

What We Do and Don't Know About Court-Connected Mediation

NANCY A. WELSH

PROFESSOR OF LAW & DIRECTOR,
DISPUTE RESOLUTION PROGRAM



Is It Fair to Say That We Know...

- There is a lot more public awareness of mediation now than in 2000.
- Mediation is a regular part of the law school curriculum.
- Law students know they need to learn about mediation.
- Mediation is now an integral part of civil litigation.
- Mediation is helping people to communicate and come to their own resolutions.
- There is more than one approach to mediation.
- Certain mediator techniques are regularly most effective, and others are regularly least effective.

Is It Fair to Say That We Know...

- There is a lot more public awareness of mediation now than in 2000.
- Mediation is a regular part of the law school curriculum.
- Law students know they need to learn about mediation.
- **Mediation is now an *integral* part of civil litigation.**
- **Mediation is *helping* people to *communicate* and come to their *own resolutions*.**
- There is more than one approach to mediation.
- **Certain mediator techniques are regularly *most effective*, and others are regularly *least effective*.**

Do we know that mediation is an *integral* part of civil litigation?

- Federal courts
 - All district courts
 - Selected district courts
 - Northern District of California
 - Central District of California
 - Southern District of New York
- State courts
 - California
 - New York
 - Maryland
 - Texas
 - **Florida**

Do we know that court-connected mediation is helping people to *communicate*?

Do we know that court-connected mediation is helping people come to their *own customized resolutions*?

Ultimately, do we know that court-connected mediation is *helping* people?

- Did the mediation process help the parties settle the case?
- Do the parties perceive that the benefits of participating in mediation outweighed the costs?
- Do the parties perceive that the mediation helped them?
- Do the parties perceive that the mediation process was fair?
- Do the parties perceive that the outcome was fair (or satisfactory)?

Ultimately, do we know that court-connected mediation is *helping* people?

- Did the mediation process help the parties settle the case?
- **Do the parties perceive that the benefits of participating in mediation outweighed the costs?**
- Do the parties perceive that the mediation helped them?
- **Do the parties perceive that the mediation process was fair?**
- **Do the parties perceive that the outcome was fair (or satisfactory)?**

Do we know that certain mediator techniques regularly are most effective, and others regularly are least effective?

Task Force Report: Categories of Mediator Actions and Styles

- Pressing or directive actions or approaches
- Offering recommendations, suggestions, evaluations, or opinions
- Eliciting disputants' suggestions or solutions
- Addressing disputants' emotions, relationships, or hostility
- Working to build rapport and trust, expressing empathy, structuring the agenda, or other “process” styles and actions
- Using pre-mediation caucuses, and
- Using caucuses during mediation

Defining Effectiveness: Task Force Report's Three Categories of Outcomes

- Settlement and related outcomes, including joint goal achievement, personalization of the mediated agreement, reaching a subsequent consent order, or filing post-mediation motions or actions
- Disputants' relationships or ability to work together and their perceptions of the mediator, the mediation process, or the outcome, and
- Attorneys' perceptions of mediation

Key Takeaways: What We Do Not Know

“[N]one of the categories of mediator actions has clear, uniform effects across the studies – that is, none consistently has negative effects, positive effects, or no effects – on any of the three sets of mediation outcomes.”

Anyone currently claiming that his or her mediation approach is clearly supported by “the research” as being “best practice” is over-claiming.

Key Takeaways: ...But There Are Patterns

Greater potential for *positive* effects than for negative effects, in terms of settlement and related outcomes, disputants' relationships and perceptions, and lawyers' perceptions:

- Eliciting disputants' suggestions or solutions.
- Giving more attention to disputants' emotions, relationship, and sources of conflict.
- Working to build trust and rapport, expressing empathy or praising the disputants, and structuring the agenda.
- Using pre-mediation caucuses focused on establishing trust.

Key Takeaways: ...But There Are Patterns

More likely than not to *negatively* affect disputants' relationships and their perceptions of the mediation process:

- Using caucuses during mediation
- Pressing or directive actions

Mediators' pressing or directive actions have the potential to increase settlement sometimes but ***virtually all*** studies found mediator pressure on or criticism of disputants either had no effect or had negative effects on disputants' relationships and perceptions of mediation.

How the Studies Defined “Pressing” or “Directive” Actions

- Press parties, push parties hard to change positions or expectations
- Urge parties to compromise, concede, or reach agreement
- Advocate for/agree with one side’s positions/ideas; argue one side’s case; push with bias for/against one side
- Tell parties what the settlement should be; press them toward that solution; try to make parties see things their way
- Control, dominate, direct the session
- Some also included: e.g., threaten to end mediation; use frequent caucuses; express displeasure with lack of progress; criticize one party’s behavior/approach
- Some also included aspects typically used to define other approaches: e.g., analyze strengths/weaknesses; note costs of non-agreement; make face-saving proposals; clarify parties’ needs

Initiatives to Improve What We Know

- Regularly collect and report key case and disposition data
- Regularly collect and report information regarding party perceptions
- Encourage empirical research regarding dispute resolution
- Support the work of leading organizations
- Understand ODR as creating opportunities to learn more
- Cooperate with efforts to provide “measured” transparency