate in other cases cannot be calculated. Therefore, cases where attorneys participated in zero or one other cases in the sample were assigned the average settlement rates of similarly situated attorneys. Smoothing the data in this manner results in some loss of information but is believed to produce more reliable estimates.

threaten the integrity of mediation.⁶² One might surmise that a party represented by an attorney enjoys an advantage in terms of resources and familiarity with the process compared to an unrepresented party.⁶³ If this is the case, there should be an unusually high rate of settlement in mediation sessions in which only one party is represented by an attorney. To test these theories of power dynamics, the number of attorneys present at each mediation session was coded. If an attorney was present serving as the mediator, an observer, a party, or a guardian ad litem, the attorney was not counted as such because he or she was acting in a capacity other than representative of a party.

5. Administrative Effort

One of the primary tasks of operating a court-connected mediation program is scheduling mediation sessions. Typically, court administrators must coordinate multiple schedules and notify all participants of the date, time, and location of a mediation session. Rescheduling is common because participants' availability for mediation changes frequently. Additionally, some mediation sessions are more difficult to schedule than others as the descriptive summary of the "notices" variable indicates.

TABLE 7: DESCRIPTIVE SUMMARY OF ADMINISTRATIVE EFFORT VARIABLE

Variable	Coding	Mean	Min.	Max.	Mode	St. Dev.	Exp. Effect
Notices	# of notices issued prior to session	1.91	0	11	1	1.41	-

62. See Fiss, *supra* note 41, at 1076–78; see also Kovach, *supra* note 2, at 1035–37; Carrie Menkel-Meadow, *Do the "Haves" Come Out Ahead in Alternative Judicial Systems?: Repeat Players in ADR*, 15 OHIO ST. J. ON DISP. RESOL. 19 (1999); 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); Trina Grillo, *The Mediation Alternative: Process Dangers for Women*, 100 YALE L. J. 1545 (1991); Richard Delgado et al., *Fairness and Formality: Minimizing the Risk of Prejudice in Alternative Dispute Resolution*, 1985 WIS. L. REV. 1359 (1985).

63. Such a claim was asserted against the enforcement of a mediated settlement in *De M. v. R.S.*, CN-00-07593, 2002 WL 31452433 at *1 (Del. Fam. Ct. May 14, 2002).

The number of notices issued in a particular case offers an approximate measure of how difficult a session was to schedule and the degree of coercion needed to bring the parties to mediation. Whether the number of notifications correlates to settlement rate has practical implications for court administration. Does this labor-intensive activity pay off with mediated settlements? This variable was considered as possibly revealing the parties' willingness to compromise to reach settlement. Indeed, facilitating parties' agreement on the dispute resolution process is comparable to facilitating settlement of the underlying dispute.⁶⁴ For these reasons, it is expected that mediated settlement rates will decrease as the court issues the parties more notices of mediation.

6. Mediator Selection

The local rules of Cobb County Superior Court provide parties an opportunity to select their mediator. Prior research suggests that mediator selection plays a pivotal role in the eventual outcome of mediation attempts. "[T]he most important factor in determining the success of the [ENE] process in any one case was the individual neutral involved."⁶⁵

To analyze the impact of mediators on mediation outcomes, the identity of the individual who served as mediator was coded for each case, along with the mediator's settlement rate in all other cases in the data sample. Some mediators settled all their other cases while some settled none of them.

Are some mediators simply more effective than others? Answering this simple question is complicated by a selection bias problem. Parties may feel that an average mediator can competently facilitate a simple mediation, but that an exceptional mediator is necessary to settle a complex, high-conflict case. As a result, average mediators may settle cases at a higher rate than exceptional mediators, despite the latter possessing more talent than the former. It is essential, therefore, to control for other factors, such as case complexity, that influence settlement prospects to isolate any impact that choice of mediator plays in the likelihood of mediated settlement.

64. See Maurits Barendrecht & Berend R. de Vries, *Fitting the Forum to the Fuss with Sticky Defaults: Failure in the Market for Dispute Resolution Services?*, 7 CARDOZO J. CONFLICT RESOL. 83, 94–111 (2005) (enumerating multiple barriers to agreement on method of dispute resolution).

65. See Rosenberg & Folberg, *supra* note 9, at 1489, 1495–96. "Over 60 percent of the variation in pendency times of different cases was due to the evaluator." *Id.* at 1531.

TABLE 8: DESCRIPTIVE SUMMARY OF MEDIATOR-RELATED VARIABLES

Variable	Coding	Mean	Min.	Max.	St. Dev.	Mode	Exp. Effect
Mediator's Settlement Rate	Mediator's average settlement rate in other cases in sample	0.53	0	1	0.15	.641	+
Mediator's Caseload	Number of mediator's other sessions in sample	99.65	0	331	108.87	331	+
Female Mediator	1 = Female; 0 = Male	0.50	0	1	N/A	1	+
Variable	Coding	Mean	Min.	Max.	St. Dev.	Mode	Exp. Effect
Attorney Mediator	1 = attorney; 0 = not	0.93	0	1	N/A	1	+
Hourly Rate	Mediator's Stated Hourly Rate	199.41	75	450	39.16	200	+

If choice of mediator significant influences settlement prospects, we may then wonder: What makes a mediator effective at facilitating settlements? To provide some analysis of this related inquiry, data was coded on each mediator's frequency of practice, gender, hourly rate, and occupation.

B. *Results of Multiple-Variable Analysis of Mediation Outcomes*

While one may enjoy some intuitive beliefs about mediation prospects, statistical analysis of a large number of cases allows us to rigorously test these beliefs. Because a number of factors plausibly influence the likelihood of mediated settlement, it is important to employ a statistical technique that properly accounts for concurrent factors. As indicated above, the outcome of a mediation session is a function of some specific factors that can be observed and quantified before the session convenes. Regression analysis of these independent variables identifies whether they correlate to settlement or impasse and provide measures of the strength of that correlation.

Results of regression analysis of 2,410 mediation sessions are summarized in Table 9 below.⁶⁶ Some findings are surprising; others, expected, but believed to point to a consistent model of the

66. Because the dependent variable is not normally distributed, logistic regression analysis was used to estimate each independent variable's contribution to the likelihood of settlement. While logistic regression analysis yields reliable estimates of statistical significance, it does not produce readily interpretable variable coefficients.

likelihood of settlement that may be put to practical use in effective case management.

TABLE 9: MULTIPLE-VARIABLE REGRESSION ANALYSIS
OF MEDIATION SESSION OUTCOMES

Variable	Coefficient	St. Error	z-Statistic	p-Value
Civil Complaint	-0.935***	0.143	-6.52	<0.001
Modification Action	-0.376**	0.129	-2.91	0.002
Contempt Action	-0.907**	0.306	-2.96	0.002
Damages Case	-0.694**	0.270	-2.57	0.005
Guardian Ad Litem Appointed	-0.315*	0.159	-1.99	0.024
Pleadings Filed	-0.015***	0.003	-4.77	<0.001
Months Since Filing	0.008	0.009	0.90	0.186
Judge Grubbs	0.337*	0.168	2.01	0.044
Average of Attorneys' Settlement Rates	1.830***	0.256	7.15	<0.001
Number of Other Sessions by Attorneys	-0.002	0.001	-1.11	0.133
Notices Issued	-0.063*	0.033	-1.89	0.030
Mediator's Settlement Rate	2.539***	0.354	7.18	<0.001
Female Mediator	0.210*	0.104	2.01	0.022
Attorney Mediator	0.281	0.191	1.48	0.070
Mediator's Hourly Rate	0.000	0.001	0.25	0.400
Mediator's Caseload	-0.001	0.000	-1.91	0.029
Constant	-1.346***	0.334	-4.04	<0.001

Dependent Variable: Settlement = 1; Part Settlement or Continuation = .5; Impasse = 0
* = $p < .05$; ** = $p < .01$; *** = $p < .001$ (one-tailed tests except for judicial assignment and constant)

N = 2410

Prob > χ^2 = <0.0001

Pseudo R^2 = 0.0896

While logistic regression analysis yields reliable estimates of statistical significance, it does not produce readily interpretable variable coefficients. Therefore, post-estimation of the marginal effects of each variable based on the logistic regression is used to identify how

Therefore, post-estimation of the marginal effects of each variable based on the logistic regression is used in order to identify how each factor increases or decreases the likelihood of settlement in percentage terms.

each factor increases or decreases the likelihood of settlement in percentage terms. These marginal effects are reproduced in Table 10. This table indicates the marginal impact of changing nominal variables from 0 to 1 and real number variables from one standard deviation below mean to one standard deviation above mean.

TABLE 10: MARGINAL IMPACT OF SIGNIFICANT VARIABLES
ON SETTLEMENT PROBABILITY

Variable	Change From -> To	Impact on Outcome
Civil Complaint	0 -> 1	-22.85%
Modification Action	0 -> 1	-9.09%
Contempt Action	0 -> 1	-22.27%
Damages Case	0 -> 1	-17.07%
Guardian Ad Litem Appointed	0 -> 1	-7.63%
Pleadings Filed	6.32 -> 44.27	-12.64%
Judge Grubbs	0 -> 1	+7.65%
Average of Attorneys' Settlement Rates	28% -> 65%	+15.80%
Notices Issued	.5 -> 3.32	-4.20%
Mediator's Settlement Rate	38% -> 68%	+17.88%
Female Mediator	0 -> 1	+4.95%
Attorney Mediator	0 -> 1	+6.80%
Mediator's Caseload	0 -> 208.70	-4.82%

Statistical analysis identifies a number of variables that help predict the likelihood of mediated settlement. Among the most effective predictors are the subject matter and complexity of the dispute, the settlement rates of attorneys involved, the difficulty of scheduling the mediation, and the mediator's settlement rate.⁶⁷

67. Although these variables are statistically significant, they do not entirely explain the variance in mediation outcomes observed in the data. The Pseudo R-Squared measurement indicates that this model explains 8.96% of the variance in observed outcomes. As noted, we have purposely excluded variables, such as the duration of mediation, that would improve the percentage of variance explained by the data and have limited analysis to relatively simple predictive variables. Indeed, we have omitted any account of the parties themselves. We do not know, for example, whether any of the parties to our mediation sessions suffered any mental impairment, lacked financial resources to make a reasonable offer of settlement, or whether there was a history of violence between the mediation parties. Additional information about the parties would certainly improve predictive power but was not accessible for this study and would raise a host of privacy concerns if used to administer a court-connected mediation program.

1. *Complexity and Some Subjects Correlated to Impasse*

The data indicates that cases which primarily concern the legal status of individual relationships, such as divorce without children, paternity, and visitation, are more likely to settle through mediation than cases in which one party seeks money from the other.⁶⁸ The case types less likely to settle include civil complaints, damages cases, modification petitions, and contempt actions. The negative marginal effect of child custody type cases on settlement prospects is not statistically significant.

Complexity, measured by the number of pleadings filed prior to mediation, is clearly correlated to impasse. Even when we control for the type of case mediated, complexity continues to significantly dampen mediation prospects.

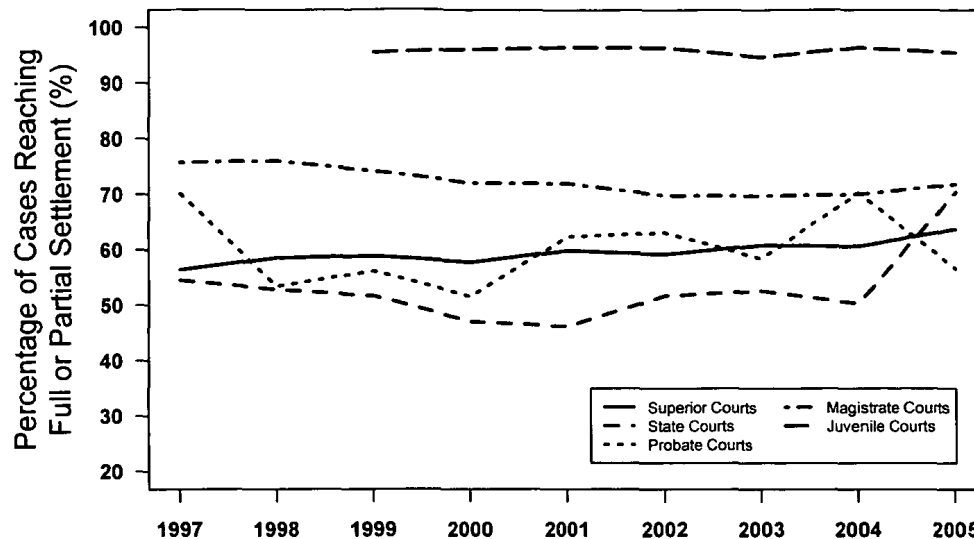
The data also indicates that cases with appointed guardians ad litem are about 8% less likely to settle, all other variables held constant. The appointment of a guardian ad litem may represent complexities not fully captured by case type or number of pleadings. Additionally, while guardian participation in mediation sessions varied, their presence in a case indicates that any mediated settlement must satisfy not only the interests of named parties, but minor children as well.

The seemingly contradictory findings of prior empirical analyses of mediation with respect to case type are understandable. The types of cases studied by Rosenberg and Folberg were confined by the limited subject matter jurisdiction of federal courts. Wissler's Ohio court study was also limited to tort cases, primarily personal injury cases. While some of the types of cases heard in federal court are also heard in state courts, this data sample includes an array of cases other than torts that are not entertained in federal courts.

The influence of case type on the likelihood of mediated settlement is borne out by comparing settlement rates in different types of courts. Data compiled by the Georgia Office of Dispute Resolution shows that different types of courts consistently produce different settlement rates in their mediation programs. The figure below compares the settlement rates achieved in programs operated by superior, state, probate, magistrate, and juvenile court-connected mediation programs.

68. Child support cases settle at higher rates in mediation but involve claims for payment of support. This apparent anomaly may be explained by the detailed child support guidelines governing this kind of dispute in Georgia. See O.C.G.A. § 19-6-15.

FIGURE 1: MEDIATED SETTLEMENT RATES BY TYPE OF COURT, 1997–2005



As the figure above indicates, the settlement rate in magistrate court mediations is consistently higher than the settlement rate in superior court cases. One obvious difference is that the amount in controversy in magistrate court cases is limited to \$15,000. The data suggests that greater amounts in controversy correspond to a decreased likelihood of mediated settlement. Additionally, because Georgia magistrate courts are small claims courts, many litigants represent themselves. Most magistrate court mediators are paid nominal sums by the court so their services are offered freely to parties. There is little disincentive to mediate in magistrate court because parties are not typically paying attorneys' fees or for their mediator's time. The depressing influence of claims for money on settlement prospects also evidences that mediated settlement rates are lower in state court mediation programs than superior court programs for all years except 2005. Because superior courts have exclusive jurisdiction over domestic relations cases, claims for money damages are relatively more common in state court mediations.

2. *Waiting to Mediate Weakly Correlated to Settlement*

What does the data suggest about the relationship between the passage of time and the likelihood of mediated settlement? It appears that each month between the initiation of a lawsuit and mediation increases the settlement prospects about one-fifth of one percent. Not only is the magnitude of this "ripening" effect relatively small, it is not statistically significant. The data suggests that the passage of

time is either unrelated to settlement prospects or slightly increases the likelihood of settlement.⁶⁹ The statistical analysis certainly does not support referring cases to mediation promptly.

3. *Judicial Assignment Plays Limited Role*

The data suggest that the likelihood of mediated settlement depends on judicial assignment. On one hand, only 50.2% of cases assigned to Judge Ingram settled at mediation, while 59.4% of cases assigned to Judge Grubbs did so. When variables other than judicial assignment are controlled, however, only assignment to Judge Grubbs among the nine judges analyzed proved to have an effect on settlement prospects that approached statistical significance.

How do judges affect the likelihood of settlement in mediation? Direct judicial encouragement to settle through mediation is unlikely because cases are referred to mediation by standing rule rather than judges.⁷⁰ Judges mainly indirectly influence how many of their cases proceed to mediation as well as the types of cases mediated by managing their docket. While a full account of indirect judicial influences on mediation success rates is beyond the scope of this work, the data indicates that Judge Grubbs closes cases more quickly than other judges regardless of mediation outcome, has the fewest cases still open at the time of this writing, and has the fewest cases referred to mediation.

4. *Attorney Settlement Rates in Other Cases Affects the Likelihood of a Particular Case Settling*

The data indicate that the tendency of attorneys to settle cases at mediation is a significant determinant of the likelihood of a particular case settling. Specifically, each percentage increase in the average settlement rate of attorneys increases the likelihood of

69. Controlling for other factors, particularly case complexity, was essential to properly estimating the effect of time on settlement prospects. Analyzing the effect of time passage alone on mediation results suggests that settlement prospects decrease nearly three percent per month at statistically significant levels. This initial result, however, is nullified by accounting for case complexity. Cases that reach the mediation table soon after an initial pleading is filed are substantially less complicated than cases that take longer to do so.

70. It may also be expected that strong judicial endorsement of mediation may not correlate to higher mediated settlement rates for that judge's cases if endorsement motivates ambivalent parties to try mediation.

settlement by 0.432%. Given the variation in average attorney settlement rates (a mean of 46.2% with a 18.3% standard deviation), attorneys' receptivity to mediation plays a large role in determining the success of a mediation session.

Numerous attempts to identify the influence of suspected power dynamics were unsuccessful. The number of attorneys participating in mediation sessions lost explanatory power when variables controlling for type and complexity of case were introduced. Parties that negotiated without attorneys were no more or less likely to settle through mediation once controlling for other factors. Additionally, a power imbalance between parties, suggested in cases where only one attorney participates in mediation, has no independent statistically significant effect on outcomes. Variations of the measure of attorneys' settlement tendencies other than averaging rates of attorneys equally, such as weighting the average according to relative attorney experience, or attempting to correlate settlement prospects to the highest or lowest attorney settlement rate, did not improve the model.

Other authors have disputed the fear of power imbalances. Wissler found that the amount of prior experience of parties or attorneys without mediation was not related to the likelihood of settlement.⁷¹ Peeples et al. found that the number of participants at mediation did not affect the rate of settlement.⁷² Cohen and Thompson's study of appellate records also indicates that the fear that power imbalances may corrupt the mediation process has been overstated.⁷³ Ironically, the attorney misconduct issue most frequently raised on appeal is not undue pressure on the adversary, but rather clients challenging settlement enforceability based on the undue pressure of their own attorneys.⁷⁴

5. *Scheduling Problems Foretell Impasse*

Parties who believe a mediation session is likely to produce favorable results will take the initiative to mediate or are cooperative

71. Wissler, *supra* note, 12 at 676.

72. See Ralph Peeples et al., *supra* note 3, at 105.

73. See James Cohen & Peter Thompson, *Disputing Irony: A Systematic Look at Litigation about Mediation*, 11 HARV. NEGOT. L. REV. 43, 74-82 (2006) (in systematic review of litigation about mediation, authors report that in 568 cases challenging enforceability of mediated settlements, only one party prevailed on claim of duress). The lone party to prevail on a duress claim was unfairly pressured into settlement as a result of his wife's threat to reveal incriminating photographs to authorities. See *Cooper v. Austin*, 750 So.2d 711 (Fla. App. 2000).

74. See Cohen & Thompson, *supra* note 73, at 91 (and cases cited therein).

with scheduling; those who believe mediation is unnecessary will be uncooperative and delay mediation.⁷⁵ The data indicates that the greater the number of notices of mediation issued in a case, the less likely it is to settle. The negative correlation between administrative difficulty and mediation results persists after controlling for type of case, case complexity, and other significant variables.

According to the data, the likelihood of settlement decreases 1.48% each time a notice of court-ordered mediation is sent to the parties. In other words, the more administrative effort is required to conduct a mediation session, the less likely a case is to settle through mediation. Hard work apparently does not always pay off. Instead, difficulty scheduling a mediation session is a warning sign that the parties are unlikely to reach a mediated settlement.

One may infer that the likelihood of settlement depends on the parties' sentiments about the mediation process. When parties believe that their dispute is likely to settle through mediation, they are likely to cooperate with the court and with each other in reaching a mediated agreement; when they believe mediation is unlikely to settle their case, they are likely to obstruct the scheduling process and end mediation in impasse. The significance of scheduling difficulties for settlement prospects suggests that the parties themselves have an idea whether mediation is likely to result in settlement or impasse; indeed, the result is ultimately determined by the parties themselves.⁷⁶ For reasons discussed further below, courts cannot directly ascertain parties' true settlement preferences, but should utilize party preferences to make appropriate use of mediation programs.

6. *Choice of Mediator is Highly Significant*

Empirical analysis strongly documents that mediator qualities are highly predictive of the likelihood of settling a given case. Specifically, holding all other case variables constant, each percent increase

75. Attorneys can delay court-ordered mediation sessions without flagrantly violating administrative rules. According to Menkel-Meadow, lawyers use ADR "as another weapon in the adversarial arsenal to manipulate time, methods of discovery, and rules of procedure for perceived client advantage." Carrie Menkel-Meadow, *Pursuing Settlement in an Adversary Culture: A Tale of Innovation Co-Opted or 'The Law of ADR'*, 19 FLA. ST. U. L. REV. 1, 3 (1991).

76. Peeples et al., *supra* note 3, at 117, made this observation in their study of medical malpractice mediations. They found that opening remarks in mediation sessions that settled were shorter than opening remarks in session that ultimately resulted in impasse. "If settlement was a real possibility, there was less reason to waste time on the formalities of the opening statements. . . . [A] sort of predestination was at work in these sessions."

in a mediator's settlement rate yields a 0.60% greater likelihood of settlement. The person selected to mediate a case significantly affects results, but the empirical results provide some interesting insights into the qualities of a successful mediator.

The majority of parties select their mediator. A small group of mediators mediate the majority of cases; indeed, ten mediators account for more than half of the sample here. Also, attorneys almost always serve as mediators in litigated cases. The ten most popular mediators in the cases sampled were all attorneys. The opportunity that this court's rules provide parties to select their own mediator does present an issue of selection bias. If low settlement rate is related to a mediator's being called to facilitate "hard" negotiations, we would expect mediators who handle difficult cases to command higher hourly fees but have unimpressive settlement rates. It is necessary, therefore, to control for case characteristics to discern the independent impact of self-reported mediation ability on the likelihood of settlement. This multiple variable analysis incorporates numerous case specific factors to control for differences in the type and complexity of cases that mediators facilitate to discern the independent impact of mediator selection on settlement probabilities.

Interestingly, the settlement rate varies widely among the most frequently selected mediators; the mediator who appeared second most frequently in the sample settled 38.55% of his cases while the fourth-most frequent mediator settled 77.11% of her cases. Statistical analysis indicates that the more active the mediator, the less likely a given mediation session results in settlement.⁷⁷ The fact that a mediator's services are in demand, it seems, is not a particularly positive sign.

Similarly surprisingly results are evident in the relationship between a mediator's hourly rate and the likelihood of settling a given case. A mediator's stated hourly rate may be viewed as a self-assessment of mediation ability. Statistical analysis, however, indicates that a mediator's hourly rate has no relationship to the likelihood the mediator will settle a given case.

77. The statistical significance of this negative correlation exceeds conventional confidence levels in the case-level data ($p = 0.029$). The p -value of a regression coefficient expresses the probability of observing the data if no relationship exists between the mediator caseload and settlement rate given the sample size and variability of the data. ALAN AGRESTI AND BARBARA FINLAY, *STATISTICAL METHODS FOR THE SOCIAL SCIENCES* 145-46 (4th ed. 2009). At the conventional 95% confidence level, one rejects a null hypothesis of no relationship when the p -value of a regression coefficient is less than 0.05. However, this negative correlation is not observed in the mediator-level observations (see Table 11).

The market demand for mediation services may be flawed; parties may not know how frequently their mediator settles cases or whether their case is comparable to those on which a settlement measure is based. More problematic, conventional beliefs about which mediators are most effective may be unrealistic and based on personal biases more than actual data.

Mediators' settlement rates do vary dramatically and conventional demand measures – actual or perceived – do not appear to relate mediator performance. It appears that mediator success may be more a function of inter-personal factors than conventional market economics. The data specifically indicate that attorney-mediators settled cases at higher rates than non-attorney mediators, though the significance of this correlation falls short of conventional confidence levels.

The independent impact of a mediator's gender on the likelihood of settlement remains significant despite a host of control variables. *Ceteris paribus*, the selection of a female mediator significantly increases the likelihood of settlement. The causes and implications of gender differences have a long history in literature and litigation. This article will not attempt to resolve any battles between the sexes, but for purposes of improving the likelihood of mediated settlements, stresses that a better understanding of different methods of female and male mediators could help improve mediation practice generally.⁷⁸

Having determined average settlement rates for the mediators represented in this data sample, we can evaluate mediator settlement rates as a dependent variable. The individual mediator, rather than a given case, can serve as our unit of analysis. While one can appreciate the finesse with which some mediators facilitate negotiations, does it really make a difference? After all, the parties' demands and offers for settlement should be products of their liabilities and assets, not the prevailing mood during mediation.

78. See, e.g., CAROL GILLIGAN, *A DIFFERENT VOICE: PSYCHOLOGICAL THEORY AND WOMEN'S DEVELOPMENT* (1993). There is continued debate over the existence and implications of gender differences in society. For an introduction to some of the legal dimensions of this debate, see Ann Scales, *The Emergence of a Feminist Jurisprudence: An Essay*, 95 YALE L. J. 1373 (1986). Perhaps coincidentally, the modern ADR movement began at roughly the same time women enrolled in U.S. law schools in significant numbers. For additional works exploring the gender difference in mediation, see Christina Boyd, *She'll Settle It: Judges, Their Sex, and the Disposition of Cases in Federal District Courts* (unpublished manuscript) (female judges are more likely to dispose of cases by settlement than their male colleagues); David Maxwell, *Gender Differences in Mediation Style and Their Impact on Mediator Effectiveness*, 9 CONFLICT RESOL. Q. 353 (1992).

The multi-variable analysis reported above yields predicted probabilities of settlement based on case factors, excluding mediator-related variables from the analysis. Averaging the case factor prediction in all cases facilitated by a mediator yields an expected settlement rate for the mediation based strictly on the nature of cases he or she mediates. The characteristics of a mediator's caseload should, in part, determine his or her settlement rate. Table 11 sorts the relative influence of case specific factors, personal characteristics, and market indicators on individual mediator settlement rates.⁷⁹

TABLE 11: MULTIPLE-VARIABLE REGRESSION ANALYSIS OF MEDIATOR SETTLEMENT RATES

Variable	Coefficient	St. Error	t-Statistic	p-Value
Case-Factors	0.777*	0.377	2.06	0.022
Attorney Mediators	0.153*	0.081	1.88	0.033
Female Mediators	0.090*	0.039	2.32	0.012
Number of Cases	0.000	0.000	-0.49	0.314
Hourly Rate	0.000	0.000	0.45	0.326
Constant	-0.146	0.288	-0.51	0.307

Dependent Variable: Individual Mediators' Observed Settlement Rates

* = $p < .05$; ** = $p < .01$; *** = $p < .001$ (one-tailed tests)

N = 56

Prob > F = 0.0148

R-Squared = 0.2403

The results reported in Table 11 generally reinforce those reported in Table 9. A mediator's personal characteristics, particularly occupation and gender, appear more significant than market-based indicators.⁸⁰ Based on this data sample, the mediator does make a difference, but conventional beliefs about who or what makes a "good"

79. This ordinary least squares regression analysis is limited to mediators who facilitated nine or more cases in the data sample. This excluded a number of mediators who did not mediate frequently enough for effective analysis. This conventional form of regression analysis is appropriate because the dependent variable of interest, individual mediator's settlement rates, is normally distributed. A caveat to this analysis of mediator settlement rates is that the number of observations (56) is limited and these results are sensitive to the inclusion or exclusion of mediators who appear infrequently in the case sample.

80. In other contexts, research has found that conventional evaluations of what it takes to be a productive baseball player, teacher or quarterback are mistaken. See, e.g., MICHAEL LEWIS, *MONEYBALL: THE ART OF WINNING AN UNFAIR GAME* (2004) (discussing the difficulty of scouting baseball prospects); MALCOLM GLADWELL, *WHAT THE DOG SAW: AND OTHER ADVENTURES* (2010) (reporting the difficulty of objectively predicting the job performance of teachers, quarterbacks, and financial advisors).

mediator fail to identify characteristics that are related to settlement. Parties frequently select mediators who settle cases at a less than average rates and charge hourly rates that bear no relation to their success settling cases. Why do a mediator's personal characteristics make such a difference? Perhaps some personal backgrounds – such as being a woman and becoming a lawyer—prepare one to consider problems from a variety of perspectives and view solutions in the context of inter-personal relationships.⁸¹ If so, expanding the perspectives mediators offer may help improve results of court-connected mediation.

Prior works have reported mixed results on the connection between mediator-related variables and the likelihood of settlement.⁸² Rosenberg and Folberg found that “the number of years of attorney experience had no relationship to either side’s attorney or party satisfaction with the ENE process.”⁸³ The study, however, did find a correlation with neutral preparation and an “even stronger relationship” with the perception of neutral preparation.⁸⁴ Rather than experience, the study found that “by far” the most significant determinants of participant satisfaction with ENE were the neutral’s “personal skills, attitudes, and behavior.”⁸⁵

Wissler found that a mediator’s use of evaluative techniques is correlated to settlement. She found that the likelihood of settlement was greater when the mediator recommended a particular settlement, evaluated the merits of a case for the parties, assisted the parties in evaluating the value of a case, and disclosed his or her own views about the case.⁸⁶ Wissler also found that neither the hours nor type of mediator training related to the likelihood of settlement.⁸⁷

7. *If At First You Don't Succeed . . . Try Again?*

In some cases, parties may make second, third, or even fourth attempts to settle a case through mediation. Whether these repeated

81. See Henderson, *supra* note 23, at 144–45 (mediators’ use of multiple techniques positively correlated with settlements in construction mediation). There is a rich literature on the inter-personal dynamics of mediation. See, e.g., Keith Allred, *Relationship Dynamics in Disputes*, in *THE HANDBOOK OF DISPUTE RESOLUTION* 83 (Michael Moffitt & Robert Bordone, eds. 2005).

82. Peeples et al., *supra* note 10, at 108, 112–13 (“It was difficult to isolate any mediator behavior that seemed to have a pronounced effect on the outcome of the case.”).

83. Rosenberg & Folberg, *supra* note 9, at 1522.

84. *Id.* at 1523.

85. *Id.* at 1529.

86. Wissler, *supra* note 12, at 679–80.

87. *Id.* at 678.

attempts are more likely to result in settlements than initial attempts has practical significance to attorneys whose clients may wonder whether repeated sessions are worthwhile. Additionally, examining subsequent attempts to mediate a given case provides an opportunity to test the belief that initial mediation attempts that do not produce settlements have the positive effect of making future settlement more likely. One-hundred-and-forty-three cases in this sample were the parties' second, third, or fourth mediation sessions and 55.24% of these sessions settled, compared to 52.84% of initial mediation attempts.

TABLE 12: CROSS-TABULATION OF REPEATED MEDIATION SESSIONS
OUTCOMES

Result	First Attempts	Second Attempts	Third Attempts	Fourth Attempts
Full Settlement	44.96%	50.37%	50.00%	0.00%
Part, Continue	15.76%	10.37%	33.33%	0.00%
Impasses	39.28%	39.26%	16.67%	100.00%
Average rate (N Cases)	52.84% (2,271)	55.56% (135)	66.67% (6)	0.00% (2)

While subsequent attempts appear to settle at a slightly higher rate, it may be the result of chance.⁸⁸ Moreover, when we attempt to introduce the number of attempts to mediate a case as an independent variable alongside other case factors, it lacks statistical significance in any specification. The data on repeated mediation attempts suggests that subsequent attempts to mediate a given case are no more or less likely to yield settlement than the initial session.

According to this analysis, the indication from Rosenberg and Folberg that "only 9 percent of attorneys said additional sessions would have been helpful" is overly pessimistic.⁸⁹ At the same time, the American Bar Association's Dispute Resolution Section's assessment that persistence and follow-up efforts are necessary to improve the quality of mediation is overly optimistic.⁹⁰ Additional sessions appear no more or less useful than initial mediation attempts.

88. The probability of achieving the settlement rate observed here in repeated sessions by random chance with the same settlement rate as initial mediation sessions is approximately 35%. In this analysis, repeated attempts at mediation do not have statistically significant impact on outcomes.

89. Rosenberg & Folberg, *supra* note 9, at 1528.

90. ABA Section on Dispute Resolution, TASK FORCE ON IMPROVING THE QUALITY OF MEDIATION FINAL REPORT (2008), available at <http://www.abanet.org/dispute/documents/FinalTaskForceMediation.pdf>.

C. *The Cost of Mediated Settlements*

How much does it cost to settle a case through mediation? Basic cost analysis can help courts determine how and when to use mediation.⁹¹ Parties may also be interested in weighing the costs and benefits of mediation. The amount of money spent to settle a case provides a common denominator to compare mediation to other methods of resolving disputes to optimize court productivity.

Incorporating cost figures into our analysis enables us to calculate the cost of conducting a mediation session, as well as the average expense of producing a mediated settlement through this program. Relevant cost considerations include public administrative and private expenses. The administrative cost can be approximated by dividing the program budget by the number of mediations conducted in an average year.⁹² According to the Cobb County Budget Office, the annual budget of the Cobb County Superior Court's ADR Program is \$348,367.⁹³ Three years of case filings resulted in 2,414 mediation sessions, or about 805 mediation sessions per year.⁹⁴ Therefore, the average administrative cost of each mediation session is approximately \$433.⁹⁵

Under program rules, the parties pay for the mediator's time. The ADR Office's web page indicates that mediator fees average \$175 per hour.⁹⁶ The data reported above indicates that mediation sessions lasted 2.87 hours on average, which produces an average cost of \$502.25. In addition to the mediator's fees, parties also bear their

91. According to Sander, *supra* note 3, at 705, there has been no empirical research done on the cost effectiveness of mediation. He made a similar observation in 1976: "There is a dearth of reliable data comparing the costs of different dispute resolution processes." Frank Sander, *Remarks*, in *THE POUND CONFERENCE: PERSPECTIVES ON JUSTICE IN THE FUTURE* 78 (A. Leo Levin & Russell Wheeler, eds., 1976).

92. The GODR published data on our state's court-connected and court-annexed programs from 1997 – 2005 and I calculated the Cobb County Superior Court ADR Program's average year caseload (754 mediations conducted) based on those years. The GODR has not published reports for 2006 or 2007 due to staff shortage and budget cuts.

93. Obtained by Open Records Act Request (on file with author). This figure does not include any account of fixed expenses, such as facility costs. In Georgia, court-connected ADR programs are authorized to charge additional filing fees to fund ADR programs. See O.C.G.A. § 15-23-7. Regardless of revenue collection method, the cost of the program is the same.

94. This figure represented an increase over the 1997-2005 average volume in GODR data (754).

95. The RAND Report found: "In terms of the ADR program cost to the district court per case referred, the range is from \$130 per case to \$440 per case." Kakalik et al., *supra* note 6, at 36.

96. *Cobb County Superior Court ADR Program*, COBBCOUNTYGA.COM, <http://sca.cobbcountyga.gov/adr.htm> (last visited Feb. 24, 2011).

attorneys' fees. The data indicates that, on average, 1.89 attorneys are present at mediation. Assuming an average hourly rate of \$250, parties accrued \$1,356.08 of attorneys' fees per mediation session.⁹⁷

How much does it cost to produce a mediated settlement? Adding the cost of public administration (\$433) and expenses borne directly by the parties (\$1,858.33) and dividing this sum by the overall settlement rate yields an estimate of \$4,323.25 per settlement (\$2,291.33 / 0.53).⁹⁸

The public and private costs of producing mediated settlements are substantial. As discussed further below, the substantial costs this program imposes upon litigants may deter certain litigants from seeking justice from the court. At the same time, the enormous budget pressures facing state courts likely preclude additional public coverage of mediation expenses.

D. *Should Courts Focus on Settlement Rates?*

A substantial body of literature argues that it is misguided to focus on mediation settlement rates. Reaching settlement, these authors point out, is simply one goal of mediation. Mediation also aims to enhance parties' self-determination, preserve ongoing relationships, increase public satisfaction with the legal system, and establish a participatory democracy.⁹⁹ Placing too much emphasis on settlements may, according to these critics, undermine the best qualities of mediation.¹⁰⁰ Other arguments against mediated settlements

97. See generally Ronald Burdge, UNITED STATES CONSUMER LAW ATTORNEY FEE SURVEY REPORT, 2010-2011, 39 (2011) (reporting \$267.00 average attorney hourly rate for consumer law attorneys in South region and \$262.00 median hourly rate), available at <http://www.nclc.org/images/pdf/litigation/fee-survey-report-2010-2011.pdf>. The calculation of average attorneys' costs used here conservatively assumes that parties are not billed for time attorneys spend traveling to or from mediation, or time preparing for mediation. It also excludes expenses associated with the participation of attorney staff, expert witnesses, or court-appointed guardians at mediation sessions.

98. Excluding partial agreements, the cost figure per full settlement is \$5,091.84 (\$2,291.33 / 0.45). Forty-five percent of mediation sessions in this sample resulted in full settlements.

99. Nancy A. Welsh, *Making Deals in Court-Connected Mediation: What's Justice Got to Do With It?*, 79 WASH. U. L.Q. 787, 789-91 (2001).

100. See Brazil, *supra* note 16, at 265-68 (arguing that "settlement obsession" makes courts appear selfishly interested in reducing their own workload and undermines mediation ethics); Joseph Folger, "Mediation Goes Mainstream" - *Taking the Conference Theme Challenge*, 3 PEPP. DISP. RESOL. L. J. 1, 31 (2002) (arguing that the institutional focus on litigation settlement has diminished the defining "alternative" characteristics of mediation); Nancy A. Welsh, *The Thinning Vision of Self-Determination in Court-Connected Mediation: The Inevitable Price of Institutionalization?*, 6

include the potential to impede the development of precedent, dissemination of information to the public, and establishment of public norms.¹⁰¹

Settlement is not the only goal of courts or of mediation, but it is proper to focus on settlement rates for a number of reasons. It is generally acknowledged that settlement is a primary goal of dispute resolution systems.¹⁰² Case disposition data, including settlement statistics, provide a basic metric for assessing the quality and quantity of justice produced by our courts.¹⁰³

Additionally, statistical analysis demonstrates that the “liberal” goals of procedural justice and “conservative” goals of institutional efficiency are not dichotomous policy choices. Improving settlement rates does not diminish other goals of mediation. As Chief Justice Burger stated at the Pound Conference, there is “nothing incompatible between efficiency and justice.”¹⁰⁴ Rather, these goals are mutually reinforcing.

Consider, for example, the value of communication. Mediation provides parties the opportunity to talk and listen to one another. In addition to empowering individual expression and potentially repairing relationships, mediation dialogue significantly advances settlement goals. The average duration of sessions that resulted in full

HARV. NEGOT. L. REV. 1, 5 (2002); Sharon Press, *Institutionalization: Savior or Saboteur of Mediation?*, 24 FLA. ST. U. L. REV. 903 (1997).

A number of commentators have lamented the infiltration and co-option of alternative dispute resolution by attorneys and the resulting emphasis on litigation settlement. See Patrick Coy & Timothy Heeden, *A Stage Model of Social Movement Co-Option: Community Mediation in the United States*, 46 SOC. Q. 405 (2005); Timothy Heeden, *Coercion and Self-Determination in Court-Connected Mediation: All Mediations are Voluntary, But Some Are More Voluntary than Others*, 26 JUST. SYS. J. 273, 281–83 (2005). For additional background on the movement for community-based dispute resolution centers, see Edith B. Primm, *The Neighborhood Justice Center Movement*, 81 KY. L. J. 1067 (1993).

101. See Fiss, *supra* note 41, at 1073; Kovach, *supra* note 2, at 1030–35. Fiss’s argument against settlement may have more merit with respect to appellate court-connected mediation programs than those implemented at the trial court level.

102. Marc Galanter & Mia Cahill, *“Most Cases Settle”: Judicial Promotion and Regulation of Settlements*, 46 STAN. L. REV. 1339 (1994) (stressing need to measure quality of settlements in addition to quantity of settlements produced).

103. See Theodore Eisenberg & Charlotte Lanvers, *What is the Settlement Rate and Why Should We Care?*, CORNELL LEGAL STUDIES RESEARCH PAPER NO. 08-30 (Nov. 21, 2008), available at <http://ssrn.com/abstract=1276383>. In his opening remarks at the 1976 Pound Conference, Chief Justice Warren Burger stressed the need to monitor and measure court reforms: “When we make changes, their operation must be monitored to be sure they are working as we intended.” Warren Burger, *Opening Remarks*, in THE POUND CONFERENCE: PERSPECTIVES ON JUSTICE IN THE FUTURE 29 (A. Leo Levin & Russell Wheeler, eds., 1976).

104. *Id.* at 32.

settlements was 3.23 hours and those that ended in impasse averaged only 2.42 hours.¹⁰⁵ Statistical analysis indicates that the likelihood of settlement increases 7.54% for each hour the parties mediate.¹⁰⁶ This finding is consistent with prior research.¹⁰⁷ In mediation, efficiency requires patience. Along similar lines, the data on scheduling difficulty reported above indicates that administrative pressure is counterproductive; the more force exerted to bring parties to the mediation table, the less likely that session is to produce a settlement.

At the same time that procedural justice can increase settlements and relieve dockets, efficient results can improve public satisfaction with the courts.¹⁰⁸ Mediation participants are likely to feel empowered, respected, and satisfied by a process that helps them settle their conflicts.¹⁰⁹ The available data suggest that parties primarily view and value mediation as a means of settling litigation. Mediation participants, including individuals, organizations, mediators, and attorneys, consider settlement the primary goal of mediation.¹¹⁰ Process-oriented values may not be valued as highly by participants as they are by mediators and academics.¹¹¹ Wissler, for example, found that parties' perceptions of fairness increased when

105. The overall average duration of sessions was 2.87 hours; the average duration of mediation sessions that resulted in partial agreements or continued mediation was 3.05 hours.

106. The probability of this correlation arising by chance is less than .001 and it explains more than five percent of the variance in mediation session outcomes.

107. See Peeples et al., *supra* note 10, at 107 (statistically significant finding that mediation sessions resulting in settlement lasted 101 minutes longer than those that resulted in impasse); Henderson, *supra* note 23, at 143.

108. See Welsh, *supra* note 99, at 791, 817–20 (emphasizing need for procedural justice in mediation, disputants must “feel like justice is being done”).

109. The data indicate that mediating settlements significantly decreases the pendency of litigation. In this sample, cases that fully settled in mediation were pending an average of 11.85 months; cases partially settled, 19.61 months; impasse, 21.21 months. 5.85% of cases filed between 2005 and 2007 that were mediated remain open case files at the time of this writing.

110. McAdoo & Welsh, *supra* note 2, at 421; see also Wissler, *supra* note 12, at 674 (“parties and attorneys in cases that settle tend to have more favorable assessments of the mediation process”).

111. For example, Rosenberg & Folberg, *supra* note 9, at 1509–10, found that there was a strong relationship between participants' subjective evaluations of the utility of ENE and the amount of time they saved by utilizing alternative dispute resolution compared to traditional litigation.

mediators evaluated the merits of cases, compared to simply facilitating negotiations. Similarly, attorneys reported that a mediator's suggestion of settlement options increased their perception of fairness.¹¹²

E. *Predicting Mediation Outcomes*

The foregoing statistical analysis was based on cases filed in 2005, 2006, and 2007 and the 2,414 mediation sessions that convened to resolve these cases before trial. A number of discrete factors appeared to predict whether a session will result in settlement or impasse. But how much does this knowledge improve our ability to predict outcomes? Recall that the overall settlement rate in the case sample was approximately fifty-three percent. If one predicts that every mediation session will result in settlement, such optimism will be correct more often than not. But limited resources preclude courts from offering (or requiring) mediation in all cases. The crucial issue, then, is how well one can successfully distinguish cases that are likely to reach mediated settlements from those that are not. One possible error, a false negative in statistical parlance, would be not mediating a case that would have settled but for improper screening. Another error would be mediating a case to impasse, a false positive.¹¹³ Ideally, a dispute resolution system would minimize both types of errors, but is it possible? This extensive analysis identified ten statistically significant variables that could be used to predict mediation results. These variables can be used to generate estimated probabilities of settlement for each case; these predicted results can then be compared to actual results to determine how successful our findings would have been at predicting mediation outcomes.¹¹⁴

112. Wissler, *supra* note 12, at 684. It may be that using some objective basis for case evaluation decreases the personal and positional conflict in mediation sessions.

113. Social scientists distinguish between type I and type II errors. The former, a false positive error, is rejecting a true hypothesis. A type I error is analogous to a jury finding an innocent person guilty. A type II error, a false negative, occurs when the researcher does not reject a false hypothesis; it equates to a jury finding a guilty defendant not guilty. AGRESTI AND FINLAY, *supra* note 77, 159-60.

114. The variables and coefficients contained in Table 9 were used to generate predicted results. If the model estimated that settlement was more likely than not (>50%), full settlement was predicted; otherwise, impasse was expected. These results are compared against predicting the mode result (full settlement), which actually occurred in 1,090 of 2,408 cases. Neither method predicts mid-range results, but there were 372 cases in the sample that resulted in partial settlements or agreements to continue mediation.

TABLE 13: PREDICTIVE IMPROVEMENT OF STATISTICAL MODEL

	Statistical Model Predictions			Modal Prediction		
	Prediction	Correct	Incorrect	Prediction	Correct	Incorrect
Settlement	1,504	822	682	2,410	1,092	1,318
Impasse	906	507	399	0	0	0
Totals	2,410	1,329 (55.1%)	1,081 (44.9%)	2,410	1,092 (45.3%)	1,318 (54.7%)

These are mixed results. On the one hand, taking some account of objective factors that tend to predict mediation outcomes can help courts match cases to the appropriate forum for dispute resolution. The multi-variable regression analysis used here produces nearly a 10% reduction in error over mode result prediction. On the other hand, if this approach were used to screen cases, the court would have ordered many cases to unsuccessful mediations and, worse, not ordered 507 cases to mediation (based on improbability of settlement) that would have settled (or reached partial settlement). Despite the impressive results of individual variables in the model, the overall explanatory power of this type of analysis is modest.

If the statistical model developed here is used only to predict results in extreme cases, the model's predictive power improves considerably. If settlement predictions are limited to cases where the model suggests greater than .68 probability of settlement (one standard deviation above the mean) and impasses where the forecast is less than .38, the model correctly predicts 232 of 363 cases that resulted in impasse and 226 of 357 cases that fully settled. The model now predicts 63.6% of results correctly, with an 18.3% improvement over modal prediction.

IV. DESIGN DEFECTS IN THE MULTI-DOOR COURTHOUSE

The "Multi-door Courthouse" (MDC) is a popular concept in the field of alternative dispute resolution that is credited to Harvard Law School Professor Frank Sander.¹¹⁵ This model of dispute resolution would provide litigants a variety of paths to justice, such as mediation, various evaluative methods, arbitration, and traditional litigation. The MDC concept has dominated the design of dispute resolution systems in United States trial courts for the past 25 years.¹¹⁶

115. See McAdoo & Welsh, *supra* note 2, at 402–03 and references cited therein for origin and history of the "multi-door courthouse" concept.

116. See generally Frank Sander, Transcript, *A Dialogue Between Professors Frank Sander and Mariana Hernandez Crespo: Exploring the Evolution of the Multi-*

At the 1976 Pound Conference, Professor Sander shared his insights on the various ways of resolving disputes. He suggested that courts develop criteria to determine the best means of resolving particular types of disputes.¹¹⁷ He then presented his vision for progressive court systems:

[T]he grievant would first be channeled through a screening clerk who would then direct him to the process (or sequence of processes) most appropriate to his type of case. The room directory in the lobby of such a Center might look as follows:

Screening Clerk	Room 1
Mediation	Room 2
Arbitration	Room 3
Fact Finding	Room 4
Malpractice Screening Panel	Room 5
Superior Court	Room 6
Ombudsman	Room 7 ¹¹⁸

Though the Multi-door Courthouse is an appealing abstract concept, it has produced a bewildering variety of court-connected ADR programs.¹¹⁹ Perhaps the most glaring defect in the MDC model of dispute resolution is the absence of any practical method of screening cases for referral to any particular process. How does the screening clerk know which “room” is appropriate for any particular case?¹²⁰ How can the various methods of resolving disputes be utilized to maximize the production of “justice” by this courthouse?¹²¹ There

Door Courthouse, 5 U. ST. THOMAS L.J. 665 (2008) (recounting the origin of Sander’s ideas, how he came to present at the 1976 Pound Conference, how his ideas were branded the Multi-Door Courthouse, and the events leading to the ADR movement).

117. Sander, *supra* note 91, at 72.

118. *Id.* at 84.

119. See Kovach, *supra* note 2, at 1025 and references cited therein. It has been reported, for example, in support of a Uniform Mediation Act, that there are more than 300 different state statutes on mediation confidentiality alone. See Birke & Teitz, *supra* note 2, at 202. Measuring the receptivity of states to mediation is a challenging exercise. See Matthias Prause, *The Oxymoron of Measuring the Immeasurable: Potential and Challenges of Determining Mediation Developments in the U.S.*, 13 HARV. NEGOT. L. REV. 131 (2008) (documenting substantial regional differences in institutionalization of mediation).

120. See generally Andrea K. Schneider, *Building a Pedagogy of Problem-Solving: Learning to Choose Among ADR Processes*, 5 HARV. NEGOT. L. REV. 113 (2002) (discussing a model for how lawyers can help clients choose among ADR options).

121. Thaler and Sunstein define a “choice architect” as someone responsible for organizing the context in which people make decisions. Providing helpful “nudges” is central to the authors’ vision of “libertarian paternalism.” “[P]eople need nudges for decisions that are difficult and rare, for which they do not get prompt feedback, and when they have trouble translating aspects of the situation into terms that can be

must be some method of “fitting the forum to fuss.” Decades later, Sander would say: “That is something I have been working on since 1976 because the thing about the multi-door courthouse is that it is a simple idea, but not simple to execute because to decide which cases ought to go to what door is not a simple task.”¹²²

This section will outline five substantial defects in the MDC design of dispute resolution systems for trial courts. These are fundamental flaws in the screening concept that necessitate some renovations.

- (1) The MDC is not suited for high-volume courts.
- (2) It engages litigants prematurely.
- (3) Multiple options are unnecessary.
- (4) Screening is prone to human error.
- (5) It is impossible to control what occurs in ADR sessions facilitated by neutral third-parties.

This section will also identify some virtues of the MDC model and offer suggestions for more effective dispute resolution systems.

The volume of cases filed in a busy American trial court would quickly overwhelm case-by-case screening. On average, a new case file opens in Cobb County Superior Court every ten minutes. The MDC is not designed to handle this kind of volume.

Outlining the variety and distinguishing characteristics of dispute resolution procedures available to litigants, answering questions about the various procedures, and understanding the nature of every single dispute (from the perspective of each litigant) would be impossible without greatly increasing state court personnel.¹²³ Printed educational materials are unlikely to relieve the necessity of having case screeners patiently explain ADR methods to a staggering volume of parties. Most state court systems are struggling financially and would be unable to implement the MDC concept, particularly as the MDC relies on substantial legal expertise and judicial support.

easily understood.” RICHARD THALER & CASS SUNSTEIN, *NUDGE: DECISIONS ABOUT HEALTH, WEALTH AND HAPPINESS* 3 (2008). How can the options available to litigants be organized and presented to help nudge them toward just, speedy and inexpensive resolution of complaints?

122. See Sander, *supra* note 116; see also Sander & Rozdeiczer, *supra* note 48; Jeffrey W. Stempel, *Reflections on Judicial ADR and the Multi-Door Courthouse at Twenty: Fait Accompli, Failed Overture, or Fledgling Adulthood?*, 11 OHIO ST. J. ON DISP. RESOL. 297 (1996).

123. Stempel, *supra* note 122, at 370, argues that case screening should be done by judicial officers with “considerable education and training.”

Some advocate referring cases to mediation as soon as possible to maximize the judicial savings. It is important to note, however, that administering mediation sessions is also costly. Many cases are voluntarily dropped by plaintiffs after tempers cool or parties resolve their disputes through direct negotiations. For example, a divorce petitioner may opt for reconciliation rather than pursue divorce, or a contractor may voluntarily make repairs to a homeowner's satisfaction. Many cases are involuntarily dismissed for want of prosecution. General case volume figures show that in this court most cases are resolved relatively quickly, but that the rate of case closure decreases over time and flattens out about two years after cases are filed.

Many authors have observed that most lawsuits settle through direct negotiations and that mediation programs have not clearly demonstrated improved efficiency in case dispositions.¹²⁴ The timing of planned interventions to encourage settlement between parties is a particularly important program design issue. The MDC concept is unlikely to demonstrate a clear advantage over traditional practice because it upsets the natural settlement of cases.

It is not simply that most cases settle, but more significantly that most cases close in a matter of months with little or no judicial intervention. The comparison data of 17,000 cases filed in the court indicated that 53% of cases closed within three months of filing. The majority of divorce petitions, which represent a focal point of mediation efforts, are uncontested and promptly resolve based on the parties' pleadings. Early referral of these cases to dispute resolution not only wastes public and private resources, it invites prolonged conflict. Simply waiting 2 – 3 months before ordering, or encouraging, parties to mediate would double the odds that a program is targeting cases that require intervention compared to ordering or encouraging mediation in all divorces.¹²⁵

Some have suggested that case screeners educate parties on various dispute resolution methods and customize solutions on a case-by-case basis in collaboration with the parties. Sander and Rozdeicer, for example, emphasize the importance of applying the parties' goals

124. McAdoo & Welsh, *supra* note 2, at 416–17 (citing judicial skepticism of ADR utility because cases may settle anyway). A significant question explored in early studies of federal pilot ADR programs was whether court-connected mediation programs significantly improve upon the natural settlement rate in trial courts.

125. If 1% of all cases filed in a court result in trial, waiting until half of these cases settle doubles the odds that the remaining cases will result in trial. The degree and rate of early settlement likely varies between court systems. Cobb Superior Court proceeds at a fairly brisk rate with modern facilities, technology and a fully staffed judiciary.

to an elaborate matrix of ADR options.¹²⁶ Such a collaborative, individualized approach to case management emphasizes flexibility, self-determination, and party control over the dispute resolution process.¹²⁷

Even if trial courts could afford this service and avoid disturbing the natural settlement process, this case screening exercise is misguided because typical litigants are not particularly interested in designing dispute resolution processes. As noted in Section Two, although the program studied here allows parties to choose either mediation or case evaluation, parties almost always chose mediation.¹²⁸ The comparison data indicates the overwhelming preference for mediation is not limited to the county studied here. In Georgia, local courts are authorized to refer litigants to a wide range of dispute resolution options.¹²⁹ However, the governing rule is a mere technicality; mediation is the only method used with any real frequency.

As Table 14 indicates, from 1997 to 2005, over 98% of court-connected ADR sessions in Georgia were mediation sessions. Mediation appears to be growing in popularity; from 2003 to 2005, mediation represented 99.7% of court-connected ADR sessions. ADR methods other than mediation are infrequently utilized not because they are unavailable. According to the GODR, at least thirty Georgia counties offer arbitration in superior, state, probate, magistrate, juvenile, or other court systems. Similarly, twenty-six counties offer early neutral evaluation. Between 2001 and 2005, the court programs offering case evaluation was greater than the number of case evaluation sessions that actually took place. These provisions for multiple alternatives introduce unnecessary complications in trial court dispute resolution systems.

126. See Sander & Rozdeiczer, *supra* note 48, at 11–19. The authors conclude that those steering parties to the appropriate forum should assume that mediation is the proper forum. *Id.*

127. See, e.g., Donna Shestowsky, *Disputants' Preferences for Court-Connected Dispute Resolution Procedures: Why We Should Care and Why We Know So Little*, 23 OHIO ST. J. ON DISP. RESOL. 549 (2008).

128. See Hensler, *supra* note 2, at 187 (noting that other options in multi-door courthouse have “withered away” and mediation dominates ADR field).

129. GEOR. COMM’N ON DISP. RESOL., ALTERNATIVE DISPUTE RESOLUTION RULES (2012), available at <http://www.godr.org/files/CURRENT%20ADR%20RULES%20COMPLETE%206-1-2012.pdf>.

TABLE 14: RELATIVE UTILIZATION OF DISPUTE RESOLUTION METHODS, 1997 – 2005

Year	Cases Mediated	Cases Arbitrated	Cases Evaluated
1997	9,946 (94.7%)	555 (5.3%)	2 (0.0%)
1998 (Jan. - June)	5,932 (99.5%)	13 (0.2%)	14 (0.2%)
FY 1999	12,988 (95.9%)	446 (3.3%)	106 (0.8%)
FY 2000	14,491 (97.5%)	274 (1.8%)	104 (0.7%)
FY 2001	15,169 (98.1%)	272 (1.8%)	22 (0.1%)
FY 2002	17,289 (99.3%)	114 (0.7%)	12 (0.1%)
FY 2003	19,660 (99.7%)	46 (0.2%)	10 (0.1%)
FY 2004	20,141 (99.6%)	65 (0.3%)	8 (0.0%)
FY 2005	21,776 (99.8%)	37 (0.2%)	4 (0.0%)
Total	137,393 (98.4%)	1,822 (1.3%)	282 (0.2%)

In practice, numerous options merely provide litigants the illusion of choice. The only option of real significance is that which occurs by default. When courts establish a default rule for dispute resolution, parties are unlikely to opt for another process.¹³⁰ The Northern District of California's early neutral evaluation program provides a telling illustration:

Although even-numbered cases in the categories designated for ENE were administratively assigned to the program, all parties in these cases could have asked to be excused from either the entire process or from having to appear in person. Interestingly, fewer than 10 percent of the parties in ENE actually took advantage of the opt-out provision. Several parties stated in their interviews that their attorneys told them ENE would not work in their case, but neither they nor their attorneys brought up the idea of petitioning to be excused from the process.

130. See Barendrecht & de Vries, *supra* note 64, at 93–94; see also THALER & SUNSTEIN, *supra* note 121, at 85 (default rules typically followed). There are two important qualifications to this statement, however. First, parties frequently bend rules in their favor without formally opting out of them. In the cases sampled for this study, parties waited between zero and forty-six months to mediate; the standard deviation of time elapsed from filing to mediation was 5.79 months (see Table 4). Similarly, some parties mediated without being formally notified of the court's mediation requirement while others mediated after the ADR office issued eleven notices (see Table 7). Second, the adversarial context of litigation often prevents parties from expressing their true intentions with respect to settlement and litigation. This theme, the litigants' dilemma, is elaborated below.

Meanwhile, parties whose cases were not automatically assigned to ENE were told that they could nonetheless participate if they so requested. *None* of these parties did so during the study period.¹³¹

The authors continue:

Despite the fact that over 80 percent of attorneys said they would select ENE in other cases if it were available, no attorney whose case was not administratively assigned to ENE requested to participate in the program. . . .

Similarly, few of those whose cases *were* assigned to ENE opted out, despite the fact that many expressed serious reservations or a firm desire not to participate. This indicates that litigants and their attorneys often follow the path of least resistance, simply staying on the track into which they were initially slotted regardless of their judgments about the suitability of that track for their case. What may appear to be complete freedom of choice to participate in alternative dispute resolution may actually result in no real choices being made at all.¹³²

This data sample also highlights the importance of default rules. Although the parties had the option of selecting mediation or case evaluation, the default method of mediation was followed in nearly all cases. Similarly, the court maintains a list of mediators that it has approved to appoint in the event parties cannot agreed upon a mediator, but the parties are free to select any mediator on the list or agree to use a mediator who is not on the court's list. Nearly all parties selected a mediator on the court's roster, even though it represents only a fraction of state-approved mediators.

While consideration of the parties' goals is certainly well-intentioned, there is no evidence of a general demand for multiple alternatives to litigation. For parties seeking support for their children, compensation for an injury, or damages for a breached contract, dispute resolution is simply a practical means to an end and mediation is the most popular means available.¹³³ Mediation has the advantage of centuries-old traditions of community dispute resolution and

131. See Rosenberg & Folberg, *supra* note 9, at 1535–36; see also Stipanowich, *supra* note 3, at 846 (observing that “everything hinges on the details”).

132. Rosenberg & Folberg, *supra* note 9, at 1538. The authors explain this apparent paradox as a consequence of strategic bluffing: attorneys fear appearing weak to adversaries while, at the same time, privately hoping for settlement. *Id.* at 1541.

133. Typical parties appreciate some control over when, where, and whether they want to pay for mediation, but too many options, particularly complex and unpopular options, complicate interactions with the court system. Parties want to trust the expertise of a neutral third parties and wisdom of established rules. People, including lawyers, do not want to weigh pros and cons of all options and customize dispute

can be readily understood by typical litigants while more innovative practices are relatively incomprehensible outside legal circles. Abundant choices, which appeal to an attorney's capacity for logic and strategy, are an imposing burden upon common citizens trying to navigate our court systems. Viewed from the perspective of ordinary litigants, multiple courtroom doors and diverse options are a confounding maze, rather than a practical means of self-determination.

The point is not to "dumb down" the governing process, but rather to apply enough intelligence and foresight in the design of dispute resolution systems that ordinary people can interact in a meaningful way with the courts. An obvious point understated in academic analysis of ADR is that most cases do not raise the type of complex legal issues one studies in appellate court opinions. Every case presents unique facts, but seldom sets legal precedent. Rather than design settlement programs to accommodate exceptional cases, courts should design processes for typical cases.

A case screener tasked with directing cases to the appropriate forum for resolving their dispute would err at a disturbing rate. The best efforts of academics over the past 35 years have generated no agreed upon standard to proactively determine which dispute resolution method is most appropriate to a given case.¹³⁴

A human screener is prone to overestimating the salience of facts that appear to distinguish one case from another and underestimating the influence of consistent forces that affect all cases. Moreover, because parties are engaged in an adversarial contest, they have incentives to provide inaccurate and misleading information to a screener. In reality, only a few factors evident before mediation are significantly correlated with outcomes and these variables must take on extreme values before one can predict the likelihood of mediated settlement with real certainty.¹³⁵

Assuming a screener can guide parties to the most appropriate "door" in the MDC, what happens next? The subsequent process depends on someone other than the screener, most likely a neutral third-party, and the label on the door is no longer relevant. The nature of the subsequent process depends far more on the neutral's individual

resolution methods on a case-by-case basis. Many lawyers practice law in multiple jurisdictions and the diversity of administrative rules makes navigating the judicial process increasingly complicated.

134. According to Fiss, *supra* note 41, at 1088, "[i]t is impossible to formulate adequate criteria for prospectively sorting cases."

135. For results consistent with the statistical analysis herein, see Henderson, *supra* note 23, at 143 ("[t]he most significant result overall is the relatively few variables entering the model").

style than program rules. Even if mediators are trained and expected to follow a practical method of mediation, they are likely to vary their approach on a case-by-case basis rather than follow a script. In their study of early neutral evaluation in the Northern District of California, Rosenberg and Folberg noted that neutrals conducted evaluation sessions in dramatically different manners, despite written rules and training on the conduct of sessions.¹³⁶

Frequent calls to strengthen regulation of mediators and mediation conduct are misguided.¹³⁷ There is no practical way to enforce such regulations. The confidentiality of mediation precludes routine inquiry into mediation communications. What actually transpires in a mediation session should be considered a “black box.” Regulators may observe some mediation sessions, but continuous direct oversight of mediation is impractical. Even if regulators used surveillance technologies to monitor mediation sessions, what mediation behavior should be required? This question immediately raises an ongoing debate of contrasting mediation techniques and philosophies: should the mediator evaluate claims, facilitate discussions, or transform the conflict? This study suggests that regulations along these lines would not improve outcomes; behavior and conduct in mediation sessions are not related to the likelihood of settlement.¹³⁸ Participants in mediation frequently use strategic bargaining tactics, so an effort to regulate what is said in mediation sessions is unlikely to be indicative of what is really taking place.

Efforts to regulate mediation conduct are likely to antagonize the ADR community and generate conflict rather than cooperation with the court system. Trying to improve outcomes by controlling what happens during mediation sessions spoils what is best about mediation as a method of resolving disputes. Attempting to control mediator conduct undermines a mediator’s ability to adapt his or her approach and temperament to the specific circumstances and personalities in a given case. The issue is not merely philosophical but extremely practical as well. Imposing rules for mediation conduct upon parties is likely to decrease settlement rates.¹³⁹ While an evaluative,

136. Rosenberg & Folberg, *supra* note 9.

137. *But see* Diane Keaty, *I’d Like to Complain About My Mediator, Please*, 6 AC-RESOLUTION 20 (2006) (advocating stronger mediator complain process to improve mediation results).

138. *See* notes 77-87, *infra*, and accompanying text on the impact of mediator selection on likelihood of settlement and works cited therein.

139. According to Henderson, *supra* note 23, at 145, “[o]f all the variables in the model, the source of the mediation rules used was, by far, the best predictor of mediation settlement. If the rules developed by the AAA, CPR, or some other institution

facilitative, or transformative approach may suit a particular mediator's skills and personality, a single style is unlikely to suit all mediators. Regulating mediation conduct beyond fundamental rules inhibits innovation and contributes to the long-run detriment of dispute resolution.

Efforts to help litigants resolve disputes should focus on variables that are subject to observation, regulation, and control, rather than what occurs during mediation sessions. The next section outlines some specific measures subject to court administration that would improve trial court dispute resolution methods.

V. HOW TO RENOVATE THE MULTI-DOOR COURTHOUSE

Our visions of efficient, futuristic courts must be tempered by a strong dose of humility: *the likelihood of mediated settlement is largely subject to idiosyncratic factors that are not subject to direct observation*. Some cases are more likely to settle through mediation than others, but we can only improve outcomes so much by attempting to match cases to mediators invading parties' private thoughts. While using some of the variables analyzed above to screen cases can make mediation more efficient and productive, the data reveals a settlement logic that suggests a dramatic renovation of the MDC concept. It is not a costly or complex renovation but it does demand that courts fundamentally alter how they interact with parties. A brief detour into the retail industry illustrates that a subtle change in customer service can have great results.

Retailers sell a wide variety of products to consumers but generally endeavor to efficiently serve consumer demand to maximize sales. At one time, the prevailing General Store model placed merchandise behind counters and sales clerks in charge of serving customers. In 1945, Sam Walton would recall, all variety stores "had cash registers and clerk aisles behind each counter throughout the store, and the clerks would wait on customers. Self-service hadn't been invented yet."¹⁴⁰ Five years later, Walton opened a store in Bentonville, Arkansas with merchandise arranged so that customers could serve themselves and bring their purchases to a cashier for payment – a store now known as the first Wal-Mart. At the time, it was only the third self-service variety store in the country.¹⁴¹ Renovating

(including the court) were used, settlement was significantly less likely to occur than when parties developed their own rules."

140. See SAM WALTON & JOHN HUEY, *MADE IN AMERICA* 29 (1993).

141. *Id.* at 43.

the variety store layout to allow consumers to serve themselves required retailers to widen store aisles, display products clearly, post clear prices, and anticipate customer demands. Significantly, this revolution did not occur because Walton created a new product: he changed the layout of his stores.

Courts should evolve the MDC model of dispute resolution as retailers have evolved from the general store model into self-service stores. The advantages of a consumer-centered model are the same in both cases: (1) parties (or consumers) can make choices effectively so long as their options are clear, and (2) relying on case screeners (or store clerks) increases costs and slows down service.

While self-selection poses problems for statistical analysis, it is a boon for designing dispute resolution systems. The fact that parties tend to distinguish themselves over time according to their amenability to settlement can help courts encourage or order mediation in cases that mediation is most likely to resolve. While parties may lack the ability to articulate mediation strategies, the data indicates that they enjoy an intuitive sense of whether their cases are likely to settle through mediation. This study did not detect significant differences between pro se litigants and represented parties in mediation sessions.

It is important to consider mediation as one mechanism that exists in a set of procedures for resolving litigation.¹⁴² Even the most ardent proponents of mediation should recognize that it is not appropriate or likely to yield settlements in all cases, and that facilitating voluntary settlements is costly and time consuming. Ideally, trial courts would want to differentiate among: (1) cases that are likely to settle without substantial intervention, (2) cases that are likely to settle through court-connected mediation, and (3) cases that will require formal adjudication. But how are courts to fairly and effectively distinguish among their cases?¹⁴³ The process must be simple,

142. This is not a novel thought. Many have identified mediation as one method along a spectrum of dispute resolution methods. See e.g. YARN AND JONES, *supra* note 26, 21-23. Rather than envisioning mediation as a mid-point of methods that exist at one point in time, consider arranging methods in time sequence, like the arrangement of various operations in a factory.

143. This inquiry should be distinguished from an advocate's determination whether he or she should advise his client to mediate, or undergo other ADR processes. For those considerations, see Lande, *supra* note 25, at 111-12 (discussing the CPR's ADR Suitability Guide based on detailed client questionnaires); John Lande & Gregg Herman, *Fitting the Forum to the Family Fuss: Choosing Mediation, Collaborative Law, or Cooperative Law for Negotiating Divorce Cases*, 42 FAM. CT. REV. 280 (2004) (identifying pros and cons of various ADR methods and suggesting protocol for advocates advising clients in divorce cases).

easily understood, and not preoccupied with exceptional cases.¹⁴⁴ Failing to appropriately distinguish cases is bad for both the courts and the parties involved. Applying excessive coercive control undermines individual autonomy and wastes public resources. Applying too little control perpetuates conflict and thwarts justice. It is imperative that case management decisions be accurate.¹⁴⁵ Consistent with the architectural metaphor of the MDC, this article suggests four specific renovations.

A. *Spacious Lobbies Needed*

In the MDC model, the "lobby" is no more than an entry point for cases which are promptly steered to some dispute resolution method. This is a mistake. Dispute resolution systems should embrace the fact that most cases settle without mediation or trial. Except for emergency matters, there should be little or no effort by the court to steer parties to any dispute resolution process for some limited period of time.¹⁴⁶

Spacious lobbies are needed to separate uncontested matters requiring minimal intervention from contested matters that require

144. Drucker's insights on management principles offer great insight for effective case management:

A control system can control only the regular process. It must identify genuine exceptions, but it cannot handle them. It can only make sure that they do not clog the process itself.

Any process is an attempt to make order out of the chaos of the universe so that the great majority of phenomena, of actions, of problems, or situations, can be routinized and do not require individual and specific decision. A control system is a tool to enable men of average competence to do things which if tackled as unique events could be done only by exceptional skill, if not by genius. A control system that violates this rule and tries to provide for handling the exceptions will, therefore, defeat the process. It will sacrifice the 97 percent we understand to the 3 percent we do not understand.

Exceptions can never be prevented but they can be eliminated from the work process. They than can be handled separately and as exceptions. To make a control system take care of exceptions misdirects and undermines both the work process and the control system.

PETER DRUCKER, *MANAGEMENT: TASKS, RESPONSIBILITIES, PRACTICES* 220 (1974).

145. Again, Drucker, *id.* at 218, is instructive: "The purpose of control is to make the process go smoothly, properly and according to high standards. The first question to ask of the control system is whether it maintains the process within a permissible range of deviation with the minimum effort. To spend a dollar to protect 99 cents is not control. It is waste. 'What is the minimum of control that will maintain the process?' is the right question to ask."

146. This is not to suggest that courts stay litigation. Parties in the lobby could proceed with discovery and other pre-trial matters.

more attention. Many, if not most, court cases are not seriously contested. There is no fair and reliable way to predict whether a divorce is uncontested or will require court intervention, but time settles most conflicts. We should expect the majority of cases to be decided by default or settled through direct negotiation of parties.

In the subject court, relatively few cases of any type actually become eligible for referral to mediation. Based on this study, one could expect the lobby to be the appropriate forum for resolving approximately half of the general court docket.

The suggestion that ADR programs should avoid intervening in disputes for a substantial period of time contrasts with the suggestion that courts should move to early case handling or assume that mediation is the preferred method of resolving disputes.¹⁴⁷ Enforcing procedural rules that limit a defendant's time to answer and efficiently processing uncontested matters are effective court practices prior to actively attempting to resolve disputes.

B. *Open Door to Voluntary Mediation*

If a case is not resolved in the metaphorical lobby, the court should encourage litigants to voluntarily mediate. Though the court may differentially target some types of cases over others, it should maintain an open door policy for voluntary mediation.

The main problem with voluntary court-connected mediation programs has been low participation rates.¹⁴⁸ Given most cases settle, it is surprising that few parties volunteer for court-connected mediation. Why do few parties voluntarily mediate? If mediation helps parties further their interests, parties should voluntarily mediate, particularly if mediation services are provided at no cost.

This problem of under-utilization arises from a specific collective action problem that should be explicitly addressed. Parties must be able to disclose their willingness to mediate in confidence. Parties in adversarial litigation are unlikely to disclose, for strategic reasons, whether their case will settle without substantial invention, settle

147. See Lande, *supra* note 25 (emphasizing early intervention for case management); Sander & Rozdeiczer, *supra* note 48 (concluding that "Step One" in matching cases to ADR forums is to assume that mediation is the right method).

148. See Shestowsky, *supra* note 127, at 579–80 ("many scholars have noted with surprise the relatively low participation rates in voluntary programs"); 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, 594 (2003) ("We know based on voluntary usage rates . . . that few individual disputants choose to use court-connected mediation when such usage is not mandated").

through mediation, or require trial. Once engaged in intense conflict, disputants "are likely to go out of their way to avoid the appearance of having a strong interest in compromise," Rubin et al. write. Disclosing true preferences for compromise may "undermine the impression that [the] Party is a tough and opportunistic opponent who cannot be forced into doing things against its will."¹⁴⁹ Consider a simple lawsuit for damages. Defendant is liable to plaintiff in the amount of X dollars. If the case is resolved through litigation, the cost of litigation is C dollars. If either party reveals a greater inclination to settle than the other, that party pays an additional cost comparable to C . Mediation would resolve the case sooner and without litigation costs, so the parties might agree to discount settlement price by b , a number between 0 and 1. Naturally, both parties want the best possible outcome they can manage. Both parties know X , C , and pay-offs associated with each of four possible outcomes. The rules of the game do not afford plaintiff the opportunity to repeatedly assert the same claim against defendant. The litigants' dilemma can be illustrated with a pay-off matrix:

TABLE 15: VOLUNTARY MEDIATION DECISION AS LITIGANTS' DILEMMA

Plaintiff's Options:	Defendant's Options	
	Reject Mediation	Accept Mediation
Reject Mediation	($X-C, -X-C$)	($X, -X-2C$)
Accept Mediation	($X-2C, -X$)	($bX, -bX$)

(Plaintiff's Pay-Off, Defendant's Pay-Off)

If these parties are offered an opportunity to voluntarily mediate, they will both reject mediation. Consider first the plaintiff's

149. JEFFREY RUBIN, DEAN G. PRUITT & SUNG HEE KIM, *SOCIAL CONFLICT: ESCALATION, STALEMATE, AND SETTLEMENT* 159 (2d ed. 1994). See also Wayne D. Brazil, *A Close Look at Three Court-Sponsored ADR Programs: Why They Exist, How They Operate, What They Deliver, and Whether They Threaten Important Values*, 1990 U. CHI. LEGAL F. 328-29 (private negotiations problematic because litigators "are terrified of exposing vulnerabilities in their case, weaknesses in their personality, or any suggestions of infirmity in their resolve to take their opponent to the proverbial mat. . . . Fear or suspicion may discourage lawyers even from putting possible solution options on the table."); Craig McEwen, *Managing Corporate Disputing: Overcoming Barriers to the Effective Use of Mediation for Reducing the Cost and Cost of Litigation*, 14 OHIO ST. J. DISP. RESOL. 1, 9-14 (1998) (discussing how factors such as competitive business culture, emotional entanglements, law firm finances, and risk-averse legal culture inhibit effective use of alternative dispute resolution); Russell Korobkin & Chris Guthrie, *Psychological Barriers to Litigation Settlement: An Experimental Approach*, 93 MICH. L. REV. 107 (1994).

strategy. If plaintiff believes defendant will reject mediation, plaintiff will reject mediation to avoid appearing weak and suffering a penalty. $X - C$ is greater than $X - 2C$, no matter the values of X or C . If plaintiff believes defendant will accept mediation, plaintiff should reject mediation and dictate the terms of a forced surrender ($X > bX$). Because plaintiff can be expected to reject mediation, defendant will too ($-X - C > -X - 2C$).¹⁵⁰ It is a problem akin to the famous Prisoner's Dilemma.¹⁵¹

Court-ordered mediation is one solution to the litigants' dilemma.¹⁵² The court orders the parties to do what they privately desire but cannot admit to one another while engaged in litigation. Court-ordered mediation, however, is an inefficient and coercive solution to the litigants' dilemma. As indicated above with respect to administrative effort, coercive force actually reduces the likelihood of settlement.¹⁵³ The harder the courts work to engineer mediated

150. Repeat players may escape the litigants' dilemma; frequent interaction among attorneys in specialized practice areas, for example, could support frequent use of voluntary mediation.

151. In the prisoners' dilemma, two suspects are separately interrogated by the police. If neither suspect confesses, they will be detained until a judge sets them free. If one suspect cooperates and the other does not, the former will be set free and the latter receives a very long sentence. If both confess, they both receive a medium-length sentence. What happens? Because the suspects are interrogated separately, they cannot coordinate their response and must maximize their individual outcomes. If suspect B is silent, suspect A should confess to walk free rather than wait until trial. If suspect B confesses, suspect A should confess to avoid being singled out for a very long sentence. Suspect B faces the same risks and rewards. Both suspects confess. They would both be better off remaining silent, but cooperation is not a stable equilibrium.

Game theory has been eloquently applied to various legal issues, including settlement negotiations during litigation. See, e.g., DOUGLAS BAIRD, ROBERT GERTNER & RANDAL PICKER, *GAME THEORY AND THE LAW* (1994); Robert Cooter, Stephen Marks & Robert Mnookin, *Bargaining in the Shadow of the Law: A Testable Model of Strategic Behavior*, 11 J. LEGAL STUD. 225 (1982) (noting that trial represents a bargaining breakdown).

152. When mediation was a new process that parties could not fully understand or appreciate, courts may have been justified in ordering mediation to overcome the parties' lack of knowledge. Mediation is now no longer an unknown or experimental process. If parties are so irrational that they cannot weigh the pros and cons of mediation for themselves, how can they be expected to weigh the pros and cons of settlement offers during mediation?

153. The same phenomenon is also weakly indicated by the positive correlation of months waiting and probability of settlement. Forcing parties to mediate before they believe they have discovered the relevant facts upon which to base settlement appears to decrease the likelihood of settlement.

settlements, the less likely mediation is to yield settlements.¹⁵⁴ Additionally, ordering parties to mediate under the threat of court sanction may be fundamentally at odds with the core values of mediation. The process is meant to provide parties opportunities for self-determination, ideally beginning with the decision of whether to mediate.

Another solution to the litigants' dilemma is allowing parties to reveal their sincere preferences without fear of appearing weak to their adversaries. For example, parties can disclose their preference to accept or reject mediation to a trusted agent who schedules a mediation session if it acceptable to all parties or, if any party rejects mediation, reports that there is no agreement to mediate. In this "double-blind" design, if all adversaries agree to mediate, a cooperative solution to the litigants' dilemma is achieved; if adversaries do not agree to mediate, no individual strategy is compromised by making a damaging disclosure. Therefore, both parties are indifferent to the other rejecting mediation because they are no worse off.

TABLE 16: COORDINATED VOLUNTARY MEDIATION DECISION PAY-OFFS

Plaintiff's Options:	Defendant's Options	
	Reject Mediation	Accept Mediation
Reject Mediation	(X-C,-X-C)	(X-C,-X-C)
Accept Mediation	(X-C,-X-C)	(bX,-bX)

(Plaintiff's Pay-Off, Defendant's Pay-Off)

This suggestion can be stated more specifically. It is suggested that the court identify parties whose cases have remained pending for a certain number of months. Parties to these cases are invited (not required) to participate in a court-connected mediation program. The invitation should highlight the positive features of mediation. Every party would be asked: Would you agree to mediate this case if all other parties were willing to mediate? All parties would be required to answer this question promptly, perhaps within fourteen or thirty day deadlines.¹⁵⁵ The logistics of such communications may

154. A number of authors have similarly suggested that requiring parties to mediate in good faith is counterproductive. See, e.g., Ulrich Boettger, *Efficiency Versus Party Empowerment — Against A Good-Faith Requirement in Mandatory Mediation*, 23 REV. LITIG. 1 (2004); John Lande, *Using Dispute System Design Methods to Promote Good-Faith Participation in Court-Connected Mediation Programs*, 50 UCLA L. REV. 69 (2002). This would also suggest that searching for an appropriate sanction for a party's failure to participate in mediation is futile.

155. The number of days suggested for the parties' reply is somewhat arbitrary, but following familiar time periods for responsive pleadings should lessen confusion and the burden on parties.

vary, but should be simple and efficient. If all parties agree to mediate, the court then appoints a mediator who proceeds to schedule a mediation session with the parties. In the pay-off illustrated above, defendant should agree to mediate because, if plaintiff also agrees to mediate, the result of $-bX$ is preferable to $-X - C$; defendant is now indifferent to the possibility that plaintiff is not willing to mediate so this consideration should not sway defendant. It is interesting to note that there is now no dominant strategy for plaintiff. Whether the pay-off of litigation, $X - C$, is greater than that of mediation, bX , depends on the values of X , C , and b . An open door to voluntary mediation under these terms requires plaintiff to determine when the discount necessary to produce mediated settlement ($X - bX$) is less than the cost of litigation (C). While these terms can be succinctly stated, it is difficult for anyone other than the plaintiff to know whether mediation is likely to yield settlement terms than pursuing litigation.

Mediator selection significantly affects the likelihood of settlement, but it is not clear why some mediators settle cases at higher rates than others. In this study, when we controlled for the type and complexity of the case mediated, the mediator's experience, hourly rate, and attorney status were not significantly correlated to settlement. Cost is another concern. The basic cost analysis conducted above indicates that attempting to accommodate party preferences for specific mediators imposes significant administrative costs. A voluntary, court-connected mediation program should utilize volunteer mediators, including new mediators seeking experience and contacts, non-attorney mediators, retired attorneys, and law students participating in clinical programs for dispute resolution.¹⁵⁶ The empirical evidence suggests experienced mediators who command high hourly fees are not significantly better than other mediators at facilitating settlements. Some courts, particularly rural courts far from law schools and legal organizations, might consider employing a staff mediator on a full or part-time basis rather than administering a panel of private mediators.

It should be emphasized that court-ordered mediation does not necessarily require court-annexed mediation. The evidence accumulated here suggests that the cost of producing settlements through court-annexed mediation is relatively high. Government-operated

156. Providing mediators an opportunity to provide free or low-cost mediation services to litigants through court-connected programs offers important opportunities for professional education and the development of mediation norms and ethics. See Brazil, *supra* note 16, at 255–56.

mediation programs in competition with private sector services are likely driving up costs.¹⁵⁷ Rather than provide mediation services directly, courts should consider utilizing community-based services when parties have agreed to voluntary mediation.

Statistical analysis of the likelihood of settlement indicates that mediation is particularly effective when utilized informally in cases that are not particularly complicated. Indeed, case complexity is strongly correlated to impasse as is administrative difficulty scheduling a case for mediation. All other factors being equal, neither mediators who charge higher hourly rates nor mediators who frequently mediate, settle a higher percentage of cases. Attorney-mediators settled cases at a higher rate than non-attorney mediators, but statistical analysis revealed that the mediator's gender is more significant than occupation with respect to the likelihood of settlement. Further analysis of the determinants of individual mediators' settlement rates showed that settlement rates decline the more often mediators were selected by attorneys who frequently mediated. While mediators certainly affect mediation outcomes, the criteria by which mediators are deemed qualified to participate in court-connected programs and selected for assignments bears only a modest relationship to positive outcomes.

Some cases are better mediation prospects than others, but who can decide which cases are best suited for mediation? The parties themselves are better suited to assess the likelihood of settlement, however limited their ability to articulate their intuitions and beliefs, than a case screener employed by the courts. It appears that litigants have an intuitive sense of whether their case is more likely than not to settle through mediation. Parties can be expected to mediate voluntarily when they believe that mediation is likely to do some good.¹⁵⁸ Leaving an open door to basic mediation services enables parties to screen themselves effectively.

A number of authors have questioned whether involuntary mediations yield fewer settlements than voluntary mediations. Some have suggested that whether parties are ordered to mediation or do

157. Court-connected mediation programs should consider their impact on the private sector and attempt to manage their relationship with the private sector. *See id.*, at 275-77.

158. Wissler, *supra* note 12, at 676, found that cases were more likely to settle if parties entered mediation at judge's initiative or a party's request than through random assignment to mediation. Attorneys also indicated that they considered the mediation process to be fairer when occurring as a result of a request than assignment. *Id.* at 683.

so voluntarily has no effect on settlement rates.¹⁵⁹ The notion that parties ordered to mediate are just as likely to settle as parties who mediate voluntarily has been discredited by a massive study of mediation programs in California state courts. The California study considered, among other design variables, the performance of mandatory and voluntary mediation programs. The Administrative Office of the Courts noted the difficulty of directly comparing mandatory and voluntary mediation programs due to a self-selection problem: "parties are likely not to stipulate to mediation either when they believe that their case is not amenable to resolution through mediation or when they believe their case is 'easy' and will resolve without the need for any intervention."¹⁶⁰ Broadly mandating "easy" cases to mediation creates the false impression that forcing parties to mediate does not decrease the likelihood of settlement. When the authors of the California study attempted to account for the comparability problem, they found that the settlement rates of voluntary and mandatory programs fell into an expected pattern.¹⁶¹ The finding that settlement is

159. See, e.g., Sander, *supra* note 3, at 708 ("the results in terms of settlements are more or less the same regardless of whether the parties opted for mediation or were ordered into it"); STEVEN GOLDBERG, FRANK SANDER & NANCY ROGERS, *DISPUTE RESOLUTION: NEGOTIATION, MEDIATION, AND OTHER PROCESSES* 393 (6th Ed. 1999). The empirical foundations of this statement are based on three sources. First, the authors cite Stephen Goldberg & Jeanne Brett, *Disputants' Perspectives on the Differences between Mediation and Arbitration*, 6 *Neg. J.* 249 (1990) (based on survey responses to pilot program offered for mine workers from 1980 to 1981). Second, Goldberg and Brett cite Craig McEwen & Richard Maiman, *Mediation in Small Claims Court: Consensual Processes and Outcomes*, in *MEDIATION RESEARCH: THE PROCESS AND EFFECTIVENESS OF THIRD-PARTY INTERVENTION* 53 (Kenneth Kressel, Dean Pruitt & Associates, eds. 1989) (observation of compliance, not settlement, rates in pilot mediation program in Maine small claims courts started in 1978). Finally, the authors cite Jessica Pearson & Nancy Thoennes, *Divorce Mediation: Reflections on a Decade of Research*, in *MEDIATION RESEARCH: THE PROCESS AND EFFECTIVENESS OF THIRD-PARTY INTERVENTION* 9 (Kenneth Kressel, Dean Pruitt & Associates, eds. 1989) (percentage settlement rates comparable between voluntary pilot mediation program that facilitated 160 sessions in 1981 and mandatory pilot program launched in Los Angeles in 1981, no controls or statistics on cases mediated by respective programs). In sum, the evidence that parties settle at comparable rates whether they volunteer or are ordered to mediation is generally 30 years old, based on surveys responses in small-scale pilot programs for specialized disputes with no statistical controls on the comparability of mandatory and voluntary mediation sessions.

160. JUDICIAL COUNCIL OF CALIFORNIA, *supra* note 11, at 21–22, 24.

161. The California pilot program study found that the mandatory and voluntary programs followed an expected pattern: "a higher percentage of cases were referred to mediation in the mandatory programs than in the voluntary programs, but a lower percentage of cases reached settlement in the mandatory programs than in the voluntary ones." *Id.* at 29.

more likely when the parties mediate voluntarily is consistent with findings of a number of studies.¹⁶²

A secondary benefit of notifying parties about their options for mediation and settlement is providing a catalyst for direct negotiation and settlement. Simply notifying parties about mediation can lead to direct settlements. The study of California pilot mediation programs found that "simply being referred to mediation may have encouraged some litigants to settle before the mediation took place."¹⁶³

The data in this study and that available for other Georgia mediation programs show that notices of mediation "nudge" parties to settlement. Consider group of cases referred to ADR in a given time period. More cases resolve without mediation than through mediation.

In the cases studied here, there were many notices of mediation issued in cases that were never mediated. Seven-thousand-four-hundred-and-eighty-four notices were issued in 3,706 different cases during the sixteen months studied, but the 2,414 reported sessions account for only 61.5% (4,606 of 7,484) of the notices issued. Parties in 1,292 cases were notified to mediate, but never mediated.

The data assembled for this study and Cobb Superior Court ADR Program figures issued in annual reports from the state agency show that notices of mediation "nudge" parties to settlement.¹⁶⁴ These sources allow us to analyze what actually happens to cases the court refers to mediation. As Table 17 indicates, many more of the cases referred to mediation between 1997 and 2005 settled prior to mediation than through mediation. This data suggests that the notices themselves are very effective in inducing settlement.¹⁶⁵

162. See Hensler, *supra* note 2, at 179 and citations cited therein (citing psychological research on behavior showing participants satisfied to have role in mediation process and procedure); Thomas J. Stipanowich, *Beyond Arbitration: Innovation and Evolution in the United States Construction Industry*, 31 WAKE FOREST L. REV. 61, 122 (1996) (based on two surveys of construction industry disputes, author found a significantly higher rate of settlement when parties utilizes their own mediation procedures, as opposed to standard court forms, and higher rate of settlement when parties agreed upon a mediator, rather than having a mediator appointed to their case).

163. JUDICIAL COUNCIL OF CALIFORNIA, *supra* note 11, at 32.

164. *Id.*

165. GODR Annual Reports grouped full and partial settlements together from FY 1997 to 2001. The figures above represent estimates of the number of full and partial settlements during this time period based on the historic ratio of full to partial settlement from 2002 to 2005. The data also reflects a change from fiscal to calendar year reporting. FY 1998 data includes cases referred to mediation during the first half of the fiscal year; remainder of FY 1998 is included in 1999 data.

TABLE 17: PROCESS ACTUALLY USED IN CASES NOTIFIED
TO MEDIATE BY CASE TYPE

Case Type	Referrals	Resolved Prior	Cases Mediated	Mediated Settlements
Child Support	12	4 (33.3%)	8	5 (41.7%)
Complaint	663	192 (29.0%)	334	104 (15.7%)
Contempt	64	15 (23.4%)	47	19 (29.7%)
Custody	156	71 (45.5%)	83	34 (21.8%)
Damages	160	84 (52.5%)	69	28 (17.5%)
Divorce	1,921	520 (27.1%)	1,374	679 (35.3%)
Legitimate	135	49 (36.3%)	79	45 (33.3%)
Modification	472	128 (27.1%)	336	136 (28.8%)
Paternity	33	4 (12.1%)	26	13 (39.4%)
Separate Maintenance	30	11 (36.7%)	18	7 (23.3%)
Visitation	14	3 (21.4%)	11	7 (50.0%)
All Case Types	3,941	1,527 (38.7%)	2,414	1,092 (27.8%)

A significant percentage of cases referred to mediation settle without convening a mediation session. While some cases that settled after referral but prior to mediation may have settled with or without receiving a court notice to mediate, the general rate of settlement slows dramatically after a few months of litigation, which suggests that notifications themselves increase the likelihood of settlement in an appreciable manner. Indeed, the available data indicates that more cases referred to mediation settle without mediation (35.7%) than as a result of mediation (23.0%). Fitting the form to the fuss may be an apt new mantra for dispute resolution. Prompting parties to consider mediation appears to induce direct negotiations and out-of-court settlements at a surprisingly high rate.

Consistent with the premise that courts should not apply excessive settlement pressure, there is a cautionary tale within the otherwise positive data on relatively spontaneous settlements. As noted above, mandatory mediation can impose a relatively steep cost on litigants. Disaggregating outcomes of cases referred to mediation by case type reveals that some types of cases, once ordered to mediation, settle more often than others. Specifically, parties seeking money damages settle far more often prior to mediation than parties in other types of cases. In cases identified as complaints, for example, two cases ordered to mediate settled prior to mediation for every one that

settled through mediation; in damages cases, the ratio is greater than three to one.¹⁶⁶

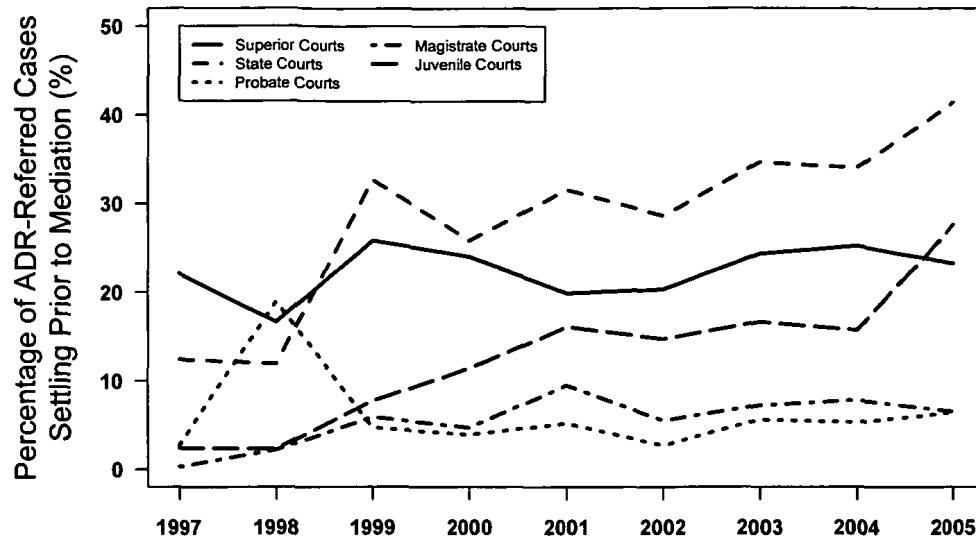
TABLE 18: ACTUAL DISPOSITION OF CASES REFERRED TO MEDIATION

Year	Mediation Referrals	Resolved Prior	Cases Mediated	Mediated Settlements
FY 1997	1,560	603 (38.7%)	957	272 (17.4%)
FY 1998	827	217 (26.2%)	610	81 (9.8%)
1999	1,424	538 (37.8%)	886	304 (21.3%)
2000	1,357	416 (30.7%)	941	281 (20.7%)
2001	1,181	357 (30.2%)	824	280 (23.7%)
2002	1,465	544 (37.1%)	921	380 (25.9%)
2003	1,517	615 (40.5%)	902	425 (28.0%)
2004	1,518	616 (40.6%)	902	419 (27.6%)
2005	1,296	425 (32.8%)	773	347 (26.8%)
Total	12,145	4,331 (35.7%)	7,814	2,789 (23.0%)

The differential impact of mandatory mediation costs on the strategies of different types of litigants is also evident in statewide data. Data assembled by the state agency for 1997-2005 indicates that the percentage of cases referred to mediation but settled prior to mediation varies according to the type of court. For most of this time period, for example, cases referred to mediation in state courts settled prior to mediation at a higher rate than in superior courts. As noted in the discussion above regarding case types, suits for money damages predominate in Georgia state courts. Moreover, the percentage of cases settling prior to mediation appears to be increasing in all types of courts.

166. The data in Table 17 is based on case sample data. Partial settlements for these years include agreements to continue mediation sessions. Mediation sessions of 2005 cases included 44 repeat sessions; 2006 cases, 56 repeat sessions; 2007 cases, 32 repeat sessions. The docket status of cases referred to mediation but not mediated at the time of this writing was determined to subtract cases currently open from column three of the table where resulting figures are reported. Of cases filed between 2005 and 2007, there are the following number of cases that have been referred to mediation, never mediated, and are still open: complaint (37), contempt (2), custody (2), damages (7), divorce (28), legitimate (5), modification (12), paternity (3), and separate maintenance (1). To facilitate a true comparison, the number of cases in which full mediated settlements were reported that are currently listed as open filed were subtracted from column five. There were ten such complaints, six such divorces, three such modification cases, and one in each of the following categories: contempt, custody, damages, legitimation, separate maintenance.

FIGURE 2: ADR REFERRED CASES SETTLING PRIOR TO MEDIATION,
BY COURT TYPE



The differential impact of mandatory mediation on the pre-mediation settlement rate of different types of cases and in different types of courts should raise some concern about equal access to our courts. Is notification of court-ordered mediation in a typical tort case, for example, simply prompting parties to negotiate directly with one another or does it present a financial burden that makes courts inaccessible? Recall that the average private cost of mediation is estimated to be \$1,858.33. According to a report by the Georgia Civil Justice Foundation, the median award in 341 superior court jury trials in Georgia between 1994 and 1997 was \$7,859 and in 108 bench trials the median award was \$17,606.¹⁶⁷ The private costs of mandatory mediation may represent 10-25% of the total expected value of a typical tort case and, as the mediation outcome data indicate, the likelihood of settling these cases through mediation is not good. Table 16 and Figure 2 suggest that many parties decide the price is too high after receiving a notice to mediate and are forced to settle before their mediation bill arrives.

At what point does requiring mediation infringe on the parties' right to a trial? Judges have discretion over docket management, but in cases where mediation is unlikely to yield settlement, requiring mediation may be a monetary sanction on parties who wish to pursue

167. Thomas A. Eaton and Susette M. Talarico, *Another Brick in the Wall: An Empirical Look at Tort Litigation in the 1990's*, 36 (2000), available at <http://www.civiljustice.org/about/AnotherBrick.pdf>.

legal recourse.¹⁶⁸ To the extent that mandatory mediation effectively clears court dockets, we must be willing to investigate why it does so. If courts were to encourage voluntary mediation rather than order parties to mediate, the danger of coercing settlement by raising litigation costs is greatly lessened.

C. *Escalators*

Parties that do not settle after a waiting period and do not agree to voluntary mediation are likely involved in a dispute requiring some degree of judicial involvement for resolution. The data presented here suggest some objective indications that a case is unlikely to settle through mediation: the parties resist mediation, file a multitude of pleadings, or a guardian ad litem is appointed. Though cases cannot be finely screened, the presence of multiple "red flags" may warrant some proactive intervention. Only when significant indicators take on extreme values can one forecast with any real confidence that a case is unlikely to settle through mediation.

The Judicial Council of California's study outlined some additional criteria to distinguish between "easy" cases that resist mediation as unnecessary and "hard" cases that parties believe are unlikely to settle through mediation. High conflict cases, that study found, have the following characteristics: "higher values, greater complexity, greater party hostility, and multiple parties in a much greater proportion" than "easy" cases that generally resolved within six months. While relatively subjective case characteristics, such as complexity and hostility, may be difficult to ascertain in advance of mediation, the amount in controversy and number of parties may serve as objective indicators of the likelihood of settlement in mediation.¹⁶⁹

Notably, the data do not indicate that unrepresented parties present any particular challenge to dispute resolution systems. Controlling for case type and other significant factors, the absence of attorneys at mediation did not significantly affect the likelihood of

168. See Dayton, *supra* note 6, at 930-32 (criticizing the implementation of ADR programs in district courts under local rules or inherent judicial authority).

169. The parties are unlikely to accurately report the degree of hostility or legal complexity because their view is always one-sided and obscured for strategic reasons. Parties may confide their true preferences to a mediator, but this confidence is premised on the mediator not disclosing the parties' true preferences after the mediation. Finally, as noted in the discussion of the correlation between duration of mediation and the likelihood of settlement, the ability to explain why a mediation session resulted in settlement or impasse after the fact does nothing to help an enlightened court program identify the best candidates for mediation.

settlement. *Pro se* litigants appear able to participate in mediation sessions much like represented parties.

Implementing these suggestions for improved utilization of mediation within the overall operation of trial courts would require accurate and up-to-date docket information. Court administrators would need to know how long cases have been pending and have the capacity to determine when all parties to a case agree to mediate. To the extent courts can efficiently identify cases that are particularly well or ill-suited for mediation, their results may be further improved. These suggestions do not require the re-invention of mediation or significant change in individual behavior. Rather, the relatively simple changes in process and choice architecture suggested here should be within reach of a reasonably determined court system.

D. *Improved Courtrooms*

The final suggested renovation to the MDC concept is to refocus attention on making courtrooms more effective as a means of resolving disputes. Our interest in alternatives should not channel energy around the problem and leave the primary problem intact. Justice Pound, in his controversial 1903 speech, advocated court reforms, not alternatives to litigation.¹⁷⁰ Chief Justice Burger reflected this true spirit of Pound when he admonished the 1976 Pound Conference: “[W]e must probe for fundamental changes and major overhaul rather than simply ‘tinkering.’”¹⁷¹

The data assembled here document how little courtroom trials contribute to the overall pattern of dispute resolution in the courts. A docket search uncovered only twenty-seven verdicts rendered in cases filed between 2005 and 2007 as of this writing. Trials appear to play a negligible role in the court’s overall case management process. As outlined in Section I, a number of studies have questioned the value of mediation programs in reducing court congestion and produced mixed results.¹⁷² A suggested direction for further research

170. Burger, *supra* note 102, at 26.

171. *Id.* at 32.

172. It stands to reason that unless alternative dispute resolution is utilized to resolve criminal trials, mediation will provide only marginal relief to the court system. Victim-offender mediation has been used in criminal cases to negotiate restitution by the offender to the victim. The outcome of victim-offender mediation does not affect the state’s criminal prosecution of the offender. See generally Mark Umbreit, Robert Coates & Betty Vos, *Victim-Offender Mediation: Evidence-Based Practice Over Three Decades*, in *THE HANDBOOK OF DISPUTE RESOLUTION* 455 (Michael Moffitt & Robert Bordone, eds., 2005). The academic literature on victim-offender mediation

along these lines is assessing the utility of trials as a means of reducing congestion in trial courts.

When parties cannot settle a dispute by other means, courtroom trials should provide a reasonable means of resolving conflict. Attempting to mediate cases that really require judgment is a misuse of both judges and mediators. However effective alternative methods of resolving disputes, some cases must be brought to trial.

To maximize the good outcomes produced by trial courts, all methods of resolving disputes are needed and should work together. Trials appear to be the least efficient component of court dispute resolution services. It is as if there is no demand for perhaps the most basic service provided by trial courts. One way to consider the issue is to disaggregate the "litigation" process into a series of methods of resolving disputes. The methods of resolving disputes include pleadings, voluntary negotiations, motions, involuntary mediations, trials, and appeals. All of the court's tools for resolving disputes should be utilized and it should be possible to adjust the mix of methods for optimal public service. It is instructive in this regard to think of a court like an economic enterprise that produces some output using a variety of inputs (labor, capital, etc). All productive inputs have a cost and are subject to diminishing returns. This means that, at any given time, the enterprise can optimize production by equalizing the marginal contribution of resources devoted to each input.¹⁷³ Mediation, representing a mid-point between direct negotiation and trial, can be improved, but improved alternatives should underscore, not relieve, the need to renovate the courtroom itself.

generally contrasts the interests of crime victims against state interests in prosecution. While the interests of crime victims and the state may sometimes conflict, those interests are not inherently opposed nor are mutually agreeable solutions impossible. A suggestion for future research and writing on criminal mediation would be to consider a three-party model in which a neutral third-party mediator facilitates a plea bargain agreeable to the state, the crime victim and the defendant. Mediators frequently facilitate multiple-party agreements in civil cases. Mediation along these lines in the criminal context may afford the opportunity to impose punishment and plan restitution with greater specificity and detail than possible in criminal trials.

173. To conduct this analysis, one would need to develop a better measure of "cost" than simple case counts because cases are not equally demanding. For example, a 10% chance of resolving a case that persists for five years and consumes 1,000 hours of time could be equivalent to a 50% chance of resolving a case that lasts one year and consumes 200 hours of time. A judge that resolves one major case may be just as productive as the magistrate who resolves hundreds of minor cases.

VI. CONCLUSION

This study has attempted to identify some previously unidentified general principles about effective litigation management and address the frequently lamented lack of evidence about the mediation process. Relatively simple data about a case can help roughly gauge the likelihood of settlement in mediation. This information is useful as it allows courts to maximize the effectiveness of mediation programs as part of a general design for resolving legal disputes.

Further research on mediation could improve upon outcome measures by accounting for complaints and controversy arising out of mediation sessions. Our measure of outcomes could be improved by discounting cases where parties return to court to set aside mediated settlement, challenge settlement on appeal, or promptly return to court to modify their settlement.

Renovating state trial courts to resolve disputes more effectively on reduced budgets is a critical and exciting challenge for judges, court administrators, the legal community, and individual litigants. The primary conclusion of this research is that meeting this challenge will require courts to empower litigants to make strategic choices that courts are ill-equipped for make for litigants. I have suggested that courts should consider how retail stores modified the general store model to facilitate consumer choice, handle more consumer traffic, and lower operating costs. Consistent with the architectural language of the multi-door courthouse, this article made four specific suggestions for trial court dispute resolution systems: spacious lobbies, an open door to voluntary mediation, escalators, and improved courtrooms. These suggestions should not be read as repudiation of the original blueprints for multi-door courthouses, but rather as appreciation of the promise and spirit of this vision for trial courts.

