ABA SECTION OF DISPUTE RESOLUTION

REPORT OF THE TASK FORCE ON RESEARCH ON MEDIATOR TECHNIQUES

June12, 2017

Task Force Members and Acknowledgments

Gary Weiner, Chair
Lawyer Mediator
Sebastopol, CA

Roselle Wissler, Principal Author
Director of Research, Lodestar Dispute
    Resolution Program
Sandra Day O'Connor College of Law, Arizona
    State University
Phoenix, AZ

Task Force Members

Alysoun Boyle
Mediator and Mediation Trainer
Ph.D. Candidate, University of Newcastle
Newcastle, Australia

Doug Frenkel
Morris M. Shuster Practice Professor of Law
University of Pennsylvania Law School
Philadelphia, PA

Teresa Frisbie
Director, Dispute Resolution Program
Loyola University Chicago School of Law
Chicago, IL

Chris Honeyman
Managing Partner
Convenor Conflict Management
Washington, D.C.

Bobbi McAdoo
Senior Fellow, Dispute Resolution Institute
    and Professor Emerita
Mitchell Hamline School of Law
St. Paul, MN

Craig McEwen
Daniel B. Fayerweather Professor of Political
    Economy and Sociology Emeritus
Bowdoin College
Brunswick, ME

Jennifer Robbennolt
Alice Curtis Campbell Professor of Law and
    Professor of Psychology
University of Illinois
Champaign, IL

Jennifer Shack
Director of Research
Resolution Systems Institute
Chicago, IL

Tania Sourdin
Dean and Professor of Law
University of Newcastle
Newcastle, Australia

Donna Stienstra
Senior Researcher
Federal Judicial Center
Washington, D.C.

Beth Trent
Senior Vice President, Public Policy, Programs
    and Resources
International Institute for Conflict Prevention &
    Resolution
New York, NY

James Wall
UM Curators' Distinguished Teaching Professor
    of Management
University of Missouri
Columbia, MO

Howard Herman
Liaison to the Section Executive Committee and
Council

Matthew Conger
Section Staff Counsel

Acknowledgements

As Chair of the Task Force on Research on Mediator Techniques, I want to acknowledge the many contributions of those who have worked on this project.

Of course, gratitude is owed to the members of the Task Force. They identified potentially relevant empirical studies for consideration, read the studies and recorded pertinent information, and provided insight, input, and comments on various issues and drafts throughout the process.

However, I am particularly grateful to Roselle Wissler, without whom this report would not have seen the light of day. She led many aspects of the process, thoroughly reexamined and distilled the study findings, and completed the most detailed and challenging portions of this report. She is credited as principal author for good reason. Roselle has made a significant contribution to the Task Force and to the field as a whole. I thank her personally.

Other members of the Task Force deserve special thanks for going above and beyond in support of the project. Jennifer Shack and Alysoun Boyle distilled the information from a subset of the studies, identified important methodological issues, and prepared an interim draft report. The two of them provided an estimable contribution without which, again, this report would not have been completed. Alysoun Boyle, Bobbi McAdoo, Chris Honeyman, and Jennifer Robbennolt gave drafts a close reading and provided substantial comments and suggestions.

Thanks also go to Matthew Conger, Section Staff Attorney, for providing logistical support with meetings and conference calls, and for creating the electronic data entry format and overseeing the database of article summaries; and to Chanda Roby for organizing the database of article citations.

Special thanks go to Howard Herman, the prior chair of the Section, for his ongoing friendship, encouragement, and support for this project from the very beginning. Howard engaged deeply with me in long and sophisticated dialogue about the concerns I had articulated in my article on the need for evidence-based foundations for understanding what it meant to do our job properly. His dedication to the field and support for this investigation led to the first ever research mini-conference and the creation of the Task Force itself. Without Howard's unending commitment, this would never have happened.

Finally, I would like to thank the Section on Dispute Resolution as an organization for providing me a home away from home as a mediator who takes the practice seriously. I have had the great pleasure of meeting some of the most insightful, open-hearted, *fun,* and dedicated professionals I could ever have hoped to find in any field. I have learned so much from this work, these people, and this organization. And, even more importantly, I have a whole world full of real friends I would never have had otherwise.

Gary Weiner, Chair

Table of Contents

REPORT OF THE
ABA SECTION OF DISPUTE RESOLUTION
TASK FORCE ON RESEARCH ON MEDIATOR TECHNIQUES

Executive Summary

Whether expressly or implicitly, mediation programs, trainers, and practitioners make assertions about which mediator actions and approaches are "best," often based on untested assumptions and beliefs. The Task Force on Research on Mediation Techniques (hereinafter "Task Force") was formed following substantive panels and informal discussions over several years at the ABA Dispute Resolution Section Conference that led to a sense that the mediation field would benefit from an empirically derived understanding of the effects of mediators' actions. The Task Force was created to learn what existing empirical evidence tells us about which mediator actions enhance mediation outcomes and which have detrimental effects and to disseminate that information to the field, with the ultimate goals of fostering additional empirical research and enhancing mediation quality. The members of the Task Force include mediators, researchers, law professors, program administrators, and other professionals with a range of experience and expertise.

A. Methodology and Overview of the Studies Reviewed

The Task Force cast a wide net to identify studies involving any non-binding process in which a third party helped disputants try to resolve any type of conflict. To be considered relevant for this inquiry, the studies had to contain empirical data examining the effects of one or more mediator actions or approaches on one or more mediation outcomes. The members of the Task Force identified studies, determined if they were relevant and had sufficient findings to include, and then read and recorded pertinent information on the final set of studies. (*See infra* Section II.)

Forty-seven studies, thirty-nine involving only mediation and eight involving another process in addition to or instead of mediation, were included in the Task Force's review. The studies covered a range of dispute types, including general civil, domestic relations, labor-management, and community mediation as well as other disputes. A majority of the studies involved court-connected mediation and a single mediator, but there was substantial variation in these and other aspects of the mediation context and mediator characteristics across the studies. (*See infra* Section III.) In addition to these differences, the studies also differed in whether they examined specific mediator actions or mediator approaches comprised of multiple actions; how those actions or approaches, as well as outcomes, were defined and measured; and the data sources and research methodology used. This variation contributed to differences in findings across the studies and made "apples to apples" comparisons challenging, making it difficult to draw broad conclusions about the effects of mediator actions. (*See infra* Section IV.)

B. Mediator Actions and Mediation Outcomes Examined

The Task Force conceptually organized the wide range of mediator actions and styles examined in the studies into the following seven categories: (1) pressing or directive actions or approaches; (2) offering recommendations, suggestions, evaluations, or opinions; (3) eliciting disputants' suggestions or solutions; (4) addressing disputants' emotions, relationships, or hostility; (5) working to build rapport and trust, expressing empathy, structuring the agenda, or other "process" styles and actions; (6) using pre-mediation caucuses; and (7) using caucuses during mediation. The Task Force grouped the mediation outcomes examined in the studies into the following three categories: (1) 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; (2) disputants' relationships or ability to work together and their perceptions of the mediator, the mediation process, or the outcome; and (3) attorneys' perceptions of mediation. (*See infra* Tables V.H.1 to V.H.3.) The Task Force examined the empirical findings regarding the effects of each category of mediator actions on each set of mediation outcomes, to the extent permitted by the available data, and reports the findings separately for each of these mediator action-mediation outcome pairs.

C. Empirical Findings Regarding the Effects of Mediator Actions on Mediation Outcomes

The Task Force's review of the studies found that none 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. (*See infra* Section V for the detailed findings.) For a majority of the mediator action-mediation outcome pairs, as many or more studies reported mediator actions had *no* effect on outcomes as reported the actions *had* an effect (either positive or negative). In addition, for a minority of the action-outcome pairs, even when most studies found a particular action had positive effects or no effects, at least two studies found the action had negative effects. For the action-outcome pairs where these patterns of findings occur, we cannot conclude with confidence that a mediator action *will* have a positive (or negative) effect on mediation outcomes, only that the action *can* have a positive (or negative) effect and, in some instances, could have an effect in the direction opposite that of the majority of the studies.

A summary of the research findings for each category of mediator actions and each set of mediation outcomes follows, ending with overall conclusions about which mediator actions, on balance, appear to have a greater *potential* for positive (or negative) effects on mediation outcomes.

Pressing or Directive Actions. Mediator styles or specific actions considered pressing or directive generally either increased settlement or had no effect, but in some studies these actions were associated with reduced settlement, lower joint goal achievement, and more post-mediation adversarial motions being filed. Virtually all studies found mediator pressure on or criticism of disputants either had no effect on disputants' perceptions and relationships or was associated with more negative views of the mediator, the mediation process, the outcome, and their ability to work with the other disputant. Thus, pressing or directive actions have the potential to increase settlement, but they also have the potential for negative effects on settlement and related outcomes, and especially on disputants' perceptions and relationships.

Offering Recommendations, Suggestions, Evaluations, or Opinions. Recommending or proposing a particular settlement, suggesting possible options or solutions, or offering some form of case evaluation or other views about the dispute or its resolution generally either increased or had no effect on settlement. These actions were not related to the personalization of mediated agreements, whether a consent order was reached, or whether post-mediation enforcement actions or adversarial motions were filed. Recommending a particular settlement, suggesting settlement options, or offering evaluations or opinions had mixed effects on disputants' relationships and perceptions of mediation – positive, negative, and no effect. With regard to attorneys' perceptions of mediation, these actions generally either had no effect or were associated with more favorable views, with the latter seen especially in Early Neutral Evaluation. Thus, this set of actions has the potential for positive effects on settlement and on attorneys' perceptions of mediation, but has the potential for both negative and positive effects on disputants' relationships and perceptions of mediation.

<u>Eliciting Disputants' Suggestions or Solutions.</u> Eliciting disputants' suggestions or solutions generally increased settlement. These actions also were related to disputants' higher joint goal achievement, reaching a consent order, and being less likely to file a post-mediation enforcement action, but were not related to the personalization of mediated agreements or the filing of post-mediation adversarial motions. Eliciting disputants' suggestions or solutions either had no effect on disputants' perceptions and relationships or was associated with more favorable views of the mediator, the mediation process, the outcome, and their ability to work with the other disputant. Thus, eliciting disputants' suggestions or solutions has the potential to increase settlement and to enhance disputants' perceptions and relationships, with no reported negative effects.

<u>Addressing Disputants' Emotions, Relationships, or Hostility.</u> Giving more attention to disputants' emotions, relationships, or sources of conflict generally either increased or had no effect on settlement, and either reduced or did not affect post-mediation court actions. These mediator actions either had no effect on disputants' perceptions and relationships or were associated with more favorable views of the mediator, the mediation process, the outcome, and their ability to work with the other disputant. Trying to reduce emotional tensions or control hostility had mixed effects on settlement – positive, negative, and no effect; these actions were not examined in relation to disputants' perceptions. Thus, giving more attention to disputants' emotions or relationships has the potential to increase settlement and to enhance disputants' relationships and perceptions, but also has the potential to reduce settlement. Addressing disputants' hostility has both the potential to increase and to reduce settlement.

<u>Working to Build Rapport and Trust, Expressing Empathy, Structuring the Agenda, or Other "Process" Actions</u>. Working to build rapport and trust with and between the disputants, expressing empathy, praising the disputants, or structuring the issues and agenda generally either increased settlement or had no effect on settlement. Other process-focused actions and approaches, such as summarizing or reframing or using a facilitative or non-directive style, had mixed effects on settlement – positive, negative, and no effect. These various mediator actions generally either had no effect on disputants' perceptions and relationships or were associated with improved relationships and more favorable perceptions of the mediator, the mediation process, and the outcome. Thus, working to build trust, expressing empathy or praise, and structuring the agenda have the potential to increase settlement and to enhance disputants' relationships and perceptions. Other "process" actions have the potential for positive effects on disputants' perceptions and settlement, but they also have the potential to reduce settlement.

<u>Using Pre-Mediation Caucuses.</u> The effects of pre-mediation caucuses depended on their purpose. When used to establish trust and build a relationship with the parties, pre-mediation caucuses increased settlement and reduced disputants' post-mediation conflict. But when used to get the parties to accept settlement proposals, pre-mediation caucuses either had a negative effect or had no effect on settlement and post-mediation conflict. Thus, pre-mediation caucuses with a trust focus have the potential for positive effects, and those with a substantive focus have the potential for negative effects.

<u>Using Caucuses During Mediation</u>. Using caucuses during mediation generally increased settlement in labor-management disputes, but had no effect on settlement in other types of disputes, regardless of whether the goal was to establish trust or discuss settlement proposals. Caucusing also was not related to disputants' joint goal achievement, the personalization of mediated agreements, or whether disputants reached a consent order or filed post-mediation adversarial motions; but disputants who spent more time in caucus were more likely to return to court to file an enforcement action. Caucusing generally either had no effect or had a negative effect on disputants' perceptions and post-mediation

conflict. Thus, caucuses during mediation appear to have the potential to increase settlement in the labor-management context, and have the potential for negative effects on disputants' relationships and perceptions.

Overall Conclusions. Looking at the relative potential for positive versus negative effects, while bearing in mind the substantial likelihood of no effects, the following mediator actions appear to have a greater *potential* for positive effects than negative effects on *both* settlement and related outcomes *and* disputants' relationships and perceptions of mediation: (1) eliciting disputants' suggestions or solutions; (2) giving more attention to disputants' emotions, relationship, and sources of conflict; (3) working to build trust and rapport, expressing empathy or praising the disputants, and structuring the agenda; and (4) using pre-mediation caucuses focused on establishing trust. Some of these actions, however, have been examined in a relatively small number of studies and in only a subset of dispute types, primarily divorce, limited jurisdiction, community, and labor disputes.

The potential effects of other mediator actions appear more mixed. Recommending a particular settlement, suggesting settlement options, and offering evaluations or opinions have the potential for positive effects on settlement and on attorneys' perceptions of mediation, but have the potential for negative as well as positive effects on disputants' relationships and perceptions of mediation. Both caucusing during mediation and pressing or directive actions have the potential to increase settlement and related outcomes, especially in labor-management disputes; but pressing actions also have the potential for negative effects on settlement, and both sets of actions have the potential for negative effects on disputants' perceptions and relationships.

D. Next Steps and Recommendations

The Task Force Report's systematic compilation and analysis of the existing empirical research shows that none of the categories of mediator actions has consistent effects on any of the three sets of mediation outcomes and that a substantial proportion of studies report no effects. Accordingly, the research does not provide clear guidance about which mediator actions will enhance mediation outcomes and which will have detrimental effects. This variation in findings across studies demonstrates that drawing conclusions about the effectiveness of mediator actions based on the findings of a single study could lead to recommendations not supported by the overall pattern of research findings and suggests the need for caution in the use of broad statements that "the research shows" that any particular mediator action constitutes "best practice."

To further the development of a reliable empirical understanding of the effects of mediator actions as well as the creation of links between researchers and the broader mediation community, the Task Force proposes a number of steps, along with specific recommendations to guide their implementation, some to be carried out by a working group of the ABA Dispute Resolution Section and others by a university consortium of mediation researchers. (*See infra* Section VI.)

Proposed Next Steps. Some of the proposed steps involve the dissemination of this Report and further work with existing studies. An accessible repository needs to be created for the studies reviewed in the Report, and researchers need to be made aware of its existence and encouraged to add new empirical studies of the effects of mediator actions in order to continue to grow the knowledge base. The possibility of establishing an additional repository for the database of study findings created by the Task Force needs to be explored. Additionally, a more nuanced analysis of the studies reviewed in the Report needs to be undertaken to uncover which dispute, context, and methodological factors alter the effects

of mediators' actions and account for different findings. This could permit more refined conclusions about the effects of mediator actions in different circumstances and provide guidance for future research. Expanding this examination to a broader set of existing studies with potentially relevant findings, in mediation and other fields, also could inform our understanding of mediator actions and the design of future research.

Other proposed steps address future research needs. Developing common terminology, definitions, and measures for mediator actions and mediation outcomes would provide more uniformity and consistency across studies and create a broader set of studies whose findings could more meaningfully be compared and aggregated. In conjunction with these efforts, a research program needs to be developed to test the reliability and validity of mediator action and mediation outcome measures so that future studies will produce more rigorous and meaningful findings. Using the insights gained from these actions, future research needs to examine the mediator action-mediation outcome pairs that have received little empirical attention to date.

The Task Force also proposes developing and expanding links between researchers and mediation trainers, practitioners, and program administrators to create on-going collaboration and exchange of questions and findings. This includes encouraging greater mediator involvement in research; disseminating the findings of the additional analyses of existing research and the new empirical work described above; and developing mechanisms to incorporate those findings into mediation practice, such as through guides for mediator training, performance assessments, quality standards, and feedback mechanisms.

Recommendations. The Task Force recommends that two bodies be established to oversee and implement the above proposed next steps, each with different tasks but consulting and collaborating with the other. One body would be comprised of relevant experts in mediation research and practice appointed by and operating under the auspices of the ABA Section of Dispute Resolution. The other body would be comprised of mediation researchers at a small consortium of universities who would be jointly responsible for implementing the proposed actions that are beyond the scope of the ABA group and for providing reports to that group.

Recommendations for the ABA Section of Dispute Resolution's appointed group include:

- Find additional mechanisms for disseminating the Report
- Oversee the creation of a repository for the studies reviewed by the Task Force, possibly in collaboration with the university consortium
- Oversee the development of research guidelines designed to address the concerns of mediation practitioners, administrators, and users about participating in research, and work to encourage their cooperation with researchers and facilitation of access to mediation
- Oversee the development of a future research agenda and the broad outlines of the research questions to be examined by the university research consortium
- Work to strengthen the links between researchers and mediators, mediation trainers, and program administrators, and to develop mechanisms to disseminate future empirical research findings about the effectiveness of mediator actions to these groups

Recommendations for researchers in the consortium of universities include:

- Work with the ABA to create a repository for the studies reviewed by the Task Force, and develop ways to make researchers aware of its existence and encourage them to contribute future studies to it; and explore the possibility of establishing an additional repository for the database of study findings created by the Task Force
- Support and/or undertake further detailed examination and analysis of the studies reviewed in the present Task Force Report, as well as other existing relevant research in mediation and other fields
- Work with the mediation community to explain research needs; to develop research protocols and guidelines to address consent, confidentiality, and other concerns; to increase cooperation with and involvement in research; and to disseminate future research findings
- Support and/or undertake the development of more uniform definitions and measurements of mediator actions and mediation outcomes, as well as the research needed to improve the reliability and validity of the measures and methodologies used so that future studies will produce more rigorous and meaningful findings
- Support and/or undertake future research to address the identified gaps and unanswered questions raised in this Report in order to expand our knowledge to a broader set of mediator actions and mediation outcomes

E. Conclusion

The Task Force believes it is critically important for the ABA Dispute Resolution Section to establish a working group, as well as to encourage the creation of a university consortium of mediation researchers, to collaboratively oversee and undertake future comprehensive efforts to deepen our empirical understanding of the effects of mediator actions. The Task Force believes the proposed future steps are essential for the field of mediation to be able to develop a body of empirically derived knowledge about which mediator actions and approaches enhance mediation outcomes, and to use that knowledge to improve mediation practice.

REPORT OF THE
ABA SECTION OF DISPUTE RESOLUTION
TASK FORCE ON RESEARCH ON MEDIATOR TECHNIQUES

I. Introduction

The Task Force on Research on Mediation Techniques (hereinafter "Task Force") was formed to identify, assess, and distill the findings of empirical research on the effectiveness of mediator techniques. The ultimate goals of the Task Force are to enhance mediation quality and move the mediation profession forward by leading an intellectually rigorous effort to learn which mediator approaches empirical research shows to have what effects, disseminate that information to mediators, mediation trainers, and program administrators, and encourage additional research to address the gaps in our present knowledge.

The use of mediation to resolve disputes has been institutionalized as a part of civil litigation in many parts of the world. Whether expressly or implicitly, mediation programs and practitioners the world over make assertions about quality in mediation. Mediation trainers teach "best practices" and coach trainees during role playing exercises as to how they could have done things better. In addition, some mediation programs and organizations have developed instruments for observing and assessing the performance of mediation trainees or practicing mediators in real disputes.

A rigorous and intellectually honest approach to understanding "how to mediate well" must, though, be based on empirically verifiable information on mediator behaviors and tactics rather than on untested assumptions or dogmatic beliefs about "what makes good mediation." Mediation trainers ought to ground their teaching in empirically derived knowledge. To do this, the field of mediation needs to adopt an evidence-based approach and develop a body of knowledge with regard to which mediator actions and approaches enhance mediation outcomes.

Much of the empirical research on mediation has followed a "black box" approach, skipping over what happens during the mediation process itself and looking only at mediation outcomes (e.g., settlement rates, participants' assessments) or at the impact of referral or case characteristics on outcomes. A few researchers have studied what mediators do during the session and what effect it has on mediation outcomes, but the findings have not been systematically compiled. In recent years, an informal group of researchers, practitioners, program administrators, and other professionals formed to discuss what this empirical research tells us about what mediators ought to be doing to accomplish the goals of the participants. This collaboration began when Gary Weiner, Chair of the Task Force, organized a mediation research panel at the 2011 ABA Dispute Resolution Section annual conference. This was followed at the 2012 conference by a two-session "mini-conference" on mediation research. There was a strong sense among the panelists and participants that the time had come for an enduring mechanism for sharing and fostering empirical research on mediators.

The work of the present Task Force in part builds on and extends the earlier work of the ABA Section of Dispute Resolution Task Force on Improving Mediation Quality. The Final Report of the Mediation Quality Task Force provides several examples of areas in mediation practice that could be informed by research findings. For instance, lawyers and mediators overwhelmingly endorsed pre-mediation preparation and discussions about the case and the mediation process as important for quality mediation, but disagreed about how that should be done. Similarly, a majority of mediation users

thought that the mediator's analysis of the case was helpful, but expressed a range of views as to which analytical techniques would be appropriate (and presumably effective) under what circumstances.

The Task Force was assigned two broad goals: (1) identifying, assessing, distilling, and disseminating the findings of existing empirical research on the effectiveness of mediator techniques and (2) laying the groundwork for future empirical research to address unanswered questions and developing on-going links between researchers and practitioners so that future research findings can be incorporated into mediation practice.

The members of the Task Force include mediators, researchers, law professors, program administrators, and other professionals with a range of experience and expertise. Many members of the Task Force have conducted empirical research on mediation or have used empirical research findings in their practice and writing.

II. Methodology

A. Establishing the Scope of Inquiry

As the first step, Task Force members decided on a set of criteria for what would constitute "empirical studies that examine the effect of mediator actions on mediation outcomes."

First, recognizing the limited number of such empirical studies and wanting to cast as wide a net as possible, the Task Force broadened its scope to include studies of any non-binding process in which a third party helped disputants try to resolve a conflict. Thus, empirical studies of not only mediation but also judicial settlement conferences, Early Neutral Evaluation, and med-arb were included *if* the process involved an effort to facilitate settlement (i.e., was not focused solely on deciding or evaluating the case). Studies of arbitration or any process in which the third party made a decision for the parties or reported a "decision" to the court were not included. Similarly, studies of bilateral negotiations without assistance from a third-party neutral were not included. In addition, the Task Force decided to include studies conducted in any setting, whether in situ or simulated, and included all studies regardless of the year in which they were conducted.

Second, the article or report had to contain empirical data. Thus, purely theoretical writings or articles solely expressing opinions about what mediator behaviors produce good or bad outcomes or about what mediators should or should not do were not included. Our inquiry was limited to research findings reported in English.

Third, the empirical data had to examine the effect of mediator actions on mediation outcomes. Thus, studies that merely reported mediators' actions or mediation outcomes, without examining the relationship between the two, were not included. The Task Force decided to frame "mediator actions" as broadly as possible, to include anything the mediator did, either at the level of specific actions or a more general style or approach, and to cover all points in the mediation process, from pre-mediation work with the parties to post-session follow-up. Similarly, the Task Force chose to look broadly at any and all mediation outcomes, including whether an agreement was reached, the nature of the agreement, parties' and attorneys' perceptions of the process and the mediator, and improvement in parties' understanding and communication.

The Task Force decided not to examine empirical research in related fields that might have potential applicability to mediation (e.g., behavioral economics, neuroscience, social psychology). Although these bodies of knowledge might be able to shed light on the effects of mediator actions and might inform

hypotheses that could be tested in actual or simulated mediations in the future, Task Force members decided this was beyond the scope of the current inquiry.

<u>B. Identifying Relevant Studies and Recording Empirical Findings and Other Pertinent Information</u>

The next step was to identify empirical studies that potentially met the above criteria. Ninety-one articles and research reports were identified by Task Force members. Each of these articles was read by one or more members of the Task Force to determine whether it met the established criteria for inclusion. If one member thought a given article did not meet the criteria, a second member also read the article. An article was excluded only after two members agreed it did not meet the established criteria. This process resulted in fifty-one articles and research reports that were deemed broadly relevant to the Task Force's inquiry, forty-seven of which ultimately were determined to have sufficient findings regarding the action-outcome link to be included. (*See* Appendix A for a list the articles that formed the basis of this report.) Some studies contained only one or two findings regarding the effect of mediator actions on mediation outcomes, while others involved more extensive findings.

Concurrently, a template was developed so that a consistent set of pertinent information about each study would be obtained and entered in an electronic format to create a usable database of the research findings. The reported effects (or lack of effects) of the mediator actions on mediation outcomes, as well as details of how those actions and outcomes were measured, were recorded. The effects of any contextual factors on the action-outcome link (e.g., the characteristics of the disputes, programs or mediators) were also indicated. In addition, details about the mediation context and the research methodology were recorded, and any methodological issues that might affect the quality of the data or the interpretation of the findings were noted. (*See* Appendix B for the template.)

Members of the Task Force each read several studies and recorded the information as described above. Several members of the Task Force then used that information to identify patterns in the observed effects of mediator actions across the studies and gaps in the empirical knowledge regarding the relationship between mediator actions and mediation outcomes.

III. Descriptive Overview of the Studies Reviewed

Thirty-nine of the forty-seven studies used to form this report involved only the mediation process. Five studies examined both mediation and another process, but did not report the action-outcome effects separately for each process. Of these five studies, three (all of which used the same dataset) involved mediation and mediation-arbitration (med-arb) with the same person serving as mediator and arbitrator; one involved mediation and non-judicial settlement conferences; and another involved mediation and facilitation. In addition, three studies examined only processes other than mediation: one examined Early Neutral Evaluation (ENE) and two examined judicial settlement conferences. In all forty-seven studies, the dispute resolution process took place in person rather than by telephone or online.

The studies covered a range of dispute types. Thirteen studies involved general civil cases and three involved cases in small claims or other limited civil jurisdiction courts. Eight studies involved domestic relations cases. Four studies involved community mediation, which included small claims and family disputes as well as minor criminal disputes in some of the settings. Three studies involved employment disputes, one study involved medical malpractice cases, and one study involved construction disputes. Seven studies involved collective bargaining of labor-management issues in the private or public sector. One study involved international disputes, and one study involved mediators who handled a wide range

of disputes. Five studies were simulations of a variety of dispute types, including collective bargaining, disputes between college students, and negotiating a sales contract.

The research involved different mediation contexts. Most involved court-connected mediation or court referral to mediation of at least some cases. Several studies involved private mediation, and several others did not clearly specify whether the mediations were private or court-connected. One study involved EEOC mediation. Most of the studies (excluding those involving collective bargaining and simulated disputes) examined the resolution of formally filed complaints or filed court cases. Several studies included both filed court cases and disputes that were not filed (e.g., in community mediation settings that involved both court referrals and walk-ins), and several studies did not specify whether the disputes were formally filed complaints or lawsuits.

The majority of studies involved a single neutral. One study involved co-mediation, and several studies involved a combination of single mediators and co-mediator pairs. Several studies did not specify the number of mediators. Most studies involved mediators who were: (a) non-lawyers and lawyers; (b) lawyers and former judges; or (c) only lawyers. A few studies involved only non-lawyer mediators. A sizeable number of studies, however, did not explicitly state whether the mediators were lawyers, judges, or non-lawyers. Among the studies involving court-connected dispute resolution, some involved staff neutrals, some involved roster or panel neutrals, and some involved both of these types of neutrals. Some studies involved only paid neutrals, while others involved only volunteers, and still others included both paid and pro bono mediators. A sizeable number of studies did not specify the neutrals' relationship to the court or their pay status.

Some studies examined mediator styles, strategies, or approaches comprised of a number of actions, while other studies examined one or more specific mediator actions. We organized the mediator actions and styles examined into seven categories: (1) pressing or directive styles and actions; (2) offering recommendations, suggestions, evaluations, or opinions; (3) eliciting disputants' suggestions or solutions; (4) addressing disputants' emotions, relationships, or hostility; (5) working to build rapport and trust, expressing empathy, structuring the agenda, or other "process" styles and actions; (6) using pre-mediation caucuses; and (7) using caucuses during mediation. In categorizing the mediator styles and actions and reporting the research findings, we used the underlying actions that made up each style rather than relying on the labels the researchers assigned to the styles. The specific details of the styles and actions examined in each category are reported in Section V. (For a listing of which studies examined mediator styles and actions in each of these categories, *see infra* Tables V.H.1 to V.H.3.)

The vast majority of studies examined whether the dispute was resolved, though how "settlement" was measured varied across studies by when the resolution was reached (e.g., at the end of the session or including later settlements); by how partial agreements were treated (e.g., whether they were considered resolved or not resolved); and by whether measures other than reaching an agreement were used (e.g., disputants' assessments of the agreement). In addition to whether an agreement was reached, several studies looked at the nature of the outcome (e.g., the extent to which the agreement achieved the parties' goals), and a few examined the durability or finality of the resolution (e.g., compliance with terms, development of new problems, or subsequent court actions).

Fewer than half of the studies assessed disputants' perceptions of the mediator, the mediation process, or the outcome. These included, for example, whether disputants thought the process was fair, the mediator understood the issues, they had sufficient chance to present their case, they were satisfied with the settlement, etc. Several studies looked at whether disputants' understanding had changed (e.g., their understanding of their own needs or the other's views), and several studies looked at

whether disputants' ability to talk to or work with the other party had changed. Only a few studies examined attorneys' assessments of the process, the mediator, or the outcome. The specific details of the outcomes examined are reported in Section V. (For a listing of which studies examined settlement, disputants' perceptions, and attorneys' perceptions, *see infra* Tables V.H.1 to V.H.3.)

IV. Difficulties Drawing Causal Inferences about the Effects of Mediator Actions on Mediation Outcomes

In order to infer that a particular mediator action caused a particular mediation outcome, several things need to be shown. First, the study needs to demonstrate that the outcome is more likely (or less likely) to occur when the mediator engages in the action under study than when she does not. (If, for example, there is no increase or decrease in settlements when the mediator evaluates the case, there is no causal relationship between the action of evaluation and the outcome of settlement.) Second, to infer that the action caused the outcome rather than the reverse, the action needs to precede the outcome in time. (Mediator actions clearly precede outcomes such as settlement, disputants' ability to work together after mediation, or filing of subsequent court actions; they arguably also precede disputants' perceptions assessed after mediation has concluded.) Third, other factors that could plausibly account for the observed relationship between the action and the outcome need to be ruled out. (For example, if we find settlement is less likely when mediators use caucuses, that finding could be due to the act of caucusing per se or to some other factor, such as disputant animosity, that independently both increased caucus use and reduced settlement.)

In the mediation process, there are many factors that could account for the apparent effects of mediator actions on mediation outcomes. For instance, the observed effects of a particular mediator action could be due not to the action per se but to how (e.g., supportively versus critically) or when (e.g., early in mediation versus after an impasse was reached) it is performed. In addition, each mediator action occurs within a constellation of other mediator actions during the course of mediation, and the observed effect of any particular action might be influenced by the other actions that accompany it. Moreover, the mediation process is interactive and iterative, such that which actions mediators engage in, as well as the effects of those actions, might depend on the responses of the disputants to the mediator and to each other. And the effects of a particular action might be due in part to disputants' expectations about what the mediator will do or what is appropriate for him to do. (For example, the same action might have positive effects in settings where it is expected and negative effects in settings where it is not.) These and other factors can both alter the effects of mediator actions on mediation outcomes and make it difficult to know whether the observed effects are due to the action per se or to when, how, or among what other actions and interactions it takes place.

A number of potential selection and other confounding factors also operate in mediation, making it difficult to know to what extent the observed effects are caused by the mediator action or by differences in dispute characteristics or other factors that co-occur with that action (or to what extent any effects might be masked by these differences). In some mediation settings, for instance, the mediator is chosen by the disputants because they prefer his particular style, or the mediator is assigned to a particular dispute by a program administrator because her approach is thought to be a good match. As a result, mediators who use different approaches are likely to mediate disputes with different characteristics, and those dispute characteristics rather than the actions themselves might explain the observed outcomes. Similarly, mediators might do different things in different disputes based on their

assessments of the dispute and which actions they think will be most effective. Again, the dispute characteristics rather than the mediator actions themselves might explain the observed outcomes.

Controlled experiments provide the best methodology for ruling out the effects of other factors like those discussed above because they permit control over many aspects of the phenomena under study. In a controlled experiment to study, for example, the effect of mediator case evaluation on settlement, the researchers would systematically control how and when the mediator performs case evaluation so that it is always done the same way. In addition, the rest of what takes place during the mediation session would be held constant, so that the only thing that varies is whether or not the mediator evaluated the case. The researchers also would randomly assign half of the disputes to mediation with case evaluation and the other half to mediation without case evaluation, so that dispute and disputant characteristics that might alter the effect of case evaluation would be distributed across both groups. These controls would increase confidence that the action under study rather than some other factor caused the outcomes. When random assignment is not possible, researchers can take steps statistically to reduce the effect of confounding factors.

As discussed earlier, the complex, interactive, and iterative nature of the mediation process makes it difficult to systematically control how a mediator action is performed, isolate the effect of a particular action from that of other actions, and control for selection and other potentially confounding processes that operate throughout mediation. Although simulation studies can provide control over many of these factors, it would be difficult even in simulation studies for mediators to strictly follow a prescribed script or set of actions throughout the session, regardless of what the disputants say or do, and still conduct a meaningful mediation. And because simulation studies lack other features of real-world disputes, such as disputants' emotions, motivations, relationships, and financial pressures or other constraints, how applicable their findings are to mediation in actual disputes is unclear. Thus, the findings of the "real world" studies discussed in the next section might be fraught with confounds and alternative explanations, and the findings of the simulation studies might not be fully applicable to the mediation of actual disputes.

Despite these problems, the Task Force believes the existing studies, taken as a group, can shed some light on the effects of mediator actions on mediation outcomes. We have greater confidence that there is a relationship between a particular action and a particular outcome when multiple studies report the same findings. Because different studies in different mediation settings are likely to have different other factors at play, seeing the same findings in multiple studies suggests it is more likely that the observed outcomes are the result of that mediator action rather than some other factor. And seeing the same findings in studies that used different research methodologies, data sources, and specific measures also suggests it is more likely that the observed outcomes are the result of that mediator action rather than something about the research approach.

Multiple sources of variation across the studies, however, make "apples to apples" comparisons difficult and could contribute to different findings in different studies. First, the "same" mediator style in different studies frequently consisted of substantially different actions. (As an extreme example, the actions constituting a "pressing" style in one study made up two separate styles, "pressing" and "evaluative," in other studies.) Second, the "same" outcome sometimes included different components in different studies. (For example, in some studies "settlement" included only full settlements, while in others it included partial settlements, and in still others it included disputants' assessments of the agreement.) Third, different studies examining the effects of the same mediator style often used different comparison groups. (For instance, strong mediator pressure was compared to mediator case

evaluation in one study, to a communication and facilitation style in another study, and to little or no pressure in a third.) Fourth, some studies analyzed subsets of cases and disputants separately (e.g., cases that settled versus cases that did not settle; labor versus management negotiators) rather than all disputes combined. When different effects were seen for these different subgroups, it is unclear how to compare these findings to those in other studies based on the full set of disputes.

Fifth, if the same mediator action has different effects in different processes (e.g., mediation, med-arb, settlement conferences), then studies that involved multiple processes analyzed together might have different findings than studies that looked only at mediation. (For example, case evaluation might have a different effect when the neutral will subsequently decide the case than when she has no decision-making role.) Sixth, disputants' perceptions of the outcome in a few studies referred not only to agreements reached in mediation but also to negotiated agreements and judicial decisions, so that disputants' outcome assessments in these studies would not be comparable to studies looking only at mediated agreements. Seventh, although most of the studies did not take steps to statistically control for the effects of potential confounding factors on the action-outcome relationship, some did control for one or more potential confounds, with different studies controlling for different factors in different ways. (Whether or how the controlled factors altered the observed effects of mediators' actions on mediation outcomes was rarely reported.) Finally, the studies span four decades; the same mediator action might have different effects now than it did earlier in mediation's adoption.

There also are statistically related reasons why some studies might find an effect while others find no effect. Differences in sample sizes could explain why a particular action would have a statistically significant effect in one study (with a large sample) but no effect in another (with a small sample lacking sufficient statistical power), even if the size of the effect was the same. ("Effect size" measures, which would provide such information, were rarely reported.) Some studies treated marginally significant findings (i.e., $p > .05$ but $p < .10$) as indicating there was an effect while others treated them as not finding an effect. Yet other studies did not report statistical significance tests, so their reported "effects" might not in fact be "true" effects (i.e., might not be statistically significant). Additionally, it is harder to detect effects if there is little variability in actions, outcomes, or both. For example, if virtually all mediators said they summarized what the disputants said and virtually all disputants said the mediator was neutral, it would be more difficult to detect a relationship between these measures in that study than in another study with greater variability in these measures. (The distributions of the actions and outcomes, which would provide information to assess variability, were seldom reported.)

In addition, the sources of inter-study variability discussed above also create intra-study variability, and heterogeneity within a study would make it harder to detect effects. For instance, it would be harder to detect effects of a mediator "style" consisting of a diverse set of actions than one made up of closely related actions. (It would also be difficult to know to which of the disparate components of the broadly inclusive style to attribute its effects.) Similarly, it would be more difficult to detect the effects of mediators' actions on a measure of "settlement" encompassing multiple facets of resolution, or on a measure of disputants' perceptions of mediation consisting of disparate dimensions, than on a single measure of resolution or a more focused set of perceptions. If a mediator action has different effects in med-arb than in mediation, studies that include both processes would be less able to detect effects than studies of either process alone. And if a mediator action has different effects depending on the characteristics of the mediators, the disputes, or other features of the mediation context, studies with greater variation on these dimensions would be less able to detect effects than studies with less variation.

As this discussion shows, there are many reasons why studies might find no effects, why different studies might find different effects, and why factors other than the mediator actions might explain the apparent effects of mediator actions on mediation outcomes. To try to understand what accounts for the findings of each study and what explains the similarities and differences in findings across studies would require a detailed examination of all aspects of the research methodology, disputes, mediators, mediation process, and mediation context of each study. Even if these full details had been reported, which in many instances they were not, assessing each study in such detail was beyond our resources. Accordingly, the report of the empirical findings in the next section includes all studies that had data on the effects of mediator actions on mediation outcomes and treats all studies with equal weight, regardless of how rigorous their research methodology was or how robust their findings were. We return to these methodological questions as we propose next steps in Part VI.

Given the variation among the studies, it proved difficult to aggregate the findings and draw meaningful, broad conclusions that nonetheless accurately represented the findings of individual studies. And to present only those general patterns would not have fulfilled the goals of this project. Details of the findings and the action and outcome measures used in each study are important to inform future research and enable readers to make their own judgments about the findings. Accordingly, the next section provides the details of the observed effects of mediator actions and mediation outcomes and the measures used in each study. The final part of the next section summarizes the most consistent findings of the studies within each conceptual category of mediator actions.

V. Empirical Findings: The Effect of Mediator Actions on Mediation Outcomes

We organized the mediator actions and styles examined in the 47 studies into seven categories: (1) pressing or directive styles and actions; (2) offering recommendations, suggestions, evaluations, or opinions; (3) eliciting disputants' suggestions or solutions; (4) addressing disputants' emotions, relationships, or hostility; (5) working to build rapport and trust, expressing empathy, structuring the agenda, or other "process" styles and actions; (6) using pre-mediation caucuses; and (7) using caucuses during mediation. (*See* Tables V.H.1 to V.H.3 for a full listing of which studies examined mediator styles and actions in each of these categories.)

Within each of the above categories, we report the research findings regarding the effect of mediator actions and styles on: (1) settlement and related outcomes, (2) disputants' perceptions and relationships, and (3) attorneys' perceptions. Each section begins with a brief summary of the effects of that set of actions and styles on each set of outcomes. (*See* Tables V.H.1 to V.H.3 for a full listing of which studies examined settlement, disputants' perceptions, and attorneys' perceptions.)

In categorizing the mediator styles and actions and reporting the research findings, we used the underlying actions that made up each style rather than relying on the labels the researchers assigned to the styles. The researchers' labels for the styles are used in the text for the sake of brevity; the specific actions that made up each style are listed in the footnotes. Similarly, when composite measures were used for mediation outcomes, we use the label in the text and list the individual measures in the footnotes. When the actions or perceptions constituting a single measure were numerous, however, we did not list them all.

A. Pressing or Directive Styles and Actions

All studies included in this section examined mediator styles or actions that involved the mediator pressuring the parties in one or more ways. Some of the studies also included in their measure of "pressing" or "directive" styles one or more substantive or "evaluative" actions, such as analyzing the strengths and weaknesses of the case or suggesting a particular settlement. Thus, there is some overlap in the actions that made up the styles examined in this section and the next. The key difference is that all styles discussed in this section included an element of pressure or coercion, while none in the next section did.

With regard to settlement, most studies found mediator styles or specific actions considered pressing or directive either increased settlement or did not affect settlement. Several studies, however, found these actions were associated with reduced settlement, lower joint goal achievement, and more post-mediation adversarial motions being filed. With regard to disputants' perceptions and relationships, virtually all studies found mediator pressure on or criticism of disputants either had no effect or was associated with more negative views of the mediator, the mediation process, the outcome, and their ability to work with the other disputant.

1. Effect on Settlement and Related Outcomes

Several studies found pressing actions can reduce the likelihood of settlement. When mediators exerted more pressure on disputants to reach agreement in community mediation, settlement was less likely and joint goal achievement was lower.[1] Two studies of general civil cases found that settlement was less likely when mediators used a "pressing" style than when they used an "evaluative" style, but was more likely with a "pressing" style than with a "neutral" style.[2]

Other studies found pressing actions were associated with more settlements. Settlements appeared to be "slightly" more likely in general civil cases when mediators used an "instigator" style than a "facilitator" or a "referee" style, but settlement rates did not appear to differ between an "instigator" style and an "evaluator" style.[3] A study of settlement conferences with the assigned judge in general civil

---

[1] Zubek *et al.*, 1992. "Pressure" included urging parties to make concessions or reach agreement, noting costs of non-agreement, and making threats to end mediation and move to arbitration. Nearly half of the cases in this study used med-arb with the same neutral; the rest used mediation. The processes were not analyzed separately. Analyses in this study were conducted controlling for "initial case difficulty," which included a history of prior escalation, intangible issues, and disputant hostility early in mediation. The researchers' interpretation of this finding is that another factor, disputant stubbornness and lack of movement, led mediators to press more and also resulted in fewer settlements.

[2] Wall & Chan-Serafin, 2010; Wall et al., 2011. The data in these two studies are not entirely independent; the cases in one study are a subset of the cases in the other. "Pressing" included pressing parties and pushing them hard to change their positions or expectations, especially with a bias for or against one side. "Evaluative" included analyzing the case in a balanced way, pointing out each side's strengths and weaknesses, discussing case merits, making suggestions, and giving their opinions about what the parties should do. "Neutral" included not taking sides, not telling disputants what to do, and not evaluating or attempting to change parties' positions. The highest settlement rate for the "pressing" style was seen when mediators told disputants at the start of mediation they would use that style and in fact did use it.

[3] Cohn, 1996. No statistical significance tests and no settlement rates were reported, so these might not be "true" (i.e., statistically significant) differences. "Instigator" included pressing hard for compromise and taking an active role suggesting solutions and analyzing strengths and weakness of the case. "Evaluator" included controlling the process and discussing the ramifications of failing to settle. "Facilitator" included focusing on establishing the

cases found that the greater "assertiveness" of the judge's actions was associated with a greater likelihood of settlement.[4] When mediators used "aggressive" actions to a greater extent in labor-management disputes, a greater percentage of issues was resolved, there was more movement on issues, fewer concessions were held back, and there were more settlements.[5] "Directive" mediator strategies generally were more likely to produce "successful outcomes" in international disputes than were "non-directive" strategies.[6] When mediators in a study of a simulated roommate dispute were seen as exerting more "control," disputants gave higher "effectiveness" ratings (which included, among other measures, whether important issues were resolved and whether mediation was successful and facilitated resolving the conflict).[7]

Yet other studies found generally no relationship between pressing or directive actions and settlement. Settlement was not related to the degree to which small claims disputants felt pressured by the mediator.[8] In varied mediation settings, "general settlement" was not related to the extent to which mediators used a "substantive/press" style.[9] A study of judicial settlement efforts found no relationship

process and trust, and not suggesting particular solutions. "Referee" included attempting to control disputants' hostility and not focusing on closure.

[4] Wall & Rude, 1991, Study 2. The specific actions and their "assertiveness" ratings were not reported. The single judge in this study called a settlement conference only in those cases where he thought it would be productive. Settlement increased with the sheer number of techniques the judge used, both overall and when controlling for the assertiveness of the techniques.

[5] Kochan & Jick, 1978. This general statement is an oversimplification of the findings. Whether the effects of "aggressiveness" were or were not statistically significant varied somewhat across the different outcome measures and by whether the analyses were conducted for the full set of cases or separately for the subsets of cases mediated under an arbitration statute or a fact-finding statute. "Aggressiveness" included pressing parties hard to make compromise, trying to get parties to change their expectations and to face reality, making substantive suggestions for compromise, helping parties move off a prior position, and helping parties save face.

[6] Bercovitch & Lee, 2003. "Directive" included pressing parties to show flexibility, promising resources or threatening to withdraw, changing the parties' expectations, taking responsibility for concessions, making substantive suggestions and proposals, making the parties aware of the costs of non-agreement, helping devise a framework for acceptable outcomes, changing perceptions, etc. "Successful outcomes" included ceasefires and partial and full settlements. For the actions constituting the "non-directive" strategies of "communication-facilitation" and "procedural-formulative," *see infra* note 142. Statistical significance tests for the overall effect of directive versus non-directive strategies on settlement were not reported, only for their effect broken down by various other factors, so these might not be "true" (i.e., statistically significant) differences. The apparent differences for the majority of dimensions, however, were relatively large (greater than 15%). There were multiple mediation attempts in some cases.

[7] Burrell et al., 1990. "Control" included pressing the parties toward a solution; imposing the mediator's own solutions; telling the parties what to do to solve the problem; and controlling, dominating, and directing the session. Other items in the composite measure of "effectiveness" included how useful mediation was for resolving the conflict, how effectively it dealt with the conflict, helped them understand the other party, prepared them to better deal with future conflicts, etc. The people acting as mediators in the simulation had received approximately four hours of mediation training.

[8] Wissler, 1995.

[9] Lim & Carnevale, 1990. "Substantive/press" included pressing parties hard to make a compromise, trying to move parties off their positions, saying they are unrealistic, trying to change parties' expectations, calling for frequent caucuses, etc. "General settlement" included whether the dispute settled, underlying core issues were resolved, the agreement had no ambiguous terms and was mutually beneficial, the number of issues was reduced, etc. The lack of effect might be explained by the statistically significant interaction of the "substantive/press" style with the level of "interparty hostility," such that this style was negatively related to "general settlement" when hostility was low but positively related when hostility was high. The composite measure of "interparty hostility" included, in

between judges' use of "aggressive" actions and settlement.[10] The extent to which mediators used "directive"[11] or "pressure"[12] tactics in two studies of labor-management disputes was not related to settlement. Mediators' use of a "directing" strategy was not related to settlement, personalization of agreements, post-mediation progress toward a consent order, or reaching a consent order in child custody mediation.[13] In the same study, however, when mediators used a "directing strategy" to a greater degree, it was more likely that any post-mediation adversarial motions were filed and that more such motions were filed.[14]

---

addition to interparty hostility, that a party had no interest in settling, had no trust in the other party, and was unreceptive to mediation; and an intransigent person was present. The researchers examined the interactions of additional dispute sources with each mediator style; we report here only the interactions with interparty hostility because they were seen most consistently across mediator actions. Slightly under half of the disputes in this study were labor disputes; the two other largest groups of disputes (each around 12%) were divorce and community disputes.

[10] Wall & Rude, 1985, Study 2. "Aggressive" included coercing lawyers to settle and threatening and penalizing them for not settling. The aggressiveness of the judge's actions also had no effect on the speed of settlement.

[11] Carnevale & Pegnetter, 1985. "Directive" included pressing hard, arguing a party's case, suggesting a compromise, suggesting a particular settlement, noting costs of disagreement, discussing other settlements, telling parties they were unrealistic, noting the next impasse step was not better, clarifying the needs of the parties, trying to change expectations, suggesting trade-offs, expressing pleasure at progress and displeasure at lack of progress, making face-saving proposals, etc. This study also examined how the source of the dispute was related both to which actions mediators used and to settlement.

[12] Posthuma et al., 2002. "Pressure" included pressing parties to make compromises, trying to change their expectations, and saying their positions were unrealistic. "Settlement" was assessed two months after mediation and included whether the dispute was settled; anything was left unclear; and the agreement reached was mutually beneficial, lasting, caused any political ramifications, and felt like their own. "Pressure" had a marginally significant interaction with party inflexibility, such that settlement was somewhat more likely when mediators used pressure if party inflexibility was the obstacle to settlement.

[13] MARYLAND ADMINISTRATIVE OFFICE OF THE COURTS, 2016, CHILD ACCESS MEDIATION. The study report uses the terms "mediation" and "mediators" throughout, but the questionnaires included reference to facilitation as well as mediation. The facilitation process and how it relates to the mediation process in these courts was not described in the report, and the two processes were not analyzed separately. For these analyses, "directing" included advocating for or agreeing with one disputant's position or ideas, praising or criticizing one disputant's behavior or approach, explaining or reinterpreting one disputant's behavior or position to the other, telling disputants how to act in mediation, using an evaluative style, offering opinions, etc. This study used factor analysis of the mediators' actions to empirically determine which actions to group together into styles. Some of the styles included an extensive list of actions; we do not list them all. Because data for different outcome measures were obtained from different subsets of cases at different points in the process, the factor analyses performed on each subset of cases often produced different groupings of actions. Thus, the specific actions constituting each mediator style, and in some instances the styles themselves, were different for different outcome measures. (*See, e.g., infra,* note 14.) Analyses of mediator actions were conducted controlling for case complexity, level of hostility, disputants' pre-mediation attitudes, demographics, representation, parenting classes, and gender match with the mediator.

[14] MARYLAND ADMINISTRATIVE OFFICE OF THE COURTS, 2016, CHILD ACCESS MEDIATION. For these analyses, "directing" included most of the same actions as *supra* note 13, except "using an evaluative style" was dropped and several new actions were added, including asking questions to suggest a solution or steer disputants toward a solution, not addressing disputants' feelings or encouraging their expression, not trying to identify the interest or goal behind disputants' positions, etc.

TABLE V.A.1. Effect of Pressing or Directive Actions and Styles on Settlement and Related Outcomes		
Reduced settlement / Negative effect	**No effect**	**Increased settlement/ Positive effect**
Karim & Pegnetter	Carnevale & Pegnetter	Bercovitch & Lee
MD Child Access	Cohn	Burrell et al.
Wall & Chan-Serafin, 2010	Dilts & Karim	Cohn
Wall et al., 2011	Donohue et al., 1985	Dilts & Karim
Zubek et al.	Hiltrop, 1985	Hiltrop, 1985
	Karim & Pegnetter	Karim & Pegnetter
	Lim & Carnevale	Kochan & Jick
	MD Child Access	Wall & Chan-Serafin, 2010
	Posthuma et al.	Wall et al., 2011
	Wall & Chan-Serafin, 2010	Wall & Rude, 1991, Study 2
	Wall et al., 2011	Woodward
	Wall & Rude, 1985, Study 2	
	Wissler, 1995	
	Zubek et al.	
NOTE: Some studies examined more than one action, compared multiple styles within a single category, examined the effects on multiple subsets of cases, or examined more than one outcome. If different findings were obtained for the different actions, comparisons, subgroups, or outcomes within a study, that study is listed in all applicable columns. However, if the findings were the same for different actions, comparisons, subgroups, or outcomes within a study, that study is listed only once in the appropriate column. This Note applies to all of the tables in Section V.		

Several studies examined the effect on settlement of individual mediator actions that were included in the pressing or directive styles examined in the above studies. Trying to diffuse disputants' unrealistic expectations appeared to be associated with increased settlement in general civil cases.[15] Trying to change disputants' expectations was associated with more settlement for union negotiators but was unrelated to settlement for management negotiators in one study;[16] the reverse pattern was seen in another study.[17] Discussing the cost of continued disagreement was associated with less settlement for union negotiators, but with more settlement for management negotiators.[18] Another study found a different pattern: discussing the cost of continued disagreement was associated with more settlement for union negotiators, but was unrelated to settlement for management negotiators.[19] Settlement was more likely in labor-management disputes when the mediator threatened to quit if there was no progress, but settlement was not related to mediators' suggesting referral of the dispute to arbitration or fact-finding.[20] When mediators in labor-management disputes expressed displeasure with the

---

[15] Woodward, 1990. No statistical significance tests were reported, so these might not be "true" (i.e., statistically significant) differences. This study involved Settlement Week mediation with attorney-mediators and pretrial mediation with judges; the processes were analyzed separately. This pattern was seen in both processes, and the apparent difference in settlement rates when mediators did versus did not try to diffuse unrealistic expectations was fairly large (a difference of 19% in Settlement Week and 25% in pretrial mediation).

[16] Karim & Pegnetter, 1983. No analyses were conducted for union and management negotiators combined.

[17] Dilts & Karim, 1990. No analyses were conducted for union and management negotiators combined.

[18] Karim & Pegnetter, 1983.

[19] Dilts & Karim, 1990.

[20] Hiltrop, 1985. This study examined whether each mediator action in the study had a different effect on settlement in different types of disputes. Both threatening to quit and suggesting referral were associated with reduced settlement in pay disputes and increased settlement in non-pay disputes; these actions had no effect in non-strike disputes. In strike disputes, threatening to quit was associated with increased settlement, but suggesting referral had no effect. We do not report the interactions of dispute type with all mediator actions; for the full set of findings, *see id.* at 94. Another study of labor-management disputes (s*ee* Hiltrop, 1989, Study 2) found mediators' threatening to quit was related to increased settlement when hostility was high but had no effect

progress of mediation, settlement was less likely.[21] Several studies in general civil,[22] community,[23] and divorce[24] mediation found no relationship between mediators' criticizing the disputants and settlement.

2. Effect on Disputants' Perceptions and Relationships

When mediators used a "pressing" style, disputants in general civil cases tended to be less satisfied overall with the mediation process than when mediators used a "neutral" style.[25] When mediators exerted more "pressure" to settle, disputants in community mediation were less satisfied with the conduct of the session and with the outcome.[26] When mediators in limited jurisdiction civil cases used an "evaluative" style to a great degree, disputants tended to see the process and the mediator as less fair, but their satisfaction with the process, mediator, and outcome was not affected.[27] Mediators' use of a "substantive/press" style in varied mediation settings was not related to "improved relationships."[28]

Mediators' greater use of "directing" actions in child custody mediation was related to disputants' more negative perceptions of the mediator on the composite measure "respect," [29] but was not related to any

---

when hostility was low. Conversely, mediators' threatening to quit was related to reduced settlement when the parties' positions were close together, but had no effect when they were far apart.

[21] Karim & Pegnetter, 1983.

[22] Wall & Chan-Serafin, 2010; Wall et al., 2011. The data in these two studies are not entirely independent; the cases in one study are a subset of the cases in the other.

[23] Zubek et al., 1992. "Criticism" included criticism of the disputants' past behavior, their behavior in mediation, or their current position. There also was no relationship between "criticism" and joint goal achievement. "Asking embarrassing questions" was not related to settlement but was associated with lower joint goal achievement. *See supra* note 1.

[24] Donohue et al., 1985. No statistical significance tests were reported, but this "difference" of only 4% is unlikely to be a "true" (i.e., statistically significant) difference. For this study, we report as apparent differences only "differences" of 14% or greater.

[25] Wall et al., 2011. The reported statistical significance test compared "pressing" and "evaluative" styles combined versus the "neutral" style. Thus, we do not know whether the satisfaction ratings for the "pressing" style differed from those for the "evaluative" style or would differ from those for the "neutral" style if analyzed alone. Satisfaction ratings for the "evaluative" style fell between the satisfaction ratings for the "neutral" and "pressing" styles. Mediator style and case type did not interact to affect satisfaction ratings. For the actions constituting each style, *see supra* note 2.

[26] Zubek et al., 1992. For the actions constituting "pressure," *see supra* note 1.

[27] Alberts et al., 2005. "Evaluative" included mediators wanting the parties to accept a particular settlement, definitely having ideas about how the case should be settled, trying to make the parties see things their way, expressing opinions, and suggesting ways to settle. The negative correlations between the "evaluative" style and fairness of the process and mediator were statistically significant for all disputants and for plaintiffs alone, but not for defendants alone.

[28] Lim & Carnevale, 1990. For the actions constituting the "substantive/press" style, *see supra* note 9. "Improved relationships" included the mediator's perception that the parties' relations improved, they had learned to communicate, etc. The lack of effect might be explained by the marginally significant interaction of the "substantive/press" style with the level of "interparty hostility," such that this style was negatively related to "improved relationships" when hostility was low, but was positively related when hostility was high.

[29] MARYLAND ADMINISTRATIVE OFFICE OF THE COURTS, 2016, CHILD ACCESS MEDIATION. For the actions constituting "directing" for these analyses, s*ee supra* note 13. This study used factor analysis of the disputants' perceptions to empirically group together sets of perceptions into composite measures. "Respect" included the disputants feeling the mediator treated them with respect, listened without judging, did not take sides, did not prevent important topics from being discussed, and did not control decisions made in mediation. Because the labels do not convey the full range of perceptions that make up each composite measure, hereinafter we do not use the label but

other disputant perceptions assessed either at the conclusion of mediation[30] or six months later,[31] including views of the mediator, mediation process, agreement, or ability to work with the other party. Mediators' greater use of "directive" actions in community mediation was related to disputants' feeling less able to express themselves, less understood by the mediator, and less satisfied with the process, but was not related to several other perceptions.[32] When mediators criticized the other party, disputants in general civil cases were less satisfied overall with the mediation process.[33] When mediators criticized disputants in community mediation, disputants were less satisfied with the conduct of the session, but their satisfaction with the outcome was not affected.[34]

TABLE V.A.2. Effect of Pressing or Directive Actions and Styles on Disputants' Perceptions and Relationships		
Negative effect	No effect	Positive effect
Alberts et al.	Alberts et al.	Burrell et al.
Charkoudian & Wayne	Charkoudian & Wayne	
Kimsey et al., 1994	Kimsey et al., 1994	
MD Child Access	Lim & Carnevale	
Wall et al., 2011	MD Child Access	
Zubek et al.	Zubek et al.	

In a study simulating a dispute between students, when mediators used a "pressing" strategy, disputants thought mediators were more controlling and imposed solutions more than when mediators used an "inaction" or a "compensating" strategy, but there was no difference between "pressing" and

---

instead list most of the individual perceptions that constitute the composite measures. All analyses of the effect of mediator actions on disputants' perceptions were conducted controlling for whether or not an agreement was reached.

[30] MARYLAND ADMINISTRATIVE OFFICE OF THE COURTS, 2016, CHILD ACCESS MEDIATION. For the actions constituting "directing" in these analyses, *see supra* notes 13. Disputants' perceptions assessed at the conclusion of mediation that were not related to mediators' "directing" style included: whether the disputants could express themselves, discuss underlying issues, became clearer about what they wanted, and were understood by the mediator; whether they listened to and understood each other and controlled decisions made in mediation; whether they were satisfied with the mediation process and their interactions with the justice system and would recommend mediation; whether they thought the agreement reached was fair, implementable, met their children's needs, and resolved issues; whether they can work with the other party regarding the children, etc.

[31] MARYLAND ADMINISTRATIVE OFFICE OF THE COURTS, 2016, CHILD ACCESS MEDIATION. At follow-up, disputants' perceptions about outcomes referred not only to agreements reached in mediation, but also to agreements resulting from negotiation or settlement conferences and judicial orders on the merits. Disputants' perceptions assessed six months after mediation that were not related to mediators' "directing" style included: whether they and the other person followed through, new problems arose, their interactions with the other party improved, they were satisfied with the final outcome, how the outcome was working for the children, whether they and the other party can talk and work together for the sake of the children, whether the children were doing well, etc. For the actions constituting "directing" used in these analyses, *see supra* note 14.

[32] Charkoudian & Wayne, 2010. "Directive" included mediators' advocating for their own solution or encouraging adoption of a particular solution, expressing an opinion, making a suggestion, and telling participants how to behave. "Directive" actions were not related to whether disputants felt they had control over the situation or whether conflict could be productive. The findings did not vary with whether there was a race or gender match between mediator and disputants.

[33] Wall et al., 2011.

[34] Zubek et al., 1992. For the types of "criticism," *see supra* note 23. "Asking embarrassing questions" was not related to satisfaction with the process or outcome. *See supra* note 1.

"integration" strategies.[35] In the same study, disputants engaged in less reframing and problem-solution redefinition when mediators used a "pressing" strategy rather than an "integration" strategy, though there was no difference between "pressing" and either "inaction" or "compensating" strategies. The "pressing" strategy, however, did not differ from other strategies in terms of the disputants' conflict management style or their views of the mediators' "fairness" or "attentiveness" or whether mediation clarified their positions.[36] In a second simulation study of a roommate dispute, when mediators were seen as exercising greater "control," disputants thought the mediator was more "competent," which included seeing the mediator as fair, and were more "satisfied with the process and outcome."[37]

3. Effect on Attorneys' Perceptions

None of the studies examined the effects of pressing or directive actions on attorneys' perceptions of mediation.

B. Offering Recommendations, Suggestions, Evaluations, or Opinions

A substantial number of studies looked at mediator actions that involved recommending or proposing a particular settlement, suggesting possible options or solutions, or offering some form of case evaluation or other views about the dispute or its resolution.[38] For the most part, these actions either increased or had no effect on settlement. Mediators' offering their views was not related to the personalization of mediated agreements, whether a consent order was reached, or whether post-mediation enforcement actions or adversarial motions were filed. Recommending a particular settlement, suggesting settlement options, or offering evaluations or opinions had mixed effects on disputants' relationships and perceptions of mediation – positive, negative, and no effect. With regard to attorneys' perceptions of mediation, these mediator actions generally either had no effect or were associated with more favorable views, with the latter seen especially in Early Neutral Evaluation.

1. Effect on Settlement and Related Outcomes

The first set of mediator actions in this category involved recommending or proposing a particular settlement. Several studies found these actions increased the likelihood of settlement. Settlement was more likely in general civil cases when mediators recommended a particular settlement than when they did not.[39] Settlement was more likely in employment cases when the mediator offered a "mediator's

---

[35] Kimsey et al., 1994. "Pressing" included using coercion or threatening punishment to get the parties to settle. "Integration" included offering solutions and trying to craft a remedy based on parties' input. "Inaction" included nonintervention, facilitating the process, and playing no role in the outcome. "Compensating" included offering rewards to get the parties to settle.

[36] Kimsey et al., 1994. "Fairness" included whether disputants thought the mediator was fair, prepared, established rules for conduct, and kept the discussion on track. "Attentiveness" included whether disputants though the mediator knew what he was doing and listened.

[37] Burrell et al., 1990. "Control" included pressing the parties toward a solution; imposing the mediator's own solutions; telling the parties what to do to solve the problem; and controlling, dominating, and directing the session. "Competent" included whether the disputants thought the mediator was fair, prepared, knew what he was doing, summarized and clarified what disputants said, and encouraged them to suggest options. "Satisfied with the process and outcome" included whether disputants were satisfied with the outcome and would use mediation again or recommend mediation to others.

[38] If the mediators' style included not only these actions but also actions that involved pressuring the disputants, the findings of those studies are discussed in the prior section.

[39] Wissler, 2002.

proposal."[40] In labor-management disputes, settlement was more likely if mediators suggested a particular settlement.[41] In a study simulating the mediation of a sales contract negotiation, higher joint outcomes were obtained when mediators proposed an agreement point.[42]

Other studies, however, found no effect on settlement of recommending or proposing a particular settlement. Divorce mediators' recommending a particular settlement was not related to settlement.[43] Whether mediators in a variety of settings used a "substantive/suggestions" style that included suggesting a particular settlement had no effect on "general settlement."[44] A study of judicial settlement efforts found that judges' use of a "logical" strategy, which included suggesting a settlement figure, was not related to settlement.[45] A study simulating the mediation of a labor-management dispute found no difference in settlement rates when mediators used a "content" approach that involved suggesting a reasonable compromise than when they adopted either a "process" or a "passive" approach.[46]

---

[40] Klerman & Klerman, 2015. The single mediator in this study offered a "mediator's proposal" (i.e., proposed a settlement she thought both sides would accept, to which they responded confidentially) in the 90% of cases in which she thought the parties had reached an impasse or a proposal could bridge the remaining gap, but not when she thought disputants either could settle on their own or were very far apart.

[41] Dilts & Karim, 1990. This relationship was seen for both union and management negotiators.

[42] Wall, 1984. Under the terms of this simulation, disputants had to reach an agreement on all issues within about an hour or their outcomes would be zero.

[43] WISSLER, 1999, MAINE STUDY.

[44] Lim & Carnevale, 1990. "Substantive/suggestions" included suggesting a particular settlement, compromises, trade-offs among issues, etc. For the outcomes constituting "general settlement," *see supra* note 9. The lack of effect might be explained by the statistically significant interaction of the "substantive/suggestions" style with the level of "interparty hostility," such that this style was negatively related to "general settlement" when hostility was low but positively related when hostility was high. For the measures constituting "interparty hostility," *see supra* note 9.

[45] Wall & Rude, 1985, Study 2. A "logical" strategy involved suggesting a settlement figure based on the lawyers' input as well as on the judge's evaluating and analyzing the case. This strategy also had no effect on the speed of settlement.

[46] Bartunek et al., 1975. This simulation limited the mediation to an hour. The "process" approach involved the mediator teaching the parties how to paraphrase and giving them a chance to practice. In the "passive" approach, the mediator had the parties take a brief break. There also was no effect of mediator style on the speed of reaching an agreement or the dollar amount of the agreement. There was a statistically significant interaction between mediator style and disputants' accountability to their constituents, such that in the high accountability condition, both the "content" and "process" interventions led to more agreements, higher dollar amounts, and briefer negotiations than the "passive" intervention. In the low accountability condition, however, mediator style had no effect on any of these measures.

TABLE V.B.1. Effect of Offering Recommendations, Suggestions, Evaluations, or Opinions on Settlement and Related Outcomes		
Reduced settlement / Negative effect	**No effect**	**Increased settlement / Positive effect**
Recommending a Particular Settlement		
	Bartunek et al.	Dilts & Karim
	Lim & Carnevale	Klerman & Klerman
	Wall & Rude, 1985, Study 2	Wall, 1984
	Wissler, 1999, Maine Study	Wissler, 2002
Suggesting Possible Settlement Options		
Wissler, 1999, Maine Study	Hiltrop, 1985	Dilts & Karim
	Karim & Pegnetter	Donohue et al., 1985
	Slaikeu et al.	Karim & Pegnetter
	Wissler, 1999, Ohio Study	Lim & Carnevale
	Wissler, 2002	Posthuma et al.
		Slaikeu et al.
		Woodward
Offering Evaluations or Opinions		
Hensler	Brett et al.	Dilts & Karim
	Dilts & Karim	Hensler
	Henderson	McEwen
	Hensler	Peeples et al.
	Hiltrop, 1985	Posthuma et al.
	MD Child Access	Wall & Chan-Serafin, 2010
	MD Day of Trial	Wall et al., 2011
	Peeples et al.	Wissler, 2002
	Wall & Chan-Serafin, 2009	
	Wall & Rude, 1985, Study 2	
	Wissler, 1999, Ohio Study	
	Wissler, 2002	

The second set of mediator actions in this category included suggesting possible settlement options or solutions. One study found settlement was less likely when mediators suggested some options for settlement in divorce mediation.[47] Several other studies found these actions increased settlement. Settlement appeared more likely when mediators created alternate proposals in divorce cases[48] and suggested solutions in general civil cases.[49] Settlement also was more likely when mediators in divorce cases spent more time discussing possible solutions in general terms, but was not affected by mediators' making suggestions about possible solutions or reacting to disputants' solutions.[50] When mediators suggested proposals that specifically helped avoid the appearance of defeat of either party, settlement was more likely in three studies of labor-management disputes.[51] And when mediators used a

---

[47] WISSLER, 1999, MAINE STUDY.

[48] Donohue et al., 1985. No statistical significance tests were reported, so this might not be a "true" (i.e., statistically significant) difference. For this study, we report as apparent differences only "differences" of 14% or greater.

[49] Woodward, 1990. No statistical significance tests were reported, so this might not be a "true" (i.e., statistically significant) difference. The apparent difference in settlement rates when mediators did versus did not suggest solutions was large in Settlement Week mediation with attorney-mediators (a difference of 34%), but was small and likely not a "true" difference in pretrial mediation with judges (6%).

[50] Slaikeu et al., 1985.

[51] Dilts & Karim, 1990 (for both union and management negotiators); Karim & Pegnetter, 1983 (for management negotiators only; no effect for union negotiators); Posthuma et al., 2002. In the latter study, "suggesting proposals to help avoid the appearance of defeat" was combined with "controlling expressions of hostility" into a single measure. "Settlement" included whether the dispute was settled; anything was left unclear; and the agreement reached was mutually beneficial, lasting, had no political ramifications, and felt like their own.

"substantive/face-saving" strategy in varied mediation settings, "settlement" was more likely.[52] Several other studies, however, found mediators' suggesting possible solutions or settlement options had no effect on settlement, including in general civil,[53] divorce,[54] and labor-management disputes.[55]

The third set of mediator actions examined in this category involved case evaluation in various forms, and a number of studies found these actions increased settlement. Settlement was more likely in general civil cases when mediators used an "evaluative" style than when they used a "pressing" or "neutral" style;[56] when mediators gave their views on the likely court outcome, the case value, and/or the legal merits of the case than if they did not express any of those views;[57] and when mediators gave an opinion or offered advice on the case or on steps the disputants might take than when they did not offer their opinions.[58] Settlement also was more likely in general civil cases if mediators evaluated the merits of the case for the parties than if they did not, if they assisted the parties in evaluating the value of the case than if they did not, or if they expressed their views of the case than if they did not, though settlement was not affected by whether mediators assisted the parties in evaluating the case.[59] In two studies of labor-management disputes, settlement tended to be more likely when mediators discussed other settlements or patterns than when they did not.[60] When mediators in general civil cases gave their

---

[52] Lim & Carnevale, 1990. "Substantive/face-saving" included suggesting face-saving proposals and helping parties save face. For the outcomes constituting "general settlement," *see supra* note 9. There was a statistically significant interaction of the "substantive/face-saving" style with the level of "interparty hostility," such that this style was more strongly related to "general settlement" when hostility was high than when it was low. For the measures constituting "interparty hostility," *see supra* note 9.

[53] Wissler, 2002.

[54] WISSLER 1999, OHIO STUDY.

[55] Hiltrop, 1985. This study also examined whether each mediator action in the study had a different effect on settlement in different types of disputes. Suggesting solutions was related to increased settlement only in strike disputes; it had no effect in non-strike, pay, and non-pay disputes. Another study of labor-management disputes (*see* Hiltrop, 1989, Study 2) found mediators' suggesting solutions was associated with increased settlement when party motivation to settle was high, hostility was low, and positional differences were small. Conversely, suggesting solutions was associated with reduced settlement when party motivation to settle was low, perceived hostility was high, and positional differences were large. Mediators' suggesting solutions had more statistically significant interactions with dispute types resulting in more divergent effects on settlement than did other mediator actions. For the findings for the other actions, *see id*. at 256-7.

[56] Wall & Chan-Serafin, 2010; Wall et al., 2011. The data in these two studies are not entirely independent; the cases in one study are a subset of the cases in the other. "Evaluative" included analyzing the case in a balanced way, pointing out each side's strengths and weaknesses, discussing case merits, making suggestions, and giving their opinions about what the parties should do. For the actions constituting the "pressing" and "neutral" styles, *see supra* note 2. The highest settlement rate for the "evaluative" style was seen when mediators told disputants at the start of mediation they would use that style and in fact did.

[57] MCEWEN, 1992. The separate effect of each of these actions was not reported.

[58] Wall et al., 2011.

[59] Wissler, 2002. "Assisted the parties in evaluating the case" was explained as "such as by reality testing, using risk analysis, or asking other questions to help the parties evaluate the case."

[60] Dilts & Karim, 1990 (this relationship was seen for management negotiators, but not for union negotiators); Posthuma et al., 2002. In the latter study, the measure used, whether mediators "discussed alternatives," included not only whether they discussed other settlements or patterns, but also whether they noted the costs of non-settlement, had the disputants prioritize issues, suggested disputants review needs with their constituents and helped them deal with constituents, and taught disputants about the bargaining or impasse process. "Settlement" included whether the dispute was settled; anything was left unclear; and the agreement reached was mutually beneficial, lasting, caused any political ramifications, and felt like their own. "Discussing alternatives" had a

assessment of case value compared to when they did not, settlement was more likely in one court, less likely in another court, and unaffected in two courts.[61]

A larger number of studies, however, found that offering an opinion or evaluation had no effect on settlement. Mediators' giving an advisory opinion or an evaluation of the parties' legal position in general civil cases during an otherwise interest-based mediation did not affect settlement.[62] Mediators' expressing their views on factual and legal issues had no effect on settlement in construction disputes.[63] Mediators' pointing out the strengths and weaknesses of each side's case and emphasizing the risks and costs of trial had no effect on settlement in general civil cases.[64] In labor-management disputes, settlement was not related to whether mediators evaluated the strengths and weaknesses of the disputants' bargaining position in a closed meeting.[65] Settlement in divorce cases was not related to mediators' evaluating the merits of the case or expressing their views about an appropriate settlement.[66] In a study of medical malpractice cases, mediators' discussing each side's strengths, expressing their opinion on the case merits or on the "correctness" of an offer, or discussing litigation risks or likely jury verdicts had no effect on settlement, though settlement was more likely when mediators explored the "worst case scenario."[67] Mediators' "offering opinions and solutions," which included their legal assessments, was not related to settlement or to whether the disputants returned to court within a year for an enforcement action in limited jurisdiction civil cases.[68] In child custody disputes, mediators' "offering perspectives," which included their legal assessments, was not related to settlement, how personalized the mediation agreement was, post-mediation progress toward a consent

---

statistically significant interaction with party inflexibility, such that "settlement" was less likely if the mediator used this approach when party inflexibility was the obstacle to settlement.

[61] Hensler, 2001.

[62] Brett et al., 1996.

[63] Henderson, 1996.

[64] Wall & Chan-Serafin, 2009. How frequently mediators used these techniques with the plaintiff showed a curvilinear relationship with settlement, such that settlement was more likely when mediators used these techniques an intermediate number of times than when mediators used these techniques rarely or extremely frequently.

[65] Hiltrop, 1985. Discussing strengths and weaknesses had different effects depending on the nature of the dispute; this action was associated with increased settlement in pay disputes and reduced settlement in non-pay and non-strike disputes, but had no effect on settlement in strike disputes.

[66] WISSLER, 1999, OHIO STUDY.

[67] Peeples et al., 2007.

[68] MARYLAND ADMINISTRATIVE OFFICE OF THE COURTS, 2016, DAY OF TRIAL MEDIATION. Although we use "mediation" and "mediators" to describe the findings, this study involved both mediation and settlement conferences with attorneys. The processes were not described and were not analyzed separately. For these analyses, "offering opinions and solutions" included mediators offering their own solutions; offering their opinions (which included opinions about a potential solution, the situation, or the mediation process; analyzing the disputants' relationship dynamics; praising both disputants' behavior in mediation; etc.); offering legal assessments (including predicting the outcome in court, evaluating the strengths and weaknesses of the case, and providing legal information); etc. This study used factor analysis of mediators' actions to empirically determine which actions to group together into styles. Some of the styles included an extensive list of actions; we do not list them all. Because data for different outcome measures were obtained from different subsets of cases at different points in the process, the factor analyses performed on each subset of cases produced different groupings of actions. Thus, the specific actions constituting each mediator style, and in some instances the styles themselves, are different for different outcome measures. Analyses of mediator actions were conducted controlling for case complexity, level of hostility, and disputants' pre-mediation attitudes.

order, the filing of a consent order,[69] or whether and how many adversarial motions were filed.[70] Judges' use of a "client-oriented" approach during settlement conferences, where they directed their discussion of the case value, risks of trial and benefits of settlement, and fairness of proposed settlement figures to the disputants instead of the lawyers, was not related to settlement.[71]

2. Effect on Disputants' Perceptions and Relationships

The first set of mediator actions in this category involved recommending or proposing a particular settlement. When mediators in general civil cases recommended a particular settlement, disputants thought the mediation process was less fair and felt more pressured to settle than when mediators did not make a specific recommendation.[72] When mediators in divorce mediation recommended a particular settlement, disputants who did not settle thought the process was less fair, but there was no effect on perceived fairness for disputants who settled.[73] In the same study, mediators' recommending a particular settlement was related to disputants' seeing their children's needs more clearly in cases that settled, but not in cases that did not settle.[74] For both cases that settled and those that did not, disputants' perceptions on all other dimensions in the above study,[75] and on all dimensions in another study of divorce mediation,[76] were not affected by mediators' recommending a particular settlement. In a study of varied mediation settings, mediators' use of a "substantive/suggestions" style was not related to "improved relationships."[77]

The second set of mediator actions in this category included suggesting possible settlement options or solutions. When mediators suggested possible settlement options, disputants in general civil cases felt

---

[69] MARYLAND ADMINISTRATIVE OFFICE OF THE COURTS, 2016, CHILD ACCESS MEDIATION. For these analyses, mediators' "offering perspectives" included mediators offering their opinions (which included opinions about a potential solution, the situation or the mediation process; analyzing the disputants' relationship dynamics; praising both disputants' behavior in mediation; or offering personal information or experiences, etc.); offering their own solutions; offering legal assessments (predicting the outcome in court, evaluating the strengths and weaknesses of the case, and/or providing legal information); etc. *See also supra* note 13.

[70] MARYLAND ADMINISTRATIVE OFFICE OF THE COURTS, 2016, CHILD ACCESS MEDIATION. At follow-up six months later, the mediator approach was instead labeled "mediator telling" and included the same actions as "offering perspectives," *see supra* note 69, except "mediators' suggesting solutions" was dropped and several actions were added: advocating for or supporting one disputant's position or ideas and praising or criticizing one disputant's behavior or approach.

[71] Wall & Rude, 1985, Study 2. This strategy also had no effect on the speed of settlement.

[72] Wissler, 2002.

[73] WISSLER, 1999, MAINE STUDY.

[74] WISSLER, 1999, MAINE STUDY.

[75] WISSLER, 1999, MAINE STUDY. These included whether disputants' understanding of the other party's views improved, their understanding of their own needs improved, their ability to deal with the other party regarding the children improved, and they were satisfied with the outcome.

[76] WISSLER, 1999, OHIO STUDY. These included whether the mediation process was fair, they had enough chance to help decide the outcome, their understanding of the other party's views improved, they were satisfied with the outcome, their children's circumstances improved, and their ability to deal with the other party regarding the children improved.

[77] Lim & Carnevale, 1990. "Substantive/suggestions" included suggesting a particular settlement, compromises, trade-offs among issues, etc. There was a statistically significant interaction between this style and the level of "interparty hostility," such that use of this style was negatively related to relationship improvement when hostility was low, but positively related to relationship improvement when hostility was high. For the measures constituting "interparty hostility," *see supra* note 9.

more pressured to settle, but their perception of the fairness of the process was not affected.[78] When mediators suggested possible options for settlement in divorce cases, disputants' understanding of the other party's views improved only in cases that settled, and disputants' thought their children's circumstances improved only in cases that did not settle; other perceptions were not related to mediators' suggesting settlement options in either set of cases.[79] In another study of divorce cases, when mediators suggested possible options for settlement, disputants in cases that settled were more likely to say mediation was fair, their understanding of the other party's views and their own needs improved, and their dealings with the other party about the children would improve.[80] Mediators' suggesting settlement options, however, was not related to other disputant perceptions in cases that settled, and was not related to any disputant perceptions in cases that did not settle.[81] In a study of varied mediation settings, mediators' use of a "substantive/suggestions" style was related to "improved relationships."[82]

Mediators' "offering opinions and solutions" was not related to any disputant perceptions of the mediation process or the mediator at the close of mediation in limited jurisdiction civil cases.[83] In the same study, however, when mediators had "offered opinions and solutions" to a greater degree, disputants at follow-up several months after mediation were less likely to be satisfied with the outcome, to recommend mediation, to say the outcome was working for them, and to say they had changed their

---

[78] Wissler, 2002.

[79] WISSLER, 1999, OHIO STUDY. For both cases that settled and those that did not, disputants' perceptions that were not related to mediators' suggesting possible options for settlement included: whether the process was fair, they had enough chance to help decide the outcome, they were satisfied with the outcome, and they felt their ability to deal with the other party regarding the children would improve.

[80] WISSLER, 1999, MAINE STUDY.

[81] WISSLER, 1999, MAINE STUDY. In cases that settled, mediators' suggesting settlement options was not related to disputants' satisfaction with the outcome and whether their understanding of their children's needs improved.

[82] Lim & Carnevale, 1990. "Substantive/face-saving" included suggesting face-saving proposals and helping parties save face. "Improved relationships" included the mediators' perception that interparty relations improved, they had learned to communicate, etc. There was a statistically significant interaction between this style and the level of "interparty hostility," such that use of this style was negatively related to relationship improvement when hostility was low, but positively related to relationship improvement when hostility was high. For the measures constituting "interparty hostility," *see supra* note 9.

[83] MARYLAND ADMINISTRATIVE OFFICE OF THE COURTS, 2016, DAY OF TRIAL MEDIATION. All analyses of the effect of mediator actions on disputants' perceptions were conducted controlling for whether or not an agreement was reached. For these analyses, "offering opinions and solutions" included the actions listed *supra* note 68, except "offering legal assessments" was dropped. This study used factor analysis of the disputants' perceptions to empirically group together sets of perceptions into composite measures. Because the labels do not convey the full range of perceptions that make up each composite measure, we list most of the individual perceptions instead of the composite measures they comprise. Disputants' perceptions not related to "offering opinions and solutions" included: whether they could express themselves freely and the mediator listened without judging, did not take sides, treated them with respect and understood them; whether the mediator prevented discussion of important topics, pressured them to settle, and controlled decisions in mediation; whether underlying issues came out and disputants became clearer about their desires; whether the disputants understood each other better, listened to each other, controlled decisions in mediation; whether they were satisfied with the process, satisfied with the outcome, thought the outcome was fair and implementable, and thought the issues were resolved; whether the disputants acknowledged responsibility and apologized; whether they can talk about their concerns with the other party, etc.

approach to conflict, though other perceptions were not affected.[84] In child custody mediation, mediators' "offering perspectives" was not related to any of the disputants' perceptions at the conclusion of mediation[85] or six months later.[86] In a study simulating a dispute between students, disputants thought mediators were more controlling and imposed solutions more when they used an "integration" strategy than when they used an "inaction" or "compensating" strategy; there were no differences in these perceptions between "integration" and "pressing" strategies.[87] In the same study, disputants engaged in more reframing and problem-solution redefinition when mediators used an "integration" strategy than any of the other strategies. The "integration" strategy, however, did not differ from the other strategies in terms of disputants' conflict management style, views of whether mediation clarified their positions, or views of the mediators' "fairness" or "attentiveness."[88]

---

[84] MARYLAND ADMINISTRATIVE OFFICE OF THE COURTS, 2016, DAY OF TRIAL MEDIATION. For these analyses, "offering opinions and solutions" included all actions listed *supra* note 68, with the additional actions of not asking disputants to come up with solutions or discuss details of solutions. At follow-up, questions about outcomes referred not only to agreements reached in mediation, but also to agreements resulting from negotiation or settlement conferences and judicial orders on the merits. Disputants' perceptions not related to "offering opinions and solutions" included: whether the other person had followed through, new problems arose, they experienced any inconvenience or costs associated with the situation; they can talk with the other person about issues; they have control over the issues, etc.

[85] MARYLAND ADMINISTRATIVE OFFICE OF THE COURTS, 2016, CHILD ACCESS MEDIATION. For these analyses, mediators' "offering perspectives" included the actions listed *supra* note 69. Disputants' perceptions not related to "offering perspectives" included: whether the mediator treated them with respect, listened without judgment, did not take sides, did not prevent important topics from being discussed, and did not control decisions made in mediation; the disputants listened to and understood each other and controlled decisions made in mediation; whether they could express themselves, discuss underlying issues, became clearer about what they wanted, and were understood by the mediator; whether they were satisfied with the mediation process and their interactions with the justice system and would recommend mediation; the agreement reached was implementable, met their children's needs, resolved issues, and was fair; whether they can work with the other party regarding the children, etc.

[86] MARYLAND ADMINISTRATIVE OFFICE OF THE COURTS, 2016, CHILD ACCESS MEDIATION. At follow-up six months after mediation, the mediator style was instead labeled "mediator telling" and included a somewhat different set of actions, *see supra* note 70. At follow-up, perceptions about outcomes referred not only to agreements reached in mediation, but also to agreements resulting from negotiation or settlement conferences and judicial orders on the merits. Disputants' perceptions not related to "mediator telling" included: whether they and the other person followed through, new problems arose, their interactions had improved, they were satisfied with the outcome, how well the outcome was working for the children; whether they can talk with the other party and work together for the sake of the children, whether the children were doing well, etc.

[87] Kimsey et al., 1994. "Integration" included offering solutions and trying to craft a remedy based on parties' input. "Inaction" included nonintervention, facilitating the process, and playing no role in the outcome. "Compensating" included offering rewards to get the parties to settle. "Pressing" included using coercion or threatening punishment to get the parties to settle.

[88] Kimsey et al., 1994. For the specific perceptions making up these composite outcome measures, *see supra* note 36.

TABLE V.B.2. Effect of Offering Recommendations, Suggestions, Evaluations, or Opinions on Disputants' Perceptions and Relationships		
Negative effect	**No effect**	**Positive effect**
Recommending a Particular Settlement		
Wissler, 1999, Maine Study Wissler, 2002	Lim & Carnevale Wissler, 1999, Maine Study Wissler, 1999, Ohio Study	Wissler, 1999, Maine Study
Suggesting Possible Settlement Options		
Kimsey et al., 1994 MD Day of Trial Wissler, 2002	Kimsey et al., 1994 MD Child Access MD Day of Trial Wissler, 1999, Maine Study Wissler, 1999, Ohio Study Wissler, 2002	Kimsey et al., 1994 Lim & Carnevale Wissler, 1999, Maine Study Wissler, 1999, Ohio Study
Offering Evaluations or Opinions		
McDermott & Obar Wall et al., 2011 Wissler, 2002	McDermott & Obar Wissler, 1999, Ohio Study Wissler, 2002	Wissler, 1999, Ohio Study Wissler, 2002

The third set of mediator actions examined in this category involved case evaluation in various forms. When mediators used an "evaluative" (or a "pressing") style, disputants in general civil cases tended to be less satisfied overall with the mediation process than when mediators used a "neutral" style.[89] In a study of employment disputes settled through the EEOC, charging parties appeared to have more negative views on all dimensions when mediators were purely "evaluative" versus purely "facilitative."[90] These dimensions were whether the mediation process was fair; they were satisfied with the fairness of the session; they had full opportunity to present their views; the mediator remained neutral, helped them develop options, understood their needs, and helped clarify their needs; the options discussed during mediation were realistic; they were satisfied with the results of mediation; and they obtained what they wanted from mediation. Responding parties' perceptions were, for the most part, not affected by the mediators' style, but responding parties appeared less likely to think the mediator

---

[89] Wall et al., 2011. The only reported statistical significance test compared "evaluative" and "pressing" styles combined versus the "neutral" style. Thus, we do not know whether the satisfaction ratings for the "evaluative" style differed from those for the "pressing" style or would differ from those for the "neutral" style if analyzed alone. Satisfaction ratings for the "evaluative" style fell between the satisfaction ratings for the "neutral" and "pressing" styles. "Evaluative" included analyzing the case in a balanced way, pointing out each side's strengths and weaknesses, discussing case merits, making suggestions, and giving their opinions about what the parties should do. For the actions constituting the "pressing" and "neutral" styles, *see supra* note 2. Mediator strategy and case type did not interact to affect satisfaction ratings.

[90] McDermott & Obar, 2004. These data are from only cases that settled. No statistical significance tests were reported, so whether these are "true" (i.e., statistically significant) differences is not known. We report here as apparent differences only "differences" of 5% or greater; the largest difference was 9%. "Purely evaluative" included actions designed to influence a party's perception or position, such as opining, challenging, predicting trial outcome, suggesting, or reality checking. "Purely facilitative" included structuring the agenda and assisting the disputants to resolve the dispute without coercion or pressure. When mediators used a "hybrid" style (a mixture of actions from both styles), disputants' perceptions either were intermediate between or similar to one or the other of the "pure" styles, depending on the measure. It is unclear whether the mediators, when answering the questions used to determine their style, were describing what they did to help resolve the dispute or what they did *that they thought* contributed to its resolution.

understood their needs, helped clarify their needs, and the options discussed during mediation were realistic when mediators were purely "evaluative" versus purely "facilitative."[91]

When mediators in general civil cases emphasized the risks or costs of trial, discussed the likely trial outcome, or pointed out weaknesses in the disputant's position and the other party's position, disputants were less satisfied overall with the mediation process.[92] When mediators evaluated the merits of the case for the parties in general civil cases, disputants thought the process was more fair, but their perceptions of settlement pressure were not affected.[93] When mediators evaluated the merits of the case in divorce mediation, disputants who settled reported greater improvement in their understanding of the other party's views, and disputants in cases that did not settle felt the mediation process was more fair and they had a greater chance to help decide the outcome; but no other perceptions were affected for either group.[94] In the same study, mediators' disclosing their opinion on the merits or their views of the appropriate settlement was not related to disputants' assessments on any dimension in both cases that did and did not settle.[95] In general civil cases, mediators' expressing their views of the case rather than keeping their views silent was related to disputants feeling more pressured to settle, but was not related to their perception that the process was fair.[96]

3. Effect on Attorneys' Perceptions

Attorneys in general civil cases thought the mediation process was more fair when mediators engaged in each of the following actions than when they did not: suggested possible settlement options, assisted the parties in evaluating the case, or assisted the parties in evaluating the value of the case.[97] In the same study, however, attorneys' assessments of the fairness of the mediation process were not related to whether the mediators engaged in each of these actions: recommended a particular settlement, evaluated the merits of the case for the parties, or kept their views of the case silent. In another study of general civil cases, mediators' offering their assessment of the case value had essentially no effect on attorneys' perceptions.[98] When mediators assessed the case, attorneys in one court were less satisfied with the mediation for their client, but there was no effect in three other courts. And in none of the courts did mediator assessment affect attorneys' satisfaction with the outcome for their client, the fairness of the mediation, the fairness of the outcome for their client, and whether mediation affected the parties' relationship. In divorce cases, attorneys' perception of the fairness of the mediation process was not related to whether mediators recommended a particular settlement or suggested possible options for settlement.[99]

---

[91] McDermott & Obar, 2004. For the responding parties' perceptions not related to mediators' actions, see the perceptions listed *supra* note 90 and accompanying text.
[92] Wall et al., 2011.
[93] Wissler, 2002.
[94] WISSLER, 1999, OHIO STUDY. For both cases that did and did not settle, disputants' perceptions not related to mediators' evaluating the case merits included whether they were satisfied with the outcome, their children's circumstances improved, and their ability to deal with the other party regarding the children improved. In cases that settled, mediators' evaluating the case merits also was not related to disputants' views of the fairness of the process or their chance to help decide the outcome. In cases that did not settle, evaluation also was not related to disputants' understanding of the other party's views.
[95] WISSLER, 1999, OHIO STUDY. *See supra* note 94 for the perceptions examined.
[96] Wissler, 2002.
[97] Wissler, 2002.
[98] Hensler, 2001.
[99] WISSLER, 1999, MAINE STUDY.

TABLE V.B.3. Effect of Offering Recommendations, Suggestions, Evaluations, or Opinions on Attorneys' Perceptions		
Negative effect	No effect	Positive effect
Hensler	Hensler Wissler, 1999, Maine Study Wissler, 2002	Rosenberg & Folberg (ENE) Wissler, 2002

In a study of Early Neutral Evaluation in general civil cases, attorneys were more satisfied with the session when the neutrals engaged in each of the following actions than when they did not: gave their views on the merits, the monetary value of the case, and procedures; suggested a specific dollar figure for settlement; and predicted a specific verdict.[100]

C. Eliciting Disputants' Suggestions or Solutions

Only a small number of studies examined the effects of eliciting disputants' suggestions or solutions; most found these mediator actions were related to increased settlement. Eliciting disputants' suggestions or solutions also was related to disputants' higher joint goal achievement, being more likely to reach a consent order, and being less likely to return to court for an enforcement action; but these mediator actions were not related to the personalization of mediated agreements or the filing of post-mediation adversarial motions. Eliciting disputants' suggestions or solutions either had no effect on disputants' perceptions and relationships or was associated with more favorable views of the mediator, the mediation process, the outcome, and their ability to work with the other disputant.

1. Effect on Settlement and Related Outcomes

When mediators "elicited participant solutions" in limited jurisdiction civil cases, settlement was more likely, and disputants were less likely to return to court for enforcement action within a year.[101] When mediators "elicited participant solutions" in child custody cases, settlement was more likely and a consent order was more likely to be reached, but there was no effect on whether mediated agreements were personalized or whether and how many adversarial motions were filed.[102] Settlement also appeared more likely in divorce cases when mediators requested that disputants provide proposals, clarification of those proposals, and evaluation of the other disputant's opinions or proposals.[103] Each of

---

[100] Rosenberg & Folberg, 1994. The neutrals' actions in ENE might have had more impact than in mediation because assessment by the neutral is an expected and integral part of ENE sessions. Settlement possibilities generally are discussed in ENE; if no settlement is reached, case management issues are explored. *Id.*

[101] MARYLAND ADMINISTRATIVE OFFICE OF THE COURTS, 2016, DAY OF TRIAL MEDIATION. The same actions comprised "eliciting participant solutions" for all outcome measures discussed in this section. These actions included asking disputants for suggestions and solutions, summarizing those ideas or agreements, checking their reaction to those solutions, and not asking open-ended or closed-ended questions.

[102] MARYLAND ADMINISTRATIVE OFFICE OF THE COURTS, 2016, CHILD ACCESS MEDIATION. For most of these analyses, "eliciting participant solutions" included asking disputants for suggestions and solutions, summarizing those ideas or agreements, checking their reaction to those solutions, not giving a legal assessment, and not asking open-ended or closed-ended questions. For the analyses of adversarial motions, which were assessed at follow-up six months after mediation, "eliciting participant solutions" included the same actions as above, except "offering legal assessments" was dropped.

[103] Donohue et al., 1985. No statistical significance tests were reported, so this might not be a "true" (i.e., statistically significant) difference. For this study, we report as apparent differences only "differences" of 14% or greater.

the following actions was related to increased settlement in community mediation: mediators' challenging disputants to generate new ideas, posing problems to be solved, suggesting new ideas, and requesting disputants' reaction to those ideas.[104] Each of those actions, except requesting disputants' reactions, also was related to greater joint goal achievement. Testing proposals, however, was not related to settlement in labor-management disputes.[105]

TABLE V.C.1. Effect of Eliciting Disputants' Suggestions or Solutions on Settlement and Related Outcomes		
Reduced settlement / Negative effect	No effect	Increased settlement / Positive effect
	Karim & Pegnetter MD Child Access	Donohue et al., 1985 MD Child Access MD Day of Trial Zubek et al.

2. Effect on Disputants' Perceptions and Relationships

When mediators "elicited participant solutions" in a study of limited jurisdiction civil cases, disputants were less likely to say the mediator controlled decisions made in mediation, pressured them to settle and prevented the discussion of important issues; and they were more likely to say they understood each other better and listened, together controlled decisions in mediation, and the other person took responsibility and apologized; and, several months after mediation, they had changed their approach to conflict.[106] However, other perceptions assessed at the conclusion of mediation and at follow-up several months later were not related to the extent to which mediators "elicited participant solutions."[107] Disputants' satisfaction with the mediation process and outcome in community mediation was not related to whether the mediators suggested new ideas, requested disputants' reaction to those ideas, challenged disputants to generate new ideas, or posed problems to be solved.[108]

When mediators "elicited participant solutions" in a study of child custody mediation, disputants were more likely to say the other person listened, they understood each other better, and together they controlled the decisions made in mediation; underlying issues came out, they could express themselves, they were clearer about what they wanted, and the mediator understood them; and they felt there was a range of options for resolving the issues and they can work together to make decisions regarding the

---

[104] Zubek et al., 1992. *See supra* note 1.

[105] Karim & Pegnetter, 1983.

[106] MARYLAND ADMINISTRATIVE OFFICE OF THE COURTS, 2016, DAY OF TRIAL MEDIATION. For the actions comprising "eliciting participant solutions" for all perceptions discussed in this section, s*ee supra* note 101.

[107] MARYLAND ADMINISTRATIVE OFFICE OF THE COURTS, 2016, DAY OF TRIAL MEDIATION. Disputants' perceptions assessed at the conclusion of mediation that were not related to "eliciting participant solutions" included: whether they could express themselves, the mediator listened without judging, did not take sides, understood them and treated them with respect; whether underlying issues came out and they were clearer about what they wanted; whether they were satisfied with the process and outcome, thought the outcome was fair and could be implemented and the issues were resolved; whether they took responsibility; etc. At follow-up several months after mediation, questions about the outcome referred to agreements reached in mediation and non-judicial settlement conferences as well as to trial decisions. Disputants' perceptions assessed at follow-up that were not related to "eliciting participant solutions" included: whether they were satisfied with the outcome, would recommend mediation to others, and the outcome was working for them; whether the other person had followed through, new problems arose, they experienced any inconvenience or costs associated with the situation; they have control over the issues and can talk with the other person about them, etc.

[108] Zubek et al., 1992. *See supra* note 1.

children.[109] However, several other perceptions assessed at the conclusion of mediation,[110] and all perceptions assessed at follow-up six months after mediation,[111] were not related to mediators' "eliciting participant solutions."

TABLE V.C.2. Effect of Eliciting Disputants' Suggestions or Solutions on Disputants' Perceptions and Relationships		
Negative effect	No effect	Positive effect
	MD Child Access MD Day of Trial Zubek et al.	MD Child Access MD Day of Trial

3. Effect on Attorneys' Perceptions

None of the studies examined the effects of eliciting disputants' suggestions or solutions on attorneys' perceptions of mediation.

D. Addressing Disputants' Emotions, Relationships, or Hostility

Most studies found giving more attention to disputants' emotions, relationships, or sources of conflict either increased settlement or did not affect settlement, and either reduced or did not affect post-mediation court actions. A few studies, however, found these actions were associated with reduced settlement. Trying to reduce emotional tensions or control hostility had mixed effects on settlement – positive, negative, and no effect. Giving more attention to disputants' emotions, relationships, or sources of conflict either had no effect on disputants' perceptions and relationships or was associated with more favorable views of the mediator, the mediation process, the outcome, and their ability to work with the other disputant.

---

[109] MARYLAND ADMINISTRATIVE OFFICE OF THE COURTS, 2016, CHILD ACCESS MEDIATION. For these analyses, "eliciting participant solutions" included asking disputants for suggestions and solutions, summarizing those ideas or agreements, checking disputants' reaction to suggested solutions, not giving a legal assessment, and not asking open-ended or closed-ended questions. *See also supra* note 13.

[110] MARYLAND ADMINISTRATIVE OFFICE OF THE COURTS, 2016, CHILD ACCESS MEDIATION. Disputants' perceptions not related to "eliciting participant solutions" included: whether the mediator treated them with respect, listened without judging, did not take sides, did not prevent important issues from being discussed, and did not control decisions made in mediation; they were satisfied with the mediation process and their interactions with the justice system and would recommend mediation; whether the agreement reached was fair, implementable, met their children's needs and resolved issues; etc.

[111] MARYLAND ADMINISTRATIVE OFFICE OF THE COURTS, 2016, CHILD ACCESS MEDIATION. At follow-up, "eliciting participant solutions" included the same actions as *supra* note 109, except "not offering legal assessments" was dropped. Questions about outcomes at follow-up referred not only to agreements reached in mediation, but also to agreements resulting from negotiation or settlement conferences and judicial orders on the merits. Disputants' perceptions not related to mediators' "eliciting participant solutions" included: whether they were satisfied with the outcome, it was working for the children, there were new problems, both parties followed through, their interactions with the other party improved, they can talk with the other party and work together for the sake of the children, the children were doing well, etc.

1. Effect on Settlement and Related Outcomes

The first set of mediator actions in this category involved addressing disputants' emotions, relationships, or sources of conflict. When mediators used a "problem-solving" style rather than a "settlement-orientation" style in divorce cases, settlement was more likely and fewer cases took post-mediation court action, though there was no difference in the mean number of court actions taken.[112] Settlement also appeared more likely when divorce mediators requested information about the disputants' relationship or feelings.[113] There appeared to be greater movement toward settlement in another study of divorce cases when mediators gave more attention to disputants' interests and emotional and relational concerns than when they focused more narrowly on the facts to the exclusion of other issues.[114] In another divorce mediation study, however, settlement was less likely when mediators spent more time making or requesting disclosures of feelings and when they spent more time coaching parties about or correcting their negotiating behavior.[115]

In child custody mediation, when mediators "reflected emotions/interests" to a greater extent, settlement was less likely, but the agreements reached were more personalized.[116] In the same study, mediators' "reflecting emotions/interests" had no effect on progress toward a consent order, reaching a consent order, or whether and how many post-mediation adversarial motions were filed. In another study of divorce cases, mediators' encouraging disputants to express their feelings was not related to settlement.[117] In limited jurisdiction civil cases, mediators' "reflecting emotions/interests" was not related to settlement or to whether disputants returned to court within a year for an enforcement action.[118]

---

[112] Kressel et al., 1994. Mediators with a "problem-solving" style used constructive problem-solving approaches, worked to gain an understanding of relevant sources of conflict and the parties' circumstances and constraints, and ultimately presented the parties with proposals to break impasse that took this information into account. Mediators with a "settlement orientation" style were primarily concerned with getting a settlement; had a narrow issue focus; did not probe or question the disputants closely about their conflict, circumstances, or needs; and made premature and insistent proposals. The cases in this study involved extremely high levels of pre-mediation conflict.

[113] Donohue et al., 1985. No statistical significance tests were reported, so this might not be a "true" (i.e., statistically significant) difference. For this study, we report as apparent differences only "differences" of 14% or greater.

[114] Donohue et al., 1994. These approaches were described as the mediators conducting a "more open-ended, broader discussion of perceptions associated with interests, values, and relationship topics" versus "a more closed-ended, information-based mediation." The two approaches were used in different mediation programs in different counties during different time periods. Because none of the cases reached a final mediation agreement, the researchers compared cases that reached more than the mean number of agreements on single issues to cases that reached fewer than the mean number of agreements. No specific data or statistical significance tests were reported.

[115] Slaikeu et al., 1985.

[116] Maryland Administrative Office of the Courts, 2016, Child Access Mediation. For these analyses, "reflecting emotions/interests" consisted of a large number of actions including: addressing and encouraging disputants to express their feelings; paraphrasing or reflecting back the interests, values, or goals disputants expressed; pointing out things the disputants had in common; not giving their opinion about the situation or solutions, etc.

[117] Wissler, 1999, Maine Study.

[118] Maryland Administrative Office of the Courts, 2016, Day of Trial Mediation. For these analyses, "reflecting emotions/interests" included addressing and encouraging disputants to express their feelings; paraphrasing or reflecting back the interests, values, or goals the disputants expressed; and not giving their opinion about the situation or solutions.

TABLE V.D.1. Effect of Addressing Disputants' Emotions, Relationships, or Hostility on Settlement and Related Outcomes		
Reduced settlement / Negative effect	No effect	Increased settlement / Positive effect
Addressing Disputants' Emotions, Relationships, or Sources of Conflict		
MD Child Access Slaikeu et al.	Kressel et al. MD Child Access MD Day of Trial Wissler, 1999, Maine Study	Donohue et al., 1985 Donohue et al., 1994 Kressel et al. MD Child Access
Trying to Control Disputants' Hostility or Reduce Emotional Tensions		
Cohn Hiltrop, 1985	Cohn Dilts & Karim	Dilts & Karim Posthuma et al.

The second set of mediator actions in this category involved trying to control disputants' hostility or reduce emotional tensions. When mediators in general civil cases used a "referee" style that involved attempting to control disputants' hostility, settlement was "slightly" less likely than when they used an "instigator" or "evaluator" style, but settlement rates did not differ between the "referee" style and a "facilitative" style.[119] Settlement was less likely when mediators tried to reduce emotional tensions in labor-management disputes.[120] When mediators tried to control the expression of hostility, settlement was more likely for union negotiators but was not affected for management negotiators.[121] "Settlement" was more likely in labor-management disputes when mediators controlled expressions of hostility along with suggesting proposals to help avoid the appearance of defeat.[122]

2. Effect on Disputants' Perceptions and Relationships

Research has examined the effects on disputants' perceptions and relationships of addressing disputants' emotions, relationships, or sources of conflict, but has not examined the effects of trying to control hostility. When mediators used a "problem-solving" rather than a "settlement orientation" style in divorce cases, disputants were more likely to say their co-parental relationship improved and they generally had more favorable views of their mediation experience.[123] When mediators had a "relationship" orientation rather than a "settlement" orientation, defendants were more likely to report their relationship had improved four to eight months after community mediation, but no difference was seen for plaintiffs.[124] In that same study, however, the mediators' orientation was not associated with compliance with the agreement or the development of new problems for either party. In a study of divorce cases, disputants appeared to be more satisfied with mediation when mediators gave more attention to disputants' emotional and relational concerns than when they focused more narrowly on

---

[119] Cohn, 1996. The "referee" style also involved not focusing on closure. *See supra* note 3 for the actions constituting the other styles. No statistical significance tests or settlement rates were reported, so these might not be "true" (i.e., statistically significant) differences.
[120] Hiltrop, 1985.
[121] Dilts & Karim, 1990.
[122] Posthuma et al., 2002. These two actions were combined into a single measure. "Settlement" included whether the dispute was settled; anything was left unclear; and the agreement reached was mutually beneficial, lasting, had no political ramifications, and felt like their own.
[123] Kressel et al., 1994. *See supra* note 112 for definitions of the styles.
[124] Pruitt et al., 1993. Mediators with a "relationship" orientation focused on building capacity for future problem-solving; mediators with a "settlement" orientation focused on reaching agreement. These analyses involved the same mediation and med-arb cases as in Zubek et al., *supra* note 1, but were based on information obtained four to eight months after mediation.

the facts to the exclusion of other issues.[125] In a study simulating divorce mediation, mediators who were ranked more highly attended more to socioemotional needs and expression than did lower-ranked mediators.[126]

In limited jurisdiction civil cases, when mediators "reflected emotions/interests," disputants were more likely to say the other party took responsibility and apologized, they can talk with the other party about their concerns, the situation would change, and the court cares about helping resolve problems fairly. However, most disputant perceptions assessed at the conclusion of mediation,[127] and all disputant perceptions assessed at follow-up several months later,[128] were not related to mediators' "reflecting emotions/interests." In child custody mediation, when mediators "reflected emotions/interests," disputants were more likely to say the other person listened to them, they understood each other better, together controlled the decisions made in mediation, saw a range of options for resolving issues, can work with the other party regarding the children,[129] can talk with the other parent and work as a team for the sake of the children, and the children were doing well.[130] However, most disputant perceptions assessed at the conclusion of mediation[131] and six months after mediation[132] were not related to mediators' "reflecting emotions/interests."

---

[125] Donohue et al., 1994. No specific data or statistical significance tests were reported. *See supra* note 114.

[126] Gale et al., 2002. The two top-ranked mediators, however, each addressed emotional issues in different ways. Twenty simulations were rank ordered by the actors who had played the roles of disputants; two mediations from the top quartile and two from the bottom quartile were examined in detail. The criteria used for ranking and for choosing which simulations to examine were not specified.

[127] MARYLAND ADMINISTRATIVE OFFICE OF THE COURTS, 2016, DAY OF TRIAL MEDIATION. For these analyses, "reflecting emotions/interests" included the actions listed *supra* note 118. Disputants' perceptions not related to these actions included: whether they could express themselves freely, the mediator listened without judging, did not take sides, understood them and treated them with respect; they listened to each other and understood each other better and together controlled the decisions in mediation; whether the mediator pressured them to settle, controlled decisions in mediation and prevented discussion of important topics; underlying issues came out and they were clearer about what they wanted; they were satisfied with the process and outcome, thought the outcome was fair and could be implemented, and issues were resolved; etc.

[128] MARYLAND ADMINISTRATIVE OFFICE OF THE COURTS, 2016, DAY OF TRIAL MEDIATION. For these analyses, "reflecting emotions/interests" included the actions listed *supra* note 118, except "not offering an opinion" was dropped. Questions about the outcome at follow-up referred to agreements reached in mediation and non-judicial settlement conferences as well as to trial decisions. Disputants' perceptions at follow-up that were not related to "reflecting emotions/interests" included: whether they changed their approach to conflict, the other person had followed through, new problems arose, they experienced inconvenience or costs associated with the situation; they can talk with the other person about issues and had control over issues; and they were satisfied with the outcome, thought it was working, and would recommend mediation; etc.

[129] MARYLAND ADMINISTRATIVE OFFICE OF THE COURTS, 2016, CHILD ACCESS MEDIATION. For analyses involving perceptions obtained at the conclusion of mediation, "reflecting emotions/interests" included the actions listed *supra* note 115.

[130] MARYLAND ADMINISTRATIVE OFFICE OF THE COURTS, 2016, CHILD ACCESS MEDIATION. Questions about outcomes at follow-up referred not only to agreements reached in mediation, but also to agreements resulting from negotiation or settlement conferences and judicial orders on the merits. For analyses involving perceptions obtained six months after mediation, "reflecting emotions/interests" included only three of the actions list *supra* note 115, namely addressing and encouraging disputants to express their feelings; paraphrasing or reflecting back the interests, values, or goals disputants expressed; and not offering their own solutions. And three new actions were added to this style: paraphrasing what disputants said about the main issues in conflict, not introducing issues the disputants hadn't raised, and using open-ended questions.

[131] MARYLAND ADMINISTRATIVE OFFICE OF THE COURTS, 2016, CHILD ACCESS MEDIATION. Disputants' perceptions not related to "reflecting emotions/interests" included: whether the mediator treated them with respect, listened without

When mediators encouraged disputants in divorce mediation to say how they felt, disputants who settled felt the mediation process was more fair, their understanding of the other party's views and their own needs had improved, and they were more satisfied with the outcome. In the same study, however, mediators' encouraging disputants to say how they felt was not related to other perceptions in cases that settled, and was not related to any perceptions in cases that did not settle.[133] In another study of divorce mediation, when mediators encouraged disputants to express how they felt, disputants who settled thought the mediation process was more fair, their understanding of the other party's views improved, their dealings with the other party about the children would improve, and they were more satisfied with the outcome.[134] In that same study, disputants who did not settle also thought the mediation process was more fair, their understanding of the other party's views improved, their dealings with the other party about the children would improve, and they had more chance to help decide the outcome when mediators encouraged them to express how they felt. For both cases that did and did not settle, however, other perceptions were not related to mediators' encouraging them to express how they felt.[135]

TABLE V.D.2. Effect of Addressing Disputants' Emotions or Relationships on Disputants' Perceptions and Relationships		
Negative effect	No effect	Positive effect
	MD Child Access MD Day of Trial Pruitt et al. Wissler, 1999, Maine Study Wissler, 1999, Ohio Study	Donohue et al., 1994 Gale et al. Kressel et al. MD Child Access MD Day of Trial Pruitt et al. Wissler, 1999, Maine Study Wissler, 1999, Ohio Study

judging, did not take sides, prevented discussion of important topics, and controlled decisions made in mediation; whether they could express themselves, underlying issues came out, they became clearer about what they wanted, and the mediator understood them; whether they were satisfied with the mediation process and their interactions with the justice system and would recommend mediation; whether the agreement reached was fair, implementable, met their children's needs and resolved issues; etc.

[132] MARYLAND ADMINISTRATIVE OFFICE OF THE COURTS, 2016, CHILD ACCESS MEDIATION. Disputants' perceptions at follow-up that were not related to "reflecting emotions/interests" included: whether both parties followed through, new problems arose, their interactions improved, they were satisfied with the outcome, and it was working for the children, etc.

[133] WISSLER, 1999, MAINE STUDY. In cases that settled, mediators' encouraging disputants to express how they felt was not related to disputants' perceptions of whether their dealings with the other party about the children or their understanding of their children's needs had improved.

[134] WISSLER, 1999, OHIO STUDY.

[135] WISSLER, 1999, OHIO STUDY. In cases that settled, mediators' encouraging disputants to express how they felt was not related to disputants' perceptions of whether they had a chance to help decide the outcome or whether their children's circumstances improved. In cases that did not settle, mediators' encouraging disputants to express how they felt was not related to disputants' perceptions of whether their children's circumstances improved or whether they were satisfied with the outcome.

3. Effect on Attorneys' Perceptions

Attorneys' perceptions of the fairness of the mediation process were not related to whether mediators encouraged the parties to express their feelings.[136]

E. Working to Build Rapport and Trust, Expressing Empathy, Structuring the Agenda, or Other "Process" Styles and Actions

Most studies found that working to build rapport and trust with and between the disputants, expressing empathy, or praising the disputants either increased settlement or had no effect on settlement. Actions to structure the issues and agenda, for the most part, either increased settlement or had no effect. Other "process" actions and approaches had mixed effects on settlement -- positive, negative, and no effect. For the most part, these various mediator actions either had no effect on disputants' perceptions and relationships or were associated with improved relationships and more favorable perceptions of the mediator, the mediation process, and the outcome.

1. Effect on Settlement and Related Outcomes

The first set of mediator actions and styles in this category involved working to build rapport and trust with and between the parties, expressing empathy, or praising the disputants. When mediators in varied mediation settings used either a "reflexive" or a "contextual/trust" style to a greater degree, "general settlement" was more likely.[137] In labor-management disputes, settlements generally increased when mediators tried to gain the parties' trust[138] or used "friendliness,"[139] although mediators' use of "reflexive" tactics was not related to settlement.[140] Settlement appeared "slightly" less likely when mediators used a "facilitator" style in general civil cases than when they used an "instigator" or "evaluator" style.[141] In international disputes, "non-directive" strategies that included "communication-facilitation" strategies generally appeared less likely to produce "successful outcomes" than "directive" strategies.[142]

---

[136] WISSLER, 1999, MAINE STUDY.

[137] Lim & Carnevale, 1990. "Reflexive" included developing rapport with parties, speaking their language, using humor, avoiding taking sides, etc. "Contextual/trust" included developing goals for mediation, developing trust between parties, gaining parties' trust, discussing interests, clarifying needs, and expressing pleasure at progress. For the outcomes constituting "general settlement," *see supra* note 9.

[138] Dilts & Karim, 1990; this relationship was seen for both union and management negotiators. Karim & Pegnetter, 1983; this relationship was seen for management negotiators but not union negotiators.

[139] Posthuma et al., 2002. "Friendliness" included tried to gain trust/confidence, let parties blow off steam, suggested tradeoffs among issues, attempted to speak parties' language, and used humor. "Settlement" included whether the dispute was settled; anything was left unclear; and the agreement reached was mutually beneficial, lasting, caused any political ramifications, and felt like their own.

[140] Carnevale & Pegnetter, 1985. "Reflexive" tactics included developing rapport, gaining trust, using humor, and avoiding taking sides.

[141] Cohn, 1996. "Facilitator" included focusing on establishing the process and trust and not suggesting particular solutions. *See supra* note 3 for the actions constituting the other styles. No statistical significance tests and no settlement rates were reported, so these might not be "true" (i.e., statistically significant) differences.

[142] Bercovitch & Lee, 2003. The "communication-facilitation" strategy included gaining the trust and confidence of the parties, developing rapport, identifying issues and interests, clarifying the situation, avoiding taking sides, developing a framework for understanding, encouraging meaningful communication, offering positive evaluations, etc. The category of "non-directive" strategies also included a "procedural-formulative" strategy, *see infra* note 160. "Successful outcomes" included ceasefires and both partial and full settlements. For the actions constituting a

Mediators' use of empathy was related to more settlement and greater joint goal achievement in community mediation.[143] However, mediators' use of empathy was not related to settlement in general civil[144] or in labor-management disputes.[145] In a study simulating a campus-based business dispute, settlement was more likely when mediators used "empathic" listening rather than "discriminative" listening, but there was no difference in settlement between "empathic" and "critical" listening.[146] Praising the disputants was not related to settlement or joint goal achievement in community mediation,[147] but was related to more settlement in general civil disputes.[148]

TABLE V.E.1. Effect of Working to Build Rapport and Trust, Expressing Empathy or Praise, Structuring the Agenda, or Other "Process" Styles and Actions on Settlement and Related Outcomes		
Reduced settlement / Negative effect	No effect	Increased settlement / Positive effect
Working to Build Rapport and Trust, Expressing Empathy or Praise		
Bercovitch & Lee Cohn	Carnevale & Pegnetter Karim & Pegnetter Kimsey et al., 1993 Wall & Chan-Serafin, 2009 Zubek et al.	Dilts & Karim Karim & Pegnetter Kimsey et al., 1993 Lim & Carnevale Posthuma et al. Wall et al., 2011 Zubek et al.
Structuring the Agenda		
Hiltrop, 1989, Study 2	Carnevale & Pegnetter Donohue et al., 1985 Karim & Pegnetter Zubek et al.	Dilts & Karim Hiltrop, 1989, Study 2 Karim & Pegnetter Lim & Carnevale Posthuma et al. Vanderkooi & Pearson Zubek et al.
Other "Process" Approaches		
Bercovitch & Lee Karim & Pegnetter Wall & Chan-Serafin, 2010 Wall et al., 2011 Woodward	Bartunek et al. Karim & Pegnetter Wissler, 1999, Maine Study Wissler, 1999,Ohio Study Woodward	Dilts & Karim Donohue et al., 1985 Hiltrop, 1985 Hiltrop, 1989, Study 2 Woodward

The second set of mediator actions in this category involved structuring the issues and agenda. When mediators in varied mediation settings used a "contextual/agenda" style to a greater degree, "general

---

"directive" strategy, see supra note 6. Statistical significance tests for the overall effect of directive versus non-directive strategies on settlement were not reported, only for their effect broken down by various other factors, so these might not be "true" (i.e., statistically significant) differences. The apparent differences for the majority of dimensions, however, were relatively large (greater than 15%).

[143] Zubek et al., 1992. "Empathy" included demonstrations of concern and perspective taking. See also supra note 1.

[144] Wall & Chan-Serafin, 2009.

[145] Karim & Pegnetter, 1983. No relationship was seen for either union or management negotiators.

[146] Kimsey et al., 1993. "Empathic" listening involved responding to disputants' emotional signals and included both of the other listening skills. "Critical" listening involved analyzing the validity and quality of arguments. "Discriminative" listening focused on understanding and remembering. More reframing by disputants was seen with "empathic" and "discriminative" listening than with "critical" listening.

[147] Zubek et al., 1992. This included praising the disputants' behavior in mediation, their current position, or their past behavior. See also supra note 1.

[148] Wall et al., 2011.

settlement" was more likely.[149] Mediators' suggesting an agenda in community mediation was not related to settlement, but was related to greater joint goal achievement.[150] Mediators' identifying or enforcing topics or the agenda was not related to settlement in divorce mediation.[151] In labor-management disputes, mediators' simplifying the agenda[152] and building or helping devise a framework for negotiation[153] were generally related to increased settlement. In labor-management mediation, mediators' suggesting separating issues to reach a partial deal and emphasizing the need to make concessions increased settlement, but mediators' suggesting parties deal with the most difficult issues first, grouping multiple issues to create a package, and asking parties to identify their bottom-line positions decreased settlement.[154] One study of labor-management disputes found increased "settlement" with a broad set of mediator "process" actions that included structuring the agenda,[155] but another found no effect on settlement of a somewhat similar set of "nondirective" mediator actions.[156] In a study of divorce cases, the two mediators with the highest settlement rates both actively structured the mediation, though each did that in different ways.[157]

The third set of mediator actions in this category included a broad range of other process-focused approaches. Two studies of general civil cases found that settlement was less likely when mediators used a "neutral" style than either a "pressing" or "evaluative" style.[158] A study simulating the mediation of a labor-management dispute found no effect on settlement when mediators used a "process" or a

---

[149] Lim & Carnevale, 1990. "Contextual/agenda" included prioritizing issues, developing a framework for mediation, simplifying the agenda, etc. For the outcomes constituting "general settlement," *see supra* note 9. There was a statistically significant interaction of the "contextual/agenda" style with the level of "interparty hostility," such that this style was more strongly related to "general settlement" when hostility was high than when it was low. For the measures constituting "interparty hostility," *see supra* note 9.

[150] Zubek et al., 1992. *See also supra* note 1.

[151] Donohue et al., 1985. No statistical significance tests were reported; however, the percentage of settlements for mediators who did versus did not engage in these actions was identical.

[152] Dilts & Karim, 1990. This relationship was seen for both union and management negotiators.

[153] Dilts & Karim, 1990; this relationship was seen for both union and management negotiators. Karim & Pegnetter, 1983; this relationship was seen for union negotiators but not management negotiators.

[154] Hiltrop, 1989, Study 2.

[155] Posthuma et al., 2002. This composite measure included: attempting to simplify the agenda by simplifying or combining issues, controlling the timing and pace of negotiations, using frequent caucusing, and keeping the parties bargaining. "Settlement" included whether the dispute was settled; anything was left unclear; and the agreement reached was mutually beneficial, lasting, had no political ramifications, and felt like their own. There was a significant interaction with party hostility, such that settlement was more likely if this approach was used when interparty hostility was the obstacle to settlement.

[156] Carnevale & Pegnetter, 1985. "Nondirective" included prioritizing issues, simplifying the agenda, developing a framework, focusing on issues, controlling timing, letting disputants blow off steam, using frequent caucuses, dealing with constituent problems, controlling hostility, helping them save face, taking responsibility for concessions, using late hours, and keeping the negotiators at the table.

[157] Vanderkooi & Pearson, 1983. The article does not report what the mediators with lowest settlement rates did with regard to structuring the session, so we do not know if their actions differed from the mediators with the highest settlement rates.

[158] Wall & Chan-Serafin, 2010; Wall et al., 2011. The data in these two studies are not entirely independent; the cases in one study are a subset of the cases in the other study. "Neutral" included not taking sides, not telling disputants what to do, and not evaluating or attempting to change parties' positions. *See supra* note 2 for the other styles.

"passive" approach compared to a "content" approach.[159] In international disputes, "non-directive" strategies that included "procedural-formulative" strategies generally appeared less likely to produce "successful outcomes" than "directive" strategies.[160]

In divorce mediation, settlement was not related to mediators' frequently summarizing what the parties said or trying to even out bargaining imbalances.[161] Settlement appeared more likely when divorce mediators engaged in each of these actions than when they did not: reframed disputants' proposals, continuously pointed out areas of agreement, asked disputants for clarification of statements, identified and enforced interaction rules, terminated and initiated topics, and provided information about the mediation process and the role of the mediator.[162] Mediators' clarifying the needs of the other party was related to increased settlement in labor-management disputes.[163] Settlement appeared more likely when mediators in general civil cases helped the parties negotiate and provided a suitable negotiation environment.[164] In the same study, urging the disputants to talk had no effect on settlement in mediation with attorney-mediators, but appeared to reduce settlement in judicial mediation.[165]

In labor-management disputes, mediators' suggesting parties review their needs with their constituency was related to increased settlement in one study,[166] but had no effect for union negotiators and decreased settlement for management negotiators in another study.[167] When mediators asked

---

[159] Bartunek et al., 1975. This simulation limited the mediation to an hour. The "process" approach involved the mediator teaching the parties how to paraphrase and giving them a chance to practice. In the "passive" approach, the mediator had the parties take a brief break. *See supra* note 48.

[160] Bercovitch & Lee, 2003. The "procedural-formulative" strategy included arranging sessions, establishing protocols, suggesting procedures, highlighting common interests, reducing tensions, controlling timing, structuring the agenda, helping parties save face, etc. The category of "non-directive" strategies also included a "communication-facilitation" strategy, *see supra* note 142. "Successful outcomes" included ceasefires and both partial and full settlements. For the actions constituting a "directive" strategy, s*ee supra* note 6. Statistical significance tests for the overall effect of directive versus non-directive strategies on settlement were not reported, only for their effect broken down by various other factors, so these might not be "true" (i.e., statistically significant) differences. The apparent differences for the majority of dimensions, however, were relatively large (greater than 15%).

[161] Wissler, 1999. The first action was examined only in the Maine Study; the latter action was examined in both the Maine Study and the Ohio Study.

[162] Donohue et al., 1985. No statistical significance tests were reported, so this might not be a "true" (i.e., statistically significant) difference. For this study, we report as apparent differences only "differences" of 14% or greater.

[163] Dilts & Karim, 1990. This relationship was seen for both union and management negotiators.

[164] Woodward, 1990. No statistical significance tests were reported, so these might not be "true" (i.e., statistically significant) differences. For both Settlement Week mediation with attorney-mediators and pretrial mediation with judges, the apparent differences in settlement rates when mediators did versus did not "help parties negotiate" were 28% and 14%, respectively; the apparent differences in settlement rates when mediators did versus did not "provide a suitable negotiation environment" were 11% and 8%, respectively.

[165] Woodward, 1990. Settlement rates appeared to decline by 8% when judicial mediators urged disputants to talk; in Settlement Week mediation, the settlement rates were identical whether the mediators did or did not urge disputants to talk.

[166] Dilts & Karim, 1990.

[167] Karim & Pegnetter, 1983.

negotiators to present possible agreement to their constituents[168] or assisted negotiators with their relationship with their constituents, [169] settlement was more likely.

2. Effect on Disputants' Perceptions and Relationships

The first set of mediator actions and styles in this category involved working to build rapport and trust with and between the parties, expressing empathy, or praising the disputants. Mediators' greater use of a "contextual/trust" style or a "reflexive" style in varied mediation settings was related to "improved relationships."[170] When mediators used empathy to a greater degree, disputants in community mediation were more satisfied with the conduct of the hearing and with the outcome.[171] In the same study, when mediators praised the disputants, they were more satisfied with the conduct of the hearing, but their satisfaction with the outcome was unaffected.[172] In civil cases, however, disputants' overall satisfaction with the mediation process was not related to whether mediators praised them or the other party.[173]

TABLE V.E.2. Effect of Working to Build Rapport and Trust, Expressing Empathy or Praise, Structuring the Agenda, or Other "Process" Styles and Actions on Disputants' Perceptions and Relationships		
Negative effect	No effect	Positive effect
Working to Build Rapport and Trust, Expressing Empathy or Praise		
	Wall et al., 2011 Zubek et al.	Lim & Carnevale Zubek et al.
Structuring the Agenda		
Zubek et al.	Zubek et al.	Gale et al. Lim & Carnevale
Other "Process" Approaches		
Kimsey et al., 1994	Kimsey et al., 1994 McDermott & Obar Wissler, 1999, Maine Study Wissler, 1999, Ohio Study	Alberts et al. Kimsey et al., 1994 McDermott & Obar Wissler, 1999, Maine Study Wissler, 1999, Ohio Study

The second set of mediator actions in this category involved structuring the issues and agenda. Mediators' greater use of a "contextual/agenda" style in varied mediation settings was related to "improved relationships."[174] When mediators suggested an agenda in community mediation, disputants were less satisfied with the conduct of the session, but their satisfaction with the outcome was not

---

[168] Hiltrop, 1989, Study 2.

[169] Hiltrop, 1985.

[170] Lim & Carnevale, 1990. "Contextual/trust" included developing goals for mediation, developing trust between parties, gaining parties' trust, discussing interests, clarifying needs, and expressing pleasure at progress. "Reflexive" included developing rapport with the parties, speaking their language, using humor, avoiding taking sides, etc. "Improved relationships" included the mediator's perception that interparty relations improved, they had learned to communicate, etc.

[171] Zubek et al., 1992. "Empathy" included demonstrations of concern and perspective taking. *See also supra* note 1.

[172] Zubek et al., 1992.

[173] Wall et al., 2011.

[174] Lim & Carnevale, 1990. "Contextual/agenda" included prioritizing issues, developing a framework for mediation, simplifying the agenda, etc. "Improved relationships" included the mediator's perception that interparty relations improved, they had learned to communicate, etc. There was a statistically significant interaction of the "contextual/agenda" style with the level of "interparty hostility," such that this style was more strongly related to "improved relationships" when hostility was high than when it was low.

affected.[175] In a study simulating divorce mediation, top-ranked mediators actively yet flexibly shaped the structure of the session with regard to what issues were discussed when and how, with the parties' input, whereas low-ranked mediators were either inflexible or very flexible with regard to structuring the session.[176]

The third set of mediator actions in this category included a broad range of other "process" approaches. When mediators in limited jurisdiction civil cases used a "facilitative" style to a greater degree, disputants felt the mediator and the process were more fair, and they were more satisfied with the mediator, the process, and the outcome.[177] In a study of employment disputes settled through the EEOC, charging parties appeared to have more favorable views on all dimensions when mediators were purely "facilitative" versus purely "evaluative."[178] These dimensions were whether the mediation process was fair; they were satisfied with the fairness of the session; they had full opportunity to present their views; the mediator remained neutral, helped the parties develop options, understood their needs, and helped clarify their needs; the options discussed during mediation were realistic; they were satisfied with the results of the mediation; and they obtained what they wanted from mediation. Responding parties in the same study, however, appeared to have more favorable views on only a few dimensions when mediators were purely "facilitative" versus purely "evaluative": whether the mediator understood their needs, helped clarify their needs, and the options discussed during mediation were realistic. Instead, most of the responding parties' views appeared unaffected by the mediators' style.[179]

In a study simulating a dispute between students, when mediators used an "inaction" strategy, disputants thought mediators were less controlling and imposed solutions less than when mediators used an "integration" or a "pressing" strategy, but there was no difference between "inaction" and "compensating" strategies in disputants' perceptions of mediator control.[180] In the same study, disputants engaged in less reframing and problem-solution redefinition when mediators used an "inaction" strategy than an "integration" strategy, but the amount of reframing did not differ between "inaction" and either "pressing" or "compensating" strategies. The "inaction" strategy did not differ from the other strategies in terms of disputants' conflict management style or disputants' views of the

---

[175] Zubek et al., 1992. *See also supra* note 1.

[176] Gale et al. 2002. For the ranking process, *see supra* note 126.

[177] Alberts et al., 2005. "Facilitative" included mediators keeping their views silent and not judging the disputants. These correlations were large and statistically significant for plaintiffs, defendants, and both disputants in a case.

[178] McDermott & Obar, 2004. These data are from only cases that settled. No statistical significance tests were reported, so whether these are "true" (i.e., statistically significant) differences is not known. We report here as apparent differences only "differences" of 5% or greater. "Purely facilitative" included structuring the agenda and assisting the disputants to resolve the dispute without coercion or pressure. "Purely evaluative" included actions designed to influence a party's perception or position, such as opining, challenging, predicting the trial outcome, suggesting, or reality checking. When mediators used a "hybrid" style (a mixture of actions from both styles), the disputants' perceptions either were intermediate between or similar to one or the other "pure" styles, depending on the measure. It is unclear whether the mediators, when answering the questions used to determine their style, were describing what they did to help resolve the dispute or what they did *that they thought* contributed to its resolution.

[179] McDermott & Obar, 2004. For the responding parties' perceptions not related to mediators' actions, *see* the perceptions listed *supra* note 178 and accompanying text.

[180] Kimsey et al., 1994. "Inaction" included nonintervention, facilitating the process, and playing no role in the outcome. "Integration" included offering solutions and trying to craft a remedy based on parties' input. "Pressing" included using coercion or threatening punishment to get the parties to settle. "Compensating" included offering rewards to get the parties to settle.

mediators' "fairness," "attentiveness," or "responsiveness" or whether mediation clarified their positions.[181]

When mediators frequently summarized what disputants said during divorce mediation, disputants in cases that settled thought the mediation process was more fair, were more satisfied with the outcome, thought their dealings with the other party about the children were more likely to improve, and thought their understanding of the other's views, their own needs, and their children's needs had improved more.[182] In cases that did not settle, disputants thought the process was more fair when mediators frequently summarized what they said, but no other perceptions were affected.[183] In another study of divorce mediation, when mediators frequently summarized what disputants said, disputants in cases that did not settle were more satisfied with the outcome and were more likely to think the mediation process was fair, their understanding of the other party's views improved, and their dealings with the other party about the children would improve, but several other perceptions were not affected.[184] In cases that settled, however, no perceptions were affected by frequent mediator summarizing.[185] Mediators' attempting to even out bargaining imbalances in divorce mediation was not related to any disputant perceptions in either cases that did or did not settle.[186]

3. Effect on Attorneys' Perceptions

Attorneys' perceptions of the fairness of the divorce mediation process were not related to whether mediators frequently summarized what disputants said.[187]

F. Using Pre-mediation Caucuses

Pre-mediation caucuses tended to increase settlement but had mixed success in reducing disputants' post-mediation conflict. The effects of pre-mediation caucuses, however, depended on their purpose. When the purpose was to establish trust and build a relationship with the parties, pre-mediation caucuses increased settlement and reduced disputants' post-mediation conflict. But when the purpose was to get the parties to accept settlement proposals, pre-mediation caucuses had either a negative effect or no effect on settlement and post-mediation conflict.

1. Effect on Settlement and Related Outcomes

Settlement was more likely when mediators in labor-management disputes arranged preliminary separate meetings with each party to explore the issues in dispute and the attitudes of the parties.[188] In a study of family and labor disputes, settlement was more likely when mediators met separately with

---

[181] Kimsey et al. 1994. For the specific items making up these measures, *see supra* note 36.
[182] WISSLER, 1999, MAINE STUDY.
[183] WISSLER, 1999, MAINE STUDY. *See supra* note 182 and accompanying text for the other disputant perceptions examined.
[184] WISSLER, 1999, OHIO STUDY. In cases that did not settle, disputant perceptions not related to mediators' summarizing were whether they had a chance to help decide the outcome and whether their children's circumstances improved.
[185] WISSLER, 1999, OHIO STUDY. *See supra* note 184 and accompanying text for the disputant perceptions examined.
[186] WISSLER, 1999, OHIO STUDY.
[187] WISSLER, 1999, MAINE STUDY.
[188] Hiltrop, 1985.

each side before mediation.[189] The effect of these pre-mediation caucuses varied, however, depending on their purpose. When the purpose of pre-mediation caucuses was to establish trust with each party, settlement increased. But when the purpose was to get the parties to accept settlement proposals, there was no effect on settlement.[190] A study of employment disputes also found the effect of pre-mediation caucuses varied depending on the purpose of the caucuses.[191] When the purpose was to establish a relationship with each party, settlement increased. But when the purpose was to encourage the parties to accept settlement proposals, pre-mediation caucuses reduced settlement.

TABLE V.F.1. Effect of Using Pre-Mediation Caucuses on Settlement and Related Outcomes		
Reduced settlement / Negative effect	**No effect**	**Increased settlement / Positive effect**
Swaab, Study 1 *(substantive focus)*	Swaab & Brett *(substantive focus)*	Hiltrop, 1985 Swaab, Study 1 *(trust focus)* Swaab & Brett *(overall & trust focus)*

2. Effect on Disputants' Perceptions and Relationships

Pre-mediation caucuses in family and labor disputes reduced disputants' post-mediation relational conflict, but did not affect their post-mediation goal conflict.[192] The effect of these pre-mediation caucuses varied, however, depending on their purpose. When the purpose of pre-mediation caucuses was to establish trust with each party, disputants' post-mediation relational conflict and goal conflict were reduced. But when the purpose of pre-mediation caucuses was to get the parties to accept settlement proposals, there was no effect on disputants' relational conflict, but goal conflict increased.[193] A study of employment cases also found the effect of pre-mediation caucuses varied depending on their purpose. When the purpose of pre-mediation caucuses was to establish a relationship with each party, disputants' post-mediation relational conflict and goal conflict were reduced. But when the purpose of pre-mediation caucuses was to encourage the parties to accept settlement proposals, disputants' post-mediation relational conflict and goal conflict increased.[194]

---

[189] Swaab & Brett, 2007. The effect on settlement of pre-mediation caucuses did not vary with the type of dispute (family or labor).

[190] Swaab & Brett, 2007. These analyses were conducted controlling for the disputants' pre-mediation relationship and goal conflict, as assessed by the mediators. The purpose of the pre-mediation caucus and the type of dispute interacted significantly to affect settlement. When the purpose was to establish trust, the effect of pre-mediation caucuses on settlement was stronger in labor disputes than family disputes. When the purpose was to accept settlement proposals, pre-mediation caucuses increased settlement in family disputes but reduced settlement in labor disputes.

[191] Swaab, 2009, Study 1. These analyses were conducted controlling for disputants' pre-mediation relationship and goal conflict, as assessed by the mediators.

[192] Swaab & Brett, 2007. All conflict measures were based on the mediators' assessments. These analyses were conducted controlling for disputants' pre-mediation relationship and goal conflict. The effect of pre-mediation caucuses on relational and goal conflict did not vary with the type of dispute (family or labor).

[193] Swaab & Brett, 2007. These analyses were conducted controlling for disputants' pre-mediation relationship and goal conflict. The purpose of the pre-mediation caucus and the type of dispute together interacted significantly to affect disputants' relational and goal conflict. When the purpose was to establish trust, the effect of pre-mediation caucuses on relational and goal conflict was stronger in labor disputes than family disputes. When the purpose was to accept settlement proposals, pre-mediation caucuses reduced both types of conflicts in family disputes but increased both types of conflict in labor disputes.

[194] Swaab, 2009, Study 1. All conflict measures were based on the mediators' assessments. These analyses were conducted controlling for disputants' pre-mediation relationship and goal conflict.

TABLE V.F.2. Effect of Using Pre-Mediation Caucuses on Disputants' Perceptions and Relationships		
Negative effect	**No effect**	**Positive effect**
Swaab, Study 1 *(substantive focus)* Swaab & Brett *(substantive focus)*	Swaab & Brett *(overall & substantive focus)*	Swaab, Study 1 *(trust focus)* Swaab & Brett *(overall & trust focus)*

3. Effect on Attorneys' Perceptions

None of the studies examined the effects of using pre-mediation caucuses on attorneys' perceptions of mediation.

G. Using Caucuses During Mediation

Using caucuses during mediation tended to increase settlement in labor-management disputes, but had no effect on settlement in other types of disputes, regardless of whether the goal was to establish trust or discuss settlement proposals. Caucusing also was not related to disputants' joint goal achievement, the personalization of mediated agreements, or whether disputants reached a consent order or filed post-mediation adversarial motions. But disputants who spent more time in caucuses were more likely to return to court to file an enforcement action. In most studies, caucusing either had no effect or had a negative effect on disputants' perceptions and post-mediation conflict.

1. Effect on Settlement and Related Outcomes

Two studies of labor-management disputes found settlement was more likely when mediators met with the disputants separately as well as together during mediation and acted as a communication link between them.[195] A third study found that frequent caucusing was related to increased settlement for union negotiators, but not for management negotiators.[196]

In other settings, however, there was no relationship between caucusing during mediation and settlement. Using caucuses had no effect on settlement in construction disputes[197] and had no effect on settlement or on disputants' joint goal achievement in community mediation.[198] The percentage of time spent in caucus did not affect settlement in limited-jurisdiction civil cases; however, disputants who spent more time in caucuses were more likely to return to court for an enforcement action in the year after mediation.[199] In child custody mediation, the percentage of time spent in caucuses did not affect reaching an agreement, having a more personalized agreement, making progress toward a consent order, having a consent order entered, or whether and how many adversarial motions were filed after

---

[195] Hiltrop, 1985; Hiltrop, 1989, Study 2.

[196] Dilts & Karim, 1990.

[197] Henderson, 1996.

[198] Welton et al., 1992. These analyses involved the same mediation and med-arb cases as in Zubek et al., 1992, *supra* note 1. This analysis was conducted controlling for "initial case difficulty." Party hostility was an important contextual factor to control; the study found caucusing was more likely in more difficult cases, disputants expressed more hostility in caucuses than in joint sessions, and mediators and disputants did different things in caucuses than in joint sessions.

[199] MARYLAND ADMINISTRATIVE OFFICE OF THE COURTS, 2016, DAY OF TRIAL MEDIATION. These analyses were conducted controlling for disputants' attitudes, strategies, and pre-mediation level of escalation. This study involved both mediation and non-judicial settlement conferences; the processes were not described and were not analyzed separately.

mediation.[200] A study of labor and family disputes and a study of employment disputes each found using caucuses did not affect settlement, regardless of whether the purpose was to establish trust with each party or to get them to accept settlement proposals.[201]

TABLE V.G.1. Effect of Using Caucuses During Mediation on Settlement and Related Outcomes		
Reduced settlement / Negative effect	**No effect**	**Increased settlement / Positive effect**
MD Day of Trial	Dilts & Karim Henderson MD Child Access MD Day of Trial Swaab, Study 1 (*trust & substantive focus*) Swaab & Brett (*overall, trust, & substantive focus*) Welton et al.	Dilts & Karim Hiltrop, 1985 Hiltrop, 1989, Study 2

2. Effect on Disputants' Perceptions and Relationships

The effects of during-mediation caucuses on the disputants' relationship and their perceptions of mediation, the mediator, and the outcome varied across different measures within studies as well as across studies. Caucusing had no effect on disputants' satisfaction with the outcome in community mediation.[202] The greater percentage of time spent in caucus in limited-jurisdiction civil cases, the more disputants said the mediator prevented discussion of important topics, pressured them to settle, and controlled decisions in mediation; the more they felt they lacked control over the issues and wanted to better understand the other party; the less they were satisfied with the process and the outcome and thought the outcome was fair and implementable and issues were resolved; and six months after mediation, the less they felt they can talk with the other party and had control over the issues.[203] The percentage of time spent in caucus, however, was not related to other perceptions assessed at the conclusion of mediation or to most perceptions assessed six months later.[204]

---

[200] MARYLAND ADMINISTRATIVE OFFICE OF THE COURTS, 2016, CHILD ACCESS MEDIATION. These analyses were conducted controlling for disputants' attitudes, strategies, and pre-mediation level of escalation. This study included both mediation and facilitation; the processes were not described and were not analyzed separately.

[201] Swaab & Brett, 2007; Swaab, 2009, Study 1. In both studies, the analyses were conducted controlling for disputants' pre-mediation relationship and goal conflict, as assessed by the mediators.

[202] Welton et al., 1992. *See supra* note 198.

[203] MARYLAND ADMINISTRATIVE OFFICE OF THE COURTS, 2016, DAY OF TRIAL MEDIATION. Analyses of the effects of caucusing were conducted controlling for the disputants' attitudes, strategies, and pre-mediation level of escalation. This study involved both mediation and non-judicial settlement conferences; the processes were not described and were not analyzed separately.

[204] MARYLAND ADMINISTRATIVE OFFICE OF THE COURTS, 2016, DAY OF TRIAL MEDIATION. Disputants' perceptions assessed at the conclusion of mediation that were not related to time in caucuses included: whether they could express themselves freely and the mediator listened without judging, did not take sides, treated them with respect and understood them; whether underlying issues came out and disputants became clearer about their desires; whether the disputants understood each other better, listened to each other, and controlled decisions in mediation; whether the disputants acknowledged responsibility and apologized; etc. Disputants' perceptions at follow-up six months after mediation that were not related to time in caucuses included: whether they had changed their approach to conflict; they were satisfied with the outcome and thought it was working and would recommend mediation; whether the other person had followed through, new problems arose, they experienced any inconvenience or costs associated with the situation; etc. At follow-up, questions about outcomes referred not

When more time was spent in caucus in child custody mediation, disputants were less likely to see a range of options and think they can work with the other parent regarding the children, but they were more likely to say the mediator treated them with respect, listened without judging, did not take sides, did not prevent important topics from being discussed, and did not control decisions made in mediation.[205] In the same study, however, caucusing had no effect on most measures of disputants' perceptions assessed at the conclusion of mediation, and had no effect on any perceptions assessed at follow-up six months later.[206] A study simulating divorce mediation found that top-ranked mediators spent a greater percentage of the time in caucuses than did low-rated mediators.[207]

TABLE V.G.2. Effect of Using Caucuses During Mediation on Disputants' Perceptions & Relationships		
Negative effect	**No effect**	**Positive effect**
MD Child Access MD Day of Trial Swaab, Study 1 (*substantive focus*) Swaab & Brett (*overall, trust, & substantive focus*)	MD Child Access MD Day of Trial Swaab, Study 1 (*trust & substantive focus*) Swaab & Brett (*trust focus*) Welton et al.	Gale et al. MD Child Access

Using caucuses during the mediation of labor and family disputes increased disputants' post-mediation relational conflict and goal conflict.[208] The effect of caucuses varied, however, depending on their purpose. When the purpose was to establish trust with the parties, caucuses increased disputants' relational conflict but had no effect on their goal conflict. When the purpose was instead to get the parties to accept settlement proposals, caucuses increased both relational and goal conflict.[209] A study

---

only to agreements reached in mediation, but also to agreements resulting from negotiation or settlement conferences and judicial orders on the merits.

[205] MARYLAND ADMINISTRATIVE OFFICE OF THE COURTS, 2016, CHILD ACCESS MEDIATION. Analyses of the effect of time spent in caucuses were conducted controlling for disputants' attitudes, strategies, and pre-mediation level of escalation.

[206] MARYLAND ADMINISTRATIVE OFFICE OF THE COURTS, 2016, CHILD ACCESS MEDIATION. Disputants' perceptions assessed at the conclusion of mediation that were not related to time in caucuses included: whether the disputants could express themselves freely, discuss underlying issues, became clearer about what they wanted, and were understood by the mediator; whether they listened to and understood each other and controlled decisions made in mediation; whether they were satisfied with the mediation process and their interactions with the justice system and would recommend mediation; whether they thought the agreement reached was fair, implementable, met their children's needs and resolved issues; etc. At follow-up, perceptions about outcomes referred not only to agreements reached in mediation, but also to agreements resulting from negotiation or settlement conferences and judicial orders on the merits. Disputants' perceptions assessed at follow up that were not related to time in caucuses included: whether they and the other person followed through, new problems arose, their interactions had improved, they were satisfied with the outcome and it was working for the children; whether they could talk with the other party and work together for the sake of the children and whether the children were doing well; etc.

[207] Gale, et al., 2002. The researchers noted that the joint session time was more productive for the top-ranked mediators, who attended to both interpersonal and substantive issues, than for the low-ranked mediators. The ranking was done by the actors who role-played the disputants, *see supra* note 126.

[208] Swaab & Brett, 2007. All conflict measures were based on the mediators' assessments. These analyses were conducted controlling for disputants' pre-mediation relationship and goal conflict. Having a caucus significantly interacted with the type of dispute (family versus labor), such that caucuses increased both relational and goal conflict in labor disputes, but decreased relational conflict and had no effect on goal conflict in family disputes.

[209] Swaab & Brett, 2007. There were no statistically significant interactions between the purpose of the caucus and the type of dispute (family or labor).

of employment disputes found a somewhat different pattern.[210] When the purpose was to establish trust, caucuses had no effect on disputants' relational or goal conflict. But when the purpose was to get the parties to accept settlement proposals, caucuses increased disputants' relational conflict but had no effect on their goal conflict.

3. Effect on Attorneys' Perceptions

Attorneys in general civil cases were more satisfied overall with the Early Neutral Evaluation process and thought the neutral had listened to their client more if the neutral met with them separately for a longer time.[211]

H. Summary of Findings

None 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.[212] Tables V.H.1 to V.H.3 at the end of this section show the pattern of empirical findings for each category of actions, separately for each set of outcomes. This variation in findings across the studies shows why drawing conclusions about the effectiveness of mediator actions based on the findings of a single study could lead to recommendations not supported by the overall pattern of research findings. And seeing that some mediator actions have different effects on disputants' relationships and perceptions of mediation than on settlement demonstrates the need to look at the impact of mediator actions on both sets of outcomes[213] before reaching conclusions about the actions' effectiveness.

For a majority of the mediator action-mediation outcome pairs, as many or more studies reported mediator actions had *no* effect on outcomes as reported the actions *had* an effect (either positive or negative).[214] For the action-outcome pairs where this pattern of findings occurs, we cannot conclude with confidence that those mediator actions *will* have a positive (or negative) effect on those mediation outcomes, only that the action *can* have a positive (or negative) effect. In addition, for a minority of the action-outcome pairs, even when most studies found a particular action had positive effects or no effects, at least two studies found the action had negative effects. In those instances, although the overall pattern of research findings suggests those actions have a greater potential for positive effects than for negative effects, the possibility of negative effects cannot be ruled out without further examination of what factors might explain those findings.

Thus, given the variation in findings, the conclusions that can be drawn about the effects of mediator actions from the existing research do not provide clear guidance about which mediator actions will enhance mediation outcomes and which will have detrimental effects. In Section VI, we propose a series

---

[210] Swaab, 2009, Study 1. All conflict measures were based on the mediators' assessments. These analyses were conducted controlling for disputants' pre-mediation relationship and goal conflict.

[211] Rosenberg & Folberg, 1994.

[212] To some degree, this variation reflects the range of measures within each outcome category, especially for disputants' relationships and perceptions. Other potential reasons for the variation in findings include differences among the studies in how the mediator actions and mediation outcomes were measured; which processes, dispute types, mediation contexts, and mediator characteristic were examined; and how the research was conducted. For additional details, *see supra* Section IV.

[213] Too few studies examined the effect of mediator actions on attorneys' perceptions to compare them to the other outcomes.

[214] For reasons why some studies might not have found effects while others did, *see supra* Section IV.

of steps and recommendations designed to further the development of an expanded and reliable empirical basis for answering these questions.

The following summary presents the overall findings for each category of mediator actions and each set of mediation outcomes, ending with overall conclusions about which mediator actions, on balance, appear to have a greater *potential* for positive effects or negative effects on mediation outcomes.

Mediator styles or specific actions considered pressing or directive generally either increased settlement or had no effect, but in some studies these actions were associated with reduced settlement, lower joint goal achievement, and more post-mediation adversarial motions being filed. Virtually all studies found mediator pressure on or criticism of disputants either had no effect on disputants' perceptions and relationships or was associated with more negative views of the mediator, the mediation process, the outcome, and their ability to work with the other disputant. Thus, pressing or directive actions have the potential to increase settlement, but they also have the potential for negative effects on settlement and related outcomes, and especially on disputants' perceptions and relationships.

Recommending or proposing a particular settlement, suggesting possible options or solutions, or offering some form of case evaluation or other views about the dispute or its resolution generally either increased or had no effect on settlement. These actions were not related to the personalization of mediated agreements, whether a consent order was reached, or whether post-mediation enforcement actions or adversarial motions were filed. Recommending a particular settlement, suggesting settlement options, or offering evaluations or opinions had mixed effects on disputants' relationships and perceptions of mediation – positive, negative, and no effect. With regard to attorneys' perceptions of mediation, these actions generally either had no effect or were associated with more favorable views, with the latter seen especially in Early Neutral Evaluation. Thus, this set of actions has the potential for positive effects on settlement and on attorneys' perceptions of mediation, but has the potential for both negative and positive effects on disputants' relationships and perceptions of mediation.

Eliciting disputants' suggestions or solutions generally increased settlement. These actions also were related to disputants' higher joint goal achievement, reaching a consent order, and being less likely to file a post-mediation enforcement action, but were not related to the personalization of mediated agreements or the filing of post-mediation adversarial motions. Eliciting disputants' suggestions or solutions either had no effect on disputants' perceptions and relationships or was associated with more favorable views of the mediator, the mediation process, the outcome, and their ability to work with the other disputant. Thus, eliciting disputants' suggestions or solutions has the potential to increase settlement and to enhance disputants' perceptions and relationships, with no reported negative effects.

Giving more attention to disputants' emotions, relationships, or sources of conflict generally either increased or had no effect on settlement, and either reduced or did not affect post-mediation court actions. These actions either had no effect on disputants' perceptions and relationships or were associated with more favorable views of the mediator, the mediation process, the outcome, and their ability to work with the other disputant. Trying to reduce emotional tensions or control hostility had mixed effects on settlement – positive, negative, and no effect; these actions were not examined in relation to disputants' perceptions. Thus, giving more attention to disputants' emotions or relationships has the potential to increase settlement and to enhance disputants' relationships and perceptions, but also has the potential to reduce settlement. Addressing disputants' hostility has both the potential to increase and to reduce settlement.

Working to build rapport and trust with and between the disputants, expressing empathy, praising the disputants, or structuring the issues and agenda generally either increased settlement or had no effect on settlement. Other process-focused actions and approaches, such as summarizing or reframing or using a facilitative or non-directive style, had mixed effects on settlement -- positive, negative, and no effect. These various mediator actions generally either had no effect on disputants' perceptions and relationships or were associated with improved relationships and more favorable perceptions of the mediator, the mediation process, and the outcome. Thus, working to build trust, expressing empathy or praise, and structuring the agenda have the potential to increase settlement and to enhance disputants' relationships and perceptions. Other "process" actions have the potential for positive effects on disputants' perceptions and settlement, but they also have the potential to reduce settlement.

The effects of pre-mediation caucuses depended on their purpose. When used to establish trust and build a relationship with the parties, pre-mediation caucuses increased settlement and reduced disputants' post-mediation conflict. But when used to get the parties to accept settlement proposals, pre-mediation caucuses either had a negative effect or had no effect on settlement and post-mediation conflict. Thus, pre-mediation caucuses with a trust focus have the potential for positive effects, and those with a substantive focus have the potential for negative effects.

Using caucuses during mediation generally increased settlement in labor-management disputes, but had no effect on settlement in other types of disputes, regardless of whether the goal was to establish trust or discuss settlement proposals. Caucusing also was not related to disputants' joint goal achievement, the personalization of mediated agreements, or whether disputants reached a consent order or filed post-mediation adversarial motions; but disputants who spent more time in caucuses were more likely to return to court to file an enforcement action. Caucusing generally either had no effect or had a negative effect on disputants' perceptions and post-mediation conflict. Thus, caucuses during mediation appear to have the potential to increase settlement in the labor-management context, and have the potential for negative effects on disputants' relationships and perceptions.

In sum, looking at the relative potential for positive versus negative effects, while bearing in mind the substantial likelihood of no effects, the following mediator actions appear to have a greater *potential* for positive effects than negative effects on *both* settlement and related outcomes *and* disputants' relationships and perceptions of mediation: (1) eliciting disputants' suggestions or solutions; (2) giving more attention to disputants' emotions, relationship, and sources of conflict; (3) working to build trust and rapport, expressing empathy or praising the disputants, and structuring the agenda; and (4) holding pre-mediation caucuses focused on establishing trust. Some of these actions, however, have been examined in a relatively small number of studies and in only a subset of dispute types, primarily divorce, limited jurisdiction, community, and labor disputes.

The potential effects of other mediator actions appear more mixed. Recommending a particular settlement, suggesting settlement options, and offering evaluations or opinions have the potential for positive effects on settlement and on attorneys' perceptions of mediation, but have the potential for negative as well as positive effects on disputants' relationships and perceptions of mediation. Both caucusing during mediation and pressing or directive actions have the potential to increase settlement and related outcomes, especially in labor-management disputes; but pressing actions also have the potential for negative effects on settlement, and both sets of actions have the potential for negative effects on disputants' perceptions and relationships.

TABLE V.H.1. Effect of Mediators' Actions and Styles on Settlement and Related Outcomes			
Actions and Styles		**Reduced settlement/ Negative effect**	**No effect**	**Increased settlement/ Positive effect**
A. pressing or directive		Karim & Pegnetter - L MD Child Access - D, M+F Wall & Chan-Serafin, 2010 - GC Wall et al., 2011 - GC Zubek et al. - C, M+MA	Carnevale & Pegnetter - L Cohn - GC Dilts & Karim - L Donohue et al., 1985 - D Hiltrop, 1985 - L Karim & Pegnetter - L Lim & Carnevale - V MD Child Access - D, M+F Posthuma et al. - L Wall & Chan-Serafin, 2010 - GC Wall et al., 2011 - GC Wall & Rude, 1985, Study 2 - GC, JSC Wissler, 1995 - LJ Zubek et al. - C, M+MA	Bercovitch & Lee - I Burrell et al. - S Cohn - GC Dilts & Karim - L Hiltrop, 1985 - L Karim & Pegnetter - L Kochan & Jick - L Wall & Chan-Serafin, 2010 - GC Wall et al., 2011 - GC Wall & Rude, 1991, Study 2 - GC, JSC Woodward - GC
B. offering recommendations, suggestions, evaluations, or opinions		*Recommending a Particular Settlement*		
		Bartunek et al. - S Lim & Carnevale - V Wall & Rude, 1985, Study 2 - GC, JSC Wissler, 1999, Maine Study - D	Dilts & Karim - L Klerman & Klerman - E Wall, 1984 - GC Wissler, 2002 - GC
		Suggesting Possible Settlement Options		
	Wissler, 1999, Maine Study - D	Hiltrop, 1985 - L Karim & Pegnetter - L Slaikeu et al. - D Wissler, 1999, Ohio Study - D Wissler, 2002 - GC	Dilts & Karim - L Donohue et al., 1985 - D Karim & Pegnetter - L Lim & Carnevale - V Posthuma et al. - L Slaikeu et al. - D Woodward - GC
		Offering Evaluations or Opinions		
	Hensler - GC	Brett et al. - GC Dilts & Karim - L Henderson - Const Hensler - GC Hiltrop, 1985 - L MD Child Access - D, M+F MD Day of Trial - LJ, M+SC Peeples et al. - MM Wall & Chan-Serafin, 2009 - GC Wall & Rude, 1985, Study 2 - GC, JSC Wissler, 1999, Ohio Study - D Wissler, 2002 - GC	Dilts & Karim - L Hensler - GC McEwen - GC Peeples et al. - MM Posthuma et al. - L Wall & Chan-Serafin, 2010 - GC Wall et al., 2011 - GC Wissler, 2002 - GC
C. eliciting disputants' suggestions or solutions			Karim & Pegnetter - L MD Child Access - D, M+F	Donohue et al., 1985 - D MD Child Access - D, M+F MD Day of Trial - LJ, M+SC Zubek et al. - C, M+MA
D. addressing disputants' emotions, relationships, or hostility		*Addressing Disputants' Emotions, Relationships, or Sources of Conflict*		
		MD Child Access - D, M+F Slaikeu et al. - D	Kressel et al. - D MD Child Access - D, M+F MD Day of Trial - LJ, M+SC Wissler, 1999, Maine Study - D	Donohue et al., 1985 - D Donohue et al., 1994 - D Kressel et al. - D MD Child Access - D, M+F
		Trying to Control Disputants' Hostility or Reduce Emotional Tensions		
		Cohn - GC Hiltrop, 1985 - L	Cohn - GC Dilts & Karim - L	Dilts & Karim - L Posthuma et al. - L

TABLE V.H.1 (continued) Effect of Mediators' Actions and Styles on Settlement and Related Outcomes			
Actions and Styles	**Reduced settlement/ Negative effect**	**No effect**	**Increased settlement/ Positive effect**
E. working to build rapport and trust, expressing empathy or praise, structuring the agenda, or other "process" approaches	*Working to Build Rapport and Trust, Expressing Empathy or Praise*		
	Bercovitch & Lee - I Cohn - GC	Carnevale & Pegnetter - L Karim & Pegnetter - L Kimsey et al., 1993 - S Wall & Chan-Serafin, 2009 - GC Zubek et al. - C, M+MA	Dilts & Karim - L Karim & Pegnetter - L Kimsey et al., 1993 - S Lim & Carnevale - V Posthuma et al. - L Wall et al., 2011 - GC Zubek et al. - C, M+MA
	Structuring the Agenda		
	Hiltrop, 1989, Study 2 - L	Carnevale & Pegnetter - L Donohue et al., 1985 - D Karim & Pegnetter - L Zubek et al. - C, M+MA	Dilts & Karim - L Hiltrop, 1989, Study 2 - L Karim & Pegnetter - L Lim & Carnevale - V Posthuma et al. - L Vanderkooi & Pearson - D Zubek et al. - C, M+MA
	Other "Process" Approaches		
	Bercovitch & Lee - I Karim & Pegnetter - L Wall & Chan-Serafin, 2010 - GC Wall et al., 2011 - GC Woodward - GC	Bartunek et al. - S Karim & Pegnetter - L Wissler, 1999, Maine Study - D Wissler, 1999,Ohio Study - D Woodward - GC	Dilts & Karim - L Donohue et al., 1985 - D Hiltrop, 1985 - L Hiltrop, 1989, Study 2 - L Woodward - GC
F. using pre-mediation caucuses	Swaab, Study 1 - *substantive focus* - E	Swaab & Brett - *substantive focus* - D & L	Hiltrop, 1985 - L Swaab, Study 1 - *trust focus* - E Swaab & Brett - *overall & trust focus* - D & L
G. using caucuses during mediation	MD Day of Trial - LJ, M+SC	Dilts & Karim - L Henderson - Const MD Child Access - D, M+F MD Day of Trial - L, M+SC Swaab, Study 1 - *trust focus & substantive focus* - E Swaab & Brett - *overall, trust & substantive focus* - D & L Welton et al. - C, M+MA	Dilts & Karim - L Hiltrop, 1985 - L Hiltrop, 1989, Study 2 - L

NOTE: *Some studies examined more than one action, compared multiple styles within a single category, examined the effects on multiple subsets of cases, or examined more than one outcome. If different findings were obtained for the different actions, comparisons, subgroups, or outcomes within a study, that study is listed in all applicable columns. However, if the findings were the same for different actions, comparisons, subgroups, or outcomes within a study, that study is listed only once in the appropriate column.*

Dispute types: *C = community, Const = construction, D = divorce, E = employment, GC = general civil, I = international, L = labor, LJ = limited jurisdiction, MM = medical malpractice, S = simulation, V = varied*

Processes: *JSC = judicial settlement conference, M+F = med + facilitation, M+MA = med + med-arb, M+SC = med + non-judicial settlement conference. If not specified, the process examined was mediation only.*

TABLE V.H.2. Effect of Mediators' Actions and Styles on Disputants' Perceptions and Relationships				
Actions and Styles		**Negative effect**	**No effect**	**Positive effect**
A. pressing or directive		Alberts et al. - LJ Charkoudian & Wayne - C Kimsey et al., 1994 - S MD Child Access - D, M+F Wall et al., 2011 - GC Zubek et al. - C, M+MA	Alberts et al. - LJ Charkoudian & Wayne - C Kimsey et al., 1994 - S Lim & Carnevale - V MD Child Access - D, M+F Zubek et al. - C, M+MA	Burrell et al. - S
B. offering recommendations, suggestions, evaluations, or opinions		*Recommending a Particular Settlement*		
		Wissler, 1999, Maine Study - D Wissler, 2002 - GC	Lim & Carnevale - V Wissler, 1999, Maine Study - D Wissler, 1999, Ohio Study - D	Wissler, 1999, Maine Study - D
		Suggesting Possible Settlement Options		
		Kimsey et al., 1994 - S MD Day of Trial - LJ, M+SC Wissler, 2002 - GC	Kimsey et al., 1994 - S MD Child Access - D, M+F MD Day of Trial - LJ, M+SC Wissler, 1999, Maine Study - D Wissler, 1999, Ohio Study - D Wissler, 2002 - GC	Kimsey et al., 1994 - S Lim & Carnevale - V Wissler, 1999, Maine Study - D Wissler, 1999, Ohio Study - D
		Offering Evaluations or Opinions		
		McDermott & Obar - E Wall et al., 2011 - GC Wissler, 2002 - GC	McDermott & Obar - E Wissler, 1999, Ohio Study - D Wissler, 2002 - GC	Wissler, 1999, Ohio Study - D Wissler, 2002 - GC
C. eliciting disputants' suggestions, solutions			MD Child Access - D, M+F MD Day of Trial - LJ, M+SC Zubek et al. - C, M+MA	MD Child Access - D, M+F MD Day of Trial - LJ, M+SC
D. addressing disputants' emotions or relationships			MD Child Access - D, M+F MD Day of Trial - LJ, M+SC Pruitt et al. - C, M+MA Wissler, 1999, Maine Study - D Wissler, 1999, Ohio Study - D	Donohue et al., 1994 - D Gale et al. - S Kressel et al. - D MD Child Access - D, M+F MD Day of Trial - LJ, M+SC Pruitt et al. - C, M+MA Wissler, 1999, Maine Study - D Wissler, 1999, Ohio Study - D
E. working to build rapport and trust, expressing empathy or praise, structuring the agenda, or other "process" approaches		*Working to Build Rapport and Trust, Expressing Empathy or Praise*		
			Wall et al., 2011 - GC Zubek et al. - C, M+MA	Lim & Carnevale - V Zubek et al. - C, M+MA
		Structuring the Agenda		
		Zubek et al. - C, M+MA	Zubek et al. - C, M+MA	Gale et al. - S Lim & Carnevale - V
		Other "Process" Approaches		
		Kimsey et al., 1994 - S	Kimsey et al., 1994 - S McDermott & Obar - E Wissler, 1999, Maine Study - D Wissler, 1999, Ohio Study - D	Alberts et al. - LJ Kimsey et al., 1994 - S McDermott & Obar - E Wissler, 1999, Maine Study - D Wissler, 1999, Ohio Study - D

TABLE V.H.2. (continued) Effect of Mediators' Actions and Styles on Disputants' Perceptions and Relationships				
Actions and Styles		**Negative effect**	**No effect**	**Positive effect**
F. using pre-mediation caucuses		Swaab, Study 1 - *substantive focus* - E Swaab & Brett - *substantive focus* - D & L	Swaab & Brett - *overall & substantive focus* - D & L	Swaab, Study 1 - *trust focus* - E Swaab & Brett - *overall & trust focus* - D & L
G. using caucuses during mediation		MD Child Access - D, M+F MD Day of Trial - LJ, M+SC Swaab, Study 1 – *substantive focus* - E Swaab & Brett - *overall, trust & substantive focus* - D & L	MD Child Access - D, M+F MD Day of Trial - LJ, M+SC Swaab, Study 1 - *trust & substantive focus* - E Swaab & Brett - *trust focus* - D & L Welton et al. - C, M+MA	Gale et al. - S MD Child Access - D, M+F

NOTE: *Some studies examined more than one action, compared multiple styles within a single category, examined the effects on multiple subsets of cases, or examined more than one outcome. If different findings were obtained for the different actions, comparisons, subgroups, or outcomes within a study, that study is listed in all applicable columns. However, if the findings were the same for different actions, comparisons, subgroups, or outcomes within a study, that study is listed only once in the appropriate column.*

Dispute types: C = community, D = divorce, E = employment, GC = general civil, L= labor, LJ = limited jurisdiction, S = simulation, V = varied.

Processes: M+F = med + facilitation, M+MA = med + med-arb, M+SC = med + non-judicial settlement conference. If not specified, the process examined was mediation only.

TABLE V.H.3. Effect of Mediators' Actions and Styles on Attorneys' Perceptions				
Actions and Styles		Negative effect	No effect	Positive effect
A. pressing or directive				
B. recommendations, suggestions, evaluations, or opinions		Hensler - GC	Hensler - GC Wissler, 1999, Maine Study - D Wissler, 2002 - GC	Rosenberg & Folberg - GC, ENE Wissler, 2002 - GC
C. eliciting disputants' suggestions or solutions				
D. addressing disputants' emotions, relationships			Wissler, 1999, Maine Study - D	
E. "process" actions			Wissler, 1999, Maine Study - D	
F. using pre-mediation caucuses				
G. using caucuses during mediation				Rosenberg & Folberg - GC, ENE

NOTE: *Some studies examined more than one action, compared multiple styles within a single category, examined the effects on multiple subsets of cases, or examined more than one outcome. If different findings were obtained for the different actions, comparisons, subgroups, or outcomes within a study, that study is listed in all applicable columns. However, if the findings were the same for different actions, comparisons, subgroups, or outcomes within a study, that study is listed only once in the appropriate column.*

Dispute types: *D = divorce, GC = general civil*

Processes: *ENE = Early Neutral Evaluation. If not specified, the process examined was mediation.*

VI. Next Steps and Recommendations

The Task Force Report's systematic compilation and analysis of the extant empirical research shows that none of the categories of mediator actions has clear, uniform effects on any of the three sets of mediation outcomes. Thus, the research does not provide clear guidance about which mediator actions will enhance mediation outcomes and which will have detrimental effects. To further the development of an expanded and reliable empirical basis for answering these questions, we first propose a set of actions designed to disseminate the Report, stimulate and improve future research on mediator actions, and create on-going links between researchers and the broader mediation community. Second, we propose two sets of specific recommendations, one for the ABA Dispute Resolution Section and one for a university consortium of mediation researchers, to guide the implementation of the proposed actions.

A. Proposed Next Steps

1. Disseminate the Report and Establish a Repository for the Studies

The Report will be disseminated to mediation researchers and the broader mediation community. This will be done through a variety of means, including a press release, posting the Report on the ABA Dispute Resolution Section website, submitting a summary article to the Section's *Dispute Resolution Magazine*, and posting a summary and link to the full Report on the Dispute Resolution Listserv (DRLE) and the Dispute Resolution Law Professors' Blog, *Indisputably*. In addition, Task Force members will propose a panel for the 2018 Dispute Resolution Section Conference organized around the Report and issues it raises.

A permanent and accessible repository needs to be created for the studies reviewed herein, and researchers need to be made aware of its existence and encouraged to add new empirical studies of the effects of mediator actions in order to continue to grow the knowledge base. The possibility of establishing an additional repository for the database of study findings created by the Task Force needs to be explored. As part of assessing the feasibility of maintaining and expanding this database, ways to enhance its usefulness (such as by streamlining its contents, establishing greater consistency in entries, and expanding entries where needed to improve clarity) and to add future studies (such as by developing guidelines to ensure the consistency and completeness of entries) need to be explored.

2. Conduct a More Detailed Examination of Existing Studies

A more nuanced analysis of the studies reviewed herein needs to be undertaken to uncover factors that explain the different effects that mediator actions had in different studies. This more in-depth analysis would involve looking at the features of the studies to see which characteristics differentiate those finding positive effects from those finding negative effects or no effects for the same action-outcome pair. These factors would include, among others, how the actions and outcomes were measured; what the characteristics of the disputes, the mediators, and the mediation contexts were; and what sample sizes and research methods were used. This examination could identify significant dispute and contextual factors that alter the effects of mediators' actions as well as important measurement and methodological factors that lead to different findings. These efforts could permit more refined conclusions about the effects of mediator actions in different circumstances and provide guidance for future research by identifying important moderating factors, measures, and methods to incorporate.

In addition, expanding this examination to a broader set of existing mediation studies than those included in the present review could also enhance our understanding of the effects of mediator actions and aid the design of future research. This research would include studies that examined the effects of dispute and contextual factors on mediators' actions or on mediation outcomes (but that did not look at the effect of actions *on* outcomes). Seeing which factors separately affect actions and outcomes could suggest additional explanatory factors that then could be tested in future research. In addition, reviewing studies in other fields with findings potentially applicable to understanding the effects of mediator actions, such as behavioral economics, neuroscience, or social psychology, could inform our present understanding and future research.[215]

3. Develop More Uniform, Reliable, and Valid Measures of Mediator Actions and Mediation Outcomes

Some of the observed variability across studies in the effects of a particular mediator action on a particular outcome is due to differences in how those actions and outcomes were defined, how they were measured, what other actions they were combined with or were compared to, the source of this information (e.g., party report, mediator report, or researcher observation), etc. As Lind and Tyler noted in the context of their research on procedural justice, ". . . there is too little attention devoted to constancy of measurement across studies."[216] Developing common terminology, definitions, and measures for mediator actions and mediation outcomes would provide more uniformity and consistency across studies and create a broader set of studies whose findings could more meaningfully be compared and aggregated.

The RSI/ABA Model Mediation Surveys provide an example of this type of approach.[217] With the goals of developing improved and more uniform data collection across court mediation programs, a group of mediation researchers and mediation program administrators identified a core set of concepts they considered essential to assessing the effectiveness of mediation in any setting, with additional concepts that would be important in different mediation contexts. The group developed questionnaires to assess disputants', attorneys', and mediators' reports and perceptions of the mediation process and outcome, trying to craft the wording of each question and its response options so as to best capture each concept.

---

[215] For examples of how empirical data from other disciplines can inform our understanding of effective mediation, *see, e.g.* James H. Stark & Douglas N. Frenkel, *Changing Minds: The Work of Mediators and Empirical Studies of Persuasion*, 28 Ohio State Journal on Dispute Resolution 263 (2013); Jennifer K. Robbennolt & Jean R. Sternlight, Psychology for Lawyers: Understanding the Human Factors in Negotiation, Litigation, and Decision Making (ABA Publishing, 2012) (*see* Chapter 11 applying social and cognitive psychology to mediation); Russell Korobkin, Psychological Impediments to Mediation Success, 21 *Ohio State Journal on Dispute Resolution* 281 (2006).

[216] E. Allan Lind & Tom R. Tyler, The Social Psychology of Procedural Justice 245 (1988). In the Appendix, they listed common measures used in several studies to measure key concepts relevant to studying procedural justice (e.g., perceptions of procedural fairness, process control, and decision control) so that other researchers could use, test, and refine those measures. *See infra* note 218 and accompanying text.

[217] The RSI/ABA Model Mediation Surveys, developed as part of a collaboration between Resolution Systems Institute and the American Bar Association Section of Dispute Resolution, are available at http://www.aboutrsi.org/publications.php?sID=12. The surveys include commentary on each question. They were created with civil cases in mind, but include suggestions for how they can be modified for other types of cases or for specific contexts. The ABA Dispute Resolution Section's Court ADR Committee currently has a project involving the use of the Model Mediation Surveys by court mediation programs, and the Section's Mediation Committee is using the Model Mediation Surveys to develop an initiative to provide individual mediators with aggregated feedback from lawyers and parties.

The Model Mediation Surveys were then pilot tested with mediation participants and were revised to enhance their clarity and ease of use by mediation participants.

In conjunction with the creation of a core set of proposed concepts and measures of mediator actions and mediation outcomes, a research program needs to be developed to test the reliability and validity of the measures so that future studies will produce more rigorous and meaningful findings. Again using procedural justice research as an example, Lind and Tyler sought "to spur researchers to undertake careful studies of the measurement" of key concepts to create "finer instruments" that are needed in order for future studies to develop a better understanding of the phenomena being studied.[218] Studies could examine the best ways to measure each action and each outcome, including whether the measures actually capture the underlying concepts as intended and do so consistently, whether they can differentiate among actions or outcomes conceptually considered to be different, which combination of individual actions best captures a particular style, whether examining actions separately versus combined into a style has greater reliability and validity, etc.[219] In addition, studies could test how the picture of mediator actions obtained from different data sources (e.g., observation or mediator or disputant reports) varies and whether the different sources produce different effects. (E.g., disputant reports of mediator actions might have stronger effects than mediator reports of their actions on disputants' perceptions, even if mediator reports were to be found to be more consistent with independent observations.)

4. Increase Researcher Access to Mediation

Mediators and mediation participants often are reluctant to permit researchers to observe, audiotape, or videotape mediation sessions, and attorneys often do not permit researchers to survey their clients before or even after mediation. Program administrators are hesitant to randomly assign cases to mediators or to certain approaches, such as the use of pre-mediation caucuses. Access to mediation sessions is key to researchers' more fully assessing what happens during mediation; access to the disputants is vital to understanding how the people mediation ultimately aims to serve experience the process; and random assignment of cases to certain actions would permit more definitive answers about their effects. Working with mediation program administrators, judges, mediators, and lawyers to explain research needs; to develop research protocols and guidelines that address consent, confidentiality, and other concerns; and to encourage their cooperation with and facilitation of research could increase researchers' access to mediation and mediators' involvement in research.

5. Conduct Additional Research to Address Identified Gaps and Issues

Tables V.H.1 through V.H.3 of the Report summarize the action-outcome relationships studied to date and reveal which mediator actions and mediation outcomes have received scant attention and need to be examined in future research. These would include, for example, mediator actions such as eliciting disputants' suggestions or solutions and using pre-mediation and in-session caucuses; and outcome measures other than settlement, including disputants' perceptions of the mediation process and outcome, and the durability or finality of the resolution. This Report shows the importance of including

---

[218] LIND & TYLER, *supra* note 216, at 245.

[219] The Open Science Collaboration provides a useful model for this undertaking; *see* https://cos.io/our-services/research/. "We are always interested in how research is conducted so we can help make it better. What contributes to reproducibility, or failure to reproduce? What best practices can we develop through evaluation that might increase the efficiency of scientific research? Our goal is to investigate and reveal those insights." *Id.*

multiple outcome measures, as some mediator actions had different effects on settlement than on the durability of the agreement or disputants' relationships and perceptions.

Other areas that have received scant empirical attention to date are what factors affect which actions mediators engage in, and what factors alter the effect that mediator actions have on outcomes. The factors to be examined would be informed by the analysis and research conducted under Steps 2 and 3 above, but could include characteristics of the disputes or disputants, interactions among participants during the mediation session, and the mediation program or institutional context. This research will enhance our understanding of the relationship between mediator actions and outcomes and provide guidance on what factors to use as statistical controls in future research.

All future research needs to be designed to avoid the methodological and other issues raised in Section IV, and in light of the insights about measures and methods gained from the research conducted under Step 3 above, in order to yield meaningful, rigorous findings. In addition, the reporting of the studies needs to clearly and comprehensively describe the nature of the disputes, the mediators, the mediation sessions, and the mediation context, as well as the variability of the actions and outcomes and the details of the research methodology, so that the findings can be compared and assessed across studies. The reporting of the findings also needs to include effect sizes so that the studies can be aggregated in future meta-analyses to provide a better understanding of the effects of mediator actions over the full body of studies than can be ascertained by simply comparing findings across studies.[220]

Over time, these new studies, along with the more in-depth examination of existing studies described in Step 2 and the definitional work and methodological examination outlined in Step 3, will help the mediation field build a more rigorous and reliable empirical body of knowledge regarding the effects of mediator actions on mediation outcomes and what circumstances, dispute characteristics, and other factors interact with mediator actions to alter their effects.

6. Disseminate Future Empirical Findings to Researchers and Practitioners

A means for disseminating the future additional analysis of existing research and the findings of the new empirical research discussed above in Steps 2, 3, and 5 to mediation researchers and the broader mediation community needs to be developed. On-going links between researchers and mediation trainers, practitioners, and program administrators need to be created so that empirical research findings can be incorporated into mediation practice, such as through guides for mediator training, performance assessments, quality standards, and feedback mechanisms.

B. Recommendations

The Task Force recommends that two bodies be established to oversee and implement the above proposed next steps, each with different tasks but consulting and collaborating with the other. One body would be comprised of relevant experts in mediation research and practice appointed by and operating under the auspices of the ABA Section of Dispute Resolution. The other body would be

---

[220] Meta-analysis takes into consideration the strength, direction, and degree of statistical significance of the effect found in each study, and provides measures that indicate the overall strength and direction of the effect and its statistical significance across the studies. For an example of the use of meta-analysis to draw conclusions across multiple mediation data sets, *see* Roselle L. Wissler, *Court-Connected Mediation in General Civil Cases: What We Know from Empirical Research*, 17 OHIO STATE JOURNAL ON DISPUTE RESOLUTION 641 (2002).

comprised of mediation researchers at a small consortium of universities who would be jointly responsible for implementing the proposed actions that are beyond the scope of the ABA group and for providing reports to that group.

1. Recommendations for the ABA Section of Dispute Resolution's Working Group

- Find additional mechanisms for disseminating the Report
- Oversee the creation of a repository for the studies reviewed by the Task Force, possibly in collaboration with the university consortium
- Oversee the development of research guidelines designed to address the concerns of mediation practitioners, administrators, and users about participating in research, and work to encourage their cooperation with researchers and facilitation of access to mediation
- Oversee the development of a future research agenda and the broad outlines of the research questions to be examined under Steps 2, 3, and 5 by the university research consortium
- Work to strengthen the links between researchers and mediators, mediation trainers, and program administrators, and to develop mechanisms to disseminate future empirical research findings about the effectiveness of mediator actions to these groups

2. Recommendations for Researchers in the Consortium of Universities

- Work with the ABA to create a repository for the studies reviewed by the Task Force, and develop ways to make researchers aware of its existence and encourage them to contribute future studies to it; and explore the possibility of establishing an additional repository for the database of study findings created by the Task Force
- Support and/or undertake further detailed examination and analysis of the studies reviewed in the present Task Force Report, as well as other existing relevant research in mediation and other fields, as described in Step 2
- Work with the mediation community to explain research needs; to develop research protocols and guidelines to address consent, confidentiality, and other concerns; to increase cooperation with and involvement in research; and to disseminate future research findings
- Support and/or undertake the development of more uniform definitions and measurements of mediator actions and mediation outcomes, as well as the research described in Step 3 needed to improve the reliability and validity of the measures and methodologies used so that future studies will produce more rigorous and meaningful findings
- Support and/or undertake the research described in Step 5 to address the identified gaps and unanswered questions raised in this Report in order to expand our knowledge to a broader set of mediator actions and mediation outcomes

C. Conclusion

The Task Force believes it is critically important for the ABA Dispute Resolution Section to establish a working group, as well as encourage the creation of a university consortium of mediation researchers, to collaboratively oversee and undertake future comprehensive efforts to deepen our empirical understanding of the effects of mediator actions. The Task Force believes the proposed future steps are essential for the field of mediation to be able to develop a body of empirically derived knowledge about which mediator actions and approaches enhance mediation outcomes, and to use that knowledge to improve mediation practice.

Appendix A
Empirical Studies with Relevant Data on the
Impact of Mediator Behaviors on Mediation Outcomes

Jess K. Alberts, Brian L. Heisterkamp, and Robert M. McPhee, *Disputant Perceptions of and Satisfaction with a Community Mediation Program*, 16 THE INTERNATIONAL JOURNAL OF CONFLICT MANAGEMENT 218 (2005)

Jean M. Bartunek, Alan A. Benton, and Christopher B. Keys, *Third Party Intervention and the Bargaining Behavior of Group Representatives*, 19 THE JOURNAL OF CONFLICT RESOLUTION 532 (1975)

Jacob Bercovitch and Su-Mi Lee, *Mediating International Conflicts: Examining the Effectiveness of Directive Strategies*, 8 INTERNATIONAL JOURNAL OF PEACE STUDIES 1 (2003)

Jeanne M. Brett, Zoe I. Barsness, and Stephen B. Goldberg, *The Effectiveness of Mediation: An Independent Analysis of Cases Handled by Four Major Service Providers*, 12 NEGOTIATION JOURNAL 259 (1996)

Nancy A. Burrell, William A. Donohue, and Mike Allen, *The Impact of Disputants' Expectations on Mediation, Testing an Interventionist Model*, HUMAN COMMUNICATION RESEARCH 104 (Fall 1990)

Peter J. D. Carnevale and Richard Pegnetter, *The Selection of Mediation Tactics in Public Sector Disputes: A Contingency Analysis*, 41 JOURNAL OF SOCIAL ISSUES 65 (1985)

Lorig Charkoudian and Ellen Kabcenell Wayne, *Fairness, Understanding, and Satisfaction: Impact of Mediator and Participant Race and Gender on Participants' Perception of Mediation*, 28 CONFLICT RESOLUTION QUARTERLY 23 (2010)

Lynn P. Cohn, *Mediation: A Fair and Efficient Alternative to Trial*, DUPAGE COUNTY BAR BRIEF 1 (October 1996)

David A. Dilts and Ahmad Karim, *The Effect of Mediators' Qualities and Strategies on Mediation Outcomes*, 45 INDUSTRIAL RELATIONS, 22 (1990)

William A. Donohue, Mike Allen, and Nancy A. Burrell, *Mediator Communicative Competence*, 10 MEDIATION QUARTERLY 22 (1985)

William A. Donohue, Laura Drake, and Anthony J. Roberto, *Mediator Issue Intervention Strategies: A Replication and Some Conclusions*, 11 MEDIATION QUARTERLY 261 (1994)

Jerry Gale, Robyn L. Mowery, Margaret S. Herrman, and Nancy L. Hollett, *Considering Effective Divorce Mediation: Three Potential Factors*, 19 CONFLICT RESOLUTION QUARTERLY 389 (2002)

Douglas A. Henderson, *Mediation Success: An Empirical Analysis*, 11 OHIO STATE JOURNAL ON DISPUTE RESOLUTION 105 (1996)

Deborah R. Hensler, *In Search of "Good" Mediation: Rhetoric, Practice, and Empiricism*, in HANDBOOK OF JUSTICE RESEARCH IN LAW 231 (Joseph Sanders and V. Lee Hamilton eds., 2001)

Jean Marie Hiltrop, *Mediator Behavior and the Settlement of Collective Bargaining Disputes in Britain,* 41 JOURNAL OF SOCIAL ISSUES 83 (1985)

Jean Marie Hiltrop, *Factors Associated with Successful Labor Mediation*, in MEDIATION RESEARCH: THE PROCESS AND EFFECTIVENESS OF THIRD-PARTY INTERVENTION 211 (Kenneth Kressel and Dean G. Pruitt eds., 1989) (Study 2 only)

Ahmad Karim and Richard Pegnetter, *Mediator Strategies and Qualities and Mediation Effectiveness*, 22 INDUSTRIAL RELATIONS 105 (1983)

William D. Kimsey, Rex M. Fuller, and Bruce C. McKinney, *Mediator Listening, Dispute Reframing, and Mediation Outcome: A Pilot Study*, 7 JOURNAL OF THE INTERNATIONAL LISTENING ASSOCIATION 74 (1993)

William D. Kimsey, Rex M. Fuller, Andrew J. Bell, and Bruce C. McKinney, *The Impact of Mediator Strategic Choices: An Experimental Study*, 12 MEDIATION QUARTERLY 89 (1994)

Daniel Klerman and Lisa Klerman, *Inside the Caucus: An Empirical Analysis of Mediation from Within*, 12 JOURNAL OF EMPIRICAL LEGAL STUDIES 686 (2015)

Thomas A. Kochan and Todd Jick, *The Public Sector Mediation Process: A Theory and Empirical Examination*, 22 THE JOURNAL OF CONFLICT RESOLUTION 209 (1978)

Kenneth Kressel, Edward A. Frontera, Samuel Forlenza, Frances Butler, and Linda Fish, *The Settlement-Orientation vs. the Problem-Solving Style in Custody Mediation*, 50 JOURNAL OF SOCIAL ISSUES 67 (1994)

Rodney G. Lim and Peter J. D. Carnevale, *Contingencies in the Mediation of Disputes*, 58 JOURNAL OF PERSONALITY AND SOCIAL PSYCHOLOGY 259 (1990)

E. Patrick McDermott and Ruth Obar, *"What's Going On" in Mediation: An Empirical Analysis of the Influence of a Mediator's Style on Party Satisfaction and Monetary Benefit*, 9 HARVARD NEGOTIATION LAW REVIEW 75 (2004)

CRAIG A. MCEWEN, AN EVALUATION OF THE ADR PILOT PROJECT: FINAL REPORT (1992) (available at: https://www.bowdoin.edu/faculty/c/cmcewen/pdfs/an-evaluation-of-the-adr-pilot-project-final-report-1992.pdf)

MARYLAND ADMINISTRATIVE OFFICE OF THE COURTS, WHAT WORKS IN DISTRICT COURT DAY OF TRIAL MEDIATION: EFFECTIVENESS OF VARIOUS MEDIATION STRATEGIES ON SHORT- AND LONG-TERM OUTCOMES (2016) (available at: http://www.courts.state.md.us/courtoperations/pdfs/districtcourtstrategiesfullreport.pdf)

MARYLAND ADMINISTRATIVE OFFICE OF THE COURTS, WHAT WORKS IN CHILD ACCESS MEDIATION: EFFECTIVENESS OF VARIOUS MEDIATION STRATEGIES ON SHORT- AND LONG-TERM OUTCOMES (2016) (available at: http://www.courts.state.md.us/macro/pdfs/reports/whatworksinchildaccessmediation201409report.pdf)

Ralph Peeples, Catherine Harris, and Thomas Metzloff, *Following the Script: An Empirical Analysis of Court-Ordered Mediation of Medical Malpractice Cases*, 2007 JOURNAL OF DISPUTE RESOLUTION 101 (2007)

Richard A. Posthuma, James B. Dworkin, and Maris Stella Swift, *Mediator Tactics and Sources of Conflict: Facilitating and Inhibiting Effects*, 41 INDUSTRIAL RELATIONS 94 (2002)

Dean G. Pruitt, Robert S. Peirce, Neil B. McGillicuddy, Gary L. Welton, and Lynne M. Castrianno, *Long-Term Success in Mediation*, 17 LAW AND HUMAN BEHAVIOR 313 (1993)

Joshua D. Rosenberg and H. Jay Folberg, *Alternative Dispute Resolution: An Empirical Analysis*, 46 STANFORD LAW REVIEW 1487 (1994)

Karl A. Slaikeu, Ralph Culler, Jessica Pearson and Nancy Thoennes, *Process and Outcome in Divorce Mediation*, 10 MEDIATION QUARTERLY 55 (1985)

Roderick I. Swaab, *Face First: Pre-Mediation Caucus and Face in Employment Disputes*, presented at THE INTERNATIONAL ASSOCIATION OF CONFLICT MANAGEMENT (2009) (Study 1 only) (available at: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1493514)

Roderick I. Swaab and Jeanne Brett, *Caucus with Care: The Impact of Pre-Mediation Caucuses on Conflict Resolution*, presented at THE INTERNATIONAL ASSOCIATION OF CONFLICT MANAGEMENT (2007) (available at: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1080622)

Lois Vanderkoooi and Jessica Pearson, *Mediating Divorce Disputes: Mediator Behaviors, Styles and Roles*, 32 FAMILY RELATIONS 557 (1983)

James A. Wall, Jr., *Mediation: The Effects of Mediator Proposals, Number of Issues, and Altered Negotiator Aspirations*, 10 JOURNAL OF MANAGEMENT 293 (1984)

James A. Wall, Jr. and Suzanne Chan-Serafin, *Processes in Civil Case Mediations*, 26 CONFLICT RESOLUTION QUARTERLY 261 (2009)

James A. Wall, Jr. and Suzanne Chan-Serafin, *Do Mediators Walk Their Talk in Civil Cases?*, 28 CONFLICT RESOLUTION QUARTERLY 3 (2010)

James A. Wall, Jr., Timothy C. Dunne, and Suzanne Chan-Serafin, *The Effects of Neutral, Evaluative, and Pressing Mediator Strategies*, 29 CONFLICT RESOLUTION QUARTERLY 127 (2011)

James A. Wall, Jr. and Dale E. Rude, *Judicial Mediation: Techniques, Strategies, and Situational Effects*, 41 JOURNAL OF SOCIAL ISSUES 47 (1985) (Study 2 only)

James A. Wall, Jr. and Dale E. Rude, *The Judge as a Mediator*, 76 JOURNAL OF APPLIED PSYCHOLOGY 54 (1991) (Study 2 only)

Gary L. Welton, Dean G. Pruitt, Neil B. McGillicuddy, Carol A. Ippolito and Jo M. Zubek, *Antecedents and Characteristics of Caucusing in Community Mediation*, 3 INTERNATIONAL JOURNAL OF CONFLICT MANAGEMENT 303 (1992)

Roselle L. Wissler, *Mediation and Adjudication in Small Claims Court: The Effects of Process and Case Characteristics*, 29 LAW & SOCIETY REVIEW 323 (1995)

ROSELLE L. WISSLER, TRAPPING THE DATA: AN ASSESSMENT OF DOMESTIC RELATIONS MEDIATION IN MAINE AND OHIO COURTS (1999) (Reported separately as WISSLER, 1999, MAINE STUDY and WISSLER, 1999, OHIO STUDY)

Roselle L. Wissler, *Court-Connected Mediation in General Civil Cases: What We Know from Empirical Research*, 17 OHIO STATE JOURNAL ON DISPUTE RESOLUTION 641 (2002)

James G. Woodward, *Settlement Week: Measuring the Promise*, 11 NORTHERN ILLINOIS UNIVERSITY LAW REVIEW 1 (1990)

Josephine M. Zubek, Dean G. Pruitt, Robert S. Peirce, Neil B. McGillicuddy, and Helena Syna, *Disputant and Mediator Behaviors Affecting Short-Term Success in Mediation*, 36 JOURNAL OF CONFLICT RESOLUTION 546 (1992)

Appendix B
Template Used to Record Information from Studies

Q1 Citation:

Q4 Mediation Outcomes Examined (check all that apply and elaborate or add as needed):

❑ Settlement, progress toward settlement, resolution of some issues, narrowing of the dispute
  ❑ Specify how this outcome was defined and measured in this study
❑ Nature of the settlement (amount, terms, etc.)
  ❑ Specify how this outcome was defined and measured in this study
❑ Compliance with or durability of the agreement, finality of resolution, proceeding to or returning to court, etc.
  ❑ Specify how this outcome was defined and measured in this study
❑ Parties' perceptions of the outcome (e.g., fair, resolves issues, etc.)
  ❑ Specify how this outcome was defined and measured in this study
❑ Parties' perceptions of the process or the mediator (e.g., fair, chance to tell their views, etc.)
  ❑ Specify how this outcome was defined and measured in this study
❑ Parties' understanding (of their own or the other side's positions, interests; issues, case value, etc.)
  ❑ Specify how this outcome was defined and measured in this study
❑ Parties' communication, relationship, problem-solving or conflict resolution skills
  ❑ Specify how this outcome was defined and measured in this study
❑ Attorneys' perceptions of the outcome (e.g., fair, resolves issues, etc.)
  ❑ Specify how this outcome was defined and measured in this study
❑ Attorneys' perceptions of the process or the mediator (e.g., fair, etc.)
  ❑ Specify how this outcome was defined and measured in this study
❑ Attorneys' understanding (of positions, interests, issues, case value, etc.)
  ❑ Specify how this outcome was defined and measured in this study
❑ Attorneys' communication, relationship, etc.
  ❑ Specify how this outcome was defined and measured in this study
❑ Other
  ❑ Specify how this outcome was defined and measured in this study

Q4.1 Additional Other Mediation Outcome(s) Examined

WHICH MEDIATOR BEHAVIORS WERE EXAMINED IN RELATION TO THE MEDIATION OUTCOMES EXAMINED?

Q5 Before the first mediation session: Whether or not the mediator engaged in some discussion with, or sought information from, the lawyers and/or disputants about the mediation process or the dispute (including meetings, phone calls, or submission of pre-session statements or briefs).
  ❑ Specify how this outcome was defined and measured in this study

Q6 During the mediation session(s):
❑ Whether or not the mediator engaged in some action to explain the mediation process, set the ground rules, explain confidentiality, etc.
  ❑ Specify how these actions were defined and measured in this study
❑ Whether or not the mediator engaged in some action to help identify or clarify the disputants' non-legal interests, concerns, needs, etc. in the dispute.
  ❑ Specify how these actions were defined and measured in this study
❑ Whether or not the mediator engaged in some action to deal with tensions or animosity between the parties or the parties' relationship.
  ❑ Specify how these actions were defined and measured in this study

- ❑ Whether or not the mediator engaged in some action to assist the parties in identifying, clarifying, or assessing the strengths and weaknesses of the parties' legal positions or views of the dispute, OTHER THAN offering his or her own opinion.
  - ❑ Specify how these actions were defined and measured in this study
- ❑ Whether or not the mediator engaged in some action to assist the disputants in generating ideas, proposals, and options for resolving the dispute.
  - ❑ Specify how these actions were defined and measured in this study
- ❑ Whether or not the mediator engaged in some action to assist the disputants in assessing various settlement options and/or the settlement value, OTHER THAN offering his or her own opinion of the settlement or its value or recommending a specific settlement figure or package.
  - ❑ Specify how these actions were defined and measured in this study
- ❑ Whether or not the mediator engaged in some action that pressured one or both disputants, including pressure to make concessions, accept a particular agreement or package, settle the dispute, etc.
  - ❑ Specify how these actions were defined and measured in this study
- ❑ Whether or not the mediator engaged in some action to assist the parties in exploring what might happen if an agreement were not reached, OTHER THAN offering his or her own views.
  - ❑ Specify how these actions were defined and measured in this study
- ❑ Whether or not the mediator met (spoke, or otherwise communicated) privately with one or both disputants (e.g., caucus, shuttle/communicate offers from one party to the other, etc.).
  - ❑ Specify how these actions were defined and measured in this study
- ❑ Whether or not the mediator stated his or her views of, or offered his or her opinion about, the relative strengths and weaknesses of the parties' positions.
  - ❑ Specify how these actions were defined and measured in this study
- ❑ Whether or not the mediator stated his or her views of, or offered his or her opinion about, the settlement or its value, or recommended a specific settlement figure or package.
  - ❑ Specify how these actions were defined and measured in this study
- ❑ Whether or not the mediator stated his or her views about what would happen if an agreement were not reached, or predicted the likely outcome.
  - ❑ Specify how these actions were defined and measured in this study

Q7 After the mediation session(s):
- ○ Whether or not the mediator engaged in any action to follow up with the disputants.
  - ○ Specify how these actions were defined and measured in this study

General: The mediator behaviors examined were general approaches or styles instead of, or in addition to, more specific behaviors.
- ❑ Specify how these actions were defined and measured in this study

Q8 List and describe any other mediator behaviors examined in relation to mediation outcomes:

Q9 Type of Process
- ○ Mediation
- ○ Early Neutral Evaluation
- ○ Med-Arb with the same person serving as the neutral for both processes
- ○ Med-Arb with different people serving as the neutral for each process
- ○ Other
  - specify

Q10 The Mediators Were:
- ❑ non-attorneys
    - describe
- ❑ attorneys but not judges
- ❑ retired or former judges
- ❑ sitting judges not assigned to the case
- ❑ sitting judges assigned to the case
- ❑ other
    - specify
- ❑ simulation
    - specify who the neutrals were supposed to be in the simulation

Q11 If the mediation was court-connected, also indicate if the mediators were:
- ❑ roster or panel neutral
- ❑ staff neutral
- ❑ other
    -specify
- ❑ not stated

Q12 Were the mediators:
- ❑ volunteers
- ❑ paid
- ❑ not stated
- ❑ not applicable (e.g., simulation)
- ❑ other
    -specify

Q13 How many mediators mediated each case?
- ❑ a single mediator
- ❑ two co-mediators
- ❑ a panel of more than two neutrals

Q13a Please note any additional or clarifying information about the mediators:

Q14 Context within which the mediations took place?
- ❑ within an organization
- ❑ private
- ❑ community
- ❑ court-connected
- ❑ government or agency (but NOT intra-agency)
- ❑ other
    -specify
- ❑ simulation
    - specify what the setting was supposed to be in the simulation

Q15 The mediations took place:
- ❑ in person
- ❑ by telephone
- ❑ online
- ❑ other
    -specify

Q16 Did the disputes in the study involve filed complaints/court cases?

○ 1=Yes   2 = No
   - specify

Q17 Dispute Type (check all that apply)
- ❑ general civil (personal injury, contracts, consumer, etc.)
- ❑ civil appellate
- ❑ family/domestic relations
- ❑ small claims or other limited civil jurisdiction
- ❑ bankruptcy
- ❑ foreclosure
- ❑ labor-management
- ❑ employment
- ❑ probate
- ❑ criminal, victim-offender
- ❑ child protection
- ❑ workers' compensation
- ❑ construction
- ❑ education
- ❑ information/privacy
- ❑ environmental or public policy
- ❑ international
- ❑ other
   - specify
- ❑ simulation
   - specify what the case type was supposed to be in the simulation

METHODOLOGY

Q18 What was the sample size on which the findings linking mediator behaviors and outcomes are based?
- ❑ Number of cases
- ❑ Number of sessions
- ❑ Number of mediators
- ❑ Number of parties
- ❑ Number of attorneys
- ❑ Other
   -specify

Q19 What was the response rate for each applicable sample?
- ❑ cases
- ❑ sessions
- ❑ mediators
- ❑ parties
- ❑ attorneys
- ❑ other
   -specify

Q20 How were the mediator's actions measured/indicated/obtained?
- ❑ mediator report (via questionnaire, interview, log, etc.)
- ❑ attorney report (via questionnaire, interview, etc.)
- ❑ party report (via questionnaire, interview, etc.)
- ❑ observation by researcher (e.g., coding of behaviors, video of session)
- ❑ simulation (i.e., mediator's actions were controlled and varied systematically)
- ❑ other
    -specify

Q21 How were the mediation outcomes measured/indicated/obtained?
- ❑ mediator report (via questionnaire, interview, log, etc.)
- ❑ attorney report (via questionnaire, interview, etc.)
- ❑ party report (via questionnaire, interview, etc.)
- ❑ observation by researcher
- ❑ court docket sheets or other court records
- ❑ program log/records
- ❑ other
    – specify

Q22 Are the actual survey or coding instruments included in the article?
- ❍ 1 = Yes   2 = No

Q23 Please note other important methodological information not included in the above checklists

Q24 Please note any methodological concerns or problems that could affect the quality of the data or the interpretation of the findings. Include all constraints or shortcomings in the research identified by the authors and by you.

Q25 Summarize the findings reported by the authors regarding the effects or relationships – or lack of effects or relationships – between mediator actions and mediation outcomes.

Q26 Summarize the findings reported by the authors regarding the effects (or lack of effects) of contextual factors on the mediator action and mediation outcome link (including dispute and disputant characteristics, program characteristics, mediator characteristics, etc.)

RELEVANT CONTEXTUAL FACTORS WHOSE EFFECT ON THE ACTION-OUTCOME LINK WAS NOT EXAMINED:

Q28 The timing of the mediator's actions (e.g., early vs. late in session, in joint session vs. caucus)

Q29 Dispute or disputant characteristics (e.g., represented, level of conflict, case complexity)

Q30 Mediator characteristics (e.g., volunteer vs. paid; paid by disputants vs. court/other; training/experience):

Q31 Mediation program characteristics (e.g., voluntary or mandatory referral; stage of litigation/dispute when mediation occurred; whether the disputants chose the mediator; length/number of sessions; child inclusive; etc.):

Q32 Miscellaneous: Please note anything else you think is important to understanding the findings regarding mediator behaviors and outcomes.