

Following the Script: An Empirical Analysis of Court-Ordered Mediation of Medical Malpractice Cases

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I. INTRODUCTION

Court-ordered mediation of civil cases has become an accepted part of the litigation process in a number of states and in some federal courts.¹ The widespread growth of court-ordered mediation is not difficult to explain. First of all, the process appears to produce settlements, although because most cases settle anyway, it is difficult to say that court-ordered mediation reduces trial rates.² It does, however, at least provide a structured opportunity for settlement discussions, if the parties are so inclined. Second, court-ordered mediation is a process usually

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1. CARRIE MENKEL-MEADOW, LELA P. LOVE, & ANDREA SCHNEIDER, DISPUTE RESOLUTION: BEYOND THE ADVERSARIAL MODEL 274 (2005); COURT-ANNEXED MEDIATION: CRITICAL PERSPECTIVES ON SELECTED STATE AND FEDERAL PROGRAMS v (Edward Bergman & John Bickerman eds., 1998).

2. This conclusion was drawn from the 1995 study of the North Carolina mediated settlement conference program by the Institute of Government. See STEVENS H. CLARKE, ELIZABETH D. ALLEN & KELLY MCCORMICK, COURT-ORDERED CIVIL CASE MEDIATION IN NORTH CAROLINA: AN EVALUATION OF ITS EFFECTS 55-56 (1995). See generally Marc Galanter, *The Vanishing Trial: An Examination of Trials and Related Matters in Federal and State Courts*, 1 J. EMP. LEGAL STUD. 459 (2004) (an examination of the fact that many more cases settle than go to trial); Marc Galanter & Mia Cahill, *Most Cases Settle: Judicial Promotion and Regulation of Settlements*, 46 STAN. L. REV. 1339 (1994) (same).

paid for by the parties themselves. From the courts' perspective, it is not a significant expense. Little wonder, then, that the courts have embraced the use of court-ordered mediation.³

Court-ordered mediation is a hybrid of public and private processes. It is public, in the sense that the mediation takes place because a court orders it and because the mediator is either appointed or approved by the court.⁴ Yet, it is also private. The mediation sessions are not open to the public. Confidentiality is emphasized throughout the process.⁵ What goes on, typically, is negotiation facilitated by a mediator.

The mediation usually begins with a joint session, in which all parties and attorneys are present. After opening statements by at least the parties' representatives, the mediator will then send the parties and their representatives to separate rooms, and hold one or more private sessions. If the mediator determines that a resolution is not possible, the mediator will end the mediation by declaring an impasse. As the preceding description suggests, court-ordered mediation is a hybrid in another sense, as well. It is not "voluntary" in the sense that traditional mediation is.⁶ The parties participate because a court orders them to do so.

II. THE RELEVANT LITERATURE

Fifteen years ago, Professors Gross and Syverud noted the scarcity of data on pretrial settlement negotiations.⁷ Their observation remains true today. The reasons for the scarcity of information are not hard to imagine. Gathering such information is difficult, at best. Settlement negotiations between lawyers are private affairs. The outcomes of settlement negotiation are reported sporadically and usually only when they have been successful. The mechanics of the process (i.e., data on opening offers, counter-offers, and final resolution) are rarely disclosed or reported—even when the outcome itself is made known.

Meanwhile, the emergence of court-connected mediation for filed civil cases in the late 1980s and early 1990s had the collateral effect of encouraging empirical studies of this new process.⁸ These studies offer a tantalizing glimpse of the

3. Timothy Hedeem, *Coercion and Self-Determination in Court-Connected Mediation: All Mediations Are Voluntary, But Some Are More Voluntary Than Others*, 26 JUST. SYS. J. 273, 276 (2005); Nancy Welsh, *The Place of Court-Connected Mediation in a Democratic Justice System*, 5 CARDOZO J. CONFLICT RESOL. 117, 135 (2004).

4. ALAN SCOTT RAU, EDWARD F. SHERMAN & SCOTT R. PEPPERT, *PROCESSES OF DISPUTE RESOLUTION: THE ROLE OF LAWYERS* 533 (2006).

5. Maureen Weston, *Confidentiality's Constitutionality: The Incursion of Judicial Powers to Regulate Party Conduct in Court-Connected Mediation*, 8 HARV. NEGOT. L. REV. 29, 32 (2003); see also N.C. GEN. STAT. § 7A-38.1(l) (2005) (inadmissibility of negotiations conducted in mediated settlement conferences).

6. STEPHEN B. GOLDBERG, FRANK E.A. SANDER, NANCY H. ROGERS & SARAH R. COLE, *DISPUTE RESOLUTION: NEGOTIATION, MEDIATION AND OTHER PROCESSES* 153 (2003).

7. Samuel Gross & Kent Syverud, *Getting To No: A Study of Settlement Negotiations and the Selection of Cases for Trial*, 90 MICH. L. REV. 319, 329-31 (1991).

8. See, e.g., E. Patrick McDermott & Ruth Obar, "What's Going On" in Mediation: An Empirical Analysis of the Influence of Mediator Style on Party Satisfaction and Monetary Benefit, 9 HARV. NEGOT. L. REV. 75 (2004); Jeffrey Dywan, *An Evaluation of the Effect of Court-Ordered Mediation and Proactive Case Management on the Pace of Civil Tort Litigation in Lake County, Indiana*, 2003 J. DISP. RESOL. 239; Roselle Wissler, *Court Connected Mediation in General Civil Cases: What We Know From Empirical Research*, 17 OHIO ST. J. ON DISP. RESOL. 641 (2002); Julie MacFarlane, *Cul-*

settlement negotiation process. However, the data is usually generated from questionnaires and surveys, directed to the mediator, the parties, and the attorneys for the parties, or some combination thereof. Studies based on direct observations are much less common. In this article, the authors report on a series of direct observations of mediated settlement conferences, all involving allegations of medical malpractice, and all conducted under the auspices of the North Carolina Superior Court Mediated Settlement Conference (MSC) program.

III. METHODS

Studying court-ordered mediation is not easy. The sessions are not publicized, and are not open to the public. As a result, most of the empirical studies of court-ordered mediation have been based on questionnaires sent to the parties, their attorneys, and/or the mediators.⁹ Studies based on actual, physical observation of the mediation sessions, including both joint and private sessions, are much less common. The reasons are understandable. First of all, the would-be researcher must have knowledge of upcoming mediations. Because these sessions are never publicized, the researcher must depend on at least one of the participants to notify him or her of an upcoming mediation. Access must be requested by the researcher and granted by all the participants, including the mediator, the parties, and their attorneys.¹⁰ Additionally, confidentiality must be respected.

This paper reports on the conduct and outcomes of almost fifty mediations of medical malpractice cases held in North Carolina. In each case, permission was requested of all parties to observe all sessions of the mediations. In all but one case, unrestricted permission was granted.¹¹ The observer protocol was consistent throughout. The observer was to follow the mediator, wherever the mediator went, and was to take copious notes. No sound recordings were taken. The observer was not to speak. Any questions the observer might have were to be di-

ture Change? A Tale of Two Cities and Mandatory Court-Connected Mediation, 2002 J. DISP. RESOL. 241; Dwight Golann, *Is Legal Mediation a Process of Repair- or Separation? An Empirical Study, and its Implications*, 7 HARV. NEGOT. L. REV. 301 (2002); Milton Heumann & Jonathan Hyman, *Negotiation Methods and Litigation Settlement Methods in New Jersey: "You Can't Always Get What You Want"*, 12 OHIO ST. J. ON DISP. RESOL. 253 (1997); CLARKE, ELLEN & MCCORMICK, *supra* note 2. Two other studies considered the impact of ADR rules adopted in Minnesota and Missouri; mediation figured prominently in both ADR rules. See Bobbi McAdoo, *A Report to the Minnesota Supreme Court: The Impact of Rule 114 on Civil Litigation Practice in Minnesota*, 25 HAMLINE L. REV. 401 (2002); Bobbi McAdoo & Art Hinshaw, *The Challenge of Institutionalizing Alternative Dispute Resolution: Attorney Perspectives on the Effect of Rule 17 on Civil Litigation in Missouri*, 67 MO. L. REV. 473 (2002). See Douglas Henderson, *Mediation Success: An Empirical Analysis*, 11 OHIO ST. J. DISP. RESOL. 105 (1996) (a study of the use of mediation, both voluntary and court-ordered, in the construction industry).

9. All of the studies cited *supra* in note 8, relied on the use of surveys and questionnaires. Only in two of the studies (Heumann & Hyman, and CLARKE, ALLEN & MCCORMICK) were direct observations of settlement negotiations also conducted. In the Heumann & Hyman study, observations of seventy-one cases were made. However, the study was directed at judicial settlement conferences, as conducted in New Jersey, rather than court-connected mediation. Thus, in at least some of the cases, the conference was presided over by a sitting trial judge, who might or might not end up trying the case being negotiated. See Heumann & Hyman, *supra* note 8, at 258, n.9.

10. For these reasons, we make no claim that our sample was random.

11. The fact that permission was so commonly obtained is a testament to the patience and goodwill of all the participants in these mediations.

rected to the mediator, but never in the presence of any of the other participants. The goal for the observer was, in short, to be like the proverbial fly on the wall. Most of the mediations observed ($n = 40$) were court-ordered. Several mediations, although not court-ordered, were also observed ($n = 6$) to supplement the court-ordered cases, and to provide possible comparisons.¹² The findings reported in this paper are based on an analysis of the observers' notes. A code book was developed. The observers' notes were coded and entered into an SPSS database. Each observed case was assigned to one of four categories based on what happened at the mediated settlement conference: (1) settled in full; (2) impasse declared; (3) conference recessed;¹³ or (4) settled in part. The data was then analyzed. In addition, the authors were able to determine the final outcome of all but one of the cases.

The findings are divided into four categories: case characteristics, mediator characteristics, the joint session, and private sessions. For each category, comparisons on the basis of the mediated settlement conference's outcome are noted. Cases for which the researchers lacked data for a particular variable were not counted. As a result, the total number of cases reported varied slightly, depending on the question asked.

IV. FINDINGS

A. *The Cases*

Results of the mediated settlement conference for 45 of the 46 cases are set forth in Table 1, below; for one of our observations, the outcome was not recorded.

Results of Mediated Settlement Conference

Settlement	Impasse	Recessed	Partial Settlement
9	29	3	4

Table 1

For the most part, these were complicated cases, requiring substantial amounts of time to present. As a result, the researchers were surprised by the relatively low number of recessed, or adjourned, cases (3 of the 46 cases). The infrequent use of adjournment can likely be explained in large part by the difficul-

12. There is not a consensus within the literature that court-ordered mediations are really different from truly voluntary mediations, at least in terms of results. Compare, e.g., Nancy Welsh, *Making Deals in Court-Connected Mediation: What's Justice Got to Do With It?*, 79 WASH. U. L.Q. 787, 788 (2001) [hereinafter Welsh, *Making Deals*], with Roselle Wissler, *Court-Connected Mediation in General Civil Cases: What We Know From Empirical Research*, 17 OHIO ST. J. ON DISP. RESOL. 641, 695-97 (2002).

13. "Recessed" or "adjourned" were the terms used by the mediators we observed to describe a mediation session in which although neither a settlement nor an impasse occurred, the parties indicated a desire to meet again at some point in the future. The practice of leaving a conference open, with or without a date set to reconvene, is authorized by Rule 3(D) of the North Carolina Rules Implementing Mediated Settlement Conferences in Superior Court Actions [hereinafter N.C. Mediated Settlement Conference Rules].

ties of scheduling an additional session. Typically, the schedules of at least five people would have to be coordinated: the plaintiff, the plaintiff's counsel, the defendant, the defendant's counsel, and the mediator.¹⁴

All 46 cases involved a claim of medical malpractice. In all but 3 of these cases, at least one of the defendants was a physician (43 of 46). In 21 of the cases (45.7%), a hospital was named as a defendant,¹⁵ but the presence of a hospital as a defendant did not have a significant effect on the rate of settlement. The number of people present at the mediation (not counting the observer) ranged from a low of four, to a high of fourteen; the median number was nine. A T-test of means of independent samples indicated that the number of people present at the mediated settlement conference did not affect the rate of settlement. These findings may be interpreted as good news for advocates of settlement. Neither multiple defendants, nor a greater number of people at the mediation session seemed to be an obstacle to reaching settlement.

A wide range of medical specialties were represented. Surgical specialties (particularly general surgery, orthopedic surgery, and obstetrics/gynecology) predominated; there were 31 surgical cases, and 14 non-surgical cases.¹⁶ Analyzing only those cases that either settled in full, or in which an impasse was declared, (n = 37) settlement was somewhat more frequent with non-surgical cases (3 of 9, or 33.3%) than with surgical cases (6 of 28, or 21.4%). Expressed in terms of the NAIC injury scale,¹⁷ the injuries alleged ranged from temporary and insignificant (n = 1) to death (n = 9). Permanent minor (n = 26) was the most frequently occurring injury level. In general, cases involving either non-permanent injuries or death were more likely to settle, as Table 2 indicates. Cases involving the patient's death were significantly more likely to settle than all other cases (p = .02).

14. Two of the three recessed cases were subsequently settled. The third case was eventually dropped by the plaintiff.

15. In the three cases in which a physician was not a defendant, a hospital was the primary defendant.

16. We were unable to determine the specific medical specialty in one of the cases.

17. The National Association of Insurance Commissioners' scale measures severity of injury, on a scale of 1 (emotional only) to 9 (death).

Severity of Injury Alleged and Result of the Mediation

Severity Level	Cases Settled	Cases Reached Impasse	Cases Recessed	Cases Partially Settled	Percentage Settled ¹⁸
1 Emotional Only	0	0	1	0	0%
2 Temporary, insignificant	1	0	0	0	100%
3 Temporary, minor	1	2	0	0	33.3%
4 Temporary, major	1	1	0	0	50%
5 Permanent, minor	2	21	1	2	8.7%
6 Permanent, significant	0	2	0	1	0%
7 Permanent, major	0	0	0	0	0%
8 Permanent, grave	0	1	0	0	0%
9 Death	4	2	1	1	66.7%
Totals	9	29	3	4	23.7%

Table 2

The initial amount demanded by the plaintiff at the mediated settlement conference varied greatly, from a low of \$30,000 to a high of \$7,000,000. Of the 46 cases, 9 settled at the mediated settlement conference. Impasse was declared by the mediator in 29 cases. Three cases were left open, and 4 additional cases reached a partial settlement.¹⁹ Of the 9 cases that settled in full, the settlement amount ranged from \$4,100 to \$780,000, with a median settlement of \$350,000. The dollar amount involved in the case did not drive settlement. The researchers found no correlation between the amount at issue and the rate of settlement. Isolating only the cases that either settled in full or resulted in impasse, the settlement rate was 23.7% (9 of 38).²⁰ This rate of settlement is less than half the settlement rate reported by the North Carolina Administrative Office of the Courts. Since the program's inception, settlement rates at the mediated settlement conference have

18. "Percentage settled" is computed by dividing, for each level of severity, the number of cases settled by the number of cases settled and that reached impasse. Cases recessed and cases that reached a partial settlement are not included.

19. In one case, the outcome was unrecorded by the observer.

20. If the "recessed" and partial settlement cases are added, the settlement rate becomes 20% (9 of 45).

consistently ranged between 50% and 60%.²¹ The dramatically lower rate of settlement for malpractice cases should not be surprising. Medical malpractice cases are often complex, and they tend to involve large amounts of money. Whenever a doctor is a named defendant, he or she may well feel that his or her professional integrity has been attacked, and thus insist on the sort of vindication that only a trial can provide. On the plaintiff's side, it is also likely that emotions will run high. The decision to settle is likely to be influenced by feelings of anger, betrayal, or disappointment.

Most mediated settlement conferences consisted of just one session. The mediated settlement conferences varied considerably in length (see Table 3). The mean length of all mediated settlement conferences was 244 minutes, with a median length of 220 minutes. Cases that settled took noticeably longer than cases that resulted in impasse. A comparison of the means indicates a statistically significant difference ($p < .05$). On average, cases that settled ran 101 minutes longer than cases that resulted in an impasse. However, the average length of the opening session for cases that settled was shorter by 23 minutes than the average length of the opening session for cases that resulted in an impasse.

Length of Conferences

	Settled	Reached Impasse	All
Mean Length of Entire Session (minutes)	317 (n = 8)	216 (n = 23)	244 (n = 38)
Mean Length of Opening Session (minutes)	48 (n = 9)	71 (n = 16)	63 (n = 29)

Table 3

B. Mediator Characteristics

The plaintiff, the plaintiff's attorney, the insurer, and the defendant's attorney were always present. In 14 of the 43 mediations in which a physician was a named defendant, the defendant physician was not present. However, the presence or absence of the physician had little effect on case settlement.²²

The cases were mediated by twenty-two different mediators. The mediators were almost always male; in only two cases was the mediator a woman. The mediators always had legal training. Table 4 summarizes the specific occupations of

21. See North Carolina Dispute Resolution Commission, Program Statistics (Apr. 5, 2007), available at <http://www.nccourts.org/Courts/CRS/Councils/DRC/MSC/Statistics.asp>.

22. Under the North Carolina rules, a named defendant would ordinarily be required to attend a court-ordered mediation. However, the rules allow for excusing a party's attendance if the other parties so agree. See N.C. Mediated Settlement Conference Rules, Rule 4(A)(2), available at <http://www.nccourts.org/Courts/CRS/Councils/DRC/MSC/Rules/MSCRule4.doc>. In three of the fourteen cases in which the defendant physician did not attend, the mediation resulted in a settlement (21.4%). This settlement percentage is consistent with the overall settlement/impasse rate we observed (23.7%).

the mediators, and provides an indication of the extent to which the practice of mediation has become a specialty.²³

Occupation of Mediators

Occupation of the Mediator	Number of Cases Mediated	Number of Cases Settled	Success Rate (pct. cases settled)
Retired (or former) Judge	18	3	16.7%
Practicing Attorney	12	2	16.7%
Non-Practicing Attorney	16	4	25.0%
Total	46	9	19.6%

Table 4

While one should keep in mind that the sample studied was not random, the evidence of specialization is still noteworthy.²⁴ For example, 14 of the 18 cases mediated by a retired judge were mediated by just two individuals. Five individuals accounted for more than half of the cases observed (26 of 46). Of the five, two were retired judges and three were full-time mediators.

The fact that all of the mediators had legal training is not surprising. Under the North Carolina Mediated Settlement Conference Rules (North Carolina Rules), the parties' counsel usually choose the mediator,²⁵ and it is to be expected that lawyers will feel most comfortable with a fellow lawyer serving as the mediator. The authors detected little difference in outcome as a function of mediator behavior. In only 9 cases did the mediator express an opinion on the merits; settlement occurred in 1 of those cases. When mediators expressed an opinion about the "correctness" of an offer (n = 25), settlement occurred six times. However, neither result was statistically significant. When the mediator explored the "worst case scenario" with the parties, the settlement rate rose to 50% (see Table 9). The mediator's occupation shed a little more light on settlement patterns (see Table 4). Non-practicing lawyers (i.e., lawyers practicing mediation full-time) had the highest settlement rate, at 25% (4 of 16), followed by practicing lawyers at 16.7% (2 of 12), and retired judges at 16.7% (3 of 18). Because the numbers are small, generalizations are dangerous. Yet, the findings presented here provide some evidence of the emergence of professional mediators from the ranks of practicing attorneys. It also seems that specific mediator comments and tactics did not, for the most part, affect the rate of settlement.

23. See, e.g., John Lande, *How Will Lawyering and Mediation Transform Each Other?*, 24 FLA. ST. U. L. REV. 839, 844-45 (1997).

24. This finding is consistent with one of the findings in a previous study of over 200 mediated settlement conferences. The authors found that 12 mediators handled more than 60% of the mediated settlement conferences. Thomas Metzloff, Ralph Peeples & Catherine Harris, *Empirical Perspectives on Mediation and Malpractice*, 60 LAW & CONTEMP. PROBS. 107, 130 n.46 (1997).

25. See N.C. Mediated Settlement Conference Rules, Rule 2(A), available at <http://www.nccourts.org/Courts/CRS/Councils/DRC/MSR/MSCRule2.doc>.

C. The Joint Session

Every mediated settlement conference observed consisted of two distinct parts. First came an opening session, at which all participants were present, and at which presentations on behalf of the parties were made to the mediator. Following the opening session, the mediator held private sessions with the parties and their counsel (caucuses).²⁶ Under the North Carolina Rules²⁷ only the mediator has the authority to declare an impasse. Thus, the number of private sessions was ultimately left to the mediator's discretion.

The joint sessions tended to be predictable, understated, and unemotional. The joint session averaged an hour in length, although with considerable variance (see Table 3, *supra*). Most of the time was taken by the attorneys for the plaintiff and the defendant(s), as Tables 5 and 6 suggest. The parties themselves did relatively little talking. The amount of talking by the parties seemed to have little impact on case outcome. The most frequent behavior, for both plaintiff and defendant, was to not speak at all ($n = 21$ and 26 , respectively).²⁸ This lack of active participation by the parties in the joint session distinguishes the North Carolina court-ordered program from traditional mediation practice. The mediations the researchers observed were dominated by the attorneys for the parties. It may be too much to expect active participation of the parties (for whom the mediated settlement conference was always a novel experience) when they are accompanied by their attorneys, the people they retained to speak on their behalf.

Plaintiff Participation in the Joint Session

Level of Plaintiff Participation	Result: Settlement	Result: Impasse
No record	2	3
Plaintiff did not speak	5	17
Plaintiff spoke a little	2	8
Plaintiff spoke more than a little	0	1
Total	9	29

Table 5

26. Nothing in the North Carolina Rules requires this specific two-step procedure. Nonetheless, a joint session followed by a series of one or more caucuses with each party and their counsel was the only type of procedure we observed. This two-step procedure appears to be the norm for court-ordered mediation in North Carolina.

27. See N.C. Mediated Settlement Conference Rules, Rule 6(B)(3), available at <http://www.nccourts.org/Courts/CRS/Councils/DRC/MSR/MSCRule6.doc>.

28. The mediated settlement conferences in which the defendant physician did not attend are counted in this total.

Defendant Physician Participation in the Joint Session

Level of Defendant Participation	Result: Settlement	Result: Impasse
No record	0	1
Defendant present; did not speak	4	9
Defendant spoke a little	1	4
Defendant spoke more than a little	1	2
Defendant not present	3	10
Total	9	26

Table 6

At the joint session, the mediator usually began by introducing all the people present (or asking them to do so), and by describing the mediated settlement conference process. It was uncommon for the mediator to spend time talking about either his or her qualifications or authority. In only 4 cases did the mediator refer to his or her practice credentials, and in only 3 cases did the mediator refer to his or her credentials as a mediator. In most cases, the mediator asked no questions related to the case in the joint session (31 of 46). The mediator's willingness to ask questions did not have an effect on the settlement rate; in only 2 of the 15 cases in which the mediator asked case-related questions was a full settlement reached at the mediated settlement conference. This sort of reticence may seem at odds with mediator behavior, as described in studies of mediation from other states.²⁹ In the context of the North Carolina program, it is not surprising. The North Carolina Rules give the parties' counsel considerable opportunity to agree on the mediator they will use ahead of time. In many cases, it is likely that the parties were already familiar with the mediator before the session convened. The mediator may have simply felt no need to remind the parties (and their lawyers) of his or her qualifications.

Almost always, the plaintiff's attorney spoke first, followed by the defendant's attorney.³⁰ In over a third of the cases, the plaintiff's attorney used a prop of some sort, typically a photo or videotape depicting the plaintiff's injury. In contrast, the defendant's attorney rarely (2 of 46) used a prop of any sort.

The plaintiff's attorney explicitly expressed confidence in his or her case less than one-third of the time (14 of 46), but expressing confidence in the case was not predictive of outcome. The points plaintiff's counsel most frequently emphasized were the facts of the case (23 of 46) and the sympathetic nature of the plaintiff (17 of 46). Defense counsel were even more self-effacing. In only 8 cases did they explicitly express confidence. When confidence was expressed, it was not predictive of outcome. Defense counsel most frequently talked about what their experts would say at trial (10 of 46) and about the facts of the case (9 of 46). In

29. See Susan Silbey & Sally Merry, *Mediator Settlement Strategies*, 8 J.L. & POL'Y 7, 12 (1986).

30. This was the pattern for at least 42 of the 46 cases. In one case, there was no joint session. In three of the cases, we lack sufficient information to determine which party spoke first.

about a third of the cases ($n = 15$) the defense counsel in the joint session indicated a willingness to “talk settlement.” When such an indication was given, the chances of settlement increased somewhat (4 of 11, or 36.4%) from a baseline settlement rate of 23.7% (see Table 2, *supra*).³¹ Neither side, in the joint session, was likely to tout the inclinations of the local jury pool. Plaintiff’s counsel never mentioned local juries; defense counsel mentioned local juries in only 2 cases that the authors observed.

It was not common in the joint session for the plaintiff’s attorney to criticize the defendant specifically. This makes generalizations about such criticism, when it did happen, difficult. Nonetheless, when the plaintiff’s counsel accused the defendant of negligence in the joint session ($n = 6$), the case settled 50% of the time (3 of 6). When the analysis is confined to cases that either settled in full or resulted in an impasse at the mediated settlement conference, this finding is significant at the .05 level.³² Defense counsel was not at all likely (3 of 46) to make disparaging comments about the plaintiff at the joint session.

In only 1 case did the plaintiff’s counsel ask questions of the other side; likewise, in only 1 case did the defense counsel ask questions of the other side. Direct examination and cross-examination were simply not features of the mediated settlement conference. Apologies were also uncommon. In only 10 cases did the defense counsel say anything that could be construed as an apology. In each of those 10 cases, the apology was one of regrets only—fault was never admitted. Of the 10 cases in which a limited apology was made, 2 resulted in a full settlement, 6 reached impasse, 1 case was adjourned, and 1 case reached a partial settlement. Isolating only the first two possible outcomes, the settlement rate was 25%.

The plaintiff made a dollar demand in the joint session less than half of the time ($n = 11$). When a dollar demand was made, settlement was the result four times; an impasse was declared in the other seven cases. The defense responded to a demand by the plaintiff only once in a joint session. The defense never made a counteroffer.

In short, the joint session was typically unemotional, understated, and choreographed—and dominated by the attorneys for the parties.³³ The joint session instead served simply as a prelude to the private sessions.

D. The Private Sessions

Access to the private sessions allowed the researchers to collect data on the negotiation process itself, as well as on what specific topics the parties chose to discuss with the mediator. In contrast to the joint session, the parties were more likely to speak in the private sessions.³⁴ It was in the private sessions that cases either settled or reached impasse. When hard work was necessary, or when diffi-

31. In addition, in three of the four partial settlement cases, the defense counsel indicated a willingness to “talk settlement.”

32. Of the six cases, three settled in full, one resulted in a partial settlement, and two resulted in an impasse.

33. Our observations were consistent with Golann’s finding that “relationship repair” is quite uncommon in “legal mediations.” See Golann, *supra* note 8, at 331-32.

34. See *infra* Tables 7 and 8.

cult decisions had to be made, they were done in private. Reality testing by the mediator was reserved for the private sessions. The allocations of time spent in joint and private sessions bear these generalizations out. As Table 3 indicates, the average length of a mediated settlement conference was a little more than four hours. The average length of the joint session was about one hour, leaving the bulk of the parties' time to the private sessions.

Plaintiff Participation in Private Sessions (n = 38)

Level of Plaintiff Participation	Result: Settlement	Result: Impasse	Percent Settled
No record	2	4	33.3%
None	1	4	20.0%
Minor	3	15	16.7%
Substantial	3	6	33.3%
Total	9	29	23.7%

Table 7

Defendant Physician Participation in Private Sessions (n = 35)³⁵

Level of Defendant Participation	Result: Settlement	Result: Impasse	Percent Settled
No record	0	2	0%
None (defendant present)	0	2	0%
Minor	4	7	36.4%
Substantial	2	5	28.6%
Defendant not present	3	10	23.1%
Total	9	26	

Table 8

A review of Tables 7 and 8 suggests that there was no level of plaintiff or defendant participation that made settlement significantly more likely to occur. Instead, it is simply worth observing that the level of party participation tended to increase in the private sessions, with no apparent impact on case outcome.

V. MEDIATOR ACTIONS

Mediation theorists have long debated the wisdom of case evaluation by the mediator: should the mediator be encouraged to offer his or her opinion on the merits of the case?³⁶ The literature relating to court-ordered mediation frequently

35. The total of cases either settled in full or reaching impasse was thirty-eight. In three cases, a physician was not a defendant.

36. See, e.g., Murray S. Levin, *The Propriety of Evaluative Mediation: Concerns About the Nature and Quality of an Evaluative Opinion*, 16 OHIO ST. J. ON DISP. RESOL. 267, 270-71 (2001); Deborah Hensler, *Suppose It's Not True: Challenging Mediation Ideology*, 2002 J. DISP. RESOL. 81, 97-98.

assumes that such mediation will typically be evaluative and distributive in nature.³⁷ Our data suggests that mediators in the North Carolina MSC program seldom engaged in overt case evaluation, although the mediation was invariably distributive in nature. In 46 observations, the authors noted only 7 instances where the mediator expressed an opinion regarding the merits of the case. Much more frequently (n = 25) did the mediator express an opinion as to the “correctness” of an offer or counter-offer.³⁸ While the authors observed a number of different tactics used by mediators to promote settlement, only one such tactic (an exploration of the “worst case scenario” with the parties) produced statistically significant results. Even this finding must be qualified because it was noted in only 10 of the observed cases.³⁹ Indeed, it was difficult to isolate any mediator behavior that seemed to have a pronounced effect on the outcome of the case (see Table 9).

Mediator Tactics

Tactic	Result: Settlement	Result: Impasse
Mediator expressed an opinion on the merits (n = 5)	1	4
Mediator expressed an opinion as to the “correctness” of an offer (n = 25)	6	15
Mediator discussed other side’s strengths (n = 18)	4	14
Mediator discussed litigation risks with plaintiff (n = 19)	3	15
Mediator discussed litigation risks with defendant (n = 15)	4	11
Mediator explored likely jury verdicts (n = 15)	4	11
Mediator explored “worst case scenario” (n = 10)	5	5

Table 9

37. Harold Abramson, *Problem-Solving Advocacy in Mediations: A Model of Client Representation*, 10 HARV. NEGOT. L. REV. 103, 107 (2005); Nancy Welsh, *The Place of Court-Connected Mediation in a Democratic Justice System*, 5 CARDOZO J. CONFLICT RESOL. 117, 136-37 (2004); Roselle Wissler, *Court-Connected Mediation in General Civil Cases: What We Know From Empirical Research*, 17 OHIO ST. J. ON DISP. RESOL. 641, 656 (2002).

38. The North Carolina enabling statute, rules, and standards of professional conduct for mediators may explain this. *E.g.*, N.C. GEN. STAT. § 7A-38.1(b) (2005) defines mediation as “an informal process conducted by a mediator with the objective of helping parties voluntarily settle their dispute[s].” *Id.* Rule V of the Standards of Professional Conduct for Mediators provides that at no time shall a mediator make a decision for the parties or express an opinion about or advise for or against any proposal under consideration. Standards of Professional Conduct for Mediators, Rule V, available at <http://www.nccourts.org/Courts/CRS/Councils/DRC/Documents/standardsofconduct.pdf>.

39. $p < 0.05$. There were ten cases in which the mediator explored the “worst case scenario” with the parties. Five of those cases ended in settlement, and five ended in an impasse, for a settlement rate of 50%.

VI. BEHAVIOR BY COUNSEL

Behavior by counsel was rarely predictive of outcome. For example, when plaintiff's counsel expressed confidence in his or her case ($n = 19$), the settlement rate was 22.2%; when plaintiff's counsel did not express confidence in his or her case, the settlement rate was 20%. The two factors most frequently emphasized by the plaintiff's counsel in private session were: (1) the specific facts of the case ($n = 23$), and (2) what the experts will say ($n = 8$). Neither factor was a significant predictor of outcome. When only full settlements and cases that reached impasse are compared, settlement occurred 31.6% of the time (6 of 19) when plaintiff's counsel emphasized the facts of the case, but only 15.8% (3 of 19) of the time when the facts were not emphasized.

When defense counsel expressed confidence in his or her case, the settlement rate was 10% (1 of 10); when defense counsel did not express confidence in his or her case, the settlement rate was 22.9% (8 of 35).⁴⁰ The two factors most frequently emphasized by defense counsel were: (1) the specific facts of the case ($n = 11$), and (2) the unattractive aspects of the plaintiff ($n = 7$). Neither of these factors were significant predictors of outcome. Offering new information at the private session, by either side, also did not affect case outcome. In fact, the disclosure of confidential information in a private session made settlement slightly less likely. When confidential information was disclosed, settlement occurred 21.4% of the time (3 of 14); when confidential information was not disclosed, settlement occurred 25% of the time (6 of 24). Verbal cues by plaintiff's counsel that might indicate a willingness to settle (e.g., "we would like to settle," or "our case has some weaknesses") were not associated with a higher rate of settlement.

Considering the research findings overall, it is difficult to point to any specific behaviors or verbal cues by the mediator, the parties, or the attorneys that were invariable indicators of case outcome, whether the outcome was impasse or settlement. The willingness of the mediator to explore a party's "worst case scenario" was associated with a higher rate of settlement, but as noted before, this tactic was not often used.⁴¹ The defense counsel's overt expression of confidence in his or her case was inversely related to settlement, but the same was not true with respect to the plaintiff's counsel. The settlement rate doubled when plaintiff's counsel emphasized the facts of the case, but this may simply reflect counsel's perception of the strength of his or her case.

VII. THE PROCESS

The existence of offers or demands made prior to the mediated settlement conference had no effect on the settlement rate. Plaintiffs almost always made a dollar demand in the private sessions (43 of 46). Defendants made dollar offers in about two-thirds of the cases (31 of 44). This last observation may seem surprising in light of the low overall settlement rate at the mediated settlement conferences. Previous research suggests that when defendants in medical malpractice

40. If only cases that settled in full or that resulted in an impasse are counted, the settlement rate was 29.6% (8 of 27).

41. See *supra* Table 9.

cases make an offer—any offer—the case settles.⁴² The key to making sense of this apparent inconsistency is to think of the mediated settlement conference as simply one event in a larger, longer process. The fact that a case in which the defendant made an offer did not settle at the mediated settlement conference does not mean that the case never settled. In fact, our research indicates that most of the cases in which an offer was made by the defendant at the mediated settlement conference did eventually settle before trial.⁴³

Plaintiffs made more demands (mean = 2.02) than defendants made offers (mean = 1.45). The number of demands made by the plaintiff ranged from zero to seven. The number of offers made by the defendant ranged from zero to six. Although the researchers found no connection between the number of demands or the number of offers, and outcome, there did appear to be a connection between the number of bargaining rounds and outcome.⁴⁴ The average number of bargaining rounds, when settlement was reached, was nearly five (4.86, $n = 7$). In contrast, the average number of bargaining rounds, when an impasse was declared, was two and one-third (2.33, $n = 27$). This is consistent with the finding, noted above in Table 3, that mediated cases resulting in settlement took more time than mediated cases that resulted in an impasse. It is also suggestive of the role procedural justice plays in settlement negotiations.⁴⁵ More bargaining rounds mean more concessions on both sides. If both sides are making concessions, it is easier to believe that the final outcome is “fair.” The point can be made in another way. Of the cases that settled, the plaintiff never accepted the defense’s first offer. Movement by the defense was expected; without it, settlement did not happen. The range of movement, expressed as a percentage of the first offer made by the defense, was considerable, varying from 20% to 210%.⁴⁶

The researchers also noted an additional pattern. Of cases that settled, and in which both sides made at least one offer, the ratio of the defendant’s first offer to the plaintiff’s first offer was higher. The average ratio of defendant’s first offer to plaintiff’s first offer for cases that resulted in an impasse was 0.152; for cases that settled, the average ratio of opening offers was 0.207.⁴⁷ While settlement required perseverance and hard work, it helped if the parties began their dance a little closer together. In that sense, first offers did seem to matter. The anchoring effect

42. Ralph Peeples et al., *The Process of Managing Medical Malpractice Cases: The Role of Standard of Care*, 37 WAKE FOREST L. REV. 877, 887 (2002).

43. We recorded an offer being made during the mediated settlement conference by the defendant (or, in cases with more than one defendant, by at least one of the defendants) in 32 of the cases. We have been able to ascertain the final outcome for all but one of those cases. Of the 31 cases, 25 (80.6%) resulted in a monetary settlement. Two reached a verdict following trial (one for the plaintiff, and one for the defendant). Four cases were dropped by the plaintiff, without the payment of money.

44. “Bargaining round” here is defined to mean a meeting by the mediator with one party, followed by a meeting by the mediator with the other party.

45. See, e.g., Nancy Welsh, *Making Deals in Court-Connected Mediation: What’s Justice Got to Do With It?*, 79 WASH. U. L.Q. 787, 817-20 (2001); Deborah Hensler, *Suppose It’s Not True: Challenging Mediation Ideology*, 2002 J. DISP. RESOL. 81, 92-94.

46. A higher percentage movement by the defense was no guarantee of settlement, however. In two cases that resulted in an impasse, for example, the defense increased its offers by 300% and 433%, respectively.

47. This finding was not statistically significant. However, it is consistent with arguments made by other observers that settlement is associated with the opening disparity of the parties’ positions; the narrower the disparity, the more likely the case is to settle. See Roselle Wissler, *What We Know About Court-Connected Mediation*, 17 OHIO ST. J. ON DISP. RESOL. 641, 674-75 (2002).

of first offers seemed to make a difference.⁴⁸ Put another way, a first offer by either side that was overly aggressive (either asking for much more than the facts warranted, or offering much less than the case appeared to be worth) made impasse more likely.

In order to settle, plaintiffs had to be willing to yield considerably on their initial demands. Of the 8 cases that settled and for which there is data, the average reduction in the plaintiff's demand was 53.7% (median = 57%). In contrast, of the cases that resulted in an impasse and for which there is data, the average reduction in the plaintiff's demand was 16.3% (median = 0). Table 10 summarizes our findings.

Average/Median Percentage Movement, First to Last Demands (Offers)

	Result: Settlement	Result: Impasse
Plaintiff % Change	53.7%/57% (n = 8)	16.3%/0 (n = 25)
Defendant % Change	96.5%/77.5% (n = 8)	35.2%/0 (n = 24)

Table 10

For both outcomes (settlement and impasse) the defendant's percentage movement exceeded the plaintiff's. It should also be noted that the impasse calculations include the cases in which at least one of the parties refused to change their initial demand or offer. Given the reciprocal nature of distributive bargaining—or, as the attorneys often put it, an unwillingness “to bargain against myself”—the disparity between settlement and impasse is to be expected. Put another way, it takes two to tango.

VIII. EVENTUAL CASE OUTCOME

So what eventually happened to these cases? The authors were able to determine final outcomes for all but 1 of the 46 cases observed, as summarized in Table 11.

Eventual Outcomes of Mediated Cases

	Impasse	Adjournment	Partial Settlement
Money paid to the plaintiff in settlement	15	3	4
Case dropped by plaintiff, money not paid	4	0	0
Summary Judgment, for defendant	2	0	0
Trial- defense verdict	7	0	0
Trial- plaintiff verdict	1	0	0
Totals	29	3	4

Table 11

48. See RUSSELL KOROBKIN, *NEGOTIATION THEORY AND STRATEGY* 87-88 (2002).

Several points can be made here. First, the most common event by far was the payment of money to the plaintiff, in settlement. If analysis is confined only to cases that settled or reached impasse, money was paid in settlement 63% of the time (24 of 38). If the settlements paid from the adjourned and partially settled cases are considered as well, money was paid in settlement almost 69% of the time (31 of 45). Second, plaintiff's chances of receiving monetary relief were limited almost exclusively to negotiated settlements. Eight of the cases observed were tried to a verdict; only 1 of those cases resulted in a verdict for the plaintiff. In 2 other cases, the defendant was able to avoid a trial altogether by prevailing on a motion for summary judgment, and in 4 cases, the plaintiff simply dropped the case, without the payment of money. Third, the fact that more than half of the cases that reached impasse at the mediated settlement conference eventually reached a monetary settlement indicates that the mediated settlement conference, from the perspective of the parties, was simply one step in a larger process. The fact that a case reached impasse at the court-ordered conference did not mean that the case would go to trial and result in a verdict.

IX. DISCUSSION AND CONCLUSION

The mediation of medical malpractice cases in the North Carolina Mediated Settlement Conference program must be understood in its context. It is one event in a series of events that leads either to trial, abandonment, or settlement of the case. Given the complexity and the high-stakes nature of most medical malpractice cases, a settlement rate much lower than the state-wide average for mediated settlement conferences should not be a surprise. Because the process is dominated by the attorneys for the parties, it is not surprising that the researchers consistently observed typical, distributive bargaining patterns at the conferences. Interests (other than the payment or receipt of money) were simply not discussed.

Cases involving death were more likely to settle, as were cases in which the plaintiff was willing to discount its opening demand substantially. Very little that the mediator said or did, or that counsel said or did, affected case outcome. Reaching settlement took time and effort. The joint session followed a predictable ritual, and it was characterized by its understated quality. The private sessions were less predictable, but also followed a certain order. The mediator usually met with the plaintiff first, and then with the defendant. There were no "magic phrases" that, when spoken, virtually guaranteed settlement or impasse.

The shorter average length of time of the opening session for cases that settled, compared to cases that reached impasse (48 minutes versus 71 minutes) suggests that the attorneys, going in, had a good idea of the likely case outcome. If settlement was a real possibility, there was less reason to waste time on the formalities of the opening statements. Reaching settlement—when settlement was a possibility—took time. How long the conference lasted was a function of the level of interest in reaching a settlement on that particular day.

The findings here suggest a sort of predestination was at work in these sessions. The parties knew, going in, whether a settlement was a distinct possibility. Even if it was, however, settlement required both persistence and hard work.

Court-ordered mediation is different from mediation conducted outside the courts. The authors' observations suggest that the presence of attorneys, pursuant

to a court order, makes the process more like settlement and less like mediation. Regardless, court-ordered mediation programs are in wide use in both state and federal courts. They do not cost the courts very much to operate, and they are likely to remain a part of the dispute resolution landscape. More research, in the form of actual observations of court-ordered mediations, would provide insight into what such programs do well, and into how such programs could be improved.