Mediation: A Viable Alternative to Litigation

by
Jodi M. Shockney

A thesis presented to the Honors College of Middle Tennessee State University in partial fulfillment of the requirements for graduation from the University Honors College
Fall 2016

Mediation: A Viable Alternative to Litigation

by
Jodi M. Shockney

APPROVED:

_____
Dr. Clyde E. Willis
Department of Political Science
and International Relations

_____
Dr. Stephen Morris
Department of Political Science
and International Relations

_____
Dr. Meredith Dye
Department of Sociology and
Anthropology
Honors Council Representative

_____
Dr. John Vile
Dean, University Honors College

To Clyde –
Thank you for sharing with me your love for mediation and
helping me every step of the way.

ABSTRACT

Concerns with the growing financial and time cost of litigation and overall dissatisfaction with the process has caused many to seek alternative routes of dispute resolution. As such, mediation has become one of the most widely accepted Alternative Dispute Resolution (ADR) methods to date. This study uses an in-depth multidisciplinary literature review to examine the benefits associated with using mediation in lieu of litigation in order to see if mediation is able to adequately serve as an alternative to traditional litigation. From this study, it is concluded that mediation is an adequate alternative, but not a replacement, for traditional litigation.

Table of Contents

LIST OF TABLES

INTRODUCTION

It has been said that as a whole, Americans are fascinated with trials. Hundreds of television series and movies document the drama of the court room, the intense emotions of a closing statement, the sympathy evoked in the jury, and anticipation of a returned verdict. News reporters camp outside of courthouses during high profile cases, salivating at the thought of the story unfolding within and chomping at the bit to be the first to publish the latest developments. American media perpetuates a rather romanticized notion of litigation, and often when parties are in dispute they are all too willing to shout "I'll see you in court," and it is common to hear familiar court-related phrases in everyday conversation, such as "innocent until proven guilty."

Undoubtedly, the state and national legislators in all of their infallible wisdom would not have created – and since, maintained – such a system if it was flawed. However, one does not have to dig too deeply to see that there is much left to be desired from our court system. Having realized these shortcomings, many legal professionals, private groups and individuals alike have begun seeking alternatives to trial, known as Alternate Dispute Resolution (ADR) processes. One such form of ADR that has gained significant momentum in recent decades is the process of mediation, in which disputing parties meet with a neutral third-party in a confidential setting in attempts to discuss the dispute in order to reach a mutually beneficial agreement.

HISTORY OF MEDIATION IN THE UNITED STATES

There is no real consensus on the origins of mediation within the United States' legal system, but Alternative Dispute Resolution (ADR) methods can be traced back to English Common Law. From the time of the colonization of New England, commercial disputants used forms of ADR to resolve business disputes. As the Pilgrims populated the colonies, they wanted another option of resolving their own disputes, as they were wary of lawyers, leading to the use of ADR in the private realm. However, it was not until the Twentieth Century that widespread interest in using Alternative Dispute Resolutions appeared in the United States. A push for mediation took hold over time as parties to disputes wanted even less formal options of ADR than arbitration. Mediation processes are now used at all levels of United States law and governance, as well as throughout the private sector.[1]

METHODOLOGY

Due to the confidential nature of mediation, there are few opportunities to do a hands-on study of the process or to conduct generalized surveys of individuals who have participated in mediation sessions. As such, methods used in this study include a

1. Michael McManus and Brianna Silverstein, "Brief History of Alternative Dispute Resolution in the United States," *Cadmus*, 1, no. 3 (2011).

literature review of information from the fields of law, business, economics, and psychology. It should be noted that much of the information available on mediation is anecdotal.

COST OF LITIGATION

For many years now, there has been increasing concern over the rising costs of litigation, but measuring those costs is an extremely difficult task. This led the National Center for State Courts (NCSC) to develop the Civil Litigation Cost Model (CLCM) as a tool to estimate the costs incurred during several areas of Civil Litigation. This model takes into account the number of billable hours, including the difference in the skill and billing rates of senior-level attorneys versus junior attorneys, complexity of the case, length of time spent on the case, stage in which the issue is resolved, relationship with opposing counsel, number of pretrial motions, discovery, and number of both lay witnesses and expert witnesses, among other things, in order to get an accurate depiction of costs. In a study conducted in cooperation with the American Board of Trial Advocates (ABOTA), the NCSC studied six types of cases: automobile tort cases, premises liability, breach of contract, employment dispute, and real estate dispute. Using what was considered to be a case of typical facts and complexity, – with the assumption that more difficult cases are balanced by less complex cases – they found that the mean amount of costs incurred during each of these case types reached $43,000, $54,000,

$66,000, $88,0000, $91,000, and $122,000, respectively.[2] However, these estimates are just that – estimates. In an attempt to confirm these estimates and potentially gain a more accurate picture of the costs of litigation, researchers often turn to self-reported surveys of practicing attorneys, though this can be problematic as many attorneys argue that reporting would be in violation of attorney client privilege.

In a survey conducted by The Institute for the Advancement of the American Legal System, three out of four attorneys agreed with the statement "litigation is too expensive."[3] The wording of this statement is especially revealing, as it does not specify a manner of measuring the costs; given this freedom to decide according to any standard, seventy-five percent of attorneys still found litigation to be too expensive. Further, four out of five participants reported "in general, [their] firm turn[s] away cases when it is not cost effective to handle them."[4] This limits access that parties have to the legal system, making it difficult for them to reach a solution pertaining to the given issue. The survey also suggested that the length of the case and the cost incurred have a positive correlation.[5] Another survey conducted using twenty Fortune 200 companies – the companies holding the top two hundred positions on the Fortune 500 list – revealed that

---

2. Paula Hannaford-Agor and Nicole L. Waters, "Estimating the Cost of Civil Litigation," Court Statistics Project 20, no. 1 (2013).

3. Corina D. Gerety, "Excess and Access: Consensus on American Civil Justice Landscape," University of Denver Institute for the Advancement of the American Legal System (2011). http://dx.doi.org/10.2139/ssm.1840683

4. Ibid.

5. Ibid.

"companies spent 16 to 24 cents of every dollar of global profit on U.S. litigation."[6] Further, this survey discovered that between 2000 and 2008 these companies experienced a seventy-three percent increase in the amount they spent on litigation.[7] If these costs have such a significant impact large companies, it is certain that they put considerable strain on small businesses and individuals as well.

As Richard Weil pointed out in an article for *Dispute Resolution* Magazine, published by the American Bar Association, individuals and small companies are put at a disadvantage, as they do not have the same resources as big businesses to spend in court.[8] In an article published in the *William Mitchell Law* Review, Gregory J. Myers, partner at Lockridge Grindal Nauen P.L.L.P. in Minneapolis, examined the hardships faced by small businesses during litigation. He reports that motion practice and multiple depositions alone can cost anywhere from $2,000 to $10,000 *per witness*.[9] Further, the complaint or answer itself can cost a business over $20,000 out of pocket, and, if necessary, an appeal can exceed $25,000.[10] This same pattern of extreme out of pocket

---

6. Howard Merten and Alexandra W. Pezzello, "Skyrocketing Litigation Costs Compel Broad Revision of the Federal Rules of Civil Procedure: A Review of Proposed Rule Changes Submitted by the FDCC," (report, FDCC Winter Meeting, Indian Wells, CA, February 26- March 5, 2011).

7. Ibid.

8. Richard S. Weil, "Mediation in a Litigation Culture: The Surprising Growth of Mediation in New York," *Dispute Resolution Magazine* (2011): 9.

9. Gregory J. Meyers, "When the Small Business Litigant Cannot Afford to Lose (or Win): Litigation Consequences for Small Businesses, Strategies for Managing Costs, and Recommendations for Courts and Policymakers," *William Mitchell Law Review* 39, no. 1 (2012): 142.

10. Ibid.

costs does not only burden small businesses, but individuals. In light of these findings, many individuals and businesses are looking for alternate ways to settle disputes.

BRIEF AND GENERAL DESCRIPTION OF MEDIATION

According to the American Bar Association, mediation is a voluntary form of alternative dispute resolution method in which a neutral individual or pair of individuals works to facilitate discussion between the involved parties with the goal of reaching a solution that is mutually beneficial for both parties.[11] This process is controlled by the parties, who are guided by their own wide array of interests in the matter, in place of the rights oriented and rules of evidence and procedures approach to litigation. During a mediation session, the mediator gives an opening statement explaining his or her own role as well as that of the parties, and other key information necessary for the parties to move forward within the session itself. After this concludes, each side, beginning with the plaintiff, presents an opening statement regarding its side of the conflict. Following these statements, the parties may either meet in a conference (also referred to as a joint session), during which both parties are in the room with the mediator and can talk openly, face-to-face, or in caucus, during which the mediator meets with each side privately to discuss particular details or things that that side is not comfortable discussing in front of

11. "Mediation," American Bar Association, accessed July 19, 2016. http/www.americanbar.org/groups/dispute_resolution/resources/DisputeResolutionProcesses/mediation.html.

the other party. It is the mediator's job to utilize a combination of these options to build a rapport and facilitate the discussion – and ultimately the agreement – between both parties.

Ron Kelly is a mediator from the San Francisco Bay area who teaches at in the Continuing Legal Education Program at the University of California Berkley. For many years now, he has attended Burning Man – the popular music and arts festival that takes place in the desert of Nevada every summer – and operated a booth dedicated to the process of mediation. Using a structured, timed model, he mediates conflict between those involved within a thirty-minute timeframe. His strategy involves making the disputants openly confirm they want to solve the issue, then both disputants are given a chance to verbally identify the issue in simplified terms, and brainstorm a list of as many possible solutions within a given timespan. After this, the disputants each choose their ideal solution and try to weave each chosen plan with the understanding that if that particular one does not work, they can move on to a new possibility.[12] This method allows a plan going forward to handle the current solution and provides them a framework for solving future disputes.

During his time, he has mediated disputes between newly dating couples, married couples, neighbors, friends, and even between warring personalities in a person with dissociative identity disorder. Kelly's practice demonstrates multiple important aspects of mediation – the ability to work through problems quickly, the recognition and promotion

12. Timothy Hedeen and Ron Kelly, "Practice Note: Challenging Conventions in Challenging Conditions: Thirty-Minute Mediations at Burning Man," *Conflict Resolution Quarterly* 27, no. 1, (2009): 114.

of each party's interest, the ability to be creative in reaching a solution, and the flexibility to address a wide variety of issues even in nontraditional settings.[13] In an interview with Timothy Hedeen, Kelly explained that "as mediators, we draw on skills from a number of professional areas – mental health, law, accounting, and others – [but] we need to maintain appropriate boundaries in our practice."[14] This is a testament to the fact that mediation is not simply a legal process, but a multifaceted tool that can be used in daily life.

Though it is becoming more common in many jurisdictions for mediation to be court mandated, it is voluntary in that neither party is required to reach an agreement within the given mediation. One example of this is the Tennessee Parenting Plan law (Tenn. Code Ann. Sections 36-6-401, et. Seq.), which establishes a system in which divorcing or already divorced parents come together to develop a plan pertaining to how they will continue to both take an active role in the parenting of their children following the divorce; they may do this amongst themselves, or they may voluntarily choose to attend mediation. The parents are encouraged to work together to cultivate a plan regarding important aspects of their child's daily life, including the child's religion, school, medical care, and how the parents will handle disputes as they arise in the future, among other things. If the parents cannot reach an agreement amongst themselves, the court will mandate that they attend a mediation session. In the event that the court takes such measures, the mediation is no longer voluntary to attend – if either party is not in attendance at the scheduled time, he or she is held to be in contempt of court. However,

13. Ibid.

14. Ibid.

the mandated mediation continues to be voluntary in that the parents are not required to reach any sort of agreement within the session. After attending the mediation, the mediator need only file the report confirming both parties attended, and then the court may hear the case.[15] In the event that a solution is reached, it is taken before a judge to be reviewed and approved, thus becoming an order of the court.[16]

In expanding upon the differences between mediation and litigation, Richard Weil utilized his experience as an attorney of forty years and a mediator facilitating over four hundred mediation sessions, explaining that "in mediation, unlike litigation, the focus is on resolution; the goal is to identify as reliably as possible the best terms that might be accessible through settlement, and then to encourage each party to compare those terms, realistically, to the litigation alternative."[17] Differences in the nature of mediation and litigation can have a significant impact on the outcome of a conflict.

Consider the hypothetical case of two sisters, Shellby and Jacie. Following the death of their mother, a conflict arose between the two women regarding a set of fine china. Their great, great, great grandmother had been given the set of china as a gift for her wedding, and since then it has been handed down to the oldest daughter of each generation. Shellby, being the oldest, was presumptively entitled to the set of china, but their mother had let Jacie, who collects antique dishes and has a sincere appreciation for

---

15. "Parenting Plan," Tennessee State Courts, accessed September 2, 2016, www.tsc.state.tn.us/programs/parenting-plans

16. "Mediation," American Bar Association, accessed July 19, 2016, http://americanbar.org/groups/dispute_resolution/resources/DisputeResolutionProcesses/mediation.html

17. Weil, "Mediation in a Litigation Culture."

the set, display the china in her home along with the other pieces in her collection. Shellby did not personally care for the dishes outside of the value they hold as being a part of their family's history, but she asked Jacie to give the set to her, wanting to ensure that her daughter would receive the family heirloom. Jacie asserted that their mother had made a gift of the china. Shellby insisted, however, that their mother had no right to make a gift of the china, because it had become the subject of an implied trust that the law creates without being explicitly expressed, but can be deducible from the nature of the transfer, as matters of intent, or it can be imposed as a matter of equity or fairness, independently of the particular intention of the parties. Jacie has no children, but Shellby has two daughters. Deciding which method of dispute resolution they would use would have far reaching implications for the outcome of the conflict.

If Shellby and Jacie were to choose to take their case to court, the outcome would be focused around their legal rights. The court would be bound by substantive law – including the Constitution and various statutes, regulations, and judicial decisions – and the case would be regulated by rules of evidence and rules of procedure. Because of this, the judge would only have the authority to decide whether this was a situation involving a gift or an implied trust, and would award ownership of the china to one or the other of the sisters, who have no say in the matter outside of presenting their respective cases before the court. Such a decision takes nothing of the interest of the relationship between the two sisters into consideration, potentially causing continuing strife and hard feelings between the two siblings. Following the court's decision, the parties are legally obligated to obey the ruling, unless they appeal the decision. However, the sisters chose to mediate

instead, and the outcome was much different compared to what might have been mandated by a judge.

Mediation, being free from the constraints of rules of procedure and rules of evidence and not being required to follow statutes and regulations, is focused on the interests of both parties. These interests include what will happen in the future, the nature of the relationship between the parties, and the emotional, economic, and family interests of the parties. Bonenkamp stated:

> "The essential difference between a judicial procedure and the mediation process is that within the judicial procedure the arrows are mainly aimed at facts in the past, at the legal consequences of these facts and at the positions that parties can adopt in relation to them. In the mediation process these facts and points of view do not take centre stage, but rather the underlying intentions and wishes [or] interests of both parties. Thus the organizing of the future is the focus and not a judgment of the past."[18]

Had they chosen to go to court, Jacie could not express her appreciation of the set, and Shellby could not share her desire for the set to be passed along to her daughter. Mediation, however, allowed them each to identify their true interests in the matter, paving the way to a solution that was mutually favorable to both women was reached: Jacie was permitted to continue displaying the dishes alongside the other pieces in her collection. Once she died, however, the china would be passed to Caroline, Shellby's oldest daughter. In addition to this agreement satisfying the interests of both Shellby and Jacie, it preserved the familial relationship between them. Like litigation, this agreement

18. H. J. Bonenkamp, "Het Mediationproces," [The Mediation Process], *Handboek Mediation [Handbook of Mediation]* (2003): 131.

is legally binding, but because the parties voluntarily come together to reach the agreement, no method of appeal is necessary.

Curtis Barnette, in a speech given during the Thirty-second Annual Meeting of the Philadelphia Bar Association, noted, "What ADR, it seems, has done (and there are many versions of it) is: to get a focus on resolution; to get the issues out simply, by advocates for their cause; and then, to try to get some process going to get the issues settled."[19] The nature of mediation has brought it into the spotlight in the search for alternate dispute resolution methods, especially for those who have incurred difficulty getting representation or being heard in court.

VARIATIONS OF MEDIATION

Preliminary Mediation

Mediation may be used for a variety of reasons in addition to simply being an alternate route of reaching an agreement between parties. Attorneys may choose to have their clients participate in mediation as a way to give them a reality check through a third party about their case and what will likely happen if they are to take the case to court. Because the proceedings of mediation are confidential and free from the restraint of the

19. Curtis Barnette, "The Importance of Alternative Dispute Resolution: Reducing Litigation Costs as a Corporate Objective," *Antitrust Law Journal* 53(1984): 278.

Rules of Evidence, attorneys may use mediation as a way to assess the strengths and weaknesses of their own case; this can be used strategically to plan out how the attorney will present the case in court. Mediation can also be used as a preliminary matter, especially in complex cases. The two parties can choose to meet with the third party mediator to clarify certain details of the case, or agree on some smaller detail. Having settled upon a part of the overall dispute, an agreed upon statement of these facts or the settlement of these specific issues is drafted into a contract in which the parties may take to the court and use in as a tool within the context of their trial. In this way, mediation is a starting point to spur progress in the proceedings in lieu of numerous pretrial motions and hearings, allowing for a more expedient trial.

Victim-Offender Reconciliation Mediation (VOM)

Another form of mediation is what is referred to as Victim-Offender Reconciliation Mediation (VOM), which focuses on restorative justice. In this version of mediation, victims or their surviving family members are given the ability to face their offenders face to face in order to have questions answered about the acts that occurred in an attempt to achieve closure regarding the incident, and, among other things, "discussing the full impact of the crime and the development of a plan to repair the harm."[20] During a trial, victims are largely cut out of the overall process; they are not allowed to watch the

20. Laura S. Abrams, Mark Umbreit, and Anne Gordon, "Youthful Offenders Response to Victim Offender Conferencing in Washington County, Minnesota," Center for Restorative Justice & Peacemaking, February 27, 2003. www.rjp.umn.edu

events of the trial transpire, but instead are kept sequestered and unaware of the proceedings. Once on the stand, not only is the victim forced to relive a possibly traumatizing experience after already having to tell a dozen other officers and attorneys this same story, he or she is subjected to cross examination by the defendant's attorney, who seeks to undermine the victim's credibility and overall discredit his or her own story.

The Victim-Offender Reconciliation Mediation process may be initiated by the victim and/or the surviving family of the victim, or the offender, and has been found to be beneficial for both parties, but it can only occur in situations in which the offender has admitted guilt and is contrite about his or her actions. Without this, the mediation could cause more harm than good. When executed effectively, the VOM process "humanizes the criminal justice experience for both victim and offender; holds offenders directly accountable to the people they victimized, allows for more active involvement of crime victims…in the justice process, and suppresses further criminal behavior in offenders."[21]

There are many different reasons that both a victim and an offender may elect to participate in Victim-Offender Reconciliation Mediation. In a study of Victim-Offender Dialogue in cases involving severe violence, the Center for Restorative Justice & Peacemaking found that the most common reasons an offender elected to participate were "to apologize to the victim, to help in the victim's healing process, to help in their own rehabilitation and healing, and to provide more information about their lives and perhaps change the victims view of them."[22] On the other hand, this study found that the most

---

21. Mark S. Umbreit, et al., "Executive Summary: Victim Offender Dialogue in Crimes of Severe Violence," Center for Restorative Justice & Peacemaking, December 1, 2002. www.rjp.umn.edu

22. Ibid.

cited reasons for a victim to participate include "to seek information and answers to lingering questions about the crime, to express the impact of the crime to the offender, to experience more human, face-to-face, interaction with the offender, and to advance the healing process of the victim or family member.[23] In a report by the Center for Restorative Justice and Peacemaking, Abrams, Umbreit, and Gordon assert "one of the major features of the VOM process is the chance not only for the offender to tell his/her side of the story, but also to confront the reality of how the victim suffered or experienced the crime."[24] By understanding the experiences of the victim in this regard, the offenders get a first-hand telling of a story they already know from a different perspective, solidifying the reality of the crime and understanding the full impact of their actions outside of the actions simply being illegal, as a court would assert. The ability to have these topics heard and acknowledged through direct communication between the victim or the victim's family members and the offender may contribute to the overall satisfaction some participants feel regarding their experience with the justice system.

More than just being a way for the offender to improve their image in the eyes of the court and to help the victim, the offender may also receive important benefits. Just as the victim may bring a support person or persons, the offender may also have a support member in attendance, especially given the situation in which the offender is a minor. A lot of the time, being put into the criminal justice system at a young age can lead to the individual feeling as if they are destined to be in the system for the remainder of his or

---

23. Ibid.

24. Abrams, Umbreit, and Gordon, "Youthful Offenders Response."

her life, as they see no way out. These support persons may offer encouragement for the offender by emphasizing that what happened does not make the offender a bad person, but a good person who did a bad thing. This can lead to the offender being brought back into the moral circle of the community in which they live with the expectation that they will do better in the future.[25]

MACRO- AND MICRO-LEVEL ADVANTAGES OF MEDIATION

More than being a legal solution to an issue, in many instances, mediation can provide the closure many parties need in order to truly accept the outcome and move forward. Unlike other paths within our legal system, mediation offers the opportunity to have one's side of the story heard in a confidential venue, allowing the true issue to surface and expediting the process of reaching a solution.

The costs associated with litigation can be extremely high; this may discourage or even prevent small businesses from attempting to seek redress for an issue through traditional channels of the justice system, as they cannot afford to pay these exorbitant amounts. In civil cases, firms may refuse to represent clients unless they believe that the costs of the litigation are outweighed by what they will receive when their client

25. Charles Barton, "Theories of Restorative Justice," *Australian Journal of Professional and Applied Ethics* 2, no. 1 (2000).

(hopefully) wins damages.[26] Mediation allows small businesses and individuals who may otherwise have been denied the opportunity to seek justice a way to have the situation taken care of without increasing the amount of cases brought before a judge.

MICRO-LEVEL ADVANTAGES OF MEDIATION

Confidentiality

Mediation has numerous benefits on the micro-level, or the level of the parties or individuals. One key characteristic of mediation is that the process is completely confidential, barring specific instances involving the safety of the parties or some other individual. This may improve the satisfaction of those involved in the justice system as a whole, as the parties do not have to undergo the stressful and potentially embarrassing process of admitting to their own actions in an open court.[27] Businesses may find the confidential nature of mediation to be particularly beneficial, particularly in the event that they are dealing with an important client, vendor or business partner that they wish to continue working with, or when the events that took place may be detrimental to their public image and thus their bottom line.

26. Hannaford-Agor and Waters, "Estimating the Costs of Civil Litigation."
27. Park, "No Disputing This."

Active Participation

Unlike going to trial, mediation gives the person wronged in the conflict a chance to actively participate, instead of being sequestered with other witnesses of the trial without a clue about what is going on within the courtroom. As Charles Barton puts it, "Traditional practices of the criminal justice system disempower both parties in the conflict and create a sense of isolation and unnecessary alienation between them, thus exacerbating feelings of helplessness, anger, hatred, and fear, which in turn worsen the plight of everyone involved on both sides."[28] The process of mediation serves as a venue for participants to be heard and ultimately ventilate, which can be vital to the process of him or her moving forward. In discussing the many benefits of mediation, Ron Kelly explains "mediation provides disputants an opportunity to speak for themselves and in their own voice, in contrast to legal processes where a lawyer speaks for them or asks carefully programmed questions to guide their responses. Speaking for yourself in this context might be considered radical self-expression."[29] Further, he explains how mediation humanizes the experience, allowing the "opportunity for parties in the midst of conflict to see the person on the other side of the table as a genuine human being with a different point of view."[30] Trial is a highly structured process in which there are many limits placed on what can and cannot be discussed. It is a largely sterile environment that focuses on the facts and the law; mediation allows for the messy expression of emotions

28. Barton, "Theories of Restorative Justice."

29. Hedeen and Kelly, "Challenging Conventions."

30. Ibid.

that are often at the root of the conflict itself. It can bring each side to hold a respect for the other person as a human being, not just an adversary.

Associated Costs

As mentioned previously, the costs of litigation have been found to have a positive correlation with the length of time spent preparing and going through the process of a trial.[31] Often lasting only a day or two, mediation has the ability to save parties thousands of dollars and potentially months or years of their time when compared with traditional litigation.[32] Procedures associated with the process of discovery, pretrial motions, having a court date set, etc., can severely bog down the progress of a trial. In a study of the juvenile court mediation program in Cobb County, Georgia, Stone, Helms and Edgeworth found that, on average, a mediated case takes one-third of the time to process and complete, compared with court cases of similar circumstance.[33] Moreover, in addition to the tangible costs associated with the actual litigation, parties to a dispute, particularly individuals, incur indirect costs such as lost wages or jobs, childcare issues, housing problems, complications with state licenses, etc.[34] Mediation, however, allows

31. Gerety, "Excess and Access."

32. Michelle Park, "No Disputing This," *Crain's Cleveland Business* 34, no. 33 (2013). ISSN: 01972375.

33. Sandra S. Stone, William A. Helms, and Pamela Edgeworth, "Cobb County Juvenile Court Mediation Program Evaluation," (report, State University of West Georgia, 1998), 38.

34. Stephanie Clifford, "For Victims, an Overloaded Court System Brings Pain and Delays," *The New York Times*, January 31, 2016.

issues and facts to be addressed and settled upon or clarified in a direct manner within the proceedings of the mediation session. This difference is highly advantageous for both individuals and companies who are party to a dispute.

It is commonly held that human capital is a company's most important resource, thus requiring that it be utilized in the most efficient way possible. With the high demands of preparing for a lengthy trial, companies involved often have to devote hundreds of hours of manpower to the case, diverting them away from other tasks and responsibilities. The longer and more complex a case, the greater the amount of hours of labor that is required to address the issues at hand. Therefore, not only does litigation often cost companies considerable amounts in terms of finances, but also in human capital that is needed to run other aspects of the company.[35] It is no surprise that mediation is becoming an ever more popular avenue for reaching a solution within our legal system in light of the growing concern over the time and cost inefficiency of litigation.

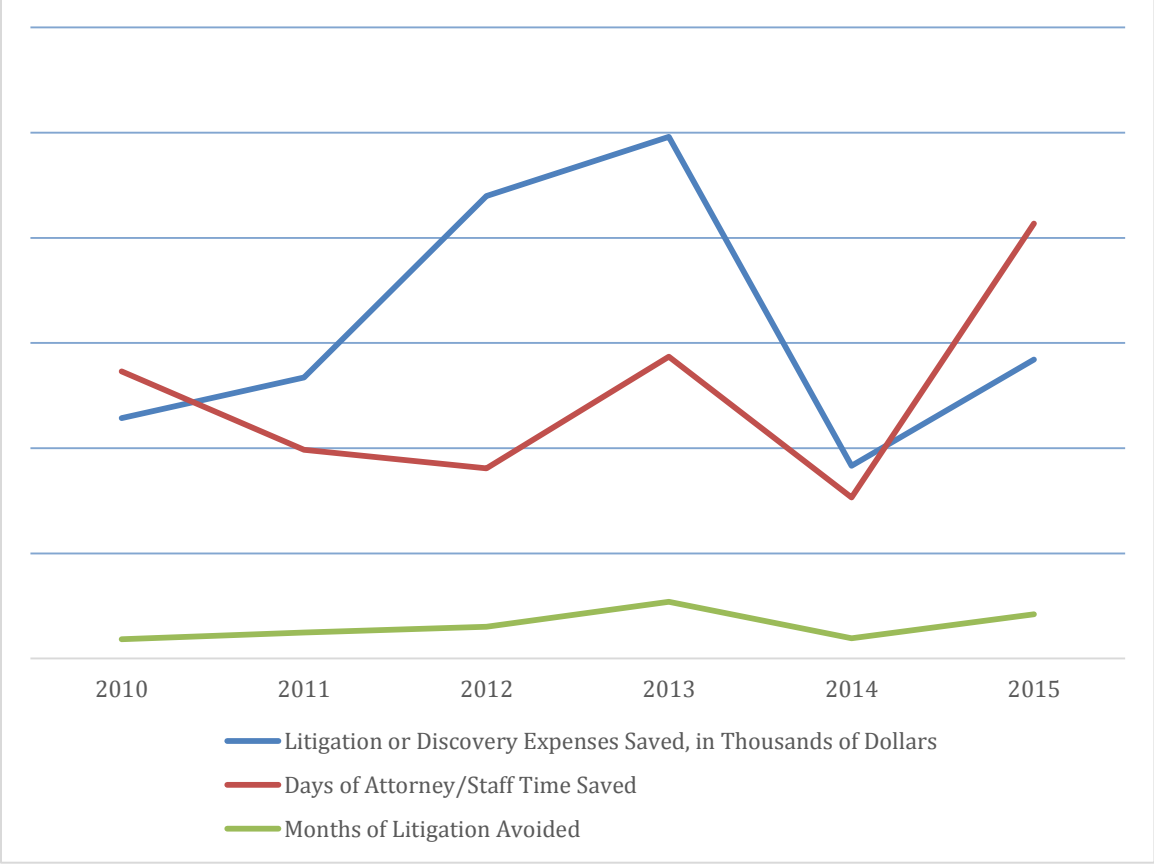
While information on the cost benefits of mediation can be hard to come by, given the confidential nature of the proceedings, reporting by the Department of Justice on their use of alternative dispute resolution methods can illustrate some of these benefits. During the years 2010 through 2015, the Department of Justice has saved a total

---

35. Meyers, "When the Small Business Litigant Cannot Afford to Lose (or Win)."

of $74,950,149 on litigation and/or discovery expenses.[36] Additionally, 75,298 hours of attorney/staff time was saved, and 9,449 months of litigation was avoided during that six-year span.[37] Figure 1 illustrates the benefits of alternative dispute resolution sources at the Department of Justice from 2010 through 2015.

Figure 1: Benefits of Alternative Dispute Resolution at the U.S. Department of Justice



36. "Alternative Dispute Resolution at the Department of Justice," The United States Department of Justice, accessed September 9, 2016. https://www.justice.gov/olp/alternative-dispute-resolution-department-justice.

37. Ibid.

Participant Control

In addition to the expedited nature of reaching a conclusion to a conflict, mediation allows parties a great deal of control over their situation. They have the flexibility to choose their own solution – including that which a court does not possess the ability to mandate – or none at all.[38] Conflicts may arise from a number of different sources, and while a court has the ability to address the legal aspects of the situation, they do not have the ability to address other kinds of issues that may arise alongside the legal dispute, such as relationship issues between the parties – which may include family members – and emotional issues. Mediation provides a venue for parties to come together and reach a settlement that addresses these other issues in addition to their main dispute. As Charles Barton points out, "Professionals…typically do not possess the detailed knowledge and appreciation required for addressing successfully the specific justice (and welfare) needs of the principal parties (victim and offender) in the criminal justice dispute."[39] Further, because the Rules of Evidence do not apply within a mediation session, there are no barriers to addressing pieces of evidence that otherwise would have to be set aside in a courtroom for lack of admissibility. This may allow greater clarification of the situation and the roots of the conflict, leading to a better solution for all parties involved.

Recall the case of the two sisters fighting over a family heirloom, Shellby and Jacie. Had they taken their dispute before a judge, they would have been denied the

38. American Bar Association, "Mediation."

39. Barton, "Theories of Restorative Justice."

ability to discuss their true interests in the heirloom china. The court would have examined the factual evidence of the case and made a decision based solely on that evidence and testimony regarding who would be granted ownership. One of the parties would have "won," by being granted ownership of the china, and one would have "lost," walking away with nothing. This win-lose situation very well might have continued the hard feelings felt between the two sisters, or even exacerbated the emotions further. However, by being able to talk openly without the constraints of the Rules of Evidence, they were able to understand the true interests of each and reach a solution in which both parties "won" and were able to walk away from the situation satisfied and willing to mend their relationship.

The flexible nature of mediation is an immense strength of the process. Freed from the constraints of court, parties are given the ability to come up with their own solution that works for *them* in their particular situation. In discussing his expedited mediation practice at Burning Man, Ron Kelly explains "I'm also giving them permission to discard the solution they presently think is best."[40] Stated another way, mediation allows the parties to discard what they (or their attorneys) expect will be the outcome of a legal battle and invent one of their own accord. This benefit is exemplified through the case of a thirteen-year-old boy and his mother.

A thirteen-year-old boy, who shall remain nameless, was accused of felonious assault against his mother, and in turn accused his mother of child abuse. The relationship between the two was extremely strained as they made several appearances in front of a juvenile court and participated in a number of counseling sessions with various

40. Hedeen and Kelly, "Challenging Conventions."

professionals, including child and family services. Finally, the two appeared before a judge who believed in the success of mediation; the judge asked if both the son and the mother would be willing to participate in a mediation session, and the two agreed. During the mediation session, the mediator, in keeping his promise to remain neutral, asked both sides if they had ever had a good relationship with the other person. Having agreed that they used to have a better relationship, they were each asked to identify which relationship they would rather have – the older, better relationship, or the current one in which they were constantly at each other's throat. Naturally, they both agreed they would prefer their old relationship, and were thus instructed to list a number of ways in which they each, themselves, could move their current relationship into something more closely resembling the good nature of their former relationship. At the top of the son's list was that he could put his Legos in a box when not in use and store the box under his bed. The mother agreed with this idea, and the two worked together to establish a combined plan for improving their relationship.

Had the two refused to go to mediation, the situation undoubtedly would have continued to be handled within the legal system, where institutional measures take little to no consideration of the relationship between the disputants. Given the opportunity to think about what was truly at stake – and to be regained – in this situation, both were then able to brainstorm solutions that applied to *their own* particular situation and relationship. No one other than they could have ever known that something as simple as putting away Legos could make such drastic progress in solving the pair's problems. The mediator simply guided the process, without making suggestions or a decision on behalf of the parties. Moreover, even given the event that such a solution was identified, the court has

no mechanism with which to implement and enforce such a solution. Mediation gave this family the ability to focus on their own interests and allowed them the flexibility to identify and implement their own unique and creative solution to their own unique conflict.

Parties also have the ability to choose a mediator "who has some expertise in a particular type of dispute."[41] This reduces the amount of problems incurred due to any parties in the transaction not being familiar with the issues, and the mediator's added knowledge of the realm in which the conflict arose may bring a more suitable agreement between the parties. This can allow the issues causing conflicts between the parties to be stripped of much of the technical jargon, getting down to the true problems at hand. Attorneys on either side of a conflict may especially find this beneficial when they are using mediation as a reality check for their clients, as an individual with personal knowledge in the field has a better background from which to assess the situation.

MACRO-LEVEL ADVANTAGES OF MEDIATION

Reduced Caseloads

From a macro-level perspective, the choice to mediate is also beneficial for the legal system as a whole, in that it reduces the caseloads of local courts. Many state

41. Park, "No Disputing This."

Supreme Courts, such as that of Ohio, are encouraging their lower court judges to utilize mediation more frequently, reducing the number of cases on their docket. This frees up the courts to allow adequate time and attention to be applied to those cases that must be heard in court.[42] While there is some debate over whether or not courts are actually hearing more cases or if cases are simply becoming overly complicated with a surplus of motions, providing an alternate route – such as mediation – for the resolution of cases is advantageous for both the parties that choose to mediate and the parties that must go to court. This is due to the fact that they each get adequate attention and their issues have the ability to be resolved in a timely manner.

In a study by the National Center for State Courts, a nonprofit organization that serves, among other things, as a think-tank for the United States court system with the purpose of improving judicial administration, data was collected on the caseloads of state courts, between the years of 2001 and 2010, specifically, the number of cases heard by the courts of each state. It was found that the total amount of cases introduced in all state courts increased 8% from the year 2001 to 2010, but when this data was adjusted for the population increase, there was no significant change in the amount of incoming cases.[43] However, the amount of cases that each judge heard increased 4% during this ten year span.[44] While this information supports the argument of some people that the amount of cases brought before courts has not truly increased, but reflects an increase in the

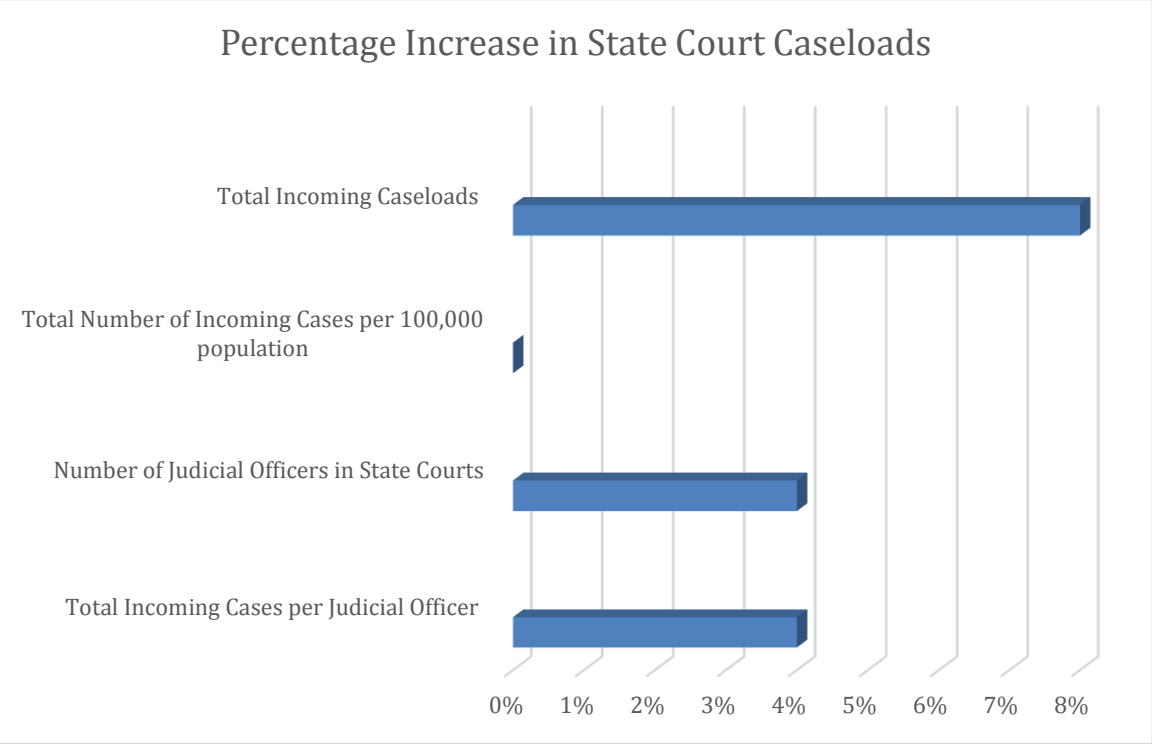
42. Park, "No Disputing This."

43. Robert C. LaFountain, et al., "Examining the Work of State Courts: An Analysis of 2010 State Court Caseloads," National Center for State Courts, 2012. ISBN: 978-0-89656-283-7

44. Ibid.

population, this data presents a more interesting trend: the increase of cases that each judge hears every year. In 2010, the median amount of cases heard by a judge reached 1,780,[45] making it much harder for judges to spend adequate time preparing and hearing each individual case, and delaying the process of parties being able to have a expedient scheduling and hearing of their trial. This data is reflected in Figure 2.

Figure 2: State Court Caseload Data from 2001 – 2010.



45. Ibid.

While many detractors of mediation argue that mediation is an efficient tool as it does not always result in an agreement, many of mediation's supporters claim that the choice of the involved parties to not reach a settlement is not a failure of the practice of mediation. Even if the mediation session is simply being used to establish some foundation for the case, removing these preliminary matters from the courts allows the courts to focus on the issues of the case that cannot be settled out of court, whether because the parties are at an impasse or because it is better handled within the confines of a courtroom.[46] Thus, again mediation demonstrates the potential to be beneficial to both the individual and to society at large.

DISADVANTAGES OF MEDIATION

Public Awareness and Judicial Review

Like all procedures, mediation is not without its flaws. In the legal system of the United States, courts have the power to influence laws and society in general through their rulings on cases. Decisions on landmark cases such as *Roe v. Wade*, which protected a woman's right to privacy regarding the decision whether or not to keep or terminate her own pregnancy, and *Brown v. Board of Education*, which ruled segregated schools to be unconstitutional, have had a monumental impact on our laws and consequently on our

46. Park, "No Disputing This."

society as a whole. Critics of mediation point out that by decentralizing the process of dispute resolution, parties take away the courts' ability to preform their important function of checking the executive and legislative branches. Courts are reactive, not proactive; they can only hear and make a ruling on those issues that are brought to them. However, the increase in the employment of mediation reduces the amount of cases that are brought before the court. Though supporters of mediation often portray this as a benefit, this can also be problematic in that under this system it may take much longer for a particular issue of import to society to come before the courts to be heard.

Consider the case of *Stella Liebeck v. McDonalds*, one of the most commonly referenced product liability cases in the history of United States litigation. Mrs. Liebeck was in the passenger seat of a parked car when she spilt the scalding hot coffee on her lap; at the time, it was McDonald's policy to serve their coffee at a temperature between one-hundred-eighty and one-hundred-ninety degrees Fahrenheit. At that temperature, the coffee can cause third degree burns in a matter of seconds. Mrs. Liebeck suffered third degree burns which required skin grafts to heal and several weeks of hospital stay. (1995 WL 360309) During the course of the proceedings, McDonald's admitted that they had received hundreds of other complaints over the course of ten years, including numerous cases of severe burns affecting infants and children. These cases were settled outside of court, and McDonald's continued selling their coffee at these dangerously high temperatures.

If McDonalds had agreed to settle out of court as was originally requested by Mrs. Liebeck, it is likely the issue would have continued to remain out of the public eye and the policy would have stood indefinitely. This is a risk of mediating especially, as the

proceedings of a mediation session are confidential and thus there is no resulting public outcry. The jury awarded Liebeck punitive damages amounting to two days' worth of McDonald's coffee sales revenue – which came out to $2.7 Million – though the court also found that Liebeck was found to be twenty-five percent liable, and reduced the award to $480,000. (1995 WL 360309) By this case going to court and receiving press coverage, the public became aware of the danger, and immediately began putting pressure on the fast-food giant and other restaurants to set limits in regard to temperature at which their coffee is served, ultimately protecting others from the same fate.

Power Imbalance

Many also worry that the great reduction of cost in comparison to litigation will put economic pressure on many minority groups and other individuals to elect for settlement within mediation. This could lead to these groups and individuals not receiving their equal protection of the law, as mediation does not have to abide by the same rules and procedures that are followed within the court system. In an article for *The New York Times*, Jessica Silver-Greenberg and Michael Corkery discuss the privatization of the justice system, stating "the change has been swift and virtually unnoticed, even though it has meant that tens of millions of Americans have lost a fundamental right: their day in court."[47] Many of those opposed to the widespread use of mediation also worry that this could cause an even greater imbalance of power, as the resolutions that

47. Jessica Silver-Greenberg and Michael Corkery, "In Arbitration, a 'Privatization of the Justice System,'" *New York Times*, Nov. 1, 2015.

arise within mediation do not set a precedent for other decisions to be guided by. The confidential nature of mediation may also contribute to abuses by some to remain out of the public eye, unlike a public trial, which often brings awareness to an issue.[48] Critics of mediation argue that the expansion of the number and types of cases settled through mediation can and will inhibit justice and social change.[49] This phenomenon poses a great barrier to our ever-evolving legal system, which has seen the overhaul of large areas of policy due to the outcome of one case.

SUMMARY CONCLUSION

In light of the growing concern about both the time and financial inefficiency of litigation, it is apparent that unconventional methods of reaching solutions in the United States legal system is essential. It is clear that the justice system as it stands is in desperate need of repair; however, mediation is not a complete solution to these problems. The process of litigation and the justice system as a whole is clearly flawed and needs revising, but this does not necessitate replacing the system with a new method. Mediation, though beneficial for many reasons, is an alternative route that presents its own benefits, as well as its own problems to be resolved. It is unlikely that mediation

48. Robert A. Baruch Bush and Joseph P. Folger, "Mediation and Social Justice: Risks and Opportunities," *Ohio State Journal on Dispute Resolution* 27, no. 1(2012). ISSN: 10464344.

49. Ibid.

would able to adequately replace litigation in a manner that upholds the integrity of the legal system of the United States while maintaining those characteristics that make it so attractive to its proponents. Because of this, mediation may best serve as an alternative route through the justice system without attempting to take litigation's place within the system. When choosing between going to court, mediation, or even other forms of resolution such as arbitration, the parties involved would be best served by carefully examining all available options and choosing the one that best meets their needs.

BIBLIOGRAPHY

Abrams, Laura S., Umbreit, Mark, and Gordon, Anne. "Youthful Offenders Response to Victim Offender Conferencing in Washington County, Minnesota." Center for Restorative Justice & Peacemaking. February 27, 2003. www.rjp.umn.edu

American Bar Association. "Mediation." Accessed July 19, 2016. http://www.americanbar.org/groups/dispute_resolution/resources/DisputeResolutionProcesses/mediation.html

Barnette, Curtis. "The Importance of Alternative Dispute Resolution: Reducing Litigation Costs as a Corporate Objective." *Antitrust Law Journal* 53(1984): 277-282.

Baruch Bush, Robert A. and Folger, Joseph P. "Mediation and Social Justice: Risks and Opportunities." *Ohio State Journal on Dispute Resolution* 27 no. 1 (2012). ISSN: 10464344

Barton, Charles. "Theories of Restorative Justice." *Australian Journal of Professional and Applied Ethics* 2, no. 1 (2000).

Bonenkamp, H.J. "Het Mediationproces" [The Mediation Process]. *Handboek Mediation [Handbook of Mediation]*. The Hague: Sdu, 2003.

Clifford, Stephanie. "For Victims, an Overloaded Court System Brings Pain and Delays." *The New York Times.* January 31, 2016.

Gerety, Corina D. "Excess and Access: Consensus on American Civil Justice Landscape." University of Denver Institute for the Advancement of the American Legal System (2011). http://dx.doi.org/10.2139/ssm.1840683

Hannaford-Agor, Paula and Waters, Nicole L. "Estimating the Cost of Civil Litigation." *Court Statistics Project* 20, no. 1 (2013).

Hedeen, Timothy and Kelly, Ron. "Practice Note: Challenging Conventions in Challenging Conventions: Thirty-Minute Mediations at Burning Man." *Conflict Resolution Quarterly* 27 no. 1 (2009). doi: 10.1002/crq.250

LaFountain, Robert C., Schauffler, Richard Y., Strickland, Shauna M., and Holt, Kathryn A. "Examining the Work of State Courts: An Analysis of 2010 State Court Caseloads," National Center for State Courts, 2012. ISBN: 978-0-89656-283-7

McManus, Michael and Silverstein, Brianna. "Brief History of Alternative Dispute Resolution in the United States." *Cadmus* 1, no. 3 (2011).

"Mediation." American Bar Association Section of Dispute Resolution. October 13, 2013. http://www.americanbar.org/groups/dispute_resolution/resources/DisputeResolutionProcesses/mediation.html

Merten, Howard and Pezzello, Alexandra W. "Skyrocketing Litigation Costs Compel Broad Revision of the Federal Rules of Civil Procedure: A Review of Proposed Rule Changes Submitted by the FDCC." Report presented to the Federation of Defense and Corporate Counsel Winter Meeting, Indian Wells, CA, February 26 – March 5, 2011.

Meyers, Gregory J. "When the Small Business Litigant Cannot Afford to Lose (or Win): Litigation Consequences for Small Businesses, Strategies for Managing Costs, and Recommendations for Courts and Policymakers." *William Mitchell Law Review* 39, no. 1 (2012): 140-153.

National Center for State Courts. "Examining the Work of State Courts: An Analysis of 2010 State Court Caseloads." 2012. ISBN 978-0-89656-283-7

Park, Michelle. "No Disputing This." *Crain's Cleveland Business* 34, no. 33 (2013). ISSN:01972375

Silver-Greenberg and Corkery, Michael. "In Arbitration, a 'Privatization of the Justice System.'" *New York Times*, Nov. 1, 2015.

Stone, Sandra S., Helms, William A., and Edgeworth, Pamela. "Cobb County Juvenile Court Mediation Program Evaluation." Report, State University of West Georgia, 1998.

Tennessee State Courts. "Parenting Plan." Accessed September 2, 2016. www.tsc.state.tn.us/progams/parenting-plan

United States Department of Justice. "Alternative Dispute Resolution at the Department of Justice." Accessed September 9, 2016. https://www.justice.gov/olp/alternative-dispute-resolution-department-justice.

Umbreit, Mark S., Coates, Robert B., Vos, Betty, and Brown, Kathy. "Executive Summary: Victim Offender Dialogue in Crimes of Severe Violence." Center for Restorative Justice and Peacemaking. www.rjp.umn.edu

Weil, Richard S. "Mediation in a Litigation Culture: The Surprising Growth of Mediation in New York." *Dispute Resolution Magazine (2011): 8-11.*