

## Memorandum 2015-5

**Relationship Between Mediation Confidentiality and Attorney Malpractice  
and Other Misconduct: Empirical Data**

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Among other things, the legislative resolution authorizing this study instructs the Commission<sup>1</sup> to consider “any data regarding the impact of differing confidentiality rules on the use of mediation.”<sup>2</sup> This memorandum addresses that point and also discusses other empirical data that may be of interest to the Commission in deciding how to proceed. The following communication is attached as an Exhibit:

*Exhibit p.*

- Saul Bercovitch, State Bar of California (1/28/15).....1

INTRODUCTORY COMMENTS

Gathering, evaluating, and effectively using empirical evidence is challenging, particularly in non-scientific fields. A few notable comments may help provide some perspective for the discussion that follows:

- “Not everything that counts can be counted, and not everything that can be counted counts.”<sup>3</sup>
- “There are three kinds of lies: lies, damned lies, and statistics.”<sup>4</sup>
- [T]he success or failure of [a proposed alternative to the conventional ways of resolving legal disputes] must be verifiable by accepted methods of (social) scientific hypothesis testing. I am unconvinced by anecdotes, glowing testimonials, confident assertions, and appeals to intuition. Lawyers, including judges and

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1. Any California Law Revision Commission document referred to in this memorandum can be obtained from the Commission. Recent materials can be downloaded from the Commission’s website ([www.clrc.ca.gov](http://www.clrc.ca.gov)). Other materials can be obtained by contacting the Commission’s staff, through the website or otherwise.

The Commission welcomes written comments at any time during its study process. Any comments received will be a part of the public record and may be considered at a public meeting. However, comments that are received less than five business days prior to a Commission meeting may be presented without staff analysis.

2. 2012 Cal. Stat. res. ch. 108 (ACR 98 (Wagner & Gorell)).

3. Albert Einstein, as quoted in *The Ultimate Quotable Einstein* 482 (Alice Calaprice ed. 2011).

4. In his autobiography, Mark Twain attributed this remark to the late British Prime Minister Benjamin Disraeli. Whether Prime Minister Disraeli actually made this comment is unclear. See <http://www.york.ac.uk/depts/maths/histstat/lies.htm>.

law professors, have been lazy about subjecting their hunches — which in honesty we should admit are often little better than prejudices — to systematic empirical testing. Judicial opinions and law review articles alike are full of assertions ... that have no demonstrable factual basis.... If we are to experiment with alternatives to trials, let us really experiment: let us propose testable hypotheses, and test them.<sup>5</sup>

- Like many other socio-legal analysts, I first became attracted to conducting empirical research on the law because of what I saw as the promise of such research: the chance to shed light on citizens' legal needs and desires, and to better understand the consequences of legal rules and court programs. I believed that by bringing fact-based, non-ideologically-driven research to bear on legal issues I could contribute in a modest way to improvements in the legal system. In my more cheerful moments, I still find myself believing in that promise, and I continue to find the research process itself enormously interesting and fulfilling. But after more years as a legal policy analyst than I choose to confess, my expectations about the impact of empirical research have diminished — perhaps, some would say they have become more reasonable. At the same time, I have become increasingly concerned about the potential for misuse of empirical research for legal policy reform and reform of other social policies. Today, whenever I reflect on the use of empirical research for public policy reform, I think not just about its promise but also about its perils and pitfalls.<sup>6</sup>

In preparing this memorandum, the staff tried to be mindful of considerations such as the ones expressed above. In particular, the staff has great appreciation for the value of a rigidly controlled, carefully designed experiment, and the dangers inherent in drawing conclusions from data gathered in other ways.

The memorandum begins by discussing the availability — or lack thereof — of “data regarding the impact of differing confidentiality rules on the use of mediation.” The memorandum then describes various other empirical data that may be relevant to this study. At the end of the memorandum, the staff shares some thoughts on the use and impact of empirical data in this study.

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5. Richard Posner, *The Summary Jury Trial and Other Methods of Alternative Dispute Resolution: Some Cautionary Observations*, 53 U. Chi. L. Rev. 366, 367 (1986).

6. Deborah Hensler, *Reflections on the Use of Empirical Research in Legal Policy Reform*, *Newcastle L. Rev.* (vol. 7, no. 2), p. 1 (footnote omitted). Ms. Hensler is the Judge John W. Ford Professor of Dispute Resolution and Associate Dean for Graduate Studies at Stanford Law School. She was the director of the RAND Corporation's Institute for Civil Justice before joining Stanford Law School.

Although this memorandum refers to many scholarly articles on mediation confidentiality, it is not intended as a review of the scholarly literature relevant to this study. The focus is on the existence and nature of empirical data. The staff will describe the relevant scholarly literature (including many of the articles cited herein) in greater detail in a future memorandum.

#### EMPIRICAL DATA ON MEDIATION CONFIDENTIALITY

As previously discussed at length in the course of this study, the need for some degree of protection for mediation communications is widely accepted. What we will refer to here as “mediation confidentiality” — recognizing that more nuanced terminology is often necessary<sup>7</sup> — is the main thrust of the Uniform Mediation Act (“UMA”);<sup>8</sup> it is established by court rule or statute in virtually every state;<sup>9</sup> it is a mandatory element of the local rules governing court-connected mediations in the federal arena;<sup>10</sup> it has broad (but not unanimous) support in the academic community;<sup>11</sup> and it is considered essential for effective mediation by numerous mediators, attorneys, and judges throughout the country.

The underlying theory is that mediation confidentiality promotes candid communication during mediation by assuring the participants that their words will not later be used against them in court or in other detrimental ways. Such candor is believed crucial in promoting “effective” mediation.

What constitutes an “effective” mediation is somewhat nebulous. For instance, it could be measured by (1) whether a mediation results in a settlement, (2) whether a mediation results in an early settlement, which is likely to conserve judicial and litigant resources, (3) whether a mediation results in a durable settlement, which will not unravel or result in further disputes, (4) whether a

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7. See Memorandum 2014-14, pp. 4-6.

8. National Conference of Commissioners on Uniform State Laws, *Uniform Mediation Act* (as amended in 2003) (hereafter, “UMA”), at Prefatory Note (“a central thrust of the Act is to provide a privilege that assures confidentiality in legal proceedings”).

9. See Memorandum 2014-24 (UMA Implementation); Memorandum 2014-35, pp. 6-25 (Florida law), pp. 25-32 (Massachusetts law), pp. 32-40 (New York law), Exhibit pp. 5-42 (non-UMA States except California, Florida, Massachusetts, New York & Pennsylvania); First Supplement to Memorandum 2014-35 (overview of law in 50 states & District of Columbia); Memorandum 2014-43 (Pennsylvania law); Memorandum 2014-44 (Texas law).

10. See 28 U.S.C. § 652(a), (d) (confidentiality requirement of Alternative Dispute Resolution Act of 1998).

11. See, e.g., Sarah Rudolph Cole, *Secrecy and Transparency in Dispute Resolution: Protecting Confidentiality in Mediation: A Promise Unfulfilled?*, 54 Kan. L. Rev. 1419, 1422 n.13 (2006) (“The weight of the scholarly authority is that protecting confidentiality is essential to the success of mediation because it facilitates open communications among the parties.”).

mediation results in a settlement that enhances party satisfaction, (5) some combination of the preceding means of measurement, or (6) some other method.<sup>12</sup> Regardless of which criterion is used, it is of no use in a vacuum; it must instead be compared to what would occur without the use of mediation.

Determining how to measure the “effectiveness” of a mediation is but one of many issues to surmount in obtaining “data regarding the impact of differing confidentiality rules on the use of mediation.” Before proceeding further, it may be helpful to offer a few preliminary thoughts on the challenge of designing good experiments in this area.

### **Preliminary Thoughts on Testing the Impact of Differing Mediation Confidentiality Rules**

In attempting to design an experiment to compare two different mediation confidentiality rules, it is perhaps obvious that it is impossible to mediate the same dispute with the same participants under the same conditions twice, once using one rule (Confidentiality Rule #1) and once using another rule (Confidentiality Rule #2). Once a dispute is mediated the first time, the conditions necessarily change. Even if the dispute remains unresolved, its character and the relationships among the parties will have been influenced by the first mediation: Positions may have hardened, animosities may have grown, participants may have greater understanding of each others’ positions, participants may be more aware of strengths and weaknesses in their own cases, and the like. The mediation cannot simply be redone from scratch.

That would, of course, be true not only with regard to mediating a real dispute, but also with regard to mediating a simulated dispute. If a simulated dispute were mediated a second time with the same participants, the participants would not be able to set aside what they had learned in the first mediation.

In addition, the process of repeating the mediation, but providing different information regarding confidentiality, might draw the participants’ attention to the level of confidentiality and the possibility that researchers are evaluating its effect. That might then influence their behavior and distort the results of the mediation.

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12. For a good list of possible factors to consider in determining whether court-connected mediation is “successful,” see Bobbi McAdoo & Nancy Welsh, *Look Before You Leap and Keep on Looking: Lessons from the Institutionalization of Court-Connected Mediation*, 5 Nev. L.J. 399, 404-05 (2004).

Because it is impossible to redo the same mediation using a different confidentiality rule, assessing the impact of differing confidentiality rules would necessarily have to involve comparing the outcomes of mediations that differ not only with regard to which rule is used, but also in other respects (such as the personalities and experience of the participants, and the nature and intensity of the dispute). That constraint would make it difficult to determine whether a difference in outcome is attributable to the use of a different confidentiality rule, or to some other difference between the mediations.

For example, if the settlement rate of Florida mediations were 60% (a purely hypothetical figure) and the settlement rate of California mediations were 50% (also a purely hypothetical figure), the difference in settlement rates might be due to differing mediation confidentiality rules, or it might be due to any number of other factors: Differences in the types of disputes mediated in the two states, differences in the quality of the mediators, differences in cultural attitudes about reaching a compromise, differences in the demography of the disputants, differences in litigation costs, differences in usage of mandatory mediation, and so forth. There would be too many variables to determine which one (or more) of them accounts for the difference in results.

By using a large sample of mediations that involve closely similar disputes, similar types of participants, and closely similar conditions, and randomly selecting which confidentiality rule to apply to each of the mediations, one could minimize the problem just identified. Under that approach, there would be two groups of mediations: (1) mediations conducted pursuant to Confidentiality Rule #1 (hereafter, Mediation Group #1), and (2) mediations conducted pursuant to Confidentiality Rule #2 (hereafter, Mediation Group #2). Through the process of random selection, other differences between the groups would tend to cancel each other out and make it possible to determine with some degree of confidence that a difference between the results of Mediation Group #1 and the results of Mediation Group #2 was attributable to the use of differing confidentiality rules.

For example, if the same pool of mediators (with varying levels of experience, skill, and expertise) was used for all of the mediations, and every mediator conducted multiple mediations, one would expect that each mediator would mediate some disputes that would be randomly selected for Mediation Group #1 and a roughly equal number of disputes that would be selected for Mediation Group #2, and thus the mediator's attributes (whatever they might be) would

affect both groups roughly equally and thus would not account for a difference in the outcomes of the two groups.

But how would it be possible for researchers to get a large sample of mediations that involve closely similar disputes, similar types of participants, and closely similar conditions, and randomly select which confidentiality rule to apply to each of the mediations? The simplest way would seem to be to have a court in a particular jurisdiction establish a mandatory mediation program for a carefully defined set of cases (e.g., all car accident cases filed in that jurisdiction within a certain time frame that consist solely of property damage claims for \$10,000-\$15,000 in which both sides are represented by counsel). The researchers would randomly assign a mediator from a court-selected mediator pool, and randomly determine which of two mediation confidentiality rules to apply to each case. Other mediation conditions would have to be kept as constant as possible. For example, to eliminate variability due to mediation timing, the program could require that all of the mediations be conducted 90-120 days after the filing of the complaint.

Such an approach might be effective in determining the impact of a mediation confidentiality rule, at least within a particular jurisdiction for a particular type of case. The results would be a start in gathering empirical data, but they would not tell anything about private mediations (pre-litigation or otherwise) or voluntary court-connected mediations. Nor could the results be generalized to mandatory court-connected mediations in other jurisdictions or to other types of cases without replicating the experiment elsewhere and with other types of cases (preferably numerous repetitions). That would, of course, be both costly and extremely time-consuming.

Moreover, the costs would multiply dramatically if researchers sought to compare several different confidentiality rules, not just two such rules. As the Commission has seen during the course of this study, there are many different possible approaches to mediation confidentiality: jurisdictions vary in the scope and extent of protection for mediation communications, the existence and contours of exceptions to the general rules, who has authority to prevent disclosure and under what circumstances, waiver doctrines, treatment of the mediator, and various other aspects. Ideally, it would be possible to test the effects of all of the different approaches, but that would be prohibitive.

Perhaps most importantly, the type of experiment described above would involve applying different mediation confidentiality rules to similarly-situated

litigants. That raises important fairness considerations and the specter of potentially inconsistent results in future cases involving attempts to introduce or obtain discovery of mediation evidence. Such concerns might even rise to the level of a due process challenge.

There would also be related practical complications. Suppose the experiment involved comparison of a jurisdiction's own mediation confidentiality rule with another jurisdiction's mediation confidentiality rule. Regardless of how the experiment turns out and whether the jurisdiction revises its approach to mediation confidentiality as a result, the experiment would essentially involve making promises to mediation participants about how their mediation communications will be treated by courts within that jurisdiction in the future. That is always the case with regard to a promise of confidentiality; it necessarily is a promise regarding future treatment of the communications. But the scenario contemplated here is a promise that future courts will, with regard to communications made in at least half of the mediations involved in the experiment, apply a mediation confidentiality rule *other than* the one that is normally used in their jurisdiction. Is it realistic and proper to expect that this type of promise will be kept, perhaps many years later? If not, would it be fair to make the promise in the first place?

The types of concerns just described — concerns about fairness, inconsistent results, due process, and binding future courts to use a mediation confidentiality rule other than the one normally applied in their jurisdiction — would not arise if the experiment involved mediations of simulated, rather than real, disputes. In that case, however, a different problem could occur. While the same artificially constructed dispute could be used in all of the simulations, the mediation participants may not be motivated to keep matters confidential in the same way or to the same degree as with a real, naturally occurring dispute.

It is one thing, for example, to disclose impending financial ruin and infidelity to your spouse if the situation is hypothetical, and quite another to make such a disclosure if the situation is real. Likewise, attitudes regarding disclosure may vary depending on the nature of the matter disclosed (e.g., incest or rape, as opposed to cheating in a card game during a research study). Factors like these may make it very hard to learn anything of value about mediation confidentiality through simulations.

These are just some of the challenges that researchers would have to overcome to obtain useful empirical data regarding the impact of differing

confidentiality rules on the use of mediation. It is thus not surprising that, to the best of the staff's knowledge, no jurisdiction has tried an experiment like the one described above. We turn now to examining what researchers have said and done regarding this area.

### **Lack of Empirical Data on Mediation Confidentiality**

In 1986, Prof. Eric Green (Boston University School of Law) noted that "conventional wisdom among practicing mediators [was] that the confidentiality of mediation should be protected by a statutory or court-created privilege."<sup>13</sup> He challenged their view, pointing out that there was no data to support the claim that confidentiality is essential to the mediation process, and expressing doubt that such data could be collected.<sup>14</sup> For that and other reasons,<sup>15</sup> Prof. Green took the "heretical position" that "[a] blanket mediation privilege is a bad idea" and there is "sufficient protection under current law to permit alternative dispute resolution to flourish."<sup>16</sup>

As both mediation and rules protecting mediation confidentiality continued to proliferate, a few other scholars expressed similar concerns about the lack of data to support the creation of such rules. In particular, Prof. Scott Hughes (University of Alabama School of Law) wrote in 1998 that "no empirical data exists that connects the success of mediation with the availability of a confidentiality privilege."<sup>17</sup> He maintained that "[u]ntil such an empirical connection can be made, the arguments in favor of mediation privileges should not overcome the historical presumption favoring the availability of 'every person's evidence.'"<sup>18</sup>

Similarly, the following year Prof. Charles Ehrhardt (Florida State University) wrote that a common law mediation privilege would "not be recognized under Federal Rule 501 until empirical data is developed which supports the public and private interests which are served by the recognition of a 'common law privilege,' and there is a clearer consensus among the federal district courts and

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13. Eric Green, *A Heretical View of the Mediation Privilege*, 2 Ohio St. J. on Disp. Resol. 1, 1 (1986).

14. Green, *supra* note 13, at 32.

15. The staff will describe Prof. Green's reasoning in greater detail when we examine the scholarly commentary on mediation confidentiality later in this study.

16. *Id.* at 2, 35, 36.

17. Scott Hughes, *A Closer Look — The Case for a Mediation Confidentiality Privilege Has Not Been Made*, 5 Disp. Resol. Mag. 14, 16 (1998) (hereafter, "Hughes 1998").

18. *Id.*; see also Scott Hughes, *The Uniform Mediation Act: To the Spoiled Go the Privileges*, 85 Marq. L. Rev. 9 (2001) (hereafter, "Hughes 2001").

the states that a mediation privilege is necessary and desirable.”<sup>19</sup> He warned that “[t]hose favoring a privilege would be well-served to develop relevant data.”<sup>20</sup>

In response to Prof. Hughes’ argument against mediation confidentiality protections, Prof. Phyllis Bernard (Oklahoma City University School of Law) observed in 2001:

In a basic sense Hughes’s argument would be: “We have no data to show the privilege is needed: therefore, we can safely eliminate it.” The fallacy of this proof is that one could just as readily argue that because there are no contrary data, there is just as much reason to preserve the practice of assuring confidentiality.<sup>21</sup>

She went on to acknowledge the lack of data, question whether the effect of mediation confidentiality is susceptible to quantification, and contend that mediation confidentiality protections should remain in place while researchers attempt to develop such data:

Arguably, the Alternative Dispute Resolution (ADR) development is still in its infancy. A sufficient body of empirical evidence as a result of longitudinal studies has yet to be compiled that could resolve a rational argument one way or the other. *Indeed, one could ask whether empirical data of any sort could truly answer this confidentiality question since the relevant factors may not be susceptible to quantification.* Given these currently insuperable barriers, there appears to be even more reason in the interim to preserve confidentiality protections due to the expectations of privacy and trust that have accrued over time.<sup>22</sup>

The same year, legal scholar J. Brad Reich said that “[t]here is no empirical evidence establishing that the mediation process requires confidentiality.”<sup>23</sup> Like Profs. Green and Hughes, he felt that “[a]bsent empirical proof, state legislatures have acted too hastily in crafting confidentiality protections for the mediation process.”<sup>24</sup> He discussed some “analogous empirical evidence” relating to the psychotherapist-patient privilege, the attorney-client privilege, and therapeutic

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19. Charles Ehrhardt, *Confidentiality, Privilege and Rule 408: The Protection of Mediation Proceedings in Federal Court*, 60 La. L. Rev. 91, 93 (1999).

20. *Id.* at 126.

21. Phyllis Bernard, *Reply: Only Nixon Could Go to China: Third Thoughts on the Uniform Mediation Act*, 85 Marq. L. Rev. 113, 116 (2001).

22. *Id.* (emphasis added, footnote omitted).

23. J. Brad Reich, *Call for Intellectual Honesty: A Response to the Uniform Mediation Act’s Privilege Against Disclosure*, 2001 J. Disp. Resol. 197, 209 (2001).

24. *Id.*

communications, arguing that it did not support the creation of a mediation privilege.<sup>25</sup> He recognized, however, that the data he presented was “susceptible to different interpretations.”<sup>26</sup>

Although only a small minority of scholars contend that mediation communications do not need special protection, many in the academic community have called for research on mediation confidentiality.<sup>27</sup> Most notably, Prof. Frank Sander (Harvard Law School) offered some comments on the subject.

Prof. Sander was a key leader of the ADR movement; he introduced the concept of the “multidoor courthouse” and served on the drafting committee for the UMA. At a symposium in 2006, he stressed the need for more basic research, saying “it is remarkable how little we know about many issues that are basic to ADR.”<sup>28</sup> He proceeded to list some of those issues, including the importance of mediation confidentiality. On that topic, he said:

Perhaps the most sacred canon in mediation is the importance of mediation confidentiality. Indeed, that is the underlying premise of the recently promulgated Uniform Mediation Act. There have been spirited scholarly debates about the importance *vel non* of confidentiality to the process, *but little by way of basic data*. Moreover, one needs to distinguish between the two kinds of confidentiality (as between the two caucuses and *vis a vis* the external world), as well as between articulations of confidentiality by the mediator and confidentiality’s legal enforceability.

*Again, this may be a question very difficult to explore. But, so far as I know, we have not even begun to do so. While real-life experiments might be difficult to achieve, perhaps we could learn something from laboratory experiments.*<sup>29</sup>

The same year, Profs. James Coben and Peter Thompson (both of Hamline University School of Law) published an article in which they noted the lack of empirical data on mediation generally, described some of the limitations in obtaining such data, and pointed out that “[l]argely overlooked in the discussion to date is one extremely large database — the reported decisions of state and

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25. *Id.* at 210, 213-20.

26. *Id.* at 252; see also *Jaffee v. Redmond*, 518 U.S. 1, 10 & n.9 (citing studies cited in the briefs of the American Psychiatric Ass’n and American Psychological Ass’n for the proposition that “the mere possibility of disclosure may impede development of the confidential relationship necessary for successful [psychotherapy] treatment”).

27. See, e.g., *Cole*, *supra* note 11, at 1422 n.13.

28. Frank Sander, *Some Concluding Thoughts*, 17 *Ohio St. J. on Disp. Resol.* 705, 706 (2002).

29. *Id.* at 708 (emphasis added, footnote omitted).

federal judges forced to confront legal disputes about mediation.”<sup>30</sup> They reported the results of a study in which they examined that database. The methodology of their study and the results relating to mediation confidentiality are discussed below.

### **Coben and Thompson Study**

Through the use of Westlaw searches of all federal and state opinions issued between 1999 and 2003, Profs. Coben and Thompson found 1223 cases that implicated mediation issues.<sup>31</sup> They then reviewed each of those cases and compiled various types of information about each case (e.g., jurisdiction in which the case arose, nature of the claims asserted, type of issues addressed in the opinion, result).<sup>32</sup>

In undertaking this analysis, Profs. Coben and Thompson admitted that “a written trial or appellate court decision is by no means a perfect window into the world of mediation.”<sup>33</sup> As they pointed out, “[o]nly the rare mediated dispute shows up in a reported opinion.”<sup>34</sup> Most mediated disputes result in a durable settlement, either during the mediation or later in the litigation process. In a small fraction of the cases, the dispute proceeds to trial, is resolved by a pretrial motion, or litigation recommences when a settlement falls apart. Only a few of those cases result in written, publicly accessible opinions that are included in the Westlaw database; many court decisions are not memorialized in such an opinion. The sample of cases that Profs. Coben and Thompson examined was thus skewed, not necessarily representative of mediated disputes generally, or even of mediation-related litigation.<sup>35</sup>

Nonetheless, Profs. Coben and Thompson believed that much could be learned from what they described as “failed” mediations (ones that resulted in “the adversarial opinion that the ADR process was designed to avoid”).<sup>36</sup> One unexpected finding, for instance, was “the sheer volume of litigation about

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30. James Coben & Peter Thompson, *Disputing Irony: A Systematic Look at Litigation About Mediation*, 11 Harv. Negotiation L. Rev. 43, 45-46 (2006) (hereafter, “Coben & Thompson (2006)”).

31. *Id.* at 49-50.

32. *Id.* at 50.

33. *Id.* at 46.

34. *Id.* at 46-47.

35. As Profs. Coben and Thompson acknowledge, “most litigated issues about mediation are handled at the trial level, usually without any reported opinion.” *Id.* at 54. Most of the opinions in their database came from appellate courts (874), but they did find 350 trial court opinions, most of which (209) came from federal courts. *Id.*

36. *Id.* at 47.

mediation.”<sup>37</sup> In a five-year time-span when general civil caseloads were relatively steady or declining nationwide, there were over a thousand cases involving mediation issues, and mediation litigation increased 95% (from 172 decisions in 1999 to 335 in 2003).<sup>38</sup>

With regard to mediation confidentiality, Profs. Coben and Thompson summarized their findings as follows:

The database contains 152 opinions where courts considered a mediation confidentiality issue, including fifteen state supreme court decisions and eight federal circuit court opinions. The number of cases raising confidentiality issues more than doubled between 1999 and 2003, from seventeen to forty-three. In a number of opinions, confidentiality issues were commonly interlinked with other mediation dispute issues: enforcement (46); ethics/malpractice (21); sanctions (21); fees (18) mediation-arbitration (9); and duty to mediate (8).

The majority of the confidentiality opinions (130) considered whether to permit testimony or discovery from mediation participants. Courts upheld statutory or rule limitations on availability of such evidence in fifty-seven opinions (44%), upheld limitations in part in eight cases (6%), and declined to protect confidentiality in sixty opinions (46%). In five cases (4%), the issue was left undecided. The balance of the confidentiality decisions (22) address a range of questions other than admissibility or discovery, most commonly judicial disqualification or consequences for breach of confidentiality agreements.

While these confidentiality disputes certainly merit discussion, *the more significant finding is the large volume of opinions in which courts considered detailed evidence of what transpired in mediations without a confidentiality issue being raised* — either by the parties, or sua sponte by the court. Indeed, uncontested mediation disclosures occurred in thirty percent of all decisions in the database, cutting across jurisdiction, level of court, underlying subject matter, and litigated mediation issues. Included are forty-five opinions in which mediators offered testimony, sixty-five opinions where others offered evidence about mediator’s statements or actions, and 266 opinions where parties or lawyers offered evidence of their own mediation communications and conduct — all without objection or comment. *In sum, the walls of the mediation room are remarkably transparent.*<sup>39</sup>

As the above quote makes clear, “a major surprise” from the study was how often courts considered evidence of what transpired in a mediation, particularly

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37. *Id.*; see also *id.* at 143.

38. *Id.* at 47-48.

39. *Id.* at 57-59 (emphasis added, footnotes omitted).

how often courts considered such evidence without any objection.<sup>40</sup> Both mediators and other mediation participants offered uncontested mediation evidence on a wide range of topics.<sup>41</sup> According to Profs. Coben and Thompson, “[t]his rather cavalier approach to disclosure of mediation information is certainly at odds with the conventional wisdom positing that confidentiality is central to the mediation process.”<sup>42</sup>

In the cases involving disputes over confidentiality, courts upheld confidentiality restrictions about half of the time, and over 20% of such decisions were issued by California courts.<sup>43</sup> The remaining decisions upholding confidentiality were from sixteen other states, including multiple rulings from Texas, Oregon, and Indiana.<sup>44</sup>

Profs. Coben and Thompson further found that when courts expressly refused to protect mediation confidentiality, few of them engaged in “a reasoned weighing of the pros and cons of compromising the mediation process.”<sup>45</sup> Instead of balancing the policy considerations at stake, the courts typically justified their decisions on other grounds, such as waiver or the harmless error doctrine.<sup>46</sup> Magistrate Judge Brazil’s decision in *Olam v. Congress Mortgage Co.*<sup>47</sup> was a notable exception.<sup>48</sup>

Profs. Coben and Thompson also concluded that the “level of vigilance for maintaining the confidentiality of mediation discussions varies depending on the context of the litigation.”<sup>49</sup> More specifically, they found:

- “If the mediation settlement affects the rights of third parties, such as settlement in class action cases, the expectation of confidentiality appears to disappear or be substantially diminished. Indeed, not a single one of the thirty-four class action opinions in the database presented a confidentiality dispute.”<sup>50</sup>

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40. *Id.* at 48.

41. *Id.* at 59-61, 62-63.

42. *Id.* at 48.

43. *Id.* at 64.

44. *Id.* at 64-65.

45. *Id.* at 66.

46. *Id.* at 66-67.

47. 68 F. Supp. 2d 1110 (N.D. Cal. 1999). For a description of the *Olam* decision, see Memorandum 2014-45.

48. Coben & Thompson (2006), *supra* note 30, at 68.

49. *Id.* at 68.

50. *Id.*

- “Outside of California and perhaps Texas, relevant mediation communications appear to be used regularly in court to establish or refute contractual defenses such as fraud, mistake, or duress.”<sup>51</sup>
- “The issue of privilege was raised in only twelve of the 117 sanctions cases.”<sup>52</sup>
- “Courts and parties appear more vigilant in enforcing confidentiality in fee issues, upholding confidentiality in eleven out of eighteen confidentiality opinions where fees were in dispute.”<sup>53</sup>

In addition to mediation confidentiality, Profs. Coben and Thompson addressed various other topics in their 2006 article. Some of those topics are relevant to this study and will be discussed later in this memorandum.

### **Follow-Up Work by Profs. Coben and Thompson**

A year later, Profs. Coben and Thompson published a follow-up article, which reported the results of similar research conducted during 2004-2005, and more limited research conducted during 2006.<sup>54</sup> In large part, they found that the trends identified in their original article continued during the follow-up period.<sup>55</sup>

The number of court opinions involving mediation issues continued to increase during the follow-up period,<sup>56</sup> with most of the increase occurring in federal courts.<sup>57</sup> As in 1999-2003, opinions from California, Texas, and Florida comprised about one-third of the database.<sup>58</sup> “In 2004-2005, California (179 federal and state opinions) surpassed Texas (104 federal and state opinions) as the jurisdiction with the most reported litigation of mediation issues.”<sup>59</sup> Florida was “a distant third,” with 68 federal and state opinions.<sup>60</sup>

“Confidentiality opinions dropped from twelve percent of the opinions in 1999-2003 to nine percent in 2004-2005.”<sup>61</sup> As before, the “Walls of the Mediation Room Remain[ed] Porous,” with judges “frequently consider[ing] what went on or what was said during the mediation, usually without any reference to

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51. *Id.* at 69; see also *id.* at 69-72.

52. *Id.* at 72.

53. *Id.*

54. James Coben & Peter Thompson, *Mediation Litigation Trends: 1999-2007*, 1 World Arbitration & Mediation Review 395 (2007) (hereafter, “Coben & Thompson (2007)”).

55. *Id.* at 397.

56. *Id.* at 398.

57. *Id.* at 399; see also *id.* at 411.

58. *Id.*

59. *Id.*

60. *Id.*

61. *Id.* at 401.

confidentiality.”<sup>62</sup> The authors noted, however, that there might be “an emerging trend toward reinvigorating the concern for confidentiality.”<sup>63</sup>

In particular, they observed:

In 2004-2005, mediators supplied testimony in six percent of the cases, quite similar to the 1999-2003 data, but reliance on other types of mediation evidence (oral or written mediation communications supplied by the parties) dropped from thirty-three percent in 1999-2003 to twenty-eight percent in the past two-year period.

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Further, in 1999-2003, the claim of privilege was upheld in forty-three percent of the cases in which privilege was raised; but in the recent two years, privilege claims were upheld in fifty-seven percent of the cases in which they were raised.<sup>64</sup>

In other words, although mediation evidence continued to be disclosed in a significant number of cases, it was not disclosed quite as often as during the earlier study.

As before, in addition to the confidentiality data, Profs. Coben and Thompson also collected various other types of data that might be of interest to the Commission. The staff will discuss that data later in this memorandum.

### **Other Data on Mediation Confidentiality**

In addition to the studies by Profs. Coben and Thompson, the staff found a few other studies that include data on mediation confidentiality. Those studies are described below.

#### *Foster and Prentice Study*

A couple of years after Profs. Coben and Thompson published their second article, Prof. T. Noble Foster and Selden Prentice (both of Albers School of Business and Economics at Seattle University) “sought to determine the perceptions of mediation practitioners in [their] own region, the Seattle/King County area, regarding mediation confidentiality and privilege.”<sup>65</sup> In particular,

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62. *Id.*

63. *Id.*

64. *Id.* at 401-02 (footnote omitted).

65. T. Noble Foster & Selden Prentice, *The Promise of Confidentiality in Mediation: Practitioners' Perceptions*, 2009 J. Disp. Resol. 163, 163 (2009).

According to a 1991 student publication, a much earlier survey conducted by the ABA “indicates that of the 288 programs surveyed, most respondents assumed that their mediation proceedings were privileged, even though they likely were not.” Kent Brown, Comment, *Confidentiality in Mediation: Status & Implications*, 2 J. Disp. Resol. 307, 311 (1991). On reviewing the source cited in the student publication, however, the staff could not tell precisely what the

they were interested in (1) whether mediation communications were disclosed as often in their area as Profs. Coben and Thompson found nationally,<sup>66</sup> and (2) whether the local community considered it advisable to enact a statute providing for sanctions upon a breach of mediation confidentiality,<sup>67</sup> similar to one enacted in Florida.<sup>68</sup>

To answer the first question, they reviewed recent Washington case law addressing mediation communications.<sup>69</sup> They found “only three recently published Washington cases in which a court ... admitted mediation communications.”<sup>70</sup> They concluded that “contrary to the findings of Coben and Thompson, Washington case law does not indicate that confidentiality is frequently breached or that the mediation privilege is frequently violated.”<sup>71</sup>

To answer both the first question and the second question, the Seattle researchers also surveyed a total of 30 local mediators, judges, and attorneys in 2007 and 2008, via email questionnaire, telephone, and personal interviews.<sup>72</sup> They asked those persons how many mediations they had participated in (as mediators or as counsel), how many breaches of mediation confidentiality they were aware of, and whether they would support a sanctions provision like the one enacted in Florida.<sup>73</sup>

They found the following:

- The 30 survey respondents had handled a combined total of 23,114 mediations.<sup>74</sup>
- Out of all of those mediations, the survey respondents were aware of only 65 breaches of confidentiality (just .28% of the total number).<sup>75</sup>
- 70% of the survey respondents did not favor enactment of a Florida-style sanctions provision.<sup>76</sup>

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ABA survey showed. See Lawrence Freedman & Michael Prigoff, *Confidentiality in Mediation: The Need for Protection*, 2 Ohio St. J. Disp. Resol. 37, 42 (1986). The ABA survey was conducted in 1986, so the results are probably outdated, whatever they were.

66. *Id.* at 163-64.

67. *Id.*

68. Fla. Stat. Ann. § 44.406.

69. Foster & Prentice, *supra* note 65, at 163.

70. *Id.* at 166.

71. *Id.* at 167.

72. *Id.* at 169-70.

73. *Id.*

74. *Id.* at 170.

75. *Id.*

76. *Id.*

Based on the results of their survey, the researchers concluded that “most practitioners in Seattle/King County perceive that breaches of confidentiality are very infrequent.”<sup>77</sup> The estimated frequency of occurrence was “less than three-tenths of one percent — a percentage that cannot be construed as significant.”<sup>78</sup> They commented that their findings “differ[ed] markedly from those reported by Coben and Thompson.”<sup>79</sup>

They did not speculate on the reasons for that disparity, but did note some differences between the two studies:

- Their study was “based on perceptions of those directly involved in the mediation process, and such perceptions are necessarily subjective.”
- Their study included both court-ordered mediations and mediations conducted independent of court proceedings. In contrast, Profs. Coben and Thompson “based their findings on a review of reported cases already in litigation.”<sup>80</sup>

Their article concludes with a call for further research:

As mediation has come into its own, courts and mediators appear to have reached consensus regarding the importance of confidentiality in mediation. Our research suggests that, in our jurisdiction at least, practitioners perceive that participants in the mediation process can reasonably rely on the promise of confidentiality. *Further research is needed, on a national basis, to determine whether confidentiality in mediation is “honored more in the breach” (as reported by Coben and Thompson), or whether most practitioners perceive that it is observed (as we have found). An additional worthwhile inquiry might involve the question of whether there is a discernable trend underway — the trajectory of which might point to the need for corrective action ....*<sup>81</sup>

#### *2008 Study Conducted By the U.S. District Court for the Southern District of Ohio*

In 2008, the Chief Judge of the U.S. District Court for the Southern District of Ohio sent a questionnaire to 290 lawyers that asked questions about their experiences with five different types of settlement procedures: (1) a settlement conference conducted by the judge or magistrate assigned to the case, (2) a settlement conference conducted by a judge or magistrate not assigned to the case, (3) a mediation conducted by a court staff mediator, (4) a court-connected

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77. *Id.* at 171.

78. *Id.*

79. *Id.*

80. *Id.*

81. *Id.* at 172 (emphasis added, footnote omitted).

mediation conducted by a volunteer mediator, and (5) a mediation conducted by a private, paid mediator.<sup>82</sup> The results of the questionnaire were presented in an article by Roselle Wissler (a research director of a dispute resolution program at the law school of Arizona State University).<sup>83</sup>

A total of 136 lawyers (47%) responded to the questionnaire.<sup>84</sup> Most of those lawyers had a substantial amount of legal experience.<sup>85</sup> Although the questionnaire was administered by the U.S. District Court for the Southern District of Ohio, the lawyers' responses "likely reflect[ed] their experience with settlement procedures in other districts as well ..., as the questionnaire instructions asked about their 'general experience with settlement conferences and mediation in federal courts.'"<sup>86</sup>

The questionnaire covered a number of different topics, including some questions about candor:

- Can parties be candid with the neutral about interests and difficulties in the case without being concerned about negative consequences?<sup>87</sup>
- Can the neutral fully explore settlement without prejudice to ongoing litigation if the case is not settled?<sup>88</sup>

Among other things, the results showed:

- "Lawyers thought that parties could be much less candid with judges assigned to the case than with each of the other types of neutrals."<sup>89</sup>
- "Lawyers thought that judges assigned to the case were much less 'able to fully explore settlement without prejudice to ongoing litigation if the case is not settled' than other types of neutrals."<sup>90</sup>

According to the author, "[t]he main factor that appeared to affect whether lawyers thought they could candidly and fully discuss settlement with the neutral without negative consequences or prejudice to ongoing litigation was whether

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82. Roselle Wissler, *Court-Connected Settlement Procedures: Mediation and Judicial Settlement Conferences*, 26 Ohio St. J. on Disp. Resol. 271, 275-76 (2011) (hereafter, "Wissler (2011)").

83. Wissler (2011), *supra* note 82.

84. *Id.* at 275.

85. *Id.* at 275-76.

86. *Id.* at 276.

87. *Id.* at 284.

88. *Id.* at 285-86.

89. *Id.* at 284. That result is consistent with other research, which involved comparisons between assigned judges and other judges, but does not appear to have involved mediators. See *id.* at 303 & sources cited therein.

90. *Id.* at 285.

the neutral facilitating settlement discussions would make subsequent substantive decisions in the case and preside at the trial.”<sup>91</sup>

She carefully pointed out that there were no “independent observations to show ... whether parties *were in fact* more candid in some models than others.”<sup>92</sup> It seems likely, however, that if a lawyer thinks candor in a particular context could be unusually detrimental to a client, the lawyer will be less candid in that context than otherwise, and will instruct the client to do the same.<sup>93</sup>

The Ohio study also found:

- Of the five options, lawyers thought parties could be most candid with private mediators. Court-connected mediators (court staff mediators and volunteer mediators for court programs) ranked higher than judges not assigned to the case.<sup>94</sup>
- The results were similar with regard to the ability to explore settlement fully without prejudice.<sup>95</sup>

The author offered several possible explanations for these results:

Finding that settlement conferences with judges not assigned to the case were rated lower on these two dimensions than all models of mediation suggests that a settlement facilitator with any potential decisionmaking role in the case raised concerns that information discussed during the settlement conference could affect subsequent rulings. Or perhaps lawyers thought that judges would be more likely than mediators to talk to the trial judge about the case, either because the judges would be more likely to communicate with the trial judge about other pretrial proceedings in the case or because the mediators had explicit confidentiality provisions and reporting limitations.<sup>96</sup>

*2011 Comments Comparing the Volume of UMA Litigation with the Volume of California Litigation*

In 2011, JAMS published a short article regarding the tenth anniversary of the UMA.<sup>97</sup> The article reported that Prof. Nancy Rogers viewed “the limited amount of case law surrounding” the UMA as a “sign that the UMA was well crafted.”<sup>98</sup> She explained that “[b]y the end of 2009 there were only 30 reported

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91. *Id.* at 286 (emphasis added).

92. *Id.* at 283 (emphasis added).

93. See generally *id.* at 308 & n. 154.

94. See *id.* at 285.

95. See *id.* at 286.

96. *Id.* (footnotes omitted).

97. See Justin Kelly, *The Uniform Mediation Act Turns 10 This Year*, JAMS Dispute Resolution Alert (Summer 2011).

98. *Id.* at 3 (quoting Prof. Rogers).

cases and there were very few where a court was confused about the privilege and its application.”<sup>99</sup> She regarded it as “a good sign that the courts [were] consistently getting it right.”<sup>100</sup>

The same article says that Prof. Coben “echoed her point, noting that ‘in California there is a lot of litigation over the confidentiality statute.’”<sup>101</sup> He contrasted that situation to the UMA, saying that “[p]eople just aren’t litigating UMA issues.”<sup>102</sup> He said that although “he was ‘not a proponent of the UMA when it came out,’” the more he studied litigation, the more he became “convinced that the approach the drafters took was the correct one.”<sup>103</sup>

The staff does not have current totals comparing the amount of mediation confidentiality litigation in California to the corresponding amount in the UMA states. We could attempt to obtain such information if the Commission is interested.

While the amount of litigation is clearly a factor to consider in evaluating a confidentiality rule, another factor would be the extent to which a rule does (or does not) chill candid mediation discussions. Unfortunately, that effect would be extremely difficult to measure and quantify. To the best of the staff’s knowledge, no such empirical data is available.

#### *Additional Data?*

In addition to the studies described above, there might be other empirical data on the effects of differing mediation confidentiality rules, which has not yet come to the staff’s attention. As recently as 2012, however, the authors of a leading treatise said:

Lawmakers have little evidence to guide them in assessing whether assurance of confidentiality is necessary to promote the frank discussion necessary to achieve settlement. Nor are there studies to buttress other arguments given for mediation confidentiality — that frequent subpoenas will thin the ranks of volunteer mediators; that otherwise parties will use mediation as a form of informal discovery, to the detriment of the legally naive party; and that the public will perceive testifying mediators as biased.<sup>104</sup>

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99. *Id.* (quoting Prof. Rogers).

100. *Id.* (quoting Prof. Rogers).

101. *Id.* (quoting Prof. Coben).

102. *Id.* (quoting Prof. Coben).

103. *Id.* (quoting Prof. Coben).

104. Stephen Goldberg, Frank Sander, Nancy Rogers & Sarah Cole, *Dispute Resolution: Negotiation, Mediation, Arbitration, and Other Processes*, p. 248 (6th ed. 2012).

The staff's research has been extensive, but not exhaustive (due to the vast amount of writing in this area). **We encourage knowledgeable persons to bring any further empirical data on this topic to the Commission's attention.**

#### OTHER EMPIRICAL DATA RELEVANT TO THIS STUDY

Empirical data on the impact of differing mediation confidentiality rules is not the only type of empirical data that might be useful in this study. For instance, rules protecting mediation communications are grounded in part on the concept that mediations (or at least some types of mediations) have positive effects, such as cost savings and increased party satisfaction. Researchers have expended much effort trying to determine whether such effects actually occur.

We first describe some of the difficulties inherent in mediation research generally, and then report on the results of the empirical research on mediation benefits. Later, we explore data bearing on the occurrence of misconduct in mediation, particularly professional misconduct by attorneys and mediators.

#### **Difficulties Inherent in Mediation Research Generally**

Like research on the impact of mediation confidentiality rules, other empirical research on mediation issues involves significant challenges. As previously discussed, the effectiveness of mediation could be measured in a variety of different ways; there is no standardized, broadly accepted, and readily administered measuring technique.<sup>105</sup> Collecting data on mediation programs and analyzing such data is also expensive, slow, time-consuming, and hard to finance when state budgets are tight and data collection would divert funds and

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105. See Gregory Jones, *Fighting Capitulation: A Research Agenda for the Future of Dispute Resolution*, 108 Penn. St. L. Rev. 277, 302 (2003) ("I have found little in the way of measurement of dispute resolution processes, with the notable exception of the ex post participant satisfaction surveys that have become so common.... Efforts at standardization and consistency in the collection and reporting of longitudinal data are desperately needed.").

In 2003, an ABA task force developed a list of data fields the courts could use to determine what ADR data to capture. "The hope [was] that with more similar data collection across court systems, there [would] be more ability to discern the impact of ADR on the justice system as a whole." Bobbi McAdoo, *All Rise, the Court is in Session: What Judges Say About Court-Connected Mediation*, 22 Ohio St. J. on Disp. Resol. 377, 428 n. 270 (2007); see also Donna Shestowsky, *Disputants' Preferences for Court-Connected Dispute Resolution Procedures: Why We Should Care and Why We Know So Little*, 23 Ohio St. J. on Disp. Resol. 549, 592 n. 158 (2008). It is not clear to the staff whether the ABA effort has had much impact; as best we can tell from extensive reading in the area, the measurement problem persists.

In California, the Judicial Council similarly prepared a model survey for trial courts to use in collecting ADR data. The staff does not have information on how extensively the trial courts have used the model survey.

resources away from direct provision of services to the public.<sup>106</sup> Long-term follow-up (such as checking whether a settlement proves durable) is particularly prohibitive.<sup>107</sup> In addition, “sound empirical data is necessarily hard to obtain given the confidential nature of most mediation.”<sup>108</sup> In fact, as Profs. Coben and Thompson have noted, it is even hard to learn how many mediations occur:

Since many mediations are private matters, it is difficult to determine the number of mediations conducted in any jurisdiction. According to the National Center for State Courts, “because programs and rules vary widely from state to state, and even within a single state, national data is nearly impossible to come by and even more difficult to analyze.”<sup>109</sup>

Moreover, “[s]ome of the standard requirements of experimental design, including random case selection, adequate model specification, and the control of other non-specified variables, have offered significant challenges in the context of actual (non-simulated) dispute resolution.”<sup>110</sup> “Random assignment is the best way to create groups that are reasonably equivalent on all known variables (e.g., age of disputant, nature of relationship between the disputants, case type) as well as unknown or unmeasured variables (e.g., psychological functioning of disputants).”<sup>111</sup> Despite its “greatness of value,” ADR research using random

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106. See, e.g., McAdoo, *supra* note 105, at 430 (“In this era of severe budget constraint encompassing the fiscal environment in state and federal government, great creativity will be needed to generate effective systems to monitor and evaluate ADR programs.”); Ignazio Ruvolo, *Appellate Mediation – “Settling” the Last Frontier of ADR*, 41 San Diego L. Rev. 177, 188 n.23 (Feb.-March 2005) (“[S]ome programs have been required to limit the resources devoted to the collection of data, thereby making the process of drawing conclusions about the reasons for programmatic success somewhat more conjectural than might be desirable.”); see generally Peter Robinson, *An Empirical Study of Settlement Conference Nuts and Bolts: Settlement Judges Facilitating Communication, Compromise, and Fear*, 17 Harv. Negotiation L. Rev. 97, 102-03 (2012) (California judicial officers were surveyed on settlement practices in 2000-2004, but results were published in 2012).

107. See, e.g., Lynn Kerbeshian, *ADR: To Be Or ...?*, 70 N. Dak. L. Rev. 381, 400 (1994) (“long-term follow-up is nonexistent”).

108. Jeffrey Stempel, *The Inevitability of the Eclectic: Liberating ADR from Ideology*, 2000 J. Disp. Resol. 247, 250 (2000); see also Jones, *supra* note 105, at 302 (“We do not even have a good idea about how many mediations are conducted each year.”).

109. Coben & Thompson (2006), *supra* note 30, at 45-46, *quoting* National Center for State Concerns, *Mediation FAQ’s*, <http://www.ncsconline.org> (last visited Apr. 5, 2005); see also Jones, *supra* note 105, at 283 (“Given the importance of process integrity and confidentiality, how can we measure the performance of alternative dispute resolution programs, particularly those that are connected to our formal systems of justice?”); Art Thompson, *The Use of Alternative Dispute Resolution in Civil Litigation in Kansas*, 12 Kan. J. L. & Pub. Policy 351, 354 (2003) (“much of the ADR that takes place is never reported”).

110. Jones, *supra* note 105 at 290 n. 61; see also Kerbeshian, *supra* note 107, at 399 (“The success of mediation is difficult to assess given the limitations in methodology and research design common in much of the published literature.”).

111. Shestowsky, *supra* note 105, at 608 (footnote omitted).

assignment of actual cases has been rare.<sup>112</sup> In large part, that may be due to reluctance to treat an actual case in a manner that appears sub-optimal, simply for purposes of experimental research. For example, in discussing the pros and cons of random assignment to appellate mediation, Justice Ignazio Ruvolo (California First District Court of Appeal) explained that “forcing the parties and counsel to spend time, and therefore money, mediating a hopeless case will undoubtedly engender resentment towards the court and its program.”<sup>113</sup>

Not only is data collection relating to mediation challenging, but also much care is necessary in interpreting the data that do exist.<sup>114</sup> To give an extreme example, an Australian publication refers to data from a community justice center showing that “in the 16 years since it was established, including over 18500 mediation sessions and 45000 files, there has not been one threat of action against a mediator.”<sup>115</sup> It might be tempting to conclude from that statistic that mediator misconduct was not a problem in mediations conducted by the community justice center. As the publication noted, however, the results may just “be a reflection of the fact that mediators in the community justice centres are protected by statutory immunity.”<sup>116</sup>

Particularly common are problems comparing results that may have been affected by multiple variables. As Magistrate Judge Brazil has explained:

Local legal cultures vary, as do docket profiles, court resources, docket pressures, and the demography of the client and lawyer communities. The extent of the development of the private ADR provider market can also vary dramatically between jurisdictions — as can the level of experience and comfort with various ADR tools in the local bar and among local repeat-player clients.<sup>117</sup>

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112. *Id.* at 609 (footnote omitted); see also Kerbeshian, *supra* note 107, at 399 (“Random assignment and use of matched samples is frequently impossible or not attempted.”); Wayne Brazil, *Should Court-Sponsored ADR Survive?*, 21 Ohio St. J. on Disp. Resol. 241, 250 (2006) (pointing out that comparative analyses of control groups are “a very rare commodity in the world of judicial administration.”).

113. Ruvolo, *supra* note 106, at 217.

114. See, e.g., Matthias Prause, *The Oxymoron of Measuring the Immeasurable: Potential and Challenges of Determining Mediation Developments in the U.S.*, 13 Harv. Negotiation L. Rev. 131, 134 (Winter 2008) (“[T]he availability of data might be as heterogeneous as the development of mediation throughout the country; information might be difficult to obtain due to decentralized organization and lack of coordination, and even if successfully obtained, there might be too many variables to accurately compare and contrast it.”).

115. Robyn Carroll, *Mediator Immunity in Australia*, 23 Sydney L. Rev. 185, 216 (2001).

116. *Id.*; see also Michael Moffitt, *Suing Mediators*, 83 B.U. L. Rev. 147, 206 (2003) (“The fact that there have been no successful lawsuits against mediators for their mediation conduct should not be mistaken as evidence that mediators are not making mistakes during their service.”).

117. Brazil, *supra* note 112, at 243 n.2.

Key characteristics of court programs may also vary, such as “whether participation in ADR is mandated by the court or is voluntary; whether the parties are permitted to select their own neutral; whether the parties are required to pay for the neutral’s services and, if so, whether at market rates or at below-market rates; and the kinds of cases that are served by the ADR program and the circumstances of the parties.”<sup>118</sup> Consequently, Judge Brazil warns that it is “impossible to generalize reliably because there is such a huge range of programs, with major differences in setting, purpose, design, quality, and quality control, as well as other variables.”<sup>119</sup>

With that warning in mind, and appreciation for the difficulties in gathering empirical data on the costs and benefits of mediation, we turn now to describing the available data.

### **Empirical Data on the Effects of Mediation**

“By the mid-1990s, more than half of state courts, and virtually all of the federal district courts, had adopted mediation programs for large categories of civil suits.”<sup>120</sup> Some of these programs were “based on efficiency goals of being less costly — both to the court system and to the individual parties — and a quicker way to a final resolution ....”<sup>121</sup> Other programs focused on party satisfaction, “look[ing] to mediation as a means to enhance self-determination and mutual problem solving by the parties in a dispute to a much greater degree than litigation.”<sup>122</sup> Proponents also justified mediation programs on other grounds, such as the notion that a mediated settlement was more likely to be durable than a settlement reached through other means.

Data pertaining to each of these justifications is discussed below. Because there are apparently “hundreds of studies”<sup>123</sup> in this area, the discussion does not attempt to describe and analyze the studies in detail. Instead, we report the

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118. *Id.*

119. *Id.* at 249; see also Roselle Wissler, *Representation in Mediation: What We Know From Empirical Research*, 37 *Fordham Urb. L.J.* 419, 468 (2010) (“Mediation programs for different types of cases and in different jurisdictions differ in many ways, including the characteristics of the parties, the characteristics of the mediators, the model or style of mediation, whether mediation is voluntary or mandatory, the typical length and number of mediation sessions, and the legal context and local legal culture within which they operate.”) (hereafter, “Wissler (2010)”; Kerbeshian, *supra* note 107, at 400 (“results obtained in one jurisdiction may not generalize to another location or type of program”).

120. Sharon Press, *Court-Connected Mediation and Minorities: A Report Card*, 39 *Cap. U. L. Rev.* 819, 823 (2011) (footnote omitted).

121. *Id.*

122. *Id.*

123. Shestowsky, *supra* note 105, at 603.

general nature of the findings, as summarized in the scholarly literature. Later, we focus specifically on data from California mediations.

*Cost-Effectiveness, Docket Control, and Time to Disposition*

In 2002, Prof. Sander noted that “[w]e boast liberally about the time- and money-saving advantages of mediation, *but there is little in the way of rigorous research to back up this claim.*”<sup>124</sup> He pointed out that “legislatures are prone to ask for proof that adoption of mediation programs will save money,” and “the legislative yearning for such data seems entirely reasonable.”<sup>125</sup>

At about the same time, Prof. Deborah Hensler (Stanford Law School) put it more strongly:

Over time, court arbitration programs have withered away, and today mediation, on a voluntary or mandatory basis, dominates the “multi-door courthouse.” The consequence of the widespread adoption by legislatures and court rule of civil case mediation has been the development and growth of a new and largely unregulated industry that operates — by design — behind closed doors.

....

Much is still to be learned about these new court mediation programs. *The evidence to date indicates that they ... produce little in the way of time or cost savings.*<sup>126</sup>

Prof. Hensler expressed skepticism with regard to purported cost savings of both court-connected and private alternative dispute resolution programs.<sup>127</sup>

Magistrate Judge Brazil seems to view the situation more optimistically than Prof. Hensler, or at least he takes a positive view with regard to multi-option court-connected ADR programs. In 2006, he said that “*there is substantial evidentiary support — even if no unassailable empirical proof — for the view that*

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124. Sander, *supra* note 28, at 706 (emphasis added).

125. *Id.*

126. Deborah Hensler, *Our Courts, Ourselves: How the Alternative Dispute Resolution Movement Is Re-Shaping Our Legal System*, 108 Penn. State L. Rev. 165, 187-188 (2003) (emphasis added, footnotes omitted); see also Shestowsky, *supra* note 105, at 560 (“Studies of court ADR programs have generally failed to find that they save significant amounts of either time or money.”), *id.* at 551 (“Courts often subordinate disputants’ needs to the desires of the bench (as well as the bar) to clear dockets and reduce the institutional costs of disputes even though empirical studies of court-connected programs suggest that they often fail to meet these institutional goals.”).

127. *Id.* at 194-95 (“There is little evidence that alternative dispute resolution procedures *within courts* have reduced the average time to dispose of civil lawsuits, or the average public or private expense to litigate cases in a system that has long relied on settlement rather than adjudication to resolve most cases. There is also little evidence that alternative dispute resolution procedures *outside of courts* have reduced the transaction costs of resolving conflicts that would never have gone to trial anyway, although they may be contributing to a drop in civil case filings.”) (emphasis added).

strong court ADR programs can reduce cost and delay for significant percentages of litigants.”<sup>128</sup> He also pointed out that due to the high cost of litigation, “one of the very few ways a court can be useful to a substantial segment of the population is to offer a free or low-cost ADR program.”<sup>129</sup>

A number of scholars have noted that empirical results on the cost-effectiveness of mediation are mixed or inconclusive.<sup>130</sup> According to Prof. Hughes, “the *perception* of savings is certainly prominent.”<sup>131</sup> There have also been some suggestions that the timing of a mediation program is important, with early mediation being preferable in terms of promoting cost savings and reduction of court dockets.<sup>132</sup>

### *Party Satisfaction*

According to Prof. Sander, “[i]f there is any consistent finding in mediation research, it is that the participants like the process and tend to view it as fair, regardless of whether a settlement was reached.”<sup>133</sup> Others have echoed that sentiment.<sup>134</sup> As Judge Brazil put it, “[m]any published studies report that the vast majority of users of court ADR programs approve of and value them — even when the lawyers and litigants are not sure whether going through the

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128. Brazil, *supra* note 112, at 249 (emphasis added; citing sources, while acknowledging that results are mixed); see also Art Thompson, *supra* note 109, at 372 (“There is growing evidence that the use of dispute resolution in the courts and government saves resources ....”).

129. *Id.* at 243 n.2.

130. See, e.g., Scott Hughes, *Mediator Immunity: The Misguided and Inequitable Shifting of Risk*, 83 Or. L. Rev. 107, 158 (2004) (footnotes omitted) (hereafter, “Hughes (2004)”); Chris Guthrie & James Levin, *A “Party Satisfaction” Perspective on a Comprehensive Mediation Statute*, 13 Ohio St. J. on Disp. Resol. 885, 897 n.38 (1998).

131. Hughes (2004), *supra* note 130, at 158 (emphasis added). See also McAdoo, *supra* note 105, at 395, which describes the results of a survey distributed to all Minnesota state district court judges in 2003. Two-thirds of them said that ADR had changed their judicial workload. *Id.* In qualitative comments from those judges, 86% of them “indicated some version of ‘reduces number of trial,’ ‘gets cases settled,’ and settlements are ‘earlier.’” *Id.* “Comparing Minnesota court data from 1994 to that of the year July 2002 through July 2003, considerably fewer trials occurred even while caseloads continued to grow .... There is no way to know whether there were fewer trials because of ADR, however, although ADR could be a contributing factor.” *Id.* at 396 n.73.

132. See, e.g., McAdoo, *supra* note 105, at 420 (“A majority of the [Minnesota] judges (57%) believe that mediation occurs after all or almost all discovery is completed. Only 43% of the judges, however, think that mediation should occur at this late point. Instead they think mediation should occur ‘after limited targeted discovery.’”). See also *id.* at 428 n.271 (referring to “some research that bears on the timing of the ADR event”).

133. Sander, *supra* note 28, at 706-07.

134. See, e.g., Art Thompson, *supra* note 109, at 355 (referring to Kansas data and “a number of national studies that show high levels of satisfaction among users of various forms [of ADR] and in particular mediation.”); Guthrie & Levin, *supra* note 130, at 887 (“Parties consistently report high levels of satisfaction with mediation.”).

ADR process resulted in savings of money or time.”<sup>135</sup> Similarly, Prof. Hughes has explained:

Most disputants feel that they have been heard while exercising self-determination and resolving differences. *They frequently leave with increased satisfaction for the entire process.* Such effects redound to the benefit of the courts as the sponsors of the mediation programs. So, in the aggregate, courts benefit greatly from court-annexed programs.<sup>136</sup>

Along the same lines, Prof. Bobbi McAdoo (Hamline University School of Law) referred in 2007 to “a body of literature suggesting that parties are ‘satisfied’ with the mediation process.”<sup>137</sup> She cautioned that “much of the data come from community and family cases, and comparisons of mediation versus negotiation without mediation, especially in general civil cases, are sparse.”<sup>138</sup> A year later, Prof. Donna Shestowsky (UC Davis School of Law) said that research “has rather consistently shown that ADR subjectively appeals to ordinary citizens.”<sup>139</sup>

Interestingly, the empirical research further shows that parties like mediation even when they are not pleased with the outcome of their dispute. “Research has ... clearly demonstrated, somewhat counter-intuitively, that assessments of dispute resolution processes and outcomes are not entirely dependent upon each other.”<sup>140</sup>

Despite the evidence that parties like mediation, Prof. Hensler expressed concern about the growing use of mediation, particularly mandatory mediation, in a provocative article in 2002. She pointed out that

[l]itigant satisfaction surveys conducted after people had experienced an ADR procedure were the primary tools that courts used to assess consequences, and generally they found that litigants surveyed were more “satisfied” than “dissatisfied.” *But knowing that litigants are ‘satisfied’ with mediation tells us little about preferences for mediation — litigants might be even more satisfied with a different procedure if it were offered to them.*<sup>141</sup>

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135. Brazil, *supra* note 112, at 249 (citing sources).

136. Hughes (2004), *supra* note 130, at 158-59 (emphasis added, footnotes omitted).

137. McAdoo, *supra* note 105, at 378 (2007) (footnote omitted).

138. *Id.*

139. Shestowsky, *supra* note 105, at 563.

140. *Id.* (citing sources); see also Deborah Hensler, *Suppose It's Not True: Challenging Mediation Ideology*, 2002 J. Disp. Resol. 81, 88 (2002) (“[C]ontrary to what many judges and lawyers believe, people’s assessments of dispute resolution processes and outcomes are not wholly dependent upon each other. Specifically, experimental subjects’ perceptions of the fairness of dispute resolution procedures depended on procedural characteristics, not on whether they won or lost their case or were satisfied with its outcome.”) (hereafter, “Hensler (2002)”).

141. Hensler (2002), *supra* note 140, at 83-84 (emphasis added).

Referring to certain empirical evidence, she queried whether litigants in disputes over money damages might “prefer adversarial litigation with the chance of adjudication to mediation under court auspices....”<sup>142</sup>

As yet, there does not appear to be a definitive answer to Prof. Hensler’s question, although it has generated much discussion. In a fairly recent article, Prof. Shestowsky suggests that the empirical data reflect a chronological trend, in which disputants initially preferred adjudicative techniques and more recently switched to preferring mediation:

Many existing empirical studies of disputants’ preferences suffer from methodological limitations that restrict their usefulness with respect to program design in modern civil courts. On balance, the initial research, conducted primarily in the 1970s, suggests that disputants favor adjudicative procedures (e.g., arbitration) to nonadjudicative procedures (e.g., mediation). The more recent literature tends to suggest the opposite. What to infer from these conflicting findings remains inconclusive because of the vastly divergent methodologies used across studies.<sup>143</sup>

#### *Settlement Durability and Other Considerations*

In addition to the points discussed above, researchers have postulated various other benefits of mediation. For example, a number have suggested that a mediated settlement is more likely to be durable, and less likely to lead to further disputes, than a settlement reached without mediation. While some say there is empirical research to support this view,<sup>144</sup> others indicate that the data is inconclusive.<sup>145</sup> A shortage of long-term follow-up research makes it difficult to

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142. *Id.* at 81; see also *id.* at 94 (“My question is whether legislators’ and judges’ choice of mediation as the procedure that most gratifies these concerns is well grounded. ... I see little to support this choice.”); but see Guthrie & Levin, *supra* note 130, at 887 n.7 (“Parties not only report high levels of satisfaction with mediation, but higher levels of satisfaction with mediation than with adjudication or arbitration.”).

143. Shestowsky, *supra* note 105, at 552.

144. See, e.g., James Alfini & Catherine McCabe, *Mediating in the Shadow of the Courts: A Survey of the Emerging Case Law*, 54 Ark. L. Rev. 171, 195 (2001); Guthrie & Levin, *supra* note 130, at 887 n.7; Kerbeshian, *supra* note 107, at 395.

145. See, e.g., McAdoo, *supra* note 105, at 382, 399 n.92

evaluate this claim.<sup>146</sup> Although the point may not have been proven, it has not been disproven either.<sup>147</sup>

Similarly, it remains unclear whether mediation typically results in a settlement that more effectively meets the disputants' goals than a settlement negotiated without a mediator, or is otherwise qualitatively different.<sup>148</sup> Other perceived mediation benefits — such as the notions that it “get[s] parties more directly involved,”<sup>149</sup> “promote[s] less destructive and costly dynamics across party and lawyer lines,”<sup>150</sup> and “enhance[s] the quality of justice”<sup>151</sup> — also appear to lack solid empirical proof.<sup>152</sup>

#### *Summary of the Nationwide Data and the Status of Research Efforts*

In sum, looking at the empirical data from across the country on the costs and benefits of mediation, the situation appears to be:

- It is unclear whether mediation results in significant cost savings, helps reduce court dockets, or shortens case disposition times. Scholars generally indicate that the data is mixed and inconclusive.
- Empirical studies (mostly post-mediation surveys<sup>153</sup>) fairly consistently show that disputants like using the mediation process. Whether mediation is *the most effective* means, as opposed to *an effective* means, of promoting disputant satisfaction is not definitively resolved, but mediation is clearly very popular.
- It is unclear whether mediation results in more durable or otherwise better settlements than unassisted negotiations, or has other beneficial effects besides what is noted above.

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146. See, e.g., Jones, *supra* note 105, at 301 (“Much of the criticism related to the evaluation of mediation programs suggests that mere reporting of case counts is inadequate, in the absence of follow-up, to ascertain how many of these cases constitute long-term resolutions rather than ending up back in court.”); Kerbeshian, *supra* note 107, at 400 (“There is little data on long-term compliance or noncompliance and the factors influencing both.”).

147. See, e.g., McAdoo, *supra* note 105, at 399 & n.92 (explaining that there is no data in Minnesota to support the view that mediation results in more durable settlements, but no direct evidence to defeat that view either).

148. See, e.g., McAdoo, *supra* note 105, at 382 (“although judges perceive better ... settlements, we know so little about settlements, with or without ADR, that the validity of this result is questionable.”); *id.* at 423 n.248 (“Research in North Carolina found that mediated settlement outcomes were neither different nor more numerous than bilaterally negotiated settlements.”).

149. Brazil, *supra* note 112, at 247.

150. *Id.* at 248.

151. *Id.*

152. See, e.g., McAdoo, *supra* note 105, at 399 & n.2 (noting the lack of evidence from Minnesota showing that clients are more directly involved in mediation than in bilateral settlement negotiations).

153. Jones, *supra* note 105, at 291 (noting that even where empirical research on ADR processes “has been undertaken, or commentators have theorized about how such research would be undertaken, the focus has been largely limited to descriptives and ex post surveying of participants.”).

As Prof. McAdoo put it, “we know very little for sure.”<sup>154</sup>

Although scholars do not agree on what the existing empirical results show, they do agree that more empirical research is needed.<sup>155</sup> Replication of results is especially critical,<sup>156</sup> and more data sharing between programs needs to occur.<sup>157</sup>

Scholars have particularly stressed the need for further research carefully comparing mediation to unassisted settlement negotiations.<sup>158</sup> Additionally, Prof. Hensler has pointed to a shortage of data on private, as opposed to court-connected, alternative dispute resolution.<sup>159</sup> She and others have also stressed the importance of research relating to the impact of mediation on minority groups.<sup>160</sup>

Further research on how mediation affects unrepresented parties is needed as well.<sup>161</sup> Such research could be of particular interest in this study, because Prof. McAdoo has warned that “[t]here is a significant potential for mediator coercion with unrepresented parties who are mandated to use mediation in the general civil context.”<sup>162</sup> A recent article might defuse that concern to some

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154. McAdoo, *supra* note 105, at 378; see also *id.* at 425 (commenting that “settlement is critical” to Minnesota judges participating in survey, “but it is not known if more settlements have occurred because of mediation, whether the content of these settlements in mediation is different, or if any other significant value is created in these settlements, justifying judicial encouragement or mandate to use mediation.”).

155. See, e.g., Press, *supra* note 120, at 846, 850-51.

156. See, e.g., *id.* at 850-51.

157. See, e.g., Kenneth Kressel, *How Do Mediators Decide What to Do? Implicit Schemas of Practice and Mediator Decisionmaking*, 28 Ohio State J. on Disp. Resol. 709, 735 (2013) (“much more sustained and collaborative efforts are needed if we are to have the kinds of research that matters to practice.”); McAdoo, *supra* note 105 at 430 (“To ignore the need to monitor [ADR] program quality ... invites process abuse and the loss of institutional legitimacy for court ADR programs.”); Jones, *supra* note 105, at 282 (reporting that at conference of ADR authorities with diverse views, “the need for empiricism was at least one thing on which we could agree.”).

158. See, e.g., Craig McEwen & Roselle Wissler, *Finding Out If It Is True: Comparing Mediation and Negotiation Through Research*, 2002 J. Disp. Resol. 131, 142 (2002).

159. See Hensler (2003), *supra* note 126, at 183 n. 76 (“[T]here are no comprehensive statistics on cases that use alternative dispute resolution mechanisms in the private sector.”).

160. See, e.g., *id.* at 188 (“We know virtually nothing about the outcomes of mediation programs, about whether they change the distribution of power between the ‘haves’ and ‘have nots.’ We have no idea whether mediation helps to open the courts to disputants of lesser means or those with ‘less important’ claims, whether it has the effect of shunting them aside, or whether court mediation programs have no effect on access to courts at all.”); Press, *supra* note 120, at 839 n.137 (“There is a dearth of actual empirical research” on minority outcomes in mediation.”).

161. See, e.g., Stephan Landsman, *Nothing for Something? Denying Legal Assistance to Those Compelled to Participate in ADR Proceedings*, 37 Fordham Urb. L.J. 273, 289 (2010). (“[M]uch of the research on party satisfaction with mediation has focused on parties with lawyers rather than those proceeding pro se. It may be open to question whether the same level of satisfaction would be found among the unrepresented.”); Wissler (2010), *supra* note 119, at 425 (noting that few empirical studies have examined questions such as “what effect representation, or conversely, the lack of representation, has on parties’ experiences in mediation as well as the process and its outcomes.”); McAdoo, *supra* note 105, at 429 (“A specific evaluation effort is needed to determine what is happening with unrepresented parties in mediation.”).

162. McAdoo, *supra* note 105, at 429.

extent: Ms. Wissler described certain work on unrepresented parties and concluded that “the studies find few differences consistently associated with representation, suggesting that unrepresented parties might face fewer problems in mediation — and lawyers might create fewer problems — than some claim.”<sup>163</sup> She cautioned, however, that “[t]he available research is too limited ... to be able to conclude that lawyers either play an essential role in mediation or are not needed, or that they are particularly helpful or detrimental to the mediation process.”<sup>164</sup> In contrast to Ms. Wissler’s findings, a recent study involving parenting mediations in Indiana found lower levels of satisfaction in mixed representation groups (i.e., mediations in which one party was represented by counsel and the other party was not) than in other mediations.<sup>165</sup> Like Ms. Wissler, the author was careful to note that the results “may not generalize to other types of mediation programs, types of parties, or parts of the country.”<sup>166</sup> Given such divergent results, the need for further study is clear.

Researchers have also pointed out that “there is relatively little in-depth data regarding parties’ perceptions of court-connected mediation.”<sup>167</sup> As Prof. Shestowsky observed, “courts appear more likely to collect data on the *attorney’s* perceptions of ADR than they are to assess the perceptions of *disputants*, and when they do assess disputants’ opinions it is often *done indirectly* by asking lawyers to report their perceptions of their clients’ perceptions, which is a poor substitute for asking disputants directly.”<sup>168</sup> She urged that “the best way to minimize flawed conclusions about disputants’ preferences is to rely on empirical studies *conducted on disputants directly*, rather than on third-party intuitions about, or reports of, disputants’ needs.”<sup>169</sup> Again, the point could be important in the current study, because attorney input might well be misleading in instances of attorney misconduct.

Ms. Wissler summed up the need for further mediation research as follows:

Many of the questions regarding mediation in general jurisdiction civil cases lack clear answers because they have been examined in only a small number of studies, different studies find

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163. Wissler (2010), *supra* note 119, at 426; see also *id.* at 440.

164. *Id.*

165. Michael Pettersen, et al., *Representation Disparities and Impartiality: An Empirical Analysis of Party Perception of Fear, Preparation, and Satisfaction in Divorce Mediation When Only One Party Has Counsel*, 48 Fam. Ct. Rev. 667 (2010).

166. *Id.* at 669.

167. McAdoo & Welsh, *supra* note 12, at 422.

168. Shestowsky, *supra* note 105, at 591 (emphasis added, footnotes omitted).

169. *Id.* at 622 (emphasis added).

different patterns of effects, or the studies suffer from methodological weaknesses. To provide the additional information needed to assess the effectiveness of the mediation process and to determine the characteristics of mediation programs that will maximize their effectiveness, future research will need to use, on the one hand, *more systematic, controlled studies involving the random assignment of cases to mediation and to non-mediation* and, on the other hand, *more observations of mediation sessions*. Studies will need, on the one hand, to include *a broader range of data sources and measures over longer periods of time* and, on the other hand, to use *more fine-grained measures to obtain more detailed information in certain areas*. And research will need to examine *not only the mediation process but also aspects of the “traditional” litigation process* within which it takes place. Some of these research approaches will be more difficult or more costly to use, but they will enable us to draw clearer inferences about and have a more complete picture of the effectiveness of mediation in general jurisdiction civil cases.<sup>170</sup>

Although she made those remarks in 2002, they still appear to be true today.

#### *California Data*

Given the gaps and limitations in the nationwide data, especially the difficulties inherent in comparing data from different jurisdictions, it seems appropriate to pay particularly close attention to data from studies of mediations in California jurisdictions. Such data may be the best indicator of whether the use of mediation is having beneficial effects in the state today, and is therefore worth promoting in the future.

In that regard, the Commission is fortunate to have access to the data from the five early mediation pilot programs, which is described in detail in Memorandum 2015-6. The Judicial Council’s study of those programs was carefully designed, involving many key features of good empirical work. Although the precise program structure varied from jurisdiction to jurisdiction, and not every feature was present in each jurisdiction, the study involved the use of large samples (almost 8,000 mediations altogether), random selection, control groups, and direct querying of both parties and attorneys (as well as some inquiries of judges). The researchers analyzed the results carefully and cautiously, using regression analyses and other techniques to control variables as much as possible. It is also noteworthy that the study collected data from five

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170. Roselle Wissler, *Court-Connected Mediation in General Civil Cases: What We Know From Empirical Research*, 17 Ohio St. J. on Disp. Resol. 641, 701-02 (2002) (emphasis added) (hereafter, “Wissler (2002)”).

programs with certain required characteristics, and, with few exceptions, the results were similar for each of the five programs. The consistency of the results adds to their credibility, even though the test conditions were not identical in each jurisdiction.

As discussed in Memorandum 2015-6, the results showed that the early mediation pilot programs were successful based on all of the criteria specified by the Legislature in the pilot program statute. “These benefits included reductions in trial rates, case disposition time, and the courts’ workload, increases in litigant satisfaction with the court’s services, and decreases in litigant costs in cases that resolved at mediation in some or all of the participating courts.”<sup>171</sup>

The results thus tend to support one of the premises underlying mediation confidentiality: The notion that mediation is a beneficial process, which should be encouraged and therefore governed by rules that promote its effectiveness.<sup>172</sup> As explained in Memorandum 2015-6, however, the pilot program data pertains only to court-connected, early mediations conducted within a certain time period, and is subject to other caveats and limitations.<sup>173</sup>

Importantly, other California research yielded similarly positive results. For example, a scholar described the results of an earlier Judicial Council study as follows:

The Judicial Council of California studied how ADR affected the civil cases in the Los Angeles, San Diego and El Dorado Superior Courts as well as several municipal courts. They found significant savings to the court system in reducing motions, hearings, conferences, and trials. Besides reporting a high level of satisfaction from the parties and attorneys involved, they also found that the program was associated with a reduction in the trial judgment rate, no change in median time to disposition, and possibly a reduction in relitigation compared to trial judgments. The data they developed also demonstrated that mediated parenting agreements are much more detailed than either non-mediated consent orders, or orders resulting from trials.<sup>174</sup>

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171. Judicial Council, *Evaluation of the Early Mediation Pilot Programs* (Feb. 27, 2004) (hereafter, “Judicial Council report”), at xix.

172. For scholarly recognition that the Judicial Council study tends to support this premise, see Shestowsky, *supra* note 105, at 560 n.37; McAdoo, *supra* note 105, at 424 n.256.

173. See Memorandum 2015-6, pp. 13-14.

174. Art Thompson, *supra* note 109, at 363-64 (footnotes omitted) (referring to data reported in Judicial Council publication entitled *Civil Action Mediation Act: Results of the Pilot Project* (Nov. 1996)).

The staff has not yet reviewed the Judicial Council report on that study, but plans to do so when time permits.

The results of a mediation program in Division Two of the Fourth District Court of Appeal (commenced in 1991) were also promising, leading to a two-year experimental mediation program in the First District Court of Appeal (commencing in mid-1999).<sup>175</sup> The latter program used both random selection and criterion-based selection techniques; participation was mandatory and the mediations occurred early in the appellate process.<sup>176</sup> For the 217 cases mediated during the pilot period, the settlement rate was 43.3 % and the time from notice of appeal to resolution “was reduced from approximately fourteen months to about four months ....”<sup>177</sup> The experimental mediation program also “achieved substantial savings for the parties as well as for the court, primarily by assisting the parties to settle before briefing.”<sup>178</sup> More specifically,

In settled mediated cases, counsel estimated the cumulative savings of attorney’s fees and costs to exceed \$7.1 million. Per case savings in attorney fees averaged from \$45,367 for appellants to \$21,269 for respondents. Cost savings per case approached \$10,000. The investment made by even those cases that did not resolve appears to have been worth the expenditure. On average, attorney fees in nonsettled cases were \$2989 for appellants and \$2402 for respondents, covering the time devoted to the mediation process. Yet, even after the costs of unsuccessful mediations were offset, the estimated net savings to parties participating in the mediation program exceeded \$6.2 million.<sup>179</sup>

In addition, “evaluations by participants of the mediation process, the mediators, and program administration were generally quite positive.”<sup>180</sup> Because the experimental program was a success, the program was made permanent. Data from the permanent program, summarized in a 2005 publication by Justice Ruvolo, are similarly favorable.<sup>181</sup>

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175. See Ruvolo, *supra* note 106, at 180-89.

176. See *id.* at 184-87.

177. See *id.* at 191.

178. *Id.* at 192.

179. *Id.* at 192-93.

180. *Id.* at 193. “The great majority of parties and counsel indicated they would use the process and the mediators again.” *Id.*

181. See *id.* at 194-201. Combined data from 1999-2003 showed a settlement rate of 55% in a total of approximately 500 mediations. *Id.* at 201. Based on evaluations completed by attorneys and parties, Justice Ruvolo estimated that “mediation program operations have saved the parties an estimated net savings of \$13,636,500.”

Likewise, a mediation program connected with the San Mateo County Superior Court has produced good results. In July 2007-July 2008, for instance, virtually 100% of the alternative dispute resolution used in the court's civil/probate/complex litigation program was mediation, although other options were offered.<sup>182</sup> The court's report on the results contains extensive data. Among other things, it says:

As reported in previous years, respondents largely viewed ADR as a time and money saving device. The overwhelming majority of those surveyed believed that ADR reduced court time. This data is based on attorneys' opinions of time saved.<sup>183</sup>

The report further notes that "85% of respondents believed that costs were reduced as a result of ADR, whereas 15% thought that ADR increased costs."<sup>184</sup> The report also states that "[m]ost respondents, regardless of their role, felt very satisfied with the process ...."<sup>185</sup> More specifically, the cumulative satisfaction rating for parties and attorneys was more than 4.0 on a scale of 1 to 5, with 5 being most satisfied and 4 being least satisfied.<sup>186</sup> "The highest overall satisfaction across roles was in response to the question about whether the neutral provided a safe and secure setting for the ADR session."<sup>187</sup> As in the early mediation pilot program, "attorneys expressed more satisfaction with the process overall than did their clients."<sup>188</sup> The report suggests that this "could be due to the fact that attorneys may have more realistic expectations about the ADR process as well as a better sense of the ultimate value of the case."<sup>189</sup> The positive results for the period from 2007-2008 were consistent with earlier data from the same court; more recent data does not appear to be available.<sup>190</sup>

The staff is still trying to obtain further data on the results of mediation programs in California jurisdictions. **We would much appreciate receiving information on this point.**

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182. See Superior Court of California, County of San Mateo, *Multi-Option ADR Project Evaluation Report July 2007-July 2008*, p. 11. This report can be downloaded at [http://sanmateocourt.org/documents/adr/2007\\_2008\\_evaluation\\_report.pdf](http://sanmateocourt.org/documents/adr/2007_2008_evaluation_report.pdf).

183. *Id.* at 16.

184. *Id.* at 17.

185. *Id.* at 21.

186. *Id.*

187. *Id.*

188. *Id.* The same was true in a study of domestic relations mediation in Maine in 1996-97 and a study of general civil mediation in Ohio in 1998-2000. See Wissler (2010), *supra* note 119, at 437 ("parties rated the mediation process as less fair than their lawyers did ....").

189. *Id.*

190. See *id.* at 16; see also Shestowsky, *supra* note 105, at 565-66.

From the data discussed above, it appears that court-connected mediation programs of the types mentioned are having beneficial effects in the California jurisdictions studied. Unfortunately, the staff is not aware of any studies pertaining to private mediations in California; we suspect that such information may not exist due to privacy concerns and cost constraints.

Given that information gap and the need for caution in generalizing from the results of studies conducted under specific circumstances, it would be overly strong to say there is empirical proof that mediation of all types has beneficial effects in all California jurisdictions. Such strong proof rarely exists for policy decisions that the Legislature must make.

What can perhaps be said is that the results of studies conducted in various California jurisdictions at various times tend to support, rather than refute, the general notion that mediation has significant positive effects. That in turn suggests that the rules governing mediation, including any confidentiality requirements, should be crafted to promote its effectiveness, absent other overriding policy considerations.

#### EMPIRICAL EVIDENCE RELATING TO MEDIATION MISCONDUCT

As directed by the Legislature, the Commission's current study is focusing on the relationship between mediation confidentiality and attorney malpractice and other misconduct.<sup>191</sup> Consequently, any empirical data regarding alleged misconduct occurring in mediations, particularly professional misconduct, would be of interest. Empirical data regarding instances in which evidence of professional misconduct allegedly surfaced in a mediation (e.g., a mediation communication revealing that an attorney gave erroneous advice at an earlier stage of the case) would likewise be of interest.

##### *California Data on Mediation Misconduct*

The popularity of California's court-connected mediation programs and high levels of satisfaction with those programs tend to suggest that misconduct during such mediations is not frequent. That is only an inference, however, and it certainly would not be reasonable to infer that mediation misconduct is nonexistent in those programs, much less in California mediations generally.

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191. 2012 Cal. Stat. res. ch. 108 ACR 98 (Wagner & Gorell).

In an effort to learn more about the magnitude and nature of mediation misconduct in California (particularly attorney malpractice and other attorney misconduct), the staff sought information on the point from the State Bar. Unfortunately, it appears that the State Bar has not collected any data on the point. Saul Bercovitch (Legislative Counsel, State Bar of California) reported to us that

the State Bar has no empirical data concerning the relationship between mediation confidentiality and 1) attorney malpractice or other misconduct that could form the basis of civil liability; or 2) attorney misconduct that could form the basis of State Bar disciplinary action. We do not have data on the number or frequency of complaints about attorney misconduct in California mediations, or a subset of California mediations, or the nature of any such complaints. When the State Bar receives a complaint about alleged attorney misconduct, there are certain allegations that are coded, but we do not have a code for allegations involving alleged misconduct in the course of a mediation.<sup>192</sup>

In case they might be useful to the Commission, Mr. Bercovitch provided (1) a chart that shows the number of certain types of disciplinary complaints received by the State Bar each year from 2009-2013,<sup>193</sup> and (2) statistics on the number of reportable actions received by the State Bar in the same period.<sup>194</sup>

Similarly, the staff sought data on allegations of mediation misconduct from Heather Anderson (Senior Attorney, Legal Services Office) of the Judicial Council. She said that the Judicial Council does not have such data, but individual courts might. Although she was not able to provide any publication reporting statistics on mediation misconduct, she did provide two memoranda relating to the development of the court rules governing court-connected mediation in California.<sup>195</sup> In a few places, those memoranda indicate that allegations of mediator misconduct in court-connected California mediations are

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192. Exhibit p. 1.

193. Exhibit p. 2.

194. Exhibit pp. 3-4.

195. Memorandum from Civil & Small Claims Advisory Committee to Members of the Judicial Council re *Alternative Dispute Resolution: Procedures for Addressing Complaints About Mediators in Court-Connected Mediation Programs for Civil Cases* (Oct. 6, 2008) (hereafter, "Oct. 2008 Memorandum"); Memorandum from Civil & Small Claims Advisory Committee to Members of the Judicial Council (Sept. 27, 2005) re *Alternative Dispute Resolution: Preserving Mediation Confidentiality in Rule 1622 Proceedings* (hereafter, "Sept. 2005 Memorandum").

rare;<sup>196</sup> the Judicial Council's Comment to a court rule that was adopted in response to one of the memoranda says the same.<sup>197</sup>

In addition, the earlier memorandum more specifically indicates that the volume of complaints against mediators is "perhaps 50 per year statewide" out of more than 30,000 court-program mediations per year statewide."<sup>198</sup> The staff is attempting to learn the source of that information. We are also making more general efforts to obtain data on mediation misconduct from California trial courts.

As yet, those efforts have not been successful. **We would much appreciate assistance in this matter.**

*Scholarly Literature Containing Empirical Data on Alleged Mediation Misconduct Generally*

A review of the scholarly literature yielded some empirical data regarding alleged mediation misconduct. We first discuss the data on alleged mediation misconduct generally, and then describe some data specifically relating to alleged mediator misconduct.

With regard to mediation misconduct generally, the results of a survey of Minnesota state district court judges in 2003 shed a little insight. The survey was administered to all 287 district court judges in the state; 203 of them responded (71%), of which 172 (60%) regularly handled the types of Minnesota cases subject to ADR processes.<sup>199</sup> The survey had many questions, including a question about whether they had heard complaints about the use of ADR under the applicable Minnesota rule. In response, 55 judges said "yes," and 48 of those judges "gave qualitative comments: issues of costs and time, together and separately, were noted by forty-six judges; six judges referred to problems with arbitration; and nineteen judges raised an issue that arguably could be considered a justice concern ...."<sup>200</sup> Of the 14 "representative complaints" Prof. McAdoo quoted in her article reporting the survey results, only the following could conceivably involve mediation misconduct:

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196. See, e.g., Oct. 2008 Memorandum, *supra* note 195, at 15 ("complaints about mediators are rare and are almost always informally resolved"), 18 ("Complaints about mediators are relatively rare."); Sept. 2005 Memorandum, *supra* note 195, at 16 n.20 ("the overall number of complaints against mediators historically received by the courts is small").

197. Cal. R. Ct. 3.865 Comment ("Complaints about mediators are relatively rare.").

198. Sept. 2005 Memorandum, *supra* note 195, at 13.

199. McAdoo, *supra* note 105, at 386.

200. *Id.* at 418 (footnotes omitted).

- “Mediated agreement doesn’t provide sense of fair process or fair result — but rather, just a cheaper result they will live with.”<sup>201</sup>
- “Mediator’s notes or others’ writings don’t accurately reflect agreement, unequal bargaining positions resulting in unfair agreements, bias of mediator.”<sup>202</sup>
- “Raises cost of process — insurance industry fails to negotiate in good faith.”<sup>203</sup>

While those results do not provide a firm sense of the volume of mediation misconduct, the small number of judges who reported having heard complaints that *might* have involved such misconduct at least suggests that mediation misconduct is not a major problem in court-connected mediations in Minnesota.

In addition to the Minnesota data, there is information on mediation misconduct from the previously described nationwide studies conducted by Profs. Coben and Thompson of court opinions available on Westlaw that relate to mediation. In their original study, which involved a database of 1223 federal and state opinions issued between 1999 and 2003, they found:

- The most frequently litigated mediation issue was an attempt to enforce a mediated agreement. Enforcement issues were raised in 568 cases (46% of the opinions in the 5-year database).<sup>204</sup>
- Of the enforcement cases, 55 involved claims that a mediated agreement was obtained by fraud or misrepresentation. “The fraud or misrepresentation defense was successful in whole or in part in only nine cases.”<sup>205</sup>
- Duress was raised as an enforcement defense in 36 opinions in the 5-year database.<sup>206</sup> “A mediation party was successful in claiming duress in only one of the thirty-six opinions.”<sup>207</sup>
- Thirteen of the opinions in the 5-year database involved a defense of undue influence. None of those defenses was successful.<sup>208</sup>
- There were 34 opinions that appeared to involve a claim of mutual mistake. In four of those, the court refused to enforce the mediated agreement; in two of them the case was remanded.<sup>209</sup> There were also 19 claims of unilateral mistake, none of which was successful.<sup>210</sup>

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201. *Id.*

202. *Id.* at 419.

203. *Id.*

204. Coben & Thompson (2006), *supra* note 30, at 73.

205. *Id.* at 80.

206. *Id.* at 81-82.

207. *Id.* at 82.

208. *Id.* at 83-84.

209. *Id.* at 85.

210. *Id.*

- A total of 99 opinions in the 5-year database involved issues relating to ethics or malpractice in mediation. Those opinions fell into five categories: (1) 34 opinions on mediator misconduct, (2) 30 opinions on lawyer malpractice, (3) 19 opinions on lawyer discipline, (4) five opinions on lawyer conflict of interest, and (5) 11 opinions on judicial ethics.<sup>211</sup>
- The database contained four opinions naming mediators as defendants, none of which was successful.<sup>212</sup> Similarly, mediator misconduct was asserted as an enforcement defense “only seventeen times in five years.”<sup>213</sup> That statistic led Profs. Coben and Thompson to conclude that “[e]ither the concern about coercive mediators is unwarranted or the litigation process does not provide an appropriate forum to address this issue.”<sup>214</sup>
- In 21 of the enforcement cases, a party argued that counsel had acted without authority in agreeing to the mediated settlement.<sup>215</sup> “This defense was rarely successful.”<sup>216</sup>
- In addition to claims of lack of authority, specific acts of misconduct were raised as a defense in 20 of the cases involving an attempt to enforce a mediated agreement.<sup>217</sup> Those claims “involved some variation on an argument that counsel placed undue pressure on their clients to settle.”<sup>218</sup> Profs. Coben and Thompson did not specify how often those claims succeeded.
- Similarly, Profs. Coben and Thompson did not specify how many of the 30 cases involving legal malpractice claims were successful. They did give details regarding several of those cases, including three in which the malpractice plaintiff succeeded to some extent with regard to the issues at stake in the opinion.<sup>219</sup> Such results were apparently the exception rather than the rule, because Profs. Coben and Thompson noted that claims for erroneous legal advice in mediation “usually fail for inability to establish causation and damages.”<sup>220</sup>
- The disciplinary proceedings against lawyers involved “a wide range of alleged improper conduct.”<sup>221</sup> Profs. Coben and Thompson provided examples of the alleged improper conduct, but did not specify how often the allegations succeeded.<sup>222</sup>

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211. *Id.* at 89-90.

212. *Id.* at 98.

213. *Id.* at 48.

214. *Id.*

215. *Id.* at 90.

216. *Id.*

217. *Id.* at 91.

218. *Id.*

219. See *id.* at 92-93.

220. *Id.* at 93.

221. *Id.*

222. See *id.*

With regard to mediation misconduct, the results of the follow-up study conducted by Profs. Coben and Thompson were similar to those in their original study. In particular,

- Of 384 opinions from 2004-2005 involving an attempt to enforce a mediated agreement, “[m]any of the disputes simply involved issues of interpretation of the mediation agreement.”<sup>223</sup> “[D]efenses of fraud (26 opinions), duress (20 opinions), or mistake (23 opinions) were raised less frequently,” and were rarely successful.<sup>224</sup> Profs. Coben and Thompson commented that “[t]he 2004-2005 data is consistent with our previous findings that if there is widespread overreaching and unfairness in the thousands of mediations throughout the country, it is not showing up in great numbers in the reported cases.”<sup>225</sup>
- During 2004-2005, “[t]here were no successful mediator misconduct cases.”<sup>226</sup>
- In 2006, there was “a noticeable increase in ethics/malpractice opinions.”<sup>227</sup> Profs. Coben and Thompson did not specify how often the misconduct allegations in those opinions succeeded, but did say that “[a]s before it was the work of the lawyers, not the mediators, that was the focus of this litigation.”<sup>228</sup>

In sum, the studies by Profs. Coben and Thompson tend to suggest that there are not many successful allegations of mediation misconduct, particularly mediator misconduct. Their studies also show, however, that such allegations do sometimes occur and occasionally succeed.

In considering their data, it is important to remember that the studies involved a skewed sample of mediations: Ones that resulted in opinions in the Westlaw database. In addition, the Commission should bear in mind that in at least some jurisdictions, a confidentiality restriction or mediator immunity provision might have impeded or deterred one or more parties in pursuing a mediation misconduct claim.

*Scholarly Literature Containing Empirical Data Specifically Relating to Alleged Mediator Misconduct*

In addition to the misconduct data described above, the staff also found a few discussions of data specifically relating to allegations of mediator misconduct.

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223. Coben & Thompson (2007), *supra* note 54, at 404.

224. *Id.* at 405; see also *id.* at 405-06 (providing further data regarding frequency of success).

225. *Id.* at 405 (footnote omitted).

226. *Id.* at 405.

227. *Id.* at 413.

228. *Id.*

For example, a 2001 article about mediator immunity in Australia said that most questions on the subject “are addressed in the literature from a theoretical perspective or based on anecdotal evidence, *as there is scant empirical data to draw upon.*”<sup>229</sup> A couple of years later, Prof. Moffitt (Oregon School of Law) wrote the following:

As an empirical matter, mediators have enjoyed almost absolute freedom from lawsuits alleging injury stemming from mediation conduct. Reported cases in U.S. federal courts, in U.S. state courts, and in the court systems of Canada, Britain, Australia, and New Zealand include only one case in which a mediator was found liable to a party for mediation conduct. In [that case], the defendant mediator successfully appealed the jury award, and the judgment was reversed. As a result, *no cases exist in the official reporters in which a mediator ultimately paid a former client for injuries the mediator caused during a mediation.* Official reporters, of course, capture only a fraction of lawsuits, and it is possible that there have been instances of unreported, successful cases against mediators. However, mediation association newsletters, academic journals, and on-line resources reveal no such cases. Even malpractice insurers, who do an apparently healthy business providing insurance to mediators annually, report very few claims against those policies. In a series of telephone interviews, mediator liability insurance providers reported no more than a handful of claims in any year. Whatever ire former clients may hold toward their mediators is apparently not being expressed in the form of lawsuits.<sup>230</sup>

Prof. Moffitt went on to say that the lack of successful lawsuits against mediators “does not mean that mediators never injure their clients through substandard mediation practices.”<sup>231</sup> He considered it “folly to believe that out of the millions of decisions mediation practitioners across the country make each year, none of them constitutes injurious conduct.”<sup>232</sup> Rather, he said “[w]e must *assume* that some mediators are making mistakes.”<sup>233</sup>

A later article by Prof. Paula Young (Appalachian School of Law) presents a detailed and careful analysis of data she gathered on complaints made against mediators in five states that have grievance systems for that purpose: Florida,

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229. Robyn Carroll, *Mediator Immunity in Australia*, 23 Sydney L. Rev. 185, 188 (2001).

230. Moffitt, *supra* note 116, at 150-51 (emphasis added, footnotes omitted).

231. *Id.* at 151.

232. *Id.*

233. *Id.* (emphasis added).

Virginia, Georgia, Maine, Minnesota, and Virginia.<sup>234</sup> She found that “[o]f the nearly 9,000 mediators regulated by the states analyzed in this article, less than 100 mediators have received any type of sanction, remedial recommendation, or intervention for conduct inconsistent with ethical standards.”<sup>235</sup> More specifically, she found:

- **Florida.** Although it has been estimated that Florida courts refer over 100,000 cases to mediation each year, Florida’s grievance system processed only 74 complaints against certified mediators from May 1992 to April 2005. Only 12 of those complaints resulted in sanctions against mediators; another six mediators “agreed to remedial measures that included making an apology, accepting oral reprimands or admonishments, agreeing to attend additional training programs, gaining experience by working with a supervising mediator, and accepting a written reprimand.”<sup>236</sup> “Florida parties most often alleged that a mediator interfered with the party’s self-determination.”<sup>237</sup> The second-most common allegation was that a mediator was not impartial.<sup>238</sup>
- **Georgia.** Georgia courts referred 28,681 cases to mediation in fiscal year 2005, and the number of annual referrals was on an upward trend. Nonetheless, the Georgia Committee on Ethics processed only four formal complaints against mediators from 2002 until Prof. Young’s article went to press in 2006.<sup>239</sup> “Most of the parties complaining about a mediator [did] not convert an informal complaint into a formal complaint ....”<sup>240</sup> Of the four formal complaints, only one resulted in a sanction (the issuance of a private letter of reprimand and publication of an opinion without identifying names of the persons involved).<sup>241</sup>

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234. Paula Young, *Take It or Leave It, Lump It or Grieve It: Designing Mediator Complaint Systems that Protect Mediators, Unhappy Parties, Attorneys, Courts, the Process, and the Field*, 21 Ohio St. J. on Disp. Resol. 721 (2006). The appendices to that article present similar data for Arkansas and North Carolina, but they are not available on LEXIS and the staff has not yet obtained them.

Towards the beginning of her article, Prof. Young says “studies suggest that perhaps a third of mediating parties are unhappy with the process or the mediator.” *Id.* at 742. The staff is not convinced that the studies she cites support that assertion: She does not appear to have properly distinguished between respondents who had negative feelings and respondents who felt neutral about questions asked, and she relies in part on a statistic that combines respondents’ attitudes towards the mediation outcome and respondents’ attitudes towards the mediation process. See *id.* at 742 & sources cited therein. Prof. Young also appears to assume that whenever a person is “unhappy” with the mediation process or the mediator, a grievance or malpractice claim would be appropriate and the person should not have to “simply ‘lump it.’” See *id.* at 743. It is not clear, however, that “unhappiness” necessarily stems from perceptions of misconduct and warrants an avenue of redress.

235. *Id.* at 775.

236. *Id.* at 749-51.

237. *Id.* at 775.

238. *Id.* at 775.

239. *Id.* at 763-64.

240. *Id.* at 764.

241. *Id.* at 764-65.

- *Maine*. At the time of Prof. Young’s study, Maine had about 140 rostered mediators, and the state’s ADR Director had received or raised 29 complaints against mediators since 1997. The nature of those complaints ranged widely (e.g., the mediator lacked impartiality; the mediator was confrontational; the mediator had a poor appearance).<sup>242</sup> In response to 23 complaints, the ADR Director “planned to observe and supervise the mediator in one or more future mediations.”<sup>243</sup> In response to nine complaints, she discussed the nature of the complaint with the mediator.<sup>244</sup> “In five situations, the mediator voluntarily resigned from the roster or agreed not to mediate cases.”<sup>245</sup> “Thus, despite the low number of rostered mediators in Maine, the complaint process ... led to the voluntary or involuntary removal from the court’s roster of more mediators than any [other state analyzed by Prof. Young].”<sup>246</sup>
- *Minnesota*. At the time of Prof. Young’s study, the Minnesota ADR Review Board had received a total of 32 formal complaints against neutrals. The Board had imposed sanctions in eight of those cases; none of those sanctions were very severe in nature.<sup>247</sup>
- *Virginia*. At the time of Prof. Young’s study, Virginia had about 1,000 certified mediators and Virginia courts were referring about 10,000 cases to mediation each year. From 1992 until Prof. Young’s article went to press in 2006, the Virginia Department of Dispute Resolution Services received 68 informal grievance complaints against mediators, only 13 of which were converted into formal complaints. Of the 13 formal complaints, seven were dismissed outright, four were dismissed with a recommendation that the mediator obtain additional training or supervised mediation experience, and only one complaint resulted in sanctions against the mediator.<sup>248</sup> “As of April 2005, the Virginia Supreme Court ha[d] not taken any mediator off its certified mediator roster based on a grievance complaint.”<sup>249</sup>

In sum, the results of Prof. Young’s study are similar to other data discussed above: They tend to suggest that allegations of mediator misconduct are uncommon but they do occur occasionally. Her study further shows that sanctions were imposed in a small fraction of the grievances against mediators. While most of those sanctions were relatively mild, some were more severe, including removal from the court’s mediation roster. Presumably, the nature of

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242. *Id.* at 772-73.

243. *Id.* at 773.

244. *Id.*

245. *Id.* at 773-74.

246. *Id.* at 774.

247. See *id.* at 766-71.

248. See *id.* at 756-62.

249. *Id.* at 757.

the sanction correlates with the type of misconduct, suggesting that egregious misconduct occurred in at least several instances.

## MEDIATION RECEPTIVITY INDEX

At times in the course of this study, Commission members or others have asked how the volume of mediations in California compares to the volume in other states, or other questions about how California's mediation culture differs from that in other states. As previously discussed, such data is hard to come by.

In 2007, however, Prof. Sander and Matthias Prause (a legal scholar mentored by Prof. Sander) proposed the concept of a "Mediation Receptivity Index" ("MRI"), a "metric to measure the extent of mediation development" in a jurisdiction.<sup>250</sup> They hoped that this concept would help "determine the strengths and weaknesses of the various mediation communities," so as to "improve the understanding of mediation" and "be a powerful tool for its practical promotion and advocacy."<sup>251</sup>

Prof. Sander and Mr. Prause suggested a list of factors to use in calculating a jurisdiction's MRI, which Mr. Prause refined in a later article. As refined, the list included:

### **I. Objective MRI**

#### *A. Quantitative indicators*

1. Number of community mediation centers
2. Number of companies offering mediation services
3. Number of members of ADR organizations
4. Academic Citation index

#### *B. Infrastructure indicators*

1. UMA implemented
2. State ADR Office

### **II. Subjective MRI**

1. Survey of ADR experts<sup>252</sup>

Using his refined list, Mr. Prause attempted a "first rough cut" at determining the MRI for each state and the District of Columbia.<sup>253</sup> For each jurisdiction, he calculated not only an "absolute MRI" (the absolute level of mediation activity in the jurisdiction), but also a "relative MRI" (the relative level of mediation activity

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250. Frank Sander & Matthias Prause, *Developing the MRI (Mediation Receptivity Index)*, 22 Ohio St. J. on Disp. Resol. 599 (2007).

251. *Id.* at 600-01.

252. Prause, *supra* note 116, at 141-42.

253. *Id.* at 134.

in relation to the population).<sup>254</sup> He then grouped the jurisdictions into five groups based on their MRI scores.<sup>255</sup>

California fell into the top group, the “undoubtedly high MRI states.” Mr. Prause described that group as follows:

The first group — which might be dubbed as “undoubtedly high MRI states” — contains those states that have both a high absolute and a high relative MRI: California, Colorado, Connecticut, Maryland, Massachusetts, Minnesota, New York and Ohio. *These states’ MRIs indicate that they are not only the most active states in terms of their absolute level of mediation but also that their mediation activities remain high even relative to their population.* In other words: the data suggests a high mediation density in these states. The latter is particularly remarkable if one considers the inclusion of California and Ohio. These states belong to the 10 most populated states in the U.S., which require a significant level of actual mediation activity in order to attain a high mediation density (high relative MRI).<sup>256</sup>

Mr. Prause also noted that this group included all of the states that were highly ranked on the survey of ADR experts (the “subjective MRI”), except Florida.<sup>257</sup> He offered various possible reasons why Florida did not fall into this top group despite its high subjective MRI.<sup>258</sup>

The staff is not sure what to make of the MRI results described above. As Mr. Prause warns, they only represent a “first rough cut.” We have included them here because we thought the Commission would be interested.

#### A FEW CONCLUDING THOUGHTS

According to the Judicial Council, California’s court system is the largest in the world, with more than 2,000 judicial officers, 19,000 court employees, and almost 8.5 million cases processed in fiscal year 2011-2012.<sup>259</sup> Ideally, any policy choices about mediation “should be informed by empirical data bearing on procedural justice and other aspects of civil case dispute resolution,” and “the central comparison [should] be between unaided bilateral settlement in the

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254. *Id.* at 145-47, 149-50, 162.

255. See *id.* at 150-56.

256. *Id.* at 150 (emphasis added).

257. *Id.*

258. See *id.* at 150-52.

259. Judicial Council of California, *2013 Court Statistics Report: Statewide Caseload Trends (2002-2003 through 2011-2012)*, at Preface & xix (2013).

context of litigation and such negotiation assisted by mediation.”<sup>260</sup> It would also be valuable to have data that was replicated in a number of different studies “form both the laboratory and field paradigms,” so as to “obtain more clarity on the reliability and generalizability of findings.”<sup>261</sup>

Unfortunately, empirical data on mediation is difficult and costly to gather, and there is much danger of comparing apples and oranges. One cannot just examine what one jurisdiction is doing and assume that the same approach will work in another jurisdiction with a different mediation structure.

That does not mean it is pointless to look at what’s happening in other jurisdictions. From looking at Florida’s mediation practice, for instance, it is probably safe to conclude that creating a malpractice exception to California’s mediation confidentiality statute would not eliminate mediation in CA. But it would be risky to assume that the effect of such an exception would be the same here as in Florida (even if we knew what effect the exception had in Florida). There is no way to predict precisely what would happen to California’s mediation culture and its court system.

In the staff’s view, the empirical data discussed in this memorandum, while imperfect, tends to suggest:

- (1) *Mediation, or at least court-connected mediation similar to the types used in the California programs previously described, serves valuable purposes in California.*

That conclusion is important, because it lends support to one of the premises underlying mediation confidentiality: the notion that mediation is worth promoting.

- (2) *Mediation misconduct is relatively infrequent, but allegations of such misconduct do occur occasionally and at least a few of those allegations appear to have some merit. From the limited data available, alleged mediator misconduct seems to be less common than alleged attorney misconduct.*

That conclusion is also important, because it bears on the strength of a key policy interest at stake in this study.

With regard to the impact of differing confidentiality rules (i.e., whether certain approaches to confidentiality are better at promoting frank discussion and effective mediation than other approaches), there do not seem to have been

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260. McEwen & Wissler, *supra* note 158, at 131.

261. Shestowsky, *supra* note 105, at 624.

any rigorously controlled experiments in this area. The staff is dubious about the feasibility of such experimentation.

Profs. Coben and Thompson have shown the existence of a significant number of written opinions in which mediation participants disclosed mediation communications without objection. It might be a mistake, however, to put much weight on that statistic in assessing how important mediation confidentiality is to the many thousands of mediation participants in the universe of mediations conducted in this country. Presumably, if confidentiality were important to one or more participants in a mediation, those participants would be reluctant to let the dispute become the subject of an opinion in the Westlaw database that Profs. Coben and Thompson searched. In such circumstances, it seems likely that they would try hard to settle the dispute without reaching that point.

At present then, assessing whether a particular approach to mediation confidentiality will better promote effective mediation than another approach appears to be a policy determination that governments need to make without the benefit of solid empirical evidence. Put differently, there does not appear to be any rigorous empirical proof regarding which approach will better promote effective mediation: absolute protection for mediation communications, no special protection for mediation communications, or something in-between.

Many other policy decisions fall into the same category: For instance, it cannot be empirically proven that freedom of speech promotes sounder governmental decisions or is the best test of truth, but our federal and state constitutions nonetheless firmly protect the right to speak freely.

Given the lack of solid empirical data regarding the potential impact of different approaches to mediation confidentiality, what should policymakers do? In commenting on a draft of the UMA, Minnesota bar groups said:

While we appreciate that there is no research demonstrating that participants in mediation would be less forthright or would refuse to participate without the assurance of confidentiality, *common sense and experience with settlement negotiations* dictates that participants in mediation feel free to be forthright, to “try on” ideas that they may later reject and to share information they might not otherwise share *without risk that their communications could be used against them.*<sup>262</sup>

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262. Letter from Jennelle Soderquist (Chair, Conflict Management & Dispute Resolution Section of Minnesota State Bar Ass’n) & Rebecca Picard (Chair, Ethics Committee of Conflict Management & Dispute Resolution Section of Minnesota State Bar Ass’n) to NCCUSL & ABA Drafting Committees on Uniform Mediation Act (Oct. 7, 1999) (emphasis added), *available from* Minnesota State Bar Ass’n.

In other words, the Minnesota bar groups, like many others before them, advocated reliance on the *commonsense* notions that people will speak more freely if they are confident their words will not be used to their detriment, and negotiations are more likely to succeed if the participants are able to speak freely.

That strikes the staff as the proper approach. The situation is akin, perhaps, to a decision on whether to wear a fluorescent jacket when biking. Should an individual insist on receiving empirical proof that such a jacket improves safety before wearing one if readily available? It seems more reasonable to rely on commonsense and experience and start wearing such a jacket despite the lack of definitive proof.

In drawing this analogy, the staff is merely suggesting that *it is appropriate, in light of commonsense and experience, to recognize the existence of an interest in protecting mediation communications against disclosure*. The staff is *not* taking a position on how much weight to give to the interest in protecting confidentiality, or whether that interest would be outweighed by competing interests in certain circumstances (akin to when a fluorescent jacket is too expensive, making it necessary to forego the purchase altogether or buy only a fluorescent vest). In all likelihood, each Commissioner will need to independently assess those points.

This suggestion is based on the current state of empirical evidence (or lack thereof) as we understand it. Although the need for mediation confidentiality is a widely accepted, commonsense notion, such notions are not always correct. Going forward, policymakers would be well-advised to monitor the evolving research in this area, in case there might be a significant breakthrough warranting a change in policy. Popular opinion and notions of commonsense are sometimes mistaken; we know now, for instance, that the earth is not flat.

According to Judge Brazil, “court programs constitute the most instructive laboratories for the entire field of ADR,” because they “may well be the only settings in which controlled experiments involving sizeable samples of participants can be conducted.”<sup>263</sup> Although the staff has expressed skepticism about the feasibility of rigorously testing the effects of differing mediation confidentiality rules, **we encourage creative thinking and constructive suggestions about this matter**. The Commission itself is not equipped to conduct substantial empirical research, but it could perhaps include a study proposal as a

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263. Brazil, *supra* note 112, at 255-56.

component of its recommendation if it becomes convinced that such an approach would be productive.

As previously mentioned, the staff's search for empirical data relevant to this study was extensive, but not exhaustive. We are continuing to look for additional data, and we will share what we learn if it appears potentially significant.

In addition, **the Commission would greatly appreciate further information from knowledgeable sources.** Empirical data relating to California mediations would be of particular interest, but data relating to other mediations might also be important in shaping the Commission's recommendation.

Respectfully submitted,

Barbara Gaal  
Chief Deputy Counsel

**EMAIL FROM SAUL BERCOVITCH, STATE BAR  
OF CALIFORNIA (1/28/15)**

**Re: CLRC study — relationship between mediation confidentiality &  
attorney malpractice & other misconduct**

Barbara –

As we've discussed, the State Bar has no empirical data concerning the relationship between mediation confidentiality and 1) attorney malpractice or other misconduct that could form the basis of civil liability; or 2) attorney misconduct that could form the basis of State Bar disciplinary action. We do not have data on the number or frequency of complaints about attorney misconduct in California mediations, or a subset of California mediations, or the nature of any such complaints. When the State Bar receives a complaint about alleged attorney misconduct, there are certain allegations that are coded, but we do not have a code for allegations involving alleged misconduct in the course of a mediation.

In response to your request for some general data, I've attached two documents.

1. Common Disciplinary Complaints – 2009 to 2013.

This chart shows the numbers for common disciplinary complaints made to the State Bar, when those complaints are initially received. Please note that these are numbers for allegations only, not for any charges filed or actual findings of attorney misconduct. In addition, this chart has been developed to list common allegations but not all allegations made in those years. Finally, since complaints often have more than one allegation, the number of allegations in the chart is not the same as the number of complaints made in any year.

2. Pages from the State Bar's 2013 Annual Discipline Report with information on reportable actions, as explained in the report.

Please let me know if you have questions or would like to discuss any of this.

Thanks.

- Saul

Common Disciplinary Complaints – 2009 to 2013

	2009	2010	2011	2012	2013
Advertising/solicitation	981	481	648	363	423
Unconscionable/illegal fees	2,193	2,526	2,490	1,838	1,795
Failure to refund unearned fees	3,763	4,745	3,583	3,433	2,943
Dividing fees with other attorneys/non-lawyers	454	381	158	111	125
Commingling	285	374	313	252	225
Misappropriation	856	698	900	747	630
Other client trust accounting violations	1,426	1,376	1,462	1,841	1,851
Failure to perform	9,711	10,953	9,972	8,373	7,202
Failure to communicate	5,589	5,736	4,945	4,088	3,966
Conflicts/Business dealings with clients	523	414	570	768	828
Misrepresentation to client/court	1,674	1,062	1,482	1,378	1,523
Improper withdrawal	3,172	2,557	2,080	1,941	1,919
Disobedience of court order	259	246	337	269	309
Pursuit of unjust cause	638	572	809	747	626
Aiding UPL/Partnership with non-attorney	898	748	422	311	321
Practice while not entitled	361	627	603	554	490
Sexual relations with client	19	17	14	22	15
Schemes to defraud/acts of moral turpitude	2,608	3,950	4,710	3,112	2,539
Loan modification complaints	3,291	5,193	4,597	3,147	3,011
Debt resolution complaints	82	228	156	55	37

## Reportable Actions

California law requires the reporting of certain actions or events involving lawyers to the State Bar.

- **Lawyers** in California have a duty under Business and Professions Code, section 6068, subdivision (o), to self-report the following actions to the State Bar:
  - (1) The filing of three or more lawsuits in a 12-month period against the lawyer for malpractice or other wrongful conduct committed in a professional capacity.
  - (2) The entry of judgment against the lawyer in a civil action for fraud, misrepresentation, breach of fiduciary duty, or gross negligence committed in a professional capacity.
  - (3) The imposition of judicial sanctions against the lawyer, except for sanctions for failure to make discovery or monetary sanctions of less than one thousand dollars (\$1,000).
  - (4) The bringing of an indictment or information charging a felony against the lawyer.
  - (5) The conviction of the lawyer, including any verdict of guilty, or plea of guilty or no contest, of a felony, or a misdemeanor committed in the course of the practice of law, or in a manner in which a client of the lawyer was the victim, or a necessary element of which, as determined by the statutory or common law definition of the misdemeanor, involves improper conduct of the lawyer, including dishonesty or other moral turpitude, or an attempt or a conspiracy or solicitation of another to commit a felony or a misdemeanor of that type.
  - (6) The imposition of discipline against the lawyer by a professional or occupational disciplinary agency or licensing board, whether in California or elsewhere.
  - (7) Reversal of judgment in a proceeding based in whole or in part upon misconduct, grossly incompetent representation, or willful misrepresentation by the lawyer.
- **Banks** under Business and Professions Code, section 6191.1, must report to the State Bar any time a properly payable instrument is presented against a lawyer's trust account containing insufficient funds.
- **Insurers and brokers of professional liability insurance** must report under Business and Professions Code, section 6086.8, subdivision (b), every claim or action for damages against a lawyer for fraud, misrepresentation, breach of fiduciary duty, or negligence committed in a professional capacity.
- **Courts,**<sup>17</sup> under Business and Professions Code, sections 6086.7 and 6086.8, must notify the State Bar of any of the following:
  - (1) A final order of contempt imposed against a lawyer that may involve grounds

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<sup>17</sup> The final report of the California Commission on the Fair Administration of Justice in 2008 (<http://www.ccfaj.org/documents/CCFAJFinalReport.pdf>) recommended changes in Canon 3D(2) of the California Code of Judicial Ethics, which included seven categories of egregious misconduct by a lawyer in a criminal proceeding that a judge should report to the State Bar. In 2010, the State Bar's Chief Trial Counsel stated that this information would be included in the *Annual Discipline Report*, and OCTC prepared reporting codes in its case management system to track the information. However, the amended canon did not include reporting in the categories recommended by the CCFAJ. See Cal. Code Jud. Ethics, Canon 3D(2), as amended eff. January 1, 2013.

warranting discipline under this chapter. The court entering the final order shall transmit to the State Bar a copy of the relevant minutes, final order, and transcript, if one exists.

(2) Whenever a modification or reversal of a judgment in a judicial proceeding is based in whole or in part on the misconduct, incompetent representation, or willful misrepresentation of a lawyer.

(3) The imposition of any judicial sanctions against an attorney, except sanctions for failure to make discovery or monetary sanctions of less than one thousand dollars (\$1,000).

(4) The imposition of any civil penalty upon a lawyer pursuant to Section 8620 of the Family Code.

(5) The rendering of a judgment that a lawyer is liable for any damages resulting in a judgment against the attorney in any civil action for fraud, misrepresentation, breach of fiduciary duty, or gross negligence committed in a professional capacity.

In addition, the State Bar may receive reports of actions or events not required by the foregoing provisions. The following table summarizes the number of reportable actions received by the State Bar.<sup>18</sup>

**Table 44: Reportable Actions by Source**

<b>Source</b>	<b>2009</b>	<b>2010</b>	<b>2011</b>	<b>2012</b>	<b>2013</b>
Lawyer Self-Reports	120	164	160	242	174
Banks	3,026	2,927	2,338	2,419	2,313
Insurers	138	140	105	180	312
Courts	102	124	151	132	112
Other Sources	<u>17</u>	<u>24</u>	<u>10</u>	<u>14</u>	<u>17</u>
Total Received	3,403	3,379	2,764	2,987	2,928
Forwarded to Investigation	572	1,049	545	238	529

<sup>18</sup> A district attorney, city attorney or other prosecuting attorney must notify OCTC of the pendency of an action against charging a defendant who is a California lawyer with a felony or misdemeanor. (Bus. & Prof. Code, § 6101, subd. (b).) After any conviction, the court clerk of the court must transmit a certified copy of the conviction to the State Bar. (Bus. & Prof. Code, § 6101, subd. (c).) These reports are included in “criminal conviction monitoring” and reported in the section below on *Informal Discipline Outcomes*.