Commentary: Focusing on Program Design Issues in Future Research on Court-Connected Mediation

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Court-connected mediation often works very well. That is a fair conclusion based on evidence summarized in Roselle Wissler's meticulous review of court-connected mediation. Analyzing studies of small claims, general civil, and appellate mediation programs, her review suggests that mediation is usually evaluated very favorably and is rated as highly as or better than the alternatives on virtually all outcome indicators.[1] In other words, almost all of these studies find that the results are either better in mediation or that there are no significant differences.

This suggests that mediation has the potential to be quite effective in producing various desired results and that whether a mediation program actually generates such results depends on how well it is designed and fits with the local practice culture. Mediation is a highly variable process that program designers and users can readily adapt. As McEwen (1988) suggests, instead of "asking whether mediation works or not, we need to examine how and why parties and lawyers 'work' mediation in varying ways" (p. 3).[2] McEwen's suggestion can be extended to analyze how mediators and program designers "work" mediation processes. Thus, this article analyzes prior research to determine why some mediation programs did not outperform traditional litigation while others did.[3] It illustrates how researchers and program designers might analyze past research findings, design programs to produce desired results, and then empirically test the effectiveness of such design efforts.[4]

This article also suggests that researchers increase the use of outcome measures in addition to traditional measures of efficiency, satisfaction, and perceived fairness. These include substantive justice, empowerment and recognition, and interest-based problem solving. Given intense concerns about mediator evaluation and party self-determination, researchers should also examine these issues further.

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Research on Mediation Efficacy

Most research on court-connected mediation analyzes a few key outcomes including settlement rates, time savings, cost savings, and participants' assessments of the process.

Settlement Rates

Future research should try to identify the most important factors affecting participants' decisions whether to reach agreement in (or soon after) mediation.

Settlement rates are a common benchmark of success used by mediators, programs, and program sponsors.[5] Moreover, settlement may affect many other important outcomes, such as efficiency of and satisfaction with the process. Wissler finds that small claims programs had settlement rates between 25 and 95 percent, general civil mediation programs had settlement rates between 13 and 80 percent, and appellate mediation programs had settlement rates between 29 and 76 percent. Although settlement rates in most programs were well within these ranges, nevertheless there was tremendous variation on this dimension. There was also great variation about whether mediated cases had higher settlement rates greater than nonmediated cases did. Although most of the appellate studies found a greater resolution rate for mediated cases, most of the studies of trial court civil cases showed no difference in settlement rates.

Wissler notes a range of findings in the relationship between settlement and other variables. Studies have found that settlement was related to the extent to which liability was contested, the amount of disparity in the parties' positions, the extent of party preparation, whether parties with decision-making authority attended, whether dispositive motions were pending, whether mediators took an active role and analyzed the strengths and weaknesses of the case, and the amount of mediators' mediation experience. There were mixed findings about whether settlement was related to whether the mediation was conducted early in the dispute, case type, the complexity of issues, whether the referral was voluntary or mandatory, and the extent to which discovery had been completed. Some studies found that settlement rates were not related to the number of named parties; the nature, contentiousness, or length of parties' relationship; the amount at issue in the case; whether the parties sought nonmonetary relief; the mediator's familiarity with the substantive issues in the case; the mediator's professional role (whether the mediator is an attorney, law clerk, or nonattorney); and the amount of mediator's mediation training.

It would be helpful to replicate these findings (some of which are based on a single study) and determine the most important causes for variation in settlement rates. Because of the large number of possible causes and the likely interrelationship among many of them, researchers should use multivariate analyses to separate possible causal factors. Moreover, some of the variables are likely to be proxies for more fundamental causes. For example, some of the variables may be related to the reasonableness of party expectations, relative assessments of their substantive and procedural alternatives to agreement in mediation, risk preferences, extent to which offers satisfied participants' interests, whether important information was missing or seriously disputed, the mediators' and participants' motivation or skill, and perhaps other factors. Obviously settlement rates are affected by mediation program decisions about which cases are mediated. Presumably, programs have higher settlement rates if they select cases for mediation that are more likely to settle.[6] Thus, analysis of screening procedures and criteria may also help explain variations in settlement rates.

Time Savings

Future research should try to reconcile previous findings regarding the effect on case disposition time of the timing of referral to and holding of mediation and should also investigate whether other factors have significant impact. Wissler reports that program evaluations found mixed results about whether mediation programs reduced the length of litigated cases. Although most of the appellate court mediation programs and about half of the civil mediation programs reported faster dispositions in the mediation group, about half of the civil mediation programs and two appellate programs found no differences. This pattern may be related to the fact that the mediation group includes cases regardless of whether they settled in mediation. Although many studies finding no difference overall did not report separately based on whether the cases settled, some studies did find, not surprisingly, that cases settling in mediation had faster disposition times than those that did not do so (Wissler, 2002). This suggests that settlement at mediation (or soon afterwards) may be a key factor in expediting resolution, and thus research on factors promoting resolution (discussed above) may be critical in reducing disposition time.

The mediation referral procedure itself may contribute to increased disposition time and should be a key independent variable in future studies. In a study of the program in federal court in the Western District of Missouri, cases were randomly assigned to three groups: those ordered to mediate early in the case, those precluded from mediating, and those

with the option of mediating. The study found that the cases ordered to mediate had the shortest disposition times. In the mediation-optional group, however, the nonmediated cases terminated an average of about one month faster than the mediated cases. The researchers suggested that this difference may be due to the time required to decide whether to mediate and set up the mediation, which was not needed in the automatic referrals to mediation (Stienstra, Johnson, and Lombard, 1997, chap. 5). Timing of referral to and holding of mediation are significant factors in the only study in which Wissler finds a study showing a group of mediation cases performing significantly worse than nonmediated cases. In the program in that study, disposition time for mediated cases was longer than nonmediated cases. This was apparently due to the fact that the referral to mediation occurred relatively late in the case (an average of 10.3 months after filing), and it took an average of four additional months before mediators were selected (Estee, 1987).

Reports about differences in timing of mediation referrals relate to a controversy about the best time to refer cases to mediation regarding whether parties have conducted discovery and courts have ruled on significant motions (see Guthrie and Levin, 1998). Although Wissler cites some research on the effect of mediation on the amount of discovery, there is apparently little or no research experimenting with various scheduling policies where the independent variable is the timing of mediation in relation to discovery and motions. The latter design would be helpful to determine whether courts can devise scheduling practices to save time and money by facilitating settlements at the earliest appropriate time.

Cost Savings

Wissler's summary showing that most studies do not find a significant reduction of litigation costs, motions, or discovery in mediated cases suggests the need to focus on causal factors in the few studies that do find significant cost savings. In one study finding reduced discovery (and presumed litigation costs), the mediation referral order suspended formal discovery during the pendency of the order (McEwen, 1992). In practice, legal communities are likely to differ about whether they would suspend discovery or adopt similar practices. In another study, Clarke and Gordon (1997) found lower litigation costs for cases that settle, with or without mediation, than those that go to trial. Litigation costs for cases settled in mediation were much closer to costs of nonmediation cases that settled. Like measures of time to disposition, litigation costs seem strongly related

to whether cases settle. Thus, researchers should study factors leading to settlement and whether these factors lead in turn to time and cost savings. In the meantime, the research findings suggest that mediation proponents should avoid claiming that mediation results in cost savings to litigants.

Participants' Assessments of the Process

Wissler's review shows consistent findings that mediation participants generally had very positive assessments of the process. The studies found that most participants believed they had an opportunity to present their case, and the mediators understood the issues and the participants' views, treated them with respect, and were neutral, well prepared, and effective. They generally believed the mediation process was fair and said that they would use mediation again. Future research should focus on identifying factors causing such positive assessments, especially factors that program designers can adjust.

Many studies of small claims mediation and some general civil mediation found that parties have more favorable assessments of mediation than litigation. There were some exceptions, especially in studies of general civil mediation. In some studies, the lack of significant difference was due to generally favorable assessments of both mediation and adjudication (Goerdt, 1993; Kobbervig, 1991) and does not reflect any design deficiency in mediation. Other studies found no difference in assessment based on whether the case was mediated, which researchers attributed to failure of some cases to settle in mediation (Fix and Harter, 1992) or dissatisfaction with the outcome (Clarke and Gordon, 1997). If the latter two findings are replicated and the causal order can be established, it might suggest appropriate program design changes. It would be helpful to know, for example, how much the fact of settlement contributes to perceptions of process fairness and how much those perceptions contribute to parties deciding to settle.

Suggestions for Research on Court-Connected Mediation

The existing body of research addresses the following issues to a limited extent. These issues deserve more study, especially in the context of court programs.

Mediator Evaluation, Party Autonomy, and Settlement Pressure

Mediators have vigorously debated the ethics and impact of using evaluative techniques in mediation. Wissler's study of civil mediation programs

(2002) helps explain the impact of separate elements of evaluation. She found that when mediators evaluated the case, parties felt the mediation process was fairer and did not feel more pressured to settle, whereas when mediators made recommendations, parties felt that the process was less fair and did feel pressured to settle. This study is intriguing because it finds beneficial (albeit modest) effects of mediator evaluation, contrary to the expectations of facilitation proponents, who believe that mediator evaluations necessarily create harmful settlement pressure and reduce parties' autonomy in making decisions. Additional research would be helpful to replicate Wissler's study, examine additional elements of evaluation (such as predicting court outcomes or urging parties to settle), consider the context of mediators' evaluative moves (such as whether the participants requested or desired the evaluative move, whether they were done in caucus, or whether participants felt that they had presented their case sufficiently before mediators did the evaluative moves), and analyze the effect of whether parties had lawyers at mediation and the perceived efficacy of lawyers' advocacy (see Lande, 1997; Riskin, 1996, 2003; Welsh, 2001a, 2001b).

Effect of Mediation on Substantive Justice

Courts are supposed to dispense justice in addition to resolving disputes, so it would be important to know more about the objective consequences of mediation processes and how to assess the substantive fairness of the results (see Bush, 1989; Galanter, 1974; Garth, 2002; Hyman and Love, 2002; Menkel-Meadow, 1999). Researchers should be creative in conceptualizing substantive justice to include a wider range of measures of justice. This is an extremely difficult endeavor, which may explain why researchers have generally studied outcome indicators relying on participants' perceptions rather than objective results. The MetroCourt report (Hermann, LaFree, Rack, and West, 1993; LaFree and Rack, 1996) is an important study of differences by gender and ethnicity in objective and subjective outcomes. The study reports surprising findings, including that despite the fact that minority claimants received lower monetary awards in mediation, they expressed more satisfaction than whites did. The study found no significant differences in awards, however, based on ethnicity of the parties when the comediators were both minorities. Just as intriguing, the study found that white women defendants achieved better objective results in mediation as compared with the other three ethnic and gender groups, but were less likely to see the mediation process as fair.

The findings of this study call out for further studies to replicate and extend this inquiry. Considering historical disadvantages that women and minorities have encountered, research exploring racial, ethnic, and gender issues focuses on an important measure of justice. Gender and ethnicity are imperfect proxies for analyzing substantive justice, however, because women and minorities may not be disadvantaged and the law may require rejections of their requests for relief in particular cases.

Research should also examine how the have-nots fare (especially in disputes with the haves), how plaintiffs fare against defendants, and how individuals fare against organizations. Again, these are important but imperfect ways of operationalizing substantive fairness. Judging by norms of law and fairness, sometimes the have-nots deserve to lose. Moreover, although defining justice in terms of winning and losing is sometimes appropriate, a major lesson of the alternative dispute resolution (ADR) movement is that a win-lose paradigm itself can lead to poor results. Using legal rules may often be an appropriate standard of justice, yet the law is unpredictable and may itself be the source of some unfairness. Hyman and Love (2002) describe various conceptualizations of substantive justice, including reparative justice, retribution, distributive justice, and improvement of relationships. Researchers should use such alternative theories of justice in conceptualizing outcome measures.

Problem Solving

Interest-based negotiation, often called problem solving, is a major contribution of the ADR movement and is sometimes the main dynamic in mediation. Yet there has been remarkably little empirical research about use of interest-based negotiation in court-connected mediation, and researchers should investigate this more. Heumann and Hyman (1997) found that although 61 percent of the lawyers in their survey wanted greater use of problem solving in their negotiations, about 71 percent of the negotiations used positional methods (see also Schneider, 2002). Is there a similar phenomenon in mediation, where mediators, lawyers, and parties believe that problem solving should be used more often than they actually use it? How often is problem solving used in mediation? What are the barriers to increased use? How often do participants benefit from problem solving, and how often do they feel exploited after openly disclosing their interests?

Empowerment and Recognition

Bush and Folger (1994) challenged the mediation community to use mediation to increase empowerment and recognition (or "transformation") rather than settlement or problem solving. Some may doubt whether transformation should be the primary goal of court mediation programs or whether it is achievable in a court context (see, for example, Hensler, 2002). Even if transformation is not the sole or primary goal, it is certainly an important potential goal or outcome and is worth measuring. Although some might have been skeptical whether transformation would be a feasible goal in an institution like the U.S. Postal Service, there is substantial evidence that mediation increases empowerment and recognition in that context (Bingham, 2003).

Mediation Program Design

Mediation program planners may want to conduct research in their local areas to understand local legal and mediation cultures (Lande, 2000). For example, litigants and lawyers may differ in their attitudes about the best time to schedule cases for mediation, whether to use premediation memoranda and, if so, what should be included, how much litigants should talk in mediation sessions (as compared with how much their lawyers talk), how much time should be spent in caucus, whether mediators should express opinions about various aspects of the case, and numerous other procedural features of mediation. Local cultures also may vary on what Riskin (2003) calls meta-procedural issues–decisions about making procedural decisions–such as whether mediators, litigants, or lawyers should make procedural decisions. Moreover, local legal communities are likely to differ on the extent to which the goals in mediation should be settlement, problem solving, substantive justice, empowerment and recognition, or perhaps a combination of goals. Presumably such factors affect people's behavior in mediation and the results of the process. Courts using a formal planning or dispute system design process for their mediation programs may be especially interested in conducting research about their local areas (Lande, 2002). Some of this research should involve experiments that vary program features to see if such adjustments affect outcomes of interest. Moreover, researchers should study courts' program design processes to find out how to make them as successful as possible.[7]

Conclusion

No further research should be needed to persuade policymakers about the potential efficacy of court-connected mediation programs. Although mediation is not necessarily superior to available procedural alternatives, the experience and evidence amassed to date about mediation is generally quite positive. If policymakers have not yet been persuaded of the benefits of court-connected mediation, further studies are unlikely to convince them to adopt or maintain these programs.

Future research should focus on program design choices rather than trying to establish the general efficacy of mediation programs. Many prior studies have focused on a single program where the program design and local culture are invariant. In the future, some researchers should compare programs that have varying design features and that operate in different cultural environments to test the effects of these variations. Future research on individual programs should focus on program features and local practice culture that bear on local policy options.

Whenever appropriate, research should use multivariate analyses to identify potential causal relationships between various independent variables (especially program and process features that can be adjusted) and outcome measures of interest. Research should expand the range of outcome measures to include substantive justice, problem solving, and empowerment and recognition.

Notes

1. Wissler provides an excellent description of limitations of the data in the studies. Because of these limitations, readers should interpret the studies with some caution.
2. Like much other literature on the subject, this article uses the term *mediation* for simplicity in referring to quite diverse and complex processes. It is particularly problematic to use *mediation* as the subject of a sentence as if the process is the active agent rather than the individuals and institutions involved. Although this article follows that convention for ease of understanding, readers should understand that the term is just a convenient placeholder for certain concerted activities (McEwen, 1998).
3. Scientific norms require researchers to assume that there is no difference between comparison groups unless the evidence shows that the probability that observed differences would have occurred by chance is less than a specified level, often 5 percent. Given these norms, researchers may conclude that there is no

difference when there is such a difference but the data do not provide a sufficient level of confidence that it exists. These "false-negative" results may occur for many reasons, including small sample sizes, problematic research design and implementation, and random events. Thus, the absence of observed differences at specified levels of confidence should not lead to the conclusion that there necessarily are no differences. If researchers suspect that findings are false negatives, the solution is to replicate the study and correct problems suspected to have caused the erroneous conclusion.

4. Wissler (2002) provided an excellent, detailed review of the empirical literature with suggestions for further research (see also Hensler, 1999). I do not attempt here to duplicate Wissler's review. Instead, I highlight a few issues that Wissler (2002 and in this volume) discusses and identify others that have not been studied much.

5. Many mediators and programs use settlement rates as a key measure of success because they value settlement as an end in itself, they can collect and interpret these data relatively easily, and they can use settlement rates to justify their work to program sponsors. Settlement is the primary goal of some, but certainly not all, mediators and programs (Bush and Folger, 1994). Sander (1995) appropriately cautions about having an "obsession" with settlement rates for many reasons, including that excessive attention to settlement rates does not recognize other values, such as opportunities to discuss issues in a safe environment regardless of the outcome.

6. This is not to imply that programs should focus only or primarily on the goal of settlement or necessarily screen out cases that may be less likely to settle. Although settlement can lead to benefits such as time and cost savings as well as greater satisfaction, there is an intrinsic value in trying to understand the other parties and negotiate even if the parties do not settle.

7. The Civil Justice Reform Act of 1990 required federal courts to use advisory groups to make recommendations about court program design. For examples of studies of the operation of this program design process, see Kakalik and others (1996), Robel (1993), and Somerlot and Mahoney (1998).

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