

**“What is an effective or good mediator: Exploring empirical research on mediator
attributes and behaviours”**

Alysoun Boyle

A thesis submitted in fulfilment of the requirements for the degree of

Doctor of Philosophy in Law

August 2020

This research was supported by an Australian Government

Research Training Program (RTP) Scholarship

STATEMENT OF ORIGINALITY

I hereby certify that the work embodied in the thesis is my own work, conducted under normal supervision. The thesis contains no material which has been accepted, or is being examined, for the award of any other degree or diploma in any university or other tertiary institution and, to the best of my knowledge and belief, contains no material previously published or written by another person, except where due reference has been made. I give consent to the final version of my thesis being made available worldwide when deposited in the University's Digital Repository, subject to the provisions of the Copyright Act 1968 and any approved embargo.

Alysoun Boyle

Table of Contents

“What is an effective or good mediator?”	1
Table of Contents	3
Table of Figures	8
Abstract.....	9
Acknowledgements	10
Chapter One: Introduction	11
1.0. Mediation: An introduction.....	11
1.1. Mediation in Australia.....	15
1.2. Defining mediation.....	19
1.3. Mediation effectiveness.....	21
1.4. The mediator.....	25
1.5. Mediator effectiveness	32
1.6 Mediation research	38
1.7. Thesis overview.....	46
1.7.0. Significance of this research.....	46
1.7.1. Contribution to the field	47
1.7.2. Research objective	48
1.7.3. Research Questions.....	48
1.7.4. Scope of this research	48
1.7.5. Methodology.....	49
1.7.6. Chapter outline	51
1.8. Conclusion.....	52
Chapter Two: Methodology	54
2.0. Metaresearch.....	55
2.1. The selected empirical literature.....	57
2.1.0. The selected studies.....	61
2.1.1. Limitations.....	63
2.1.2. Strengths	67
2.2. Thematic analysis: effectiveness and what mediators do	68
2.2.0. Mediation effectiveness	68
2.2.1. What mediators do	72

2.3. Systematic appraisal and bibliometric analysis	81
2.3.0. Overview and aims	81
2.3.1. Methodology	85
2.3.2. Limitations	88
2.3.3. Bibliometric analysis	88
2.4. Targeted review	91
2.5. Online survey of professional mediators	93
2.5.0. Background literature	94
2.5.1. The survey	98
2.5.2. Analysis	104
2.6. Thesis terminology	105
2.7. Conclusion	106
 Chapter Three: Effectiveness.....	 108
3.0. Context, aims, and key findings.....	108
3.0.1. Key findings	109
3.1. Effectiveness in mediation	113
3.1.0. Defining effectiveness in mediation.....	114
3.1.1. Defining effectiveness in Australia.....	115
3.2 Simple and complex effectiveness.....	121
3.2.0. Simple effectiveness	122
3.2.1. <i>Complex effectiveness</i>	124
3.2.2. Mediation context.....	128
3.2.3. Contextual comparative analysis	130
3.3. Influencing effectiveness.....	139
3.3.0. Procedural justice in mediation	140
3.3.1. Interpersonal justice in mediation	145
3.3.2. Mediator neutrality and impartiality	147
3.3.3. Private meetings	150
3.3.4. Disputant advisers and representatives.....	152
3.3.5. Reducing effectiveness	154
3.4. Effectiveness and models of mediation practice.....	155
3.4.0. The evaluative, facilitative, and transformative models.....	156
3.4.1. Effectiveness and models in the selected studies.....	158
3.5. Conclusion.....	162
 Chapter Four: What mediators do	 164
4.0. Chapter aims, findings, and methodology	164
4.1. Research terminology does matter	169
4.1.0. Language conventions and conceptual clarity	170
4.2. Analysis.....	173
4.2.0. Key terms in the selected studies	173
4.2.1. Identifying key terms and their prevalence	175

4.3. Findings: What mediators do	189
4.3.0. Generalised stylistic categories	191
4.3.1. Outcomes, not actions	193
4.3.2. Effects, not actions	194
4.3.3. Generalised, not specific	195
4.3.4. Specific actions and approaches?	197
4.3.5. Contextual and effectiveness trends	200
4.4. Communication skills, empathy, and rapport	201
4.5. Mediator influence and effectiveness	206
4.6. Conclusion	207
 Chapter Five: The people	 210
5.0. Terms, aims, and findings	211
5.0.1. Terms used in the systematic appraisal	211
5.0.2 Systematic appraisal: Aims and findings	211
5.0.3. Chapter Five: Aims and findings	213
5.0.4. Brief findings: research design, and study purpose	215
5.1. Appraisal findings: The people	221
5.1.0. Study participants	223
5.1.1. Population groups	227
5.1.2. Demographic representativeness	235
5.1.3. Gender	243
5.1.4. Confidentiality restrictions on research data	246
5.2. Participant selection, and research roles	248
5.2.0. Selection and consent	252
5.2.1. Pressure to participate	264
5.3. Research roles	265
5.3.0. Overview	265
5.3.1. Allocated research roles	267
5.4. Influence: Groups and repeat players	278
5.4.0. Group effect	278
5.4.1. Mediation experience and repeat players	280
5.4.2. Control groups	286
5.5. Conclusion	287
 Chapter Six: The data	 290
6.0. Context, aims, and findings	290
6.0.0. Aims and key findings	291
6.0.1. Methodology	292
6.1. Collecting the data	294
6.1.0. Data collection methods	299
6.1.1. Data topics	322
6.1.2. Summary: Data collection	351
6.2. Acknowledged limitations	353

6.2.0. General limitations	353
6.2.1. Methodological limitations	358
6.2.2. Subjective data	365
6.2.3. Broader limitations	367
6.3. Missing data	372
6.3.0. Identifying “missing data”	373
6.3.1. Replacing missing data	385
6.3.2. Coding and inter-coder reliability	387
6.4. Chapter Five and Chapter Six: Findings.....	398
6.4.0. Chapter Five: Findings	398
6.4.1. Chapter Six: Findings	399
6.5. Conclusion.....	399
 Chapter Seven: The researchers	 402
7.0. Introduction, context, and aims	402
7.0.1. Aims of Chapter Seven	404
7.0.2. Key findings	405
7.0.3. Scope of the Chapter	406
7.1. Researcher influence and reflexivity	412
7.1.0. Researcher influence: External	412
7.1.1. Researcher influence: reflexivity.....	425
7.2. Constraints on mediation research.....	433
7.2.0. Systemic constraints	433
7.2.1. Endemic constraints.....	445
7.2.2. Journals and publications.....	455
7.2.3. The social desirability effect.....	460
7.3. Knowledge gaps	469
7.4. Addressing constraints and filling gaps.....	473
7.4.1. Professional mediators online survey	475
7.5. Systematic appraisal: Outcomes.....	479
7.6. Alternative research approaches and methods	481
7.7. Conclusion.....	482
 Chapter Eight: The future.....	 484
8.0. The Research Questions	484
8.1. Future research: Alternative approaches and methods.....	486
8.1.1. Addressing research constraints	487
8.1.2. Research approaches and methods	494
8.2. Conclusion.....	514
 Appendix A.	 516
Bibliography and references	516

Appendix B.....	544
The 47 selected empirical studies.....	544
Appendix C.....	548
Data collection instruments.....	548
Appendix D.	562
Online survey of professional mediators, 2019	562
Appendix E.....	563
Report of the ABA Task Force, 2017	563

Table of Figures

FIGURE 3.1. SIMPLE AND COMPLEX EFFECTIVENESS.....	125
FIGURE 3.2. SIMPLE AND COMPLEX EFFECTIVENESS: CONTEXTUAL ANALYSIS.....	132
FIGURE 4.1. FIFTEEN KEY TERMS	176
FIGURE 4.2. KEY TERMS: FREQUENCY OF OCCURRENCE.	182
FIGURE 4.3. KEY TERMS: EXPLANATIONS INCLUDED.....	186
FIGURE 5.1. STUDY PURPOSE.	220
FIGURE 5.2. POPULATION GROUPS – MEDIATOR PARTICIPANTS.....	231
FIGURE 5.3. POPULATION GROUPS – NON-MEDIATOR PARTICIPANTS.....	234
FIGURE 5.4. SELECTION PROCESS INCLUDED.....	257
FIGURE 5.5. SELECTION PROCESS.	257
FIGURE 5.6. MEDIATOR PARTICIPANTS: WHOSE DATA?	276
FIGURE 5.7. NON-MEDIATOR PARTICIPANTS: WHOSE DATA?	276
FIGURE 6.1. DATA COLLECTION USING SURVEYS.	306
FIGURE 6.2. OBSERVATIONAL DATA COLLECTION.....	312
FIGURE 6.3. MODE OF DATA COLLECTION	320
FIGURE 6.4. RESPONDENT IDENTITY AND FOCUS AREA.	323
FIGURE 6.5. DATA ABOUT MEDIATOR IN-MEDIATION BEHAVIOUR.....	339
FIGURE 6.6. DISPUTANT IN-MEDIATION BEHAVIOUR.	344

Abstract

At present, in Australia, mediation is widely available through a range of publicly funded and supported mediation programs and services, most visibly in the court-connected context, and it is also available through industry programs as well as privately. The process has statutory acknowledgement in all jurisdictions, and mediators can be accessed through their membership of mediation panels, and of tribunals, or they can be appointed privately by disputants. Mediation enjoys a strong reputation for its dispute resolution efficacy, resting on at least forty years of research.

The purpose of the research supporting this thesis was to establish what is known about mediator effectiveness and what makes a “good” mediator. The research analysed a selection of influential empirical studies of mediation and was conducted using a metaresearch framework, an approach that enables system-wide analysis and is uncommon in mediation research. Four research methodologies were applied: two thematic reviews, a systematic appraisal, a targeted review, and an online survey of professional mediators.

The thesis argues that very little is known about mediator effectiveness, or about the role, actions, contributions, and influence of the mediator, because these remain largely unexplored. It argues further that very little can be known unless steps are taken to address the constraints on mediation research, including changes to publishing practices and the adoption of alternative research approaches and methods.

This thesis contributes to mediation research, in particular empirical studies of mediation, by filling two knowledge gaps. It establishes that very little is known about mediator effectiveness and, taking a system-wide approach, it confirms reported constraints on mediation research.

Acknowledgements

First and foremost, I must acknowledge the valuable supervision of Professor Tania Sourdin (University of Newcastle). Throughout the genesis, development, and completion of this research and thesis, she has been an extraordinary guide and sounding board and I can only say that she has been a wonder of encouragement, advice, humour, and personal support.

I must also thank my associate supervisor, Dr Jennifer Waterhouse (University of Newcastle), who has provided valuable and insightful comments, in particular from a research perspective.

Thank you to my colleagues on the American Bar Association Section of Dispute Resolution Task Force on Research on Mediator Techniques.

Thank you to my friends and colleagues in the ADR Research Network, on the Australian Dispute Resolution Advisory Council, and on the Board of the National Mediation Conference: for your support and guidance.

Dylan in Chicago (US), and, in Newtown, Kathleen, Nick, Rufus, Clyde, and Nell, gave me the personal strength to stay with this undertaking.

Sandy, Alaric, Janet, John , Jenny and Hans have all given freely their unstinting support, advice, and friendship.

Thank you Jennifer.

Chapter One: Introduction

This thesis explores the concept of mediator effectiveness, and reports on extensive research and an analysis that is focused on a selection of empirical studies of mediation, most of which are from the United States of America ('US'). Although the US continues to be a dominant influence on mediation research and literature, this first Chapter of the thesis gives an overview of mediation and its practice in the author's country of residence, Australia. It also includes an overview of key concepts relevant to any consideration of mediation and mediator effectiveness, and to mediation research, providing a context for the thesis. The final section of this Chapter introduces the thesis itself, describing the Research Questions, the scope and aims of the research, a summary of the proposed methodologies, and an outline of the thesis structure.¹

1.0. Mediation: An introduction

Mediation is a relatively informal process for managing and resolving conflicts and disputes and, although it eludes any commonly accepted definition,² as a concept, it long predates its familiar modern forms. Research in the field of biological anthropology suggests it may have its roots in the social evolution of community cohesion that is essential for human social development:³ where conflict and disputes within or between individuals, groups and communities are perceived to threaten that group or community's stability and well-being, intervention is sought to re-establish the status quo.⁴ In such circumstances, people often call on mediators, or people with similar skills, to help repair the rift and prevent further damage to the community.

¹ Chapter Two includes coverage of the methodology used in this thesis.

² Definitions of mediation are considered below, see 1.2. Definitional issues.

³ For further reading about the links between human evolution, human development, and social cohesion, see Reynolds, K. J., and N. R. Branscombe, *Psychology of Change: Life Contexts, Experiences, and Identities* (Psychology Press, USA, 2015); Wrangham, R., *The Goodness Paradox: The Strange Relationship Between Virtue and Violence in Human Evolution* (Pantheon Books, USA, 2019).

⁴ Wrangham, R., *The Goodness Paradox: The Strange Relationship Between Virtue and Violence in Human Evolution* (Pantheon Books, USA, 2019).

In many societies, interventions for managing conflict management include elements common to mediation in that contemporary traditional societies continue to use approaches that involve the assistance of individuals whose status within the community coupled with their interpersonal skills, give them authority to directly guide the management and resolution of disputes with the aim of protecting both community stability and social cohesion.⁵

Mediation as it is currently recognised and practised can be said to be a product of ideological and practical needs in the US. On the practical side, at the Roscoe Pound Conference (the 'Pound Conference') in Minneapolis, US, Frank Sander proposed several options for addressing what was then seen to be an overutilization and clogging of the US courts system.⁶ His proposals included no-fault provisions for some infringements, the removal of criminal status for others, the promotion of preventative legal services, and options for 'resolving disputes outside courts'.⁷ Considering many attributes and contexts of disputes, Sander proposed so-called 'alternative dispute resolution mechanisms',⁸ which included litigation itself, arbitration, negotiation, and mediation, the latter three not involving the courts. This has led to unresolved controversy concerning the role and influence of the legal system on the nature of mediation and its practice.⁹ On the ideological side, the values articulated at the Pound Conference, such as '[the parties gaining] a new and shared

⁵ Alexander, N., 'The Mediation Meta Model: Understanding Practice' (2008) 26(1) *Conflict Resolution Quarterly* 97; Bishop, H., *Aboriginal Decision Making, Problem Solving and Alternative Dispute Resolution – Challenging the Status Quo* (Keynote address, Native Title Services Victoria, Alternative Dispute Resolution in Indigenous Communities [ADRIC], Symposium, Victoria, July 2015).

⁶ Sander, F. E. A., 'Varieties of Dispute Processing' in A. Levin, and R. Wheeler (eds), *Proceedings of the National Conference on the Causes of Popular Dissatisfaction with the Administration of Justice* (West Publishing Company, St Paul, Minnesota, USA, 1979).

⁷ Sander, F. E. A., 'Varieties of Dispute Processing' in A. Levin, and R. Wheeler (eds), *Proceedings of the National Conference on the Causes of Popular Dissatisfaction with the Administration of Justice* (West Publishing Company, St Paul, Minnesota, USA, 1979), 66.

⁸ Sander, F. E. A., 'Varieties of Dispute Processing' in A. Levin, and R. Wheeler (eds), *Proceedings of the National Conference on the Causes of Popular Dissatisfaction with the Administration of Justice* (West Publishing Company, St Paul, Minnesota, USA, 1979), 67.

⁹ For example, see Kovach, K. K., 'Privatization of Dispute Resolution: In the Spirit of Pound, but Mission Incomplete: Lessons Learned and a Possible Blueprint for the Future' (2006) 48(1) *South Texas Law Review* 1003; Riskin, L. L., and N. Welsh, *Is That All There Is? 'The Problem' in Court-Oriented Mediation*, University of Florida Levin College of Law Research Paper No 2008-08.

perception of their relationship',¹⁰ and the need to 'reorient the parties toward each other',¹¹ still resonate for commentators,¹² and, over 40 years later, remain relevant and continue to be espoused by many mediation practitioners in Australia.¹³ Sander's "alternative dispute resolution mechanisms" became "Alternative Dispute Resolution" leading to the acronym ADR, or DR.

Mediation emerged within Western societies whose then ideologies and idealisms were demonstrably driven by the social upheavals during that time. When describing that developmental phase of mediation, commentators of the time use idealistic terms such as 'transformative potential [and] empowerment';¹⁴ 'a regained sense of community';¹⁵ 'disputants finding their own solutions';¹⁶ they expressed the firm conviction that mediator skills were 'innate';¹⁷ and, from a pillar of the legal profession, that mediation enabled 'the attainment of civil peace in our community'.¹⁸ More recent commentators continue to echo those sentiments when they describe mediation in

¹⁰ Sander, F. E. A., 'Varieties of Dispute Processing' in A. Levin, and R. Wheeler (eds), *Proceedings of the National Conference on the Causes of Popular Dissatisfaction with the Administration of Justice* (West Publishing Company, St Paul, Minnesota, USA, 1979), 69.

¹¹ Sander, F. E. A., 'Varieties of Dispute Processing' in A. Levin, and R. Wheeler (eds), *Proceedings of the National Conference on the Causes of Popular Dissatisfaction with the Administration of Justice* (West Publishing Company, St Paul, Minnesota, USA, 1979), 69.

¹² For example, see Kovach, K. K., 'The Mediation Coma: Purposeful or Problematic?' (2014) 16(3) *Cardozo Journal of Conflict Resolution* 755; Riskin, L. L., 'Beginning with Yes: A Review Essay on Michael Wheeler's the Art of Negotiation: How to Improve Agreement in a Chaotic World' (2015) *University of Florida Levin College of Law, Legal Studies Research Paper Series*, Paper No. 15-38.

¹³ Sourdin, T., *Alternative Dispute Resolution* (6th Edition, Thomson Reuters, Australia, 2020).

¹⁴ Baruch Bush, R. A., and J. P. Folger *The Promise of Mediation* (Jossey-Bass, USA, 1994, and 2005), 2.

¹⁵ Sander, F. E. A., 'Varieties of Dispute Processing' in A. Levin, and R. Wheeler (eds), *Proceedings of the National Conference on the Causes of Popular Dissatisfaction with the Administration of Justice* ['The Pound Conference'] (West Publishing Company, St Paul, Minnesota, USA, 1979), 81.

¹⁶ Mugford, J., 'Overview' in J. Mugford (ed), *Alternative Dispute Resolution, AIC Seminar Proceedings, No 15* (Institute of Criminology, Canberra, 1986), 4.

¹⁷ Boulle, L., *Mediation Principles, Process, Practice* (Butterworths, Australia, 1996), 227.

¹⁸ Street, the Hon, Sir L., AC KCMG QC, 'Opening Address' in J. Mugford (ed), *Alternative Dispute Resolution, AIC Seminar Proceedings, No 15* (Institute of Criminology, Canberra, 1986), 23

terms of 'authentic, lasting conflict resolution';¹⁹ 'missionary zeal';²⁰ and 'compassion, understanding, and caring';²¹ and when they describe mediators as having 'intuitive sensibilities'.²²

Principled negotiation was influential in the development of modern mediation in Australia, and the approaches continue to be the basis of mediator training, here and elsewhere.²³ In 1981, the concept of 'principled negotiation' was publicised through the work of what was then called the Harvard Negotiation Project.²⁴ Principled negotiation is based on values similar to those of the mediation movement, and mutuality, commonality, and the importance of broader community interests continue to underlie any principled negotiation process.²⁵ The concept of principled negotiation is derived from the work of Mary Parker Follett, who is credited with being the first person to give structure to its approaches. Her area of speciality was organisational management, and she emphasised the importance of communication, informal processes, and cooperative and inclusive approaches to problem solving.²⁶

In Australia today, mediation and mediators are supported by legislation, by publicly funded programs and services, and by a network of membership bodies dedicated to meeting the professional needs of practicing mediators. Based on a body of research, and numerous empirical studies, it is now accepted that mediation is an effective dispute resolution process in that it achieves settlement most of the time and does so in ways that satisfies participants. Mediation is

¹⁹ Bowling, G. D., 'Foreword' in M. LeBaron, C. MacLeod, and A. Acland (eds), *The Choreography of Resolution: Conflict, Movement, and Neuroscience* (American Bar Association, USA, 2014), xx.

²⁰ Adler, P. S., *Expectation and Regret: A Look Back at How Mediation has Fared in the United States*, (Paper presented at the 7th National Conference, Civil Mediation Council, London, UK, 2013), 9.

²¹ Friedman, G., and J. Himmelstein, *Challenging Conflict: Mediation Through Understanding* (American Bar Association, USA, 2008), xxvi.

²² Benjamin, R. D., 'Managing the Natural Energy of Conflict: Mediators, Tricksters, and the Constructive Use of Deception' in D. Bowling and D. Hoffman (eds), *Bringing Peace into the Room* (Jossey-Bass, USA, 2003), 93.

²³ Bowling, G. D., 'Foreword' in M. LeBaron, C. MacLeod, and A. Floyer (eds), *The Choreography of Resolution* (American Bar Association, USA, 2013); Boyle, A., *Mediation: A Practitioner's Guide* (Institute of Arbitrators and Mediators Australia, 2006, 2009).

²⁴ Fisher, R., W. Ury, and B. Patton, *Getting to Yes: Negotiating an Agreement Without Giving In* (Random Century Australia, 1981, 1991).

²⁵ Fisher, R., W. Ury, and B. Patton, *Getting to Yes: Negotiating an Agreement Without Giving In* (Random Century Australia, 1981, 1991).

²⁶ Most of Mary Parker Follett's writings are no longer in print; however, for electronic versions, see Mary Parker Follett Network, *Follett Writings*, available on <<http://mpfollett.ning.com/mpf/follett-writings>>.

practised on all continents and is now even more integral to international trade following the United Nations General Assembly's 2019 ratification of the Singapore Convention (the United Nations Convention on International Settlement Agreements Resulting from Mediation).²⁷ However, there are still many matters that are not understood about mediation which have not been clarified by research: for example, it is still not known what actually happens during mediation, how or why the process actually works, or what is an effective mediator.

This thesis aims to enhance understanding about mediation effectiveness by focusing on the mediator and establishing what is known about "good" mediators and their role in effective mediation.

A range of measures have been applied to establish mediation's effectiveness, and these include the achievement of settlement as well as the participant's satisfaction with the mediation process and with any outcomes that are achieved.²⁸ Perceptions of procedural justice as well as cost and time savings, have also been considered in terms of effectiveness measures in court-connected mediations.²⁹

1.1. Mediation in Australia

1986 was the International Year of Peace and the Institute of Criminology convened a conference in Canberra specifically to consider Alternative Dispute Resolution (ADR) and mediation, the first conference of its kind to be held in Australia. One of the conference presentations provided what was probably the first snapshot of the spread of ADR, and mediation, across the country to that time.³⁰

²⁷ Information about the Singapore Convention is available on <<https://www.singaporeconvention.org/>> and on <<https://undocs.org/en/a/cn.9/wg.ii/wp.205>>.

²⁸ The definitions and measures of effectiveness are examined in Chapter Three of this thesis.

²⁹ Procedural justice is also considered in Chapter Three.

³⁰ David, J., 'Alternative Dispute Resolution – What Is It?' in J. Mugford (ed), *Alternative Dispute Resolution, AIC Seminar Proceedings, No 15* (Institute of Criminology, Canberra, 1986).

The presenter was a leader of the introduction of mediation to Australia's legal sector and, in her presentation, canvassed the extent and availability of ADR and mediation at the time, listed the service-provider organisations and agencies, considered the ADR processes' use within the courts system, and attempted to define the various processes, including mediation. She also summarised the origins of what was called 'the ADR movement', including the influence of the courts on that development. Reflecting the view of many at the time, the presenter described ADR in general, and mediation in particular, as a means of repairing what was seen as society's deepest ill: its capacity for violence and war. In keeping with a widespread approach to mediation that resisted it being formalised and structured, it was suggested that mediation '[defies] strict definition',³¹ a perspective with which many practitioners and commentators would still agree, especially those who perceive that institutionalisation of mediation removes the links to its original values.³²

The presentation included a description of the role of the mediator, as it was perceived in 1986, noting that its scope ranged 'from pure "scribes" who have no direct input into the meetings of the parties to "musclers" who are very directive of both the outcome and the content.'³³

Four years later, in 1990, the *Australasian Dispute Resolution Journal (ADRJ)* was launched with the publication of its first two issues, covering topics that continue to interest current commentators and practitioners. These included the use of ADR, and mediation, in the courts system,³⁴ in commercial disputes,³⁵ in the community sector,³⁶ and for resolving disputes about

³¹ David, J., 'Alternative Dispute Resolution – What Is It?' in J. Mugford (ed), *Alternative Dispute Resolution, AIC Seminar Proceedings, No 15* (Institute of Criminology, Canberra, 1986), 50.

³² Press, S., 'Institutionalization of Mediation in Florida: At the Crossroads' (2003) 108(1) *Penn State Law Review* 43.

³³ David, J., 'Alternative Dispute Resolution – What Is It?' in J. Mugford (ed), *Alternative Dispute Resolution, AIC Seminar Proceedings, No 15* (Institute of Criminology, Canberra, 1986), 51.

³⁴ Street, The Hon Sir L., AC KCMG QC, 'The Court System and Alternative Dispute Resolution Procedures' (1990) 1(1) *ADRJ* 5.

³⁵ Riekert, J., 'Alternative Dispute Resolution in Australian Commercial Disputes: Quo Vadis?' (1990) 1(1) *ADRJ* 31.

³⁶ Stevenson, E., 'The Use of Community Mediation in the Family Mediation Centre (NSW)' (1990) 1(1) *ADRJ* 24.

government policy.³⁷ One article examined the then definitional problems in ADR,³⁸ another cautioned against the involvement of the legal profession in ADR practice,³⁹ and another considered the potential effects of ADR on pre-trial actions in NSW.⁴⁰

The early theoretical discussions about ADR in the first issues of the *ADRJ* included one that emphasised the “alternative” origins of ADR, and cited Karl Marx, Bob Dylan, and the conference presenter from 1986 (mentioned above).⁴¹ At the heart of the then ADR bundle of loosely defined processes was mediation, whose identifying principle was that participants could resolve their own disputes – ‘power to the people’, as one commentator has described it.⁴²

Although mediation in Australia is now a mainstream dispute resolution process, many still hold to its original idealistic roots. However, a number of mediation’s early issues remain unresolved and to some extent unexplored by researchers, including the lack of clarity around the mediator’s role, and the tension between quality control and ‘intuitive sensibilities.’⁴³

Mediation is widely perceived to be a cost-efficient, generally satisfying, and accessible method for resolving disputes. It could be argued that it is most publicly visible through referrals from and within the legal and justice system, and there is a growing body of legislation and case law that relates specifically to it.⁴⁴ Mediation is also used for resolving conflicts and disputes outside the litigation system, being available in most areas where people need to manage and resolve conflict, including: the commercial and business sectors; health and education; mental health, aged care, and

³⁷ Adler, P. S., ‘Resolving Public Policy Conflicts Through Mediation’ (1990) 1(2) *ADRJ* 69.

³⁸ Ingleby, R., ‘Catholics, Communists, Alternative Dispute Resolution and Bob Dylan’ (1990) 1(1) *ADRJ* 18.

³⁹ Faulkes, W., ‘The Modern Development of Alternative Dispute Resolution in Australia’ (1990) 1(2) *ADRJ* 61.

⁴⁰ NSW Attorney-General, *Impact of ADR on Pre-Trial Procedures* (Discussion Paper extract, Attorney-General’s Department, 1990) 1(2) *ADRJ* 96.

⁴¹ Ingleby, R., ‘Catholics, Communists, Alternative Dispute Resolution and Bob Dylan’ (1990) 1(1) *ADRJ* 18.

⁴² Weiner, G., ‘A Call for Evidence-based Standards for Mediator Quality’ (2012) *Professional Standards and Ethics*, *Unpublished Paper*, Paper 2, available on <<http://www.civiljustice.info/profstan/2>>.

⁴³ Benjamin, R. D., ‘Managing the Natural Energy of Conflict: Mediators, Tricksters, and the Constructive Use of Deception’ in D. Bowling and D. Hoffman (eds), *Bringing Peace into the Room* (Jossey-Bass, USA, 2003), 93.

⁴⁴ For information about legislation and case law, see AUSTLII, available on <<http://www.austlii.edu.au/>>; Boule, L., *Mediation Principles, Process, Practice* (3rd Edition, LexisNexis Butterworths, Australia, 2011); Sourdin, T., *Alternative Dispute Resolution* (6th Edition, Lawbook Co, Thomson Reuters, Australia, 2020).

disability care; planning and construction in the commercial and domestic sectors; government policy and decision-making; family, divorce, and child custody; workplace and employment; discrimination and human rights; indigenous social problems and land rights; environment and natural resources; intellectual property; artists' rights; and community and inter-personal disputes.

Mediation programs and schemes have proliferated in equally divergent areas for the resolution of disputes specific to those areas, such as: farm debt; workers compensation; various ombudsmen, including small business commissioners; industry schemes; consumer complaints; internet domain names; franchising; provision of household utilities; and victim-offender mediation.⁴⁵ It is also a core component of the processes available through Civil and Administrative Tribunals operating in each State and Territory.

Many mediation programs retain panels of mediators and, while some do not place requirements on how their empanelled mediators are to conduct mediations within those programs, others do. The latter may specify how mediations are to be conducted, sometimes referring to models of practice or to existing standards of mediator conduct and certification requirements that are defined outside the program (eg the National Mediator Accreditation System (NMAS)).

Most courts and tribunals offer to litigants the option of referral to mediation, often called court-connected mediation. In some courts, mediation is mandatory, while in others it is a voluntary option enabling litigants to choose whether or not they will participate. In some court and tribunal programs, internal staff act as mediators; in others, mediators are appointed on a rostered basis from a panel retained by the court or tribunal. When people agree to participate in mediation, many litigants deliberately choose to jointly select a private mediator who is not connected to a court or tribunal.

⁴⁵ For comprehensive coverage of the availability of mediation in Australia see Boule, L., *Mediation Principles, Process, Practice* (3rd Edition, LexisNexis Butterworths Australia, 2011); Sourdin, T., *Alternative Dispute Resolution* (6th Edition, Thomson Reuters, Australia, 2020).

Mediation skills are also used in non-dispute situations where the process' structure and principles guide high-level planning and decision-making, complex multi-participant consultations, and preliminary negotiations of contract provisions. For example, mediation is also used for aiding community recovery from natural disasters.

Mediators in Australia can opt to provide their services through many avenues. They can choose to be retained as members of mediator panels associated with the legal system, or associated with other mediation services, from which they can be rostered to mediate at any time, or from which they can be selected by participants. Mediators can be registered to provide mediation services under specific mediation schemes; these, too, can operate on the basis of rostered appointments or as per selection by participants. Mediators can also practise privately, relying on their own publicity, including word of mouth, to promote their services and ensure their selection by participants. Most mediators in Australia provide their services simultaneously through several, or all, of these options.

In summary, mediation in Australia has many iterations, distributed across diverse sectors and jurisdictions, and practised by a wide variety of mediators. Despite the appearance of superficial commonalities, the mediation sector is beset by definitional differences and professional affiliations that are likely to influence individual mediator approaches as well as participant selection of mediators. The next section includes a brief examination of some of those issues.

1.2. Defining mediation

Although many practitioners and commentators believe there is broad acknowledgement and acceptance that “mediation” generally refers to a relatively informal process for resolving disputes, there is not complete agreement on its definition,⁴⁶ and researchers have reported the term itself

⁴⁶ Adler, P. S., *Expectation and Regret: A Look Back at How Mediation has Fared in the United States* (Paper presented at the 7th National Conference, Civil Mediation Council, London, UK, 2013).

being used in reference to disparate practices.⁴⁷ While it has been proposed that mediation's core, or defining features include disputant self-determination, mediator neutrality, and confidentiality,⁴⁸ each of those is problematic to define and to measure in the context of mediation. This thesis does not set out to clarify the meaning of mediation, and, outlined below, it is the definition that is most widely accepted in the Australian context and on which this thesis relies.⁴⁹

In Australia, the former National Alternative Dispute Resolution Advisory Council (NADRAC) and the NMAS have provided definitions of mediation that are generally accepted, although some organisations continue to provide their own. This thesis relies on the NMAS definition, as provided on the website of its overseeing body, the Mediator Standards Board (MSB):

*A mediation process is a process in which the participants, with the support of the mediator, identify issues, develop options, consider alternatives and make decisions about future actions and outcomes. The mediator acts as a third party to support participants to reach their own decisions.*⁵⁰

A longer NMAS explanation includes the accomplishments expected of the non-mediator participants during mediation:

Mediation is a process that promotes the self-determination of participants and in which participants, with the support of a mediator:

- (a) communicate with each other, exchange information and seek understanding*
- (b) identify, clarify and explore interests, issues and underlying needs*
- (c) consider their alternatives*
- (d) generate and evaluate options*

⁴⁷ For example, see Menkel-Meadow, C., 'Empirical Studies of ADR: The Baseline Problem of What ADR is and What it is Compared To' in P. Cane, and H. Kritzer (eds), *The Oxford Handbook of Empirical Legal Research* (Oxford University Press, UK, 2010), available on <<http://ssrn.com/abstract=1485563>>.

⁴⁸ Kovach, K. K., 'The Mediation Coma: Purposeful or Problematic?' (2014) 16(3) *Cardozo Journal of Conflict Resolution* 755.

⁴⁹ Generally, this thesis puts to one side mediation's definitional problems, and accepts at face value researchers' claims that the process they are investigating is mediation.

⁵⁰ Mediator Standards Board, *What is Mediation?* available on <<https://msb.org.au/about-mediation/what-mediation>>.

- (e) *negotiate with each other; and*
- (f) *reach and make their own decisions.*⁵¹

Many mediation organisations in Australia are members of NMAS, as Recognised Mediator Accreditation Bodies (RMABs), and most use the NMAS definition of mediation.

A mediation process can be conducted with the participants in the same room and talking to each other, with occasional breaks enabling the mediator to conduct 'Private Sessions', or caucuses, with each side. It can also be conducted as a 'shuttle' process in which the participants are in the same room only for the purposes of opening presentations and finalisation of any terms of agreement, and otherwise spend most of the mediation session in separate rooms while the mediator ferries information between them, including offers for settlement. In recognition of the mediator's mobile role, this method has also been called 'ambulatory mediation'.⁵² In recent years, there has been an increase in mediation being conducted by teleconference, by videoconference, and by other electronic means, including through secure on-line facilities.

Whenever mediation is mentioned in this thesis, it is a reference to the broad view (ie relatively informal, consensual process for resolving disputes), and it includes all approaches and models.⁵³

1.3. Mediation effectiveness

Mediation's reputation for effectiveness is sufficiently well-established that many consider it to be self-evident. The reputation is founded in large part on mediation's perceived capacity for achieving settlement and participant satisfaction in a timely and cost-effective way, especially when compared with more traditional adversarial processes, such as court hearings.⁵⁴ Although many

⁵¹ Mediator Standards Board, *National Mediator Accreditation System (2015)*, 2, footnote 1, available on <<https://msb.org.au>>.

⁵² Wall, J., and S Chan-Serafin, 'Processes in Civil Case Mediations' (2009) 26(3) *Conflict Resolution Quarterly* 261.

⁵³ Chapter Two includes a list of terms that are used in this thesis.

⁵⁴ David, J., 'Alternative Dispute Resolution – What Is It?' in J. Mugford (ed), *Alternative Dispute Resolution, AIC Seminar Proceedings, No 15* (Institute of Criminology, Canberra, 1986).

studies have produced results that appear to confirm this reputation across a variety of jurisdictions and models of mediation practice⁵⁵, the results are primarily focussed on settlement rates and in terms of other benefits, the research is considered, by some, to be equivocal,⁵⁶ and it has been suggested that much of mediation's reputation is based more on belief than on research findings.⁵⁷

Some measures of effectiveness have focused on qualitative and subjective indicia, such as participants' responses to involvement in the mediation (satisfaction with the process, and with its outcomes, as well as their perceptions of the fairness of the process).⁵⁸ Other reporting has focused on more quantitative measures, such as achievement of settlement, efficient use of resources, timeliness, and compliance with the terms of settlement.⁵⁹ Some reporting has included combinations of qualitative and quantitative measures, such as a key evaluation of the effectiveness of court-connected mediation programs in the US which considered the following effectiveness measures: timeliness, costs to disputants, costs to the courts (of providing the mediation services), settlement rates (including monetary outcomes), satisfaction with the program, and perceptions of fairness with the mediation process.⁶⁰ One claimed measure of mediation effectiveness, particularly in legal contexts, is its capacity for safeguarding procedural justice.⁶¹

⁵⁵ David, J., 'Alternative Dispute Resolution – What Is It?' in J. Mugford (ed), *Alternative Dispute Resolution, AIC Seminar Proceedings, No 15* (Institute of Criminology, Canberra, 1986); McDermott, E. P., and R Obar, "'What's Going On" in Mediation: An Empirical Analysis of the Influence of a Mediator's Style on Party Satisfaction and Monetary Benefit' (2004) 9(75) *Harvard Negotiation Law Review* 75; Sourdin, T., and T Matruglio, *Evaluating Mediation – New South Wales Settlement Scheme 2002* (Report, La Trobe University, University of Western Sydney 2004).

⁵⁶ Weiner, G., 'A Call for Evidence-based Standards for Mediator Quality' (2012) *Professional Standards and Ethics., Unpublished Paper*, Paper 2, available on <<http://www.civiljustice.info/profstan/2>>; Wissler, R., 'Mediation and Adjudication in Small Claims Court: The Effects of Process and Case Characteristics' (1995) 29 *Law & Society Review* 323.

⁵⁷ Weiner, G., 'A Call for Evidence-based Standards for Mediator Quality' (2012) *Professional Standards and Ethics., Unpublished Paper*, Paper 2, available on <<http://www.civiljustice.info/profstan/2>>.

⁵⁸ Sourdin, T., and T Matruglio, *Evaluating Mediation – New South Wales Settlement Scheme 2002* (Report, La Trobe University, University of Western Sydney).

⁵⁹ Sourdin, T., *Mediation in the Supreme and County Courts of Victoria* (Report, Department of Justice, Victoria, Australia, 2009); Wissler, R., 'Court-Connected Mediation in General Civil Cases: What We Know from Empirical Research' (2002) 17(3) *Ohio State Journal on Dispute Resolution* 641.

⁶⁰ Kakalik, J. S., T. Dunworth, L. A. Hill, D. M. McCaffrey, M. Oshiro, N. M. Pace. And M. E. Vaiana, *An Evaluation of Mediation and Early Neutral Evaluation Under the Civil Justice Reform Act* (Report for The Institute for Civil Justice, RAND, USA, 1996).

⁶¹ Definitions and measures of effectiveness in mediation are considered in Chapter Three.

Procedural justice in mediation

Although procedural justice may appear to be a straightforward concept in the context of court and tribunal processes, it has proven to be more complex in the context of mediation. Procedural justice in the mediation context is not usually linked to the notion that procedures have been complied with (see below). This notion has been referred to by the former NADRAC,⁶² and with each iteration of the NMAS Standards,⁶³ and by many commentators. It is widely reported that participant perceptions of procedural justice in mediation are correlated with participant perceptions of fairness in the mediated outcome/s and with participant satisfaction, with the process, with the mediator, and with the mediated outcomes,⁶⁴ although it has been noted that the concepts of satisfaction and fairness are complex and may not be easily differentiated by mediation participants.⁶⁵

There continues to be debate about how procedural justice is evaluated in mediation, including ascertaining the influence of the mediator's role and any relationship between procedural and substantive fairness.⁶⁶ The factors reported to influence participants' perceptions of procedural justice in mediation include a sense of control over the process; participants having "voice", or opportunities to have their say and to be heard; the nature of participants' exchanges during the process – and how they view their exchanges; participants' perceptions of bias and/or conflict of interest on the part of the mediator; participants perceiving that they are treated with respect and

⁶² NADRAC, *Issues of Fairness and Justice in ADR* (Discussion Paper, NADRAC, 1997; NADRAC, *A Fair Say* (Guide, NADRAC, 1999); NADRAC, *National Principles for Resolution of Disputes* (Interim Report to the Attorney General, 2011).

⁶³ Unfortunately, the Mediator Standards Board does not provide copies of the NMAS Standards from 2008 and 2009, nor the draft NMAS Standards from 2007; although the author has copies of all documents, none is readily and publicly accessible.

⁶⁴ Sourdin, T., *Mediation in the Supreme and County Courts of Victoria* (Report, Department of Justice, Victoria, Australia, 2009).

⁶⁵ Alberts, J. K., B. L. Heisterkamp, and R. M. McPhee, 'Disputant Perceptions of and Satisfaction with a Community Mediation Program' (2005) 16(3) *The International Journal of Conflict Management* 218.

⁶⁶ Akin Ojelabi, L., 'Mediation and Justice: An Australian Perspective Using Rawls' Categories of Procedural Justice' (2012) 31(3) *Civil Justice Quarterly* 319; Sourdin, T., *Mediation in the Supreme and County Courts of Victoria* (Report, Department of Justice, Victoria, Australia, 2009).

dignity, and that their dispute is taken seriously; the participants being able to access additional information and advice; and the mediator not pressuring the participants to reach an agreement.⁶⁷

Participants are less likely to perceive procedural justice when they consider the mediation process to have been unfair *to either side* or that *both sides* were not treated equally – and when these issues were not acknowledged or addressed.⁶⁸ Consequently, there remains some tension for the mediator between the need to address perceived inequalities, or power imbalances, and the need to retain impartiality.⁶⁹ As yet, the tension has not been resolved.

For more than 40 years, context has been acknowledged as being highly influential in mediation itself, and in mediation research,⁷⁰ and the context of a mediation process is likely to influence the definition and measures of its effectiveness. The next section briefly considers this factor.

The influence of mediation context

Context has been reported to influence many aspects of mediation including the mediator's choice of model of practice, the role assumed by the mediator,⁷¹ the nature of the disputants' involvement and level of participation, and the nature and level of their legal advisers' involvement

⁶⁷ Akin Ojelabi, L., 'Mediation and Justice: An Australian Perspective Using Rawls' Categories of Procedural Justice' (2012) 31(3) *Civil Justice Quarterly* 319; Sourdin, T., *Mediation in the Supreme and County Courts of Victoria* (Report, Department of Justice, Victoria, Australia, 2009).

⁶⁸ Akin Ojelabi, L., 'Mediation and Justice: An Australian Perspective Using Rawls' Categories of Procedural Justice' (2012) 31(3) *Civil Justice Quarterly* 319.

⁶⁹ Akin Ojelabi, L., 'Mediation and Justice: An Australian Perspective Using Rawls' Categories of Procedural Justice' (2012) 31(3) *Civil Justice Quarterly* 319; Crowe, J., and R. Field, 'The Empty Idea of Mediator Impartiality' (2019) 29 *ADJR* 273; Douglas, S., 'Neutrality, Self-Determination, Fairness and Differing Models of Mediation' (2012) 19 *James Cook University Law Review* 19.

⁷⁰ Bingham, L. B., 'Transformative Mediation in the United States Postal Service' (2012) 5(4) *Negotiation and Conflict Management Research* 354; Kochan, T. A., and Jick, T., 'The Public Sector Mediation Process: A Theory and Empirical Examination' (1978) 22(2) *The Journal of Conflict Resolution* 709; Kressel, K., 'How Do Mediators Decide What To Do? Implicit Schemas of Practice and Mediator Decisionmaking' (2013) 28(3) *Ohio State Journal on Dispute Resolution* 709; Wissler, R., and R. W. Rack, Jr., 'Assessing Mediator Performance: The Usefulness of Participant Questionnaires' (2004) 1 *Journal of Dispute Resolution* 229.

⁷¹ Kressel, K., 'How Do Mediators Decide What To Do? Implicit Schemas of Practice and Mediator Decisionmaking' (2013) 28(3) *Ohio State Journal on Dispute Resolution* 709.

(where they attend the mediation). As noted above, context also influences the definitions of and measures for mediation effectiveness.

Context has been said to include the institutional structures within which both the dispute and the mediation occur, and that contextual influence is increased where the mediator has the status of being embedded within that institutional structure.⁷² Examples of such embedding include institutional mediation programs that operate using their own panels of mediators, their own standards of practice, and their own expectations of disputant participation.⁷³ It has been suggested that empirical studies may be affected by such institutionalisation and the research design should take into account the effects of contextual influence.⁷⁴

Mediation could also be considered to be institutional, and mediators embedded, when referrals regularly originate within the same context, with all participants being predominantly from a particular profession and regularly participating in mediations together, as is the case in many court-connected mediations.

1.4. The mediator

Mediators have evolved beyond the somewhat free-spirited, informal role first ascribed to them during the 1970s and 1980s. Originally considered to be 'born, not made',⁷⁵ mediators are now expected to undergo training and assessment that covers basic mediator techniques as well as procedures for conducting a mediation process.

⁷² Kressel, K., 'The Mediation of Conflict: Context, Cognition, and Practice' in P. Coleman, M. Deutsch, and E. Marcus (eds), *The Handbook of Conflict Resolution [Theory and Practice]* (Jossey-Bass, US, 2014).

⁷³ For example, in the Workers Compensation Commission of New South Wales, the Damages Disputes Pathway delineates a mediation process that includes specific instructions for lodgement of a claim, following which a mediator is appointed from an internal panel of mediators, and the mediation is conducted according to an established procedure [further information is available on <<https://www.wcc.nsw.gov.au/types-of-disputes/damages-dispute-pathway>>].

⁷⁴ Bingham, L. B., 'Transformative Mediation at the United States Postal Service' (2012) 5(4) *Negotiation and Conflict Management Research* 354; Kochan, T. A., and T. Jick, 'The Public Sector Mediation Process: A Theory and Empirical Examination' (1978) 22(2) *The Journal of Conflict Resolution* 209.

⁷⁵ Although this is a widely used phrase, for an example, see Boule, L., *Mediation Principles, Process, Practice* (3rd Edition, LexisNexis Butterworths, Australia, 2011).

A mediator is generally accepted to be the third party who oversees, controls, or sometimes even orchestrates, the mediation session and the participants' interactions and behaviours within it. Some descriptions might include that the mediator has a dispute resolution role, and some might refer to specific models of practice (eg the mediator is expected to facilitate discussions or more controversially is expected to evaluate the dispute).

Most definitions of mediation do not include a definition of the mediator, apart from being the person who conducts the mediation process, although many do include reference to the mediator's role not including a determinative capacity, or the giving of legal advice.

Within its Practice Standards, designed primarily for mediators, the NMAS specifies the knowledge and skills an accredited mediator is expected to have, as well as ethical principles mediators should uphold in their mediation practice, each of which is summarised below.⁷⁶

- Knowledge about:
 - The mediation process;
 - Interpersonal communication;
 - The law as it relates generally to mediation and to mediators;
- Skills for managing:
 - The mediation process;
 - Their own and other's communication and negotiation;
 - Disputants' high emotion;

⁷⁶ The Standards are available in full at the MSB website
<<https://msb.org.au/themes/msb/assets/documents/national-mediator-accreditation-system.pdf>>.

- Ethical principles to be upheld:
 - In relation to the mediator (integrity, accountability, and impartiality);
 - In relation to the disputants (self-determination, and safety); and
 - In relation to the process (confidentiality, and procedural fairness).

Defining the mediator's role

This section, and the ones that follow, consider several factors that affect how the mediator's role could be perceived or defined. For example, the role of the mediator can be categorised according to models of practice; according to interpretations of effectiveness; according to training and education approaches; and according to indicators of quality control.

Mediator behaviour has not been widely investigated and, perhaps as a result, has not been clearly differentiated from the mediator role, which itself is not always clearly differentiated from the mediation process. In simple terms, a mediator's role is accepted to be the third party in a mediation process – the person who conducts the mediation. Mediators are generally expected to be neutral (or impartial) and independent, and to act impartially when they are mediating, although there have been some recent challenges to this view, proposing that it is unrealistic in situations where disputant capacity and safety are at issue.⁷⁷

The recognised models of mediation are said to derive their identity from key aspects of the mediator's role.⁷⁸ For example, in evaluative mediation (which many claim is not mediation at all), the mediator's role includes evaluating each side's case so the disputants can make an informed decision about suitable settlement terms; in facilitative mediation, the mediator's role includes facilitating constructive communication between the disputants so they can discuss their situation

⁷⁷ Crowe, J., and R. Field, 'The Empty Idea of Mediator Impartiality' (2019) 29 *ADRJ* 273.

⁷⁸ Riskin, L. L., 'Understanding Mediators' Orientations, Strategies, and Techniques: A Grid for the Perplexed' (1996) 1(7) *Harvard Negotiation Law Review* 7.

with each other and jointly develop settlement options; and , in transformative mediation, the mediator's role includes empowering the disputants to make their own decisions and to transform their relationship.

At present, in the specific mediation practice area of Family Dispute Resolution (FDR), Family Dispute Resolution Practitioners (FDRPs) operate according to the requirements of the *Family Law (Family Dispute Resolution Practitioners) Regulations 2008*.⁷⁹ As the FDRP has, or can have, an advisory role, such third parties are often not known as mediators but 'FDRPs'. Unlike the broad scope of possibilities for non-FDRP mediators, these regulations are quite specific in their descriptions of the role and obligations for FDRPs. In order to gain accreditation as an FDRP, an applicant must have met several accreditation requirements, including several specialist training requirements and FDRP's have obligations to report abusive behaviour or actions under some circumstances. Although mediation training is required of FDRPs, NMAS accreditation is an optional accreditation criterion.^{80 81}

At present, there is no overarching description of the mediator's role that can accommodate all the approaches recognised in the models of practice and, in some situations, mediators can be expected to fulfil quite different roles. For example, in transformative mediation, the mediator is expected to focus on the empowerment of the actual disputants and the repair of their relationship; while in the evaluative model of practice, the mediator is expected to focus on achieving a settlement. One might query how the same role definition (ie mediator) can apply to such dissimilar processes. Perceptions of the mediator's role, and how those perceptions are interpreted and measured are integral to this thesis and are analysed in more detail in later Chapters.⁸²

Models of mediation practice

⁷⁹ A copy of the current regulations is available on <<https://www.legislation.gov.au/Details/F2008L03470>>.

⁸⁰ *Family Law (Family Dispute Resolution Practitioners) Regulations 2008 (Cth)* Section 5.

⁸¹ At the time of writing, the Family Law system in Australia is the subject of significant review and restructure, including the provision of services such as FDRPs.

⁸² See Chapter Four, Chapter Five, Chapter Six, and Chapter Seven.

Models of mediation practice are concepts that enable the categorisation of a mediator's role in conjunction with a recognised and predictable style of mediation process. From the mediator's viewpoint and in the Australian context, they range from the model in which the mediator's role is said to be less directive and interventionist (transformative mediation)⁸³ to those that are most directive and may not be regarded as mediation by many theorists (evaluative mediation). Discussions of models of mediation and their relative effectiveness are prevalent in much of the mediation literature.

It has been claimed that articulating models of practice can inform the participants' understanding of the mediation process, inform the development of training for mediators, and can even assist mediators themselves in seeking to understand what they are doing when they mediate. Models of practice achieved prominence in the mid-1990s, and, for many researchers and theorists, most mediators are expected to practise according to one or more of the recognised models.^{84 85}

Although it is generally accepted in Australia that there are four models of mediation practice (ie transformative, facilitative, narrative, and evaluative),⁸⁶ 25 models have been described in the US.⁸⁷ It was suggested that the unwieldy 25 be consolidated into five more practical categories (neutral, relational, transformative, analytic, and pressing);^{88 89} however, they have more relevance

⁸³ Many mediators who practise this model claim that the mediator's role can be quite interventionist. The complex issues raised by the use and meanings of terms in mediation research are considered in Chapter Four, as well as in Chapters Five, Six, and Seven. The effectiveness of models of mediation practice is considered in Chapter Three.

⁸⁴ Key commentary on models of practice includes: Alexander, N., 'The Mediation Metamodel: Understanding Practice' (2008) 26(1) *Conflict Resolution Quarterly* 97; Riskin, L. L., 'Understanding Mediators' Orientation, Strategies, and Techniques: A Grid for the Perplexed' (1996) 1(7) *Harvard Negotiation Law Review* 7; Riskin, L. L., 'Decisionmaking in Mediation: the New Old Grid and the New New Grid System' (2003) 79(1) *Notre Dame Law Review* 1.

⁸⁵ Research reported in this thesis suggests that expectation may not always be met; however, this is an area in which the research is equivocal; see Chapter Three and Chapter Four.

⁸⁶ Boulle, L., *Mediation Principles, Process, Practice* (3rd Edition, Lexis Nexis Butterworths, Australia, 2011).

⁸⁷ Wall, J. A., and T C Dunne, 'Mediation Research: A Current Review' (2012) 28 *Negotiation Journal* 217.

⁸⁸ Wall, J., and K Kressel, 'Research on Mediator Style: A Summary and Some Research Suggestions' (2012) 5(4) *Negotiation and Conflict Management Research* 403.

⁸⁹ The five were selected based on being readily recognisable and representative of the models of mediation that are most familiar and widely used.

to mediation practice in the US where the concepts of “analytic” and “pressing” are more frequently used when describing mediator styles.

Models of practice continue to be based on a relatively common structure which includes progressing through a staged process, though with different expectations of the mediator’s role and with an overlay of model-specific mediator techniques. One of the more intriguing and potentially controversial outcomes reported in mediation research is that few mediators are observed, or otherwise reported, to use the same model of practice in which they claim to have been trained or with which they claim to comply.⁹⁰ As this thesis shows, it is not always clear if the reported discrepancies are due to mediator differences, or to the researchers’ definitions and measures.

It has been suggested that a mediator’s choice of skills, strategies, and interventions at any time might be determined by a complex range of factors, including cognitive processes, personal preferences, considerations of overarching style preferences, and the perceived nature of the disputants’, and their advisers’, involvement.⁹¹ This calls into question the influence that conceptual models might have on the practice of mediation.

Conceptual development: process, models, and skills

⁹⁰ This discrepancy is reported widely in the research. For examples, see Bingham, L. B., ‘Transformative Mediation at the United States Postal Service’ (2012) 5(4) *Negotiation and Conflict Management Research* 354; Charkoudian, L., ‘Just My Style: The Practical, Ethical, and Empirical Dangers of the Lack of Consensus about Definitions of Mediator Style’ (2012) 5(4) *Negotiation and Conflict Management Research* 367; Kressel, K., E. A. Frontera, S. Forlenza, F. Butler, and L. Fish, ‘The Settlement-Oriented vs. the Problem-Solving Style in Custody Mediation’ (1994) 50(1) *Journal of Social Issues* 67; McDermott, E. P., and R. Obar, ‘“What’s Going On” in Mediation: An Empirical Analysis of the Influence of a Mediator’s Style on Party Satisfaction and Monetary Benefit’ (2004) 9 *Harvard Negotiation Law Review* 75; Wall and Chan-Serafin 2010.

⁹¹ Kressel, K., ‘How Do Mediators Decide What To Do? Implicit Schemas of Practice and Mediator Decisionmaking’ (2013) 28(3) *Ohio State Journal on Dispute Resolution* 709.

In mediation's early years in Australia, most mediation literature was focused on the process itself. Articles in early issues of the *ADRJ*,⁹² as mentioned above, refer mainly to the mediation process, with the mediator seen as the person who conducted that process.⁹³

Since the early 2000s, the focus has shifted more towards the mediator's technical skills: a prescribed set of strategies, techniques, specific actions and statements that are considered to be essential for effective practice. For example, the NMAS include relatively brief mention of the mediation process itself yet provide more extensive coverage of various mediator skills.⁹⁴ Although all models of practice have been instrumental in the development of recognised mediator skills, the classic, or pure, facilitative model appears to have been the most influential. Instruments for assessing mediator skills still include skills associated with pure facilitation, wherein the mediator's responsibility is to guide the mediation process and to facilitate discussions between the disputants, while the disputants themselves have responsibility for the substance of their dispute, and for developing its terms of resolution. Although this model of practice echoes the early ideological commitment to an empowering process facilitated by a non-interventionist mediator, it has been suggested that it is not as widespread in practice as it is in theory.⁹⁵ It is likely that the models used by mediators vary significantly according to context.

Other definitional criteria for mediators

The mediator can also be defined according to their appointment and practice status. For example, whether the mediator is a staff member of the organisation within which the mediation

⁹² The *ADRJ* (*Australasian Dispute Resolution Journal*) is Australia's leading specialist journal for mediation and DR research and commentary.

⁹³ Stevenson, E., 'The Use of Community Mediation in the Family Mediation Centre (NSW)' (1990) 1(1) *ADRJ* 24; Riekert, J., 'Alternative Dispute Resolution in Australian Commercial Disputes: Quo Vadis?' (1990) 1(1) *ADRJ* 31.

⁹⁴ Mediator Standards Board, *NMAS* (MSB, 2015) Part III Practice Standards, 9-13, available on <<http://www.msb.org.au/sites/default/files/documents.NMAS%20July%202015.pdf>>.

⁹⁵ Sourdin, T., 'Avoiding the Credentialling Wars: Mediation Accreditation in Australia' (2008) 27(2) *The Arbitrator and Mediator* 21.

occurs; a rostered panel member; a legal or judicial mediator associated with a court-connected program or service; or appointed as a private practitioner.

1.5. Mediator effectiveness

Measuring mediator effectiveness

As with definitions of mediators, most effectiveness measures are designed around the mediation process, not the mediator, and, over time, this has tended to make mediator effectiveness synonymous with process effectiveness, rather than each being examined separately. A small number of research studies have proposed key attributes of mediator effectiveness, including: the mediator being perceived as being fair and respectful, knowledgeable and impartial, prepared and skilful, and overseeing the completion of settlement;⁹⁶ however, these are complex and subjective concepts that are difficult to define and measure. It has also been suggested that a mediator's effectiveness relies on their capacity for exercising a constructive influence over the participants,⁹⁷ which is also problematic from a research perspective.

Mediator training and education

In Australia, since the early 2000s there has been extensive focus on the provision of mediator training and assessment that centres on the technical skills of mediators. In some instances, this approach arose from the contemporary approach to the skills-based training and assessment of apprentices.⁹⁸ Essential technical skills for mediators were identified, codified and categorised within the framework of models of practice, and mediation training courses and assessment processes were developed around them. In 2008, the NMAS became effective and it, too, specified

⁹⁶ Bingham, L. B., 'Transformative Mediation at the United States Postal Service' (2012) 5(4) *Negotiation and Conflict Management Research* 354; McDermott, P. E., 'Discovering the Importance of Mediator Style – An Interdisciplinary Challenge' (2012) 5(4) *Negotiation and Conflict Management Research* 340.

⁹⁷ Bowling, D., and D Hoffman (eds), *Bringing Peace Into the Room* (Jossey-Bass, USA, 2003).

⁹⁸ For example, see *Mediation Act (1997)* (Australian Capital Territory) [repealed 2015], and its attendant regulations which included specific detail about mediator technical skills and the means by which they should be assessed; the development of the specific skills-based training and assessment requirements that were included in the *Mediation Act 1997 (ACT) Regulations* were based on the then operating apprenticeship scheme.

technical skills and knowledge which were intended, in part, to guide mediator training and assessment.

At present, training for mediators in Australia is loosely regulated via key components prescribed by the NMAS. In general, the training is provided by mediation organisations and agencies, as well as by universities. The key influence on mediator training and assessment is the NMAS. The NMAS generally enjoys broad recognition in the mediation sector, and its Standards include requirements for initial mediator training and for the ongoing education and professional development of experienced mediators.⁹⁹ Most professional bodies, courts, tribunals, and government departments and agencies (at national, state/territory, and local levels) require mediators to have NMAS accreditation. Despite the NMAS not being a mandatory system, nor its Standards enforceable, most mediator training courses link their content and format to its requirements. In Australia, most organisations that provide basic mediation training, require that the training courses be based on an articulated process model, an associated model of practice (most commonly, the facilitative model), and mediator skills that align with the specified model and process.¹⁰⁰

Most of the organisations providing mediator accreditation also provide mediator training designed to meet their own accreditation requirements. As part of their responsibilities under the NMAS, RMABs undertake to recognise each other's mediator training programs for the purposes of mediator accreditation; however, the conduct of mediator training courses is a valuable source of income and organisations tend to conduct their own training, competing with each other for course attendees, and closely protecting their training materials and course content.

⁹⁹ Mediator Standards Board, *NMAS* (MSB, 2015) Part II Approval Standards, available on <<http://www.msb.org.au/sites/default/files/documents.NMAS%20July%202015.pdf>>.

¹⁰⁰ Sourdin, T., *Alternative Dispute Resolution* (4th Edition, Lawbook Co. Thomson Reuters, Australia, 2012), 219-246; Boyle, A., *Mediation: A Practitioner's Guide* (Institute of Arbitrators and Mediators Australia, 2006, 2009). For commercial-in-confidence reasons, it is difficult to obtain training and assessment documentation from mediator training bodies in Australia.

It has been suggested that the incorporation of mediation into programs, schemes, and court and tribunal panels is institutionalising mediation in Australia, with the institutionalisation being reinforced by the provision of institutionally based mediator training that focuses on the institution's preferences for mediator practice in terms of models and role.¹⁰¹

Quality control of mediation and of mediators

In Australia, there are two major systems that provide standards-based mediator accreditation at a national level and oversee quality control of mediation practice. One is the NMAS, and the other is the *Family Law (Family Dispute Resolution Practitioners) Regulations 2008* (FDRP Regulations).¹⁰²

The term "NMAS" applies to the Standards themselves, which are overseen by the MSB. While the Standards are subject to regular review by the MSB, and by RMABs,¹⁰³ the MSB does not apply the Standards directly, relying instead on RMABs to do so.

The MSB, oversees the operations of NMAS, including its system of self-regulating quality control vested in its organisational members (RMABs). The FDRP Regulations include Federal regulation of quality control. Although mediators generally can practise without NMAS accreditation, mediators cannot call themselves Family Dispute Resolution Practitioners (FDRPs) or practise as FDRPs without being accredited under the FDRP Regulations.¹⁰⁴

¹⁰¹ Boulle, L., *Mediation Principles, Process, Practice* (3rd Edition, LexisNexis Butterworths, Australia 2011).

¹⁰² Information about both systems is available on their relevant websites. Information about NMAS is available on <<https://msb.org.au/>>; <<https://www.legislation.gov.au/Details/F2008L03470>>; and information about Family Dispute Resolution is available on <<https://www.ag.gov.au/FamiliesAndMarriage/Families/FamilyDisputeResolution/Pages/Foraccreditedfamilydisputeresolutionpractitioners.aspx>>.

¹⁰³ Since its inception in early 2008, NMAS has been reviewed once leading to revised Standards being issued in 2015. At the time of writing, the system is again under review specifically to examine the feasibility, and practicality, of incorporating standards for conciliators and for Indigenous conflict managers and peacemakers.

¹⁰⁴ As noted earlier in this Chapter, the Family Law Court, and its associated services, including Family Dispute Resolution, are under review and possible re-structure.

Both systems include standards for initial accreditation, although the requirements that must be met by FDRP applicants are more complex and include vocational and post-graduate training.¹⁰⁵ Both NMAS mediators and FDRPs are required to meet similar criteria for on-going preservation of their accreditation status.¹⁰⁶

The NMAS and the FDRP systems each include similar requirements regarding the management of complaints about practitioners; however, responsibility for overseeing non-compliance reflect the differences in responsibility under the NMAS and under the FDRP Regulations. For example, under the NMAS, RMABs are responsible for overseeing and acting on complaints about non-compliance of their mediator members, and neither the NMAS nor the MSB include specific requirements for RMAB actions on complaints. On the other hand, under the FDRP Regulations, the Department retains responsibility for acting on complaints and the Regulations specify actions the Department may take in the event of an FDRP's non-compliance.¹⁰⁷

In addition to these two national systems, the mediation landscape in Australia includes a proliferation of individual professional dispute resolution organisations that oversee quality control of mediation and mediators. There is a wide range of such organisations, including: The Resolution Institute¹⁰⁸, the Australian Mediation Association¹⁰⁹, the Chartered Institute of Arbitrators¹¹⁰, Relationships Australia¹¹¹, the Community Justice Centres (in NSW¹¹² and the Northern Territory¹¹³), the Dispute Settlement Centre of Victoria¹¹⁴, the Dispute Resolution Branch (Queensland

¹⁰⁵ *Family Law (Family Dispute Resolution Practitioners) Regulations 2008* (Cth), Regulation 5.

¹⁰⁶ See *Family Law (Family Dispute Resolution Practitioners) Regulations 2008* (Cth), Regulation 14; Mediator Standards Board, NMAS, (MSB, 2015) Part II Approval Standards, 5-6, NMAS, July 2015, available on <<http://www.msb.org.au/sites/default/files/documents.NMAS%20July%202015.pdf>>.

¹⁰⁷ *Family Law (Family Dispute Resolution Practitioners) Regulations 2008* (Cth), Regulations 17-22.

¹⁰⁸ Further information is available on <<http://www.resolution.institute/>>.

¹⁰⁹ Further information is available on <<http://ama.asn.au/>>.

¹¹⁰ Further information is available on <<https://www.ciarb.net.au/>>.

¹¹¹ Further information is available on <<http://www.relationships.org.au/>>.

¹¹² Further information is available on <<http://www.cjc.justice.nsw.gov.au/>>.

¹¹³ Further information is available on <<http://www.cjc.nt.gov.au/>>.

¹¹⁴ Further information is available on <<http://www.disputes.vic.gov.au/>>.

Department of Justice and the Attorney General)¹¹⁵, the Citizens Advice Bureau (Western Australia)¹¹⁶, the Conflict Resolution Service (ACT)¹¹⁷, and the Australian Dispute Resolution Association, or its state equivalents. All these organisations are RMABs under the NMAS¹¹⁸ and many also operate under the FDRP Regulations.

Many mediators retain membership of one or more of the professional organisations, making themselves subject to the relevant organisations' implementation of NMAS and/or FDRP Regulations. The mediators are responsible for their own ongoing education and professional development, and for maintaining their ongoing accreditations. RMABs are required to have ethical codes of conduct with which their mediator members are expected to comply and some of the mediator membership organisations have additional internal standards of practice for mediators and internal processes for overseeing mediator compliance.

Some mediation programs also include their own quality control regime which is overseen internally. For example, courts and tribunals may have RMAB status or will themselves handle non-compliance complaints about mediator members rather than submit a complaint to an RMAB, or to one of the professional organisations.

Although many FDRPs practise full-time, there are also many mediators for whom their mediation practice is an adjunct to their primary profession, such as law, accountancy, engineering, psychology or archaeology, and mediators usually retain additional membership of relevant non-mediator professional organisations. Many of those same professional organisations have

¹¹⁵ In Queensland, the Dispute resolution Branch oversees the provision of dispute resolution services, including mediation, through Dispute Resolution Centres; the RMAB status and quality control of mediators resides with the Dispute Resolution Branch; quality control information is available on <https://www.qld.gov.au/law/legal-mediation-and-justice-of-the-peace/training-in-dispute-resolution/national-mediator-re-accreditation/>.

¹¹⁶ Further information is available on <https://www.cabwa.com.au/>.

¹¹⁷ Further information is available on <http://www.crs.org.au/>.

¹¹⁸ A full listing of RMABs is available on the MSB website <https://msb.org.au/accreditation-bodies/rmab-contact-list>.

developed internal professional support services for their mediator members, some are also RMABs, and some have their own mediator accreditation systems.¹¹⁹

The complex array of professional accreditation, compliance, and support services that are available for mediators has led to an equally complex quality control landscape, and, apart from FDRPs, it is based on self-regulation. While many RMABs ask their mediator members to comply with the NMAS Standards, they also retain their own practice standards and ethical codes of conduct. Through their choice of membership, mediators can subject themselves to any or all these arrangements and many contribute to the sector's complexity through their membership with multiple organisations.

Mediator behaviour

Mediator behaviour has not been defined and studies of it are limited; however, it is a key focus of this thesis. Although some researchers consider mediator behaviour to include everything done by an individual mediator during mediation, including responding to and influencing the dynamics of the process,¹²⁰ others have suggested that research should include all pre-mediation and post-mediation activities for a fuller understanding of the process and the mediator's role.¹²¹ It could be said that mediator behaviour includes all that a mediator says and does to fulfil the mediator role; however, that assumes clarity about the mediator's role.

Mediator behaviour includes what the mediator does as well as the mediator's decisions to act in certain ways, and researchers have sought to analyse individual mediators' decision-making

¹¹⁹ Examples include the State-based Law Societies and their equivalents: the Law Society of NSW provides Dispute Resolution Specialist Accreditation for its members, available on <<http://lawsociety.com.au/cs/groups/public/documents/internetcontent/026295.pdf>>; the Law Institute of Victoria, provides a similar Specialist Accreditation program, available on <<http://www.liv.asn.au/Professional-Development/Accredited-Specialisation/Areas-of-Specialist-Accreditation/Mediation.aspx>>.

¹²⁰ Kressel, K., T. Henderson, W. Reich, and C. Cohen, 'Multidimensional Analysis of Conflict Mediator Style' (2012) 30(2) *Conflict Resolution Quarterly* 135; Kressel, K., 'How Do Mediators Decide What To Do? Implicit Schemas of Practice and Mediator Decisionmaking' (2013) 28(3) *Ohio State Journal on Dispute Resolution* 709.

¹²¹ Charkoudian, L., 'Just My Style: The Practical, Ethical, and Empirical Dangers of the Lack of Consensus about Definitions of Mediator Style' (2012) 5(4) *Negotiation and Conflict Management Research* 367; Kochan, T. A., 'Commentary' (2012) 5(4) *Negotiation and Conflict Management Research* 392.

processes, considering them to be integral to what the mediator chooses to do at any time during the mediation, without necessarily being related to any model of practice.¹²²

It is inadequate to describe the mediator's role as being that of the third party who conducts the mediation process. Such a description belies the multiple complexities inherent to the practice of mediation and to what mediators say and do during mediation. For example, the NMAS require mediators to safeguard the procedural fairness of the process, ensuring that it is 'fair, equitable and impartial', while also ensuring that participants have appropriate levels of participation and contribute to the process and to any outcomes.¹²³ These responsibilities involve more complex activities than merely conducting the mediation process.

The next Section of this Chapter provides an overview of mediation research, including brief descriptions of constraints reported by mediation researchers.

1.6 Mediation research

As part of an analysis and appraisal of the selected empirical studies, this thesis includes detailed commentary on key issues in mediation research, including definitions and measures;¹²⁴ empirical methodologies;¹²⁵ and constraints on research and on researchers.¹²⁶

Despite their role in illuminating the practicalities of the mediation process, empirical studies are the lesser component in the relatively small field of mediation research. Theoretical studies are more prominent and are important for developing mediation's conceptual frameworks. In its investigation of what is known about mediator effectiveness, the research supporting this thesis is

¹²² Kressel, K., T. Henderson, W. Reich, and C. Cohen, 'Multidimensional Analysis of Conflict Mediator Style' (2012) 30(2) *Conflict Resolution Quarterly* 135; Wall, J. A., Jr, and S. Chan-Serafin, 'Do Mediators Walk Their Talk in Civil Cases?' (2010) 28(1) *Conflict Resolution Quarterly* 3.

¹²³ NMAS Practice Standards, 2015, section 7.1, available on <<https://msb.org.au/themes/msb/assets/documents/national-mediator-accreditation-system-2015.pdf#page=9>>.

¹²⁴ See Chapters Three and Four.

¹²⁵ See Chapters Six, Seven, and Eight.

¹²⁶ See Chapter Five.

focused largely on empirical work, although, where they contribute to analysis, theoretical and doctrinal works are included.

Mediation is said to have developed from two directions, each of which has influenced how the process continues to be evaluated.¹²⁷ One direction was from the community sector, whose measures of mediation's effectiveness derive from a sense of the self-responsible community with a focus on participation and satisfaction. The other direction was from the legal sector, whose measures of mediation effectiveness derive from its need for effective case management in a legal context and a focus on the efficient delivery of mutually satisfactory resolution of disputes.

Empirical studies of mediation

The overarching purposes of empirical investigations of mediation have been said to include:

- i) Establishing and confirming mediation's effectiveness as a process for resolving conflicts and disputes;¹²⁸

¹²⁷ Kovach, K. K., 'Privatization of Dispute Resolution: In the Spirit of Pound, but Mission Incomplete: Lessons Learned and a Possible Blueprint for the Future' (2006) 48(1) *South Texas Law Review* 1003; Stevenson, E., 'The Use of Community Mediation in the Family Mediation Centre (NSW)' (1990) 1(1) *ADRJ* 24; G. Weiner, 'A Call for Evidence-based Standards for Mediator Quality' (2012) *Professional Standards and Ethics*, *Unpublished Paper*, Paper 2, available on <<http://www.civiljustice.info/profstan/2>>.

¹²⁸ Henderson, D. A., 'Mediation Success: An Empirical Analysis' (1996) 11(1) *Ohio State Journal on Dispute Resolution* 105; Karim, A. and D. Dilts, 'Determinants of Mediation Success in the Iowa Public Sector' (1990) 19(2) *Journal of Collective Negotiations* 129; Karim, A. and R. Pegnetter, 'Mediator Strategies and Qualities and Mediation Effectiveness' (1983) 22(1) *Industrial Relations* 105; Kressel, K., E. A. Frontera, S. Forlenza, F. Butler, and L. Fish, 'The Settlement-Orientation vs the Problem-Solving Style' (1994) 50(1) *Journal of Social Issues* 67; Mareschal, P. M., 'What Makes Mediation Work? Perspectives on Resolving Disputes' (2005) 44(3) *Industrial Relations* 509; McEwen, C. A., *An Evaluation of the ADR Pilot Project: Final Report 1* (Unpublished report, 1992); Posthuma, R. A., A. Richard, J. B. Dworkin, and M. S. Swift, 'Mediator Tactics and Sources of Conflict: Facilitating and Inhibiting Effects' (2002) 41(1) *Industrial Relations* 94; Pruitt, D. G., R. S. Peirce, N. B. McGillicuddy, G. L. Welton, and L. Castrianno, 'Long-Term Success in Mediation' (1993) 17(3) *Law and Human Behavior* 313; Slaikeu, K. A., R. Culler, J. Pearson, and N. Thoennes, 'Process and Outcome in Divorce Mediation' (1985) 10 *Mediation Quarterly* 55; Sourdin, T., *Dispute Resolution Processes for Credit Consumers* (Project Report, Conflict Resolution Research Centre, La Trobe University, 2007); Sourdin, T., *Mediation in the Supreme and County Courts of Victoria* (Report prepared for the Department of Justice, Victoria, Australia, April 2009), available on <<http://www.civiljustice.info/adreval/1/>>; Sourdin, T., *Exploring Pre-Action Requirements: Resolving Disputes Outside Courts* (ACJI, Monash University, October 2012); Sourdin, T., and T. Matruglio, *Evaluating Mediation – New South Wales Settlement Scheme 2002* (2004) *Mediation*. Paper 7, available on <<http://www.civiljustice.info/med/7/>>; Thoennes, N. A., and J. Pearson, 'Predicting Outcomes in Divorce Mediation: The Influence of People and Process' (1985) 41(2) *Journal of Social Issues* 115; Wall, J. A., Jr, and D. E. Rude, 'The Judge as a Mediator' (1991) 76(1) *Journal of Applied Psychology* 54; Wissler, R. L., 'Mediation and Adjudication in Small Claims Court: The Effects of Process and Case Characteristics' (1995)

- ii) Increasing what is known about mediation and its practice;¹²⁹ and
- iii) Improving the standard of mediation practice.¹³⁰

29(2) *Law & Society Review* 323; Wissler, R. L., *Trapping the Data: An Assessment of Domestic Relations Mediation in Maine and Ohio Courts* (Unpublished report, 1999); Wissler, R. L., 'Court-Connected Mediation in General Civil Cases: What We Know from Empirical Research' (2002) 17(3) *Ohio State Journal on Dispute Resolution* 641; Woodward, J. G., 'Settlement Week: Measuring the Promise' (1990) 11 *Northern Illinois University Law Review* 1; Zubeck, J. M., D. G. Pruitt, R. S. Peirce, N. B. McGillicuddy, and H. Syna, 'Disputant and Mediator Behaviors Affecting Short-Term Success in Mediation' (1992) 36(3) *Journal of Conflict Resolution* 546.

¹²⁹ Alberts, J. K., B. L. Heisterkamp, and R. M. McPhee, 'Disputant Perceptions of and Satisfaction with a Community Mediation Program' (2005) 16(3) *The International Journal of Conflict Management* 218; Burrell, N. A., W. A. Donohue, and M. Allen, 'The Impact of Disputants' Expectations on Mediation, Testing an Interventionist Model' (1990) Fall 1990 *Human Communication Research* 104; Carnevale, P. J. D., and R. Peggnetter, 'The Selection of Mediator Tactics in Public Sector Disputes: A Contingency Analysis' (1985) 41(2) *Journal of Social Issues* 2; Dilts, D. A. and A. Karim, 'The Effect of Mediators' Qualities and Strategies on Mediation Outcomes' (1990) 45(1) *Relations Industrielles/Industrial Relations* 22; Hiltrop, J. M., 'Factors Associated with Successful Labor Mediation' in K. Kressel and D. G. Pruitt (eds), *Mediation Research: The Process and Effectiveness of Third-Party Intervention* (Jossey-Bass, USA, 1989); Kochan, T. A., and T. Jick, 'The Public Sector Mediation Process: A Theory and Empirical Examination' (1978) 22(2) *The Journal of Conflict Resolution* 209; Kressel, K., 'How Do Mediators Decide What To Do? Implicit Schemas of Practice and Mediator Decisionmaking' (2013) 28(3) *Ohio State Journal on Dispute Resolution* 709; McDermott, E. P., and R. Obar, "'What's Going On" in Mediation: An Empirical Analysis of the Influence of a Mediator's Style on Party Satisfaction and Monetary Benefit' (2004) 9 *Harvard Negotiation Law Review* 75; McGillicuddy, N. B., G. L. Welton, and D. G. Pruitt, 'Third-Party Intervention: A Field Experiment Comparing Three Different Models' (1987) 53(1) *Journal of Personality and Social Psychology* 104; Pruitt, D. G., W. R. Fry, L. Castrianno, J. Zubeck, G. L. Welton, N. B. McGillicuddy, and C. Ippolito, 'The Process of Mediation: Caucusing, Control, and Problem Solving' in M. A. Rahim (ed), *Managing Conflict: An Interdisciplinary Approach* (Praeger, USA, 1989); Shapiro, D., R. Drieghe, and J. Brett, 'Mediator Behavior and the Outcomes of Mediation' (1985) 41(2) *Journal of Social Issues* 101; Slaikeu, K. A., R. Culler, J. Pearson, and N. Thoennes, 'Process and Outcome in Divorce Mediation' (1985) 10 *Mediation Quarterly* 55; Wall, J. A., Jr, and S. Chan-Serafin, 'Processes in Civil Case Mediations' (2009) 26(3) *Conflict Resolution Quarterly* 261; Wall, J. A., Jr, and S. Chan-Serafin, 'Do Mediators Walk Their Talk in Civil Cases?' (2010) 28(1) *Conflict Resolution Quarterly* 3; Welton, G. L., and D. G. Pruitt, 'The Mediation Process: The Effects of Mediator Bias and Disputant Power' (1987) 13(1) *Personality and Social Psychology Bulletin* 123.

¹³⁰ Gale, J., R. L. Mowery, M. S. Herrman, and N. L. Hollett, 'Considering Effective Divorce Mediation: Three Potential Factors' (2002) 19(4) *Conflict Resolution Quarterly* 389; Goldberg, S. B., and M. L. Shaw, 'Further Investigation into the Secrets of Successful and Unsuccessful Mediators' (2008) 26(8) *Alternatives to the High Cost of Litigation* 149; Jones, T. S., 'Lag Sequential Analyses of Mediator-Spouse and Husband-Wife Interaction in Successful and Unsuccessful Divorce Mediation' in M. A. Rahim (ed), *Managing Conflict: An Interdisciplinary Approach* (Praeger, USA, 1989); Kimsey, W. D., R. M. Fuller, A. J. Bell, and B. C. McKinney, 'The Impact of Mediator Strategic Choices: An Experimental Study' (1994) 12(1) *Mediation Quarterly* 89; Kimsey 1993; Kressel, K., T. Henderson, W. Reich, and C. Cohen, 'Multi-Dimensional Analysis of Conflict Mediator Style' (2012) 30(2) *Conflict Resolution Quarterly* 135; McDermott, E. P., and R. Obar, "'What's Going On" in Mediation: An Empirical Analysis of the Influence of a Mediator's Style on Party Satisfaction and Monetary Benefit' (2004) 9 *Harvard Negotiation Law Review* 75; Peeples, R., C. Harris, and T. Metzloff, 'Following the Script: An Empirical Analysis of Court-Ordered Mediation of Medical Malpractice Cases' (2007) 2007(1) *Journal of Dispute Resolution* 101; Swaab, R. I., *Face First: Pre-Mediation Caucus and Face in Employment Disputes* (Presentation, Annual Association of Conflict Management Conference, June 2009); Swaab, R. I., and J. Brett, *Caucus with Care: The Impact of Pre-Mediation Caucuses on Conflict Resolution* (Meetings Paper, International Association of Conflict Management, 2007); Vanderkooi, L., and J. Pearson, 'Mediating Divorce Disputes: Mediator Behaviors, Styles and Roles' (1983) 32(4) *Family Relations* 557; Wall, J. A., Jr, and S. Chan-Serafin, 'Processes in Civil Case Mediations' (2009) 26(3) *Conflict Resolution Quarterly* 261; Wall, J. A., Jr, and S. Chan-

Empirical studies of mediation have tended to focus on whether the mediation process can be predicted to produce settlements in a timely and cost-effective way, and whether participants are consistently satisfied with the process and its outcomes, as well as with the mediator. Many studies have investigated the process components that can be shown to contribute to the achievement of agreements and have sought to establish the primacy of any of the models of practice.¹³¹ Empirical studies have been conducted in the settings typical of mediation, including in court-connected disputes, in community-based disputes, in industrial disputes, and in divorce/custody disputes. Although there have been many studies of mediation within those settings, analyses that compare mediation effectiveness across settings are rare. There have been very few longitudinal studies of mediation effectiveness, so the long-term effects or benefits of mediation have been difficult to ascertain. Empirical studies include limited information about mediator demographics (eg age, ethnicity, education, gender, etc) and investigations of minority group access to and satisfaction with mediation are not common.

Funding and support

As in other fields of research, including those linked to the justice sector, mediation researchers have noted the limited availability of funding and support for their activities, and their reliance on funders who have vested interests in the research outcomes. For example, where research projects are funded by mediation programs themselves, or by courts, or by the justice system, or by any other sector in which mediation occurs, and there are limited public grant opportunities, there is a likelihood that the focus of the research may be defined by the primary

Serafin, 'Do Mediators Walk Their Talk in Civil Cases?' (2010) 28(1) *Conflict Resolution Quarterly* 3; Welton, G. L., D. G. Pruitt, and N. B. McGillicuddy, 'The Role of Caucusing in Community Mediation' (1988) 32(1) *The Journal of Conflict Resolution* 181; Welton, G. L., D. G. Pruitt, N. B. McGillicuddy, C. A. Ippolito, and J. M. Zubeck, 'Antecedents and Characteristics of Caucusing in Community Mediation' (1992) 3(4) *International Journal of Conflict Management* 303; Zubeck, J. M., D. G. Pruitt, R. S. Peirce, N. B. McGillicuddy, and H. Syna, 'Disputant and Mediator Behaviors Affecting Short-Term Success in Mediation' (1992) 36(3) *Journal of Conflict Resolution* 546.

¹³¹ In its analysis of mediation effectiveness, Chapter Three considers models of mediation practice in more detail.

interests of the research funder. Many research studies into mediation are sponsored, or funded, by mediation programs and other organisations for whom the research direction, results and findings may influence the research objectives as well as future operations and ongoing funding.

Mediation research funders have their own financial constraints and may prefer to support the most cost and time efficient research methods, in anticipation of obtaining quick results. For example, where a mediation program has the stated goals of producing settlements in the majority of cases, and of having high levels of participant satisfaction with the mediation process and its outcomes, the program's administrators are most likely to prefer research that is designed to be aligned to these objectives.

The mediation field enjoys government and institutional support through the proliferation of mediation services and, although studies with a focus on settlement rates and participant satisfaction may be contributing to the continued growth in mediation's availability, a close reading of mediation research shows that the findings about settlement and satisfaction are not clear-cut. It is unclear if the equivocal findings arise directly from the research data or reflect the ways in which the data has been collected.

Constraints on empirical research

It is recognised that investigations of mediation face their own specific difficulties, and mediation researchers report that those difficulties include access restrictions caused by mediation's confidentiality (and the confidentiality of the study data); problems accessing funding and support for empirical studies; the influence of vested interests in the outcomes of research; the pressure for "good news" findings that confirm mediation's effectiveness; access to suitable study participants; the professional requirements, and pressure on researchers, for frequent publications; the effects

that research results may have on broader social systems (eg the legal and justice systems); and gaining ethics approval for what is human research.¹³²

Access to mediation records for the purpose of data collection can also present problems for researchers. For example, although courts and tribunals may maintain some mediation case records, they are not usually accessible without the participants' consent and consent may be impossible to obtain if the contact details retained by the court or tribunal are incomplete. Many courts may have no records relating to a mediated referral or outcome and may simply record a consent judgment to reflect that a mediation occurred (and reached agreement). Many mediation agencies receive public funding for the provision of mediation services and could be valuable sources of data for mediation research; however, privacy requirements and ethical concerns ensure that their public reports (such as annual reports) include only basic quantitative data relating to rates of mediation usage. The fact that mediation is ordinarily a "confidential" process can raise additional obstacles both in terms of access to more extensive data (if it is available) and access to participant details. There is a dearth of research based on private mediations and private mediators, perhaps caused in part by the difficulty in accessing any records of mediations conducted by private mediators.

In addition, the field of mediation research is small which is likely to limit the number of researchers working in it, the scope of their investigations, and the range of their research approaches. The limited numbers of researchers may also magnify their influence on the field and on each other's work. Chapter Two considers the limitations of the selected studies that are the focus of the research contributing to this thesis.

Study participants

¹³² Chapter Seven includes a targeted review of constraints on mediation research.

When considering the participants in any empirical study of mediation, there are two issues: the selection of suitable participants, and their capacity to provide the information that researchers require.¹³³

Empirical researchers rely heavily on information provided by mediation participants (mediators, disputants, and others) and it is reasonable to expect that, as key stakeholders in any mediation process, they can provide valuable information about their experiences. However, the credibility of the data depends on the researchers having selected participants who are suitable for the roles they are to fulfil in the study, and on the participants themselves being appropriately knowledgeable and experienced to be able to provide the required information. For example, do disputants have the knowledge and experience to report on the detailed events assumed to have occurred during mediation; are mediators free to report on their own actions during mediation if the results will be available to others (say, in published form); are mediators willing to report what they do in mediation if they know their actions do not “fit” the accepted, or required, model of practice?

Researchers report that it can be difficult to enlist mediators and disputants into empirical studies, leading to studies with small sample sizes which affect the reliability of study results. Although there can be many explanations for this (including disputants’ understandable lack of interest in research, concerns about confidentiality, and mediators’ time constraints), it is a constraint that might be overcome by encouraging mediators as research collaborators rather than as study participants.

Empirical methodologies

¹³³ Chapter Five of this thesis includes analysis of the selection and capacity of study participants as reported in the selected literature.

In general, empirical studies of mediation seek to understand what happens during mediation, and, to that end, they collect research data from mediation participants (including the mediator, the disputants, and their legal advisers) and/or from observational reports.¹³⁴

To inform empirical studies of mediation, most research data is collected from mediation participants using surveys or interviews. Information is also collected from observational reports (eg live observations, or recordings), and from court or program records. Researchers seek information about what happens during mediation including what the mediator said and/or did, and participants' perceptions of the mediator, of fairness (of the process, of its outcomes, and of the mediator), and their own sense of satisfaction with their mediation experience. It is common for researchers to ask mediators to report on themselves including assessments of their own skills and effectiveness.

Some empirical studies have collected data from lawyers and from mediators to examine the role of lawyers in mediation and the extent of their influence on their client's participation and levels of satisfaction.¹³⁵

Although commentators regularly suggest that more reliable data for empirical studies is to be collected from observers, the method is widely said to be expensive, complex, and time consuming to design and to undertake. It has also been said to be strongly reliant on the cooperation of mediators and the administrators of subject programs¹³⁶ – where such cooperation is limited access to observable mediations is also likely to be limited. A small number of researchers have suggested that their own observational studies might have been affected by subjective factors (such as the observers' personal interpretations of what they perceived).¹³⁷ It is not common for empirical

¹³⁴ Chapter Six of this thesis includes analysis of the data collection methodologies described in the selected literature.

¹³⁵ Rundle, O., 'Barking Dogs: Lawyer Attitudes Towards Direct Disputant Participation in Court-Connected Mediation of General Civil Cases' (2008) 8(1) *QUTLJ* 77; Douglas, K., and B. Batagol, 'The Role of Lawyers in Mediation: Insights from Mediators at Victoria's Civil and Administrative Tribunal' (2014) 40(3) *Monash University Law Review* 758.

¹³⁶ Druckman, D., and J. A. Wall, 'A Treasure Trove of Insights: Sixty Years of JCR Research on Negotiation and Mediation' (2017) 61(9) *Journal of Conflict Resolution* 1898.

¹³⁷ For example, see Gale, J., R. L. Mowery, M. S. Herrman, and N. L. Hollett, 'Considering Effective Divorce Mediation: Three Potential Factors' (2002) 19(4) *Conflict Resolution Quarterly* 389.

studies to include data from all sources (ie from mediators and from disputants and from observations). The development of collaborative research networks and current developments in artificial intelligence may present opportunities for innovative approaches to data collection for future empirical studies of mediation.¹³⁸

The remainder of this Chapter describes the significance of this thesis, including its objectives and Research Questions, its scope, and its methodology.

1.7. Thesis overview

1.7.0. Significance of this research

Although research findings are equivocal – and possibly contextually dependent – as to whether the mediator or the disputants or the disputants’ advisers assert more influence during a mediation session, it is accepted that the mediator is a key influencer.¹³⁹ A number of studies claim to have investigated the mediator’s role, and the effectiveness of model-based mediator strategies and techniques; however, there are very few studies of, and very little knowledge about, what mediators do during mediation. As the mediation process has come to be used more widely and in more institutional settings, it is becoming more important to put to one side the history of assumptions and beliefs about mediation, and develop a credible evidence-base about what mediators do, why they do it, and how they might influence mediation’s effectiveness.

Also, there is a need to establish recognised and evidence-based benchmarks for effective mediator practices, and to raise the professional credibility of the mediation field. The beneficiaries of knowing about mediator effectiveness include all mediation stakeholders: practicing mediators; users of mediation; mediation policy-makers and program administrators with responsibility for mediator quality control in the legal and justice systems; mediation trainers; and those with responsibility for ongoing mediator education and for maintenance of standards of practice.

¹³⁸ Chapter Eight considers future options for mediation research.

¹³⁹ Druckman, D., and J. A. Wall, ‘A Treasure Trove of Insights: Sixty Years of JCR Research on Negotiation and Mediation’ (2017) 61(9) *Journal of Conflict Resolution* 1898.

Through its analysis and appraisal of a selection of influential empirical studies of mediation, this thesis contributes to establishing evidence-based knowledge about mediator effectiveness.

1.7.1. Contribution to the field

Mediation research has been, and continues to be, dominated by considerations of what this thesis identifies as “simple effectiveness” which is measured in terms of whether a mediated agreement has been reached. Traditionally, researchers have investigated the role of *the mediation process* in achieving simple effectiveness, and, in the small number of studies that have sought to investigate the role of the mediator, they have limited their focus to the mediator’s influence over the achievement of simple effectiveness. Although a smaller number of investigations has examined the achievement of what this thesis identifies as “complex effectiveness” in mediation,¹⁴⁰ again most of those have focused on the influence of the mediation process rather than on the influence of the mediator. Although such studies are credited with having increased levels of understanding about what makes an effective mediator, it is unclear if they can be considered as an “evidence-base”.

Acknowledging a research approach recommended elsewhere¹⁴¹, this project seeks to identify and challenge the assumptions that underlie the dominant theoretical frameworks applied in empirical studies of mediation, and the traditional empirical methodologies used by mediation researchers. It is uncommon for empirical studies of mediation to be subjected to metaresearch and systematic appraisal approaches, and specific procedures and appraisal tools were developed for use in this project.¹⁴² The research approach in this thesis fills two gaps in mediation research:

- Establishing what is known about mediator effectiveness; and

¹⁴⁰ See Chapter Three of this thesis for a more detailed examination of the definition and measurement of effectiveness in the selected empirical studies of mediation.

¹⁴¹ Alvesson, M., and J. Sandberg, *Constructing Research Questions: Doing Interesting Research* (SAGE Publications Ltd, UK, 2013).

¹⁴² Templates of appraisal instruments are included at Appendix C.

- Taking a systemic approach to confirming the reported constraints on mediation research.

1.7.2. Research objective

The overall objective of this thesis is to establish what is known about mediator effectiveness including what makes a “good” mediator.¹⁴³

1.7.3. Research Questions

Chapters Three to Seven of this thesis explore the selected empirical studies of mediation in terms of research issues and methodological, legal, social, and behavioural issues in order to answer the Research Questions:

1. What is an effective, or “good”, mediator?
 - a. What are the attributes of “good” mediators?
 - b. What are the behaviours of “good” mediators?
 - c. What do “good” mediators do well?
 - d. What are the limitations of existing empirical studies of mediator effectiveness?

1.7.4. Scope of this research

This thesis focuses on research approaches to empirical investigations of mediation, and mediator, effectiveness. Applying a metaresearch framework, the scope of its methodologies are outlined below and include thematic analysis, targeted review, as well as systematic and bibliometric analysis.

¹⁴³ The research underpinning this thesis focuses on empirical investigations of the practicalities of mediator effectiveness. It does not consider the complex issues associated with a mediator being ethically “good”.

Research methodologies are pivotal to the credibility of research data and to the validity of results and study outcomes. Although many of the selected researchers question the reliability of traditional data collection methods for empirical studies of mediation, they continue to apply those same methods in their own research. The ongoing improvement of mediator practice depends on researchers designing credible empirical studies of what mediators do and producing reliable findings with applicability beyond the studies' own settings.

The body of literature that forms the main focus of the thesis is a selection of 47 empirical studies of mediation selected from a compilation of the American Bar Association Task Force on Mediator Techniques.¹⁴⁴ The US continues to dominate mediation research and publishing and the contents of the selected literature are drawn mainly from there, although they do include four reports from Australia, one study conducted in the United Kingdom (UK), and two conducted in The Netherlands. The selection includes articles published between 1978 and 2013. The selected studies have been conducted in a variety of mediation contexts, including court-connected mediations; labour/management (or industrial) mediations; family, divorce, and child custody mediations; community-based mediations; evaluations of mediation programs and services; and studies of simulated mediations. One of its limitations is that the selection includes a preponderance of US research and does not include reports from other regions such as Asia, Africa, and Latin America.

While the selected literature does include two unpublished papers, it does not include significant amounts of unavailable research. For example, it includes *only* two unpublished research reports, and does not include program evaluations whose findings are not publicly available.

1.7.5. Methodology

This thesis uses a metaresearch framework to explore research and methodological issues in the selected empirical studies, with the intent of explaining answers to the thesis Research

¹⁴⁴ The selected literature and its provenance are described in more detail in Chapter Two.

Questions. Metaresearch is a relatively recent approach devised for assessing and evaluating a whole body of research, and designed to detect any methodological factors that may contribute to a lack of information about key research topics (such as mediator effectiveness).¹⁴⁵ Incorporated within that framework are content and bibliometric analyses of the selected empirical studies, as well as a systematic appraisal of their research methodologies. Below is an outline of the methodologies used in this thesis.

1. Two thematic analyses of the selected literature focus on definitions and measurements of mediation effectiveness, and on the terminologies used by researchers to describe what mediators say and do during mediations.
2. The same selection of empirical studies is subjected to a systematic appraisal and limited bibliometric analysis. The appraisal includes analysis of the core methodological components:
 - a. Study participants – their selection and allocation to research roles;
 - b. Data collection methodologies – their selection and application; and
 - c. Researcher influence and reflexivity – their effects on the results and findings described in the selected literature.
3. Using the same body of literature, and other relevant mediation literature, a targeted review explores the researchers' own descriptions of the constraints that affect their work.
4. Responses to an online survey of professional mediators contributes to the targeted review.

¹⁴⁵ The metaresearch framework and the research methodologies underpinning this thesis are explained in Chapter Two.

5. The thesis includes compilation and analysis of the findings and recommendations that arise from each research component and considers the potential ramifications of the research findings for the future of mediation research as well as ramifications for the practice of mediation.
6. The thesis concludes by proposing alternative research methods and approaches through for in-depth exploration of mediator effectiveness.

1.7.6. Chapter outline

The thesis is divided into four parts, including eight Chapters.

Part I Introduction

Chapter One provides an introduction and overview of mediation, the topic of the thesis.

Chapter Two describes the metaresearch approach taken in this thesis and the methodologies chosen for analysis of the selected empirical literature; Chapter Two includes a list of terms used throughout this thesis.

Part II The literature

Chapter Three includes a review of the selected literature in the form of a content analysis focusing on definitions and measurements of mediation effectiveness. The Chapter also includes an analysis of how measures of mediation effectiveness might influence interpretations of mediator effectiveness.

Chapter Four incorporates a review of the selected literature in the form of a content analysis focusing on the terminologies used by the researchers when they describe what mediators say and do during mediation. The Chapter also explores how the terminologies might influence approaches to the measurement of mediator effectiveness.

Part III Systematic appraisal

Chapter Five reports on Part One of the systematic appraisal, and an analysis of study participants in the selected empirical literature: who are the study participants; how were they selected into the studies; and what is their suitability for the research roles to which they are allocated.

Chapter Six reports on Part Two of the systematic appraisal, and an analysis of the data collection methodologies described in the selected empirical literature: what data was collected; how was it collected; and from whom was it collected

Chapter Seven reports on Part Three of the systematic appraisal and an analysis of researcher influence and reflexivity in the selected empirical literature. The Chapter includes a targeted review of aspects of mediation research including particular constraints on empirical studies of mediation.

Part IV Conclusion

The final Chapter of the thesis, **Chapter Eight**, returns to Chapter One and summarises the responses to the Research Questions. Alternative approaches and methods for future mediation research are proposed with the dual objectives of improving what is known about mediator effectiveness and improving the practice of mediation.

1.8. Conclusion

This first chapter of the thesis has provided a brief overview of key concepts and issues relevant to consideration of mediation effectiveness and of mediator effectiveness. It has outlined the reasons that make this research an important contribution to the field of mediation research, and it has identified the gaps in empirical studies that it investigates.

The intent of the research reported in this thesis is to reveal what is known about happens when a mediator enters a dispute, and what it is that a mediator contributes that makes mediation succeed, when it does. The aim is to establish what is known about “good” mediators and to gain

some insight into the sense of wisdom, idealism and 'magic' that attracted so many keen adherents to mediation practice nearly half a century ago.¹⁴⁶

¹⁴⁶ Davis, A., 'The Logic Behind the Magic of Mediation' 5(1) *Negotiation Journal* 17.

Chapter Two: Methodology

As noted in Chapter One, this thesis reports on an investigation into what is known about mediator effectiveness. The investigation focuses on a compilation of selected empirical studies of mediation previously subjected to external expert analysis. This thesis includes a more comprehensive and detailed analysis of that selection, using five methodologies (thematic review, systematic appraisal, bibliometric analysis, targeted review, and online survey):

- (i) Two thematically based literature reviews, reported in Chapters Three and Four, whose outcomes inform the analysis and appraisal that follow later in this thesis;
- (ii) A systematic appraisal of the selected studies, presented in three parts, with Part One presented in Chapter Five and Part Two in Chapter Six;
- (iii) Part Three of the systematic appraisal is presented in Chapter Seven, as is a limited bibliometric analysis of the selected studies;
- (iv) A targeted review of aspects of mediation research practice is included in Chapter Seven; and
- (v) An online survey of practising mediators, of which the results are also presented in Chapter Seven.

Context and purpose of the Chapter

This chapter introduces the metaresearch framework and the associated methodologies that will be applied to analyse, review, assess, and appraise the selected studies and which are reported in the remaining Chapters of this thesis.

2.0. Metaresearch

Metaresearch, also known as ‘research on research’,¹⁴⁷ or ‘research on research methods’,¹⁴⁸ is a relatively recent approach to assessing and evaluating a body of research, rather than individual studies. It differs from meta-analysis in that the latter collects all the available data on a specific research topic and re-analyses it. One limitation of meta-analysis is its inherent capacity to perpetuate any structural flaws that might underlie the collected data included in its analysis.¹⁴⁹ Metaresearch is designed to detect any such flaws.

As metaresearch methodologies investigate how research has been conducted, how it has been reported, even how it has been published,¹⁵⁰ it has become the most feasible technique for examining a whole body of empirical research with a view to ascertaining, for example, why studies are not reproducible, or, as in this research, the factors that might contribute to the lack of information about a key research topic (ie mediator effectiveness).

Metaresearch has become more widely applied and reported in response to what has been called the ‘reproducibility crisis’ occurring in the social sciences,¹⁵¹ whereby many studies designed specifically to reproduce earlier ones have not been successful, and, in some cases, have led to a reversal of the original research findings.¹⁵² Reproducibility is accepted as a cornerstone of ‘the verification of facts’.¹⁵³ The repetition of a study where different researchers use the same

¹⁴⁷ Enserink, M. (ed), ‘Research on Research’ 361(6408) *Science* 1178, 1179; Ioannidis, J. P. A., ‘Meta-Research: Why Research on Research Matters’ (2018) <<https://doi.org/10.1371/journal.pbio.2005468>>, 1.

¹⁴⁸ Howard, G. S., M. Y. Lau, S. E. Maxwell, A. Venter, R. Lundy, and R. M. Sweeney, ‘Do Research Literatures Give Correct Answers?’ (2009) 13(2) *Review of General Psychology* 116, 117.

¹⁴⁹ Howard, G. S., M. Y. Lau, S. E. Maxwell, A. Venter, R. Lundy, and R. M. Sweeney, ‘Do Research Literatures Give Correct Answers?’ (2009) 13(2) *Review of General Psychology* 116.

¹⁵⁰ Ioannidis, J. P. A., ‘Meta-Research: Why Research on Research Matters’ (2018), <<https://doi.org/10.1371/journal.pbio.2005468>>, 1.

¹⁵¹ Ioannidis, J. P. A., ‘Meta-Research: Why Research on Research Matters’ (2018), <<https://doi.org/10.1371/journal.pbio.2005468>>, 1, 3; Stokstad, E. ‘The Truth Squad’ in M. Enserink (ed), ‘Research on Research’ 361(6408) *Science* 1178, 1190.

¹⁵² For example, see Open Science Collaboration, Estimating the Reproducibility of Psychological Science’ (2015) 349(6251) *Science* 943; Soumerai, S. B., D. Starr, and S. R. Majumdar, ‘Effectiveness Research You Can Trust: A Guide to Study Design for the Perplexed’ (2015) 12(E101) *Public Health Research, Practice, and Policy* 1.

¹⁵³ Schmidt, S., ‘Shall We Really Do It Again? The Powerful Concept of Replication is Neglected in the Social Sciences’ (2009) 13(2) *Review of General Psychology* 90, 90.

experimental processes, under different conditions, to reproduce the original findings is accepted as demonstrating that the original findings are objectively proven.¹⁵⁴ In the natural sciences, reproducibility has not been as problematic as it has in the social sciences.¹⁵⁵

Replication is often difficult to achieve, and, in some fields of research, it can be an unrealistic goal. It has been proposed that it be conceived of as having a range of forms, from a quite narrow reproduction of every aspect of an experimental procedure, to a broader, more conceptual approach in which the original hypothesis is tested using quite different methodologies.¹⁵⁶ It is recognised that, although all research should be methodologically accountable, the formalised and often inflexible criteria applied in the natural sciences, may not always be workable in the social sciences.¹⁵⁷ In some disciplines, the narrow form of reproducibility is neither practicable nor feasible (for example, in studies of ecology and evolution, original studies' reliance on factors of time and context cannot be reproduced),¹⁵⁸ and a broader interpretation and approach has been recommended.¹⁵⁹ This thesis takes the view that, with its focus on transitory human events and behaviours (ie conflicts and disputes and individual responses to them), mediation is one of those disciplines in which a broader approach is appropriate.

The metaresearch framework for this thesis includes four methodological components (thematic analysis, systematic appraisal, bibliometric analysis, and targeted review).

¹⁵⁴ Schmidt, S., 'Shall We Really Do It Again? The Powerful Concept of Replication is Neglected in the Social Sciences' (2009) 13(2) *Review of General Psychology* 90.

¹⁵⁵ Schmidt, S., 'Shall We Really Do It Again? The Powerful Concept of Replication is Neglected in the Social Sciences' (2009) 13(2) *Review of General Psychology* 90.

¹⁵⁶ Fidler, F., Y. E. Chee, B. C. Wintle, M. A. Burgman, M. A. McCarthy, and A. Gordon, 'Metaresearch for Evaluating Reproducibility in Ecology and Evolution' (2017) 67(3) *Bioscience* 282; Schmidt, S., 'Shall We Really Do It Again? The Powerful Concept of Replication is Neglected in the Social Sciences' (2009) 13(2) *Review of General Psychology* 90.

¹⁵⁷ Dixon-Woods, M., R. L. Shaw, S. Agarwal, and J. A. Smith, 'The Problem of Appraising Qualitative Research' 13 *Quality and Safety in Health Care* 223.

¹⁵⁸ Fidler, F., Y. E. Chee, B. C. Wintle, M. A. Burgman, M. A. McCarthy, and A. Gordon, 'Metaresearch for Evaluating Reproducibility in Ecology and Evolution' (2017) 67(3) *Bioscience* 282.

¹⁵⁹ Fidler, F., Y. E. Chee, B. C. Wintle, M. A. Burgman, M. A. McCarthy, and A. Gordon, 'Metaresearch for Evaluating Reproducibility in Ecology and Evolution' (2017) 67(3) *Bioscience* 282.

- (i) Two thematic literature analyses are conducted of mediation effectiveness, and of research terminology;¹⁶⁰
- (ii) Systematic appraisal and bibliometric analysis provide the basis for evaluation of the research methodologies reported in the selected studies;¹⁶¹
- (iii) A targeted review is conducted of the reported constraints on mediation research;¹⁶² and
- (iv) The responses to an online survey of professional mediators are included in a targeted review of recognised gaps in knowledge about mediation and about mediators.¹⁶³

2.1. The selected empirical literature

In 2014, a selection of empirical mediation literature was compiled in the US, with the support of a range of Dispute Resolution (DR) experts under the auspices of the American Bar Association (ABA), creating a valuable resource to inform mediation research. Accepting that the compilation is an appropriate and representative selection of empirical studies of mediation, this thesis will report on analysis of materials selected from it. Further reasoning on the selection is given below.

The mediation database

In 2013, the American Bar Association (ABA) Section on Dispute Resolution established a Task Force on Research on Mediator Techniques ('the Task Force') to investigate research into mediator techniques and the effects of those techniques on mediation outcomes. Members of the Task Force were drawn from law and dispute resolution academics and researchers from the US and Australia and included highly experienced DR practitioners from both countries. All members had relevant

¹⁶⁰ See Chapter Three and Chapter Four.

¹⁶¹ See Chapter Five, Chapter Six, and Chapter Seven; for an explanation of bibliometric analysis, see Gallardo-Gallardo, E., S. Nijs, N. Dries, and P. Gallo, 'Towards an Understanding of Talent Management as a Phenomenon-Driven Field Using Bibliometric and Content Analysis' (2015) 25 *Human Resource Management Review* 264.

¹⁶² See Chapter Seven.

¹⁶³ See Chapter Seven.

research expertise, many with extensive experience in conducting empirical research.¹⁶⁴ By the end of 2014, the Task Force had compiled over one hundred and sixty publications and reports ('the mediation database') which formed the basis of its investigations.

Between 2014 and 2017, the Task Force conducted a limited review of items in the database. In 2017, the Task Force's final report was published on the ABA website, after which the Task Force was disbanded; the report includes recommendations for future activity in the field of empirical studies of mediation.¹⁶⁵ The author was a member of the Task Force and joined the task Force in May 2014.

The mediation database contains items largely from the US, as well as from Australia and the United Kingdom (UK), which were published or completed between 1975 and 2014. The items include descriptions of the techniques used by participating dispute resolution practitioners, especially mediators. Reasons for selecting research materials form this compilation include that it is the only such compilation and, because of the stature of Task Force members, is likely to be broadly representative of the existing empirical literature relating to mediator effectiveness. In addition, the compilation includes material that is readily accessible to practising mediators.

Criteria for inclusion in the mediation database

¹⁶⁴ A copy of the Task Force's final report is at Appendix E; the report includes a full list of Task Force members.

¹⁶⁵ American Bar Association Section of Dispute Resolution, *Report of the Task Force on Research on Mediator Techniques* (American Bar Association, USA, June 2017), available on <https://www.americanbar.org/content/dam/aba/administrative/dispute_resolution/med_techniques_tf_report.authcheckdam.pdf>.

The Task Force's initial criteria for inclusion necessarily excluded many empirical studies.^{166 167} For example, one of the Task Force's initial criteria for inclusion in the mediation database specified that the study must have been published in a refereed, or peer-reviewed, journal.¹⁶⁸ It is probable that many non-academic studies were not included or even considered simply because such studies are not ordinarily published in refereed or peer-reviewed journals (regardless of what is understood by "refereed" or "peer reviewed"). In addition, to be included, studies were required to have a specific focus on the *mediator*, and many studies that appeared to explore the *mediation process* were not included, despite their potential to include information relevant to the Task Force's undertaking.¹⁶⁹

During its investigation, the Task Force applied additional inclusion criteria, the final versions of which are published in their report, and include:

- i) The compilation was to include 'studies of any non-binding process in which a third party helped disputants try to resolve a conflict.'; this included 'studies conducted in any setting, whether in situ or simulated';^{170 171}

¹⁶⁶ In particular, the initial criteria included: articles that were published in refereed journals and that examined any dispute resolution process in which a third party helped participants resolve their dispute; not intended to be included were studies of processes in which the third party made decisions on behalf of the participants; however, a small number of included articles did include investigation of determinative processes, including arbitration; journal articles had to contain empirical data examining the effects of mediator actions on mediated outcomes (Task Force members agreed that outcomes could include: any agreement, the nature/details of any agreement, participant and adviser perceptions of the process and of the third party, and perceived improvements in participants' understanding of each other's situation, and improvements in their communication).

¹⁶⁷ All references to the ABA Task Force in this section derive primarily from the Task Force's report; Task Force records, and informal discussions with Task Force members, have also contributed information.

¹⁶⁸ Although the unrecorded consensus among Task Force members was that articles were to have been published in refereed and/or peer reviewed journals, Australia and the US have quite different understandings of what constitutes a refereed or peer reviewed journal.

¹⁶⁹ Despite setting out to do so, very few of the publications in the mediation database do actually focus on the mediator; this issue is considered in some detail throughout this thesis.

¹⁷⁰ American Bar Association Section of Dispute Resolution, *Report of the Task Force on Research on Mediator Techniques* (American Bar Association, USA, June 2017), available on https://www.americanbar.org/content/dam/aba/administrative/dispute_resolution/med_techniques_tf_report.authcheckdam.pdf, 8.

¹⁷¹ A small number of included items do analyse data from binding processes such as arbitration; however, the binding process is not the focus of the study – it is included to enable a comparative analysis of mediation.

- ii) To be included, an article/report ‘had to contain empirical data ... reported in English’;¹⁷² and
- iii) ‘empirical data had to examine the effect of mediator actions on mediation outcomes.’¹⁷³

In addition to reaching an agreement, mediation outcomes were accepted as including ‘the nature of the agreement, parties’ and attorneys’ perceptions of the process and the mediator, and improvement in parties’ understanding and communication.’¹⁷⁴ The Task Force’s report specifies that included items must focus on: ‘mediator techniques’,¹⁷⁵ ‘mediator actions’,¹⁷⁶ or ‘mediator behaviors’.¹⁷⁷ The Task Force specified one exclusion criterion: items could not include analysis of ‘any process in which a third party made a decision for the parties or reported a “decision” to the court’¹⁷⁸ This placed clear restrictions on the inclusion of any items that related only to determinative processes.

¹⁷² American Bar Association Section of Dispute Resolution, *Report of the Task Force on Research on Mediator Techniques* (American Bar Association, USA, June 2017), available on https://www.americanbar.org/content/dam/aba/administrative/dispute_resolution/med_techniques_tf_report.authcheckdam.pdf, 8.

¹⁷³ American Bar Association Section of Dispute Resolution, *Report of the Task Force on Research on Mediator Techniques* (American Bar Association, USA, June 2017), available on https://www.americanbar.org/content/dam/aba/administrative/dispute_resolution/med_techniques_tf_report.authcheckdam.pdf, 8.

¹⁷⁴ American Bar Association Section of Dispute Resolution, *Report of the Task Force on Research on Mediator Techniques* (American Bar Association, USA, June 2017), available on https://www.americanbar.org/content/dam/aba/administrative/dispute_resolution/med_techniques_tf_report.authcheckdam.pdf, 8.

¹⁷⁵ American Bar Association Section of Dispute Resolution, *Report of the Task Force on Research on Mediator Techniques* (American Bar Association, USA, June 2017), available on https://www.americanbar.org/content/dam/aba/administrative/dispute_resolution/med_techniques_tf_report.authcheckdam.pdf, 8.

¹⁷⁶ American Bar Association Section of Dispute Resolution, *Report of the Task Force on Research on Mediator Techniques* (American Bar Association, USA, June 2017), available on https://www.americanbar.org/content/dam/aba/administrative/dispute_resolution/med_techniques_tf_report.authcheckdam.pdf, 8.

¹⁷⁷ American Bar Association Section of Dispute Resolution, *Report of the Task Force on Research on Mediator Techniques* (American Bar Association, USA, June 2017), available on https://www.americanbar.org/content/dam/aba/administrative/dispute_resolution/med_techniques_tf_report.authcheckdam.pdf, 8.

¹⁷⁸ American Bar Association Section of Dispute Resolution, *Report of the Task Force on Research on Mediator Techniques* (American Bar Association, USA, June 2017), available on https://www.americanbar.org/content/dam/aba/administrative/dispute_resolution/med_techniques_tf_report.authcheckdam.pdf, 8.

The mediation database includes documents that are not strictly compliant with the specified criteria, such as chapters of books, and unpublished reports. The selection suggests that members' preference was to create an inclusive database of existing publications and reports relating to empirical research into mediator techniques, rather than being limited by the strict application of the Task Force's own criteria.

2.1.0. The selected studies

The mediation database is a unique research resource, and, after detailed consideration of its contents, 47 items were selected to be the core focus of this research. For practicality, throughout this thesis, they are referred to as "the 47 selected studies" or "the selected studies".^{179 180}

Inclusion criteria for the selected studies

In the context of this thesis, the following additional inclusion criteria were applied to the mediation database, and items that met the criteria were included in the selected studies for this research:

1. Items had to have been included in the original Task Force database;
2. Reports of empirical investigations of *mediation* only. As this thesis is examining mediator effectiveness, in order to be included, publications and reports should describe only investigations of mediation and mediators (application of this criterion relied on the terms and descriptions included in the database items themselves, and not on a separate analysis of the process they described), within the database. Notably, many of the reported processes that researchers describe as mediation lack process

¹⁷⁹ A list of the forty-seven items is at Appendix A. All the selected items are directly related to empirical studies of mediation; and the majority are published descriptions of those studies and include reporting of the study results and findings.

¹⁸⁰ Coincidentally, the Task Force also gave detailed examination to only forty-seven of the original one hundred and sixty publications and reports; however, theirs are not the same forty-seven that are the focus of this research. Although there are many that the two have in common, the Task Force and this research have applied different inclusion criteria.

consistency, and, according to the descriptions, some are notably different from others¹⁸¹; and

3. Primary sources are preferred, being reports of empirical studies of mediation which include investigation of the mediator's influence on any achieved outcomes, or of any link between the mediator role and the mediation outcomes. In this regard, it is noted that a primary source does more than 'contain empirical data'¹⁸² – it may be a direct report of one or more empirical studies.

Criteria were applied to exclude some material from the final selection: if a study was not empirical; if it lacked basic methodology;¹⁸³ if it was not specific to mediation; and/or if it did not include links to mediation outcomes it was excluded.

Four items have been included despite not meeting the revised selection criteria. One is not a study of mediation only, and includes analysis of determinative processes as well as of mediation;¹⁸⁴ however, it has been included because it describes an empirical study incorporating some aspects of the mediator role and describes mediator actions considered to be directly relevant to this research.¹⁸⁵ Three items report only on mediator techniques and actions, without considering the possible links between those interventions and any outcomes of the subject mediations; these items

¹⁸¹ In part, the lack of consistency may be due to the passage of time. The move towards consistent descriptions (even definitions) of the mediation process and the role of the mediator is a relatively recent phenomenon. However, analysis in this thesis suggests that even recent studies do not include consistent interpretations of "mediation" (see Chapter Seven).

¹⁸² American Bar Association Section of Dispute Resolution, *Report of the Task Force on Research on Mediator Techniques* (American Bar Association, USA, June 2017), available on https://www.americanbar.org/content/dam/aba/administrative/dispute_resolution/med_techniques_tf_rep_orf.authcheckdam.pdf, 8.

¹⁸³ For example, a study would be excluded if it relied only data drawn from the author's personal observations about a selection of mediations that s/he had conducted, and that included no other data.

¹⁸⁴ Determinative processes include those in which the third party delivers a final resolution of the dispute – a determination; arbitration is a typical determinative process.

¹⁸⁵ McGillicuddy, N. B., G. L. Welton, and D. G. Pruitt, 'Third-Party Intervention: A Field Experiment Comparing Three Different Models' (1987) 53 *Journal of Personality and Social Psychology* 104.

include descriptions of specific mediator techniques and behaviours considered to be directly relevant to this research.¹⁸⁶

2.1.1. Limitations

(a) *Predominance of US publications*

The US dominates many fields of research, and the predominance of US material in the mediation database and in the selected studies reflects the US's domination of the field of DR and mediation research. Although a US-based Task Force could be expected to focus on US publications, the mediation database does include some material published in other countries. For example, bibliometric analysis shows that forty-eight different journals were involved in publishing the Task Force compilation, of which forty-one are, or were, US-based; four are, or were, UK-based; two are, or were, Australia-based; and one is, or was, Canada-based.¹⁸⁷ Of the forty-eight journals, less than half are specific to DR and mediation; however, they, too, are dominated by US publications: thirteen DR/mediation journals are, or were, US-based; four are, or were, UK-based; and two are, or were, Australia-based. Where the publications are in the form of book chapters, the US dominance persists. For example, one of the selected studies was conducted in the UK and published as a chapter in a US book.

US dominance is not unique to DR or mediation research and is reported in many fields. For example, a recent bibliometric analysis of existing research into talent management, in the field of Human Resource Management, found that *a single* journal (US-based) dominates the publication of

¹⁸⁶ Kressel, K., E. A. Frontera, S. Forlenza, F. Butler, and L. Fish, 'The Settlement-Oriented vs the Problem-Solving Style in Custody Mediation' (1994) 50 *Journal of Social Issues* 67; Kressel, K., T. Henderson, W. Reich, and C. Cohen, 'Multi-dimensional Analysis of Conflict Mediator Style' (2012) 30(2) *Conflict Resolution Quarterly* 135; K. Kressel, How Do Mediators Decide What to Do? (2013) 28 *Ohio State Journal on Dispute Resolution* 709.

¹⁸⁷ Currently, most academic, and peer-reviewed journals are available electronically and do not have a clear geographic base; however, the location and affiliations of editorial boards are likely to retain some influence.

relevant research.¹⁸⁸ Although DR/mediation industry-specific journals are heavily US dominated, mediation researchers do have access to more than one.

Chapter Seven includes findings from a bibliometric analysis of the selected studies.

(b) Small number of studies, and their disparate historical contexts

A major problem for mediation researchers (and for practising mediators) is that there are not many empirical studies that investigate mediator effects on mediated outcomes; and empirical studies that investigate the effectiveness of the mediator are largely unknown, even if the researchers might have set out to conduct such a study. With such a limited pool from which to draw, the selected studies and the mediation database are necessarily small samples of empirical studies.¹⁸⁹ A small research field cannot produce a large number of studies for analysis; however, as noted earlier, the Task Force compilation and the studies selected from it are likely to be broadly representative.

The relatively small numbers of empirical studies of mediation, and of mediators, may reflect, in part, the many constraints on their work that mediation researchers have identified. Chapter Seven reviews the constraints in more detail.

The selected studies include descriptions of empirical studies conducted at different periods over a timeframe of more than 40 years, during which theoretical frameworks and research approaches can be expected to have changed. In addition, the selected studies encompass a variety of dispute and mediation contexts, in which research approaches, terminology, and interpretations can also be expected to have differed. Chapters Three and Four examine these issues in more detail.

¹⁸⁸ Gallardo-Gallardo, E., S. Nijs, N. Dries, and P. Gallo, 'Towards an Understanding of Talent Management as a Phenomenon-Driven Field Using Bibliometric and Content Analysis' (2015) 25 *Human Resource Management Review* 264.

¹⁸⁹ Research in other fields suggests that having a relatively small number of studies for analysis, may not be unusual or a significant limitation, if the analysis itself is rigorously designed and conducted; for example, see Probst, B., 'The Eye Regards Itself: Benefits and Challenges of Reflexivity in Qualitative Social Work Research' (2015) 39(1) *Social Work Research* 37.

Publication dates of the selected studies have not limited inclusion in this research. Some items predate the DR industry's attempts at clarifying and defining the mediation process, and the "mediation" process described in those items may, or may not, be familiar to current researchers and practitioners. On the other hand, most of the terms used in association with mediators should be familiar. For example, even if the following phrases do not have commonly accepted meanings, the terms themselves should be recognisable: 'mediator strategies and characteristics',¹⁹⁰ 'mediator styles',¹⁹¹ and 'mediator qualities'.¹⁹²

(c) *Predominance of research into publicly funded mediation programs*

The vast majority of items included in the mediation database, and in the selected studies, are investigations of publicly funded mediation services and programs. Publicly funded mediation services and programs are a valuable research resource because they tend to be accessible to researchers. They are also more likely to include clear parameters for the mediation process and for the role of the mediator. For example, they can include:

- Service-defined standards of mediator practice;
- Service-specified models and styles of mediation that are seen as defining the role of the mediators who conduct the service/program mediations; and
- Preferred outcome measures that reflect the need for accountability of public funds, including achievement of agreement and other efficiency measures.

Unfortunately, there is very little published research into the use and effectiveness of private mediation, and, as a result, it is not possible to readily determine if or how standards of practice are applied in private mediation, which models and styles are applied to the role of the mediator, or

¹⁹⁰ Kochan, T. A., and T. Jick, 'The Public Sector Mediation process: A Theory and Empirical Examination' (1978) 22(2) *The Journal of Conflict Resolution* 209, 209.

¹⁹¹ Shapiro, D., R. Drieghe, and J. Brett, 'Mediator Behavior and the Outcomes of Mediation' (1985) 41(2) *Journal of Social Issues*, 101, 102.

¹⁹² Vanderkooi, L., and J. Pearson, 'Mediating Divorce Disputes: Mediator Behaviors, Styles and Roles' (1983) 32(4) *Family Relations* 557, 558.

which outcomes are most typically sought and achieved. In short, even less is known about what makes an effective mediator in the private mediation context than in the public context.

Investigations of publicly funded mediation services and programs are more likely to be designed with public accountability or other justice-based objectives in mind and are likely to focus on the efficient use of public funds (including in the costs and design of the research). Although some of the items included in the selected studies have been conducted in such contexts, it is not anticipated that the contextual parameters would impede the researchers' analysis of the effectiveness of relevant mediators, even if that effectiveness is contextually-based.

(d) Nature of the database items

The original inclusion criteria set by the Task Force ensured that most of the items in the mediation database are publications. Rather than being original research reports, they are documents that have been tailored for publication – either by the researchers or at the request of the editors or publishers. In other words, they are likely to be summaries of original research reports, and it is not immediately clear how much methodological information might have been removed in preparation for publication. The issue of meeting publication requirements is considered in more detail in Chapter Seven and within the systematic appraisal in Chapters Five and Six.

(e) Research participation

In several items in the selected studies, researchers include mention of lower than expected research participation rates by mediators, and by disputants. It is likely that professional mediators could make positive contributions to mediation research, and the issue of their cooperative involvement is considered in Chapters Five, Six, Seven, and Eight.

(f) Excluded literature

The selected studies include only two examples of so-called “grey literature” which, by definition, has not been made publicly available through journals and other recognised public forums.¹⁹³ Mediation literature that is not part of the selected studies has been included as additional resources and references to inform the review, analysis, and appraisal included in this thesis, including where its inclusion contributes to analysis of thematic and empirical research issues.

Finally, as noted earlier, very few empirical studies actually do investigate the role, actions, influence, and effectiveness of mediators, even where their stated intention is to do so.

2.1.2. Strengths

The selected studies include work by some of the mediation field’s eminent researchers,¹⁹⁴ selected by their colleagues and peers, as well as by some of the researchers themselves, in their capacity as members of the Task Force. The selection includes studies conducted in seven different mediation contexts that are representative of the contexts in which mediation is practised and in which it is studied (ie community, construction/business, court-connected, evaluations of mediation programs and services, family/divorce/child custody, labour/management, and simulated mediations).

In particular, the selection includes items that can be readily accessed by practicing mediators and from which they may seek practical guidance. When reading any piece included in the selected studies, a practising mediator might ask: “Should I try this technique in my own mediation practice?”

The methodologies included in this metaresearch are designed primarily to contribute to answering the Research Questions. They also consider the practising mediator’s question posed

¹⁹³ C. A. McEwen, *An Evaluation of the ADR Pilot Project: Final Report 1* (Unpublished report, 1992); Wissler, R. L., *Trapping the Data: An Assessment of Domestic Relations Mediation in Maine and Ohio Courts* (Unpublished report, 1999).

¹⁹⁴ The limited bibliometric analysis in Chapter Seven includes further analysis of researcher and author influence.

above: to ascertain the transferability of the various mediator behaviours that are described in the selected studies.

Additional literature and resources

This thesis, and the research supporting it, relies on the selected studies, with additional consideration of other mediation literature. This thesis also draws on examples from research fields other than mediation (and DR) where they are considered to make useful contributions to this analysis. It has been said that mediation research lacks an interdisciplinary approach,¹⁹⁵ and drawing on interdisciplinary research experience and expertise is one way to commence an interdisciplinary focus. A broader literature review that includes doctrinal perspectives has also been undertaken to assist with the analysis of core mediation concepts.

The next sections in this Chapter describe the metaresearch methodologies that are applied in this thesis for review, analysis, and systematic appraisal of the 47 selected studies.

2.2. Thematic analysis: effectiveness and what mediators do

2.2.0. Mediation effectiveness ¹⁹⁶

The concept of effectiveness provides a key theoretical framework for mediation research, for mediation practice, and for this research, as demonstrated by it being the subject of this thesis' first thematic review, described in the next Chapter. Using the approach of a 'traditional narrative review',¹⁹⁷ it explores how "effectiveness" is interpreted and measured, and the influence of those interpretations and measurements on mediation research. The aim of the thematic analysis is to answer three questions:

¹⁹⁵ McDermott, E. P., 'Discovering the Importance of Mediator Style – An Interdisciplinary Challenge' (2012) 5(4) *Negotiation and Conflict Management Research* 340.

¹⁹⁶ See Chapter Three.

¹⁹⁷ Jesson, J. K., L. Matheson, and F. M. Lacey, *Doing Your Literature Review: Traditional and Systematic Techniques* (SAGE Publication Ltd, UK, 2012), 75.

1. How is mediation and mediator effectiveness defined and measured in the selected studies?
2. What are the discernible contextual trends of those definitions and measures?
3. What do the selected studies suggest are the influences on mediation and mediator effectiveness?

Specific attention has been given to selected studies that include interpretations of effectiveness, and indications of how it was measured in each study. If effectiveness is not mentioned, its interpretation and measurement cannot be analysed, and, for this reason, seven of the forty-seven publications and reports have been excluded from this initial analysis.¹⁹⁸

Using the remaining forty studies, the analysis considers, firstly, how the term “effectiveness” is used in each, and how the researcher/s intend the term to be interpreted by the reader. The analysis then explores the reported findings about the effectiveness of the mediation process, and, secondly, findings about a range of influences on that effectiveness, including the mediator’s influence. Where researchers have investigated mediator effectiveness separately from any mediation process, those findings, too, are included in the analysis.

¹⁹⁸ Burrell, N. A., W. A. Donohue, and M. Allen, ‘The Impact of Disputants’ Expectations on Mediation, Testing an Interventionist Model’ (1990) Fall 1990 *Human Communication Research* 104; Carnevale, P. J. D., and R. Pegnetter, ‘The Selection of Mediator Tactics in Public Sector Disputes: A Contingency Analysis’ (1985) 41(2) *Journal of Social Issues* 2; Kimsey, W. D., R. M. Fuller, A. J. Bell, and B. C. McKinney, ‘The Impact of Mediator Strategic Choices: An Experimental Study’ (1994) 12 *Mediation Quarterly* 89; Kressel, K., T. Henderson, W. Reich, and C. Cohen, ‘Multi-Dimensional Analysis of Conflict Mediator Style’ (2012) 30(2) *Conflict Resolution Quarterly* 135; K. Kressel, ‘How Do Mediators Decide What To Do? Implicit Schemas of Practice and Mediator Decisionmaking’ (2013) 28 *Ohio State Journal on Dispute Resolution* 709; McGillicuddy, N. B., G. L. Welton, and D. G. Pruitt, ‘Third-Party Intervention: A Field Experiment Comparing Three Different Models’ (1987) 53 *Journal of Personality and Social Psychology* 104; Shapiro, D., R. Drieghe, and J. Brett, ‘Mediator Behavior and the Outcome of Mediation’ 41 *Journal of Social Issues* 101; Welton, G. L., and D. G. Pruitt, ‘The Mediation Process: The Effects of Mediator Bias and Disputant Power’ (1987) 13 *Personality and Social Psychology Bulletin*; Welton, G. L., D. G. Pruitt, and N. B. McGillicuddy, ‘The Role of Caucusing in Community Mediation’ (1988) 32 *The Journal of Conflict Resolution* 181.

The use of electronic analysis methods has been shown to distort subject data and the analysis results (see further discussion below).¹⁹⁹ For this reason, each of the included forty selected studies has also been subjected to manual analysis, examining the contextual occurrence of the term “effectiveness” and its reported links to either the mediator or the mediation process.

Chapter Three: Methodology

The 47 selected studies were initially reviewed to ascertain which included consideration of mediation effectiveness in their data analysis, resulting in the above-noted exclusion of seven of the studies.²⁰⁰ Forty studies were included in the analysis and were subjected to a manual content analysis to determine the context of each study, and to clarify the definition and measures of effectiveness that were applied in each individual study. As a result of the inconsistencies in the definitions and measures relevant to the effectiveness component, the analysis was somewhat cumbersome. Subsequently, a measure of simple or complex effectiveness was devised and applied to a second analysis of the included studies, and to a comparative contextual analysis.

The selected studies include articles that report on recent studies as well as studies conducted more than 40 years ago. In some instances, historical contexts may differ slightly from their modern counterparts. For example, in the US in the 1970s, community-based mediations were often conducted through a small number of Neighbourhood Justice Centers and the types of disputes to

¹⁹⁹ Glänzel, W., ‘Bibliometric Methods for Detecting and Analysing Emerging Research Topics’ (2012) 21(2) *El Profesional de la Informacion* 194; Busch, D., ‘Does Conflict Mediation Research Keep Track with Cultural Theory?’ (2016) 4(2) *European Journal of Applied Linguistics* 181.

²⁰⁰ Carnevale, P. J. D., and R. Peggnetter, ‘The Selection of Mediator Tactics in Public Sector Disputes: A Contingency Analysis’ (1985) 41(2) *Journal of Social Issues* 2; Kimsey, W. D., R. M. Fuller, A. J. Bell, and B. C. McKinney, ‘The Impact of Mediator Strategic Choices: An Experimental Study’ (1994) 12(1) *Mediation Quarterly* 89; Kressel, K., T. Henderson, W. Reich, and C. Cohen, ‘Multi-Dimensional Analysis of Conflict Mediator Style’ (2012) 30(2) *Conflict Resolution Quarterly* 135; Kressel, K., ‘How Do Mediators Decide What To Do? Implicit Schemas of Practice and Mediator Decisionmaking’ (2013) 28(3) *Ohio State Journal on Dispute Resolution* 709; McGillicuddy, N. B., G. L. Welton, and D. G. Pruitt, ‘Third-Party Intervention: A Field Experiment Comparing Three Different Models’ (1987) 53(1) *Journal of Personality and Social Psychology* 104; Welton, G. L., and D. G. Pruitt, ‘The Mediation Process: The Effects of Mediator Bias and Disputant Power’ (1987) 13(1) *Personality and Social Psychology Bulletin* 123; Welton, G. L., D. G. Pruitt, and N. B. McGillicuddy, ‘The Role of Caucusing in Community Mediation’ (1988) 32(1) *The Journal of Conflict Resolution* 181.

be resolved were limited to minor disputes between neighbours, landlord/tenant disputes, minor consumer complaints, and family disputes.²⁰¹ A modern understanding of “community-based mediation” in the US may have changed to include a broader category of disputes (such as consumer complaints), but not sufficiently to affect the analysis focus on measures of mediation effectiveness. Chapter Three limits its focus on effectiveness to the relevant issues raised in the selected studies.

Limitations

Any investigation of what is known about mediation effectiveness, and about mediator effectiveness, is a complex undertaking. Conceptual questions arise concerning: the differentiation between, and the determination of, interpretations and measurements of effectiveness itself; the levels of influence of external factors on the research and on the context in which those definitions and measurements are made; and how the mediator’s influence can be differentiated from other potential influences. Other potential influences can include the behaviours of disputants, of other participants, and of advisers and representatives in the mediation, as well as the mediation’s context and the researchers.

The various overriding philosophical approaches to mediation in any particular instance may also influence interpretations and measurements of effectiveness. For example, a mediation may focus on achieving transformative objectives or it may have a narrower focus on achieving settlement. In addition, there may be several philosophical approaches operating concurrently in any one mediation: the mediator’s philosophical approach, the disputants’ philosophical approach, the advisers’ philosophical approach, and the philosophical approach of the mediation program, or setting, within which the mediation is occurring, and, in the context of mediation research, the researchers’ philosophical approach. There may also be a broader cultural context that influences what effectiveness might mean, and how it might be measured.

²⁰¹ Garth, B. G., and M. Cappelletti, ‘Access to Justice: The Newest Wave in the Worldwide Movement to make Rights Effective’ (1978) *Articles by Maurer Faculty, Paper 1142*, available on <<https://www.repository.law.indiana.edu/facpub/1142>>.

When the Task Force compiled the original 160 items, effectiveness was not a criterion for inclusion. Among other criteria, the Task Force specified that an item had to include 'empirical data [on] the effect of mediator actions on mediation outcomes.'²⁰² Therefore, it cannot be expected that the selected studies include extensive explorations of mediation effectiveness; however, the lack of data about mediator effectiveness is surprising.

2.2.1. What mediators do

This section describes the methodological approach reported in Chapter Four of this thesis and used to analyse the terms reported in the selected studies for describing the activities and behaviours of mediator participants. In any field of research, consistency in the use of key terms and how they are interpreted provides a point of research identity for the field, and a form of cultural 'sense-making'.²⁰³ A lack of terminological consistency can lead to confusion and can hamper comparative assessment. It can also be problematic for researchers themselves. Pivotal to answering the Research Questions is an understanding of the common language, or accepted key terminologies, that are used in the selected studies. For example, to understand mediator effectiveness, it is important to clarify how the researchers describe mediator activities, especially in comparative studies.

The analysis is designed to: identify the key terms that appear in the selected studies when referring to subject mediators and their activities; conduct a preliminary analysis of those terms; and conduct subsequent, more detailed, analyses. In the context of this thesis, key terminology is taken to be the words and phrases that researchers use in direct association with activities of subject mediators. In other words, within the selected studies, key terminology relates to what subject mediators are reported to say and do. All forty-seven of the selected studies have been included in

²⁰² American Bar Association Section of Dispute Resolution, Report of the Task Force on Mediator Techniques (American Bar Association, USA, June 2017), available on <https://www.americanbar.org/content/dam/aba/administrative/dispute_resolution/med_techniques_tf_report.authcheckdam.pdf>, 8.

²⁰³ McKee, A., *Textual Analysis: A Beginner's Guide* (Sage Publications Ltd, 2003), 19.

this analysis because they provide descriptions of what participating mediators are reported to have said or done.

In a recent review of the literature on mediator ‘competencies, skills, and behaviours’,²⁰⁴ descriptions of mediator behaviour are bundled into one of two groups, the first of which is: ‘mediator style, strategy and personality’,²⁰⁵ and the second: ‘mediator competencies, skills, knowledge and behavior’.²⁰⁶ A similar bundling approach was considered for the current analysis, however it was found to be impracticable because of the scope, variety, and diversity of terms and interpretations in the selected studies. Also, it was thought that bundling might mask the scope and potential effects of the terminological inconsistencies.

Chapter Four: Identification and analysis of key terms

Initially it was anticipated that mediator actions and approaches that influence the effectiveness of mediation could be revealed by a review of the selected studies. Ultimately, however, the studies include a sufficiently diverse range of terminologies and interpretations of them that a comparative analysis of their relevant findings proved unworkable. The wide range of terminologies adopted might have been less problematic had the studies included similar interpretations and applications or some material that would enable inferences to be drawn about common terminological meanings.

Any analysis of research design and/or research findings is reliant on the ways in which researchers describe their work. However, it was not possible to establish common, or benchmark, terms used in the selected studies to describe the key unit of analysis in empirical analyses of

²⁰⁴ Kennedy Institute Workplace Mediation Research Group, *Shaping the Agenda 1: Exploring the Competencies, Skills and Behaviours of Effective Workplace Mediators* (KIWMRG, Ireland, 2016), 5.

²⁰⁵ Kennedy Institute Workplace Mediation Research Group, *Shaping the Agenda 1: Exploring the Competencies, Skills and Behaviours of Effective Workplace Mediators* (KIWMRG, Ireland, 2016), 16.

²⁰⁶ Kennedy Institute Workplace Mediation Research Group, *Shaping the Agenda 1: Exploring the Competencies, Skills and Behaviours of Effective Workplace Mediators* (KIWMRG, Ireland, 2016), 16; the report also demonstrates the concomitant use of unexplained terms that appears to be so prevalent in the selected studies.

mediator effectiveness: the activities of the mediator participants. It had been anticipated that establishing those benchmark terms could facilitate a comparative analysis of empirical investigations of mediator effectiveness across the various contexts described in the selected studies. Early in the analysis, it became clear that there are no obvious benchmark terms in the selected studies, despite all apparently having mediator activities as a common unit of analysis. Once the lack of benchmark terms became obvious, it was clear that the intended analysis could not be undertaken.

The objectives were then revised to incorporate the identification and analysis of the predominant, or key, terms applied in the selected studies, including analysis of how researchers interpret and apply those key terms in their empirical investigations of mediators and their activities. It was anticipated that the findings of such a terminological analysis could inform the development of agreed benchmark terms for the field of mediation research.

Although the use of electronic analysis techniques is relatively commonplace, in this thematic analysis both manual and electronic analysis methods have been used. Commentators have cautioned that electronic analysis (ie software-based analysis of electronic publication databases) can create misleading assumptions about commonalities among documents;²⁰⁷ can result in distorted findings based on restrictions imposed by the design of the database (eg where the database accesses only abstracts of articles, not the full articles);²⁰⁸ and it has been noted that ascertaining the mere occurrence of terms, or words, in a given text does not provide an understanding of how authors might choose to interpret those words in different contexts.²⁰⁹ In any

²⁰⁷ Glänzel, W., 'Bibliometric Methods for Detecting and Analysing Emerging Research Topics' (2012) 21(2) *El Profesional de la Informacion* 194.

²⁰⁸ Duyx, B., G. M. H. Swaen, M. J. E. Urlings, L. M. Bouter, and M. P. Zeegers, 'The Strong Focus on Positive Results in Abstracts May Cause Bias in Systematic Reviews: A Case Study on Abstract Reporting Bias' (2019) 8(1) *Systematic Reviews* 174.

²⁰⁹ Busch, D., 'Does Conflict Mediation Research Keep Track with Cultural Theory?' (2016) 4(2) *European Journal of Applied Linguistics* 181.

case, the lack of consistency and clarity in the way the terms are applied in the selected studies has made the use of electronic analysis impracticable.²¹⁰

Each of the selected studies is subjected to two analyses. The purpose of the first analysis is to identify and document the key terminologies and their interpretation. The purpose of the second is to check for contextual trends in the occurrence and interpretation of the key terms, and for any contextual (or other) associations with measures of effectiveness. To be included in the list of key terms, an expression (word or phrase) had to demonstrate being used more than as a “one-off” and the following measure was applied: the term had to appear in at least two of the selected documents, and each appearance had to be in direct association with participating mediators.

Analysing the selected studies

All forty-seven of the selected studies were read to identify the predominant terms applied in direct association with mediators and their activities. Although a single key term was frequently identified in that context, the selected studies include many instances of concurrent multiple key terms being used conjointly to describe the actions of mediator participants. For example: ‘mediator strategies and qualities’,²¹¹ and ‘a mediator must rely on various strategies, skills, and abilities’.²¹²

The analysis has revealed that, in most cases where multiple terms are used, they are used interchangeably, impeding the isolation of specific terms and trends in their usage. Some terms have been found to describe variously mediator behaviour, personal attributes of individual mediators, and other factors not related to mediator behaviour (eg the behaviour of other mediation participants). Care has been taken to include terms for analysis only when they are used in direct association with mediator participants and their activities, or to describe factors directly

²¹⁰ The bibliometric analysis, reported in Chapter Seven, includes limited analysis of publication practices.

²¹¹ Karim, A. and R. Pegnetter, ‘Mediator Strategies and Qualities and Mediation Effectiveness’ (1983) 22(1) *Industrial Relations* 105, 109.

²¹² Dilts, D. A. and A. Karim, ‘The Effect of Mediators’ Qualities and Strategies on Mediation Outcomes’ (1990) 45(1) *Relations Industrielles/Industrial Relations* 22, 23.

related to their activities.²¹³ For example, the word “characteristics” appears in the studies describing variously the presenting disputes²¹⁴, the disputants²¹⁵, the mediation process,²¹⁶ and various aspects of the mediator participants including their personal attributes (and ‘personality’²¹⁷),²¹⁸ their demographics (including gender, age, and education),²¹⁹ their professional attributes (mediation experience, and subject matter expertise),²²⁰ their generalised stylistic approach,²²¹ and an undifferentiated combination of personal and professional attributes.²²² One study reports mediator characteristics in terms of statistical indicators;²²³ and another specifies two ‘sets of personal characteristics’ that encompass both demographic information about the mediator participants and the disputants’ perceptions of ‘the quality of the mediator’.²²⁴

Ultimately, fifteen terms were identified as being predominant, or key, terms.

²¹³ During the analysis of the selected studies, it became clear that many researchers use the key terms to describe effects and outcomes of mediator activities, and this is discussed in more detail below at 4.1. Analysis findings; however, it is clear that, in the overwhelming majority of studies, these descriptions are intended to describe mediator activities.

²¹⁴ For example, see Wissler, R. L., ‘Mediation and Adjudication in the Small Claims Court: The Effects of Process and Case Characteristics’ (1995) 29(2) *Law and Society Review* 323.

²¹⁵ For example, see Wissler, R. L., *Trapping the Data: An Assessment of Domestic Relations Mediation in Maine and Ohio Courts* (Unpublished report, 1999).

²¹⁶ For example, see Sourdin, T., *Mediation in the Supreme and County Courts of Victoria* (Report prepared for the Department of Justice, Victoria, Australia, April 2009), available on <<http://civiljustice.info/adreval/1/>>.

²¹⁷ Gale, J., R. L. Mowery, M. S. Herrman, and N. L. Hollett, ‘Considering Effective Divorce Mediation: Three Potential Factors’ (2002) 19(4) *Conflict Resolution Quarterly*, 389.

²¹⁸ For example, see Karim, A., and R. Peggnetter, ‘Mediator Strategies and Qualities and Mediation Effectiveness’ (1983) 22(1) *Industrial Relations* 105; Kressel, K., T. Henderson, W. Reich, and C. Cohen, ‘Multidimensional Analysis of Conflict Mediator Style’ (2012) 30(2) *Conflict Resolution Quarterly* 135.

²¹⁹ For example, see Slaikeu, K. A., R. Culler, J. Pearson, and N. Thoennes, ‘Process and Outcome in Divorce Mediation’ (1985) 10 *Mediation Quarterly* 55; Wissler, R. L., *Trapping the Data: An Assessment of Domestic Relations Mediation in Maine and Ohio Courts* (Unpublished report, 1999).

²²⁰ Wissler, R. L., ‘Court-Connected Mediation in General Civil Cases: What We Know from Empirical Research’ (2002) 17 *Ohio State Journal on Dispute Resolution* 641.

²²¹ For example, see Pruitt, D. G., R. S. Peirce, N. B. McGillicuddy, G. L. Welton, and L. M. Castrianno, ‘Long-Term, Success in Mediation’ (1993) 17(3) *Law and Human Behavior* 313.

²²² Dilts, D. A., and A. Karim, ‘the Effect of Mediators’ Qualities and Strategies on Mediation Outcomes’ (1990) 45(1) *Relations Industrielles* 22; Henderson, D. A., ‘Mediation Success: An Empirical Analysis’ (1996) 11(1) *Ohio State Journal on Dispute Resolution* 105.

²²³ ‘The sole characteristic shared by nearly all the 13 mediators ... was that 11 of the 13 were a standard deviation above the mean’, Goldberg, S. B., and M. L. Shaw, ‘Further Investigation into the Secrets of Successful and Unsuccessful Mediators’ (2008) 26(8) *Alternatives to the High Cost of Litigation* 149, 158.

²²⁴ Kochan, T. A., and T. Jick, ‘The Public Sector Mediation Process: A Theory and Empirical Examination’ (1978) 22(2) *The Journal of Conflict Resolution* 209, 219.

Additional analysis of key terms

Each of the forty-seven studies was reviewed to determine co-occurrence of key terms and descriptions of mediator activities of any kind. All such descriptions were separately tabulated for initial analysis of compliance with the three criteria listed below (see *Terms used in this analysis*). The descriptions were also analysed to ascertain whether they could be categorised as any of the following: effects/outcomes, generalised mediator activities, and other non-activity concepts (such as '[the mediator was] calm, detached, patient'²²⁵). All descriptions were later subjected to additional analysis to check for possible contextual trends and for trends in terms of mediation effectiveness.

In all, close to 300 relevant, separate descriptions of the fifteen key terms were identified in the selected studies as being used in direct association with mediator participants and their actions. The 300 descriptions were subjected to more detailed analysis.²²⁶

In one recent review of the literature on mediator 'competencies, skills, and behaviours',²²⁷ descriptions of mediator actions and behaviour are bundled into one of two groups: 'mediator style, strategy and personality',²²⁸ or 'mediator competencies, skills, knowledge and behavior'.²²⁹ Initially, a similar bundling approach was considered for the current analysis, however it was found to be impracticable because the scope, variety, and diversity of terms and interpretations in the selected

²²⁵ McDermott, E. P., and R. Obar, "What's Going On" in Mediation: An Empirical Analysis of the Influence of a Mediator's Style on Party Satisfaction and Monetary Benefit' (2004) 9 *Harvard Negotiation Law Review* 75, 114.

²²⁶ The figure 300 is intended to give a sense of the scope of the analysis. It is a rough count that includes all separate explanations that appear on different pages in each study. It does not include detailed break-down of tabulated explanations, or separate instances of explanations of the same term that appear within the same paragraph on the same page. Although detailed counting of every individual explanation of every key term was attempted, it proved cumbersome and impractical. It also appeared not to serve any useful analytic purpose.

²²⁷ Kennedy Institute Workplace Mediation Research Group, *Shaping the Agenda 1: Exploring the Competencies, Skills and Behaviours of Effective Workplace Mediators* (KIWMRG, Ireland, 2016), 5.

²²⁸ Kennedy Institute Workplace Mediation Research Group, *Shaping the Agenda 1: Exploring the Competencies, Skills and Behaviours of Effective Workplace Mediators* (KIWMRG, Ireland, 2016), 16.

²²⁹ Kennedy Institute Workplace Mediation Research Group, *Shaping the Agenda 1: Exploring the Competencies, Skills and Behaviours of Effective Workplace Mediators* (KIWMRG, Ireland, 2016), 16; the report also demonstrates the concomitant use of unexplained terms that appears to be so prevalent in the selected studies.

studies impedes ready differentiation into such categories. Also, it was thought that bundling might mask the scope and potential effects of the terminological inconsistencies.

Terms used in Chapter Four

The phrase “mediators’ specific actions and approaches” is used in this thesis in reference to anything that mediator participants are observed or reported to have said and/or done, and the ways in which those were said or done. The phrase derives from one of the selected studies in which the researcher notes the widespread lack of such important information (‘specific mediator actions’) in empirical studies of mediation.²³⁰ To be included as “mediators’ specific actions and approaches”, a research description must comply with three criteria:

- i) The described activity is part of the primary study (rather than from, say, a secondary report of other literature and research),
- ii) The description is of what the mediator participants’ specific actions and approaches, and
- iii) A competent mediator could be expected to provide a reasonable replication of the described activity or statement; this is not intended to be an exact replication, more a recognisable replication.

The three criteria were devised using a thematic analysis approach,²³¹ and it was important that they be adequate for reflecting the content of the selected studies and the chosen analysis theme: researcher descriptions of mediator actions and interventions. All the selected studies were read to gain familiarity with the nature of the researchers’ coverage of mediator participants and to ascertain commonalities, or themes, in the ways mediator participants and their actions and interventions are described. Based on that reading, it was clear that all researchers have included

²³⁰ Wissler, R. L., ‘Court-Connected Mediation in General Civil Cases: What We Know from Empirical Research’ (2002) 17 *Ohio State Journal on Dispute Resolution* 641, 701.

²³¹ Bryman, A., *Social Research Methods* (5th Edition Oxford University Press, UK, 2016).

descriptions of mediator actions and interventions, often in detail, though not consistently in the terms required for this analysis.

Most of the studies include commentary on separate studies and it was important that the data collected for analysis include only primary data (ie researcher descriptions relating to mediator participants in their own studies). Criterion i) was designed for that purpose.

As has been observed in one of the selected studies, generalised descriptions, such as 'mediator tactics',²³² do not provide adequate information about 'specific mediator actions',²³³ so the criteria needed to focus on data that referred to mediator participants' specific actions and approaches. Criterion ii) is designed for that purpose. Criterion ii) is also designed to capture mediator actions that the researchers include as primary data and whose analysis has contributed to their findings about mediation effectiveness.

Criterion iii) has been included as a way of testing the material, that is, by providing some assurance that the items included under criterion ii) are achievable.

As illustrative examples, the following four statements are chosen from selected studies where they are presented as being descriptions of mediator activities. None of the statements meets the above criteria as a primary description of mediator participants' specific actions and approaches:

1. 'facilitating "recognition" by each party of the other party's vantage point'²³⁴
 - a) This statement does not specify the mediators' specific actions or behaviours that constituted "facilitating", also, it is not clear what is meant by each party

²³² Wissler, R. L., 'Court-Connected Mediation in General Civil Cases: What We Know from Empirical Research' (2002) 17 *Ohio State Journal on Dispute Resolution* 641, 701.

²³³ Wissler, R. L., 'Court-Connected Mediation in General Civil Cases: What We Know from Empirical Research' (2002) 17 *Ohio State Journal on Dispute Resolution* 641, 701.

²³⁴ McDermott, E. P., and R. Obar, "'What's Going On" in Mediation: An Empirical Analysis of the Influence of a Mediator's Style on Party Satisfaction and Monetary Benefit' (2004) 9 *Harvard Negotiation Law Review* 75, 81.

“recognising” the other’s vantage point and how that would be ascertained.

Finally, the description is part of secondary data (ie commentary on separate research) and does not arise from the study’s mediator participants;

2. ‘keeping order’²³⁵

- a) This phrase describes a possible effect of a mediator’s actions or behaviours, it is not an action or behaviour in its own right. It is unclear what the mediator participant did say or do that resulted in “order” being kept, nor is it clear how the researchers (or other participants) interpreted “order”;

3. ‘the mediator [created] “a supportive environment – fair, neutral, focused”’²³⁶

- a) The phrase also describes a possible effect of a mediator’s actions or behaviours, it is not an action or behaviour in its own right (ie it is not clear what the mediator actually said and/or did that led to the perceived ‘supportive environment’). The meaning of the concepts ‘supportive’, ‘fair, neutral, focused’ are likely to be subjective and contextually dependent;

4. ‘the mediator simply repeated what a disputant had said’²³⁷

- a) Although a description of a mediator action, this does not include important additional information such as the mediator’s tone of voice, manner, and demeanour, all contributing to its specificity, and assessment of its influence on any perceived effectiveness of the subject mediation.

²³⁵ Pruitt, D. G., R. S. Peirce, N. B. McGillicuddy, G. L. Welton, and L. Castrianno, ‘Long-Term Success in Mediation’ (1993) 17(3) *Law and Human Behavior* 313, 319.

²³⁶ Kressel, K., E. A. Frontera, S. Forlenza, F. Butler, and L. Fish, ‘The Settlement-Oriented vs the Problem-Solving Style’ (1994) 50(1) *Journal of Social Issues* 67, 78.

²³⁷ Welton, G. L., D. G. Pruitt, N. B. McGillicuddy, C. A. Ippolito, and J. M. Zubeck, ‘Antecedents and Characteristics of Caucusing in Community Mediation’ (1992) 3(4) *International Journal of Conflict Management* 303, 308.

Two other phrases have been devised to assist in the analysis by differentiating the ways in which researchers describe mediator actions:

1. “Generalised mediator actions” – this phrase is explained in more detail in Chapter Four. It describes instances where mediator behaviour is depicted in generalisations rather than as specific actions and approaches; for example, in the statement ‘the mediators’ recommending a particular settlement’.²³⁸ it is unclear what the mediator actually said that was interpreted as being the recommendation of a particular settlement. In addition, it is unclear how the mediator recommended settlement, whether by explicitly stating that an offer should be accepted, or by referring to an option and somehow indicating “I prefer that particular settlement”.

2. “Generalised stylistic categories” – this phrase, too, is explained in more detail in Chapter Four. It refers to descriptions of mediator actions that are depicted in terms of generalised stylistic approaches, or of recognised models of practice, without describing the mediator’s specific actions and approaches. Examples that appear frequently in the selected studies include “evaluative”, “facilitative”, “transformative”, “directive”, “nondirective”, “settlement-oriented”, “process-oriented”, “passive”, “active”, “process skills”, and “summarisation behaviours”.

2.3. Systematic appraisal and bibliometric analysis

2.3.0. Overview and aims

The thematic analyses reported in Chapters Three and Four of this thesis suggest there might be systemic issues and constraints affecting the reliability of findings reported in the selected studies. The thematic analyses show that there is a lack of consistency in the definitions and measures used for assessing mediation effectiveness, and in the terms used to describe and measure mediator actions and approaches. The studies produce very little information about mediator effectiveness, and, despite using quite different units of analysis, and sometimes relying on

²³⁸ Wissler, R. L., ‘Court-Connected Mediation in General Civil Cases: What We Know from Empirical Research’ (2002) 17(3) *Ohio State Journal on Dispute Resolution* 641, 701.

researcher assumptions, they report consistently positive findings about mediation. As is reported in Chapters Six and Seven, the selected studies include researcher concerns about their own methodologies. All these factors suggest there might be systemic issues affecting the research that is reported in the selected studies.

The process of systematic appraisal enables assessment of a body of qualitative research to ascertain whether systemic issues might be affecting the reliability of its findings, and the process includes detailed assessment of the methodologies that researchers apply in their empirical investigations. It is a relatively flexible and accommodating approach to identifying systemic issues and constraints.

The systematic appraisal has two aims:

1. To ascertain whether there are systemic issues affecting the validity of the findings described in the 47 selected studies; and
2. If there are systemic issues, to identify them.

Systematic reviews and systematic appraisals are widely used to review, or appraise, a body of research without concentrating only on its findings.²³⁹ Systematic reviews rely on a formulaic pro-forma approach, using criteria that are most suitable for reviewing the reliability of bodies of quantitative research.²⁴⁰ Commentators have recognised the difficulties in the approach's application to qualitative research, suggesting less rigid methods of appraisal might be more useful that take into account the inherent diversity of qualitative research. Hence, systematic appraisals are preferred for appraising qualitative research.²⁴¹

²³⁹ Bryman, A., *Social Research Methods* (5th Edition, Oxford University Press, 2016).

²⁴⁰ Huggins, J., and S. Green, *Cochrane Handbook for Systematic Reviews* (Wiley-Blackwell, UK, 2008).

²⁴¹ Dixon-Woods, M., R. L. Shaw, S. Agarwal, and J. A. Smith, 'The Problem of Appraising Qualitative Research' (2004) 13 *Quality and Safety in Health Care* 223; Kuper, A., L. Lingard, and W. Levinson, 'Qualitative Research: Critically Appraising Qualitative Research' (2008) 337:a1035 *BMJ* 687.

The selected studies include quantitative, qualitative, and mixed methods approaches, and the researchers describe the use of consistent methodologies combined with inconsistent units of measure (eg effectiveness measures). All these factors suggest that a pro forma systematic review would be less productive than would be the less rigid approach of systematic appraisal.²⁴² Although it is rare to apply systematic appraisal to a body of mediation research,²⁴³ it was anticipated the process would provide insight into systemic issues affecting the lack of information about mediator effectiveness

Systematic reviews, and some appraisals, rely heavily on accessing and analysing online data that is accessible through electronic databases. Many relevant publications have been shown to adjust the online data that they submit to online databases, and reliance on them has been reported to produced problematic results.²⁴⁴ All the analyses, reviews, and appraisals reported in this thesis have included manual processes. This appraisal has sought to include all the selected studies, and not to exclude any study from analysis on the grounds of its methodological approaches. Although this inclusive and reflective approach to the appraisal is preferred by some,²⁴⁵ it is a departure from some review and meta-analysis approaches.²⁴⁶

²⁴² Jesson, J., K. L. Matheson, and F. M. Lacey, *Doing Your Literature Review: Traditional and Systematic Techniques* (Sage Publications LTD, UK, 2012).

²⁴³ A recent report of mediation research includes references to “systematic review”, “systematic analysis”, and “systematic exploration”; it reports on the accumulation of reported research findings about mediators, and, in that context, is a valuable study; however, its focus is limited to the results and findings reported in mediation research and it does not consider the research approaches and methods behind them; see Kennedy Institute Workplace Mediation Research Group (KIWMRG), *Shaping the Agenda 1: Exploring the Competencies, Skills and Behaviours of Effective Workplace Mediators* (KIWMRG, Ireland, 2016); see also Kennedy Institute of Workplace Mediation Research Group (KIWMRG) *Shaping the Agenda 2: Implications for Workplace Mediation Training, Standards and Practice in Ireland* (KIWMRG, Ireland, 2016).

²⁴⁴ Duyx, B., G. M. H. Swaen, M. J. E. Urlings, L. M. Bouter, and M. P. Zeegers, ‘The Strong Focus on Positive Results in Abstracts May Cause Bias in Systematic Reviews: A Case Study on Abstract Reporting Bias’ (2019) 8(1) *Systematic Reviews* 174.

²⁴⁵ Kuper, A., L. Lingard, and W. Levinson, ‘Critically Appraising Qualitative Research’ (2008) 337(1035) *BMJ* 687.

²⁴⁶ Sayo, A., R. G. Jennings, and J. D. van Horn, ‘Study Factors Influencing Ventricular Enlargement in Schizophrenia: A 20 Year Follow-up Meta-Analysis’ (2011) 59(1) *NeuroImage* 154.

Within this appraisal, the analysis does not impose its own interpretations of such concepts as the mediation process. Data about the mediation process is accepted as including what the researchers report as being the mediation process in the context of their study, and this can include:

- The location of, and disputant enlistment into, the mediation process (eg whether the subject mediation was a private one-off event; or whether it was part of a court-connected service, or of an organisational in-house service; or whether it was conducted within an institutionalised mediation service?);
- The typical structure of the process (eg whether the process included preliminary private meetings, or caucuses, with each disputant; whether there were joint sessions; whether the disputants talked with each other; whether there was a structured agenda?)²⁴⁷;
- The duration of the mediation process;
- Disputant perceptions of the fairness of the process, and its outcomes; and
- Disputant assessment of their own satisfaction with the mediation process.

Within this appraisal the term “mediator in-mediation behaviour” is used to encapsulate data about participating mediators that includes what the participating mediators are reported to have said and done during mediation, approaches that the participating mediators are reported to have adopted, and anything the researchers report as relating to what the participating mediators did and said in subject mediations, including:

- Participating mediator behaviour (eg reports of actions that the mediator undertook);
- Things that the participating mediator is reported to have said; and

²⁴⁷ “Typical structure” refers to the customary way in which the subject mediations are structured. For example, many of the studies include descriptions of how mediations are typically structured in the setting within which the study is conducted; some include specific mention of instances where participating mediators may (or may not) have acted to influence that typical structure (eg in some studies, the researchers report that it is not customary to convene preliminary private sessions separately with each disputant, yet they report that some mediators choose to convene such private sessions).

- Disputant assessment of their own satisfaction with the mediator.

Similarly, the term “non-mediator in-mediation behaviour” is used to refer to data about what non-mediator participants have said or done during subject mediations.

Chapters Five, Six, and Seven report the outcomes of the systematic appraisal, and Chapter Seven includes a limited bibliometric analysis of the selected studies. The appraisal processes and instruments have been designed specifically to explore the selected studies and identify research design or methodological factors that might contribute to the limitations and constraints reported in this thesis and reported by the researchers, as well as to the lack of information about mediator effectiveness. The appraisal considers what is practicable and feasible for researchers in the various contexts in which they work. Although the systematic appraisal does not answer the thesis Research Questions directly, it does provide some explanation for mediation research not being able to answer them either.

2.3.1. Methodology

As noted above, although the overall purpose of systematic appraisal is to assess the general reliability of a body of research, there are no established procedures or pro forma for the appraisal approach, nor for the collection and analysis of methodological data.²⁴⁸ The relevant research includes only generalised guidelines for building an appraisal framework appropriate for each specific study. Those guidelines focus on being able to confirm a subject study’s clarity in explaining/describing: the purpose of the study (ie research question or stated objectives); the appropriateness of the study participants (ie the sample population); the nature and appropriateness of the data, how it was collected, and how it was analysed; the transferability, or generalisability, of the findings; the links between the research data and the researchers’

²⁴⁸ On the other hand, systematic reviews are well supported by defined procedures and accompanying pro forma; see Critical Appraisal Skills Program (CASP), available on <<https://casp-uk.net/>>; Centre for Evidence-Based Medicine (CEBM), available on <<https://www.cebm.net/>>; Accessing the Methodological Quality of Systematic Reviews (AMSTAR), available on <<http://amstar.ca/>>; Cochrane (Collaboration), available on <<https://www.cochrane.org/>>; Joanna Briggs Institute, available on <<http://joannabriggs.org/>>.

interpretations of it, as well as links between the research data and the researchers' conclusions and findings; and how the researchers address key ethical issues such as confidentiality and reflexivity.²⁴⁹ Commentators stress the importance of a subject study's internal consistency and of the integration of its methodological components.²⁵⁰

In this thesis, the development of the appraisal process is based on the available systematic appraisal literature,²⁵¹ as well as on appropriate information from existing procedures and guidelines for conducting systematic reviews.²⁵² It is designed for specific applicability to the selected studies, and includes two unique data collection instruments, which have been used to collect relevant data from each of the selected studies, and to support analysis of that data. Copies of the instruments are available at Appendix C.

Pro forma (i): Appraisal master – data collection

An instrument was designed that included eight categories and eighteen sub-categories of methodological information, enabling the collection and differentiation of all such information from

²⁴⁹ Dixon-Woods, M., R. L. Shaw, S. Agarwal, and J. A. Smith, 'The Problem of Appraising Qualitative Research' (2004) 13 *Quality and Safety in Health Care* 223; Kuper, A., L. Lingard, and W. Levinson, 'Qualitative Research: Critically Appraising Qualitative Research' (2008) 337:a1035 *BMJ* 687.

²⁵⁰ Bansal, P., W. K. Smith, and E. Vaara, 'From the Editors: New Ways of Seeing Through Qualitative Research' (2018) 61(4) *Academy of Management Journal* 1189; Dixon-Woods, M., R. L. Shaw, S. Agarwal, and J. A. Smith, 'The Problem of Appraising Qualitative Research' (2004) 13 *Quality and Safety in Health Care* 223.

²⁵¹ For example, see Dixon-Woods, M., S. Agarwal, B. Young, D. Jones, and A. Sutton, 'Integrative Approaches to Qualitative and Quantitative Evidence' (Health Development Agency, National Health Service, UK, 2004), available on <https://www.webarchive.org.uk/wayback/archive/20140616174235mp/http://nice.org.uk/nicemedia/documents/integrative_approaches.pdf>; Kuper, A., L. Lingard, and W. Levinson, 'Qualitative Research: Critically Appraising Qualitative Research' (2008) 337:a1035 *BMJ* 687; Kuper, A., S. Reeves, and W. Levinson, 'Qualitative Research: An Introduction to Reading and Appraising Qualitative Research' (2008) 337:a288 *BMJ* 404; Reeves, S., M. Albert, A. Kuper, and B. D. Hodges, 'Why Use Theories in Qualitative Research?' (2008) 337:a949 *BMJ* 631; Bryman, A., *Social Research Methods* (5th Edition, Oxford University Press, UK, 2016); Maruyama, G., and C. S. Ryan, *Research Methods in Social Relations* (8th Edition, Wiley Blackwell, UK, 2014); Greenhalgh, T., *How to Read a Paper: The Basics of Evidence-Based Medicine* (5th Edition, Wiley and BMJ Books, UK, 2014); Greenhalgh, T., et al [76 co-authors], 'An Open Letter to *The BMJ* Editors on Qualitative Research' (2016) 352:i563 *BMJ* 1; Carpenter, D., 'Ethics, Reflexivity and Virtue' in R. Iphofen and M. Tolich (eds), *The SAGE Handbook of Qualitative Research Ethics* (SAGE Publishing, UK/USA/India, 2018); J. P. A. Ioannidis, 'Why Most Published Research Findings are False' (2009) 18(4) *Chance* 40.

²⁵² Critical Appraisal Skills Program (CASP), available on <<https://casp-uk.net/>>; Centre for Evidence-Based Medicine (CEBM), available on <<https://www.cebm.net/>>; Accessing the Methodological Quality of Systematic Reviews (AMSTAR), available on <<http://amstar.ca>>; Cochrane (Collaboration), available on <<https://www.cochrane.org/>>; Joanna Briggs Institute, available on <<http://joannabriggs.org/>>.

each study, leading to rich data collection and analysis.²⁵³ For example, one major category in the pro forma “Research Design”, which includes eight sub-categories such as “Objectives/hypothesis/research questions”, “Population sample” (which includes “Selection”), “Methodology”, “Data collection” and so on.

Pro forma (ii): Data collection – reported methodologies

A second instrument was designed to collect all information from each study that is directly relevant to the collection of research data (ie who the data was collected from, how it was collected, and general nature of the data).²⁵⁴

Collecting relevant data from the studies was a complex undertaking: many studies lack a consistent, structured approach to describing their research design and methodology, and do not always clearly differentiate the key design components (eg some do not include a clear statement of the purpose of the study; some do not include clear links between the findings of the study and their stated objectives; some do not clearly describe the process for selecting their study participants, or for collecting their research data). It is unclear if the reporting limitations are a result of editorial decisions imposed by journal publication requirements.

Within the appraisal, data analysis has relied on the aggregated data for each category and sub-category from the data collection instruments completed for each study. For example, in *Pro forma (i)*, analysis of the category “sample populations and participant selection” produces information relating to: the range of populations accessed by researchers, as well as their

²⁵³ Four of the selected studies were used to pre-test the instrument, having been selected purposely to include a diversity of time periods and of mediation contexts: Alberts, J. K., B. L. Heisterkamp, and R. M. McPhee, ‘Disputant Perceptions of and Satisfaction with a Community Mediation Program’ (2005) 16(3) *The International Journal of Conflict Management* 218 [Community context]; Burrell, N. A., W. A. Donohue, and M. Allen, ‘The Impact of Disputants’ Expectations on Mediation, Testing an Interventionist Model’ (1990) Fall 1990 *Human Communication Research* 104 [Simulated context]; Kochan, T. A., and T. Jick, ‘The Public Sector Mediation Process: A Theory and Empirical Examination’ (1978) 22(2) *The Journal of Conflict Resolution* 209 [Labour/management context]; Wall, J. A., Jr, and S. Chan-Serafin, ‘Do Mediators Walk Their Talk in Civil Cases?’ (2010) 28(1) *Conflict Resolution Quarterly* 3 [Court-connected context].

²⁵⁴ The same four studies were used to test both instruments.

representativeness; the diversity in sample populations (eg do researchers routinely access the same participants?); and demographic differentiation among study participants (including mediator participants). The instrument was also used to collect information about how researchers select study participants from the sample population, usually a key factor when assessing the transferability of research findings.²⁵⁵

2.3.2. Limitations

A key limitation of the methodology is that it has been undertaken by a single researcher rather than a team, and subjective judgements may have influenced the design of the two data collection instruments and the subsequent data analysis. Although traditional approaches to systematic appraisal recommend the use of a team of researchers, it has also been suggested that, in a process that requires collecting, categorising, aggregating, and analysing a significant amount of specialist data, a single researcher with some substantive expertise, and who is familiar with the data, may produce a more congruent analysis than a team whose members may have less substantive expertise and are less familiar with the data.²⁵⁶ The reliability of either approach depends heavily on the creation of transparent records – which have been maintained in this undertaking.²⁵⁷

2.3.3. Bibliometric analysis

Bibliometric analysis is included in the methodologies reported in this thesis because it is a recognised method for assessing publication practices as well as establishing the existence of publication and citation influence networks – in themselves potential indicators of established research approaches and unexamined field-of-research beliefs and assumptions. The purpose of the

²⁵⁵ Bryman, A., *Social Science Research Methods* (5th Edition, Oxford University Press, 2016); Maruyama, G., and C. S. Ryan, *Research Methods in Social Relations* (8th Edition, Wiley Blackwell, 2014).

²⁵⁶ Greenhalgh, T., *How to Read a Paper: The Basics of Evidence-Based Medicine* (5th Edition, Wiley and BMJ Books, UK, 2014).

²⁵⁷ The author's principal supervisor provided invaluable assistance and guidance in the design and undertaking of the systematic appraisal.

bibliometric analysis reported in this thesis is to inform exploration of the influence of the researchers involved in the selected studies

Long before the introduction of internet-based data collections, bibliometrics was devised as a means of analysing written communication through the application of statistical methods.²⁵⁸ More recently, it has become a recognised approach for assessing the developmental status of a specific field of research, the consequent strength of its theoretical frameworks, and the influence of researchers and authors on each other and on the research.²⁵⁹ The technique focuses on the journal publication of articles and, ordinarily, collects publication data on each article, enabling analysis of many associated factors, including journal standing; year of publication; institutional and discipline affiliation of authors; and the frequency with which their work is published.²⁶⁰ The technique has been used to assess theoretical developments through analysis of the appearance of indicative terms in paper titles and in key words, noting in particular how they fluctuate over time.²⁶¹ To date, use of the technique is limited to journal publications, and it is not designed to incorporate analysis of published books, or book chapters.²⁶²

The bibliometric analysis included in Chapter Seven is limited and is intended to augment Part Three of the systematic appraisal which analyses research influence. The most frequently cited of the 47 selected studies are analysed to ascertain potential citation and influence networks among the researchers and co-authors.

²⁵⁸ A. Pritchard, 'Statistical Bibliography or Bibliometrics?' (1969) 25(4) *Journal of Documentation* 348, 349.

²⁵⁹ Gallardo-Gallardo, E., S. Nijs, N. Dries, and P. Gallo, 'Towards an Understanding of Talent Management as a Phenomenon-Driven Field Using Bibliometric and Content Analysis' (2015) 25 *Human Resource Management Review* 264.

²⁶⁰ For example, see Aksu, G., and C. O. Güzeller, 'Analysis of Scientific Studies on Item Response Theory by Bibliometric Analysis Method' (2019) 15(2) *International Journal of Progressive Education* 44; Guo, F., G. Ye, L. Hudders, W. Lv, M. Li, and V. G. Duffy, 'Product Placement in Mass Media: A Review and Bibliometric Analysis' (2019) 48 *Journal of Advertising* 215.

²⁶¹ Almeida, F., and L. G. de Paula, 'The Place of Uncertainty in Heterodox Economics Journals: A Bibliometric Study' (2019) 53(2) *Journal of Economic Issues* 553; Glänzel, W., 'Bibliometric Methods for Detecting and Analysing Emerging Research Topics' (2012) 21(2) *El Profesional de la Informacion* 194.

²⁶² For example, see Web of Science, available on <<http://wokinfo.com/>>.

The scope of the bibliometric analysis in this thesis is limited above all by the number of included publications. The nature of bibliometric analysis limits which items can be included because the process cannot accommodate unpublished items, or items that have not been published in journals. In this analysis, only 36 of the selected studies can be included because the remaining eleven were published in books,²⁶³ or are conference presentations,²⁶⁴ or are reports not published in journals,²⁶⁵ or have not been published at all.²⁶⁶ Thirty-six subject items is a very small sample and it is reduced even further when only the most highly cited items are included. The internet provides access to large amounts of journal information, and bibliometric analyses across diverse disciplines routinely include at least 1000 published works, and often more.²⁶⁷ Specific computer software has been developed to enable these large-scale studies.²⁶⁸

²⁶³ Hiltrop, J. M., 'Factors Associated with Successful Labor Mediation' in K. Kressel and D. G. Pruitt (eds), *Mediation Research: The Process and Effectiveness of Third-Party Intervention* (Jossey-Bass, USA, 1989); Jones, T. S., 'Lag Sequential Analyses of Mediator-Spouse and Husband-Wife Interaction in Successful and Unsuccessful Divorce Mediation' in M. A. Rahim (ed), *Managing Conflict: An Interdisciplinary Approach* (Praeger, USA, 1989); Pruitt, D. G., W. R. Fry, L. Castrianno, J. Zubeck, G. L. Welton, N. B. McGillicuddy, and C. Ippolito, 'The Process of Mediation: Caucusing, Control, and Problem Solving' in M. A. Rahim (ed), *Managing Conflict: An Interdisciplinary Approach* (Praeger, USA, 1989).

²⁶⁴ Swaab, R. I., *Face First: Pre-Mediation Caucus and Face in Employment Disputes* (Presentation, Annual Association of Conflict Management Conference, June 2009); Swaab, R. I., and J. Brett, *Caucus with Care: The Impact of Pre-Mediation Caucuses on Conflict Resolution* (Meetings Paper, International Association of Conflict Management, 2007).

²⁶⁵ Sourdin, T., *Dispute Resolution Processes for Credit Consumers* (Project Report, Conflict Resolution Research Centre, La Trobe University, 2007); Sourdin, T., *Mediation in the Supreme and County Courts of Victoria* (Report prepared for the Department of Justice, Victoria, Australia, April 2009), available on <<http://www.civiljustice.info/adreval/1/>>; Sourdin, T., *Exploring Pre-Action Requirements: Resolving Disputes Outside Courts* (ACJI, Monash University, October 2012); Sourdin, T., and T. Matruglio, *Evaluating Mediation – New South Wales Settlement Scheme 2002 (2004) Mediation*. Paper 7, available on <<http://www.civiljustice.info/med/7>>.

²⁶⁶ McEwen, C. A., *An Evaluation of the ADR Pilot Project: Final Report 1* (Unpublished report, 1992); Wissler, R. L., *Trapping the Data: An Assessment of Domestic Relations Mediation in Maine and Ohio Courts* (Unpublished report, 1999).

²⁶⁷ For example, see Aksu, G., and C. O. Güzeller, 'Analysis of Scientific Studies on Item Response Theory by Bibliometric Analysis Method' (2019) 15(2) *International Journal of Progressive Education* 44; Almeida, F., and L. G. de Paula, 'The Place of Uncertainty in Heterodox Economics Journals: A Bibliometric Study' (2019) 53(2) *Journal of Economic Issues* 553; Guo, F., G. Ye, L. Hudders, W. Lv, M. Li, and V. G. Duffy, 'Product Placement in Mass Media: A Review and Bibliometric Analysis' (2019) 48 *Journal of Advertising* 215; Ford, J. B., and A. Merchant, 'A Ten-year Retrospective of Advertising Research productivity, 1997 – 2006' (2008) 37(3) *Journal of Advertising* 69.

²⁶⁸ Independent examples include: BibExcel, available on <<https://homepage.univie.ac.at/juan.gorraiz/bibexcel/>>; Gephi, available on <<https://gephi.org/>>; SciMAT Science Mapping Analysis Tool, available on <<https://sci2s.ugr.es/scimat/description.html>>.

As noted earlier (see, 2.3.2. *Thematic analysis: Key terminologies in mediation research*), recent commentary has cautioned that electronic bibliometric analysis techniques are limited in that they rely on the electronically available data and cannot take important contextual factors into account.²⁶⁹ In addition, with the increase in electronic analysis, journals have adjusted the ways in which their content can be electronically searched, limiting the scope of electronic databases.²⁷⁰ This issue is considered in more detail in Chapter Seven.

A recent bibliometric analysis (in the field of social psychology) has suggested that publication pressure influences the choice of research methodologies. In particular, the analysis reported a significant increase in the use of large amounts of relatively inexpensive, online, and relatively undifferentiated data, and a decrease in the use of smaller, more resource-intensive, ‘real life’ data collection techniques.²⁷¹

2.4. Targeted review²⁷²

This review has been included in the thesis to illuminate some of the constraints described by mediation researchers as affecting their research work. Constraints they describe are likely to influence how mediation research is designed, conducted, and reported, and is a major consideration in the context of metaresearch. Chapter Seven examines these constraints in detail, and considers their potential influence on the research design and methodologies included in the selected studies.

²⁶⁹ Busch, D., ‘Does Conflict Mediation Research Keep Track with Cultural Theory?’ (2016) 4(2) *European Journal of Applied Linguistics* 181; Glänzel, W., ‘Bibliometric Methods for Detecting and Analysing Emerging Research Topics’ (2012) 21(2) *El Profesional de la Informacion* 194.

²⁷⁰ Duyx, B., G. M. H. Swaen, M. J. E. Urlings, L. M. Bouter, and M. P. Zeegers, ‘The Strong Focus on Positive Results in Abstracts May Cause Bias in Systematic Reviews: A Case Study on Abstract Reporting Bias’ (2019) 8(1) *Systematic Reviews* 174.

²⁷¹ Baumeister, R. F., K. D. Vohs, and D. C. Funder, ‘Psychology as a Science of Self-Reports and Finger Movements: Whatever Happened to Actual Behavior?’ (2007) 2(4) *Perspectives on Psychological Science* 396, 402; Sassenberg, K., and L. Ditrich, ‘Research in Social Psychology Changed Between 2011 and 2016: Larger Sample Sizes, More Self-Report Measures, and More Online Studies’ (2019) 2(2) *Advances in Methods and Practices in Psychological Science* 107.

²⁷² See Chapter Seven.

The selected studies include numbers of references to limitations the researchers describe as having affected their investigations and, for this reason alone, warrant their inclusion in this review. Additional literature searches reveal further relevant commentary by the same researchers in other publications, as well as commentary by other researchers. Discussion of the research constraints includes exploration of the findings of this thesis which might also act as constraints on mediation research, in particular on empirical studies of mediation.

The review of constraints on research includes a review recognised gaps in knowledge about mediation, and about mediators, again drawing on the mediation literature, including the 47 selected studies. Responses to an online survey of professional mediators contributes to this review.

In order to provide a perspective on mediation research, and on its constraints, broader than that provided by the 47 selected studies, an electronic search was conducted of the library database of the University of Newcastle (Australia).²⁷³ From the search results, material was purposely selected to include (but not be limited to) non-Western research settings, non-law researcher disciplines, relatively recent publications, and, where available, alternative empirical research approaches and methods. After completion of the electronic search and the inclusion of a range of studies, three recent reports were also added for their extensive reviews of the mediation literature.²⁷⁴ The purpose of including additional references was to expand the scope of recognised constraints on mediation research, of gaps in knowledge about mediation and its practice, and of suggestions for filling those gaps

²⁷³ Using the search term “conflict mediation research methodologies”.

²⁷⁴ Expert Group on Mediation, *Bringing Mediation into the Mainstream in Civil Justice in Scotland* (Report of the Expert Group on Mediation in Civil Justice in Scotland, Scotland, June 2019); Kennedy Institute of Workplace Mediation Research Group, *Shaping the Agenda 1: Exploring the Competencies, Skills and Behaviours of Effective Workplace Mediators* (KIWMRG, Ireland, 2016); Social Research Series, *An International Evidence Review of Mediation in Civil Justice* (Report for the Scottish Government, June 2019).

2.5. Online survey of professional mediators

This thesis reports two gaps in mediation research:

- (a) Practising mediators' low rates of cooperative participation in mediation research;²⁷⁵
- and
- (b) The lack of input from practising mediators to inform mediation research.²⁷⁶

Analysis of an online survey of professional mediators is included in this thesis in response to both these issues, and it has been designed to meet two objectives:

1. To ascertain the rates at which practising mediators would respond to an online survey;
- and
2. To obtain from practising mediators their ideas for future mediation research.

The survey responses contribute to filling knowledge gaps in mediation, in particular those that may derive from research constraints. They also contribute to this thesis by confirming the lack of knowledge about mediator effectiveness, and by suggesting potential future research that might increase that knowledge. The survey responses provide some insight into the research interests of professional mediators and suggest that professional mediators have limited information about mediator effectiveness.

The following sections provide an overview of the research design and methodology of the survey. At Appendix D is a copy of the survey instrument and a compilation of the survey responses.²⁷⁷

²⁷⁵ In the 47 selected studies, researchers report mediator participants who do not attend research meetings and interviews, do not complete questions in data collection surveys, and do not consistently activate recording equipment for their mediation. Further information is provided in Chapters Six and Seven.

²⁷⁶ Apart from researchers who happen to be mediators, which is rarely made clear in publications and reports.

²⁷⁷ Chapter Seven includes analysis of the survey responses.

2.5.0. Background literature

According to the selected studies, the three overarching aims of mediation research are (i) to establish and confirm mediation's effectiveness as a process for resolving conflicts and disputes; (ii) to increase understanding and knowledge about mediation, and about the role of mediators;²⁷⁸ and (iii) to improve the practice of mediation.²⁷⁹ The collaborative contributions of professional mediators and of researchers in designing and conducting studies of mediation could be expected to be a significant contribution to meeting those overarching aims. Apart from researchers who happen to practise mediation, there appears to be very little mediator input to the design and conduct of mediation research.²⁸⁰

²⁷⁸ Alberts, J. K., B. L. Heisterkamp, and R. M. McPhee, 'Disputant Perceptions of and Satisfaction with a Community Mediation Program' (2005) 16(3) *The International Journal of Conflict Management* 218; Burrell, N. A., W. A. Donohue, and M. Allen, 'The Impact of Disputants' Expectations on Mediation, Testing an Interventionist Model' (1990) Fall 1990 *Human Communication Research* 104; Carnevale, P. J. D., and R. Peggnetter, 'The Selection of Mediator Tactics in Public Sector Disputes: A Contingency Analysis' (1985) 41(2) *Journal of Social Issues* 2; Dilts, D. A. and A. Karim, 'The Effect of Mediators' Qualities and Strategies on Mediation Outcomes' (1990) 45(1) *Relations Industrielles/Industrial Relations* 22; Gale, J., R. L. Mowery, M. S. Herrman, and N. L. Hollett, 'Considering Effective Divorce Mediation: Three Potential Factors' (2002) 19(4) *Conflict Resolution Quarterly* 389; Hiltrop, J. M., 'Factors Associated with Successful Labor Mediation' in K. Kressel and D. G. Pruitt (eds), *Mediation Research: The Process and Effectiveness of Third-Party Intervention* (Jossey-Bass, USA, 1989); Kochan and Jick 1978; Kressel, K., 'How Do Mediators Decide What To Do? Implicit Schemas of Practice and Mediator Decisionmaking' (2013) 28(3) *Ohio State Journal on Dispute Resolution* 709; Posthuma, R. A., A. Richard, J. B. Dworkin, and M. S. Swift, 'Mediator Tactics and Sources of Conflict: Facilitating and Inhibiting Effects' (2002) 41(1) *Industrial Relations* 94; Wall, J. A., Jr, and S. Chan-Serafin, 'Processes in Civil Case Mediations' (2009) 26(3) *Conflict Resolution Quarterly* 261.

²⁷⁹ Carnevale, P. J. D., and R. Peggnetter, 'The Selection of Mediator Tactics in Public Sector Disputes: A Contingency Analysis' (1985) 41(2) *Journal of Social Issues* 2; Gale, J., R. L. Mowery, M. S. Herrman, and N. L. Hollett, 'Considering Effective Divorce Mediation: Three Potential Factors' (2002) 19(4) *Conflict Resolution Quarterly* 389; Goldberg, S. B., and M. L. Shaw, 'Further Investigation into the Secrets of Successful and Unsuccessful Mediators' (2008) 26(8) *Alternatives to the High Cost of Litigation* 149; Jones, T. S., 'Lag Sequential Analyses of Mediator-Spouse and Husband-Wife Interaction in Successful and Unsuccessful Divorce Mediation' in M. A. Rahim (ed), *Managing Conflict: An Interdisciplinary Approach* (Praeger, USA, 1989); Kressel, K., 'How Do Mediators Decide What To Do? Implicit Schemas of Practice and Mediator Decisionmaking' (2013) 28(3) *Ohio State Journal on Dispute Resolution* 709; Kressel, K., T. Henderson, W. Reich, and C. Cohen, 'Multi-Dimensional Analysis of Conflict Mediator Style' (2012) 30(2) *Conflict Resolution Quarterly* 135; McDermott, E. P., and R. Obar, "'What's Going On" in Mediation: An Empirical Analysis of the Influence of a Mediator's Style on Party Satisfaction and Monetary Benefit' (2004) 9 *Harvard Negotiation Law Review* 75; Posthuma, R. A., A. Richard, J. B. Dworkin, and M. S. Swift, 'Mediator Tactics and Sources of Conflict: Facilitating and Inhibiting Effects' (2002) 41(1) *Industrial Relations* 94; Wall, J. A., Jr, and S. Chan-Serafin, 'Processes in Civil Case Mediations' (2009) 26(3) *Conflict Resolution Quarterly* 261; Wall, J. A., Jr, and S. Chan-Serafin, 'Do Mediators Walk Their Talk in Civil Cases?' (2010) 28(1) *Conflict Resolution Quarterly* 3.

²⁸⁰ Although some mediation researchers may also be practicing mediators, there appears to have been very little active engagement of practising mediators in mediation research. As noted in Chapter Five, the findings reported in some of the selected studies are limited by low mediator response rates.

A sequence of complex recent studies confirms that people who have an active role in contributing to the purpose and design of research studies are more cooperative with, and readily participate in, the subsequent research study.²⁸¹ Mediation researchers have reported both low participation rates of practising mediators in empirical studies of mediation,²⁸² and low rates of mediator cooperation with research techniques such as observations and recording of mediation sessions for analysis.²⁸³ It has been suggested that this arises, at least in part, from mediator concerns about the ramifications research findings may have on their work,²⁸⁴ and about the levels of researcher “respect” for the complexities inherent to the mediator’s role.²⁸⁵

The survey response rate provides a rough estimation of the willingness of professional mediators to contribute to mediation research.

Online survey response rates

Online survey formats are widely used in research and are often included to support other empirical approaches in the same study.²⁸⁶ They may save time and effort for researchers/designers, as well as for participants.²⁸⁷ However, they may not be recognised as

²⁸¹ P. Firchow, *Reclaiming Everyday Peace: Local Voices in Measurement and Evaluation After War* (Cambridge University Press, UK, and USA, 2018).

²⁸² Goldberg, S. B., ‘The Secrets of Successful Mediators’ (2005) 21(3) *Negotiation Journal* 365; McLaughlin, M. E., R. G. Lim, and P. Carnevale, ‘Professional Mediators’ Judgements of Mediation Tactics: Multidimensional Scaling and Cluster Analyses’ (1991) 76(3) *Journal of Applied Psychology* 465; Sourdin, T., *Mediation in the Supreme and County Courts of Victoria* (Report prepared for the Department of Justice, Victoria, Australia, April 2009), available on <<http://www.civiljustice.info/adreval/1/>>; Sourdin, T., *Exploring Pre-Action Requirements: Resolving Disputes Outside Courts* (ACJI, Monash University, October 2012).

²⁸³ Wall, J. A., Jr., and T. C. Dunne, ‘Mediation Research: A Current Review’ (2012) 28 *Negotiation Journal* 217; Slaikeu, K. A., R. Culler, J. Pearson, and N. Thoennes, ‘Process and Outcome in Divorce Mediation’ (1985) 10 *Mediation Quarterly* 55.

²⁸⁴ Bingham, L. B., ‘Transformative Mediation in the United States Postal Service’ (2012) 5(4) *Negotiation and Conflict Management Research* 354; Della Noce, D. J., ‘Mediator Style and the Question of “Good” Mediation: A Call for Theoretical Development’ (2012) 5(4) *Negotiation and Conflict Management Research* 396; McDermott, E. P., ‘Discovering the Importance of Mediator Style – An Interdisciplinary Challenge’ (2012) 5(4) *Negotiation and Conflict Management Research* 340.

²⁸⁵ Wall, J. and K. Kressel, ‘Research on Mediator Style: A Summary and Some Research Suggestions’ (2012) 5(4) *Negotiation and Conflict Management Research* 401.

²⁸⁶ Poynton, T. A., E. R. DeFouw, and L. J. Morizo, ‘A Systematic Review of Online Response Rates in Four Counselling Journals’ (2019) 97 *Journal of Counselling and Development* 33.

²⁸⁷ Aerny-Perreten, N., F. Dominguez-Berjon, M. D. Esteban-Vasallo, and C. Garcia-Riolobos, ‘Participation and Factors Associated with Late or Non-Response to an Online Survey in Primary Care’ (2015) 21 *Journal of Evaluation in Clinical Practice* 688.

reliable approaches in terms of data collection. They have a notoriously low response rate,²⁸⁸ and it has been suggested that their use has been continuing to decline since 2005.²⁸⁹ At the same time, reported response rates might not be reliable either – it has been suggested that researchers tend to report response rates only when they are high, and that very few researchers incorporate a comprehensive response rate reporting capacity into their research design.²⁹⁰

Despite existing reports about the advantages and limitations of using online surveys as data collection tools, it was decided to proceed using this methodology. An important advantage was having a limited opportunity for online access to over 500 mediators. The survey instrument and the survey process were modified with the intent of addressing many of the known limitations.

Prior to choosing an online survey for data collection in this study, the problem of low response rates was investigated and ameliorating options were incorporated into the survey design, based on recommendations from the research literature (eg personalised invitation to participate; culturally flexible language; disclosure of researcher identity; short survey seeking qualitative responses; protection of confidentiality).²⁹¹ Research into the use of online surveys has found several factors that influence response rates and cannot be ameliorated by survey design: internet access and familiarity with technology; interest in and knowledge about the subject; and avoiding

²⁸⁸ Aerny-Perreten, N., F. Dominguez-Berjon, M. D. Esteban-Vasallo, and C. Garcia-Riolobos, 'Participation and Factors Associated with Late or Non-Response to an Online Survey in Primary Care' (2015) 21 *Journal of Evaluation in Clinical Practice* 688; afWahlberg, A. E., and L. Poom, 'An Empirical Test of Nonresponse Bias in Internet Surveys' (2015) 37(6) *Basic and Applied Social Psychology* 336; Bryman, A., *Social Research Methods* (5th Edition, Oxford University Press, UK, 2016); Maruyama, G., and C. S. Ryan, *Research Methods in Social Relations* (8th Edition, Wiley Blackwell, 2014); Poynton, T. A., E. R. DeFouw, and L. J. Morizo, 'A Systematic Review of Online Response Rates in Four Counselling Journals' (2019) 97 *Journal of Counselling and Development* 33.

²⁸⁹ afWahlberg, A. E., and L. Poom, 'An Empirical Test of Nonresponse Bias in Internet Surveys' (2015) 37(6) *Basic and Applied Social Psychology* 336.

²⁹⁰ Poynton, T. A., E. R. DeFouw, and L. J. Morizo, 'A Systematic Review of Online Response Rates in Four Counselling Journals' (2019) 97 *Journal of Counselling and Development* 33.

²⁹¹ Aerny-Perreten, N., F. Dominguez-Berjon, M. D. Esteban-Vasallo, and C. Garcia-Riolobos, 'Participation and Factors Associated with Late or Non-Response to an Online Survey in Primary Care' (2015) 21 *Journal of Evaluation in Clinical Practice* 688; afWahlberg, A. E., and L. Poom, 'An Empirical Test of Nonresponse Bias in Internet Surveys' (2015) 37(6) *Basic and Applied Social Psychology* 336 – 347; Poynton, T. A., E. R. DeFouw, and L. J. Morizo, 'A Systematic Review of Online Response Rates in Four Counselling Journals' (2019) 97 *Journal of Counselling and Development* 33.

professional membership organisations.²⁹² Survey design factors were included specifically to avoid the effects of those factors. It was designed for ease of use and to be accessible through the most convenient device (ie mobile phones); the survey topic was chosen to interest practising mediators (ie mediation research); and design and distribution of the survey was not associated with mediator membership bodies.

It has been reported that there is no way of knowing whether the numbers of responses to a survey are indicators of interest in its subject and, conversely, whether people who choose not to respond to a survey do so because they are not interested in its subject matter.²⁹³ In the subject survey, conference delegates could be expected to have some interest in mediation research because the conference routinely includes research presentations. On the other hand, some delegates may have believed they had insufficient knowledge to contribute ideas and suggestions for mediation research, and this may have affected people's choice to participate.²⁹⁴

Design of the survey prioritised confidentiality to maximise participation; it was not possible to track multiple submissions without compromising confidentiality.²⁹⁵ Although survey data has been reported to be affected when responders submit more than one completed survey,²⁹⁶ it was decided that multiple responses would not be a major problem in this case. Although multiple

²⁹² Aerny-Perreten, N., F. Dominguez-Berjon, M. D. Esteban-Vasallo, and C. Garcia-Riolobos, 'Participation and Factors Associated with Late or Non-Response to an Online Survey in Primary Care' (2015) 21 *Journal of Evaluation in Clinical Practice* 688; Granello, D. H., and J. E. Wheaton, 'Online Data Collection: Strategies for Research' (2004) 82(4) *Journal of Counselling and Development* 387; Poynton, T. A., E. R. DeFouw, and L. J. Morizo, 'A Systematic Review of Online Response Rates in Four Counselling Journals' (2019) 97 *Journal of Counselling and Development* 33.

²⁹³ afWahlberg, A. E., and L. Poom, 'An Empirical Test of Nonresponse Bias in Internet Surveys' (2015) 37(6) *Basic and Applied Social Psychology* 336.

²⁹⁴ The survey included an open-ended text-box question and responders were asked to include all their ideas and suggestions for mediation research.

²⁹⁵ Consideration was given to providing additional confidentiality protection through a Custom SSL certificate; however, this idea was not followed through after IT advice suggested that it would be excessive in light of Survey Gizmo's existing protections.

²⁹⁶ Poynton, T. A., E. R. DeFouw, and L. J. Morizo, 'A Systematic Review of Online Response Rates in Four Counselling Journals' (2019) 97 *Journal of Counselling and Development* 33.

responses from a single participant may have distorted the response rate data, this was assessed as being unlikely – and extra ideas on mediation research would be welcome.²⁹⁷

Effects of nonresponders on data collection and data analysis.

It is widely accepted that nonresponses to online surveys can affect, or skew, the data and its analysis.²⁹⁸ However, in a recent study designed specifically to investigate the effects of nonresponders and in which the representativeness of the responders was a key factor, no significant differences were found between responders and nonresponders. The study reported that a nonresponder bias could not be established if the responders could be identified as being representative of the sample population. Although nonresponders may differ from responders in many ways, the differences cannot be assumed to bias data and its analysis.²⁹⁹ As is shown in Chapter Eight, the survey responders are representative of the sample population and it is unlikely that the results are affected by a nonresponder bias.

The same study suggested that the social desirability effect might have a much greater effect on the results, even where people cannot see each other responding.³⁰⁰ For example, people who know each other might feel pressured to participate, and might feel pressured to be seen to participate (ie not wanting to be seen *not* participating).

2.5.1. The survey

The study accessed a sample population of registered delegates at the National Mediation Conference, in Canberra, during April 2019 (“the conference”), inviting them to participate in a

²⁹⁷ Ultimately, analysis of the survey responses suggests there were very few, if any, multiple responses.

²⁹⁸ A. Bryman, *Social Research Methods* (5th Edition, Oxford University Press, UK, 2016); Maruyama, G., and C. S. Ryan, *Research Methods in Social Relations* (8th Edition, Wiley Blackwell, UK, 2014).

²⁹⁹ afWahlberg, A. E., and L. Poom, ‘An Empirical Test of Nonresponse Bias in Internet Surveys’ (2015) 37(6) *Basic and Applied Social Psychology* 336.

³⁰⁰ Social desirability effect occurs when people want to be seen to be doing what is most socially desirable, or acceptable (whether or not they are); Chapter Seven explores its potential effects on mediation research.

confidential online survey. The research study used quantitative and qualitative approaches centred on a simple electronic survey designed for online completion by practising mediators.

(a) Study design

The design of the survey instrument, and its accessibility, were intended to facilitate the participation of practising mediators, and place no limits on any research ideas they wished to submit. As far as is practicable for online data, the survey design ensured that it would not be possible to link any submitted response to any individual participant: confidentiality was a high priority.

The University of Newcastle's Human Research Ethics Committee approved the study.³⁰¹

Specific design components were incorporated into the survey to demonstrate respect for participants: trust in their capacity both to self-identify their dispute resolution practice, and to provide their own ideas for mediation research. The online survey did not include any definitions or explanations of key terms such as "mediation/mediator", various types of "dispute resolution practice", "academic", or "research". The preference was that participants self-identify their dispute resolution practice, their academic status, and their experience in mediation and/or dispute resolution research. Apart from the importance of demonstrating respect for survey participants, the inclusion of any definitions might have three additional unwanted effects:

- In themselves, definitions might influence and limit the scope of participant responses to all survey questions; and
- In setting formal language standards, definitions might limit participant input by discouraging less formal wording; and
- In-design categories would inevitably reflect the researcher's own biases, assumptions, and preferences.

³⁰¹ University of Newcastle Human Research Ethics Committee Reference No.: H-2019-0084.

The survey distribution procedure included a capacity to calculate response rates. The professional conference organiser (PCO) distributed the invitation and reminder emails only to the email addresses that registered conference delegates themselves had included as contact addresses with their conference registration information.³⁰² This approach limited access to the survey. By not enabling the enlistment of unknown numbers of external uninvited participants, this approach clearly revealed the response rate, and participant representativeness (of practising mediators) could be calculated.³⁰³

(b) Data collection

i) Sample population and participant selection

Finding an accessible and representative sample population is difficult because there are no reliable figures available of the numbers of practising mediators in Australia. As noted in Chapter One of this thesis, practising mediators in Australia can be members of, or be affiliated with, a range of organisations, agencies, panels, and programs, many of which maintain lists/panels/registers of mediators for their own purposes; however, with many mediators being members of multiple organisations, these are not reliable sources for calculating the numbers of practising mediators.

The Mediator Standards Board (MSB) oversees the National Mediator Accreditation System (NMAS), and MSB records show that, in June 2019, 3,345 mediators were accredited under NMAS.³⁰⁴ The number of practising mediators who do not have NMAS accreditation is not known and would be largely unknowable. The figure obtained from the MSB is only one record of the population of practising mediators, and it is possible that the conference delegates included mediators without NMAS accreditation.

³⁰² The PCO confirmed that none of the invitation or reminder emails was returned as undeliverable, indicating that all invitation emails were delivered.

³⁰³ Poynton, T. A., E. R. DeFouw, and L. J. Morizo, 'A Systematic Review of Online Response Rates in Four Counselling Journals' (2019) 97 *Journal of Counselling and Development* 33.

³⁰⁴ Email exchange between the author and a member of the MSB, 9 August 2019.

The conference presents unique circumstances for accessing a cohesive group of practising mediators. The event has been held biennially since 1992, and, since 2010, its records suggest that it has routinely attracted 400 – 500 delegates. Registration numbers, and privately accessed conference evaluations suggest that the event has high credibility with practising mediators.

The conference scheduled to be held in Canberra during April 2019 was expected to include an accessible representative sample of practising mediators from many parts of Australia and with varying levels of experience in many areas and contexts of mediation practice. The conference had 532 registered delegates, and all had provided an email contact address as part of their registration (demonstrating internet access), providing access to 100% of the sample. For the purposes of the survey, delegates were invited to attend an information presentation at the conference, and an invitation email was distributed by the PCO two weeks after the conference had concluded.

The invitation email included an *Information and Consent Sheet*, and a hyperlink to the on-line survey. By accessing the online survey, delegates self-selected to participate in the study. As noted above, various social influences may have affected the voluntariness of participation and of non-participation.

Apart from the conference presentation, there was no direct link between the researcher and any study participant; however, many delegates were already known to the researcher. Part of the reason for withholding commencement of the study until two weeks after the conclusion of the conference was to reduce that immediate connection.

Anecdotal reports suggest that conference delegates usually include other DR practitioners, as well as mediators, and, although the aims of the study are specific to practising mediators, all conference delegates were invited to participate.³⁰⁵ The design of the survey instrument enabled

³⁰⁵ It is said anecdotally that many practising mediators are also practitioners in a range of other dispute resolution processes; the results of this study show that only 7.4% of submitted responses were from people who practice only mediation, providing some confirmation of anecdotal reports – though only among delegates at the National Mediation Conference..

differentiation of eighteen types of dispute resolution, including mediation; academics and researchers were also differentiated within the survey. It was hoped that the differentiation between practising mediators, academics, and researchers, would enable comparative analysis of all themes and issues included in survey responses.

It has been reported that combining regional and non-regional data can dilute the different regional and international emphases in research,³⁰⁶ and it was known that overseas delegates had attended the conference. However, existing mediation research demonstrates many common research interests regardless of regional location, suggesting that international and local delegates' survey responses would be likely to raise similar research interests, without either overriding the responses of the other.

(c) *Informed consent to participate*

As described earlier, two forums were available in which delegates could obtain information about the online survey and its context, and about what would be required of them if they chose to participate (ie the conference presentation, and the *Information and Consent Sheet*).

(d) *Format and design of the survey*

The advantages of online data collection were exploited for this survey: ease of data entry for the survey designer and for participants; availability of flexible survey styles; capacity to accommodate large numbers of responses (although it is consistently reported that online surveys have a low response rate); and capacity of online survey platforms to provide some automated data analysis; and low cost.

The survey instrument included five questions designed to provide a mix of qualitative and quantitative data which, when analysed, would contribute to the survey objectives:

³⁰⁶ Glänzel, W., 'Bibliometric Methods for Detecting and Analysing Emerging Research Topics' (2012) 21(2) *El Profesional de la Informacion* 194.

1. To ascertain the rates at which practising mediators would respond to an online survey;
and
2. To obtain practising mediator input about mediation research.

The survey included three question formats:

1. Multiple-choice radio button questions (ie Yes/No questions; one selection was permitted)
 - a. Question 1: Confirmation that the participant was at least 18 years of age (participants could not access the remainder of the survey if they responded “No”); this question was designed to ensure compliance with conditions of the ethics approval that required only adult participants;
 - b. Question 3: Confirmation (or not) that the participant self-identified as an academic; this question was most relevant to survey objective 2. (ie mediator input about mediation research), and was designed to elicit responses enabling comparative analysis; and
 - c. Question 4: Confirmation (or not) that the participant had undertaken mediation and/or dispute resolution research; this question was most relevant to survey objective 2. and was designed to enable comparative analysis.
2. Checkbox (ie multiple selections were possible from a customised Drop-Down Menu)
 - a. Question 2: Participants were asked to identify all types of dispute resolution processes they had conducted; this question was relevant to both study objectives, enabling differentiation of practising mediators from non-mediators; differentiation of practising mediators enabled calculation of their participation and response rates (survey objective 2.), the differentiation also enabled of ideas for mediation research (survey objective 2.).
3. Textbox – essay style (ie allows respondents to write a long answer)

- a. Question 5: Participants were asked to include all their ideas for mediation research, and there were no limits on what they could submit; this question was designed to be the key question of the survey; it was anticipated that responses would provide sufficient information to enable comparative analysis according to dispute resolution practice, and academic/researcher status (responses would contribute to survey objective 2.).

It was anticipated that responses to Question 5 would provide information of immediate relevance to this thesis.

(e) Timing and duration

The online survey was accessible for two weeks: 9 – 24 May 2019, and, based on pre-testing, was estimated to take five to ten minutes to complete³⁰⁷.

2.5.2. Analysis

The online survey platform provided a range of automated statistical results of responses to each of Questions 1, 2, 3, and 4; the results of these are included in Chapter Eight.³⁰⁸

The survey was designed to enable manual analysis of the responses to the text-box question (seeking ideas for mediation research). The limitations of automated analysis of open-ended text responses has been explored earlier in this chapter and include that the reliance on targeted words and phrases often neglects the author's contextual nuances. It was anticipated that manual analysis would more readily access and incorporate everything included in each response.

Availability of data and results

³⁰⁷ A small number of responses to Question 5 are likely to have taken longer to complete because they include multiple ideas and suggestions.

³⁰⁸ Unfortunately, the survey platform collected and conducted statistical analyses on all surveys, including those which were incomplete, making some of the automated statistical analyses unusable. A manual check was conducted to ensure that only completed and usable submitted surveys were included in the study analysis.

The conference presentation, and the Participant Information and Consent Sheet both specified that the results and findings of the study would be included in the researcher's PhD thesis; and that the results and findings may also be published in journal articles and would be made available to the MSB. A compilation of the responses is available on the website of the Board of Directors which oversees the National Mediation Conference.³⁰⁹

2.6. Thesis terminology

Study participants

The terms "participants", or "attendees", and "mediator", are used widely in the selected studies, and elsewhere, with the intent of differentiating between the people attending a mediation. The term "Participants" is often understood to include the disputants; however, some commentators use the term "participant" to include other attendees such as various advisers, experts, and support people whose roles may include attendance and/or include actual participation. The use of such broad terminology can be confusing where neither the attendees are differentiated nor the data they provide to researchers.

Within this thesis, the following terms are used to describe the various participants in mediation, including in the mediations that are the subject of research in the selected studies:

- Mediator and mediator participant – attendee/participant who conducts the subject mediation process;
- Non-mediator participant – includes disputants and advisers (eg lawyers), each of which is differentiated where relevant to the research;
- Disputants – attendees/participants who are actually in dispute with each other and who are ordinarily considered to be responsible for substantive decision-making during the mediation;

³⁰⁹ Available on <<https://www.nationalmediationconference.com/>>.

- Representatives – attendees/participants who attend and are accepted as representing the views of, the disputants; representatives are most likely to attend mediation where the number of disputants may be considered to be impractical for the purposes of mediation (eg in some large-scale intra- and inter-community disputes), or where it is an established historic norm that representatives attend (eg in collective labour-management disputes);
- Advisers – attendees whose role is ordinarily considered to be primarily the provision of expert advice to other participants (usually the disputants) during the mediation process; this can include experts of various kinds; in the selected studies, the most frequently reported advisers are legal representatives;
- Other attendees/participants – some mediations can include attendees who attend either as support people, or who have no clearly defined role in the mediation process. These attendees may be directly or indirectly affected by any outcome of the mediation; however, they are not active participants (or disputants) in the process. For example, in natural disaster mediations, non-affected community members may attend the mediation, and, in family mediation, non-participating children may attend.

Each thesis Chapter includes explanations of the terms specific to the focus of its analysis and review. A single formatting guide has been applied throughout this thesis.³¹⁰ Full footnotes are used throughout the thesis to ensure clarity in research references.

2.7. Conclusion

This thesis aims to establish what is known about mediator effectiveness. This Chapter has described the metaresearch framework and the research methodologies used to support the

³¹⁰ Melbourne University Law Review Association Incorporated, and Melbourne Journal of International Law Incorporated, *Australian Guide to Legal Citation* (Melbourne University Law Review Association Incorporated, and Melbourne Journal of International Law Incorporated, Melbourne, Australia, 2019).

analysis and outcomes that are reported in this thesis. The next Chapter, Chapter Three, is the only part of the thesis that is based on analysis of research findings, being those related to mediation, and mediator, effectiveness. The remainder of the thesis focuses on the approaches and methodologies that have resulted in findings such as those about “effectiveness” that are analysed in Chapter Three. Chapters Six and Seven report on unaddressed limitations of research methods, and of unresolved constraints on research work.

The next chapter, Chapter Three, presents the thematic analysis of “effectiveness”, as it is defined and measured in the selected studies.

Chapter Three: Effectiveness

This Chapter uses thematic analysis to explore the concepts of mediation, and mediator, effectiveness as presented in the selection of empirical studies ('the studies') that are the focus of this thesis' research.³¹¹ Effectiveness in mediation is often cited as being a core attribute, or selling point, of the mediation process. However, it has not always been clear which aspect of effectiveness is being lauded: its reputation for achieving settlement, or its reputation for achieving high levels of disputant satisfaction, or high levels of procedural and interpersonal justice, or some other beneficial attribute such as improving communication or supporting relationships.

3.0. Context, aims, and key findings

This Chapter and Chapter Four present thematic analyses of the selected studies, with this Chapter focusing on mediation and mediator effectiveness, as it is defined and measured in the selected studies. This Chapter focuses on the findings reported in the selected studies, while the remaining Chapters focus on the research terms, approaches, designs and methodologies from which the reported findings have emerged.

The aim of this Chapter is to answer three questions:

1. How is mediation and mediator effectiveness defined and measured in the selected studies?
2. What are the discernible contextual trends of those definitions and measures?
3. What do the selected studies suggest are the influences on mediation and mediator effectiveness?

³¹¹ Parts of this Chapter have been published elsewhere: Boyle, A., 'Effectiveness in Mediation: A New Approach' (2017) 12 *Newcastle Law Review* 148.

3.0.1. Key findings

The Chapter includes three sets of findings relating to definitions and measurement of mediation effectiveness, contextual trends, and the factors reported to influence the achievement of mediation effectiveness.

I. Definitions and measurement of mediation effectiveness

According to the selected studies, there appears to be no consistently applied definition or measure of mediation effectiveness, despite it being the most frequently applied unit of analysis. As a first step in the investigation of a possible relationship between context and definitions of effectiveness, and in response to the lack of consistent definitions and measures, the initial analysis resulted in the creation of a theoretical framework for exploring contextual comparative analysis of two related concepts: simple and complex effectiveness in mediation. Briefly, simple effectiveness is the achievement of a mediated agreement, or settlement, and complex effectiveness is the achievement of a mediated agreement in addition to other outcomes such as disputant satisfaction.

II. Comparative contextual analysis of simple and complex effectiveness

Four unexpected findings emerge from this part of the analysis:

- a) Despite widespread claims from the mediation sector that disputant satisfaction is a core benefit of mediation, the selected studies suggest that the majority of mediation research across a range of mediation contexts maintains a narrow focus on the achievement of settlement in mediation (the simple effectiveness measure);
- b) According to the selected studies, simple effectiveness is used most in three mediation contexts: labour/management, family/divorce/child custody, and court-connected mediation;

- c) Although measures of complex effectiveness are not used frequently, they are included most often in community-based and in court-connected contexts, as well as in evaluations of mediation programs and services; and
- d) There is almost no investigation of mediator effectiveness or of the mediator's influence on the achievement of either simple or complex effectiveness (the latter being problematic to measure because it includes a range of other influential variables).

II. The factors reported to influence the achievement of effectiveness in mediation.

In the selected studies, five factors are reported to have influenced mediation effectiveness:

- Procedural and interpersonal justice (or disputant perceptions of fairness and satisfaction);
- Mediator influence on disputant interactions during the mediation;
- Mediator neutrality, honesty, and integrity;
- The use of private meetings before and during the subject mediations; and
- The involvement of legal advisers and disputant representatives.

A small number of the selected studies examine links between models of mediation practice and the achievement of simple or complex effectiveness; however, no consistent relationship is established.

In addition, the analysis of effectiveness suggests that there are significant terminological and definitional limitations in the researchers' consideration of mediator interventions and the impact of those interventions, that the limitations might reduce conceptual clarity in the selected studies, and that they are likely to affect the reliability of their reported findings about influences on mediation effectiveness. These issues are explored in Chapter Four.

In terms of the three questions that are the focus of this Chapter:

(i) How is mediation and mediator effectiveness defined and measured in the selected studies?

Within the selected studies, there appears to be no consistently applied definition or measure of effectiveness in mediation. Simple effectiveness is cited in more than two thirds of the included studies, or more than twice as often as complex effectiveness.

(ii) What are the discernible contextual trends of definitions and measures of mediation effectiveness?

Applying the conceptual framework of simple and complex effectiveness, measures of simple effectiveness are used most frequently in the labour/management context, in the family/divorce/child custody context, and in the court-connected context. Although measures of complex effectiveness are not used frequently in the selected studies, they appear most often in the community-based and court-connected contexts as well as in evaluations of mediation programs and services.

(iii) What do the selected studies show are the influences on mediation and mediator effectiveness?

The selected studies do not reveal any factors that are consistently shown to influence mediation effectiveness. Findings from the analysis suggest that a divergence in the definition and measurement of effectiveness in mediation might be linked to the subject mediation context. It is possible that there is a circular, self-reinforcing relationship between definition and context, where the context of the mediation influences the choice of definition and measurement of effectiveness, and that choice – and the subsequent data collection and research findings – reinforce established views and preferences about effectiveness within that context.

Chapter Methodology

This Chapter includes analysis of a range of material relevant to the effectiveness issues raised in the selected studies, differentiating the “effectiveness” literature from the more extensive

literature that explores factors that may also influence mediation effectiveness including the definition of mediation, the process characteristics of mediation, the communication approaches in mediation, and the legal and other issues that surface in a mediation context.

*The selected studies*³¹²

The selected studies forming the core of all analyses in this thesis were introduced in Chapter Two. Of the forty-seven publications and reports that make up that selection, forty are included in this Chapter's analysis.³¹³ Seven are excluded because, although studies describe investigating in-

³¹² The selected studies, their provenance, limitations, and strengths are described in some detail in Chapter Two of this thesis.

³¹³ Alberts, J. K., B. L. Heisterkamp, and R. M. McPhee, 'Disputant Perceptions of and Satisfaction with a Community Mediation Program' (2005) 16(3) *The International Journal of Conflict Management* 218; Bingham, L. B., 'Transformative Mediation in the United States Postal Service' (2012) 5(4) *Negotiation and Conflict Management Research* 354; Burrell, N. A., W. A. Donohue, and M. Allen, 'The Impact of Disputants' Expectations on Mediation, Testing an Interventionist Model' (1990) Fall 1990 *Human Communication Research* 104; Diltz, D. A. and A. Karim, 'The Effect of Mediators' Qualities and Strategies on Mediation Outcomes' (1990) 45(1) *Relations Industrielles/Industrial Relations* 22; Gale, J., R. L. Mowery, M. S. Herrman, and N. L. Hollett, 'Considering Effective Divorce Mediation: Three Potential Factors' (2002) 19(4) *Conflict Resolution Quarterly* 389; Goldberg, S. B., and M. L. Shaw, 'Further Investigation into the Secrets of Successful and Unsuccessful Mediators' (2008) 26(8) *Alternatives to the High Cost of Litigation* 149; Henderson, D. A., 'Mediation Success: An Empirical Analysis' (1996) 11(1) *Ohio State Journal on Dispute Resolution* 105; Hiltrop, J. M., 'Factors Associated with Successful Labor Mediation' in K. Kressel and D. G. Pruitt (eds), *Mediation Research: The Process and Effectiveness of Third-Party Intervention* (Jossey-Bass, USA, 1989); Jones, T. S., 'Lag Sequential Analyses of Mediator-Spouse and Husband-Wife Interaction in Successful and Unsuccessful Divorce Mediation' in M. A. Rahim (ed), *Managing Conflict: An Interdisciplinary Approach* (Praeger, USA, 1989); Karim, A. and D. Diltz, 'Determinants of Mediation Success in the Iowa Public Sector' (1990) 19(2) *Journal of Collective Negotiations* 129; Karim, A. and R. Peggnetter, 'Mediator Strategies and Qualities and Mediation Effectiveness' (1983) 22(1) *Industrial Relations* 105; Kimsey, W. D., R. M. Fuller, and B. C. McKinney, 'Mediator Listening, Dispute Reframing, and Mediation Outcome: A Pilot Study' (1993) 7(1) *Journal of the International Listening Association* 74; Kochan, T. A., and T. Jick, 'The Public Sector Mediation Process: A Theory and Empirical Examination' (1978) 22(2) *The Journal of Conflict Resolution* 209; Kressel 1994; Mareschal, P. M., 'What Makes Mediation Work? Perspectives on Resolving Disputes' (2005) 44(3) *Industrial Relations* 509; McDermott, E. P., and R. Obar, 'What's Going On' in Mediation: An Empirical Analysis of the Influence of a Mediator's Style on Party Satisfaction and Monetary Benefit' (2004) 9 *Harvard Negotiation Law Review* 75; McEwen, C. A., *An Evaluation of the ADR Pilot Project: Final Report 1* (Unpublished report, 1992); Peeples, R., C. Harris, and T. Metzloff, 'Following the Script: An Empirical Analysis of Court-Ordered Mediation of Medical Malpractice Cases' (2007) 2007(1) *Journal of Dispute Resolution* 101; Posthuma, R. A., A. Richard, J. B. Dworkin, and M. S. Swift, 'Mediator Tactics and Sources of Conflict: Facilitating and Inhibiting Effects' (2002) 41(1) *Industrial Relations* 94; Pruitt, D. G., W. R. Fry, L. Castrianno, J. Zubeck, G. L. Welton, N. B. McGillicuddy, and C. Ippolito, 'The Process of Mediation: Caucusing, Control, and Problem Solving' in M. A. Rahim (ed), *Managing Conflict: An Interdisciplinary Approach* (Praeger, USA, 1989); Pruitt, D. G., R. S. Peirce, N. B. McGillicuddy, G. L. Welton, and L. Castrianno, 'Long-Term Success in Mediation' (1993) 17(3) *Law and Human Behavior* 313; Shapiro, D., R. Drieghe, and J. Brett, 'Mediator Behavior and the Outcomes of Mediation' (1985) 41(2) *Journal of Social Issues* 101; Slaikou, K. A., R. Culler, J. Pearson, and N. Thoennes, 'Process and Outcome in Divorce Mediation' (1985) 10 *Mediation Quarterly* 55; Sourdin, T., *Dispute Resolution Processes for Credit Consumers* (Project Report, Conflict Resolution Research Centre, La Trobe University, 2007); Sourdin, T., *Mediation in the Supreme and*

mediation events and participants perceptions of those events, they do not include consideration or measurement of mediation effectiveness.³¹⁴

The purpose of this analysis is *not* to use the findings from the selected empirical studies to discuss the long-standing differences between the various approaches to, and models of practice typical within, the mediation process itself. This analysis focuses on mediation effectiveness, seeking to determine in particular any information about the effectiveness of mediators, and any influence they may have over the effectiveness of the process.

3.1. Effectiveness in mediation

Overview

County Courts of Victoria (Report prepared for the Department of Justice, Victoria, Australia, April 2009), available on <<http://www.civiljustice.info/adreval/1/>>; Sourdin, T., *Exploring Pre-Action Requirements: Resolving Disputes Outside Courts* (ACJI, Monash University, October 2012); Sourdin, T., and T. Matruglio, *Evaluating Mediation – New South Wales Settlement Scheme 2002 (2004) Mediation*. Paper 7, available on <<http://www.civiljustice.info/med/7>>; Swaab, R. I., *Face First: Pre-Mediation Caucus and Face in Employment Disputes* (Presentation, Annual Association of Conflict Management Conference, June 2009); Swaab, R. I., and J. Brett, *Caucus with Care: The Impact of Pre-Mediation Caucuses on Conflict Resolution* (Meetings Paper, International Association of Conflict Management, 2007); Thoennes, N. A., and J. Pearson, 'Predicting Outcomes in Divorce Mediation: The Influence of People and Process' (1985) 41(2) *Journal of Social Issues* 115; Vanderkooi, L., and J. Pearson, 'Mediating Divorce Disputes: Mediator Behaviors, Styles and Roles' (1983) 32(4) *Family Relations* 557; Wall, J. A., Jr, and S. Chan-Serafin, 'Processes in Civil Case Mediations' (2009) 26(3) *Conflict Resolution Quarterly* 261; Wall, J. A., Jr, and S. Chan-Serafin, 'Do Mediators Walk Their Talk in Civil Cases?' (2010) 28(1) *Conflict Resolution Quarterly* 3; Wall, J. A., Jr, and D. E. Rude, 'The Judge as a Mediator' (1991) 76(1) *Journal of Applied Psychology* 54; Welton, G. L., D. G. Pruitt, N. B. McGillicuddy, C. A. Ippolito, and J. M. Zubeck, 'Antecedents and Characteristics of Caucusing in Community Mediation' (1992) 3(4) *International Journal of Conflict Management* 303; Wissler, R. L., 'Mediation and Adjudication in Small Claims Court: The Effects of Process and Case Characteristics' (1995) 29(2) *Law & Society Review* 323; Wissler, R. L., *Trapping the Data: An Assessment of Domestic Relations Mediation in Maine and Ohio Courts* (Unpublished report, 1999); Wissler, R. L., 'Court-Connected Mediation in General Civil Cases: What We Know from Empirical Research' (2002) 17(3) *Ohio State Journal on Dispute Resolution* 641; Woodward, J. G., 'Settlement Week: Measuring the Promise' (1990) 11 *Northern Illinois University Law Review* 1; Zubeck, J. M., D. G. Pruitt, R. S. Peirce, N. B. McGillicuddy, and H. Syna, 'Disputant and Mediator Behaviors Affecting Short-Term Success in Mediation' (1992) 36(3) *Journal of Conflict Resolution* 546.

³¹⁴ Carnevale, P. J. D., and R. Peggnetter, 'The Selection of Mediator Tactics in Public Sector Disputes: A Contingency Analysis' (1985) 41(2) *Journal of Social Issues* 2; Kimsey, W. D., R. M. Fuller, A. J. Bell, and B. C. McKinney, 'The Impact of Mediator Strategic Choices: An Experimental Study' (1994) 12(1) *Mediation Quarterly* 89; Kressel, K., 'How Do Mediators Decide What To Do? Implicit Schemas of Practice and Mediator Decisionmaking' (2013) 28(3) *Ohio State Journal on Dispute Resolution* 709; Kressel, K., T. Henderson, W. Reich, and C. Cohen, 'Multi-Dimensional Analysis of Conflict Mediator Style' (2012) 30(2) *Conflict Resolution Quarterly* 135; McGillicuddy, N. B., G. L. Welton, and D. G. Pruitt, 'Third-Party Intervention: A Field Experiment Comparing Three Different Models' (1987) 53(1) *Journal of Personality and Social Psychology* 104; Welton, G. L., and D. G. Pruitt, 'The Mediation Process: The Effects of Mediator Bias and Disputant Power' (1987) 13(1) *Personality and Social Psychology Bulletin* 123; Welton, G. L., D. G. Pruitt, and N. B. McGillicuddy, 'The Role of Caucusing in Community Mediation' (1988) 32(1) *The Journal of Conflict Resolution* 181.

This section reviews and analyses effectiveness in mediation according to the definitions and measures that are described in the selected studies. Where they enhance the analysis, reference to other literature is made, including relevant Australian studies and reports. The selected studies were originally limited, by the Task Force, to empirical studies of mediator techniques, so their relevance to the mediation process itself may be limited because they may not have been designed to be investigations of process effectiveness.

There being no commonly accepted definitions of mediation effectiveness, this section commences by establishing Australia's definitional context, providing a comparative base for the subsequent analysis. This thematic analysis is not intended to provide an overall investigation of effectiveness in mediation and is limited to analysis of how the selected studies have defined and measured effectiveness since 1978. The analysis that is explored in more detail below suggests that:

- Whether settlement is achieved is the predominant definition and measure of effectiveness in mediation;
 - Procedural and interpersonal justice, as measures of effectiveness, do not appear as often in the selected studies;
- The definition and measurement of simple effectiveness in mediation is relatively consistent across all contexts of the studied mediations;
- Studies of mediation may influence, and reinforce, the predominant definitions and measurements used in the context of the subject mediations; and,
- The observed contextual trends are unlikely to change markedly in larger and more comprehensive analyses.

3.1.0. Defining effectiveness in mediation

Investigation of mediation effectiveness, and any potential links with mediator techniques, is beset by complexity. The investigator must establish an acceptable and credible definition of what constitutes effectiveness in mediation, as well as acceptable and workable factors for its

measurement, and the measurements are often derived from the chosen definition. The chosen definition is often related to, and may be specified by, the context within which the subject mediation occurs and, as noted previously, additional contextual influences may also affect the choice of definition, its measurement, the way in which the study is conducted and the findings that it produces.

In the broad context of mediation, there is a range of definitions of effectiveness, and their key components vary from the simple question of whether or not settlement is reached, to complex qualitative questions that can be linked to disputant perceptions of their own involvement, and including how satisfied the disputants report having been with the mediation process, with the mediator, with each other's involvement, and with the mediation's outcomes. Ultimately, with a wide range of investigation contexts, and diverse contextual influences on definitions and measurements, it may be difficult to conduct a comparative analysis within a single empirical investigation, or even within a broad review of many such investigations; however, under such circumstances, simple and complex effectiveness may provide a useful preliminary analysis framework.³¹⁵

3.1.1. Defining effectiveness in Australia

In Australia, key texts describe effectiveness in mediation in terms of whether or not the mediation process meets identified objectives, such as achieving settlement, creating acceptable and durable agreements, narrowing the issues in dispute, and/or having been a fair process,³¹⁶ although it has been noted that, in some key instances, such objectives can be applied while remaining undefined.³¹⁷ The most frequently cited objectives for DR and mediation in Australia are

³¹⁵ See below 3.2. Simple and complex effectiveness.

³¹⁶ Boulle, L., *Mediation: Principles, Process, Practice* (3rd Edition, LexisNexis, Australia, 2011); Mack, K., *Court Referral to ADR: Criteria and Research* (Report. NADRAC & AIJA, 2003); Sourdin, T., *Alternative Dispute Resolution* (6th Edition, Thomson Reuters, Australia, 2020).

³¹⁷ Mack, K., *Court Referral to ADR: Criteria and Research* (Report. NADRAC & Australian Institute of Judicial Administration [AIJA], 2003).

those proposed by the Australian Law Reform Commission (ALRC) and the former National ADR Advisory Council (NADRAC). Most recently, the NMAS has provided a definition of the mediation process, though without any associated objectives.

*Objectives for Dispute Resolution: ALRC*³¹⁸

In 1998, the ALRC published its five 'key objectives' for Australia's federal civil litigation system, noting that the objectives were applicable to all processes within the system, including dispute resolution (which, in itself, included mediation).³¹⁹ According to the ALRC, any process used within the federal litigation system should be just, accessible, efficient, timely, and effective. To be just, a process should be consistent in 'process and result',³²⁰ free from coercion or corruption, and conducted in ways that ensure any inequality between the disputants does not affect any outcomes. To be accessible, a process should be 'appropriate'³²¹ and available, not cost prohibitive (or, where there are high costs, appropriate alternatives should be available), and all participants should understand the process, their roles, and the reasons for any outcome. To be efficient, a process should avoid waste of the public funding of courts and other processes, reduce litigation costs and unnecessary repetition, and consider the needs of others who are waiting to use the same process. To be timely, a process should minimise any delay, the duration of the process once it has commenced, and the time which all participants give to the process. To be effective, a process should promote compliance with any outcome, ensure there is no need to use any further processes, and 'promote certainty in the law'.³²²

³¹⁸ Australian Law Reform Commission, *Rethinking the Federal Civil Litigation System* (Issues Paper 20, ALRC, 1998).

³¹⁹ Australian Law Reform Commission, *Rethinking the Federal Civil Litigation System* (Issues Paper 20, ALRC, 1998), 3.39.

³²⁰ Australian Law Reform Commission, *Rethinking the Federal Civil Litigation System* (Issues Paper 20, ALRC, 1998), 3.11.

³²¹ Australian Law Reform Commission, *Rethinking the Federal Civil Litigation System* (Issues Paper 20, ALRC, 1998), 3.13.

³²² Australian Law Reform Commission, *Rethinking the Federal Civil Litigation System* (Issues Paper 20, ALRC, 1998), 3.16.

While these are valuable objectives for any structured, formal, court-based process, their general application as measures for the less formal process of mediation could prove problematic. As has been noted elsewhere, the capacity of most DR processes, including mediation, to meet the ALRC objectives is limited because they occur outside the court system, are conducted privately, and lack reporting data;³²³ these same factors make it difficult to track whether the processes are consistently meeting the ALRC objectives.

It is difficult to apply broadly to mediation the ALRC objectives that relate specifically to accessibility and to timeliness. Despite the lack of reporting data, it has been suggested that access to DR and to mediation services can be limited by factors such as lack of awareness of services, lack of appropriate resources, and lack of rural-based services; in addition, reductions in government funding inevitably lead to a reduction in the numbers and spread of mediation services.³²⁴

Timeliness is difficult to measure in the context of mediation because the process can be accepted as having commenced at different points in each case, dependent upon the required preliminary activities, which often take place long before the formal mediation session itself convenes. It is customary to consider the process unfinalized until the disputants perceive that the terms of any agreement are being implemented, which various factors can delay for a considerable period.³²⁵ These case-dependent circumstances are quite different from the definitive timeliness parameters that apply in the context of court processes.

It is difficult to promote certainty of the law in the context of mediation. A key principle of mediation is that the disputants be encouraged to make their own decisions and to create terms of agreement that are the most suitable for them.³²⁶ The disputants might design mutually satisfactory terms in their agreement that, while not being illegal, may fall beyond the formal scope of the law.

³²³ Sourdin, T., *Alternative Dispute Resolution* (6th Edition, Thomson Reuters, Australia, 2020).

³²⁴ Productivity Commission, *Access to Justice Arrangements* (Inquiry Report No 72, Overview, Productivity Commission, September 2014); Sourdin, T., *The Timeliness Project* (Background Report, ACJI, October 2013).

³²⁵ Sourdin, T., *The Timeliness Project* (Background Report, ACJI, October 2013).

³²⁶ NMAS, July 2015, available on <https://msb.org.au/sites/default/files/documents/NMAS%201%20July%202015.pdf>.

In any case, mediation processes and any agreements they produce are generally protected by levels of confidentiality that prevent them from being used to publicly promote certainty in the law.³²⁷

These examples illustrate some of the difficulties when attempting to apply to mediation the five ALRC objectives for dispute resolution. However, they have provided important legal acceptance of DR and mediation and are a valuable foundation for the subsequent development of objectives that are more practicable and suitable for consensual DR processes, such as mediation.

*Objectives for Alternative Dispute Resolution – NADRAC*³²⁸

At the beginning of an extensive, eight-year, consultation process that, in 2008, would culminate in the National Mediator Accreditation System (NMAS), the then National ADR Advisory Council (NADRAC) developed objectives that were intended to provide a framework for NMAS. NADRAC proposed three objectives for DR, that were anticipated to be applicable to all DR process, including determinative processes such as arbitration, and non-determinative processes such as mediation.³²⁹ The three objectives specified that DR processes would at least resolve disputes both effectively and efficiently;³³⁰ that the processes would be procedurally fair; and that any outcomes would be acceptable to the disputants and to the broader community. NADRAC acknowledged that the context of any DR process could influence what might be meant by effectiveness (including measures such as compliance with the terms of an agreement or an agreement's durability) or efficiency; what types of fairness might be applicable in any case (noting that, because disputants develop their own terms of agreement, non-determinative processes such as mediation would be less able to protect substantive fairness than would processes such as arbitration where the arbitrator resolves the dispute by finalising and issuing a written award); and the broader interests

³²⁷ NMAS, July 2015, available on <<http://www.msb.org.au/sites/default/files/documents.NMAS%20July%202015.pdf>>.

³²⁸ National Alternative Dispute Resolution Advisory Council.

³²⁹ NADRAC, *The Development of Standards for ADR* (Discussion Paper, Commonwealth of Australia, March 2000).

³³⁰ NADRAC included that, if disputes could not be resolved, they should at least aim to reduce the scope of the dispute.

that might affect the balance between community and disputant acceptability when preparing the terms of an agreement.

Both the ALRC and NADRAC objectives refer to efficiency, and to compliance with the terms of an agreement. As noted above, for the ALRC, compliance is a measure of effectiveness, and efficiency is an objective in its own right,³³¹ while for NADRAC, efficiency is linked with effectiveness and with durability.³³² Australia's litigation system has emphasised process efficiency in the context of effective case management;³³³ however, considerations of effectiveness and efficiency, especially in mediation, raise complex issues. It has been suggested that a focus on efficiency *in mediation* detracts from other benefits of the process, including disputant satisfaction.³³⁴

Unlike the ALRC's objectives for the context of the federal justice system of which DR was only one part, NADRAC's objectives for DR were developed specifically for application to DR processes.³³⁵

³³⁶ Despite NADRAC's abolition in 2013, and when considered in conjunction with the ALRC's objectives, the DR objectives continue to provide a valuable framework for the practice and development of mediation in Australia, as well as a foundation for research in the area³³⁷

Definition of mediation: National Mediator Accreditation System (NMAS)

NMAS was launched in 2008 as a set of standards for the practice of mediation in Australia. There is a history in Australia of aligning mediation with concepts of disputant empowerment,

³³¹ Australian Law Reform Commission, *Rethinking the Federal Civil Litigation System* (Issues Paper 20, ALRC, 1998), 3.14

³³² NADRAC, *A Framework for ADR Standards* (Report to the Commonwealth Attorney-General, Commonwealth of Australia, April 2001).

³³³ Sage, C., T. Wright, and C. Morris, *Case Management Reform: A Study of the Federal Court's Individual Docket System* (2002) Law and Justice Foundation of New South Wales, available on <[http://www.lawfoundation.net.au/ljf/site/templates/reports/\\$file/CaseManagementReform.pdf](http://www.lawfoundation.net.au/ljf/site/templates/reports/$file/CaseManagementReform.pdf)>.

³³⁴ Sourdin, T., *Alternative Dispute Resolution* (6th Edition, Thomson Reuters, Australia, 2020).

³³⁵ For a comparative analysis of the two sets of objectives, see Sourdin, T., *Alternative Dispute Resolution* (6th Edition, Thomson Reuters, Australia, 2020).

³³⁶ NADRAC itself referred consistently to "ADR"; during recent years, DR has become the preferred term.

³³⁷ One of the selected studies does include measures of effectiveness drawn from both the ALRC and NADRAC objectives; see Sourdin, T., *Mediation in the Supreme and County Courts of Victoria* (Report prepared for the Department of Justice, Victoria, Australia, April 2009), available on <<http://www.civiljustice.info/adreval/1/>>.

including self-determination,³³⁸ and, NMAS includes a definition of mediation expressed in terms of the disputants' right to self-determination, and a set of standards that focus on mediator knowledge and activities that are intended to protect that right.³³⁹

NMAS is relevant only to mediation,³⁴⁰ and although it includes no specific objectives nor any definition of effectiveness (the word does not appear in NMAS), it includes clear guidance about what is expected of a mediator. Included are sets of core knowledge, core skills, and core ethical principles which, in the context of NMAS, are fundamental to mediation practice and provide a framework for mediation training;³⁴¹ however, many of the concepts lack the clarity essential for measurement.

The knowledge component encompasses theoretical concepts for mediators and includes understanding conflict and its effects on communication and interpersonal dynamics; the key factors in assessing the suitability for mediation of the dispute and disputants; understanding the structured mediation process and the mediator role within it; the roles of support people and advisers; relevant cross-cultural, or inter-cultural, issues; and basic knowledge of the law as it applies in the context of mediation.

The skills component encompasses the practicalities of conducting a mediation session, and the ethical principles canvass mediator integrity and impartiality, disputant self-determination, procedural fairness, equity, and confidentiality as it applies in the context of mediation.

³³⁸ Astor, H., and C. M. Chinkin, *Dispute Resolution in Australia* (Butterworths, Australia, 1992); Baruch Bush, R. A., and J. P. Folger, *The Promise of Mediation* (Jossey-Bass, US, 1994, and 2005); Hoffman, D., 'Paradoxes of Mediation' in D. Bowling and D. Hoffman (eds), *Bringing Peace into the Room – How the Personal Qualities of the Mediator Impact the Process of Conflict Resolution* (Jossey-Bass, US, 2003).

³³⁹ NMAS Practice Standards, July 2015, available on <https://msb.org.au/sites/default/files/documents.NMAS%20July%202015.pdf>; the NMAS definition is quoted in full in Chapter One of this thesis.

³⁴⁰ At the time of writing, NMAS is under review and, in part, consideration is being given to the inclusion of conciliation under its standards.

³⁴¹ The concepts of knowledge, skills, and ethics are derived from a much longer version that is included in the 2001 NADRAC report, *A Framework for ADR Standards*, noted above.

NMAS was reviewed and substantially rewritten in 2015, and, at the time of writing, is being reviewed once more. The current review is intended to check for minor edits that may be needed rather than take the form of a substantial rewrite of the Standards.³⁴²

In summary, according to the three key Australian references, definitions of mediation effectiveness do appear to be contextual. The ALRC has considered mediation effectiveness in a legal context, NADRAC has considered mediation effectiveness in the broader DR context, though without a definition, and NMAS has not included effectiveness at all, preferring to focus on the rights of disputants in mediation, and the role of the mediator in safeguarding and supporting those rights. Although the ALRC objectives are more readily measurable in some contexts, that is not necessarily the case in the context of mediation. Conversely, NMAS, having defined mediation in terms of the disputants, not the process or the mediator, and having not included any mention of effectiveness, may not be a useful guide for evaluating mediation effectiveness.

Evaluating mediation's utility relies on being able to measure its effectiveness, and, for that purpose, it is important to understand how researchers interpret the concept in the context of their study. The remainder of this Chapter explores the concepts of mediation and mediator effectiveness in the selected studies.

3.2 Simple and complex effectiveness

This section includes the first set of findings from the thematic analysis of the selected studies. The analysis focuses on definitions and measurements of effectiveness in mediation and introduces a new analysis approach devised to enable contextual comparative analysis of effectiveness concept: differentiation between simple effectiveness and complex effectiveness. The section includes the findings of the contextual comparative analysis.

³⁴² Oral communication from a member of the MSB, May 2019.

In this thesis, simple effectiveness includes only the measurement of whether settlement is achieved in the mediation; and complex effectiveness includes several additional factors, usually relating to perceptions of fairness and satisfaction, in addition to whether settlement is achieved. Unexpectedly, the analysis suggests both a lack of consistently applied definitions and measures of complex effectiveness in mediation, and the dominance of settlement as a unit of analysis for mediation effectiveness.

Of the forty studies included in the analysis reported in this Chapter, two do refer to the effectiveness of their subject mediations, though the researchers do not explain how they have interpreted the concept for their studies.³⁴³ Although the two studies are counted among those that have considered the effectiveness of their subject mediations, the lack of definition or measure means the studies cannot be fully analysed.

3.2.0. Simple effectiveness

Twenty-seven of the 40 included studies describe simple effectiveness as a measure in their investigations of mediation.³⁴⁴ For the purposes of this analysis, and in keeping with the studies'

³⁴³ Gale, J., R. L. Mowery, M. S. Herrman, and N. L. Hollett, 'Considering Effective Divorce Mediation: Three Potential Factors' (2002) 19(4) *Conflict Resolution Quarterly* 389; Wissler, R. L., *Trapping the Data: An Assessment of Domestic Relations Mediation in Maine and Ohio Courts* (Unpublished report, 1999).

³⁴⁴ Burrell, N. A., W. A. Donohue, and M. Allen, 'The Impact of Disputants' Expectations on Mediation, Testing an Interventionist Model' (1990) Fall 1990 *Human Communication Research* 104; Dilts 1985; Goldberg, S. B., and M. L. Shaw, 'Further Investigation into the Secrets of Successful and Unsuccessful Mediators' (2008) 26(8) *Alternatives to the High Cost of Litigation* 149; Henderson, D. A., 'Mediation Success: An Empirical Analysis' (1996) 11(1) *Ohio State Journal on Dispute Resolution* 105; Hiltrop, J. M., 'Factors Associated with Successful Labor Mediation' in K. Kressel and D. G. Pruitt (eds), *Mediation Research: The Process and Effectiveness of Third-Party Intervention* (Jossey-Bass, USA, 1989); Jones, T. S., 'Lag Sequential Analyses of Mediator-Spouse and Husband-Wife Interaction in Successful and Unsuccessful Divorce Mediation' in M. A. Rahim (ed), *Managing Conflict: An Interdisciplinary Approach* (Praeger, USA, 1989); Karim, A. and D. Dilts, 'Determinants of Mediation Success in the Iowa Public Sector' (1990) 19(2) *Journal of Collective Negotiations* 129; Karim, A. and R. Pegnetter, 'Mediator Strategies and Qualities and Mediation Effectiveness' (1983) 22(1) *Industrial Relations* 105; Kimsey, W. D., R. M. Fuller, and B. C. McKinney, 'Mediator Listening, Dispute Reframing, and Mediation Outcome: A Pilot Study' (1993) 7(1) *Journal of the International Listening Association* 74; Kochan, T. A., and T. Jick, 'The Public Sector Mediation Process: A Theory and Empirical Examination' (1978) 22(2) *The Journal of Conflict Resolution* 209; Mareschal, P. M., 'What Makes Mediation Work? Perspectives on Resolving Disputes' (2005) 44(3) *Industrial Relations* 509; McEwen, C. A., *An Evaluation of the ADR Pilot Project: Final Report 1* (Unpublished report, 1992); Peeples, R., C. Harris, and T. Metzloff, 'Following the Script: An Empirical Analysis of Court-Ordered Mediation of Medical Malpractice Cases' (2007) 2007(1) *Journal of Dispute Resolution* 101; Posthuma, R. A., A. Richard, J. B. Dworkin, and M. S. Swift, 'Mediator Tactics and Sources of Conflict:

own descriptions, efficiency indicators and measures (such as timeliness and costs) are not included as additional complex measures; they are accepted as being qualifiers of settlement and are therefore included in simple effectiveness.³⁴⁵

Simple effectiveness could be regarded as a case management statistic, a standard against which the effectiveness of many mediation services and programs is measured and assessed. Even a cursory assessment of the broader mediation literature suggests that the focus on simple effectiveness may have influenced the design of many mediation programs and services.³⁴⁶ So widespread is its application in research and practice, simple effectiveness could be said to be an “industry standard” for mediation across all dispute and mediation contexts.

A research focus on simple effectiveness bypasses more detailed analysis of what actually happens during mediation, such as the contributions and influences of the mediator thereby hindering investigation of mediator effectiveness.

Facilitating and Inhibiting Effects’ (2002) 41(1) *Industrial Relations* 94; Pruitt, D. G., W. R. Fry, L. Castrianno, J. Zubeck, G. L. Welton, N. B. McGillicuddy, and C. Ippolito, ‘The Process of Mediation: Caucusing, Control, and Problem Solving’ in M. A. Rahim (ed), *Managing Conflict: An Interdisciplinary Approach* (Praeger, USA, 1989); Shapiro, D., R. Drieghe, and J. Brett, ‘Mediator Behavior and the Outcomes of Mediation’ (1985) 41(2) *Journal of Social Issues* 101; Slaikeu, K. A., R. Culler, J. Pearson, and N. Thoennes, ‘Process and Outcome in Divorce Mediation’ (1985) 10 *Mediation Quarterly* 55; Sourdin, T., *Exploring Pre-Action Requirements: Resolving Disputes Outside Courts* (ACJI, Monash University, October 2012); Swaab, R. I., *Face First: Pre-Mediation Caucus and Face in Employment Disputes* (Presentation, Annual Association of Conflict Management Conference, June 2009); Swaab, R. I., and J. Brett, *Caucus with Care: The Impact of Pre-Mediation Caucuses on Conflict Resolution* (Meetings Paper, International Association of Conflict Management, 2007); Thoennes, N. A., and J. Pearson, ‘Predicting Outcomes in Divorce Mediation: The Influence of People and Process’ (1985) 41(2) *Journal of Social Issues* 115; Vanderkooi, L., and J. Pearson, ‘Mediating Divorce Disputes: Mediator Behaviors, Styles and Roles’ (1983) 32(4) *Family Relations* 557; Wall, J. A., Jr, and S. Chan-Serafin, ‘Processes in Civil Case Mediations’ (2009) 26(3) *Conflict Resolution Quarterly* 261; Wall, J. A., Jr, and S. Chan-Serafin, ‘Do Mediators Walk Their Talk in Civil Cases?’ (2010) 28(1) *Conflict Resolution Quarterly* 3; Wall, J. A., Jr, and D. E. Rude, ‘The Judge as a Mediator’ (1991) 76(1) *Journal of Applied Psychology* 54; Welton, G. L., D. G. Pruitt, N. B. McGillicuddy, C. A. Ippolito, and J. M. Zubeck, ‘Antecedents and Characteristics of Caucusing in Community Mediation’ (1992) 3(4) *International Journal of Conflict Management* 303; Woodward, J. G., ‘Settlement Week: Measuring the Promise’ (1990) 11 *Northern Illinois University Law Review* 1.

³⁴⁵ In the selected studies, factors included in complex effectiveness exist separately and are measured separately from the measure of reaching agreement, whereas efficiency measures are not.

³⁴⁶ For example, see Boule, L., *Mediation Principles Process Practice* (3rd Edition, LexisNexis Butterworths, Australia, 2011); Sourdin, T., *Alternative Dispute Resolution* (6th Edition, Thomson Reuters, Australia, 2020).

3.2.1. Complex effectiveness

Eleven of the 40 included studies describe various components of complex effectiveness as well as the achievement of a mediated agreement in their investigations of mediation.³⁴⁷

Complex effectiveness includes the measurement of any, or a combination of any, mediation outcomes *additional to the achievement of settlement*,³⁴⁸ including, but not limited to, the following:

- Disputant satisfaction (accepted as incorporating factors that relate to perceptions of fairness);
- Nature of agreements (ie terms that include more than, say, an exchange of payment);
- Rates of compliance; and
- Improvement in disputants' post-dispute relationship.

It could be said that the above measures are each relevant to overall disputant satisfaction and perceptions of fairness. In this section, they are referred to collectively as “fairness and satisfaction measures”. Some of the selected studies apply measures that are additional to, rather than being components of, effectiveness.

³⁴⁷ Alberts, J. K., B. L. Heisterkamp, and R. M. McPhee, 'Disputant Perceptions of and Satisfaction with a Community Mediation Program' (2005) 16(3) *The International Journal of Conflict Management* 218; Bingham, L. B., 'Transformative Mediation in the United States Postal Service' (2012) 5(4) *Negotiation and Conflict Management Research* 354; Kressel, K., E. A. Frontera, S. Forlenza, F. Butler, and L. Fish, 'The Settlement-Orientation vs the Problem-Solving Style' (1994) 50(1) *Journal of Social Issues* 67; McDermott, E. P., and R. Obar, "'What's Going On" in Mediation: An Empirical Analysis of the Influence of a Mediator's Style on Party Satisfaction and Monetary Benefit' (2004) 9 *Harvard Negotiation Law Review* 75; Pruitt, D. G., R. S. Peirce, N. B. McGillicuddy, G. L. Welton, and L. Castrianno, 'Long-Term Success in Mediation' (1993) 17(3) *Law and Human Behavior* 313; Sourdin, T., *Dispute Resolution Processes for Credit Consumers* (Project Report, Conflict Resolution Research Centre, La Trobe University, 2007); Sourdin, T., *Mediation in the Supreme and County Courts of Victoria* (Report prepared for the Department of Justice, Victoria, Australia, April 2009), available on <<http://www.civiljustice.info/adreval/1/>>; Sourdin, T., and T. Matruglio, *Evaluating Mediation – New South Wales Settlement Scheme 2002* (2004) *Mediation*. Paper 7, available on <<http://www.civiljustice.info/med/7>>; Wissler, R. L., 'Mediation and Adjudication in Small Claims Court: The Effects of Process and Case Characteristics' (1995) 29(2) *Law & Society Review* 323; Wissler, R. L., 'Court-Connected Mediation in General Civil Cases: What We Know from Empirical Research' (2002) 17(3) *Ohio State Journal on Dispute Resolution* 641; Zubeck, J. M., D. G. Pruitt, R. S. Peirce, N. B. McGillicuddy, and H. Syna, 'Disputant and Mediator Behaviors Affecting Short-Term Success in Mediation' (1992) 36(3) *Journal of Conflict Resolution* 546.

³⁴⁸ None of the selected studies investigates a form of effectiveness that does not include the achievement of settlement.

The components of complex effectiveness have been said to produce more durable agreements than simple effectiveness.³⁴⁹ However, in the assessment of mediation services and programs, complex effectiveness is less likely to be considered than simple effectiveness and appears less frequently in the mediation literature as a component, or measure of effectiveness. Because of the nature of its achievements, complex effectiveness could be said to provide a broader scope of dispute resolution that can include measures of disputant satisfaction whereas simple effectiveness is limited to the achievement of settlement, without consideration of the disputants' responses.

While the mediator's role in achieving the outcome standard of simple effectiveness may receive limited acknowledgement, their role in relation to complex effectiveness is largely unexplored.

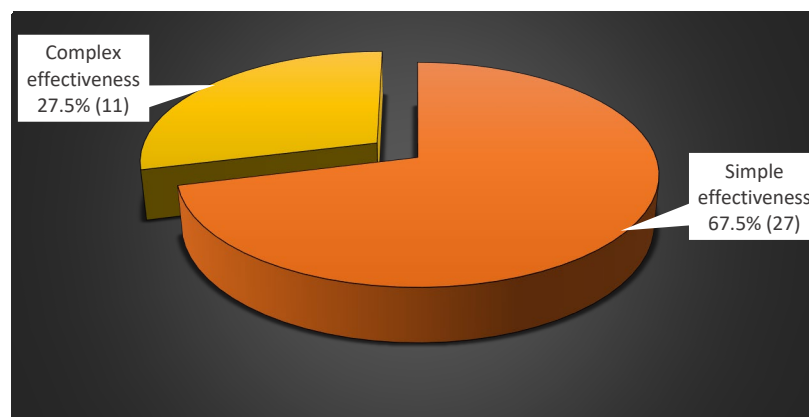


Figure 3.1. Simple and complex effectiveness.

³⁴⁹ Alberts, J. K., B. L. Heisterkamp, and R. M. McPhee, 'Disputant Perceptions of and Satisfaction with a Community Mediation Program' (2005) 16 *The International Journal of Conflict Management* 218; Kressel, K., E. A. Frontera, S. Forlenza, F. Butler, and L. Fish, 'The Settlement-Oriented vs the problem-Solving Style in Custody Mediation' (1994) 50 *Journal of Social Issues* 67; Meierding, N. R., 'Does Mediation Work? A Survey of Long-Term Satisfaction and Durability Rates for Privately Mediated Agreements' (1993) 11(2) *Mediation Quarterly* 157; Pruitt, D. G., N. B. McGillicuddy, G. L. Welton, and L. Castrianno, 'Long-Term Success in Mediation' 17 *Law and Behavior* 313.

(iii) Components of complex effectiveness

Fairness and satisfaction

The eleven included studies that define and measure components of complex effectiveness show a strong preference for measures related to procedural fairness and disputant satisfaction. All eleven include definitions and measures of fairness and satisfaction.³⁵⁰ The researchers collect data about fairness and satisfaction largely from the non-mediators and the relevant measures include reference to:³⁵¹

- Procedural justice and satisfaction, including satisfaction with the process and/or its outcome;³⁵²

³⁵⁰ Alberts, J. K., B. L. Heisterkamp, and R. M. McPhee, 'Disputant Perceptions of and Satisfaction with a Community Mediation Program' (2005) 16(3) *The International Journal of Conflict Management* 218; Bingham, L. B., 'Transformative Mediation in the United States Postal Service' (2012) 5(4) *Negotiation and Conflict Management Research* 354; Kressel, K., E. A. Frontera, S. Forlenza, F. Butler, and L. Fish, 'The Settlement-Orientation vs the Problem-Solving Style' (1994) 50(1) *Journal of Social Issues* 67; McDermott, E. P., and R. Obar, "'What's Going On" in Mediation: An Empirical Analysis of the Influence of a Mediator's Style on Party Satisfaction and Monetary Benefit' (2004) 9 *Harvard Negotiation Law Review* 75; Pruitt, D. G., R. S. Peirce, N. B. McGillicuddy, G. L. Welton, and L. Castrianno, 'Long-Term Success in Mediation' (1993) 17(3) *Law and Human Behavior* 313; Sourdin, T., *Dispute Resolution Processes for Credit Consumers* (Project Report, Conflict Resolution Research Centre, La Trobe University, 2007); Sourdin, T., *Mediation in the Supreme and County Courts of Victoria* (Report prepared for the Department of Justice, Victoria, Australia, April 2009), available on <<http://www.civiljustice.info/adreval/1/>>; Sourdin, T., and T. Matruglio, *Evaluating Mediation – New South Wales Settlement Scheme 2002* (2004) *Mediation*. Paper 7, available on <<http://www.civiljustice.info/med/7>>; Wissler, R. L., 'Mediation and Adjudication in Small Claims Court: The Effects of Process and Case Characteristics' (1995) 29(2) *Law & Society Review* 323; Zubeck, J. M., D. G. Pruitt, R. S. Peirce, N. B. McGillicuddy, and H. Syna, 'Disputant and Mediator Behaviors Affecting Short-Term Success in Mediation' (1992) 36(3) *Journal of Conflict Resolution* 546.

³⁵¹ Others of the selected studies that do not investigate mediation effectiveness do include investigation of perceptions of fairness and satisfaction; a small number of those collect relevant data from mediator participants. Issues relating to study participants and data collection are considered in more detail in Chapters Five and Six.

³⁵² Bingham, L. B., 'Transformative Mediation in the United States Postal Service' (2012) 5(4) *Negotiation and Conflict Management Research* 354; Sourdin, T., *Dispute Resolution Processes for Credit Consumers* (Project Report, Conflict Resolution Research Centre, La Trobe University, 2007); Sourdin 2009; Sourdin, T., and T. Matruglio, *Evaluating Mediation – New South Wales Settlement Scheme 2002* (2004) *Mediation*. Paper 7, available on <<http://www.civiljustice.info/med/7>>; Wissler, R. L., 'Court-Connected Mediation in General Civil Cases: What We Know from Empirical Research' (2002) 17(3) *Ohio State Journal on Dispute Resolution* 641.

- Improved relations between the disputants;³⁵³
- Fairness (unspecified) and satisfaction (unspecified);³⁵⁴
- Lack of pressure or coercion;³⁵⁵
- Satisfaction with the mediation process and with its outcome;³⁵⁶
- Satisfaction with the process, with the mediator, and with the mediation outcome;³⁵⁷
- Satisfaction with the mediation process;³⁵⁸ and
- Satisfaction (unspecified).³⁵⁹

However, one of the selected studies reports that study disputants were not able to clearly differentiate between the concepts of satisfaction and fairness as they related to the mediation process and to the mediation – a caution in the study findings that is acknowledged by the researchers.³⁶⁰

³⁵³ Pruitt, D. G., R. S. Peirce, N. B. McGillicuddy, G. L. Welton, and L. Castrianno, 'Long-Term Success in Mediation' (1993) 17(3) *Law and Human Behavior* 313; Sourdin, T., *Mediation in the Supreme and County Courts of Victoria* (Report prepared for the Department of Justice, Victoria, Australia, April 2009), available on <<http://www.civiljustice.info/adreval/1/>>; Wissler, R. L., 'Mediation and Adjudication in Small Claims Court: The Effects of Process and Case Characteristics' (1995) 29(2) *Law & Society Review* 323.

³⁵⁴ Sourdin, T., *Mediation in the Supreme and County Courts of Victoria* (Report prepared for the Department of Justice, Victoria, Australia, April 2009), available on <<http://www.civiljustice.info/adreval/1/>>; Wissler, R. L., 'Mediation and Adjudication in Small Claims Court: The Effects of Process and Case Characteristics' (1995) 29(2) *Law & Society Review* 323.

³⁵⁵ Sourdin, T., and T. Matruglio, *Evaluating Mediation – New South Wales Settlement Scheme 2002* (2004) *Mediation*. Paper 7, available on <<http://www.civiljustice.info/med/7/>>; Wissler, R. L., 'Court-Connected Mediation in General Civil Cases: What We Know from Empirical Research' (2002) 17(3) *Ohio State Journal on Dispute Resolution* 641.

³⁵⁶ McDermott, E. P., and R. Obar, "'What's Going On" in Mediation: An Empirical Analysis of the Influence of a Mediator's Style on Party Satisfaction and Monetary Benefit' (2004) 9 *Harvard Negotiation Law Review* 75; Zubeck, J. M., D. G. Pruitt, R. S. Peirce, N. B. McGillicuddy, and H. Syna, 'Disputant and Mediator Behaviors Affecting Short-Term Success in Mediation' (1992) 36(3) *Journal of Conflict Resolution* 546.

³⁵⁷ Alberts, J. K., B. L. Heisterkamp, and R. M. McPhee, 'Disputant Perceptions of and Satisfaction with a Community Mediation Program' (2005) 16(3) *The International Journal of Conflict Management* 218.

³⁵⁸ McDermott, E. P., and R. Obar, "'What's Going On" in Mediation: An Empirical Analysis of the Influence of a Mediator's Style on Party Satisfaction and Monetary Benefit' (2004) 9 *Harvard Negotiation Law Review* 75.

³⁵⁹ Pruitt, D. G., R. S. Peirce, N. B. McGillicuddy, G. L. Welton, and L. Castrianno, 'Long-Term Success in Mediation' (1993) 17(3) *Law and Human Behavior* 313.

³⁶⁰ Alberts, J. K., B. L. Heisterkamp, and R. M. McPhee, 'Disputant Perceptions of and Satisfaction with a Community Mediation Program' (2005) 16(3) *The International Journal of Conflict Management* 218.

The eleven studies include other defined and measured components of complex effectiveness, including the following:

- The durability of the mediated agreement, and/or compliance with its terms;³⁶¹
- The levels at which disputants achieved their goals;³⁶² and
- A range of factors, including:
 - Conflict management skills for disputants;³⁶³
 - No new problems between the disputants;³⁶⁴
 - The accessibility of the mediation service;³⁶⁵ and
 - Comprehensive coverage of dispute issues within the mediation.³⁶⁶

3.2.2. Mediation context

The initial analysis of the selected studies established seven contexts within which subject mediations were conducted or within which the research or evaluation occurred. Within this analysis, context is taken to mean the setting within which the investigated mediations occur, as described in each study, or as deduced during the analysis, and each of the selected forty studies is allocated to one context. The context groupings are described below:

³⁶¹ Pruitt, D. G., R. S. Peirce, N. B. McGillicuddy, G. L. Welton, and L. Castrianno, 'Long-Term Success in Mediation' (1993) 17(3) *Law and Human Behavior* 313; Sourdin, T., *Mediation in the Supreme and County Courts of Victoria* (Report prepared for the Department of Justice, Victoria, Australia, April 2009), available on <<http://www.civiljustice.info/adreval/1/>>; Wissler, R. L., 'Mediation and Adjudication in Small Claims Court: The Effects of Process and Case Characteristics' (1995) 29(2) *Law & Society Review* 323.

³⁶² Pruitt, D. G., R. S. Peirce, N. B. McGillicuddy, G. L. Welton, and L. Castrianno, 'Long-Term Success in Mediation' (1993) 17(3) *Law and Human Behavior* 313; Zubeck, J. M., D. G. Pruitt, R. S. Peirce, N. B. McGillicuddy, and H. Syna, 'Disputant and Mediator Behaviors Affecting Short-Term Success in Mediation' (1992) 36(3) *Journal of Conflict Resolution* 546.

³⁶³ Bingham, L. B., 'Transformative Mediation in the United States Postal Service' (2012) 5(4) *Negotiation and Conflict Management Research* 354.

³⁶⁴ Pruitt, D. G., R. S. Peirce, N. B. McGillicuddy, G. L. Welton, and L. Castrianno, 'Long-Term Success in Mediation' (1993) 17(3) *Law and Human Behavior* 313.

³⁶⁵ Sourdin, T., *Mediation in the Supreme and County Courts of Victoria* (Report prepared for the Department of Justice, Victoria, Australia, April 2009), available on <<http://www.civiljustice.info/adreval/1/>>.

³⁶⁶ Wissler, R. L., 'Court-Connected Mediation in General Civil Cases: What We Know from Empirical Research' (2002) 17(3) *Ohio State Journal on Dispute Resolution* 641.

- Community-based context (mediations conducted in a community-based mediation centre, regardless of the professional standing of the mediator or the nature of the dispute);
- Construction and building context: there is only one report from a study of mediations conducted in a construction setting, and the majority of the study participants (mediators and non-mediators) were reported to be either lawyers or retired judges; despite the legal background of the mediators, this study has been differentiated from legal and court connected mediations because of the nature and setting of the disputes themselves.
- Court-connected context (mediations conducted within, or in association with, a court or tribunal, and/or conducted by a practising or retired judge or legal practitioner): this contextual category does not include assessments or evaluations of court-connected mediation programs or services, which are included in the contextual category of evaluations;
- Evaluation context (specifically funded evaluations or assessments of existing mediation programs and services): funded program and service evaluations are considered to be a discrete contextual category because they tend to have their evaluation criteria established as part of their terms of reference rather than using contextual definitions and measures (even though they might be similar). In particular, studies describing themselves as evaluations are included in this context. The evaluation criteria usually include readily quantifiable measures of efficiency such as settlement rates, timeliness, and cost reductions, as they relate to the subject program or service;

- Family/divorce/child custody context (mediations conducted by mediators at a family mediation service, and/or concerns matters associated with divorce proceedings and/or child custody and visitation rights);^{367 368}
- Labour-management context (mediations where the issues in dispute concern collective workplace conditions, the parties are the representatives of employees and management, and the mediators have an institutional association with labour/management mediation services): this context does not include workplace mediation between individual employees and individual employers/managers; and
- Simulated mediation context (studies conducted in a laboratory, or simulated, setting): in each of these studies, evaluation criteria, including effectiveness, were part of the study design; studies of simulated mediation, researchers are relatively free from external influence which affords them some latitude in how they choose to define and measure effectiveness.

After each study had been allocated to its relevant context category, the definitions and measures of effectiveness in all studies were analysed according to the framework of simple and complex effectiveness.

3.2.3. Contextual comparative analysis

The results of the comparative contextual analysis suggest that applying simple and complex effectiveness criteria can be productive in contextual comparative analyses of effectiveness in mediation. A little over two thirds of the included studies measure simple effectiveness and less

³⁶⁷ Family/divorce/child custody mediations typically occur in association with a purpose-specific court; however, they differ from court-connected mediations in that, in the selected studies, they do not routinely include judge/legal practitioner mediators.

³⁶⁸ The four studies in this context were conducted in the US where, as described in the studies, family/divorce/child custody matters were referred by the courts to specialist mediation services which, at least at the time of the studies, operated differently from the Australian FDR system.

than one third measure complex effectiveness. The analysis shows a clear dominance of simple effectiveness across most contexts, especially in labour/management, in family/divorce/child custody, and in court-connected mediations. The use of complex effectiveness measures was reported in a minority of the studies, and it is surprising that complex effectiveness is not applied more widely in empirical studies of mediation.

In summary, of the forty selected studies that explore issues related specifically to effectiveness, 67.5% (n = 27 studies) refer to settlement (including efficiency measures) as the sole measure for effectiveness,³⁶⁹ and 27.5% (n = 11 studies) refer to complex effectiveness measures.³⁷⁰

³⁶⁹ Alberts, J. K., B. L. Heisterkamp, and R. M. McPhee, 'Disputant Perceptions of and Satisfaction with a Community Mediation Program' (2005) 16(3) *The International Journal of Conflict Management* 218; Bingham, L. B., 'Transformative Mediation in the United States Postal Service' (2012) 5(4) *Negotiation and Conflict Management Research* 354; Kressel, K., E. A. Frontera, S. Forlenza, F. Butler, and L. Fish, 'The Settlement-Orientation vs the Problem-Solving Style' (1994) 50(1) *Journal of Social Issues* 67; McDermott, E. P., and R. Obar, "'What's Going On" in Mediation: An Empirical Analysis of the Influence of a Mediator's Style on Party Satisfaction and Monetary Benefit' (2004) 9 *Harvard Negotiation Law Review* 75; Pruitt, D. G., R. S. Peirce, N. B. McGillicuddy, G. L. Welton, and L. Castrianno, 'Long-Term Success in Mediation' (1993) 17(3) *Law and Human Behavior* 313; Sourdin, T., *Dispute Resolution Processes for Credit Consumers* (Project Report, Conflict Resolution Research Centre, La Trobe University, 2007); Sourdin, T., *Mediation in the Supreme and County Courts of Victoria* (Report prepared for the Department of Justice, Victoria, Australia, April 2009), available on <<http://www.civiljustice.info/adreval/1/>>; Sourdin, T., and T. Matruglio, *Evaluating Mediation – New South Wales Settlement Scheme 2002* (2004) *Mediation*. Paper 7, available on <<http://www.civiljustice.info/med/7>>; Wissler, R. L., 'Mediation and Adjudication in Small Claims Court: The Effects of Process and Case Characteristics' (1995) 29(2) *Law & Society Review* 323; Wissler, R. L., 'Court-Connected Mediation in General Civil Cases: What We Know from Empirical Research' (2002) 17(3) *Ohio State Journal on Dispute Resolution* 641; Zubeck, J. M., D. G. Pruitt, R. S. Peirce, N. B. McGillicuddy, and H. Syna, 'Disputant and Mediator Behaviors Affecting Short-Term Success in Mediation' (1992) 36(3) *Journal of Conflict Resolution* 546.

³⁷⁰ Alberts, J. K., B. L. Heisterkamp, and R. M. McPhee, 'Disputant Perceptions of and Satisfaction with a Community Mediation Program' (2005) 16(3) *The International Journal of Conflict Management* 218; Bingham, L. B., 'Transformative Mediation in the United States Postal Service' (2012) 5(4) *Negotiation and Conflict Management Research* 354; Kressel, K., E. A. Frontera, S. Forlenza, F. Butler, and L. Fish, 'The Settlement-Orientation vs the Problem-Solving Style' (1994) 50(1) *Journal of Social Issues* 67; McDermott, E. P., and R. Obar, "'What's Going On" in Mediation: An Empirical Analysis of the Influence of a Mediator's Style on Party Satisfaction and Monetary Benefit' (2004) 9 *Harvard Negotiation Law Review* 75; Pruitt, D. G., R. S. Peirce, N. B. McGillicuddy, G. L. Welton, and L. Castrianno, 'Long-Term Success in Mediation' (1993) 17(3) *Law and Human Behavior* 313; Sourdin, T., *Dispute Resolution Processes for Credit Consumers* (Project Report, Conflict Resolution Research Centre, La Trobe University, 2007); Sourdin, T., *Mediation in the Supreme and County Courts of Victoria* (Report prepared for the Department of Justice, Victoria, Australia, April 2009), available on <<http://www.civiljustice.info/adreval/1/>>; Sourdin, T., and T. Matruglio, *Evaluating Mediation – New South Wales Settlement Scheme 2002* (2004) *Mediation*. Paper 7, available on <<http://www.civiljustice.info/med/7>>; Wissler, R. L., 'Mediation and Adjudication in Small Claims Court: The Effects of Process and Case Characteristics' (1995) 29(2) *Law & Society Review* 323; Wissler, R. L., 'Court-Connected Mediation in General Civil Cases: What We Know from Empirical Research' (2002) 17(3) *Ohio State Journal on Dispute Resolution* 641; Zubeck, J. M., D. G. Pruitt, R. S. Peirce, N. B. McGillicuddy, and H. Syna, 'Disputant and Mediator Behaviors Affecting Short-Term Success in Mediation' (1992) 36(3) *Journal of Conflict Resolution* 546.

The three contexts with the highest proportion of simple effectiveness measures are the labour-management context (all seven studies), the family/divorce/custody context (three out of the four studies), and the court-connected context (seven out of the ten studies).

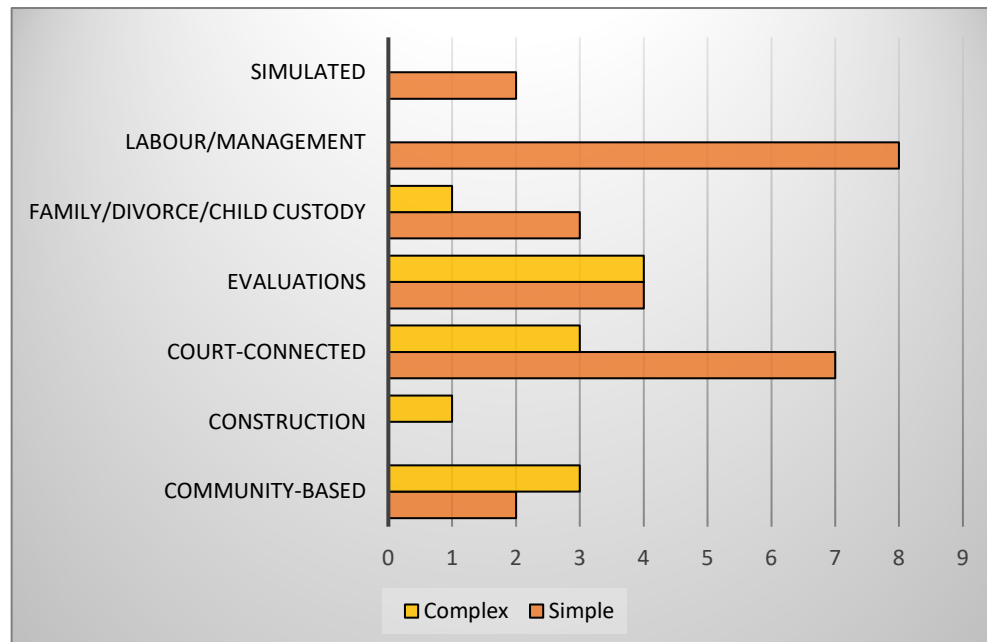


Figure 3.2. Simple and complex effectiveness: contextual analysis.

Figure 3.2 shows the strong preference for simple effectiveness measures in the labour/management and court-connected contexts, and the preference for complex effectiveness measures in program and service evaluations (the latter include five evaluations of court-connected programs).

The results of the contextual comparative analysis are listed below, with the seven mediation contexts listed in alphabetical order.³⁷¹ In the labour/management context, all seven studies

³⁷¹ Where this analysis reports that effectiveness was measured in terms of whether or not settlement was reached, this binary question is considered to be different from so-called “settlement rates” which are, in effect, comparative analyses of simple effectiveness.

measure only simple effectiveness, whereas in the remaining six contexts, there is a mix of both simple and complex effectiveness.

a) *Community-based context*

Of the five included studies of mediations conducted in a community-based context,³⁷² two define and measure simple effectiveness,³⁷³ and three define and measure complex effectiveness using fairness and satisfaction measures.³⁷⁴

b) *Construction and business context*

Only one of the studies investigates mediations conducted in the construction and business context.³⁷⁵ In that study, the researcher defines and measures effectiveness in terms of whether or not settlement was reached, plus associated efficiency measures (reduction in costs, and timeliness).

c) *Court-connected context*

³⁷² Alberts, J. K., B. L. Heisterkamp, and R. M. McPhee, 'Disputant Perceptions of and Satisfaction with a Community Mediation Program' (2005) 16 *The International Journal of Conflict Management* 218; Pruitt, D. G., W. R. Fry, L. Castrianno, J. Zubek, G. L. Welton, N. B. McGillicuddy, and C. Ippolito, 'The Process of Mediation: Caucusing, Control, and Problem Solving' in M. A. Rahim (Ed), *Managing Conflict: An Interdisciplinary Approach* (Praeger, USA, 1989); Pruitt, D. G., R. S. Peirce, N. B. McGillicuddy, G. L. Welton, and L. Castrianno, 'Long-Term Success in Mediation' (1993) 17 *Law and Human Behavior* 313; Welton, G. L., D. G. Pruitt, N. B. McGillicuddy, C. A. Ippolito, and J. M. Zubek, 'Antecedents and Characteristics of Caucusing in Community Mediation' (1992) 394 *International Journal of Conflict Management* 303; Zubek, J. M., D. G. Pruitt, R. S. Peirce, N. B. McGillicuddy, and H. Syna, 'Disputant and Mediator Behaviors Affecting Short-Term Success in Mediation' (1992) 36 *Journal of Conflict Resolution* 546.

³⁷³ Pruitt, D. G., W. R. Fry, L. Castrianno, J. Zubek, G. L. Welton, N. B. McGillicuddy, and C. Ippolito, 'The Process of Mediation: Caucusing, Control, and Problem Solving' in M. A. Rahim (ed), *Managing Conflict: An Interdisciplinary Approach* (Praeger, USA, 1989); Welton, G. L., D. G. Pruitt, N. B. McGillicuddy, C. A. Ippolito, and J. M. Zubek, 'Antecedents and Characteristics of Caucusing in Community Mediation' (1992) 3(4) *International Journal of Conflict Management* 303.

³⁷⁴ Alberts, J. K., B. L. Heisterkamp, and R. M. McPhee, 'Disputant Perceptions of and Satisfaction with a Community Mediation Program' (2005) 16(3) *The International Journal of Conflict Management* 218; Pruitt, D. G., R. S. Peirce, N. B. McGillicuddy, G. L. Welton, and L. Castrianno, 'Long-Term Success in Mediation' (1993) 17(3) *Law and Human Behavior* 313; Zubek, J. M., D. G. Pruitt, R. S. Peirce, N. B. McGillicuddy, and H. Syna, 'Disputant and Mediator Behaviors Affecting Short-Term Success in Mediation' (1992) 36(3) *Journal of Conflict Resolution* 546.

³⁷⁵ Henderson, D. A., 'Mediation Success: An Empirical Analysis' (1996) 11 *Ohio State Journal on Dispute Resolution* 105.

Of the ten included studies of mediations conducted in a court-connected context,³⁷⁶ seven define and measure simple effectiveness.³⁷⁷ The other three define and measure complex effectiveness in terms of settlement plus fairness and satisfaction measures.³⁷⁸

d) *Evaluations and assessments of mediation program and services*

³⁷⁶ Goldberg, S. B., and M. L. Shaw, 'Further Investigation into the Secrets of Successful and Unsuccessful Mediators' (2008) 26 *Alternatives to the High Cost of Litigation* 149; McDermott, E. P., and R. Obar, "'What's Going On" in Mediation: An Empirical Analysis of the Influence of a Mediator's Style on Party Satisfaction and Monetary Benefit' (2004) 9 *Harvard Negotiation Law Review* 75; Peeples, R., C. Harris, and T. Metzloff, 'Following the Script: An Empirical Analysis of Court-Ordered Mediation of Medical Malpractice Cases' (2007) 2007 *Journal of Dispute Resolution* 101; Swaab, R. I., *Face First: Pre-Mediation Caucus and Face in Employment Disputes* (Presentation, 22nd Annual Association of Conflict Management Conference, June 2009); Swaab, R. I., and J. Brett, *Caucus with Care: The Impact of Pre-Mediation Caucuses on Conflict Resolution* (Meetings Paper, International Association of Conflict Management, 2007); Wall, J. A., Jr, and S. Chan-Serafin, 'Processes in Civil Case Mediations' (2009) 26 *Conflict Resolution Quarterly* 261; Wall, Jr, J. A., and S. Chan-Serafin, 'Do Mediators Walk Their Talk in Civil Cases?' (2010) 28 *Conflict Resolution Quarterly* 3; Wall, Jr, J. A., and D. E. Rude, 'the Judge as Mediator' (1991) 76 *Journal of Applied Psychology* 54; Wissler, R. L., 'Mediation and Adjudication in Small Claims Court: The Effects of Process and Case Characteristics' (1995) 29(2) *Law & Society Review* 323; Wissler, R. L., 'Court-Connected Mediation in General Civil Cases: What We Know from Empirical Research' (2002) 17 *Ohio State Journal on Dispute Resolution* 641.

³⁷⁷ Goldberg, S. B., and M. L. Shaw, 'Further Investigation into the Secrets of Successful and Unsuccessful Mediators' (2008) 26(8) *Alternatives to the High Cost of Litigation* 149; Peeples, R., C. Harris, and T. Metzloff, 'Following the Script: An Empirical Analysis of Court-Ordered Mediation of Medical Malpractice Cases' (2007) 2007(1) *Journal of Dispute Resolution* 101; Swaab, R. I., *Face First: Pre-Mediation Caucus and Face in Employment Disputes* (Presentation, Annual Association of Conflict Management Conference, June 2009); Swaab, R. I., and J. Brett, *Caucus with Care: The Impact of Pre-Mediation Caucuses on Conflict Resolution* (Meetings Paper, International Association of Conflict Management, 2007); Wall, J. A., Jr, and S. Chan-Serafin, 'Processes in Civil Case Mediations' (2009) 26(3) *Conflict Resolution Quarterly* 261; Wall, J. A., Jr, and S. Chan-Serafin, 'Do Mediators Walk Their Talk in Civil Cases?' (2010) 28(1) *Conflict Resolution Quarterly* 3; Wall, J. A., Jr, and D. E. Rude, 'The Judge as a Mediator' (1991) 76(1) *Journal of Applied Psychology* 54.

³⁷⁸ McDermott, E. P., and R. Obar, "'What's Going On" in Mediation: An Empirical Analysis of the Influence of a Mediator's Style on Party Satisfaction and Monetary Benefit' (2004) 9 *Harvard Negotiation Law Review* 75; Wissler, R. L., 'Mediation and Adjudication in Small Claims Court: The Effects of Process and Case Characteristics' (1995) 29(2) *Law & Society Review* 323; Wissler, R. L., 'Court-Connected Mediation in General Civil Cases: What We Know from Empirical Research' (2002) 17 *Ohio State Journal on Dispute Resolution* 641.

Nine of the included studies are funded assessments or evaluations of mediation programs or services.³⁷⁹ Four define and measure simple effectiveness.³⁸⁰ Four define and measure complex effectiveness including measures of fairness and satisfaction.³⁸¹

The nine evaluations and assessments of mediation programs and services include five evaluations of court-connected mediation programs;³⁸² one of mediation services in a family/divorce/custody context;³⁸³ one of a workplace mediation program;³⁸⁴ and one of mediation services in the financial sector.³⁸⁵

³⁷⁹ Bingham, L. B., 'Transformative Mediation in the United States Postal Service' (2012) 5 *Negotiation and Conflict Management Research* 354; McEwen, C. A., *An Evaluation of the ADR Pilot Project: Final Report 1* (Unpublished report, 1992); Sourdin, T., *Dispute Resolution Processes for Credit Consumers* (Project Report, Conflict Resolution Research Centre, La Trobe University, 2007); Sourdin, T., *Mediation in the Supreme and County Courts of Victoria* (Report prepared for the Department of Justice, Victoria, Australia, April 2009), available on <<http://www.civiljustice.info/adreval/1/>>; Sourdin, T., *Resolving Disputes Outside Courts: Exploring Civil Pre-Action Requirements* (ACJI, Monash University, October 2012); Sourdin, T., and T. Matruggio, *Evaluating Mediation – New South Wales Settlement Scheme 2002* (2004) *Mediation*. Paper 7, available on <<http://www.civiljustice.info/med/7/>>; Vanderkooi, L., and J. Pearson, 'Mediating Divorce Disputes: Mediator Behaviors, Styles and Roles' (1983) 32(4) *Family Relations* 557; Wissler, R. L., *Trapping the Data: An Assessment of Domestic Relations Mediation in Maine and Ohio Courts* (Unpublished report, 1999); Woodward, J. G., 'Settlement Week: Measuring the Promise' (1990) 11 *Northern Illinois University Law Review* 1; one of the evaluations cannot be analysed because the researcher has not included a definition or any measures of effectiveness.

³⁸⁰ McEwen, C. A., *An Evaluation of the ADR Pilot Project: Final Report 1* (Unpublished report, 1992); Sourdin, T., *Exploring Pre-Action Requirements: Resolving Disputes Outside Courts* (ACJI, Monash University, October 2012); Vanderkooi, L., and J. Pearson, 'Mediating Divorce Disputes: Mediator Behaviors, Styles and Roles' (1983) 32(4) *Family Relations* 557; Woodward, J. G., 'Settlement Week: Measuring the Promise' (1990) 11 *Northern Illinois University Law Review* 1.

³⁸¹ Bingham, L. B., 'Transformative Mediation in the United States Postal Service' (2012) 5(4) *Negotiation and Conflict Management Research* 354; Sourdin, T., *Dispute Resolution Processes for Credit Consumers* (Project Report, Conflict Resolution Research Centre, La Trobe University, 2007); Sourdin 2009; Sourdin, T., and T. Matruggio, *Evaluating Mediation – New South Wales Settlement Scheme 2002* (2004) *Mediation*. Paper 7, available on <<http://www.civiljustice.info/med/7/>>.

³⁸² McEwen, C. A., *An Evaluation of the ADR Pilot Project: Final Report 1* (Unpublished report, 1992); Sourdin, T., *Mediation in the Supreme and County Courts of Victoria* (Report prepared for the Department of Justice, Victoria, Australia, April 2009), available on <<http://www.civiljustice.info/adreval/1/>>; Sourdin, T., *Exploring Pre-Action Requirements: Resolving Disputes Outside Courts* (ACJI, Monash University, October 2012); Sourdin, T., and T. Matruggio, *Evaluating Mediation – New South Wales Settlement Scheme 2002* (2004) *Mediation*. Paper 7, available on <<http://www.civiljustice.info/med/7/>>; Woodward, J. G., 'Settlement Week: Measuring the Promise' (1990) 11 *Northern Illinois University Law Review* 1.

³⁸³ Vanderkooi, L., and J. Pearson, 'Mediating Divorce Disputes: Mediator Behaviors, Styles and Roles' (1983) 32(4) *Family Relations* 557.

³⁸⁴ Bingham, L. B., 'Transformative Mediation in the United States Postal Service' (2012) 5(4) *Negotiation and Conflict Management Research* 354.

³⁸⁵ Sourdin, T., *Dispute Resolution Processes for Credit Consumers* (Project Report, Conflict Resolution Research Centre, La Trobe University, 2007).

e) *Family/divorce/child custody context*

Of the four studies of mediations reported to have been conducted in a family, divorce, or child custody context,³⁸⁶ three define and measure simple effectiveness,³⁸⁷ and one defines and measures effectiveness in terms of settlement plus fairness and satisfaction measures.³⁸⁸

f) *Labour-management context*

Of the eight included studies of mediations reported to have been conducted in a labour/management context,³⁸⁹ all eight define and measure simple effectiveness. None defines or measures any aspect of complex effectiveness. One of the studies does include additional measures (the percentage of issues resolved, and any observed 'movement' in the parties' positions or any concessions the parties have made);³⁹⁰ however, in the study, these are measured in direct association with the achievement of settlement – they are not measured in their own right.

³⁸⁶ Jones, T. S., 'Lag Sequential Analyses of Mediator-Spouse and Husband-Wife Interaction in Successful and Unsuccessful Divorce Mediation' in M. A. Rahim (Ed), *Managing Conflict: An Interdisciplinary Approach* (Praeger, USA, 1989); Kressel, K., E. A. Frontera, S. Forlenza, F. Butler, and L. Fish, 'The Settlement-Orientation vs the Problem-Solving Style in Custody Mediation' (1994) 50 *Journal of Social Issues* 67; Slaikeu, K. A., R. Culler, J. Pearson and N. Thoennes, 'Process and Outcome in Divorce Mediation' (1985) 10 *Mediation Quarterly* 55; Thoennes, N. A., and J. Pearson, 'Predicting Outcomes in Divorce Mediation: The Influence of People and Process' (1985) 41 *Journal of Social Issues* 115.

³⁸⁷ Jones, T. S., 'Lag Sequential Analyses of Mediator-Spouse and Husband-Wife Interaction in Successful and Unsuccessful Divorce Mediation' in M. A. Rahim (ed), *Managing Conflict: An Interdisciplinary Approach* (Praeger, USA, 1989); Slaikeu, K. A., R. Culler, J. Pearson, and N. Thoennes, 'Process and Outcome in Divorce Mediation' (1985) 10 *Mediation Quarterly* 55; Thoennes, N. A., and J. Pearson, 'Predicting Outcomes in Divorce Mediation: The Influence of People and Process' (1985) 41(2) *Journal of Social Issues* 115.

³⁸⁸ Kressel, K., E. A. Frontera, S. Forlenza, F. Butler, and L. Fish, 'The Settlement-Orientation vs the Problem-Solving Style' (1994) 50(1) *Journal of Social Issues* 67.

³⁸⁹ Dilts, D. A., and A. Karim, 'The Effect of Mediators' Qualities and Strategies on Mediation Outcomes' (1990) 45(1) *Relations Industrielles/Industrial Relations* 22; Hiltrop, J. M., 'Factors Associated with Successful Labor Mediation' in K. Kressel and D. G. Pruitt (Eds), *Mediation Research: The Process and Effectiveness of Third-Party Intervention* (Jossey-Bass, US, 1989); Karim, A., and D. Dilts, 'Determinants of Mediation Success in the Iowa Public Sector' (1990) 19(2) *Journal of Collective Negotiations* 129; Karim, A., and R. Pegnetter, 'Mediator Strategies and Qualities and Mediation Effectiveness' (1983) 22 *Industrial Relations* 105; Kochan, T. A., and T. Jick, 'The Public Sector Mediation Process: A Theory and Empirical Examination' (1978) 22 *The Journal of Conflict Resolution* 209; Mareschal, P. M., 'What Makes Mediation Work? Perspectives on Resolving Disputes' (2005) 44 *Industrial Relations* 509; Posthuma, R. A., A. Richard, J. B. Dworkin, and M. S. Swift, 'Mediator Tactics and Sources of Conflict: Facilitating and Inhibiting Effects' (2002) 41 *Industrial Relations* 94; Shapiro, D., R. Drieghe, and J. Brett, 'Mediator Behavior and the Outcomes of Mediation' (1985) 41(2) *Journal of Social Issues* 101.

³⁹⁰ Kochan, T. A., and T. Jick, 'The Public Sector Mediation Process: A Theory and Empirical Examination' (1978) 22(2) *The Journal of Conflict Resolution* 209, 212.

g) *Simulated mediations*

Three of the included studies are of simulated mediations using hypothetical scenarios.³⁹¹

Two define and measure effectiveness only in terms of settlement.³⁹²

Commentary

The application of simple and complex effectiveness measures has been productive in this analysis of empirical studies of mediation conducted across a range of contexts. Using simple and complex effectiveness as an analysis tool has enabled an overall analysis of approaches to effectiveness, as well as a contextual comparative analysis. Previously such analysis had been too cumbersome to undertake productively.

While more than two thirds of the forty studies define and measure simple effectiveness, less than a third of the forty studies included in this analysis define and measure aspects of complex effectiveness. Additional year-of-publication analysis of the selected studies suggests that in no decade since the 1970s have measures of complex effectiveness outnumbered measures of simple effectiveness.³⁹³ The same year-of-publication analysis of the selected literature suggests that the 1990s might have been the decade in which there was greatest application of complex effectiveness measures.³⁹⁴ However, caution is advisable with any year-of-publication analysis because the very small number of studies published in some decades precludes valid interpretation. Year-of-

³⁹¹ Burrell, N. A., W. A. Donohue, and M. Allen, 'The Impact of Disputants' Expectations on Mediation, Testing an Interventionist Model' (1990) Fall 1990 *Human Communication Research* 104; Gale, J., R. L. Mowery, M. S. Herrman, and N. L. Hollett, 'Considering Effective Divorce Mediation: Three Potential Factors' (2002) 19(4) *Conflict Resolution Quarterly* 389; Kimsey, W. D., R. M. Fuller and B. C. McKinney, 'Mediator Listening, Dispute Reframing, and Mediation Outcome: A Pilot Study' (1993) 7 *Journal of the International Listening Association* 74; one of the studies cannot be analysed because the researcher has not included either a definition or measures of effectiveness.

³⁹² Burrell, N. A., W. A. Donohue, and M. Allen, 'The Impact of Disputants' Expectations on Mediation, Testing an Interventionist Model' (1990) Fall 1990 *Human Communication Research* 104.

³⁹³ For example, only one of the selected articles was published in the 1970s, and only two were published in the 2010s.

³⁹⁴ Of the selected studies, none of those published in the 1980s includes any measures of complex effectiveness; of those published in the 1990s, a little over 69% include measures of complex effectiveness; and of those published in the 2000s, 60% include measures of complex effectiveness.

publication data alone cannot take into account the range of factors that might influence the choice of effectiveness measures at any time, by any researcher, in any mediation context.

The application of the simple/complex effectiveness analysis tool has confirmed the dominance of simple effectiveness as a definition of effectiveness and as a unit of analysis in mediation research across seven mediation contexts. Conversely, the analysis has revealed the minority status of complex effectiveness in mediation research, despite its relevance to disputant satisfaction and its potential links to agreement durability. It is not known to what extent the focus on simple effectiveness limits the scope for assessment and development of mediation programs, the scope of research into mediation, and developments in the practice of mediation.

Although limited to the selected studies, the results of this analysis reveal which mediation contexts appear to be most strongly focused on achieving settlement, and which tend to take into account factors associated with complex effectiveness. Useful further research could include applying simple and complex effectiveness to analysis beyond the selected studies.

A small number of the selected studies report having investigated the durability of mediated agreements; however, none investigates specific links between simple or complex effectiveness and agreement durability. Research that is not part of the selected studies has reported on investigations into possible links between complex effectiveness and agreement durability and their work is considered below, at 3.3.1. Procedural justice in mediation and 3.3.2. Interpersonal justice in mediation.

Accepting that durable mediation agreements are valuable for a range of reasons, additional empirical studies could investigate the reported links between the durability of mediation agreements and the achievement of complex effectiveness, as well as the influence of the mediator on complex effectiveness. The outcomes of such research would be major contributors to discussion about how such measurable benefits might affect the practice of mediation.

Recent research

Recent mediation research confirms that simple effectiveness remains a key measure of mediation effectiveness.

A recent empirical investigation of what mediators do to facilitate successful, or effective, mediations, bases its findings on research data collected from 13 mediators practising in France, Spain, Luxembourg, and Canada.³⁹⁵ Unfortunately, the data analysis is limited to simple effectiveness.

In a recent comprehensive review of mediation literature related to the use and effectiveness of workplace mediation,³⁹⁶ the concept of “effectiveness” appears to be synonymous with “success” which is equated with the achievement of an agreement, or of settlement. Little consideration is given to complex effectiveness. In addition, the report appears to equate mediator effectiveness with having conducted a mediation that results in an agreement, without a clear description of how the researchers interpret or measure mediator effectiveness. Although the researchers claim that an effective mediator has the ‘mediator style, strategy, personality, competencies, skills, knowledge and behaviours to conduct a successful mediation,’³⁹⁷ it is not clear how they have established these attributes nor how the attributes contribute to achieving an agreement.

3.3. Influencing effectiveness

Overview

This section is based on the factors described in the included studies as having influenced the effectiveness of subject mediations. The factors include disputant perceptions of fairness, their

³⁹⁵ Pignault, A., R. Meyers, and C. Houssmande, ‘Mediators’ Self-Perception of their Work and Practice: Content and Lexical Analysis’ (2017) 22(6) *The Qualitative Report* 1589.

³⁹⁶ Kennedy Institute Workplace Mediation Research Group, *Shaping the Agenda 1: Exploring the Competencies, Skills and Behaviours of Effective Workplace Mediators* (Report, September 2016).

³⁹⁷ Kennedy Institute Workplace Mediation Research Group, *Shaping the Agenda 1: Exploring the Competencies, Skills and Behaviours of Effective Workplace Mediators* (Report, September 2016), 15.

sense of satisfaction with their mediation experience; their interactions with each other and with the mediator; mediator neutrality, honesty, and integrity; the use and purpose of private meetings, or caucuses, before and during the mediation; and the influence of legal advisers. Many of the factors are interrelated and overlap (eg there have been many investigations of the close links between disputant active involvement and disputant perceptions of procedural justice); however, it is practicable to consider each separately in this analysis, acknowledging that the factors remain interrelated. The next sub-sections consider each of the factors in turn.

Some researchers have considered the influence on mediation effectiveness of factors that others have included as measures of effectiveness. For example, for some, perceptions of and a sense of satisfaction are components in the definition and measurement of mediation effectiveness, and for others, fairness and satisfaction are included as influences on effectiveness. In both circumstances, researchers are grappling with subjective issues that are difficult to quantify and, often, are not clearly articulated.

The number of selected studies included in this analysis is necessarily small.

3.3.0. Procedural justice in mediation

As reported above (see 3.2.1. Complex effectiveness), eleven of the included studies define and measure complex effectiveness in terms using various accepted indicators of procedural justice. This section briefly summarises key issues in procedural justice as they relate to mediation.

Fairness in mediation has traditionally focused on procedural justice and the influence of interpersonal justice on people's perception of procedural justice (interpersonal justice refers to situations where 'people are treated with politeness, dignity, and respect by authorities or third parties involved in executing or determining outcomes.'³⁹⁸). The ALRC ADR objectives,³⁹⁹ NADRAC's ADR objectives, and the NMAS standards all refer to fairness either broadly across the federal justice

³⁹⁸ Colquitt, J. A., D. E. Conlon, M. J. Wesson, C. Porter, and K. Y. Ng, 'Justice at the Millennium: A Meta-Analytic Review of 25 Years of Organizational Justice Research' (2001) 86(3) *Journal of Applied Psychology* 425, 427.

³⁹⁹ See above 3.1.1. Defining effectiveness in Australia.

system, in DR or in mediation. In this section, the term “procedural justice” incorporates procedural fairness.

Although the ALRC did not write its objectives specifically for mediation, or for DR, their application was intended to include both and they require that processes should be ‘just’ (ie should be conducted equitably, and without corruption, and the disputants being free from coercion).⁴⁰⁰

NADRAC’s interest in the application of procedural fairness in DR processes appears in two publications both of which include recommendations for how the process itself can safeguard procedural justice.⁴⁰¹ The earlier of the two includes the importance of practitioners being even-handed and unbiased, the disputants being actively involved in the process, the need for processes that protect disputants from intimidation and violence, and the importance of disputants being able to access processes that are culturally suitable and appropriate.⁴⁰² The later of the two documents focuses on the responsibilities of practitioners and service providers and emphasises the importance of practitioner neutrality and impartiality, and even-handedness; and treating disputants equally (including being equally supportive).⁴⁰³

NMAS has a dual focus in terms of procedural justice. On the one hand, mediation is defined in terms of disputant self-determination and, on the other, the standards allocate responsibility to mediators for ensuring that self-determination is protected. The standards are limited in their referral to the disputants’ own assertion of their right to self-determination. NMAS includes a

⁴⁰⁰ Although the mediation literature refers to coercion, or pressure, as it might be applied to disputants, the selected studies include findings that suggest the mediators may have been subjected to coercion and pressure; in the labour/management context, researchers report that experienced disputants have more influence over the mediator than the other way around, and that the mediators with the most influence are those with the least experience (for example, see Kochan, T. A., and T. Jick, ‘The Public Sector Mediation Process: A Theory and Empirical Examination’ (1978) 22(2) *The Journal of Conflict Resolution* 209).

⁴⁰¹ NADRAC, *Issues of Fairness and Justice in Alternative Dispute Resolution* (Discussion Paper, November 1997); NADRAC, *A Framework for ADR Standards* (Report to the Commonwealth Attorney-General, Commonwealth of Australia, April 2001).

⁴⁰² NADRAC, *Issues of Fairness and Justice in Alternative Dispute Resolution* (Discussion Paper, November 1997).

⁴⁰³ NADRAC, *A Framework for ADR Standards* (Report to the Commonwealth Attorney-General, Commonwealth of Australia, April 2001).

section of the standards specific to 'Procedural fairness and impartiality' in which the mediator is given responsibility for:⁴⁰⁴

- A fair, equitable and impartial process;
- Ensuring disputants give informed consent to final agreements (including allowing them to access relevant advice and information);
- Ensuring there is no 'undue' influence on the disputants;⁴⁰⁵
- Ensuring disputants have 'appropriate' opportunities to speak with each other.⁴⁰⁶

NMAS does not clarify what is meant by *undue* influence or by *appropriate* opportunities both of which are likely to be relevant to considerations of fairness, impartiality, and self-determination.

In summary, for the ALRC, procedural justice centres on an equitable process that proscribes coercion; for NADRAC, it centres on even-handed processes that are culturally suitable and appropriate, that prevent intimidation or violence, and are typified by active disputant involvement. According to NMAS, processes are procedurally just when they are equitable and impartial; when they are conducted by mediators with integrity; and when they enable informed disputant involvement without undue influence.

For NADRAC and for NMAS procedural justice is linked with mediator neutrality, impartiality, and integrity. These issues are considered below (see 3.3.3. Mediator neutrality and impartiality).

Recent commentators have noted that the concept of justice means different things in different contexts, and contextual expectations may conflict with the traditionally understood DR

⁴⁰⁴ NMAS, July 2015, section 7 NMAS, available on <http://www.msb.org.au/sites/default/files/documents.NMAS%20July%202015.pdf>.

⁴⁰⁵ NMAS, July 2015, section 7, available on <http://www.msb.org.au/sites/default/files/documents.NMAS%20July%202015.pdf>.

⁴⁰⁶ NMAS, July 2015, section 7, available on <http://www.msb.org.au/sites/default/files/documents.NMAS%20July%202015.pdf>.

values and principles outlined above.⁴⁰⁷ For example, in some jurisdictions, mediators who conduct court-connected mediations are required to ensure the final mediated agreement is fair.

Traditionally, mediators are expected to be concerned about the process and leave the disputants to exercise their self-determination in developing the terms of their agreement; in addition, when seeking to ensure that a mediated agreement is fair, the mediator is likely to be perceived as being partial to at least one side, and, if the dispute re-emerges, perhaps even perceived as no longer neutral.

Investigations of mediation (and of DR) have reported clear links between disputant interactions with each other and with the mediator, and their perceptions of their mediation experience including their sense of having been treated fairly and of being satisfied with their experience. According to the broader literature, active disputant involvement, including constructive interactions with the person in authority, and with each other, leads to enhanced disputant perceptions of fairness and to increased disputant satisfaction, which in turn lead to even more active participation, becoming a self-reinforcing cycle. It has been proposed that, based on studies in other fields, it is likely that, in the context of mediation, such a cycle could lead to a higher likelihood of settlement being reached.⁴⁰⁸ It has also been suggested that, the higher the quality of those interactions, the higher the quality of mediated settlement.⁴⁰⁹

Three empirical studies in the 1970s and 1980s are credited with establishing that people's sense of procedural fairness and perceptions of satisfaction in the context of dispute resolution

⁴⁰⁷ Akin Ojelabi, L., and M. A. Noone, 'ADR Processes: Connections Between Purpose, Values, Ethics and Justice' (2017) 35(1) *Law in Context* 5.

⁴⁰⁸ Boyle, A., *Self-Determination, Empowerment, and Empathy in Mediation: Rehumanising Mediation's Effectiveness* (Conference Paper, Law and Society Association Annual Meeting, Toronto, Canada, 2018).

⁴⁰⁹ Nesbit, R., T. Nabatchi, and L. B. Bingham, 'Employees, Supervisors, and Workplace Mediation: Experiences of Justice and Settlement' (2012) 32(3) *Review of Public Personnel Administration* 260.

increase when they have a sense of control over, and active involvement in, the relevant process.⁴¹⁰

People's perceptions of fairness and satisfaction were reported to increase when:

- They had a sense of control over the process (and for the decisionmaker's control to be minimised),⁴¹¹ and
- They were able to talk and interact with each other.⁴¹²

Subsequent research has found that their perceptions of fairness and satisfaction have been positively influenced if the disputants experience interpersonal justice.⁴¹³

In the specific context of mediation, there have been similar research findings in which perceptions of satisfaction and fairness are linked to the levels of people's active involvement and their sense of process control.⁴¹⁴ Researchers have reported that, when mediation disputants have constructive interactions with each other, and with the mediator, settlement is more likely to be achieved,⁴¹⁵ and that the quality of the settlement is influenced by the quality of their interactions.

416

⁴¹⁰ Thibaut, J., L. Walker, S. LaTour, and P. Houlden, 'Procedural Justice as Fairness' (1974) 26 *Stanford Law Review* 1271; Tyler, T., 'What is Procedural Justice?: Criteria Used by Citizens to Assess the Fairness of Legal procedures' (1988) 22(1) *Law and Society Review* 103; Walker, L., E. A. Lind, and J. Thibaut, 'The Relation Between Procedural and Distributive Justice' (1979) 65(8) *Virginia Law Review* 1401.

⁴¹¹ Thibaut, J., L. Walker, S. LaTour, and P. Houlden, 'Procedural Justice as Fairness' (1974) 26 *Stanford Law Review* 1271; Walker, L., E. A. Lind, and J. Thibaut, 'The Relation Between Procedural and Distributive Justice' (1979) 65(8) *Virginia Law Review* 1401.

⁴¹² Tyler, T. R., 'What is Procedural Justice?: Criteria Used by Citizens to Assess the Fairness of Legal Procedures' (1988) 22(1) *Law and Society Review* 103.

⁴¹³ Colquitt, J. A., D. E. Conlon, M. J. Wesson, C. Porter, and K. Y. Ng, 'Justice at the Millennium: A Meta-Analytic Review of 25 Years of Organizational Justice Research' (2001) 86(3) *Journal of Applied Psychology* 425; Akin Ojelabi, L., 'Community Legal Centres' Views on ADR as a Means of Improving Access to Justice – Pt II' (2011) 22 *ADRJ* 173.

⁴¹⁴ Nesbit, R., T. Nabatchi, and L. B. Bingham, 'Employees, Supervisors, and Workplace Mediation: Experiences of Justice and Settlement' (2012) 32(3) *Review of Public Personnel Administration* 260; Sourdin, T., *Dispute Resolution Procedures for Credit Consumers* (Project Report, Conflict Resolution Research Centre, La Trobe University, 2007); Sourdin, T., *Mediation in the Supreme and County Courts of Victoria* (Report prepared for the Department of Justice, Victoria, Australia, April 2009), available on <<http://www.civiljustice.info/adreval/1/>>.

⁴¹⁵ Nesbit, R., T. Nabatchi, and L. B. Bingham, 'Employees, Supervisors, and Workplace Mediation: Experiences of Justice and Settlement' (2012) 32(3) *Review of Public Personnel Administration* 260.

⁴¹⁶ Nesbit, R., T. Nabatchi, and L. B. Bingham, 'Employees, Supervisors, and Workplace Mediation: Experiences of Justice and Settlement' (2012) 32(3) *Review of Public Personnel Administration* 260.

The selected studies report similarly that the mediator's behaviour influences disputants' active involvement,⁴¹⁷ which influences disputant perceptions of fairness and satisfaction.⁴¹⁸ They report also that the quality of the interactions between the mediator and the disputants is more crucial to achieving settlement than are either the nature of the dispute or the characteristics of the disputants,⁴¹⁹ and that disputant engagement in the mediation process contributes more to disputant satisfaction than does the achievement of settlement.⁴²⁰ Finally, two of the studies report that, when the mediator controls a structurally fair process, the achievement of an agreement is more likely.⁴²¹

3.3.1. Interpersonal justice in mediation

Those of the selected studies that have investigated the predictors of, and influences on, the achievement of settlement, confirm the stand-alone importance of interpersonal interactions in mediation, in many cases without explicitly considering any associated potential procedural justice issues.

The selected studies include findings that the achievement of settlement is more likely when the mediator acts as a manager, or a facilitator; engages with the disputants; is patient, sincere, and

⁴¹⁷ Kressel, K., E. A. Frontera, S. Forlenza, F. Butler, and L. Fish, 'The Settlement-Oriented vs the Problem-Solving Style in Custody Mediation' (1994) 50 *Journal of Social Issues* 67.

⁴¹⁸ Sourdin, T., *Dispute Resolution Processes for Credit Consumers* (Project Report, Conflict Resolution Research Centre, La Trobe University, 2007).

⁴¹⁹ Thoennes, N. A., and J. Pearson, 'Predicting Outcomes in Divorce Mediation: The Influence of People and Process' (1985) 41 *Journal of Social Issues* 115.

⁴²⁰ Kressel, K., E. A. Frontera, S. Forlenza, F. Butler, and L. Fish, 'The Settlement-Oriented vs the Problem-Solving Style in Custody Mediation' (1994) 50 *Journal of Social Issues* 67; Sourdin, T., *Mediation in the Supreme and County Courts of Victoria* (Report prepared for the Department of Justice, Victoria, Australia, April 2009), available on <<http://www.civiljustice.info/adreval/1/>>.

⁴²¹ Karim, A., and R. Peggnetter, 'Mediator Strategies and Qualities and Mediation Effectiveness' 22 *Industrial Relations* 105; Vanderkooi, L., and J. Pearson, 'Mediating Divorce Disputes: Mediator Behaviors, Styles and Roles' (1983) 32(4) *Family Relations* 557.

empathetic;⁴²² and does not reinforce the disputants' own unacceptable behaviour.⁴²³ When acting as a manager, the mediator increases the chances of an agreement when they manage disputant expectations of the process;⁴²⁴ focus on the process if disputants are hostile towards each other;⁴²⁵ help to manage the disputants' relationships with their constituents;⁴²⁶ and ensure disputant discussions are structured.⁴²⁷

It is suggested in the selected studies that the chances of achieving an agreement increase when the mediator acts as a facilitator by facilitating the disputants' understanding of each other's position;⁴²⁸ using summaries as a facilitation tool;⁴²⁹ enabling joint problem-solving between the disputants;⁴³⁰ and enabling the disputants to reframe their own dispute.⁴³¹

⁴²² Goldberg, S. B., and M. L. Shaw, 'Further Investigation into the Secrets of Successful and Unsuccessful Mediators' (2008) 26 *Alternatives to the High Cost of Litigation* 149; Kimsey, W. D., R. M. Fuller, B. C. McKinney, 'Mediator Listening, Dispute Reframing, and Mediation Outcome: A Pilot Study' (1993) 7 *Journal of the International Listening Association* 74; Slaikeu, K. A., R. Culler, J. Pearson, and N. Thoennes, 'Process and Outcome in Divorce Mediation' (1985) 10 *Mediation Quarterly* 55; Zubeck, J. M., D. G. Pruitt, R. S. Peirce, N. B. McGillicuddy, and H. Syna, 'Disputant and Mediator Behaviors Affecting Short-Term Success in Mediation' (1992) 36 *Journal of Conflict Resolution* 546.

⁴²³ Jones, T. S., 'Lag Sequential Analyses of Mediator-Spouse and Husband-Wife Interaction in Successful and Unsuccessful Divorce Mediation' in M. A. Rahim (Ed), *Managing Conflict: An Interdisciplinary Approach* (Praeger, USA, 1989).

⁴²⁴ Karim, A., and R. Pagnetter, 'Mediator Strategies and Qualities and Mediation Effectiveness' (1983) 22 *Industrial Relations* 105.

⁴²⁵ Posthuma, R. A., J. B. Dworkin, and M. S. Swift, 'Mediator Tactics and Sources of Conflict: Facilitating and Inhibiting Effects' (2001) 41 *Industrial Relations* 94.

⁴²⁶ Hiltrop, J. M., 'Factors Associated with Successful Labor Mediation Research' in K. Kressel and D. G. Pruitt (Eds), *Mediation Research: The Process and Effectiveness of Third-Party Intervention* (Jossey-Bass, US, 1989).

⁴²⁷ Donohue, W. A., M. Allen, and N. Burrell, 'Mediator Communicative Competence' (1985) 10 *Mediation Quarterly* 22; Gale, J., R. L. Mowery, M. S. Herrman, and N. L. Hollett, 'Considering Effective Divorce Mediation: Three Potential Factors' (2002) 19 *Conflict Resolution Quarterly* 389; Karim, A., and R. Pagnetter, 'Mediator Strategies and Qualities and Mediation Effectiveness' (1983) 22 *Industrial Relations* 105; Zubeck, J. M., D. G. Pruitt, R. S. Peirce, N. B. McGillicuddy, and H. Syna, 'Disputant and Mediator Behaviors Affecting Short-Term Success in Mediation' (1992) 36 *Journal of Conflict Resolution* 546.

⁴²⁸ Slaikeu, K. A., R. Culler, J. Pearson, and N. Thoennes, 'Process and Outcome in Divorce Mediation' (1985) 10 *Mediation Quarterly* 55.

⁴²⁹ Jones, T. S., 'Lag Sequential Analyses of Mediator-Spouse and Husband-Wife Interaction in Successful and Unsuccessful Divorce Mediation' in M. A. Rahim (Ed), *Managing Conflict: An Interdisciplinary Approach* (Praeger, USA, 1989); Vanderkooi, L., and J. Pearson, 'Mediating Divorce Disputes: Mediator Behaviors, Styles and Roles' (1983) 32(4) *Family Relations* 557.

⁴³⁰ Zubeck, J. M., D. G. Pruitt, R. S. Peirce, N. B. McGillicuddy, and H. Syna, 'Disputant and Mediator Behaviors Affecting Short-Term Success in Mediation' (1992) 36 *Journal of Conflict Resolution* 546.

⁴³¹ Kimsey, W. D., R. M. Fuller, A. J. Bell, and B. C. McKinney, 'The Impact of Mediator Strategic Choices: An Experimental Study' (1994) 12 *Mediation Quarterly* 89.

Finally, in terms of influencing disputant behaviour and thus making agreement more likely, the studies suggest that the mediator needs to encourage the disputants' active involvement through personal engagement including by attending to personal issues between them;⁴³² being attentive and establishing rapport with both disputants;⁴³³ facilitating their talking with each other, rather than on behalf of or about each other;⁴³⁴ and ensuring that neither loses face.⁴³⁵

The selected studies also report that, when the disputants demonstrate empathy towards each other, the likelihood of settlement increases,⁴³⁶ and, when the mediator facilitates constructive interactions with and between the disputants, not only is the achievement of settlement more likely, it is likely to be more durable.⁴³⁷ The latter finding has also been reported elsewhere in separate mediation research.⁴³⁸

3.3.2. Mediator neutrality and impartiality

Practitioner neutrality and impartiality are complex concepts in the context of mediation because the mediator has no substantive decision-making authority, and the application of the two

⁴³² Gale, J., R. L. Mowery, M. S. Herrman, and N. Hollett, 'Considering Effective Divorced Mediation: Three Potential Factors' (2002) 19 *Conflict Resolution Quarterly* 389; Vanderkooi, L., and J. Pearson, 'Mediating Divorce Disputes: Mediator Behaviors, Styles and Roles' (1983) 32(4) *Family Relations* 557.

⁴³³ Pruitt, D. G., R. S. Peirce, N. B. McGillicuddy, G. L. Welton, and L. Castrianno, 'Long-Term Success in Mediation' (1993) 17 *Law and Human Behavior* 313; Vanderkooi, L., and J. Pearson, 'Mediating Divorce Disputes: Mediator Behaviors, Styles and Roles' (1983) 32(4) *Family Relations* 557.

⁴³⁴ Jones, T. S., 'Lag Sequential Analyses of Mediator-Spouse and Husband-Wife Interaction in Successful and Unsuccessful Divorce Mediation' in M. A. Rahim (Ed), *Managing Conflict: An Interdisciplinary Approach* (Praeger, USA, 1989), 106.

⁴³⁵ Karim, A., and R. Pegnetter, 'Mediator Strategies and Qualities and Mediation Effectiveness' (1983) 22 *Industrial Relations* 105; Swaab, R. I., *Face-First: Pre-Mediation Caucus and Face in Employment Disputes* (Conference Presentation, 22nd Annual International Association of Conflict management, June 15 2009); Swaab, R. I., and J. Brett, *Caucus with Care: The Impact of Pre-Mediation Caucuses on Conflict Resolution* (Meetings Paper, International Association of Conflict Management, 2007).

⁴³⁶ Slaikeu, K. A., R. Culler, J. Pearson, and N. Thoennes, 'Process and Outcome in Divorce Mediation' (1985) 10 *Mediation Quarterly* 55.

⁴³⁷ Alberts, J. K., B. L. Heisterkamp, and R. M. McPhee, 'Disputant Perceptions of and Satisfaction with a Community Mediation Program' (2005) 16 *The International Journal of Conflict Management* 218; Kressel, K., E. A. Frontera, S. Forlenza, F. Butler, and L. Fish, 'The Settlement-Oriented vs the Problem-Solving Style' (1994) 50 *Journal of Social Issues* 67; Pruitt, D. G., R. S. Peirce, N. B. McGillicuddy, G. L. Welton, and L. Castrianno, 'Long-Term Success in Mediation' (1993) 17 *Law and Human Behavior* 313.

⁴³⁸ Meierding, N. R., 'Does Mediation Work? A Survey of Long-Term Satisfaction and Durability Rates for Privately Mediated Agreements' (1993) 11(2) *Mediation Quarterly* 157.

concepts is limited to the mediator's roles as process manager and facilitator, in particular, and as required by NMAS, as protector of the disputants' right to self-determination.

NADRAC differentiates neutrality and impartiality by proposing that neutrality is 'a question of interest' that encompasses lack of bias and mediator disclosure of any factors that might create a perception of interest, or bias, including conflicts of interest.⁴³⁹ For NADRAC, impartiality is 'a matter of behaviour' that includes conducting a fair and even-handed process in which all disputants have equal opportunities to participate.⁴⁴⁰

In the NMAS standards, the ethical principles refer to impartiality that includes a lack of conflicts of interest and, in section 7, NMAS requires mediators to disclose any potential biases or conflicts of interest.⁴⁴¹

Mediator neutrality and impartiality are not uniformly accepted as being achievable, especially where mediators place a priority on establishing empathy and rapport with each mediation participant. One view is that it is impossible for any mediator to maintain neutrality,⁴⁴² while another is that mediators exemplify neutrality by ensuring all disputants have equal opportunities to speak.⁴⁴³ It has been suggested that the focus on mediator neutrality is erroneous and that, instead, mediators themselves have a responsibility to focus on disputant self-determination rather than on their own neutrality or impartiality.⁴⁴⁴

⁴³⁹ NADRAC, *A Framework for ADR Standards* (Report to the Commonwealth Attorney-General, Commonwealth of Australia, April 2001), 112.

⁴⁴⁰ NADRAC, *A Framework for ADR Standards* (Report to the Commonwealth Attorney-General, Commonwealth of Australia, April 2001), 112.

⁴⁴¹ NMAS, July 2015, available on <http://www.msb.org.au/sites/default/files/documents.NMAS%20July%202015.pdf>.

⁴⁴² Astor, H., *Mediator Neutrality: Making Sense of Theory and Practice* (Legal Studies Research Paper No 07/46, University of Sydney, Sydney Law School, July 2007).

⁴⁴³ Press, S., 'Court-Connected Mediation and Minorities: Has Any Progress Been Made?' (2013) Summer 2013 *Dispute Resolution Magazine* 36, available on http://www.americanbar.org/publications/dispute_resolution_magazine/2013/summer.html.

⁴⁴⁴ Crowe, J., and R. Field, 'The Empty Idea of Mediator Impartiality' (2019) 29 *ADRJ* 273.

It has been asserted that distinctions such as NADRAC's make no difference to the impossibility of mediator neutrality, or impartiality, when a mediator is seeking to encourage the active involvement of all disputants.⁴⁴⁵ For example, the suggestion is that a mediator cannot sufficiently address disputant power imbalances in mediation and remain neutral, particularly in circumstances that require that the mediator to assist one disputant. In mediations that involve power imbalances, even intimidation, the mediator cannot assist the intimidated disputant without abandoning neutrality – yet it is a requirement that mediators are able to balance remaining neutral while enabling disputants' capacity to exercise their right to self-determination.

It has also been suggested that the problems perceived to be inherent to the mediator's joint exercise of neutrality and protection of disputant active involvement might arise from a lack of conceptual clarity.⁴⁴⁶ If the meaning of self-determination were to be contextually dependent, this would lead to different interpretations according to individual disputants and to their social setting. From this view, it becomes less a question of mediator neutrality and more a focus on the levels of disputant self-determination that are appropriate at any given time, and how the mediator can facilitate those levels of participation in ways that are suitable to the disputants. A similar sliding scale approach has been proposed in which the mediator oversees levels of disputant involvement and self-determination that are based on the disputants' preferences.⁴⁴⁷

In this thesis, the concepts of neutrality and impartiality are interpreted according to the meaning of the words as provided in the Oxford English Dictionary.⁴⁴⁸ Being neutral is more related to not participating in war or in a dispute,⁴⁴⁹ whereas being impartial is related to not taking sides (or

⁴⁴⁵ Crowe, J., and R. Field, 'The Empty Idea of Mediator Impartiality' (2019) 29 *ADRJ* 273; Field, R., and J. Crowe, 'Playing the Language Game of Family Mediation: Implications for Mediator Ethics' (2017) 35(1) *Law in Context* 84.

⁴⁴⁶ Douglas, S., 'Neutrality, Self-Determination, Fairness and Differing Models of Mediation' (2012) 19 *James Cook University Law Review* 19.

⁴⁴⁷ Boyle, A., *Self-Determination, Empowerment, and Empathy in Mediation: Rehumanising Mediation's Effectiveness* (Conference Paper, Law and Society Association Annual Meeting, Toronto, Canada, 2018).

⁴⁴⁸ *Shorter Oxford English Dictionary* (5th Edition, 2002).

⁴⁴⁹ *Shorter Oxford English Dictionary* (5th Edition, 2002), 'neutral' (def 1).

“parts”) in a dispute.⁴⁵⁰ When being neutral, a mediator can be expected not to become involved in the dispute, and when being impartial, the mediator can be expected not to take sides or demonstrate any bias.

One of the selected studies investigates the influence of mediator neutrality on whether an agreement was achieved,⁴⁵¹ and a second investigates the influence of the mediator’s credibility, honesty, and integrity.⁴⁵² The former found that the disputants’ trust and confidence in the mediator’s neutrality were more influential on achieving settlement than were any of the mediator’s actions during mediation. In the second study, perceptions of the mediator’s credibility, honesty, and integrity were found to influence simple effectiveness; however, the researcher notes that the latter finding is based on data collected only from mediators’ own reports (ie the mediators’ perceptions of their own credibility, honesty, and integrity).⁴⁵³

3.3.3. Private meetings

In Australia, the convening of private meetings, or caucuses, before and/or during mediation are an accepted part of the mediation process, during which the mediator meets separately with each disputant (and/or their advisers and others). However, in the US, they continue to be controversial particularly where the private meetings replace joint meetings. The greatest reported danger of private meetings at any time is the risk they pose to mediator neutrality and impartiality in that either disputant has a private opportunity to influence the mediator and, potentially, co-opt the mediator to their point of view.⁴⁵⁴

⁴⁵⁰ *Shorter Oxford English Dictionary* (5th Edition, 2002), ‘impartial’ (def 1).

⁴⁵¹ Karim, A., and D. A. Dilts, ‘Determinants of Mediation Success in the Iowa Public Sector’ (1990) 19(2) *Journal of Collective Negotiations* 129.

⁴⁵² Mareschal, P. M., ‘What Makes Mediation Work? Mediators’ Perspectives on Resolving Disputes’ (2005) 44 *Industrial Relations* 509.

⁴⁵³ Mareschal, P. M., ‘What Makes Mediation Work? Mediators’ Perspectives on Resolving Disputes’ (2005) 44 *Industrial Relations* 509.

⁴⁵⁴ Pruitt, D. G., W. R. Fry, L. Castrianno, J. Zubeck, G. L. Welton, N. B. McGillicuddy, and C. Ippolito, ‘The Process of Mediation: Caucusing, Control, and Problem Solving’ in M. A. Rahim (ed), *Managing Conflict: An Interdisciplinary Approach* (Praeger, USA, 1989).

Where they are convened prior to the mediation, private meetings have been reported in the selected studies, and elsewhere, to be beneficial for establishing rapport and constructive relationships between the mediator and each disputant,⁴⁵⁵ and to enhance the chance of achieving a mediated settlement.⁴⁵⁶ They have also been reported to provide beneficial opportunities for the mediator to address hostility between the disputants and so increase the chances of reaching an agreement.⁴⁵⁷ It has also been acknowledged that, despite the risks to mediator integrity, private meetings can be used by the mediator to build trust and rapport with each disputant, thus fostering their active involvement in the mediation, and benefitting the process.⁴⁵⁸

The selected studies report apparently conflicting findings about the use of private meetings. For example, although they include findings that suggest the use of private meetings for the discussion of substantive issues can reduce the likelihood of reaching an agreement,⁴⁵⁹ they also

⁴⁵⁵ Golann, D., 'Is Legal Mediation a Process of Repair – or Separation? An Empirical Study, and its Implications' (2002) 7 *Harvard Negotiation Law Review* 301; Kochan, T. A., and T. Jick, 'The Public Sector Mediation Process: A Theory and Empirical Examination' (1978) 22 *The Journal of Conflict Resolution* 209; Swaab, R. I., *Face First: Pre-Mediation Caucus and Face in Employment Disputes* (Presentation, Annual Association of Conflict Management Conference, June 2009); Swaab, R. I., and J. Brett, *Caucus with Care: The Impact of Pre-Mediation Caucuses on Conflict Resolution* (Meetings Paper, International Association of Conflict Management, 2007).

⁴⁵⁶ Swaab, R. I., *Face First: Pre-Mediation Caucus and Face in Employment Disputes* (Conference presentation, 22nd Annual International Association of Conflict Management Conference, 15 June 2009); Swaab, R. I., and J. Brett, *Caucus with Care: The Impact of Pre-Mediation Caucuses on Conflict Resolution* (Meetings Paper, International Association of Conflict Management, 2007); Welton, G. L., D. G. Pruitt, and N. B. McGillicuddy, 'The Roles of Caucusing in Community Mediation' (1988) 32 *The Journal of Conflict Resolution* 181.

⁴⁵⁷ Welton, G. L., D. G. Pruitt, N. B. McGillicuddy, C. A. Ippolito, and J. M. Zubeck, 'Antecedents and Characteristics of Caucusing in Community Mediation' (1992) 3(4) *International Journal of Conflict Management* 303.

⁴⁵⁸ Pruitt, D. G., W. R. Fry, L. Castrianno, J. Zubeck, G. L. Welton, N. B. McGillicuddy, and C. Ippolito, 'The Process of Mediation: Caucusing, Control, and Problem Solving' in M. A. Rahim (ed), *Managing Conflict: An Interdisciplinary Approach* (Praeger, USA, 1989); Swaab, R. I., *Face First: Pre-Mediation Caucus and Face in Employment Disputes* (Presentation, Annual Association of Conflict Management Conference, June 2009); Swaab, R. I., and J. Brett, *Caucus with Care: The Impact of Pre-Mediation Caucuses on Conflict Resolution* (Meetings Paper, International Association of Conflict Management, 2007); Welton, G. L., D. G. Pruitt, and N. B. McGillicuddy, 'The Role of Caucusing in Community Mediation' (1988) 32(1) *The Journal of Conflict Resolution* 181.

⁴⁵⁹ Swaab, R. I., *Face First: Pre-Mediation Caucus and Face in Employment Disputes* (Presentation, Annual Association of Conflict Management Conference, June 2009); Swaab, R. I., and J. Brett, *Caucus with Care: The Impact of Pre-Mediation Caucuses on Conflict Resolution* (Meetings Paper, International Association of Conflict Management, 2007).

include findings suggesting that an agreement is more likely where private meetings *are* used for that purpose.⁴⁶⁰

3.3.4. Disputant advisers and representatives

Disputant advisers can include anyone who is providing advice to the disputant, such as accountants and other financial advisers, planning advisers, architects, union officials, water managers, medical experts, professional peers and colleagues, quantity surveyors, and so on. Usually, when advisers attend mediation, the disputants are their clients, and the advisers are being paid to attend the mediation.

The roles of advisers are not explicitly described in NMAS where it is left to mediators to decide how advisers might be engaged in the process; however, NMAS does require mediators to ensure that, in each case, all participants are aware of what the advisers' role is to be. The levels of their participation can be interpreted flexibly, usually by the mediator assessing disputant needs and expectations in any particular case.

In the selected studies, disputant advisers are almost invariably legal representatives. In the labour/management context, the actual disputants do not attend mediations. Instead, union and management representatives attend and negotiate on their behalf with the disputants being their constituents. In both situations, the legal advisers and the representatives are likely to be repeat players, who have attended many mediations and are familiar with the process and with the role of the mediator (the influence of repeat players and their roles in data collection for empirical studies is considered in Chapters Five and Six).

It has been reported that disputant advisers, and disputant representatives, exert influence over the mediator and over the mediation process, particularly in court-connected and

⁴⁶⁰ Wall, J. A., Jr, and S. Chan-Serafin, 'Processes in Civil Case Mediations' (2009) 26(3) *Conflict Resolution Quarterly* 261; Wall, J. A., Jr, and S. Chan-Serafin, 'Do Mediators Walk Their Talk in Civil Cases?' (2010) 28(1) *Conflict Resolution Quarterly* 3.

labour/management mediations.⁴⁶¹ It has also been reported that client expectations of the mediation process and the potential for achieving settlement have been influenced by the predictions of their lawyers, and that the fulfilment of those predictions and expectations can positively influence the clients' reported levels of satisfaction with the mediation process.⁴⁶² Lawyers are also reported to play a key role in choosing mediators, and to select mediators based on their reputation for using styles that best suit the lawyers' own preference for dominating the mediation process,⁴⁶³ or styles that best suit their own personal approach to conflict.⁴⁶⁴

Similar observations about the influence of legal advisers and of union and management representatives have been made in the selected studies,⁴⁶⁵ including that participating lawyers distrusted the mediation processes and the mediators who limited their involvement.⁴⁶⁶

In the selected studies, the influence of legal advisers has been explored in relation to their clients' expectations and perceptions of the mediation and of the mediator. Although it is possible

⁴⁶¹ Garth, B. G., M. Cappelletti, and N. Trocker, 'Access to Justice – Variations and Continuity of a World-Wide Movement' (1985) *Articles by Maurer Faculty*, Paper 1064, available on <<http://www.repository.law.indiana.edu/facpub/1064>>; Noone, M. A., 'ADR Public Interest Law and Access to Justice: The Need for Vigilance' (2011) 37(1) *Monash University Law Review* 57; Press, S., 'Institutionalization of Mediation in Florida: At the Crossroads' (2003) 108(1) *Penn State Law Review* 43; Riskin, L. L., and N. Welsh, *Is That All There Is? 'The Problem' in Court-Oriented Mediation*, University of Florida Levin College of Law Research Paper No 2008-08; Sourdin, T., and N. Balvin, 'Mediation styles and their impact: Lessons from the Supreme and County Courts of Victoria Research Project' (2009) 20 *ADRJ* 142; Welsh, N. A., 'Remembering the Role of Justice in Resolution: Insights from Procedural and Social Justice Theories' (2004) 54(1) *Journal of Legal Education* 49.

⁴⁶² Sourdin, T., and T. Matruglio, "Evaluating Mediation – New South Wales Settlement Scheme 2002" (2004) *Mediation*. Paper 7, available on <<http://www.civiljustice.info/med/7>>.

⁴⁶³ Sourdin, T., and N. Balvin, 'Mediation Styles and their Impact: Lessons from the Supreme and County Courts of Victoria Research Project' (2009) 20 *ADRJ* 142.

⁴⁶⁴ Goldfien, J., and J. K. Robbennolt, 'What if the Lawyers Have Their Way? An Empirical Assessment of Conflict Strategies and Attitudes Toward Mediation Styles' (2007) 22(2) *Ohio State Journal on Dispute Resolution* 277.

⁴⁶⁵ Hiltrop, J. M., 'Factors Associated with Successful Labor Mediation' in K. Kressel and D. G. Pruitt (Eds), *Mediation Research: The Process and Effectiveness of Third-Party Intervention* (Jossey-Bass, US, 1989); Kochan, T. A., and T. Jick, 'The Public Sector Mediation Process: A Theory and Empirical Examination' (1978) 22 *The Journal of Conflict Resolution* 209; Peebles, R., C. Harris, and T. Metzloff, 'Following the Script: An Empirical Analysis of Court-Ordered Mediation of Medical Malpractice Cases' (2007) 2007 *Journal of Dispute Resolution* 101; Wall, Jr, J. A., and S. Chan-Serafin, 'Processes in Civil Case Mediations' (2009) 26 *Conflict Resolution Quarterly* 261.

⁴⁶⁶ McDermott, E. P., and R. Obar, "'What's Going On" in Mediation: An Empirical Analysis of the Influence of a Mediator's Style on Party Satisfaction and Monetary Benefit' (2004) 9 *Harvard Negotiation Law Review* 75; Rundle, O., 'Barking Dogs: Lawyer Attitudes Towards Disputant Participation in Court-Connected Mediation of General Civil Cases' (2008) 8(1) *QUTLJ* 77.

that influencing disputant perceptions might also influence the achievement of outcomes, the studies do not explore the direct influence of legal advisers on either simple or complex effectiveness.

3.3.5. Reducing effectiveness

In the selected studies, the chances of achieving settlement are said to be reduced when the mediator does not treat the disputants with politeness, dignity and respect,⁴⁶⁷ does not ensure their active involvement in the mediation process,⁴⁶⁸ and does not ensure constructive interactions either with or between the disputants.⁴⁶⁹ In other words, the likelihood of achieving an agreement is reduced if the mediator does not ensure procedural and interpersonal justice.

On the other hand, others of the selected studies report the achievement of simple effectiveness when the subject mediation includes limited joint sessions and there are almost no opportunities for disputants to have any interactions with each other – constructive or otherwise.⁴⁷⁰ One study reports the achievement of simple effectiveness in mediation where the researcher

⁴⁶⁷ Karim, A., and R. Peggnetter, 'Mediator Strategies and Qualities and Mediation Effectiveness' (1983) 22 *Industrial Relations* 105 – mediator emphasising humour, presenting as being "one of them"; Zubeck, J. M., D. G. Pruitt, R. S. Peirce, N. B. McGillicuddy, H. Syna, 'Disputant and Mediator Behaviors Affecting Short-Term Success in Mediation' (1992) 36 *Journal of Conflict Resolution* 546 (mediator criticising parties, and causing parties to lose face).

⁴⁶⁸ Karim, A., and R. Peggnetter, 'Mediator Strategies and Qualities and Mediation Effectiveness' (1983) 22 *Industrial Relations* 105 (mediator expressing displeasure at lack of progress); Posthuma, R. A., J. B. Dworkin, and M. S. Swift, 'Mediator Tactics and Sources of Conflict: Facilitating and Inhibiting Effects' (2001) 41 *Industrial Relations* 94 (mediator raising alternatives for settlement); Zubeck, J. M., D. G. Pruitt, R. S. Peirce, N. B. McGillicuddy, H. Syna, 'Disputant and Mediator Behaviors Affecting Short-Term Success in Mediation' (1992) 36 *Journal of Conflict Resolution* 546 (mediator insisting on keeping order).

⁴⁶⁹ Swaab, R. I., and J. Brett, *Caucus with Care: The Impact of Pre-Mediation Caucuses on Conflict Resolution* (Meetings Paper, International Association of Conflict Management, 2007) (mediator using Private Meetings for substantive issues rather than establishing relationships); Vanderkooi, L., and J. Pearson, 'Mediating Divorce Disputes: Mediator Behaviors, Styles and Roles' (1983) 32(4) *Family Relations* 557 (mediator not acknowledging progress); Zubeck, J. M., D. G. Pruitt, R. S. Peirce, N. B. McGillicuddy, H. Syna, 'Disputant and Mediator Behaviors Affecting Short-Term Success in Mediation' (1992) 36 *Journal of Conflict Resolution* 546 (mediator demonstrating expertise, permitting party hostility, criticising parties, and making parties lose face).

⁴⁷⁰ Wall, J. A., Jr, and S. Chan-Serafin, 'Processes in Civil Case Mediations' (2009) 26(3) *Conflict Resolution Quarterly* 261; Wall, J. A., Jr, and S. Chan-Serafin, 'Do Mediators Walk Their Talk in Civil Cases?' (2010) 28(1) *Conflict Resolution Quarterly* 3.

describes not being able to determine what the mediator participants actually did or what they contributed to effectiveness, despite relying on data collected from those same mediators.⁴⁷¹

3.4. Effectiveness and models of mediation practice

Overview

Nine of the selected studies include consideration of models of mediation practice (or similar approaches and behaviours) and any influence they may have been found to have on mediation effectiveness.⁴⁷²

For more than 20 years, models of mediation have been the accepted structural concepts that enable identification, or categorisation, of mediator approaches and styles.⁴⁷³ When commentators and mediators refer to mediator approaches and styles, they are referring to how the mediation sector generally interprets the mediator role and the clusters of interventions and behaviours that mediators choose to apply at any time during a structured mediation.

The potential relationship between models of mediation practice and mediation effectiveness has exercised many mediators, researchers, and commentators since the concept of models was discussed in 1996.⁴⁷⁴ In particular, there has been a long-standing interest in establishing whether

⁴⁷¹ McEwen, C. A., *An Evaluation of the ADR Pilot Project: Final Report 1* (Unpublished report, 1992).

⁴⁷² Alberts, J. K., B. L. Heisterkamp, and R. M. McPhee, 'Disputant Perceptions of and Satisfaction with a Community Mediation Program' (2005) 16(3) *The International Journal of Conflict Management* 218; Bingham, L. B., 'Transformative Mediation in the United States Postal Service' (2012) 5(4) *Negotiation and Conflict Management Research* 354; McDermott, E. P., and R. Obar, "'What's Going On" in Mediation: An Empirical Analysis of the Influence of a Mediator's Style on Party Satisfaction and Monetary Benefit' (2004) 9 *Harvard Negotiation Law Review* 75; Peeples, R., C. Harris, and T. Metzloff, 'Following the Script: An Empirical Analysis of Court-Ordered Mediation of Medical Malpractice Cases' (2007) 2007(1) *Journal of Dispute Resolution* 101; Posthuma, R. A., A. Richard, J. B. Dworkin, and M. S. Swift, 'Mediator Tactics and Sources of Conflict: Facilitating and Inhibiting Effects' (2002) 41(1) *Industrial Relations* 94; Sourdin, T., *Mediation in the Supreme and County Courts of Victoria* (Report prepared for the Department of Justice, Victoria, Australia, April 2009), available on <<http://www.civiljustice.info/adreval/1/>>; Wall, J. A., Jr, and S. Chan-Serafin, 'Processes in Civil Case Mediations' (2009) 26(3) *Conflict Resolution Quarterly* 261; Wall, J. A., Jr, and S. Chan-Serafin, 'Do Mediators Walk Their Talk in Civil Cases?' (2010) 28(1) *Conflict Resolution Quarterly* 3; Wissler, R. L., 'Court-Connected Mediation in General Civil Cases: What We Know from Empirical Research' (2002) 17 *Ohio State Journal on Dispute Resolution* 641.

⁴⁷³ Alexander, N., 'The Mediation Metamodel: Understanding Practice' (2008) 26(1) *Conflict Resolution Quarterly* 97.

⁴⁷⁴ Riskin, L. L., 'Understanding Mediators' Orientations, Strategies, and Techniques: A Grid for the Perplexed' (1996) 1(7) *Harvard Negotiation Law Review* 7.

the facilitative or evaluative model is the more effective, and, to complicate any relevant comparative investigation, it has been suggested that the different models of mediation practice may each have different definitions of success.⁴⁷⁵

None of the selected studies describes including co-mediation. In one study, conducted in a co-mediation setting, the researchers sought to avoid the data collection and analysis complexities associated with co-mediation, and asked for single mediators only to conduct their subject mediations.⁴⁷⁶ The program administrator agreed to select single mediators; however, perhaps concerned for the program's reputation as it may be reflected in the study findings, the administrator ensured that the study included only the program's most experienced mediators. The researchers acknowledge the likely effect on their research data when the program's most experienced mediators were selected into the study.

In this section, the applicability of models of practice is limited to the models specifically mentioned in the selected studies, and to the selected studies' reported findings about potential links between models of practice and mediation effectiveness. It is one area in which the topic of analysis does affect this analysis because many of the selected studies predate the concept of models of practice as proposed in 1996 and as they have come to be accepted, and those studies are excluded from this analysis.

3.4.0. The evaluative, facilitative, and transformative models

There are four widely recognised models of mediation practice (transformative, narrative, facilitative, and evaluative) of which three form part of the analysis in the selected studies. Another

⁴⁷⁵ Alberstein, M., 'Forms of Mediation and Law: Cultures of Dispute Resolution' (2007) 22(2) *Ohio State Journal of Dispute Resolution* 321.

⁴⁷⁶ Alberts, J. K., B. L. Heisterkamp, and R. M. McPhee, 'Disputant Perceptions of and Satisfaction with a Community Mediation Program' (2005) 16(3) *The International Journal of Conflict Management* 218.

21 have been documented, though with less recognition,⁴⁷⁷ and they are said to be largely derivative of the facilitative and evaluative models.⁴⁷⁸

As noted previously, evaluative mediation is at times not regarded as mediation because there is a strong focus on settlement and, to that end, the mediator may provide an evaluation of various aspects of the dispute.⁴⁷⁹ Evaluative mediators are more active than the disputants, and are expected to evaluate their cases for them, and push them to accept settlement.⁴⁸⁰ For some in the mediation field, this is a controversial model because the mediator's role is perceived to be antithetical to the traditional principles and values of mediation.⁴⁸¹

Facilitative mediation focuses on the disputants devising their own resolution to their dispute and the mediator facilitates their discussions to that end.⁴⁸² The mediator's role is to ensure the disputants can devise a resolution based on what they have learnt about each other's motivations for the dispute and for its resolution.⁴⁸³ The NMAS standards align most closely with the facilitative model of practice, and it is the basis for most mediation training in Australia.

Transformative mediation focuses on the disputants and their relationship, rather than the dispute, and the mediator's role is to empower them and encourage their discussions with each other. The aim is to enable the disputants to transform their relationship from one focused on disputes to one focused on cooperation and a constructive future.⁴⁸⁴

⁴⁷⁷ Kressel and Wall 2012; Wall, J. A., and T. C Dunne, 'Mediation Research: A Current Review' (2012) 28 *Negotiation Journal* 217.

⁴⁷⁸ Wall, J. A., and T. C Dunne, 'Mediation Research: A Current Review' (2012) 28 *Negotiation Journal* 217.

⁴⁷⁹ Riskin, L. L., 'Understanding Mediators' Orientations, Strategies, and Techniques: A Grid for the Perplexed' (1996) 1(7) *Harvard Negotiation Law Review* 7.

⁴⁸⁰ Alfini, J. J., 'Evaluative versus Facilitative Mediation: A Discussion' (1997) 24 *Florida State University Law Review* 919; Kovach, K. K., and L. P. Love, "'Evaluative' Mediation is an Oxymoron' (1996 14(3) *Alternatives (CPR Institute for Dispute Resolution)* 31; Wall, Jr, J. A., and S. Chan-Serafin, 'Do Mediators Walk their Talk in Civil Cases?' 28(1) *Conflict Resolution Quarterly* 3.

⁴⁸¹ Kovach, K. K., and L. P. Love, "'Evaluative' Mediation is an Oxymoron' (1996 14(3) *Alternatives (CPR Institute for Dispute Resolution)* 31.

⁴⁸² Riskin, L. L., 'Understanding Mediators' Orientations, Strategies, and Techniques: A Grid for the Perplexed' (1996) 1(7) *Harvard Negotiation Law Review* 7.

⁴⁸³ Sourdin, T., *Alternative Dispute Resolution* (6th Edition, Thomson Reuters, Australia, 2020), 75.

⁴⁸⁴ Baruch Bush, R. A., and J. P. Folger, *The Promise of Mediation* (Jossey-Bass, USA, 1994, and 2005); Noone, M. A, 'The Disconnect Between Transformative Mediation and Social Justice' (2008) 19 *ADRJ* 114.

There are widespread differences in the terminology associated with the various models of mediation practice, and with how they are enacted. For example, transformative mediation has been described as a form of facilitative mediation (rather than being a model in its own right), and, for some, the inclusion of a mediation agenda is ascribed to the evaluative model, as is the use of reality-testing.⁴⁸⁵ This analysis has taken a relatively flexible approach to enable the inclusion of studies that do not specifically mention models of practice, but which do consider certain mediator behaviours that are usually associated with models. For example, one study included in this analysis describes and measures the influence of ‘mediator pressure tactics’ which are said to include ‘expressions of displeasure with progress’ and mediators being ‘forceful’ (though “forceful” is not clarified); the same study notes that the effectiveness of certain mediator interventions is likely to be contextual.⁴⁸⁶ The divergence in terminology and in its interpretation makes comparative analysis very difficult.

This section is not an analysis of models generally, as they appear in the selected studies; it includes only the studies that investigate the influence of models of practice on effectiveness. In the selected studies that include relevant investigations and findings, evaluative and facilitative models have been reported to produce similar rates of settlement.⁴⁸⁷ Otherwise, the relevant studies report inconsistent findings, and this analysis focuses on contextual issues and any associations with simple and complex effectiveness.

3.4.1. Effectiveness and models in the selected studies

The nine selected studies that are included in this section consider the influence of specific models of practice on mediation effectiveness, or they consider mediator behaviours in terms that

⁴⁸⁵ McDermott, E. P., and R. Obar, “What’s Going On” in Mediation: An Empirical Analysis of the Influence of a Mediator’s Style on Party Satisfaction and Monetary Benefit’ (2004) 9 *Harvard Negotiation Law Review* 75.

⁴⁸⁶ Posthuma, R. A., A. Richard, J. B. Dworkin, and M. S. Swift, ‘Mediator Tactics and Sources of Conflict: Facilitating and Inhibiting Effects’ (2002) 41(1) *Industrial Relations* 94, 100.

⁴⁸⁷ Alberts, J. K., B. L. Heisterkamp, and R. M. McPhee, ‘Disputant Perceptions of and Satisfaction with a Community Mediation Program’ (2005) 16 *The International Journal of Conflict Management* 218; McDermott, E. P., and R. Obar, “What’s Going On?” in Mediation: An Empirical Analysis of the Influence of a Mediator’s Style on Party Satisfaction and Monetary Benefit’ (2004) 9 *Harvard Negotiation Law Review* 75.

are recognisably associated with models of practice.⁴⁸⁸ Four explore issues related explicitly to facilitative and/or evaluative and/or transformative models of practice.⁴⁸⁹ Five explore issues related to mediator approaches and behaviours, without explicitly referring to models of practice.⁴⁹⁰

Noting that the number of studies is very small and the reliability of the data is therefore very limited, of the nine studies that investigate the influence of models of practice, or mediator approaches, on mediation effectiveness, two are evaluations of mediation programs and services,⁴⁹¹ and one each are from the community-based⁴⁹² and labour/management contexts.⁴⁹³ Five of the

⁴⁸⁸ Alberts, J. K., B. L. Heisterkamp, and R. M. McPhee, 'Disputant Perceptions of and Satisfaction with a Community Mediation Program' (2005) 16(3) *The International Journal of Conflict Management* 218; Bingham, L. B., 'Transformative Mediation in the United States Postal Service' (2012) 5(4) *Negotiation and Conflict Management Research* 354; McDermott, E. P., and R. Obar, "'What's Going On" in Mediation: An Empirical Analysis of the Influence of a Mediator's Style on Party Satisfaction and Monetary Benefit' (2004) 9 *Harvard Negotiation Law Review* 75; Peeples, R., C. Harris, and T. Metzloff, 'Following the Script: An Empirical Analysis of Court-Ordered Mediation of Medical Malpractice Cases' (2007) 2007(1) *Journal of Dispute Resolution* 101; Posthuma, R. A., A. Richard, J. B. Dworkin, and M. S. Swift, 'Mediator Tactics and Sources of Conflict: Facilitating and Inhibiting Effects' (2002) 41(1) *Industrial Relations* 94; Sourdin, T., *Mediation in the Supreme and County Courts of Victoria* (Report prepared for the Department of Justice, Victoria, Australia, April 2009), available on <<http://www.civiljustice.info/adreval/1/>>; Wall, J. A., Jr, and S. Chan-Serafin, 'Processes in Civil Case Mediations' (2009) 26(3) *Conflict Resolution Quarterly* 261; Wall, J. A., Jr, and S. Chan-Serafin, 'Do Mediators Walk Their Talk in Civil Cases?' (2010) 28(1) *Conflict Resolution Quarterly* 3; Wissler, R. L., 'Court-Connected Mediation in General Civil Cases: What We Know from Empirical Research' (2002) 17 *Ohio State Journal on Dispute Resolution* 641.

⁴⁸⁹ Alberts, J. K., B. L. Heisterkamp, and R. M. McPhee, 'Disputant Perceptions of and Satisfaction with a Community Mediation Program' (2005) 16(3) *The International Journal of Conflict Management* 218; Bingham, L. B., 'Transformative Mediation in the United States Postal Service' (2012) 5(4) *Negotiation and Conflict Management Research* 354; McDermott, E. P., and R. Obar, "'What's Going On" in Mediation: An Empirical Analysis of the Influence of a Mediator's Style on Party Satisfaction and Monetary Benefit' (2004) 9 *Harvard Negotiation Law Review* 75; Peeples, R., C. Harris, and T. Metzloff, 'Following the Script: An Empirical Analysis of Court-Ordered Mediation of Medical Malpractice Cases' (2007) 2007(1) *Journal of Dispute Resolution* 101.

⁴⁹⁰ Posthuma, R. A., A. Richard, J. B. Dworkin, and M. S. Swift, 'Mediator Tactics and Sources of Conflict: Facilitating and Inhibiting Effects' (2002) 41(1) *Industrial Relations* 94; Sourdin, T., *Mediation in the Supreme and County Courts of Victoria* (Report prepared for the Department of Justice, Victoria, Australia, April 2009), available on <<http://www.civiljustice.info/adreval/1/>>; Wall, J. A., Jr, and S. Chan-Serafin, 'Processes in Civil Case Mediations' (2009) 26(3) *Conflict Resolution Quarterly* 261; Wall, J. A., Jr, and S. Chan-Serafin, 'Do Mediators Walk Their Talk in Civil Cases?' (2010) 28(1) *Conflict Resolution Quarterly* 3; Wissler, R. L., 'Court-Connected Mediation in General Civil Cases: What We Know from Empirical Research' (2002) 17 *Ohio State Journal on Dispute Resolution* 641.

⁴⁹¹ Bingham, L. B., 'Transformative Mediation in the United States Postal Service' (2012) 5(4) *Negotiation and Conflict Management Research* 354; Sourdin, T., *Mediation in the Supreme and County Courts of Victoria* (Report prepared for the Department of Justice, Victoria, Australia, April 2009), available on <<http://www.civiljustice.info/adreval/1/>>.

⁴⁹² Alberts, J. K., B. L. Heisterkamp, and R. M. McPhee, 'Disputant Perceptions of and Satisfaction with a Community Mediation Program' (2005) 16(3) *The International Journal of Conflict Management* 218.

⁴⁹³ Posthuma, R. A., A. Richard, J. B. Dworkin, and M. S. Swift, 'Mediator Tactics and Sources of Conflict: Facilitating and Inhibiting Effects' (2002) 41(1) *Industrial Relations* 94.

included studies are from the court-connected context,⁴⁹⁴ of which three measure simple effectiveness,⁴⁹⁵ and two measure complex effectiveness.⁴⁹⁶ The labour/management study also measures simple effectiveness.⁴⁹⁷

Three of the studies conduct comparative investigations, one comparing the facilitative and transformative models,⁴⁹⁸ and two comparing the facilitative and evaluative models.⁴⁹⁹ Their accumulated findings include that the transformative model gives disputants a better sense of interpersonal justice than the facilitative model, perhaps increasing the likelihood of settlement;⁵⁰⁰ and that, although the facilitative model creates higher levels of disputant satisfaction than the evaluative model, mediated agreements achieved using the evaluative model include higher monetary exchanges.⁵⁰¹ One of the three (comparing facilitative and evaluative models) includes measures of fairness and satisfaction as key effectiveness measures;⁵⁰² however, those measures are

⁴⁹⁴ McDermott, E. P., and R. Obar, "What's Going On" in Mediation: An Empirical Analysis of the Influence of a Mediator's Style on Party Satisfaction and Monetary Benefit' (2004) 9 *Harvard Negotiation Law Review* 75; Peebles, R., C. Harris, and T. Metzloff, 'Following the Script: An Empirical Analysis of Court-Ordered Mediation of Medical Malpractice Cases' (2007) 2007(1) *Journal of Dispute Resolution* 101; Wall, J. A., Jr, and S. Chan-Serafin, 'Processes in Civil Case Mediations' (2009) 26(3) *Conflict Resolution Quarterly* 261; Wall, J. A., Jr, and S. Chan-Serafin, 'Do Mediators Walk Their Talk in Civil Cases?' (2010) 28(1) *Conflict Resolution Quarterly* 3; Wissler, R. L., 'Court-Connected Mediation in General Civil Cases: What We Know from Empirical Research' (2002) 17 *Ohio State Journal on Dispute Resolution* 641.

⁴⁹⁵ Peebles, R., C. Harris, and T. Metzloff, 'Following the Script: An Empirical Analysis of Court-Ordered Mediation of Medical Malpractice Cases' (2007) 2007(1) *Journal of Dispute Resolution* 101; Wall, J. A., Jr, and S. Chan-Serafin, 'Processes in Civil Case Mediations' (2009) 26(3) *Conflict Resolution Quarterly* 261; Wall, J. A., Jr, and S. Chan-Serafin, 'Do Mediators Walk Their Talk in Civil Cases?' (2010) 28(1) *Conflict Resolution Quarterly* 3.

⁴⁹⁶ McDermott, E. P., and R. Obar, "What's Going On" in Mediation: An Empirical Analysis of the Influence of a Mediator's Style on Party Satisfaction and Monetary Benefit' (2004) 9 *Harvard Negotiation Law Review* 75; Wissler, R. L., 'Court-Connected Mediation in General Civil Cases: What We Know from Empirical Research' (2002) 17 *Ohio State Journal on Dispute Resolution* 641.

⁴⁹⁷ Posthuma, R. A., A. Richard, J. B. Dworkin, and M. S. Swift, 'Mediator Tactics and Sources of Conflict: Facilitating and Inhibiting Effects' (2002) 41(1) *Industrial Relations* 94.

⁴⁹⁸ Bingham, L. B., 'Transformative Mediation in the United States Postal Service' (2012) 5(4) *Negotiation and Conflict Management Research* 354.

⁴⁹⁹ Alberts, J. K., B. L. Heisterkamp, and R. M. McPhee, 'Disputant Perceptions of and Satisfaction with a Community Mediation Program' (2005) 16(3) *The International Journal of Conflict Management* 218; McDermott, E. P., and R. Obar, "What's Going On" in Mediation: An Empirical Analysis of the Influence of a Mediator's Style on Party Satisfaction and Monetary Benefit' (2004) 9 *Harvard Negotiation Law Review* 75.

⁵⁰⁰ Bingham, L. B., 'Transformative Mediation in the United States Postal Service' (2012) 5(4) *Negotiation and Conflict Management Research* 354.

⁵⁰¹ McDermott, E. P., and R. Obar, "What's Going On" in Mediation: An Empirical Analysis of the Influence of a Mediator's Style on Party Satisfaction and Monetary Benefit' (2004) 9 *Harvard Negotiation Law Review* 75.

⁵⁰² Alberts, J. K., B. L. Heisterkamp, and R. M. McPhee, 'Disputant Perceptions of and Satisfaction with a Community Mediation Program' (2005) 16(3) *The International Journal of Conflict Management* 218.

based on disputant reports which the researchers found did not consistently differentiate between the two concepts limiting the data's credibility as a measure of comparative effectiveness. One of the three studies (comparing transformative and facilitative models) found that existing measures of procedural justice in mediation were inadequate.⁵⁰³

Others of the selected studies that do not investigate models and approaches, do comment on them, including on the importance of contextual influences on mediator choice of models and approaches;⁵⁰⁴ the lack of consistency in the actions that are included in each model or approach;⁵⁰⁵ the conflicting findings that are reported about models and approaches elsewhere in mediation research (eg settlement being reported to be *more likely* and disputants *less pressured* when mediators use evaluative styles, and disputants reported to feel *more pressured* and settlement *less likely* when mediators use evaluative styles);⁵⁰⁶ and the lack of specific information about the categorised mediator actions (ie which 'specific mediator actions' are included when a mediator is 'evaluating a case').⁵⁰⁷

Several studies comment on other research in which it has been reported that mediators do not consistently follow the requirements of the models of practice in which they have been trained, or to which they espouse commitment.⁵⁰⁸ There can be many reasons for such apparent

⁵⁰³ Bingham, L. B., 'Transformative Mediation in the United States Postal Service' (2012) 5(4) *Negotiation and Conflict Management Research* 354.

⁵⁰⁴ Bingham, L. B., 'Transformative Mediation in the United States Postal Service' (2012) 5(4) *Negotiation and Conflict Management Research* 354; Kressel, K., T. Henderson, W. Reich, and C. Cohen, 'Multi-Dimensional Analysis of Conflict Mediator Style' (2012) 30(2) *Conflict Resolution Quarterly* 135; Posthuma, R. A., A. Richard, J. B. Dworkin, and M. S. Swift, 'Mediator Tactics and Sources of Conflict: Facilitating and Inhibiting Effects' (2002) 41(1) *Industrial Relations* 94; Wissler, R. L., 'Court-Connected Mediation in General Civil Cases: What We Know from Empirical Research' (2002) 17 *Ohio State Journal on Dispute Resolution* 641.

⁵⁰⁵ Sourdin, T., *Mediation in the Supreme and County Courts of Victoria* (Report prepared for the Department of Justice, Victoria, Australia, April 2009), available on <<http://www.civiljustice.info/adreval/1/>>.

⁵⁰⁶ Wissler, R. L., 'Court-Connected Mediation in General Civil Cases: What We Know from Empirical Research' (2002) 17 *Ohio State Journal on Dispute Resolution* 641.

⁵⁰⁷ Wissler, R. L., 'Court-Connected Mediation in General Civil Cases: What We Know from Empirical Research' (2002) 17 *Ohio State Journal on Dispute Resolution* 641, 701.

⁵⁰⁸ Bingham, L. B., 'Transformative Mediation in the United States Postal Service' (2012) 5(4) *Negotiation and Conflict Management Research* 354; Kressel, K., T. Henderson, W. Reich, and C. Cohen, 'Multi-Dimensional Analysis of Conflict Mediator Style' (2012) 30(2) *Conflict Resolution Quarterly* 135; McDermott, E. P., and R. Obar, "'What's Going On" in Mediation: An Empirical Analysis of the Influence of a Mediator's Style on Party

inconsistency, including the mediator's responsiveness to the dynamics of the mediation. The strength of some mediators' commitment to specific models of practice has been noted to be potentially divisive, particularly in response to research about the comparative effectiveness of certain models.⁵⁰⁹

3.5. Conclusion

The analysis has revealed a surprising lack of investigations into the mediator's influence on the achievement of either simple or complex effectiveness. According to the findings reported in most of the selected studies, an effective mediation is one in which settlement has been reached, and, in a few of the studies, one in which settlement is accompanied by measures of fairness and disputant satisfaction.

The findings described in the selected studies suggest that an effective mediator conducts an effective mediation process; however, they do not clearly describe mediator effectiveness or how the mediator might influence mediation effectiveness. The selected studies' findings appear to confirm that the prospect of achieving settlement, and the quality of the settlement, increase if, during the mediation, the mediator ensures that the disputants are actively involved, and experience both procedural and interpersonal justice. Unfortunately, the studies do not describe the mediators specific actions and behaviours that apparently achieve those effects. In terms of links between effectiveness and models of mediation practice, the studies do not include consistent findings.

It is possible that circular reinforcement entrenches contextual and researcher preferences for definitions and measures of mediation effectiveness. Where the contextual preferences are likely to

Satisfaction and Monetary Benefit' (2004) 9 *Harvard Negotiation Law Review* 75; Wall, J. A., Jr, and S. Chan-Serafin, 'Do Mediators Walk Their Talk in Civil Cases?' (2010) 28(1) *Conflict Resolution Quarterly* 3; Wissler, R. L., 'Court-Connected Mediation in General Civil Cases: What We Know from Empirical Research' (2002) 17 *Ohio State Journal on Dispute Resolution* 641.

⁵⁰⁹ McDermott, E. P., 'Discovering the Importance of Mediator Style – An Interdisciplinary Challenge' (2012) 5(4) *Negotiation and Conflict Management Research* 340.

affect factors such as procedural justice, interpersonal justice, as well as mediator neutrality and impartiality, there might be additional associated issues related to process integrity and ethics.

It could be said that the dominant focus on simple effectiveness measures in the selected studies derives from the ease of measuring the achievement of an agreement, and that the less frequent focus on measuring complex effectiveness derives from the difficulties inherent to designing reliable measures for less concrete and more subjective concepts such as “satisfaction”.

The findings on mediation and mediator effectiveness discussed in this Chapter, and the divergent interpretations of effectiveness and the factors associated with it, suggest that existing research frameworks and methods may not be adequate for exploring key concepts in empirical studies of mediation. In addition, the lack of conceptual clarity must limit researcher choices of definitions and measures that are used in empirical studies of mediation.

It might be useful for mediation researchers to re-consider the traditional approaches to interpreting and measuring mediation concepts such as disputant satisfaction, or models of practice, or even mediator empathy, each of which lacks distinct, measurable components and is open to a variety of researcher and study participant interpretations. In other fields of research, where existing traditional frameworks have been found to be inadequate for describing key concepts, ‘hypothetical constructs’ have provided an alternative approach.⁵¹⁰

The next Chapter, Chapter Four, analyses terminological issues in the selected studies, and explores hypothetical constructs and their potential relevance for mediation research.

⁵¹⁰ Lovasz, N., and K. L. Slaney, ‘What Makes a Hypothetical Construct “Hypothetical”? Tracing the Origins and Uses of the “Hypothetical Construct” Concept in Psychological Science’ (2013) 31 *New Ideas in Psychology* 22, 23.

Chapter Four: What mediators do

This Chapter reports on the second thematic analysis in the research supporting this thesis, focusing on the terminologies used by researchers in the selected studies to describe what mediator participants say and do during subject mediations. The previous Chapter reported on the definition and measurement of effectiveness in mediation, as described in the selected studies. Conclusions discussed in that Chapter included that two types of mediation effectiveness are routinely defined and measured: simple effectiveness, and complex effectiveness, the former occurring far more frequently.

4.0. Chapter aims, findings, and methodology

Aims

Terminology and language, as applied in research literature, can be expected to relate closely to the key concepts for any particular field of research. Consistent benchmark terms can be expected to reflect clarity in the concepts to which those terms refer, and to provide a platform for interpreting research, as well giving traceable continuity to its development. Ordinarily, it would be expected that consistently applied terminology contributes to understanding and knowledge in any field of research. The importance of research terminology is considered below at 4.1.

The aims of this Chapter are:⁵¹¹

- i) To establish which key terms are applied in the selected studies in direct association with mediator participants and their activities;

⁵¹¹ The aims of the Chapter were revised after it became clear that there are no common or benchmark terms for describing and reporting on empirical studies of mediator actions; the aims were not revised subsequent to the terminological analysis and to suit its findings.

- ii) To ascertain how the identified key terms are interpreted and applied in the selected studies, particularly in descriptions of mediator participants and their activities (including any discernible temporal, contextual, and effectiveness trends);⁵¹² and
- iii) To consider how researchers' descriptions of their investigations and findings contribute to understanding about mediator effectiveness.

Consideration is also given to the transferability of the analysis to broader mediation literature and contexts.

Key findings

This Chapter considers two aspects of terminology:

- a. The key terms that researchers apply in direct association with mediator participants and their activities; and
- b. The ways in which researchers interpret and apply those key terms when describing and measuring the specific actions and approaches of mediator participants.

There are four key findings from the terminological analysis:

- 1. According to the 47 selected studies, it is unclear what mediators do, and it is likely that far less is known than is assumed about mediators' specific actions and approaches during mediation, thus limiting knowledge and understanding about mediator effectiveness;
 - a. Many of the studies describe and measure the *purported effects* of mediator participants' unspecified activities, or describe them in terms of what this thesis

⁵¹² Noting that, because the key terms are necessarily those used in direct association with mediator participants and their actions, it can be assumed that any explanation of those key terms will be descriptions of those mediators and their actions.

calls “generalised mediator actions”,⁵¹³ neither of which clearly describes specific actions and approaches;

- b. None of the selected studies includes sufficient descriptions of mediator participants’ specific actions and approaches to guide a competent mediator in providing a reasonable replication of them;
2. Within and between the selected studies there is a lack of clear differentiation of observed actions or behaviours of mediator participants;
3. Within the selected studies, there is a lack of consistency in the choice of key terms used to describe mediators and their activities. In addition, researchers do not routinely include explanations of how they interpret and apply key terms in their studies. Where interpretations are included, they are sufficiently varied to impede comparative analysis and a number of the selected studies do not include any explanation of their interpretation of key terms, or they include an interpretation of one key term while including several that are not explained. In most cases in the selected studies, where multiple terms are used, they are used interchangeably further detracting from conceptual clarity.
4. In the absence of any accepted field-of-research terminological benchmarks, it is possible that researchers’ experience and personal preferences might influence their choice of term and how they choose to interpret those terms.

The terminological analysis also shows that, when describing the mediation process and/or the mediator participants and their activities, researchers use terms often associated with models of practice (such as “evaluative”, “directive”, “pressing”, “active”, “nondirective”, “passive”, and “facilitative”), although their interpretations of those terms vary.

⁵¹³ The concept of “generalised mediator actions”, as applied in this thesis, is explained below at 4.0.3. Methodology.

No notable trends are discerned between researchers' terminological choices and measures of mediation effectiveness, contexts of subject mediations, year of publication of the studies, or the existence of multiple co-authors.⁵¹⁴ None of the studies includes a specific section in which they explain, or clarify, any terms which they will be using. One possible side-effect of the lack of terminological clarity is the potential for the misinterpretation of research.

Methodology

The analysis reported in this Chapter is presented in two sections. 4.2. Analysis reports on which key terms are used in the selected studies, including the frequency of their use, and the relative incidence of explanations of their meaning. 4.3. Findings: Describing what mediators do reports on analysis of how the terms are applied in the studies to describe the actions and approaches of mediator participants.

(a) Terms used in this analysis

The following terms are used throughout this Chapter. Detailed information about each is included in Chapter Two.

Mediators' specific actions and approaches is used in reference to anything that mediator participants are observed to have said or done, and the ways in which they were said or done.

Generalised mediator actions is used to describe purported mediator behaviours that are depicted in generalised terms rather than as specific actions or approaches.

Generalised stylistic categories is used to describe purported mediator actions depicted in terms of generalised stylistic approaches or of recognised models of practice rather than as specific actions or approaches.

⁵¹⁴ Consideration was given to the potential influence of multiple co-authors with various terminological preferences; no trends were discerned among co-authored reports, or between them and single-author reports.

(b) *The selected studies*

The selected studies forming the core of analysis in this thesis were introduced in Chapter Two. Their publication dates do not limit inclusion in this thematic analysis. Most of the terms used to describe mediator actions and approaches would be familiar to most within the sector. For example, even if the following phrases do not have commonly accepted meanings, they would be known to researchers and practitioners: ‘mediator strategies and characteristics’,⁵¹⁵ ‘mediator styles’,⁵¹⁶ and ‘mediator qualities’.⁵¹⁷

Relevant examples from the mediation literature that are not part of the selected studies are included as references within the analysis in this Chapter.

(c) *What the analysis does not do*

This analysis does not enter into debate about how mediation itself is defined. It does not consider whether researchers’ choice of key terms, or their clarifications, explanations, or interpretations are either precise or correct in relation to mediators or their activities. As discussed earlier, this analysis aims to establish the key terms that researchers choose to apply in direct association with mediator participants and their activities, and how those terms are interpreted in the selected studies. It also considers the potential effects of those choices on what is known about mediator effectiveness.

Approaches to, and descriptions of, the mediation process have changed and developed since 1978 (the year of publication of the earliest of the selected studies⁵¹⁸), and continue to differ from

⁵¹⁵ Kochan, T. A., and T. Jick, ‘The Public Sector Mediation process: A Theory and Empirical Examination’ (1978) 22(2) *The Journal of Conflict Resolution* 209, 209.

⁵¹⁶ Shapiro, D., R. Drieghe, and J. Brett, ‘Mediator Behavior and the Outcomes of Mediation’ (1985) 41(2) *Journal of Social Issues*, 102.

⁵¹⁷ Vanderkooi, L., and J. Pearson, ‘Mediating Divorce Disputes: Mediator Behaviors, Styles and Roles’ (1983) 32(4) *Family Relations* 557.

⁵¹⁸ Kochan, T. A., and T. Jick, ‘The Public Sector Mediation process: A Theory and Empirical Examination’ (1978) 22(2) *The Journal of Conflict Resolution* 209.

country to country.⁵¹⁹ Although the various theoretical approaches to, and descriptions of, the mediation process have been reported to both influence and not influence the activities of individual mediators,⁵²⁰ it is not yet clear how theoretical approaches might influence researchers' choice of terms for describing mediator participants' specific actions and approaches. In the absence of such information, the analysis in this Chapter considers the terminology independently of any definition of mediation that researchers may have included in their report, although not all the studies do include clarification of what the researchers understand mediation to be.

4.1. Research terminology does matter

It has been said that a culture develops its own linguistic and terminological understandings and agreed ways in which words are used and what they mean, and that these understandings guide individuals' interpretations of what they read.⁵²¹ These are language conventions.

As in any text, the key terminologies applied in research documents can be expected to provide reasonable and accepted benchmarks for interpretation and understanding of the documents' contents. In qualitative research, the researchers' terminology is the best guide to understanding what they have done because much qualitative research cannot be replicated – it is not possible to exactly re-create the full setting of the original studies, so one must rely on what researchers say about their work, and how they say it.⁵²²

⁵¹⁹ For examples of conceptual differences, see International Mediation Institute, available on <<https://imimediation.org/>>; American Bar Association, *Model Standards of Conduct for Mediators* (ABA, 2005), 2/10, available on <https://www.americanbar.org/content/dam/aba/administrative/dispute_resolution/dispute_resolution/model_standards_conduct_april2007.pdf>; Law Society of NSW, available on <<https://www.lawsociety.com.au/community/disputesandmediation/ADR/index.htm>>.

⁵²⁰ Kressel, K., T. Henderson, W. Reich, and C. Cohen, 'Multi-Dimensional Analysis of Conflict Mediator Style' (2012) 30(2) *Conflict Resolution Quarterly* 135.

⁵²¹ McKee, A., *Textual Analysis: A Beginner's Guide* (2003), available on <www1.cs.columbia.edu/~sbenus/Teaching/APTD/McKee_Ch1.pdf>; Tannen, D., 'Language and Culture' in R. Fasold and J. Connor-Linton (eds), *Introduction to Language and Linguistics* (Cambridge University Press, UK, 2006).

⁵²² Bryman, A., *Social Research Methods* (5th Edition, Oxford University Press, UK, 2016).

4.1.0. Language conventions and conceptual clarity

Language conventions and their relationship with the philosophies of language and learning derive from the work of Ludwig Wittgenstein. For Wittgenstein, words gain their meaning from their use and the context in which they are used,⁵²³ and a word's meaning is constantly developing and transforming within that context, while it continues to be used by people in that context. The particular systems of language and its practice in which we are raised define how we speak and how we act.⁵²⁴

For Wittgenstein, language and actions are not separate entities, but a 'whole, consisting of language and the actions into which it is woven'⁵²⁵ During our lives, we learn all the associations of words and actions and contexts that make up the idioms of our mother tongue. This concept of language has been said to include implicit 'ground rules' that are so completely self-contained and self-referring that it is not possible to understand a word without understanding the implicit reference to its whole network of conventional associations.⁵²⁶

Wittgenstein proposed the concept of 'family resemblances' in language whereby a word that is used in different contexts may develop new nuances of meaning, while never losing the sense of its original meaning.⁵²⁷ Although different contextual uses of the word continue to build up new layers of meaning, the word always retains the core of its original meaning and it is that original core that gives the family resemblances to all the contextual variants of the word. The way in which words are constantly developing and transforming is, for Wittgenstein, a form of game in which all

⁵²³ Wittgenstein, L., *Philosophical Investigations*, tr M. Carino (Basil Blackwell, UK, 1953-1986); by convention, Wittgenstein's works are referenced by initials only – thus, *Philosophical Investigations* is known as *PI* – and, because every paragraph in the work is numbered, citations within *PI* are by section (or paragraph) number rather than by page. For example, 'when language goes on holiday' [*PI*, §38].

⁵²⁴ Dufresne, M., 'The Illusion of Teaching and Learning: Zhuangzi, Wittgenstein, and the Groundlessness of Language' (2017) 49(12) *Educational Philosophy and Theory* 1207.

⁵²⁵ Wittgenstein, L., *PI*, §7.

⁵²⁶ Altmann, A., 'The God of Religion, the God of Metaphysics and Wittgenstein's "Language-Games"' (1987) 39(4) *Zeitschrift für Religions und Geistesgeschichte* 289.

⁵²⁷ Wittgenstein, L., *PI*, §67.

the learning of a word's meanings, associations, and idioms become conventional and only those people who have access to all that information are inside the "game".

There has been recent discussion in the mediation literature of the potential for the disputants' active role in the mediation process to be limited by their ignorance of the 'conventions of the mediation game',⁵²⁸ and in particular 'the conventions of language'⁵²⁹ used in Family Dispute Resolution. It has been proposed that the concept of "language games" can be applied to family mediation because the conventions and rituals around language and behaviour might exclude disputants who have no experience or specialist knowledge about family mediation, and the language idioms inherent to it.

For Wittgenstein, the full and complete meaning of a word resides in the "thing", or the entity, to which it refers and with which the word is associated. The word gets not only its meaning, but also its identity from that "thing",⁵³⁰ so problems arise when a set of language games – or associated words and actions - that are habitually used in one context are transferred into a different context without either awareness of their inapplicability, or adjustment of their application.⁵³¹ It has been suggested that one characteristic of language games is that the habitual use of certain words and phrases in association with certain actions in certain contexts becomes so habitual that the word often remains unexamined and unclarified.⁵³²

If words no longer have a "thing" to give them meaning and identity, they lose their meaning. Without the associated "thing", it is no longer possible for them to have meaning. Similarly, if

⁵²⁸ Field, R., and J. Crowe, 'Playing the Language Game of Family Mediation: Implications for Mediator Ethics' (2017) 35(1) *Law in Context* 92, 92.

⁵²⁹ Dufresne, M., 'The Illusion of Teaching and Learning: Zhuangzi, Wittgenstein, and the Groundlessness of Language' (2017) 49(12) *Educational Philosophy and Theory* 1207, 1209.

⁵³⁰ Lovasz, N., and K. L. Slaney, 'What Makes a Hypothetical Construct "Hypothetical"? Tracing the Origins and Uses of the "Hypothetical Construct" Concept in Psychological Science' (2013) 31 *New Ideas in Psychology* 22, 23.

⁵³¹ Lindsay, P., T. Pitt, and O. Thomas, 'Bewitched by our Words: Wittgenstein, Language-Games, and the Pictures that Hold Sport Psychology Captive' (2014) 10(1) *Exercise Psychology Review* 41.

⁵³² Lindsay, P., T. Pitt, and O. Thomas, 'Bewitched by our Words: Wittgenstein, Language-Games, and the Pictures that Hold Sport Psychology Captive' (2014) 10(1) *Exercise Psychology Review* 41.

concepts have nothing to which they refer, they, too, cannot have meaning.⁵³³ In addition, concepts can be clear, observable and measurable in their own right, or they can be unclear, unobservable and only their effects can be seen and measured.⁵³⁴ Where concepts are not observable in their own right, but their effects are, they can be called hypothetical constructs.⁵³⁵ A hypothetical construct is an entity that is assumed to exist because its effects are observable. Hypothetical constructs are ‘conjectural, provisional’ in that their *assumed* existence has led to observed and measured effects.⁵³⁶ Gravity is probably the most well-known example of a hypothetical construct.

The thematic analyses in this and the previous Chapter suggest there is a lack of conceptual clarity in mediation research, in particular in relation to mediation “effectiveness”, “communication skills”, “empathy” and “rapport”.⁵³⁷ The lack of conceptual clarity means there is no clear “thing” with which the many words, or terminologies, used in mediation research can be associated and from which they ought to gain their meaning and identity.

The thematic analysis in this Chapter suggests there are many “things” in empirical investigations of mediation research (eg communication skills, empathy, and rapport) that researchers claim to describe, to observe and seek to measure; however, what they are most frequently describing, observing and measuring are observable and measurable effects caused by communication skills, empathy or rapport – they are not observing the latter concepts at all.

⁵³³ Lovasz, N., and K. L. Slaney, ‘What Makes a Hypothetical Construct “Hypothetical”? Tracing the Origins and Uses of the “Hypothetical Construct” Concept in Psychological Science’ (2013) 31 *New Ideas in Psychology* 22, 23.

⁵³⁴ Lovasz, N., and K. L. Slaney, ‘What Makes a Hypothetical Construct “Hypothetical”? Tracing the Origins and Uses of the “Hypothetical Construct” Concept in Psychological Science’ (2013) 31 *New Ideas in Psychology* 22, 23.

⁵³⁵ Bryman, A., *Social Research Methods* (5th Edition, Oxford University Press, UK, 2016); Wright, J., (ed-in-chief), *International Encyclopedia of Social and Behavioral Sciences* (2nd Edition, Elsevier, 2015).

⁵³⁶ Lovasz, N., and K. L. Slaney, ‘What Makes a Hypothetical Construct “Hypothetical”? Tracing the Origins and Uses of the ‘hypothetical construct’ Concept in Psychological Science’ (2013) 31 *New Ideas in Psychology* 22, 26.

⁵³⁷ As a concept, simple effectiveness is very clear: a mediated agreement is observable and, to a large extent, measurable.

The findings from both thematic analyses suggest that mediation research includes a wide range of possibly habitual terminologies which might be called a mediation “language family” except that they cannot have meaning because they are associated with unclarified concepts whose existence is assumed because they have not been observed or measured. Thus, mediation research might have dual interlinked problems: lack of terminological meaning and lack of conceptual clarity.

4.2. Analysis

Excluded studies

Of the forty-seven selected studies, four are not included in this analysis.⁵³⁸ Although they use some of the key terms in direct association with mediator participants, they do not include any description of those mediators’ actions or behaviours because mediator actions and approaches are not core components of their investigations.

4.2.0. Key terms in the selected studies

This section reports on two areas of analysis, relying on information available in the included 43 studies: (i) identifying the key terminologies used to describe mediator participants’ specific actions and approaches and establishing the prevalence of their usage; and (ii) establishing the prevalence of explanations of those terms, including which terms are explained most often.

The latter analysis in particular provides some insight into conceptual clarity in mediation research (ie the more frequently a key terms is explained, or interpreted, the more likely it is that the term is not widely understood, or its use not widely accepted). In addition, researchers who

⁵³⁸ Burrell, N. A., W. A. Donohue, and M. Allen, ‘The Impact of Disputants’ Expectations on Mediation, Testing an Interventionist Model’ (1990) Fall 1990 *Human Communication Research* 104; Karim, A. and D. Diltz, ‘Determinants of Mediation Success in the Iowa Public Sector’ (1990) 19(2) *Journal of Collective Negotiations* 129; Sourdin, T., *Exploring Pre-Action Requirements: Resolving Disputes Outside Courts* (ACJI, Monash University, October 2012); Welton, G. L., and D. G. Pruitt, ‘The Mediation Process: The Effects of Mediator Bias and Disputant Power’ (1987) 13(1) *Personality and Social Psychology Bulletin* 123. The contexts of these reports are simulated, labour/management, evaluation, and simulated, respectively.

include explanations of how they have interpreted certain terms within their study are demonstrating an awareness of their own role and of their audience's needs.

The inclusion of terminological explanations may be limited by publication requirements; however, it is likely to be an important contributor to understanding the study and its findings.

Terminological analysis of the selected studies has been complicated, even frustrated, by the researchers' diverse approaches. There are many instances of researchers using the same term to investigate quite diverse research topics or using different terms to describe the same research topic. For example, "mediator skills" are described as including 'patience and persistence'⁵³⁹ while mediator persistence is described elsewhere as being a mediator characteristic.⁵⁴⁰ "Mediator behaviour" is described as encompassing empathy,⁵⁴¹ while mediator empathy is described elsewhere as being a mediator quality,⁵⁴² or a mediator characteristic.⁵⁴³ When researchers report on "mediator qualities", they can variously be describing: 'knowledge and expertise',⁵⁴⁴ 'stopp[ing] arguments',⁵⁴⁵ '[being] patient, positive [and] persistent',⁵⁴⁶ or '[the mediator's] use of aggressive tactics'⁵⁴⁷ A brief analysis of the key term, "mediator characteristics", is provided earlier in this

⁵³⁹ Goldberg, S. B., and M. L. Shaw, 'Further Investigation into the Secrets of Successful and Unsuccessful Mediators' (2008) 26(8) *Alternatives to the High Cost of Litigation* 149, 157.

⁵⁴⁰ Dilts, D. A. and A. Karim, 'The Effect of Mediators' Qualities and Strategies on Mediation Outcomes' (1990) 45(1) *Relations Industrielles/Industrial Relations* 22.

⁵⁴¹ For example, see Pruitt, D. G., R. S. Peirce, N. B. McGillicuddy, G. L. Welton, and L. Castrianno, 'Long-Term Success in Mediation' (1993) 17(3) *Law and Human Behavior* 313.

⁵⁴² For example, see Sourdin, T., *Mediation in the Supreme and County Courts of Victoria* (Report prepared for the Department of Justice, Victoria, Australia, April 2009), available on <<http://www.civiljustice.info/adreval/1/>>.

⁵⁴³ Zubeck, J. M., D. G. Pruitt, R. S. Peirce, N. B. McGillicuddy, and H. Syna, 'Disputant and Mediator Behaviors Affecting Short-Term Success in Mediation' (1992) 36(3) *Journal of Conflict Resolution* 546.

⁵⁴⁴ Karim, A. and R. Pegnetter, 'Mediator Strategies and Qualities and Mediation Effectiveness' (1983) 22(1) *Industrial Relations* 105, 110.

⁵⁴⁵ Kressel, K., E. A. Frontera, S. Forlenza, F. Butler, and L. Fish, 'The Settlement-Oriented vs the Problem-Solving Style' (1994) 50(1) *Journal of Social Issues* 67, 78.

⁵⁴⁶ Sourdin, T., *Mediation in the Supreme and County Courts of Victoria* (Report prepared for the Department of Justice, Victoria, Australia, April 2009), available on <<http://www.civiljustice.info/adreval/1/>>, 168-169.

⁵⁴⁷ Vanderkooi, L., and J. Pearson, 'Mediating Divorce Disputes: Mediator Behaviors, Styles and Roles' (1983) 32(4) *Family Relations* 557, 558.

Chapter and provides an illustrative example of the scope of researcher divergence in their approaches to terminology.⁵⁴⁸

4.2.1. Identifying key terms and their prevalence

The first part of this analysis establishes the key terms that are used in the included 43 studies specifically in direct association with mediator participants and their actions. This section does not consider terminology that appears in less than two of the studies; in other words, to be included as a *key term* the term must be repeated, appearing in at least two of the selected studies.

Fifteen distinct terms are used in the included 43 studies in direct association with mediator participants and their activities. All fifteen occur relatively frequently across the 43 and are referred to as “the key terms” in this analysis. Each of the fifteen terms appears in at least three of the 43 studies, with thirteen key terms appearing in at least ten. Only two of the key terms appear in less than ten of the studies. These rates are well within the pre-set requirement of appearing in at least two of the studies. Figure 4.1, below, illustrates two key findings from the analysis: it lists the fifteen key terms themselves, and the number of studies in which each key term appears.

⁵⁴⁸ See above, 4.2.0. Key terms in the selected studies.

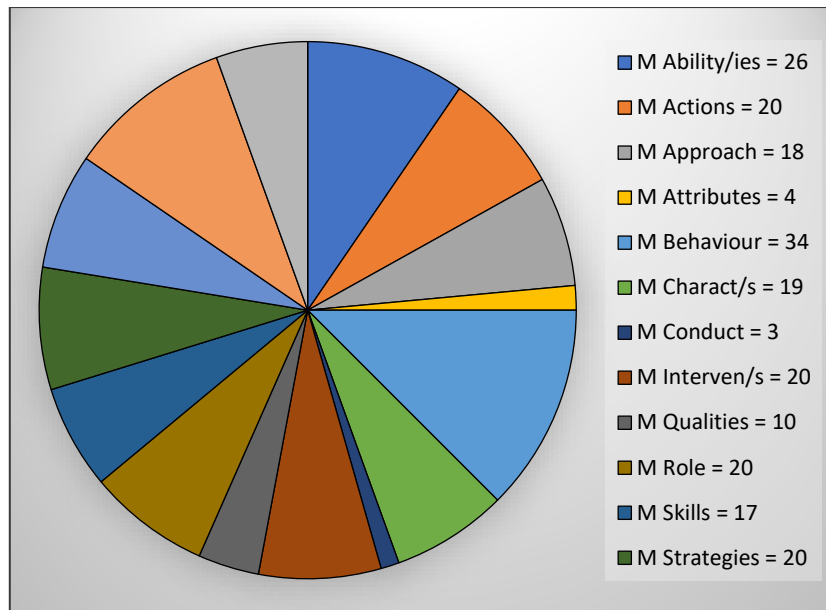


Figure 4.1. Fifteen key terms

Figure 4.1 shows the fifteen key terms used in the selected studies in direct association with mediator participants, and the number of the selected studies in which each key term appears. It illustrates that there is significant diversity in the key terms that are used in the selected studies in direct association with mediator participants and their actions. The term “mediator behaviour” is the most frequently applied term (occurring in thirty-four of the studies), and “mediator conduct” the least frequently applied (occurring in three).

The four most frequently occurring key terms are: “mediator behaviour” (occurring in thirty-four studies); “mediator tactics” (in twenty-six studies); “mediator ability/ies” (in twenty-six studies); and “mediator actions/activities” (in twenty-two studies). Other reasonably frequently occurring terms are: “mediator role” (in twenty studies); “mediator interventions” (in twenty studies); and “mediator strategies” (in twenty studies). Appearing in nineteen studies each are: “mediator style”, and “mediator characteristics”.

Thirteen of the fifteen key terms are spread relatively consistently across the studies; however, two terms appear relatively infrequently: “mediator attributes” appears in four studies,⁵⁴⁹ and “conduct of the mediator” appears in three.⁵⁵⁰

(i) *Explaining the key terms*

Analysis of the selected studies suggests that the vast majority of the identified key terms are applied routinely, across all mediation contexts; however, not all the researchers include explanations of the key terms that they use. Researchers tend to use their own explanations and it is not common to cite the explanations of others. For example, in only four studies do the researchers cite another’s explanation of a key term (“mediator characteristics”).⁵⁵¹ It is unclear if the citation is a reflexion of the importance of the cited explanation or of the cited researchers.

Some studies include more than one definition of the same key term. For example, at different points in one report, mediator ‘skills and characteristics’ are said to include: ‘flexibility, credibility, trustworthiness, active listening skills, and facilitation skills’⁵⁵² and to include: ““ability to be a quick study”, “labor relations skills/experience” and “process skills””.⁵⁵³ The same report

⁵⁴⁹ Goldberg, S. B., and M. L. Shaw, ‘Further Investigation into the Secrets of Successful and Unsuccessful Mediators’ (2008) 26(8) *Alternatives to the High Cost of Litigation* 149; Henderson, D. A., ‘Mediation Success: An Empirical Analysis’ (1996) 11(1) *Ohio State Journal on Dispute Resolution* 105; Swaab, R., *Face First: Pre-Mediation Caucus and Face in Employment Disputes* (Conference Presentation, 32nd Annual International Association of Conflict Management, June 2009); Wissler, R. L., ‘Mediation and Adjudication in the Small Claims Court: The Effects of Process and Case Characteristics’ (1995) 29(2) *Law and Society Review* 323.

⁵⁵⁰ Goldberg, S. B., and M. L. Shaw, ‘Further Investigation into the Secrets of Successful and Unsuccessful Mediators’ (2008) 26(8) *Alternatives to the High Cost of Litigation* 149; McDermott, E. P., and R. Obar, ‘An Empirical Analysis of the Influence of a Mediator’s Style on Party Satisfaction and Monetary Benefit’ (2004) 9 *Harvard Law Review* 75; Woodward, J. G., ‘Settlement Week: Measuring the Promise’ (1990) 11 *Northern Illinois University Law Review* 1.

⁵⁵¹ Diltz, D. A. and A. Karim, ‘The Effect of Mediators’ Qualities and Strategies on Mediation Outcomes’ (1990) 45(1) *Relations Industrielles/Industrial Relations* 22; Henderson, D. A., ‘Mediation Success: An Empirical Analysis’ (1996) 11(1) *Ohio State Journal on Dispute Resolution* 105; Karim, A. and D. Diltz, ‘Determinants of Mediation Success in the Iowa Public Sector’ (1990) 19(2) *Journal of Collective Negotiations* 129; Mareschal, P. M., ‘What Makes Mediation Work? Perspectives on Resolving Disputes’ (2005) 44(3) *Industrial Relations* 509; the study that they all cite is Kochan, T. A., and T. Jick, ‘The Public Sector Mediation Process: A Theory and Empirical Examination’ (1978) 22(2) *The Journal of Conflict Resolution* 209.

⁵⁵² Mareschal, P. M., ‘What Makes Mediation Work? Perspectives on Resolving Disputes’ (2005) 44(3) *Industrial Relations* 509, 509.

⁵⁵³ Mareschal, P. M., ‘What Makes Mediation Work? Perspectives on Resolving Disputes’ (2005) 44(3) *Industrial Relations* 509, 511; the listed ‘skills and characteristics’ are included in written surveys used for data collection in the study.

includes no explicit differentiation between “skills” and “characteristics”. Similar interchangeable use of key terms is reasonably common in the selected studies.

Nine of the selected studies include more than one of the key terms, though they include an explanation for only one, despite including a range of other, undefined, concomitant terms, apparently used for similar purposes.⁵⁵⁴ For example, four studies use single explained key terms along with multiple unexplained key terms all in association with mediator participants and their actions: “mediator characteristics” explained and used with mediator actions/activities; mediator behaviour; mediator qualities; mediator skills; mediator strategies; mediator style; and mediator tactics;⁵⁵⁵ “mediator characteristics” explained and used with mediator approach/es; mediator behaviour; mediator interventions; models; mediator strategies; mediator style; and mediator tactics;⁵⁵⁶ “mediator behaviour” explained and used with mediator interventions; mediator qualities; the role of the mediator; and mediator tactics;⁵⁵⁷ and “mediator behaviour” explained and used with mediator ability/ies; mediator style; and mediator tactics.⁵⁵⁸

⁵⁵⁴ Alberts, J. K., B. L. Heisterkamp, and R. M. McPhee, ‘Disputant Perceptions of and Satisfaction with a Community Mediation Program’ (2005) 16(3) *The International Journal of Conflict Management* 218; Gale, J., R. L. Mowery, M. S. Herrman, and N. L. Hollett, ‘Considering Effective Divorce Mediation: Three Potential Factors’ (2002) 19(4) *Conflict Resolution Quarterly* 389; Jones, T. S., ‘Lag Sequential Analyses of Mediator-Spouse and Husband-Wife Interaction in Successful and Unsuccessful Divorce Mediation’ in M. A. Rahim (ed), *Managing Conflict: An Interdisciplinary Approach* (Praeger, USA, 1989); Kimsey, W. D., R. M. Fuller, and B. C. McKinney, ‘Mediator Listening, Dispute Reframing, and Mediation Outcome: A Pilot Study’ (1993) 7(1) *Journal of the International Listening Association* 74; Kressel, K., ‘How Do Mediators Decide What To Do? Implicit Schemas of Practice and Mediator Decisionmaking’ (2013) 28(3) *Ohio State Journal on Dispute Resolution* 709; Peebles, R., C. Harris, and T. Metzloff, ‘Following the Script: An Empirical Analysis of Court-Ordered Mediation of Medical Malpractice Cases’ (2007) 2007(1) *Journal of Dispute Resolution* 101; Pruitt, D. G., W. R. Fry, L. Castrianno, J. Zubeck, G. L. Welton, N. B. McGillicuddy, and C. Ippolito, ‘The Process of Mediation: Caucusing, Control, and Problem Solving’ in M. A. Rahim (ed), *Managing Conflict: An Interdisciplinary Approach* (Praeger, USA, 1989); Swaab, R. I., *Face First: Pre-Mediation Caucus and Face in Employment Disputes* (Presentation, Annual Association of Conflict Management Conference, June 2009); Wall, J. A., Jr, and S. Chan-Serafin, ‘Processes in Civil Case Mediations’ (2009) 26(3) *Conflict Resolution Quarterly* 261.

⁵⁵⁵ Gale, J., R. L. Mowery, M. S. Herrman, and N. L. Hollett, ‘Considering Effective Divorce Mediation: Three Potential Factors’ (2002) 19(4) *Conflict Resolution Quarterly* 389.

⁵⁵⁶ Kressel, K., ‘How Do Mediators Decide What To Do? Implicit Schemas of Practice and Mediator Decisionmaking’ (2013) 28(3) *Ohio State Journal on Dispute Resolution* 709.

⁵⁵⁷ Jones, T. S., ‘Lag Sequential Analyses of Mediator-Spouse and Husband-Wife Interaction in Successful and Unsuccessful Divorce Mediation’ in M. A. Rahim (ed), *Managing Conflict: An Interdisciplinary Approach* (Praeger, USA, 1989).

⁵⁵⁸ Kimsey, W. D., R. M. Fuller, and B. C. McKinney, ‘Mediator Listening, Dispute Reframing, and Mediation Outcome: A Pilot Study’ (1993) 7(1) *Journal of the International Listening Association* 74.

Use of the term, “mediator intervention/s”, although relatively widespread (occurring in twenty of the studies), commonly lacks any explanation of what researchers intend the term to mean in the context of their study.⁵⁵⁹ In mediation practice, the term can commonly refer to many mediator actions and approaches including the mediator doing any of following: entering the mediation room; physically intervening with intrusive hand gestures, or with less intrusive hand gestures (eg laying one hand on the table to gain disputants’ attention); choosing to stand up, or to sit down; starting to speak after a period of silence from every attendee; starting to speak after the disputants have finished speaking; interrupting the disputants; speaking noticeably loudly or softly. The effect of each of these actions is likely to be different according to the situation at any time during any mediation. In the included studies, the majority of the term’s occurrences are versions of ‘intervention of the mediator’⁵⁶⁰ and lack any explanation of what form the intervention took. The range of insufficient descriptions of “intervention” includes: ‘[the mediator’s] use of thirteen mediation strategies during the intervention’;⁵⁶¹ ‘adequate and inadequate mediator interventions’;⁵⁶² ‘pre-mediation caucuses are an important intervention tool’;⁵⁶³ and ‘mediators can intervene to build rapport’.⁵⁶⁴ None of these examples include further explanation of how the term

⁵⁵⁹ Six of the reports include descriptions, or explanations, of their use of the term: Burrell, N. A., W. A. Donohue, and M. Allen, ‘The Impact of Disputants’ Expectations on Mediation, Testing an Interventionist Model’ (1990) Fall 1990 *Human Communication Research* 104; Henderson, D. A., ‘Mediation Success: An Empirical Analysis’ (1996) 11(1) *Ohio State Journal on Dispute Resolution* 105; Hiltrop, J. M., *Factors Associated with Successful Labor Mediation*, in K. Kressel and D. G. Pruitt (eds) *Mediation Research: The Process and Effectiveness of Third-Party Intervention* (Jossey-Bass, USA, 1989); Jones, T. S., *Lag Sequential Analyses of Mediator-Spouse and Husband-Wife Interaction in Successful and Unsuccessful Divorce Mediation*, in M. A. Rahim (ed) *Managing Conflict: An Interdisciplinary Approach* (Praeger, USA, 1989); Swaab, R. I., *Face First: Pre-Mediation Caucus and Face in Employment Disputes* (Presentation, Annual Association of Conflict Management Conference, June 2009); Zubeck, J. M., D. G. Pruitt, R. S. Peirce, N. B. McGillicuddy, and H. Syna, ‘Disputant and Mediator Behaviors Affecting Short-Term Success in Mediation’ (1992) 36(3) *Journal of Conflict Resolution* 546.

⁵⁶⁰ Posthuma, R. A., A. Richard, J. B. Dworkin, and M. S. Swift, ‘Mediator Tactics and Sources of Conflict: Facilitating and Inhibiting Effects’ (2002) 41(1) *Industrial Relations* 94, 96.

⁵⁶¹ Hiltrop, J. M., *Factors Associated with Successful Labor Mediation*, in K. Kressel and D. G. Pruitt (eds) *Mediation Research: The Process and Effectiveness of Third-Party Intervention* (Jossey-Bass, USA, 1989), 244.

⁵⁶² Jones, T. S., ‘Lag Sequential Analyses of Mediator-Spouse and Husband-Wife Interaction in Successful and Unsuccessful Divorce Mediation’ in M. A. Rahim (ed), *Managing Conflict: An Interdisciplinary Approach* (Praeger, USA, 1989), 94.

⁵⁶³ Swaab, R. I., *Face First: Pre-Mediation Caucus and Face in Employment Disputes* (Presentation, Annual Association of Conflict Management Conference, June 2009), 11.

⁵⁶⁴ Zubeck, J. M., D. G. Pruitt, R. S. Peirce, N. B. McGillicuddy, and H. Syna, ‘Disputant and Mediator Behaviors Affecting Short-Term Success in Mediation’ (1992) 36(3) *Journal of Conflict Resolution* 546, 550.

should be interpreted in the context of each study, and, without that information, it is impossible to know the specific actions and approaches of the relevant mediator participants and the study itself and its findings could be misinterpreted.

(ii) *Prevalence of explanations*

This section reports on the 43 studies that include explanations, or clarifications, or interpretations of what researchers understand the key terms to mean within the context of their investigations. Two figures are included: Figure 4.2 shows the number of the selected studies in which each key term is accompanied by an explanation. Figure 4.3 shows the number of studies that include explanations for each key term compared with the total number of studies that actually use that same key term.

The three key terms that are most frequently explained/clarified are: “mediator abilities” (occurs in twenty-six studies; explained in 81% [n = 21] of those); “mediator characteristics” (occurs in nineteen studies; explained in 78% [n = 15] of those); and “mediator behaviour” (occurs in thirty-four studies; explained in 41% [n = 14] of those).

The term “mediator attributes” is used to describe many aspects of what a mediator says and does, including personal, demographic, and professional characteristics, as well as professional capacities, and specific behaviours. It is fortunate that researchers include explanations of how they have interpreted this term because the scope of the explanations demonstrate the potential confusion when terminology is inconsistent. In two studies, mediator attributes include ‘the confidence-building attributes ... [of being] friendly, empathetic, likeable, etc [*sic*];⁵⁶⁵ ‘possessing

⁵⁶⁵ Goldberg, S. B., and M. L. Shaw, ‘Further Investigations into the Secrets of Successful and Unsuccessful Mediators’ (2008) 26(8) *Alternatives to the High Cost of Litigation* 149, 157.

excellent process skills or evaluative skills’;⁵⁶⁶ ‘impartiality, managerial skills, personal discretion, listening ability, and the ability to understand complex issues ... [f]amiliarity to the parties.’⁵⁶⁷

The term, “conduct of the mediator”, appears in three studies,⁵⁶⁸ two of which include at least one explanation of what the researchers mean when they use the term.⁵⁶⁹ For example, ‘[mediator] conduct that had reduced the likelihood of settlement’;⁵⁷⁰ ‘conduct that encourages or assists the parties to resolve the dispute without reliance on the mediator’;⁵⁷¹ ‘all mediator conduct used to facilitate resolution of the dispute’;⁵⁷² ‘evaluative behavior as conduct that opines, challenges, suggests, predicts, or otherwise attempts to influence’.⁵⁷³

⁵⁶⁶ Goldberg, S. B., and M. L. Shaw, ‘Further Investigations into the Secrets of Successful and Unsuccessful Mediators’ (2008) 26(8) *Alternatives to the High Cost of Litigation*, 149, 156-160, 157.

⁵⁶⁷ Henderson, D. A., ‘Mediation Success: An Empirical Analysis’ (1996) 11(1) *Ohio State Journal on Dispute Resolution*, 129.

⁵⁶⁸ Goldberg, S. B., and M. L. Shaw, , ‘Further Investigations into the Secrets of Successful and Unsuccessful Mediators’ (2008) 26(8) *Alternatives to the High Cost of Litigation* 149; McDermott, E. P., and R. Obar, ‘An Empirical Analysis of the Influence of Mediator’s Style on Party Satisfaction and Monetary Benefit’ (2004) 9 *Harvard Law Review* 75; Woodward, J. G., ‘Settlement Week: Measuring the promise’ (1990) 11 *Northern Illinois University Law Review* 1.

⁵⁶⁹ Goldberg, S. B., and M. L. Shaw, ‘Further Investigations into the Secrets of Successful and Unsuccessful Mediators’ (2008) 26(8) *Alternatives to the High Cost of Litigation* 149; McDermott, E. P., and R. Obar, ‘An Empirical Analysis of the Influence of Mediator’s Style on Party Satisfaction and Monetary Benefit’ (2004) 9 *Harvard Law Review* 75.

⁵⁷⁰ Goldberg, S. B., and M. L. Shaw, ‘Further Investigations into the Secrets of Successful and Unsuccessful Mediators’ (2008) 26(8) *Alternatives to the High Cost of Litigation*, 149, 159.

⁵⁷¹ McDermott, E. P., and R. Obar, ‘An Empirical Analysis of the Influence of Mediator’s Style on Party Satisfaction and Monetary Benefit’ (2004) 9 *Harvard Law Review* 75, 93.

⁵⁷² McDermott, E. P., and R. Obar, ‘An Empirical Analysis of the Influence of Mediator’s Style on Party Satisfaction and Monetary Benefit’ (2004) 9 *Harvard Law Review* 75, 92.

⁵⁷³ McDermott, E. P., and R. Obar, ‘An Empirical Analysis of the Influence of Mediator’s Style on Party Satisfaction and Monetary Benefit’ (2004) 9 *Harvard Law Review* 75, 93.

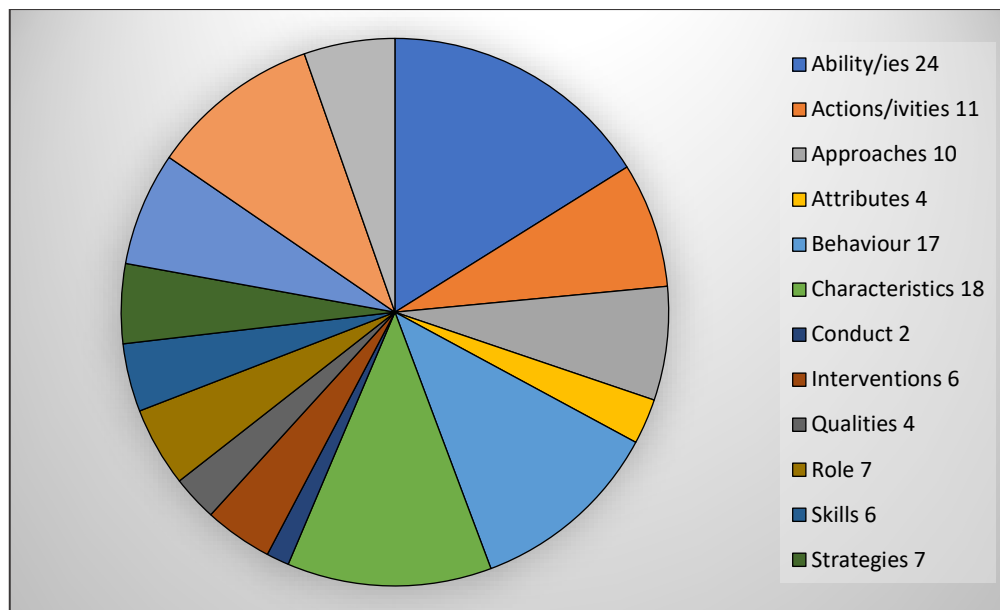


Figure 4.2. Key terms: frequency of occurrence.

Figure 4.2 depicts the number of selected studies that include at least one explanation of each key term; eg “mediator ability/ies” occurs in 26 studies and 24 of those include at least one explanation.⁵⁷⁴ It is compiled without analysis of the explanations themselves. Some key terms are explained more often than others and the most frequently explained are: “mediator ability/ies” (explained separately in 24 studies);⁵⁷⁵ “mediator characteristics” (explained separately in 18

⁵⁷⁴ Figure 4.2 does not include the total number of occurrences of each key term.

⁵⁷⁵ Bingham, L. B., ‘Transformative Mediation in the United States Postal Service’ (2012) 5(4) *Negotiation and Conflict Management Research* 354; Burrell, N. A., W. A. Donohue, and M. Allen, ‘The Impact of Disputants’ Expectations on Mediation, Testing an Interventionist Model’ (1990) Fall 1990 *Human Communication Research* 104; Carnevale, P. J. D., and R. Pagnetter, ‘The Selection of Mediator Tactics in Public Sector Disputes: A Contingency Analysis’ (1985) 41(2) *Journal of Social Issues* 2; Diltz, D. A. and A. Karim, ‘The Effect of Mediators’ Qualities and Strategies on Mediation Outcomes’ (1990) 45(1) *Relations Industrielles/Industrial Relations* 22; Goldberg, S. B., and M. L. Shaw, ‘Further Investigation into the Secrets of Successful and Unsuccessful Mediators’ (2008) 26(8) *Alternatives to the High Cost of Litigation* 149; Henderson, D. A., ‘Mediation Success: An Empirical Analysis’ (1996) 11(1) *Ohio State Journal on Dispute Resolution* 105; Hiltrop, J. M., *Factors Associated with Successful Labor Mediation*, in K. Kressel and D. G. Pruitt (eds) *Mediation Research: The Process and Effectiveness of Third-Party Intervention* (Jossey-Bass, USA, 1989); Karim, A. and R. Pagnetter, ‘Mediator Strategies and Qualities and Mediation Effectiveness’ (1983) 22(1) *Industrial Relations* 105; Kimsey, W. D., R. M. Fuller, and B. C. McKinney, ‘Mediator Listening, Dispute Reframing, and Mediation Outcome: A Pilot Study’ (1993) 7(1) *Journal of the International Listening Association* 74; Kochan, T. A., and T. Jick, ‘The Public Sector Mediation Process: A Theory and Empirical Examination’ (1978) 22(2) *The Journal of Conflict Resolution* 209; Kressel, K., E. A. Frontera, S. Forlenza, F. Butler, and L. Fish, ‘The Settlement-Orientation vs the

Problem-Solving Style' (1994) 50(1) *Journal of Social Issues* 67; Kressel, K., T. Henderson, W. Reich, and C. Cohen, 'Multi-Dimensional Analysis of Conflict Mediator Style' (2012) 30(2) *Conflict Resolution Quarterly* 135; Mareschal, P. M., 'What Makes Mediation Work? Perspectives on Resolving Disputes' (2005) 44(3) *Industrial Relations* 509; Shapiro, D., R. Drieghe, and J. Brett, 'Mediator Behavior and the Outcomes of Mediation' (1985) 41(2) *Journal of Social Issues* 101; Slaikeu, K. A., R. Culler, J. Pearson, and N. Thoennes, 'Process and Outcome in Divorce Mediation' (1985) 10 *Mediation Quarterly* 55; Sourdin, T., *Mediation in the Supreme and County Courts of Victoria* (Report prepared for the Department of Justice, Victoria, Australia, April 2009), available on <<http://www.civiljustice.info/adreval/1/>>; Swaab, R. I., *Face First: Pre-Mediation Caucus and Face in Employment Disputes* (Presentation, Annual Association of Conflict Management Conference, June 2009); Swaab, R. I., and J. Brett, *Caucus with Care: The Impact of Pre-Mediation Caucuses on Conflict Resolution* (Meetings Paper, International Association of Conflict Management, 2007); Thoennes, N. A., and J. Pearson, 'Predicting Outcomes in Divorce Mediation: The Influence of People and Process' (1985) 41(2) *Journal of Social Issues* 115; Welton, G. L., D. G. Pruitt, and N. B. McGillicuddy, 'The Role of Caucusing in Community Mediation' (1988) 32(1) *The Journal of Conflict Resolution* 181; Wissler, R. L., 'Mediation and Adjudication in Small Claims Court: The Effects of Process and Case Characteristics' (1995) 29(2) *Law & Society Review* 323; Wissler, R. L., 'Court-Connected Mediation in General Civil Cases: What We Know from Empirical Research' (2002) 17 *Ohio State Journal on Dispute Resolution* 641; Woodward, J. G., 'Settlement Week: Measuring the Promise' (1990) 11 *Northern Illinois University Law Review* 1; Zubeck, J. M., D. G. Pruitt, R. S. Peirce, N. B. McGillicuddy, and H. Syna, 'Disputant and Mediator Behaviors Affecting Short-Term Success in Mediation' (1992) 36(3) *Journal of Conflict Resolution* 546.

studies)⁵⁷⁶; and mediator behaviour” (explained separately in 17 studies).⁵⁷⁷ The key terms that are least frequently explained are: “mediator conduct” (explained in two studies);⁵⁷⁸ “mediator qualities” (explained in four studies)⁵⁷⁹; and “mediator attributes” (explained in four studies).⁵⁸⁰

⁵⁷⁶ Dilts, D. A. and A. Karim, ‘The Effect of Mediators’ Qualities and Strategies on Mediation Outcomes’ (1990) 45(1) *Relations Industrielles/Industrial Relations* 22; Gale, J., R. L. Mowery, M. S. Herrman, and N. L. Hollett, ‘Considering Effective Divorce Mediation: Three Potential Factors’ (2002) 19(4) *Conflict Resolution Quarterly* 389; Goldberg, S. B., and M. L. Shaw, ‘Further Investigation into the Secrets of Successful and Unsuccessful Mediators’ (2008) 26(8) *Alternatives to the High Cost of Litigation* 149; Henderson, D. A., ‘Mediation Success: An Empirical Analysis’ (1996) 11(1) *Ohio State Journal on Dispute Resolution* 105; Karim, A. and R. Pagnetter, ‘Mediator Strategies and Qualities and Mediation Effectiveness’ (1983) 22(1) *Industrial Relations* 105; Kochan, T. A., and T. Jick, ‘The Public Sector Mediation Process: A Theory and Empirical Examination’ (1978) 22(2) *The Journal of Conflict Resolution* 209; Kressel, K., ‘How Do Mediators Decide What To Do? Implicit Schemas of Practice and Mediator Decisionmaking’ (2013) 28(3) *Ohio State Journal on Dispute Resolution* 709; Kressel, K., T. Henderson, W. Reich, and C. Cohen, ‘Multi-Dimensional Analysis of Conflict Mediator Style’ (2012) 30(2) *Conflict Resolution Quarterly* 135; Mareschal, P. M., ‘What Makes Mediation Work? Perspectives on Resolving Disputes’ (2005) 44(3) *Industrial Relations* 509; McDermott, E. P., and R. Obar, ‘“What’s Going On” in Mediation: An Empirical Analysis of the Influence of a Mediator’s Style on Party Satisfaction and Monetary Benefit’ (2004) 9 *Harvard Negotiation Law Review* 75; Pruitt, D. G., R. S. Peirce, N. B. McGillicuddy, G. L. Welton, and L. Castrianno, ‘Long-Term Success in Mediation’ (1993) 17(3) *Law and Human Behavior* 313; Slaikeu, K. A., R. Culler, J. Pearson, and N. Thoennes, ‘Process and Outcome in Divorce Mediation’ (1985) 10 *Mediation Quarterly* 55; Sourdin, T., Mediation in the Supreme and County Courts of Victoria (Report prepared for the Department of Justice, Victoria, Australia, April 2009), available on <<http://www.civiljustice.info/adreval/1/>>; Thoennes, N. A., and J. Pearson, ‘Predicting Outcomes in Divorce Mediation: The Influence of People and Process’ (1985) 41(2) *Journal of Social Issues* 115; Wissler, R. L., ‘Mediation and Adjudication in Small Claims Court: The Effects of Process and Case Characteristics’ (1995) 29(2) *Law & Society Review* 323; Wissler, R. L., *Trapping the Data: An Assessment of Domestic Relations Mediation in Maine and Ohio Courts* (Unpublished report, 1999); Wissler, R. L., ‘Court-Connected Mediation in General Civil Cases: What We Know from Empirical Research’ (2002) 17 *Ohio State Journal on Dispute Resolution* 641; Zubeck, J. M., D. G. Pruitt, R. S. Peirce, N. B. McGillicuddy, and H. Syna, ‘Disputant and Mediator Behaviors Affecting Short-Term Success in Mediation’ (1992) 36(3) *Journal of Conflict Resolution* 546.

⁵⁷⁷ Alberts, J. K., B. L. Heisterkamp, and R. M. McPhee, ‘Disputant Perceptions of and Satisfaction with a Community Mediation Program’ (2005) 16(3) *The International Journal of Conflict Management* 218; Burrell, N. A., W. A. Donohue, and M. Allen, ‘The Impact of Disputants’ Expectations on Mediation, Testing an Interventionist Model’ (1990) Fall 1990 *Human Communication Research* 104; Goldberg, S. B., and M. L. Shaw, ‘Further Investigation into the Secrets of Successful and Unsuccessful Mediators’ (2008) 26(8) *Alternatives to the High Cost of Litigation* 149; Jones, T. S., *Lag Sequential Analyses of Mediator-Spouse and Husband-Wife Interaction in Successful and Unsuccessful Divorce Mediation*, in M. A. Rahim (ed) *Managing Conflict: An Interdisciplinary Approach* (Praeger, USA, 1989); Kimsey, W. D., R. M. Fuller, A. J. Bell, and B. C. McKinney, ‘The Impact of Mediator Strategic Choices: An Experimental Study’ (1994) 12(1) *Mediation Quarterly* 89; Kimsey, W. D., R. M. Fuller, and B. C. McKinney, ‘Mediator Listening, Dispute Reframing, and Mediation Outcome: A Pilot Study’ (1993) 7(1) *Journal of the International Listening Association* 74; Kressel, K., T. Henderson, W. Reich, and C. Cohen, ‘Multi-Dimensional Analysis of Conflict Mediator Style’ (2012) 30(2) *Conflict Resolution Quarterly* 135; McDermott, E. P., and R. Obar, ‘“What’s Going On” in Mediation: An Empirical Analysis of the Influence of a Mediator’s Style on Party Satisfaction and Monetary Benefit’ (2004) 9 *Harvard Negotiation Law Review* 75; McGillicuddy, N. B., G. L. Welton, and D. G. Pruitt, ‘Third-Party Intervention: A Field Experiment Comparing Three Different Models’ (1987) 53(1) *Journal of Personality and Social Psychology* 104; Pruitt, D. G., R. S. Peirce, N. B. McGillicuddy, G. L. Welton, and L. Castrianno, ‘Long-Term Success in Mediation’ (1993) 17(3) *Law and Human Behavior* 313; Slaikeu, K. A., R. Culler, J. Pearson, and N. Thoennes, ‘Process and Outcome in Divorce Mediation’ (1985) 10 *Mediation Quarterly* 55; Swaab, R. I., *Face First: Pre-Mediation Caucus and Face in Employment Disputes* (Presentation, Annual Association of Conflict Management Conference, June 2009);

Figure 4.2 does not show the number of studies that include more than one explanation of the same key term, although this occurs in many studies. The use of multiple explanations of a single key term, can serve to expand the original explanation; however, multiple explanations do not always clarify how the reader should interpret the study or its findings. For example, within twenty-nine pages, one report includes ten explanations of the key term “mediator techniques”; the explanations canvass generalised stylistic categories,⁵⁸¹ and generalised mediator actions,⁵⁸² as well as using other key terms interchangeably within the explanations.⁵⁸³

Thoennes, N. A., and J. Pearson, ‘Predicting Outcomes in Divorce Mediation: The Influence of People and Process’ (1985) 41(2) *Journal of Social Issues* 115; Welton, G. L., D. G. Pruitt, and N. B. McGillicuddy, ‘The Role of Caucusing in Community Mediation’ (1988) 32(1) *The Journal of Conflict Resolution* 181; Welton, G. L., D. G. Pruitt, N. B. McGillicuddy, C. A. Ippolito, and J. M. Zubeck, ‘Antecedents and Characteristics of Caucusing in Community Mediation’ (1992) 3(4) *International Journal of Conflict Management* 303; Woodward, J. G., ‘Settlement Week: Measuring the Promise’ (1990) 11 *Northern Illinois University Law Review* 1; Zubeck, J. M., D. G. Pruitt, R. S. Peirce, N. B. McGillicuddy, and H. Syna, ‘Disputant and Mediator Behaviors Affecting Short-Term Success in Mediation’ (1992) 36(3) *Journal of Conflict Resolution* 546.

⁵⁷⁸ Goldberg, S. B., and M. L. Shaw, ‘Further Investigation into the Secrets of Successful and Unsuccessful Mediators’ (2008) 26(8) *Alternatives to the High Cost of Litigation* 149; McDermott, E. P., and R. Obar, ‘“What’s Going On” in Mediation: An Empirical Analysis of the Influence of a Mediator’s Style on Party Satisfaction and Monetary Benefit’ (2004) 9 *Harvard Negotiation Law Review* 75.

⁵⁷⁹ Karim, A. and R. Pegnetter, ‘Mediator Strategies and Qualities and Mediation Effectiveness’ (1983) 22(1) *Industrial Relations* 105; Kressel, K., E. A. Frontera, S. Forlenza, F. Butler, and L. Fish, ‘The Settlement-Oriented vs the Problem-Solving Style’ (1994) 50(1) *Journal of Social Issues* 67; Sourdin, T., Mediation in the Supreme and County Courts of Victoria (Report prepared for the Department of Justice, Victoria, Australia, April 2009), available on <<http://www.civiljustice.info/adreval/1/>>; Vanderkooi, L., and J. Pearson, ‘Mediating Divorce Disputes: Mediator Behaviors, Styles and Roles’ (1983) 32(4) *Family Relations* 557.

⁵⁸⁰ Goldberg, S. B., and M. L. Shaw, ‘Further Investigation into the Secrets of Successful and Unsuccessful Mediators’ (2008) 26(8) *Alternatives to the High Cost of Litigation* 149; Henderson, D. A., ‘Mediation Success: An Empirical Analysis’ (1996) 11(1) *Ohio State Journal on Dispute Resolution* 105; Swaab, R. I., *Face First: Pre-Mediation Caucus and Face in Employment Disputes* (Presentation, Annual Association of Conflict Management Conference, June 2009); Wissler, R. L., ‘Mediation and Adjudication in Small Claims Court: The Effects of Process and Case Characteristics’ (1995) 29(2) *Law & Society Review* 323.

⁵⁸¹ McDermott, E. P., and R. Obar, ‘“What’s Going On” in Mediation: An Empirical Analysis of the Influence of a Mediator’s Style on Party Satisfaction and Monetary Benefit’ (2004) 9 *Harvard Negotiation Law Review* 75, 80, 88, 94, 95, 97, 108, and 109.

⁵⁸² McDermott, E. P., and R. Obar, ‘“What’s Going On” in Mediation: An Empirical Analysis of the Influence of a Mediator’s Style on Party Satisfaction and Monetary Benefit’ (2004) 9 *Harvard Negotiation Law Review* 75, 86.

⁵⁸³ McDermott, E. P., and R. Obar, ‘“What’s Going On” in Mediation: An Empirical Analysis of the Influence of a Mediator’s Style on Party Satisfaction and Monetary Benefit’ (2004) 9 *Harvard Negotiation Law Review* 75, 94 (“mediator behaviour”), 95 (“mediator behaviour”), and 97 (“mediator style”; “mediator tactics”).

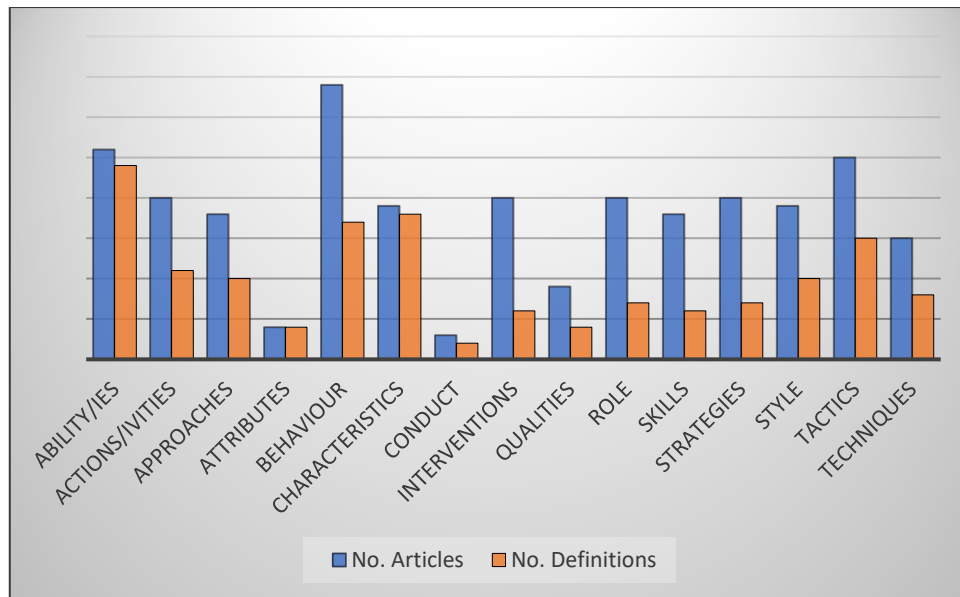


Figure 4.3. Key terms: explanations included.

Figure 4.3 shows the number of studies that include explanations of key terms, shown in comparison with the number of studies in which the key term occurs.⁵⁸⁴ The key term with the highest proportion of explanations is “mediator attributes”; however, it does not appear in many studies. The term with the second highest proportion of explanations is “mediator characteristics”: in nineteen studies, the term is used at least once in direct association with mediator participants and their actions, and the term is explained at least once in eighteen of those studies,⁵⁸⁵ in other

⁵⁸⁴ Figure 4.3 is compiled without considering any analysis of the explanations themselves.

⁵⁸⁵ Dilts, D. A. and A. Karim, ‘The Effect of Mediators’ Qualities and Strategies on Mediation Outcomes’ (1990) 45(1) *Relations Industrielles/Industrial Relations* 22; Gale, J., R. L. Mowery, M. S. Herrman, and N. L. Hollett, ‘Considering Effective Divorce Mediation: Three Potential Factors’ (2002) 19(4) *Conflict Resolution Quarterly* 389; Goldberg, S. B., and M. L. Shaw, ‘Further Investigation into the Secrets of Successful and Unsuccessful Mediators’ (2008) 26(8) *Alternatives to the High Cost of Litigation* 149; Henderson, D. A., ‘Mediation Success: An Empirical Analysis’ (1996) 11(1) *Ohio State Journal on Dispute Resolution* 105; Karim, A. and R. Pegnetter, ‘Mediator Strategies and Qualities and Mediation Effectiveness’ (1983) 22(1) *Industrial Relations* 105; Kochan, T. A., and T. Jick, ‘The Public Sector Mediation Process: A Theory and Empirical Examination’ (1978) 22(2) *The Journal of Conflict Resolution* 209; Kressel, K., ‘How Do Mediators Decide What To Do? Implicit Schemas of Practice and Mediator Decisionmaking’ (2013) 28(3) *Ohio State Journal on Dispute Resolution* 709; Kressel, K., T. Henderson, W. Reich, and C. Cohen, ‘Multi-Dimensional Analysis of Conflict Mediator Style’ (2012) 30(2) *Conflict Resolution Quarterly* 135; Mareschal, P. M., ‘What Makes Mediation Work? Perspectives on Resolving Disputes’ (2005) 44(3) *Industrial Relations* 509; McDermott, E. P., and R. Obar, ‘“What’s Going On” in Mediation: An Empirical Analysis of the Influence of a Mediator’s Style on Party Satisfaction and Monetary Benefit’ (2004) 9 *Harvard Negotiation Law Review* 75; Pruitt, D. G., R. S. Peirce, N. B. McGillicuddy, G. L.

words, only one study using the term does not include an explanation.⁵⁸⁶ The key term, “mediator ability/ies”, also has a high proportion of explanations. It is used in twenty-six of the studies in direct association with mediator participants and their actions and is explained at least once in twenty-four of those studies.⁵⁸⁷

Welton, and L. Castrianno, ‘Long-Term Success in Mediation’ (1993) 17(3) *Law and Human Behavior* 313; Slaikeu, K. A., R. Culler, J. Pearson, and N. Thoennes, ‘Process and Outcome in Divorce Mediation’ (1985) 10 *Mediation Quarterly* 55; Sourdin, T., *Mediation in the Supreme and County Courts of Victoria* (Report prepared for the Department of Justice, Victoria, Australia, April 2009), available on <<http://www.civiljustice.info/adreval/1/>>; Thoennes, N. A., and J. Pearson, ‘Predicting Outcomes in Divorce Mediation: The Influence of People and Process’ (1985) 41(2) *Journal of Social Issues* 115; Wissler, R. L., ‘Mediation and Adjudication in Small Claims Court: The Effects of Process and Case Characteristics’ (1995) 29(2) *Law & Society Review* 323; Wissler, R. L., *Trapping the Data: An Assessment of Domestic Relations Mediation in Maine and Ohio Courts* (Unpublished report, 1999); Wissler, R. L., ‘Court-Connected Mediation in General Civil Cases: What We Know from Empirical Research’ (2002) 17 *Ohio State Journal on Dispute Resolution* 641; Zubeck, J. M., D. G. Pruitt, R. S. Peirce, N. B. McGillicuddy, and H. Syna, ‘Disputant and Mediator Behaviors Affecting Short-Term Success in Mediation’ (1992) 36(3) *Journal of Conflict Resolution* 546.⁵⁸⁶ Karim, A., and D. Diltz, ‘Determinants of Mediation Success in the Iowa Public Sector’ (1990) 19(2) *Journal of Collective Negotiations* 129.

⁵⁸⁷ Bingham, L. B., ‘Transformative Mediation in the United States Postal Service’ (2012) 5(4) *Negotiation and Conflict Management Research* 354; Burrell, N. A., W. A. Donohue, and M. Allen, ‘The Impact of Disputants’ Expectations on Mediation, Testing an Interventionist Model’ (1990) Fall 1990 *Human Communication Research* 104; Carnevale, P. J. D., and R. Pegnetter, ‘The Selection of Mediator Tactics in Public Sector Disputes: A Contingency Analysis’ (1985) 41(2) *Journal of Social Issues* 2; Diltz, D. A. and A. Karim, ‘The Effect of Mediators’ Qualities and Strategies on Mediation Outcomes’ (1990) 45(1) *Relations Industrielles/Industrial Relations* 22; Goldberg, S. B., and M. L. Shaw, ‘Further Investigation into the Secrets of Successful and Unsuccessful Mediators’ (2008) 26(8) *Alternatives to the High Cost of Litigation* 149; Henderson, D. A., ‘Mediation Success: An Empirical Analysis’ (1996) 11(1) *Ohio State Journal on Dispute Resolution* 105; Hiltrop, J. M., *Factors Associated with Successful Labor Mediation*, in K. Kressel and D. G. Pruitt (eds) *Mediation Research: The Process and Effectiveness of Third-Party Intervention* (Jossey-Bass, USA, 1989); Karim, A. and R. Pegnetter, ‘Mediator Strategies and Qualities and Mediation Effectiveness’ (1983) 22(1) *Industrial Relations* 105; Kimsey, W. D., R. M. Fuller, and B. C. McKinney, ‘Mediator Listening, Dispute Reframing, and Mediation Outcome: A Pilot Study’ (1993) 7(1) *Journal of the International Listening Association* 74; Kochan, T. A., and T. Jick, ‘The Public Sector Mediation Process: A Theory and Empirical Examination’ (1978) 22(2) *The Journal of Conflict Resolution* 209; Kressel, K., E. A. Frontera, S. Forlenza, F. Butler, and L. Fish, ‘The Settlement-Orientation vs the Problem-Solving Style’ (1994) 50(1) *Journal of Social Issues* 67; Kressel, K., T. Henderson, W. Reich, and C. Cohen, ‘Multi-Dimensional Analysis of Conflict Mediator Style’ (2012) 30(2) *Conflict Resolution Quarterly* 135; Mareschal, P. M., ‘What Makes Mediation Work? Perspectives on Resolving Disputes’ (2005) 44(3) *Industrial Relations* 509; Shapiro, D., R. Drieghe, and J. Brett, ‘Mediator Behavior and the Outcomes of Mediation’ (1985) 41(2) *Journal of Social Issues* 101; Slaikeu, K. A., R. Culler, J. Pearson, and N. Thoennes, ‘Process and Outcome in Divorce Mediation’ (1985) 10 *Mediation Quarterly* 55; Sourdin, T., *Mediation in the Supreme and County Courts of Victoria* (Report prepared for the Department of Justice, Victoria, Australia, April 2009), available on <<http://www.civiljustice.info/adreval/1/>>; Swaab, R. I., *Face First: Pre-Mediation Caucus and Face in Employment Disputes* (Presentation, Annual Association of Conflict Management Conference, June 2009); Swaab, R. I., and J. Brett, *Caucus with Care: The Impact of Pre-Mediation Caucuses on Conflict Resolution* (Meetings Paper, International Association of Conflict Management, 2007); Thoennes, N. A., and J. Pearson, ‘Predicting Outcomes in Divorce Mediation: The Influence of People and Process’ (1985) 41(2) *Journal of Social Issues* 115; Welton, G. L., D. G. Pruitt, and N. B. McGillicuddy, ‘The Role of Caucusing in Community Mediation’ (1988) 32(1) *The Journal of Conflict Resolution* 181; Wissler, R. L., ‘Mediation and Adjudication in Small Claims Court: The Effects of Process and Case Characteristics’ (1995) 29(2) *Law & Society Review* 323; Wissler, R. L.,

The key term with the lowest proportion of explanations is “mediator interventions”: the key term is used in twenty studies in direct association with mediator participants and their actions, and explanations are provided in only six of those studies.⁵⁸⁸ The key term, “role of the mediator”, occurs in twenty studies in direct association with mediator participants and their actions, with only seven of those studies including an explanation of how researchers interpret the term themselves (or how they intend the term to be interpreted by readers).⁵⁸⁹ Similarly, “mediator strategies” is used in twenty studies, and is explained in seven of them.⁵⁹⁰

‘Court-Connected Mediation in General Civil Cases: What We Know from Empirical Research’ (2002) 17 *Ohio State Journal on Dispute Resolution* 641; Woodward, J. G., ‘Settlement Week: Measuring the Promise’ (1990) 11 *Northern Illinois University Law Review* 1; Zubeck, J. M., D. G. Pruitt, R. S. Peirce, N. B. McGillicuddy, and H. Syna, ‘Disputant and Mediator Behaviors Affecting Short-Term Success in Mediation’ (1992) 36(3) *Journal of Conflict Resolution* 546.

⁵⁸⁸ Burrell, N. A., W. A. Donohue, and M. Allen, ‘The Impact of Disputants’ Expectations on Mediation, Testing an Interventionist Model’ (1990) Fall 1990 *Human Communication Research* 104; Henderson, D. A., ‘Mediation Success: An Empirical Analysis’ (1996) 11(1) *Ohio State Journal on Dispute Resolution* 105; Hiltrop, J. M., *Factors Associated with Successful Labor Mediation*, in K. Kressel and D. G. Pruitt (eds) *Mediation Research: The Process and Effectiveness of Third-Party Intervention* (Jossey-Bass, USA, 1989); Jones, T. S., ‘Lag Sequential Analyses of Mediator-Spouse and Husband-Wife Interaction in Successful and Unsuccessful Divorce Mediation’ in M. A. Rahim (ed), *Managing Conflict: An Interdisciplinary Approach* (Praeger, USA, 1989); Swaab, R. I., *Face First: Pre-Mediation Caucus and Face in Employment Disputes* (Presentation, Annual Association of Conflict Management Conference, June 2009); Zubeck, J. M., D. G. Pruitt, R. S. Peirce, N. B. McGillicuddy, and H. Syna, ‘Disputant and Mediator Behaviors Affecting Short-Term Success in Mediation’ (1992) 36(3) *Journal of Conflict Resolution* 546.

⁵⁸⁹ Burrell, N. A., W. A. Donohue, and M. Allen, ‘The Impact of Disputants’ Expectations on Mediation, Testing an Interventionist Model’ (1990) Fall 1990 *Human Communication Research* 104; Sourdin, T., *Dispute Resolution Processes for Credit Consumers* (Project Report, Conflict Resolution Research Centre, La Trobe University, 2007); Sourdin, T., *Mediation in the Supreme and County Courts of Victoria* (Report prepared for the Department of Justice, Victoria, Australia, April 2009), available on <<http://www.civiljustice.info/adreval/1/>>; Sourdin, T., and T. Matruglio, *Evaluating Mediation – New South Wales Settlement Scheme 2002* (2004) *Mediation*. Paper 7, available on <<http://www.civiljustice.info/med/7/>>; Thoennes, N. A., and J. Pearson, ‘Predicting Outcomes in Divorce Mediation: The Influence of People and Process’ (1985) 41(2) *Journal of Social Issues* 115; Vanderkooi, L., and J. Pearson, ‘Mediating Divorce Disputes: Mediator Behaviors, Styles and Roles’ (1983) 32(4) *Family Relations* 557; Wissler, R. L., ‘Mediation and Adjudication in Small Claims Court: The Effects of Process and Case Characteristics’ (1995) 29(2) *Law & Society Review* 323.

⁵⁹⁰ Carnevale, P. J. D., and R. Pagnetter, ‘The Selection of Mediator Tactics in Public Sector Disputes: A Contingency Analysis’ (1985) 41(2) *Journal of Social Issues* 2; Dilts, D. A. and A. Karim, ‘The Effect of Mediators’ Qualities and Strategies on Mediation Outcomes’ (1990) 45(1) *Relations Industrielles/Industrial Relations* 22; Hiltrop, J. M., *Factors Associated with Successful Labor Mediation*, in K. Kressel and D. G. Pruitt (eds) *Mediation Research: The Process and Effectiveness of Third-Party Intervention* (Jossey-Bass, USA, 1989); Karim, A. and R. Pagnetter, ‘Mediator Strategies and Qualities and Mediation Effectiveness’ (1983) 22(1) *Industrial Relations* 105; Kimsey, W. D., R. M. Fuller, A. J. Bell, and B. C. McKinney, ‘The Impact of Mediator Strategic Choices: An Experimental Study’ (1994) 12(1) *Mediation Quarterly* 89; Kochan, T. A., and T. Jick, ‘The Public Sector Mediation Process: A Theory and Empirical Examination’ (1978) 22(2) *The Journal of Conflict Resolution* 209; Wall, J. A., Jr, and S. Chan-Serafin, ‘Do Mediators Walk Their Talk in Civil Cases?’ (2010) 28(1) *Conflict Resolution Quarterly* 3.

There is no immediate rationale for the diversity in incidence and proportion of explanations of key terms.

According to this analysis, the terms most frequently explained in the 43 studies are mediator abilities, mediator characteristics, and mediator tactics. This suggests the related concepts may not be well understood in the context of mediation. It also suggests the researchers are concerned that readers understand their studies and their findings.

The next section explores the use of key terms in the selected studies to describe and measure mediator participants' specific actions and approaches.

4.3. Findings: What mediators do

For around thirty years, mediation researchers have been aware of a problem in empirical studies of mediation: the lack of information about what mediators actually do during any given mediation session.⁵⁹¹ One of the selected studies includes descriptions of a range of events within the subject mediations that the mediators are reported to have actively orchestrated, including 'advising parties on their views of the legal merits of the case ... their estimates of the case value ... and/or their views of the likely court outcome.'⁵⁹² The mediator participants are also reported to have 'either talked with lawyers individually by phone or convened them in person or in a conference call ... helped arrange for informal exchange of information.'⁵⁹³ Despite having access to a reasonable amount of information about what was reported to have happened immediately prior to, and within, the subject mediations, it is observed that 'it is not at all clear what the 74 different ADR "mediators" actually did during their conferences.'⁵⁹⁴

⁵⁹¹ McEwen, C. A., *An Evaluation of the ADR Pilot Project: Final Report 1* (Unpublished report, 1992).

⁵⁹² McEwen, C. A., *An Evaluation of the ADR Pilot Project: Final Report 1* (Unpublished report, 1992), 19-20.

⁵⁹³ McEwen, C. A., *An Evaluation of the ADR Pilot Project: Final Report 1* (Unpublished report, 1992), 19.

⁵⁹⁴ McEwen, C. A., *An Evaluation of the ADR Pilot Project: Final Report 1* (Unpublished report, 1992), 18-19.

Another of the studies, published ten years later, also includes descriptions of a range of activities that are ascribed to the mediator participants.⁵⁹⁵ For example, the mediators are reported to have ‘disclosed their views about the case ... recommended a particular settlement ... evaluated the case ... [and] suggested possible settlement options’⁵⁹⁶ The study concludes with the researcher asking ‘what specific mediator actions constituted each of these?’⁵⁹⁷

Recent mediation literature includes this observation: ‘empirical research that describes what mediators actually do presents a very confusing and contradictory picture’,⁵⁹⁸ and this from a comprehensive literature review: ‘confusion still persists’⁵⁹⁹ about the ‘competencies, skills, knowledge and behaviours of effective mediators’.⁶⁰⁰ The latter review concludes that the confusion arises from deficiencies in mediation research itself: the lack of conceptual differentiation, the interchangeability of key descriptive terms, and the lack of clarity in the meanings attributed to those key descriptive terms.^{601 602} This current analysis produces similar findings.

The lack of clarity and consistency in relation to broader aspects of mediation has been noted outside this research field. In an analysis of the ways in which mediation researchers identify, define, and describe “cross-cultural”, or “intercultural”, issues (as they relate to mediation), it has

⁵⁹⁵ Wissler, R. L., ‘Court-Connected Mediation in General Civil Cases: What We Know from Empirical Research’ (2002) 17 *Ohio State Journal on Dispute Resolution* 641.

⁵⁹⁶ Wissler, R. L., ‘Court-Connected Mediation in General Civil Cases: What We Know from Empirical Research’ (2002) 17 *Ohio State Journal on Dispute Resolution* 641, 700-701.

⁵⁹⁷ Wissler, R. L., ‘Court-Connected Mediation in General Civil Cases: What We Know from Empirical Research’ (2002) 17 *Ohio State Journal on Dispute Resolution* 641, 701.

⁵⁹⁸ Della Noce, D. J., ‘Mediator Style and the Question of “Good” Mediation: A Call for Theoretical Development’ (2012) 5(4) *Negotiation and Conflict Management Research* 396, 396.

⁵⁹⁹ Kennedy Institute Workplace Mediation Research Group, *Shaping the Agenda 1: Exploring the Competencies, Skills and Behaviours of Effective Workplace Mediators* (Kennedy Institute Workplace Mediation Research Group, Ireland, 2016), 35.

⁶⁰⁰ Kennedy Institute Workplace Mediation Research Group, *Shaping the Agenda 1: Exploring the Competencies, Skills and Behaviours of Effective Workplace Mediators* (Kennedy Institute Workplace Mediation Research Group, Ireland, 2016), 35.

⁶⁰¹ Kennedy Institute Workplace Mediation Research Group, *Shaping the Agenda 1: Exploring the Competencies, Skills and Behaviours of Effective Workplace Mediators* (Kennedy Institute Workplace Mediation Research Group, Ireland, 2016), 50.

⁶⁰² The review specifically mentions ‘lack of clear definition’: Kennedy Institute Workplace Mediation Research Group, *Shaping the Agenda 1: Exploring the Competencies, Skills and Behaviours of Effective Workplace Mediators* (Kennedy Institute Workplace Mediation Research Group, Ireland, 2016), 35.

been found that clear descriptions of relevant terminology are ‘neglected and avoided’.⁶⁰³ The same analysis further finds that, not only does mediation research in the area lack definitional clarity, mediation researchers can be shown to choose terminological meanings that suit their prior assumptions and the mediation sector’s established views.

This analysis has explored similar dilemmas. A core question is: Is it possible for a competent mediator to provide a reasonable replication of the described mediator activity? In other words, is the description provided in the report sufficient to inform such replication? Most of the selected studies include descriptions of events that are reported or observed to have occurred in their subject mediations; however, almost none of them describe their mediator participants’ specific actions and approaches. The results of this analysis show that, within the selected studies, only seven provide practical detail about their mediator participants’ specific actions and approaches and, even then, that none includes a description of mediator participant specific actions and approaches is sufficient to inform reasonable replication by a competent mediator.

4.3.0. Generalised stylistic categories⁶⁰⁴

A relatively small number of the studies include descriptions of mediator participant actions that are expressed only in terms of generalised stylistic categories, without the addition of clarifying detail. For example: ‘mediator’s process, information, summarization, and self-disclosure behaviors’;⁶⁰⁵ ‘evaluative skills (the mediator’s ability to encourage agreement by evaluating a party’s likelihood of achieving its goals outside of mediation ...) ... process skills (those skills by which a mediator seeks to encourage agreement, not including evaluative skills ...)’.⁶⁰⁶

⁶⁰³ Busch, D., ‘Does Conflict Mediation Research Keep Track with Cultural Theory?’ (2016) 4(2) *European Journal of Applied Linguistics* 181, 184.

⁶⁰⁴ The phrase “stylistic categories” includes concepts such as models of practice as well as stylistic approaches.

⁶⁰⁵ Jones, T. S., ‘Lag Sequential Analyses of Mediator-Spouse and Husband-Wife Interaction in Successful and Unsuccessful Divorce Mediation’ in M. A. Rahim (ed), *Managing Conflict: An Interdisciplinary Approach* (Praeger, USA, 1989), 99.

⁶⁰⁶ Goldberg, S. B., and M. L. Shaw, ‘Further Investigation into the Secrets of Successful and Unsuccessful Mediators’ (2008) 26(8) *Alternatives to the High Cost of Litigation* 149, 158.

Some studies that include descriptions of stylistic categorisation, also include some, though insufficient, details of mediator participant actions. For example: '[Directive mediator tactics included] ... [d]eveloped rapport ... compromise suggestions ... [e]xpressed displeasure at lack of progress ... [nondirective tactics included] ... [l]et them blow off steam ... [f]ocus on issues ... [h]elped "save face" ... [reflexive tactics included] ... [a]voided taking sides ... [s]poke their language ... [u]sed humor';⁶⁰⁷ 'Evaluative style ... [t]he mediator wanted me to accept a particular settlement ... Facilitative style ... the mediator did not judge us';⁶⁰⁸ "'urges agreement" ... "mentions the costs of no agreement" [are] light pressure tactics';⁶⁰⁹

These descriptions are very generalised, are expressed in stylistic terms, and do not include mediator participants' specific actions and approaches that might enable their stylistic categorisation. For example, when a mediator chooses to "encourage agreement", they can opt for, say, a light-handed approach (eg by saying "If this doesn't get sorted out here today, what might be the next steps for each of you?") or a more heavy-handed approach (eg by saying "That offer is well within the applicable range and you should really consider accepting it."), either of which can be readily associated with a specific style, or model of practice. There are many ways in which a mediator can establish rapport and they are likely to be contextually rather than stylistically driven – the disputants, the setting, the nature of the dispute are all likely to influence how a mediator chooses to build and maintain rapport, and do so at a level appropriate to the situation. In any case, the studies' above descriptions do not include the mediator participants' specific actions and approaches that led to rapport being established.

The incorporation of humour into mediation is a more complex activity than might be suggested when it is included as a "reflexive tactic", and it would be useful to know the mediator's

⁶⁰⁷ Carnevale, P. J. D., and R. Peggnetter, 'The Selection of Mediator Tactics in Public Sector Disputes: A Contingency Analysis' (1985) 41(2) *Journal of Social Issues* 2, 73.

⁶⁰⁸ Alberts, J. K., B. L. Heisterkamp, and R. M. McPhee, 'Disputant Perceptions of and Satisfaction with a Community Mediation Program' (2005) 16(3) *The International Journal of Conflict Management* 218, 229.

⁶⁰⁹ McGillicuddy, N. B., G. L. Welton, and D. G. Pruitt, 'Third-Party Intervention: A Field Experiment Comparing Three Different Models' (1987) 53(1) *Journal of Personality and Social Psychology* 104, 109.

specific actions and approaches that were perceived as being humorous. Although humour has been shown to be an effective way to build a sense of social affiliation,⁶¹⁰ in the context of mediation it should be used with caution as what may seem humorous to the mediator could be offensive to the disputants. It has been reported that, although some mediators do not use humour at all unless the disputants do, others use it occasionally to help engage disputant participation and to reduce tension.⁶¹¹

One study refers to the mediator participants' 'Strategy or Style',⁶¹² including only "generalised mediator actions" to encapsulate each strategy or style (and thus categorise the mediator participants), rather than specific actions or approaches. For example: '[mediators were categorised as] neutral if they were impartial and did not tell the disputants what to do, if they tended to ask for information and transfer it objectively to the opposing side, and if they infrequently pointed out either sides' strengths or weaknesses.'⁶¹³ While these descriptions may create some simple links to stylistic categorisations, they do not include any specific actions or approaches that demonstrated the mediators' reported impartiality (and how impartiality was assessed) nor what the mediator said that was interpreted as pointing out the strengths and weaknesses of either an option or a perspective.

4.3.1. Outcomes, not actions

Overwhelmingly, the selected studies' purported descriptions of mediator actions are expressed as potential outcomes of the mediation process, or as effects of unspecified actions or statements. Examples of outcomes that are not mediator actions are quite obvious and include

⁶¹⁰ Curry, O. S., and R. I. M. Dunbar, 'Sharing a Joke: The Effects of a Similar Sense of Humour on Affiliation and Altruism' (2013) 34 *Evolution and Human Behavior* 125.

⁶¹¹ Coburn, C., B. Batagol, and K. Douglas, 'How a Dose of Humour May Help the Mediators and Disputants in Conflict' (2013) 24(18) *ADRJ* 18.

⁶¹² Wall, J. A., Jr, and S. Chan-Serafin, 'Do Mediators Walk Their Talk in Civil Cases?' (2010) 28(1) *Conflict Resolution Quarterly* 3, 11.

⁶¹³ Wall, J. A., Jr, and S. Chan-Serafin, 'Do Mediators Walk Their Talk in Civil Cases?' (2010) 28(1) *Conflict Resolution Quarterly* 3, 12.

‘resolve the dispute’,⁶¹⁴ ‘facilitate settlement’,⁶¹⁵ and ‘obtain wage concessions’.⁶¹⁶ Although it is highly likely to be beneficial when a mediation results in the dispute being resolved, this in itself is not a mediator action.

4.3.2. Effects, not actions

Many of the selected studies include descriptions of what their mediator participants are observed or reported to have said and/or done that are expressed in terms of the immediate, or short-term, *effects* of those actions and statements. A sequence of such effects might be a key contributor to the outcome/s of a mediation process. For example, where a mediator is reported to have ‘created a helpful, positive environment’, that environment might contribute to the development of constructive negotiations between the disputants that, in themselves, might also lead to the achievement of settlement. Other examples include ‘provided a suitable environment for negotiation’;⁶¹⁷ ‘created a helpful, positive environment’;⁶¹⁸ ‘clarified the needs of other parties’;⁶¹⁹ ‘to defuse unrealistic expectations’;⁶²⁰ ‘to promote interspouse communication and to provide disputants with interpersonal insights’;⁶²¹ ‘reduce emotional tensions’;⁶²² ‘helped the other person understand your viewpoint’;⁶²³ ‘reduce the level of hostility’.⁶²⁴

⁶¹⁴ Wissler, R. L., ‘Mediation and Adjudication in Small Claims Court: The Effects of Process and Case Characteristics’ (1995) 29(2) *Law & Society Review* 323, 337.

⁶¹⁵ Wall, J. A., Jr, and D. E. Rude, ‘The Judge as a Mediator’ (1991) 76(1) *Journal of Applied Psychology* 54, 57.

⁶¹⁶ Kochan, T. A., and T. Jick, ‘The Public Sector Mediation Process: A Theory and Empirical Examination’ (1978) 22(2) *The Journal of Conflict Resolution* 209, 229.

⁶¹⁷ Woodward, J. G., ‘Settlement Week: Measuring the Promise’ (1990) 11 *Northern Illinois University Law Review* 1, 41.

⁶¹⁸ Kressel, K., E. A. Frontera, S. Forlenza, F. Butler, and L. Fish, ‘The Settlement-Oriented vs the Problem-Solving Style’ (1994) 50(1) *Journal of Social Issues* 67, 78.

⁶¹⁹ Dilts, D. A. and A. Karim, ‘The Effect of Mediators’ Qualities and Strategies on Mediation Outcomes’ (1990) 45(1) *Relations Industrielles/Industrial Relations* 22, 27.

⁶²⁰ Woodward, J. G., ‘Settlement Week: Measuring the Promise’ (1990) 11 *Northern Illinois University Law Review* 1, 41.

⁶²¹ Shapiro, D., R. Drieghe, and J. Brett, ‘Mediator Behavior and the Outcomes of Mediation’ (1985) 41(2) *Journal of Social Issues* 101, 115.

⁶²² Hiltrop, J. M., ‘Factors Associated with Successful Labor Mediation’ in K. Kressel and D. G. Pruitt (eds), *Mediation Research: The Process and Effectiveness of Third-Party Intervention* (Jossey-Bass, USA, 1989), 252.

⁶²³ Bingham, L. B., ‘Transformative Mediation in the United States Postal Service’ (2012) 5(4) *Negotiation and Conflict Management Research* 354, 362.

⁶²⁴ Welton, G. L., D. G. Pruitt, and N. B. McGillicuddy, ‘The Role of Caucusing in Community Mediation’ (1988) 32(1) *The Journal of Conflict Resolution* 181, 192.

These may all be beneficial impacts; however, none of the studies describes the mediator participant's specific actions and approaches that apparently led to them.

4.3.3. Generalised, not specific

As noted earlier, the phrase "generalised mediator actions" is used to describe instances where mediator behaviour is depicted in generalisations rather than as specific actions and approaches (see 4.0.3. Methodology, Terms used in this analysis).

When a mediator facilitates discussions between the disputants, at first glance, it can appear that the facilitation is something specific that the mediator has done. However, there are many ways to facilitate a discussion. If the discussion occurs in a face-to-face setting, the mediator can facilitate using a variety of behaviours, including making references to the way in which the conversation will take place, verbally inviting each person in turn to contribute to the discussion; verbally inviting people to discuss the issue with one other; and gesturing (non-verbally) in ways that invite both people to discuss the issue with each other. Additional factors that influence the facilitated discussion might include: the mediator's tone of voice, the pre-established atmosphere, and even the mediator's physical demeanour. If the discussion occurs over the phone, the mediator's options will be more limited and include only verbal prompts in which voice tone and volume become more influential. If the discussion occurs via electronic video link, it is still possible for mediator actions to be both verbal and non-verbal.

In the selected studies, generalised mediator actions are used commonly. Some representative examples are: 'gave suggestions for how to settle the case';⁶²⁵ 'suggested review of

⁶²⁵ Alberts, J. K., B. L. Heisterkamp, and R. M. McPhee, 'Disputant Perceptions of and Satisfaction with a Community Mediation Program' (2005) 16(3) *The International Journal of Conflict Management* 218, 229.

needs';⁶²⁶ 'suggested a particular settlement';⁶²⁷ 'proposing solutions/being creative';⁶²⁸ 'expressed views on factual and legal issues in the dispute';⁶²⁹ 'emphasizing the need to make concessions';⁶³⁰ 'offered solutions';⁶³¹ 'intensive question asking'.⁶³² 'argues for a particular proposal';⁶³³ 'mediator explored "worst case scenario"';⁶³⁴ 'pointed out the costs of disagreement';⁶³⁵ 'asking embarrassing questions ... challenging disputants';⁶³⁶ 'proposed solutions';⁶³⁷ 'noting the strong points of the opponents' case';⁶³⁸ 'mediator statements urging the parties to come to an agreement';⁶³⁹ 'threatening to withdraw';⁶⁴⁰ 'encouraged [the parties] to express how they felt';⁶⁴¹ 'urging participants to agree to talk'.⁶⁴²

⁶²⁶ Carnevale, P. J. D., and R. Pagnetter, 'The Selection of Mediator Tactics in Public Sector Disputes: A Contingency Analysis' (1985) 41(2) *Journal of Social Issues* 2, 73.

⁶²⁷ Dilts, D. A. and A. Karim, 'The Effect of Mediators' Qualities and Strategies on Mediation Outcomes' (1990) 45(1) *Relations Industrielles/Industrial Relations* 22, 28.

⁶²⁸ Goldberg, S. B., and M. L. Shaw, 'Further Investigation into the Secrets of Successful and Unsuccessful Mediators' (2008) 26(8) *Alternatives to the High Cost of Litigation* 149, 158.

⁶²⁹ Henderson, D. A., 'Mediation Success: An Empirical Analysis' (1996) 11(1) *Ohio State Journal on Dispute Resolution* 105, 136-137.

⁶³⁰ Hiltrop, J. M., 'Factors Associated with Successful Labor Mediation' in K. Kressel and D. G. Pruitt (eds), *Mediation Research: The Process and Effectiveness of Third-Party Intervention* (Jossey-Bass, USA, 1989), 252.

⁶³¹ Jones, T. S., 'Lag Sequential Analyses of Mediator-Spouse and Husband-Wife Interaction in Successful and Unsuccessful Divorce Mediation' in M. A. Rahim (ed), *Managing Conflict: An Interdisciplinary Approach* (Praeger, USA, 1989), 99.

⁶³² Kressel, K., E. A. Frontera, S. Forlenza, F. Butler, and L. Fish, 'The Settlement-Oriented vs the Problem-Solving Style' (1994) 50(1) *Journal of Social Issues* 67, 82.

⁶³³ McGillicuddy, N. B., G. L. Welton, and D. G. Pruitt, 'Third-Party Intervention: A Field Experiment Comparing Three Different Models' (1987) 53(1) *Journal of Personality and Social Psychology* 104, 109.

⁶³⁴ Peebles, R., C. Harris, and T. Metzloff, 'Following the Script: An Empirical Analysis of Court-Ordered Mediation of Medical Malpractice Cases' (2007) 2007(1) *Journal of Dispute Resolution* 101, 113.

⁶³⁵ Posthuma, R. A., A. Richard, J. B. Dworkin, and M. S. Swift, 'Mediator Tactics and Sources of Conflict: Facilitating and Inhibiting Effects' (2002) 41(1) *Industrial Relations* 94, 105.

⁶³⁶ Pruitt, D. G., R. S. Peirce, N. B. McGillicuddy, G. L. Welton, and L. Castrianno, 'Long-Term Success in Mediation' (1993) 17(3) *Law and Human Behavior* 313, 319.

⁶³⁷ Slaikeu, K. A., R. Culler, J. Pearson, and N. Thoennes, 'Process and Outcome in Divorce Mediation' (1985) 10 *Mediation Quarterly* 55, 60.

⁶³⁸ Wall, J. A., Jr, and S. Chan-Serafin, 'Processes in Civil Case Mediations' (2009) 26(3) *Conflict Resolution Quarterly* 261, 272.

⁶³⁹ Welton, G. L., D. G. Pruitt, and N. B. McGillicuddy, 'The Role of Caucusing in Community Mediation' (1988) 32(1) *The Journal of Conflict Resolution* 181, 198.

⁶⁴⁰ Welton, G. L., D. G. Pruitt, N. B. McGillicuddy, C. A. Ippolito, and J. M. Zubeck, 'Antecedents and Characteristics of Caucusing in Community Mediation' (1992) 3(4) *International Journal of Conflict Management* 303, 308.

⁶⁴¹ Wissler, R. L., *Trapping the Data: An Assessment of Domestic Relations Mediation in Maine and Ohio Courts* (Unpublished report, 1999), 68.

⁶⁴² Woodward, J. G., 'Settlement Week: Measuring the Promise' (1990) 11 *Northern Illinois University Law Review* 1, 41.

The use of such descriptions has become sufficiently wide-spread to suggest it is a professional collective short-hand enabling mediator actions to be described in terms of a “whole” without having to specify any component parts, or specific related actions by the mediator. When a mediator is reported to have facilitated a discussion, the facilitation is not an act in itself. It is almost as if the facilitation is a forest and the various specific actions that comprise it are its component trees. Not one action or statement alone facilitates a discussion any more than a single species of tree comprises a forest. The facilitation, or “forest”, has become a collective noun within which many individual and specific mediator statements and actions (or trees) are incorporated, and which remain unidentified in the selected studies.

If researchers were to be more specific about mediator participants’ specific actions and approaches, it might be possible to remove some of the confusion and contradiction mentioned by one commentator.⁶⁴³ It might also enable more comparative investigations of mediators’ use of specific actions and approaches under different circumstances, and it might provide some insights into the apparent inconsistencies in how disputants respond to mediators. Less generalisation and more specific approaches might also contribute to knowledge about mediation and about mediator effectiveness.

4.3.4. Specific actions and approaches?

Seven of the included 43 studies include descriptions of what could be taken to be mediator participants’ actions (including mediator statements), and those seven are included in this section;⁶⁴⁴

⁶⁴³ Della Noce, D. J., ‘Mediator Style and the Question of “Good” Mediation: A Call for Theoretical Development’ (2012) 5(4) *Negotiation and Conflict Management Research* 396.

⁶⁴⁴ Bingham, L. B., ‘Transformative Mediation in the United States Postal Service’ (2012) 5(4) *Negotiation and Conflict Management Research* 354; Henderson, D. A., ‘Mediation Success: An Empirical Analysis’ (1996) 11(1) *Ohio State Journal on Dispute Resolution* 105; McDermott, E. P., and R. Obar, ‘“What’s Going On” in Mediation: An Empirical Analysis of the Influence of a Mediator’s Style on Party Satisfaction and Monetary Benefit’ (2004) 9 *Harvard Negotiation Law Review* 75; Vanderkooi, L., and J. Pearson, ‘Mediating Divorce Disputes: Mediator Behaviors, Styles and Roles’ (1983) 32(4) *Family Relations* 557; Wall, J. A., Jr, and S. Chan-Serafin, ‘Processes in Civil Case Mediations’ (2009) 26(3) *Conflict Resolution Quarterly* 261; Welton, G. L., D. G. Pruitt, N. B. McGillicuddy, C. A. Ippolito, and J. M. Zubeck, ‘Antecedents and Characteristics of Caucusing in Community Mediation’ (1992) 3(4) *International Journal of Conflict Management* 303; and Zubeck, J. M., D. G. Pruitt, R. S.

however, as is shown below, even these seven do not describe specific mediator actions and approaches.⁶⁴⁵

One of the eight studies includes examples of questions mediator participants themselves have said they asked of the disputants: ““What is the likely court outcome?” ... “What is the cost of taking the matter to court?””⁶⁴⁶ In five studies, mediator participants are reported, or observed, as having made statements such as: ‘[the mediator] told you who would win in court’,⁶⁴⁷ ‘the mediator simply repeated what a disputant had said’,⁶⁴⁸ ‘[the mediator] rephrased a disputant statement’.⁶⁴⁹ In all the instances of mediators asking questions and making statements, the researchers do not make clear additional contextual factors that might influence their effect. For example, whether these occurred with all parties present, or in private sessions; and what was observed about the tone of voice, manner, or demeanour of the mediator.

In five studies, the mediator participants are reported, or observed, as having *done* four things, though it is unclear how they were done: ‘collects, or asks for, information, documents, or third parties’,⁶⁵⁰ ‘the mediator undertook review of job records and other documentation ...

Peirce, N. B. McGillicuddy, and H. Syna, ‘Disputant and Mediator Behaviors Affecting Short-Term Success in Mediation’ (1992) 36(3) *Journal of Conflict Resolution* 546.

⁶⁴⁵ None of the seven studies includes sufficient descriptive detail for exact replication. For example, using the examples of what mediators are reported to have done: when a mediator “collects information” that might be done in a variety of ways (eg by examining files, by talking with other people, etc); when a mediator consults with “independent experts”, how might that be done (eg in person, by phone, in the company of the disputants or separately, etc). Although some of the seven studies include descriptions of mediator statements, none includes additional information about the mediator’s tone of voice, manner, or demeanour while speaking, yet these are likely to increase any influence that may be perceived in the mediator’s actual words.

⁶⁴⁶ Sourdin, T., and T. Matruglio, *Evaluating Mediation – New South Wales Settlement Scheme 2002* (2004) *Mediation*. Paper 7, 44, available on <<http://www.civiljustice.info/med/7>>.

⁶⁴⁷ Bingham, L. B., ‘Transformative Mediation in the United States Postal Service’ (2012) 5(4) *Negotiation and Conflict Management Research* 354, 362.

⁶⁴⁸ Welton, G. L., D. G. Pruitt, N. B. McGillicuddy, C. A. Ippolito, and J. M. Zubeck, ‘Antecedents and Characteristics of Caucusing in Community Mediation’ (1992) 3(4) *International Journal of Conflict Management* 303, 308.

⁶⁴⁹ Welton, G. L., D. G. Pruitt, N. B. McGillicuddy, C. A. Ippolito, and J. M. Zubeck, ‘Antecedents and Characteristics of Caucusing in Community Mediation’ (1992) 3(4) *International Journal of Conflict Management* 303, 308.

⁶⁵⁰ Wall, J. A., Jr, and S. Chan-Serafin, ‘Processes in Civil Case Mediations’ (2009) 26(3) *Conflict Resolution Quarterly* 261, 273.

mediator undertook jobsite visit ... mediator undertook consultation with independent experts or reference works'.⁶⁵¹

One mediator participant is said to have 'mention[ed] risk or cost of trial'.⁶⁵² This description does not include whether the mediator made the statement in joint or private session, nor whether the mediator made the mention to the disputants themselves or to their advisers, nor whether the mediator stated it bluntly, or alluded to the risks and costs in a very generalised way.

The following examples are from the two studies that include twenty-eight examples of what mediator participants were observed to have said, including⁶⁵³ '[other mediators ask] "What are your issues?" or "What do you want?"';⁶⁵⁴ '[mediators] ask parties to ... describe[e] current custody and visitation arrangements and what they like or dislike about them';⁶⁵⁵ '[the] mediator states "We can work something out on these" [and] "You are close to an agreement now. There are just a few minor details to work out"';⁶⁵⁶ '[a] common example of reframing is to discuss custody and visitation matters as "time-sharing problems"'.⁶⁵⁷

One of the two studies includes a list of mediator behaviours considered by the researchers to be encompassed by 'mediator pressure to reach agreement':⁶⁵⁸

'(1) urging agreement – pushing the parties to make concessions or to reach agreement (... e.g., "Concede if you have to, and agreement is better than no

⁶⁵¹ Henderson, D. A., 'Mediation Success: An Empirical Analysis' (1996) 11(1) *Ohio State Journal on Dispute Resolution* 105, 136.

⁶⁵² Wall, J. A., Jr, and S. Chan-Serafin, 'Processes in Civil Case Mediations' (2009) 26(3) *Conflict Resolution Quarterly* 261, 273.

⁶⁵³ In both studies, the observations are based on analysis of audiotapes of the subject mediations; although neither study includes any mention of visual observation of the mediator participants, key factors such as voice tone and volume are readily accessible in audio-recordings.

⁶⁵⁴ Vanderkooi, L., and J. Pearson, 'Mediating Divorce Disputes: Mediator Behaviors, Styles and Roles' (1983) 32(4) *Family Relations* 557, 561.

⁶⁵⁵ Vanderkooi, L., and J. Pearson, 'Mediating Divorce Disputes: Mediator Behaviors, Styles and Roles' (1983) 32(4) *Family Relations* 557, 561.

⁶⁵⁶ Vanderkooi, L., and J. Pearson, 'Mediating Divorce Disputes: Mediator Behaviors, Styles and Roles' (1983) 32(4) *Family Relations* 557, 562.

⁶⁵⁷ Vanderkooi, L., and J. Pearson, 'Mediating Divorce Disputes: Mediator Behaviors, Styles and Roles' (1983) 32(4) *Family Relations* 557, 564.

⁶⁵⁸ Zubeck, J. M., D. G. Pruitt, R. S. Peirce, N. B. McGillicuddy, and H. Syna, 'Disputant and Mediator Behaviors Affecting Short-Term Success in Mediation' (1992) 36(3) *Journal of Conflict Resolution* 546, 557.

*agreement”), (2) mentioning the costs of no agreement – pointing out the consequences of continued disagreement (... e.g., “If you don’t reach a settlement, you’re both going to suffer because you’re still living next door to each other”), and (3) making threats – pointing out that continued delay would lead to discontinuation of the hearing or moving to arbitration (... e.g., “If you don’t reach an agreement in the next five minutes, I will force a decision on you”)*⁶⁵⁹

Neither of the two studies includes additional information such as whether the mediators’ comments were made in joint or private sessions; or whether the comments were made as stand-alone remarks, or as part of other conversation or commentary.

Most importantly, none of the seven studies includes any description or detail about the mediator participants’ tone of voice, manner or demeanour while they were talking. In the literature on empathy and rapport, these factors are recognised as having considerable influence on the effect that oral statements might produce.⁶⁶⁰ For example, clearly the tone of voice, or demeanour, might alter the impact of this mediator statement: “If you don’t reach a settlement, you’re both going to suffer.” If stated gently and as part of a flowing conversation, it could be interpreted as an observation; if stated forcefully and as a stand-alone comment, it could be interpreted as a threat.

4.3.5. Contextual and effectiveness trends

Of the seven studies that include descriptions of the mediator participants’ specific actions and approaches, three measure simple effectiveness,⁶⁶¹ and four measure complex effectiveness.⁶⁶²

⁶⁵⁹ Zubeck, J. M., D. G. Pruitt, R. S. Peirce, N. B. McGillicuddy, and H. Syna, ‘Disputant and Mediator Behaviors Affecting Short-Term Success in Mediation’ (1992) 36(3) *Journal of Conflict Resolution* 546, 557.

⁶⁶⁰ Holmberg, U. and K. Madsen, ‘Rapport Operationalized as a Humanitarian Interview in Investigative Interview Settings’ (2014) 21(4) *Psychiatry, Psychology, and Law* 591.

⁶⁶¹ Henderson, D. A., ‘Mediation Success: An Empirical Analysis’ (1996) 11(1) *Ohio State Journal on Dispute Resolution* 105; Vanderkooi, L., and J. Pearson, ‘Mediating Divorce Disputes: Mediator Behaviors, Styles and Roles’ (1983) 32(4) *Family Relations* 557; Wall, J. A., Jr, and S. Chan-Serafin, ‘Processes in Civil Case Mediations’ (2009) 26(3) *Conflict Resolution Quarterly* 261.

⁶⁶² Bingham, L. B., ‘Transformative Mediation in the United States Postal Service’ (2012) 5(4) *Negotiation and Conflict Management Research* 354; McDermott, E. P., and R. Obar, “What’s Going On” in Mediation: An

The seven studies include two from the community-based context,⁶⁶³ two from the court-connected context,⁶⁶⁴ two are evaluations of mediation programs and services,⁶⁶⁵ and one is from the construction/business context.⁶⁶⁶ Studies from the following mediation contexts include no descriptions of mediator participants' actions or statements that could have been included in this section: labour/management, and simulated mediations.

It is important to explore what else is revealed in this terminological analysis. The next section considers mediator communication skills, which are depicted frequently in all the selected studies as being mediator actions or mediator behaviours, though consistently they occur without explanation of what the communication skills might include.

4.4. Communication skills, empathy, and rapport

One of the most common mediator "actions" described in the selected studies is "communication skills", and it takes a variety of forms, including: 'listening skills';⁶⁶⁷ 'empathic

Empirical Analysis of the Influence of a Mediator's Style on Party Satisfaction and Monetary Benefit' (2004) 9 *Harvard Negotiation Law Review* 75; Welton, G. L., D. G. Pruitt, N. B. McGillicuddy, C. A. Ippolito, and J. M. Zubeck, 'Antecedents and Characteristics of Caucusing in Community Mediation' (1992) 3(4) *International Journal of Conflict Management* 303; Zubeck, J. M., D. G. Pruitt, R. S. Peirce, N. B. McGillicuddy, and H. Syna, 'Disputant and Mediator Behaviors Affecting Short-Term Success in Mediation' (1992) 36(3) *Journal of Conflict Resolution* 546.

⁶⁶³ Welton, G. L., D. G. Pruitt, N. B. McGillicuddy, C. A. Ippolito, and J. M. Zubeck, 'Antecedents and Characteristics of Caucusing in Community Mediation' (1992) 3(4) *International Journal of Conflict Management* 303; Zubeck, J. M., D. G. Pruitt, R. S. Peirce, N. B. McGillicuddy, and H. Syna, 'Disputant and Mediator Behaviors Affecting Short-Term Success in Mediation' (1992) 36(3) *Journal of Conflict Resolution* 546.

⁶⁶⁴ McDermott, E. P., and R. Obar, "What's Going On" in Mediation: An Empirical Analysis of the Influence of a Mediator's Style on Party Satisfaction and Monetary Benefit' (2004) 9 *Harvard Negotiation Law Review* 75; Wall, J. A., Jr, and S. Chan-Serafin, 'Processes in Civil Case Mediations' (2009) 26(3) *Conflict Resolution Quarterly* 261.

⁶⁶⁵ Bingham, L. B., 'Transformative Mediation in the United States Postal Service' (2012) 5(4) *Negotiation and Conflict Management Research* 354; Vanderkooi, L., and J. Pearson, 'Mediating Divorce Disputes: Mediator Behaviors, Styles and Roles' (1983) 32(4) *Family Relations* 557.

⁶⁶⁶ Henderson, D. A., 'Mediation Success: An Empirical Analysis' (1996) 11(1) *Ohio State Journal on Dispute Resolution* 105.

⁶⁶⁷ Kimsey, W. D., R. M. Fuller, and B. C. McKinney, 'Mediator Listening, Dispute Reframing, and Mediation Outcome: A Pilot Study' (1993) 7(1) *Journal of the International Listening Association* 74, 79.

listening’,⁶⁶⁸ and ‘critical listening skills’;⁶⁶⁹ ‘[mediator’s] active listening skills’;⁶⁷⁰ ‘[mediator] listening ability’;⁶⁷¹ and ‘future research needs to examine specific mediator characteristics, such as listening and interpersonal skills’.⁶⁷²

It is suggested that such language is insufficient to enable an accurate description of the mediator participants’ specific actions and approaches. It is unclear which specific actions the researchers would include as listening skills, especially if they are reported as being “empathic”. All the above examples are descriptions of relatively generalised skills, rather than of the mediator participants’ specific actions and approaches. One report hints at what the researchers intended the term to mean: ‘empathic listening, through which [the mediators] conveyed the message that they truly cared about the parties’ feelings, needs, and concerns.’⁶⁷³ This describes the intent of demonstrating empathy, not the mediator participants’ specific actions and approaches that might have resulted in a sense of empathy, and it does not describe how the “message” was actually conveyed.

Communication is a particularly complex example of human interaction and its effectiveness is very contextually dependent – what individuals consider to be effective communication in one context may not be considered as effective by the same individuals in a different context.⁶⁷⁴ For example, the formal and relatively ritualised communication style that is considered, by some, to be

⁶⁶⁸ Goldberg, S. B., and M. L. Shaw, ‘Further Investigation into the Secrets of Successful and Unsuccessful Mediators’ (2008) 26(8) *Alternatives to the High Cost of Litigation* 149, 156; Kimsey, W. D., R. M. Fuller, and B. C. McKinney, ‘Mediator Listening, Dispute Reframing, and Mediation Outcome: A Pilot Study’ (1993) 7(1) *Journal of the International Listening Association* 74, 78.

⁶⁶⁹ Kimsey, W. D., R. M. Fuller, and B. C. McKinney, ‘Mediator Listening, Dispute Reframing, and Mediation Outcome: A Pilot Study’ (1993) 7(1) *Journal of the International Listening Association* 74, 80.

⁶⁷⁰ Burrell, N. A., W. A. Donohue, and M. Allen, ‘The Impact of Disputants’ Expectations on Mediation, Testing an Interventionist Model’ (1990) Fall 1990 *Human Communication Research* 104, 121; Mareschal, P. M., ‘What Makes Mediation Work? Perspectives on Resolving Disputes’ (2005) 44(3) *Industrial Relations* 509, 510.

⁶⁷¹ Henderson, D. A., ‘Mediation Success: An Empirical Analysis’ (1996) 11(1) *Ohio State Journal on Dispute Resolution* 105, 130.

⁶⁷² Wissler, R. L., ‘Court-Connected Mediation in General Civil Cases: What We Know from Empirical Research’ (2002) 17 *Ohio State Journal on Dispute Resolution* 641, 699-670.

⁶⁷³ Goldberg, S. B., and M. L. Shaw, ‘Further Investigation into the Secrets of Successful and Unsuccessful Mediators’ (2008) 26(8) *Alternatives to the High Cost of Litigation* 149, 156.

⁶⁷⁴ Hook, D., B. Franks, and M. W. Bauer, *The Social Psychology of Communication* (Palgrave Macmillan, UK, 2011).

effective in the setting of a court room may not be considered to be as effective in the setting of a workplace dispute. Without including at least some contextualisation of the communications in their subject mediations (eg the mediation context and the disputants' social setting) in addition to the subject mediators' actions and approaches, the researchers' descriptions cannot reflect what happened in each case nor how effective it might have been. An additional issue is that communication can be expected to change constantly during mediation as the atmosphere switches from the relatively formal early stages to the more interactive stages. Any description of communication during a mediation would be expected to at least acknowledge its inherent complexity, which is not achieved by describing actions as "skilled".

Establishing empathy and building rapport are mentioned in nine of the selected studies in direct association with mediator participants and their actions.⁶⁷⁵ Of the nine, only two quote examples of what the mediator participants said to establish empathy or rapport.⁶⁷⁶ Unfortunately, neither of the two includes any detail about the mediators' tone of voice, manner, or demeanour while they were speaking, yet the importance of these non-verbal factors is well recognised in the literature on empathy and rapport.⁶⁷⁷ None of the nine studies includes any explanation of what the researchers mean when they refer to establishing empathy, or building rapport, despite other fields

⁶⁷⁵ Alberts, J. K., B. L. Heisterkamp, and R. M. McPhee, 'Disputant Perceptions of and Satisfaction with a Community Mediation Program' (2005) 16(3) *The International Journal of Conflict Management* 218; Carnevale, P. J. D., and R. Peggnetter, 'The Selection of Mediator Tactics in Public Sector Disputes: A Contingency Analysis' (1985) 41(2) *Journal of Social Issues* 2; Goldberg, S. B., and M. L. Shaw, 'Further Investigation into the Secrets of Successful and Unsuccessful Mediators' (2008) 26(8) *Alternatives to the High Cost of Litigation* 149; Pruitt, D. G., R. S. Peirce, N. B. McGillicuddy, G. L. Welton, and L. Castrianno, 'Long-Term Success in Mediation' (1993) 17(3) *Law and Human Behavior* 313; Slaikeu, K. A., R. Culler, J. Pearson, and N. Thoennes, 'Process and Outcome in Divorce Mediation' (1985) 10 *Mediation Quarterly* 55; Swaab, R. I., *Face First: Pre-Mediation Caucus and Face in Employment Disputes* (Presentation, Annual Association of Conflict Management Conference, June 2009); Vanderkooi, L., and J. Pearson, 'Mediating Divorce Disputes: Mediator Behaviors, Styles and Roles' (1983) 32(4) *Family Relations* 557; Welton, G. L., D. G. Pruitt, and N. B. McGillicuddy, 'The Role of Caucusing in Community Mediation' (1988) 32(1) *The Journal of Conflict Resolution* 181; Zubeck, J. M., D. G. Pruitt, R. S. Peirce, N. B. McGillicuddy, and H. Syna, 'Disputant and Mediator Behaviors Affecting Short-Term Success in Mediation' (1992) 36(3) *Journal of Conflict Resolution* 546.

⁶⁷⁶ Vanderkooi, L., and J. Pearson, 'Mediating Divorce Disputes: Mediator Behaviors, Styles and Roles' (1983) 32(4) *Family Relations* 557; Zubeck, J. M., D. G. Pruitt, R. S. Peirce, N. B. McGillicuddy, and H. Syna, 'Disputant and Mediator Behaviors Affecting Short-Term Success in Mediation' (1992) 36(3) *Journal of Conflict Resolution* 546.

⁶⁷⁷ See Holmberg, U., and K. Madsen, 'Rapport Operationalized as a Humanitarian Interview in Investigative Interview Settings' (2014) 21(4) *Psychiatry, Psychology, and Law* 591.

of research having established that empathy is accepted as being the capacity to identify with another person, and to ‘understand what it is like to be that particular individual’,⁶⁷⁸ while retaining a ‘sense of self [and] emotional regulation’.⁶⁷⁹

The selected studies include no stated recognition of the developmental relationship between establishing empathy, building rapport, and developing trust, although this, too, is widely recognised in the empathy/rapport literature.⁶⁸⁰ The so-called ‘rules of communicative competence’⁶⁸¹ are reported to underpin empathy in that individuals with communicative competence calculate appropriate levels for relating to others, taking into account any cultural and personal influences at any given time. High levels of communicative competence enable a person to remain sufficiently aware of the presence of others that their behavioural and linguistic preferences will enable them to assume an appropriate level of relationship with them.⁶⁸² The rules of communicative competence have become better known as the ‘Rules of Rapport’.⁶⁸³

Investigations into the influence of social power, social status, and social desirability, on people’s capacity for empathy⁶⁸⁴ suggest that mediation should be a fertile area for exploring the influence of conflict on empathy, and for investigating which (if any) mediator behaviours might enable the development of empathy, rapport, and trust between disputants.

⁶⁷⁸ Clark, A. J., ‘Empathy and Alfred Adler: An Integral Perspective’ (2016) 72(4) *The Journal of Individual Psychology* 238.

⁶⁷⁹ Lietz, C., K. E. Gerdes, F. Sun, J. M. Geiger, M. A. Wagaman, and E. A. Segal, ‘The Empathy Assessment Index (EAI): A Confirmatory Factor Analysis of a Multidimensional Model of Empathy’ (2011) 2(2) *Journal of the Society for Social Work and Research*, 105.

⁶⁸⁰ Holmberg, U., and K. Madsen, ‘Rapport Operationalized as a Humanitarian Interview in Investigative Interview Settings’ (2014) 21(4) *Psychiatry, Psychology, and Law* 591; Vallano, J. P., J. R. Evans, N. S. Compo, and J. M. Kieckhafer, ‘Rapport-Building During Witness and Suspect Interviews: A Survey of Law Enforcement’ (2015) 29(3) *Applied Cognitive Psychology* 369.

⁶⁸¹ Lakoff, R. T., *Stylistic Strategies Within a Grammar of Style* (Annals of the New York Academy of Sciences, USA, 1979), 62.

⁶⁸² Lakoff, R. T., *Stylistic Strategies within a Grammar of Style* (Annals of the New York Academy of Sciences, USA, 1979).

⁶⁸³ Tannen, D., ‘Framing and Face: The Relevance of the Presentation of Self to Linguistic Discourse Analysis’ (2009) 72(4) *Social Psychology Quarterly*, 300.

⁶⁸⁴ Côté, S., M. W. Kraus, B. H. Cheng, C. Oveis, I. van der Löwe, H. Lian, and D. Keltner, ‘Social Power Facilitates the Effect of Prosocial Orientation on Empathic Accuracy’ (2011) 101(2) *Journal of Personality and Social Psychology* 217; Zaki, J., ‘Empathy: A Motivated Account’ (2014) 140(6) *Psychological Bulletin* 1608.

Seven of the studies include expressions that are used in direct association with mediator participants and their actions and are similar in meaning to empathy and rapport; however, the researchers do not explain how they intend the terms to be interpreted in the context of their studies.⁶⁸⁵ The terms include: '[mediator ability] to understand genuinely' (without any explanation of what genuine understanding might be),⁶⁸⁶ '[the mediator] was trustworthy' (without any explanation of the meaning of "trustworthy", or of the mediator's specific actions and approaches that might have created the perception of trustworthiness),⁶⁸⁷ '[the mediator's] trust-building strategies' (without any description of what the strategies actually were),⁶⁸⁸ and 'gain trust and confidence' (without an explanation of what the mediator did that led to a perception of trust and confidence).⁶⁸⁹

Mediation research includes limited explorations of the specific actions and approaches that a mediator might use to develop or maintain rapport and empathy. It is important when commentators acknowledge that the mediator's 'ability to empathise' with the disputants is more than just a statement of "empathy"; it relies at least in part on the mediator demonstrating recognition, or acceptance, of the whole person, knowing that empathy can lead to increased self-

⁶⁸⁵ Alberts, J. K., B. L. Heisterkamp, and R. M. McPhee, 'Disputant Perceptions of and Satisfaction with a Community Mediation Program' (2005) 16(3) *The International Journal of Conflict Management* 218; Carnevale, P. J. D., and R. Pagnetter, 'The Selection of Mediator Tactics in Public Sector Disputes: A Contingency Analysis' (1985) 41(2) *Journal of Social Issues* 2; Dilts, D. A. and A. Karim, 'The Effect of Mediators' Qualities and Strategies on Mediation Outcomes' (1990) 45(1) *Relations Industrielles/Industrial Relations* 22; Goldberg, S. B., and M. L. Shaw, 'Further Investigation into the Secrets of Successful and Unsuccessful Mediators' (2008) 26(8) *Alternatives to the High Cost of Litigation* 149; Karim, A. and R. Pagnetter, 'Mediator Strategies and Qualities and Mediation Effectiveness' (1983) 22(1) *Industrial Relations* 105; Swaab, R. I., and J. Brett, *Caucus with Care: The Impact of Pre-Mediation Caucuses on Conflict Resolution* (Meetings Paper, International Association of Conflict Management, 2007); Zubeck, J. M., D. G. Pruitt, R. S. Peirce, N. B. McGillicuddy, and H. Syna, 'Disputant and Mediator Behaviors Affecting Short-Term Success in Mediation' (1992) 36(3) *Journal of Conflict Resolution* 546.

⁶⁸⁶ Zubeck, J. M., D. G. Pruitt, R. S. Peirce, N. B. McGillicuddy, and H. Syna, 'Disputant and Mediator Behaviors Affecting Short-Term Success in Mediation' (1992) 36(3) *Journal of Conflict Resolution* 546, 555.

⁶⁸⁷ Alberts, J. K., B. L. Heisterkamp, and R. M. McPhee, 'Disputant Perceptions of and Satisfaction with a Community Mediation Program' (2005) 16(3) *The International Journal of Conflict Management* 218, 230.

⁶⁸⁸ Swaab, R. I., and J. Brett, *Caucus with Care: The Impact of Pre-Mediation Caucuses on Conflict Resolution* (Meetings Paper, International Association of Conflict Management, 2007), 6.

⁶⁸⁹ Carnevale, P. J. D., and R. Pagnetter, 'The Selection of Mediator Tactics in Public Sector Disputes: A Contingency Analysis' (1985) 41(2) *Journal of Social Issues* 2, 73.

confidence and a more active role for disputants in the mediation process.⁶⁹⁰ It is also important that researchers examine, say, communicative competence in mediation, and investigate which of a mediator's specific actions and approaches might demonstrate the necessary recognition and acceptance in any given situation.

4.5. Mediator influence and effectiveness

The lack of terminological clarity in the selected studies appears to prevent differentiation between four aspects of potential mediator influence. According to the studies, mediators are assumed to be influential through any of the following factors:

- The mediator's specific actions and approaches at any time during the mediation;
- The mediator's personal and professional attributes (eg honesty, friendliness, trustworthiness, warmth, optimism, and subject matter expertise);
- The mediator's own personal demography (eg age, culture, gender, ethnography, education status, professional background, mediation experience, employment status [ie is the mediator a member of an organisation's mediation panel, or an independently appointed mediator]); and
- The mediator's stylistic approach to any mediation and to their role in it (includes all descriptors of mediation style, and models, including evaluative, facilitative, transformative, narrative, directive, non-directive, passive, active, settlement-focused, process-focused, relationship-focused, etc).

The terminological analysis in this Chapter shows that mediation researchers are keen to understand a mediator's influence during mediation and have investigated various aspects of those four influence factors to that end. However, by conflating those factors and not differentiating their

⁶⁹⁰ Akin Ojelabi, L., and T. Sourdin, 'Using a Values-Based Approach in Mediation' (2011) 22 *ADRJ* 5.

potentially separate form of influence, researchers may be oversimplifying the mediator role or ignoring its apparent complexity. The lack of differentiation also makes it difficult to undertake any analysis of the ways in which mediators may be influential, how that influence affects the mediation, and any comparative research on the topic. If researchers were to specify at the outset which feature of assumed mediator influence they were investigating, it would clarify the purpose of the research and it might also assist in the development of broader conceptual clarity.

Although it might be assumed that any of the four above-listed aspects of mediator influence do affect what happens in mediation, targeted examination of any one of them is likely to result in confirmation (or not) of that assumption. It is also likely to reveal other influential factors that might also be at play. For example, if an investigation were designed to explore mediator participant actions and approaches, with a focus on mediator language, including the ways in which mediators adjust their language in different mediation settings, the results might provide insight into both mediator language choices, and contextual influences on those choices.

A more clearly articulated approach to empirical research would enable the accumulation of differentiated data about various aspects of mediator influence and might increase what is known about mediator effectiveness.

4.6. Conclusion

A prominent feature of the selected forty-seven studies that is revealed in this analysis is the lack of clear conceptual differentiation of mediators' specific actions and approaches, and the ways in which mediators might influence what happens during mediation. The lack of conceptual clarity and differentiation makes individual analysis and comparative research extremely difficult. It is also likely to impede any increase in understanding about mediation effectiveness and about what makes an effective mediator. Improving conceptual clarity would benefit researchers, their study participants, and would likely improve the reliability of research findings. It is also likely to provide a

stronger foundation from which to investigate what mediators do and say during mediation and so improve what is known about mediator effectiveness.

The thematic analysis in Chapter Three suggests that both simple and complex effectiveness may be influenced by the mediator's role in ensuring procedural and interpersonal justice; the mediator's own neutrality, impartiality, and integrity; and the use the mediator makes of private meetings before and during the mediation. The thematic analysis in this Chapter suggests that very little is known about mediators' specific actions and approaches in achieving those influences on effectiveness. Future research could focus on clarifying key mediation concepts such as "effectiveness", "communication skills", "empathy" and "rapport" (the latter three accepted as being integral to the achievement of procedural and interpersonal justice).

Social setting has been shown to influence most aspects of human interaction, including what is talked about and how it is broached; acceptable levels of animosity; voice pitch, tone, and volume; the acceptability of interrupting other speakers; how turn-taking works; and whether language is direct or indirect.⁶⁹¹ Therefore, it would also be useful if researchers were able to clearly differentiate mediator actions and approaches from other potential sources of influence such as the mediation context, the disputants' social setting, and the attendance of legal advisers at mediation.

It is likely that the lack of conceptual clarity about mediation itself and about the role of mediators contributes to, or even exacerbates, the lack of conceptual clarity about mediation effectiveness, about mediator actions and approaches, and even about mediator effectiveness.

The terminological analysis has revealed a lack of consistency in the use of key terms and their interpretation in the selected forty-seven studies. Given the range and diversity in application and interpretation of those key terms across all seven contexts included in the selected studies, it is possible that researchers are influenced more by experience and by personal preference than by any

⁶⁹¹ Tannen, D., 'Language and Culture' in R. Fasold and J. Connor-Linton (eds), *Introduction to Language and Linguistics* (Cambridge University Press, UK, 2006).

contextual expectations in their choice of terms. This may arise from a general lack of conceptual clarity within the mediation literature and the lack of a consistent disciplinary approach to the study of mediation, neither of which is hardly surprising given the lack of a clear disciplinary base for mediation research.

The two thematic analyses suggest that mediation research might be using a terminological framework that is inadequate for describing events that occur during mediation – simple effectiveness is one of the very few definitive measures included in the selected studies. The terminologies are likely to have developed simultaneously with the field of research itself and through the influence of researcher networks. It is likely that a re-examination of key mediation concepts would influence the choice of key terminologies for use in empirical studies of mediation, as well as how the terms are used.

One issue arising from the two thematic analyses is how the lack of conceptual clarity might affect research design and the choice of empirical methodologies when researchers investigate what happens during mediation. Chapters Five, Six, and Seven report on Parts One, Two, and Three, respectively, of the systematic appraisal of the selected studies, focusing on their research methodologies.

The next Chapter, Chapter Five, is Part One of the systematic appraisal and considers the 47 selected studies in terms of the study participants (mediators and non-mediators) that are included in them.

Chapter Five: The people

This Chapter presents Part One of the systematic appraisal which focuses on the people in empirical studies of mediation: the sample populations and study participants selected from them as well as their suitability for the research roles to which they are allocated. Part Two, in Chapter Six, reports on data collection methods; and Part Three, in Chapter Seven, reports on researcher influence and reflexivity. Relevant ethical issues are considered in all three Chapters.

It is accepted that, in the social sciences, *how* a study is conducted is at least as important as the subject of the study and the outcomes and results that are reported,⁶⁹² and recent general commentary on empirical research has questioned the increasing attention being given to research results without consideration of how results have been achieved.⁶⁹³ The use of unreliable empirical methods has also been questioned in specific relation to mediation research.⁶⁹⁴ Taking into account that having access to what the researchers actually did makes it easier to understand a study's reported results,⁶⁹⁵ the systematic appraisal is conducted in anticipation of finding some insights into potential systemic constraints on mediation research and identifying methodological approaches that might be of use into the future.

⁶⁹² Druckman, D., and W. Donohue, 'Innovations in Social Science Methodologies: An Overview' (2020) 64(1) *American Behavioural Scientist* 3.

⁶⁹³ Bishop, D. V. M., 'The Psychology of Experimental Psychologists: Overcoming Cognitive Constraints to Improve Research: The 47th Sir Frederick Bartlett Lecture' (2019) 73(1) *Quarterly Journal of Experimental Psychology* 1; Hahn, U., C. Merdes, M. von Sydow, 'How Good is Your Evidence and How Would You Know?' (2018) 10 *Topics in Cognitive Science* 660; Ioannidis, J. P. A., M. R. Munafò, P. Fusar-Poli, B. A. Nosek, and S. P. David, 'Publication and Other Reporting Biases in Cognitive Sciences: Detection, Prevalence, and Prevention' (2014) 18(5) *Trends in Cognitive Sciences* 235; John, L. K., G. Loewenstein, and D. Prelec, 'Measuring the Prevalence of Questionable Research Practices with Incentives for Truth Telling' (2012) 23(5) *Psychological Science* 524.

⁶⁹⁴ Weiner, G., 'A Call for Evidence-based Standards for Mediator Quality' (2012) *Professional Standards and Ethics*, *Unpublished Paper*, Paper 2, available on <<http://www.civiljustice.info/profstan/2>>.

⁶⁹⁵ Greenhalgh, T., *How to Read a Paper: The Basics of Evidence-Based Medicine* (5th Edition, Wiley and BMJ Books, UK, 2014); Horsburgh, D., 'Evaluation of Qualitative Research' (2003) 12 *Journal of Clinical Nursing* 307.

5.0. Terms, aims, and findings

5.0.1. Terms used in the systematic appraisal

Throughout Chapters Five, Six, and Seven, the following terms are used.

Study participants are described as:

- Mediator participants (all mediators who participate in the selected studies); and
- Non-mediator participants (all participants in the selected studies who do not participate as mediators); the non-mediator participants include disputants, disputants' lawyers and advisers, disputants' representatives – including management and union representatives in labour/management mediations – and other participants such as experts, and support people).

“The researchers” refers to the authors and co-authors of the selected studies, unless specified otherwise.

“The studies” or “the selected studies” refers to the 47 selected studies described in the selected studies, unless specified otherwise.

“Data” and “research data”: within the selected studies, some researchers collect data that is not included in their data analysis (eg researchers may access the records of a mediation program to access contact details for potential study participants, and although the details may constitute study data, they are not included in any analysis). “Research data” refers to information that researchers are reported to have collected for inclusion in their data analysis.

5.0.2 Systematic appraisal: Aims and findings

Aims

Two distinguishing characteristics of the selected studies is their limited consideration of mediator effectiveness,⁶⁹⁶ and their consistently positive findings about mediation, despite the studies being conducted in diverse settings, over a period of more than 40 years. This suggests that systemic issues might affect mediation research that involves empirical studies. In Chapter Seven, a targeted review of constraints that are reported to affect mediation research confirms that many are in fact systemic. For example, researchers acknowledge they have access to only a limited range of populations for their studies; that funding restrictions limit the scope of what they can do; that, in general, the field has limited research skills; and access to mediation is limited by the mediation's own confidentiality restrictions.⁶⁹⁷ In addition, many of the selected studies are published in journals and books where imposed publication restrictions may lead to the exclusion of key methodological information – or researchers themselves may consider that inclusion of such material is not useful – reducing any emphasis on its importance.⁶⁹⁸

If there are likely to be systemic issues constraining mediation research, and, in particular, empirical studies of mediation, systematic appraisal is a useful approach for exploring what they might be. For this reason, the systematic appraisal has two aims:

3. To ascertain whether there are systemic issues affecting the validity of the findings described in the 47 selected studies; and
4. If there are systemic issues, to identify them.

Findings

The appraisal findings are reported in Chapter Seven and are not unexpected. They have much in common with concerns expressed by commentators in the mediation and DR literature

⁶⁹⁶ See Chapter Three for analysis of the concept of “effectiveness” in the selected studies; see Chapter Four for analysis of key terminologies and units of analysis in the selected studies.

⁶⁹⁷ See Chapter Five.

⁶⁹⁸ Issues relevant to publication limitations are considered in Chapter Seven.

about research approaches and methodologies,⁶⁹⁹ about the lack of clarity in key concepts and units of analysis,⁷⁰⁰ and the range of constraints on mediation research.⁷⁰¹

There is an extensive literature exploring the problems inherent to qualitative empirical research methodologies, and commentators have considered a range of alternative approaches designed to overcome the problems while taking into account the essential dynamism of such investigations.⁷⁰² Potential alternative approaches relevant to mediation research are a key focus of Chapter Eight.

5.0.3. Chapter Five: Aims and findings

Aims

The reliability of research results and findings is paramount to any assessment of their contribution to knowledge in any field. In reporting Part One of the systematic appraisal, this Chapter analyses the selected studies' choice of mediator and non-mediator participants, and their contributions to the reliability of the research results and findings. It is directed at four questions:

- i. Who are the mediator and non-mediator participants, and how they were selected for study inclusion?;
- ii. How representative are the study participants of the population that attends or conducts mediation?;

⁶⁹⁹ For example, see Druckman, D., and W. Donohue, 'Innovations in Social Science Methodologies: An Overview' (2020) 64(1) *American Behavioral Scientist* 3; Druckman, D., and J. A. Wall, 'A Treasure Trove of Insights: Sixty Years of JCR Research on Negotiation and Mediation' (2017) 61(9) *Journal of Conflict Resolution* 1898; Weiner, G., 'A Call for Evidence-based Standards for Mediator Quality' (2012) *Professional Standards and Ethics*, *Unpublished Paper*, Paper 2, available on <<http://www.civiljustice.info/profstan/2>>.

⁷⁰⁰ For example, see Kovach, K. K., 'The Mediation Coma: Purposeful or Problematic?' (2014) 16(3) *Cardozo Journal of Conflict Resolution* 755; Menkel-Meadow, C., 'Empirical Studies of ADR: The Baseline Problem of What ADR is and What it is Compared To' in P. Cane, and H. Kritzer (eds), *The Oxford Handbook of Empirical Legal Research* (Oxford University Press, UK, 2010), available on <<http://ssrn.com/abstract=1485563>>.

⁷⁰¹ See Chapter Seven.

⁷⁰² Mauthner, N. S., 'A Posthumanist Ethics of Mattering: New Materialisms and the Ethical Practice of Inquiry' in R. Iphofen and M. Tolich (eds), *The SAGE Handbook of Qualitative Research Ethics* (SAGE Publishing, UK, 2018).

- iii. How well do the mediator and non-mediator participants suit each study's stated purpose?; and
- iv. What is the capacity of mediator and non-mediator participants to fulfil their designated research roles, and provide the required information?

Key findings

There are four key findings from the appraisal of the representativeness, suitability, and capacity of mediator and non-mediator participants in the selected studies.

- i. Researchers generally include very limited information about mediator and non-mediator participants in their studies, and a little less than half the studies do not include information about the processes and procedures for the selection of study participants;
- iii. According to the available information in the studies, the study participants (mediator and non-mediator) may not be representative of the population that typically conducts or attends mediation;
- iv. Within the selected studies, mediator and non-mediator participants have a variety of knowledge and experience about mediation and thus a variety of capacities to provide the information required by the researchers; however, these capacities appear not to have been taken into account in the allocation of research roles; and
- v. Based on the limited information provided in the studies, the appraisal of participant capacity suggests that the selected study participants (mediator and non-mediator) were unlikely to be well-suited to the study purpose in many of the studies and may not have had the capacity to consistently provide credible research data.

5.0.4. Brief findings: research design, and study purpose

The majority of the selected studies include some description of their research design, although this is not always clearly differentiated. It is uncommon for there to be clear linkages between research design and the selection of study participants and/or the choice of data collection and analysis methods. The studies include very little recognition of the various design factors/components that might have influenced the behaviour of study participants (mediator and non-mediator), and their responses in surveys and interviews.

Research Design

In qualitative research, research design encompasses all aspects of a study, including its purpose (what the researcher set out to investigate), its participants, its data collection methods and analysis methods, and how each component contributes to the results and findings. A clear description of the research design enables a reader to understand what the researchers did, and why they did it. Both the study objectives and the research design contribute to the overall reliability of its results and findings.⁷⁰³ The research design is a guide for tracking the study's internal coherence, or consistency (ie that the study purpose, the participants, the data collection, and the data analysis are all suited to each other).⁷⁰⁴

In all qualitative research, it is important for researchers to acknowledge any limitations – including those created by the complex relationship between the researchers and the participants. When a study is well documented, and transparent, its findings are more trustworthy; it can also become a guide for other researchers.⁷⁰⁵

⁷⁰³ Freeman, M., K. deMarrais, J. Preissle, K. Roulston, and E. A. St Pierre, 'Standards of Evidence in Qualitative Research: An Incitement to Discourse' (2007) 36(1) *Educational Researcher* 25.

⁷⁰⁴ Bansal, P., W. K. Smith, and E. Vaara, 'From the Editors: New Ways of Seeing Through Qualitative Research' (2018) 61(4) *Academy of Management Journal* 1189, 1193.

⁷⁰⁵ Freeman, M., K. deMarrais, J. Preissle, K. Roulston, and E. A. St Pierre, 'Standards of Evidence in Qualitative Research: An Incitement to Discourse' (2007) 36(1) *Educational Researcher* 25.

There can be many reasons researchers do not include a description of their research design or a statement of their study purpose, including publication word limits and confidentiality;⁷⁰⁶ or that the relevant document is unpublished⁷⁰⁷. Without additional information, in relation to the selected studies, it is not possible to know the limitations that might have influenced researcher decisions about how to report their studies.

Study purpose

79% (n = 37) of the selected studies include a workable description of their research design and their study's purpose.^{708 709} Six of the studies include neither (ie no description of research

⁷⁰⁶ Reybold, L. E., J. D. Hammert, and S. M. Stribling, 'Participant Selection as a Conscious Research Method: Thinking Forward and the Deliberation of "Emergent" Findings' (2012) 13(6) *Qualitative Research* 699.

⁷⁰⁷ In the selected studies, McEwen, C. A., *An Evaluation of the ADR Pilot Project: Final Report 1* (Unpublished report, 1992); Wissler, R. L., *Trapping the Data: An Assessment of Domestic Relations Mediation in Maine and Ohio Courts* (Unpublished report, 1999).

⁷⁰⁸ By "workable" is meant both clear statements and statements that can be readily deciphered; it does not include unclear statements whose meaning cannot be deciphered.

⁷⁰⁹ Alberts, J. K., B. L. Heisterkamp, and R. M. McPhee, 'Disputant Perceptions of and Satisfaction with a Community Mediation Program' (2005) 16(3) *The International Journal of Conflict Management* 218; Burrell, N. A., W. A. Donohue, and M. Allen, 'The Impact of Disputants' Expectations on Mediation, Testing an Interventionist Model' (1990) Fall 1990 *Human Communication Research* 104; Carnevale, P. J. D., and R. Peggnetter, 'The Selection of Mediator Tactics in Public Sector Disputes: A Contingency Analysis' (1985) 41(2) *Journal of Social Issues* 2; Gale, J., R. L. Mowery, M. S. Herrman, and N. L. Hollett, 'Considering Effective Divorce Mediation: Three Potential Factors' (2002) 19(4) *Conflict Resolution Quarterly* 389; Goldberg, S. B., and M. L. Shaw, 'Further Investigation into the Secrets of Successful and Unsuccessful Mediators' (2008) 26(8) *Alternatives to the High Cost of Litigation* 149; Henderson, D. A., 'Mediation Success: An Empirical Analysis' (1996) 11(1) *Ohio State Journal on Dispute Resolution* 105; Hiltrop, J. M., 'Factors Associated with Successful Labor Mediation' in K. Kressel and D. G. Pruitt (eds), *Mediation Research: The Process and Effectiveness of Third-Party Intervention* (Jossey-Bass, USA, 1989); Jones, T. S., 'Lag Sequential Analyses of Mediator-Spouse and Husband-Wife Interaction in Successful and Unsuccessful Divorce Mediation' in M. A. Rahim (ed), *Managing Conflict: An Interdisciplinary Approach* (Praeger, USA, 1989); Karim, A. and D. Diltz, 'Determinants of Mediation Success in the Iowa Public Sector' (1990) 19(2) *Journal of Collective Negotiations* 129; Karim, A. and R. Peggnetter, 'Mediator Strategies and Qualities and Mediation Effectiveness' (1983) 22(1) *Industrial Relations* 105; Kimsey, W. D., R. M. Fuller, A. J. Bell, and B. C. McKinney, 'The Impact of Mediator Strategic Choices: An Experimental Study' (1994) 12(1) *Mediation Quarterly* 89; Kimsey, W. D., R. M. Fuller, and B. C. McKinney, 'Mediator Listening, Dispute Reframing, and Mediation Outcome: A Pilot Study' (1993) 7(1) *Journal of the International Listening Association* 74; Kochan, T. A., and T. Jick, 'The Public Sector Mediation Process: A Theory and Empirical Examination' (1978) 22(2) *The Journal of Conflict Resolution* 209; Kressel, K., 'How Do Mediators Decide What To Do? Implicit Schemas of Practice and Mediator Decisionmaking' (2013) 28(3) *Ohio State Journal on Dispute Resolution* 709; Kressel, K., E. A. Frontera, S. Forlenza, F. Butler, and L. Fish, 'The Settlement-Orientation vs the Problem-Solving Style' (1994) 50(1) *Journal of Social Issues* 67; Kressel, K., T. Henderson, W. Reich, and C. Cohen, 'Multi-Dimensional Analysis of Conflict Mediator Style' (2012) 30(2) *Conflict Resolution Quarterly* 135; Mareschal, P. M., 'What Makes Mediation Work? Perspectives on Resolving Disputes' (2005) 44(3) *Industrial Relations* 509; McDermott, E. P., and R. Obar, "'What's Going On" in Mediation: An Empirical Analysis of the Influence of a Mediator's Style on Party Satisfaction and Monetary Benefit' (2004) 9 *Harvard Negotiation Law Review* 75; McGillicuddy, N. B., G. L. Welton, and D. G. Pruitt, 'Third-

design and no clear or decipherable statement of study purpose).⁷¹⁰ Four of the studies include a workable statement of purpose *without* a clear description of their research design.⁷¹¹

87% (n = 41) of the studies include a statement of purpose, and the purposes can be summarised as follows (in order of frequency).

Party Intervention: A Field Experiment Comparing Three Different Models' (1987) 53(1) *Journal of Personality and Social Psychology* 104; Posthuma, R. A., A. Richard, J. B. Dworkin, and M. S. Swift, 'Mediator Tactics and Sources of Conflict: Facilitating and Inhibiting Effects' (2002) 41(1) *Industrial Relations* 94; Pruitt, D. G., R. S. Peirce, N. B. McGillicuddy, G. L. Welton, and L. Castrianno, 'Long-Term Success in Mediation' (1993) 17(3) *Law and Human Behavior* 313; Shapiro, D., R. Drieghe, and J. Brett, 'Mediator Behavior and the Outcomes of Mediation' (1985) 41(2) *Journal of Social Issues* 101; Slaikeu, K. A., R. Culler, J. Pearson, and N. Thoennes, 'Process and Outcome in Divorce Mediation' (1985) 10 *Mediation Quarterly* 55; Sourdin, T., *Dispute Resolution Processes for Credit Consumers* (Project Report, Conflict Resolution Research Centre, La Trobe University, 2007); Sourdin, T., *Mediation in the Supreme and County Courts of Victoria* (Report prepared for the Department of Justice, Victoria, Australia, April 2009), available on <<http://www.civiljustice.info/adreval/1/>>; Sourdin, T., *Exploring Pre-Action Requirements: Resolving Disputes Outside Courts* (ACJI, Monash University, October 2012); Sourdin, T., and T. Matruglio, *Evaluating Mediation – New South Wales Settlement Scheme 2002* (2004) *Mediation*. Paper 7, available on <<http://www.civiljustice.info/med/7>>; Swaab, R. I., *Face First: Pre-Mediation Caucus and Face in Employment Disputes* (Presentation, Annual Association of Conflict Management Conference, June 2009); Swaab, R. I., and J. Brett, *Caucus with Care: The Impact of Pre-Mediation Caucuses on Conflict Resolution* (Meetings Paper, International Association of Conflict Management, 2007); Thoennes, N. A., and J. Pearson, 'Predicting Outcomes in Divorce Mediation: The Influence of People and Process' (1985) 41(2) *Journal of Social Issues* 115; Vanderkooi, L., and J. Pearson, 'Mediating Divorce Disputes: Mediator Behaviors, Styles and Roles' (1983) 32(4) *Family Relations* 557; Wall, J. A., Jr, and S. Chan-Serafin, 'Processes in Civil Case Mediations' (2009) 26(3) *Conflict Resolution Quarterly* 261; Wall, J. A., Jr, and S. Chan-Serafin, 'Processes in Civil Case Mediations' (2009) 26(3) *Conflict Resolution Quarterly* 261; Wall, J. A., Jr, and D. E. Rude, 'The Judge as a Mediator' (1991) 76(1) *Journal of Applied Psychology* 54; Welton, G. L., and D. G. Pruitt, 'The Mediation Process: The Effects of Mediator Bias and Disputant Power' (1987) 13(1) *Personality and Social Psychology Bulletin* 123; Welton, G. L., D. G. Pruitt, and N. B. McGillicuddy, 'The Role of Caucusing in Community Mediation' (1988) 32(1) *The Journal of Conflict Resolution* 181; Wissler, R. L., 'Mediation and Adjudication in Small Claims Court: The Effects of Process and Case Characteristics' (1995) 29(2) *Law & Society Review* 323; Zubeck, J. M., D. G. Pruitt, R. S. Peirce, N. B. McGillicuddy, and H. Syna, 'Disputant and Mediator Behaviors Affecting Short-Term Success in Mediation' (1992) 36(3) *Journal of Conflict Resolution* 546.

⁷¹⁰ Bingham, L. B., 'Transformative Mediation in the United States Postal Service' (2012) 5(4) *Negotiation and Conflict Management Research* 354; Dilts, D. A. and A. Karim, 'The Effect of Mediators' Qualities and Strategies on Mediation Outcomes' (1990) 45(1) *Relations Industrielles/Industrial Relations* 22; Peebles, R., C. Harris, and T. Metzloff, 'Following the Script: An Empirical Analysis of Court-Ordered Mediation of Medical Malpractice Cases' (2007) 2007(1) *Journal of Dispute Resolution* 101; Wall, J. A., Jr, and S. Chan-Serafin, 'Do Mediators Walk Their Talk in Civil Cases?' (2010) 28(1) *Conflict Resolution Quarterly* 3; Welton, G. L., D. G. Pruitt, N. B. McGillicuddy, C. A. Ippolito, and J. M. Zubeck, 'Antecedents and Characteristics of Caucusing in Community Mediation' (1992) 3(4) *International Journal of Conflict Management* 303; Wissler, R. L., *Trapping the Data: An Assessment of Domestic Relations Mediation in Maine and Ohio Courts* (Unpublished report, 1999).

⁷¹¹ McEwen, C. A., *An Evaluation of the ADR Pilot Project: Final Report 1* (Unpublished report, 1992); Pruitt, D. G., W. R. Fry, L. Castrianno, J. Zubeck, G. L. Welton, N. B. McGillicuddy, and C. Ippolito, 'The Process of Mediation: Caucusing, Control, and Problem Solving' in M. A. Rahim (ed), *Managing Conflict: An Interdisciplinary Approach* (Praeger, USA, 1989); Wissler, R. L., 'Mediation and Adjudication in Small Claims Court: The Effects of Process and Case Characteristics' (1995) 29(2) *Law & Society Review* 323; Woodward, J. G., 'Settlement Week: Measuring the Promise' (1990) 11 *Northern Illinois University Law Review* 1.

1. Twenty of the studies' purposes are related to the effectiveness of mediation or of the mediator (including style comparisons);⁷¹²
2. Eleven of the studies' purposes are related to what mediator participants say and do, and what influences their choices;⁷¹³

⁷¹² Gale, J., R. L. Mowery, M. S. Herrman, and N. L. Hollett, 'Considering Effective Divorce Mediation: Three Potential Factors' (2002) 19(4) *Conflict Resolution Quarterly* 389; Goldberg, S. B., and M. L. Shaw, 'Further Investigation into the Secrets of Successful and Unsuccessful Mediators' (2008) 26(8) *Alternatives to the High Cost of Litigation* 149; Henderson, D. A., 'Mediation Success: An Empirical Analysis' (1996) 11(1) *Ohio State Journal on Dispute Resolution* 105; Karim, A. and R. Pegnetter, 'Mediator Strategies and Qualities and Mediation Effectiveness' (1983) 22(1) *Industrial Relations* 105; Kimsey, W. D., R. M. Fuller, and B. C. McKinney, 'Mediator Listening, Dispute Reframing, and Mediation Outcome: A Pilot Study' (1993) 7(1) *Journal of the International Listening Association* 74; Mareschal, P. M., 'What Makes Mediation Work? Perspectives on Resolving Disputes' (2005) 44(3) *Industrial Relations* 509; McDermott, E. P., and R. Obar, "'What's Going On" in Mediation: An Empirical Analysis of the Influence of a Mediator's Style on Party Satisfaction and Monetary Benefit' (2004) 9 *Harvard Negotiation Law Review* 75; McEwen, C. A., *An Evaluation of the ADR Pilot Project: Final Report 1* (Unpublished report, 1992); McGillicuddy, N. B., G. L. Welton, and D. G. Pruitt, 'Third-Party Intervention: A Field Experiment Comparing Three Different Models' (1987) 53(1) *Journal of Personality and Social Psychology* 104; Pruitt, D. G., R. S. Peirce, N. B. McGillicuddy, G. L. Welton, and L. Castrianno, 'Long-Term Success in Mediation' (1993) 17(3) *Law and Human Behavior* 313; Sourdin, T., *Dispute Resolution Processes for Credit Consumers* (Project Report, Conflict Resolution Research Centre, La Trobe University, 2007); Sourdin, T., *Mediation in the Supreme and County Courts of Victoria* (Report prepared for the Department of Justice, Victoria, Australia, April 2009), available on <<http://www.civiljustice.info/adreval/1/>>; Sourdin, T., *Exploring Pre-Action Requirements: Resolving Disputes Outside Courts* (ACJI, Monash University, October 2012); Sourdin, T., and T. Matruglio, *Evaluating Mediation – New South Wales Settlement Scheme 2002* (2004) *Mediation*. Paper 7, available on <<http://www.civiljustice.info/med/7>>; Swaab, R. I., *Face First: Pre-Mediation Caucus and Face in Employment Disputes* (Presentation, Annual Association of Conflict Management Conference, June 2009); Swaab, R. I., and J. Brett, *Caucus with Care: The Impact of Pre-Mediation Caucuses on Conflict Resolution* (Meetings Paper, International Association of Conflict Management, 2007); Thoennes, N. A., and J. Pearson, 'Predicting Outcomes in Divorce Mediation: The Influence of People and Process' (1985) 41(2) *Journal of Social Issues* 115; Wissler, R. L., 'Mediation and Adjudication in Small Claims Court: The Effects of Process and Case Characteristics' (1995) 29(2) *Law & Society Review* 323; Woodward, J. G., 'Settlement Week: Measuring the Promise' (1990) 11 *Northern Illinois University Law Review* 1; Zubeck, J. M., D. G. Pruitt, R. S. Peirce, N. B. McGillicuddy, and H. Syna, 'Disputant and Mediator Behaviors Affecting Short-Term Success in Mediation' (1992) 36(3) *Journal of Conflict Resolution* 546.

⁷¹³ Carnevale, P. J. D., and R. Pegnetter, 'The Selection of Mediator Tactics in Public Sector Disputes: A Contingency Analysis' (1985) 41(2) *Journal of Social Issues* 2; Hiltrop, J. M., 'Factors Associated with Successful Labor Mediation' in K. Kressel and D. G. Pruitt (eds), *Mediation Research: The Process and Effectiveness of Third-Party Intervention* (Jossey-Bass, USA, 1989) (study 2); Jones, T. S., 'Lag Sequential Analyses of Mediator-Spouse and Husband-Wife Interaction in Successful and Unsuccessful Divorce Mediation in M. A. Rahim (ed), *Managing Conflict: An Interdisciplinary Approach* (Praeger, USA, 1989); Kressel, K., 'How Do Mediators Decide What To Do? Implicit Schemas of Practice and Mediator Decisionmaking' (2013) 28(3) *Ohio State Journal on Dispute Resolution* 709; Kressel, K., E. A. Frontera, S. Forlenza, F. Butler, and L. Fish, 'The Settlement-Oriented vs the Problem-Solving Style' (1994) 50(1) *Journal of Social Issues* 67; Kressel, K., T. Henderson, W. Reich, and C. Cohen, 'Multi-Dimensional Analysis of Conflict Mediator Style' (2012) 30(2) *Conflict Resolution Quarterly* 135; Pruitt, D. G., W. R. Fry, L. Castrianno, J. Zubeck, G. L. Welton, N. B. McGillicuddy, and C. Ippolito, 'The Process of Mediation: Caucusing, Control, and Problem Solving' in M. A. Rahim (ed), *Managing Conflict: An Interdisciplinary Approach* (Praeger, USA, 1989); Shapiro, D., R. Drieghe, and J. Brett, 'Mediator Behavior and the Outcomes of Mediation' (1985) 41(2) *Journal of Social Issues* 101; Slaikeu, K. A., R. Culler, J. Pearson, and N. Thoennes, 'Process and Outcome in Divorce Mediation' (1985) 10 *Mediation Quarterly* 55; Vanderkooi, L., and J. Pearson, 'Mediating Divorce Disputes: Mediator Behaviors, Styles and Roles' (1983) 32(4) *Family*

3. Five of the studies' purposes are related to mediator influence;⁷¹⁴
4. Five of the studies' purposes are related to participant perceptions of fairness and satisfaction (process and mediator);⁷¹⁵
5. Two of the studies' purposes are related to the influence of non-mediator participant expectations;⁷¹⁶ and
6. Two of the studies' purposes are related to the influence of mediation context.⁷¹⁷

Relations 557; Welton, G. L., D. G. Pruitt, and N. B. McGillicuddy, 'The Role of Caucusing in Community Mediation' (1988) 32(1) *The Journal of Conflict Resolution* 181.

⁷¹⁴ Hiltrop, J. M., 'Factors Associated with Successful Labor Mediation' in K. Kressel and D. G. Pruitt (eds), *Mediation Research: The Process and Effectiveness of Third-Party Intervention* (Jossey-Bass, USA, 1989) (study 1); Kimsey, W. D., R. M. Fuller, A. J. Bell, and B. C. McKinney, 'The Impact of Mediator Strategic Choices: An Experimental Study' (1994) 12(1) *Mediation Quarterly* 89; Wall, J. A., Jr, and S. Chan-Serafin, 'Processes in Civil Case Mediations' (2009) 26(3) *Conflict Resolution Quarterly* 261; Wall, J. A., Jr, and D. E. Rude, 'The Judge as a Mediator' (1991) 76(1) *Journal of Applied Psychology* 54; Welton, G. L., and D. G. Pruitt, 'The Mediation Process: The Effects of Mediator Bias and Disputant Power' (1987) 13(1) *Personality and Social Psychology Bulletin* 123.

⁷¹⁵ Alberts, J. K., B. L. Heisterkamp, and R. M. McPhee, 'Disputant Perceptions of and Satisfaction with a Community Mediation Program' (2005) 16(3) *The International Journal of Conflict Management* 218; Sourdin, T., Dispute Resolution Processes for Credit Consumers (Project Report, Conflict Resolution Research Centre, La Trobe University, 2007); Sourdin, T., and T. Matruglio, *Evaluating Mediation – New South Wales Settlement Scheme 2002* (2004) *Mediation*. Paper 7, available on <<http://www.civiljustice.info/med/7>>; Wissler, R. L., 'Mediation and Adjudication in Small Claims Court: The Effects of Process and Case Characteristics' (1995) 29(2) *Law & Society Review* 323; Woodward, J. G., 'Settlement Week: Measuring the Promise' (1990) 11 *Northern Illinois University Law Review* 1.

⁷¹⁶ Burrell, N. A., W. A. Donohue, and M. Allen, 'The Impact of Disputants' Expectations on Mediation, Testing an Interventionist Model' (1990) Fall 1990 *Human Communication Research* 104; Karim, A. and D. Dilts, 'Determinants of Mediation Success in the Iowa Public Sector' (1990) 19(2) *Journal of Collective Negotiations* 129.

⁷¹⁷ Kochan, T. A., and T. Jick, 'The Public Sector Mediation Process: A Theory and Empirical Examination' (1978) 22(2) *The Journal of Conflict Resolution* 209; Posthuma, R. A., A. Richard, J. B. Dworkin, and M. S. Swift, 'Mediator Tactics and Sources of Conflict: Facilitating and Inhibiting Effects' (2002) 41(1) *Industrial Relations* 94.

Eight of the studies are evaluations of mediation program/services⁷¹⁸ and, of those, six include a workable statement of purpose, or objectives, for their evaluation.⁷¹⁹ As would be expected, all six include that their purpose is to evaluate various facets of the effectiveness of their programs/services, and they have been included in Item 1, above;⁷²⁰ however, three include an additional purpose related to non-mediator participant perceptions of fairness and satisfaction. These three have been included in item 4, above.

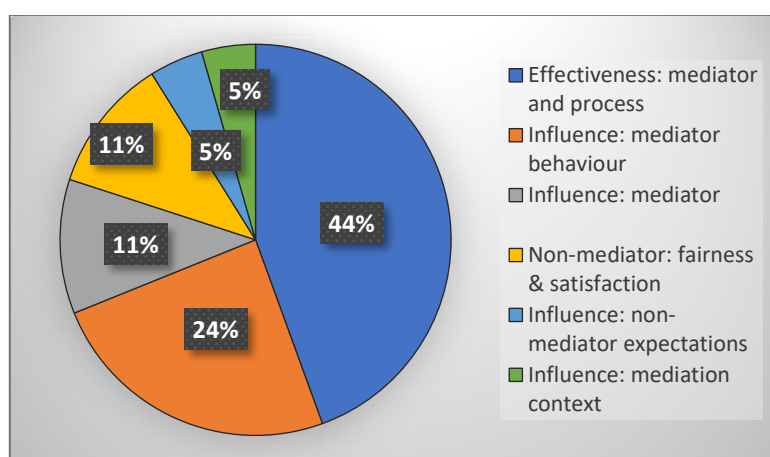


Figure 5.1. Study purpose.

⁷¹⁸ Bingham, L. B., 'Transformative Mediation in the United States Postal Service' (2012) 5(4) *Negotiation and Conflict Management Research* 354; McEwen, C. A., *An Evaluation of the ADR Pilot Project: Final Report 1* (Unpublished report, 1992); Sourdin, T., *Dispute Resolution Processes for Credit Consumers* (Project Report, Conflict Resolution Research Centre, La Trobe University, 2007); Sourdin, T., *Mediation in the Supreme and County Courts of Victoria* (Report prepared for the Department of Justice, Victoria, Australia, April 2009), available on <<http://www.civiljustice.info/adreval/1/>>; Sourdin, T., *Exploring Pre-Action Requirements: Resolving Disputes Outside Courts* (ACJI, Monash University, October 2012); Sourdin, T., and T. Matruglio, *Evaluating Mediation – New South Wales Settlement Scheme 2002* (2004) *Mediation*. Paper 7, available on <<http://www.civiljustice.info/med/7/>>; Wissler, R. L., *Trapping the Data: An Assessment of Domestic Relations Mediation in Maine and Ohio Courts* (Unpublished report, 1999); Woodward, J. G., 'Settlement Week: Measuring the Promise' (1990) 11 *Northern Illinois University Law Review* 1.

⁷¹⁹ McEwen, C. A., *An Evaluation of the ADR Pilot Project: Final Report 1* (Unpublished report, 1992); Sourdin, T., *Dispute Resolution Processes for Credit Consumers* (Project Report, Conflict Resolution Research Centre, La Trobe University, 2007); Sourdin, T., *Mediation in the Supreme and County Courts of Victoria* (Report prepared for the Department of Justice, Victoria, Australia, April 2009), available on <<http://www.civiljustice.info/adreval/1/>>; Sourdin, T., *Exploring Pre-Action Requirements: Resolving Disputes Outside Courts* (ACJI, Monash University, October 2012); Sourdin, T., and T. Matruglio, *Evaluating Mediation – New South Wales Settlement Scheme 2002* (2004) *Mediation*. Paper 7, available on <<http://www.civiljustice.info/med/7/>>; Woodward, J. G., 'Settlement Week: Measuring the Promise' (1990) 11 *Northern Illinois University Law Review* 1.

⁷²⁰ For example, evaluation of the efficiency of the program as well as its effectiveness; the influence of case complexity on effectiveness; and the rate of usage of the program/service.

Figure 5.1 shows the study purposes as described in the selected studies. The percentages shown are a proportion of all the studies that include a statement of purpose (n = 41). Most (though not all) studies include a description of their original research purpose/aim (or objective/s); however, there is not always a clear and demonstrable link between that stated purpose and other methodological components, nor a link with the reported research findings.

Research integrity and ethical issues

Overall, ethical issues receive very little recognition in the selected studies, apart from some considerations of confidentiality. The research design, as described, does not routinely include provisions for protecting the rights and dignity of all participants, including mediators and non-mediators. The issue of researcher reflexivity is almost completely absent from the studies: the researchers do not appear to have considered their own roles and the influence they might have in the purpose, design, and conduct of their studies, including any potential effects on the participation, behaviour, and research contributions of mediator and non-mediator participants during the study.

5.1. Appraisal findings: The people

There is a wide range of qualitative approaches and methods that could be appropriate for investigating both what happens during mediation, and what mediators do and say. The selected studies include a relatively narrow selection of methodologies without always clearly describing the reasons behind their choices. It is possible that their choices have been influenced by the preferences of external interest groups such as research funders and supporters (ie resource efficiency) and/or mediation program administrators (ie study results that confirm the program's achievements) and/or publication pressures.⁷²¹

Key concepts

⁷²¹ Chapter Seven includes a targeted review of influences and constraints on mediation research.

The participants are a key data source in an empirical study, and thus are major contributors to the reliability of the study's findings. Participants can affect the reliability of research findings when they are recruited and selected appropriately, and their selection is linked to the purpose of the study. Participants also have the capacity to provide the required information,⁷²² and to present diverse points of view and challenge a hypothesis.⁷²³ Needless to say, it is expected that study participants will usually not include people with vested interests in the outcome of the research.⁷²⁴ This may be difficult to avoid in empirical studies of mediation where participating mediators may have a strong interest in presenting their skills in the most positive light.⁷²⁵ Apart from creating potentially unreliable data, where participants have a vested interest, ethical risks and risks of bias can emerge, which are examined in some detail in Chapters Six and Seven.

The selected studies include mediator and/or non-mediator participants, and some studies also collect research data from non-participants, such as program administrators, court officials, and mediation observers. Broadly speaking, the mediator and non-mediator participants are enlisted into the studies for one or any of three research roles: to report on themselves, to report on other participants (including the mediator), and to report on the subject mediation process. In addition, other participants can be asked to report on them, and, in some studies, mediators and/or disputants are asked to report on the presenting dispute.

Ultimately, researchers expect to have access to a credible body of data for their analysis and on which they rely for reporting on the study's achievement of its purpose. The study participants have credibility that is inherent and personal to them; however, the credibility of their data contributions also relies on the study that has been designed around their participation. Although

⁷²² Horsburgh, D., 'Evaluation of Qualitative Research' (2003) 12 *Journal of Clinical Nursing* 307; Olson, K., 'Ethical Issues in Grounded Theory' in R. Iphofen and M. Tolich (eds), *The SAGE Handbook of Qualitative Research Ethics* (SAGE Publishing, UK, 2018).

⁷²³ Tracy, S. J., 'Qualitative Quality: Eight "Big Tent" Criteria for Excellent Qualitative Research' (2010) 16(10) *Qualitative Inquiry* 837.

⁷²⁴ Maruyama, G., and C. S. Ryan, *Research Methods in Social Relations* (8th Edition, Wiley Blackwell, 2014).

⁷²⁵ Wissler, R. L., *Trapping the Data: An Assessment of Domestic Relations Mediation in Maine and Ohio Courts* (Unpublished report, 1999).

they have subjective and individual perceptions of what is being investigated, and those perceptions might be unexpected, they remain an integral part of the collected research data.

For a reader to be able to assess the justifiability of research results and findings, it is important for researchers to be transparent and include information about what they have done during a study, including information about the participants they selected for the study, and about the roles of researcher and participants during the study.⁷²⁶

5.1.0. Study participants

Methodology

Where study participants are being asked to provide detailed information about the events that have occurred during a mediation, it is preferable for them to be suited to that research role and have the capacity (ie knowledge and experience) to provide the required information. In order to appraise the credibility of the data reported in the selected studies, this chapter assesses the suitability of mediator and non-mediator participants, relying on information about them and their research roles that is provided in the studies themselves.

Eleven studies include mediation observers in the research role of data collection,⁷²⁷ and this appraisal considers them to be study participants whose suitability for the study purpose is included

⁷²⁶ Freeman, M., K. deMarrais, J. Preissle, K. Roulston, and E. A. St Pierre, 'Standards of Evidence in Qualitative Research: An Incitement to Discourse' (2007) 36(1) *Educational Researcher* 25.

⁷²⁷ Bingham, L. B., 'Transformative Mediation in the United States Postal Service' (2012) 5(4) *Negotiation and Conflict Management Research* 354; McGillicuddy, N. B., G. L. Welton, and D. G. Pruitt, 'Third-Party Intervention: A Field Experiment Comparing Three Different Models' (1987) 53(1) *Journal of Personality and Social Psychology* 104; Peebles, R., C. Harris, and T. Metzloff, 'Following the Script: An Empirical Analysis of Court-Ordered Mediation of Medical Malpractice Cases' (2007) 2007(1) *Journal of Dispute Resolution* 101; Pruitt, D. G., W. R. Fry, L. Castrianno, J. Zubeck, G. L. Welton, N. B. McGillicuddy, and C. Ippolito, 'The Process of Mediation: Caucusing, Control, and Problem Solving' in M. A. Rahim (ed), *Managing Conflict: An Interdisciplinary Approach* (Praeger, USA, 1989); Pruitt, D. G., R. S. Peirce, N. B. McGillicuddy, G. L. Welton, and L. Castrianno, 'Long-Term Success in Mediation' (1993) 17(3) *Law and Human Behavior* 313; Vanderkooi, L., and J. Pearson, 'Mediating Divorce Disputes: Mediator Behaviors, Styles and Roles' (1983) 32(4) *Family Relations* 557; Wall, J. A., Jr, and S. Chan-Serafin, 'Processes in Civil Case Mediations' (2009) 26(3) *Conflict Resolution Quarterly* 261; Wall, J. A., Jr, and S. Chan-Serafin, 'Do Mediators Walk Their Talk in Civil Cases?' (2010) 28(1) *Conflict Resolution Quarterly* 3; Welton, G. L., D. G. Pruitt, and N. B. McGillicuddy, 'The Role of

in the assessment. The observer role is important both in data collection activities, and the potential effects on other participants. According to the studies, the observers attended mediations in full and made a written (or electronic) record of everything that was said by the mediator and non-mediator participants. As with other non-mediator participants, they can be expected to have subjective and individual perceptions that inform and influence their data. It is likely that the presence of one or more observers can influence other participants, as can the presence of observation equipment which is reported to have been used in another eight studies.⁷²⁸

Some of the selected studies include useful descriptions of research design and methodological components, and some include only minimal descriptions. Where they include sufficient information, minimal descriptions have been interpreted for this appraisal. For example, some studies mention that the non-mediator participants are those who accessed court-connected mediation coincident with the study⁷²⁹ – this is taken to mean that all the people who typically

Caucusing in Community Mediation' (1988) 32(1) *The Journal of Conflict Resolution* 181; Welton, G. L., D. G. Pruitt, N. B. McGillicuddy, C. A. Ippolito, and J. M. Zubeck, 'Antecedents and Characteristics of Caucusing in Community Mediation' (1992) 3(4) *International Journal of Conflict Management* 303; Zubeck, J. M., D. G. Pruitt, R. S. Peirce, N. B. McGillicuddy, and H. Syna, 'Disputant and Mediator Behaviors Affecting Short-Term Success in Mediation' (1992) 36(3) *Journal of Conflict Resolution* 546.

⁷²⁸ Alberts, J. K., B. L. Heisterkamp, and R. M. McPhee, 'Disputant Perceptions of and Satisfaction with a Community Mediation Program' (2005) 16(3) *The International Journal of Conflict Management* 218; Burrell, N. A., W. A. Donohue, and M. Allen, 'The Impact of Disputants' Expectations on Mediation, Testing an Interventionist Model' (1990) Fall 1990 *Human Communication Research* 104; Gale, J., R. L. Mowery, M. S. Herrman, and N. L. Hollett, 'Considering Effective Divorce Mediation: Three Potential Factors' (2002) 19(4) *Conflict Resolution Quarterly* 389; Jones, T. S., 'Lag Sequential Analyses of Mediator-Spouse and Husband-Wife Interaction in Successful and Unsuccessful Divorce Mediation in M. A. Rahim (ed), *Managing Conflict: An Interdisciplinary Approach* (Praeger, USA, 1989); Kressel, K., 'How Do Mediators Decide What To Do? Implicit Schemas of Practice and Mediator Decisionmaking' (2013) 28(3) *Ohio State Journal on Dispute Resolution* 709; Kressel, K., E. A. Frontera, S. Forlenza, F. Butler, and L. Fish, 'The Settlement-Oriented vs the Problem-Solving Style' (1994) 50(1) *Journal of Social Issues* 67; Kressel, K., T. Henderson, W. Reich, and C. Cohen, 'Multi-Dimensional Analysis of Conflict Mediator Style' (2012) 30(2) *Conflict Resolution Quarterly* 135; Slaikeu, K. A., R. Culler, J. Pearson, and N. Thoennes, 'Process and Outcome in Divorce Mediation' (1985) 10 *Mediation Quarterly* 55.

⁷²⁹ For example, see McGillicuddy, N. B., G. L. Welton, and D. G. Pruitt, 'Third-Party Intervention: A Field Experiment Comparing Three Different Models' (1987) 53(1) *Journal of Personality and Social Psychology* 104; Peebles, R., C. Harris, and T. Metzloff, 'Following the Script: An Empirical Analysis of Court-Ordered Mediation of Medical Malpractice Cases' (2007) 2007(1) *Journal of Dispute Resolution* 101; Pruitt, D. G., W. R. Fry, L. Castrianno, J. Zubeck, G. L. Welton, N. B. McGillicuddy, and C. Ippolito, 'The Process of Mediation: Caucusing, Control, and Problem Solving' in M. A. Rahim (ed), *Managing Conflict: An Interdisciplinary Approach* (Praeger, USA, 1989); Pruitt, D. G., R. S. Peirce, N. B. McGillicuddy, G. L. Welton, and L. Castrianno, 'Long-Term Success in Mediation' (1993) 17(3) *Law and Human Behavior* 313; Slaikeu, K. A., R. Culler, J. Pearson, and N. Thoennes,

access a court or service are the sample population from whom the study participants were selected. Similarly, where studies describe being conducted within the setting of a specific mediation service, this appraisal interprets the sample population as being all the disputing parties who typically access that service.⁷³⁰ For those studies that describe using simulated mediations, and

'Process and Outcome in Divorce Mediation' (1985) 10 *Mediation Quarterly* 55; Sourdin, T., *Mediation in the Supreme and County Courts of Victoria* (Report prepared for the Department of Justice, Victoria, Australia, April 2009), available on <<http://www.civiljustice.info/adreval/1/>>; Swaab, R. I., *Face First: Pre-Mediation Caucus and Face in Employment Disputes* (Presentation, Annual Association of Conflict Management Conference, June 2009); Swaab, R. I., and J. Brett, *Caucus with Care: The Impact of Pre-Mediation Caucuses on Conflict Resolution* (Meetings Paper, International Association of Conflict Management, 2007); Thoennes, N. A., and J. Pearson, 'Predicting Outcomes in Divorce Mediation: The Influence of People and Process' (1985) 41(2) *Journal of Social Issues* 115; Vanderkooi, L., and J. Pearson, 'Mediating Divorce Disputes: Mediator Behaviors, Styles and Roles' (1983) 32(4) *Family Relations* 557; Wall, J. A., Jr, and S. Chan-Serafin, 'Processes in Civil Case Mediations' (2009) 26(3) *Conflict Resolution Quarterly* 261; Wall, J. A., Jr, and S. Chan-Serafin, 'Do Mediators Walk Their Talk in Civil Cases?' (2010) 28(1) *Conflict Resolution Quarterly* 3; Welton, G. L., D. G. Pruitt, and N. B. McGillicuddy, 'The Role of Caucusing in Community Mediation' (1988) 32(1) *The Journal of Conflict Resolution* 181; Welton, G. L., D. G. Pruitt, N. B. McGillicuddy, C. A. Ippolito, and J. M. Zubeck, 'Antecedents and Characteristics of Caucusing in Community Mediation' (1992) 3(4) *International Journal of Conflict Management* 303; Wissler, R. L., 'Mediation and Adjudication in Small Claims Court: The Effects of Process and Case Characteristics' (1995) 29(2) *Law & Society Review* 323; Wissler, R. L., *Trapping the Data: An Assessment of Domestic Relations Mediation in Maine and Ohio Courts* (Unpublished report, 1999); Wissler, R. L., 'Court-Connected Mediation in General Civil Cases: What We Know from Empirical Research' (2002) 17(3) *Ohio State Journal on Dispute Resolution* 641; Zubeck, J. M., D. G. Pruitt, R. S. Peirce, N. B. McGillicuddy, and H. Syna, 'Disputant and Mediator Behaviors Affecting Short-Term Success in Mediation' (1992) 36(3) *Journal of Conflict Resolution* 546.

⁷³⁰ For example, see Alberts, J. K., B. L. Heisterkamp, and R. M. McPhee, 'Disputant Perceptions of and Satisfaction with a Community Mediation Program' (2005) 16(3) *The International Journal of Conflict Management* 218; Bingham, L. B., 'Transformative Mediation in the United States Postal Service' (2012) 5(4) *Negotiation and Conflict Management Research* 354; Carnevale, P. J. D., and R. Peggnetter, 'The Selection of Mediator Tactics in Public Sector Disputes: A Contingency Analysis' (1985) 41(2) *Journal of Social Issues* 2; Dilts, D. A. and A. Karim, 'The Effect of Mediators' Qualities and Strategies on Mediation Outcomes' (1990) 45(1) *Relations Industrielles/Industrial Relations* 22; Hiltrop, J. M., 'Factors Associated with Successful Labor Mediation' in K. Kressel and D. G. Pruitt (eds), *Mediation Research: The Process and Effectiveness of Third-Party Intervention* (Jossey-Bass, USA, 1989); Karim, A. and D. Dilts, 'Determinants of Mediation Success in the Iowa Public Sector' (1990) 19(2) *Journal of Collective Negotiations* 129; Karim, A. and R. Peggnetter, 'Mediator Strategies and Qualities and Mediation Effectiveness' (1983) 22(1) *Industrial Relations* 105; Kochan, T. A., and T. Jick, 'The Public Sector Mediation Process: A Theory and Empirical Examination' (1978) 22(2) *The Journal of Conflict Resolution* 209; Kressel, K., E. A. Frontera, S. Forlenza, F. Butler, and L. Fish, 'The Settlement-Oriented vs the Problem-Solving Style' (1994) 50(1) *Journal of Social Issues* 67; Mareschal, P. M., 'What Makes Mediation Work? Perspectives on Resolving Disputes' (2005) 44(3) *Industrial Relations* 509; McDermott, E. P., and R. Obar, "'What's Going On" in Mediation: An Empirical Analysis of the Influence of a Mediator's Style on Party Satisfaction and Monetary Benefit' (2004) 9 *Harvard Negotiation Law Review* 75; McEwen, C. A., *An Evaluation of the ADR Pilot Project: Final Report 1* (Unpublished report, 1992); Posthuma, R. A., A. Richard, J. B. Dworkin, and M. S. Swift, 'Mediator Tactics and Sources of Conflict: Facilitating and Inhibiting Effects' (2002) 41(1) *Industrial Relations* 94; Shapiro, D., R. Drieghe, and J. Brett, 'Mediator Behavior and the Outcomes of Mediation' (1985) 41(2) *Journal of Social Issues* 101; Sourdin, T., *Dispute Resolution Processes for Credit Consumers* (Project Report, Conflict Resolution Research Centre, La Trobe University, 2007); Sourdin, T., *Exploring Pre-Action Requirements: Resolving Disputes Outside Courts* (ACJI, Monash University, October 2012); Sourdin, T., and T. Matruggio, *Evaluating Mediation – New South Wales Settlement Scheme 2002* (2004) *Mediation*. Paper 7, available on <<http://www.civiljustice.info/med/7>>; Woodward, J. G., 'Settlement Week: Measuring the Promise' (1990) 11 *Northern Illinois University Law Review* 1.

include descriptions of students acting as disputants, the interpretation has been that the sample population is university students (unless stated otherwise).⁷³¹ Where study participants are to report what happened during mediation, as well as their own responses to the mediation process, it can be useful to know about the participants' demographics. For example, the perceptions and responses of people from minority ethnic groups or from higher socio-economic settings are likely to be quite different from those who are in majority ethnic groups or from lower socio-economic settings, and it may reduce the value of their data if it is not differentiated during collection and analysis. Very little demographic information is included in the studies about study participants (mediator and non-mediator).⁷³² The processes and procedures for participant selection are included below.⁷³³

All appraisal data included in this chapter is derived from the studies themselves.⁷³⁴

The following sections report on the appraisal of study participants, and consider the selected studies, firstly, in terms of the populations and samples selected from them, and, secondly, in terms of the various participants' research roles in each study.⁷³⁵

⁷³¹ For example, see Burrell, N. A., W. A. Donohue, and M. Allen, 'The Impact of Disputants' Expectations on Mediation, Testing an Interventionist Model' (1990) Fall 1990 *Human Communication Research* 104; Kimsey, W. D., R. M. Fuller, A. J. Bell, and B. C. McKinney, 'The Impact of Mediator Strategic Choices: An Experimental Study' (1994) 12(1) *Mediation Quarterly* 89; Kimsey, W. D., R. M. Fuller, and B. C. McKinney, 'Mediator Listening, Dispute Reframing, and Mediation Outcome: A Pilot Study' (1993) 7(1) *Journal of the International Listening Association* 74; Welton, G. L., and D. G. Pruitt, 'The Mediation Process: The Effects of Mediator Bias and Disputant Power' (1987) 13(1) *Personality and Social Psychology Bulletin* 123.

⁷³² See below at 5.1.2. Demographic representativeness, and 5.1.3. Gender.

⁷³³ See 5.1.6. Participant selection and research roles.

⁷³⁴ One cluster of six studies appear to have used the same dataset as well as at least part of that set's original data analysis; although the studies do cross-reference and cite each other's publications, some descriptions of the data collection methodologies are less detailed than others. All co-authors of the six studies were involved in the original data collection and analysis, although each of the six studies include differing interpretations of the results to inform their own reports. This appraisal does not aggregate the information in the studies, and relies on the methodological information that is provided in each study.

⁷³⁵ Where interpretations are included in the appraisal, they are acknowledged as such, and their basis is explained. Interpretations are not made where researchers have included insufficient information or no information at all.

5.1.1. Population groups

In this appraisal it is acknowledged that the application of generalisability in qualitative research is controversial and has limited applicability in many empirical research contexts, in particular where research data derives from subjective perceptions of events.⁷³⁶ Therefore, the generalisability of study findings is not assessed. However, a number of the selected studies do claim that their findings are generalisable, or suggest that mediators more broadly apply the behaviours described in their study.⁷³⁷ A study's generalisability to any group depends, in large part, on the representativeness of its participant sample, and it is accepted research practice for research objectives, or hypotheses, to specify the broader population to which researchers intend their findings to be relevant, as well as to explain why the specific sample was chosen.⁷³⁸ This practice is not evident in the relevant selected studies.

In studies of mediation, there are almost limitless populations from which participants can be selected – mediation itself has been said to 'play a role in virtually every significant area of social

⁷³⁶ Carminati, L., 'Generalizability in Qualitative Research: A Tale of Two Traditions' (2018) 28(13) *Qualitative Health Research* 2094.

⁷³⁷ For example, see Goldberg, S. B., and M. L. Shaw, 'Further Investigation into the Secrets of Successful and Unsuccessful Mediators' (2008) 26(8) *Alternatives to the High Cost of Litigation* 149; Kimsey, W. D., R. M. Fuller, A. J. Bell, and B. C. McKinney, 'The Impact of Mediator Strategic Choices: An Experimental Study' (1994) 12(1) *Mediation Quarterly* 89; Kressel, K., E. A. Frontera, S. Forlenza, F. Butler, and L. Fish, 'The Settlement-Oriented vs the Problem-Solving Style' (1994) 50(1) *Journal of Social Issues* 67; McDermott, E. P., and R. Obar, "'What's Going On" in Mediation: An Empirical Analysis of the Influence of a Mediator's Style on Party Satisfaction and Monetary Benefit' (2004) 9 *Harvard Negotiation Law Review* 75; Posthuma, R. A., A. Richard, J. B. Dworkin, and M. S. Swift, 'Mediator Tactics and Sources of Conflict: Facilitating and Inhibiting Effects' (2002) 41(1) *Industrial Relations* 94; Pruitt, D. G., R. S. Peirce, N. B. McGillicuddy, G. L. Welton, and L. Castrianno, 'Long-Term Success in Mediation' (1993) 17(3) *Law and Human Behavior* 313; Swaab, R. I., *Face First: Pre-Mediation Caucus and Face in Employment Disputes* (Presentation, Annual Association of Conflict Management Conference, June 2009); Swaab, R. I., and J. Brett, *Caucus with Care: The Impact of Pre-Mediation Caucuses on Conflict Resolution* (Meeting Paper, International Association of Conflict Management, 2007); Wall, J. A., Jr, and S. Chan-Serafin, 'Do Mediators Walk Their Talk in Civil Cases?' (2010) 28(1) *Conflict Resolution Quarterly* 3; Welton, G. L., D. G. Pruitt, and N. B. McGillicuddy, 'The Role of Caucusing in Community Mediation' (1988) 32(1) *The Journal of Conflict Resolution* 181; Zubeck, J. M., D. G. Pruitt, R. S. Peirce, N. B. McGillicuddy, and H. Syna, 'Disputant and Mediator Behaviors Affecting Short-Term Success in Mediation' (1992) 36(3) *Journal of Conflict Resolution* 546.

⁷³⁸ Bryman, A., *Social Research Methods* (5th Edition, Oxford University Press, UK, 2016); Maruyama, G., and C. S. Ryan, *Research Methods in Social Relations* (8th Edition, Wiley Blackwell, 2014).

conflict.⁷³⁹ Research practicalities ensure researchers limit their scope to more manageable proportions and select participants from a population group that is more relevant to the purpose of their study.

In the selected studies, the accessed populations are quite limited, as is consideration of participant representativeness; however, mediation researchers themselves report facing a range of restrictions when accessing potential study participants, including the confidentiality of the mediation process, the limits imposed by funding availability, the influence and preferences of funders and of program/service providers, and the researchers' own skills.⁷⁴⁰

According to descriptions in the forty-seven selected studies (which cover six different contexts of mediation practice,⁷⁴¹ plus simulated mediations), mediator participants were selected from three population groups, and non-mediator participants from six population groups. For both mediators and non-mediators, most of the population groups represent convenience samples (ie all the disputants who accessed a specific program or service during the study period, and all the mediators who conducted those mediations). The nature of a convenience sample assumes participant suitability, and, unlike purposeful selection, cannot consider participant capacity.

Mediator participants

According to the studies, mediator participants were accessed from the following groups:

1. All mediators working with specific programs and services during the study period (n = 34 studies);⁷⁴²

⁷³⁹ Kressel, K., 'The Mediation of Conflict: Context, Cognition, and Practice' in P. T. Coleman, M. Deutsch, and E. C. Marcus (eds), *The Handbook of Conflict Resolution: Theory and Practice* (3rd Edition, Jossey-Bass, USA, 2014) 817.

⁷⁴⁰ Chapter Seven includes a targeted review of the constraints on mediation research, including empirical studies of mediation.

⁷⁴¹ Community, court-connected, family, labour/management, construction/commercial, and structured programs/services.

⁷⁴² Alberts, J. K., B. L. Heisterkamp, and R. M. McPhee, 'Disputant Perceptions of and Satisfaction with a Community Mediation Program' (2005) 16(3) *The International Journal of Conflict Management* 218; Bingham, L. B., 'Transformative Mediation in the United States Postal Service' (2012) 5(4) *Negotiation and Conflict*

Management Research 354; Carnevale, P. J. D., and R. Pagnetter, 'The Selection of Mediator Tactics in Public Sector Disputes: A Contingency Analysis' (1985) 41(2) *Journal of Social Issues* 2; Dilts, D. A. and A. Karim, 'The Effect of Mediators' Qualities and Strategies on Mediation Outcomes' (1990) 45(1) *Relations Industrielles/Industrial Relations* 22; Hiltrop, J. M., 'Factors Associated with Successful Labor Mediation' in K. Kressel and D. G. Pruitt (eds), *Mediation Research: The Process and Effectiveness of Third-Party Intervention* (Jossey-Bass, USA, 1989); Jones, T. S., 'Lag Sequential Analyses of Mediator-Spouse and Husband-Wife Interaction in Successful and Unsuccessful Divorce Mediation in M. A. Rahim (ed), *Managing Conflict: An Interdisciplinary Approach* (Praeger, USA, 1989); Karim, A. and D. Dilts, 'Determinants of Mediation Success in the Iowa Public Sector' (1990) 19(2) *Journal of Collective Negotiations* 129; Karim, A. and R. Pagnetter, 'Mediator Strategies and Qualities and Mediation Effectiveness' (1983) 22(1) *Industrial Relations* 105; Kochan, T. A., and T. Jick, 'The Public Sector Mediation Process: A Theory and Empirical Examination' (1978) 22(2) *The Journal of Conflict Resolution* 209; Kressel, K., T. Henderson, W. Reich, and C. Cohen, 'Multi-Dimensional Analysis of Conflict Mediator Style' (2012) 30(2) *Conflict Resolution Quarterly* 135; McDermott, E. P., and R. Obar, "'What's Going On" in Mediation: An Empirical Analysis of the Influence of a Mediator's Style on Party Satisfaction and Monetary Benefit' (2004) 9 *Harvard Negotiation Law Review* 75; McEwen, C. A., *An Evaluation of the ADR Pilot Project: Final Report 1* (Unpublished report, 1992); McGillicuddy, N. B., G. L. Welton, and D. G. Pruitt, 'Third-Party Intervention: A Field Experiment Comparing Three Different Models' (1987) 53(1) *Journal of Personality and Social Psychology* 104; Peeples, R., C. Harris, and T. Metzloff, 'Following the Script: An Empirical Analysis of Court-Ordered Mediation of Medical Malpractice Cases' (2007) 2007(1) *Journal of Dispute Resolution* 101; Posthuma, R. A., A. Richard, J. B. Dworkin, and M. S. Swift, 'Mediator Tactics and Sources of Conflict: Facilitating and Inhibiting Effects' (2002) 41(1) *Industrial Relations* 94; Pruitt, D. G., W. R. Fry, L. Castrianno, J. Zubeck, G. L. Welton, N. B. McGillicuddy, and C. Ippolito, 'The Process of Mediation: Caucusing, Control, and Problem Solving' in M. A. Rahim (ed), *Managing Conflict: An Interdisciplinary Approach* (Praeger, USA, 1989); Pruitt, D. G., R. S. Peirce, N. B. McGillicuddy, G. L. Welton, and L. Castrianno, 'Long-Term Success in Mediation' (1993) 17(3) *Law and Human Behavior* 313; Shapiro, D., R. Drieghe, and J. Brett, 'Mediator Behavior and the Outcomes of Mediation' (1985) 41(2) *Journal of Social Issues* 101; Slaikou, K. A., R. Culler, J. Pearson, and N. Thoennes, 'Process and Outcome in Divorce Mediation' (1985) 10 *Mediation Quarterly* 55; Sourdin, T., *Dispute Resolution Processes for Credit Consumers* (Project Report, Conflict Resolution Research Centre, La Trobe University, 2007); Sourdin, T., *Mediation in the Supreme and County Courts of Victoria* (Report prepared for the Department of Justice, Victoria, Australia, April 2009), available on <http://www.civiljustice.info/adreval/1/>; Sourdin, T., Exploring Pre-Action Requirements: Resolving Disputes Outside Courts (ACJI, Monash University, October 2012); Sourdin, T., and T. Matruglio, *Evaluating Mediation – New South Wales Settlement Scheme 2002* (2004) *Mediation*. Paper 7, available on <http://www.civiljustice.info/med/7/>; Thoennes, N. A., and J. Pearson, 'Predicting Outcomes in Divorce Mediation: The Influence of People and Process' (1985) 41(2) *Journal of Social Issues* 115; Vanderkooi, L., and J. Pearson, 'Mediating Divorce Disputes: Mediator Behaviors, Styles and Roles' (1983) 32(4) *Family Relations* 557; Wall, J. A., Jr, and S. Chan-Serafin, 'Processes in Civil Case Mediations' (2009) 26(3) *Conflict Resolution Quarterly* 261; Wall, J. A., Jr, and S. Chan-Serafin, 'Do Mediators Walk Their Talk in Civil Cases?' (2010) 28(1) *Conflict Resolution Quarterly* 3; Welton, G. L., D. G. Pruitt, and N. B. McGillicuddy, 'The Role of Caucusing in Community Mediation' (1988) 32(1) *The Journal of Conflict Resolution* 181; Welton, G. L., D. G. Pruitt, N. B. McGillicuddy, C. A. Ippolito, and J. M. Zubeck, 'Antecedents and Characteristics of Caucusing in Community Mediation' (1992) 3(4) *International Journal of Conflict Management* 303; Wissler, R. L., 'Mediation and Adjudication in Small Claims Court: The Effects of Process and Case Characteristics' (1995) 29(2) *Law & Society Review* 323; Wissler, R. L., *Trapping the Data: An Assessment of Domestic Relations Mediation in Maine and Ohio Courts* (Unpublished report, 1999); Wissler, R. L., 'Court-Connected Mediation in General Civil Cases: What We Know from Empirical Research' (2002) 17(3) *Ohio State Journal on Dispute Resolution* 641; Woodward, J. G., 'Settlement Week: Measuring the Promise' (1990) 11 *Northern Illinois University Law Review* 1; Zubeck, J. M., D. G. Pruitt, R. S. Peirce, N. B. McGillicuddy, and H. Syna, 'Disputant and Mediator Behaviors Affecting Short-Term Success in Mediation' (1992) 36(3) *Journal of Conflict Resolution* 546.

2. Mediator professional member organisations (n = 5 studies);^{743 744}
3. In simulated mediations using “simulated” mediators
 - a. University students (n = 3 studies);⁷⁴⁵
 - b. University staff (n = 1 study);⁷⁴⁶
4. Other
 - a. Possibly private mediators (n = 2 studies);⁷⁴⁷ and
 - b. Unknown (n = 2 studies).⁷⁴⁸

⁷⁴³ Henderson, D. A., ‘Mediation Success: An Empirical Analysis’ (1996) 11(1) *Ohio State Journal on Dispute Resolution* 105; Kressel, K., T. Henderson, W. Reich, and C. Cohen, ‘Multi-Dimensional Analysis of Conflict Mediator Style’ (2012) 30(2) *Conflict Resolution Quarterly* 135; Mareschal, P. M., ‘What Makes Mediation Work? Perspectives on Resolving Disputes’ (2005) 44(3) *Industrial Relations* 509; Swaab, R. I., *Face First: Pre-Mediation Caucus and Face in Employment Disputes* (Presentation, Annual Association of Conflict Management Conference, June 2009); Swaab, R. I., and J. Brett, *Caucus with Care: The Impact of Pre-Mediation Caucuses on Conflict Resolution* (Meetings Paper, International Association of Conflict Management, 2007).

⁷⁴⁴ The relevant mediator membership organisations are all based in the US: the American Bar Association – Forum on the Construction Industry; the Federal Mediation and Conciliation Service (FMCS); the Netherlands Mediation Institute; the New Jersey Association of Professional Mediators.

⁷⁴⁵ Burrell, N. A., W. A. Donohue, and M. Allen, ‘The Impact of Disputants’ Expectations on Mediation, Testing an Interventionist Model’ (1990) Fall 1990 *Human Communication Research* 104; Kimsey, W. D., R. M. Fuller, A. J. Bell, and B. C. McKinney, ‘The Impact of Mediator Strategic Choices: An Experimental Study’ (1994) 12(1) *Mediation Quarterly* 89; Welton, G. L., and D. G. Pruitt, ‘The Mediation Process: The Effects of Mediator Bias and Disputant Power’ (1987) 13(1) *Personality and Social Psychology Bulletin* 123.

⁷⁴⁶ Kimsey, W. D., R. M. Fuller, and B. C. McKinney, ‘Mediator Listening, Dispute Reframing, and Mediation Outcome: A Pilot Study’ (1993) 7(1) *Journal of the International Listening Association* 74.

⁷⁴⁷ Gale, J., R. L. Mowery, M. S. Herrman, and N. L. Hollett, ‘Considering Effective Divorce Mediation: Three Potential Factors’ (2002) 19(4) *Conflict Resolution Quarterly* 389 (geographic location); Wall, J. A., Jr, and D. E. Rude, ‘The Judge as a Mediator’ (1991) 76(1) *Journal of Applied Psychology* 54.

⁷⁴⁸ Goldberg, S. B., and M. L. Shaw, ‘Further Investigation into the Secrets of Successful and Unsuccessful Mediators’ (2008) 26(8) *Alternatives to the High Cost of Litigation* 149; Kressel, K., T. Henderson, W. Reich, and C. Cohen, ‘Multi-Dimensional Analysis of Conflict Mediator Style’ (2012) 30(2) *Conflict Resolution Quarterly* 135.

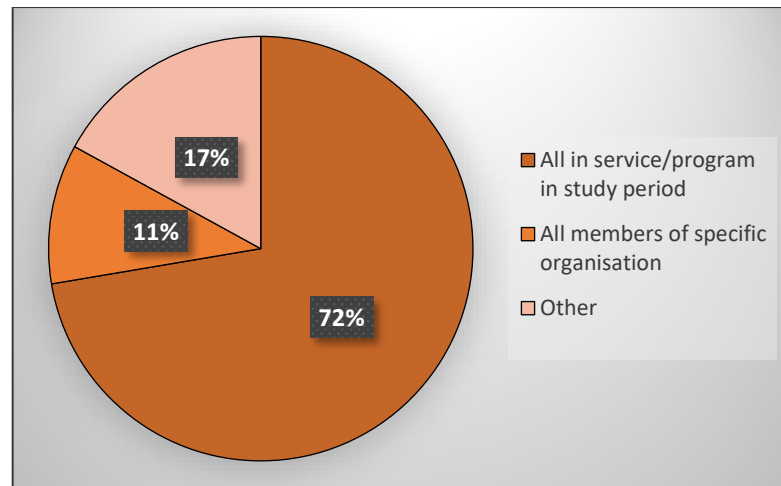


Figure 5.2. Population groups – mediator participants

Figure 5.2 depicts the population groups, as described in the studies from which mediator participants were selected. “Other” includes simulated mediations,⁷⁴⁹ plus two studies which describe using private mediators,⁷⁵⁰ and two studies with unknown mediator populations.⁷⁵¹

Non-mediator participants

According to the studies, non-mediator participants were drawn from all the people who accessed the following programs and services during the study period:⁷⁵²

⁷⁴⁹ Burrell, N. A., W. A. Donohue, and M. Allen, ‘The Impact of Disputants’ Expectations on Mediation, Testing an Interventionist Model’ (1990) Fall 1990 *Human Communication Research* 104; Kimsey, W. D., R. M. Fuller, A. J. Bell, and B. C. McKinney, ‘The Impact of Mediator Strategic Choices: An Experimental Study’ (1994) 12(1) *Mediation Quarterly* 89; Kimsey, W. D., R. M. Fuller, and B. C. McKinney, ‘Mediator Listening, Dispute Reframing, and Mediation Outcome: A Pilot Study’ (1993) 7(1) *Journal of the International Listening Association* 74; Welton, G. L., and D. G. Pruitt, ‘The Mediation Process: The Effects of Mediator Bias and Disputant Power’ (1987) 13(1) *Personality and Social Psychology Bulletin* 123.

⁷⁵⁰ Gale, J., R. L. Mowery, M. S. Herrman, and N. L. Hollett, ‘Considering Effective Divorce Mediation: Three Potential Factors’ (2002) 19(4) *Conflict Resolution Quarterly* 389; Wall, J. A., Jr, and D. E. Rude, ‘The Judge as a Mediator’ (1991) 76(1) *Journal of Applied Psychology* 54.

⁷⁵¹ Goldberg, S. B., and M. L. Shaw, ‘Further Investigation into the Secrets of Successful and Unsuccessful Mediators’ (2008) 26(8) *Alternatives to the High Cost of Litigation* 149; Kressel, K., T. Henderson, W. Reich, and C. Cohen, ‘Multi-Dimensional Analysis of Conflict Mediator Style’ (2012) 30(2) *Conflict Resolution Quarterly* 135.

⁷⁵² One study did not access any non-mediator participants: Wall, J. A., Jr, and D. E. Rude, ‘The Judge as a Mediator’ (1991) 76(1) *Journal of Applied Psychology* 54.

- i. Specific programs and services associated with the legal system (n = 14 studies);⁷⁵³
- ii. Structured, localised labour/management programs (n = 9 studies);⁷⁵⁴
- iii. Specific, localised community-based programs (n = 7 studies);⁷⁵⁵

⁷⁵³ Goldberg, S. B., and M. L. Shaw, 'Further Investigation into the Secrets of Successful and Unsuccessful Mediators' (2008) 26(8) *Alternatives to the High Cost of Litigation* 149; McEwen, C. A., *An Evaluation of the ADR Pilot Project: Final Report 1* (Unpublished report, 1992); Peeples, R., C. Harris, and T. Metzloff, 'Following the Script: An Empirical Analysis of Court-Ordered Mediation of Medical Malpractice Cases' (2007) 2007(1) *Journal of Dispute Resolution* 101; Sourdin, T., *Mediation in the Supreme and County Courts of Victoria* (Report prepared for the Department of Justice, Victoria, Australia, April 2009), available on <<http://www.civiljustice.info/adreval/1/>>; Sourdin, T., *Exploring Pre-Action Requirements: Resolving Disputes Outside Courts* (ACJI, Monash University, October 2012); Sourdin, T., and T. Matruglio, *Evaluating Mediation – New South Wales Settlement Scheme 2002* (2004) *Mediation*. Paper 7, available on <<http://www.civiljustice.info/med/7>>; Swaab, R. I., *Face First: Pre-Mediation Caucus and Face in Employment Disputes* (Presentation, Annual Association of Conflict Management Conference, June 2009); Swaab, R. I., and J. Brett, *Caucus with Care: The Impact of Pre-Mediation Caucuses on Conflict Resolution* (Meetings Paper, International Association of Conflict Management, 2007); Wall, J. A., Jr, and S. Chan-Serafin, 'Processes in Civil Case Mediations' (2009) 26(3) *Conflict Resolution Quarterly* 261; Wall, J. A., Jr, and S. Chan-Serafin, 'Do Mediators Walk Their Talk in Civil Cases?' (2010) 28(1) *Conflict Resolution Quarterly* 3; Wissler, R. L., 'Mediation and Adjudication in Small Claims Court: The Effects of Process and Case Characteristics' (1995) 29(2) *Law & Society Review* 323; Wissler, R. L., 'Court-Connected Mediation in General Civil Cases: What We Know from Empirical Research' (2002) 17(3) *Ohio State Journal on Dispute Resolution* 641; Woodward, J. G., 'Settlement Week: Measuring the Promise' (1990) 11 *Northern Illinois University Law Review* 1.

⁷⁵⁴ Carnevale, P. J. D., and R. Pegnetter, 'The Selection of Mediator Tactics in Public Sector Disputes: A Contingency Analysis' (1985) 41(2) *Journal of Social Issues* 2; Dilts, D. A. and A. Karim, 'The Effect of Mediators' Qualities and Strategies on Mediation Outcomes' (1990) 45(1) *Relations Industrielles/Industrial Relations* 22; Hiltrop, J. M., 'Factors Associated with Successful Labor Mediation' in K. Kressel and D. G. Pruitt (eds), *Mediation Research: The Process and Effectiveness of Third-Party Intervention* (Jossey-Bass, USA, 1989); Karim, A. and D. Dilts, 'Determinants of Mediation Success in the Iowa Public Sector' (1990) 19(2) *Journal of Collective Negotiations* 129; Karim, A. and R. Pegnetter, 'Mediator Strategies and Qualities and Mediation Effectiveness' (1983) 22(1) *Industrial Relations* 105; Kochan, T. A., and T. Jick, 'The Public Sector Mediation Process: A Theory and Empirical Examination' (1978) 22(2) *The Journal of Conflict Resolution* 209; Mareschal, P. M., 'What Makes Mediation Work? Perspectives on Resolving Disputes' (2005) 44(3) *Industrial Relations* 509; Posthuma, R. A., A. Richard, J. B. Dworkin, and M. S. Swift, 'Mediator Tactics and Sources of Conflict: Facilitating and Inhibiting Effects' (2002) 41(1) *Industrial Relations* 94; Shapiro, D., R. Drieghe, and J. Brett, 'Mediator Behavior and the Outcomes of Mediation' (1985) 41(2) *Journal of Social Issues* 101.

⁷⁵⁵ Alberts, J. K., B. L. Heisterkamp, and R. M. McPhee, 'Disputant Perceptions of and Satisfaction with a Community Mediation Program' (2005) 16(3) *The International Journal of Conflict Management* 218; McGillicuddy, N. B., G. L. Welton, and D. G. Pruitt, 'Third-Party Intervention: A Field Experiment Comparing Three Different Models' (1987) 53(1) *Journal of Personality and Social Psychology* 104; Pruitt, D. G., W. R. Fry, L. Castrianno, J. Zubeck, G. L. Welton, N. B. McGillicuddy, and C. Ippolito, 'The Process of Mediation: Caucusing, Control, and Problem Solving' in M. A. Rahim (ed), *Managing Conflict: An Interdisciplinary Approach* (Praeger, USA, 1989); Pruitt, D. G., R. S. Peirce, N. B. McGillicuddy, G. L. Welton, and L. Castrianno, 'Long-Term Success in Mediation' (1993) 17(3) *Law and Human Behavior* 313; Welton, G. L., D. G. Pruitt, and N. B. McGillicuddy, 'The Role of Caucusing in Community Mediation' (1988) 32(1) *The Journal of Conflict Resolution* 181; Welton, G. L., D. G. Pruitt, N. B. McGillicuddy, C. A. Ippolito, and J. M. Zubeck, 'Antecedents and Characteristics of Caucusing in Community Mediation' (1992) 3(4) *International Journal of Conflict Management* 303; Zubeck, J. M., D. G. Pruitt, R. S. Peirce, N. B. McGillicuddy, and H. Syna, 'Disputant and Mediator Behaviors Affecting Short-Term Success in Mediation' (1992) 36(3) *Journal of Conflict Resolution* 546.

- iv. Specific programs and services for divorce and child custody disputes (n = 6 studies);⁷⁵⁶
- v. Other specific services and programs (n = 3 studies);⁷⁵⁷
- vi. Professional member organisations providing mediator referrals (n = 1 study);⁷⁵⁸
- vii. In simulated mediations
 - a. University students (n = 5 studies);⁷⁵⁹ and
 - b. Employed actors (n = 1 study).⁷⁶⁰

⁷⁵⁶ Jones, T. S., 'Lag Sequential Analyses of Mediator-Spouse and Husband-Wife Interaction in Successful and Unsuccessful Divorce Mediation in M. A. Rahim (ed), *Managing Conflict: An Interdisciplinary Approach* (Praeger, USA, 1989); Kressel, K., E. A. Frontera, S. Forlenza, F. Butler, and L. Fish, 'The Settlement-Oriented vs the Problem-Solving Style' (1994) 50(1) *Journal of Social Issues* 67; Slaikeu, K. A., R. Culler, J. Pearson, and N. Thoennes, 'Process and Outcome in Divorce Mediation' (1985) 10 *Mediation Quarterly* 55; Thoennes, N. A., and J. Pearson, 'Predicting Outcomes in Divorce Mediation: The Influence of People and Process' (1985) 41(2) *Journal of Social Issues* 115; Vanderkooi, L., and J. Pearson, 'Mediating Divorce Disputes: Mediator Behaviors, Styles and Roles' (1983) 32(4) *Family Relations* 557; Wissler, R. L., *Trapping the Data: An Assessment of Domestic Relations Mediation in Maine and Ohio Courts* (Unpublished report, 1999).

⁷⁵⁷ Bingham, L. B., 'Transformative Mediation in the United States Postal Service' (2012) 5(4) *Negotiation and Conflict Management Research* 354; McDermott, E. P., and R. Obar, "'What's Going On" in Mediation: An Empirical Analysis of the Influence of a Mediator's Style on Party Satisfaction and Monetary Benefit' (2004) 9 *Harvard Negotiation Law Review* 75; Sourdin, T., *Dispute Resolution Processes for Credit Consumers* (Project Report, Conflict Resolution Research Centre, La Trobe University, 2007).

⁷⁵⁸ Henderson, D. A., 'Mediation Success: An Empirical Analysis' (1996) 11(1) *Ohio State Journal on Dispute Resolution* 105.

⁷⁵⁹ Burrell, N. A., W. A. Donohue, and M. Allen, 'The Impact of Disputants' Expectations on Mediation, Testing an Interventionist Model' (1990) Fall 1990 *Human Communication Research* 104; Kimsey, W. D., R. M. Fuller, A. J. Bell, and B. C. McKinney, 'The Impact of Mediator Strategic Choices: An Experimental Study' (1994) 12(1) *Mediation Quarterly* 89; Kimsey, W. D., R. M. Fuller, and B. C. McKinney, 'Mediator Listening, Dispute Reframing, and Mediation Outcome: A Pilot Study' (1993) 7(1) *Journal of the International Listening Association* 74; Kressel, K., T. Henderson, W. Reich, and C. Cohen, 'Multi-Dimensional Analysis of Conflict Mediator Style' (2012) 30(2) *Conflict Resolution Quarterly* 135; Welton, G. L., and D. G. Pruitt, 'The Mediation Process: The Effects of Mediator Bias and Disputant Power' (1987) 13(1) *Personality and Social Psychology Bulletin* 123.

⁷⁶⁰ Gale, J., R. L. Mowery, M. S. Herrman, and N. L. Hollett, 'Considering Effective Divorce Mediation: Three Potential Factors' (2002) 19(4) *Conflict Resolution Quarterly* 389.

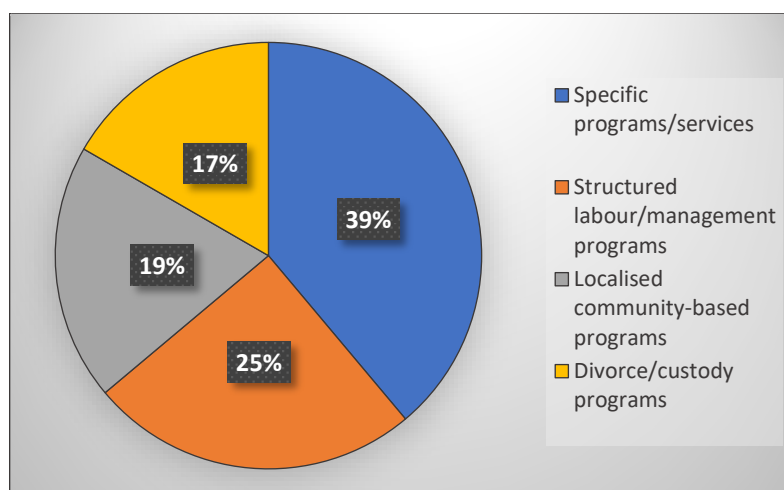


Figure 5.3. Population groups – non-mediator participants.

In Figure 5.3., shows the mediation programs and services from whose population groups non-mediator participants were selected. Two groups are not included in the graph (other specific services and programs, and simulated mediations).

Non-participants

Two studies report collecting data from people who did not participate in the subject mediations. Two accessed non-participants associated with the program/service being evaluated (eg program administrators);⁷⁶¹ and one accessed them through a membership organisation (ie non-participant mediation commentators).⁷⁶²

None of the studies provides explicit information about the sample populations from which their participants were selected. Although some studies do present demographic information (as described above), it is presented as being applicable to the study participants rather than to the population from which they were drawn. This restricts any assessment of the participants'

⁷⁶¹ Sourdin, T., *Dispute Resolution Processes for Credit Consumers* (Project Report, Conflict Resolution Research Centre, La Trobe University, 2007); Sourdin, T., *Exploring Pre-Action Requirements: Resolving Disputes Outside Courts* (ACJI, Monash University, October 2012).

⁷⁶² Wall, J. A., Jr, and D. E. Rude, 'The Judge as a Mediator' (1991) 76(1) *Journal of Applied Psychology* 54.

representativeness. The scope of the populations is limited to structured mediation programs and services, and to the mediators who work in those programs and services. In addition, the programs and services appear to receive at least some government support if not full public funding (eg court-connected programs, and institutionalised services for the resolution of industrial disputes, and community-based services).

Private mediators and private mediation

The lack of private mediator representation (that is those engaged in mediation practice in their own right and not associated with a specific scheme or court) is a significant gap in the studies, imposing practical limitations on the generalisability of findings to the situations of private individual mediators and their practices.

Of the two studies which appear to have included private mediators, one includes a single mediator who operates within the legal system,⁷⁶³ a setting that may influence their private practice approach.⁷⁶⁴

5.1.2. Demographic representativeness

While this appraisal does not assess the studies' generalisability, it does take note of demographic diversity in study participants. Where qualitative empirical research intends to contribute to the broad knowledge about a field such as mediation, either in terms of practise, or in terms of research development, it is useful to understand the demographic characteristics of the study participants, not for the purposes of establishing a causal link between certain demographic characteristics, mediator behaviours, and mediation outcomes, but in order to gain a broader understanding about perceptions of and responses to the mediation process.

⁷⁶³ Wall, J. A., Jr, and D. E. Rude, 'The Judge as a Mediator' (1991) 76(1) *Journal of Applied Psychology* 54.

⁷⁶⁴ Kressel, K., 'How Do Mediators Decide What To Do? Implicit Schemas of Practice and Mediator Decisionmaking' (2013) 28(3) *Ohio State Journal on Dispute Resolution* 709; 'Rundle, O., 'The Purpose of Court-Connected Mediation from the Legal Perspective' (2007) 10(2) *ADR Bulletin* 28.

The disputants' perceptions of, say, a mediation process and the actions of a mediator, can be expected to be influenced by their social context and characteristics such as gender and ethnicity, age brackets, and socioeconomic status, providing a context for the research data obtained from them and contributing important information about those population's perceptions of and responses to mediation. A mediator's choices about their own actions and approaches are also likely to be influenced by a range of factors including their own demographic characteristics. Demographic diversity can add depth to research data, and if researchers consistently access the same population groups, the research data is likely to lack that demographic depth.

In mediation, it can be expected that disputants and mediators share demographic characteristics with the broad community in which disputes occur, and, in mediation research, that study participants will similarly demonstrate that wide range, providing researchers with a diverse breadth of research data. It is useful for a reader to know if study participants are generally representative of the diversity in the broader population or, if they are from a specific population group, that this is made clear in the study.

Four studies explicitly consider the issue of their study participants' representativeness of a broader population.⁷⁶⁵ Two consider the issue only for mediator participants,⁷⁶⁶ one considers it only for non-mediator participants,⁷⁶⁷ and one considers it for both mediator and non-mediator participants.⁷⁶⁸

⁷⁶⁵ Gale, J., R. L. Mowery, M. S. Herrman, and N. L. Hollett, 'Considering Effective Divorce Mediation: Three Potential Factors' (2002) 19(4) *Conflict Resolution Quarterly* 389; Mareschal, P. M., 'What Makes Mediation Work? Perspectives on Resolving Disputes' (2005) 44(3) *Industrial Relations* 509; McDermott, E. P., and R. Obar, "'What's Going On" in Mediation: An Empirical Analysis of the Influence of a Mediator's Style on Party Satisfaction and Monetary Benefit' (2004) 9 *Harvard Negotiation Law Review* 75; Sourdin, T., *Dispute Resolution Processes for Credit Consumers* (Project Report, Conflict Resolution Research Centre, La Trobe University, 2007).

⁷⁶⁶ Gale, J., R. L. Mowery, M. S. Herrman, and N. L. Hollett, 'Considering Effective Divorce Mediation: Three Potential Factors' (2002) 19(4) *Conflict Resolution Quarterly* 389; Mareschal, P. M., 'What Makes Mediation Work? Perspectives on Resolving Disputes' (2005) 44(3) *Industrial Relations* 509.

⁷⁶⁷ Sourdin, T., *Dispute Resolution Processes for Credit Consumers* (Project Report, Conflict Resolution Research Centre, La Trobe University, 2007).

⁷⁶⁸ McDermott, E. P., and R. Obar, "'What's Going On" in Mediation: An Empirical Analysis of the Influence of a Mediator's Style on Party Satisfaction and Monetary Benefit' (2004) 9 *Harvard Negotiation Law Review* 75.

Mediator participants

Less than half the studies (ie 45%, n = 21) include descriptions of at least some of the demographic characteristics of mediator participants.⁷⁶⁹ For example, one study notes that there are 35 male and 3 female mediators, all working for the Iowa Public Employment Relations Board;⁷⁷⁰ another that the mediators include 21 attorneys and 8 judges, of whom 3 are female and 26 male, and 28 are 'white' and 1 'black';⁷⁷¹ another that the mediators are described in terms of gender, ethnicity, experience, age, and education⁷⁷². 19% (n = 9) of the studies describe mediator

⁷⁶⁹ Alberts, J. K., B. L. Heisterkamp, and R. M. McPhee, 'Disputant Perceptions of and Satisfaction with a Community Mediation Program' (2005) 16(3) *The International Journal of Conflict Management* 218; Carnevale, P. J. D., and R. Peggnetter, 'The Selection of Mediator Tactics in Public Sector Disputes: A Contingency Analysis' (1985) 41(2) *Journal of Social Issues* 2; Gale, J., R. L. Mowery, M. S. Herrman, and N. L. Hollett, 'Considering Effective Divorce Mediation: Three Potential Factors' (2002) 19(4) *Conflict Resolution Quarterly* 389; Kimsey, W. D., R. M. Fuller, A. J. Bell, and B. C. McKinney, 'The Impact of Mediator Strategic Choices: An Experimental Study' (1994) 12(1) *Mediation Quarterly* 89; Kimsey, W. D., R. M. Fuller, and B. C. McKinney, 'Mediator Listening, Dispute Reframing, and Mediation Outcome: A Pilot Study' (1993) 7(1) *Journal of the International Listening Association* 74; Mareschal, P. M., 'What Makes Mediation Work? Perspectives on Resolving Disputes' (2005) 44(3) *Industrial Relations* 509; McGillicuddy, N. B., G. L. Welton, and D. G. Pruitt, 'Third-Party Intervention: A Field Experiment Comparing Three Different Models' (1987) 53(1) *Journal of Personality and Social Psychology* 104; Peeples, R., C. Harris, and T. Metzloff, 'Following the Script: An Empirical Analysis of Court-Ordered Mediation of Medical Malpractice Cases' (2007) 2007(1) *Journal of Dispute Resolution* 101; Peeples, R., C. Harris, and T. Metzloff, 'Following the Script: An Empirical Analysis of Court-Ordered Mediation of Medical Malpractice Cases' (2007) 2007(1) *Journal of Dispute Resolution* 101; Shapiro, D., R. Drieghe, and J. Brett, 'Mediator Behavior and the Outcomes of Mediation' (1985) 41(2) *Journal of Social Issues* 101; Sourdin, T., *Mediation in the Supreme and County Courts of Victoria* (Report prepared for the Department of Justice, Victoria, Australia, April 2009), available on <<http://www.civiljustice.info/adreval/1/>>; Sourdin, T., and T. Matruglio, *Evaluating Mediation – New South Wales Settlement Scheme 2002* (2004) *Mediation*. Paper 7, available on <<http://www.civiljustice.info/med/7>>; Swaab, R. I., *Face First: Pre-Mediation Caucus and Face in Employment Disputes* (Presentation, Annual Association of Conflict Management Conference, June 2009); Vanderkooi, L., and J. Pearson, 'Mediating Divorce Disputes: Mediator Behaviors, Styles and Roles' (1983) 32(4) *Family Relations* 557; Wall, J. A., Jr, and S. Chan-Serafin, 'Processes in Civil Case Mediations' (2009) 26(3) *Conflict Resolution Quarterly* 261; Wall, J. A., Jr, and S. Chan-Serafin, 'Do Mediators Walk Their Talk in Civil Cases?' (2010) 28(1) *Conflict Resolution Quarterly* 3; Welton, G. L., D. G. Pruitt, and N. B. McGillicuddy, 'The Role of Caucusing in Community Mediation' (1988) 32(1) *The Journal of Conflict Resolution* 181; Welton, G. L., D. G. Pruitt, N. B. McGillicuddy, C. A. Ippolito, and J. M. Zubeck, 'Antecedents and Characteristics of Caucusing in Community Mediation' (1992) 3(4) *International Journal of Conflict Management* 303; Wissler, R. L., 'Mediation and Adjudication in Small Claims Court: The Effects of Process and Case Characteristics' (1995) 29(2) *Law & Society Review* 323; Wissler, R. L., *Trapping the Data: An Assessment of Domestic Relations Mediation in Maine and Ohio Courts* (Unpublished report, 1999); Wissler, R. L., 'Court-Connected Mediation in General Civil Cases: What We Know from Empirical Research' (2002) 17(3) *Ohio State Journal on Dispute Resolution* 641.

⁷⁷⁰ Carnevale, P. J. D., and R. Peggnetter, 'The Selection of Mediator Tactics in Public Sector Disputes: A Contingency Analysis' (1985) 41(2) *Journal of Social Issues* 2.

⁷⁷¹ Wall, J. A., Jr, and S. Chan-Serafin, 'Processes in Civil Case Mediations' (2009) 26(3) *Conflict Resolution Quarterly* 261, 269.

⁷⁷² Alberts, J. K., B. L. Heisterkamp, and R. M. McPhee, 'Disputant Perceptions of and Satisfaction with a Community Mediation Program' (2005) 16(3) *The International Journal of Conflict Management* 218.

participants only in terms of their employment or membership affiliations (eg that the mediators conducted mediations for the Iowa Public Relations Employment Board,⁷⁷³ or were affiliated with the Netherlands Mediation Institute⁷⁷⁴);⁷⁷⁵ and six describe mediator participants in very minimal terms (eg all mediators were male trial attorneys, or ‘approximately seventy prominent Chicago plaintiff and defense litigation attorneys’⁷⁷⁶).⁷⁷⁷

Three studies describe mediator participants only in terms of the types of cases they mediate;⁷⁷⁸ and three do not include any demographic description of the mediator participants.⁷⁷⁹

⁷⁷³ Carnevale, P. J. D., and R. Pegnetter, ‘The Selection of Mediator Tactics in Public Sector Disputes: A Contingency Analysis’ (1985) 41(2) *Journal of Social Issues* 2.

⁷⁷⁴ Swaab, R. I., *Face First: Pre-Mediation Caucus and Face in Employment Disputes* (Presentation, Annual Association of Conflict Management Conference, June 2009); Swaab, R. I., and J. Brett, *Caucus with Care: The Impact of Pre-Mediation Caucuses on Conflict Resolution* (Meetings Paper, International Association of Conflict Management, 2007).

⁷⁷⁵ Dilts, D. A. and A. Karim, ‘The Effect of Mediators’ Qualities and Strategies on Mediation Outcomes’ (1990) 45(1) *Relations Industrielles/Industrial Relations* 22; Hiltrop, J. M., ‘Factors Associated with Successful Labor Mediation’ in K. Kressel and D. G. Pruitt (eds), *Mediation Research: The Process and Effectiveness of Third-Party Intervention* (Jossey-Bass, USA, 1989); Karim, A. and D. Dilts, ‘Determinants of Mediation Success in the Iowa Public Sector’ (1990) 19(2) *Journal of Collective Negotiations* 129; Kochan, T. A., and T. Jick, ‘The Public Sector Mediation Process: A Theory and Empirical Examination’ (1978) 22(2) *The Journal of Conflict Resolution* 209; Kressel, K., T. Henderson, W. Reich, and C. Cohen, ‘Multi-Dimensional Analysis of Conflict Mediator Style’ (2012) 30(2) *Conflict Resolution Quarterly* 135 (in part); Posthuma, R. A., A. Richard, J. B. Dworkin, and M. S. Swift, ‘Mediator Tactics and Sources of Conflict: Facilitating and Inhibiting Effects’ (2002) 41(1) *Industrial Relations* 94; Sourdin, T., *Dispute Resolution Processes for Credit Consumers* (Project Report, Conflict Resolution Research Centre, La Trobe University, 2007); Swaab, R. I., *Face First: Pre-Mediation Caucus and Face in Employment Disputes* (Presentation, Annual Association of Conflict Management Conference, June 2009); Swaab, R. I., and J. Brett, *Caucus with Care: The Impact of Pre-Mediation Caucuses on Conflict Resolution* (Meetings Paper, International Association of Conflict Management, 2007); Wall, J. A., Jr, and D. E. Rude, ‘The Judge as a Mediator’ (1991) 76(1) *Journal of Applied Psychology* 54 (in part).

⁷⁷⁶ Woodward, J. G., ‘Settlement Week: Measuring the Promise’ (1990) 11 *Northern Illinois University Law Review* 1, 8.

⁷⁷⁷ Kressel, K., E. A. Frontera, S. Forlenza, F. Butler, and L. Fish, ‘The Settlement-Oriented vs the Problem-Solving Style’ (1994) 50(1) *Journal of Social Issues* 67; McEwen, C. A., *An Evaluation of the ADR Pilot Project: Final Report 1* (Unpublished report, 1992); Slaikeu, K. A., R. Culler, J. Pearson, and N. Thoennes, ‘Process and Outcome in Divorce Mediation’ (1985) 10 *Mediation Quarterly* 55; Welton, G. L., and D. G. Pruitt, ‘The Mediation Process: The Effects of Mediator Bias and Disputant Power’ (1987) 13(1) *Personality and Social Psychology Bulletin* 123; Woodward, J. G., ‘Settlement Week: Measuring the Promise’ (1990) 11 *Northern Illinois University Law Review* 1.

⁷⁷⁸ Goldberg, S. B., and M. L. Shaw, ‘Further Investigation into the Secrets of Successful and Unsuccessful Mediators’ (2008) 26(8) *Alternatives to the High Cost of Litigation* 149; Jones, T. S., ‘Lag Sequential Analyses of Mediator-Spouse and Husband-Wife Interaction in Successful and Unsuccessful Divorce Mediation in M. A. Rahim (ed), *Managing Conflict: An Interdisciplinary Approach* (Praeger, USA, 1989); McDermott, E. P., and R. Obar, ‘“What’s Going On” in Mediation: An Empirical Analysis of the Influence of a Mediator’s Style on Party Satisfaction and Monetary Benefit’ (2004) 9 *Harvard Negotiation Law Review* 75.

⁷⁷⁹ Henderson, D. A., ‘Mediation Success: An Empirical Analysis’ (1996) 11(1) *Ohio State Journal on Dispute Resolution* 105; Karim, A. and R. Pegnetter, ‘Mediator Strategies and Qualities and Mediation Effectiveness’

In one community-based study, the researchers consider the differences between mediators who work in community-based contexts, and those who work in court-connected contexts, especially those who are court appointed.⁷⁸⁰ According to the researchers, the latter tend to be paid fees, deal with a limited range of disputes, and usually include legal advisers, while community-based mediators tend to be volunteers who deal with a wide variety of disputes. None of the studies considers how these differences might influence what mediators say and do, or how they might influence the non-mediator participants' perceptions of them, both of which are key units of analysis in the study. The studies report an additional apparent difference between court-connected and community-based mediators: their reported levels of mediation experience. The relevant experience of mediator and non-mediator participants is considered later in this chapter.

Non-mediator participants

Twelve studies include descriptions of at least some demographic characteristics of their non-mediator participants, and some are more informative than others.⁷⁸¹ For example, descriptive details include the nature of the dispute, socioeconomic status, and indices for 'extremely high levels

(1983) 22(1) *Industrial Relations* 105; Thoennes, N. A., and J. Pearson, 'Predicting Outcomes in Divorce Mediation: The Influence of People and Process' (1985) 41(2) *Journal of Social Issues* 115.

⁷⁸⁰ Alberts, J. K., B. L. Heisterkamp, and R. M. McPhee, 'Disputant Perceptions of and Satisfaction with a Community Mediation Program' (2005) 16(3) *The International Journal of Conflict Management* 218.

⁷⁸¹ Kressel, K., E. A. Frontera, S. Forlenza, F. Butler, and L. Fish, 'The Settlement-Oriented vs the Problem-Solving Style' (1994) 50(1) *Journal of Social Issues* 67; McGillicuddy, N. B., G. L. Welton, and D. G. Pruitt, 'Third-Party Intervention: A Field Experiment Comparing Three Different Models' (1987) 53(1) *Journal of Personality and Social Psychology* 104; Pruitt, D. G., R. S. Peirce, N. B. McGillicuddy, G. L. Welton, and L. Castrianno, 'Long-Term Success in Mediation' (1993) 17(3) *Law and Human Behavior* 313; Sourdin, T., *Dispute Resolution Processes for Credit Consumers* (Project Report, Conflict Resolution Research Centre, La Trobe University, 2007); Sourdin, T., *Mediation in the Supreme and County Courts of Victoria* (Report prepared for the Department of Justice, Victoria, Australia, April 2009), available on <<http://www.civiljustice.info/adreval/1/>>; Sourdin, T., *Exploring Pre-Action Requirements: Resolving Disputes Outside Courts* (ACJI, Monash University, October 2012); Sourdin, T., and T. Matruglio, *Evaluating Mediation – New South Wales Settlement Scheme 2002* (2004) *Mediation*. Paper 7, available on <<http://www.civiljustice.info/med/7>>; Welton, G. L., D. G. Pruitt, and N. B. McGillicuddy, 'The Role of Caucusing in Community Mediation' (1988) 32(1) *The Journal of Conflict Resolution* 181; Welton 199; Wissler, R. L., *Trapping the Data: An Assessment of Domestic Relations Mediation in Maine and Ohio Courts* (Unpublished report, 1999); Wissler, R. L., 'Court-Connected Mediation in General Civil Cases: What We Know from Empirical Research' (2002) 17(3) *Ohio State Journal on Dispute Resolution* 641; Zubeck, J. M., D. G. Pruitt, R. S. Peirce, N. B. McGillicuddy, and H. Syna, 'Disputant and Mediator Behaviors Affecting Short-Term Success in Mediation' (1992) 36(3) *Journal of Conflict Resolution* 546.

of pre-mediation conflict’;⁷⁸² or ‘The disputants were ... heterogeneous in race, ethnic background, and sex’.⁷⁸³ Twelve studies include no demographic information about non-mediator participants, describing them only as typical cases in an institutional mediation program or service (eg participants in ‘divorce mediation’ in three court programs;⁷⁸⁴ or all small claims cases in four specific courts⁷⁸⁵).⁷⁸⁶ Eight studies describe their non-mediator participants only in terms of being union or management representatives.⁷⁸⁷ Four include minimal demographic information (eg the

⁷⁸² Kressel, K., E. A. Frontera, S. Forlenza, F. Butler, and L. Fish, ‘The Settlement-Oriented vs the Problem-Solving Style’ (1994) 50(1) *Journal of Social Issues* 67 P 70.

⁷⁸³ Welton, G. L., D. G. Pruitt, and N. B. McGillicuddy, ‘The Role of Caucusing in Community Mediation’ (1988) 32(1) *The Journal of Conflict Resolution* 181, 189.

⁷⁸⁴ Jones, T. S., ‘Lag Sequential Analyses of Mediator-Spouse and Husband-Wife Interaction in Successful and Unsuccessful Divorce Mediation in M. A. Rahim (ed), *Managing Conflict: An Interdisciplinary Approach* (Praeger, USA, 1989).

⁷⁸⁵ Wissler, R. L., ‘Mediation and Adjudication in Small Claims Court: The Effects of Process and Case Characteristics’ (1995) 29(2) *Law & Society Review* 323.

⁷⁸⁶ Alberts, J. K., B. L. Heisterkamp, and R. M. McPhee, ‘Disputant Perceptions of and Satisfaction with a Community Mediation Program’ (2005) 16(3) *The International Journal of Conflict Management* 218; Jones, T. S., ‘Lag Sequential Analyses of Mediator-Spouse and Husband-Wife Interaction in Successful and Unsuccessful Divorce Mediation in M. A. Rahim (ed), *Managing Conflict: An Interdisciplinary Approach* (Praeger, USA, 1989); McEwen, C. A., *An Evaluation of the ADR Pilot Project: Final Report 1* (Unpublished report, 1992); Peeples, R., C. Harris, and T. Metzloff, ‘Following the Script: An Empirical Analysis of Court-Ordered Mediation of Medical Malpractice Cases’ (2007) 2007(1) *Journal of Dispute Resolution* 101; Slaikou, K. A., R. Culler, J. Pearson, and N. Thoennes, ‘Process and Outcome in Divorce Mediation’ (1985) 10 *Mediation Quarterly* 55; Swaab, R. I., *Face First: Pre-Mediation Caucus and Face in Employment Disputes* (Presentation, Annual Association of Conflict Management Conference, June 2009); Swaab, R. I., and J. Brett, *Caucus with Care: The Impact of Pre-Mediation Caucuses on Conflict Resolution* (Meetings Paper, International Association of Conflict Management, 2007); Thoennes, N. A., and J. Pearson, ‘Predicting Outcomes in Divorce Mediation: The Influence of People and Process’ (1985) 41(2) *Journal of Social Issues* 115; Vanderkooi, L., and J. Pearson, ‘Mediating Divorce Disputes: Mediator Behaviors, Styles and Roles’ (1983) 32(4) *Family Relations* 557; Wall, J. A., Jr, and S. Chan-Serafin, ‘Do Mediators Walk Their Talk in Civil Cases?’ (2010) 28(1) *Conflict Resolution Quarterly* 3; Wissler, R. L., ‘Mediation and Adjudication in Small Claims Court: The Effects of Process and Case Characteristics’ (1995) 29(2) *Law & Society Review* 323; Woodward, J. G., ‘Settlement Week: Measuring the Promise’ (1990) 11 *Northern Illinois University Law Review* 1.

⁷⁸⁷ Carnevale, P. J. D., and R. Pagnetter, ‘The Selection of Mediator Tactics in Public Sector Disputes: A Contingency Analysis’ (1985) 41(2) *Journal of Social Issues* 2; Dilts, D. A. and A. Karim, ‘The Effect of Mediators’ Qualities and Strategies on Mediation Outcomes’ (1990) 45(1) *Relations Industrielles/Industrial Relations* 22; Hiltrop, J. M., ‘Factors Associated with Successful Labor Mediation’ in K. Kressel and D. G. Pruitt (eds), *Mediation Research: The Process and Effectiveness of Third-Party Intervention* (Jossey-Bass, USA, 1989); Karim, A. and D. Dilts, ‘Determinants of Mediation Success in the Iowa Public Sector’ (1990) 19(2) *Journal of Collective Negotiations* 129; Karim, A. and R. Pagnetter, ‘Mediator Strategies and Qualities and Mediation Effectiveness’ (1983) 22(1) *Industrial Relations* 105; Kochan, T. A., and T. Jick, ‘The Public Sector Mediation Process: A Theory and Empirical Examination’ (1978) 22(2) *The Journal of Conflict Resolution* 209; Posthuma, R. A., A. Richard, J. B. Dworkin, and M. S. Swift, ‘Mediator Tactics and Sources of Conflict: Facilitating and Inhibiting Effects’ (2002) 41(1) *Industrial Relations* 94; Shapiro, D., R. Drieghe, and J. Brett, ‘Mediator Behavior and the Outcomes of Mediation’ (1985) 41(2) *Journal of Social Issues* 101.

non-mediator participants came from the public, private, and federal sectors;⁷⁸⁸ or they are described as “being” all the matters listed at court, and unresolved, which would be ‘productive’⁷⁸⁹).⁷⁹⁰ One study describes all non-mediator participants only as representatives: lawyers, union/management representatives, or government representatives.⁷⁹¹

In the studies that use simulated mediations, and where students are enlisted as mediator and/or non-mediator participants, the students are described according to their program of origin,⁷⁹² or as ‘undergraduates’,⁷⁹³ or as ‘48 male and 48 female volunteer subjects’ (without any further information).⁷⁹⁴

Although thirty-one of the studies include at least some demographic information about mediator and non-mediator participants, almost none of the researchers use the information for comparative analysis of study results. For example, in a study that includes information about the socioeconomic status of non-mediator participants, there is no consideration of how that status might affect their responses to mediation. In the studies that include information about minority group participants, there is no consideration of how the research data they provided might have differed from the data of non-minority group participants.

Non-mediator participants: legal advisers

⁷⁸⁸ Mareschal, P. M., ‘What Makes Mediation Work? Perspectives on Resolving Disputes’ (2005) 44(3) *Industrial Relations* 509.

⁷⁸⁹ Wall, J. A., Jr, and D. E. Rude, ‘The Judge as a Mediator’ (1991) 76(1) *Journal of Applied Psychology* 54, 58.

⁷⁹⁰ Mareschal, P. M., ‘What Makes Mediation Work? Perspectives on Resolving Disputes’ (2005) 44(3) *Industrial Relations* 509; Wall, J. A., Jr, and S. Chan-Serafin, ‘Processes in Civil Case Mediations’ (2009) 26(3) *Conflict Resolution Quarterly* 261; Wall, J. A., Jr, and D. E. Rude, ‘The Judge as a Mediator’ (1991) 76(1) *Journal of Applied Psychology* 54.

⁷⁹¹ Goldberg, S. B., and M. L. Shaw, ‘Further Investigation into the Secrets of Successful and Unsuccessful Mediators’ (2008) 26(8) *Alternatives to the High Cost of Litigation* 149.

⁷⁹² Kimsey, W. D., R. M. Fuller, A. J. Bell, and B. C. McKinney, ‘The Impact of Mediator Strategic Choices: An Experimental Study’ (1994) 12(1) *Mediation Quarterly* 89; Kimsey, W. D., R. M. Fuller, and B. C. McKinney, ‘Mediator Listening, Dispute Reframing, and Mediation Outcome: A Pilot Study’ (1993) 7(1) *Journal of the International Listening Association* 74.

⁷⁹³ Burrell, N. A., W. A. Donohue, and M. Allen, ‘The Impact of Disputants’ Expectations on Mediation, Testing an Interventionist Model’ (1990) Fall 1990 *Human Communication Research* 104.

⁷⁹⁴ Welton, G. L., and D. G. Pruitt, ‘The Mediation Process: The Effects of Mediator Bias and Disputant Power’ (1987) 13(1) *Personality and Social Psychology Bulletin* 123, 124.

In sixteen studies, the non-mediator participants include disputants and their legal advisers. Despite widespread recognition that the two groups have different perceptions of the mediation process, and of what mediators say and do,⁷⁹⁵ not all the sixteen studies clearly differentiate between them when reporting observations of their behaviour or analysing collected survey and interview data. Because their perceptions are known to be different, researchers could be expected to differentially identify the two groups of non-mediator participants, and to differentiate the data collected from and about them.

Seven studies report collecting data specifically from legal representatives.⁷⁹⁶ These include three in which data is collected *only* from legal representatives; the researchers identify the data accordingly),⁷⁹⁷ and four report having differentiated between representatives and disputants when the data was collected from both groups.⁷⁹⁸ Nine studies, conducted in a court-connected context,

⁷⁹⁵ Global Pound Conference Series, *Shaping the Future of Dispute Resolution & Improving Access to Justice: The Singapore Report* (Report of Global Pound Conferences, 2016); Rundle, O., 'Barking Dogs: Lawyer Attitudes Towards Direct Disputant Participation in Court-Connected Mediation of General Civil Cases' (2008) 8(1) *QUTLJ* 77; Sourdin, T., 'Introduction' (2011) 22 *ADRJ* 1; Wissler, R. J., 'Court-Connected Mediation in General Civil Cases: What We Know From Empirical Research' (2002) 17 *Ohio State Journal on Dispute Resolution*; Woodward, J. G., 'Settlement Week: Measuring the Promise' (1990) 11 *Northern Illinois University Law Review* 1.

⁷⁹⁶ Goldberg, S. B., and M. L. Shaw, 'Further Investigation into the Secrets of Successful and Unsuccessful Mediators' (2008) 26(8) *Alternatives to the High Cost of Litigation* 149; Henderson, D. A., 'Mediation Success: An Empirical Analysis' (1996) 11(1) *Ohio State Journal on Dispute Resolution* 105; Sourdin, T., *Dispute Resolution Processes for Credit Consumers* (Project Report, Conflict Resolution Research Centre, La Trobe University, 2007); Sourdin, T., *Mediation in the Supreme and County Courts of Victoria* (Report prepared for the Department of Justice, Victoria, Australia, April 2009), available on <<http://www.civiljustice.info/adreval/1/>>; Sourdin, T., *Exploring Pre-Action Requirements: Resolving Disputes Outside Courts* (ACJI, Monash University, October 2012); Wissler, R. L., 'Court-Connected Mediation in General Civil Cases: What We Know from Empirical Research' (2002) 17(3) *Ohio State Journal on Dispute Resolution* 641; Woodward, J. G., 'Settlement Week: Measuring the Promise' (1990) 11 *Northern Illinois University Law Review* 1.

⁷⁹⁷ Goldberg, S. B., and M. L. Shaw, 'Further Investigation into the Secrets of Successful and Unsuccessful Mediators' (2008) 26(8) *Alternatives to the High Cost of Litigation* 149; Henderson, D. A., 'Mediation Success: An Empirical Analysis' (1996) 11(1) *Ohio State Journal on Dispute Resolution* 105; Woodward, J. G., 'Settlement Week: Measuring the Promise' (1990) 11 *Northern Illinois University Law Review* 1.

⁷⁹⁸ Sourdin, T., *Dispute Resolution Processes for Credit Consumers* (Project Report, Conflict Resolution Research Centre, La Trobe University, 2007); Sourdin, T., *Mediation in the Supreme and County Courts of Victoria* (Report prepared for the Department of Justice, Victoria, Australia, April 2009), available on <<http://www.civiljustice.info/adreval/1/>>; Sourdin, T., *Exploring Pre-Action Requirements: Resolving Disputes Outside Courts* (ACJI, Monash University, October 2012); Wissler, R. L., 'Court-Connected Mediation in General Civil Cases: What We Know from Empirical Research' (2002) 17(3) *Ohio State Journal on Dispute Resolution* 641.

involve the presence of legal representatives,⁷⁹⁹ yet do not differentiate the disputants and their advisers, either in terms of in-mediation behaviour, or in terms of research data.

Mediation observers

None of the studies includes any demographic information about the mediation observers. Based on the limited relevant information in the studies, it appears the observers are researchers. The observers, and their influence, are considered in more detail in Chapter Seven.

5.1.3. Gender

In recent years, there has been widespread recognition that “traditional” research approaches have ignored male/female differentiation. Traditionally, researchers in all fields have used only male participants and it is now acknowledged that theoretical development has been based on results and findings that cannot be generalised to at least half the population (ie the female population).⁸⁰⁰ The issue has proven so disruptive of accepted research practice and knowledge, that at least two influential journals have issued special editions devoted to its ramifications.⁸⁰¹

According to the seven studies that include relevant demographic information about mediator participants, they are predominantly Caucasian, predominantly male, predominantly tertiary

⁷⁹⁹ McDermott, E. P., and R. Obar, “What’s Going On” in Mediation: An Empirical Analysis of the Influence of a Mediator’s Style on Party Satisfaction and Monetary Benefit’ (2004) 9 *Harvard Negotiation Law Review* 75; Peeples, R., C. Harris, and T. Metzloff, ‘Following the Script: An Empirical Analysis of Court-Ordered Mediation of Medical Malpractice Cases’ (2007) 2007(1) *Journal of Dispute Resolution* 101; Swaab, R. I., *Face First: Pre-Mediation Caucus and Face in Employment Disputes* (Presentation, Annual Association of Conflict Management Conference, June 2009); Swaab, R. I., and J. Brett, *Caucus with Care: The Impact of Pre-Mediation Caucuses on Conflict Resolution* (Meetings Paper, International Association of Conflict Management, 2007); Wall, J. A., Jr, and S. Chan-Serafin, ‘Processes in Civil Case Mediations’ (2009) 26(3) *Conflict Resolution Quarterly* 261; Wall, J. A., Jr, and S. Chan-Serafin, ‘Do Mediators Walk Their Talk in Civil Cases?’ (2010) 28(1) *Conflict Resolution Quarterly* 3; Wall, J. A., Jr, and D. E. Rude, ‘The Judge as a Mediator’ (1991) 76(1) *Journal of Applied Psychology* 54; Wissler, R. L., ‘Mediation and Adjudication in Small Claims Court: The Effects of Process and Case Characteristics’ (1995) 29(2) *Law & Society Review* 323; Wissler, R. L., *Trapping the Data: An Assessment of Domestic Relations Mediation in Maine and Ohio Courts* (Unpublished report, 1999).

⁸⁰⁰ Beery, A. K., and I. Zucker, ‘Sex Bias in Neuroscience and Biomedical Research’ (2011) 35 *Neuroscience and Biobehavioral Reviews* 565; Palanza, P., and S. Parmigiani, ‘How Does Sex Matter? Behavior, Stress, and Animal Models of Neurobehavioral Disorders’ (2017) 76 *Neuroscience and Biobehavioral Reviews* 134.

⁸⁰¹ Special Issue (2017) 95(1-2) *Journal of Neuroscience Research*; (Spring 2017) *Stanford Medicine*.

educated, and in at least a “middle class” socioeconomic grouping.⁸⁰² Three studies include sufficient demographic information to suggest that, in the community and family mediation contexts, there is relatively equal representation of male and female mediators, or a predominance of female mediators.⁸⁰³ On the other hand, in the small number of studies that record the gender of disputants, there is relatively equal representation of male and female.⁸⁰⁴ The lack of this information, and the general lack of its contribution to data analysis suggests that mediation research may be subject to a gender bias similar to that in other research fields, perhaps warranting future research on gender differences in mediation (both in the actions and approaches of mediators, and in the perceptions and responses of disputants).

Where there are gender inequities among participating mediators, it is unclear if this reflects the gender balance among practicing mediators in the broader mediator population, or is limited to the study setting. Does the inequity arise because male mediators are more likely to participate in mediation research than are female mediators? Or does it show that mediation researchers are more likely to choose male than female mediator participants? Or does it simply reflect the

⁸⁰² Alberts, J. K., B. L. Heisterkamp, and R. M. McPhee, ‘Disputant Perceptions of and Satisfaction with a Community Mediation Program’ (2005) 16(3) *The International Journal of Conflict Management* 218; Gale, J., R. L. Mowery, M. S. Herrman, and N. L. Hollett, ‘Considering Effective Divorce Mediation: Three Potential Factors’ (2002) 19(4) *Conflict Resolution Quarterly* 389; Kressel, K., T. Henderson, W. Reich, and C. Cohen, ‘Multi-Dimensional Analysis of Conflict Mediator Style’ (2012) 30(2) *Conflict Resolution Quarterly* 135; Peeples, R., C. Harris, and T. Metzloff, ‘Following the Script: An Empirical Analysis of Court-Ordered Mediation of Medical Malpractice Cases’ (2007) 2007(1) *Journal of Dispute Resolution* 101; Wall, J. A., Jr, and S. Chan-Serafin, ‘Processes in Civil Case Mediations’ (2009) 26(3) *Conflict Resolution Quarterly* 261; Wall, J. A., Jr, and S. Chan-Serafin, ‘Do Mediators Walk Their Talk in Civil Cases?’ (2010) 28(1) *Conflict Resolution Quarterly* 3; Wissler, R. L., *Trapping the Data: An Assessment of Domestic Relations Mediation in Maine and Ohio Courts* (Unpublished report, 1999).

⁸⁰³ Alberts, J. K., B. L. Heisterkamp, and R. M. McPhee, ‘Disputant Perceptions of and Satisfaction with a Community Mediation Program’ (2005) 16(3) *The International Journal of Conflict Management* 218; McGillicuddy, N. B., G. L. Welton, and D. G. Pruitt, ‘Third-Party Intervention: A Field Experiment Comparing Three Different Models’ (1987) 53(1) *Journal of Personality and Social Psychology* 104; Wissler, R. L., *Trapping the Data: An Assessment of Domestic Relations Mediation in Maine and Ohio Courts* (Unpublished report, 1999).

⁸⁰⁴ Sourdin, T., *Dispute Resolution Processes for Credit Consumers* (Project Report, Conflict Resolution Research Centre, La Trobe University, 2007); Sourdin, T., *Mediation in the Supreme and County Courts of Victoria* (Report prepared for the Department of Justice, Victoria, Australia, April 2009), available on <<http://www.civiljustice.info/adreval/1/>>; Wissler, R. L., *Trapping the Data: An Assessment of Domestic Relations Mediation in Maine and Ohio Courts* (Unpublished report, 1999); Wissler, R. L., ‘Court-Connected Mediation in General Civil Cases: What We Know from Empirical Research’ (2002) 17(3) *Ohio State Journal on Dispute Resolution* 641.

extremely limited demographic information about participants in empirical studies of mediation?

The researchers in each of the studies do not appear to consider any of these questions.

Where male/female numbers are provided for mediator participants in the studies, they are given as general information and not linked to specific subject mediations. For example, one study reports that its mediator participants include twenty-nine lawyers and ten judges, and of those thirty-nine mediators, three are female and thirty-six male, while one is a person of colour and thirty-eight are 'white'.⁸⁰⁵ Although the study does not include a clear statement of purpose, its analysis focuses on the mediator participants' actions and approaches and the ways in which those can be inferred to have influenced the mediation process and outcomes. Unfortunately, the study does not include consideration of gender differences and their potential influence on those reported and analysed mediator actions and behaviours. For example, if the lone person of colour is, say, a female and a judge, it would be useful to have a comparative analysis of the actions and approaches taken by, say, the male and female mediators (comparative data on that mix of mediators would likely compromise identification information about the single person of colour; however, if such information were to be de-identified, it could provide valuable comparative information about mediator actions and approaches). Another study, also lacking a clear purpose, includes analysis of mediator actions and approaches and their inferred influence on mediation outcomes. It describes twenty-two mediator participants who include two female and twenty male mediators, being retired and former judges, and practicing and non-practicing attorneys (though without comparative numbers for these).⁸⁰⁶ Again, the researchers include no additional information about whether the two females were, say, retired judges or non-practicing attorneys, nor do they include any comparative analysis of the actions and approaches taken by the female and male mediators.

⁸⁰⁵ Wall, J. A., Jr, and S. Chan-Serafin, 'Do Mediators Walk Their Talk in Civil Cases?' (2010) 28(1) *Conflict Resolution Quarterly* 3, 7.

⁸⁰⁶ Peeples, R., C. Harris, and T. Metzloff, 'Following the Script: An Empirical Analysis of Court-Ordered Mediation of Medical Malpractice Cases' (2007) 2007(1) *Journal of Dispute Resolution* 101.

Neither study includes commentary on the stark lack of female participants, nor do they use that information for comparative analysis of research data.

Apart from not being able to establish participant representativeness, it is concerning in terms of respect and dignity that so many researchers do not describe their study participants as people, instead relying on case file references, union/management categorisation, and large-scale generalisations. Of those who refer to the non-mediator participants only as “cases”, four rely on research data that has been contributed by these “cases”,⁸⁰⁷ and seven rely on research data collected about them (by observing their behaviour during the subject mediations).⁸⁰⁸

The studies reveal no observable trends over time in the ways that researchers refer to study participants.⁸⁰⁹

5.1.4. Confidentiality restrictions on research data⁸¹⁰

There are several aspects to the effects confidentiality restrictions can have on mediation research. The mediation process itself enjoys confidentiality protections which can restrict

⁸⁰⁷ Alberts, J. K., B. L. Heisterkamp, and R. M. McPhee, ‘Disputant Perceptions of and Satisfaction with a Community Mediation Program’ (2005) 16(3) *The International Journal of Conflict Management* 218; Thoennes, N. A., and J. Pearson, ‘Predicting Outcomes in Divorce Mediation: The Influence of People and Process’ (1985) 41(2) *Journal of Social Issues* 115; Wissler, R. L., ‘Mediation and Adjudication in Small Claims Court: The Effects of Process and Case Characteristics’ (1995) 29(2) *Law & Society Review* 323; Woodward, J. G., ‘Settlement Week: Measuring the Promise’ (1990) 11 *Northern Illinois University Law Review* 1.

⁸⁰⁸ Alberts, J. K., B. L. Heisterkamp, and R. M. McPhee, ‘Disputant Perceptions of and Satisfaction with a Community Mediation Program’ (2005) 16(3) *The International Journal of Conflict Management* 218; Jones, T. S., ‘Lag Sequential Analyses of Mediator-Spouse and Husband-Wife Interaction in Successful and Unsuccessful Divorce Mediation in M. A. Rahim (ed), *Managing Conflict: An Interdisciplinary Approach* (Praeger, USA, 1989); Peeples, R., C. Harris, and T. Metzloff, ‘Following the Script: An Empirical Analysis of Court-Ordered Mediation of Medical Malpractice Cases’ (2007) 2007(1) *Journal of Dispute Resolution* 101; Slaikeu, K. A., R. Culler, J. Pearson, and N. Thoennes, ‘Process and Outcome in Divorce Mediation’ (1985) 10 *Mediation Quarterly* 55; Thoennes, N. A., and J. Pearson, ‘Predicting Outcomes in Divorce Mediation: The Influence of People and Process’ (1985) 41(2) *Journal of Social Issues* 115; Vanderkooi, L., and J. Pearson, ‘Mediating Divorce Disputes: Mediator Behaviors, Styles and Roles’ (1983) 32(4) *Family Relations* 557; Wall, J. A., Jr, and S. Chan-Serafin, ‘Do Mediators Walk Their Talk in Civil Cases?’ (2010) 28(1) *Conflict Resolution Quarterly* 3.

⁸⁰⁹ The publication dates of the studies range from 1978 to 2013.

⁸¹⁰ The broader issue of confidentiality is also considered in Chapter Seven of this thesis.

researcher access,^{811 812} and confidentiality requirements may also restrict researchers' capacity to reveal demographic information about mediator and non-mediator participants.⁸¹³ Researchers in the mediation field recognise the restrictions that confidentiality places on their studies.⁸¹⁴ Ten of the selected studies include mention of this issue in relation to mediation research generally,⁸¹⁵ as well as its effects on their own study.⁸¹⁶ Although mediation researchers must protect the confidentiality that is inherent to the mediation process and those who participate in it – and ethics approvals are known to include that requirement⁸¹⁷ – such protections do not have to prevent researchers from providing generalised demographic information about their study participants for

⁸¹¹ For example, see Kochan, T. A., 'Commentary' (2012) 5(4) *Negotiation and Conflict Management Research* 392; Mareschal, P. M., 'What Makes Mediation Work? Perspectives on Resolving Disputes' (2005) 44(3) *Industrial Relations* 509; Sourdin, T., *Dispute Resolution Processes for Credit Consumers* (Project Report, Conflict Resolution Research Centre, La Trobe University, 2007); Wall, J. and K. Kressel, 'Research on Mediator Style: A Summary and Some Research Suggestions' (2012) 5(4) *Negotiation and Conflict Management Research* 401.

⁸¹² This particular aspect of mediation confidentiality is considered further in Chapter Seven, and in Chapter Eight.

⁸¹³ For example, some study participants may not wish to provide their demographic information, and, from an ethical standpoint, they are entitled to make such a refusal.

⁸¹⁴ Kochan, T. A., 'Commentary' (2012) 5(4) *Negotiation and Conflict Management Research* 392; Wall, J., and K. Kressel, 'Research on Mediator Style: A Summary and Some Research Questions' (2012) 5(4) *Negotiation and Conflict Management Research* 401; Sourdin, T., 'Introduction' (2011) 22(3) *ADRJ* 1.

⁸¹⁵ Burrell, N. A., W. A. Donohue, and M. Allen, 'The Impact of Disputants' Expectations on Mediation, Testing an Interventionist Model' (1990) Fall 1990 *Human Communication Research* 104; Carnevale, P. J. D., and R. Pegnetter, 'The Selection of Mediator Tactics in Public Sector Disputes: A Contingency Analysis' (1985) 41(2) *Journal of Social Issues* 2; Henderson, D. A., 'Mediation Success: An Empirical Analysis' (1996) 11(1) *Ohio State Journal on Dispute Resolution* 105; Kochan, T. A., and T. Jick, 'The Public Sector Mediation Process: A Theory and Empirical Examination' (1978) 22(2) *The Journal of Conflict Resolution* 209; Mareschal, P. M., 'What Makes Mediation Work? Perspectives on Resolving Disputes' (2005) 44(3) *Industrial Relations* 509; Sourdin, T., *Dispute Resolution Processes for Credit Consumers* (Project Report, Conflict Resolution Research Centre, La Trobe University, 2007); Sourdin, T., *Mediation in the Supreme and County Courts of Victoria* (Report prepared for the Department of Justice, Victoria, Australia, April 2009), available on <<http://www.civiljustice.info/adreval/1/>>.

⁸¹⁶ Bingham, L. B., 'Transformative Mediation in the United States Postal Service' (2012) 5(4) *Negotiation and Conflict Management Research* 354; Gale, J., R. L. Mowery, M. S. Herrman, and N. L. Hollett, 'Considering Effective Divorce Mediation: Three Potential Factors' (2002) 19(4) *Conflict Resolution Quarterly* 389; Wall, J. A., Jr, and D. E. Rude, 'The Judge as a Mediator' (1991) 76(1) *Journal of Applied Psychology* 54.

⁸¹⁷ Sourdin, T., *Mediation in the Supreme and County Courts of Victoria* (Report prepared for the Department of Justice, Victoria, Australia, April 2009), available on <<http://www.civiljustice.info/adreval/1/>>; Sourdin, T., 'Introduction' (2011) 22(3) *ADRJ* 1; Sourdin, T., *Exploring Pre-Action Requirements: Resolving Disputes Outside Courts* (ACJI, Monash University, October 2012).

the purposes of establishing their representativeness and the credibility of their data, as is demonstrated by the three studies that include such data.⁸¹⁸

The next section of this chapter assesses how mediator and non-mediator participants are reported to have been selected into the studies, and the integrity of those selection procedures.

5.2. Participant selection, and research roles⁸¹⁹

Key concepts

A key contribution by participants in an empirical study is to provide qualitative and quantitative research data – by providing their own reports or by being the object of others’ reports. When assessing the credibility of that data and its contribution to the study, it is important to know how and why participants have been selected, including any selection criteria.⁸²⁰ Researchers should also report how many selected participants did *not* take part, and how many were ultimately excluded from analysis – and the reasons for their non-participation and exclusion.⁸²¹

In practice, selection options can be limited by time, by setting, and by context.⁸²² They can be limited by practicalities such as a people’s availability, and their capacity to participate.⁸²³ The choice of selection options can also be influenced by the relationships between potential

⁸¹⁸ Alberts, J. K., B. L. Heisterkamp, and R. M. McPhee, ‘Disputant Perceptions of and Satisfaction with a Community Mediation Program’ (2005) 16(3) *The International Journal of Conflict Management* 218; Carnevale, P. J. D., and R. Peggnetter, ‘The Selection of Mediator Tactics in Public Sector Disputes: A Contingency Analysis’ (1985) 41(2) *Journal of Social Issues* 2; Wall, J. A., Jr, and S. Chan-Serafin, ‘Processes in Civil Case Mediations’ (2009) 26(3) *Conflict Resolution Quarterly* 261.

⁸¹⁹ Analysis in this section includes aspects of the studies that make it impossible for numbers to be consistent with the total number of studies. For example, some have used more than one selection process, while others have included study participants in more than one research role.

⁸²⁰ Bryman, A., *Social Research Methods* (5th Edition, Oxford University Press, UK, 2016); Gorard, S., *Research Design: Creating Robust Approaches for the Social Sciences* (SAGE Publications Limited, UK/USA/India, 2013); Maruyama, G., and C. S. Ryan, *Research Methods in Social Relations* (8th Edition, Wiley Blackwell, 2014); Reybold, L. E., J. D. Hammert, and S. M. Stribling, ‘Participant Selection as a Conscious Research Method: Thinking Forward and the Deliberation of “Emergent” Findings’ (2012) 13(6) *Qualitative Research* 699.

⁸²¹ Gorard, S., *Research Design: Creating Robust Approaches for the Social Sciences* (SAGE Publishing Limited, UK/USA/India, 2013).

⁸²² Reybold, L. E., J. D. Hammert, and S. M. Stribling, ‘Participant Selection as a Conscious Research Method: Thinking Forward and the Deliberation of “Emergent” Findings’ (2012) 13(6) *Qualitative Research* 699.

⁸²³ Poland, F., and L. Birt, ‘Protecting and Empowering Research with the Vulnerable Older Person’ in R. Iphofen and M. Tolich (eds), *The SAGE Handbook of Qualitative Research Ethics* (SAGE Publishing, UK, 2018).

participants,⁸²⁴ as well as by their relationships with the researchers,⁸²⁵ and their interest in the research topic.⁸²⁶ Available funding is also likely to affect the choice of selection options – where funding is limited, the more complex and expensive processes are unlikely to be considered.

Research funders may also influence researcher access to potential study participants.

Although researchers are expected to choose participants based on the information they hope to obtain,⁸²⁷ not all prospective participants have the capacity to fulfil those expectations (as is observed in one of the selected studies⁸²⁸).⁸²⁹ For example, non-mediator participants may not have sufficient knowledge and experience to recognise, recall, and describe the many things that the mediator might have said or done, or the sometimes complex concepts included in mediation research, especially when the participant is under some personal pressure from their own dispute. People should be able to agree voluntarily to participate, or to refuse, and not feel pressured by researchers, by other participants, or by “gatekeepers” (such as legal advisers or program officials).⁸³⁰

In the context of mediation, pressure to participate may apply where the subject mediation occurs in an institutional setting and the mediator and non-mediator participants have mediation

⁸²⁴ Lowton, K., ‘He Said, She Said, We Said: Ethical Issues in Conducting Dyadic Interviews’ in R. Iphofen, and M. Tolich (eds), *The SAGE Handbook of Qualitative Research Ethics* (SAGE Publishing, UK, 2018); Reybold, L. E., J. D. Hammert, and S. M. Stribling, ‘Participant Selection as a Conscious Research Method: Thinking Forward and the Deliberation of “Emergent” Findings’ (2012) 13(6) *Qualitative Research* 699.

⁸²⁵ Olson, K., ‘Ethical Issues in Grounded Theory’ in R. Iphofen and M. Tolich (eds), *The SAGE Handbook of Qualitative Research Ethics* (SAGE Publishing, UK, 2018).

⁸²⁶ Wynn, L. L., ‘Why Ethics Review Boards Get Ethnographic Research Wrong’ in R. Iphofen and M. Tolich (eds), *The SAGE Handbook of Qualitative Research Ethics* (SAGE Publishing, UK, 2018).

⁸²⁷ Lowton, K., ‘He Said, She Said, We Said: Ethical Issues in Conducting Dyadic Interviews’ in R. Iphofen, and M. Tolich (eds), *The SAGE Handbook of Qualitative Research Ethics* (SAGE Publishing, UK, 2018); Reybold, L. E., J. D. Hammert, and S. M. Stribling, ‘Participant Selection as a Conscious Research Method: Thinking Forward and the Deliberation of “Emergent” Findings’ (2012) 13(6) *Qualitative Research* 699.

⁸²⁸ Alberts, J. K., B. L. Heisterkamp, and R. M. McPhee, ‘Disputant Perceptions of and Satisfaction with a Community Mediation Program’ (2005) 16(3) *The International Journal of Conflict Management* 218.

⁸²⁹ Olson, K., ‘Ethical Issues in Grounded Theory’ in R. Iphofen and M. Tolich (eds), *The SAGE Handbook of Qualitative Research Ethics* (SAGE Publishing, UK, 2018).

⁸³⁰ Lowton, K., ‘He Said, She Said, We Said: Ethical Issues in Conducting Dyadic Interviews’ in R. Iphofen, and M. Tolich (eds), *The SAGE Handbook of Qualitative Research Ethics* (SAGE Publishing, UK, 2018).

experience and are well-known to each other.⁸³¹ It has been acknowledged that it can be difficult to avoid the perception of pressure when potential participants are in an emotionally vulnerable situation.⁸³² Potential participants in mediation research may consider that they are being pressured to participate if their invitation is issued when they are about to commence their mediation – a time when they are likely to be preoccupied and, perhaps, “on edge”.

Finally, it has been recommended that participants not be selected merely because they are readily accessible and convenient (eg all mediators and non-mediators who access a specific mediation program or service during a specified period).⁸³³ In mediation research, access to potential non-mediator participants can be quite restricted especially when the only access route is through lawyers where professional privilege can affect access to the contact details of their clients. Access can also be problematic if contact details can only be obtained from, say, court records which may not be up-to-date or complete.⁸³⁴

‘Purposeful selection’,⁸³⁵ or ‘purposive selection’,⁸³⁶ of study participants is based on their capacity to provide the information that is directly relevant to the study’s purpose; however, the approach requires clear criteria for participant inclusion.⁸³⁷ Although it has been suggested that purposeful selection of study participants can enrich the research data,⁸³⁸ researchers have been cautioned to ensure that they do not select participants on the basis of their capacity to provide the

⁸³¹ Kressel, K., ‘How Do Mediators Decide What To Do? Implicit Schemas of Practice and Mediator Decisionmaking’ (2013) 28(3) *Ohio State Journal on Dispute Resolution* 709.

⁸³² O’Mathúna, D., ‘The Dual Imperative in Disaster Research Ethics’ in R. Iphofen and M. Tolich (eds), *The SAGE Handbook of Qualitative Research Ethics* (SAGE Publishing, UK, 2018).

⁸³³ Poland, F., and L. Birt, ‘Protecting and Empowering Research with the Vulnerable Older Person’ in R. Iphofen and M. Tolich (eds), *The SAGE Handbook of Qualitative Research Ethics* (SAGE Publishing, UK, 2018).

⁸³⁴ Sourdin, T., *Mediation in the Supreme and County Courts of Victoria* (Report prepared for the Department of Justice, Victoria, Australia, April 2009), available on <<http://www.civiljustice.info/adreval/1/>>.

⁸³⁵ Reybold, L. E., J. D. Hammert, and S. M. Stribling, ‘Participant Selection as a Conscious Research Method: Thinking Forward and the Deliberation of “Emergent” Findings’ (2012) 13(6) *Qualitative Research* 699.

⁸³⁶ Bryman, A., *Social Research Methods* (5th Edition, Oxford University Press, UK, 2016), 694.

⁸³⁷ Bryman, A., *Social Research Methods* (5th Edition, Oxford University Press, UK, 2016).

⁸³⁸ Reybold, L. E., J. D. Hammert, and S. M. Stribling, ‘Participant Selection as a Conscious Research Method: Thinking Forward and the Deliberation of “Emergent” Findings’ (2012) 13(6) *Qualitative Research* 699.

“right” data and confirm the researcher’s pre-existing views.⁸³⁹ Even when they have chosen to make purposeful selections, researchers should be constantly aware that the participant data they collect is the participants’ own *subjective interpretations*.⁸⁴⁰ It cannot be treated as objective “fact”.

⁸³⁹ Olson, K., ‘Ethical Issues in Grounded Theory’ in R. Iphofen and M. Tolich (eds), *The SAGE Handbook of Qualitative Research Ethics* (SAGE Publishing, UK, 2018).

⁸⁴⁰ Freeman, M., K. deMarrais, J. Preissle, K. Roulston, and E. A. St Pierre, ‘Standards of Evidence in Qualitative Research: An Incitement to Discourse’ (2007) 36(1) *Educational Researcher* 25; Reybold, L. E., J. D. Hammert, and S. M. Stribling, ‘Participant Selection as a Conscious Research Method: Thinking Forward and the Deliberation of “Emergent” Findings’ (2012) 13(6) *Qualitative Research* 699.

5.2.0. Selection and consent

Twenty-five of the selected studies include a usable description of processes for selecting participants into their studies.⁸⁴¹ Of the twenty-five studies, two describe a selection process that is applied for some participants, without including a selection process for other participants.⁸⁴²

⁸⁴¹ Carnevale, P. J. D., and R. Pagnetter, 'The Selection of Mediator Tactics in Public Sector Disputes: A Contingency Analysis' (1985) 41(2) *Journal of Social Issues* 2; Dilts, D. A. and A. Karim, 'The Effect of Mediators' Qualities and Strategies on Mediation Outcomes' (1990) 45(1) *Relations Industrielles/Industrial Relations* 22; Gale, J., R. L. Mowery, M. S. Herrman, and N. L. Hollett, 'Considering Effective Divorce Mediation: Three Potential Factors' (2002) 19(4) *Conflict Resolution Quarterly* 389; Goldberg, S. B., and M. L. Shaw, 'Further Investigation into the Secrets of Successful and Unsuccessful Mediators' (2008) 26(8) *Alternatives to the High Cost of Litigation* 149; Henderson, D. A., 'Mediation Success: An Empirical Analysis' (1996) 11(1) *Ohio State Journal on Dispute Resolution* 105; Hiltrop, J. M., 'Factors Associated with Successful Labor Mediation' in K. Kressel and D. G. Pruitt (eds), *Mediation Research: The Process and Effectiveness of Third-Party Intervention* (Jossey-Bass, USA, 1989); Karim, A. and D. Dilts, 'Determinants of Mediation Success in the Iowa Public Sector' (1990) 19(2) *Journal of Collective Negotiations* 129; Karim, A. and R. Pagnetter, 'Mediator Strategies and Qualities and Mediation Effectiveness' (1983) 22(1) *Industrial Relations* 105; Kressel, K., E. A. Frontera, S. Forlenza, F. Butler, and L. Fish, 'The Settlement-Oriented vs the Problem-Solving Style' (1994) 50(1) *Journal of Social Issues* 67 (non-mediators); Mareschal, P. M., 'What Makes Mediation Work? Perspectives on Resolving Disputes' (2005) 44(3) *Industrial Relations* 509; McEwen, C. A., *An Evaluation of the ADR Pilot Project: Final Report 1* (Unpublished report, 1992); McGillicuddy, N. B., G. L. Welton, and D. G. Pruitt, 'Third-Party Intervention: A Field Experiment Comparing Three Different Models' (1987) 53(1) *Journal of Personality and Social Psychology* 104; Posthuma, R. A., A. Richard, J. B. Dworkin, and M. S. Swift, 'Mediator Tactics and Sources of Conflict: Facilitating and Inhibiting Effects' (2002) 41(1) *Industrial Relations* 94; Pruitt, D. G., W. R. Fry, L. Castrianno, J. Zubeck, G. L. Welton, N. B. McGillicuddy, and C. Ippolito, 'The Process of Mediation: Caucusing, Control, and Problem Solving' in M. A. Rahim (ed), *Managing Conflict: An Interdisciplinary Approach* (Praeger, USA, 1989); Shapiro, D., R. Drieghe, and J. Brett, 'Mediator Behavior and the Outcomes of Mediation' (1985) 41(2) *Journal of Social Issues* 101; Sourdin, T., *Dispute Resolution Processes for Credit Consumers* (Project Report, Conflict Resolution Research Centre, La Trobe University, 2007); Sourdin, T., *Mediation in the Supreme and County Courts of Victoria* (Report prepared for the Department of Justice, Victoria, Australia, April 2009), available on <<http://www.civiljustice.info/adreval/1/>>; Sourdin, T., Exploring Pre-Action Requirements: Resolving Disputes Outside Courts (ACJI, Monash University, October 2012); Sourdin, T., and T. Matruglio, *Evaluating Mediation – New South Wales Settlement Scheme 2002* (2004) *Mediation*. Paper 7, available on <<http://www.civiljustice.info/med/7/>>; Swaab, R. I., *Face First: Pre-Mediation Caucus and Face in Employment Disputes* (Presentation, Annual Association of Conflict Management Conference, June 2009); Swaab, R. I., and J. Brett, *Caucus with Care: The Impact of Pre-Mediation Caucuses on Conflict Resolution* (Meetings Paper, International Association of Conflict Management, 2007); Wall, J. A., Jr, and D. E. Rude, 'The Judge as a Mediator' (1991) 76(1) *Journal of Applied Psychology* 54 (study 1); Wissler, R. L., 'Mediation and Adjudication in Small Claims Court: The Effects of Process and Case Characteristics' (1995) 29(2) *Law & Society Review* 323; Wissler, R. L., *Trapping the Data: An Assessment of Domestic Relations Mediation in Maine and Ohio Courts* (Unpublished report, 1999); Wissler, R. L., 'Court-Connected Mediation in General Civil Cases: What We Know from Empirical Research' (2002) 17(3) *Ohio State Journal on Dispute Resolution* 641.

⁸⁴² Kressel, K., E. A. Frontera, S. Forlenza, F. Butler, and L. Fish, 'The Settlement-Oriented vs the Problem-Solving Style' (1994) 50(1) *Journal of Social Issues* 67 (not for mediators); Wall, J. A., Jr, and D. E. Rude, 'The Judge as a Mediator' (1991) 76(1) *Journal of Applied Psychology* 54 (not for study 2).

Twenty-two of the studies include no usable description of the selection process for mediator and/or non-mediator participants.⁸⁴³

Six studies describe a procedure for obtaining the participants' consent to specific data collection activities, though without including a description of selection procedures.⁸⁴⁴ Consent relates to a specific research activity (or data collection procedure), and is not a selection process for

⁸⁴³ Alberts, J. K., B. L. Heisterkamp, and R. M. McPhee, 'Disputant Perceptions of and Satisfaction with a Community Mediation Program' (2005) 16(3) *The International Journal of Conflict Management* 218; Bingham, L. B., 'Transformative Mediation in the United States Postal Service' (2012) 5(4) *Negotiation and Conflict Management Research* 354; Burrell, N. A., W. A. Donohue, and M. Allen, 'The Impact of Disputants' Expectations on Mediation, Testing an Interventionist Model' (1990) Fall 1990 *Human Communication Research* 104; Jones, T. S., 'Lag Sequential Analyses of Mediator-Spouse and Husband-Wife Interaction in Successful and Unsuccessful Divorce Mediation in M. A. Rahim (ed), *Managing Conflict: An Interdisciplinary Approach* (Praeger, USA, 1989); Kimsey, W. D., R. M. Fuller, A. J. Bell, and B. C. McKinney, 'The Impact of Mediator Strategic Choices: An Experimental Study' (1994) 12(1) *Mediation Quarterly* 89; Kimsey, W. D., R. M. Fuller, and B. C. McKinney, 'Mediator Listening, Dispute Reframing, and Mediation Outcome: A Pilot Study' (1993) 7(1) *Journal of the International Listening Association* 74; Kochan, T. A., and T. Jick, 'The Public Sector Mediation Process: A Theory and Empirical Examination' (1978) 22(2) *The Journal of Conflict Resolution* 209; Kressel, K., 'How Do Mediators Decide What To Do? Implicit Schemas of Practice and Mediator Decisionmaking' (2013) 28(3) *Ohio State Journal on Dispute Resolution* 709; Kressel, K., T. Henderson, W. Reich, and C. Cohen, 'Multi-Dimensional Analysis of Conflict Mediator Style' (2012) 30(2) *Conflict Resolution Quarterly* 135; McDermott, E. P., and R. Obar, "'What's Going On" in Mediation: An Empirical Analysis of the Influence of a Mediator's Style on Party Satisfaction and Monetary Benefit' (2004) 9 *Harvard Negotiation Law Review* 75; Peebles 007; Pruitt, D. G., R. S. Peirce, N. B. McGillicuddy, G. L. Welton, and L. Castrianno, 'Long-Term Success in Mediation' (1993) 17(3) *Law and Human Behavior* 313; Slaikeu, K. A., R. Culler, J. Pearson, and N. Thoennes, 'Process and Outcome in Divorce Mediation' (1985) 10 *Mediation Quarterly* 55; Thoennes, N. A., and J. Pearson, 'Predicting Outcomes in Divorce Mediation: The Influence of People and Process' (1985) 41(2) *Journal of Social Issues* 115; Vanderkooi, L., and J. Pearson, 'Mediating Divorce Disputes: Mediator Behaviors, Styles and Roles' (1983) 32(4) *Family Relations* 557; Wall, J. A., Jr, and S. Chan-Serafin, 'Processes in Civil Case Mediations' (2009) 26(3) *Conflict Resolution Quarterly* 261; Wall, J. A., Jr, and S. Chan-Serafin, 'Do Mediators Walk Their Talk in Civil Cases?' (2010) 28(1) *Conflict Resolution Quarterly* 3; Welton, G. L., and D. G. Pruitt, 'The Mediation Process: The Effects of Mediator Bias and Disputant Power' (1987) 13(1) *Personality and Social Psychology Bulletin* 123; Welton, G. L., D. G. Pruitt, and N. B. McGillicuddy, 'The Role of Caucusing in Community Mediation' (1988) 32(1) *The Journal of Conflict Resolution* 181; Welton, G. L., D. G. Pruitt, N. B. McGillicuddy, C. A. Ippolito, and J. M. Zubeck, 'Antecedents and Characteristics of Caucusing in Community Mediation' (1992) 3(4) *International Journal of Conflict Management* 303; Woodward, J. G., 'Settlement Week: Measuring the Promise' (1990) 11 *Northern Illinois University Law Review* 1; Zubeck, J. M., D. G. Pruitt, R. S. Peirce, N. B. McGillicuddy, and H. Syna, 'Disputant and Mediator Behaviors Affecting Short-Term Success in Mediation' (1992) 36(3) *Journal of Conflict Resolution* 546.

⁸⁴⁴ Alberts, J. K., B. L. Heisterkamp, and R. M. McPhee, 'Disputant Perceptions of and Satisfaction with a Community Mediation Program' (2005) 16(3) *The International Journal of Conflict Management* 218; Wall, J. A., Jr, and S. Chan-Serafin, 'Do Mediators Walk Their Talk in Civil Cases?' (2010) 28(1) *Conflict Resolution Quarterly* 3; Welton, G. L., D. G. Pruitt, N. B. McGillicuddy, C. A. Ippolito, and J. M. Zubeck, 'Antecedents and Characteristics of Caucusing in Community Mediation' (1992) 3(4) *International Journal of Conflict Management* 303; Zubeck, J. M., D. G. Pruitt, R. S. Peirce, N. B. McGillicuddy, and H. Syna, 'Disputant and Mediator Behaviors Affecting Short-Term Success in Mediation' (1992) 36(3) *Journal of Conflict Resolution* 546; Pruitt, D. G., R. S. Peirce, N. B. McGillicuddy, G. L. Welton, and L. Castrianno, 'Long-Term Success in Mediation' (1993) 17(3) *Law and Human Behavior* 313; Welton, G. L., D. G. Pruitt, and N. B. McGillicuddy, 'The Role of Caucusing in Community Mediation' (1988) 32(1) *The Journal of Conflict Resolution* 181.

enlisting participants into a study; therefore, the studies with only a consent procedure are included in the twenty-two studies without a selection process include those including a consent procedure.

There are various issues inherent in some of the described selection processes, and they are considered below.

Selection processes and procedures

The twenty-five studies that include participant selection processes, describe four basic selection approaches: self-selection, random selection, court referral, and a form of cross-selection.⁸⁴⁵

a) Self-selection

76% (n = 19 of 25) describe self-selection processes both for the mediator and the non-mediator participants (four of the studies describe selecting more than one group of participants using different processes⁸⁴⁶).

I. Procedure: return of surveys

(i) Mediator participants (n = 9 studies);⁸⁴⁷

⁸⁴⁵ The figures cannot be expected to sum to 25 because some studies appear in more than one category; eg researchers may randomly select mediators into a study and use self-selection procedures to enlist non-mediators.

⁸⁴⁶ Sourdin, T., *Mediation in the Supreme and County Courts of Victoria* (Report prepared for the Department of Justice, Victoria, Australia, April 2009), available on <<http://www.civiljustice.info/adreval/1/>>; Sourdin, T., *Exploring Pre-Action Requirements: Resolving Disputes Outside Courts* (ACJI, Monash University, October 2012); Sourdin, T., and T. Matruglio, *Evaluating Mediation – New South Wales Settlement Scheme 2002* (2004) *Mediation*. Paper 7, available on <<http://www.civiljustice.info/med/7/>>; Wissler, R. L., *Trapping the Data: An Assessment of Domestic Relations Mediation in Maine and Ohio Courts* (Unpublished report, 1999).

⁸⁴⁷ Mareschal, P. M., 'What Makes Mediation Work? Perspectives on Resolving Disputes' (2005) 44(3) *Industrial Relations* 509; McEwen, C. A., *An Evaluation of the ADR Pilot Project: Final Report 1* (Unpublished report, 1992); Swaab, R. I., *Face First: Pre-Mediation Caucus and Face in Employment Disputes* (Presentation, Annual Association of Conflict Management Conference, June 2009); Swaab, R. I., and J. Brett, *Caucus with Care: The Impact of Pre-Mediation Caucuses on Conflict Resolution* (Meetings Paper, International Association of Conflict Management, 2007); Dilts, D. A. and A. Karim, 'The Effect of Mediators' Qualities and Strategies on Mediation Outcomes' (1990) 45(1) *Relations Industrielles/Industrial Relations* 22; Sourdin, T., *Mediation in the Supreme and County Courts of Victoria* (Report prepared for the Department of Justice, Victoria, Australia, April 2009), available on <<http://www.civiljustice.info/adreval/1/>>; Sourdin, T., and T. Matruglio, *Evaluating Mediation – New South Wales Settlement Scheme 2002* (2004) *Mediation*. Paper 7, available on <<http://www.civiljustice.info/med/7/>>; Wissler, R. L., *Trapping the Data: An Assessment of Domestic Relations Mediation in Maine and Ohio Courts* (Unpublished report, 1999).

- (ii) Non-mediator participants (n = 9 studies);⁸⁴⁸
 - (iii) Participating legal representatives (n = 5 studies);⁸⁴⁹ and
 - (iv) Non-participants (n = 1 study).⁸⁵⁰
- II. Procedure: invitation by phone call
- (i) Mediator participants (n = 1 study);⁸⁵¹ and
 - (ii) Non-mediator participants (n = 1 study).⁸⁵²
- III. Procedure: other invitations
- (i) Mediator participants (n = 1 study);⁸⁵³ and
 - (ii) Non-mediator participants (n = 1 study).⁸⁵⁴
- b) Random selection

⁸⁴⁸ Hiltrop, J. M., 'Factors Associated with Successful Labor Mediation' in K. Kressel and D. G. Pruitt (eds), *Mediation Research: The Process and Effectiveness of Third-Party Intervention* (Jossey-Bass, USA, 1989) (study 2); Karim, A. and D. Dilts, 'Determinants of Mediation Success in the Iowa Public Sector' (1990) 19(2) *Journal of Collective Negotiations* 129; Karim, A. and R. Peggnetter, 'Mediator Strategies and Qualities and Mediation Effectiveness' (1983) 22(1) *Industrial Relations* 105; Posthuma, R. A., A. Richard, J. B. Dworkin, and M. S. Swift, 'Mediator Tactics and Sources of Conflict: Facilitating and Inhibiting Effects' (2002) 41(1) *Industrial Relations* 94; Sourdin, T., *Mediation in the Supreme and County Courts of Victoria* (Report prepared for the Department of Justice, Victoria, Australia, April 2009), available on <<http://www.civiljustice.info/adreval/1/>>; Sourdin, T., and T. Matruggio, *Evaluating Mediation – New South Wales Settlement Scheme 2002* (2004) *Mediation*. Paper 7, available on <<http://www.civiljustice.info/med/7>>; Wissler, R. L., *Trapping the Data: An Assessment of Domestic Relations Mediation in Maine and Ohio Courts* (Unpublished report, 1999); Wissler, R. L., 'Court-Connected Mediation in General Civil Cases: What We Know from Empirical Research' (2002) 17(3) *Ohio State Journal on Dispute Resolution* 641.

⁸⁴⁹ Henderson, D. A., 'Mediation Success: An Empirical Analysis' (1996) 11(1) *Ohio State Journal on Dispute Resolution* 105; Sourdin, T., *Mediation in the Supreme and County Courts of Victoria* (Report prepared for the Department of Justice, Victoria, Australia, April 2009), available on <<http://www.civiljustice.info/adreval/1/>>; Sourdin, T., *Exploring Pre-Action Requirements: Resolving Disputes Outside Courts* (ACJI, Monash University, October 2012); Sourdin, T., and T. Matruggio, *Evaluating Mediation – New South Wales Settlement Scheme 2002* (2004) *Mediation*. Paper 7, available on <<http://www.civiljustice.info/med/7>>; Wissler, R. L., *Trapping the Data: An Assessment of Domestic Relations Mediation in Maine and Ohio Courts* (Unpublished report, 1999).

⁸⁵⁰ Wall, J. A., Jr, and D. E. Rude, 'The Judge as a Mediator' (1991) 76(1) *Journal of Applied Psychology* 54.

⁸⁵¹ Carnevale, P. J. D., and R. Peggnetter, 'The Selection of Mediator Tactics in Public Sector Disputes: A Contingency Analysis' (1985) 41(2) *Journal of Social Issues* 2.

⁸⁵² Sourdin, T., *Dispute Resolution Processes for Credit Consumers* (Project Report, Conflict Resolution Research Centre, La Trobe University, 2007).

⁸⁵³ Sourdin, T., *Exploring Pre-Action Requirements: Resolving Disputes Outside Courts* (ACJI, Monash University, October 2012).

⁸⁵⁴ Sourdin, T., *Exploring Pre-Action Requirements: Resolving Disputes Outside Courts* (ACJI, Monash University, October 2012).

Four studies describe random selection of mediator or non-mediator participants into their studies.

- I. Mediator participants (n = 2 studies);⁸⁵⁵ and
- II. Non-mediator participants (n = 2 studies).⁸⁵⁶

c) Court referral

One study describes court referral as the process for selecting non-mediator study participants.

- I. No mediator participants were selected into studies by court referral; and
- II. Non-mediator participants (n = 1 study).⁸⁵⁷

d) Other: cross referral

Two studies describe selection processes in which mediators and non-mediators recommended study participants.

- I. Non-mediators select mediator participants (n = 1 study);⁸⁵⁸ and
- II. Mediators select non-mediator participants. (n = 1 study).⁸⁵⁹

⁸⁵⁵ Gale, J., R. L. Mowery, M. S. Herrman, and N. L. Hollett, 'Considering Effective Divorce Mediation: Three Potential Factors' (2002) 19(4) *Conflict Resolution Quarterly* 389; Hiltrop, J. M., 'Factors Associated with Successful Labor Mediation' in K. Kressel and D. G. Pruitt (eds), *Mediation Research: The Process and Effectiveness of Third-Party Intervention* (Jossey-Bass, USA, 1989) (study 1).

⁸⁵⁶ McGillicuddy, N. B., G. L. Welton, and D. G. Pruitt, 'Third-Party Intervention: A Field Experiment Comparing Three Different Models' (1987) 53(1) *Journal of Personality and Social Psychology* 104; Pruitt, D. G., W. R. Fry, L. Castrianno, J. Zubeck, G. L. Welton, N. B. McGillicuddy, and C. Ippolito, 'The Process of Mediation: Caucusing, Control, and Problem Solving' in M. A. Rahim (ed), *Managing Conflict: An Interdisciplinary Approach* (Praeger, USA, 1989).

⁸⁵⁷ Kressel, K., E. A. Frontera, S. Forlenza, F. Butler, and L. Fish, 'The Settlement-Oriented vs the Problem-Solving Style' (1994) 50(1) *Journal of Social Issues* 67.

⁸⁵⁸ Shapiro, D., R. Drieghe, and J. Brett, 'Mediator Behavior and the Outcomes of Mediation' (1985) 41(2) *Journal of Social Issues* 101.

⁸⁵⁹ Goldberg, S. B., and M. L. Shaw, 'Further Investigation into the Secrets of Successful and Unsuccessful Mediators' (2008) 26(8) *Alternatives to the High Cost of Litigation* 149.

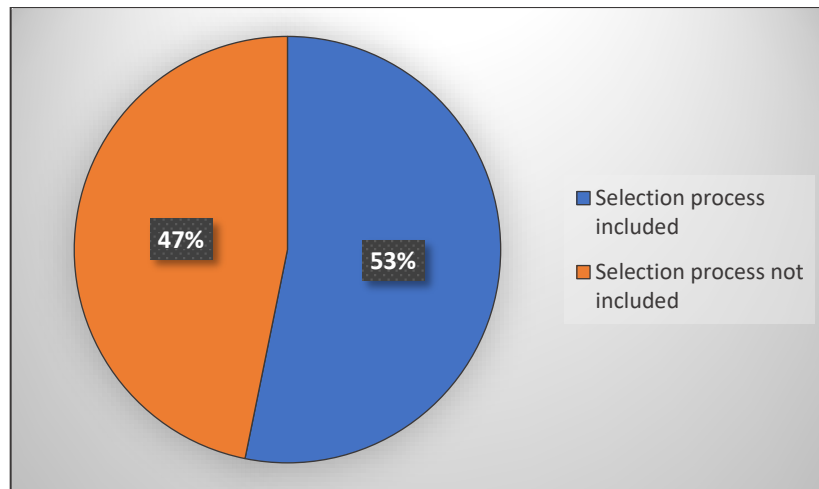


Figure 5.4. Selection process included.

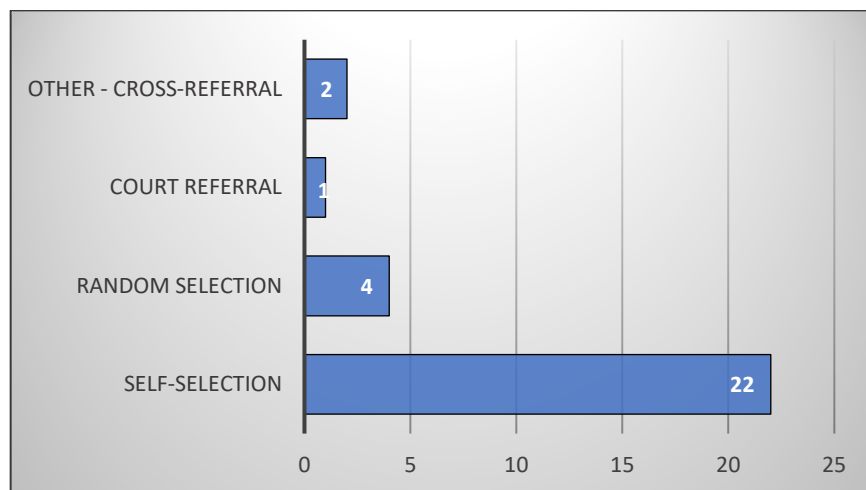


Figure 5.5. Selection process.

Commentary

a) Self-selection

Where large numbers of participants are preferred, self-selection into an empirical study is a relatively efficient means of enlisting large numbers of participants into empirical research and can be a preferred approach in terms of meeting ethical requirements. Limitations include that findings

can often be generalised only to those participants:⁸⁶⁰ people who self-select into a study may have strong positive or negative opinions about the research topic, or have a special interest in it (ie people who are indifferent to a research topic tend not to self-select) into studies of it.⁸⁶¹

Of the thirty-one studies in which a selection or consent process is described, self-selection is the predominant selection process, being described in eighteen studies.⁸⁶² Of those, sixteen

⁸⁶⁰ Gorard, S., *Research Design: Creating Robust Approaches for the Social Sciences* (SAGE Publications Limited, UK/USA/India, 2013).

⁸⁶¹ Wynn, L. L., 'Why Ethics Review Boards Get Ethnographic Research Wrong' in R. Iphofen and M. Tolich (eds), *The SAGE Handbook of Qualitative Research Ethics* (SAGE Publishing, UK, 2018).

⁸⁶² Carnevale, P. J. D., and R. Peggnetter, 'The Selection of Mediator Tactics in Public Sector Disputes: A Contingency Analysis' (1985) 41(2) *Journal of Social Issues* 2; Dilts, D. A. and A. Karim, 'The Effect of Mediators' Qualities and Strategies on Mediation Outcomes' (1990) 45(1) *Relations Industrielles/Industrial Relations* 22; Henderson, D. A., 'Mediation Success: An Empirical Analysis' (1996) 11(1) *Ohio State Journal on Dispute Resolution* 105; Hiltrop, J. M., 'Factors Associated with Successful Labor Mediation' in K. Kressel and D. G. Pruitt (eds), *Mediation Research: The Process and Effectiveness of Third-Party Intervention* (Jossey-Bass, USA, 1989); Karim, A. and D. Dilts, 'Determinants of Mediation Success in the Iowa Public Sector' (1990) 19(2) *Journal of Collective Negotiations* 129; Karim, A. and R. Peggnetter, 'Mediator Strategies and Qualities and Mediation Effectiveness' (1983) 22(1) *Industrial Relations* 105; Mareschal, P. M., 'What Makes Mediation Work? Perspectives on Resolving Disputes' (2005) 44(3) *Industrial Relations* 509; McEwen, C. A., *An Evaluation of the ADR Pilot Project: Final Report 1* (Unpublished report, 1992); Posthuma, R. A., A. Richard, J. B. Dworkin, and M. S. Swift, 'Mediator Tactics and Sources of Conflict: Facilitating and Inhibiting Effects' (2002) 41(1) *Industrial Relations* 94; Sourdin, T., *Dispute Resolution Processes for Credit Consumers* (Project Report, Conflict Resolution Research Centre, La Trobe University, 2007); Sourdin, T., *Mediation in the Supreme and County Courts of Victoria* (Report prepared for the Department of Justice, Victoria, Australia, April 2009), available on <<http://www.civiljustice.info/adreval/1/>>; Sourdin, T., *Exploring Pre-Action Requirements: Resolving Disputes Outside Courts* (ACJI, Monash University, October 2012); Sourdin, T., and T. Matruggio, *Evaluating Mediation – New South Wales Settlement Scheme 2002* (2004) *Mediation*. Paper 7, available on <<http://www.civiljustice.info/med/7>>; Swaab, R. I., *Face First: Pre-Mediation Caucus and Face in Employment Disputes* (Presentation, Annual Association of Conflict Management Conference, June 2009); Swaab, R. I., and J. Brett, *Caucus with Care: The Impact of Pre-Mediation Caucuses on Conflict Resolution* (Meetings Paper, International Association of Conflict Management, 2007); Wall, J. A., Jr, and D. E. Rude, 'The Judge as a Mediator' (1991) 76(1) *Journal of Applied Psychology* 54; Wissler, R. L., *Trapping the Data: An Assessment of Domestic Relations Mediation in Maine and Ohio Courts* (Unpublished report, 1999); Wissler, R. L., 'Court-Connected Mediation in General Civil Cases: What We Know from Empirical Research' (2002) 17(3) *Ohio State Journal on Dispute Resolution* 641.

researchers describe using the completion and return of surveys as at least part of the self-selection procedure.⁸⁶³ Two studies report using phone calls to invite potential participants.⁸⁶⁴

b) Random selection

Random selection is recognised as the process most likely to reduce researcher influence and bias,⁸⁶⁵ and, for some, is the preferred selection process for inclusion in empirical studies.⁸⁶⁶

However, it can be complex to manage, and, in some contexts, can be impractical, and even raise ethical issues when study participants are denied access to the intervention being investigated. For example, participants in mediation research might be randomly assigned to a group that is denied access to mediation as part of the study.⁸⁶⁷ The issue of random allocation into study groups is considered below (see 5.4. Groups and repeat players).

⁸⁶³ Dilts, D. A. and A. Karim, 'The Effect of Mediators' Qualities and Strategies on Mediation Outcomes' (1990) 45(1) *Relations Industrielles/Industrial Relations* 22; Henderson, D. A., 'Mediation Success: An Empirical Analysis' (1996) 11(1) *Ohio State Journal on Dispute Resolution* 105; Hiltrop, J. M., 'Factors Associated with Successful Labor Mediation' in K. Kressel and D. G. Pruitt (eds), *Mediation Research: The Process and Effectiveness of Third-Party Intervention* (Jossey-Bass, USA, 1989); Karim, A. and D. Dilts, 'Determinants of Mediation Success in the Iowa Public Sector' (1990) 19(2) *Journal of Collective Negotiations* 129; Karim, A. and R. Pegnetter, 'Mediator Strategies and Qualities and Mediation Effectiveness' (1983) 22(1) *Industrial Relations* 105; Mareschal, P. M., 'What Makes Mediation Work? Perspectives on Resolving Disputes' (2005) 44(3) *Industrial Relations* 509; McEwen, C. A., *An Evaluation of the ADR Pilot Project: Final Report 1* (Unpublished report, 1992); Posthuma, R. A., A. Richard, J. B. Dworkin, and M. S. Swift, 'Mediator Tactics and Sources of Conflict: Facilitating and Inhibiting Effects' (2002) 41(1) *Industrial Relations* 94; Sourdin, T., *Mediation in the Supreme and County Courts of Victoria* (Report prepared for the Department of Justice, Victoria, Australia, April 2009), available on <<http://www.civiljustice.info/adreval/1/>>; Sourdin, T., Exploring Pre-Action Requirements: Resolving Disputes Outside Courts (ACJI, Monash University, October 2012); Sourdin, T., and T. Matruglio, *Evaluating Mediation – New South Wales Settlement Scheme 2002* (2004) *Mediation*. Paper 7, available on <<http://www.civiljustice.info/med/7/>>; Swaab, R. I., *Face First: Pre-Mediation Caucus and Face in Employment Disputes* (Presentation, Annual Association of Conflict Management Conference, June 2009); Swaab, R. I., and J. Brett, *Caucus with Care: The Impact of Pre-Mediation Caucuses on Conflict Resolution* (Meetings Paper, International Association of Conflict Management, 2007); Wall, J. A., Jr, and D. E. Rude, 'The Judge as a Mediator' (1991) 76(1) *Journal of Applied Psychology* 54; Wissler, R. L., *Trapping the Data: An Assessment of Domestic Relations Mediation in Maine and Ohio Courts* (Unpublished report, 1999); Wissler, R. L., 'Court-Connected Mediation in General Civil Cases: What We Know from Empirical Research' (2002) 17(3) *Ohio State Journal on Dispute Resolution* 641.

⁸⁶⁴ Carnevale, P. J. D., and R. Pegnetter, 'The Selection of Mediator Tactics in Public Sector Disputes: A Contingency Analysis' (1985) 41(2) *Journal of Social Issues* 2; Sourdin, T., *Dispute Resolution Processes for Credit Consumers* (Project Report, Conflict Resolution Research Centre, La Trobe University, 2007). In both studies, if invitees agreed to participate, an interview was conducted as part of the same phone call.

⁸⁶⁵ Gorard, S., *Research Design: Creating Robust Approaches for the Social Sciences* (SAGE Publications Limited, UK/USA/India, 2013).

⁸⁶⁶ Bryman, A., *Social Research Methods* (5th Edition, Oxford University Press, 2016).

⁸⁶⁷ Wissler, R. L., 'Mediation and Adjudication in Small Claims Court: The Effects of Process and Case Characteristics' (1995) 29(2) *Law & Society Review* 323.

Four studies claim to have used random selection of participants, two for mediator participants,⁸⁶⁸ and two for non-mediator participants.⁸⁶⁹ One of the studies (using simulated mediation) claims that mediator participants were randomly selected;⁸⁷⁰ however, the study includes a sequence of selection procedures only one of which was randomised; it could be said that the initial random selection created a sample population from which four participants were selected into the study by the prospective “disputants”.⁸⁷¹

c) Court referral (non-mediator participants only)

Four studies claim that courts referred matters into their studies.⁸⁷² In three of those, it appears the courts referred matters to the centres in which the studies occurred, and researchers do report that not all referred matters were included in the studies. Thus, the courts did not refer matters directly into each study.

d) Other: cross-referral

Two studies describe selection processes in which non-mediators selected mediator participants, and mediators selected non-mediator participants.

⁸⁶⁸ Gale, J., R. L. Mowery, M. S. Herrman, and N. L. Hollett, ‘Considering Effective Divorce Mediation: Three Potential Factors’ (2002) 19(4) *Conflict Resolution Quarterly* 389; Hiltrop, J. M., ‘Factors Associated with Successful Labor Mediation’ in K. Kressel and D. G. Pruitt (eds), *Mediation Research: The Process and Effectiveness of Third-Party Intervention* (Jossey-Bass, USA, 1989).

⁸⁶⁹ McGillicuddy, N. B., G. L. Welton, and D. G. Pruitt, ‘Third-Party Intervention: A Field Experiment Comparing Three Different Models’ (1987) 53(1) *Journal of Personality and Social Psychology* 104; Pruitt, D. G., N. B. McGillicuddy, G. L. Welton, and W. R. Fry, ‘Process of Mediation in Dispute Settlement Centres’ in K. Kressel, and D. G. Pruitt (eds), *Mediation Research: The Process and Effectiveness of Third-Party Intervention* (Jossey-Bass, US, 1989).

⁸⁷⁰ Gale, J., R. L. Mowery, M. S. Herrman, and N. L. Hollett, ‘Considering Effective Divorce Mediation: Three Potential Factors’ (2002) 19(4) *Conflict Resolution Quarterly* 389.

⁸⁷¹ In the study, potential mediator participants were sent a written invitation to participate in the study; 100 of those who responded were randomly selected, following which a further procedure selected 20 mediator participants for inclusion in the collection of research data. From those 20, the four non-mediator participants (disputants) selected the final four mediator participants for inclusion in the study’s data analysis.

⁸⁷² Kressel, K., T. Henderson, W. Reich, and C. Cohen, ‘Multi-Dimensional Analysis of Conflict Mediator Style’ (2012) 30(2) *Conflict Resolution Quarterly* 135; Welton, G. L., D. G. Pruitt, and N. B. McGillicuddy, ‘The Role of Caucusing in Community Mediation’ (1988) 32(1) *The Journal of Conflict Resolution* 181; Welton, G. L., D. G. Pruitt, N. B. McGillicuddy, C. A. Ippolito, and J. M. Zubeck, ‘Antecedents and Characteristics of Caucusing in Community Mediation’ (1992) 3(4) *International Journal of Conflict Management* 303; Zubeck, J. M., D. G. Pruitt, R. S. Peirce, N. B. McGillicuddy, and H. Syna, ‘Disputant and Mediator Behaviors Affecting Short-Term Success in Mediation’ (1992) 36(3) *Journal of Conflict Resolution* 546.

One study describes a selection procedure in which non-mediator participants select mediator participants.⁸⁷³ Union and management negotiators were invited to select mediator participants from among those who worked with them in an institutional labour/management mediation program. It is unclear how the mediators were informed of their selection.

A second study includes a selection process in which mediator participants from an earlier study were asked to recommend non-mediator participants who could provide information to the researchers about those same mediators (mediators and non-mediators worked regularly together).⁸⁷⁴ The data collected from the non-mediator participants was to be made available to the recommending mediators. This selection process incorporates influences likely to affect the responses of the non-mediator participants and might cause some discomfort to them – it might be very difficult for them to provide anything other than positive information about the mediators. This process raises issues of integrity that may limit the credibility of the participants' research data and the reliability of the study's findings.

e) Unclear/unusable selection process

Examples of unclear descriptions (which are unusable in this analysis) include mentioning a 'sampling technique' without describing what it is,⁸⁷⁵ and mentioning participant surveys without describing their distribution, nor whether their surveys were associated with a participant selection process.⁸⁷⁶

Of the twenty-two studies that include no usable information about selection processes, seven report collecting research data through a potentially intrusive method: observations of the

⁸⁷³ Shapiro, D., R. Drieghe, and J. Brett, 'Mediator Behavior and the Outcomes of Mediation' (1985) 41(2) *Journal of Social Issues* 101.

⁸⁷⁴ Goldberg, S. B., and M. L. Shaw, 'Further Investigation into the Secrets of Successful and Unsuccessful Mediators' (2008) 26(8) *Alternatives to the High Cost of Litigation* 149.

⁸⁷⁵ McDermott, E. P., and R. Obar, "'What's Going On" in Mediation: An Empirical Analysis of the Influence of a Mediator's Style on Party Satisfaction and Monetary Benefit' (2004) 9 *Harvard Negotiation Law Review* 75.

⁸⁷⁶ Thoennes, N. A., and J. Pearson, 'Predicting Outcomes in Divorce Mediation: The Influence of People and Process' (1985) 41(2) *Journal of Social Issues* 115; Woodward, J. G., 'Settlement Week: Measuring the Promise' (1990) 11 *Northern Illinois University Law Review* 1.

subject mediations.⁸⁷⁷ Three of these report using observations as the sole data collection method,⁸⁷⁸ and four report using observations in addition to other collection methods.⁸⁷⁹ Although all empirical data collection methods are at least somewhat intrusive, it is useful for researchers to include some acknowledgement of their intrusion even if only to describe how participants have been enlisted.

Court referrals into court-connected programs: Evaluations

Six of the studies are evaluations of specific court-related programs, such as Settlement Week programs,⁸⁸⁰ or so-called Pilot Programs/Projects,⁸⁸¹ and all six describe some form of external selection into the programs being evaluated. Settlement Week programs usually accept self-

⁸⁷⁷ Jones, T. S., 'Lag Sequential Analyses of Mediator-Spouse and Husband-Wife Interaction in Successful and Unsuccessful Divorce Mediation in M. A. Rahim (ed), *Managing Conflict: An Interdisciplinary Approach* (Praeger, USA, 1989); Kressel, K., T. Henderson, W. Reich, and C. Cohen, 'Multi-Dimensional Analysis of Conflict Mediator Style' (2012) 30(2) *Conflict Resolution Quarterly* 135; Peebles, R., C. Harris, and T. Metzloff, 'Following the Script: An Empirical Analysis of Court-Ordered Mediation of Medical Malpractice Cases' (2007) 2007(1) *Journal of Dispute Resolution* 101; Pruitt, D. G., W. R. Fry, L. Castrianno, J. Zubeck, G. L. Welton, N. B. McGillicuddy, and C. Ippolito, 'The Process of Mediation: Caucusing, Control, and Problem Solving' in M. A. Rahim (ed), *Managing Conflict: An Interdisciplinary Approach* (Praeger, USA, 1989) (study centre #2); Slaikeu, K. A., R. Culler, J. Pearson, and N. Thoennes, 'Process and Outcome in Divorce Mediation' (1985) 10 *Mediation Quarterly* 55; Wall, J. A., Jr, and S. Chan-Serafin, 'Processes in Civil Case Mediations' (2009) 26(3) *Conflict Resolution Quarterly* 261; Welton, G. L., and D. G. Pruitt, 'The Mediation Process: The Effects of Mediator Bias and Disputant Power' (1987) 13(1) *Personality and Social Psychology Bulletin* 123.

⁸⁷⁸ Jones, T. S., 'Lag Sequential Analyses of Mediator-Spouse and Husband-Wife Interaction in Successful and Unsuccessful Divorce Mediation in M. A. Rahim (ed), *Managing Conflict: An Interdisciplinary Approach* (Praeger, USA, 1989); Peebles, R., C. Harris, and T. Metzloff, 'Following the Script: An Empirical Analysis of Court-Ordered Mediation of Medical Malpractice Cases' (2007) 2007(1) *Journal of Dispute Resolution* 101; Slaikeu, K. A., R. Culler, J. Pearson, and N. Thoennes, 'Process and Outcome in Divorce Mediation' (1985) 10 *Mediation Quarterly* 55.

⁸⁷⁹ Kressel, K., T. Henderson, W. Reich, and C. Cohen, 'Multi-Dimensional Analysis of Conflict Mediator Style' (2012) 30(2) *Conflict Resolution Quarterly* 135; Pruitt, D. G., W. R. Fry, L. Castrianno, J. Zubeck, G. L. Welton, N. B. McGillicuddy, and C. Ippolito, 'The Process of Mediation: Caucusing, Control, and Problem Solving' in M. A. Rahim (ed), *Managing Conflict: An Interdisciplinary Approach* (Praeger, USA, 1989) (dispute centre 2); Wall, J. A., Jr, and S. Chan-Serafin, 'Processes in Civil Case Mediations' (2009) 26(3) *Conflict Resolution Quarterly* 261; Welton, G. L., and D. G. Pruitt, 'The Mediation Process: The Effects of Mediator Bias and Disputant Power' (1987) 13(1) *Personality and Social Psychology Bulletin* 123.

⁸⁸⁰ Sourdin, T., and T. Matruggio, *Evaluating Mediation – New South Wales Settlement Scheme 2002* (2004) *Mediation*. Paper 7, available on <<http://www.civiljustice.info/med/7>>; Wissler, R. L., 'Court-Connected Mediation in General Civil Cases: What We Know from Empirical Research' (2002) 17(3) *Ohio State Journal on Dispute Resolution* 641 (study 3); Woodward, J. G., 'Settlement Week: Measuring the Promise' (1990) 11 *Northern Illinois University Law Review* 1.

⁸⁸¹ McEwen, C. A., *An Evaluation of the ADR Pilot Project: Final Report 1* (Unpublished report, 1992); Vanderkooi, L., and J. Pearson, 'Mediating Divorce Disputes: Mediator Behaviors, Styles and Roles' (1983) 32(4) *Family Relations* 557; Wissler, R. L., 'Court-Connected Mediation in General Civil Cases: What We Know from Empirical Research' (2002) 17(3) *Ohio State Journal on Dispute Resolution* 641 (Studies 1 & 2).

referrals, as well as referrals from courts (eg judges or magistrates) and organisations, such as Law Societies associated with the program, and the Pilot Programs mentioned in three studies include similar referral schemes.⁸⁸² Three of the evaluations include descriptions of processes for program participants to self-select into their studies,⁸⁸³ and are included in the above section on Self-Selection. Four of the evaluations of court-connected programs do not include selection processes and are included in the twenty-two studies with no usable description of selection processes.⁸⁸⁴

Simulated mediations: Student participants

Six of the studies use simulated mediation,⁸⁸⁵ in which three do not have “real” mediator participants,⁸⁸⁶ and, instead, report enlisting university students,⁸⁸⁷ or university staff, to be the

⁸⁸² McEwen, C. A., *An Evaluation of the ADR Pilot Project: Final Report 1* (Unpublished report, 1992); Vanderkooi, L., and J. Pearson, ‘Mediating Divorce Disputes: Mediator Behaviors, Styles and Roles’ (1983) 32(4) *Family Relations* 557; Wissler, R. L., ‘Court-Connected Mediation in General Civil Cases: What We Know from Empirical Research’ (2002) 17(3) *Ohio State Journal on Dispute Resolution* 641 (Studies 1 & 2).

⁸⁸³ McEwen, C. A., *An Evaluation of the ADR Pilot Project: Final Report 1* (Unpublished report, 1992); Sourdin, T., *Mediation in the Supreme and County Courts of Victoria* (Report prepared for the Department of Justice, Victoria, Australia, April 2009), available on <<http://www.civiljustice.info/adreval/1/>>; Sourdin, T., and T. Matruglio, *Evaluating Mediation – New South Wales Settlement Scheme 2002* (2004) *Mediation*. Paper 7, available on <<http://www.civiljustice.info/med/7>>.

⁸⁸⁴ Vanderkooi, L., and J. Pearson, ‘Mediating Divorce Disputes: Mediator Behaviors, Styles and Roles’ (1983) 32(4) *Family Relations* 557; Wissler, R. L., ‘Court-Connected Mediation in General Civil Cases: What We Know from Empirical Research’ (2002) 17(3) *Ohio State Journal on Dispute Resolution* 641; Woodward, J. G., ‘Settlement Week: Measuring the Promise’ (1990) 11 *Northern Illinois University Law Review* 1.

⁸⁸⁵ Burrell, N. A., W. A. Donohue, and M. Allen, ‘The Impact of Disputants’ Expectations on Mediation, Testing an Interventionist Model’ (1990) Fall 1990 *Human Communication Research* 104; Gale, J., R. L. Mowery, M. S. Herrman, and N. L. Hollett, ‘Considering Effective Divorce Mediation: Three Potential Factors’ (2002) 19(4) *Conflict Resolution Quarterly* 389; Kimsey, W. D., R. M. Fuller, A. J. Bell, and B. C. McKinney, ‘The Impact of Mediator Strategic Choices: An Experimental Study’ (1994) 12(1) *Mediation Quarterly* 89; Kimsey, W. D., R. M. Fuller, and B. C. McKinney, ‘Mediator Listening, Dispute Reframing, and Mediation Outcome: A Pilot Study’ (1993) 7(1) *Journal of the International Listening Association* 74; Kressel, K., T. Henderson, W. Reich, and C. Cohen, ‘Multi-Dimensional Analysis of Conflict Mediator Style’ (2012) 30(2) *Conflict Resolution Quarterly* 135; Welton, G. L., and D. G. Pruitt, ‘The Mediation Process: The Effects of Mediator Bias and Disputant Power’ (1987) 13(1) *Personality and Social Psychology Bulletin* 123.

⁸⁸⁶ Burrell, N. A., W. A. Donohue, and M. Allen, ‘The Impact of Disputants’ Expectations on Mediation, Testing an Interventionist Model’ (1990) Fall 1990 *Human Communication Research* 104; Kimsey, W. D., R. M. Fuller, A. J. Bell, and B. C. McKinney, ‘The Impact of Mediator Strategic Choices: An Experimental Study’ (1994) 12(1) *Mediation Quarterly* 89; Welton, G. L., and D. G. Pruitt, ‘The Mediation Process: The Effects of Mediator Bias and Disputant Power’ (1987) 13(1) *Personality and Social Psychology Bulletin* 123.

⁸⁸⁷ Burrell, N. A., W. A. Donohue, and M. Allen, ‘The Impact of Disputants’ Expectations on Mediation, Testing an Interventionist Model’ (1990) Fall 1990 *Human Communication Research* 104; Kimsey, W. D., R. M. Fuller, A. J. Bell, and B. C. McKinney, ‘The Impact of Mediator Strategic Choices: An Experimental Study’ (1994) 12(1) *Mediation Quarterly* 89.

“mediator”.⁸⁸⁸ Five of the six studies report that the roles of non-mediator participants are taken by university students,⁸⁸⁹ and one reports paying actors to assume the non-mediator participant roles (including disputants and their legal advisers).⁸⁹⁰ There are no descriptions of selection processes or procedures in any of the five studies that enlist students to play roles in the simulated mediations.

The representativeness of university students in any field of research (including mediation) is very limited, and the power differentials between student and researcher are a major influence on in-mediation behaviour and on data collection.⁸⁹¹ Researcher influence and the complex issues it raises are considered in Chapter Seven.

5.2.1. Pressure to participate

Two studies report a selection process or the seeking of consent that could be seen to have compromised the role of the mediator participants. In one, the mediator participants ‘asked’ non-mediator participants to participate,⁸⁹² and in the other, the mediator participant sought the non-mediator participants’ ‘permission’ for observers to remain in the mediation.⁸⁹³

Of the studies that mention obtaining participant consent, six describe a consent process that might be seen to place pressure on the non-mediator participants. The researchers obtain the mediator’s consent at least twenty-four hours beforehand, and so not seek the non-mediator

⁸⁸⁸ Welton, G. L., and D. G. Pruitt, ‘The Mediation Process: The Effects of Mediator Bias and Disputant Power’ (1987) 13(1) *Personality and Social Psychology Bulletin* 123.

⁸⁸⁹ Burrell, N. A., W. A. Donohue, and M. Allen, ‘The Impact of Disputants’ Expectations on Mediation, Testing an Interventionist Model’ (1990) Fall 1990 *Human Communication Research* 104; Kimsey, W. D., R. M. Fuller, A. J. Bell, and B. C. McKinney, ‘The Impact of Mediator Strategic Choices: An Experimental Study’ (1994) 12(1) *Mediation Quarterly* 89; Kimsey, W. D., R. M. Fuller, and B. C. McKinney, ‘Mediator Listening, Dispute Reframing, and Mediation Outcome: A Pilot Study’ (1993) 7(1) *Journal of the International Listening Association* 74; Kressel, K., T. Henderson, W. Reich, and C. Cohen, ‘Multi-Dimensional Analysis of Conflict Mediator Style’ (2012) 30(2) *Conflict Resolution Quarterly* 135; Welton, G. L., and D. G. Pruitt, ‘The Mediation Process: The Effects of Mediator Bias and Disputant Power’ (1987) 13(1) *Personality and Social Psychology Bulletin* 123.

⁸⁹⁰ Gale, J., R. L. Mowery, M. S. Herrman, and N. L. Hollett, ‘Considering Effective Divorce Mediation: Three Potential Factors’ (2002) 19(4) *Conflict Resolution Quarterly* 389.

⁸⁹¹ Maruyama, G., and C. S. Ryan, *Research Methods in Social Relations* (8th Edition, Wiley Blackwell, 2014).

⁸⁹² Wissler, R. L., ‘Mediation and Adjudication in Small Claims Court: The Effects of Process and Case Characteristics’ (1995) 29(2) *Law & Society Review* 323, 328.

⁸⁹³ Wall, J. A., Jr, and S. Chan-Serafin, ‘Do Mediators Walk Their Talk in Civil Cases?’ (2010) 28(1) *Conflict Resolution Quarterly* 3, 7.

participants' consent until the commencement of the mediation,⁸⁹⁴ and, in some studies, in the presence of researchers, mediator, staff, and other disputants.⁸⁹⁵

5.3. Research roles

5.3.0. Overview

Researchers have an important responsibility when allocating research roles to study participants, and they can be expected to take into account their own research purpose when assessing the participants' capacities to fulfil their allocated roles.⁸⁹⁶ If researchers do not consider participant capacity, it can affect the quality of their research data and, ultimately, the reliability of the study results and findings.

In the selected studies, the mediator and non-mediator participants have varying levels of knowledge and experience about mediation that contribute to their capacity to provide the data and information required by the researchers. Their capacities can be differentiated into four categories.

- a) Novice participants in mediation and in research (ie limited knowledge, experience, and capacity);
- b) Experienced participants in mediation (some knowledge, experience, and capacity);
- c) Experienced participants in mediation and in research (reasonable knowledge and experience, and capacity); and
- d) Repeat players (well-informed and experienced with high capacity).

⁸⁹⁴ Alberts, J. K., B. L. Heisterkamp, and R. M. McPhee, 'Disputant Perceptions of and Satisfaction with a Community Mediation Program' (2005) 16(3) *The International Journal of Conflict Management* 218.

⁸⁹⁵ McGillicuddy, N. B., G. L. Welton, and D. G. Pruitt, 'Third-Party Intervention: A Field Experiment Comparing Three Different Models' (1987) 53(1) *Journal of Personality and Social Psychology* 104; Pruitt, D. G., R. S. Peirce, N. B. McGillicuddy, G. L. Welton, and L. Castrianno, 'Long-Term Success in Mediation' (1993) 17(3) *Law and Human Behavior* 313; Welton, G. L., D. G. Pruitt, and N. B. McGillicuddy, 'The Role of Caucusing in Community Mediation' (1988) 32(1) *The Journal of Conflict Resolution* 181; Welton, G. L., D. G. Pruitt, N. B. McGillicuddy, C. A. Ippolito, and J. M. Zubeck, 'Antecedents and Characteristics of Caucusing in Community Mediation' (1992) 3(4) *International Journal of Conflict Management* 303; Zubeck, J. M., D. G. Pruitt, R. S. Peirce, N. B. McGillicuddy, and H. Syna, 'Disputant and Mediator Behaviors Affecting Short-Term Success in Mediation' (1992) 36(3) *Journal of Conflict Resolution* 546.

⁸⁹⁶ Bryman, A., *Social Research Methods* (5th Edition, Oxford University Press, UK, 2016).

Non-mediator participants from category a) are likely to be able to provide valuable experiential data rather than being asked to recall and report on the details of complex in-mediation interactions (the selected studies relying on data collected from non-mediator participants report collecting the latter). The capacity of non-mediator participants in, say, category c) could also provide valuable experiential data, though from the perspective of being relative “experts”. The selected studies do not routinely differentiate between study participants in this way, and do not provide comparative analysis of the participants’ contributions.

In the vast majority of the studies, the unit of analysis is the mediation session, and the data provided by all participants, including mediators, is intended to inform analysis of what the mediator said and did within that session and, in many studies, analysis of mediation outcomes.⁸⁹⁷ The varying perspectives of the study participants could be valuable sources of rich and informative qualitative data which is an opportunity that many of the researchers seem to have missed.

The analysis of the studies shows there are four research roles to which study participants are allocated, all producing important information for the researchers:

1. Self-report (a participant report about themselves);
2. Reports about others (a participant report on other participants in the mediation);
3. Reports about process (a participant report on the mediation process, which can include its structure and its outcomes); and
4. Reports by others (that is where a participant is the subject of another participant’s report).

The analysis below reports on the above four research roles for each study group: mediator participants, non-mediator participants, and non-participants (eg observers). Initially, the analysis

⁸⁹⁷ One study does not include the collection of research data specifically about the mediator participants; non-mediator participants are required to report on their dispute and on the mediation process – the latter reports include incidental information about what participant mediators said and did [Thoennes, N. A., and J. Pearson, ‘Predicting Outcomes in Divorce Mediation: The Influence of People and Process’ (1985) 41(2) *Journal of Social Issues* 115].

reports the number of studies that have relied on data collected by participants in each of the four research roles; and this is followed by commentary. The analysis is restricted to the roles themselves; examination of the data collection methodologies is included in Chapter Six.

5.3.1. Allocated research roles

Mediator research roles

- i. Self-reports (n = 21 studies);^{898 899}

⁸⁹⁸ Bingham, L. B., 'Transformative Mediation in the United States Postal Service' (2012) 5(4) *Negotiation and Conflict Management Research* 354; Burrell, N. A., W. A. Donohue, and M. Allen, 'The Impact of Disputants' Expectations on Mediation, Testing an Interventionist Model' (1990) Fall 1990 *Human Communication Research* 104; Carnevale, P. J. D., and R. Peggnetter, 'The Selection of Mediator Tactics in Public Sector Disputes: A Contingency Analysis' (1985) 41(2) *Journal of Social Issues* 2; Gale, J., R. L. Mowery, M. S. Herrman, and N. L. Hollett, 'Considering Effective Divorce Mediation: Three Potential Factors' (2002) 19(4) *Conflict Resolution Quarterly* 389; Mareschal, P. M., 'What Makes Mediation Work? Perspectives on Resolving Disputes' (2005) 44(3) *Industrial Relations* 509; McEwen, C. A., *An Evaluation of the ADR Pilot Project: Final Report 1* (Unpublished report, 1992); Hiltrop, J. M., 'Factors Associated with Successful Labor Mediation' in K. Kressel and D. G. Pruitt (eds), *Mediation Research: The Process and Effectiveness of Third-Party Intervention* (Jossey-Bass, USA, 1989) (study 1); Kressel, K., 'How Do Mediators Decide What To Do? Implicit Schemas of Practice and Mediator Decisionmaking' (2013) 28(3) *Ohio State Journal on Dispute Resolution* 709; Kressel, K., E. A. Frontera, S. Forlenza, F. Butler, and L. Fish, 'The Settlement-Oriented vs the Problem-Solving Style' (1994) 50(1) *Journal of Social Issues* 67; Kressel, K., T. Henderson, W. Reich, and C. Cohen, 'Multi-Dimensional Analysis of Conflict Mediator Style' (2012) 30(2) *Conflict Resolution Quarterly* 135; McDermott, E. P., and R. Obar, "'What's Going On" in Mediation: An Empirical Analysis of the Influence of a Mediator's Style on Party Satisfaction and Monetary Benefit' (2004) 9 *Harvard Negotiation Law Review* 75; McGillicuddy, N. B., G. L. Welton, and D. G. Pruitt, 'Third-Party Intervention: A Field Experiment Comparing Three Different Models' (1987) 53(1) *Journal of Personality and Social Psychology* 104; Pruitt, D. G., R. S. Peirce, N. B. McGillicuddy, G. L. Welton, and L. Castrianno, 'Long-Term Success in Mediation' (1993) 17(3) *Law and Human Behavior* 313; Shapiro, D., R. Drieghe, and J. Brett, 'Mediator Behavior and the Outcomes of Mediation' (1985) 41(2) *Journal of Social Issues* 101; Sourdin, T., and T. Matruglio, *Evaluating Mediation – New South Wales Settlement Scheme 2002* (2004) *Mediation*. Paper 7, available on <<http://www.civiljustice.info/med/7>>; Swaab, R. I., *Face First: Pre-Mediation Caucus and Face in Employment Disputes* (Presentation, Annual Association of Conflict Management Conference, June 2009); Swaab, R. I., and J. Brett, *Caucus with Care: The Impact of Pre-Mediation Caucuses on Conflict Resolution* (Meetings Paper, International Association of Conflict Management, 2007); Vanderkooi, L., and J. Pearson, 'Mediating Divorce Disputes: Mediator Behaviors, Styles and Roles' (1983) 32(4) *Family Relations* 557; Wall, J. A., Jr, and D. E. Rude, 'The Judge as a Mediator' (1991) 76(1) *Journal of Applied Psychology* 54 (study 2); Welton, G. L., D. G. Pruitt, and N. B. McGillicuddy, 'The Role of Caucusing in Community Mediation' (1988) 32(1) *The Journal of Conflict Resolution* 181; Wissler, R. L., *Trapping the Data: An Assessment of Domestic Relations Mediation in Maine and Ohio Courts* (Unpublished report, 1999).

⁸⁹⁹ In six of the 21, research data was obtained only from mediator participants: Carnevale, P. J. D., and R. Peggnetter, 'The Selection of Mediator Tactics in Public Sector Disputes: A Contingency Analysis' (1985) 41(2) *Journal of Social Issues* 2; Mareschal, P. M., 'What Makes Mediation Work? Perspectives on Resolving Disputes' (2005) 44(3) *Industrial Relations* 509; McEwen, C. A., *An Evaluation of the ADR Pilot Project: Final Report 1* (Unpublished report, 1992); Shapiro, D., R. Drieghe, and J. Brett, 'Mediator Behavior and the Outcomes of Mediation' (1985) 41(2) *Journal of Social Issues* 101; Swaab, R. I., *Face First: Pre-Mediation Caucus and Face in Employment Disputes* (Presentation, Annual Association of Conflict Management Conference, June 2009); Swaab, R. I., and J. Brett, *Caucus with Care: The Impact of Pre-Mediation Caucuses on Conflict Resolution* (Meetings Paper, International Association of Conflict Management, 2007).

- ii. Report on disputants (n = 10 studies);⁹⁰⁰
- iii. Report on the presenting dispute (n = 3 studies);⁹⁰¹
- iv. Report on mediation process (n = 12 studies);⁹⁰² and

⁹⁰⁰ Carnevale, P. J. D., and R. Pagnetter, 'The Selection of Mediator Tactics in Public Sector Disputes: A Contingency Analysis' (1985) 41(2) *Journal of Social Issues* 2; Hiltrop, J. M., 'Factors Associated with Successful Labor Mediation' in K. Kressel and D. G. Pruitt (eds), *Mediation Research: The Process and Effectiveness of Third-Party Intervention* (Jossey-Bass, USA, 1989); Mareschal, P. M., 'What Makes Mediation Work? Perspectives on Resolving Disputes' (2005) 44(3) *Industrial Relations* 509; McDermott, E. P., and R. Obar, "'What's Going On" in Mediation: An Empirical Analysis of the Influence of a Mediator's Style on Party Satisfaction and Monetary Benefit' (2004) 9 *Harvard Negotiation Law Review* 75; McEwen, C. A., *An Evaluation of the ADR Pilot Project: Final Report 1* (Unpublished report, 1992); Shapiro, D., R. Drieghe, and J. Brett, 'Mediator Behavior and the Outcomes of Mediation' (1985) 41(2) *Journal of Social Issues* 101; Swaab, R. I., and J. Brett, *Caucus with Care: The Impact of Pre-Mediation Caucuses on Conflict Resolution* (Meetings Paper, International Association of Conflict Management, 2007); Wissler, R. L., *Trapping the Data: An Assessment of Domestic Relations Mediation in Maine and Ohio Courts* (Unpublished report, 1999); Wissler, R. L., 'Court-Connected Mediation in General Civil Cases: What We Know from Empirical Research' (2002) 17(3) *Ohio State Journal on Dispute Resolution* 641.

⁹⁰¹ Sourdin, T., *Mediation in the Supreme and County Courts of Victoria* (Report prepared for the Department of Justice, Victoria, Australia, April 2009), available on <<http://www.civiljustice.info/adreval/1/>>; Sourdin, T., and T. Matruggio, *Evaluating Mediation – New South Wales Settlement Scheme 2002* (2004) *Mediation*. Paper 7, available on <<http://www.civiljustice.info/med/7/>>; Wissler, R. L., 'Court-Connected Mediation in General Civil Cases: What We Know from Empirical Research' (2002) 17(3) *Ohio State Journal on Dispute Resolution* 641.

⁹⁰² Burrell, N. A., W. A. Donohue, and M. Allen, 'The Impact of Disputants' Expectations on Mediation, Testing an Interventionist Model' (1990) Fall 1990 *Human Communication Research* 104; Hiltrop, J. M., 'Factors Associated with Successful Labor Mediation' in K. Kressel and D. G. Pruitt (eds), *Mediation Research: The Process and Effectiveness of Third-Party Intervention* (Jossey-Bass, USA, 1989) (study 1); Kressel, K., 'How Do Mediators Decide What To Do? Implicit Schemas of Practice and Mediator Decisionmaking' (2013) 28(3) *Ohio State Journal on Dispute Resolution* 709; Kressel, K., E. A. Frontera, S. Forlenza, F. Butler, and L. Fish, 'The Settlement-Oriented vs the Problem-Solving Style' (1994) 50(1) *Journal of Social Issues* 67; Kressel, K., T. Henderson, W. Reich, and C. Cohen, 'Multi-Dimensional Analysis of Conflict Mediator Style' (2012) 30(2) *Conflict Resolution Quarterly* 135; Shapiro, D., R. Drieghe, and J. Brett, 'Mediator Behavior and the Outcomes of Mediation' (1985) 41(2) *Journal of Social Issues* 101; Sourdin, T., *Mediation in the Supreme and County Courts of Victoria* (Report prepared for the Department of Justice, Victoria, Australia, April 2009), available on <<http://www.civiljustice.info/adreval/1/>>; Sourdin, T., and T. Matruggio, *Evaluating Mediation – New South Wales Settlement Scheme 2002* (2004) *Mediation*. Paper 7, available on <<http://www.civiljustice.info/med/7/>>; Swaab, R. I., and J. Brett, *Caucus with Care: The Impact of Pre-Mediation Caucuses on Conflict Resolution* (Meetings Paper, International Association of Conflict Management, 2007); Wall, J. A., Jr, and D. E. Rude, 'The Judge as a Mediator' (1991) 76(1) *Journal of Applied Psychology* 54; Wissler, R. L., *Trapping the Data: An Assessment of Domestic Relations Mediation in Maine and Ohio Courts* (Unpublished report, 1999); Wissler, R. L., 'Court-Connected Mediation in General Civil Cases: What We Know from Empirical Research' (2002) 17(3) *Ohio State Journal on Dispute Resolution* 641.

- v. Be reported on by observers,⁹⁰³ by disputants,⁹⁰⁴ and/or by legal advisers⁹⁰⁵ (n = 47 studies).

⁹⁰³ Gale, J., R. L. Mowery, M. S. Herrman, and N. L. Hollett, 'Considering Effective Divorce Mediation: Three Potential Factors' (2002) 19(4) *Conflict Resolution Quarterly* 389; Jones, T. S., 'Lag Sequential Analyses of Mediator-Spouse and Husband-Wife Interaction in Successful and Unsuccessful Divorce Mediation in M. A. Rahim (ed), *Managing Conflict: An Interdisciplinary Approach* (Praeger, USA, 1989); Kressel, K., 'How Do Mediators Decide What To Do? Implicit Schemas of Practice and Mediator Decisionmaking' (2013) 28(3) *Ohio State Journal on Dispute Resolution* 709; Kressel, K., E. A. Frontera, S. Forlenza, F. Butler, and L. Fish, 'The Settlement-Orientation vs the Problem-Solving Style' (1994) 50(1) *Journal of Social Issues* 67; Kressel, K., T. Henderson, W. Reich, and C. Cohen, 'Multi-Dimensional Analysis of Conflict Mediator Style' (2012) 30(2) *Conflict Resolution Quarterly* 135; McGillicuddy, N. B., G. L. Welton, and D. G. Pruitt, 'Third-Party Intervention: A Field Experiment Comparing Three Different Models' (1987) 53(1) *Journal of Personality and Social Psychology* 104; Peeples, R., C. Harris, and T. Metzloff, 'Following the Script: An Empirical Analysis of Court-Ordered Mediation of Medical Malpractice Cases' (2007) 2007(1) *Journal of Dispute Resolution* 101; Pruitt, D. G., W. R. Fry, L. Castrianno, J. Zubeck, G. L. Welton, N. B. McGillicuddy, and C. Ippolito, 'The Process of Mediation: Caucusing, Control, and Problem Solving' in M. A. Rahim (ed), *Managing Conflict: An Interdisciplinary Approach* (Praeger, USA, 1989); Pruitt, D. G., R. S. Peirce, N. B. McGillicuddy, G. L. Welton, and L. Castrianno, 'Long-Term Success in Mediation' (1993) 17(3) *Law and Human Behavior* 313; Slaikeu, K. A., R. Culler, J. Pearson, and N. Thoennes, 'Process and Outcome in Divorce Mediation' (1985) 10 *Mediation Quarterly* 55; Wall, J. A., Jr, and S. Chan-Serafin, 'Processes in Civil Case Mediations' (2009) 26(3) *Conflict Resolution Quarterly* 261; Wall, J. A., Jr, and S. Chan-Serafin, 'Do Mediators Walk Their Talk in Civil Cases?' (2010) 28(1) *Conflict Resolution Quarterly* 3; Welton, G. L., and D. G. Pruitt, 'The Mediation Process: The Effects of Mediator Bias and Disputant Power' (1987) 13(1) *Personality and Social Psychology Bulletin* 123; Welton, G. L., D. G. Pruitt, and N. B. McGillicuddy, 'The Role of Caucusing in Community Mediation' (1988) 32(1) *The Journal of Conflict Resolution* 181; Welton, G. L., D. G. Pruitt, N. B. McGillicuddy, C. A. Ippolito, and J. M. Zubeck, 'Antecedents and Characteristics of Caucusing in Community Mediation' (1992) 3(4) *International Journal of Conflict Management* 303; Zubeck, J. M., D. G. Pruitt, R. S. Peirce, N. B. McGillicuddy, and H. Syna, 'Disputant and Mediator Behaviors Affecting Short-Term Success in Mediation' (1992) 36(3) *Journal of Conflict Resolution* 546.

⁹⁰⁴ Alberts, J. K., B. L. Heisterkamp, and R. M. McPhee, 'Disputant Perceptions of and Satisfaction with a Community Mediation Program' (2005) 16(3) *The International Journal of Conflict Management* 218; Bingham, L. B., 'Transformative Mediation in the United States Postal Service' (2012) 5(4) *Negotiation and Conflict Management Research* 354; Burrell, N. A., W. A. Donohue, and M. Allen, 'The Impact of Disputants' Expectations on Mediation, Testing an Interventionist Model' (1990) Fall 1990 *Human Communication Research* 104; Dilts, D. A. and A. Karim, 'The Effect of Mediators' Qualities and Strategies on Mediation Outcomes' (1990) 45(1) *Relations Industrielles/Industrial Relations* 22; Gale, J., R. L. Mowery, M. S. Herrman, and N. L. Hollett, 'Considering Effective Divorce Mediation: Three Potential Factors' (2002) 19(4) *Conflict Resolution Quarterly* 389; Hiltrop, J. M., 'Factors Associated with Successful Labor Mediation' in K. Kressel and D. G. Pruitt (eds), *Mediation Research: The Process and Effectiveness of Third-Party Intervention* (Jossey-Bass, USA, 1989) (study 2); Karim, A. and D. Dilts, 'Determinants of Mediation Success in the Iowa Public Sector' (1990) 19(2) *Journal of Collective Negotiations* 129; Karim, A. and R. Pegnetter, 'Mediator Strategies and Qualities and Mediation Effectiveness' (1983) 22(1) *Industrial Relations* 105; Kimsey, W. D., R. M. Fuller, A. J. Bell, and B. C. McKinney, 'The Impact of Mediator Strategic Choices: An Experimental Study' (1994) 12(1) *Mediation Quarterly* 89; Kimsey, W. D., R. M. Fuller, and B. C. McKinney, 'Mediator Listening, Dispute Reframing, and Mediation Outcome: A Pilot Study' (1993) 7(1) *Journal of the International Listening Association* 74; Kochan, T. A., and T. Jick, 'The Public Sector Mediation Process: A Theory and Empirical Examination' (1978) 22(2) *The Journal of Conflict Resolution* 209; Kressel, K., 'How Do Mediators Decide What To Do? Implicit Schemas of Practice and Mediator Decisionmaking' (2013) 28(3) *Ohio State Journal on Dispute Resolution* 709; Kressel, K., T. Henderson, W. Reich, and C. Cohen, 'Multi-Dimensional Analysis of Conflict Mediator Style' (2012) 30(2) *Conflict Resolution Quarterly* 135; McGillicuddy, N. B., G. L. Welton, and D. G. Pruitt, 'Third-Party Intervention: A Field Experiment Comparing Three Different Models' (1987) 53(1) *Journal of Personality and Social Psychology* 104; Posthuma, R. A., A. Richard, J. B. Dworkin, and M. S. Swift, 'Mediator

Non-mediator (disputant) research roles

i. Report on all disputants (n = 16 studies);⁹⁰⁶

Tactics and Sources of Conflict: Facilitating and Inhibiting Effects' (2002) 41(1) *Industrial Relations* 94; Pruitt, D. G., W. R. Fry, L. Castrianno, J. Zubeck, G. L. Welton, N. B. McGillicuddy, and C. Ippolito, 'The Process of Mediation: Caucusing, Control, and Problem Solving' in M. A. Rahim (ed), *Managing Conflict: An Interdisciplinary Approach* (Praeger, USA, 1989); Pruitt, D. G., R. S. Peirce, N. B. McGillicuddy, G. L. Welton, and L. Castrianno, 'Long-Term Success in Mediation' (1993) 17(3) *Law and Human Behavior* 313; Sourdin, T., *Mediation in the Supreme and County Courts of Victoria* (Report prepared for the Department of Justice, Victoria, Australia, April 2009), available on <<http://www.civiljustice.info/adreval/1/>>; Sourdin, T., Exploring Pre-Action Requirements: Resolving Disputes Outside Courts (ACJI, Monash University, October 2012); Sourdin, T., and T. Matruglio, *Evaluating Mediation – New South Wales Settlement Scheme 2002* (2004) *Mediation*. Paper 7, available on <<http://www.civiljustice.info/med/7/>>; Wall, J. A., Jr, and S. Chan-Serafin, 'Processes in Civil Case Mediations' (2009) 26(3) *Conflict Resolution Quarterly* 261; Welton, G. L., and D. G. Pruitt, 'The Mediation Process: The Effects of Mediator Bias and Disputant Power' (1987) 13(1) *Personality and Social Psychology Bulletin* 123; Welton, G. L., D. G. Pruitt, and N. B. McGillicuddy, 'The Role of Caucusing in Community Mediation' (1988) 32(1) *The Journal of Conflict Resolution* 181; Welton, G. L., D. G. Pruitt, N. B. McGillicuddy, C. A. Ippolito, and J. M. Zubeck, 'Antecedents and Characteristics of Caucusing in Community Mediation' (1992) 3(4) *International Journal of Conflict Management* 303; Wissler, R. L., 'Mediation and Adjudication in Small Claims Court: The Effects of Process and Case Characteristics' (1995) 29(2) *Law & Society Review* 323; Wissler, R. L., *Trapping the Data: An Assessment of Domestic Relations Mediation in Maine and Ohio Courts* (Unpublished report, 1999); Wissler, R. L., 'Court-Connected Mediation in General Civil Cases: What We Know from Empirical Research' (2002) 17(3) *Ohio State Journal on Dispute Resolution* 641; Zubeck, J. M., D. G. Pruitt, R. S. Peirce, N. B. McGillicuddy, and H. Syna, 'Disputant and Mediator Behaviors Affecting Short-Term Success in Mediation' (1992) 36(3) *Journal of Conflict Resolution* 546.

⁹⁰⁵ Goldberg, S. B., and M. L. Shaw, 'Further Investigation into the Secrets of Successful and Unsuccessful Mediators' (2008) 26(8) *Alternatives to the High Cost of Litigation* 149; Henderson, D. A., 'Mediation Success: An Empirical Analysis' (1996) 11(1) *Ohio State Journal on Dispute Resolution* 105; Woodward, J. G., 'Settlement Week: Measuring the Promise' (1990) 11 *Northern Illinois University Law Review* 1.

⁹⁰⁶ Hiltrop, J. M., 'Factors Associated with Successful Labor Mediation' in K. Kressel and D. G. Pruitt (eds), *Mediation Research: The Process and Effectiveness of Third-Party Intervention* (Jossey-Bass, USA, 1989) (study 2); Kimsey, W. D., R. M. Fuller, A. J. Bell, and B. C. McKinney, 'The Impact of Mediator Strategic Choices: An Experimental Study' (1994) 12(1) *Mediation Quarterly* 89; Kimsey, W. D., R. M. Fuller, and B. C. McKinney, 'Mediator Listening, Dispute Reframing, and Mediation Outcome: A Pilot Study' (1993) 7(1) *Journal of the International Listening Association* 74; McGillicuddy, N. B., G. L. Welton, and D. G. Pruitt, 'Third-Party Intervention: A Field Experiment Comparing Three Different Models' (1987) 53(1) *Journal of Personality and Social Psychology* 104; Posthuma, R. A., A. Richard, J. B. Dworkin, and M. S. Swift, 'Mediator Tactics and Sources of Conflict: Facilitating and Inhibiting Effects' (2002) 41(1) *Industrial Relations* 94; Pruitt, D. G., W. R. Fry, L. Castrianno, J. Zubeck, G. L. Welton, N. B. McGillicuddy, and C. Ippolito, 'The Process of Mediation: Caucusing, Control, and Problem Solving' in M. A. Rahim (ed), *Managing Conflict: An Interdisciplinary Approach* (Praeger, USA, 1989); Pruitt, D. G., R. S. Peirce, N. B. McGillicuddy, G. L. Welton, and L. Castrianno, 'Long-Term Success in Mediation' (1993) 17(3) *Law and Human Behavior* 313; Sourdin, T., *Mediation in the Supreme and County Courts of Victoria* (Report prepared for the Department of Justice, Victoria, Australia, April 2009), available on <<http://www.civiljustice.info/adreval/1/>>; Sourdin, T., Exploring Pre-Action Requirements: Resolving Disputes Outside Courts (ACJI, Monash University, October 2012); Sourdin, T., and T. Matruglio, *Evaluating Mediation – New South Wales Settlement Scheme 2002* (2004) *Mediation*. Paper 7, available on <<http://www.civiljustice.info/med/7/>>; Wall, J. A., Jr, and S. Chan-Serafin, 'Processes in Civil Case Mediations' (2009) 26(3) *Conflict Resolution Quarterly* 261; Welton, G. L., D. G. Pruitt, and N. B. McGillicuddy, 'The Role of Caucusing in Community Mediation' (1988) 32(1) *The Journal of Conflict Resolution* 181; Welton, G. L., D. G. Pruitt, N. B. McGillicuddy, C. A. Ippolito, and J. M. Zubeck, 'Antecedents and Characteristics of Caucusing in Community Mediation' (1992) 3(4) *International Journal of Conflict Management* 303; Wissler, R. L., 'Mediation and Adjudication in Small Claims Court: The Effects of Process and Case Characteristics' (1995) 29(2) *Law & Society Review* 323; Wissler, R. L., *Trapping the Data: An Assessment of Domestic Relations*

- ii. Report on the presenting dispute (n = 9 studies);⁹⁰⁷
- iii. Report on the mediator (n = 28 studies);⁹⁰⁸

Mediation in Maine and Ohio Courts (Unpublished report, 1999); Zubeck, J. M., D. G. Pruitt, R. S. Peirce, N. B. McGillicuddy, and H. Syna, 'Disputant and Mediator Behaviors Affecting Short-Term Success in Mediation' (1992) 36(3) *Journal of Conflict Resolution* 546.

⁹⁰⁷ Burrell, N. A., W. A. Donohue, and M. Allen, 'The Impact of Disputants' Expectations on Mediation, Testing an Interventionist Model' (1990) Fall 1990 *Human Communication Research* 104; Hiltrop, J. M., 'Factors Associated with Successful Labor Mediation' in K. Kressel and D. G. Pruitt (eds), *Mediation Research: The Process and Effectiveness of Third-Party Intervention* (Jossey-Bass, USA, 1989) (study 2); Kimsey, W. D., R. M. Fuller, A. J. Bell, and B. C. McKinney, 'The Impact of Mediator Strategic Choices: An Experimental Study' (1994) 12(1) *Mediation Quarterly* 89; Kimsey, W. D., R. M. Fuller, and B. C. McKinney, 'Mediator Listening, Dispute Reframing, and Mediation Outcome: A Pilot Study' (1993) 7(1) *Journal of the International Listening Association* 74; Posthuma, R. A., A. Richard, J. B. Dworkin, and M. S. Swift, 'Mediator Tactics and Sources of Conflict: Facilitating and Inhibiting Effects' (2002) 41(1) *Industrial Relations* 94; Sourdin, T., *Dispute Resolution Processes for Credit Consumers* (Project Report, Conflict Resolution Research Centre, La Trobe University, 2007); Thoennes, N. A., and J. Pearson, 'Predicting Outcomes in Divorce Mediation: The Influence of People and Process' (1985) 41(2) *Journal of Social Issues* 115; Wissler, R. L., 'Mediation and Adjudication in Small Claims Court: The Effects of Process and Case Characteristics' (1995) 29(2) *Law & Society Review* 323; Wissler, R. L., 'Court-Connected Mediation in General Civil Cases: What We Know from Empirical Research' (2002) 17(3) *Ohio State Journal on Dispute Resolution* 641.

⁹⁰⁸ Alberts, J. K., B. L. Heisterkamp, and R. M. McPhee, 'Disputant Perceptions of and Satisfaction with a Community Mediation Program' (2005) 16(3) *The International Journal of Conflict Management* 218; Bingham, L. B., 'Transformative Mediation in the United States Postal Service' (2012) 5(4) *Negotiation and Conflict Management Research* 354; Burrell, N. A., W. A. Donohue, and M. Allen, 'The Impact of Disputants' Expectations on Mediation, Testing an Interventionist Model' (1990) Fall 1990 *Human Communication Research* 104; Dilts, D. A. and A. Karim, 'The Effect of Mediators' Qualities and Strategies on Mediation Outcomes' (1990) 45(1) *Relations Industrielles/Industrial Relations* 22; Gale, J., R. L. Mowery, M. S. Herrman, and N. L. Hollett, 'Considering Effective Divorce Mediation: Three Potential Factors' (2002) 19(4) *Conflict Resolution Quarterly* 389; Hiltrop, J. M., 'Factors Associated with Successful Labor Mediation' in K. Kressel and D. G. Pruitt (eds), *Mediation Research: The Process and Effectiveness of Third-Party Intervention* (Jossey-Bass, USA, 1989) (study 2); Karim, A. and D. Dilts, 'Determinants of Mediation Success in the Iowa Public Sector' (1990) 19(2) *Journal of Collective Negotiations* 129; Karim, A. and R. Peggnetter, 'Mediator Strategies and Qualities and Mediation Effectiveness' (1983) 22(1) *Industrial Relations* 105; Kimsey, W. D., R. M. Fuller, A. J. Bell, and B. C. McKinney, 'The Impact of Mediator Strategic Choices: An Experimental Study' (1994) 12(1) *Mediation Quarterly* 89; Kimsey, W. D., R. M. Fuller, and B. C. McKinney, 'Mediator Listening, Dispute Reframing, and Mediation Outcome: A Pilot Study' (1993) 7(1) *Journal of the International Listening Association* 74; Kochan, T. A., and T. Jick, 'The Public Sector Mediation Process: A Theory and Empirical Examination' (1978) 22(2) *The Journal of Conflict Resolution* 209; Kressel, K., 'How Do Mediators Decide What To Do? Implicit Schemas of Practice and Mediator Decisionmaking' (2013) 28(3) *Ohio State Journal on Dispute Resolution* 709; Kressel, K., T. Henderson, W. Reich, and C. Cohen, 'Multi-Dimensional Analysis of Conflict Mediator Style' (2012) 30(2) *Conflict Resolution Quarterly* 135; McGillicuddy, N. B., G. L. Welton, and D. G. Pruitt, 'Third-Party Intervention: A Field Experiment Comparing Three Different Models' (1987) 53(1) *Journal of Personality and Social Psychology* 104; Posthuma, R. A., A. Richard, J. B. Dworkin, and M. S. Swift, 'Mediator Tactics and Sources of Conflict: Facilitating and Inhibiting Effects' (2002) 41(1) *Industrial Relations* 94; Pruitt, D. G., W. R. Fry, L. Castrianno, J. Zubeck, G. L. Welton, N. B. McGillicuddy, and C. Ippolito, 'The Process of Mediation: Caucusing, Control, and Problem Solving' in M. A. Rahim (ed), *Managing Conflict: An Interdisciplinary Approach* (Praeger, USA, 1989); Pruitt, D. G., R. S. Peirce, N. B. McGillicuddy, G. L. Welton, and L. Castrianno, 'Long-Term Success in Mediation' (1993) 17(3) *Law and Human Behavior* 313; Sourdin, T., *Mediation in the Supreme and County Courts of Victoria* (Report prepared for the Department of Justice, Victoria, Australia, April 2009), available on <<http://www.civiljustice.info/adreval/1/>>; Sourdin, T., *Exploring Pre-Action Requirements: Resolving Disputes Outside Courts* (ACJI, Monash University, October 2012); Sourdin, T., and T. Matruglio, *Evaluating Mediation – New South Wales Settlement Scheme 2002* (2004) *Mediation*.

iv. Report on the mediation process (n = 21 studies);⁹⁰⁹ and

Paper 7, available on <<http://www.civiljustice.info/med/7>>; Wall, J. A., Jr, and S. Chan-Serafin, 'Processes in Civil Case Mediations' (2009) 26(3) *Conflict Resolution Quarterly* 261; Welton, G. L., and D. G. Pruitt, 'The Mediation Process: The Effects of Mediator Bias and Disputant Power' (1987) 13(1) *Personality and Social Psychology Bulletin* 123; Welton, G. L., D. G. Pruitt, and N. B. McGillicuddy, 'The Role of Caucusing in Community Mediation' (1988) 32(1) *The Journal of Conflict Resolution* 181; Welton, G. L., D. G. Pruitt, N. B. McGillicuddy, C. A. Ippolito, and J. M. Zubeck, 'Antecedents and Characteristics of Caucusing in Community Mediation' (1992) 3(4) *International Journal of Conflict Management* 303; Wissler, R. L., 'Mediation and Adjudication in Small Claims Court: The Effects of Process and Case Characteristics' (1995) 29(2) *Law & Society Review* 323; Wissler, R. L., *Trapping the Data: An Assessment of Domestic Relations Mediation in Maine and Ohio Courts* (Unpublished report, 1999); Wissler, R. L., 'Court-Connected Mediation in General Civil Cases: What We Know from Empirical Research' (2002) 17(3) *Ohio State Journal on Dispute Resolution* 641; Zubeck, J. M., D. G. Pruitt, R. S. Peirce, N. B. McGillicuddy, and H. Syna, 'Disputant and Mediator Behaviors Affecting Short-Term Success in Mediation' (1992) 36(3) *Journal of Conflict Resolution* 546.

⁹⁰⁹ Alberts, J. K., B. L. Heisterkamp, and R. M. McPhee, 'Disputant Perceptions of and Satisfaction with a Community Mediation Program' (2005) 16(3) *The International Journal of Conflict Management* 218; Bingham, L. B., 'Transformative Mediation in the United States Postal Service' (2012) 5(4) *Negotiation and Conflict Management Research* 354; Hiltrop, J. M., 'Factors Associated with Successful Labor Mediation' in K. Kressel and D. G. Pruitt (eds), *Mediation Research: The Process and Effectiveness of Third-Party Intervention* (Jossey-Bass, USA, 1989) (study 2); Kressel, K., 'How Do Mediators Decide What To Do? Implicit Schemas of Practice and Mediator Decisionmaking' (2013) 28(3) *Ohio State Journal on Dispute Resolution* 709; Kressel, K., E. A. Frontera, S. Forlenza, F. Butler, and L. Fish, 'The Settlement-Oriented vs the Problem-Solving Style' (1994) 50(1) *Journal of Social Issues* 67; McDermott, E. P., and R. Obar, "'What's Going On" in Mediation: An Empirical Analysis of the Influence of a Mediator's Style on Party Satisfaction and Monetary Benefit' (2004) 9 *Harvard Negotiation Law Review* 75; McGillicuddy, N. B., G. L. Welton, and D. G. Pruitt, 'Third-Party Intervention: A Field Experiment Comparing Three Different Models' (1987) 53(1) *Journal of Personality and Social Psychology* 104; Posthuma, R. A., A. Richard, J. B. Dworkin, and M. S. Swift, 'Mediator Tactics and Sources of Conflict: Facilitating and Inhibiting Effects' (2002) 41(1) *Industrial Relations* 94; Pruitt, D. G., W. R. Fry, L. Castrianno, J. Zubeck, G. L. Welton, N. B. McGillicuddy, and C. Ippolito, 'The Process of Mediation: Caucusing, Control, and Problem Solving' in M. A. Rahim (ed), *Managing Conflict: An Interdisciplinary Approach* (Praeger, USA, 1989); Pruitt, D. G., R. S. Peirce, N. B. McGillicuddy, G. L. Welton, and L. Castrianno, 'Long-Term Success in Mediation' (1993) 17(3) *Law and Human Behavior* 313; Sourdin, T., *Dispute Resolution Processes for Credit Consumers* (Project Report, Conflict Resolution Research Centre, La Trobe University, 2007); Sourdin, T., *Mediation in the Supreme and County Courts of Victoria* (Report prepared for the Department of Justice, Victoria, Australia, April 2009), available on <<http://www.civiljustice.info/adreval/1>>; Sourdin, T., Exploring Pre-Action Requirements: Resolving Disputes Outside Courts (ACJI, Monash University, October 2012); Sourdin, T., and T. Matruglio, *Evaluating Mediation – New South Wales Settlement Scheme 2002* (2004) *Mediation*. Paper 7, available on <<http://www.civiljustice.info/med/7>>; Thoennes, N. A., and J. Pearson, 'Predicting Outcomes in Divorce Mediation: The Influence of People and Process' (1985) 41(2) *Journal of Social Issues* 115; Welton, G. L., D. G. Pruitt, and N. B. McGillicuddy, 'The Role of Caucusing in Community Mediation' (1988) 32(1) *The Journal of Conflict Resolution* 181; Welton, G. L., D. G. Pruitt, N. B. McGillicuddy, C. A. Ippolito, and J. M. Zubeck, 'Antecedents and Characteristics of Caucusing in Community Mediation' (1992) 3(4) *International Journal of Conflict Management* 303; Wissler, R. L., 'Mediation and Adjudication in Small Claims Court: The Effects of Process and Case Characteristics' (1995) 29(2) *Law & Society Review* 323; Wissler, R. L., *Trapping the Data: An Assessment of Domestic Relations Mediation in Maine and Ohio Courts* (Unpublished report, 1999); Wissler, R. L., 'Court-Connected Mediation in General Civil Cases: What We Know from Empirical Research' (2002) 17(3) *Ohio State Journal on Dispute Resolution* 641; Zubeck, J. M., D. G. Pruitt, R. S. Peirce, N. B. McGillicuddy, and H. Syna, 'Disputant and Mediator Behaviors Affecting Short-Term Success in Mediation' (1992) 36(3) *Journal of Conflict Resolution* 546.

- v. Be reported on by mediators,⁹¹⁰ and/or by observers⁹¹¹ (n = 21 studies).⁹¹²

⁹¹⁰ Carnevale, P. J. D., and R. Peggnetter, 'The Selection of Mediator Tactics in Public Sector Disputes: A Contingency Analysis' (1985) 41(2) *Journal of Social Issues* 2; Hiltrop, J. M., 'Factors Associated with Successful Labor Mediation' in K. Kressel and D. G. Pruitt (eds), *Mediation Research: The Process and Effectiveness of Third-Party Intervention* (Jossey-Bass, USA, 1989) (study 1); Mareschal, P. M., 'What Makes Mediation Work? Perspectives on Resolving Disputes' (2005) 44(3) *Industrial Relations* 509; McDermott, E. P., and R. Obar, "'What's Going On" in Mediation: An Empirical Analysis of the Influence of a Mediator's Style on Party Satisfaction and Monetary Benefit' (2004) 9 *Harvard Negotiation Law Review* 75; McEwen, C. A., *An Evaluation of the ADR Pilot Project: Final Report 1* (Unpublished report, 1992); Shapiro, D., R. Drieghe, and J. Brett, 'Mediator Behavior and the Outcomes of Mediation' (1985) 41(2) *Journal of Social Issues* 101; Sourdin, T., *Mediation in the Supreme and County Courts of Victoria* (Report prepared for the Department of Justice, Victoria, Australia, April 2009), available on <<http://www.civiljustice.info/adreval/1/>>; Swaab, R. I., and J. Brett, *Caucus with Care: The Impact of Pre-Mediation Caucuses on Conflict Resolution* (Meetings Paper, International Association of Conflict Management, 2007); Wissler, R. L., *Trapping the Data: An Assessment of Domestic Relations Mediation in Maine and Ohio Courts* (Unpublished report, 1999); Wissler, R. L., 'Court-Connected Mediation in General Civil Cases: What We Know from Empirical Research' (2002) 17(3) *Ohio State Journal on Dispute Resolution* 641.

⁹¹¹ Gale, J., R. L. Mowery, M. S. Herrman, and N. L. Hollett, 'Considering Effective Divorce Mediation: Three Potential Factors' (2002) 19(4) *Conflict Resolution Quarterly* 389; Jones, T. S., 'Lag Sequential Analyses of Mediator-Spouse and Husband-Wife Interaction in Successful and Unsuccessful Divorce Mediation' in M. A. Rahim (ed), *Managing Conflict: An Interdisciplinary Approach* (Praeger, USA, 1989); McGillicuddy, N. B., G. L. Welton, and D. G. Pruitt, 'Third-Party Intervention: A Field Experiment Comparing Three Different Models' (1987) 53(1) *Journal of Personality and Social Psychology* 104; Pruitt, D. G., W. R. Fry, L. Castrianno, J. Zubeck, G. L. Welton, N. B. McGillicuddy, and C. Ippolito, 'The Process of Mediation: Caucusing, Control, and Problem Solving' in M. A. Rahim (ed), *Managing Conflict: An Interdisciplinary Approach* (Praeger, USA, 1989); Pruitt, D. G., R. S. Peirce, N. B. McGillicuddy, G. L. Welton, and L. Castrianno, 'Long-Term Success in Mediation' (1993) 17(3) *Law and Human Behavior* 313; Slaikeu, K. A., R. Culler, J. Pearson, and N. Thoennes, 'Process and Outcome in Divorce Mediation' (1985) 10 *Mediation Quarterly* 55; Wall, J. A., Jr, and S. Chan-Serafin, 'Processes in Civil Case Mediations' (2009) 26(3) *Conflict Resolution Quarterly* 261; Welton, G. L., and D. G. Pruitt, 'The Mediation Process: The Effects of Mediator Bias and Disputant Power' (1987) 13(1) *Personality and Social Psychology Bulletin* 123; Welton, G. L., D. G. Pruitt, and N. B. McGillicuddy, 'The Role of Caucusing in Community Mediation' (1988) 32(1) *The Journal of Conflict Resolution* 181; Welton, G. L., D. G. Pruitt, N. B. McGillicuddy, C. A. Ippolito, and J. M. Zubeck, 'Antecedents and Characteristics of Caucusing in Community Mediation' (1992) 3(4) *International Journal of Conflict Management* 303; Zubeck, J. M., D. G. Pruitt, R. S. Peirce, N. B. McGillicuddy, and H. Syna, 'Disputant and Mediator Behaviors Affecting Short-Term Success in Mediation' (1992) 36(3) *Journal of Conflict Resolution* 546.

⁹¹² Carnevale, P. J. D., and R. Peggnetter, 'The Selection of Mediator Tactics in Public Sector Disputes: A Contingency Analysis' (1985) 41(2) *Journal of Social Issues* 2; Gale, J., R. L. Mowery, M. S. Herrman, and N. L. Hollett, 'Considering Effective Divorce Mediation: Three Potential Factors' (2002) 19(4) *Conflict Resolution Quarterly* 389; Hiltrop, J. M., 'Factors Associated with Successful Labor Mediation' in K. Kressel and D. G. Pruitt (eds), *Mediation Research: The Process and Effectiveness of Third-Party Intervention* (Jossey-Bass, USA, 1989) (study 1); Jones, T. S., 'Lag Sequential Analyses of Mediator-Spouse and Husband-Wife Interaction in Successful and Unsuccessful Divorce Mediation' in M. A. Rahim (ed), *Managing Conflict: An Interdisciplinary Approach* (Praeger, USA, 1989); Mareschal, P. M., 'What Makes Mediation Work? Perspectives on Resolving Disputes' (2005) 44(3) *Industrial Relations* 509; McDermott, E. P., and R. Obar, "'What's Going On" in Mediation: An Empirical Analysis of the Influence of a Mediator's Style on Party Satisfaction and Monetary Benefit' (2004) 9 *Harvard Negotiation Law Review* 75; McEwen, C. A., *An Evaluation of the ADR Pilot Project: Final Report 1* (Unpublished report, 1992); McGillicuddy, N. B., G. L. Welton, and D. G. Pruitt, 'Third-Party Intervention: A Field Experiment Comparing Three Different Models' (1987) 53(1) *Journal of Personality and Social Psychology* 104; Pruitt, D. G., W. R. Fry, L. Castrianno, J. Zubeck, G. L. Welton, N. B. McGillicuddy, and C. Ippolito, 'The Process of Mediation: Caucusing, Control, and Problem Solving' in M. A. Rahim (ed), *Managing Conflict: An Interdisciplinary Approach* (Praeger, USA, 1989); Pruitt, D. G., R. S. Peirce, N. B. McGillicuddy, G. L. Welton, and L. Castrianno, 'Long-Term Success in Mediation' (1993) 17(3) *Law and Human Behavior* 313; Shapiro, D., R.

Non-mediator (legal advisers) research roles

- i. No self-reports;
- ii. Report on the mediator (n = 3 studies);⁹¹³
- iii. Report on the disputants/clients (n = 2 studies);⁹¹⁴
- iv. Report on mediation process (n = 3 studies);⁹¹⁵ and
- v. Be reported on (0 studies).

Non-participants (Observers) research roles

- i. No observer self-reports;
- ii. Report on mediator (n = 16 studies);⁹¹⁶

Drieghe, and J. Brett, 'Mediator Behavior and the Outcomes of Mediation' (1985) 41(2) *Journal of Social Issues* 101; Slaikou, K. A., R. Culler, J. Pearson, and N. Thoennes, 'Process and Outcome in Divorce Mediation' (1985) 10 *Mediation Quarterly* 55; Sourdin, T., Mediation in the Supreme and County Courts of Victoria (Report prepared for the Department of Justice, Victoria, Australia, April 2009), available on <<http://www.civiljustice.info/adreval/1/>>; Swaab, R. I., and J. Brett, *Caucus with Care: The Impact of Pre-Mediation Caucuses on Conflict Resolution* (Meetings Paper, International Association of Conflict Management, 2007); Wall, J. A., Jr, and S. Chan-Serafin, 'Processes in Civil Case Mediations' (2009) 26(3) *Conflict Resolution Quarterly* 261; Welton, G. L., and D. G. Pruitt, 'The Mediation Process: The Effects of Mediator Bias and Disputant Power' (1987) 13(1) *Personality and Social Psychology Bulletin* 123; Welton, G. L., D. G. Pruitt, and N. B. McGillicuddy, 'The Role of Caucusing in Community Mediation' (1988) 32(1) *The Journal of Conflict Resolution* 181; Welton, G. L., D. G. Pruitt, N. B. McGillicuddy, C. A. Ippolito, and J. M. Zubeck, 'Antecedents and Characteristics of Caucusing in Community Mediation' (1992) 3(4) *International Journal of Conflict Management* 303; Wissler, R. L., *Trapping the Data: An Assessment of Domestic Relations Mediation in Maine and Ohio Courts* (Unpublished report, 1999); Wissler, R. L., 'Court-Connected Mediation in General Civil Cases: What We Know from Empirical Research' (2002) 17(3) *Ohio State Journal on Dispute Resolution* 641; Zubeck, J. M., D. G. Pruitt, R. S. Peirce, N. B. McGillicuddy, and H. Syna, 'Disputant and Mediator Behaviors Affecting Short-Term Success in Mediation' (1992) 36(3) *Journal of Conflict Resolution* 546.

⁹¹³ Goldberg, S. B., and M. L. Shaw, 'Further Investigation into the Secrets of Successful and Unsuccessful Mediators' (2008) 26(8) *Alternatives to the High Cost of Litigation* 149; Henderson, D. A., 'Mediation Success: An Empirical Analysis' (1996) 11(1) *Ohio State Journal on Dispute Resolution* 105; Woodward, J. G., 'Settlement Week: Measuring the Promise' (1990) 11 *Northern Illinois University Law Review* 1.

⁹¹⁴ Sourdin, T., Exploring Pre-Action Requirements: Resolving Disputes Outside Courts (ACJI, Monash University, October 2012); Woodward, J. G., 'Settlement Week: Measuring the Promise' (1990) 11 *Northern Illinois University Law Review* 1.

⁹¹⁵ Henderson, D. A., 'Mediation Success: An Empirical Analysis' (1996) 11(1) *Ohio State Journal on Dispute Resolution* 105; Sourdin, T., *Exploring Pre-Action Requirements: Resolving Disputes Outside Courts* (ACJI, Monash University, October 2012).

⁹¹⁶ Gale, J., R. L. Mowery, M. S. Herrman, and N. L. Hollett, 'Considering Effective Divorce Mediation: Three Potential Factors' (2002) 19(4) *Conflict Resolution Quarterly* 389; Jones, T. S., 'Lag Sequential Analyses of Mediator-Spouse and Husband-Wife Interaction in Successful and Unsuccessful Divorce Mediation in M. A. Rahim (ed), *Managing Conflict: An Interdisciplinary Approach* (Praeger, USA, 1989); Kressel, K., 'How Do Mediators Decide What To Do? Implicit Schemas of Practice and Mediator Decisionmaking' (2013) 28(3) *Ohio State Journal on Dispute Resolution* 709; Kressel, K., E. A. Frontera, S. Forlenza, F. Butler, and L. Fish, 'The

- iii. Report on disputants (n = 11 studies);⁹¹⁷
- iv. Report on presenting dispute (0 studies);⁹¹⁸
- v. Report on mediation process (n = 2 studies);⁹¹⁹ and
- vi. Be reported on (0 studies).

Settlement-Orientation vs the Problem-Solving Style' (1994) 50(1) *Journal of Social Issues* 67; Kressel, K., T. Henderson, W. Reich, and C. Cohen, 'Multi-Dimensional Analysis of Conflict Mediator Style' (2012) 30(2) *Conflict Resolution Quarterly* 135; McGillicuddy, N. B., G. L. Welton, and D. G. Pruitt, 'Third-Party Intervention: A Field Experiment Comparing Three Different Models' (1987) 53(1) *Journal of Personality and Social Psychology* 104; Peeples, R., C. Harris, and T. Metzloff, 'Following the Script: An Empirical Analysis of Court-Ordered Mediation of Medical Malpractice Cases' (2007) 2007(1) *Journal of Dispute Resolution* 101; Pruitt, D. G., W. R. Fry, L. Castrianno, J. Zubeck, G. L. Welton, N. B. McGillicuddy, and C. Ippolito, 'The Process of Mediation: Caucusing, Control, and Problem Solving' in M. A. Rahim (ed), *Managing Conflict: An Interdisciplinary Approach* (Praeger, USA, 1989); Pruitt, D. G., R. S. Peirce, N. B. McGillicuddy, G. L. Welton, and L. Castrianno, 'Long-Term Success in Mediation' (1993) 17(3) *Law and Human Behavior* 313; Slaikeu, K. A., R. Culler, J. Pearson, and N. Thoennes, 'Process and Outcome in Divorce Mediation' (1985) 10 *Mediation Quarterly* 55; Wall, J. A., Jr, and S. Chan-Serafin, 'Processes in Civil Case Mediations' (2009) 26(3) *Conflict Resolution Quarterly* 261; Wall, J. A., Jr, and S. Chan-Serafin, 'Do Mediators Walk Their Talk in Civil Cases?' (2010) 28(1) *Conflict Resolution Quarterly* 3; Welton, G. L., and D. G. Pruitt, 'The Mediation Process: The Effects of Mediator Bias and Disputant Power' (1987) 13(1) *Personality and Social Psychology Bulletin* 123; Welton, G. L., D. G. Pruitt, and N. B. McGillicuddy, 'The Role of Caucusing in Community Mediation' (1988) 32(1) *The Journal of Conflict Resolution* 181; Welton, G. L., D. G. Pruitt, N. B. McGillicuddy, C. A. Ippolito, and J. M. Zubeck, 'Antecedents and Characteristics of Caucusing in Community Mediation' (1992) 3(4) *International Journal of Conflict Management* 303; Zubeck, J. M., D. G. Pruitt, R. S. Peirce, N. B. McGillicuddy, and H. Syna, 'Disputant and Mediator Behaviors Affecting Short-Term Success in Mediation' (1992) 36(3) *Journal of Conflict Resolution* 546.

⁹¹⁷ Gale, J., R. L. Mowery, M. S. Herrman, and N. L. Hollett, 'Considering Effective Divorce Mediation: Three Potential Factors' (2002) 19(4) *Conflict Resolution Quarterly* 389; Jones, T. S., 'Lag Sequential Analyses of Mediator-Spouse and Husband-Wife Interaction in Successful and Unsuccessful Divorce Mediation in M. A. Rahim (ed), *Managing Conflict: An Interdisciplinary Approach* (Praeger, USA, 1989); McGillicuddy, N. B., G. L. Welton, and D. G. Pruitt, 'Third-Party Intervention: A Field Experiment Comparing Three Different Models' (1987) 53(1) *Journal of Personality and Social Psychology* 104; Pruitt, D. G., W. R. Fry, L. Castrianno, J. Zubeck, G. L. Welton, N. B. McGillicuddy, and C. Ippolito, 'The Process of Mediation: Caucusing, Control, and Problem Solving' in M. A. Rahim (ed), *Managing Conflict: An Interdisciplinary Approach* (Praeger, USA, 1989); Pruitt, D. G., R. S. Peirce, N. B. McGillicuddy, G. L. Welton, and L. Castrianno, 'Long-Term Success in Mediation' (1993) 17(3) *Law and Human Behavior* 313; Slaikeu, K. A., R. Culler, J. Pearson, and N. Thoennes, 'Process and Outcome in Divorce Mediation' (1985) 10 *Mediation Quarterly* 55; Wall, J. A., Jr, and S. Chan-Serafin, 'Processes in Civil Case Mediations' (2009) 26(3) *Conflict Resolution Quarterly* 261; Welton, G. L., and D. G. Pruitt, 'The Mediation Process: The Effects of Mediator Bias and Disputant Power' (1987) 13(1) *Personality and Social Psychology Bulletin* 123; Welton, G. L., D. G. Pruitt, and N. B. McGillicuddy, 'The Role of Caucusing in Community Mediation' (1988) 32(1) *The Journal of Conflict Resolution* 181; Welton, G. L., D. G. Pruitt, N. B. McGillicuddy, C. A. Ippolito, and J. M. Zubeck, 'Antecedents and Characteristics of Caucusing in Community Mediation' (1992) 3(4) *International Journal of Conflict Management* 303; Zubeck, J. M., D. G. Pruitt, R. S. Peirce, N. B. McGillicuddy, and H. Syna, 'Disputant and Mediator Behaviors Affecting Short-Term Success in Mediation' (1992) 36(3) *Journal of Conflict Resolution* 546.

⁹¹⁸ Although no observations included reports on the presenting dispute, a cluster that include observations have taken the nature of the dispute into account in their analysis.

⁹¹⁹ Pruitt, D. G., W. R. Fry, L. Castrianno, J. Zubeck, G. L. Welton, N. B. McGillicuddy, and C. Ippolito, 'The Process of Mediation: Caucusing, Control, and Problem Solving' in M. A. Rahim (ed), *Managing Conflict: An Interdisciplinary Approach* (Praeger, USA, 1989); Wall, J. A., Jr, and S. Chan-Serafin, 'Do Mediators Walk Their Talk in Civil Cases?' (2010) 28(1) *Conflict Resolution Quarterly* 3.

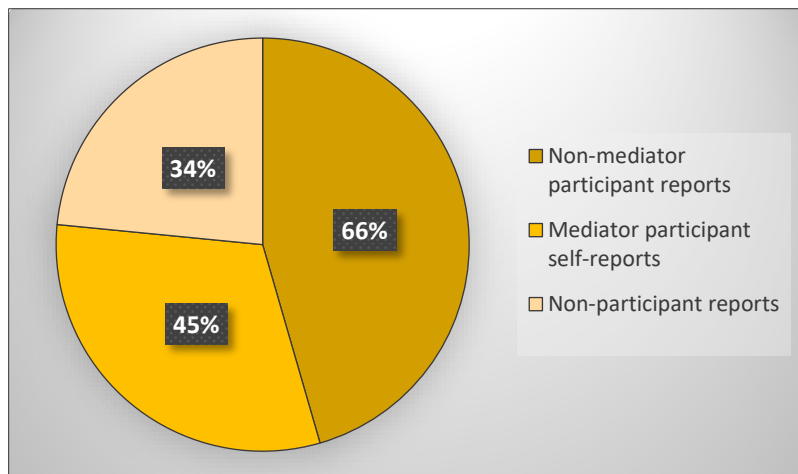


Figure 5.6. Mediator participants: whose data?

Figure 5.6 shows that, for data about mediator participants, researchers were most reliant on information obtained from the non-mediator participants (ie disputants and their advisers).

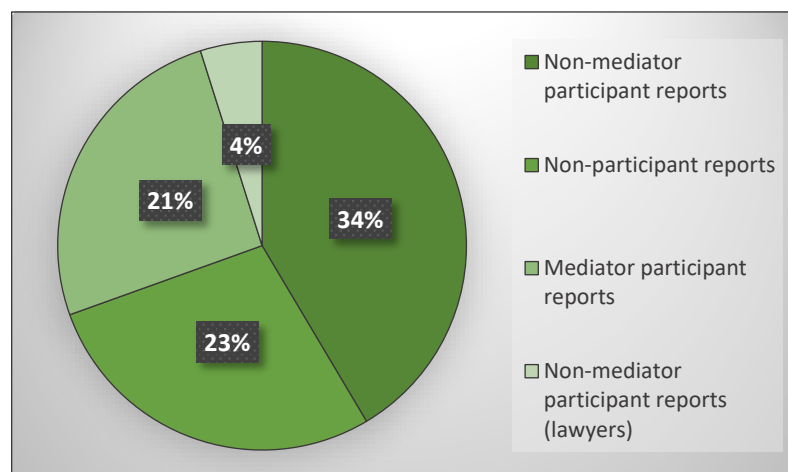


Figure 5.7. Non-mediator participants: whose data?

Figure 5.7 shows that, for data about non-mediator participants (disputants), researchers were most reliant on information obtained from the disputants themselves.

Figures 5.6 and 5.7 show that researchers were most reliant on non-mediator participants for data about all mediation participants, and that they also relied heavily on mediator self-reports to obtain data about the mediators. Obviously, the capacity of study participants is pivotal to the provision of the required information, emphasising researcher responsibility for appropriate allocation of research roles. Additional complexities arise, and may influence data credibility, when participants are required to report on each other.

The non-mediator participants are important in the selected studies: only two of the forty-seven selected report *not* collecting data from or about them.⁹²⁰ Although seven of the selected studies report collecting research data only from mediator participants,⁹²¹ five of those report that the mediator surveys and interviews included questions that solicited information about the non-mediator participants.⁹²²

According to the studies, researchers expect participants to provide significant amounts of detailed information about the mediation and the people in it. The researchers themselves do not report having considered how difficult this might be, nor how participants' capacity might be affected by how they are selected into the study, and by their experience in mediation and in

⁹²⁰ Swaab, R. I., *Face First: Pre-Mediation Caucus and Face in Employment Disputes* (Presentation, Annual Association of Conflict Management Conference, June 2009); Wall, J. A., Jr, and D. E. Rude, 'The Judge as a Mediator' (1991) 76(1) *Journal of Applied Psychology* 54.

⁹²¹ Carnevale, P. J. D., and R. Peggnetter, 'The Selection of Mediator Tactics in Public Sector Disputes: A Contingency Analysis' (1985) 41(2) *Journal of Social Issues* 2; Mareschal, P. M., 'What Makes Mediation Work? Perspectives on Resolving Disputes' (2005) 44(3) *Industrial Relations* 509; McEwen, C. A., *An Evaluation of the ADR Pilot Project: Final Report 1* (Unpublished report, 1992); Shapiro, D., R. Drieghe, and J. Brett, 'Mediator Behavior and the Outcomes of Mediation' (1985) 41(2) *Journal of Social Issues* 101; Swaab, R. I., *Face First: Pre-Mediation Caucus and Face in Employment Disputes* (Presentation, Annual Association of Conflict Management Conference, June 2009); Swaab, R. I., and J. Brett, *Caucus with Care: The Impact of Pre-Mediation Caucuses on Conflict Resolution* (Meetings Paper, International Association of Conflict Management, 2007); Wall, J. A., Jr, and D. E. Rude, 'The Judge as a Mediator' (1991) 76(1) *Journal of Applied Psychology* 54.

⁹²² Carnevale, P. J. D., and R. Peggnetter, 'The Selection of Mediator Tactics in Public Sector Disputes: A Contingency Analysis' (1985) 41(2) *Journal of Social Issues* 2; Mareschal, P. M., 'What Makes Mediation Work? Perspectives on Resolving Disputes' (2005) 44(3) *Industrial Relations* 509; McEwen, C. A., *An Evaluation of the ADR Pilot Project: Final Report 1* (Unpublished report, 1992); Shapiro, D., R. Drieghe, and J. Brett, 'Mediator Behavior and the Outcomes of Mediation' (1985) 41(2) *Journal of Social Issues* 101; Swaab, R. I., and J. Brett, *Caucus with Care: The Impact of Pre-Mediation Caucuses on Conflict Resolution* (Meetings Paper, International Association of Conflict Management, 2007).

research. It is not apparent that researchers have taken participants' different capacities into account when analysing the various datasets. For example, some participants might have more mediation experience (and knowledge) than others in the same study. Less knowledgeable participants may feel less comfortable when asked to report on detailed mediator behaviours with which they are completely unfamiliar, which is likely to affect the information they choose to include in their surveys and interviews. While this is valuable data, it might also become "lost" during quantitative analysis.⁹²³

5.4. Influence: Groups and repeat players

5.4.0. Group effect

Group effect is rarely considered in the selected studies and it is an area requiring further research to clarify how it might influence what happens in mediation, as well as any influence on the reliability of the research data on which mediation research relies.

Group effect is a well-documented group setting behaviour where people's tendency is to suppress their own views in deference to the majority views.⁹²⁴ Group effect has been shown to regulate our individual decision-making,⁹²⁵ strengthen our social cohesion,⁹²⁶ and often cause us to make decisions that reinforce the group's interests while being contrary to our individual interests.⁹²⁷ Group effect can therefore influence what people report about group events in which

⁹²³ Chapter Six considers the issue of "missing data".

⁹²⁴ Carey, M. A., and M. W. Smith, 'Capturing the Group Effect in Focus Groups: A Special Concern in Analysis' (1994) 4(1) *Qualitative Health Research* 123.

⁹²⁵ Zheng, Y., and Xue, W., 'Group Effect and Its Influence on Economic Decision-making Based on Brain Evoked Potential Analysis' (2018) 16(5) *NeuroQuantology* 256.

⁹²⁶ Reynolds, K. J., and N. R. Branscombe, *Psychology of Change: Life Contexts, Experiences, and Identities* (Psychology Press, Taylor and Francis, UK/USA, 2015).

⁹²⁷ Flint, D., *Perceptions of Procedural Justice: Group Polarization Effects* (PhD Thesis, Rotman School of Management, University of Toronto, Canada, 2001); Reynolds, K. J., and N. R. Branscombe, *Psychology of Change: Life Contexts, Experiences, and Identities* (Psychology Press, Taylor and Francis, UK/USA, 2015).

they have participated. People also take into account their own perception of their status in the group and censor their own views in deference to group members with perceived higher status.⁹²⁸

One of the studies includes a statistical check of its results intended to confirm there was no group effect influence on their research data.⁹²⁹ However, group effect is likely to influence most aspects of mediation itself and of group-based data collection about it, including behaviour towards the mediator and other participants; behaviour towards the researcher; approaches to data collection activities; and interpretations of what occurred during a subject mediation.

The influence of individual status in a group setting – known as ‘status differential’⁹³⁰ – is also relevant in many mediation research settings that involve high status individuals as study participants or as researchers. For example, in a study where the mediator participant is a judge, how might that person’s status influence other mediation participants and the nature of the information they provide to researchers about the mediator and the mediation? How might it influence how the researcher interprets and reports their own study results and findings?

Group effect was first reported in the context of focus groups and is known to influence data collected in a focus group setting.⁹³¹ Two of the selected studies report having collected data in several focus group settings and it is unclear what steps were taken to ameliorate the influence of group effect and maximise the scope and representativeness of data collection.⁹³² The influence of group effect may also contribute to the effects of repeat players in mediation and in mediation

⁹²⁸ Carey, M. A., and M. W. Smith, ‘Capturing the Group Effect in Focus Groups: A Special Concern in Analysis’ (1994) 4(1) *Qualitative Health Research* 123.

⁹²⁹ Alberts, J. K., B. L. Heisterkamp, and R. M. McPhee, ‘Disputant Perceptions of and Satisfaction with a Community Mediation Program’ (2005) 16(3) *The International Journal of Conflict Management* 218.

⁹³⁰ Carey, M. A., and M. W. Smith, ‘Capturing the Group Effect in Focus Groups: A Special Concern in Analysis’ (1994) 4(1) *Qualitative Health Research* 123, 125.

⁹³¹ Carey, M. A., and M. W. Smith, ‘Capturing the Group Effect in Focus Groups: A Special Concern in Analysis’ (1994) 4(1) *Qualitative Health Research* 123.

⁹³² Sourdin, T., *Mediation in the Supreme and County Courts of Victoria* (Report prepared for the Department of Justice, Victoria, Australia, April 2009), available on <<http://www.civiljustice.info/adreval/1/>>; Sourdin, T., *Exploring Pre-Action Requirements: Resolving Disputes Outside Courts* (ACJI, Monash University, October 2012).

research, particularly where the repeat players are all associated with institutionalised mediation programs and services.

5.4.1. Mediation experience and repeat players

In empirical studies of mediation, where participants are asked to report on what happened during a mediation, their information can be influenced by their levels of mediation experience and of knowledge about the process and the mediator's role. If participants have little or no experience or knowledge, they might have limited capacity to provide complex research data about the process and about the mediator.

Although sixteen of the studies do not explicitly consider the influence of mediator and non-mediator experience,⁹³³ six do acknowledge the important influence of mediator experience,⁹³⁴ and

⁹³³ Goldberg, S. B., and M. L. Shaw, 'Further Investigation into the Secrets of Successful and Unsuccessful Mediators' (2008) 26(8) *Alternatives to the High Cost of Litigation* 149; Henderson, D. A., 'Mediation Success: An Empirical Analysis' (1996) 11(1) *Ohio State Journal on Dispute Resolution* 105; Jones, T. S., 'Lag Sequential Analyses of Mediator-Spouse and Husband-Wife Interaction in Successful and Unsuccessful Divorce Mediation in M. A. Rahim (ed), *Managing Conflict: An Interdisciplinary Approach* (Praeger, USA, 1989); Karim, A. and D. Dilts, 'Determinants of Mediation Success in the Iowa Public Sector' (1990) 19(2) *Journal of Collective Negotiations* 129; Karim, A. and R. Peggnetter, 'Mediator Strategies and Qualities and Mediation Effectiveness' (1983) 22(1) *Industrial Relations* 105; Kimsey, W. D., R. M. Fuller, and B. C. McKinney, 'Mediator Listening, Dispute Reframing, and Mediation Outcome: A Pilot Study' (1993) 7(1) *Journal of the International Listening Association* 74; Mareschal, P. M., 'What Makes Mediation Work? Perspectives on Resolving Disputes' (2005) 44(3) *Industrial Relations* 509; McDermott, E. P., and R. Obar, "'What's Going On" in Mediation: An Empirical Analysis of the Influence of a Mediator's Style on Party Satisfaction and Monetary Benefit' (2004) 9 *Harvard Negotiation Law Review* 75; McEwen, C. A., *An Evaluation of the ADR Pilot Project: Final Report* 1 (Unpublished report, 1992); Peeples, R., C. Harris, and T. Metzloff, 'Following the Script: An Empirical Analysis of Court-Ordered Mediation of Medical Malpractice Cases' (2007) 2007(1) *Journal of Dispute Resolution* 101; Pruitt, D. G., W. R. Fry, L. Castrianno, J. Zubeck, G. L. Welton, N. B. McGillicuddy, and C. Ippolito, 'The Process of Mediation: Caucusing, Control, and Problem Solving' in M. A. Rahim (ed), *Managing Conflict: An Interdisciplinary Approach* (Praeger, USA, 1989); Pruitt, D. G., R. S. Peirce, N. B. McGillicuddy, G. L. Welton, and L. Castrianno, 'Long-Term Success in Mediation' (1993) 17(3) *Law and Human Behavior* 313; Slaikeu, K. A., R. Culler, J. Pearson, and N. Thoennes, 'Process and Outcome in Divorce Mediation' (1985) 10 *Mediation Quarterly* 55; Welton, G. L., and D. G. Pruitt, 'The Mediation Process: The Effects of Mediator Bias and Disputant Power' (1987) 13(1) *Personality and Social Psychology Bulletin* 123; Welton, G. L., D. G. Pruitt, N. B. McGillicuddy, C. A. Ippolito, and J. M. Zubeck, 'Antecedents and Characteristics of Caucusing in Community Mediation' (1992) 3(4) *International Journal of Conflict Management* 303; Wissler, R. L., 'Mediation and Adjudication in Small Claims Court: The Effects of Process and Case Characteristics' (1995) 29(2) *Law & Society Review* 323.

⁹³⁴ Dilts, D. A. and A. Karim, 'The Effect of Mediators' Qualities and Strategies on Mediation Outcomes' (1990) 45(1) *Relations Industrielles/Industrial Relations* 22; Kimsey, W. D., R. M. Fuller, A. J. Bell, and B. C. McKinney, 'The Impact of Mediator Strategic Choices: An Experimental Study' (1994) 12(1) *Mediation Quarterly* 89; Kochan, T. A., and T. Jick, 'The Public Sector Mediation Process: A Theory and Empirical Examination' (1978) 22(2) *The Journal of Conflict Resolution* 209; Swaab, R. I., and J. Brett, *Caucus with Care: The Impact of Pre-*

five acknowledge the important influence of non-mediator experience.⁹³⁵ Thirteen of the studies include mention of the experience of their mediator participants,⁹³⁶ and four mention the experience, and inexperience, of their non-mediator participants.⁹³⁷

According to the studies, mediator participants in community-based and in divorce/custody contexts are likely to be less experienced than are mediator participants in the court-connected context. For example, two community-based studies report that the mediator participants had

Mediation Caucuses on Conflict Resolution (Meetings Paper, International Association of Conflict Management, 2007); Vanderkooi, L., and J. Pearson, 'Mediating Divorce Disputes: Mediator Behaviors, Styles and Roles' (1983) 32(4) *Family Relations* 557; Zubeck, J. M., D. G. Pruitt, R. S. Peirce, N. B. McGillicuddy, and H. Syna, 'Disputant and Mediator Behaviors Affecting Short-Term Success in Mediation' (1992) 36(3) *Journal of Conflict Resolution* 546.

⁹³⁵ Carnevale, P. J. D., and R. Pagnetter, 'The Selection of Mediator Tactics in Public Sector Disputes: A Contingency Analysis' (1985) 41(2) *Journal of Social Issues* 2; Dilts, D. A. and A. Karim, 'The Effect of Mediators' Qualities and Strategies on Mediation Outcomes' (1990) 45(1) *Relations Industrielles/Industrial Relations* 22; Hiltrop, J. M., 'Factors Associated with Successful Labor Mediation' in K. Kressel and D. G. Pruitt (eds), *Mediation Research: The Process and Effectiveness of Third-Party Intervention* (Jossey-Bass, USA, 1989); Kochan, T. A., and T. Jick, 'The Public Sector Mediation Process: A Theory and Empirical Examination' (1978) 22(2) *The Journal of Conflict Resolution* 209; McGillicuddy, N. B., G. L. Welton, and D. G. Pruitt, 'Third-Party Intervention: A Field Experiment Comparing Three Different Models' (1987) 53(1) *Journal of Personality and Social Psychology* 104.

⁹³⁶ Alberts, J. K., B. L. Heisterkamp, and R. M. McPhee, 'Disputant Perceptions of and Satisfaction with a Community Mediation Program' (2005) 16(3) *The International Journal of Conflict Management* 218; Carnevale, P. J. D., and R. Pagnetter, 'The Selection of Mediator Tactics in Public Sector Disputes: A Contingency Analysis' (1985) 41(2) *Journal of Social Issues* 2; Gale, J., R. L. Mowery, M. S. Herrman, and N. L. Hollett, 'Considering Effective Divorce Mediation: Three Potential Factors' (2002) 19(4) *Conflict Resolution Quarterly* 389; Kressel, K., T. Henderson, W. Reich, and C. Cohen, 'Multi-Dimensional Analysis of Conflict Mediator Style' (2012) 30(2) *Conflict Resolution Quarterly* 135; McGillicuddy, N. B., G. L. Welton, and D. G. Pruitt, 'Third-Party Intervention: A Field Experiment Comparing Three Different Models' (1987) 53(1) *Journal of Personality and Social Psychology* 104; Shapiro, D., R. Drieghe, and J. Brett, 'Mediator Behavior and the Outcomes of Mediation' (1985) 41(2) *Journal of Social Issues* 101; Sourdin, T., *Mediation in the Supreme and County Courts of Victoria* (Report prepared for the Department of Justice, Victoria, Australia, April 2009), available on <<http://www.civiljustice.info/adreval/1/>>; Sourdin, T., and T. Matruggio, *Evaluating Mediation – New South Wales Settlement Scheme 2002* (2004) *Mediation*. Paper 7, available on <<http://www.civiljustice.info/med/7/>>; Swaab, R. I., *Face First: Pre-Mediation Caucus and Face in Employment Disputes* (Presentation, Annual Association of Conflict Management Conference, June 2009); Welton, G. L., D. G. Pruitt, and N. B. McGillicuddy, 'The Role of Caucusing in Community Mediation' (1988) 32(1) *The Journal of Conflict Resolution* 181; Wissler, R. L., *Trapping the Data: An Assessment of Domestic Relations Mediation in Maine and Ohio Courts* (Unpublished report, 1999); Wissler, R. L., 'Court-Connected Mediation in General Civil Cases: What We Know from Empirical Research' (2002) 17(3) *Ohio State Journal on Dispute Resolution* 641; Woodward, J. G., 'Settlement Week: Measuring the Promise' (1990) 11 *Northern Illinois University Law Review* 1.

⁹³⁷ Posthuma, R. A., A. Richard, J. B. Dworkin, and M. S. Swift, 'Mediator Tactics and Sources of Conflict: Facilitating and Inhibiting Effects' (2002) 41(1) *Industrial Relations* 94; Sourdin, T., and T. Matruggio, *Evaluating Mediation – New South Wales Settlement Scheme 2002* (2004) *Mediation*. Paper 7, available on <<http://www.civiljustice.info/med/7/>>; Thoennes, N. A., and J. Pearson, 'Predicting Outcomes in Divorce Mediation: The Influence of People and Process' (1985) 41(2) *Journal of Social Issues* 115; Wissler, R. L., 'Court-Connected Mediation in General Civil Cases: What We Know from Empirical Research' (2002) 17(3) *Ohio State Journal on Dispute Resolution* 641.

between three months and six years' mediation experience;⁹³⁸ one study reports its 'professional' mediator participants have more than ten years' experience,⁹³⁹ while two court-connected studies report mediator participants having up to twenty years' and twenty-three years' experience respectively.⁹⁴⁰ One of the studies conducted in the labour/management context reports non-mediator participants with over seventeen years' experience in mediation,⁹⁴¹ while a study for the divorce/custody context reports 'inexperienced' non-mediator participants.⁹⁴² Almost 50% of the studies include a range of experienced non-mediator participants such as legal practitioners,⁹⁴³ hospital representatives,⁹⁴⁴ insurance representatives,⁹⁴⁵ and union and management negotiators.⁹⁴⁶

⁹³⁸ McGillicuddy, N. B., G. L. Welton, and D. G. Pruitt, 'Third-Party Intervention: A Field Experiment Comparing Three Different Models' (1987) 53(1) *Journal of Personality and Social Psychology* 104; Welton, G. L., D. G. Pruitt, and N. B. McGillicuddy, 'The Role of Caucusing in Community Mediation' (1988) 32(1) *The Journal of Conflict Resolution* 181.

⁹³⁹ Kressel, K., T. Henderson, W. Reich, and C. Cohen, 'Multi-Dimensional Analysis of Conflict Mediator Style' (2012) 30(2) *Conflict Resolution Quarterly* 135, 135.

⁹⁴⁰ Sourdin, T., *Mediation in the Supreme and County Courts of Victoria* (Report prepared for the Department of Justice, Victoria, Australia, April 2009), available on <<http://www.civiljustice.info/adreval/1/>>; Sourdin, T., and T. Matruglio, *Evaluating Mediation – New South Wales Settlement Scheme 2002* (2004) *Mediation*. Paper 7, available on <<http://www.civiljustice.info/med/7>>.

⁹⁴¹ Posthuma, R. A., A. Richard, J. B. Dworkin, and M. S. Swift, 'Mediator Tactics and Sources of Conflict: Facilitating and Inhibiting Effects' (2002) 41(1) *Industrial Relations* 94.

⁹⁴² Thoennes, N. A., and J. Pearson, 'Predicting Outcomes in Divorce Mediation: The Influence of People and Process' (1985) 41(2) *Journal of Social Issues* 115, 124.

⁹⁴³ Goldberg, S. B., and M. L. Shaw, 'Further Investigation into the Secrets of Successful and Unsuccessful Mediators' (2008) 26(8) *Alternatives to the High Cost of Litigation* 149; McEwen, C. A., *An Evaluation of the ADR Pilot Project: Final Report 1* (Unpublished report, 1992); Peeples2007; Sourdin, T., *Mediation in the Supreme and County Courts of Victoria* (Report prepared for the Department of Justice, Victoria, Australia, April 2009), available on <<http://www.civiljustice.info/adreval/1/>>; Sourdin, T., Exploring Pre-Action Requirements: Resolving Disputes Outside Courts (ACJI, Monash University, October 2012); Sourdin, T., and T. Matruglio, *Evaluating Mediation – New South Wales Settlement Scheme 2002* (2004) *Mediation*. Paper 7, available on <<http://www.civiljustice.info/med/7>>; Wall, J. A., Jr, and S. Chan-Serafin, 'Processes in Civil Case Mediations' (2009) 26(3) *Conflict Resolution Quarterly* 261; Wall, J. A., Jr, and S. Chan-Serafin, 'Do Mediators Walk Their Talk in Civil Cases?' (2010) 28(1) *Conflict Resolution Quarterly* 3; Wissler, R. L., 'Mediation and Adjudication in Small Claims Court: The Effects of Process and Case Characteristics' (1995) 29(2) *Law & Society Review* 323; Wissler, R. L., *Trapping the Data: An Assessment of Domestic Relations Mediation in Maine and Ohio Courts* (Unpublished report, 1999); Wissler, R. L., 'Court-Connected Mediation in General Civil Cases: What We Know from Empirical Research' (2002) 17(3) *Ohio State Journal on Dispute Resolution* 641; Woodward, J. G., 'Settlement Week: Measuring the Promise' (1990) 11 *Northern Illinois University Law Review* 1.

⁹⁴⁴ Peeples, R., C. Harris, and T. Metzloff, 'Following the Script: An Empirical Analysis of Court-Ordered Mediation of Medical Malpractice Cases' (2007) 2007(1) *Journal of Dispute Resolution* 101.

⁹⁴⁵ Peeples, R., C. Harris, and T. Metzloff, 'Following the Script: An Empirical Analysis of Court-Ordered Mediation of Medical Malpractice Cases' (2007) 2007(1) *Journal of Dispute Resolution* 101.

⁹⁴⁶ Carnevale, P. J. D., and R. Pegnetter, 'The Selection of Mediator Tactics in Public Sector Disputes: A Contingency Analysis' (1985) 41(2) *Journal of Social Issues* 2; Dilts, D. A. and A. Karim, 'The Effect of Mediators'

Although the issue of experience is widely acknowledged in the studies, none of them describes taking levels of experience into account when considering participant research roles.

Repeat players

Associated with issues linked to experience are issues related to repeat players. In the context of mediation research, repeat players are participants who have participated in mediation frequently enough to be familiar with the process and with the role of the mediator. For example, when a study reports that non-mediator participants had ‘considerable’ mediation experience, they can be treated as repeat players.⁹⁴⁷ Non-repeat players’ non-existent prior experience and very limited awareness of the mediation process⁹⁴⁸ makes them readily influenced by the more experienced repeat players who are said to be very influential over general acceptance of mediation, and over its practice.⁹⁴⁹ It is recognised that repeat-players have much greater knowledge about ADR processes such as mediation, and greater familiarity with their usage, than do non-repeat players,⁹⁵⁰ and it is likely that this experience increases their influence. For example, in one study, researchers describe mediations where the mediator reports that they have sufficient familiarity with participants and the disputes that they dispense with some components of the mediation process.⁹⁵¹ The researcher

Qualities and Strategies on Mediation Outcomes’ (1990) 45(1) *Relations Industrielles/Industrial Relations* 22; Hiltrop, J. M., ‘Factors Associated with Successful Labor Mediation’ in K. Kressel and D. G. Pruitt (eds), *Mediation Research: The Process and Effectiveness of Third-Party Intervention* (Jossey-Bass, USA, 1989); Karim, A. and D. Dilts, ‘Determinants of Mediation Success in the Iowa Public Sector’ (1990) 19(2) *Journal of Collective Negotiations* 129; Karim, A. and R. Peggnetter, ‘Mediator Strategies and Qualities and Mediation Effectiveness’ (1983) 22(1) *Industrial Relations* 105; Kochan, T. A., and T. Jick, ‘The Public Sector Mediation Process: A Theory and Empirical Examination’ (1978) 22(2) *The Journal of Conflict Resolution* 209; Mareschal, P. M., ‘What Makes Mediation Work? Perspectives on Resolving Disputes’ (2005) 44(3) *Industrial Relations* 509; Posthuma, R. A., A. Richard, J. B. Dworkin, and M. S. Swift, ‘Mediator Tactics and Sources of Conflict: Facilitating and Inhibiting Effects’ (2002) 41(1) *Industrial Relations* 94; Shapiro, D., R. Drieghe, and J. Brett, ‘Mediator Behavior and the Outcomes of Mediation’ (1985) 41(2) *Journal of Social Issues* 101.

⁹⁴⁷ Wissler, R. L., ‘Court-Connected Mediation in General Civil Cases: What We Know from Empirical Research’ (2002) 17(3) *Ohio State Journal on Dispute Resolution* 641, 654.

⁹⁴⁸ Wissler, R. L., ‘Court-Connected Mediation in General Civil Cases: What We Know from Empirical Research’ (2002) 17(3) *Ohio State Journal on Dispute Resolution* 641.

⁹⁴⁹ Global Pound Conference Series, *Global Data Trends and Regional Differences* (Report of Global Pound Conferences, 2018).

⁹⁵⁰ Global Pound Conference Series, *Global Data Trends and Regional Differences* (Report of Global Pound Conferences, 2018).

⁹⁵¹ Wall, J. A., Jr, and S. Chan-Serafin, ‘Do Mediators Walk Their Talk in Civil Cases?’ (2010) 28(1) *Conflict Resolution Quarterly* 3.

does not appear to take into account how such process changes (and the familiarity leading to them) might affect in-mediation behaviour, and perceptions of the mediator and of the mediation process, especially when the omitted component is a key data measure for the study.

Repeat players have complex professional relationships that they may seek to protect into the future. For example, they may wish to protect their relationship with mediators before whom they might interact in future; they may seek to protect their future dealings with each other; they may want to protect their ongoing access to the program or service within which the research study occurs; and they might want to protect any future professional dealings with the researchers. Although the potential effects of these issues on perceptions of impartiality are rarely considered,⁹⁵² they are also likely to influence what participants report to researchers about each other and about the mediation program/service.

People's repeat player status and their familiarity with the mediation process and other participants can influence their willingness to participate in mediation,⁹⁵³ it can influence their in-mediation behaviour,⁹⁵⁴ their perceptions of the mediation process and of the mediator,⁹⁵⁵ and their assessment of any mediated outcomes.⁹⁵⁶ One of the selected studies describes highly experienced disputant representatives who are reported to have more influence in the mediation than does the mediator.⁹⁵⁷ This could be said to be a form of repeat player procedural power in which the repeat player's influence dominates all process decision-making and in-mediation behaviour. It has been

⁹⁵² For an example where they are considered, see Sourdin, T., *Mediation in the Supreme and County Courts of Victoria* (Report prepared for the Department of Justice, Victoria, Australia, April 2009), available on <<http://www.civiljustice.info/adreval/1/>>.

⁹⁵³ Global Pound Conference Series, *Global Data Trends and Regional Differences* (Report of Global Pound Conferences, 2018).

⁹⁵⁴ Rundle, O., 'The Purpose of Court-Connected Mediation from the Legal Perspective' (2007) 10(2) *ADR Bulletin* 28.

⁹⁵⁵ Wissler, R. L., 'Court-Connected Mediation in General Civil Cases: What We Know from Empirical Research' (2002) 17(3) *Ohio State Journal on Dispute Resolution* 641.

⁹⁵⁶ Wissler, R. L., 'Court-Connected Mediation in General Civil Cases: What We Know from Empirical Research' (2002) 17(3) *Ohio State Journal on Dispute Resolution* 641.

⁹⁵⁷ Kochan, T. A., and T. Jick, 'The Public Sector Mediation Process: A Theory and Empirical Examination' (1978) 22(2) *The Journal of Conflict Resolution* 209.

suggested that repeat players may contribute to skewed outcomes,⁹⁵⁸ and that making repeat players the sole sample population for studies of mediation limits the credibility of research data⁹⁵⁹ – unless, of course, the study is an investigation of repeat player influence in mediation research.

Legal practitioners can be recognised as repeat players in court-connected mediation,⁹⁶⁰ as can be some business and insurance representatives in commercial mediations.⁹⁶¹ In the labour/management context, experienced union and management negotiators are repeat players. Mediators themselves can be repeat players; for example, where they are members of an institutional panel providing mediation services within or for that institution, or where they often are retained by the same disputants (or their legal advisers).⁹⁶² Repeat player relationships and influences are multi-faceted and complex, and a worthwhile research topic in their own right.

It could be said that researchers, too, are repeat players in certain contexts with which they are experienced and familiar. For example, if a researcher has conducted more than one study in a particular setting,⁹⁶³ or where the study requires significant amounts of data collection at one site,⁹⁶⁴

⁹⁵⁸ Menkel-Meadow, C., 'Empirical Studies of ADR: The Baseline Problem of What ADR is and What it is Compared To' in P. Cane, and H. Kritzer (eds), *The Oxford Handbook of Empirical Legal Research* (Oxford University Press, UK, 2010), available on <<http://ssrn.com/abstract=1485563>>.

⁹⁵⁹ Sourdin, T., 'Introduction' (2011) 22 *ADRJ* 1.

⁹⁶⁰ Wissler, R. L., 'Court-Connected Mediation in General Civil Cases: What We Know from Empirical Research' (2002) 17(3) *Ohio State Journal on Dispute Resolution* 641; Sourdin 2011; Sourdin, T., and T. Matruglio, *Evaluating Mediation – New South Wales Settlement Scheme 2002* (2004) *Mediation*. Paper 7, available on <<http://www.civiljustice.info/med/7>>; Rundle, O., 'The Purpose of Court-Connected Mediation From the Legal Perspective' (2007) 10(2) *ADR Bulletin* 28; Rundle, O., 'Barking Dogs: Lawyer Attitudes Towards Disputant Participation in Court-Connected Mediation of General Civil Cases' (2008) 8(1) *QUTLJ* 77.

⁹⁶¹ Wissler, R. L., 'Court-Connected Mediation in General Civil Cases: What We Know from Empirical Research' (2002) 17(3) *Ohio State Journal on Dispute Resolution* 641.

⁹⁶² Menkel-Meadow, C., 'Empirical Studies of ADR: The Baseline Problem of What ADR is and What it is Compared To' in P. Cane, and H. Kritzer (eds), *The Oxford Handbook of Empirical Legal Research* (Oxford University Press, UK, 2010), available on <<http://ssrn.com/abstract=1485563>>.

⁹⁶³ Carnevale, P. J. D., and R. Pegnetter, 'The Selection of Mediator Tactics in Public Sector Disputes: A Contingency Analysis' (1985) 41(2) *Journal of Social Issues* 2; Karim, A. and D. Dilts, 'Determinants of Mediation Success in the Iowa Public Sector' (1990) 19(2) *Journal of Collective Negotiations* 129; Karim, A. and R. Pegnetter, 'Mediator Strategies and Qualities and Mediation Effectiveness' (1983) 22(1) *Industrial Relations* 105; Sourdin, T., *Mediation in the Supreme and County Courts of Victoria* (Report prepared for the Department of Justice, Victoria, Australia, April 2009), available on <<http://www.civiljustice.info/adreval/1/>>; Sourdin, T., and T. Matruglio, *Evaluating Mediation – New South Wales Settlement Scheme 2002* (2004) *Mediation*. Paper 7, available on <<http://www.civiljustice.info/med/7>>.

⁹⁶⁴ Wall, J. A., Jr, and S. Chan-Serafin, 'Processes in Civil Case Mediations' (2009) 26(3) *Conflict Resolution Quarterly* 261; Wall, J. A., Jr, and S. Chan-Serafin, 'Do Mediators Walk Their Talk in Civil Cases?' (2010) 28(1) *Conflict Resolution Quarterly* 3.

she or he is likely to become familiar and experienced in that setting – and the mediators and non-mediators in that setting are likely to become familiar with the researcher, as well as with the researcher’s approaches and preferences. If a researcher conducts a study of significant duration,⁹⁶⁵ she or he is likely to become familiar with the setting and its population -and vice versa. All these situations are likely to affect the study through the social desirability effect.⁹⁶⁶ The social desirability effect (or bias) occurs when research participants provide research information and survey responses that they perceive are preferred by the researcher.⁹⁶⁷ There are likely to be high levels of social desirability effect among participants in many of the selected studies.⁹⁶⁸

One issue that appears in many of the studies is that of the institutional mediator – the mediator who is a long-term employee in a specific program or service, or a mediator who appears so often in a specific context that she or he is identified with that context. Such mediators have been called ‘embedded’ and the situation is typified by strong cross-influences between repeat mediators and the repeat players who appear in their mediations.⁹⁶⁹ Embedded mediators may be influenced by the institution itself and by wanting to protect their future work.

5.4.2. Control groups

Control groups are included in the classic model of empirical research and involve incorporating an extra parallel group of study participants (the control group) who do not experience the intervention being examined. Study participants are randomly assigned to the control group or the experimental group and the control group is intended to provide objective confirmation of the

⁹⁶⁵ Bingham, L. B., ‘Transformative Mediation in the United States Postal Service’ (2012) 5(4) *Negotiation and Conflict Management Research* 354; Kressel, K., E. A. Frontera, S. Forlenza, F. Butler, and L. Fish, ‘The Settlement-Oriented vs the Problem-Solving Style’ (1994) 50(1) *Journal of Social Issues* 67.

⁹⁶⁶ Social desirability effect, or bias, I considered in some detail in Chapter Seven.

⁹⁶⁷ Bryman, A., *Social Research Methods* (5th Edition, Oxford University Press, UK, 2011), 6.

⁹⁶⁸ Chapter Seven includes a review of the social desirability effect and its potential influence within mediation research.

⁹⁶⁹ Kressel, K., ‘How Do Mediators Decide What To Do? Implicit Schemas of Practice and Mediator Decisionmaking’ (2013) 28(3) *Ohio State Journal on Dispute Resolution* 709, 734.

intervention's effects on the experimental group.⁹⁷⁰ The so-called 'justice principle' raises the ethical appropriateness, or fairness, of denying study participants access to a potentially helpful intervention.⁹⁷¹ For example, in the context of mediation research, a control group may be denied access to mediation services. Apart from the issue of fairness, another significant disadvantage to using control groups is their reported misuse by researchers (in a research context other than mediation) who purposely select control group members to enhance the magnitude of a study's reported effects.⁹⁷²

The use of control groups in two of the studies⁹⁷³ does not appear to have influenced the selection of mediator and non-mediator participants or researcher choice of data collection methodologies, both of which are the focus of this systematic appraisal. Therefore, control groups as research design components are not included in the appraisal.

5.5. Conclusion

This chapter reports on an appraisal of the selected studies in terms of their mediator and non-mediator participants, including how they were selected, and the research roles to which they were allocated. The appraisal has taken into account that access to mediator and non-mediator participants in any empirical study of mediation is likely to be limited by what is reasonable and feasible in that study's context.

⁹⁷⁰ Bryman, A., *Social Research Methods* (5th Edition, Oxford University Press, UK, 2016); Maruyama, G., and C. S. Ryan, *Research Methods in Social Relations* (8th Edition, Wiley Blackwell, 2014).

⁹⁷¹ Maruyama, G., and C. S. Ryan, *Research Methods in Social Relations* (8th Edition, Wiley Blackwell, 2014), 62.

⁹⁷² Bishop, D. V. M., 'The Psychology of Experimental Psychologists: Overcoming Cognitive Constraints to Improve Research: The 47th Sir Frederick Bartlett Lecture' (2019) 73(1) *Quarterly Journal of Experimental Psychology* 1; Sayo, A., R. G. Jennings, and J. D. van Horn, 'Study Factors Influencing Ventricular Enlargement in Schizophrenia: A 20 Year Follow-Up Meta-Analysis' (2011) 59(1) *NeuroImage* 154.

⁹⁷³ McGillicuddy, N. B., G. L. Welton, and D. G. Pruitt, 'Third-Party Intervention: A Field Experiment Comparing Three Different Models' (1987) 53(1) *Journal of Personality and Social Psychology* 104; Sourdin, T., and T. Matruggio, *Evaluating Mediation – New South Wales Settlement Scheme 2002* (2004) *Mediation*. Paper 7, available on <<http://www.civiljustice.info/med/7>>.

The appraisal findings show that little is known about the study participants, yet, for the researchers, they are important sources of research data. It is not clear that the participants are always suited to the purpose of the study in which they are involved, nor that they always have the knowledge and experience to be able to provide the information required by the researchers. Ultimately, where a study is reliant on its participants providing specific data that contributes to quantitative analysis, and those participants may not have the knowledge or experience for providing it, the data they do provide may have limited credibility, and so affect the reliability of the reported study findings.

The study participants appear to have been influenced by a range of factors that are likely to have affected their choice to participate in the studies, their in-mediation behaviours, and the nature of the research data they subsequently provided. Their varying levels of knowledge, experience, and capacity is likely to influence how they perceived the subject mediations, how they perceived their roles in the studies, and how they perceived the researchers.

There are many alternative approaches to empirical research that aim to overcome the limitations created by the participant selection methodologies appraised in this chapter.⁹⁷⁴ One approach seeks participant involvement early in the study's development, when they can assist with developing the study purpose and its design. Participatory action research (PAR) is a recognised approach in which study participants are treated as co-researchers, or collaborators.⁹⁷⁵ They are part of the research team and help design, conduct, and assess studies. Dispensing with objectives and methodologies defined only by the researcher (and funder/s) also allows studies to avoid some of the complex power differentials and ethical problems that can affect the reliability of results and findings reported in traditional empirical studies.⁹⁷⁶ In particular, mediators have the professional

⁹⁷⁴ Chapter Eight explores alternative approaches and methods for investigating what happens during mediation.

⁹⁷⁵ Carpenter, D., 'Ethics, Reflexivity and Virtue' in R. Iphofen and M. Tolich (eds), *The SAGE Handbook of Qualitative Research Ethics* (SAGE Publishing, UK, 2018).

⁹⁷⁶ Harley, A., and J. Langdon, 'Ethics and Power in Visual Research Methods' in R. Iphofen and M. Tolich (eds), *The SAGE Handbook of Qualitative Research Ethics* (SAGE Publishing, UK, 2018).

capacity – and practical interest – to work with researchers on studies that will improve their practice, and the services they provide for disputants.

Chapter Six includes Part Two of the appraisal and considers the data collection methods that are described in the selected studies.

Chapter Six: The data

Reporting on Part Two of the systematic appraisal, this Chapter considers the collection of research data as described in the 47 selected studies with a specific focus on data collection methods and procedures. The data collection methods described in the selected studies include any, and combinations of, self-administered written self-reports (ie surveys and questionnaires); interviews (face-to-face, and by telephone); observations (live observations, video-recordings, and audio-recordings); and the extraction of data from court and program records. The methods are appraised in terms of their suitability for purpose; their contributions to the credibility, reliability, and justifiability of the studies' reported findings; their potential contribution to the consistent positive findings that are reported in the studies; and their contribution to increased understanding about mediator effectiveness.

In this Chapter, there is also consideration of the methodological limitations noted by the researchers themselves, and the potential effects of those limitations on the studies as well as how the limitations reveal missing research data and expose the effects that coding schemes can have on research data.

6.0. Context, aims, and findings⁹⁷⁷

Context

The findings reported in Part One of the systematic appraisal relate to the suitability, appropriateness, and capacity of study participants, as described in the selected studies.⁹⁷⁸ In summary, the conclusions reached in Chapter Five are that the mediator and non-mediator participants have varied capacity and ability to provide relevant research data; that those varied capacities may not have been taken into account by researchers when allocating research roles; and

⁹⁷⁷ See Chapter Two for a description of the systematic appraisal methodology that has contributed to the analysis reported in Chapters Five, Six, and Seven.

⁹⁷⁸ See Chapter Five.

that study participants have been selected from a limited range of sample populations, with very little consideration, or analysis of the effects of, population diversity in terms of ethnicity, gender, or socio-economic status.

This Chapter contributes to the appraisal aims by examining the choice and application of the data collection methods that are described in the selected studies, including their contribution to the credibility, reliability, and justifiability of the reported study findings. In addition, there is exploration of what the researchers required of study participants in terms of the collection of research data: what they were asked to do, and the research data they were required to provide (about themselves, about each other, about the mediation process, and about the mediator).

6.0.0. Aims and key findings

The analysis is designed to establish the credibility of research data and the reliability of research findings reported in the selected studies. There are five key findings resulting from the analysis.

1. The research data in the selected studies has limited credibility, affecting the reliability of the research findings reported in the studies;
2. Data collection in the studies relies on methods whose credibility and reliability have long been questioned in the mediation field as well as in other fields of research;
 - a. Use of such methods is widespread among the 47 selected studies;
 - b. Around half the studies acknowledge the limitations of the data collection methods that are used;
3. The limitations of the methodologies limit their suitability for the subject studies and for study participants;
4. The researchers often appear not to have considered how the methodological limitations might have affected the quality of research data, nor do they appear to have

taken those effects into account when interpreting the research data and reporting their study results; and

5. The limitations in terms of data collection are sufficiently widespread in the studies to suggest there are likely to be systemic issues constraining how research data is collected in empirical studies of mediation.

6.0.1. Methodology

This Chapter includes reference to material such as the methodological limitations acknowledged by researchers, “missing data”, and the use of coding schemes for the organisation and analysis of research data.

It is important to note that many of the studies report using more than one source of data, more than one data collection methodology, and seek more than one type of data (eg data about mediator participants and data about the mediation process and data about the presenting dispute). Consequently, data totals do not equal the total number of studies for all analysis outcome (ie 47).⁹⁷⁹ A small number of studies describe having used a range of data collection methodologies, though without all data being treated as research data. This analysis includes only identified research data.

Nine of the studies are conducted in the labour/management context in which disputant representatives (such as repeat players) attend mediation in place of the actual disputants.⁹⁸⁰

⁹⁷⁹ One study describes relying on observational data collected in an apparently *ad hoc* way, using video-recordings and live observations, though without clear differentiation of numbers for each, nor how either data collection process was carried out: Vanderkooi, L., and J. Pearson, ‘Mediating Divorce Disputes: Mediator Behaviors, Styles and Roles’ (1983) 32(4) *Family Relations* 557.

⁹⁸⁰ Carnevale, P. J. D., and R. Pagnetter, ‘The Selection of Mediator Tactics in Public Sector Disputes: A Contingency Analysis’ (1985) 41(2) *Journal of Social Issues* 2; Dilts, D. A. and A. Karim, ‘The Effect of Mediators’ Qualities and Strategies on Mediation Outcomes’ (1990) 45(1) *Relations Industrielles/Industrial Relations* 22; Hiltrop, J. M., ‘Factors Associated with Successful Labor Mediation’ in K. Kressel and D. G. Pruitt (eds), *Mediation Research: The Process and Effectiveness of Third-Party Intervention* (Jossey-Bass, USA, 1989); Karim, A. and D. Dilts, ‘Determinants of Mediation Success in the Iowa Public Sector’ (1990) 19(2) *Journal of Collective Negotiations* 129; Karim, A. and R. Pagnetter, ‘Mediator Strategies and Qualities and Mediation Effectiveness’ (1983) 22(1) *Industrial Relations* 105; Kochan, T. A., and T. Jick, ‘The Public Sector Mediation Process: A Theory and Empirical Examination’ (1978) 22(2) *The Journal of Conflict Resolution* 209; Mareschal, P. M., ‘What Makes Mediation Work? Perspectives on Resolving Disputes’ (2005) 44(3) *Industrial Relations* 509; Posthuma, R. A., A. Richard, J. B. Dworkin, and M. S. Swift, ‘Mediator Tactics and Sources of Conflict: Facilitating and Inhibiting

Although participant repeat player status has been considered in Chapter Five, in this Chapter, it is often more practical to treat the non-lawyer representatives as disputants. Where it is considered relevant to the analysis, clear differentiation is made between disputants and union/management representatives.

Terms and concepts

As is reported elsewhere in this thesis, the researchers in the forty-seven studies do not consistently and clearly differentiate the mediation process which they describe investigating or the varying roles and activities of the mediator participants,⁹⁸¹ and their data collection methods sometimes mingle the two concepts. This Chapter reports on analysis of data collection methodologies (ie not on study results), and, for the purposes of the analysis, where researchers claim to have sought research data about, say, the participating mediators, or where they have asked participants to provide information about participating mediators, that data is accepted as being a methodology related to collecting data about participating mediators even where the results might have been more relevant to the mediation process.

Unfortunately, more than a third of the researchers do not report clearly or consistently about their study timeframes.⁹⁸² The period of data collection can be expected to have some effect on

Effects' (2002) 41(1) *Industrial Relations* 94; Shapiro, D., R. Drieghe, and J. Brett, 'Mediator Behavior and the Outcomes of Mediation' (1985) 41(2) *Journal of Social Issues* 101.

⁹⁸¹ See Chapter Three and Chapter Four.

⁹⁸² Alberts, J. K., B. L. Heisterkamp, and R. M. McPhee, 'Disputant Perceptions of and Satisfaction with a Community Mediation Program' (2005) 16(3) *The International Journal of Conflict Management* 218; Goldberg, S. B., and M. L. Shaw, 'Further Investigation into the Secrets of Successful and Unsuccessful Mediators' (2008) 26(8) *Alternatives to the High Cost of Litigation* 149; Kimsey, W. D., R. M. Fuller, A. J. Bell, and B. C. McKinney, 'The Impact of Mediator Strategic Choices: An Experimental Study' (1994) 12(1) *Mediation Quarterly* 89; Kimsey, W. D., R. M. Fuller, and B. C. McKinney, 'Mediator Listening, Dispute Reframing, and Mediation Outcome: A Pilot Study' (1993) 7(1) *Journal of the International Listening Association* 74; Kressel, K., 'How Do Mediators Decide What To Do? Implicit Schemas of Practice and Mediator Decisionmaking' (2013) 28(3) *Ohio State Journal on Dispute Resolution* 709; Kressel, K., T. Henderson, W. Reich, and C. Cohen, 'Multi-Dimensional Analysis of Conflict Mediator Style' (2012) 30(2) *Conflict Resolution Quarterly* 135; Peeples, R., C. Harris, and T. Metzloff, 'Following the Script: An Empirical Analysis of Court-Ordered Mediation of Medical Malpractice Cases' (2007) 2007(1) *Journal of Dispute Resolution* 101; Pruitt, D. G., W. R. Fry, L. Castrianno, J. Zubeck, G. L. Welton, N. B. McGillicuddy, and C. Ippolito, 'The Process of Mediation: Caucusing, Control, and Problem Solving' in M. A. Rahim (ed), *Managing Conflict: An Interdisciplinary Approach* (Praeger, USA, 1989); Pruitt, D. G., R. S. Peirce, N. B. McGillicuddy, G. L. Welton, and L. Castrianno, 'Long-Term Success in Mediation' (1993)

participants and the data they provide. For example, when data is collected over an extended period (say two or more years)⁹⁸³ the researchers and their project may become more familiar to participants, with the potential for earlier participants to be influenced by the researchers in ways that are different from the ways in which later participants might be influenced, potentially creating differences between the data collected early in the study and the data collected later that are not attributable only to people's mediation experience. None of the 47 studies describes either recognising or allowing for such temporal influences.

From time to time, this Chapter illustrates various points by including relevant examples from the studies. There may be more references to examples from some studies than from others simply because some studies happen to include more relevant examples; other studies may appear less frequently because they include fewer examples.

6.1. Collecting the data

Overview

As was noted in Chapter Five, despite there being a wide range of qualitative approaches and methods that could be appropriate for investigating both what happens during mediation, and what mediators do and say, the selected studies have relied on relatively narrow options for data

17(3) *Law and Human Behavior* 313; Swaab, R. I., and J. Brett, *Caucus with Care: The Impact of Pre-Mediation Caucuses on Conflict Resolution* (Meetings Paper, International Association of Conflict Management, 2007); Wall, J. A., Jr, and S. Chan-Serafin, 'Processes in Civil Case Mediations' (2009) 26(3) *Conflict Resolution Quarterly* 261; Wall, J. A., Jr, and S. Chan-Serafin, 'Do Mediators Walk Their Talk in Civil Cases?' (2010) 28(1) *Conflict Resolution Quarterly* 3; Wall, J. A., Jr, and D. E. Rude, 'The Judge as a Mediator' (1991) 76(1) *Journal of Applied Psychology* 54; Welton, G. L., and D. G. Pruitt, 'The Mediation Process: The Effects of Mediator Bias and Disputant Power' (1987) 13(1) *Personality and Social Psychology Bulletin* 123; Welton, G. L., D. G. Pruitt, N. B. McGillicuddy, C. A. Ippolito, and J. M. Zubeck, 'Antecedents and Characteristics of Caucusing in Community Mediation' (1992) 3(4) *International Journal of Conflict Management* 303; Wissler, R. L., 'Mediation and Adjudication in Small Claims Court: The Effects of Process and Case Characteristics' (1995) 29(2) *Law & Society Review* 323 (partial = # months of collection, not which year); Woodward, J. G., 'Settlement Week: Measuring the Promise' (1990) 11 *Northern Illinois University Law Review* 1 (mentions two Settlement Weeks, but not which was evaluated – or both); Zubeck, J. M., D. G. Pruitt, R. S. Peirce, N. B. McGillicuddy, and H. Syna, 'Disputant and Mediator Behaviors Affecting Short-Term Success in Mediation' (1992) 36(3) *Journal of Conflict Resolution* 546.

⁹⁸³ For example, see Kressel, K., E. A. Frontera, S. Forlenza, F. Butler, and L. Fish, 'The Settlement-Orientation vs the Problem-Solving Style' (1994) 50(1) *Journal of Social Issues* 67.

collection.⁹⁸⁴ While the options they have chosen produce readily quantifiable data, they cannot produce rich, in-depth data about what happens during mediation, and about participants' mediation experience.

Four of the studies do include extensive descriptions of their research methodologies and their data collection methods,⁹⁸⁵ including having collated available relevant best practice examples to inform the design of their survey instruments.⁹⁸⁶

Part Two of the appraisal shows that, in the selected studies, researchers use any of four data collection methods (self-administered written surveys, interviews, observations, court/program records, and any combination of those four) to collect information from and about study participants. The information they seek can be categorised into five dimensions of mediation (listed in descending order of frequency):

- Mediator in-mediation behaviour (ie what the mediator said and/or did during the subject mediation);
- Disputant in-mediation behaviour (ie what the disputants said and/or did during the subject mediation);
- The mediation process, including any outcomes achieved;
- The presenting dispute; and
- Levels of satisfaction with the process, with the mediator, and with the outcomes achieved.

⁹⁸⁴ Chapter Seven includes a targeted review of influences and constraints on mediation research.

⁹⁸⁵ Sourdin, T., *Dispute Resolution Processes for Credit Consumers* (Project Report, Conflict Resolution Research Centre, La Trobe University, 2007); Sourdin, T., *Mediation in the Supreme and County Courts of Victoria* (Report prepared for the Department of Justice, Victoria, Australia, April 2009), available on <<http://www.civiljustice.info/adreval/1/>>; Sourdin, T., *Exploring Pre-Action Requirements: Resolving Disputes Outside Courts* (ACJI, Monash University, October 2012); Sourdin; Sourdin, T., and T. Matruglio, *Evaluating Mediation – New South Wales Settlement Scheme 2002 (2004) Mediation*. Paper 7, available on <<http://www.civiljustice.info/med/7>>.

⁹⁸⁶ Sourdin, T., and T. Matruglio, *Evaluating Mediation – New South Wales Settlement Scheme 2002 (2004) Mediation*. Paper 7, available on <<http://www.civiljustice.info/med/7>>.

Given the inclusion criteria for this thesis, it is notable that 96% (45) of the forty-seven studies do report having sought information about the mediators' in-mediation behaviour.⁹⁸⁷

Researchers report using single sources of research data (eg only mediator participants, or only non-mediator participants, or only observations), as well as multiple sources of data (eg obtaining data from mediator and non-mediator participants, or from non-mediator participants and observers, or from mediator participants and from non-mediator participants and from observers). It is not known if participants in all multi-source studies were aware that data would be collected from more than one source, nor how that knowledge might have influenced the information they chose to provide.

Twenty-two studies report obtaining research data from single sources (mediator participants, or non-mediator participants, or observations),⁹⁸⁸ and twenty-five from multiple sources (mediator

⁹⁸⁷ Two of the studies do not report explicitly seeking information about mediator participants; however, they both report results that include research data about mediators: Sourdin, T., *Dispute Resolution Processes for Credit Consumers* (Project Report, Conflict Resolution Research Centre, La Trobe University, 2007); Thoennes, N. A., and J. Pearson, 'Predicting Outcomes in Divorce Mediation: The Influence of People and Process' (1985) 41(2) *Journal of Social Issues* 115.

⁹⁸⁸ Carnevale, P. J. D., and R. Peggnetter, 'The Selection of Mediator Tactics in Public Sector Disputes: A Contingency Analysis' (1985) 41(2) *Journal of Social Issues* 2; Dilts, D. A. and A. Karim, 'The Effect of Mediators' Qualities and Strategies on Mediation Outcomes' (1990) 45(1) *Relations Industrielles/Industrial Relations* 22; Goldberg, S. B., and M. L. Shaw, 'Further Investigation into the Secrets of Successful and Unsuccessful Mediators' (2008) 26(8) *Alternatives to the High Cost of Litigation* 149; Henderson, D. A., 'Mediation Success: An Empirical Analysis' (1996) 11(1) *Ohio State Journal on Dispute Resolution* 105; Jones, T. S., 'Lag Sequential Analyses of Mediator-Spouse and Husband-Wife Interaction in Successful and Unsuccessful Divorce Mediation in M. A. Rahim (ed), *Managing Conflict: An Interdisciplinary Approach* (Praeger, USA, 1989); Karim, A. and D. Dilts, 'Determinants of Mediation Success in the Iowa Public Sector' (1990) 19(2) *Journal of Collective Negotiations* 129; Karim, A. and R. Peggnetter, 'Mediator Strategies and Qualities and Mediation Effectiveness' (1983) 22(1) *Industrial Relations* 105; Kimsey, W. D., R. M. Fuller, A. J. Bell, and B. C. McKinney, 'The Impact of Mediator Strategic Choices: An Experimental Study' (1994) 12(1) *Mediation Quarterly* 89; Kimsey, W. D., R. M. Fuller, and B. C. McKinney, 'Mediator Listening, Dispute Reframing, and Mediation Outcome: A Pilot Study' (1993) 7(1) *Journal of the International Listening Association* 74; Mareschal, P. M., 'What Makes Mediation Work? Perspectives on Resolving Disputes' (2005) 44(3) *Industrial Relations* 509; McEwen, C. A., *An Evaluation of the ADR Pilot Project: Final Report 1* (Unpublished report, 1992); Peeples, R., C. Harris, and T. Metzloff, 'Following the Script: An Empirical Analysis of Court-Ordered Mediation of Medical Malpractice Cases' (2007) 2007(1) *Journal of Dispute Resolution* 101; Posthuma, R. A., A. Richard, J. B. Dworkin, and M. S. Swift, 'Mediator Tactics and Sources of Conflict: Facilitating and Inhibiting Effects' (2002) 41(1) *Industrial Relations* 94; Shapiro, D., R. Drieghe, and J. Brett, 'Mediator Behavior and the Outcomes of Mediation' (1985) 41(2) *Journal of Social Issues* 101; Slaikou, K. A., R. Culler, J. Pearson, and N. Thoennes, 'Process and Outcome in Divorce Mediation' (1985) 10 *Mediation Quarterly* 55; Swaab, R. I., *Face First: Pre-Mediation Caucus and Face in Employment Disputes* (Presentation, Annual Association of Conflict Management Conference, June 2009); Swaab, R. I., and J. Brett, *Caucus with Care: The Impact of Pre-Mediation Caucuses on Conflict Resolution*

and non-mediator participants; mediator participants and observations; non-mediator participants and observations; mediator and non-mediator participants and observations; mediator and non-mediator participants and observations and non-participants).⁹⁸⁹

(Meetings Paper, International Association of Conflict Management, 2007); Thoennes, N. A., and J. Pearson, 'Predicting Outcomes in Divorce Mediation: The Influence of People and Process' (1985) 41(2) *Journal of Social Issues* 115; Wall, J. A., Jr, and S. Chan-Serafin, 'Do Mediators Walk Their Talk in Civil Cases?' (2010) 28(1) *Conflict Resolution Quarterly* 3; Wall, J. A., Jr, and D. E. Rude, 'The Judge as a Mediator' (1991) 76(1) *Journal of Applied Psychology* 54; Wissler, R. L., 'Mediation and Adjudication in Small Claims Court: The Effects of Process and Case Characteristics' (1995) 29(2) *Law & Society Review* 323; Woodward, J. G., 'Settlement Week: Measuring the Promise' (1990) 11 *Northern Illinois University Law Review* 1.

⁹⁸⁹ Alberts, J. K., B. L. Heisterkamp, and R. M. McPhee, 'Disputant Perceptions of and Satisfaction with a Community Mediation Program' (2005) 16(3) *The International Journal of Conflict Management* 218; Bingham, L. B., 'Transformative Mediation in the United States Postal Service' (2012) 5(4) *Negotiation and Conflict Management Research* 354; Burrell, N. A., W. A. Donohue, and M. Allen, 'The Impact of Disputants' Expectations on Mediation, Testing an Interventionist Model' (1990) Fall 1990 *Human Communication Research* 104; Gale, J., R. L. Mowery, M. S. Herrman, and N. L. Hollett, 'Considering Effective Divorce Mediation: Three Potential Factors' (2002) 19(4) *Conflict Resolution Quarterly* 389; Hiltrop, J. M., 'Factors Associated with Successful Labor Mediation' in K. Kressel and D. G. Pruitt (eds), *Mediation Research: The Process and Effectiveness of Third-Party Intervention* (Jossey-Bass, USA, 1989); Kochan, T. A., and T. Jick, 'The Public Sector Mediation Process: A Theory and Empirical Examination' (1978) 22(2) *The Journal of Conflict Resolution* 209; Kressel, K., 'How Do Mediators Decide What To Do? Implicit Schemas of Practice and Mediator Decisionmaking' (2013) 28(3) *Ohio State Journal on Dispute Resolution* 709; Kressel, K., E. A. Frontera, S. Forlenza, F. Butler, and L. Fish, 'The Settlement-Orientation vs the Problem-Solving Style' (1994) 50(1) *Journal of Social Issues* 67; Kressel, K., T. Henderson, W. Reich, and C. Cohen, 'Multi-Dimensional Analysis of Conflict Mediator Style' (2012) 30(2) *Conflict Resolution Quarterly* 135; McDermott, E. P., and R. Obar, "'What's Going On" in Mediation: An Empirical Analysis of the Influence of a Mediator's Style on Party Satisfaction and Monetary Benefit' (2004) 9 *Harvard Negotiation Law Review* 75; McGillicuddy, N. B., G. L. Welton, and D. G. Pruitt, 'Third-Party Intervention: A Field Experiment Comparing Three Different Models' (1987) 53(1) *Journal of Personality and Social Psychology* 104; Pruitt, D. G., W. R. Fry, L. Castrianno, J. Zubeck, G. L. Welton, N. B. McGillicuddy, and C. Ippolito, 'The Process of Mediation: Caucusing, Control, and Problem Solving' in M. A. Rahim (ed), *Managing Conflict: An Interdisciplinary Approach* (Praeger, USA, 1989); Pruitt, D. G., R. S. Peirce, N. B. McGillicuddy, G. L. Welton, and L. Castrianno, 'Long-Term Success in Mediation' (1993) 17(3) *Law and Human Behavior* 313; Sourdin, T., *Dispute Resolution Processes for Credit Consumers* (Project Report, Conflict Resolution Research Centre, La Trobe University, 2007); Sourdin, T., *Mediation in the Supreme and County Courts of Victoria* (Report prepared for the Department of Justice, Victoria, Australia, April 2009), available on <<http://www.civiljustice.info/adreval/1/>>; Sourdin, T., *Exploring Pre-Action Requirements: Resolving Disputes Outside Courts* (ACJI, Monash University, October 2012); Sourdin, T., and T. Matruglio, *Evaluating Mediation – New South Wales Settlement Scheme 2002* (2004) *Mediation*. Paper 7, available on <<http://www.civiljustice.info/med/7>>; Vanderkooi, L., and J. Pearson, 'Mediating Divorce Disputes: Mediator Behaviors, Styles and Roles' (1983) 32(4) *Family Relations* 557; Wall, J. A., Jr, and S. Chan-Serafin, 'Processes in Civil Case Mediations' (2009) 26(3) *Conflict Resolution Quarterly* 261; Welton, G. L., and D. G. Pruitt, 'The Mediation Process: The Effects of Mediator Bias and Disputant Power' (1987) 13(1) *Personality and Social Psychology Bulletin* 123; Welton, G. L., D. G. Pruitt, and N. B. McGillicuddy, 'The Role of Caucusing in Community Mediation' (1988) 32(1) *The Journal of Conflict Resolution* 181; Welton, G. L., D. G. Pruitt, N. B. McGillicuddy, C. A. Ippolito, and J. M. Zubeck, 'Antecedents and Characteristics of Caucusing in Community Mediation' (1992) 3(4) *International Journal of Conflict Management* 303; Wissler, R. L., *Trapping the Data: An Assessment of Domestic Relations Mediation in Maine and Ohio Courts* (Unpublished report, 1999); Wissler, R. L., 'Court-Connected Mediation in General Civil Cases: What We Know from Empirical Research' (2002) 17(3) *Ohio State Journal on Dispute Resolution* 641; Zubeck, J. M., D. G. Pruitt, R. S. Peirce, N. B. McGillicuddy, and H. Syna, 'Disputant and Mediator Behaviors Affecting Short-Term Success in Mediation' (1992) 36(3) *Journal of Conflict Resolution* 546.

More researchers report relying on data collected from non-mediator participants than from any other source. Thirty-two studies report having collected research data from non-mediator participants, either alone, or in combination with other data sources; twenty-five studies report having collected research data from mediator participants either alone or in combination with other sources;⁹⁹⁰ and twenty studies report having collected research data from observations, either alone or in combination with other sources.⁹⁹¹

⁹⁹⁰ Alberts, J. K., B. L. Heisterkamp, and R. M. McPhee, 'Disputant Perceptions of and Satisfaction with a Community Mediation Program' (2005) 16(3) *The International Journal of Conflict Management* 218; Bingham, L. B., 'Transformative Mediation in the United States Postal Service' (2012) 5(4) *Negotiation and Conflict Management Research* 354; Burrell, N. A., W. A. Donohue, and M. Allen, 'The Impact of Disputants' Expectations on Mediation, Testing an Interventionist Model' (1990) Fall 1990 *Human Communication Research* 104; Carnevale, P. J. D., and R. Pegnetter, 'The Selection of Mediator Tactics in Public Sector Disputes: A Contingency Analysis' (1985) 41(2) *Journal of Social Issues* 2; Gale, J., R. L. Mowery, M. S. Herrman, and N. L. Hollett, 'Considering Effective Divorce Mediation: Three Potential Factors' (2002) 19(4) *Conflict Resolution Quarterly* 389; Hiltrop, J. M., 'Factors Associated with Successful Labor Mediation' in K. Kressel and D. G. Pruitt (eds), *Mediation Research: The Process and Effectiveness of Third-Party Intervention* (Jossey-Bass, USA, 1989); Kochan, T. A., and T. Jick, 'The Public Sector Mediation Process: A Theory and Empirical Examination' (1978) 22(2) *The Journal of Conflict Resolution* 209; Kressel, K., 'How Do Mediators Decide What To Do? Implicit Schemas of Practice and Mediator Decisionmaking' (2013) 28(3) *Ohio State Journal on Dispute Resolution* 709; Kressel, K., E. A. Frontera, S. Forlenza, F. Butler, and L. Fish, 'The Settlement-Oriented vs the Problem-Solving Style' (1994) 50(1) *Journal of Social Issues* 67; Kressel, K., T. Henderson, W. Reich, and C. Cohen, 'Multi-Dimensional Analysis of Conflict Mediator Style' (2012) 30(2) *Conflict Resolution Quarterly* 135; Mareschal, P. M., 'What Makes Mediation Work? Perspectives on Resolving Disputes' (2005) 44(3) *Industrial Relations* 509; McDermott, E. P., and R. Obar, "'What's Going On" in Mediation: An Empirical Analysis of the Influence of a Mediator's Style on Party Satisfaction and Monetary Benefit' (2004) 9 *Harvard Negotiation Law Review* 75; McEwen, C. A., *An Evaluation of the ADR Pilot Project: Final Report 1* (Unpublished report, 1992); McGillicuddy, N. B., G. L. Welton, and D. G. Pruitt, 'Third-Party Intervention: A Field Experiment Comparing Three Different Models' (1987) 53(1) *Journal of Personality and Social Psychology* 104; Pruitt, D. G., R. S. Peirce, N. B. McGillicuddy, G. L. Welton, and L. Castrianno, 'Long-Term Success in Mediation' (1993) 17(3) *Law and Human Behavior* 313; Shapiro, D., R. Drieghe, and J. Brett, 'Mediator Behavior and the Outcomes of Mediation' (1985) 41(2) *Journal of Social Issues* 101; Sourdin, T., and T. Matruglio, *Evaluating Mediation – New South Wales Settlement Scheme 2002* (2004) *Mediation*. Paper 7, available on <<http://www.civiljustice.info/med/7>>; Swaab, R. I., *Face First: Pre-Mediation Caucus and Face in Employment Disputes* (Presentation, Annual Association of Conflict Management Conference, June 2009); Swaab, R. I., and J. Brett, *Caucus with Care: The Impact of Pre-Mediation Caucuses on Conflict Resolution* (Meetings Paper, International Association of Conflict Management, 2007); Wall, J. A., Jr, and S. Chan-Serafin, 'Processes in Civil Case Mediations' (2009) 26(3) *Conflict Resolution Quarterly* 261; Wall, J. A., Jr, and D. E. Rude, 'The Judge as a Mediator' (1991) 76(1) *Journal of Applied Psychology* 54; Welton, G. L., D. G. Pruitt, and N. B. McGillicuddy, 'The Role of Caucusing in Community Mediation' (1988) 32(1) *The Journal of Conflict Resolution* 181; Wissler, R. L., *Trapping the Data: An Assessment of Domestic Relations Mediation in Maine and Ohio Courts* (Unpublished report, 1999); Wissler, R. L., 'Court-Connected Mediation in General Civil Cases: What We Know from Empirical Research' (2002) 17(3) *Ohio State Journal on Dispute Resolution* 641; Zubeck, J. M., D. G. Pruitt, R. S. Peirce, N. B. McGillicuddy, and H. Syna, 'Disputant and Mediator Behaviors Affecting Short-Term Success in Mediation' (1992) 36(3) *Journal of Conflict Resolution* 546.

⁹⁹¹ Alberts, J. K., B. L. Heisterkamp, and R. M. McPhee, 'Disputant Perceptions of and Satisfaction with a Community Mediation Program' (2005) 16(3) *The International Journal of Conflict Management* 218; Bingham,

6.1.0. Data collection methods

The 47 studies include descriptions of four data collection methods: self-administered written surveys, interviews, observations, and any combination of those three.

I. Data collection from self-administered written surveys

72% (n = 34 studies) include self-administered written surveys as at least one data collection method;⁹⁹² 59% of those describe collecting research data *only* from self-administered written surveys (n = 20 studies).

L. B., 'Transformative Mediation in the United States Postal Service' (2012) 5(4) *Negotiation and Conflict Management Research* 354; Burrell, N. A., W. A. Donohue, and M. Allen, 'The Impact of Disputants' Expectations on Mediation, Testing an Interventionist Model' (1990) Fall 1990 *Human Communication Research* 104; Gale, J., R. L. Mowery, M. S. Herrman, and N. L. Hollett, 'Considering Effective Divorce Mediation: Three Potential Factors' (2002) 19(4) *Conflict Resolution Quarterly* 389; Jones, T. S., 'Lag Sequential Analyses of Mediator-Spouse and Husband-Wife Interaction in Successful and Unsuccessful Divorce Mediation in M. A. Rahim (ed), *Managing Conflict: An Interdisciplinary Approach* (Praeger, USA, 1989); Kressel, K., 'How Do Mediators Decide What To Do? Implicit Schemas of Practice and Mediator Decisionmaking' (2013) 28(3) *Ohio State Journal on Dispute Resolution* 709; Kressel, K., E. A. Frontera, S. Forlenza, F. Butler, and L. Fish, 'The Settlement-Oriented vs the Problem-Solving Style' (1994) 50(1) *Journal of Social Issues* 67; Kressel, K., T. Henderson, W. Reich, and C. Cohen, 'Multi-Dimensional Analysis of Conflict Mediator Style' (2012) 30(2) *Conflict Resolution Quarterly* 135; McGillicuddy, N. B., G. L. Welton, and D. G. Pruitt, 'Third-Party Intervention: A Field Experiment Comparing Three Different Models' (1987) 53(1) *Journal of Personality and Social Psychology* 104; Peeples, R., C. Harris, and T. Metzloff, 'Following the Script: An Empirical Analysis of Court-Ordered Mediation of Medical Malpractice Cases' (2007) 2007(1) *Journal of Dispute Resolution* 101; Pruitt, D. G., W. R. Fry, L. Castrianno, J. Zubeck, G. L. Welton, N. B. McGillicuddy, and C. Ippolito, 'The Process of Mediation: Caucusing, Control, and Problem Solving' in M. A. Rahim (ed), *Managing Conflict: An Interdisciplinary Approach* (Praeger, USA, 1989); Pruitt, D. G., R. S. Peirce, N. B. McGillicuddy, G. L. Welton, and L. Castrianno, 'Long-Term Success in Mediation' (1993) 17(3) *Law and Human Behavior* 313; Slaikeu, K. A., R. Culler, J. Pearson, and N. Thoennes, 'Process and Outcome in Divorce Mediation' (1985) 10 *Mediation Quarterly* 55; Vanderkooi, L., and J. Pearson, 'Mediating Divorce Disputes: Mediator Behaviors, Styles and Roles' (1983) 32(4) *Family Relations* 557; Wall, J. A., Jr, and S. Chan-Serafin, 'Processes in Civil Case Mediations' (2009) 26(3) *Conflict Resolution Quarterly* 261; Wall, J. A., Jr, and S. Chan-Serafin, 'Do Mediators Walk Their Talk in Civil Cases?' (2010) 28(1) *Conflict Resolution Quarterly* 3; Welton, G. L., and D. G. Pruitt, 'The Mediation Process: The Effects of Mediator Bias and Disputant Power' (1987) 13(1) *Personality and Social Psychology Bulletin* 123; Welton, G. L., D. G. Pruitt, and N. B. McGillicuddy, 'The Role of Caucusing in Community Mediation' (1988) 32(1) *The Journal of Conflict Resolution* 181; Welton, G. L., D. G. Pruitt, N. B. McGillicuddy, C. A. Ippolito, and J. M. Zubeck, 'Antecedents and Characteristics of Caucusing in Community Mediation' (1992) 3(4) *International Journal of Conflict Management* 303; Zubeck, J. M., D. G. Pruitt, R. S. Peirce, N. B. McGillicuddy, and H. Syna, 'Disputant and Mediator Behaviors Affecting Short-Term Success in Mediation' (1992) 36(3) *Journal of Conflict Resolution* 546.

⁹⁹² Alberts, J. K., B. L. Heisterkamp, and R. M. McPhee, 'Disputant Perceptions of and Satisfaction with a Community Mediation Program' (2005) 16(3) *The International Journal of Conflict Management* 218; Bingham, L. B., 'Transformative Mediation in the United States Postal Service' (2012) 5(4) *Negotiation and Conflict Management Research* 354; Burrell, N. A., W. A. Donohue, and M. Allen, 'The Impact of Disputants' Expectations on Mediation, Testing an Interventionist Model' (1990) Fall 1990 *Human Communication Research* 104; Dilts, D. A. and A. Karim, 'The Effect of Mediators' Qualities and Strategies on Mediation

i. Research data collected only from self-administered surveys (n = 20 studies)⁹⁹³

Outcomes' (1990) 45(1) *Relations Industrielles/Industrial Relations* 22; Gale, J., R. L. Mowery, M. S. Herrman, and N. L. Hollett, 'Considering Effective Divorce Mediation: Three Potential Factors' (2002) 19(4) *Conflict Resolution Quarterly* 389; Goldberg, S. B., and M. L. Shaw, 'Further Investigation into the Secrets of Successful and Unsuccessful Mediators' (2008) 26(8) *Alternatives to the High Cost of Litigation* 149; Henderson, D. A., 'Mediation Success: An Empirical Analysis' (1996) 11(1) *Ohio State Journal on Dispute Resolution* 105; Hiltrop, J. M., 'Factors Associated with Successful Labor Mediation' in K. Kressel and D. G. Pruitt (eds), *Mediation Research: The Process and Effectiveness of Third-Party Intervention* (Jossey-Bass, USA, 1989); Karim, A. and D. Dilts, 'Determinants of Mediation Success in the Iowa Public Sector' (1990) 19(2) *Journal of Collective Negotiations* 129; Karim, A. and R. Peggnetter, 'Mediator Strategies and Qualities and Mediation Effectiveness' (1983) 22(1) *Industrial Relations* 105; Kimsey, W. D., R. M. Fuller, A. J. Bell, and B. C. McKinney, 'The Impact of Mediator Strategic Choices: An Experimental Study' (1994) 12(1) *Mediation Quarterly* 89; Kimsey, W. D., R. M. Fuller, and B. C. McKinney, 'Mediator Listening, Dispute Reframing, and Mediation Outcome: A Pilot Study' (1993) 7(1) *Journal of the International Listening Association* 74; Kressel, K., 'How Do Mediators Decide What To Do? Implicit Schemas of Practice and Mediator Decisionmaking' (2013) 28(3) *Ohio State Journal on Dispute Resolution* 709; Kressel, K., E. A. Frontera, S. Forlenza, F. Butler, and L. Fish, 'The Settlement-Oriented vs the Problem-Solving Style' (1994) 50(1) *Journal of Social Issues* 67; Kressel, K., T. Henderson, W. Reich, and C. Cohen, 'Multi-Dimensional Analysis of Conflict Mediator Style' (2012) 30(2) *Conflict Resolution Quarterly* 135; Mareschal, P. M., 'What Makes Mediation Work? Perspectives on Resolving Disputes' (2005) 44(3) *Industrial Relations* 509; McDermott, E. P., and R. Obar, "'What's Going On" in Mediation: An Empirical Analysis of the Influence of a Mediator's Style on Party Satisfaction and Monetary Benefit' (2004) 9 *Harvard Negotiation Law Review* 75; McEwen, C. A., *An Evaluation of the ADR Pilot Project: Final Report 1* (Unpublished report, 1992); McGillicuddy, N. B., G. L. Welton, and D. G. Pruitt, 'Third-Party Intervention: A Field Experiment Comparing Three Different Models' (1987) 53(1) *Journal of Personality and Social Psychology* 104; Posthuma, R. A., A. Richard, J. B. Dworkin, and M. S. Swift, 'Mediator Tactics and Sources of Conflict: Facilitating and Inhibiting Effects' (2002) 41(1) *Industrial Relations* 94; Shapiro, D., R. Drieghe, and J. Brett, 'Mediator Behavior and the Outcomes of Mediation' (1985) 41(2) *Journal of Social Issues* 101; Sourdin, T., *Mediation in the Supreme and County Courts of Victoria* (Report prepared for the Department of Justice, Victoria, Australia, April 2009), available on <<http://www.civiljustice.info/adreval/1/>>; Sourdin, T., and T. Matruglio, *Evaluating Mediation – New South Wales Settlement Scheme 2002* (2004) *Mediation*. Paper 7, available on <<http://www.civiljustice.info/med/7/>>; Swaab, R. I., *Face First: Pre-Mediation Caucus and Face in Employment Disputes* (Presentation, Annual Association of Conflict Management Conference, June 2009); Swaab, R. I., and J. Brett, *Caucus with Care: The Impact of Pre-Mediation Caucuses on Conflict Resolution* (Meetings Paper, International Association of Conflict Management, 2007); Thoennes, N. A., and J. Pearson, 'Predicting Outcomes in Divorce Mediation: The Influence of People and Process' (1985) 41(2) *Journal of Social Issues* 115; Vanderkooi, L., and J. Pearson, 'Mediating Divorce Disputes: Mediator Behaviors, Styles and Roles' (1983) 32(4) *Family Relations* 557; Wall, J. A., Jr, and S. Chan-Serafin, 'Processes in Civil Case Mediations' (2009) 26(3) *Conflict Resolution Quarterly* 261; Wall, J. A., Jr, and D. E. Rude, 'The Judge as a Mediator' (1991) 76(1) *Journal of Applied Psychology* 54; Welton, G. L., and D. G. Pruitt, 'The Mediation Process: The Effects of Mediator Bias and Disputant Power' (1987) 13(1) *Personality and Social Psychology Bulletin* 123; Welton, G. L., D. G. Pruitt, and N. B. McGillicuddy, 'The Role of Caucusing in Community Mediation' (1988) 32(1) *The Journal of Conflict Resolution* 181; Wissler, R. L., *Trapping the Data: An Assessment of Domestic Relations Mediation in Maine and Ohio Courts* (Unpublished report, 1999); Wissler, R. L., 'Court-Connected Mediation in General Civil Cases: What We Know from Empirical Research' (2002) 17(3) *Ohio State Journal on Dispute Resolution* 641; Woodward, J. G., 'Settlement Week: Measuring the Promise' (1990) 11 *Northern Illinois University Law Review* 1.

⁹⁹³ Bingham, L. B., 'Transformative Mediation in the United States Postal Service' (2012) 5(4) *Negotiation and Conflict Management Research* 354; Burrell, N. A., W. A. Donohue, and M. Allen, 'The Impact of Disputants' Expectations on Mediation, Testing an Interventionist Model' (1990) Fall 1990 *Human Communication Research* 104; Dilts, D. A. and A. Karim, 'The Effect of Mediators' Qualities and Strategies on Mediation Outcomes' (1990) 45(1) *Relations Industrielles/Industrial Relations* 22; Goldberg, S. B., and M. L. Shaw, 'Further Investigation into the Secrets of Successful and Unsuccessful Mediators' (2008) 26(8) *Alternatives to the High Cost of Litigation* 149; Henderson, D. A., 'Mediation Success: An Empirical Analysis' (1996) 11(1) *Ohio State*

- a. Surveys of non-mediator participants (disputants) (n = 6 studies);⁹⁹⁴
- b. Surveys of mediator participants (n = 5 studies);⁹⁹⁵
- c. Surveys of disputant advisers (n = 3 studies);⁹⁹⁶

Journal on Dispute Resolution 105; Karim, A. and D. Dilts, 'Determinants of Mediation Success in the Iowa Public Sector' (1990) 19(2) *Journal of Collective Negotiations* 129; Karim, A. and R. Pegnetter, 'Mediator Strategies and Qualities and Mediation Effectiveness' (1983) 22(1) *Industrial Relations* 105; Kimsey, W. D., R. M. Fuller, A. J. Bell, and B. C. McKinney, 'The Impact of Mediator Strategic Choices: An Experimental Study' (1994) 12(1) *Mediation Quarterly* 89; Kimsey, W. D., R. M. Fuller, and B. C. McKinney, 'Mediator Listening, Dispute Reframing, and Mediation Outcome: A Pilot Study' (1993) 7(1) *Journal of the International Listening Association* 74; Mareschal, P. M., 'What Makes Mediation Work? Perspectives on Resolving Disputes' (2005) 44(3) *Industrial Relations* 509; McDermott, E. P., and R. Obar, "'What's Going On" in Mediation: An Empirical Analysis of the Influence of a Mediator's Style on Party Satisfaction and Monetary Benefit' (2004) 9 *Harvard Negotiation Law Review* 75; McEwen, C. A., *An Evaluation of the ADR Pilot Project: Final Report* 1 (Unpublished report, 1992); Posthuma, R. A., A. Richard, J. B. Dworkin, and M. S. Swift, 'Mediator Tactics and Sources of Conflict: Facilitating and Inhibiting Effects' (2002) 41(1) *Industrial Relations* 94; Shapiro, D., R. Drieghe, and J. Brett, 'Mediator Behavior and the Outcomes of Mediation' (1985) 41(2) *Journal of Social Issues* 101; Sourdin, T., and T. Matruglio, *Evaluating Mediation – New South Wales Settlement Scheme 2002* (2004) *Mediation*. Paper 7, available on <<http://www.civiljustice.info/med/7>>; Swaab, R. I., and J. Brett, *Caucus with Care: The Impact of Pre-Mediation Caucuses on Conflict Resolution* (Meetings Paper, International Association of Conflict Management, 2007); Wall, J. A., Jr, and D. E. Rude, 'The Judge as a Mediator' (1991) 76(1) *Journal of Applied Psychology* 54; Wissler, R. L., *Trapping the Data: An Assessment of Domestic Relations Mediation in Maine and Ohio Courts* (Unpublished report, 1999); Wissler, R. L., 'Court-Connected Mediation in General Civil Cases: What We Know from Empirical Research' (2002) 17(3) *Ohio State Journal on Dispute Resolution* 641; Woodward, J. G., 'Settlement Week: Measuring the Promise' (1990) 11 *Northern Illinois University Law Review* 1.

⁹⁹⁴ Dilts, D. A. and A. Karim, 'The Effect of Mediators' Qualities and Strategies on Mediation Outcomes' (1990) 45(1) *Relations Industrielles/Industrial Relations* 22; Karim, A. and D. Dilts, 'Determinants of Mediation Success in the Iowa Public Sector' (1990) 19(2) *Journal of Collective Negotiations* 129; Karim, A. and R. Pegnetter, 'Mediator Strategies and Qualities and Mediation Effectiveness' (1983) 22(1) *Industrial Relations* 105; Kimsey, W. D., R. M. Fuller, A. J. Bell, and B. C. McKinney, 'The Impact of Mediator Strategic Choices: An Experimental Study' (1994) 12(1) *Mediation Quarterly* 89; Kimsey, W. D., R. M. Fuller, and B. C. McKinney, 'Mediator Listening, Dispute Reframing, and Mediation Outcome: A Pilot Study' (1993) 7(1) *Journal of the International Listening Association* 74; Posthuma, R. A., A. Richard, J. B. Dworkin, and M. S. Swift, 'Mediator Tactics and Sources of Conflict: Facilitating and Inhibiting Effects' (2002) 41(1) *Industrial Relations* 94.

⁹⁹⁵ Mareschal, P. M., 'What Makes Mediation Work? Perspectives on Resolving Disputes' (2005) 44(3) *Industrial Relations* 509; McEwen, C. A., *An Evaluation of the ADR Pilot Project: Final Report* 1 (Unpublished report, 1992); Shapiro, D., R. Drieghe, and J. Brett, 'Mediator Behavior and the Outcomes of Mediation' (1985) 41(2) *Journal of Social Issues* 101; Swaab, R. I., and J. Brett, *Caucus with Care: The Impact of Pre-Mediation Caucuses on Conflict Resolution* (Meetings Paper, International Association of Conflict Management, 2007); Wall, J. A., Jr, and D. E. Rude, 'The Judge as a Mediator' (1991) 76(1) *Journal of Applied Psychology* 54.

⁹⁹⁶ Goldberg, S. B., and M. L. Shaw, 'Further Investigation into the Secrets of Successful and Unsuccessful Mediators' (2008) 26(8) *Alternatives to the High Cost of Litigation* 149; Henderson, D. A., 'Mediation Success: An Empirical Analysis' (1996) 11(1) *Ohio State Journal on Dispute Resolution* 105; Woodward, J. G., 'Settlement Week: Measuring the Promise' (1990) 11 *Northern Illinois University Law Review* 1.

- d. Surveys of non-mediator participants (disputants) and mediator participants (n = 5 studies);⁹⁹⁷ and
- e. Surveys of non-mediator participants (disputants and advisers) and mediators (n = 1 study).⁹⁹⁸
- ii. Research data collected from self-administered surveys and from observations (n = 5 studies).⁹⁹⁹
- iii. Research data collected from self-administered surveys and from interviews (n = 3 studies).¹⁰⁰⁰
- iv. Research data collected from self-administered surveys and from focus groups (n = 1 study).¹⁰⁰¹

⁹⁹⁷ Bingham, L. B., 'Transformative Mediation in the United States Postal Service' (2012) 5(4) *Negotiation and Conflict Management Research* 354; Burrell, N. A., W. A. Donohue, and M. Allen, 'The Impact of Disputants' Expectations on Mediation, Testing an Interventionist Model' (1990) Fall 1990 *Human Communication Research* 104; McDermott, E. P., and R. Obar, "'What's Going On" in Mediation: An Empirical Analysis of the Influence of a Mediator's Style on Party Satisfaction and Monetary Benefit' (2004) 9 *Harvard Negotiation Law Review* 75; Sourdin, T., and T. Matruglio, *Evaluating Mediation – New South Wales Settlement Scheme 2002* (2004) *Mediation*. Paper 7, available on <<http://www.civiljustice.info/med/7>>; Wissler, R. L., *Trapping the Data: An Assessment of Domestic Relations Mediation in Maine and Ohio Courts* (Unpublished report, 1999).

⁹⁹⁸ Wissler, R. L., 'Court-Connected Mediation in General Civil Cases: What We Know from Empirical Research' (2002) 17(3) *Ohio State Journal on Dispute Resolution* 641.

⁹⁹⁹ Alberts, J. K., B. L. Heisterkamp, and R. M. McPhee, 'Disputant Perceptions of and Satisfaction with a Community Mediation Program' (2005) 16(3) *The International Journal of Conflict Management* 218 (mediator and disputants); Burrell, N. A., W. A. Donohue, and M. Allen, 'The Impact of Disputants' Expectations on Mediation, Testing an Interventionist Model' (1990) Fall 1990 *Human Communication Research* 104 (mediator and disputants); Gale, J., R. L. Mowery, M. S. Herrman, and N. L. Hollett, 'Considering Effective Divorce Mediation: Three Potential Factors' (2002) 19(4) *Conflict Resolution Quarterly* 389 (mediator and disputants); Welton, G. L., and D. G. Pruitt, 'The Mediation Process: The Effects of Mediator Bias and Disputant Power' (1987) 13(1) *Personality and Social Psychology Bulletin* 123 (disputants); Welton, G. L., D. G. Pruitt, and N. B. McGillicuddy, 'The Role of Caucusing in Community Mediation' (1988) 32(1) *The Journal of Conflict Resolution* 181 (mediators and disputants).

¹⁰⁰⁰ Hiltrop, J. M., 'Factors Associated with Successful Labor Mediation' in K. Kressel and D. G. Pruitt (eds), *Mediation Research: The Process and Effectiveness of Third-Party Intervention* (Jossey-Bass, USA, 1989) (mediator interviews and disputant surveys); Swaab, R. I., *Face First: Pre-Mediation Caucus and Face in Employment Disputes* (Presentation, Annual Association of Conflict Management Conference, June 2009) (mediator X both); Thoennes, N. A., and J. Pearson, 'Predicting Outcomes in Divorce Mediation: The Influence of People and Process' (1985) 41(2) *Journal of Social Issues* 115 (disputants only).

¹⁰⁰¹ Sourdin, T., *Mediation in the Supreme and County Courts of Victoria* (Report prepared for the Department of Justice, Victoria, Australia, April 2009), available on <<http://www.civiljustice.info/adreval/1/>> (both data collection methods for mediators and disputants and advisers).

- v. Research data collected from self-administered surveys and from interviews and from observations (n = 6 studies).¹⁰⁰²

Thirteen studies report using data collection methods *other than* self-administered written surveys for data collection. Four report using only observations (live observations and audio-recordings);¹⁰⁰³ five report using only interviews;¹⁰⁰⁴ four report using a combination of interviews and observations (all are live observations);¹⁰⁰⁵ and one reports using a combination of interviews and focus groups.¹⁰⁰⁶

There are no discernible contextual trends in the use of self-administered written surveys.

¹⁰⁰² Kressel, K., 'How Do Mediators Decide What To Do? Implicit Schemas of Practice and Mediator Decisionmaking' (2013) 28(3) *Ohio State Journal on Dispute Resolution* 709 (mediator and disputants); Kressel, K., E. A. Frontera, S. Forlenza, F. Butler, and L. Fish, 'The Settlement-Oriented vs the Problem-Solving Style' (1994) 50(1) *Journal of Social Issues* 67 (mediator/researchers + disputants); Kressel, K., T. Henderson, W. Reich, and C. Cohen, 'Multi-Dimensional Analysis of Conflict Mediator Style' (2012) 30(2) *Conflict Resolution Quarterly* 135 (mediator and disputants); McGillicuddy, N. B., G. L. Welton, and D. G. Pruitt, 'Third-Party Intervention: A Field Experiment Comparing Three Different Models' (1987) 53(1) *Journal of Personality and Social Psychology* 104; Vanderkooi, L., and J. Pearson, 'Mediating Divorce Disputes: Mediator Behaviors, Styles and Roles' (1983) 32(4) *Family Relations* 557; Wall, J. A., Jr, and S. Chan-Serafin, 'Processes in Civil Case Mediations' (2009) 26(3) *Conflict Resolution Quarterly* 261 (mediators and disputants).

¹⁰⁰³ Jones, T. S., 'Lag Sequential Analyses of Mediator-Spouse and Husband-Wife Interaction in Successful and Unsuccessful Divorce Mediation in M. A. Rahim (ed), *Managing Conflict: An Interdisciplinary Approach* (Praeger, USA, 1989); Peeples, R., C. Harris, and T. Metzloff, 'Following the Script: An Empirical Analysis of Court-Ordered Mediation of Medical Malpractice Cases' (2007) 2007(1) *Journal of Dispute Resolution* 101; Slaikeu, K. A., R. Culler, J. Pearson, and N. Thoennes, 'Process and Outcome in Divorce Mediation' (1985) 10 *Mediation Quarterly* 55; Wall, J. A., Jr, and S. Chan-Serafin, 'Do Mediators Walk Their Talk in Civil Cases?' (2010) 28(1) *Conflict Resolution Quarterly* 3.

¹⁰⁰⁴ Carnevale, P. J. D., and R. Pegnetter, 'The Selection of Mediator Tactics in Public Sector Disputes: A Contingency Analysis' (1985) 41(2) *Journal of Social Issues* 2; Kochan, T. A., and T. Jick, 'The Public Sector Mediation Process: A Theory and Empirical Examination' (1978) 22(2) *The Journal of Conflict Resolution* 209; Sourdin, T., *Dispute Resolution Processes for Credit Consumers* (Project Report, Conflict Resolution Research Centre, La Trobe University, 2007); Thoennes, N. A., and J. Pearson, 'Predicting Outcomes in Divorce Mediation: The Influence of People and Process' (1985) 41(2) *Journal of Social Issues* 115; Wissler, R. L., 'Mediation and Adjudication in Small Claims Court: The Effects of Process and Case Characteristics' (1995) 29(2) *Law & Society Review* 323.

¹⁰⁰⁵ Pruitt, D. G., W. R. Fry, L. Castrianno, J. Zubeck, G. L. Welton, N. B. McGillicuddy, and C. Ippolito, 'The Process of Mediation: Caucusing, Control, and Problem Solving' in M. A. Rahim (ed), *Managing Conflict: An Interdisciplinary Approach* (Praeger, USA, 1989); Pruitt, D. G., R. S. Peirce, N. B. McGillicuddy, G. L. Welton, and L. Castrianno, 'Long-Term Success in Mediation' (1993) 17(3) *Law and Human Behavior* 313; Welton, G. L., D. G. Pruitt, N. B. McGillicuddy, C. A. Ippolito, and J. M. Zubeck, 'Antecedents and Characteristics of Caucusing in Community Mediation' (1992) 3(4) *International Journal of Conflict Management* 303; Zubeck, J. M., D. G. Pruitt, R. S. Peirce, N. B. McGillicuddy, and H. Syna, 'Disputant and Mediator Behaviors Affecting Short-Term Success in Mediation' (1992) 36(3) *Journal of Conflict Resolution* 546.

¹⁰⁰⁶ Sourdin, T., *Exploring Pre-Action Requirements: Resolving Disputes Outside Courts* (ACJI, Monash University, October 2012).

Figure 6.1. shows that studies have relied more on survey data collected from disputants¹⁰⁰⁷ (including from both mediators and disputants¹⁰⁰⁸) than from other study participants, including mediators,¹⁰⁰⁹ and legal advisers.¹⁰¹⁰

¹⁰⁰⁷ Alberts, J. K., B. L. Heisterkamp, and R. M. McPhee, 'Disputant Perceptions of and Satisfaction with a Community Mediation Program' (2005) 16(3) *The International Journal of Conflict Management* 218; Bingham, L. B., 'Transformative Mediation in the United States Postal Service' (2012) 5(4) *Negotiation and Conflict Management Research* 354; Burrell, N. A., W. A. Donohue, and M. Allen, 'The Impact of Disputants' Expectations on Mediation, Testing an Interventionist Model' (1990) Fall 1990 *Human Communication Research* 104; Dilts, D. A. and A. Karim, 'The Effect of Mediators' Qualities and Strategies on Mediation Outcomes' (1990) 45(1) *Relations Industrielles/Industrial Relations* 22; Gale, J., R. L. Mowery, M. S. Herrman, and N. L. Hollett, 'Considering Effective Divorce Mediation: Three Potential Factors' (2002) 19(4) *Conflict Resolution Quarterly* 389; Hiltrop, J. M., 'Factors Associated with Successful Labor Mediation' in K. Kressel and D. G. Pruitt (eds), *Mediation Research: The Process and Effectiveness of Third-Party Intervention* (Jossey-Bass, USA, 1989); Karim, A. and D. Dilts, 'Determinants of Mediation Success in the Iowa Public Sector' (1990) 19(2) *Journal of Collective Negotiations* 129; Karim, A. and R. Pegnetter, 'Mediator Strategies and Qualities and Mediation Effectiveness' (1983) 22(1) *Industrial Relations* 105; Kimsey, W. D., R. M. Fuller, A. J. Bell, and B. C. McKinney, 'The Impact of Mediator Strategic Choices: An Experimental Study' (1994) 12(1) *Mediation Quarterly* 89; Kimsey, W. D., R. M. Fuller, and B. C. McKinney, 'Mediator Listening, Dispute Reframing, and Mediation Outcome: A Pilot Study' (1993) 7(1) *Journal of the International Listening Association* 74; Kressel, K., 'How Do Mediators Decide What To Do? Implicit Schemas of Practice and Mediator Decisionmaking' (2013) 28(3) *Ohio State Journal on Dispute Resolution* 709; Kressel, K., T. Henderson, W. Reich, and C. Cohen, 'Multi-Dimensional Analysis of Conflict Mediator Style' (2012) 30(2) *Conflict Resolution Quarterly* 135; McDermott, E. P., and R. Obar, "'What's Going On" in Mediation: An Empirical Analysis of the Influence of a Mediator's Style on Party Satisfaction and Monetary Benefit' (2004) 9 *Harvard Negotiation Law Review* 75; McGillicuddy, N. B., G. L. Welton, and D. G. Pruitt, 'Third-Party Intervention: A Field Experiment Comparing Three Different Models' (1987) 53(1) *Journal of Personality and Social Psychology* 104; Posthuma, R. A., A. Richard, J. B. Dworkin, and M. S. Swift, 'Mediator Tactics and Sources of Conflict: Facilitating and Inhibiting Effects' (2002) 41(1) *Industrial Relations* 94; Pruitt, D. G., W. R. Fry, L. Castrianno, J. Zubeck, G. L. Welton, N. B. McGillicuddy, and C. Ippolito, 'The Process of Mediation: Caucusing, Control, and Problem Solving' in M. A. Rahim (ed), *Managing Conflict: An Interdisciplinary Approach* (Praeger, USA, 1989); Sourdin, T., *Mediation in the Supreme and County Courts of Victoria* (Report prepared for the Department of Justice, Victoria, Australia, April 2009), available on <<http://www.civiljustice.info/adreval/1/>>; Sourdin, T., and T. Matruglio, *Evaluating Mediation – New South Wales Settlement Scheme 2002* (2004) *Mediation*. Paper 7, available on <<http://www.civiljustice.info/med/7>>; Thoennes, N. A., and J. Pearson, 'Predicting Outcomes in Divorce Mediation: The Influence of People and Process' (1985) 41(2) *Journal of Social Issues* 115; Wall, J. A., Jr, and S. Chan-Serafin, 'Processes in Civil Case Mediations' (2009) 26(3) *Conflict Resolution Quarterly* 261; Welton, G. L., and D. G. Pruitt, 'The Mediation Process: The Effects of Mediator Bias and Disputant Power' (1987) 13(1) *Personality and Social Psychology Bulletin* 123; Welton, G. L., D. G. Pruitt, and N. B. McGillicuddy, 'The Role of Caucusing in Community Mediation' (1988) 32(1) *The Journal of Conflict Resolution* 181; Wissler, R. L., *Trapping the Data: An Assessment of Domestic Relations Mediation in Maine and Ohio Courts* (Unpublished report, 1999); Wissler, R. L., 'Court-Connected Mediation in General Civil Cases: What We Know from Empirical Research' (2002) 17(3) *Ohio State Journal on Dispute Resolution* 641.

¹⁰⁰⁸ Alberts, J. K., B. L. Heisterkamp, and R. M. McPhee, 'Disputant Perceptions of and Satisfaction with a Community Mediation Program' (2005) 16(3) *The International Journal of Conflict Management* 218; Bingham, L. B., 'Transformative Mediation in the United States Postal Service' (2012) 5(4) *Negotiation and Conflict Management Research* 354; Burrell, N. A., W. A. Donohue, and M. Allen, 'The Impact of Disputants' Expectations on Mediation, Testing an Interventionist Model' (1990) Fall 1990 *Human Communication Research* 104; Gale, J., R. L. Mowery, M. S. Herrman, and N. L. Hollett, 'Considering Effective Divorce Mediation: Three Potential Factors' (2002) 19(4) *Conflict Resolution Quarterly* 389; Kressel, K., 'How Do Mediators Decide What To Do? Implicit Schemas of Practice and Mediator Decisionmaking' (2013) 28(3) *Ohio*

State Journal on Dispute Resolution 709; Kressel, K., T. Henderson, W. Reich, and C. Cohen, 'Multi-Dimensional Analysis of Conflict Mediator Style' (2012) 30(2) *Conflict Resolution Quarterly* 135; McDermott, E. P., and R. Obar, "'What's Going On' in Mediation: An Empirical Analysis of the Influence of a Mediator's Style on Party Satisfaction and Monetary Benefit' (2004) 9 *Harvard Negotiation Law Review* 75; McGillicuddy, N. B., G. L. Welton, and D. G. Pruitt, 'Third-Party Intervention: A Field Experiment Comparing Three Different Models' (1987) 53(1) *Journal of Personality and Social Psychology* 104; Sourdin, T., *Mediation in the Supreme and County Courts of Victoria* (Report prepared for the Department of Justice, Victoria, Australia, April 2009), available on <<http://www.civiljustice.info/adreval/1/>>; Sourdin, T., and T. Matruglio, *Evaluating Mediation – New South Wales Settlement Scheme 2002* (2004) *Mediation*. Paper 7, available on <<http://www.civiljustice.info/med/7>>; Wissler, R. L., *Trapping the Data: An Assessment of Domestic Relations Mediation in Maine and Ohio Courts* (Unpublished report, 1999).

¹⁰⁰⁹ Bingham, L. B., 'Transformative Mediation in the United States Postal Service' (2012) 5(4) *Negotiation and Conflict Management Research* 354; Burrell, N. A., W. A. Donohue, and M. Allen, 'The Impact of Disputants' Expectations on Mediation, Testing an Interventionist Model' (1990) Fall 1990 *Human Communication Research* 104; Carnevale, P. J. D., and R. Peggnetter, 'The Selection of Mediator Tactics in Public Sector Disputes: A Contingency Analysis' (1985) 41(2) *Journal of Social Issues* 2; Gale, J., R. L. Mowery, M. S. Herrman, and N. L. Hollett, 'Considering Effective Divorce Mediation: Three Potential Factors' (2002) 19(4) *Conflict Resolution Quarterly* 389; Hiltrop, J. M., 'Factors Associated with Successful Labor Mediation' in K. Kressel and D. G. Pruitt (eds), *Mediation Research: The Process and Effectiveness of Third-Party Intervention* (Jossey-Bass, USA, 1989); Kressel, K., 'How Do Mediators Decide What To Do? Implicit Schemas of Practice and Mediator Decisionmaking' (2013) 28(3) *Ohio State Journal on Dispute Resolution* 709; Kressel, K., E. A. Frontera, S. Forlenza, F. Butler, and L. Fish, 'The Settlement-Orientation vs the Problem-Solving Style' (1994) 50(1) *Journal of Social Issues* 67; Kressel, K., T. Henderson, W. Reich, and C. Cohen, 'Multi-Dimensional Analysis of Conflict Mediator Style' (2012) 30(2) *Conflict Resolution Quarterly* 135; Mareschal, P. M., 'What Makes Mediation Work? Perspectives on Resolving Disputes' (2005) 44(3) *Industrial Relations* 509; McDermott, E. P., and R. Obar, "'What's Going On' in Mediation: An Empirical Analysis of the Influence of a Mediator's Style on Party Satisfaction and Monetary Benefit' (2004) 9 *Harvard Negotiation Law Review* 75; McEwen, C. A., *An Evaluation of the ADR Pilot Project: Final Report 1* (Unpublished report, 1992); Shapiro, D., R. Drieghe, and J. Brett, 'Mediator Behavior and the Outcomes of Mediation' (1985) 41(2) *Journal of Social Issues* 101; Sourdin, T., *Mediation in the Supreme and County Courts of Victoria* (Report prepared for the Department of Justice, Victoria, Australia, April 2009), available on <<http://www.civiljustice.info/adreval/1/>>; Sourdin, T., and T. Matruglio, *Evaluating Mediation – New South Wales Settlement Scheme 2002* (2004) *Mediation*. Paper 7, available on <<http://www.civiljustice.info/med/7>>; Swaab, R. I., *Face First: Pre-Mediation Caucus and Face in Employment Disputes* (Presentation, Annual Association of Conflict Management Conference, June 2009); Swaab, R. I., and J. Brett, *Caucus with Care: The Impact of Pre-Mediation Caucuses on Conflict Resolution* (Meetings Paper, International Association of Conflict Management, 2007); Vanderkooi, L., and J. Pearson, 'Mediating Divorce Disputes: Mediator Behaviors, Styles and Roles' (1983) 32(4) *Family Relations* 557; Wall, J. A., Jr, and S. Chan-Serafin, 'Processes in Civil Case Mediations' (2009) 26(3) *Conflict Resolution Quarterly* 261; Wall, J. A., Jr, and D. E. Rude, 'The Judge as a Mediator' (1991) 76(1) *Journal of Applied Psychology* 54; Welton, G. L., D. G. Pruitt, and N. B. McGillicuddy, 'The Role of Caucusing in Community Mediation' (1988) 32(1) *The Journal of Conflict Resolution* 181; Wissler, R. L., *Trapping the Data: An Assessment of Domestic Relations Mediation in Maine and Ohio Courts* (Unpublished report, 1999); Wissler, R. L., 'Court-Connected Mediation in General Civil Cases: What We Know from Empirical Research' (2002) 17(3) *Ohio State Journal on Dispute Resolution* 641.

¹⁰¹⁰ Goldberg, S. B., and M. L. Shaw, 'Further Investigation into the Secrets of Successful and Unsuccessful Mediators' (2008) 26(8) *Alternatives to the High Cost of Litigation* 149; Henderson, D. A., 'Mediation Success: An Empirical Analysis' (1996) 11(1) *Ohio State Journal on Dispute Resolution* 105; Woodward, J. G., 'Settlement Week: Measuring the Promise' (1990) 11 *Northern Illinois University Law Review* 1.

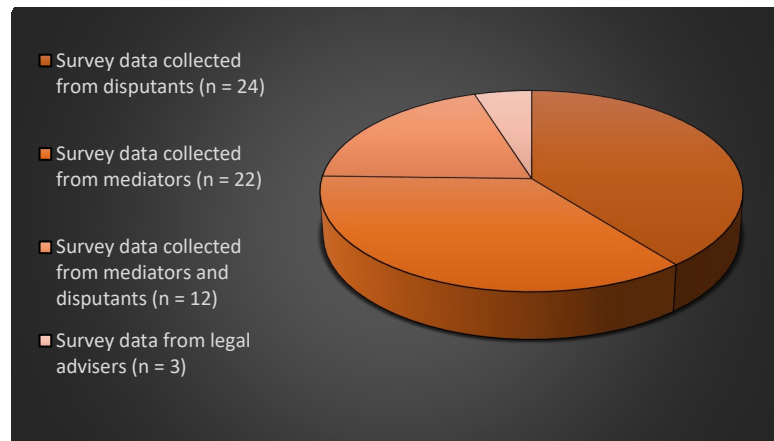


Figure 6.1. Data collection using surveys.

II. Research data collected from observations (including live observations, audio-recordings, and video-recordings)

40% (n = 19 studies) include observational reports as at least one research data collection method.^{1011 1012} Eighteen collect research data about mediator and non-mediator participants, while one study reports collecting observational data only about mediator participants.¹⁰¹³

- i. Research data collected only from observations (n = 4 studies)¹⁰¹⁴

¹⁰¹¹ Alberts, J. K., B. L. Heisterkamp, and R. M. McPhee, 'Disputant Perceptions of and Satisfaction with a Community Mediation Program' (2005) 16(3) *The International Journal of Conflict Management* 218; Burrell, N. A., W. A. Donohue, and M. Allen, 'The Impact of Disputants' Expectations on Mediation, Testing an Interventionist Model' (1990) Fall 1990 *Human Communication Research* 104; Gale, J., R. L. Mowery, M. S. Herrman, and N. L. Hollett, 'Considering Effective Divorce Mediation: Three Potential Factors' (2002) 19(4) *Conflict Resolution Quarterly* 389; Jones, T. S., 'Lag Sequential Analyses of Mediator-Spouse and Husband-Wife Interaction in Successful and Unsuccessful Divorce Mediation in M. A. Rahim (ed), *Managing Conflict: An Interdisciplinary Approach* (Praeger, USA, 1989); Kressel, K., 'How Do Mediators Decide What To Do? Implicit Schemas of Practice and Mediator Decisionmaking' (2013) 28(3) *Ohio State Journal on Dispute Resolution* 709; Kressel, K., E. A. Frontera, S. Forlenza, F. Butler, and L. Fish, 'The Settlement-Oriented vs the Problem-Solving Style' (1994) 50(1) *Journal of Social Issues* 67; Kressel, K., T. Henderson, W. Reich, and C. Cohen, 'Multi-Dimensional Analysis of Conflict Mediator Style' (2012) 30(2) *Conflict Resolution Quarterly* 135; McGillicuddy, N. B., G. L. Welton, and D. G. Pruitt, 'Third-Party Intervention: A Field Experiment Comparing Three Different Models' (1987) 53(1) *Journal of Personality and Social Psychology* 104; Peeples, R., C. Harris, and T. Metzloff, 'Following the Script: An Empirical Analysis of Court-Ordered Mediation of Medical Malpractice Cases' (2007) 2007(1) *Journal of Dispute Resolution* 101; Pruitt, D. G., W. R. Fry, L. Castrianno, J. Zubeck, G. L. Welton, N. B. McGillicuddy, and C. Ippolito, 'The Process of Mediation: Caucusing, Control, and Problem Solving' in M. A. Rahim (ed), *Managing Conflict: An Interdisciplinary Approach* (Praeger, USA, 1989); Pruitt, D. G., R. S. Peirce, N. B. McGillicuddy, G. L. Welton, and L. Castrianno, 'Long-Term Success in Mediation' (1993) 17(3) *Law and Human Behavior* 313; Slaikeu, K. A., R. Culler, J. Pearson, and N. Thoennes, 'Process and Outcome in Divorce Mediation' (1985) 10 *Mediation Quarterly* 55; Vanderkooi, L., and J. Pearson, 'Mediating Divorce Disputes: Mediator Behaviors, Styles and Roles' (1983) 32(4) *Family Relations* 557; Wall, J. A., Jr, and S. Chan-Serafin, 'Processes in Civil Case Mediations' (2009) 26(3) *Conflict Resolution Quarterly* 261; Wall, J. A., Jr, and S. Chan-Serafin, 'Do Mediators Walk Their Talk in Civil Cases?' (2010) 28(1) *Conflict Resolution Quarterly* 3; Welton, G. L., and D. G. Pruitt, 'The Mediation Process: The Effects of Mediator Bias and Disputant Power' (1987) 13(1) *Personality and Social Psychology Bulletin* 123; Welton, G. L., D. G. Pruitt, and N. B. McGillicuddy, 'The Role of Caucusing in Community Mediation' (1988) 32(1) *The Journal of Conflict Resolution* 181; Welton, G. L., D. G. Pruitt, N. B. McGillicuddy, C. A. Ippolito, and J. M. Zubeck, 'Antecedents and Characteristics of Caucusing in Community Mediation' (1992) 3(4) *International Journal of Conflict Management* 303; Zubeck, J. M., D. G. Pruitt, R. S. Peirce, N. B. McGillicuddy, and H. Syna, 'Disputant and Mediator Behaviors Affecting Short-Term Success in Mediation' (1992) 36(3) *Journal of Conflict Resolution* 546.

¹⁰¹² Twenty studies report using observational reports as part of the study; however, one does not include the observational report as research data for analysis within the study and is excluded from this analysis: Bingham, L. B., 'Transformative Mediation in the United States Postal Service' (2012) 5(4) *Negotiation and Conflict Management Research* 354.

¹⁰¹³ Peeples, R., C. Harris, and T. Metzloff, 'Following the Script: An Empirical Analysis of Court-Ordered Mediation of Medical Malpractice Cases' (2007) 2007(1) *Journal of Dispute Resolution* 101.

¹⁰¹⁴ Jones, T. S., 'Lag Sequential Analyses of Mediator-Spouse and Husband-Wife Interaction in Successful and Unsuccessful Divorce Mediation in M. A. Rahim (ed), *Managing Conflict: An Interdisciplinary Approach* (Praeger, USA, 1989); Peeples, R., C. Harris, and T. Metzloff, 'Following the Script: An Empirical Analysis of Court-Ordered Mediation of Medical Malpractice Cases' (2007) 2007(1) *Journal of Dispute Resolution* 101; Slaikeu, K. A., R. Culler, J. Pearson, and N. Thoennes, 'Process and Outcome in Divorce Mediation' (1985) 10 *Mediation Quarterly* 55; Wall, J. A., Jr, and S. Chan-Serafin, 'Processes in Civil Case Mediations' (2009) 26(3) *Conflict Resolution Quarterly* 261.

- a. Research data collected from live observations (n = 2 studies);¹⁰¹⁵
- b. Research data collected from audio-recordings of subject mediations (n = 2 studies);¹⁰¹⁶ and
- c. No studies report collecting research data only from video-recordings;
- ii. Research data collected from observations and from surveys (n = studies).¹⁰¹⁷
- iii. Research data collected from observations and from interviews (n = 4 studies).¹⁰¹⁸
- iv. Research data collected from observations and from surveys and from interviews (n = 6 studies).¹⁰¹⁹

¹⁰¹⁵ Peebles, R., C. Harris, and T. Metzloff, 'Following the Script: An Empirical Analysis of Court-Ordered Mediation of Medical Malpractice Cases' (2007) 2007(1) *Journal of Dispute Resolution* 101; Wall, J. A., Jr, and S. Chan-Serafin, 'Do Mediators Walk Their Talk in Civil Cases?' (2010) 28(1) *Conflict Resolution Quarterly* 3.

¹⁰¹⁶ Jones, T. S., 'Lag Sequential Analyses of Mediator-Spouse and Husband-Wife Interaction in Successful and Unsuccessful Divorce Mediation in M. A. Rahim (ed), *Managing Conflict: An Interdisciplinary Approach* (Praeger, USA, 1989); Slaikeu, K. A., R. Culler, J. Pearson, and N. Thoennes, 'Process and Outcome in Divorce Mediation' (1985) 10 *Mediation Quarterly* 55.

¹⁰¹⁷ Alberts, J. K., B. L. Heisterkamp, and R. M. McPhee, 'Disputant Perceptions of and Satisfaction with a Community Mediation Program' (2005) 16(3) *The International Journal of Conflict Management* 218 (mediator and disputants); Burrell, N. A., W. A. Donohue, and M. Allen, 'The Impact of Disputants' Expectations on Mediation, Testing an Interventionist Model' (1990) Fall 1990 *Human Communication Research* 104 (mediator and disputants); Gale, J., R. L. Mowery, M. S. Herrman, and N. L. Hollett, 'Considering Effective Divorce Mediation: Three Potential Factors' (2002) 19(4) *Conflict Resolution Quarterly* 389 (mediator and disputants); Welton, G. L., and D. G. Pruitt, 'The Mediation Process: The Effects of Mediator Bias and Disputant Power' (1987) 13(1) *Personality and Social Psychology Bulletin* 123 (disputants); Welton, G. L., D. G. Pruitt, and N. B. McGillicuddy, 'The Role of Caucusing in Community Mediation' (1988) 32(1) *The Journal of Conflict Resolution* 181 (mediator and disputants).

¹⁰¹⁸ Pruitt, D. G., W. R. Fry, L. Castrianno, J. Zubeck, G. L. Welton, N. B. McGillicuddy, and C. Ippolito, 'The Process of Mediation: Caucusing, Control, and Problem Solving' in M. A. Rahim (ed), *Managing Conflict: An Interdisciplinary Approach* (Praeger, USA, 1989) (mediators and disputants); Pruitt, D. G., R. S. Peirce, N. B. McGillicuddy, G. L. Welton, and L. Castrianno, 'Long-Term Success in Mediation' (1993) 17(3) *Law and Human Behavior* 313 (mediators and disputants); Welton, G. L., D. G. Pruitt, N. B. McGillicuddy, C. A. Ippolito, and J. M. Zubeck, 'Antecedents and Characteristics of Caucusing in Community Mediation' (1992) 3(4) *International Journal of Conflict Management* 303 (disputants); Zubeck, J. M., D. G. Pruitt, R. S. Peirce, N. B. McGillicuddy, and H. Syna, 'Disputant and Mediator Behaviors Affecting Short-Term Success in Mediation' (1992) 36(3) *Journal of Conflict Resolution* 546 (disputants).

¹⁰¹⁹ Kressel, K., 'How Do Mediators Decide What To Do? Implicit Schemas of Practice and Mediator Decisionmaking' (2013) 28(3) *Ohio State Journal on Dispute Resolution* 709 (mediator interviews and surveys, and disputant interviews and surveys); Kressel, K., E. A. Frontera, S. Forlenza, F. Butler, and L. Fish, 'The Settlement-Orientation vs the Problem-Solving Style' (1994) 50(1) *Journal of Social Issues* 67 (mediator surveys and interviews, and disputant interviews); Kressel, K., T. Henderson, W. Reich, and C. Cohen, 'Multi-Dimensional Analysis of Conflict Mediator Style' (2012) 30(2) *Conflict Resolution Quarterly* 135 (mediator surveys and interviews, and disputant surveys); McGillicuddy, N. B., G. L. Welton, and D. G. Pruitt, 'Third-Party Intervention: A Field Experiment Comparing Three Different Models' (1987) 53(1) *Journal of Personality and*

Fourteen of the nineteen observational studies conducted their own observations, and five did not.¹⁰²⁰ The five used data that had been collected as part of a previous study.¹⁰²¹ Commentators have raised concerns about the re-use and re-analysis of mediation data collected for a different purpose in a previous study.¹⁰²²

A limitation of observational studies is the potential for the observer, or the recording equipment, to influence participant in-mediation behaviour. For example, study participants are likely to be aware of note-taking observers seated in the mediation room; they are also likely to be conscious of recording equipment in the mediation room – in particular if it is activated by the mediator.¹⁰²³ Only one of the studies considers these influences, noting its potential effect on mediator choice of whether to activate the recording equipment for their own mediation session.¹⁰²⁴

Contextual analysis – observational data collection

Observation of mediation can be claimed to be the most effective way of collecting data collection about mediator effectiveness, although with attendant time and resource costs.¹⁰²⁵ The

Social Psychology 104 (mediator and disputant surveys, disputant interviews); Vanderkooi, L., and J. Pearson, 'Mediating Divorce Disputes: Mediator Behaviors, Styles and Roles' (1983) 32(4) *Family Relations* 557 (mediators); Wall, J. A., Jr, and S. Chan-Serafin, 'Processes in Civil Case Mediations' (2009) 26(3) *Conflict Resolution Quarterly* 261 (mediator interviews and disputant surveys).

¹⁰²⁰ Jones, T. S., 'Lag Sequential Analyses of Mediator-Spouse and Husband-Wife Interaction in Successful and Unsuccessful Divorce Mediation in M. A. Rahim (ed), *Managing Conflict: An Interdisciplinary Approach* (Praeger, USA, 1989); Pruitt, D. G., R. S. Peirce, N. B. McGillicuddy, G. L. Welton, and L. Castrianno, 'Long-Term Success in Mediation' (1993) 17(3) *Law and Human Behavior* 313; Welton, G. L., D. G. Pruitt, and N. B. McGillicuddy, 'The Role of Caucusing in Community Mediation' (1988) 32(1) *The Journal of Conflict Resolution* 181; Welton, G. L., D. G. Pruitt, N. B. McGillicuddy, C. A. Ippolito, and J. M. Zubeck, 'Antecedents and Characteristics of Caucusing in Community Mediation' (1992) 3(4) *International Journal of Conflict Management* 303; Zubeck, J. M., D. G. Pruitt, R. S. Peirce, N. B. McGillicuddy, and H. Syna, 'Disputant and Mediator Behaviors Affecting Short-Term Success in Mediation' (1992) 36(3) *Journal of Conflict Resolution* 546.

¹⁰²¹ Another of the selected studies reports having re-analysed data collected in a previous study; however, the data was originally collected from self-administered written surveys [see Henderson, D. A., 'Mediation Success: An Empirical Analysis' (1996) 11(1) *Ohio State Journal on Dispute Resolution* 105].

¹⁰²² Beck, C. J. A., and B. D. Sales, 'A Critical Appraisal of Divorce Mediation Research and Policy' (2000) 6(4) *Psychology, Public Policy, and Law* 989.

¹⁰²³ Researcher influence, including the Hawthorne effect, are considered in Chapter Seven.

¹⁰²⁴ Slaikou, K. A., R. Culler, J. Pearson, and N. Thoennes, 'Process and Outcome in Divorce Mediation' (1985) 10 *Mediation Quarterly* 55.

¹⁰²⁵ Bingham, L. B., 'Transformative Mediation in the United States Postal Service' (2012) 5(4) *Negotiation and Conflict Management Research* 354; Hiltrop, J. M., 'Factors Associated with Successful Labor Mediation' in K. Kressel and D. G. Pruitt (eds), *Mediation Research: The Process and Effectiveness of Third-Party Intervention*

context in which observations appear most frequently are in studies of simulated mediation, conducted within a university setting. The second most prevalent use of observational studies is in each of the family/divorce/custody, court-connected, and community-based contexts.

- Four studies conducted using simulated mediations describe collecting at least part of their research data from their own observational reports;¹⁰²⁶
- Three studies conducted in the court-connected context describe collecting at least part of their research data from observational reports;¹⁰²⁷
- Three studies conducted in the community-based context report collecting at least part of their research data from their own observational reports;¹⁰²⁸ and
- Three studies conducted in the family/divorce/custody context report collecting at least part of their research data from their own observational reports.¹⁰²⁹

(Jossey-Bass, USA, 1989); Kochan, T. A., and T. Jick, 'The Public Sector Mediation Process: A Theory and Empirical Examination' (1978) 22(2) *The Journal of Conflict Resolution* 209.

¹⁰²⁶ Burrell, N. A., W. A. Donohue, and M. Allen, 'The Impact of Disputants' Expectations on Mediation, Testing an Interventionist Model' (1990) Fall 1990 *Human Communication Research* 104; Gale, J., R. L. Mowery, M. S. Herrman, and N. L. Hollett, 'Considering Effective Divorce Mediation: Three Potential Factors' (2002) 19(4) *Conflict Resolution Quarterly* 389; Kressel, K., 'How Do Mediators Decide What To Do? Implicit Schemas of Practice and Mediator Decisionmaking' (2013) 28(3) *Ohio State Journal on Dispute Resolution* 709; Kressel, K., T. Henderson, W. Reich, and C. Cohen, 'Multi-Dimensional Analysis of Conflict Mediator Style' (2012) 30(2) *Conflict Resolution Quarterly* 135; Welton, G. L., and D. G. Pruitt, 'The Mediation Process: The Effects of Mediator Bias and Disputant Power' (1987) 13(1) *Personality and Social Psychology Bulletin* 123.

¹⁰²⁷ Peeples, R., C. Harris, and T. Metzloff, 'Following the Script: An Empirical Analysis of Court-Ordered Mediation of Medical Malpractice Cases' (2007) 2007(1) *Journal of Dispute Resolution* 101; Wall, J. A., Jr, and S. Chan-Serafin, 'Processes in Civil Case Mediations' (2009) 26(3) *Conflict Resolution Quarterly* 261; Wall, J. A., Jr, and S. Chan-Serafin, 'Do Mediators Walk Their Talk in Civil Cases?' (2010) 28(1) *Conflict Resolution Quarterly* 3.

¹⁰²⁸ Alberts, J. K., B. L. Heisterkamp, and R. M. McPhee, 'Disputant Perceptions of and Satisfaction with a Community Mediation Program' (2005) 16(3) *The International Journal of Conflict Management* 218; McGillicuddy, N. B., G. L. Welton, and D. G. Pruitt, 'Third-Party Intervention: A Field Experiment Comparing Three Different Models' (1987) 53(1) *Journal of Personality and Social Psychology* 104; Pruitt, D. G., W. R. Fry, L. Castrianno, J. Zubeck, G. L. Welton, N. B. McGillicuddy, and C. Ippolito, 'The Process of Mediation: Caucusing, Control, and Problem Solving' in M. A. Rahim (ed), *Managing Conflict: An Interdisciplinary Approach* (Praeger, USA, 1989).

¹⁰²⁹ Kressel, K., E. A. Frontera, S. Forlenza, F. Butler, and L. Fish, 'The Settlement-Orientation vs the Problem-Solving Style' (1994) 50(1) *Journal of Social Issues* 67; Slaikou, K. A., R. Culler, J. Pearson, and N. Thoennes, 'Process and Outcome in Divorce Mediation' (1985) 10 *Mediation Quarterly* 55; Vanderkooi, L., and J. Pearson, 'Mediating Divorce Disputes: Mediator Behaviors, Styles and Roles' (1983) 32(4) *Family Relations* 557.

The studies conducted in the labour/management context do not include any data collection from observational reports, nor does the single study conducted in the construction/business context.

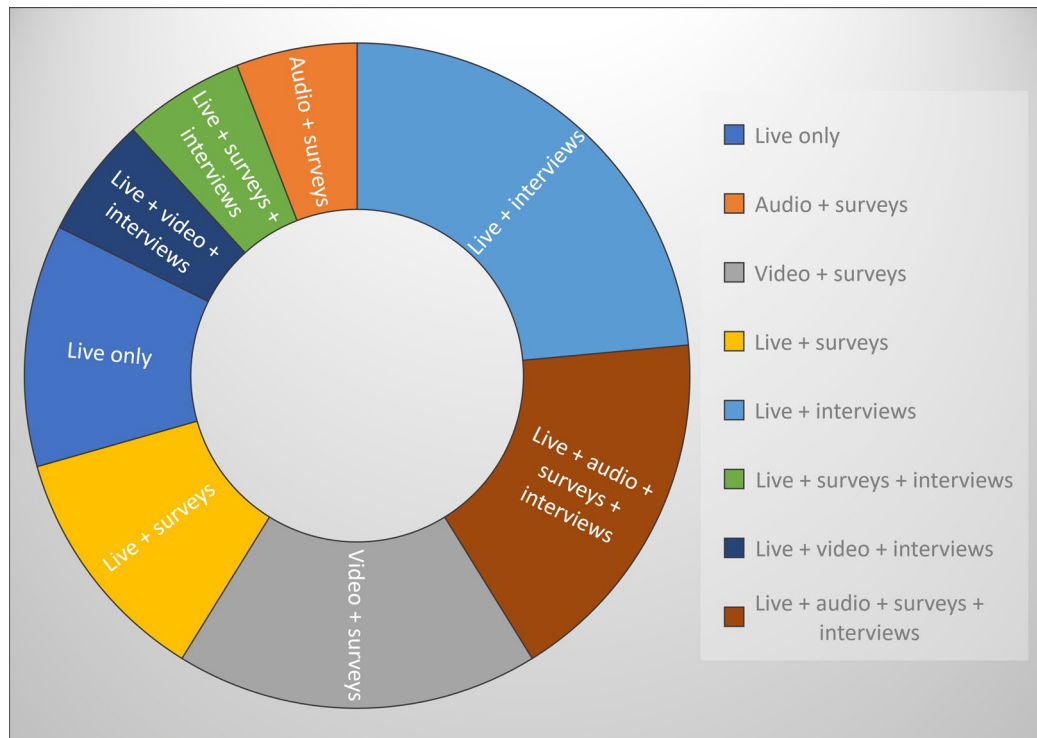


Figure 6.2. Observational data collection

Figure 6.2. shows all twenty studies that include some form of observational reporting as part of their collection of research data. Audio-recordings only (n = 2 studies);¹⁰³⁰ live observations only (n = 2 studies);¹⁰³¹ audio-recordings + surveys (n = 1 study);¹⁰³² video-recordings + surveys (n = 3

¹⁰³⁰ Jones, T. S., 'Lag Sequential Analyses of Mediator-Spouse and Husband-Wife Interaction in Successful and Unsuccessful Divorce Mediation in M. A Rahim (ed), *Managing Conflict: An Interdisciplinary Approach* (Praeger, USA, 1989); Slaikeu, K. A., R. Culler, J. Pearson, and N. Thoennes, 'Process and Outcome in Divorce Mediation' (1985) 10 *Mediation Quarterly* 55.

¹⁰³¹ Peebles, R., C. Harris, and T. Metzloff, 'Following the Script: An Empirical Analysis of Court-Ordered Mediation of Medical Malpractice Cases' (2007) 2007(1) *Journal of Dispute Resolution* 101; Wall, J. A., Jr, and S. Chan-Serafin, 'Do Mediators Walk Their Talk in Civil Cases?' (2010) 28(1) *Conflict Resolution Quarterly* 3.

¹⁰³² Welton, G. L., and D. G. Pruitt, 'The Mediation Process: The Effects of Mediator Bias and Disputant Power' (1987) 13(1) *Personality and Social Psychology Bulletin* 123.

studies);¹⁰³³ live observations + surveys (n = 2 studies);¹⁰³⁴ live observations + interviews n = (4 studies);¹⁰³⁵ live observations + surveys + interviews (n = 1 study);¹⁰³⁶ live observations + video-recordings + interviews) (n = 1 study);¹⁰³⁷ live observations + audio-recordings + surveys + interviews (n = 3 studies);¹⁰³⁸ observational data not included for data analysis purposes, and not included in this Figure. (n = 1 study).¹⁰³⁹

III. Research data collected during interviews

36% (n = 17) include interviews (face-to-face and/or by phone) as at least one data collection method.¹⁰⁴⁰ These studies and the varying approaches are set out below.

¹⁰³³ Alberts, J. K., B. L. Heisterkamp, and R. M. McPhee, 'Disputant Perceptions of and Satisfaction with a Community Mediation Program' (2005) 16(3) *The International Journal of Conflict Management* 218; Burrell, N. A., W. A. Donohue, and M. Allen, 'The Impact of Disputants' Expectations on Mediation, Testing an Interventionist Model' (1990) Fall 1990 *Human Communication Research* 104; Gale, J., R. L. Mowery, M. S. Herrman, and N. L. Hollett, 'Considering Effective Divorce Mediation: Three Potential Factors' (2002) 19(4) *Conflict Resolution Quarterly* 389.

¹⁰³⁴ Wall, J. A., Jr, and S. Chan-Serafin, 'Processes in Civil Case Mediations' (2009) 26(3) *Conflict Resolution Quarterly* 261; Welton, G. L., D. G. Pruitt, and N. B. McGillicuddy, 'The Role of Caucusing in Community Mediation' (1988) 32(1) *The Journal of Conflict Resolution* 181.

¹⁰³⁵ Pruitt, D. G., W. R. Fry, L. Castrianno, J. Zubeck, G. L. Welton, N. B. McGillicuddy, and C. Ippolito, 'The Process of Mediation: Caucusing, Control, and Problem Solving' in M. A. Rahim (ed), *Managing Conflict: An Interdisciplinary Approach* (Praeger, USA, 1989); Pruitt, D. G., R. S. Peirce, N. B. McGillicuddy, G. L. Welton, and L. Castrianno, 'Long-Term Success in Mediation' (1993) 17(3) *Law and Human Behavior* 313; Welton, G. L., D. G. Pruitt, N. B. McGillicuddy, C. A. Ippolito, and J. M. Zubeck, 'Antecedents and Characteristics of Caucusing in Community Mediation' (1992) 3(4) *International Journal of Conflict Management* 303; Zubeck, J. M., D. G. Pruitt, R. S. Peirce, N. B. McGillicuddy, and H. Syna, 'Disputant and Mediator Behaviors Affecting Short-Term Success in Mediation' (1992) 36(3) *Journal of Conflict Resolution* 546.

¹⁰³⁶ McGillicuddy, N. B., G. L. Welton, and D. G. Pruitt, 'Third-Party Intervention: A Field Experiment Comparing Three Different Models' (1987) 53(1) *Journal of Personality and Social Psychology* 104.

¹⁰³⁷ Vanderkooi, L., and J. Pearson, 'Mediating Divorce Disputes: Mediator Behaviors, Styles and Roles' (1983) 32(4) *Family Relations* 557.

¹⁰³⁸ Kressel, K., 'How Do Mediators Decide What To Do? Implicit Schemas of Practice and Mediator Decisionmaking' (2013) 28(3) *Ohio State Journal on Dispute Resolution* 709; Kressel, K., E. A. Frontera, S. Forlenza, F. Butler, and L. Fish, 'The Settlement-Orientation vs the Problem-Solving Style' (1994) 50(1) *Journal of Social Issues* 67; Kressel, K., T. Henderson, W. Reich, and C. Cohen, 'Multi-Dimensional Analysis of Conflict Mediator Style' (2012) 30(2) *Conflict Resolution Quarterly* 135.

¹⁰³⁹ Bingham, L. B., 'Transformative Mediation in the United States Postal Service' (2012) 5(4) *Negotiation and Conflict Management Research* 354.

¹⁰⁴⁰ Carnevale, P. J. D., and R. Pegnetter, 'The Selection of Mediator Tactics in Public Sector Disputes: A Contingency Analysis' (1985) 41(2) *Journal of Social Issues* 2; Hiltrop, J. M., 'Factors Associated with Successful Labor Mediation' in K. Kressel and D. G. Pruitt (eds), *Mediation Research: The Process and Effectiveness of Third-Party Intervention* (Jossey-Bass, USA, 1989) (study 1); Kochan, T. A., and T. Jick, 'The Public Sector Mediation Process: A Theory and Empirical Examination' (1978) 22(2) *The Journal of Conflict Resolution* 209; Kressel, K., 'How Do Mediators Decide What To Do? Implicit Schemas of Practice and Mediator Decisionmaking' (2013) 28(3) *Ohio State Journal on Dispute Resolution* 709; Kressel, K., E. A. Frontera, S.

- i. Research data collected only from interviews (n = 5 studies)¹⁰⁴¹
 - a. Interviews of mediator participants (n = 1 study);¹⁰⁴²
 - b. Interviews of non-mediator participants (n = 3 studies);¹⁰⁴³ and
 - c. Interviews of mediator and non-mediator participants (n = 1 study).¹⁰⁴⁴
- ii. Research data collected from interviews and from self-administered surveys
 - a. Interviews of mediators and surveys of non-mediators (n = 1 study);¹⁰⁴⁵ and

Forlenza, F. Butler, and L. Fish, 'The Settlement-Oriented vs the Problem-Solving Style' (1994) 50(1) *Journal of Social Issues* 67; Kressel, K., T. Henderson, W. Reich, and C. Cohen, 'Multi-Dimensional Analysis of Conflict Mediator Style' (2012) 30(2) *Conflict Resolution Quarterly* 135; McGillicuddy, N. B., G. L. Welton, and D. G. Pruitt, 'Third-Party Intervention: A Field Experiment Comparing Three Different Models' (1987) 53(1) *Journal of Personality and Social Psychology* 104; Pruitt, D. G., W. R. Fry, L. Castrianno, J. Zubeck, G. L. Welton, N. B. McGillicuddy, and C. Ippolito, 'The Process of Mediation: Caucusing, Control, and Problem Solving' in M. A. Rahim (ed), *Managing Conflict: An Interdisciplinary Approach* (Praeger, USA, 1989); Pruitt, D. G., R. S. Peirce, N. B. McGillicuddy, G. L. Welton, and L. Castrianno, 'Long-Term Success in Mediation' (1993) 17(3) *Law and Human Behavior* 313; Swaab, R. I., *Face First: Pre-Mediation Caucus and Face in Employment Disputes* (Presentation, Annual Association of Conflict Management Conference, June 2009); Vanderkooi, L., and J. Pearson, 'Mediating Divorce Disputes: Mediator Behaviors, Styles and Roles' (1983) 32(4) *Family Relations* 557; Sourdin, T., *Dispute Resolution Processes for Credit Consumers* (Project Report, Conflict Resolution Research Centre, La Trobe University, 2007); Sourdin, T., *Exploring Pre-Action Requirements: Resolving Disputes Outside Courts* (ACJL, Monash University, October 2012); Thoennes, N. A., and J. Pearson, 'Predicting Outcomes in Divorce Mediation: The Influence of People and Process' (1985) 41(2) *Journal of Social Issues* 115; Wall, J. A., Jr, and S. Chan-Serafin, 'Processes in Civil Case Mediations' (2009) 26(3) *Conflict Resolution Quarterly* 261; Wissler, R. L., 'Mediation and Adjudication in Small Claims Court: The Effects of Process and Case Characteristics' (1995) 29(2) *Law & Society Review* 323; Zubeck, J. M., D. G. Pruitt, R. S. Peirce, N. B. McGillicuddy, and H. Syna, 'Disputant and Mediator Behaviors Affecting Short-Term Success in Mediation' (1992) 36(3) *Journal of Conflict Resolution* 546.

¹⁰⁴¹ Carnevale, P. J. D., and R. Pegnetter, 'The Selection of Mediator Tactics in Public Sector Disputes: A Contingency Analysis' (1985) 41(2) *Journal of Social Issues* 2 (disputants); Kochan, T. A., and T. Jick, 'The Public Sector Mediation Process: A Theory and Empirical Examination' (1978) 22(2) *The Journal of Conflict Resolution* 209 (M and D); Sourdin, T., *Dispute Resolution Processes for Credit Consumers* (Project Report, Conflict Resolution Research Centre, La Trobe University, 2007) (disputants); Thoennes, N. A., and J. Pearson, 'Predicting Outcomes in Divorce Mediation: The Influence of People and Process' (1985) 41(2) *Journal of Social Issues* 115 (disputants); Wissler, R. L., 'Mediation and Adjudication in Small Claims Court: The Effects of Process and Case Characteristics' (1995) 29(2) *Law & Society Review* 323 (disputants).

¹⁰⁴² Carnevale, P. J. D., and R. Pegnetter, 'The Selection of Mediator Tactics in Public Sector Disputes: A Contingency Analysis' (1985) 41(2) *Journal of Social Issues* 2; Kochan, T. A., and T. Jick, 'The Public Sector Mediation Process: A Theory and Empirical Examination' (1978) 22(2) *The Journal of Conflict Resolution* 209.

¹⁰⁴³ Sourdin, T., *Dispute Resolution Processes for Credit Consumers* (Project Report, Conflict Resolution Research Centre, La Trobe University, 2007); Thoennes, N. A., and J. Pearson, 'Predicting Outcomes in Divorce Mediation: The Influence of People and Process' (1985) 41(2) *Journal of Social Issues* 115; Wissler, R. L., 'Mediation and Adjudication in Small Claims Court: The Effects of Process and Case Characteristics' (1995) 29(2) *Law & Society Review* 323.

¹⁰⁴⁴ Kochan, T. A., and T. Jick, 'The Public Sector Mediation Process: A Theory and Empirical Examination' (1978) 22(2) *The Journal of Conflict Resolution* 209.

¹⁰⁴⁵ Hiltrop, J. M., 'Factors Associated with Successful Labor Mediation' in K. Kressel and D. G. Pruitt (eds), *Mediation Research: The Process and Effectiveness of Third-Party Intervention* (Jossey-Bass, USA, 1989).

- b. Surveys and interviews of mediators (n = 1 study).¹⁰⁴⁶
 - iii. Research data collected from interviews and from observations
 - a. Interviews of mediators and non-mediators, and observations (n = 2 studies);¹⁰⁴⁷
 - b. Interviews of non-mediators, and observations (n = 2 studies);¹⁰⁴⁸ and
 - c. Interviews of mediators, and observations (n = 1 study).¹⁰⁴⁹
 - iv. Research data collected from interviews and from observations and from self-administered surveys (n = 6 studies)¹⁰⁵⁰
 - a. Interviews and surveys of mediators, interviews of non-mediators, and observations (n = 1 study);¹⁰⁵¹

¹⁰⁴⁶ Swaab, R. I., *Face First: Pre-Mediation Caucus and Face in Employment Disputes* (Presentation, Annual Association of Conflict Management Conference, June 2009).

¹⁰⁴⁷ Pruitt, D. G., W. R. Fry, L. Castrianno, J. Zubeck, G. L. Welton, N. B. McGillicuddy, and C. Ippolito, 'The Process of Mediation: Caucusing, Control, and Problem Solving' in M. A. Rahim (ed), *Managing Conflict: An Interdisciplinary Approach* (Praeger, USA, 1989); Pruitt, D. G., R. S. Peirce, N. B. McGillicuddy, G. L. Welton, and L. Castrianno, 'Long-Term Success in Mediation' (1993) 17(3) *Law and Human Behavior* 313.

¹⁰⁴⁸ Welton, G. L., D. G. Pruitt, N. B. McGillicuddy, C. A. Ippolito, and J. M. Zubeck, 'Antecedents and Characteristics of Caucusing in Community Mediation' (1992) 3(4) *International Journal of Conflict Management* 303; Zubeck, J. M., D. G. Pruitt, R. S. Peirce, N. B. McGillicuddy, and H. Syna, 'Disputant and Mediator Behaviors Affecting Short-Term Success in Mediation' (1992) 36(3) *Journal of Conflict Resolution* 546.

¹⁰⁴⁹ Kressel, K., 'How Do Mediators Decide What To Do? Implicit Schemas of Practice and Mediator Decisionmaking' (2013) 28(3) *Ohio State Journal on Dispute Resolution* 709.

¹⁰⁵⁰ Kressel, K., E. A. Frontera, S. Forlenza, F. Butler, and L. Fish, 'The Settlement-Oriented vs the Problem-Solving Style' (1994) 50(1) *Journal of Social Issues* 67 (mediator surveys and interviews, and disputant interviews); Kressel, K., T. Henderson, W. Reich, and C. Cohen, 'Multi-Dimensional Analysis of Conflict Mediator Style' (2012) 30(2) *Conflict Resolution Quarterly* 135 (mediator surveys and interviews, and disputant surveys); Kressel, K., 'How Do Mediators Decide What To Do? Implicit Schemas of Practice and Mediator Decisionmaking' (2013) 28(3) *Ohio State Journal on Dispute Resolution* 709 (mediator interviews and surveys, and disputant interviews and surveys); McGillicuddy, N. B., G. L. Welton, and D. G. Pruitt, 'Third-Party Intervention: A Field Experiment Comparing Three Different Models' (1987) 53(1) *Journal of Personality and Social Psychology* 104 (mediator and disputant surveys, disputant interviews); Vanderkooi, L., and J. Pearson, 'Mediating Divorce Disputes: Mediator Behaviors, Styles and Roles' (1983) 32(4) *Family Relations* 557 (mediators); Wall, J. A., Jr, and S. Chan-Serafin, 'Processes in Civil Case Mediations' (2009) 26(3) *Conflict Resolution Quarterly* 261 (mediator interviews and disputant surveys).

¹⁰⁵¹ Kressel, K., E. A. Frontera, S. Forlenza, F. Butler, and L. Fish, 'The Settlement-Oriented vs the Problem-Solving Style' (1994) 50(1) *Journal of Social Issues* 67.

- b. Interviews and surveys of mediators, surveys of non-mediators, and observations (n = 1 study);¹⁰⁵²
- c. Interviews and surveys of non-mediators, interviews of mediators, and observations (n = 1 study);¹⁰⁵³
- d. Interviews of mediators, surveys of non-mediators, and observations (n = 1 study);¹⁰⁵⁴ and
- e. Interviews and surveys of mediators, and observations.¹⁰⁵⁵
- v. Research data collected from interviews and from focus groups (n = 1 study).¹⁰⁵⁶
- vi. Research data collected from surveys either 'self-administered' or 'administered by phone' (n = 1 study).¹⁰⁵⁷

Interview format

Of the seventeen studies that describe collecting research data during participant interviews, five are described as being conducted face-to-face,¹⁰⁵⁸ and five are described as being conducted by

¹⁰⁵² Kressel, K., T. Henderson, W. Reich, and C. Cohen, 'Multi-Dimensional Analysis of Conflict Mediator Style' (2012) 30(2) *Conflict Resolution Quarterly* 135.

¹⁰⁵³ McGillicuddy, N. B., G. L. Welton, and D. G. Pruitt, 'Third-Party Intervention: A Field Experiment Comparing Three Different Models' (1987) 53(1) *Journal of Personality and Social Psychology* 104.

¹⁰⁵⁴ Wall, J. A., Jr, and S. Chan-Serafin, 'Processes in Civil Case Mediations' (2009) 26(3) *Conflict Resolution Quarterly* 261.

¹⁰⁵⁵ Vanderkooi, L., and J. Pearson, 'Mediating Divorce Disputes: Mediator Behaviors, Styles and Roles' (1983) 32(4) *Family Relations* 557.

¹⁰⁵⁶ Sourdin, T., *Exploring Pre-Action Requirements: Resolving Disputes Outside Courts* (ACJI, Monash University, October 2012) (disputant interviews and mediator focus groups).

¹⁰⁵⁷ Thoennes, N. A., and J. Pearson, 'Predicting Outcomes in Divorce Mediation: The Influence of People and Process' (1985) 41(2) *Journal of Social Issues* 115, 118 (disputants).

¹⁰⁵⁸ Kressel, K., 'How Do Mediators Decide What To Do? Implicit Schemas of Practice and Mediator Decisionmaking' (2013) 28(3) *Ohio State Journal on Dispute Resolution* 709; Kressel, K., T. Henderson, W. Reich, and C. Cohen, 'Multi-Dimensional Analysis of Conflict Mediator Style' (2012) 30(2) *Conflict Resolution Quarterly* 135; Pruitt, D. G., W. R. Fry, L. Castrianno, J. Zubeck, G. L. Welton, N. B. McGillicuddy, and C. Ippolito, 'The Process of Mediation: Caucusing, Control, and Problem Solving' in M. A. Rahim (ed), *Managing Conflict: An Interdisciplinary Approach* (Praeger, USA, 1989); Vanderkooi, L., and J. Pearson, 'Mediating Divorce Disputes: Mediator Behaviors, Styles and Roles' (1983) 32(4) *Family Relations* 557; Zubeck, J. M., D. G. Pruitt, R. S. Peirce, N. B. McGillicuddy, and H. Syna, 'Disputant and Mediator Behaviors Affecting Short-Term Success in Mediation' (1992) 36(3) *Journal of Conflict Resolution* 546.

phone.¹⁰⁵⁹ Two studies describe collecting data in interviews conducted face-to-face *and* by

phone.¹⁰⁶⁰ Five of the seventeen studies do not specify how their interviews were conducted.¹⁰⁶¹

IV. *Research data collected from court/program records*

¹⁰⁵⁹ Carnevale, P. J. D., and R. Pegnetter, 'The Selection of Mediator Tactics in Public Sector Disputes: A Contingency Analysis' (1985) 41(2) *Journal of Social Issues* 2 (mediators); McGillicuddy, N. B., G. L. Welton, and D. G. Pruitt, 'Third-Party Intervention: A Field Experiment Comparing Three Different Models' (1987) 53(1) *Journal of Personality and Social Psychology* 104; Sourdin, T., *Dispute Resolution Processes for Credit Consumers* (Project Report, Conflict Resolution Research Centre, La Trobe University, 2007); Thoennes, N. A., and J. Pearson, 'Predicting Outcomes in Divorce Mediation: The Influence of People and Process' (1985) 41(2) *Journal of Social Issues* 115; Wissler, R. L., 'Mediation and Adjudication in Small Claims Court: The Effects of Process and Case Characteristics' (1995) 29(2) *Law & Society Review* 323.

¹⁰⁶⁰ Kressel, K., E. A. Frontera, S. Forlenza, F. Butler, and L. Fish, 'The Settlement-Oriented vs the Problem-Solving Style' (1994) 50(1) *Journal of Social Issues* 67 (mediator face-to-face, disputants by phone); Pruitt, D. G., R. S. Peirce, N. B. McGillicuddy, G. L. Welton, and L. Castrianno, 'Long-Term Success in Mediation' (1993) 17(3) *Law and Human Behavior* 313 (mediators by phone; disputants face-to-face immediate post-mediation and by phone 4-8 months later).

¹⁰⁶¹ Hiltrop, J. M., 'Factors Associated with Successful Labor Mediation' in K. Kressel and D. G. Pruitt (eds), *Mediation Research: The Process and Effectiveness of Third-Party Intervention* (Jossey-Bass, USA, 1989); Kochan, T. A., and T. Jick, 'The Public Sector Mediation Process: A Theory and Empirical Examination' (1978) 22(2) *The Journal of Conflict Resolution* 209; Sourdin, T., *Exploring Pre-Action Requirements: Resolving Disputes Outside Courts* (ACJI, Monash University, October 2012); Swaab, R. I., *Face First: Pre-Mediation Caucus and Face in Employment Disputes* (Presentation, Annual Association of Conflict Management Conference, June 2009); Wall, J. A., Jr, and S. Chan-Serafin, 'Processes in Civil Case Mediations' (2009) 26(3) *Conflict Resolution Quarterly* 261.

Thirteen studies report accessing court or program records from which the researchers collect research data.^{1062 1063} All report using the data in combination with other collection methods (ie none report relying solely on data obtained from court or program records).

- Eight of the thirteen studies describe using court/program/service records to obtain similar information about subject cases, including any of: court/action dates; the nature of the dispute/case; representation; basic demographics and information about mediator and non-mediator participants; types of resolution processes; resolution outcomes; and so on;¹⁰⁶⁴

¹⁰⁶² Kimsey, W. D., R. M. Fuller, and B. C. McKinney, 'Mediator Listening, Dispute Reframing, and Mediation Outcome: A Pilot Study' (1993) 7(1) *Journal of the International Listening Association* 74; Kressel, K., E. A. Frontera, S. Forlenza, F. Butler, and L. Fish, 'The Settlement-Oriented vs the Problem-Solving Style' (1994) 50(1) *Journal of Social Issues* 67; McEwen, C. A., *An Evaluation of the ADR Pilot Project: Final Report 1* (Unpublished report, 1992); Posthuma, R. A., A. Richard, J. B. Dworkin, and M. S. Swift, 'Mediator Tactics and Sources of Conflict: Facilitating and Inhibiting Effects' (2002) 41(1) *Industrial Relations* 94; Pruitt, D. G., R. S. Peirce, N. B. McGillicuddy, G. L. Welton, and L. Castrianno, 'Long-Term Success in Mediation' (1993) 17(3) *Law and Human Behavior* 313; Sourdin, T., *Dispute Resolution Processes for Credit Consumers* (Project Report, Conflict Resolution Research Centre, La Trobe University, 2007); Sourdin, T., *Mediation in the Supreme and County Courts of Victoria* (Report prepared for the Department of Justice, Victoria, Australia, April 2009), available on <<http://www.civiljustice.info/adreval/1/>>; Sourdin, T., *Exploring Pre-Action Requirements: Resolving Disputes Outside Courts* (ACJI, Monash University, October 2012); Sourdin, T., and T. Matruggio, *Evaluating Mediation – New South Wales Settlement Scheme 2002* (2004) *Mediation*. Paper 7, available on <<http://www.civiljustice.info/med/7/>>; Welton, G. L., D. G. Pruitt, N. B. McGillicuddy, C. A. Ippolito, and J. M. Zubeck, 'Antecedents and Characteristics of Caucusing in Community Mediation' (1992) 3(4) *International Journal of Conflict Management* 303; Wissler, R. L., 'Court-Connected Mediation in General Civil Cases: What We Know from Empirical Research' (2002) 17(3) *Ohio State Journal on Dispute Resolution* 641; Woodward, J. G., 'Settlement Week: Measuring the Promise' (1990) 11 *Northern Illinois University Law Review* 1; Zubeck, J. M., D. G. Pruitt, R. S. Peirce, N. B. McGillicuddy, and H. Syna, 'Disputant and Mediator Behaviors Affecting Short-Term Success in Mediation' (1992) 36(3) *Journal of Conflict Resolution* 546.

¹⁰⁶³ One study is not included among those that describe using court/program records for collecting research data because, despite including the terms of mediated agreements in its research data, the researchers do not clearly describe how they accessed those terms of agreement (McGillicuddy, N. B., G. L. Welton, and D. G. Pruitt, 'Third-Party Intervention: A Field Experiment Comparing Three Different Models' (1987) 53(1) *Journal of Personality and Social Psychology* 104).

¹⁰⁶⁴ Kressel, K., E. A. Frontera, S. Forlenza, F. Butler, and L. Fish, 'The Settlement-Oriented vs the Problem-Solving Style' (1994) 50(1) *Journal of Social Issues* 67; McEwen, C. A., *An Evaluation of the ADR Pilot Project: Final Report 1* (Unpublished report, 1992); Sourdin, T., *Dispute Resolution Processes for Credit Consumers* (Project Report, Conflict Resolution Research Centre, La Trobe University, 2007); Sourdin, T., *Mediation in the Supreme and County Courts of Victoria* (Report prepared for the Department of Justice, Victoria, Australia, April 2009), available on <<http://www.civiljustice.info/adreval/1/>>; Sourdin, T., *Exploring Pre-Action Requirements: Resolving Disputes Outside Courts* (ACJI, Monash University, October 2012); Sourdin, T., and T. Matruggio, *Evaluating Mediation – New South Wales Settlement Scheme 2002* (2004) *Mediation*. Paper 7, available on <<http://www.civiljustice.info/med/7/>>; Wissler, R. L., 'Court-Connected Mediation in General Civil Cases: What We Know from Empirical Research' (2002) 17(3) *Ohio State Journal on Dispute Resolution* 641; Woodward, J. G., 'Settlement Week: Measuring the Promise' (1990) 11 *Northern Illinois University Law Review* 1.

- Three of the thirteen studies describe obtaining from court-program/service files detailed information about the final terms of agreement reached during the mediations, and including the information as a key analysis measure;¹⁰⁶⁵ and
- One of the thirteen studies describes using court/program/service records to obtain research data about the ‘success rate’ of mediator participants, as well as the names and contact information about potential study participants.¹⁰⁶⁶

One of the thirteen studies describes accessing “records” of mediated agreements obtained during simulated mediations, which the researchers subsequently include in their data analysis of disputant behaviour change.¹⁰⁶⁷

Contextual trends – court-program records

It is not surprising that court/program records are included most frequently in the studies that are evaluations of the mediation programs and services whose records the researchers access (six studies, of which five are evaluations of court-connected programs/services¹⁰⁶⁸).¹⁰⁶⁹ The next most

¹⁰⁶⁵ Pruitt, D. G., R. S. Peirce, N. B. McGillicuddy, G. L. Welton, and L. Castrianno, ‘Long-Term Success in Mediation’ (1993) 17(3) *Law and Human Behavior* 313; Welton, G. L., D. G. Pruitt, N. B. McGillicuddy, C. A. Ippolito, and J. M. Zubeck, ‘Antecedents and Characteristics of Caucusing in Community Mediation’ (1992) 3(4) *International Journal of Conflict Management* 303; Zubeck, J. M., D. G. Pruitt, R. S. Peirce, N. B. McGillicuddy, and H. Syna, ‘Disputant and Mediator Behaviors Affecting Short-Term Success in Mediation’ (1992) 36(3) *Journal of Conflict Resolution* 546.

¹⁰⁶⁶ Posthuma, R. A., A. Richard, J. B. Dworkin, and M. S. Swift, ‘Mediator Tactics and Sources of Conflict: Facilitating and Inhibiting Effects’ (2002) 41(1) *Industrial Relations* 94, P 99.

¹⁰⁶⁷ Kimsey, W. D., R. M. Fuller, and B. C. McKinney, ‘Mediator Listening, Dispute Reframing, and Mediation Outcome: A Pilot Study’ (1993) 7(1) *Journal of the International Listening Association* 74.

¹⁰⁶⁸ McEwen, C. A., *An Evaluation of the ADR Pilot Project: Final Report 1* (Unpublished report, 1992); Sourdin, T., *Mediation in the Supreme and County Courts of Victoria* (Report prepared for the Department of Justice, Victoria, Australia, April 2009), available on <<http://www.civiljustice.info/adreval/1/>>; Sourdin, T., *Exploring Pre-Action Requirements: Resolving Disputes Outside Courts* (ACJI, Monash University, October 2012); Sourdin, T., and T. Matruglio, *Evaluating Mediation – New South Wales Settlement Scheme 2002* (2004) *Mediation*. Paper 7, available on <<http://www.civiljustice.info/med/7/>>; Woodward, J. G., ‘Settlement Week: Measuring the Promise’ (1990) 11 *Northern Illinois University Law Review* 1.

¹⁰⁶⁹ McEwen, C. A., *An Evaluation of the ADR Pilot Project: Final Report 1* (Unpublished report, 1992); Sourdin, T., *Dispute Resolution Processes for Credit Consumers* (Project Report, Conflict Resolution Research Centre, La Trobe University, 2007); Sourdin, T., *Mediation in the Supreme and County Courts of Victoria* (Report prepared for the Department of Justice, Victoria, Australia, April 2009), available on <<http://www.civiljustice.info/adreval/1/>>; Sourdin, T., *Exploring Pre-Action Requirements: Resolving Disputes Outside Courts* (ACJI, Monash University, October 2012); Sourdin, T., and T. Matruglio, *Evaluating Mediation – New South Wales Settlement Scheme 2002* (2004) *Mediation*. Paper 7, available on

frequent use of court-program records is by three studies conducted in the community-based context (all using the same single dataset),¹⁰⁷⁰ followed by one study conducted in the family/divorce/custody context,¹⁰⁷¹ and one in the labour/management context.¹⁰⁷²

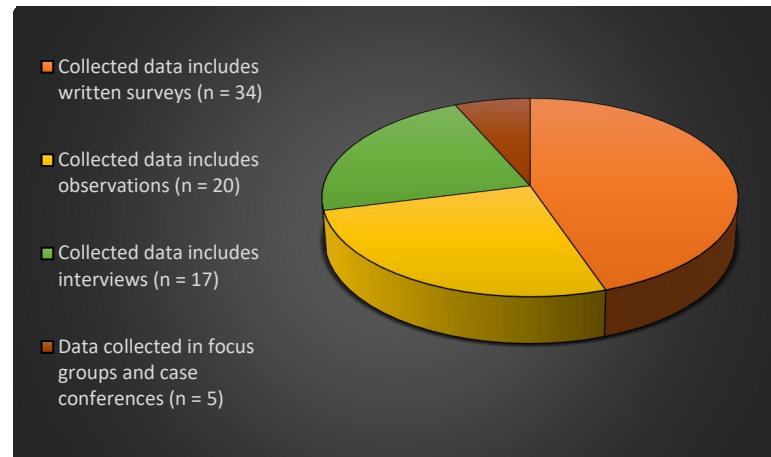


Figure 6.3. Mode of data collection

Figure 6.3. shows the proportion of articles that describe data collection that *includes* survey responses;¹⁰⁷³ *includes* observations (live observations, video-recordings, and audio-recordings)

<<http://www.civiljustice.info/med/7>>; Woodward, J. G., 'Settlement Week: Measuring the Promise' (1990) 11 *Northern Illinois University Law Review* 1.

¹⁰⁷⁰ Pruitt, D. G., R. S. Peirce, N. B. McGillicuddy, G. L. Welton, and L. Castrianno, 'Long-Term Success in Mediation' (1993) 17(3) *Law and Human Behavior* 313; Welton, G. L., D. G. Pruitt, N. B. McGillicuddy, C. A. Ippolito, and J. M. Zubeck, 'Antecedents and Characteristics of Caucusing in Community Mediation' (1992) 3(4) *International Journal of Conflict Management* 303; Zubeck, J. M., D. G. Pruitt, R. S. Peirce, N. B. McGillicuddy, and H. Syna, 'Disputant and Mediator Behaviors Affecting Short-Term Success in Mediation' (1992) 36(3) *Journal of Conflict Resolution* 546.

¹⁰⁷¹ Kressel, K., E. A. Frontera, S. Forlenza, F. Butler, and L. Fish, 'The Settlement-Oriented vs the Problem-Solving Style' (1994) 50(1) *Journal of Social Issues* 67.

¹⁰⁷² Posthuma, R. A., A. Richard, J. B. Dworkin, and M. S. Swift, 'Mediator Tactics and Sources of Conflict: Facilitating and Inhibiting Effects' (2002) 41(1) *Industrial Relations* 94.

¹⁰⁷³ Alberts, J. K., B. L. Heisterkamp, and R. M. McPhee, 'Disputant Perceptions of and Satisfaction with a Community Mediation Program' (2005) 16(3) *The International Journal of Conflict Management* 218; Bingham, L. B., 'Transformative Mediation in the United States Postal Service' (2012) 5(4) *Negotiation and Conflict Management Research* 354; Burrell, N. A., W. A. Donohue, and M. Allen, 'The Impact of Disputants' Expectations on Mediation, Testing an Interventionist Model' (1990) Fall 1990 *Human Communication Research* 104; Carnevale, P. J. D., and R. Pegnetter, 'The Selection of Mediator Tactics in Public Sector Disputes: A Contingency Analysis' (1985) 41(2) *Journal of Social Issues* 2; Dilts, D. A. and A. Karim, 'The Effect of Mediators' Qualities and Strategies on Mediation Outcomes' (1990) 45(1) *Relations Industrielles/Industrial Relations* 22; Gale, J., R. L. Mowery, M. S. Herrman, and N. L. Hollett, 'Considering Effective Divorce Mediation: Three Potential Factors' (2002) 19(4) *Conflict Resolution Quarterly* 389; Goldberg, S. B., and M. L. Shaw,

'Further Investigation into the Secrets of Successful and Unsuccessful Mediators' (2008) 26(8) *Alternatives to the High Cost of Litigation* 149; Henderson, D. A., 'Mediation Success: An Empirical Analysis' (1996) 11(1) *Ohio State Journal on Dispute Resolution* 105; Hiltrop, J. M., 'Factors Associated with Successful Labor Mediation' in K. Kressel and D. G. Pruitt (eds), *Mediation Research: The Process and Effectiveness of Third-Party Intervention* (Jossey-Bass, USA, 1989); Karim, A. and D. Diltz, 'Determinants of Mediation Success in the Iowa Public Sector' (1990) 19(2) *Journal of Collective Negotiations* 129; Karim, A. and R. Peggnetter, 'Mediator Strategies and Qualities and Mediation Effectiveness' (1983) 22(1) *Industrial Relations* 105; Kimsey, W. D., R. M. Fuller, A. J. Bell, and B. C. McKinney, 'The Impact of Mediator Strategic Choices: An Experimental Study' (1994) 12(1) *Mediation Quarterly* 89; Kimsey, W. D., R. M. Fuller, and B. C. McKinney, 'Mediator Listening, Dispute Reframing, and Mediation Outcome: A Pilot Study' (1993) 7(1) *Journal of the International Listening Association* 74; Kressel, K., 'How Do Mediators Decide What To Do? Implicit Schemas of Practice and Mediator Decisionmaking' (2013) 28(3) *Ohio State Journal on Dispute Resolution* 709; Kressel, K., E. A. Frontera, S. Forlenza, F. Butler, and L. Fish, 'The Settlement-Orientation vs the Problem-Solving Style' (1994) 50(1) *Journal of Social Issues* 67; Kressel, K., T. Henderson, W. Reich, and C. Cohen, 'Multi-Dimensional Analysis of Conflict Mediator Style' (2012) 30(2) *Conflict Resolution Quarterly* 135; Mareschal, P. M., 'What Makes Mediation Work? Perspectives on Resolving Disputes' (2005) 44(3) *Industrial Relations* 509; McDermott, E. P., and R. Obar, "'What's Going On" in Mediation: An Empirical Analysis of the Influence of a Mediator's Style on Party Satisfaction and Monetary Benefit' (2004) 9 *Harvard Negotiation Law Review* 75; McEwen, C. A., *An Evaluation of the ADR Pilot Project: Final Report 1* (Unpublished report, 1992); McGillicuddy, N. B., G. L. Welton, and D. G. Pruitt, 'Third-Party Intervention: A Field Experiment Comparing Three Different Models' (1987) 53(1) *Journal of Personality and Social Psychology* 104; Posthuma, R. A., A. Richard, J. B. Dworkin, and M. S. Swift, 'Mediator Tactics and Sources of Conflict: Facilitating and Inhibiting Effects' (2002) 41(1) *Industrial Relations* 94; Shapiro, D., R. Drieghe, and J. Brett, 'Mediator Behavior and the Outcomes of Mediation' (1985) 41(2) *Journal of Social Issues* 101; Sourdin, T., *Mediation in the Supreme and County Courts of Victoria* (Report prepared for the Department of Justice, Victoria, Australia, April 2009), available on <<http://www.civiljustice.info/adreval/1/>>; Sourdin, T., and T. Matruglio, *Evaluating Mediation – New South Wales Settlement Scheme 2002* (2004) *Mediation*. Paper 7, available on <<http://www.civiljustice.info/med/7/>>; Swaab, R. I., *Face First: Pre-Mediation Caucus and Face in Employment Disputes* (Presentation, Annual Association of Conflict Management Conference, June 2009); Swaab, R. I., and J. Brett, *Caucus with Care: The Impact of Pre-Mediation Caucuses on Conflict Resolution* (Meetings Paper, International Association of Conflict Management, 2007); Thoennes, N. A., and J. Pearson, 'Predicting Outcomes in Divorce Mediation: The Influence of People and Process' (1985) 41(2) *Journal of Social Issues* 115; Vanderkooi, L., and J. Pearson, 'Mediating Divorce Disputes: Mediator Behaviors, Styles and Roles' (1983) 32(4) *Family Relations* 557; Wall, J. A., Jr, and S. Chan-Serafin, 'Processes in Civil Case Mediations' (2009) 26(3) *Conflict Resolution Quarterly* 261; Wall, J. A., Jr, and D. E. Rude, 'The Judge as a Mediator' (1991) 76(1) *Journal of Applied Psychology* 54; Welton, G. L., and D. G. Pruitt, 'The Mediation Process: The Effects of Mediator Bias and Disputant Power' (1987) 13(1) *Personality and Social Psychology Bulletin* 123; Welton, G. L., D. G. Pruitt, and N. B. McGillicuddy, 'The Role of Caucusing in Community Mediation' (1988) 32(1) *The Journal of Conflict Resolution* 181; Wissler, R. L., *Trapping the Data: An Assessment of Domestic Relations Mediation in Maine and Ohio Courts* (Unpublished report, 1999); Wissler, R. L., 'Court-Connected Mediation in General Civil Cases: What We Know from Empirical Research' (2002) 17(3) *Ohio State Journal on Dispute Resolution* 641; Woodward, J. G., 'Settlement Week: Measuring the Promise' (1990) 11 *Northern Illinois University Law Review* 1.

includes interview responses;¹⁰⁷⁴ and includes data collected in focus groups and case conferences.¹⁰⁷⁵ It represents a summary of the analysis of data collection methods described in the selected studies, and shows that the researchers have made more use of research data collected from self-administered written surveys than from any of the other data collection methods.

6.1.1. Data topics

The analysis in this Chapter suggests that non-mediator participants are required to provide more information than mediator participants, and, arguably, more complex information. Figure 6.4.

¹⁰⁷⁴ Carnevale, P. J. D., and R. Pegnetter, 'The Selection of Mediator Tactics in Public Sector Disputes: A Contingency Analysis' (1985) 41(2) *Journal of Social Issues* 2; Hiltrop, J. M., 'Factors Associated with Successful Labor Mediation' in K. Kressel and D. G. Pruitt (eds), *Mediation Research: The Process and Effectiveness of Third-Party Intervention* (Jossey-Bass, USA, 1989); Kochan, T. A., and T. Jick, 'The Public Sector Mediation Process: A Theory and Empirical Examination' (1978) 22(2) *The Journal of Conflict Resolution* 209; Kressel, K., 'How Do Mediators Decide What To Do? Implicit Schemas of Practice and Mediator Decisionmaking' (2013) 28(3) *Ohio State Journal on Dispute Resolution* 709; Kressel, K., E. A. Frontera, S. Forlenza, F. Butler, and L. Fish, 'The Settlement-Orientation vs the Problem-Solving Style' (1994) 50(1) *Journal of Social Issues* 67; Kressel, K., T. Henderson, W. Reich, and C. Cohen, 'Multi-Dimensional Analysis of Conflict Mediator Style' (2012) 30(2) *Conflict Resolution Quarterly* 135; McGillicuddy, N. B., G. L. Welton, and D. G. Pruitt, 'Third-Party Intervention: A Field Experiment Comparing Three Different Models' (1987) 53(1) *Journal of Personality and Social Psychology* 104; Pruitt, D. G., W. R. Fry, L. Castrianno, J. Zubeck, G. L. Welton, N. B. McGillicuddy, and C. Ippolito, 'The Process of Mediation: Caucusing, Control, and Problem Solving' in M. A. Rahim (ed), *Managing Conflict: An Interdisciplinary Approach* (Praeger, USA, 1989); Pruitt, D. G., R. S. Peirce, N. B. McGillicuddy, G. L. Welton, and L. Castrianno, 'Long-Term Success in Mediation' (1993) 17(3) *Law and Human Behavior* 313; Vanderkooi, L., and J. Pearson, 'Mediating Divorce Disputes: Mediator Behaviors, Styles and Roles' (1983) 32(4) *Family Relations* 557; Sourdin, T., *Dispute Resolution Processes for Credit Consumers* (Project Report, Conflict Resolution Research Centre, La Trobe University, 2007); Sourdin, T., *Exploring Pre-Action Requirements: Resolving Disputes Outside Courts* (ACJI, Monash University, October 2012); Swaab, R. I., *Face First: Pre-Mediation Caucus and Face in Employment Disputes* (Presentation, Annual Association of Conflict Management Conference, June 2009); Thoennes, N. A., and J. Pearson, 'Predicting Outcomes in Divorce Mediation: The Influence of People and Process' (1985) 41(2) *Journal of Social Issues* 115; Welton, G. L., D. G. Pruitt, N. B. McGillicuddy, C. A. Ippolito, and J. M. Zubeck, 'Antecedents and Characteristics of Caucusing in Community Mediation' (1992) 3(4) *International Journal of Conflict Management* 303; Wissler, R. L., 'Mediation and Adjudication in Small Claims Court: The Effects of Process and Case Characteristics' (1995) 29(2) *Law & Society Review* 323; Zubeck, J. M., D. G. Pruitt, R. S. Peirce, N. B. McGillicuddy, and H. Syna, 'Disputant and Mediator Behaviors Affecting Short-Term Success in Mediation' (1992) 36(3) *Journal of Conflict Resolution* 546.

¹⁰⁷⁵ Kressel, K., 'How Do Mediators Decide What To Do? Implicit Schemas of Practice and Mediator Decisionmaking' (2013) 28(3) *Ohio State Journal on Dispute Resolution* 709; Kressel, K., E. A. Frontera, S. Forlenza, F. Butler, and L. Fish, 'The Settlement-Orientation vs the Problem-Solving Style' (1994) 50(1) *Journal of Social Issues* 67; Kressel, K., T. Henderson, W. Reich, and C. Cohen, 'Multi-Dimensional Analysis of Conflict Mediator Style' (2012) 30(2) *Conflict Resolution Quarterly* 135; Sourdin, T., *Mediation in the Supreme and County Courts of Victoria* (Report prepared for the Department of Justice, Victoria, Australia, April 2009), available on <<http://www.civiljustice.info/adreval/1/>>; Sourdin, T., *Exploring Pre-Action Requirements: Resolving Disputes Outside Courts* (ACJI, Monash University, October 2012).

(below) shows the relative frequency with which the researchers collect specific research data from the various participants in mediation.

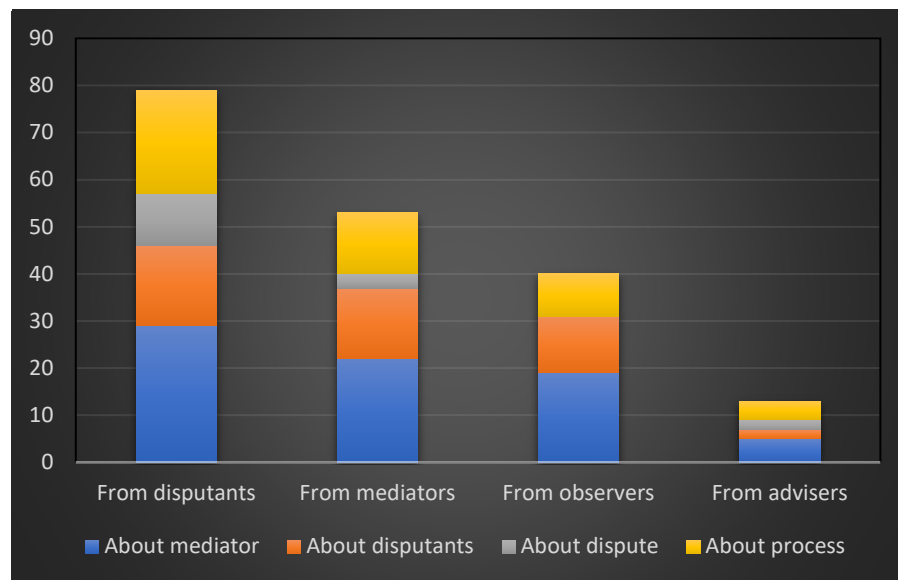


Figure 6.4. Respondent identity and focus area.

Figure 6.4. depicts the proportions of research data collected from the different participants (and observers), and the general nature of the data. In summary, research data is collected from disputants about: mediators (n = 29 studies);¹⁰⁷⁶ about disputants themselves (ie self and each other,

¹⁰⁷⁶ Alberts, J. K., B. L. Heisterkamp, and R. M. McPhee, 'Disputant Perceptions of and Satisfaction with a Community Mediation Program' (2005) 16(3) *The International Journal of Conflict Management* 218; Bingham, L. B., 'Transformative Mediation in the United States Postal Service' (2012) 5(4) *Negotiation and Conflict Management Research* 354; Burrell, N. A., W. A. Donohue, and M. Allen, 'The Impact of Disputants' Expectations on Mediation, Testing an Interventionist Model' (1990) Fall 1990 *Human Communication Research* 104; Dilts, D. A. and A. Karim, 'The Effect of Mediators' Qualities and Strategies on Mediation Outcomes' (1990) 45(1) *Relations Industrielles/Industrial Relations* 22; Gale, J., R. L. Mowery, M. S. Herrman, and N. L. Hollett, 'Considering Effective Divorce Mediation: Three Potential Factors' (2002) 19(4) *Conflict Resolution Quarterly* 389; Hiltrop, J. M., 'Factors Associated with Successful Labor Mediation' in K. Kressel and D. G. Pruitt (eds), *Mediation Research: The Process and Effectiveness of Third-Party Intervention* (Jossey-Bass, USA, 1989); Karim, A. and D. Dilts, 'Determinants of Mediation Success in the Iowa Public Sector' (1990) 19(2) *Journal of Collective Negotiations* 129; Karim, A. and R. Peggnetter, 'Mediator Strategies and Qualities and Mediation Effectiveness' (1983) 22(1) *Industrial Relations* 105; Kimsey, W. D., R. M. Fuller, A. J. Bell, and B. C. McKinney, 'The Impact of Mediator Strategic Choices: An Experimental Study' (1994) 12(1) *Mediation Quarterly* 89; Kimsey, W. D., R. M. Fuller, and B. C. McKinney, 'Mediator Listening, Dispute Reframing, and

Mediation Outcome: A Pilot Study' (1993) 7(1) *Journal of the International Listening Association* 74; Kochan, T. A., and T. Jick, 'The Public Sector Mediation Process: A Theory and Empirical Examination' (1978) 22(2) *The Journal of Conflict Resolution* 209; Kressel, K., 'How Do Mediators Decide What To Do? Implicit Schemas of Practice and Mediator Decisionmaking' (2013) 28(3) *Ohio State Journal on Dispute Resolution* 709; Kressel, K., T. Henderson, W. Reich, and C. Cohen, 'Multi-Dimensional Analysis of Conflict Mediator Style' (2012) 30(2) *Conflict Resolution Quarterly* 135; McGillicuddy, N. B., G. L. Welton, and D. G. Pruitt, 'Third-Party Intervention: A Field Experiment Comparing Three Different Models' (1987) 53(1) *Journal of Personality and Social Psychology* 104; Posthuma, R. A., A. Richard, J. B. Dworkin, and M. S. Swift, 'Mediator Tactics and Sources of Conflict: Facilitating and Inhibiting Effects' (2002) 41(1) *Industrial Relations* 94; Pruitt, D. G., W. R. Fry, L. Castrianno, J. Zubeck, G. L. Welton, N. B. McGillicuddy, and C. Ippolito, 'The Process of Mediation: Caucusing, Control, and Problem Solving' in M. A. Rahim (ed), *Managing Conflict: An Interdisciplinary Approach* (Praeger, USA, 1989); Pruitt, D. G., R. S. Peirce, N. B. McGillicuddy, G. L. Welton, and L. Castrianno, 'Long-Term Success in Mediation' (1993) 17(3) *Law and Human Behavior* 313; Sourdin, T., *Mediation in the Supreme and County Courts of Victoria* (Report prepared for the Department of Justice, Victoria, Australia, April 2009), available on <<http://www.civiljustice.info/adreval/1/>>; Sourdin, T., *Exploring Pre-Action Requirements: Resolving Disputes Outside Courts* (ACJI, Monash University, October 2012); Sourdin, T., and T. Matruglio, *Evaluating Mediation – New South Wales Settlement Scheme 2002* (2004) *Mediation*. Paper 7, available on <<http://www.civiljustice.info/med/7>>; Wall, J. A., Jr, and S. Chan-Serafin, 'Processes in Civil Case Mediations' (2009) 26(3) *Conflict Resolution Quarterly* 261; Wall, J. A., Jr, and D. E. Rude, 'The Judge as a Mediator' (1991) 76(1) *Journal of Applied Psychology* 54; Welton, G. L., and D. G. Pruitt, 'The Mediation Process: The Effects of Mediator Bias and Disputant Power' (1987) 13(1) *Personality and Social Psychology Bulletin* 123; Welton, G. L., D. G. Pruitt, and N. B. McGillicuddy, 'The Role of Caucusing in Community Mediation' (1988) 32(1) *The Journal of Conflict Resolution* 181; Welton, G. L., D. G. Pruitt, N. B. McGillicuddy, C. A. Ippolito, and J. M. Zubeck, 'Antecedents and Characteristics of Caucusing in Community Mediation' (1992) 3(4) *International Journal of Conflict Management* 303; Wissler, R. L., 'Mediation and Adjudication in Small Claims Court: The Effects of Process and Case Characteristics' (1995) 29(2) *Law & Society Review* 323; Wissler, R. L., *Trapping the Data: An Assessment of Domestic Relations Mediation in Maine and Ohio Courts* (Unpublished report, 1999); Wissler, R. L., 'Court-Connected Mediation in General Civil Cases: What We Know from Empirical Research' (2002) 17(3) *Ohio State Journal on Dispute Resolution* 641; Zubeck, J. M., D. G. Pruitt, R. S. Peirce, N. B. McGillicuddy, and H. Syna, 'Disputant and Mediator Behaviors Affecting Short-Term Success in Mediation' (1992) 36(3) *Journal of Conflict Resolution* 546.

n = 17 studies);¹⁰⁷⁷ the dispute (n = 11 studies);¹⁰⁷⁸ and about the mediation process, including perceptions of fairness and satisfaction (n = 22 studies).¹⁰⁷⁹ Research data is collected from

¹⁰⁷⁷ Hiltrop, J. M., 'Factors Associated with Successful Labor Mediation' in K. Kressel and D. G. Pruitt (eds), *Mediation Research: The Process and Effectiveness of Third-Party Intervention* (Jossey-Bass, USA, 1989); Kimsey, W. D., R. M. Fuller, A. J. Bell, and B. C. McKinney, 'The Impact of Mediator Strategic Choices: An Experimental Study' (1994) 12(1) *Mediation Quarterly* 89; Kimsey, W. D., R. M. Fuller, and B. C. McKinney, 'Mediator Listening, Dispute Reframing, and Mediation Outcome: A Pilot Study' (1993) 7(1) *Journal of the International Listening Association* 74; McGillicuddy, N. B., G. L. Welton, and D. G. Pruitt, 'Third-Party Intervention: A Field Experiment Comparing Three Different Models' (1987) 53(1) *Journal of Personality and Social Psychology* 104; Posthuma, R. A., A. Richard, J. B. Dworkin, and M. S. Swift, 'Mediator Tactics and Sources of Conflict: Facilitating and Inhibiting Effects' (2002) 41(1) *Industrial Relations* 94; Pruitt, D. G., W. R. Fry, L. Castrianno, J. Zubeck, G. L. Welton, N. B. McGillicuddy, and C. Ippolito, 'The Process of Mediation: Caucusing, Control, and Problem Solving' in M. A. Rahim (ed), *Managing Conflict: An Interdisciplinary Approach* (Praeger, USA, 1989); Pruitt, D. G., R. S. Peirce, N. B. McGillicuddy, G. L. Welton, and L. Castrianno, 'Long-Term Success in Mediation' (1993) 17(3) *Law and Human Behavior* 313; Sourdin, T., *Dispute Resolution Processes for Credit Consumers* (Project Report, Conflict Resolution Research Centre, La Trobe University, 2007); Sourdin, T., *Exploring Pre-Action Requirements: Resolving Disputes Outside Courts* (ACJI, Monash University, October 2012); Sourdin, T., and T. Matruglio, *Evaluating Mediation – New South Wales Settlement Scheme 2002* (2004) *Mediation*. Paper 7, available on <<http://www.civiljustice.info/med/7>>; Wall, J. A., Jr, and S. Chan-Serafin, 'Processes in Civil Case Mediations' (2009) 26(3) *Conflict Resolution Quarterly* 261; Welton, G. L., D. G. Pruitt, and N. B. McGillicuddy, 'The Role of Caucusing in Community Mediation' (1988) 32(1) *The Journal of Conflict Resolution* 181; Welton, G. L., D. G. Pruitt, N. B. McGillicuddy, C. A. Ippolito, and J. M. Zubeck, 'Antecedents and Characteristics of Caucusing in Community Mediation' (1992) 3(4) *International Journal of Conflict Management* 303; Wissler, R. L., 'Mediation and Adjudication in Small Claims Court: The Effects of Process and Case Characteristics' (1995) 29(2) *Law & Society Review* 323; Wissler, R. L., *Trapping the Data: An Assessment of Domestic Relations Mediation in Maine and Ohio Courts* (Unpublished report, 1999); Zubeck, J. M., D. G. Pruitt, R. S. Peirce, N. B. McGillicuddy, and H. Syna, 'Disputant and Mediator Behaviors Affecting Short-Term Success in Mediation' (1992) 36(3) *Journal of Conflict Resolution* 546.

¹⁰⁷⁸ Burrell, N. A., W. A. Donohue, and M. Allen, 'The Impact of Disputants' Expectations on Mediation, Testing an Interventionist Model' (1990) Fall 1990 *Human Communication Research* 104; Hiltrop, J. M., 'Factors Associated with Successful Labor Mediation' in K. Kressel and D. G. Pruitt (eds), *Mediation Research: The Process and Effectiveness of Third-Party Intervention* (Jossey-Bass, USA, 1989); Kimsey, W. D., R. M. Fuller, A. J. Bell, and B. C. McKinney, 'The Impact of Mediator Strategic Choices: An Experimental Study' (1994) 12(1) *Mediation Quarterly* 89; Kimsey, W. D., R. M. Fuller, and B. C. McKinney, 'Mediator Listening, Dispute Reframing, and Mediation Outcome: A Pilot Study' (1993) 7(1) *Journal of the International Listening Association* 74; Posthuma, R. A., A. Richard, J. B. Dworkin, and M. S. Swift, 'Mediator Tactics and Sources of Conflict: Facilitating and Inhibiting Effects' (2002) 41(1) *Industrial Relations* 94; Pruitt, D. G., W. R. Fry, L. Castrianno, J. Zubeck, G. L. Welton, N. B. McGillicuddy, and C. Ippolito, 'The Process of Mediation: Caucusing, Control, and Problem Solving' in M. A. Rahim (ed), *Managing Conflict: An Interdisciplinary Approach* (Praeger, USA, 1989); Thoennes, N. A., and J. Pearson, 'Predicting Outcomes in Divorce Mediation: The Influence of People and Process' (1985) 41(2) *Journal of Social Issues* 115; Welton, G. L., D. G. Pruitt, N. B. McGillicuddy, C. A. Ippolito, and J. M. Zubeck, 'Antecedents and Characteristics of Caucusing in Community Mediation' (1992) 3(4) *International Journal of Conflict Management* 303; Wissler, R. L., 'Mediation and Adjudication in Small Claims Court: The Effects of Process and Case Characteristics' (1995) 29(2) *Law & Society Review* 323; Wissler, R. L., 'Court-Connected Mediation in General Civil Cases: What We Know from Empirical Research' (2002) 17(3) *Ohio State Journal on Dispute Resolution* 641; Zubeck, J. M., D. G. Pruitt, R. S. Peirce, N. B. McGillicuddy, and H. Syna, 'Disputant and Mediator Behaviors Affecting Short-Term Success in Mediation' (1992) 36(3) *Journal of Conflict Resolution* 546.

¹⁰⁷⁹ Alberts, J. K., B. L. Heisterkamp, and R. M. McPhee, 'Disputant Perceptions of and Satisfaction with a Community Mediation Program' (2005) 16(3) *The International Journal of Conflict Management* 218; Bingham, L. B., 'Transformative Mediation in the United States Postal Service' (2012) 5(4) *Negotiation and Conflict Management Research* 354; Hiltrop, J. M., 'Factors Associated with Successful Labor Mediation' in K. Kressel

and D. G. Pruitt (eds), *Mediation Research: The Process and Effectiveness of Third-Party Intervention* (Jossey-Bass, USA, 1989); Kressel, K., 'How Do Mediators Decide What To Do? Implicit Schemas of Practice and Mediator Decisionmaking' (2013) 28(3) *Ohio State Journal on Dispute Resolution* 709; Kressel, K., E. A. Frontera, S. Forlenza, F. Butler, and L. Fish, 'The Settlement-Oriented vs the Problem-Solving Style' (1994) 50(1) *Journal of Social Issues* 67; McDermott, E. P., and R. Obar, "'What's Going On" in Mediation: An Empirical Analysis of the Influence of a Mediator's Style on Party Satisfaction and Monetary Benefit' (2004) 9 *Harvard Negotiation Law Review* 75; McGillicuddy, N. B., G. L. Welton, and D. G. Pruitt, 'Third-Party Intervention: A Field Experiment Comparing Three Different Models' (1987) 53(1) *Journal of Personality and Social Psychology* 104; Posthuma, R. A., A. Richard, J. B. Dworkin, and M. S. Swift, 'Mediator Tactics and Sources of Conflict: Facilitating and Inhibiting Effects' (2002) 41(1) *Industrial Relations* 94; Pruitt, D. G., W. R. Fry, L. Castrianno, J. Zubeck, G. L. Welton, N. B. McGillicuddy, and C. Ippolito, 'The Process of Mediation: Caucusing, Control, and Problem Solving' in M. A. Rahim (ed), *Managing Conflict: An Interdisciplinary Approach* (Praeger, USA, 1989); Pruitt, D. G., R. S. Peirce, N. B. McGillicuddy, G. L. Welton, and L. Castrianno, 'Long-Term Success in Mediation' (1993) 17(3) *Law and Human Behavior* 313; Sourdin, T., *Dispute Resolution Processes for Credit Consumers* (Project Report, Conflict Resolution Research Centre, La Trobe University, 2007); Sourdin, T., *Mediation in the Supreme and County Courts of Victoria* (Report prepared for the Department of Justice, Victoria, Australia, April 2009), available on <<http://www.civiljustice.info/adreval/1/>>; Sourdin, T., *Exploring Pre-Action Requirements: Resolving Disputes Outside Courts* (ACJI, Monash University, October 2012); Sourdin, T., and T. Matruglio, *Evaluating Mediation – New South Wales Settlement Scheme 2002* (2004) *Mediation*. Paper 7, available on <<http://www.civiljustice.info/med/7/>>; Thoennes, N. A., and J. Pearson, 'Predicting Outcomes in Divorce Mediation: The Influence of People and Process' (1985) 41(2) *Journal of Social Issues* 115; Welton, G. L., D. G. Pruitt, and N. B. McGillicuddy, 'The Role of Caucusing in Community Mediation' (1988) 32(1) *The Journal of Conflict Resolution* 181; Welton, G. L., D. G. Pruitt, N. B. McGillicuddy, C. A. Ippolito, and J. M. Zubeck, 'Antecedents and Characteristics of Caucusing in Community Mediation' (1992) 3(4) *International Journal of Conflict Management* 303; Wissler, R. L., 'Mediation and Adjudication in Small Claims Court: The Effects of Process and Case Characteristics' (1995) 29(2) *Law & Society Review* 323; Wissler, R. L., *Trapping the Data: An Assessment of Domestic Relations Mediation in Maine and Ohio Courts* (Unpublished report, 1999); Wissler, R. L., 'Court-Connected Mediation in General Civil Cases: What We Know from Empirical Research' (2002) 17(3) *Ohio State Journal on Dispute Resolution* 641; Zubeck, J. M., D. G. Pruitt, R. S. Peirce, N. B. McGillicuddy, and H. Syna, 'Disputant and Mediator Behaviors Affecting Short-Term Success in Mediation' (1992) 36(3) *Journal of Conflict Resolution* 546.

mediators about: mediators (n = 22 studies);¹⁰⁸⁰ disputants (n = 15);¹⁰⁸¹ the dispute (n = 3);¹⁰⁸² and about the mediation process (n = 13 studies).¹⁰⁸³ Research data is collected from observations

¹⁰⁸⁰ Bingham, L. B., 'Transformative Mediation in the United States Postal Service' (2012) 5(4) *Negotiation and Conflict Management Research* 354; Burrell, N. A., W. A. Donohue, and M. Allen, 'The Impact of Disputants' Expectations on Mediation, Testing an Interventionist Model' (1990) Fall 1990 *Human Communication Research* 104; Carnevale, P. J. D., and R. Peggnetter, 'The Selection of Mediator Tactics in Public Sector Disputes: A Contingency Analysis' (1985) 41(2) *Journal of Social Issues* 2; Gale, J., R. L. Mowery, M. S. Herrman, and N. L. Hollett, 'Considering Effective Divorce Mediation: Three Potential Factors' (2002) 19(4) *Conflict Resolution Quarterly* 389; Hiltrop, J. M., 'Factors Associated with Successful Labor Mediation' in K. Kressel and D. G. Pruitt (eds), *Mediation Research: The Process and Effectiveness of Third-Party Intervention* (Jossey-Bass, USA, 1989); Kressel, K., 'How Do Mediators Decide What To Do? Implicit Schemas of Practice and Mediator Decisionmaking' (2013) 28(3) *Ohio State Journal on Dispute Resolution* 709; Kressel, K., E. A. Frontera, S. Forlenza, F. Butler, and L. Fish, 'The Settlement-Oriented vs the Problem-Solving Style' (1994) 50(1) *Journal of Social Issues* 67; Kressel, K., T. Henderson, W. Reich, and C. Cohen, 'Multi-Dimensional Analysis of Conflict Mediator Style' (2012) 30(2) *Conflict Resolution Quarterly* 135; Mareschal, P. M., 'What Makes Mediation Work? Perspectives on Resolving Disputes' (2005) 44(3) *Industrial Relations* 509; McDermott, E. P., and R. Obar, "'What's Going On" in Mediation: An Empirical Analysis of the Influence of a Mediator's Style on Party Satisfaction and Monetary Benefit' (2004) 9 *Harvard Negotiation Law Review* 75; McEwen, C. A., *An Evaluation of the ADR Pilot Project: Final Report 1* (Unpublished report, 1992); McGillicuddy, N. B., G. L. Welton, and D. G. Pruitt, 'Third-Party Intervention: A Field Experiment Comparing Three Different Models' (1987) 53(1) *Journal of Personality and Social Psychology* 104; Pruitt, D. G., R. S. Peirce, N. B. McGillicuddy, G. L. Welton, and L. Castrianno, 'Long-Term Success in Mediation' (1993) 17(3) *Law and Human Behavior* 313; Shapiro, D., R. Drieghe, and J. Brett, 'Mediator Behavior and the Outcomes of Mediation' (1985) 41(2) *Journal of Social Issues* 101; Sourdin, T., and T. Matruggio, *Evaluating Mediation – New South Wales Settlement Scheme 2002* (2004) *Mediation*. Paper 7, available on <<http://www.civiljustice.info/med/7>>; Swaab, R. I., *Face First: Pre-Mediation Caucus and Face in Employment Disputes* (Presentation, Annual Association of Conflict Management Conference, June 2009); Swaab, R. I., and J. Brett, *Caucus with Care: The Impact of Pre-Mediation Caucuses on Conflict Resolution* (Meetings Paper, International Association of Conflict Management, 2007); Vanderkooi, L., and J. Pearson, 'Mediating Divorce Disputes: Mediator Behaviors, Styles and Roles' (1983) 32(4) *Family Relations* 557; Wall, J. A., Jr, and S. Chan-Serafin, 'Processes in Civil Case Mediations' (2009) 26(3) *Conflict Resolution Quarterly* 261; Welton, G. L., D. G. Pruitt, and N. B. McGillicuddy, 'The Role of Caucusing in Community Mediation' (1988) 32(1) *The Journal of Conflict Resolution* 181; Wissler, R. L., *Trapping the Data: An Assessment of Domestic Relations Mediation in Maine and Ohio Courts* (Unpublished report, 1999).

¹⁰⁸¹ Carnevale, P. J. D., and R. Peggnetter, 'The Selection of Mediator Tactics in Public Sector Disputes: A Contingency Analysis' (1985) 41(2) *Journal of Social Issues* 2; Hiltrop, J. M., 'Factors Associated with Successful Labor Mediation' in K. Kressel and D. G. Pruitt (eds), *Mediation Research: The Process and Effectiveness of Third-Party Intervention* (Jossey-Bass, USA, 1989); Kressel, K., 'How Do Mediators Decide What To Do? Implicit Schemas of Practice and Mediator Decisionmaking' (2013) 28(3) *Ohio State Journal on Dispute Resolution* 709; Kressel, K., E. A. Frontera, S. Forlenza, F. Butler, and L. Fish, 'The Settlement-Oriented vs the Problem-Solving Style' (1994) 50(1) *Journal of Social Issues* 67; Mareschal, P. M., 'What Makes Mediation Work? Perspectives on Resolving Disputes' (2005) 44(3) *Industrial Relations* 509; McDermott, E. P., and R. Obar, "'What's Going On" in Mediation: An Empirical Analysis of the Influence of a Mediator's Style on Party Satisfaction and Monetary Benefit' (2004) 9 *Harvard Negotiation Law Review* 75; McEwen, C. A., *An Evaluation of the ADR Pilot Project: Final Report 1* (Unpublished report, 1992); McGillicuddy, N. B., G. L. Welton, and D. G. Pruitt, 'Third-Party Intervention: A Field Experiment Comparing Three Different Models' (1987) 53(1) *Journal of Personality and Social Psychology* 104; Pruitt, D. G., R. S. Peirce, N. B. McGillicuddy, G. L. Welton, and L. Castrianno, 'Long-Term Success in Mediation' (1993) 17(3) *Law and Human Behavior* 313; Shapiro, D., R. Drieghe, and J. Brett, 'Mediator Behavior and the Outcomes of Mediation' (1985) 41(2) *Journal of Social Issues* 101; Sourdin, T., *Mediation in the Supreme and County Courts of Victoria* (Report prepared for the Department of Justice, Victoria, Australia, April 2009), available on <<http://www.civiljustice.info/adreval/1/>>; Swaab, R. I., and J. Brett, *Caucus with Care: The Impact of Pre-Mediation Caucuses on Conflict Resolution* (Meetings Paper, International Association of Conflict Management, 2007); Wall, J. A., Jr, and S. Chan-Serafin, 'Processes in Civil

Case Mediations' (2009) 26(3) *Conflict Resolution Quarterly* 261; Welton, G. L., D. G. Pruitt, and N. B. McGillicuddy, 'The Role of Caucusing in Community Mediation' (1988) 32(1) *The Journal of Conflict Resolution* 181; Wissler, R. L., *Trapping the Data: An Assessment of Domestic Relations Mediation in Maine and Ohio Courts* (Unpublished report, 1999).

¹⁰⁸² Sourdin, T., and T. Matruglio, *Evaluating Mediation – New South Wales Settlement Scheme 2002* (2004) Mediation. Paper 7, available on <<http://www.civiljustice.info/med/7>>; Wissler, R. L., *Trapping the Data: An Assessment of Domestic Relations Mediation in Maine and Ohio Courts* (Unpublished report, 1999); Wissler, R. L., 'Court-Connected Mediation in General Civil Cases: What We Know from Empirical Research' (2002) 17(3) *Ohio State Journal on Dispute Resolution* 641.

¹⁰⁸³ Burrell, N. A., W. A. Donohue, and M. Allen, 'The Impact of Disputants' Expectations on Mediation, Testing an Interventionist Model' (1990) Fall 1990 *Human Communication Research* 104; Hiltrop, J. M., 'Factors Associated with Successful Labor Mediation' in K. Kressel and D. G. Pruitt (eds), *Mediation Research: The Process and Effectiveness of Third-Party Intervention* (Jossey-Bass, USA, 1989); Kressel, K., 'How Do Mediators Decide What To Do? Implicit Schemas of Practice and Mediator Decisionmaking' (2013) 28(3) *Ohio State Journal on Dispute Resolution* 709; Kressel, K., E. A. Frontera, S. Forlenza, F. Butler, and L. Fish, 'The Settlement-Oriented vs the Problem-Solving Style' (1994) 50(1) *Journal of Social Issues* 67; Kressel, K., T. Henderson, W. Reich, and C. Cohen, 'Multi-Dimensional Analysis of Conflict Mediator Style' (2012) 30(2) *Conflict Resolution Quarterly* 135; Shapiro, D., R. Drieghe, and J. Brett, 'Mediator Behavior and the Outcomes of Mediation' (1985) 41(2) *Journal of Social Issues* 101; Sourdin, T., *Mediation in the Supreme and County Courts of Victoria* (Report prepared for the Department of Justice, Victoria, Australia, April 2009), available on <<http://www.civiljustice.info/adreval/1/>>; Sourdin, T., and T. Matruglio, *Evaluating Mediation – New South Wales Settlement Scheme 2002* (2004) Mediation. Paper 7, available on <<http://www.civiljustice.info/med/7>>; Swaab, R. I., *Face First: Pre-Mediation Caucus and Face in Employment Disputes* (Presentation, Annual Association of Conflict Management Conference, June 2009); Swaab, R. I., and J. Brett, *Caucus with Care: The Impact of Pre-Mediation Caucuses on Conflict Resolution* (Meetings Paper, International Association of Conflict Management, 2007); Wall, J. A., Jr, and D. E. Rude, 'The Judge as a Mediator' (1991) 76(1) *Journal of Applied Psychology* 54; Wissler, R. L., *Trapping the Data: An Assessment of Domestic Relations Mediation in Maine and Ohio Courts* (Unpublished report, 1999); Wissler, R. L., 'Court-Connected Mediation in General Civil Cases: What We Know from Empirical Research' (2002) 17(3) *Ohio State Journal on Dispute Resolution* 641.

about: mediators (n = 19);¹⁰⁸⁴ disputants (n = 12);¹⁰⁸⁵ the dispute (0 studies); and about the mediation process (n = 9).¹⁰⁸⁶ Data is collected from legal advisers about: mediators (n = 5);¹⁰⁸⁷ disputants (n = 2);¹⁰⁸⁸ the dispute (n = 2);¹⁰⁸⁹ and about the mediation process (n = 4 studies).¹⁰⁹⁰

¹⁰⁸⁴ Burrell, N. A., W. A. Donohue, and M. Allen, 'The Impact of Disputants' Expectations on Mediation, Testing an Interventionist Model' (1990) Fall 1990 *Human Communication Research* 104; Gale, J., R. L. Mowery, M. S. Herrman, and N. L. Hollett, 'Considering Effective Divorce Mediation: Three Potential Factors' (2002) 19(4) *Conflict Resolution Quarterly* 389; Kressel, K., 'How Do Mediators Decide What To Do? Implicit Schemas of Practice and Mediator Decisionmaking' (2013) 28(3) *Ohio State Journal on Dispute Resolution* 709; Kressel, K., E. A. Frontera, S. Forlenza, F. Butler, and L. Fish, 'The Settlement-Oriented vs the Problem-Solving Style' (1994) 50(1) *Journal of Social Issues* 67; Kressel, K., T. Henderson, W. Reich, and C. Cohen, 'Multi-Dimensional Analysis of Conflict Mediator Style' (2012) 30(2) *Conflict Resolution Quarterly* 135; Jones, T. S., 'Lag Sequential Analyses of Mediator-Spouse and Husband-Wife Interaction in Successful and Unsuccessful Divorce Mediation in M. A. Rahim (ed), *Managing Conflict: An Interdisciplinary Approach* (Praeger, USA, 1989); McGillicuddy, N. B., G. L. Welton, and D. G. Pruitt, 'Third-Party Intervention: A Field Experiment Comparing Three Different Models' (1987) 53(1) *Journal of Personality and Social Psychology* 104; Peebles, R., C. Harris, and T. Metzloff, 'Following the Script: An Empirical Analysis of Court-Ordered Mediation of Medical Malpractice Cases' (2007) 2007(1) *Journal of Dispute Resolution* 101; Pruitt, D. G., W. R. Fry, L. Castrianno, J. Zubeck, G. L. Welton, N. B. McGillicuddy, and C. Ippolito, 'The Process of Mediation: Caucusing, Control, and Problem Solving' in M. A. Rahim (ed), *Managing Conflict: An Interdisciplinary Approach* (Praeger, USA, 1989); Pruitt, D. G., R. S. Peirce, N. B. McGillicuddy, G. L. Welton, and L. Castrianno, 'Long-Term Success in Mediation' (1993) 17(3) *Law and Human Behavior* 313; Slaikeu, K. A., R. Culler, J. Pearson, and N. Thoennes, 'Process and Outcome in Divorce Mediation' (1985) 10 *Mediation Quarterly* 55; Vanderkooi, L., and J. Pearson, 'Mediating Divorce Disputes: Mediator Behaviors, Styles and Roles' (1983) 32(4) *Family Relations* 557; Wall, J. A., Jr, and S. Chan-Serafin, 'Processes in Civil Case Mediations' (2009) 26(3) *Conflict Resolution Quarterly* 261; Wall, J. A., Jr, and S. Chan-Serafin, 'Do Mediators Walk Their Talk in Civil Cases?' (2010) 28(1) *Conflict Resolution Quarterly* 3; Welton, G. L., and D. G. Pruitt, 'The Mediation Process: The Effects of Mediator Bias and Disputant Power' (1987) 13(1) *Personality and Social Psychology Bulletin* 123; Welton, G. L., D. G. Pruitt, and N. B. McGillicuddy, 'The Role of Caucusing in Community Mediation' (1988) 32(1) *The Journal of Conflict Resolution* 181; Welton, G. L., D. G. Pruitt, N. B. McGillicuddy, C. A. Ippolito, and J. M. Zubeck, 'Antecedents and Characteristics of Caucusing in Community Mediation' (1992) 3(4) *International Journal of Conflict Management* 303; Zubeck, J. M., D. G. Pruitt, R. S. Peirce, N. B. McGillicuddy, and H. Syna, 'Disputant and Mediator Behaviors Affecting Short-Term Success in Mediation' (1992) 36(3) *Journal of Conflict Resolution* 546.

¹⁰⁸⁵ Gale, J., R. L. Mowery, M. S. Herrman, and N. L. Hollett, 'Considering Effective Divorce Mediation: Three Potential Factors' (2002) 19(4) *Conflict Resolution Quarterly* 389; Hiltrop, J. M., 'Factors Associated with Successful Labor Mediation' in K. Kressel and D. G. Pruitt (eds), *Mediation Research: The Process and Effectiveness of Third-Party Intervention* (Jossey-Bass, USA, 1989); Jones, T. S., 'Lag Sequential Analyses of Mediator-Spouse and Husband-Wife Interaction in Successful and Unsuccessful Divorce Mediation in M. A. Rahim (ed), *Managing Conflict: An Interdisciplinary Approach* (Praeger, USA, 1989); McGillicuddy, N. B., G. L. Welton, and D. G. Pruitt, 'Third-Party Intervention: A Field Experiment Comparing Three Different Models' (1987) 53(1) *Journal of Personality and Social Psychology* 104; Pruitt, D. G., W. R. Fry, L. Castrianno, J. Zubeck, G. L. Welton, N. B. McGillicuddy, and C. Ippolito, 'The Process of Mediation: Caucusing, Control, and Problem Solving' in M. A. Rahim (ed), *Managing Conflict: An Interdisciplinary Approach* (Praeger, USA, 1989); Pruitt, D. G., R. S. Peirce, N. B. McGillicuddy, G. L. Welton, and L. Castrianno, 'Long-Term Success in Mediation' (1993) 17(3) *Law and Human Behavior* 313; Slaikeu, K. A., R. Culler, J. Pearson, and N. Thoennes, 'Process and Outcome in Divorce Mediation' (1985) 10 *Mediation Quarterly* 55; Wall, J. A., Jr, and S. Chan-Serafin, 'Processes in Civil Case Mediations' (2009) 26(3) *Conflict Resolution Quarterly* 261; Welton, G. L., and D. G. Pruitt, 'The Mediation Process: The Effects of Mediator Bias and Disputant Power' (1987) 13(1) *Personality and Social Psychology Bulletin* 123; Welton, G. L., D. G. Pruitt, and N. B. McGillicuddy, 'The Role of Caucusing in Community Mediation' (1988) 32(1) *The Journal of Conflict Resolution* 181; Welton, G. L., D. G. Pruitt, N. B. McGillicuddy, C. A. Ippolito, and J. M. Zubeck, 'Antecedents and Characteristics of Caucusing in Community

The next sections provide more detail about the analysis data.

In the 47 studies, the researchers describe obtaining information about five dimensions of the mediation process, including the process itself.

- I. In-mediation behaviour of mediator participants;
- II. In-mediation behaviour of non-mediator participants;
- III. The mediation process (including any outcomes achieved);
- IV. Participant perceptions of fairness and satisfaction; and

Mediation' (1992) 3(4) *International Journal of Conflict Management* 303; Zubeck, J. M., D. G. Pruitt, R. S. Peirce, N. B. McGillicuddy, and H. Syna, 'Disputant and Mediator Behaviors Affecting Short-Term Success in Mediation' (1992) 36(3) *Journal of Conflict Resolution* 546.

¹⁰⁸⁶ McGillicuddy, N. B., G. L. Welton, and D. G. Pruitt, 'Third-Party Intervention: A Field Experiment Comparing Three Different Models' (1987) 53(1) *Journal of Personality and Social Psychology* 104; Pruitt, D. G., W. R. Fry, L. Castrianno, J. Zubeck, G. L. Welton, N. B. McGillicuddy, and C. Ippolito, 'The Process of Mediation: Caucusing, Control, and Problem Solving' in M. A. Rahim (ed), *Managing Conflict: An Interdisciplinary Approach* (Praeger, USA, 1989); Pruitt, D. G., R. S. Peirce, N. B. McGillicuddy, G. L. Welton, and L. Castrianno, 'Long-Term Success in Mediation' (1993) 17(3) *Law and Human Behavior* 313; Vanderkooi, L., and J. Pearson, 'Mediating Divorce Disputes: Mediator Behaviors, Styles and Roles' (1983) 32(4) *Family Relations* 557; Wall, J. A., Jr, and S. Chan-Serafin, 'Do Mediators Walk Their Talk in Civil Cases?' (2010) 28(1) *Conflict Resolution Quarterly* 3; Welton, G. L., D. G. Pruitt, and N. B. McGillicuddy, 'The Role of Caucusing in Community Mediation' (1988) 32(1) *The Journal of Conflict Resolution* 181; Welton, G. L., D. G. Pruitt, N. B. McGillicuddy, C. A. Ippolito, and J. M. Zubeck, 'Antecedents and Characteristics of Caucusing in Community Mediation' (1992) 3(4) *International Journal of Conflict Management* 303; Zubeck, J. M., D. G. Pruitt, R. S. Peirce, N. B. McGillicuddy, and H. Syna, 'Disputant and Mediator Behaviors Affecting Short-Term Success in Mediation' (1992) 36(3) *Journal of Conflict Resolution* 546.

¹⁰⁸⁷ Goldberg, S. B., and M. L. Shaw, 'Further Investigation into the Secrets of Successful and Unsuccessful Mediators' (2008) 26(8) *Alternatives to the High Cost of Litigation* 149; Henderson, D. A., 'Mediation Success: An Empirical Analysis' (1996) 11(1) *Ohio State Journal on Dispute Resolution* 105; Sourdin, T., *Exploring Pre-Action Requirements: Resolving Disputes Outside Courts* (ACJI, Monash University, October 2012); Wissler, R. L., 'Court-Connected Mediation in General Civil Cases: What We Know from Empirical Research' (2002) 17(3) *Ohio State Journal on Dispute Resolution* 641; Woodward, J. G., 'Settlement Week: Measuring the Promise' (1990) 11 *Northern Illinois University Law Review* 1.

¹⁰⁸⁸ Sourdin, T., *Exploring Pre-Action Requirements: Resolving Disputes Outside Courts* (ACJI, Monash University, October 2012); Woodward, J. G., 'Settlement Week: Measuring the Promise' (1990) 11 *Northern Illinois University Law Review* 1.

¹⁰⁸⁹ Wissler, R. L., 'Court-Connected Mediation in General Civil Cases: What We Know from Empirical Research' (2002) 17(3) *Ohio State Journal on Dispute Resolution* 641; Woodward, J. G., 'Settlement Week: Measuring the Promise' (1990) 11 *Northern Illinois University Law Review* 1.

¹⁰⁹⁰ Henderson, D. A., 'Mediation Success: An Empirical Analysis' (1996) 11(1) *Ohio State Journal on Dispute Resolution* 105; Sourdin, T., *Exploring Pre-Action Requirements: Resolving Disputes Outside Courts* (ACJI, Monash University, October 2012); Wissler, R. L., 'Court-Connected Mediation in General Civil Cases: What We Know from Empirical Research' (2002) 17(3) *Ohio State Journal on Dispute Resolution* 641; Woodward, J. G., 'Settlement Week: Measuring the Promise' (1990) 11 *Northern Illinois University Law Review* 1.

V. The presenting dispute.

I. *In-mediation behaviour: mediator participants*¹⁰⁹¹

Of the 47 studies, 96% (n = 45) report collecting research data about the in-mediation behaviour of the mediator. Two studies do not report collecting this data.¹⁰⁹²

- i. 69% (n = 31 of 45) report collecting the research data from non-mediator participants (disputants and disputant advisers) using self-administered written surveys¹⁰⁹³

¹⁰⁹¹ ie what mediators said and/or did during the mediation.

¹⁰⁹² Sourdin, T., *Dispute Resolution Processes for Credit Consumers* (Project Report, Conflict Resolution Research Centre, La Trobe University, 2007); Thoennes, N. A., and J. Pearson, 'Predicting Outcomes in Divorce Mediation: The Influence of People and Process' (1985) 41(2) *Journal of Social Issues* 115.

¹⁰⁹³ Alberts, J. K., B. L. Heisterkamp, and R. M. McPhee, 'Disputant Perceptions of and Satisfaction with a Community Mediation Program' (2005) 16(3) *The International Journal of Conflict Management* 218; Bingham, L. B., 'Transformative Mediation in the United States Postal Service' (2012) 5(4) *Negotiation and Conflict Management Research* 354; Burrell, N. A., W. A. Donohue, and M. Allen, 'The Impact of Disputants' Expectations on Mediation, Testing an Interventionist Model' (1990) Fall 1990 *Human Communication Research* 104; Diltz, D. A. and A. Karim, 'The Effect of Mediators' Qualities and Strategies on Mediation Outcomes' (1990) 45(1) *Relations Industrielles/Industrial Relations* 22; Gale, J., R. L. Mowery, M. S. Herrman, and N. L. Hollett, 'Considering Effective Divorce Mediation: Three Potential Factors' (2002) 19(4) *Conflict Resolution Quarterly* 389; Goldberg, S. B., and M. L. Shaw, 'Further Investigation into the Secrets of Successful and Unsuccessful Mediators' (2008) 26(8) *Alternatives to the High Cost of Litigation* 149; Henderson, D. A., 'Mediation Success: An Empirical Analysis' (1996) 11(1) *Ohio State Journal on Dispute Resolution* 105; Hiltrop, J. M., 'Factors Associated with Successful Labor Mediation' in K. Kressel and D. G. Pruitt (eds), *Mediation Research: The Process and Effectiveness of Third-Party Intervention* (Jossey-Bass, USA, 1989); Karim, A. and D. Diltz, 'Determinants of Mediation Success in the Iowa Public Sector' (1990) 19(2) *Journal of Collective Negotiations* 129; Karim, A. and R. Peggnetter, 'Mediator Strategies and Qualities and Mediation Effectiveness' (1983) 22(1) *Industrial Relations* 105; Kimsey, W. D., R. M. Fuller, A. J. Bell, and B. C. McKinney, 'The Impact of Mediator Strategic Choices: An Experimental Study' (1994) 12(1) *Mediation Quarterly* 89; Kimsey, W. D., R. M. Fuller, and B. C. McKinney, 'Mediator Listening, Dispute Reframing, and Mediation Outcome: A Pilot Study' (1993) 7(1) *Journal of the International Listening Association* 74; Kochan, T. A., and T. Jick, 'The Public Sector Mediation Process: A Theory and Empirical Examination' (1978) 22(2) *The Journal of Conflict Resolution* 209; Kressel, K., 'How Do Mediators Decide What To Do? Implicit Schemas of Practice and Mediator Decisionmaking' (2013) 28(3) *Ohio State Journal on Dispute Resolution* 709; Kressel, K., T. Henderson, W. Reich, and C. Cohen, 'Multi-Dimensional Analysis of Conflict Mediator Style' (2012) 30(2) *Conflict Resolution Quarterly* 135; McGillicuddy, N. B., G. L. Welton, and D. G. Pruitt, 'Third-Party Intervention: A Field Experiment Comparing Three Different Models' (1987) 53(1) *Journal of Personality and Social Psychology* 104; Posthuma, R. A., A. Richard, J. B. Dworkin, and M. S. Swift, 'Mediator Tactics and Sources of Conflict: Facilitating and Inhibiting Effects' (2002) 41(1) *Industrial Relations* 94; Pruitt, D. G., W. R. Fry, L. Castrianno, J. Zubeck, G. L. Welton, N. B. McGillicuddy, and C. Ippolito, 'The Process of Mediation: Caucusing, Control, and Problem Solving' in M. A. Rahim (ed), *Managing Conflict: An Interdisciplinary Approach* (Praeger, USA, 1989); Pruitt, D. G., R. S. Peirce, N. B. McGillicuddy, G. L. Welton, and L. Castrianno, 'Long-Term Success in Mediation' (1993) 17(3) *Law and Human Behavior* 313; Sourdin, T., *Mediation in the Supreme and County Courts of Victoria* (Report prepared for the Department of Justice, Victoria, Australia, April 2009), available on <<http://www.civiljustice.info/adreval/1/>>; Sourdin, T., *Exploring Pre-Action Requirements: Resolving Disputes Outside Courts* (ACJI, Monash University, October 2012); Sourdin, T., and T. Matruglio, *Evaluating Mediation – New South Wales Settlement Scheme 2002* (2004) *Mediation*. Paper 7, available on

a. Research data collected from disputants (n = 27 studies);¹⁰⁹⁴

<<http://www.civiljustice.info/med/7>>; Wall, J. A., Jr, and S. Chan-Serafin, 'Processes in Civil Case Mediations' (2009) 26(3) *Conflict Resolution Quarterly* 261; Welton, G. L., and D. G. Pruitt, 'The Mediation Process: The Effects of Mediator Bias and Disputant Power' (1987) 13(1) *Personality and Social Psychology Bulletin* 123; Welton, G. L., D. G. Pruitt, and N. B. McGillicuddy, 'The Role of Caucusing in Community Mediation' (1988) 32(1) *The Journal of Conflict Resolution* 181; Welton, G. L., D. G. Pruitt, N. B. McGillicuddy, C. A. Ippolito, and J. M. Zubeck, 'Antecedents and Characteristics of Caucusing in Community Mediation' (1992) 3(4) *International Journal of Conflict Management* 303; Wissler, R. L., 'Mediation and Adjudication in Small Claims Court: The Effects of Process and Case Characteristics' (1995) 29(2) *Law & Society Review* 323; Wissler, R. L., *Trapping the Data: An Assessment of Domestic Relations Mediation in Maine and Ohio Courts* (Unpublished report, 1999); Wissler, R. L., 'Court-Connected Mediation in General Civil Cases: What We Know from Empirical Research' (2002) 17(3) *Ohio State Journal on Dispute Resolution* 641; Zubeck, J. M., D. G. Pruitt, R. S. Peirce, N. B. McGillicuddy, and H. Syna, 'Disputant and Mediator Behaviors Affecting Short-Term Success in Mediation' (1992) 36(3) *Journal of Conflict Resolution* 546.

¹⁰⁹⁴ Alberts, J. K., B. L. Heisterkamp, and R. M. McPhee, 'Disputant Perceptions of and Satisfaction with a Community Mediation Program' (2005) 16(3) *The International Journal of Conflict Management* 218; Bingham, L. B., 'Transformative Mediation in the United States Postal Service' (2012) 5(4) *Negotiation and Conflict Management Research* 354; Burrell, N. A., W. A. Donohue, and M. Allen, 'The Impact of Disputants' Expectations on Mediation, Testing an Interventionist Model' (1990) Fall 1990 *Human Communication Research* 104; Diltz, D. A. and A. Karim, 'The Effect of Mediators' Qualities and Strategies on Mediation Outcomes' (1990) 45(1) *Relations Industrielles/Industrial Relations* 22; Gale, J., R. L. Mowery, M. S. Herrman, and N. L. Hollett, 'Considering Effective Divorce Mediation: Three Potential Factors' (2002) 19(4) *Conflict Resolution Quarterly* 389; Hiltrop, J. M., 'Factors Associated with Successful Labor Mediation' in K. Kressel and D. G. Pruitt (eds), *Mediation Research: The Process and Effectiveness of Third-Party Intervention* (Jossey-Bass, USA, 1989); Karim, A. and D. Diltz, 'Determinants of Mediation Success in the Iowa Public Sector' (1990) 19(2) *Journal of Collective Negotiations* 129; Karim, A. and R. Pegnetter, 'Mediator Strategies and Qualities and Mediation Effectiveness' (1983) 22(1) *Industrial Relations* 105; Kimsey, W. D., R. M. Fuller, A. J. Bell, and B. C. McKinney, 'The Impact of Mediator Strategic Choices: An Experimental Study' (1994) 12(1) *Mediation Quarterly* 89; Kimsey, W. D., R. M. Fuller, and B. C. McKinney, 'Mediator Listening, Dispute Reframing, and Mediation Outcome: A Pilot Study' (1993) 7(1) *Journal of the International Listening Association* 74; Kochan, T. A., and T. Jick, 'The Public Sector Mediation Process: A Theory and Empirical Examination' (1978) 22(2) *The Journal of Conflict Resolution* 209; Kressel, K., 'How Do Mediators Decide What To Do? Implicit Schemas of Practice and Mediator Decisionmaking' (2013) 28(3) *Ohio State Journal on Dispute Resolution* 709; Kressel, K., T. Henderson, W. Reich, and C. Cohen, 'Multi-Dimensional Analysis of Conflict Mediator Style' (2012) 30(2) *Conflict Resolution Quarterly* 135; McGillicuddy, N. B., G. L. Welton, and D. G. Pruitt, 'Third-Party Intervention: A Field Experiment Comparing Three Different Models' (1987) 53(1) *Journal of Personality and Social Psychology* 104; Posthuma, R. A., A. Richard, J. B. Dworkin, and M. S. Swift, 'Mediator Tactics and Sources of Conflict: Facilitating and Inhibiting Effects' (2002) 41(1) *Industrial Relations* 94; Pruitt, D. G., W. R. Fry, L. Castrianno, J. Zubeck, G. L. Welton, N. B. McGillicuddy, and C. Ippolito, 'The Process of Mediation: Caucusing, Control, and Problem Solving' in M. A. Rahim (ed), *Managing Conflict: An Interdisciplinary Approach* (Praeger, USA, 1989); Pruitt, D. G., R. S. Peirce, N. B. McGillicuddy, G. L. Welton, and L. Castrianno, 'Long-Term Success in Mediation' (1993) 17(3) *Law and Human Behavior* 313; Sourdin, T., *Mediation in the Supreme and County Courts of Victoria* (Report prepared for the Department of Justice, Victoria, Australia, April 2009), available on <<http://www.civiljustice.info/adreval/1/>>; Sourdin, T., and T. Matruglio, *Evaluating Mediation – New South Wales Settlement Scheme 2002* (2004) *Mediation*. Paper 7, available on <<http://www.civiljustice.info/med/7>>; Wall, J. A., Jr, and S. Chan-Serafin, 'Processes in Civil Case Mediations' (2009) 26(3) *Conflict Resolution Quarterly* 261; Welton, G. L., and D. G. Pruitt, 'The Mediation Process: The Effects of Mediator Bias and Disputant Power' (1987) 13(1) *Personality and Social Psychology Bulletin* 123; Welton, G. L., D. G. Pruitt, and N. B. McGillicuddy, 'The Role of Caucusing in Community Mediation' (1988) 32(1) *The Journal of Conflict Resolution* 181; Welton, G. L., D. G. Pruitt, N. B. McGillicuddy, C. A. Ippolito, and J. M. Zubeck, 'Antecedents and Characteristics of Caucusing in Community Mediation' (1992) 3(4) *International Journal of Conflict Management* 303; Wissler, R. L., 'Mediation and Adjudication in Small Claims Court: The Effects of Process and Case Characteristics' (1995) 29(2) *Law & Society Review* 323; Wissler, R. L., *Trapping the Data: An Assessment*

- b. Research data collected from disputant advisers (n = 2 studies);¹⁰⁹⁵ and
 - c. Research data collected from disputants and from disputant advisers (n = 1 study).¹⁰⁹⁶
- ii. 58% (n = 26 of 45) report collecting the research data from mediator participants using surveys, interviews, and focus groups¹⁰⁹⁷

of Domestic Relations Mediation in Maine and Ohio Courts (Unpublished report, 1999); Wissler, R. L., 'Court-Connected Mediation in General Civil Cases: What We Know from Empirical Research' (2002) 17(3) *Ohio State Journal on Dispute Resolution* 641; Zubeck, J. M., D. G. Pruitt, R. S. Peirce, N. B. McGillicuddy, and H. Syna, 'Disputant and Mediator Behaviors Affecting Short-Term Success in Mediation' (1992) 36(3) *Journal of Conflict Resolution* 546.

¹⁰⁹⁵ Goldberg, S. B., and M. L. Shaw, 'Further Investigation into the Secrets of Successful and Unsuccessful Mediators' (2008) 26(8) *Alternatives to the High Cost of Litigation* 149; Henderson 2009.

¹⁰⁹⁶ Sourdin, T., *Exploring Pre-Action Requirements: Resolving Disputes Outside Courts* (ACJI, Monash University, October 2012).

¹⁰⁹⁷ Bingham, L. B., 'Transformative Mediation in the United States Postal Service' (2012) 5(4) *Negotiation and Conflict Management Research* 354; Burrell, N. A., W. A. Donohue, and M. Allen, 'The Impact of Disputants' Expectations on Mediation, Testing an Interventionist Model' (1990) Fall 1990 *Human Communication Research* 104; Carnevale, P. J. D., and R. Pegnetter, 'The Selection of Mediator Tactics in Public Sector Disputes: A Contingency Analysis' (1985) 41(2) *Journal of Social Issues* 2; Gale, J., R. L. Mowery, M. S. Herrman, and N. L. Hollett, 'Considering Effective Divorce Mediation: Three Potential Factors' (2002) 19(4) *Conflict Resolution Quarterly* 389; Hiltrop, J. M., 'Factors Associated with Successful Labor Mediation' in K. Kressel and D. G. Pruitt (eds), *Mediation Research: The Process and Effectiveness of Third-Party Intervention* (Jossey-Bass, USA, 1989); Kressel, K., 'How Do Mediators Decide What To Do? Implicit Schemas of Practice and Mediator Decisionmaking' (2013) 28(3) *Ohio State Journal on Dispute Resolution* 709; Kressel, K., E. A. Frontera, S. Forlenza, F. Butler, and L. Fish, 'The Settlement-Orientation vs the Problem-Solving Style' (1994) 50(1) *Journal of Social Issues* 67; Kressel, K., T. Henderson, W. Reich, and C. Cohen, 'Multi-Dimensional Analysis of Conflict Mediator Style' (2012) 30(2) *Conflict Resolution Quarterly* 135; Mareschal, P. M., 'What Makes Mediation Work? Perspectives on Resolving Disputes' (2005) 44(3) *Industrial Relations* 509; McDermott, E. P., and R. Obar, 'What's Going On' in Mediation: An Empirical Analysis of the Influence of a Mediator's Style on Party Satisfaction and Monetary Benefit' (2004) 9 *Harvard Negotiation Law Review* 75; McEwen, C. A., *An Evaluation of the ADR Pilot Project: Final Report 1* (Unpublished report, 1992); McGillicuddy, N. B., G. L. Welton, and D. G. Pruitt, 'Third-Party Intervention: A Field Experiment Comparing Three Different Models' (1987) 53(1) *Journal of Personality and Social Psychology* 104; Pruitt, D. G., R. S. Peirce, N. B. McGillicuddy, G. L. Welton, and L. Castrianno, 'Long-Term Success in Mediation' (1993) 17(3) *Law and Human Behavior* 313; Shapiro, D., R. Drieghe, and J. Brett, 'Mediator Behavior and the Outcomes of Mediation' (1985) 41(2) *Journal of Social Issues* 101; Sourdin, T., and T. Matruggio, *Evaluating Mediation – New South Wales Settlement Scheme 2002* (2004) *Mediation*. Paper 7, available on <<http://www.civiljustice.info/med/7>>; Swaab, R. I., *Face First: Pre-Mediation Caucus and Face in Employment Disputes* (Presentation, Annual Association of Conflict Management Conference, June 2009); Swaab, R. I., and J. Brett, *Caucus with Care: The Impact of Pre-Mediation Caucuses on Conflict Resolution* (Meetings Paper, International Association of Conflict Management, 2007); Vanderkooi, L., and J. Pearson, 'Mediating Divorce Disputes: Mediator Behaviors, Styles and Roles' (1983) 32(4) *Family Relations* 557; Wall, J. A., Jr, and S. Chan-Serafin, 'Processes in Civil Case Mediations' (2009) 26(3) *Conflict Resolution Quarterly* 261; Welton, G. L., D. G. Pruitt, and N. B. McGillicuddy, 'The Role of Caucusing in Community Mediation' (1988) 32(1) *The Journal of Conflict Resolution* 181; Wissler, R. L., *Trapping the Data: An Assessment of Domestic Relations Mediation in Maine and Ohio Courts* (Unpublished report, 1999).

- a. Research data collected from mediator self-administered surveys (ie written self-reports) (n = 13 studies);¹⁰⁹⁸
- b. Research data collected during mediator interviews (ie oral self-reports) (n = 6 studies);¹⁰⁹⁹
- c. Research data collected during mediator interviews and from mediator self-administered surveys (ie written and oral self-reports) (n = 5 studies);¹¹⁰⁰ and

¹⁰⁹⁸ Bingham, L. B., 'Transformative Mediation in the United States Postal Service' (2012) 5(4) *Negotiation and Conflict Management Research* 354; Burrell, N. A., W. A. Donohue, and M. Allen, 'The Impact of Disputants' Expectations on Mediation, Testing an Interventionist Model' (1990) Fall 1990 *Human Communication Research* 104; Gale, J., R. L. Mowery, M. S. Herrman, and N. L. Hollett, 'Considering Effective Divorce Mediation: Three Potential Factors' (2002) 19(4) *Conflict Resolution Quarterly* 389; Mareschal, P. M., 'What Makes Mediation Work? Perspectives on Resolving Disputes' (2005) 44(3) *Industrial Relations* 509; McDermott, E. P., and R. Obar, "'What's Going On" in Mediation: An Empirical Analysis of the Influence of a Mediator's Style on Party Satisfaction and Monetary Benefit' (2004) 9 *Harvard Negotiation Law Review* 75; McEwen, C. A., *An Evaluation of the ADR Pilot Project: Final Report 1* (Unpublished report, 1992); McGillicuddy, N. B., G. L. Welton, and D. G. Pruitt, 'Third-Party Intervention: A Field Experiment Comparing Three Different Models' (1987) 53(1) *Journal of Personality and Social Psychology* 104; Shapiro, D., R. Drieghe, and J. Brett, 'Mediator Behavior and the Outcomes of Mediation' (1985) 41(2) *Journal of Social Issues* 101; Sourdin, T., and T. Matruglio, *Evaluating Mediation – New South Wales Settlement Scheme 2002* (2004) *Mediation*. Paper 7, available on <<http://www.civiljustice.info/med/7>>; Swaab, R. I., and J. Brett, *Caucus with Care: The Impact of Pre-Mediation Caucuses on Conflict Resolution* (Meetings Paper, International Association of Conflict Management, 2007); Wall, J. A., Jr, and D. E. Rude, 'The Judge as a Mediator' (1991) 76(1) *Journal of Applied Psychology* 54; Welton, G. L., D. G. Pruitt, and N. B. McGillicuddy, 'The Role of Caucusing in Community Mediation' (1988) 32(1) *The Journal of Conflict Resolution* 181; Wissler, R. L., *Trapping the Data: An Assessment of Domestic Relations Mediation in Maine and Ohio Courts* (Unpublished report, 1999).

¹⁰⁹⁹ Carnevale, P. J. D., and R. Pegnetter, 'The Selection of Mediator Tactics in Public Sector Disputes: A Contingency Analysis' (1985) 41(2) *Journal of Social Issues* 2; Hiltrop, J. M., 'Factors Associated with Successful Labor Mediation' in K. Kressel and D. G. Pruitt (eds), *Mediation Research: The Process and Effectiveness of Third-Party Intervention* (Jossey-Bass, USA, 1989) (study 1); Kochan, T. A., and T. Jick, 'The Public Sector Mediation Process: A Theory and Empirical Examination' (1978) 22(2) *The Journal of Conflict Resolution* 209; Pruitt, D. G., W. R. Fry, L. Castrianno, J. Zubeck, G. L. Welton, N. B. McGillicuddy, and C. Ippolito, 'The Process of Mediation: Caucusing, Control, and Problem Solving' in M. A. Rahim (ed), *Managing Conflict: An Interdisciplinary Approach* (Praeger, USA, 1989); Pruitt, D. G., R. S. Peirce, N. B. McGillicuddy, G. L. Welton, and L. Castrianno, 'Long-Term Success in Mediation' (1993) 17(3) *Law and Human Behavior* 313; Wall, J. A., Jr, and S. Chan-Serafin, 'Processes in Civil Case Mediations' (2009) 26(3) *Conflict Resolution Quarterly* 261.

¹¹⁰⁰ Kressel, K., 'How Do Mediators Decide What To Do? Implicit Schemas of Practice and Mediator Decisionmaking' (2013) 28(3) *Ohio State Journal on Dispute Resolution* 709; Kressel, K., E. A. Frontera, S. Forlenza, F. Butler, and L. Fish, 'The Settlement-Orientation vs the Problem-Solving Style' (1994) 50(1) *Journal of Social Issues* 67; Kressel, K., T. Henderson, W. Reich, and C. Cohen, 'Multi-Dimensional Analysis of Conflict Mediator Style' (2012) 30(2) *Conflict Resolution Quarterly* 135; Swaab, R. I., *Face First: Pre-Mediation Caucus and Face in Employment Disputes* (Presentation, Annual Association of Conflict Management Conference, June 2009); Vanderkooi, L. and J. Pearson, 'Mediating Divorce Disputes: Mediator Behaviors, Styles and Roles' (1983) 32(4) *Family Relations* 557.

- d. Research data collected during mediator focus groups (ie collective oral self-reports) (n = 2 studies).¹¹⁰¹
- iii. 37.7% (n = 17 of 45 studies) report collecting the research data from observational reports.¹¹⁰²

¹¹⁰¹ Sourdin, T., *Mediation in the Supreme and County Courts of Victoria* (Report prepared for the Department of Justice, Victoria, Australia, April 2009), available on <<http://www.civiljustice.info/adreval/1/>>; Sourdin, T., *Exploring Pre-Action Requirements: Resolving Disputes Outside Courts* (ACJI, Monash University, October 2012).

¹¹⁰² Gale, J., R. L. Mowery, M. S. Herrman, and N. L. Hollett, 'Considering Effective Divorce Mediation: Three Potential Factors' (2002) 19(4) *Conflict Resolution Quarterly* 389; Jones, T. S., 'Lag Sequential Analyses of Mediator-Spouse and Husband-Wife Interaction in Successful and Unsuccessful Divorce Mediation in M. A. Rahim (ed), *Managing Conflict: An Interdisciplinary Approach* (Praeger, USA, 1989); Kressel, K., 'How Do Mediators Decide What To Do? Implicit Schemas of Practice and Mediator Decisionmaking' (2013) 28(3) *Ohio State Journal on Dispute Resolution* 709; Kressel, K., E. A. Frontera, S. Forlenza, F. Butler, and L. Fish, 'The Settlement-Orientation vs the Problem-Solving Style' (1994) 50(1) *Journal of Social Issues* 67; Kressel, K., T. Henderson, W. Reich, and C. Cohen, 'Multi-Dimensional Analysis of Conflict Mediator Style' (2012) 30(2) *Conflict Resolution Quarterly* 135; McGillicuddy, N. B., G. L. Welton, and D. G. Pruitt, 'Third-Party Intervention: A Field Experiment Comparing Three Different Models' (1987) 53(1) *Journal of Personality and Social Psychology* 104; Peeples, R., C. Harris, and T. Metzloff, 'Following the Script: An Empirical Analysis of Court-Ordered Mediation of Medical Malpractice Cases' (2007) 2007(1) *Journal of Dispute Resolution* 101; Pruitt, D. G., W. R. Fry, L. Castrianno, J. Zubeck, G. L. Welton, N. B. McGillicuddy, and C. Ippolito, 'The Process of Mediation: Caucusing, Control, and Problem Solving' in M. A. Rahim (ed), *Managing Conflict: An Interdisciplinary Approach* (Praeger, USA, 1989); Pruitt, D. G., R. S. Peirce, N. B. McGillicuddy, G. L. Welton, and L. Castrianno, 'Long-Term Success in Mediation' (1993) 17(3) *Law and Human Behavior* 313; Slaikeu, K. A., R. Culler, J. Pearson, and N. Thoennes, 'Process and Outcome in Divorce Mediation' (1985) 10 *Mediation Quarterly* 55; Vanderkooi, L., and J. Pearson, 'Mediating Divorce Disputes: Mediator Behaviors, Styles and Roles' (1983) 32(4) *Family Relations* 557; Wall, J. A., Jr, and S. Chan-Serafin, 'Processes in Civil Case Mediations' (2009) 26(3) *Conflict Resolution Quarterly* 261; Wall, J. A., Jr, and S. Chan-Serafin, 'Do Mediators Walk Their Talk in Civil Cases?' (2010) 28(1) *Conflict Resolution Quarterly* 3; Welton, G. L., and D. G. Pruitt, 'The Mediation Process: The Effects of Mediator Bias and Disputant Power' (1987) 13(1) *Personality and Social Psychology Bulletin* 123; Welton, G. L., D. G. Pruitt, and N. B. McGillicuddy, 'The Role of Caucusing in Community Mediation' (1988) 32(1) *The Journal of Conflict Resolution* 181; Welton, G. L., D. G. Pruitt, N. B. McGillicuddy, C. A. Ippolito, and J. M. Zubeck, 'Antecedents and Characteristics of Caucusing in Community Mediation' (1992) 3(4) *International Journal of Conflict Management* 303; Zubeck, J. M., D. G. Pruitt, R. S. Peirce, N. B. McGillicuddy, and H. Syna, 'Disputant and Mediator Behaviors Affecting Short-Term Success in Mediation' (1992) 36(3) *Journal of Conflict Resolution* 546.

Of the 17 studies that report collecting research data using observations, nine describe using live observations,¹¹⁰³ three describe using audio-recordings,¹¹⁰⁴ and three describe using video-recordings.¹¹⁰⁵ Two studies report using both audio-recordings and video-recordings,¹¹⁰⁶ and one study reports using both video-recordings and live observations.¹¹⁰⁷

Three of the selected studies report using observational methods as part of their investigation; however, none of the three reports using the observations to collect research data about any participant's in-mediation behaviour.¹¹⁰⁸ In the three studies, one describes the observational data being used to confirm achievement of a mediated agreement, an outcome

¹¹⁰³ McGillicuddy, N. B., G. L. Welton, and D. G. Pruitt, 'Third-Party Intervention: A Field Experiment Comparing Three Different Models' (1987) 53(1) *Journal of Personality and Social Psychology* 104; Peeples, R., C. Harris, and T. Metzloff, 'Following the Script: An Empirical Analysis of Court-Ordered Mediation of Medical Malpractice Cases' (2007) 2007(1) *Journal of Dispute Resolution* 101; Pruitt, D. G., W. R. Fry, L. Castrianno, J. Zubeck, G. L. Welton, N. B. McGillicuddy, and C. Ippolito, 'The Process of Mediation: Caucusing, Control, and Problem Solving' in M. A. Rahim (ed), *Managing Conflict: An Interdisciplinary Approach* (Praeger, USA, 1989); Pruitt, D. G., R. S. Peirce, N. B. McGillicuddy, G. L. Welton, and L. Castrianno, 'Long-Term Success in Mediation' (1993) 17(3) *Law and Human Behavior* 313; Wall, J. A., Jr, and S. Chan-Serafin, 'Processes in Civil Case Mediations' (2009) 26(3) *Conflict Resolution Quarterly* 261; Wall, J. A., Jr, and S. Chan-Serafin, 'Do Mediators Walk Their Talk in Civil Cases?' (2010) 28(1) *Conflict Resolution Quarterly* 3; Welton, G. L., D. G. Pruitt, and N. B. McGillicuddy, 'The Role of Caucusing in Community Mediation' (1988) 32(1) *The Journal of Conflict Resolution* 181; Welton, G. L., D. G. Pruitt, N. B. McGillicuddy, C. A. Ippolito, and J. M. Zubeck, 'Antecedents and Characteristics of Caucusing in Community Mediation' (1992) 3(4) *International Journal of Conflict Management* 303; Zubeck, J. M., D. G. Pruitt, R. S. Peirce, N. B. McGillicuddy, and H. Syna, 'Disputant and Mediator Behaviors Affecting Short-Term Success in Mediation' (1992) 36(3) *Journal of Conflict Resolution* 546.

¹¹⁰⁴ Jones, T. S., 'Lag Sequential Analyses of Mediator-Spouse and Husband-Wife Interaction in Successful and Unsuccessful Divorce Mediation in M. A. Rahim (ed), *Managing Conflict: An Interdisciplinary Approach* (Praeger, USA, 1989); Slaikeu, K. A., R. Culler, J. Pearson, and N. Thoennes, 'Process and Outcome in Divorce Mediation' (1985) 10 *Mediation Quarterly* 55; Welton, G. L., and D. G. Pruitt, 'The Mediation Process: The Effects of Mediator Bias and Disputant Power' (1987) 13(1) *Personality and Social Psychology Bulletin* 123.

¹¹⁰⁵ Burrell, N. A., W. A. Donohue, and M. Allen, 'The Impact of Disputants' Expectations on Mediation, Testing an Interventionist Model' (1990) Fall 1990 *Human Communication Research* 104; Gale, J., R. L. Mowery, M. S. Herrman, and N. L. Hollett, 'Considering Effective Divorce Mediation: Three Potential Factors' (2002) 19(4) *Conflict Resolution Quarterly* 389; Kressel, K., E. A. Frontera, S. Forlenza, F. Butler, and L. Fish, 'The Settlement-Oriented vs the Problem-Solving Style' (1994) 50(1) *Journal of Social Issues* 67.

¹¹⁰⁶ Kressel, K., 'How Do Mediators Decide What To Do? Implicit Schemas of Practice and Mediator Decisionmaking' (2013) 28(3) *Ohio State Journal on Dispute Resolution* 709; Kressel, K., T. Henderson, W. Reich, and C. Cohen, 'Multi-Dimensional Analysis of Conflict Mediator Style' (2012) 30(2) *Conflict Resolution Quarterly* 135.

¹¹⁰⁷ Vanderkooi, L., and J. Pearson, 'Mediating Divorce Disputes: Mediator Behaviors, Styles and Roles' (1983) 32(4) *Family Relations* 557.

¹¹⁰⁸ Alberts, J. K., B. L. Heisterkamp, and R. M. McPhee, 'Disputant Perceptions of and Satisfaction with a Community Mediation Program' (2005) 16(3) *The International Journal of Conflict Management* 218 (agreement); Bingham, L. B., 'Transformative Mediation in the United States Postal Service' (2012) 5(4) *Negotiation and Conflict Management Research* 354 (checking study suitability); Burrell, N. A., W. A. Donohue, and M. Allen, 'The Impact of Disputants' Expectations on Mediation, Testing an Interventionist Model' (1990) Fall 1990 *Human Communication Research* 104 (agreement).

measure that is included in the data analysis.¹¹⁰⁹ The other two report that the observations were used to confirm mediator practice was compliant with organisational mediation policy,¹¹¹⁰ and to confirm “mediator” skills uptake in preparation for simulated mediations.¹¹¹¹ In neither of the latter two studies, do the researchers report including observational data in their data analysis.¹¹¹²

Of the 17 studies that do collect data about in-mediation behaviour, only two report considering any nonverbal interactions/behaviour.¹¹¹³ Data described in the remaining 15 are reliant on reports of verbal behaviour only (ie notes and transcripts of what was said by the mediator and non-mediator participants).¹¹¹⁴

Of the studies that describe using observational research data, fifteen also describe the application of coding schemes in their data analysis.¹¹¹⁵ A total of 30 studies mention the use of

¹¹⁰⁹ Alberts, J. K., B. L. Heisterkamp, and R. M. McPhee, ‘Disputant Perceptions of and Satisfaction with a Community Mediation Program’ (2005) 16(3) *The International Journal of Conflict Management* 218.

¹¹¹⁰ Bingham, L. B., ‘Transformative Mediation in the United States Postal Service’ (2012) 5(4) *Negotiation and Conflict Management Research* 354.

¹¹¹¹ Burrell, N. A., W. A. Donohue, and M. Allen, ‘The Impact of Disputants’ Expectations on Mediation, Testing an Interventionist Model’ (1990) Fall 1990 *Human Communication Research* 104.

¹¹¹² None of the three considers the potential for recording equipment to have influenced the behaviour of study participants, regardless of the purpose of the recordings.

¹¹¹³ Gale, J., R. L. Mowery, M. S. Herrman, and N. L. Hollett, ‘Considering Effective Divorce Mediation: Three Potential Factors’ (2002) 19(4) *Conflict Resolution Quarterly* 389; Zubeck, J. M., D. G. Pruitt, R. S. Peirce, N. B. McGillicuddy, and H. Syna, ‘Disputant and Mediator Behaviors Affecting Short-Term Success in Mediation’ (1992) 36(3) *Journal of Conflict Resolution* 546.

¹¹¹⁴ A small number of studies mention using audio-recordings during interviews; however, the audio-recordings are not reported as being used for data collection; they are intended to be a back-up to the interviewers’ own records. These recordings are not included in this analysis of observational data collection.

¹¹¹⁵ Jones, T. S., ‘Lag Sequential Analyses of Mediator-Spouse and Husband-Wife Interaction in Successful and Unsuccessful Divorce Mediation in M. A. Rahim (ed), *Managing Conflict: An Interdisciplinary Approach* (Praeger, USA, 1989); Kressel, K., ‘How Do Mediators Decide What To Do? Implicit Schemas of Practice and Mediator Decisionmaking’ (2013) 28(3) *Ohio State Journal on Dispute Resolution* 709; Kressel, K., E. A. Frontera, S. Forlenza, F. Butler, and L. Fish, ‘The Settlement-Oriented vs the Problem-Solving Style’ (1994) 50(1) *Journal of Social Issues* 67; Kressel, K., T. Henderson, W. Reich, and C. Cohen, ‘Multi-Dimensional Analysis of Conflict Mediator Style’ (2012) 30(2) *Conflict Resolution Quarterly* 135; McGillicuddy, N. B., G. L. Welton, and D. G. Pruitt, ‘Third-Party Intervention: A Field Experiment Comparing Three Different Models’ (1987) 53(1) *Journal of Personality and Social Psychology* 104; Peebles, R., C. Harris, and T. Metzloff, ‘Following the Script: An Empirical Analysis of Court-Ordered Mediation of Medical Malpractice Cases’ (2007) 2007(1) *Journal of Dispute Resolution* 101; Pruitt, D. G., W. R. Fry, L. Castrianno, J. Zubeck, G. L. Welton, N. B. McGillicuddy, and C. Ippolito, ‘The Process of Mediation: Caucusing, Control, and Problem Solving’ in M. A. Rahim (ed), *Managing Conflict: An Interdisciplinary Approach* (Praeger, USA, 1989); Pruitt, D. G., R. S. Peirce, N. B. McGillicuddy, G. L. Welton, and L. Castrianno, ‘Long-Term Success in Mediation’ (1993) 17(3) *Law and Human Behavior* 313; Slaikeu, K. A., R. Culler, J. Pearson, and N. Thoennes, ‘Process and Outcome in Divorce Mediation’ (1985) 10 *Mediation Quarterly* 55; Wall, J. A., Jr, and S. Chan-Serafin, ‘Processes in Civil Case Mediations’ (2009) 26(3)

coding schemes within their data analysis.¹¹¹⁶ In the context of observational reporting, the reliance on verbal exchanges only may derive from the high use of coding schemes for the preparation of

Conflict Resolution Quarterly 261; Wall, J. A., Jr, and S. Chan-Serafin, 'Do Mediators Walk Their Talk in Civil Cases?' (2010) 28(1) *Conflict Resolution Quarterly* 3; Welton, G. L., and D. G. Pruitt, 'The Mediation Process: The Effects of Mediator Bias and Disputant Power' (1987) 13(1) *Personality and Social Psychology Bulletin* 123; Welton, G. L., D. G. Pruitt, and N. B. McGillicuddy, 'The Role of Caucusing in Community Mediation' (1988) 32(1) *The Journal of Conflict Resolution* 181; Welton, G. L., D. G. Pruitt, N. B. McGillicuddy, C. A. Ippolito, and J. M. Zubeck, 'Antecedents and Characteristics of Caucusing in Community Mediation' (1992) 3(4) *International Journal of Conflict Management* 303; Zubeck, J. M., D. G. Pruitt, R. S. Peirce, N. B. McGillicuddy, and H. Syna, 'Disputant and Mediator Behaviors Affecting Short-Term Success in Mediation' (1992) 36(3) *Journal of Conflict Resolution* 546.

¹¹¹⁶ Henderson, D. A., 'Mediation Success: An Empirical Analysis' (1996) 11(1) *Ohio State Journal on Dispute Resolution* 105; Hiltrop, J. M., 'Factors Associated with Successful Labor Mediation' in K. Kressel and D. G. Pruitt (eds), *Mediation Research: The Process and Effectiveness of Third-Party Intervention* (Jossey-Bass, USA, 1989); Jones, T. S., 'Lag Sequential Analyses of Mediator-Spouse and Husband-Wife Interaction in Successful and Unsuccessful Divorce Mediation in M. A. Rahim (ed), *Managing Conflict: An Interdisciplinary Approach* (Praeger, USA, 1989); Kimsey, W. D., R. M. Fuller, A. J. Bell, and B. C. McKinney, 'The Impact of Mediator Strategic Choices: An Experimental Study' (1994) 12(1) *Mediation Quarterly* 89; Kimsey, W. D., R. M. Fuller, and B. C. McKinney, 'Mediator Listening, Dispute Reframing, and Mediation Outcome: A Pilot Study' (1993) 7(1) *Journal of the International Listening Association* 74; Kressel, K., 'How Do Mediators Decide What To Do? Implicit Schemas of Practice and Mediator Decisionmaking' (2013) 28(3) *Ohio State Journal on Dispute Resolution* 709; Kressel, K., E. A. Frontera, S. Forlenza, F. Butler, and L. Fish, 'The Settlement-Orientation vs the Problem-Solving Style' (1994) 50(1) *Journal of Social Issues* 67; Kressel, K., T. Henderson, W. Reich, and C. Cohen, 'Multi-Dimensional Analysis of Conflict Mediator Style' (2012) 30(2) *Conflict Resolution Quarterly* 135; Mareschal, P. M., 'What Makes Mediation Work? Perspectives on Resolving Disputes' (2005) 44(3) *Industrial Relations* 509; McDermott, E. P., and R. Obar, "'What's Going On" in Mediation: An Empirical Analysis of the Influence of a Mediator's Style on Party Satisfaction and Monetary Benefit' (2004) 9 *Harvard Negotiation Law Review* 75; McEwen, C. A., *An Evaluation of the ADR Pilot Project: Final Report 1* (Unpublished report, 1992); McGillicuddy, N. B., G. L. Welton, and D. G. Pruitt, 'Third-Party Intervention: A Field Experiment Comparing Three Different Models' (1987) 53(1) *Journal of Personality and Social Psychology* 104; Peeples, R., C. Harris, and T. Metzloff, 'Following the Script: An Empirical Analysis of Court-Ordered Mediation of Medical Malpractice Cases' (2007) 2007(1) *Journal of Dispute Resolution* 101; Posthuma, R. A., A. Richard, J. B. Dworkin, and M. S. Swift, 'Mediator Tactics and Sources of Conflict: Facilitating and Inhibiting Effects' (2002) 41(1) *Industrial Relations* 94; Pruitt, D. G., W. R. Fry, L. Castrianno, J. Zubeck, G. L. Welton, N. B. McGillicuddy, and C. Ippolito, 'The Process of Mediation: Caucusing, Control, and Problem Solving' in M. A. Rahim (ed), *Managing Conflict: An Interdisciplinary Approach* (Praeger, USA, 1989), Pruitt, D. G., R. S. Peirce, N. B. McGillicuddy, G. L. Welton, and L. Castrianno, 'Long-Term Success in Mediation' (1993) 17(3) *Law and Human Behavior* 313; Shapiro, D., R. Drieghe, and J. Brett, 'Mediator Behavior and the Outcomes of Mediation' (1985) 41(2) *Journal of Social Issues* 101; Slaikeu, K. A., R. Culler, J. Pearson, and N. Thoennes, 'Process and Outcome in Divorce Mediation' (1985) 10 *Mediation Quarterly* 55; Sourdin, T., *Dispute Resolution Processes for Credit Consumers* (Project Report, Conflict Resolution Research Centre, La Trobe University, 2007); Sourdin, T., *Mediation in the Supreme and County Courts of Victoria* (Report prepared for the Department of Justice, Victoria, Australia, April 2009), available on <<http://www.civiljustice.info/adreval/1/>>; Sourdin, T., *Exploring Pre-Action Requirements: Resolving Disputes Outside Courts* (ACJI, Monash University, October 2012); Sourdin, T., and T. Matruglio, *Evaluating Mediation – New South Wales Settlement Scheme 2002* (2004) *Mediation*. Paper 7, available on <<http://www.civiljustice.info/med/7/>>; Wall, J. A., Jr, and D. E. Rude, 'The Judge as a Mediator' (1991) 76(1) *Journal of Applied Psychology* 54; Wall, J. A., Jr, and S. Chan-Serafin, 'Processes in Civil Case Mediations' (2009) 26(3) *Conflict Resolution Quarterly* 261; Wall, J. A., Jr, and S. Chan-Serafin, 'Do Mediators Walk Their Talk in Civil Cases?' (2010) 28(1) *Conflict Resolution Quarterly* 3; Welton, G. L., and D. G. Pruitt, 'The Mediation Process: The Effects of Mediator Bias and Disputant Power' (1987) 13(1) *Personality and Social Psychology Bulletin* 123; Welton, G. L., D. G. Pruitt, and N. B. McGillicuddy, 'The Role of Caucusing in Community Mediation' (1988) 32(1) *The Journal of Conflict Resolution* 181; Welton, G. L., D. G. Pruitt, N. B.

observational data; it may be easier for researchers to codify verbal exchanges than nonverbal interactions. The two studies that claim not to have used any coding at all in their data analysis both include data collection from observational reports; one of them describes taking participant nonverbal interactions into account in their analysis.¹¹¹⁷

The use of coding in the studies is considered in more detail below, in 6.4. *Missing data*.

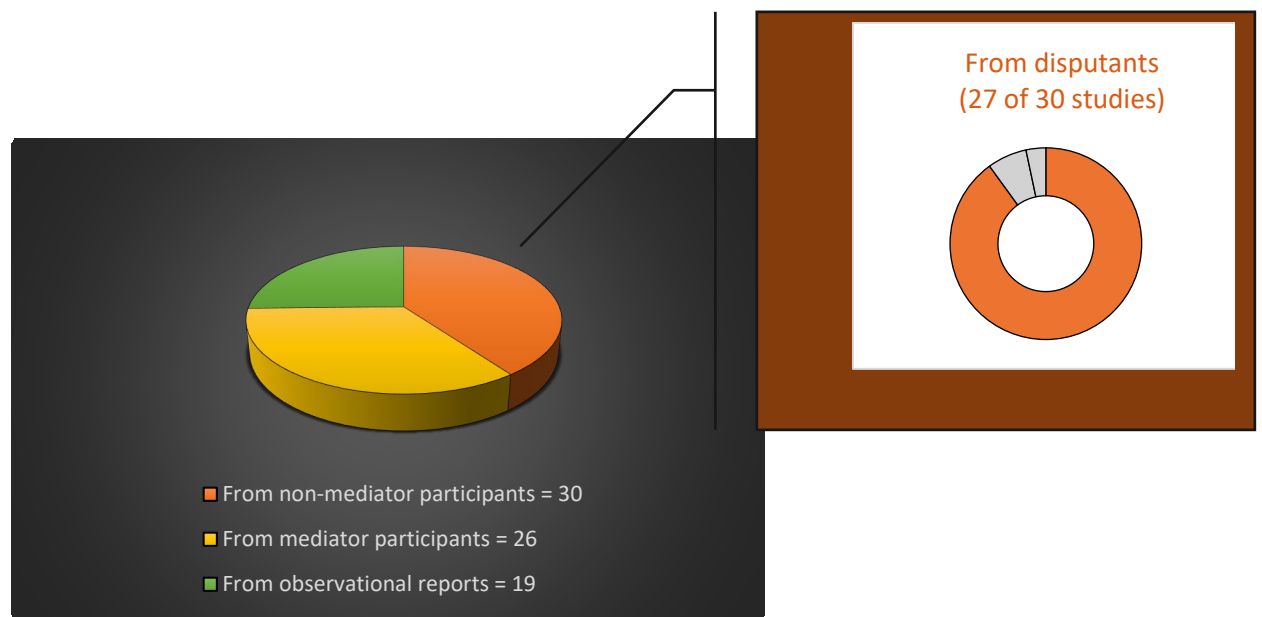


Figure 6.5. Data about mediator in-mediation behaviour

Figure 6.5. shows a summary of data sources for information about what mediator participants said and/or did within the mediation; in particular it shows the researchers' heavy reliance on data collected from disputants.

McGillicuddy, C. A. Ippolito, and J. M. Zubeck, 'Antecedents and Characteristics of Caucusing in Community Mediation' (1992) 3(4) *International Journal of Conflict Management* 303; Woodward, J. G., 'Settlement Week: Measuring the Promise' (1990) 11 *Northern Illinois University Law Review* 1; Zubeck, J. M., D. G. Pruitt, R. S. Peirce, N. B. McGillicuddy, and H. Syna, 'Disputant and Mediator Behaviors Affecting Short-Term Success in Mediation' (1992) 36(3) *Journal of Conflict Resolution* 546.

¹¹¹⁷ Gale, J., R. L. Mowery, M. S. Herrman, and N. L. Hollett, 'Considering Effective Divorce Mediation: Three Potential Factors' (2002) 19(4) *Conflict Resolution Quarterly* 389.

II. In-mediation behaviour: non-mediator participants (disputants)¹¹¹⁸

64% (n = 30) report collecting research data about the in-mediation behaviour of disputants (ie what disputants said and/or did).¹¹¹⁹

¹¹¹⁸ ie what disputants said and/or did during the mediation.

¹¹¹⁹ Carnevale, P. J. D., and R. Pegnetter, 'The Selection of Mediator Tactics in Public Sector Disputes: A Contingency Analysis' (1985) 41(2) *Journal of Social Issues* 2; Gale, J., R. L. Mowery, M. S. Herrman, and N. L. Hollett, 'Considering Effective Divorce Mediation: Three Potential Factors' (2002) 19(4) *Conflict Resolution Quarterly* 389; Hiltrop, J. M., 'Factors Associated with Successful Labor Mediation' in K. Kressel and D. G. Pruitt (eds), *Mediation Research: The Process and Effectiveness of Third-Party Intervention* (Jossey-Bass, USA, 1989); Jones, T. S., 'Lag Sequential Analyses of Mediator-Spouse and Husband-Wife Interaction in Successful and Unsuccessful Divorce Mediation in M. A. Rahim (ed), *Managing Conflict: An Interdisciplinary Approach* (Praeger, USA, 1989); Kimsey, W. D., R. M. Fuller, A. J. Bell, and B. C. McKinney, 'The Impact of Mediator Strategic Choices: An Experimental Study' (1994) 12(1) *Mediation Quarterly* 89; Kimsey, W. D., R. M. Fuller, and B. C. McKinney, 'Mediator Listening, Dispute Reframing, and Mediation Outcome: A Pilot Study' (1993) 7(1) *Journal of the International Listening Association* 74; Kressel, K., 'How Do Mediators Decide What To Do? Implicit Schemas of Practice and Mediator Decisionmaking' (2013) 28(3) *Ohio State Journal on Dispute Resolution* 709; Kressel, K., E. A. Frontera, S. Forlenza, F. Butler, and L. Fish, 'The Settlement-Oriented vs the Problem-Solving Style' (1994) 50(1) *Journal of Social Issues* 67; Mareschal, P. M., 'What Makes Mediation Work? Perspectives on Resolving Disputes' (2005) 44(3) *Industrial Relations* 509; McDermott, E. P., and R. Obar, "'What's Going On" in Mediation: An Empirical Analysis of the Influence of a Mediator's Style on Party Satisfaction and Monetary Benefit' (2004) 9 *Harvard Negotiation Law Review* 75; McEwen, C. A., *An Evaluation of the ADR Pilot Project: Final Report 1* (Unpublished report, 1992); McGillicuddy, N. B., G. L. Welton, and D. G. Pruitt, 'Third-Party Intervention: A Field Experiment Comparing Three Different Models' (1987) 53(1) *Journal of Personality and Social Psychology* 104; Posthuma, R. A., A. Richard, J. B. Dworkin, and M. S. Swift, 'Mediator Tactics and Sources of Conflict: Facilitating and Inhibiting Effects' (2002) 41(1) *Industrial Relations* 94; Pruitt, D. G., W. R. Fry, L. Castrianno, J. Zubeck, G. L. Welton, N. B. McGillicuddy, and C. Ippolito, 'The Process of Mediation: Caucusing, Control, and Problem Solving' in M. A. Rahim (ed), *Managing Conflict: An Interdisciplinary Approach* (Praeger, USA, 1989); Pruitt, D. G., R. S. Peirce, N. B. McGillicuddy, G. L. Welton, and L. Castrianno, 'Long-Term Success in Mediation' (1993) 17(3) *Law and Human Behavior* 313; Shapiro, D., R. Drieghe, and J. Brett, 'Mediator Behavior and the Outcomes of Mediation' (1985) 41(2) *Journal of Social Issues* 101; Slaikeu, K. A., R. Culler, J. Pearson, and N. Thoennes, 'Process and Outcome in Divorce Mediation' (1985) 10 *Mediation Quarterly* 55; Swaab, R. I., and J. Brett, *Caucus with Care: The Impact of Pre-Mediation Caucuses on Conflict Resolution* (Meetings Paper, International Association of Conflict Management, 2007); Sourdin, T., *Dispute Resolution Processes for Credit Consumers* (Project Report, Conflict Resolution Research Centre, La Trobe University, 2007); Sourdin, T., *Mediation in the Supreme and County Courts of Victoria* (Report prepared for the Department of Justice, Victoria, Australia, April 2009), available on <<http://www.civiljustice.info/adreval/1/>>; Sourdin, T., *Exploring Pre-Action Requirements: Resolving Disputes Outside Courts* (ACJI, Monash University, October 2012); Sourdin, T., and T. Matruggio, *Evaluating Mediation – New South Wales Settlement Scheme 2002* (2004) *Mediation*. Paper 7, available on <<http://www.civiljustice.info/med/7>>; Wall, J. A., Jr, and S. Chan-Serafin, 'Processes in Civil Case Mediations' (2009) 26(3) *Conflict Resolution Quarterly* 261; Welton, G. L., and D. G. Pruitt, 'The Mediation Process: The Effects of Mediator Bias and Disputant Power' (1987) 13(1) *Personality and Social Psychology Bulletin* 123; Welton, G. L., D. G. Pruitt, and N. B. McGillicuddy, 'The Role of Caucusing in Community Mediation' (1988) 32(1) *The Journal of Conflict Resolution* 181; Welton, G. L., D. G. Pruitt, N. B. McGillicuddy, C. A. Ippolito, and J. M. Zubeck, 'Antecedents and Characteristics of Caucusing in Community Mediation' (1992) 3(4) *International Journal of Conflict Management* 303; Wissler, R. L., 'Mediation and Adjudication in Small Claims Court: The Effects of Process and Case Characteristics' (1995) 29(2) *Law & Society Review* 323; Wissler, R. L., *Trapping the Data: An Assessment of Domestic Relations Mediation in Maine and Ohio Courts* (Unpublished report, 1999); Woodward, J. G., 'Settlement Week: Measuring the Promise' (1990) 11 *Northern Illinois University Law Review* 1; Zubeck, J. M., D. G. Pruitt, R. S. Peirce, N. B. McGillicuddy, and H. Syna, 'Disputant and Mediator Behaviors Affecting Short-Term Success in Mediation' (1992) 36(3) *Journal of Conflict Resolution* 546.

- i. Research data collected from non-mediator participants, including disputants and disputant advisers (n = 17 studies).¹¹²⁰
- ii. Research data collected from disputants (n = 16 studies)¹¹²¹
 - a. Data collected from surveys (n = 8 studies);¹¹²² and

¹¹²⁰ For the purpose of this analysis, the meaning of “disputant in-mediation behaviour” is based on what is reported in the studies, and includes what disputants said and/or did, how they responded towards each other, including levels of hostility towards each other, as well as assessments of changes in their relationship with each other.

¹¹²¹ Hiltrop, J. M., ‘Factors Associated with Successful Labor Mediation’ in K. Kressel and D. G. Pruitt (eds), *Mediation Research: The Process and Effectiveness of Third-Party Intervention* (Jossey-Bass, USA, 1989); Kimsey, W. D., R. M. Fuller, A. J. Bell, and B. C. McKinney, ‘The Impact of Mediator Strategic Choices: An Experimental Study’ (1994) 12(1) *Mediation Quarterly* 89; Kimsey, W. D., R. M. Fuller, and B. C. McKinney, ‘Mediator Listening, Dispute Reframing, and Mediation Outcome: A Pilot Study’ (1993) 7(1) *Journal of the International Listening Association* 74; McGillicuddy, N. B., G. L. Welton, and D. G. Pruitt, ‘Third-Party Intervention: A Field Experiment Comparing Three Different Models’ (1987) 53(1) *Journal of Personality and Social Psychology* 104; Posthuma, R. A., A. Richard, J. B. Dworkin, and M. S. Swift, ‘Mediator Tactics and Sources of Conflict: Facilitating and Inhibiting Effects’ (2002) 41(1) *Industrial Relations* 94; Pruitt, D. G., W. R. Fry, L. Castrianno, J. Zubeck, G. L. Welton, N. B. McGillicuddy, and C. Ippolito, ‘The Process of Mediation: Caucusing, Control, and Problem Solving’ in M. A. Rahim (ed), *Managing Conflict: An Interdisciplinary Approach* (Praeger, USA, 1989); Pruitt, D. G., R. S. Peirce, N. B. McGillicuddy, G. L. Welton, and L. Castrianno, ‘Long-Term Success in Mediation’ (1993) 17(3) *Law and Human Behavior* 313; Sourdin, T., *Dispute Resolution Processes for Credit Consumers* (Project Report, Conflict Resolution Research Centre, La Trobe University, 2007); Sourdin, T., *Exploring Pre-Action Requirements: Resolving Disputes Outside Courts* (ACJI, Monash University, October 2012); Sourdin, T., and T. Matruglio, *Evaluating Mediation – New South Wales Settlement Scheme 2002* (2004) *Mediation*. Paper 7, available on <<http://www.civiljustice.info/med/7>>; Wall, J. A., Jr, and S. Chan-Serafin, ‘Processes in Civil Case Mediations’ (2009) 26(3) *Conflict Resolution Quarterly* 261; Welton, G. L., D. G. Pruitt, and N. B. McGillicuddy, ‘The Role of Caucusing in Community Mediation’ (1988) 32(1) *The Journal of Conflict Resolution* 181; Welton, G. L., D. G. Pruitt, N. B. McGillicuddy, C. A. Ippolito, and J. M. Zubeck, ‘Antecedents and Characteristics of Caucusing in Community Mediation’ (1992) 3(4) *International Journal of Conflict Management* 303; Wissler, R. L., ‘Mediation and Adjudication in Small Claims Court: The Effects of Process and Case Characteristics’ (1995) 29(2) *Law & Society Review* 323; Wissler, R. L., *Trapping the Data: An Assessment of Domestic Relations Mediation in Maine and Ohio Courts* (Unpublished report, 1999); Zubeck, J. M., D. G. Pruitt, R. S. Peirce, N. B. McGillicuddy, and H. Syna, ‘Disputant and Mediator Behaviors Affecting Short-Term Success in Mediation’ (1992) 36(3) *Journal of Conflict Resolution* 546.

¹¹²² Hiltrop, J. M., ‘Factors Associated with Successful Labor Mediation’ in K. Kressel and D. G. Pruitt (eds), *Mediation Research: The Process and Effectiveness of Third-Party Intervention* (Jossey-Bass, USA, 1989); Kimsey, W. D., R. M. Fuller, A. J. Bell, and B. C. McKinney, ‘The Impact of Mediator Strategic Choices: An Experimental Study’ (1994) 12(1) *Mediation Quarterly* 89; Kimsey, W. D., R. M. Fuller, and B. C. McKinney, ‘Mediator Listening, Dispute Reframing, and Mediation Outcome: A Pilot Study’ (1993) 7(1) *Journal of the International Listening Association* 74; McGillicuddy, N. B., G. L. Welton, and D. G. Pruitt, ‘Third-Party Intervention: A Field Experiment Comparing Three Different Models’ (1987) 53(1) *Journal of Personality and Social Psychology* 104; Posthuma, R. A., A. Richard, J. B. Dworkin, and M. S. Swift, ‘Mediator Tactics and Sources of Conflict: Facilitating and Inhibiting Effects’ (2002) 41(1) *Industrial Relations* 94; Sourdin, T., and T. Matruglio, *Evaluating Mediation – New South Wales Settlement Scheme 2002* (2004) *Mediation*. Paper 7, available on <<http://www.civiljustice.info/med/7>>; Wall, J. A., Jr, and S. Chan-Serafin, ‘Processes in Civil Case Mediations’ (2009) 26(3) *Conflict Resolution Quarterly* 261; Welton, G. L., D. G. Pruitt, and N. B. McGillicuddy, ‘The Role of Caucusing in Community Mediation’ (1988) 32(1) *The Journal of Conflict Resolution* 181.

- b. Data collected from interviews (n = 7 studies);¹¹²³
- iii. Research data collected from the disputant advisers (n = 2 studies).¹¹²⁴
- iv. Research data collected from mediator participants (n = 15 studies)
 - a. Research data collected from mediators using self-administered surveys (n = 11 studies);¹¹²⁵ and
 - b. Research data collected from mediators during interviews (n = 4 studies);¹¹²⁶

¹¹²³ Pruitt, D. G., W. R. Fry, L. Castrianno, J. Zubeck, G. L. Welton, N. B. McGillicuddy, and C. Ippolito, 'The Process of Mediation: Caucusing, Control, and Problem Solving' in M. A. Rahim (ed), *Managing Conflict: An Interdisciplinary Approach* (Praeger, USA, 1989); Pruitt, D. G., R. S. Peirce, N. B. McGillicuddy, G. L. Welton, and L. Castrianno, 'Long-Term Success in Mediation' (1993) 17(3) *Law and Human Behavior* 313; Sourdin, T., *Dispute Resolution Processes for Credit Consumers* (Project Report, Conflict Resolution Research Centre, La Trobe University, 2007); Sourdin, T., *Exploring Pre-Action Requirements: Resolving Disputes Outside Courts* (ACJI, Monash University, October 2012); Welton, G. L., D. G. Pruitt, N. B. McGillicuddy, C. A. Ippolito, and J. M. Zubeck, 'Antecedents and Characteristics of Caucusing in Community Mediation' (1992) 3(4) *International Journal of Conflict Management* 303; Wissler, R. L., 'Mediation and Adjudication in Small Claims Court: The Effects of Process and Case Characteristics' (1995) 29(2) *Law & Society Review* 323; Zubeck, J. M., D. G. Pruitt, R. S. Peirce, N. B. McGillicuddy, and H. Syna, 'Disputant and Mediator Behaviors Affecting Short-Term Success in Mediation' (1992) 36(3) *Journal of Conflict Resolution* 546.

¹¹²⁴ Sourdin, T., *Exploring Pre-Action Requirements: Resolving Disputes Outside Courts* (ACJI, Monash University, October 2012); Woodward, J. G., 'Settlement Week: Measuring the Promise' (1990) 11 *Northern Illinois University Law Review* 1.

¹¹²⁵ Kressel, K., E. A. Frontera, S. Forlenza, F. Butler, and L. Fish, 'The Settlement-Oriented vs the Problem-Solving Style' (1994) 50(1) *Journal of Social Issues* 67; Mareschal, P. M., 'What Makes Mediation Work? Perspectives on Resolving Disputes' (2005) 44(3) *Industrial Relations* 509; McDermott, E. P., and R. Obar, "'What's Going On" in Mediation: An Empirical Analysis of the Influence of a Mediator's Style on Party Satisfaction and Monetary Benefit' (2004) 9 *Harvard Negotiation Law Review* 75; McEwen, C. A., *An Evaluation of the ADR Pilot Project: Final Report 1* (Unpublished report, 1992); McGillicuddy, N. B., G. L. Welton, and D. G. Pruitt, 'Third-Party Intervention: A Field Experiment Comparing Three Different Models' (1987) 53(1) *Journal of Personality and Social Psychology* 104; Shapiro, D., R. Drieghe, and J. Brett, 'Mediator Behavior and the Outcomes of Mediation' (1985) 41(2) *Journal of Social Issues* 101; Sourdin, T., *Mediation in the Supreme and County Courts of Victoria* (Report prepared for the Department of Justice, Victoria, Australia, April 2009), available on <<http://www.civiljustice.info/adreval/1/>>; Swaab, R. I., and J. Brett, *Caucus with Care: The Impact of Pre-Mediation Caucuses on Conflict Resolution* (Meetings Paper, International Association of Conflict Management, 2007); Welton, G. L., D. G. Pruitt, and N. B. McGillicuddy, 'The Role of Caucusing in Community Mediation' (1988) 32(1) *The Journal of Conflict Resolution* 181; Wissler, R. L., *Trapping the Data: An Assessment of Domestic Relations Mediation in Maine and Ohio Courts* (Unpublished report, 1999); Wissler, R. L., 'Court-Connected Mediation in General Civil Cases: What We Know from Empirical Research' (2002) 17(3) *Ohio State Journal on Dispute Resolution* 641.

¹¹²⁶ Hiltrop, J. M., 'Factors Associated with Successful Labor Mediation' in K. Kressel and D. G. Pruitt (eds), *Mediation Research: The Process and Effectiveness of Third-Party Intervention* (Jossey-Bass, USA, 1989); Pruitt, D. G., W. R. Fry, L. Castrianno, J. Zubeck, G. L. Welton, N. B. McGillicuddy, and C. Ippolito, 'The Process of Mediation: Caucusing, Control, and Problem Solving' in M. A. Rahim (ed), *Managing Conflict: An Interdisciplinary Approach* (Praeger, USA, 1989); Pruitt, D. G., R. S. Peirce, N. B. McGillicuddy, G. L. Welton, and L. Castrianno, 'Long-Term Success in Mediation' (1993) 17(3) *Law and Human Behavior* 313; Wall, J. A., Jr, and S. Chan-Serafin, 'Processes in Civil Case Mediations' (2009) 26(3) *Conflict Resolution Quarterly* 261.

- v. Research data collected from observational reports (n = 12 studies)¹¹²⁷
 - a. Research data collected from live observations (n = 8 studies);¹¹²⁸
 - b. Research data collected from audio-recordings (n = 3 studies);¹¹²⁹ and
 - c. Research data collected from video-recordings (n = 1 study).¹¹³⁰

¹¹²⁷ Gale, J., R. L. Mowery, M. S. Herrman, and N. L. Hollett, 'Considering Effective Divorce Mediation: Three Potential Factors' (2002) 19(4) *Conflict Resolution Quarterly* 389; Jones, T. S., 'Lag Sequential Analyses of Mediator-Spouse and Husband-Wife Interaction in Successful and Unsuccessful Divorce Mediation in M. A. Rahim (ed), *Managing Conflict: An Interdisciplinary Approach* (Praeger, USA, 1989); McGillicuddy, N. B., G. L. Welton, and D. G. Pruitt, 'Third-Party Intervention: A Field Experiment Comparing Three Different Models' (1987) 53(1) *Journal of Personality and Social Psychology* 104; Pruitt, D. G., W. R. Fry, L. Castrianno, J. Zubeck, G. L. Welton, N. B. McGillicuddy, and C. Ippolito, 'The Process of Mediation: Caucusing, Control, and Problem Solving' in M. A. Rahim (ed), *Managing Conflict: An Interdisciplinary Approach* (Praeger, USA, 1989); Pruitt, D. G., R. S. Peirce, N. B. McGillicuddy, G. L. Welton, and L. Castrianno, 'Long-Term Success in Mediation' (1993) 17(3) *Law and Human Behavior* 313; Slaikeu, K. A., R. Culler, J. Pearson, and N. Thoennes, 'Process and Outcome in Divorce Mediation' (1985) 10 *Mediation Quarterly* 55; Wall, J. A., Jr, and S. Chan-Serafin, 'Processes in Civil Case Mediations' (2009) 26(3) *Conflict Resolution Quarterly* 261; Wall, J. A., Jr, and S. Chan-Serafin, 'Do Mediators Walk Their Talk in Civil Cases?' (2010) 28(1) *Conflict Resolution Quarterly* 3; Welton, G. L., and D. G. Pruitt, 'The Mediation Process: The Effects of Mediator Bias and Disputant Power' (1987) 13(1) *Personality and Social Psychology Bulletin* 123; Welton, G. L., D. G. Pruitt, and N. B. McGillicuddy, 'The Role of Caucusing in Community Mediation' (1988) 32(1) *The Journal of Conflict Resolution* 181; Welton, G. L., D. G. Pruitt, N. B. McGillicuddy, C. A. Ippolito, and J. M. Zubeck, 'Antecedents and Characteristics of Caucusing in Community Mediation' (1992) 3(4) *International Journal of Conflict Management* 303; Zubeck, J. M., D. G. Pruitt, R. S. Peirce, N. B. McGillicuddy, and H. Syna, 'Disputant and Mediator Behaviors Affecting Short-Term Success in Mediation' (1992) 36(3) *Journal of Conflict Resolution* 546.

¹¹²⁸ McGillicuddy, N. B., G. L. Welton, and D. G. Pruitt, 'Third-Party Intervention: A Field Experiment Comparing Three Different Models' (1987) 53(1) *Journal of Personality and Social Psychology* 104; Pruitt, D. G., W. R. Fry, L. Castrianno, J. Zubeck, G. L. Welton, N. B. McGillicuddy, and C. Ippolito, 'The Process of Mediation: Caucusing, Control, and Problem Solving' in M. A. Rahim (ed), *Managing Conflict: An Interdisciplinary Approach* (Praeger, USA, 1989); Pruitt, D. G., R. S. Peirce, N. B. McGillicuddy, G. L. Welton, and L. Castrianno, 'Long-Term Success in Mediation' (1993) 17(3) *Law and Human Behavior* 313; Wall, J. A., Jr, and S. Chan-Serafin, 'Processes in Civil Case Mediations' (2009) 26(3) *Conflict Resolution Quarterly* 261; Wall, J. A., Jr, and S. Chan-Serafin, 'Do Mediators Walk Their Talk in Civil Cases?' (2010) 28(1) *Conflict Resolution Quarterly* 3; Welton, G. L., D. G. Pruitt, and N. B. McGillicuddy, 'The Role of Caucusing in Community Mediation' (1988) 32(1) *The Journal of Conflict Resolution* 181; Welton, G. L., D. G. Pruitt, N. B. McGillicuddy, C. A. Ippolito, and J. M. Zubeck, 'Antecedents and Characteristics of Caucusing in Community Mediation' (1992) 3(4) *International Journal of Conflict Management* 303; Zubeck, J. M., D. G. Pruitt, R. S. Peirce, N. B. McGillicuddy, and H. Syna, 'Disputant and Mediator Behaviors Affecting Short-Term Success in Mediation' (1992) 36(3) *Journal of Conflict Resolution* 546.

¹¹²⁹ Jones, T. S., 'Lag Sequential Analyses of Mediator-Spouse and Husband-Wife Interaction in Successful and Unsuccessful Divorce Mediation in M. A. Rahim (ed), *Managing Conflict: An Interdisciplinary Approach* (Praeger, USA, 1989); Slaikeu, K. A., R. Culler, J. Pearson, and N. Thoennes, 'Process and Outcome in Divorce Mediation' (1985) 10 *Mediation Quarterly* 55; Welton, G. L., and D. G. Pruitt, 'The Mediation Process: The Effects of Mediator Bias and Disputant Power' (1987) 13(1) *Personality and Social Psychology Bulletin* 123.

¹¹³⁰ Gale, J., R. L. Mowery, M. S. Herrman, and N. L. Hollett, 'Considering Effective Divorce Mediation: Three Potential Factors' (2002) 19(4) *Conflict Resolution Quarterly* 389.

- vi. Research data collected during focus groups (n = 2 studies) ¹¹³¹
 - a. Research data collected during adviser focus groups, and during mediator focus groups (n = 1 study);¹¹³² and
 - b. Research data collected during disputant focus groups, and mediator focus groups, and adviser focus groups (n = 1 study).¹¹³³

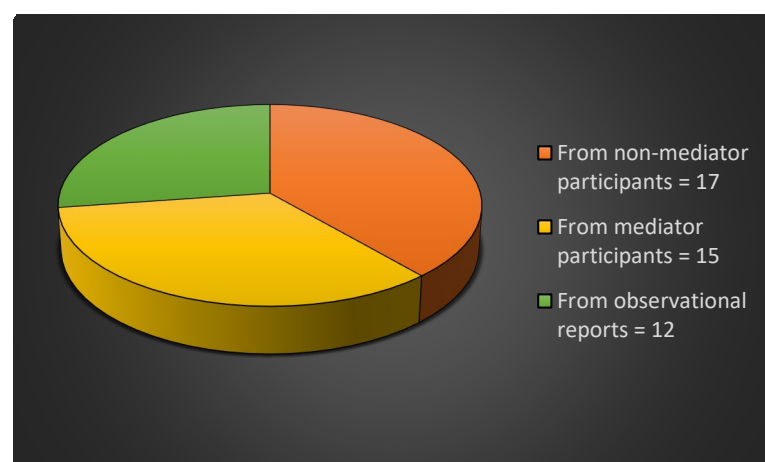


Figure 6.6. Disputant in-mediation behaviour.

Figure 6.6. shows the proportion of studies that describe research data about disputant in-mediation behaviour being collected from disputants themselves, from mediators, and from observers.

¹¹³¹ Sourdin, T., *Mediation in the Supreme and County Courts of Victoria* (Report prepared for the Department of Justice, Victoria, Australia, April 2009), available on <<http://www.civiljustice.info/adreval/1/>>; Sourdin, T., *Exploring Pre-Action Requirements: Resolving Disputes Outside Courts* (ACJI, Monash University, October 2012).

¹¹³² Sourdin, T., *Exploring Pre-Action Requirements: Resolving Disputes Outside Courts* (ACJI, Monash University, October 2012).

¹¹³³ Sourdin, T., *Mediation in the Supreme and County Courts of Victoria* (Report prepared for the Department of Justice, Victoria, Australia, April 2009), available on <<http://www.civiljustice.info/adreval/1/>>.

III. The mediation process

55% (n = 26 studies) report collecting research data about the mediation process.¹¹³⁴

- i. Research data collected from non-mediator participants, including disputants and disputant (legal) advisers (n = 21 studies).
- ii. Research data collected from disputants (n = 17 studies)¹¹³⁵
 - a. Data collected from surveys (n = 9 studies);¹¹³⁶ and

¹¹³⁴ In this appraisal, the mediation process includes the process itself as well as any agreements that are achieved as part of the mediation.

¹¹³⁵ Alberts, J. K., B. L. Heisterkamp, and R. M. McPhee, 'Disputant Perceptions of and Satisfaction with a Community Mediation Program' (2005) 16(3) *The International Journal of Conflict Management* 218; Bingham, L. B., 'Transformative Mediation in the United States Postal Service' (2012) 5(4) *Negotiation and Conflict Management Research* 354; McDermott, E. P., and R. Obar, "'What's Going On" in Mediation: An Empirical Analysis of the Influence of a Mediator's Style on Party Satisfaction and Monetary Benefit' (2004) 9 *Harvard Negotiation Law Review* 75; McGillicuddy, N. B., G. L. Welton, and D. G. Pruitt, 'Third-Party Intervention: A Field Experiment Comparing Three Different Models' (1987) 53(1) *Journal of Personality and Social Psychology* 104; Posthuma, R. A., A. Richard, J. B. Dworkin, and M. S. Swift, 'Mediator Tactics and Sources of Conflict: Facilitating and Inhibiting Effects' (2002) 41(1) *Industrial Relations* 94; Pruitt, D. G., W. R. Fry, L. Castrianno, J. Zubeck, G. L. Welton, N. B. McGillicuddy, and C. Ippolito, 'The Process of Mediation: Caucusing, Control, and Problem Solving' in M. A. Rahim (ed), *Managing Conflict: An Interdisciplinary Approach* (Praeger, USA, 1989); Pruitt, D. G., R. S. Peirce, N. B. McGillicuddy, G. L. Welton, and L. Castrianno, 'Long-Term Success in Mediation' (1993) 17(3) *Law and Human Behavior* 313; Sourdin, T., *Dispute Resolution Processes for Credit Consumers* (Project Report, Conflict Resolution Research Centre, La Trobe University, 2007); Thoennes, N. A., and J. Pearson, 'Predicting Outcomes in Divorce Mediation: The Influence of People and Process' (1985) 41(2) *Journal of Social Issues* 115; Welton, G. L., D. G. Pruitt, and N. B. McGillicuddy, 'The Role of Caucusing in Community Mediation' (1988) 32(1) *The Journal of Conflict Resolution* 181; Welton, G. L., D. G. Pruitt, N. B. McGillicuddy, C. A. Ippolito, and J. M. Zubeck, 'Antecedents and Characteristics of Caucusing in Community Mediation' (1992) 3(4) *International Journal of Conflict Management* 303; Wissler, R. L., 'Mediation and Adjudication in Small Claims Court: The Effects of Process and Case Characteristics' (1995) 29(2) *Law & Society Review* 323; Zubeck, J. M., D. G. Pruitt, R. S. Peirce, N. B. McGillicuddy, and H. Syna, 'Disputant and Mediator Behaviors Affecting Short-Term Success in Mediation' (1992) 36(3) *Journal of Conflict Resolution* 546.

¹¹³⁶ Alberts, J. K., B. L. Heisterkamp, and R. M. McPhee, 'Disputant Perceptions of and Satisfaction with a Community Mediation Program' (2005) 16(3) *The International Journal of Conflict Management* 218; Bingham, L. B., 'Transformative Mediation in the United States Postal Service' (2012) 5(4) *Negotiation and Conflict Management Research* 354; Hiltrop, J. M., 'Factors Associated with Successful Labor Mediation' in K. Kressel and D. G. Pruitt (eds), *Mediation Research: The Process and Effectiveness of Third-Party Intervention* (Jossey-Bass, USA, 1989); McDermott, E. P., and R. Obar, "'What's Going On" in Mediation: An Empirical Analysis of the Influence of a Mediator's Style on Party Satisfaction and Monetary Benefit' (2004) 9 *Harvard Negotiation Law Review* 75; McGillicuddy, N. B., G. L. Welton, and D. G. Pruitt, 'Third-Party Intervention: A Field Experiment Comparing Three Different Models' (1987) 53(1) *Journal of Personality and Social Psychology* 104; Posthuma, R. A., A. Richard, J. B. Dworkin, and M. S. Swift, 'Mediator Tactics and Sources of Conflict: Facilitating and Inhibiting Effects' (2002) 41(1) *Industrial Relations* 94; Sourdin, T., and T. Matruglio, *Evaluating Mediation – New South Wales Settlement Scheme 2002* (2004) *Mediation*. Paper 7, available on <<http://www.civiljustice.info/med/7>>; Welton, G. L., D. G. Pruitt, and N. B. McGillicuddy, 'The Role of Caucusing in Community Mediation' (1988) 32(1) *The Journal of Conflict Resolution* 181; Wissler, R. L., *Trapping the Data: An Assessment of Domestic Relations Mediation in Maine and Ohio Courts* (Unpublished report, 1999).

- b. Data collected during interviews (n = 8 studies).¹¹³⁷
- ii. Research data collected from disputant adviser surveys (n = 3 studies).¹¹³⁸
- iii. Research data collected from disputants and from disputant advisers, in interviews and focus groups (n = 1 study).¹¹³⁹
- iv. Research data from mediator participants (n = 13 studies)¹¹⁴⁰
 - a. Research data collected from mediators using self-administered surveys (n = 8 studies);¹¹⁴¹

¹¹³⁷ Kressel, K., 'How Do Mediators Decide What To Do? Implicit Schemas of Practice and Mediator Decisionmaking' (2013) 28(3) *Ohio State Journal on Dispute Resolution* 709; Kressel, K., E. A. Frontera, S. Forlenza, F. Butler, and L. Fish, 'The Settlement-Oriented vs the Problem-Solving Style' (1994) 50(1) *Journal of Social Issues* 67; Pritt 1989; Pruitt, D. G., R. S. Peirce, N. B. McGillicuddy, G. L. Welton, and L. Castrianno, 'Long-Term Success in Mediation' (1993) 17(3) *Law and Human Behavior* 313; Thoennes, N. A., and J. Pearson, 'Predicting Outcomes in Divorce Mediation: The Influence of People and Process' (1985) 41(2) *Journal of Social Issues* 115; Welton, G. L., D. G. Pruitt, N. B. McGillicuddy, C. A. Ippolito, and J. M. Zubeck, 'Antecedents and Characteristics of Caucusing in Community Mediation' (1992) 3(4) *International Journal of Conflict Management* 303; Wissler, R. L., 'Mediation and Adjudication in Small Claims Court: The Effects of Process and Case Characteristics' (1995) 29(2) *Law & Society Review* 323; Zubeck, J. M., D. G. Pruitt, R. S. Peirce, N. B. McGillicuddy, and H. Syna, 'Disputant and Mediator Behaviors Affecting Short-Term Success in Mediation' (1992) 36(3) *Journal of Conflict Resolution* 546.

¹¹³⁸ Henderson, D. A., 'Mediation Success: An Empirical Analysis' (1996) 11(1) *Ohio State Journal on Dispute Resolution* 105; Wissler, R. L., 'Court-Connected Mediation in General Civil Cases: What We Know from Empirical Research' (2002) 17(3) *Ohio State Journal on Dispute Resolution* 641; Woodward, J. G., 'Settlement Week: Measuring the Promise' (1990) 11 *Northern Illinois University Law Review* 1.

¹¹³⁹ Sourdin, T., *Exploring Pre-Action Requirements: Resolving Disputes Outside Courts* (ACJI, Monash University, October 2012).

¹¹⁴⁰ Burrell, N. A., W. A. Donohue, and M. Allen, 'The Impact of Disputants' Expectations on Mediation, Testing an Interventionist Model' (1990) Fall 1990 *Human Communication Research* 104; Kressel, K., 'How Do Mediators Decide What To Do? Implicit Schemas of Practice and Mediator Decisionmaking' (2013) 28(3) *Ohio State Journal on Dispute Resolution* 709; Kressel, K., T. Henderson, W. Reich, and C. Cohen, 'Multi-Dimensional Analysis of Conflict Mediator Style' (2012) 30(2) *Conflict Resolution Quarterly* 135; Shapiro, D., R. Drieghe, and J. Brett, 'Mediator Behavior and the Outcomes of Mediation' (1985) 41(2) *Journal of Social Issues* 101; Swaab, R. I., *Face First: Pre-Mediation Caucus and Face in Employment Disputes* (Presentation, Annual Association of Conflict Management Conference, June 2009); Swaab, R. I., and J. Brett, *Caucus with Care: The Impact of Pre-Mediation Caucuses on Conflict Resolution* (Meetings Paper, International Association of Conflict Management, 2007); Wall, J. A., Jr, and D. E. Rude, 'The Judge as a Mediator' (1991) 76(1) *Journal of Applied Psychology* 54.

¹¹⁴¹ Burrell, N. A., W. A. Donohue, and M. Allen, 'The Impact of Disputants' Expectations on Mediation, Testing an Interventionist Model' (1990) Fall 1990 *Human Communication Research* 104; Shapiro, D., R. Drieghe, and J. Brett, 'Mediator Behavior and the Outcomes of Mediation' (1985) 41(2) *Journal of Social Issues* 101; Sourdin, T., *Mediation in the Supreme and County Courts of Victoria* (Report prepared for the Department of Justice, Victoria, Australia, April 2009), available on <<http://www.civiljustice.info/adreval/1/>>; Sourdin, T., and T. Matruglio, *Evaluating Mediation – New South Wales Settlement Scheme 2002* (2004) *Mediation*. Paper 7, available on <<http://www.civiljustice.info/med/7/>>; Swaab, R. I., and J. Brett, *Caucus with Care: The Impact of Pre-Mediation Caucuses on Conflict Resolution* (Meetings Paper, International Association of Conflict Management, 2007); Wall, J. A., Jr, and D. E. Rude, 'The Judge as a Mediator' (1991) 76(1) *Journal of Applied*

- b. Research data collected from mediators during interviews (n = 1 study);¹¹⁴² and
- c. Research data collected from mediators in self-administered surveys and in interviews n = 4 studies).¹¹⁴³
- v. Research data collected from mediators and from disputants (n = 6 studies).¹¹⁴⁴
- vi. Research data collected from observational reports (n = 1 study).¹¹⁴⁵

IV. Non-mediator and mediator participants: satisfaction

51% (n = 24 studies) report on non-mediator participant, and mediator participant satisfaction: with the mediation process, with its outcomes, and/or with the mediator.

- i. Research data collected from non-mediator participants (disputants)
 - a. Research data collected from disputant self-administered surveys (n = 12 studies);¹¹⁴⁶

Psychology 54; Wissler, R. L., *Trapping the Data: An Assessment of Domestic Relations Mediation in Maine and Ohio Courts* (Unpublished report, 1999); Wissler, R. L., 'Court-Connected Mediation in General Civil Cases: What We Know from Empirical Research' (2002) 17(3) *Ohio State Journal on Dispute Resolution* 641.

¹¹⁴² Hiltrop, J. M., 'Factors Associated with Successful Labor Mediation' in K. Kressel and D. G. Pruitt (eds), *Mediation Research: The Process and Effectiveness of Third-Party Intervention* (Jossey-Bass, USA, 1989).

¹¹⁴³ Kressel, K., 'How Do Mediators Decide What To Do? Implicit Schemas of Practice and Mediator Decisionmaking' (2013) 28(3) *Ohio State Journal on Dispute Resolution* 709; Kressel, K., E. A. Frontera, S. Forlenza, F. Butler, and L. Fish, 'The Settlement-Oriented vs the Problem-Solving Style' (1994) 50(1) *Journal of Social Issues* 67; Kressel, K., T. Henderson, W. Reich, and C. Cohen, 'Multi-Dimensional Analysis of Conflict Mediator Style' (2012) 30(2) *Conflict Resolution Quarterly* 135; Swaab, R. I., *Face First: Pre-Mediation Caucus and Face in Employment Disputes* (Presentation, Annual Association of Conflict Management Conference, June 2009).

¹¹⁴⁴ Hiltrop, J. M., 'Factors Associated with Successful Labor Mediation' in K. Kressel and D. G. Pruitt (eds), *Mediation Research: The Process and Effectiveness of Third-Party Intervention* (Jossey-Bass, USA, 1989); Kressel, K., E. A. Frontera, S. Forlenza, F. Butler, and L. Fish, 'The Settlement-Oriented vs the Problem-Solving Style' (1994) 50(1) *Journal of Social Issues* 67; Sourdin, T., *Mediation in the Supreme and County Courts of Victoria* (Report prepared for the Department of Justice, Victoria, Australia, April 2009), available on <<http://www.civiljustice.info/adreval/1/>>; Sourdin, T., and T. Matruglio, *Evaluating Mediation – New South Wales Settlement Scheme 2002* (2004) *Mediation*. Paper 7, available on <<http://www.civiljustice.info/med/7>>; Wissler, R. L., *Trapping the Data: An Assessment of Domestic Relations Mediation in Maine and Ohio Courts* (Unpublished report, 1999); Wissler, R. L., 'Court-Connected Mediation in General Civil Cases: What We Know from Empirical Research' (2002) 17(3) *Ohio State Journal on Dispute Resolution* 641.

¹¹⁴⁵ Wall, J. A., Jr, and S. Chan-Serafin, 'Do Mediators Walk Their Talk in Civil Cases?' (2010) 28(1) *Conflict Resolution Quarterly* 3.

¹¹⁴⁶ Alberts, J. K., B. L. Heisterkamp, and R. M. McPhee, 'Disputant Perceptions of and Satisfaction with a Community Mediation Program' (2005) 16(3) *The International Journal of Conflict Management* 218; Bingham,

1. Satisfaction with mediation process and/or outcomes (n = 8 studies);¹¹⁴⁷
 2. Satisfaction with mediator (n = 2 studies);¹¹⁴⁸ and
 3. Satisfaction with process, outcomes, and mediator (n = 2 studies).¹¹⁴⁹
- b. Research data collected during disputant interviews (n = 6 studies)¹¹⁵⁰

L. B., 'Transformative Mediation in the United States Postal Service' (2012) 5(4) *Negotiation and Conflict Management Research* 354; Burrell, N. A., W. A. Donohue, and M. Allen, 'The Impact of Disputants' Expectations on Mediation, Testing an Interventionist Model' (1990) Fall 1990 *Human Communication Research* 104; Kressel, K., T. Henderson, W. Reich, and C. Cohen, 'Multi-Dimensional Analysis of Conflict Mediator Style' (2012) 30(2) *Conflict Resolution Quarterly* 135; McDermott, E. P., and R. Obar, "'What's Going On" in Mediation: An Empirical Analysis of the Influence of a Mediator's Style on Party Satisfaction and Monetary Benefit' (2004) 9 *Harvard Negotiation Law Review* 75; McGillicuddy, N. B., G. L. Welton, and D. G. Pruitt, 'Third-Party Intervention: A Field Experiment Comparing Three Different Models' (1987) 53(1) *Journal of Personality and Social Psychology* 104; Sourdin, T., *Mediation in the Supreme and County Courts of Victoria* (Report prepared for the Department of Justice, Victoria, Australia, April 2009), available on <<http://www.civiljustice.info/adreval/1/>>; Sourdin, T., and T. Matruglio, *Evaluating Mediation – New South Wales Settlement Scheme 2002* (2004) *Mediation*. Paper 7, available on <<http://www.civiljustice.info/med/7>>; Wall, J. A., Jr, and S. Chan-Serafin, 'Processes in Civil Case Mediations' (2009) 26(3) *Conflict Resolution Quarterly* 261; Welton, G. L., D. G. Pruitt, and N. B. McGillicuddy, 'The Role of Caucusing in Community Mediation' (1988) 32(1) *The Journal of Conflict Resolution* 181; Wissler, R. L., *Trapping the Data: An Assessment of Domestic Relations Mediation in Maine and Ohio Courts* (Unpublished report, 1999); Wissler, R. L., 'Court-Connected Mediation in General Civil Cases: What We Know from Empirical Research' (2002) 17(3) *Ohio State Journal on Dispute Resolution* 641.

¹¹⁴⁷ Bingham, L. B., 'Transformative Mediation in the United States Postal Service' (2012) 5(4) *Negotiation and Conflict Management Research* 354; Burrell, N. A., W. A. Donohue, and M. Allen, 'The Impact of Disputants' Expectations on Mediation, Testing an Interventionist Model' (1990) Fall 1990 *Human Communication Research* 104; McGillicuddy, N. B., G. L. Welton, and D. G. Pruitt, 'Third-Party Intervention: A Field Experiment Comparing Three Different Models' (1987) 53(1) *Journal of Personality and Social Psychology* 104; Sourdin, T., *Mediation in the Supreme and County Courts of Victoria* (Report prepared for the Department of Justice, Victoria, Australia, April 2009), available on <<http://www.civiljustice.info/adreval/1/>>; Sourdin, T., and T. Matruglio, *Evaluating Mediation – New South Wales Settlement Scheme 2002* (2004) *Mediation*. Paper 7, available on <<http://www.civiljustice.info/med/7>>; Welton, G. L., D. G. Pruitt, and N. B. McGillicuddy, 'The Role of Caucusing in Community Mediation' (1988) 32(1) *The Journal of Conflict Resolution* 181; Wissler, R. L., *Trapping the Data: An Assessment of Domestic Relations Mediation in Maine and Ohio Courts* (Unpublished report, 1999); Wissler, R. L., 'Court-Connected Mediation in General Civil Cases: What We Know from Empirical Research' (2002) 17(3) *Ohio State Journal on Dispute Resolution* 641.

¹¹⁴⁸ McDermott, E. P., and R. Obar, "'What's Going On" in Mediation: An Empirical Analysis of the Influence of a Mediator's Style on Party Satisfaction and Monetary Benefit' (2004) 9 *Harvard Negotiation Law Review* 75; Wall, J. A., Jr, and S. Chan-Serafin, 'Processes in Civil Case Mediations' (2009) 26(3) *Conflict Resolution Quarterly* 261 [latter included satisfaction with 'opponent', 273].

¹¹⁴⁹ Alberts, J. K., B. L. Heisterkamp, and R. M. McPhee, 'Disputant Perceptions of and Satisfaction with a Community Mediation Program' (2005) 16(3) *The International Journal of Conflict Management* 218; Kressel, K., T. Henderson, W. Reich, and C. Cohen, 'Multi-Dimensional Analysis of Conflict Mediator Style' (2012) 30(2) *Conflict Resolution Quarterly* 135.

¹¹⁵⁰ Kressel, K., E. A. Frontera, S. Forlenza, F. Butler, and L. Fish, 'The Settlement-Orientation vs the Problem-Solving Style' (1994) 50(1) *Journal of Social Issues* 67 (phone); Pruitt, D. G., R. S. Peirce, N. B. McGillicuddy, G. L. Welton, and L. Castrianno, 'Long-Term Success in Mediation' (1993) 17(3) *Law and Human Behavior* 313; Sourdin, T., *Dispute Resolution Processes for Credit Consumers* (Project Report, Conflict Resolution Research Centre, La Trobe University, 2007); Sourdin, T., *Exploring Pre-Action Requirements: Resolving Disputes Outside*

1. Satisfaction with the mediation process and/or outcome (n = 6 studies).¹¹⁵¹
 - ii. Research data collected from mediator participants
 - a. Research data collected from mediator self-administered surveys: estimating disputant levels of satisfaction with the mediated outcome (n = 1 study);¹¹⁵²
 - b. Research data collected from mediator interviews: mediators' own satisfaction with the mediation process (n = 1 study);¹¹⁵³ and
 - c. Research data collected from mediator self-administered surveys and interviews: mediator satisfaction with their own 'performance' (n = 1 study).¹¹⁵⁴
 - iii. Research data collected from disputant advisers
 1. Research data collected from advisers: their own levels of satisfaction with mediator participants (n = 1 study).¹¹⁵⁵
 - iv. Research data collected from others

Courts (ACJI, Monash University, October 2012) (phone); Welton, G. L., D. G. Pruitt, N. B. McGillicuddy, C. A. Ippolito, and J. M. Zubeck, 'Antecedents and Characteristics of Caucusing in Community Mediation' (1992) 3(4) *International Journal of Conflict Management* 303; Wissler, R. L., 'Mediation and Adjudication in Small Claims Court: The Effects of Process and Case Characteristics' (1995) 29(2) *Law & Society Review* 323 (phone); Zubeck, J. M., D. G. Pruitt, R. S. Peirce, N. B. McGillicuddy, and H. Syna, 'Disputant and Mediator Behaviors Affecting Short-Term Success in Mediation' (1992) 36(3) *Journal of Conflict Resolution* 546.

¹¹⁵¹ Kressel, K., E. A. Frontera, S. Forlenza, F. Butler, and L. Fish, 'The Settlement-Oriented vs the Problem-Solving Style' (1994) 50(1) *Journal of Social Issues* 67; Pruitt, D. G., R. S. Peirce, N. B. McGillicuddy, G. L. Welton, and L. Castrianno, 'Long-Term Success in Mediation' (1993) 17(3) *Law and Human Behavior* 313; Sourdin, T., *Exploring Pre-Action Requirements: Resolving Disputes Outside Courts* (ACJI, Monash University, October 2012); Welton, G. L., D. G. Pruitt, N. B. McGillicuddy, C. A. Ippolito, and J. M. Zubeck, 'Antecedents and Characteristics of Caucusing in Community Mediation' (1992) 3(4) *International Journal of Conflict Management* 303; Wissler, R. L., 'Mediation and Adjudication in Small Claims Court: The Effects of Process and Case Characteristics' (1995) 29(2) *Law & Society Review* 323 (phone); Zubeck, J. M., D. G. Pruitt, R. S. Peirce, N. B. McGillicuddy, and H. Syna, 'Disputant and Mediator Behaviors Affecting Short-Term Success in Mediation' (1992) 36(3) *Journal of Conflict Resolution* 546.

¹¹⁵² Sourdin, T., *Mediation in the Supreme and County Courts of Victoria* (Report prepared for the Department of Justice, Victoria, Australia, April 2009), available on <<http://www.civiljustice.info/adreval/1/>>.

¹¹⁵³ Kressel, K., T. Henderson, W. Reich, and C. Cohen, 'Multi-Dimensional Analysis of Conflict Mediator Style' (2012) 30(2) *Conflict Resolution Quarterly* 135.

¹¹⁵⁴ Kressel, K., E. A. Frontera, S. Forlenza, F. Butler, and L. Fish, 'The Settlement-Oriented vs the Problem-Solving Style' (1994) 50(1) *Journal of Social Issues* 67, 72; in this study, the mediators were the researchers; however, the list of co-authors suggest there was one non-mediator researcher.

¹¹⁵⁵ Sourdin, T., *Mediation in the Supreme and County Courts of Victoria* (Report prepared for the Department of Justice, Victoria, Australia, April 2009), available on <<http://www.civiljustice.info/adreval/1/>>.

1. Research data collected from observer/mediator participants
(interviews/discussions): satisfaction with mediator participants (ie self and each other) (n = 1 study);¹¹⁵⁶ and
2. Research data collected from non-participants (survey): satisfaction with hypothetical mediators (n = 1 study).¹¹⁵⁷

The above analysis suggests that, in the 47 selected studies, where researchers sought such data, they used self-administered surveys for collecting research data on disputant satisfaction with the mediation process, the outcome/s, and/or the mediator. Chapter Seven considers the reliability of this data collection method.

Twenty-three studies *do not* describe collecting any research data about satisfaction with the process, with the outcome, and/or with the mediator.¹¹⁵⁸ Of those 23, nine were conducted in a labour/management context, which is all nine of the studies from that context.

¹¹⁵⁶ Kressel, K., E. A. Frontera, S. Forlenza, F. Butler, and L. Fish, 'The Settlement-Orientation vs the Problem-Solving Style' (1994) 50(1) *Journal of Social Issues* 67; in this study, researchers were mediators and also observed each other's mediations, subsequently assessing their own levels of satisfaction with their own and each other's mediator actions and approaches (the assessments provided research data).

¹¹⁵⁷ Wall, J. A., Jr, and D. E. Rude, 'The Judge as a Mediator' (1991) 76(1) *Journal of Applied Psychology* 54 (study 1); in this study, non-participants assessed their own levels of satisfaction with a selection of possible mediator actions and approaches.

¹¹⁵⁸ Carnevale, P. J. D., and R. Peggnetter, 'The Selection of Mediator Tactics in Public Sector Disputes: A Contingency Analysis' (1985) 41(2) *Journal of Social Issues* 2; Dilts, D. A. and A. Karim, 'The Effect of Mediators' Qualities and Strategies on Mediation Outcomes' (1990) 45(1) *Relations Industrielles/Industrial Relations* 22; Gale, J., R. L. Mowery, M. S. Herrman, and N. L. Hollett, 'Considering Effective Divorce Mediation: Three Potential Factors' (2002) 19(4) *Conflict Resolution Quarterly* 389; Goldberg, S. B., and M. L. Shaw, 'Further Investigation into the Secrets of Successful and Unsuccessful Mediators' (2008) 26(8) *Alternatives to the High Cost of Litigation* 149; Hiltrop, J. M., 'Factors Associated with Successful Labor Mediation' in K. Kressel and D. G. Pruitt (eds), *Mediation Research: The Process and Effectiveness of Third-Party Intervention* (Jossey-Bass, USA, 1989); Karim, A. and D. Dilts, 'Determinants of Mediation Success in the Iowa Public Sector' (1990) 19(2) *Journal of Collective Negotiations* 129; Karim, A. and R. Peggnetter, 'Mediator Strategies and Qualities and Mediation Effectiveness' (1983) 22(1) *Industrial Relations* 105; Kimsey, W. D., R. M. Fuller, A. J. Bell, and B. C. McKinney, 'The Impact of Mediator Strategic Choices: An Experimental Study' (1994) 12(1) *Mediation Quarterly* 89; Kimsey, W. D., R. M. Fuller, and B. C. McKinney, 'Mediator Listening, Dispute Reframing, and Mediation Outcome: A Pilot Study' (1993) 7(1) *Journal of the International Listening Association* 74; Kochan, T. A., and T. Jick, 'The Public Sector Mediation Process: A Theory and Empirical Examination' (1978) 22(2) *The Journal of Conflict Resolution* 209; Mareschal, P. M., 'What Makes Mediation Work? Perspectives on Resolving Disputes' (2005) 44(3) *Industrial Relations* 509; McEwen, C. A., *An Evaluation of the ADR Pilot Project: Final Report 1* (Unpublished report, 1992); Peebles, R., C. Harris, and T. Metzloff, 'Following the Script: An Empirical Analysis of Court-Ordered Mediation of Medical Malpractice Cases' (2007) 2007(1) *Journal of Dispute*

As is shown earlier in this thesis, the concepts of satisfaction, fairness, and effectiveness are frequently interrelated and often treated as being interchangeable in the studies.¹¹⁵⁹

6.1.2. Summary: Data collection

The above analysis shows:

- Most of the selected studies collect research data from at least self-administered written surveys;
- Most of the selected surveys collect research data from non-mediator participants (especially disputants) who have varying levels of experience and knowledge of mediation and of the role of mediators;
- In their surveys, non-mediator participants are asked to provide information about
 - In-mediation behaviour of the mediator;
 - In-mediation behaviour of the disputants (themselves, and other side);
 - The mediation process; and
 - Their own satisfaction with the mediation process, with its outcomes, and with the mediator.
- In their interviews, disputants are asked to provide information about
 - Their own (and the other side's) in-mediation behaviour; and

Resolution 101; Posthuma, R. A., A. Richard, J. B. Dworkin, and M. S. Swift, 'Mediator Tactics and Sources of Conflict: Facilitating and Inhibiting Effects' (2002) 41(1) *Industrial Relations* 94; Pruitt, D. G., W. R. Fry, L. Castrianno, J. Zubeck, G. L. Welton, N. B. McGillicuddy, and C. Ippolito, 'The Process of Mediation: Caucusing, Control, and Problem Solving' in M. A. Rahim (ed), *Managing Conflict: An Interdisciplinary Approach* (Praeger, USA, 1989); Shapiro, D., R. Drieghe, and J. Brett, 'Mediator Behavior and the Outcomes of Mediation' (1985) 41(2) *Journal of Social Issues* 101; Swaab, R. I., *Face First: Pre-Mediation Caucus and Face in Employment Disputes* (Presentation, Annual Association of Conflict Management Conference, June 2009); Swaab, R. I., and J. Brett, *Caucus with Care: The Impact of Pre-Mediation Caucuses on Conflict Resolution* (Meetings Paper, International Association of Conflict Management, 2007); Thoennes, N. A., and J. Pearson, 'Predicting Outcomes in Divorce Mediation: The Influence of People and Process' (1985) 41(2) *Journal of Social Issues* 115; Vanderkooi, L., and J. Pearson, 'Mediating Divorce Disputes: Mediator Behaviors, Styles and Roles' (1983) 32(4) *Family Relations* 557; Wall, J. A., Jr, and S. Chan-Serafin, 'Do Mediators Walk Their Talk in Civil Cases?' (2010) 28(1) *Conflict Resolution Quarterly* 3; Welton, G. L., and D. G. Pruitt, 'The Mediation Process: The Effects of Mediator Bias and Disputant Power' (1987) 13(1) *Personality and Social Psychology Bulletin* 123; Woodward, J. G., 'Settlement Week: Measuring the Promise' (1990) 11 *Northern Illinois University Law Review* 1.

¹¹⁵⁹ See Chapter Three.

- Their own satisfaction with the process, with outcomes, and with the mediator.

Non-mediator participants are required to provide information about any or all of the following: the mediator, each other, the presenting dispute, and the mediation process. In some of the studies, researchers describe a single data collection activity (eg a written survey) in which non-mediator participants are asked to provide all that information. It is a significant amount of complex information to be provided by people who, according to some of the researchers, have varying levels of experience with mediation and varying levels of knowledge about it, and who may not be familiar with the process or with the role of the mediator.¹¹⁶⁰ Two of the studies consider how the study participant expectations about their own research role may have affected their in-mediation behaviour and the information they chose to provide to the researchers; however, they consider this issue only for mediator participants.¹¹⁶¹ None of the researchers include similar consideration of the non-mediator participants in their studies.

The next sections consider two issues likely to affect the integrity of the research data, and the reliability of study findings:

1. Limitations inherent to the research methodologies; and
2. Information that is not included in analysis of research data, or in reporting of study results (ie missing data).

¹¹⁶⁰ See Chapter Five; see also Alberts, J. K., B. L. Heisterkamp, and R. M. McPhee, 'Disputant Perceptions of and Satisfaction with a Community Mediation Program' (2005) 16(3) *The International Journal of Conflict Management* 218; Dilts, D. A. and A. Karim, 'The Effect of Mediators' Qualities and Strategies on Mediation Outcomes' (1990) 45(1) *Relations Industrielles/Industrial Relations* 22; Thoennes 985; Wissler, R. L., 'Court-Connected Mediation in General Civil Cases: What We Know from Empirical Research' (2002) 17(3) *Ohio State Journal on Dispute Resolution* 641.

¹¹⁶¹ Shapiro, D., R. Drieghe, and J. Brett, 'Mediator Behavior and the Outcomes of Mediation' (1985) 41(2) *Journal of Social Issues* 101; Slaikeu, K. A., R. Culler, J. Pearson, and N. Thoennes, 'Process and Outcome in Divorce Mediation' (1985) 10 *Mediation Quarterly* 55.

6.2. Acknowledged limitations

6.2.0. General limitations

This section examines the methodological limitations of the studies, *as acknowledged, or noted by the researchers*. The analysis considers potential ramifications of the limitations including how they might affect the credibility of research data and the reliability of study findings.¹¹⁶²

The intent of this section is to examine the researchers' own expressed concerns about the methodologies that they have used. For example, some researchers acknowledge the limitations inherent to their studies' use of self-administered written surveys for the collection of research data, because the methodology is known to be unreliable¹¹⁶³ (and its unreliability has been noted more broadly in the mediation literature).¹¹⁶⁴ It is to be expected that, when analysing their data and reporting their results, researchers will take into account any limitations they have acknowledged.

It is accepted practice for researchers to be transparent about the methods they have used, and about the limitations of their data and of its wider application beyond the specific context of their investigation.¹¹⁶⁵ Researchers have a responsibility to be transparent about the reliability of their research:¹¹⁶⁶ transparency about their methodologies is considered to be a contributor to

¹¹⁶² Issues of credibility and reliability are considered in some detail in Chapter Seven of this thesis.

¹¹⁶³ For example, see Hiltrop, J. M., 'Factors Associated with Successful Labor Mediation' in K. Kressel and D. G. Pruitt (eds), *Mediation Research: The Process and Effectiveness of Third-Party Intervention* (Jossey-Bass, USA, 1989); Karim, A. and D. Dilts, 'Determinants of Mediation Success in the Iowa Public Sector' (1990) 19(2) *Journal of Collective Negotiations* 129; Kochan, T. A., and T. Jick, 'The Public Sector Mediation Process: A Theory and Empirical Examination' (1978) 22(2) *The Journal of Conflict Resolution* 209; Wissler, R. L., *Trapping the Data: An Assessment of Domestic Relations Mediation in Maine and Ohio Courts* (Unpublished report, 1999).

¹¹⁶⁴ Charkoudian, L., 'Just My Style: The Practical, Ethical, and Empirical Dangers of the Lack of Consensus about Definitions of Mediation Styles' (2012) 5(4) *Negotiation and Conflict Management Research* 367; T. A. Kochan, 'Commentary 2' (2012) 5(4) *Negotiation and Conflict Management Research*; Kressel, K., T. Henderson, W. Reich, and C. Cohen, 'Multi-Dimensional Analysis of Conflict Mediator Style' (2012) 30(2) *Conflict Resolution Quarterly* 135.

¹¹⁶⁵ Spencer, L., J. Ritchie, J. Lewis, and L. Dillon, *Quality in Qualitative Evaluation: A Framework for Assessing Research Evidence* (Report for the Chief Social Researcher's Office, UK, 2003).

¹¹⁶⁶ Golafshani, N., 'Understanding Reliability and Validity in Qualitative Research' (2003) 8(4) *The Qualitative Report* 597.

researcher integrity, as well as to the reliability of research findings.¹¹⁶⁷ It has been said that such transparency is an ethical responsibility of which the intent is to ensure that readers understand what has been done.¹¹⁶⁸

In summary, close to half (24) of the selected studies include some form of acknowledgement of methodological limitations in their own studies,¹¹⁶⁹ and the most frequently mentioned limitations relate to:

¹¹⁶⁷ Tracy, S. J., 'Qualitative Quality: Eight "Big Tent" Criteria for Excellent Qualitative Research' (2010) 16(10) *Qualitative Inquiry* 837.

¹¹⁶⁸ Bishop, D. V. M., 'The Psychology of Experimental Psychologists: Overcoming Cognitive Constraints to Improved Research: The 47th Sir Frederic Bartlett Lecture' (2019) 73(1) *Quarterly Journal of Experimental Psychology* 1.

¹¹⁶⁹ Alberts, J. K., B. L. Heisterkamp, and R. M. McPhee, 'Disputant Perceptions of and Satisfaction with a Community Mediation Program' (2005) 16(3) *The International Journal of Conflict Management* 218; Bingham, L. B., 'Transformative Mediation in the United States Postal Service' (2012) 5(4) *Negotiation and Conflict Management Research* 354; Burrell, N. A., W. A. Donohue, and M. Allen, 'The Impact of Disputants' Expectations on Mediation, Testing an Interventionist Model' (1990) Fall 1990 *Human Communication Research* 104; Carnevale, P. J. D., and R. Peggnetter, 'The Selection of Mediator Tactics in Public Sector Disputes: A Contingency Analysis' (1985) 41(2) *Journal of Social Issues* 2; Gale, J., R. L. Mowery, M. S. Herrman, and N. L. Hollett, 'Considering Effective Divorce Mediation: Three Potential Factors' (2002) 19(4) *Conflict Resolution Quarterly* 389; Hiltrop, J. M., 'Factors Associated with Successful Labor Mediation' in K. Kressel and D. G. Pruitt (eds), *Mediation Research: The Process and Effectiveness of Third-Party Intervention* (Jossey-Bass, USA, 1989); Jones, T. S., 'Lag Sequential Analyses of Mediator-Spouse and Husband-Wife Interaction in Successful and Unsuccessful Divorce Mediation in M. A. Rahim (ed), *Managing Conflict: An Interdisciplinary Approach* (Praeger, USA, 1989); Kochan, T. A., and T. Jick, 'The Public Sector Mediation Process: A Theory and Empirical Examination' (1978) 22(2) *The Journal of Conflict Resolution* 209; Kressel, K., E. A. Frontera, S. Forlenza, F. Butler, and L. Fish, 'The Settlement-Orientation vs the Problem-Solving Style' (1994) 50(1) *Journal of Social Issues* 67; Mareschal, P. M., 'What Makes Mediation Work? Perspectives on Resolving Disputes' (2005) 44(3) *Industrial Relations* 509; McGillicuddy, N. B., G. L. Welton, and D. G. Pruitt, 'Third-Party Intervention: A Field Experiment Comparing Three Different Models' (1987) 53(1) *Journal of Personality and Social Psychology* 104; Posthuma, R. A., A. Richard, J. B. Dworkin, and M. S. Swift, 'Mediator Tactics and Sources of Conflict: Facilitating and Inhibiting Effects' (2002) 41(1) *Industrial Relations* 94; Pruitt, D. G., R. S. Peirce, N. B. McGillicuddy, G. L. Welton, and L. Castrianno, 'Long-Term Success in Mediation' (1993) 17(3) *Law and Human Behavior* 313; Shapiro, D., R. Drieghe, and J. Brett, 'Mediator Behavior and the Outcomes of Mediation' (1985) 41(2) *Journal of Social Issues* 101; Slaikou, K. A., R. Culler, J. Pearson, and N. Thoennes, 'Process and Outcome in Divorce Mediation' (1985) 10 *Mediation Quarterly* 55; Sourdin, T., *Dispute Resolution Processes for Credit Consumers* (Project Report, Conflict Resolution Research Centre, La Trobe University, 2007); Sourdin, T., *Mediation in the Supreme and County Courts of Victoria* (Report prepared for the Department of Justice, Victoria, Australia, April 2009), available on <<http://www.civiljustice.info/adreval/1/>>; Sourdin, T., *Exploring Pre-Action Requirements: Resolving Disputes Outside Courts* (ACJI, Monash University, October 2012); Thoennes, N. A., and J. Pearson, 'Predicting Outcomes in Divorce Mediation: The Influence of People and Process' (1985) 41(2) *Journal of Social Issues* 115; Wall, J. A., Jr, and S. Chan-Serafin, 'Processes in Civil Case Mediations' (2009) 26(3) *Conflict Resolution Quarterly* 261; Wall, J. A., Jr, and D. E. Rude, 'The Judge as a Mediator' (1991) 76(1) *Journal of Applied Psychology* 54; Welton, G. L., D. G. Pruitt, N. B. McGillicuddy, C. A. Ippolito, and J. M. Zubeck, 'Antecedents and Characteristics of Caucusing in Community Mediation' (1992) 3(4) *International Journal of Conflict Management* 303; Wissler, R. L., 'Court-Connected Mediation in General Civil Cases: What We Know from Empirical Research' (2002) 17(3) *Ohio State Journal on Dispute Resolution* 641;

- Small sample sizes and response rates;
- The use of participant self-reports (ie self-administered written surveys, or interviews);
- Skewed processes for referral into their studies;
- Limitations on the scope of their research that are caused by the nature of the research data and methods for its analysis;
- The use of data collected in a previous study and for a different purpose; and
- Participants' often limited capacity to provide the required research data.¹¹⁷⁰

Twelve of the studies acknowledge that more than one of their methodologies has limitations.

A number of studies also recognise the limited generalisability of their findings, and limitations associated with researcher influence.

Five of the studies describe a range of methodological problems which they consider are widespread in the field of mediation research;¹¹⁷¹ unfortunately, two of those five neglect to note any limitations in their own studies.^{1172 1173}

Zubeck, J. M., D. G. Pruitt, R. S. Peirce, N. B. McGillicuddy, and H. Syna, 'Disputant and Mediator Behaviors Affecting Short-Term Success in Mediation' (1992) 36(3) *Journal of Conflict Resolution* 546.

¹¹⁷⁰ In a small number of studies, researchers acknowledge limitations, and also claim that the limitations have no effect on their research data or on their analysis and results [see Wissler, R. L., 'Court-Connected Mediation in General Civil Cases: What We Know from Empirical Research' (2002) 17(3) *Ohio State Journal on Dispute Resolution* 641].

¹¹⁷¹ Bingham, L. B., 'Transformative Mediation in the United States Postal Service' (2012) 5(4) *Negotiation and Conflict Management Research* 354; Burrell, N. A., W. A. Donohue, and M. Allen, 'The Impact of Disputants' Expectations on Mediation, Testing an Interventionist Model' (1990) Fall 1990 *Human Communication Research* 104; Hiltrop, J. M., 'Factors Associated with Successful Labor Mediation' in K. Kressel and D. G. Pruitt (eds), *Mediation Research: The Process and Effectiveness of Third-Party Intervention* (Jossey-Bass, USA, 1989); Kressel, K., 'How Do Mediators Decide What To Do? Implicit Schemas of Practice and Mediator Decisionmaking' (2013) 28(3) *Ohio State Journal on Dispute Resolution* 709; Kressel, K., T. Henderson, W. Reich, and C. Cohen, 'Multi-Dimensional Analysis of Conflict Mediator Style' (2012) 30(2) *Conflict Resolution Quarterly* 135.

¹¹⁷² Kressel, K., 'How Do Mediators Decide What To Do? Implicit Schemas of Practice and Mediator Decisionmaking' (2013) 28(3) *Ohio State Journal on Dispute Resolution* 709; Kressel, K., T. Henderson, W. Reich, and C. Cohen, 'Multi-Dimensional Analysis of Conflict Mediator Style' (2012) 30(2) *Conflict Resolution Quarterly* 135.

¹¹⁷³ Chapter Seven of this thesis considers these issues in some detail.

In 23 studies, the researchers make neither explicit nor allusive reference to potential limitations inherent to their studies.¹¹⁷⁴ These are referred to as the “non-limitation” studies. They include methodologies similar to those which their colleagues consider to be limitations.

Twenty years ago, in 2000, two researchers published a review of empirical studies from one specific area of mediation research: family/divorce/custody mediation.¹¹⁷⁵ The publication is critical of that research field, in particular of its methodological limitations which, at the time, were said to be characterised by a range of systemic limitations, some of which echo the acknowledged limitations in the 47 selected studies. For example, researchers are aware that the lack of clarity in

¹¹⁷⁴ Dilts, D. A. and A. Karim, ‘The Effect of Mediators’ Qualities and Strategies on Mediation Outcomes’ (1990) 45(1) *Relations Industrielles/Industrial Relations* 22; Goldberg, S. B., and M. L. Shaw, ‘Further Investigation into the Secrets of Successful and Unsuccessful Mediators’ (2008) 26(8) *Alternatives to the High Cost of Litigation* 149; Henderson, D. A., ‘Mediation Success: An Empirical Analysis’ (1996) 11(1) *Ohio State Journal on Dispute Resolution* 105; Karim, A. and D. Dilts, ‘Determinants of Mediation Success in the Iowa Public Sector’ (1990) 19(2) *Journal of Collective Negotiations* 129; Karim, A. and R. Peggnetter, ‘Mediator Strategies and Qualities and Mediation Effectiveness’ (1983) 22(1) *Industrial Relations* 105; Kimsey, W. D., R. M. Fuller, A. J. Bell, and B. C. McKinney, ‘The Impact of Mediator Strategic Choices: An Experimental Study’ (1994) 12(1) *Mediation Quarterly* 89; Kimsey, W. D., R. M. Fuller, and B. C. McKinney, ‘Mediator Listening, Dispute Reframing, and Mediation Outcome: A Pilot Study’ (1993) 7(1) *Journal of the International Listening Association* 74; Kressel, K., ‘How Do Mediators Decide What To Do? Implicit Schemas of Practice and Mediator Decisionmaking’ (2013) 28(3) *Ohio State Journal on Dispute Resolution* 709; Kressel, K., T. Henderson, W. Reich, and C. Cohen, ‘Multi-Dimensional Analysis of Conflict Mediator Style’ (2012) 30(2) *Conflict Resolution Quarterly* 135; McDermott, E. P., and R. Obar, ‘“What’s Going On” in Mediation: An Empirical Analysis of the Influence of a Mediator’s Style on Party Satisfaction and Monetary Benefit’ (2004) 9 *Harvard Negotiation Law Review* 75; McEwen, C. A., *An Evaluation of the ADR Pilot Project: Final Report 1* (Unpublished report, 1992); Peeples, R., C. Harris, and T. Metzloff, ‘Following the Script: An Empirical Analysis of Court-Ordered Mediation of Medical Malpractice Cases’ (2007) 2007(1) *Journal of Dispute Resolution* 101; Pruitt, D. G., W. R. Fry, L. Castrianno, J. Zubeck, G. L. Welton, N. B. McGillicuddy, and C. Ippolito, ‘The Process of Mediation: Caucusing, Control, and Problem Solving’ in M. A. Rahim (ed), *Managing Conflict: An Interdisciplinary Approach* (Praeger, USA, 1989); Sourdin, T., and T. Matruggio, *Evaluating Mediation – New South Wales Settlement Scheme 2002* (2004) *Mediation*. Paper 7, available on <<http://www.civiljustice.info/med/7>>; Swaab, R. I., *Face First: Pre-Mediation Caucus and Face in Employment Disputes* (Presentation, Annual Association of Conflict Management Conference, June 2009); Swaab, R. I., and J. Brett, *Caucus with Care: The Impact of Pre-Mediation Caucuses on Conflict Resolution* (Meetings Paper, International Association of Conflict Management, 2007); Vanderkooi, L., and J. Pearson, ‘Mediating Divorce Disputes: Mediator Behaviors, Styles and Roles’ (1983) 32(4) *Family Relations* 557; Wall, J. A., Jr, and S. Chan-Serafin, ‘Do Mediators Walk Their Talk in Civil Cases?’ (2010) 28(1) *Conflict Resolution Quarterly* 3; Welton, G. L., and D. G. Pruitt, ‘The Mediation Process: The Effects of Mediator Bias and Disputant Power’ (1987) 13(1) *Personality and Social Psychology Bulletin* 123; Welton, G. L., D. G. Pruitt, and N. B. McGillicuddy, ‘The Role of Caucusing in Community Mediation’ (1988) 32(1) *The Journal of Conflict Resolution* 181; Wissler, R. L., ‘Mediation and Adjudication in Small Claims Court: The Effects of Process and Case Characteristics’ (1995) 29(2) *Law & Society Review* 323; Wissler, R. L., *Trapping the Data: An Assessment of Domestic Relations Mediation in Maine and Ohio Courts* (Unpublished report, 1999); Woodward, J. G., ‘Settlement Week: Measuring the Promise’ (1990) 11 *Northern Illinois University Law Review* 1.

¹¹⁷⁵ Beck, C. J. A., and B. D. Sales, ‘A Critical Reappraisal of Divorce Mediation Research and Policy’ (2000) 6(4) *Psychology, Public Policy, and Law* 989; it is unclear which review method or process was applied.

concepts and terms (in particular about mediator actions and approaches) are likely to affect knowledge and understanding about mediation and limit comparative analysis.¹¹⁷⁶ Researchers have noted the potential effects on generalisability when studies are narrowly-based, with small sample sizes and limited population groups;¹¹⁷⁷ and the limitations on knowledge about mediation and its effects when broader population groups are not included, or the effects of ethnicity. Ethnicity, gender and socio-economic status are not taken into account.¹¹⁷⁸ Although it has been suggested

¹¹⁷⁶ *An International Evidence Review of Mediation in Civil Justice* (Report for the Scottish Government, Social Research Series, June 2019); Boule, L., *Mediation: Principles, Process, Practice* (3rd Edition, LexisNexis Butterworths, Australia, 2011); Charkoudian, L., 'Just My Style: The Practical, Ethical, and Empirical Dangers of the Lack of Consensus about Definitions of Mediator Style' (2012) 5(4) *Negotiation and Conflict Management Research* 367; De Girolamo, D., *The Fugitive Identity of Mediation: Negotiation, Shift Changes and Allusionary Action* (Routledge, UK, 2013); Della Noce, D. J., 'Mediator Style and the Question of "Good" Mediation: A Call for Theoretical Development' (2012) 5(4) *Negotiation and Conflict Management Research* 396; Expert Group on Mediation, *Bringing Mediation into the Mainstream in Civil Justice in Scotland* (Report of the Expert Group on Mediation in Civil Justice in Scotland, Scotland, June 2019); Kennedy Institute of Workplace Mediation Research Group, *Shaping the Agenda 1: Exploring the Competencies, Skills and Behaviours of Effective Workplace Mediators* (KIWMRG, Ireland, 2016).

¹¹⁷⁷ Burrell 1990 Burrell, N. A., W. A. Donohue, and M. Allen, 'The Impact of Disputants' Expectations on Mediation, Testing an Interventionist Model' (1990) Fall 1990 *Human Communication Research* 104; Carnevale, P. J. D., and R. Pegnetter, 'The Selection of Mediator Tactics in Public Sector Disputes: A Contingency Analysis' (1985) 41(2) *Journal of Social Issues* 2; Crampton, A., 'Escape from the Laboratory: Ethnographic Methods in the Study of Elder and Family Court Mediation' (2016) 32(3) *Negotiation Journal* 191; De Girolamo, D., 'Sen, Justice and the Private Realm of Dispute Resolution' (2018) 14(3) *International Journal of Law in Context* 353; Keikelame, M. J., and L. Swartz, 'Decolonising Research Methodologies: Lessons from a Qualitative Research Project, Cape Town, South Africa' (2019) 12 *Global Health Action* 1; Kochan, T. A., and T. Jick, 'The Public Sector Mediation Process: A Theory and Empirical Examination' (1978) 22(2) *The Journal of Conflict Resolution* 209; Kressel, K., T. Henderson, W. Reich, and C. Cohen, 'Multi-Dimensional Analysis of Conflict Mediator Style' (2012) 30(2) *Conflict Resolution Quarterly* 135; Mareschal, P. M., 'What Makes Mediation Work? Perspectives on Resolving Disputes' (2005) 44(3) *Industrial Relations* 509; McConnell, B., 'To Bring Peace that Stays: Music, Conflict and Conciliation in the Gambia' (2019) 12(3) *International Journal of Community Music* 349; Pruitt, D. G., N. B. McGillicuddy, G. L. Welton, and W. R. Fry, 'Process of Mediation in Dispute Settlement Centres' in K. Kressel, and D. G. Pruitt (eds), *Mediation Research: The Process and Effectiveness of Third-Party Intervention* (Jossey-Bass, US, 1989); Shapiro, D., R. Drieghe, and J. Brett, 'Mediator Behavior and the Outcomes of Mediation' (1985) 41(2) *Journal of Social Issues* 101; Sourdin, T., 'Introduction' (2011) 22 *ADRJ* 1; Wall, J. A., Jr, and S. Chan-Serafin, 'Processes in Civil Case Mediations' (2009) 26(3) *Conflict Resolution Quarterly* 261.

¹¹⁷⁸ Crampton, A., 'Escape from the Laboratory: Ethnographic Methods in the Study of Elder and Family Court Mediation' (2016) 32(3) *Negotiation Journal* 191; Federal Court of Australia's Indigenous Dispute Resolution and Conflict Management Case Study Project, *Solid Work You Mob are Doing – Case Studies in Indigenous Dispute Resolution and Conflict Management in Australia* (Commonwealth of Australia, 2009); Keikelame, M. J., and L. Swartz, 'Decolonising Research Methodologies: Lessons from a Qualitative Research Project, Cape Town, South Africa' (2019) 12 *Global Health Action* 1; McConnell, B., 'To Bring Peace that Stays: Music, Conflict and Conciliation in the Gambia' (2019) 12(3) *International Journal of Community Music* 349; Sourdin, T., *Mediation in the Supreme and County Courts of Victoria* (Report prepared for the Department of Justice, Victoria, Australia, April 2009), available on <<http://www.civiljustice.info/adreval/1/>>; Sourdin, T., 'Introduction' (2011) 22 *ADRJ* 1.

that there are insufficient randomised empirical studies,¹¹⁷⁹ it has also been recognised that including randomisation in studies of mediation can have complex ethical ramifications.¹¹⁸⁰ Another issue raised in 2000 which is often reported in the mediation literature is researchers' reliance on participant self-report surveys for the collection of research data.¹¹⁸¹

The analysis in this section reports researcher acknowledgements of similar limitations and concerns.¹¹⁸²

6.2.1. Methodological limitations

Analysis in this section is based on a small number of studies; however, it shows that, when conducting empirical studies, mediation researchers are aware that they are working with methodological limitations. The analysis provides valuable insight into those researchers' perceptions of their own work, and their awareness of the actual and potential limitations that affect the reliability of their findings. It also shows that researchers in some contexts report more limitations than researchers in other contexts, and that researchers in some contexts report fewer limitations than researchers in other contexts.¹¹⁸³ There are more limitations apparent in the studies than those mentioned by the researchers, and some of those are considered later in this Chapter, and in Chapter Seven.

I. Participant selection

¹¹⁷⁹ Pruitt, D. G., 'Commentary 1' (2012) 5(4) *Negotiation and Conflict Management Research* 384.

¹¹⁸⁰ Wissler, R. L., 'Court-Connected Mediation in General Civil Cases: What We Know from Empirical Research' (2002) 17(3) *Ohio State Journal on Dispute Resolution* 641.

¹¹⁸¹ For example, see Hiltrop, J. M., 'Factors Associated with Successful Labor Mediation' in K. Kressel and D. G. Pruitt (eds), *Mediation Research: The Process and Effectiveness of Third-Party Intervention* (Jossey-Bass, USA, 1989); Kochan 1978 Kochan, T. A., and T. Jick, 'The Public Sector Mediation Process: A Theory and Empirical Examination' (1978) 22(2) *The Journal of Conflict Resolution* 209; Wall, J. and K. Kressel, 'Research on Mediator Style: A Summary and Some Research Suggestions' (2012) 5(4) *Negotiation and Conflict Management Research* 401.

¹¹⁸² In particular, see below 6.2.3. Broader limitations.

¹¹⁸³ Which may be more a reflection of researcher reporting than of actual limitations.

- i. In seven studies, researchers acknowledge or note that they have worked with a limited, or small, sample of participants in at least part of their study;¹¹⁸⁴ in two of the studies, researchers describe working with sample sizes of less than ten participants;¹¹⁸⁵
- ii. In five studies, researchers describe concerns that the participant selection process may have skewed their research data towards high settlement rates (eg in studies where courts referred only matters deemed suitable for mediation¹¹⁸⁶);^{1187 1188}
- iii. In four studies, researchers describe concerns about participants' capacity to provide the information required for the study;¹¹⁸⁹ of the three studies, two consider

¹¹⁸⁴ Gale, J., R. L. Mowery, M. S. Herrman, and N. L. Hollett, 'Considering Effective Divorce Mediation: Three Potential Factors' (2002) 19(4) *Conflict Resolution Quarterly* 389; Kressel, K., E. A. Frontera, S. Forlenza, F. Butler, and L. Fish, 'The Settlement-Oriented vs the Problem-Solving Style' (1994) 50(1) *Journal of Social Issues* 67; Sourdin, T., Dispute Resolution Processes for Credit Consumers (Project Report, Conflict Resolution Research Centre, La Trobe University, 2007); Sourdin, T., *Mediation in the Supreme and County Courts of Victoria* (Report prepared for the Department of Justice, Victoria, Australia, April 2009), available on <<http://www.civiljustice.info/adreval/1/>>; Sourdin, T., *Exploring Pre-Action Requirements: Resolving Disputes Outside Courts* (ACJI, Monash University, October 2012); Thoennes, N. A., and J. Pearson, 'Predicting Outcomes in Divorce Mediation: The Influence of People and Process' (1985) 41(2) *Journal of Social Issues* 115; Welton, G. L., D. G. Pruitt, N. B. McGillicuddy, C. A. Ippolito, and J. M. Zubeck, 'Antecedents and Characteristics of Caucusing in Community Mediation' (1992) 3(4) *International Journal of Conflict Management* 303.

¹¹⁸⁵ Gale, J., R. L. Mowery, M. S. Herrman, and N. L. Hollett, 'Considering Effective Divorce Mediation: Three Potential Factors' (2002) 19(4) *Conflict Resolution Quarterly* 389; Sourdin, T., *Mediation in the Supreme and County Courts of Victoria* (Report prepared for the Department of Justice, Victoria, Australia, April 2009), available on <<http://www.civiljustice.info/adreval/1/>>.

¹¹⁸⁶ Thoennes, N. A., and J. Pearson, 'Predicting Outcomes in Divorce Mediation: The Influence of People and Process' (1985) 41(2) *Journal of Social Issues* 115.

¹¹⁸⁷ Carnevale, P. J. D., and R. Pegnetter, 'The Selection of Mediator Tactics in Public Sector Disputes: A Contingency Analysis' (1985) 41(2) *Journal of Social Issues* 2; Gale, J., R. L. Mowery, M. S. Herrman, and N. L. Hollett, 'Considering Effective Divorce Mediation: Three Potential Factors' (2002) 19(4) *Conflict Resolution Quarterly* 389; Posthuma, R. A., A. Richard, J. B. Dworkin, and M. S. Swift, 'Mediator Tactics and Sources of Conflict: Facilitating and Inhibiting Effects' (2002) 41(1) *Industrial Relations* 94; Thoennes, N. A., and J. Pearson, 'Predicting Outcomes in Divorce Mediation: The Influence of People and Process' (1985) 41(2) *Journal of Social Issues* 115; Wall, J. A., Jr, and D. E. Rude, 'The Judge as a Mediator' (1991) 76(1) *Journal of Applied Psychology* 54.

¹¹⁸⁸ In one study using simulated mediation with real mediators, the roleplaying disputants selected the four mediators for inclusion in the study, and subsequently assessed the skills of those same four mediators [Gale, J., R. L. Mowery, M. S. Herrman, and N. L. Hollett, 'Considering Effective Divorce Mediation: Three Potential Factors' (2002) 19(4) *Conflict Resolution Quarterly* 389].

¹¹⁸⁹ Alberts, J. K., B. L. Heisterkamp, and R. M. McPhee, 'Disputant Perceptions of and Satisfaction with a Community Mediation Program' (2005) 16(3) *The International Journal of Conflict Management* 218; Kochan, T. A., and T. Jick, 'The Public Sector Mediation Process: A Theory and Empirical Examination' (1978) 22(2) *The Journal of Conflict Resolution* 209; Pruitt, D. G., R. S. Peirce, N. B. McGillicuddy, G. L. Welton, and L. Castrianno, 'Long-Term Success in Mediation' (1993) 17(3) *Law and Human Behavior* 313; Thoennes, N. A., and J. Pearson, 'Predicting Outcomes in Divorce Mediation: The Influence of People and Process' (1985) 41(2) *Journal of Social Issues* 115.

associations between the participants' capacity and the study's reliance on self-administered self-reports (eg researchers consider whether the survey instrument was too long and complex for the participants);¹¹⁹⁰

- iv. In four studies, researchers describe their concerns about low participant response rates to invitations for study participation.¹¹⁹¹

II. Data collection

- i. In seven studies, researchers describe their concerns about their reliance on data collected from participant self-administered written self-reports and from interviews, having acknowledged that the methods do not produce credible data;¹¹⁹²
- ii. In five studies, researchers express concern that the chosen data analysis methods limit the scope of the research and its findings (eg when the coding technique used as part of the data analysis relies, unrealistically, on participant communication data being 'perfectly coded';¹¹⁹³ or when researchers acknowledge imposing their own subjective

¹¹⁹⁰ Kochan, T. A., and T. Jick, 'The Public Sector Mediation Process: A Theory and Empirical Examination' (1978) 22(2) *The Journal of Conflict Resolution* 209; Thoennes, N. A., and J. Pearson, 'Predicting Outcomes in Divorce Mediation: The Influence of People and Process' (1985) 41(2) *Journal of Social Issues* 115.

¹¹⁹¹ Pruitt, D. G., R. S. Peirce, N. B. McGillicuddy, G. L. Welton, and L. Castrianno, 'Long-Term Success in Mediation' (1993) 17(3) *Law and Human Behavior* 313; Sourdin, T., *Mediation in the Supreme and County Courts of Victoria* (Report prepared for the Department of Justice, Victoria, Australia, April 2009), available on <<http://www.civiljustice.info/adreval/1/>>; Sourdin, T., *Exploring Pre-Action Requirements: Resolving Disputes Outside Courts* (ACJI, Monash University, October 2012); Welton, G. L., D. G. Pruitt, and N. B. McGillicuddy, 'The Role of Caucusing in Community Mediation' (1988) 32(1) *The Journal of Conflict Resolution* 181.

¹¹⁹² Carnevale, P. J. D., and R. Pegnetter, 'The Selection of Mediator Tactics in Public Sector Disputes: A Contingency Analysis' (1985) 41(2) *Journal of Social Issues* 2; Hiltrop, J. M., 'Factors Associated with Successful Labor Mediation' in K. Kressel and D. G. Pruitt (eds), *Mediation Research: The Process and Effectiveness of Third-Party Intervention* (Jossey-Bass, USA, 1989); Kochan, T. A., and T. Jick, 'The Public Sector Mediation Process: A Theory and Empirical Examination' (1978) 22(2) *The Journal of Conflict Resolution* 209; Mareschal, P. M., 'What Makes Mediation Work? Perspectives on Resolving Disputes' (2005) 44(3) *Industrial Relations* 509; Shapiro, D., R. Drieghe, and J. Brett, 'Mediator Behavior and the Outcomes of Mediation' (1985) 41(2) *Journal of Social Issues* 101; Thoennes, N. A., and J. Pearson, 'Predicting Outcomes in Divorce Mediation: The Influence of People and Process' (1985) 41(2) *Journal of Social Issues* 115; Wall, J. A., Jr, and D. E. Rude, 'The Judge as a Mediator' (1991) 76(1) *Journal of Applied Psychology* 54.

¹¹⁹³ Jones, T. S., 'Lag Sequential Analyses of Mediator-Spouse and Husband-Wife Interaction in Successful and Unsuccessful Divorce Mediation in M. A. Rahim (ed), *Managing Conflict: An Interdisciplinary Approach* (Praeger, USA, 1989), 98.

measures on mediator participants;¹¹⁹⁴ or when coding techniques used as part of data analysis cannot provide reliable reports on key data measures such as interpretation of participants' 'intangible issues'¹¹⁹⁵),¹¹⁹⁶

- iii. In four studies, researchers describe their concerns that the nature of the data being collected, and the way in which it is being collected, necessarily limits the scope of their research (eg in one study, the researchers acknowledge that their indiscriminate recording of all that is said by mediator and non-mediator participants excludes a capacity to identify the subtleties of changes in communication style that occur during the mediation;¹¹⁹⁷ in another study, the researchers acknowledge that their data collection focuses only on specific aspects of the mediation, and excludes other potentially influential aspects, leading to possible misinterpretations of in-mediation events¹¹⁹⁸);¹¹⁹⁹

¹¹⁹⁴ Kressel, K., E. A. Frontera, S. Forlenza, F. Butler, and L. Fish, 'The Settlement-Oriented vs the Problem-Solving Style' (1994) 50(1) *Journal of Social Issues* 67.

¹¹⁹⁵ Zubeck, J. M., D. G. Pruitt, R. S. Peirce, N. B. McGillicuddy, and H. Syna, 'Disputant and Mediator Behaviors Affecting Short-Term Success in Mediation' (1992) 36(3) *Journal of Conflict Resolution* 546, 567.

¹¹⁹⁶ Jones, T. S., 'Lag Sequential Analyses of Mediator-Spouse and Husband-Wife Interaction in Successful and Unsuccessful Divorce Mediation in M. A. Rahim (ed), *Managing Conflict: An Interdisciplinary Approach* (Praeger, USA, 1989); Kressel, K., E. A. Frontera, S. Forlenza, F. Butler, and L. Fish, 'The Settlement-Oriented vs the Problem-Solving Style' (1994) 50(1) *Journal of Social Issues* 67; Shapiro, D., R. Drieghe, and J. Brett, 'Mediator Behavior and the Outcomes of Mediation' (1985) 41(2) *Journal of Social Issues* 101; Welton, G. L., D. G. Pruitt, N. B. McGillicuddy, C. A. Ippolito, and J. M. Zubeck, 'Antecedents and Characteristics of Caucusing in Community Mediation' (1992) 3(4) *International Journal of Conflict Management* 303; Zubeck, J. M., D. G. Pruitt, R. S. Peirce, N. B. McGillicuddy, and H. Syna, 'Disputant and Mediator Behaviors Affecting Short-Term Success in Mediation' (1992) 36(3) *Journal of Conflict Resolution* 546.

¹¹⁹⁷ Slaikou, K. A., R. Culler, J. Pearson, and N. Thoennes, 'Process and Outcome in Divorce Mediation' (1985) 10 *Mediation Quarterly* 55.

¹¹⁹⁸ Thoennes, N. A., and J. Pearson, 'Predicting Outcomes in Divorce Mediation: The Influence of People and Process' (1985) 41(2) *Journal of Social Issues* 115.

¹¹⁹⁹ Kressel, K., E. A. Frontera, S. Forlenza, F. Butler, and L. Fish, 'The Settlement-Oriented vs the Problem-Solving Style' (1994) 50(1) *Journal of Social Issues* 67; Slaikou, K. A., R. Culler, J. Pearson, and N. Thoennes, 'Process and Outcome in Divorce Mediation' (1985) 10 *Mediation Quarterly* 55; Thoennes, N. A., and J. Pearson, 'Predicting Outcomes in Divorce Mediation: The Influence of People and Process' (1985) 41(2) *Journal of Social Issues* 115; Kochan, T. A., and T. Jick, 'The Public Sector Mediation Process: A Theory and Empirical Examination' (1978) 22(2) *The Journal of Conflict Resolution* 209; Pruitt, D. G., R. S. Peirce, N. B. McGillicuddy, G. L. Welton, and L. Castrianno, 'Long-Term Success in Mediation' (1993) 17(3) *Law and Human Behavior* 313.

- iv. In two studies, researchers note that their data was collected as part of a separate and previous study – though neither considers this to be a limitation despite the original data having been collected for different purposes.^{1200 1201}

III. Generalisability¹²⁰²

In eight of the studies, researchers acknowledge that their study results have limited generalisability.¹²⁰³ The reasons they provide include the study's specialised context;¹²⁰⁴ the

¹²⁰⁰ Henderson, D. A., 'Mediation Success: An Empirical Analysis' (1996) 11(1) *Ohio State Journal on Dispute Resolution* 105; Jones, T. S., 'Lag Sequential Analyses of Mediator-Spouse and Husband-Wife Interaction in Successful and Unsuccessful Divorce Mediation in M. A. Rahim (ed), *Managing Conflict: An Interdisciplinary Approach* (Praeger, USA, 1989).

¹²⁰¹ A separate cluster of six studies report variously on data collected in two original studies; although they include varying cross-references and cross-citations, only one explicitly acknowledges their re-use of the same 'data set': Zubeck, J. M., D. G. Pruitt, R. S. Peirce, N. B. McGillicuddy, and H. Syna, 'Disputant and Mediator Behaviors Affecting Short-Term Success in Mediation' (1992) 36(3) *Journal of Conflict Resolution* 546, 547.

¹²⁰² The studies included in this section include two that mention the limited generalisability of their findings without mentioning other limitations or potential limitations arising from any aspect of their studies. In this thesis, generalisability is not a methodological limitation in itself – it is a limitation that can arise from the design and methodologies of a study. Researchers can claim limited generalisability of their findings without acknowledging, for example, that the contextually specialised skills of the mediator participants might have limited the credibility of research data and the reliability of research findings.

¹²⁰³ Burrell, N. A., W. A. Donohue, and M. Allen, 'The Impact of Disputants' Expectations on Mediation, Testing an Interventionist Model' (1990) Fall 1990 *Human Communication Research* 104; Carnevale, P. J. D., and R. Peggnetter, 'The Selection of Mediator Tactics in Public Sector Disputes: A Contingency Analysis' (1985) 41(2) *Journal of Social Issues* 2; Gale, J., R. L. Mowery, M. S. Herrman, and N. L. Hollett, 'Considering Effective Divorce Mediation: Three Potential Factors' (2002) 19(4) *Conflict Resolution Quarterly* 389; Karim, A. and R. Peggnetter, 'Mediator Strategies and Qualities and Mediation Effectiveness' (1983) 22(1) *Industrial Relations* 105; Kochan, T. A., and T. Jick, 'The Public Sector Mediation Process: A Theory and Empirical Examination' (1978) 22(2) *The Journal of Conflict Resolution* 209; Pruitt, D. G., W. R. Fry, L. Castrianno, J. Zubeck, G. L. Welton, N. B. McGillicuddy, and C. Ippolito, 'The Process of Mediation: Caucusing, Control, and Problem Solving' in M. A. Rahim (ed), *Managing Conflict: An Interdisciplinary Approach* (Praeger, USA, 1989); Shapiro, D., R. Drieghe, and J. Brett, 'Mediator Behavior and the Outcomes of Mediation' (1985) 41(2) *Journal of Social Issues* 101; Wall, J. A., Jr, and S. Chan-Serafin, 'Processes in Civil Case Mediations' (2009) 26(3) *Conflict Resolution Quarterly* 261.

¹²⁰⁴ Carnevale, P. J. D., and R. Peggnetter, 'The Selection of Mediator Tactics in Public Sector Disputes: A Contingency Analysis' (1985) 41(2) *Journal of Social Issues* 2; Karim, A. and R. Peggnetter, 'Mediator Strategies and Qualities and Mediation Effectiveness' (1983) 22(1) *Industrial Relations* 105; Kochan, T. A., and T. Jick, 'The Public Sector Mediation Process: A Theory and Empirical Examination' (1978) 22(2) *The Journal of Conflict Resolution* 209; Pruitt, D. G., W. R. Fry, L. Castrianno, J. Zubeck, G. L. Welton, N. B. McGillicuddy, and C. Ippolito, 'The Process of Mediation: Caucusing, Control, and Problem Solving' in M. A. Rahim (ed), *Managing Conflict: An Interdisciplinary Approach* (Praeger, USA, 1989); Shapiro, D., R. Drieghe, and J. Brett, 'Mediator Behavior and the Outcomes of Mediation' (1985) 41(2) *Journal of Social Issues* 101.

mediators' specialised experience and skills;¹²⁰⁵ the use of simulated mediation;¹²⁰⁶ and small sample size.¹²⁰⁷

IV. *Researcher influence*

In three studies, the researchers note that they are likely to have influenced participant in-mediation behaviour and participant responses in surveys and interviews.¹²⁰⁸ In one study, the researchers note that mediator in-mediation behaviour and responses in surveys may have been influenced by their awareness of the mediation session being examined by researchers.¹²⁰⁹ In a second study, mediator participants were responsible for activating the audio-recording equipment and, because some recordings were of poor quality or were incomplete, they proved to be unusable. The researchers note that this may have favoured more experienced and confident mediators who were unconcerned about being recorded and chose to activate the recording equipment appropriately.¹²¹⁰ The third study notes, more generally, that, in observational studies, it is likely that the presence of observers will influence mediator behaviour.¹²¹¹

V. *Multiple limitations*

¹²⁰⁵ Shapiro, D., R. Drieghe, and J. Brett, 'Mediator Behavior and the Outcomes of Mediation' (1985) 41(2) *Journal of Social Issues* 101; Wall, J. A., Jr, and S. Chan-Serafin, 'Processes in Civil Case Mediations' (2009) 26(3) *Conflict Resolution Quarterly* 261.

¹²⁰⁶ Burrell, N. A., W. A. Donohue, and M. Allen, 'The Impact of Disputants' Expectations on Mediation, Testing an Interventionist Model' (1990) Fall 1990 *Human Communication Research* 104.

¹²⁰⁷ Gale, J., R. L. Mowery, M. S. Herrman, and N. L. Hollett, 'Considering Effective Divorce Mediation: Three Potential Factors' (2002) 19(4) *Conflict Resolution Quarterly* 389.

¹²⁰⁸ Hiltrop, J. M., 'Factors Associated with Successful Labor Mediation' in K. Kressel and D. G. Pruitt (eds), *Mediation Research: The Process and Effectiveness of Third-Party Intervention* (Jossey-Bass, USA, 1989); Shapiro, D., R. Drieghe, and J. Brett, 'Mediator Behavior and the Outcomes of Mediation' (1985) 41(2) *Journal of Social Issues* 101; Slaikeu, K. A., R. Culler, J. Pearson, and N. Thoennes, 'Process and Outcome in Divorce Mediation' (1985) 10 *Mediation Quarterly* 55.

¹²⁰⁹ Shapiro, D., R. Drieghe, and J. Brett, 'Mediator Behavior and the Outcomes of Mediation' (1985) 41(2) *Journal of Social Issues* 101.

¹²¹⁰ Slaikeu, K. A., R. Culler, J. Pearson, and N. Thoennes, 'Process and Outcome in Divorce Mediation' (1985) 10 *Mediation Quarterly* 55.

¹²¹¹ Kochan, T. A., and T. Jick, 'The Public Sector Mediation Process: A Theory and Empirical Examination' (1978) 22(2) *The Journal of Conflict Resolution* 209.

In eleven studies, the researchers acknowledge more than one methodological limitation.¹²¹²

- i. In eight studies, the researchers acknowledge two limitations (including combinations of: data analysis methods; small sample size; reliance on participant self-reports; skewed referral process; and low response rates);¹²¹³
- ii. In two studies, researchers acknowledge three limitations (including participant capacity; and issues relating to the nature of research data limiting the scope of the study);¹²¹⁴ and

¹²¹² Carnevale, P. J. D., and R. Pegnetter, 'The Selection of Mediator Tactics in Public Sector Disputes: A Contingency Analysis' (1985) 41(2) *Journal of Social Issues* 2; Gale, J., R. L. Mowery, M. S. Herrman, and N. L. Hollett, 'Considering Effective Divorce Mediation: Three Potential Factors' (2002) 19(4) *Conflict Resolution Quarterly* 389; Kochan, T. A., and T. Jick, 'The Public Sector Mediation Process: A Theory and Empirical Examination' (1978) 22(2) *The Journal of Conflict Resolution* 209; Kressel, K., E. A. Frontera, S. Forlenza, F. Butler, and L. Fish, 'The Settlement-Oriented vs the Problem-Solving Style' (1994) 50(1) *Journal of Social Issues* 67; Pruitt, D. G., R. S. Peirce, N. B. McGillicuddy, G. L. Welton, and L. Castrianno, 'Long-Term Success in Mediation' (1993) 17(3) *Law and Human Behavior* 313; Shapiro, D., R. Drieghe, and J. Brett, 'Mediator Behavior and the Outcomes of Mediation' (1985) 41(2) *Journal of Social Issues* 101; Sourdin, T., *Mediation in the Supreme and County Courts of Victoria* (Report prepared for the Department of Justice, Victoria, Australia, April 2009), available on <<http://www.civiljustice.info/adreval/1/>>; Sourdin, T., *Exploring Pre-Action Requirements: Resolving Disputes Outside Courts* (ACJI, Monash University, October 2012); Thoennes, N. A., and J. Pearson, 'Predicting Outcomes in Divorce Mediation: The Influence of People and Process' (1985) 41(2) *Journal of Social Issues* 115; Wall, J. A., Jr, and D. E. Rude, 'The Judge as a Mediator' (1991) 76(1) *Journal of Applied Psychology* 54; Welton, G. L., D. G. Pruitt, N. B. McGillicuddy, C. A. Ippolito, and J. M. Zubeck, 'Antecedents and Characteristics of Caucusing in Community Mediation' (1992) 3(4) *International Journal of Conflict Management* 303.

¹²¹³ Carnevale, P. J. D., and R. Pegnetter, 'The Selection of Mediator Tactics in Public Sector Disputes: A Contingency Analysis' (1985) 41(2) *Journal of Social Issues* 2; Gale, J., R. L. Mowery, M. S. Herrman, and N. L. Hollett, 'Considering Effective Divorce Mediation: Three Potential Factors' (2002) 19(4) *Conflict Resolution Quarterly* 389; Jones, T. S., 'Lag Sequential Analyses of Mediator-Spouse and Husband-Wife Interaction in Successful and Unsuccessful Divorce Mediation in M. A. Rahim (ed), *Managing Conflict: An Interdisciplinary Approach* (Praeger, USA, 1989); Kressel, K., E. A. Frontera, S. Forlenza, F. Butler, and L. Fish, 'The Settlement-Oriented vs the Problem-Solving Style' (1994) 50(1) *Journal of Social Issues* 67; Shapiro, D., R. Drieghe, and J. Brett, 'Mediator Behavior and the Outcomes of Mediation' (1985) 41(2) *Journal of Social Issues* 101; Sourdin, T., *Mediation in the Supreme and County Courts of Victoria* (Report prepared for the Department of Justice, Victoria, Australia, April 2009), available on <<http://www.civiljustice.info/adreval/1/>>; Sourdin, T., *Exploring Pre-Action Requirements: Resolving Disputes Outside Courts* (ACJI, Monash University, October 2012); Wall, J. A., Jr, and D. E. Rude, 'The Judge as a Mediator' (1991) 76(1) *Journal of Applied Psychology* 54; Welton, G. L., D. G. Pruitt, N. B. McGillicuddy, C. A. Ippolito, and J. M. Zubeck, 'Antecedents and Characteristics of Caucusing in Community Mediation' (1992) 3(4) *International Journal of Conflict Management* 303.

¹²¹⁴ Kochan, T. A., and T. Jick, 'The Public Sector Mediation Process: A Theory and Empirical Examination' (1978) 22(2) *The Journal of Conflict Resolution* 209; Pruitt, D. G., R. S. Peirce, N. B. McGillicuddy, G. L. Welton, and L. Castrianno, 'Long-Term Success in Mediation' (1993) 17(3) *Law and Human Behavior* 313.

- iii. In one study, researchers acknowledge five limitations (including small sample size; skewed referral process; reliance on participant self-reports; participant capacity; and the nature of research data limiting the scope of the study).¹²¹⁵

Of the 11 studies in which limitations are acknowledged, four also note the limited generalisability of their results.¹²¹⁶

6.2.2. Subjective data

Quantitative research, especially in the natural sciences, is associated with the objective collection of data in the form of definitive evidence. On the other hand, qualitative research can be associated with less definitive data that is far removed from traditional evidence and can include the collection of necessarily subjective research data in the form of study participants' personal perceptions and interpretations.¹²¹⁷

Most of the selected studies rely on similarly subjective data collected from participants largely through self-administered surveys in which the scope of responses is limited to the participants' own personal and subjective perceptions of in-mediation events. The necessarily subjective nature of perceptions and interpretations may account, in part, for some of the discrepancies researchers report detecting between the descriptions provided by mediator participants and by non-mediator participants.

That same subjectiveness may also account for discrepancies that researchers report between the descriptions provided by mediator participants and those provided by observers which have

¹²¹⁵ Thoennes, N. A., and J. Pearson, 'Predicting Outcomes in Divorce Mediation: The Influence of People and Process' (1985) 41(2) *Journal of Social Issues* 115.

¹²¹⁶ Carnevale, P. J. D., and R. Pegnetter, 'The Selection of Mediator Tactics in Public Sector Disputes: A Contingency Analysis' (1985) 41(2) *Journal of Social Issues* 2; Gale, J., R. L. Mowery, M. S. Herrman, and N. L. Hollett, 'Considering Effective Divorce Mediation: Three Potential Factors' (2002) 19(4) *Conflict Resolution Quarterly* 389; Kochan, T. A., and T. Jick, 'The Public Sector Mediation Process: A Theory and Empirical Examination' (1978) 22(2) *The Journal of Conflict Resolution* 209; Shapiro, D., R. Drieghe, and J. Brett, 'Mediator Behavior and the Outcomes of Mediation' (1985) 41(2) *Journal of Social Issues* 101.

¹²¹⁷ Freeman, M., K. deMarrais, J. Preissle, K. Roulston, and E. A. St Pierre, 'Standards of Evidence in Qualitative Research: An Incitement to Discourse' (2007) 36(1) *Educational Researcher* 25.

been cited as demonstration of a lack of mediator awareness of their in-mediation behaviour.¹²¹⁸

While some researchers have proposed complex explanations for the latter discrepancies, very few appear to have followed a core research approach and firstly discounted simpler explanations for unexpected results,¹²¹⁹ such as the subjective nature of the data that is based on perceptions, or of mediator participants' self-reports being influenced by such factors as social desirability or deference effects.¹²²⁰ Although many of the researchers acknowledge the subjective nature of the data, their analysis methods appear not to take that subjectivity into account when the data is quantified for statistical analysis. Nor do they appear to consider its essential subjectivity in their presentation of research findings.

For example, in one study, each of four mediators conducts a simulated mediation, with the same two paid actors playing the same parts of disputants in all the subject mediations. The actors and the researchers, separately, evaluate the "effectiveness" of each mediator (the researchers having access to video-recordings of the mediations); however, the researchers are surprised to find that their own evaluation of one mediator differs markedly from the actors' evaluation. Although the researchers suggest a range of alternatives to explain their own evaluation, they do not similarly examine the actors' evaluation. There is only limited consideration given to the subjective personal responses likely to have influenced the researchers and the actors during their evaluations, including the potential contextual differences between the actors being involved in the mediation, and the researchers viewing it later on a video.¹²²¹

¹²¹⁸ For example, see Charkoudian, L., 'Just My Style: The Practical, Ethical, and Empirical Dangers of the Lack of Consensus about Definitions of Mediator Style' (2012) 5(4) *Negotiation and Conflict Management Research* 367; Kressel, K., T. Henderson, W. Reich, and C. Cohen, 'Multi-Dimensional Analysis of Conflict Mediator Style' (2012) 30(2) *Conflict Resolution Quarterly* 135; Kressel, K., 'How Do Mediators Decide What To Do? Implicit Schemas of Practice and Mediator Decisionmaking' (2013) 28(3) *Ohio State Journal on Dispute Resolution* 709; Wall, J. and K. Kressel, 'Research on Mediator Style: A Summary and Some Research Suggestions' (2012) 5(4) *Negotiation and Conflict Management Research* 401.

¹²¹⁹ Gorard, S., *Research Design: Creating Robust Approaches for the Social Sciences* (SAGE Publications Limited, UK/USA/India, 2013).

¹²²⁰ These are explored in Chapter Seven.

¹²²¹ Gale, J., R. L. Mowery, M. S. Herrman, and N. L. Hollett, 'Considering Effective Divorce Mediation: Three Potential Factors' (2002) 19(4) *Conflict Resolution Quarterly* 389.

In a second example, researchers describe collecting research data from non-mediator participants in a community-based mediation setting.¹²²² Fairness and satisfaction are key analysis measures in that study. The participants are asked to complete post-mediation surveys in which some questions require them to rate their satisfaction with the mediation process, with its outcomes, and with the mediator, while other questions require them to rate the fairness of the process, of its outcomes, and of the mediator. The researchers express concern that the participant responses do not clearly differentiate between satisfaction and fairness, nor between the process and the mediator, and they suggest that the disappointing survey data is due to the participants not being knowledgeable about mediation. Certainly, satisfaction and fairness are complex to differentiate in the context of mediation; however, the researchers do not appear to consider that the survey responders were providing their own perceptions of the subject mediations (which the researchers did not attend) and their own interpretations of in-mediation events, as they experienced them. In themselves, the responses might have provided valuable information about participant interpretations of these two key mediation concepts.

6.2.3. Broader limitations¹²²³

Five studies point to ‘methodological shortcomings’ in mediation research generally.^{1224 1225}

The limitations they raise include:

¹²²² Alberts, J. K., B. L. Heisterkamp, and R. M. McPhee, ‘Disputant Perceptions of and Satisfaction with a Community Mediation Program’ (2005) 16(3) *The International Journal of Conflict Management* 218.

¹²²³ Chapter Seven of this thesis considers in some detail the issue of limitations and constraints mediation research; this section is limited to listing them, according to their inclusion in five of the studies.

¹²²⁴ Kressel, K., T. Henderson, W. Reich, and C. Cohen, ‘Multi-Dimensional Analysis of Conflict Mediator Style’ (2012) 30(2) *Conflict Resolution Quarterly* 135, 139.

¹²²⁵ Bingham, L. B., ‘Transformative Mediation in the United States Postal Service’ (2012) 5(4) *Negotiation and Conflict Management Research* 354; Burrell, N. A., W. A. Donohue, and M. Allen, ‘The Impact of Disputants’ Expectations on Mediation, Testing an Interventionist Model’ (1990) Fall 1990 *Human Communication Research* 104; Hiltrop, J. M., ‘Factors Associated with Successful Labor Mediation’ in K. Kressel and D. G. Pruitt (eds), *Mediation Research: The Process and Effectiveness of Third-Party Intervention* (Jossey-Bass, USA, 1989); Kressel, K., ‘How Do Mediators Decide What To Do? Implicit Schemas of Practice and Mediator Decisionmaking’ (2013) 28(3) *Ohio State Journal on Dispute Resolution* 709; Kressel, K., T. Henderson, W. Reich, and C. Cohen, ‘Multi-Dimensional Analysis of Conflict Mediator Style’ (2012) 30(2) *Conflict Resolution Quarterly* 135.

- Widespread reliance on written self-report surveys;¹²²⁶
 - Small sample sizes;¹²²⁷
 - Narrow focus on mediation models of practice;¹²²⁸
 - Researcher influence, especially on observational studies;¹²²⁹
 - The lack of methodologies suitable for investigating procedural justice;¹²³⁰
 - The role of confidentiality in inhibiting the use of observational studies of mediation;¹²³¹
- and
- The use of coding techniques in data analysis.¹²³²

The last issue is considered below, in 6.3 Missing data.

Contextual analysis

This analysis considers only the twenty-two studies in which researchers have acknowledged methodologies that might limit the credibility of their research data and the reliability of their research findings.

¹²²⁶ Hiltrop, J. M., 'Factors Associated with Successful Labor Mediation' in K. Kressel and D. G. Pruitt (eds), *Mediation Research: The Process and Effectiveness of Third-Party Intervention* (Jossey-Bass, USA, 1989); Kressel, K., T. Henderson, W. Reich, and C. Cohen, 'Multi-Dimensional Analysis of Conflict Mediator Style' (2012) 30(2) *Conflict Resolution Quarterly* 135.

¹²²⁷ Kressel, K., T. Henderson, W. Reich, and C. Cohen, 'Multi-Dimensional Analysis of Conflict Mediator Style' (2012) 30(2) *Conflict Resolution Quarterly* 135.

¹²²⁸ Kressel, K., 'How Do Mediators Decide What To Do? Implicit Schemas of Practice and Mediator Decisionmaking' (2013) 28(3) *Ohio State Journal on Dispute Resolution* 709; Kressel, K., T. Henderson, W. Reich, and C. Cohen, 'Multi-Dimensional Analysis of Conflict Mediator Style' (2012) 30(2) *Conflict Resolution Quarterly* 135.

¹²²⁹ Bingham, L. B., 'Transformative Mediation in the United States Postal Service' (2012) 5(4) *Negotiation and Conflict Management Research* 354.

¹²³⁰ Bingham, L. B., 'Transformative Mediation in the United States Postal Service' (2012) 5(4) *Negotiation and Conflict Management Research* 354.

¹²³¹ Burrell, N. A., W. A. Donohue, and M. Allen, 'The Impact of Disputants' Expectations on Mediation, Testing an Interventionist Model' (1990) Fall 1990 *Human Communication Research* 104.

¹²³² Kressel, K., T. Henderson, W. Reich, and C. Cohen, 'Multi-Dimensional Analysis of Conflict Mediator Style' (2012) 30(2) *Conflict Resolution Quarterly* 135.

- Of the nine studies conducted in a labour/management context, six include acknowledgement, or noting, of methodological limitations,¹²³³ and three do not;¹²³⁴
- Of the ten studies conducted in a court-connected context, two include acknowledgement, or noting, of methodological limitations,¹²³⁵ and eight do not;¹²³⁶
- Of the nine studies that are evaluations of programs and services, three include noting of limitations,¹²³⁷ and six do not;¹²³⁸

¹²³³ Carnevale, P. J. D., and R. Pegnetter, 'The Selection of Mediator Tactics in Public Sector Disputes: A Contingency Analysis' (1985) 41(2) *Journal of Social Issues* 2; Hiltrop, J. M., 'Factors Associated with Successful Labor Mediation' in K. Kressel and D. G. Pruitt (eds), *Mediation Research: The Process and Effectiveness of Third-Party Intervention* (Jossey-Bass, USA, 1989); Kochan, T. A., and T. Jick, 'The Public Sector Mediation Process: A Theory and Empirical Examination' (1978) 22(2) *The Journal of Conflict Resolution* 209; Mareschal, P. M., 'What Makes Mediation Work? Perspectives on Resolving Disputes' (2005) 44(3) *Industrial Relations* 509; Posthuma, R. A., A. Richard, J. B. Dworkin, and M. S. Swift, 'Mediator Tactics and Sources of Conflict: Facilitating and Inhibiting Effects' (2002) 41(1) *Industrial Relations* 94; Shapiro, D., R. Drieghe, and J. Brett, 'Mediator Behavior and the Outcomes of Mediation' (1985) 41(2) *Journal of Social Issues* 101.

¹²³⁴ Dilts, D. A. and A. Karim, 'The Effect of Mediators' Qualities and Strategies on Mediation Outcomes' (1990) 45(1) *Relations Industrielles/Industrial Relations* 22; Karim, A. and D. Dilts, 'Determinants of Mediation Success in the Iowa Public Sector' (1990) 19(2) *Journal of Collective Negotiations* 129; Karim, A. and R. Pegnetter, 'Mediator Strategies and Qualities and Mediation Effectiveness' (1983) 22(1) *Industrial Relations* 105.

¹²³⁵ Wall, J. A., Jr, and S. Chan-Serafin, 'Processes in Civil Case Mediations' (2009) 26(3) *Conflict Resolution Quarterly* 261; Wall, J. A., Jr, and D. E. Rude, 'The Judge as a Mediator' (1991) 76(1) *Journal of Applied Psychology* 54.

¹²³⁶ Goldberg, S. B., and M. L. Shaw, 'Further Investigation into the Secrets of Successful and Unsuccessful Mediators' (2008) 26(8) *Alternatives to the High Cost of Litigation* 149; McDermott, E. P., and R. Obar, "'What's Going On" in Mediation: An Empirical Analysis of the Influence of a Mediator's Style on Party Satisfaction and Monetary Benefit' (2004) 9 *Harvard Negotiation Law Review* 75; Peeples, R., C. Harris, and T. Metzloff, 'Following the Script: An Empirical Analysis of Court-Ordered Mediation of Medical Malpractice Cases' (2007) 2007(1) *Journal of Dispute Resolution* 101; Swaab, R. I., *Face First: Pre-Mediation Caucus and Face in Employment Disputes* (Presentation, Annual Association of Conflict Management Conference, June 2009); Swaab, R. I., and J. Brett, *Caucus with Care: The Impact of Pre-Mediation Caucuses on Conflict Resolution* (Meetings Paper, International Association of Conflict Management, 2007); Wall, J. A., Jr, and S. Chan-Serafin, 'Do Mediators Walk Their Talk in Civil Cases?' (2010) 28(1) *Conflict Resolution Quarterly* 3; Wissler, R. L., 'Mediation and Adjudication in Small Claims Court: The Effects of Process and Case Characteristics' (1995) 29(2) *Law & Society Review* 323; Wissler, R. L., 'Court-Connected Mediation in General Civil Cases: What We Know from Empirical Research' (2002) 17(3) *Ohio State Journal on Dispute Resolution* 641.

¹²³⁷ Sourdin, T., *Dispute Resolution Processes for Credit Consumers* (Project Report, Conflict Resolution Research Centre, La Trobe University, 2007); Sourdin, T., *Mediation in the Supreme and County Courts of Victoria* (Report prepared for the Department of Justice, Victoria, Australia, April 2009), available on <<http://www.civiljustice.info/adreval/1/>>; Sourdin, T., *Exploring Pre-Action Requirements: Resolving Disputes Outside Courts* (ACJI, Monash University, October 2012).

¹²³⁸ Bingham, L. B., 'Transformative Mediation in the United States Postal Service' (2012) 5(4) *Negotiation and Conflict Management Research* 354; McEwen, C. A., *An Evaluation of the ADR Pilot Project: Final Report 1* (Unpublished report, 1992); Sourdin, T., and T. Matruglio, *Evaluating Mediation – New South Wales Settlement Scheme 2002* (2004) *Mediation*. Paper 7, available on <<http://www.civiljustice.info/med/7>>; Vanderkooi, L., and J. Pearson, 'Mediating Divorce Disputes: Mediator Behaviors, Styles and Roles' (1983) 32(4) *Family Relations* 557; Wissler, R. L., *Trapping the Data: An Assessment of Domestic Relations Mediation in Maine and Ohio Courts* (Unpublished report, 1999); Woodward, J. G., 'Settlement Week: Measuring the Promise' (1990) 11 *Northern Illinois University Law Review* 1.

- Of the six studies using simulated mediation, two include acknowledgement, or noting, methodological limitations,¹²³⁹ and four do not;¹²⁴⁰
- Of the seven studies of community-based mediation, five include acknowledgement, or noting, of methodological limitations,¹²⁴¹ and two do not;^{1242 1243} and
- Of the four studies of family/divorce/custody mediation, three include acknowledgement, or noting, of methodological limitations,¹²⁴⁴ and one does not.¹²⁴⁵

The single study of construction/business mediation does not include acknowledgement of any methodological limitations.¹²⁴⁶

Temporal analysis

¹²³⁹ Burrell, N. A., W. A. Donohue, and M. Allen, 'The Impact of Disputants' Expectations on Mediation, Testing an Interventionist Model' (1990) Fall 1990 *Human Communication Research* 104; Gale, J., R. L. Mowery, M. S. Herrman, and N. L. Hollett, 'Considering Effective Divorce Mediation: Three Potential Factors' (2002) 19(4) *Conflict Resolution Quarterly* 389.

¹²⁴⁰ Kimsey 194; Kimsey, W. D., R. M. Fuller, and B. C. McKinney, 'Mediator Listening, Dispute Reframing, and Mediation Outcome: A Pilot Study' (1993) 7(1) *Journal of the International Listening Association* 74; Kressel, K., 'How Do Mediators Decide What To Do? Implicit Schemas of Practice and Mediator Decisionmaking' (2013) 28(3) *Ohio State Journal on Dispute Resolution* 709; Kressel, K., T. Henderson, W. Reich, and C. Cohen, 'Multi-Dimensional Analysis of Conflict Mediator Style' (2012) 30(2) *Conflict Resolution Quarterly* 135.

¹²⁴¹ Alberts, J. K., B. L. Heisterkamp, and R. M. McPhee, 'Disputant Perceptions of and Satisfaction with a Community Mediation Program' (2005) 16(3) *The International Journal of Conflict Management* 218; McGillicuddy, N. B., G. L. Welton, and D. G. Pruitt, 'Third-Party Intervention: A Field Experiment Comparing Three Different Models' (1987) 53(1) *Journal of Personality and Social Psychology* 104; Pruitt, D. G., R. S. Peirce, N. B. McGillicuddy, G. L. Welton, and L. Castrianno, 'Long-Term Success in Mediation' (1993) 17(3) *Law and Human Behavior* 313; Welton, G. L., D. G. Pruitt, N. B. McGillicuddy, C. A. Ippolito, and J. M. Zubeck, 'Antecedents and Characteristics of Caucusing in Community Mediation' (1992) 3(4) *International Journal of Conflict Management* 303; Zubeck, J. M., D. G. Pruitt, R. S. Peirce, N. B. McGillicuddy, and H. Syna, 'Disputant and Mediator Behaviors Affecting Short-Term Success in Mediation' (1992) 36(3) *Journal of Conflict Resolution* 546.

¹²⁴² Pruitt, D. G., W. R. Fry, L. Castrianno, J. Zubeck, G. L. Welton, N. B. McGillicuddy, and C. Ippolito, 'The Process of Mediation: Caucusing, Control, and Problem Solving' in M. A. Rahim (ed), *Managing Conflict: An Interdisciplinary Approach* (Praeger, USA, 1989); Welton, G. L., D. G. Pruitt, and N. B. McGillicuddy, 'The Role of Caucusing in Community Mediation' (1988) 32(1) *The Journal of Conflict Resolution* 181.

¹²⁴³ Of the seven community-based studies, six describe different limitations despite reporting findings from the same data sets.

¹²⁴⁴ Jones, T. S., 'Lag Sequential Analyses of Mediator-Spouse and Husband-Wife Interaction in Successful and Unsuccessful Divorce Mediation in M. A. Rahim (ed), *Managing Conflict: An Interdisciplinary Approach* (Praeger, USA, 1989); Slaikeu, K. A., R. Culler, J. Pearson, and N. Thoennes, 'Process and Outcome in Divorce Mediation' (1985) 10 *Mediation Quarterly* 55; Thoennes, N. A., and J. Pearson, 'Predicting Outcomes in Divorce Mediation: The Influence of People and Process' (1985) 41(2) *Journal of Social Issues* 115.

¹²⁴⁵ Wissler, R. L., *Trapping the Data: An Assessment of Domestic Relations Mediation in Maine and Ohio Courts* (Unpublished report, 1999).

¹²⁴⁶ Henderson, D. A., 'Mediation Success: An Empirical Analysis' (1996) 11(1) *Ohio State Journal on Dispute Resolution* 105.

There are no major discernible trends across the years of the studies' publication (ie 1978 – 2013). Of the 24 studies in which researchers acknowledge methodological limitations, eight were published before 1990;¹²⁴⁷ six were published between 1990 and 1999;¹²⁴⁸ eight were published between 2000 – 2009;¹²⁴⁹ and two were published between 2010 - 2013.¹²⁵⁰

The lack of any acknowledgement of study limitations is also reasonably evenly spread across all decades.

¹²⁴⁷ Carnevale, P. J. D., and R. Pegnetter, 'The Selection of Mediator Tactics in Public Sector Disputes: A Contingency Analysis' (1985) 41(2) *Journal of Social Issues* 2; Hiltrop, J. M., 'Factors Associated with Successful Labor Mediation' in K. Kressel and D. G. Pruitt (eds), *Mediation Research: The Process and Effectiveness of Third-Party Intervention* (Jossey-Bass, USA, 1989); Jones, T. S., 'Lag Sequential Analyses of Mediator-Spouse and Husband-Wife Interaction in Successful and Unsuccessful Divorce Mediation in M. A. Rahim (ed), *Managing Conflict: An Interdisciplinary Approach* (Praeger, USA, 1989); Kochan, T. A., and T. Jick, 'The Public Sector Mediation Process: A Theory and Empirical Examination' (1978) 22(2) *The Journal of Conflict Resolution* 209; McGillicuddy, N. B., G. L. Welton, and D. G. Pruitt, 'Third-Party Intervention: A Field Experiment Comparing Three Different Models' (1987) 53(1) *Journal of Personality and Social Psychology* 104; Shapiro, D., R. Drieghe, and J. Brett, 'Mediator Behavior and the Outcomes of Mediation' (1985) 41(2) *Journal of Social Issues* 101; Slaikeu, K. A., R. Culler, J. Pearson, and N. Thoennes, 'Process and Outcome in Divorce Mediation' (1985) 10 *Mediation Quarterly* 55; Thoennes, N. A., and J. Pearson, 'Predicting Outcomes in Divorce Mediation: The Influence of People and Process' (1985) 41(2) *Journal of Social Issues* 115.

¹²⁴⁸ Burrell, N. A., W. A. Donohue, and M. Allen, 'The Impact of Disputants' Expectations on Mediation, Testing an Interventionist Model' (1990) Fall 1990 *Human Communication Research* 104; Kressel, K., E. A. Frontera, S. Forlenza, F. Butler, and L. Fish, 'The Settlement-Orientation vs the Problem-Solving Style' (1994) 50(1) *Journal of Social Issues* 67; Pruitt, D. G., R. S. Peirce, N. B. McGillicuddy, G. L. Welton, and L. Castrianno, 'Long-Term Success in Mediation' (1993) 17(3) *Law and Human Behavior* 313; Wall, J. A., Jr, and D. E. Rude, 'The Judge as a Mediator' (1991) 76(1) *Journal of Applied Psychology* 54; Welton, G. L., D. G. Pruitt, N. B. McGillicuddy, C. A. Ippolito, and J. M. Zubeck, 'Antecedents and Characteristics of Caucusing in Community Mediation' (1992) 3(4) *International Journal of Conflict Management* 303; Zubeck, J. M., D. G. Pruitt, R. S. Peirce, N. B. McGillicuddy, and H. Syna, 'Disputant and Mediator Behaviors Affecting Short-Term Success in Mediation' (1992) 36(3) *Journal of Conflict Resolution* 546.

¹²⁴⁹ Alberts, J. K., B. L. Heisterkamp, and R. M. McPhee, 'Disputant Perceptions of and Satisfaction with a Community Mediation Program' (2005) 16(3) *The International Journal of Conflict Management* 218; Gale, J., R. L. Mowery, M. S. Herrman, and N. L. Hollett, 'Considering Effective Divorce Mediation: Three Potential Factors' (2002) 19(4) *Conflict Resolution Quarterly* 389; Mareschal, P. M., 'What Makes Mediation Work? Perspectives on Resolving Disputes' (2005) 44(3) *Industrial Relations* 509; Posthuma, R. A., A. Richard, J. B. Dworkin, and M. S. Swift, 'Mediator Tactics and Sources of Conflict: Facilitating and Inhibiting Effects' (2002) 41(1) *Industrial Relations* 94; Sourdin, T., *Dispute Resolution Processes for Credit Consumers* (Project Report, Conflict Resolution Research Centre, La Trobe University, 2007); Sourdin, T., *Mediation in the Supreme and County Courts of Victoria* (Report prepared for the Department of Justice, Victoria, Australia, April 2009), available on <<http://www.civiljustice.info/adreval/1/>>; Wall, J. A., Jr, and S. Chan-Serafin, 'Processes in Civil Case Mediations' (2009) 26(3) *Conflict Resolution Quarterly* 261; Wissler, R. L., 'Court-Connected Mediation in General Civil Cases: What We Know from Empirical Research' (2002) 17(3) *Ohio State Journal on Dispute Resolution* 641.

¹²⁵⁰ Bingham, L. B., 'Transformative Mediation in the United States Postal Service' (2012) 5(4) *Negotiation and Conflict Management Research* 354; Sourdin, T., Exploring Pre-Action Requirements: Resolving Disputes Outside Courts (ACJI, Monash University, October 2012).

It cannot be ascertained if lack of acknowledgement of limitations can be linked to increasing awareness at certain times, or to publication limitations, or to other factors. Where they can be included, awareness and transparent acknowledgement of methodological limitations is likely to have beneficial effects on mediation research including:

- Improved awareness of problematic methodologies;
- Fostering of improved research methodologies;
- Increased confidence in mediation research; and
- Improved research knowledge and skills among mediation researchers.

Adopting alternative and more reliable methodologies would increase the reliability of mediation research findings and would be likely to lead to an improvement in understanding about mediation as well as the effectiveness of mediators.

Summary

According to their own acknowledgements in the selected studies, researchers' key concerns are focused on methodological limitations related to the numbers, selection, and capacity of study participants; continued reliance on data collected through self-administered written self-reports; and limitations related to the nature of research data and the methodologies for its analysis.

6.3. Missing data

Perhaps methodological limitations can be better understood as methodological flaws that create gaps in research information. Where methodological limitations exist, they can restrict the availability of, and access to, research data, leading to a flaw which is known more broadly as

‘missing data’,¹²⁵¹ and has been called ‘missing dark matter’.¹²⁵² This section examines the links between methodological limitations and missing data in the selected studies.

6.3.0. Identifying “missing data”

Missing data is relevant information that could be expected to enrich a study’s findings and may be integral to the research analysis, but which is not included in the researchers’ analysis and reporting of their study findings. The omission of key research data and information has been described as an ethical issue relevant to the relationship between researchers and their readers.¹²⁵³ It has been recognised for some time that the main consequences of missing data are the information gaps that can lead to readers misinterpreting, distorting, and misunderstanding a study’s results and findings.¹²⁵⁴ Missing data can also be seen to misrepresent the contributions of study participants.¹²⁵⁵

Data can go missing because it is withheld by study participants when they do not cooperate with researchers (eg not responding to an invitation to participate; not completing all answers in a survey; not activating recording equipment¹²⁵⁶),¹²⁵⁷ or because researchers choose to exclude it (eg excluding study participants from data analysis; omitting key information about study participants;

¹²⁵¹ Bryman, A., *Social Research Methods* (5th Edition, Oxford University Press, UK, 2016), 693; in the Statistical Package for the Social Sciences (SPSS), missing data is known as “missing values”.

¹²⁵² Weiner-Levy, N., and A. Popper-Giveon, ‘The Absent, the Hidden and the Obscured: Reflections on “Dark Matter” in Qualitative Research’ (2013) 47(4) *Quality and Quantity* 2177, 2177.

¹²⁵³ Bishop, D. V. M., ‘The Psychology of Experimental Psychologists: Overcoming Cognitive Constraints to Improve Research: The 47th Sir Frederic Bartlett Lecture’ (2019) 73(1) *Quarterly Journal of Experimental Psychology* 1; see footnote 199.

¹²⁵⁴ Bishop, D. V. M., ‘The Psychology of Experimental Psychologists: Overcoming Cognitive Constraints to Improve Research: The 47th Sir Frederic Bartlett Lecture’ (2019) 73(1) *Quarterly Journal of Experimental Psychology* 1; Carey, M. A., and M. W. Smith ‘Capturing the Group Effect in Focus Groups: A Special Concern in Analysis’ (1994) 4(1) *Qualitative Health Research* 123; Pope, C., S. Ziebland, and N. Mays, ‘Qualitative Research in Health Care: Analysing Qualitative Data’ (2000) 320 *BMJ* 114; Tracy, S. J., ‘Qualitative Quality: Eight “Big Tent” Criteria for Excellent Qualitative Research’ (2010) 16(10) *Qualitative Inquiry* 837; Weiner-Levy, N., and A. Popper-Giveon, ‘The Absent, the Hidden and the Obscured: Reflections on “Dark Matter” in Qualitative Research’ (2013) 47(4) *Quality and Quantity* 2177; West, B. T., and A. G. Blom, ‘Explaining Interviewer Effects: A Research Synthesis’ (2017) 5 *Journal of Statistics and Methodology* 175.

¹²⁵⁵ Pope, C., S. Ziebland, and N. Mays, ‘Qualitative Research in Health Care: Analysing Qualitative Data’ (2000) 320 *BMJ* 114.

¹²⁵⁶ These examples are reported in the selected studies.

¹²⁵⁷ Weiner-Levy, N., and A. Popper-Giveon, ‘The Absent, the Hidden and the Obscured: Reflections on “Dark Matter” in Qualitative Research’ (2013) 47(4) *Quality and Quantity* 2177.

removing the information during transcription and coding of data; having insufficient time or resources to analyse the data; omitting information from publications¹²⁵⁸).¹²⁵⁹

There can be many reasons for data not being included, or for it to “go missing”, including publisher constraints and publication word limits.¹²⁶⁰ For example, researchers may omit certain data to meet prescribed word limits, in consideration of publisher preferences, or by the researchers’ own choices; however, it has also been suggested that researchers may claim publisher constraints in order to purposely omit data that is problematic for their study.¹²⁶¹ Among the selected studies, there are examples where varying amounts of methodological information are included in articles that appear in the same publication, suggesting that some researchers can make efficient use of the limited space that publishers provide.¹²⁶²

Other suggested reasons for data to be missing include that observers or transcribers have interpreted data wrongly, or that coders have misinterpreted information, or have mis-typed, or have activated incorrect electronic components,¹²⁶³ or that larger-scale computerised analysis may not have been designed to capture subtle, nuanced interactions between participants.¹²⁶⁴

Although none of the studies refers to missing data, or its implications for their findings, the researchers’ acknowledgement of methodological limitations provides a key to its existence, as shown below, in Table 6.1. Table 6.1. shows, in summary, the acknowledged study limitations, the

¹²⁵⁸ These examples are reported in the selected studies.

¹²⁵⁹ Carey, M. A., and M. W. Smith ‘Capturing the Group Effect in Focus Groups: A Special Concern in Analysis’ (1994) 4(1) *Qualitative Health Research* 123.

¹²⁶⁰ Weiner-Levy, N., and A. Popper-Giveon, ‘The Absent, the Hidden and the Obscured: Reflections on “Dark Matter” in Qualitative Research’ (2013) 47(4) *Quality and Quantity* 2177.

¹²⁶¹ Weiner-Levy, N., and A. Popper-Giveon, ‘The Absent, the Hidden and the Obscured: Reflections on “Dark Matter” in Qualitative Research’ (2013) 47(4) *Quality and Quantity* 2177.

¹²⁶² For example, see Jones, T. S., ‘Lag Sequential Analyses of Mediator-Spouse and Husband-Wife Interaction in Successful and Unsuccessful Divorce Mediation in M. A. Rahim (ed), *Managing Conflict: An Interdisciplinary Approach* (Praeger, USA, 1989) and Pruitt, D. G., W. R. Fry, L. Castrianno, J. Zubeck, G. L. Welton, N. B. McGillicuddy, and C. Ippolito, ‘The Process of Mediation: Caucusing, Control, and Problem Solving’ in M. A. Rahim (ed), *Managing Conflict: An Interdisciplinary Approach* (Praeger, USA, 1989).

¹²⁶³ West, B. T., and A. G. Blom, ‘Explaining Interviewer Effects: A Research Synthesis’ (2017) 5 *Journal of Statistics and Methodology* 175.

¹²⁶⁴ Tracy, S. J., ‘Qualitative Quality: Eight “Big Tent” Criteria for Excellent Qualitative Research’ (2010) 16(10) *Qualitative Inquiry* 837.

potential ramifications of those limitations, and how the limitations might also limit the availability of research data.

Table 6.1. Summary of acknowledged methodological limitations.

<i>Acknowledged limitation</i>	<i>Ramifications</i>	<i>Missing data</i>
Limited, or small, study samples ¹²⁶⁵	<ul style="list-style-type: none"> ▪ Narrow scope of information limits study results/findings ▪ Small sample increases statistical significance of results 	<ul style="list-style-type: none"> ▪ No information from broader range of participants
Skewed selection process ¹²⁶⁶	<ul style="list-style-type: none"> ▪ Positive results are more likely 	<ul style="list-style-type: none"> ▪ Few mediations included where settlement less likely, or unlikely
Participant capacity to provide required information ¹²⁶⁷	<ul style="list-style-type: none"> ▪ Participant responses likely influenced by deference effect,¹²⁶⁸ include fewer of their own perceptions ▪ Positive results more likely 	<ul style="list-style-type: none"> ▪ Lack of credible, or reliable, information about in-mediation events
Low response rates ¹²⁶⁹	<ul style="list-style-type: none"> ▪ Narrow scope of information limits study results/findings ▪ Responders' likely strong views (positive/negative) on their experience ▪ Small sample size increases statistical significance 	<ul style="list-style-type: none"> ▪ Available information is limited ▪ Study lacks wider range of data

¹²⁶⁵ Gale, J., R. L. Mowery, M. S. Herrman, and N. L. Hollett, 'Considering Effective Divorce Mediation: Three Potential Factors' (2002) 19(4) *Conflict Resolution Quarterly* 389; Kressel, K., E. A. Frontera, S. Forlenza, F. Butler, and L. Fish, 'The Settlement-Orientation vs the Problem-Solving Style' (1994) 50(1) *Journal of Social Issues* 67; Sourdin, T., *Dispute Resolution Processes for Credit Consumers* (Project Report, Conflict Resolution Research Centre, La Trobe University, 2007); Sourdin, T., *Mediation in the Supreme and County Courts of Victoria* (Report prepared for the Department of Justice, Victoria, Australia, April 2009), available on <<http://www.civiljustice.info/adreval/1/>>; Sourdin, T., *Exploring Pre-Action Requirements: Resolving Disputes Outside Courts* (ACJI, Monash University, October 2012); Thoennes, N. A., and J. Pearson, 'Predicting Outcomes in Divorce Mediation: The Influence of People and Process' (1985) 41(2) *Journal of Social Issues* 115; Welton, G. L., D. G. Pruitt, N. B. McGillicuddy, C. A. Ippolito, and J. M. Zubeck, 'Antecedents and Characteristics of Caucusing in Community Mediation' (1992) 3(4) *International Journal of Conflict Management* 303.

¹²⁶⁶ Carnevale, P. J. D., and R. Pegnetter, 'The Selection of Mediator Tactics in Public Sector Disputes: A Contingency Analysis' (1985) 41(2) *Journal of Social Issues* 2; Gale, J., R. L. Mowery, M. S. Herrman, and N. L. Hollett, 'Considering Effective Divorce Mediation: Three Potential Factors' (2002) 19(4) *Conflict Resolution Quarterly* 389; Posthuma 002; Thoennes, N. A., and J. Pearson, 'Predicting Outcomes in Divorce Mediation: The Influence of People and Process' (1985) 41(2) *Journal of Social Issues* 115; Wall, J. A., Jr, and D. E. Rude, 'The Judge as a Mediator' (1991) 76(1) *Journal of Applied Psychology* 54.

¹²⁶⁷ Alberts, J. K., B. L. Heisterkamp, and R. M. McPhee, 'Disputant Perceptions of and Satisfaction with a Community Mediation Program' (2005) 16(3) *The International Journal of Conflict Management* 218; Kochan, T. A., and T. Jick, 'The Public Sector Mediation Process: A Theory and Empirical Examination' (1978) 22(2) *The Journal of Conflict Resolution* 209; Thoennes, N. A., and J. Pearson, 'Predicting Outcomes in Divorce Mediation: The Influence of People and Process' (1985) 41(2) *Journal of Social Issues* 115.

¹²⁶⁸ Deference effect and other biases are considered in the next section, 6.4 Researcher influence, and in Chapter Seven.

¹²⁶⁹ Pruitt, D. G., R. S. Peirce, N. B. McGillicuddy, G. L. Welton, and L. Castrianno, 'Long-Term Success in Mediation' (1993) 17(3) *Law and Human Behavior* 313; Welton, G. L., D. G. Pruitt, and N. B. McGillicuddy, 'The Role of Caucusing in Community Mediation' (1988) 32(1) *The Journal of Conflict Resolution* 181; Sourdin, T., *Mediation in the Supreme and County Courts of Victoria* (Report prepared for the Department of Justice, Victoria, Australia, April 2009), available on <<http://www.civiljustice.info/adreval/1/>>; Sourdin, T., *Exploring Pre-Action Requirements: Resolving Disputes Outside Courts* (ACJI, Monash University, October 2012).

Reliance on self-administered written surveys (ie self-reports)¹²⁷⁰	<p>Responses likely to be influenced by:</p> <ul style="list-style-type: none"> ▪ Social desirability effect ▪ The inference effect¹²⁷¹ ▪ Deference effect ▪ Judgement by others ▪ Fatigue <p>Surveys likely to have missing answers or be deemed ‘unusable’;¹²⁷² data likely to be unreliable; responses likely to be positive</p>	<ul style="list-style-type: none"> ▪ Limited, or no, access to credible data
Nature of data and collection methods limit research scope¹²⁷³	<ul style="list-style-type: none"> ▪ Results limited to the scope of the data ▪ In each of cited studies, a focus on settlement 	<ul style="list-style-type: none"> ▪ Nature of data & collection methods prevents access to information about in-mediation behaviour, participant perceptions, & influences
Data analysis methods (eg coding scheme) narrow scope of study¹²⁷⁴	<ul style="list-style-type: none"> ▪ Results limited to coded, categorised information;¹²⁷⁵ ▪ Coding narrows scope of data 	<ul style="list-style-type: none"> ▪ Analysis excludes important data that cannot be coded, or is beyond researchers’ subjective categorisation
Data collected in previous study; different purpose¹²⁷⁶	<ul style="list-style-type: none"> ▪ Results cannot be appropriate to study purpose 	<ul style="list-style-type: none"> ▪ No information appropriate to study purpose

¹²⁷⁰ Carnevale, P. J. D., and R. Pegnetter, ‘The Selection of Mediator Tactics in Public Sector Disputes: A Contingency Analysis’ (1985) 41(2) *Journal of Social Issues* 2; Hiltrop 1985; Kochan, T. A., and T. Jick, ‘The Public Sector Mediation Process: A Theory and Empirical Examination’ (1978) 22(2) *The Journal of Conflict Resolution* 209; Mareschal, P. M., ‘What Makes Mediation Work? Perspectives on Resolving Disputes’ (2005) 44(3) *Industrial Relations* 509; Shapiro, D., R. Drieghe, and J. Brett, ‘Mediator Behavior and the Outcomes of Mediation’ (1985) 41(2) *Journal of Social Issues* 101; Thoennes, N. A., and J. Pearson, ‘Predicting Outcomes in Divorce Mediation: The Influence of People and Process’ (1985) 41(2) *Journal of Social Issues* 115; Wall, J. A., Jr, and D. E. Rude, ‘The Judge as a Mediator’ (1991) 76(1) *Journal of Applied Psychology* 54.

¹²⁷¹ The inference effect is said to occur when survey responders do not understand, and hence infer, the meaning of a question.

¹²⁷² Dilts, D. A. and A. Karim, ‘The Effect of Mediators’ Qualities and Strategies on Mediation Outcomes’ (1990) 45(1) *Relations Industrielles/Industrial Relations* 22, 25.

¹²⁷³ Slaikeu, K. A., R. Culler, J. Pearson, and N. Thoennes, ‘Process and Outcome in Divorce Mediation’ (1985) 10 *Mediation Quarterly* 55; Thoennes, N. A., and J. Pearson, ‘Predicting Outcomes in Divorce Mediation: The Influence of People and Process’ (1985) 41(2) *Journal of Social Issues* 115; Kochan, T. A., and T. Jick, ‘The Public Sector Mediation Process: A Theory and Empirical Examination’ (1978) 22(2) *The Journal of Conflict Resolution* 209; Pruitt, D. G., R. S. Peirce, N. B. McGillicuddy, G. L. Welton, and L. Castrianno, ‘Long-Term Success in Mediation’ (1993) 17(3) *Law and Human Behavior* 313.

¹²⁷⁴ Jones, T. S., ‘Lag Sequential Analyses of Mediator-Spouse and Husband-Wife Interaction in Successful and Unsuccessful Divorce Mediation in M. A. Rahim (ed), *Managing Conflict: An Interdisciplinary Approach* (Praeger, USA, 1989); Kressel, K., E. A. Frontera, S. Forlenza, F. Butler, and L. Fish, ‘The Settlement-Oriented vs the Problem-Solving Style’ (1994) 50(1) *Journal of Social Issues* 67; Shapiro, D., R. Drieghe, and J. Brett, ‘Mediator Behavior and the Outcomes of Mediation’ (1985) 41(2) *Journal of Social Issues* 101; Welton, G. L., D. G. Pruitt, N. B. McGillicuddy, C. A. Ippolito, and J. M. Zubeck, ‘Antecedents and Characteristics of Caucusing in Community Mediation’ (1992) 3(4) *International Journal of Conflict Management* 303; Zubeck, J. M., D. G. Pruitt, R. S. Peirce, N. B. McGillicuddy, and H. Syna, ‘Disputant and Mediator Behaviors Affecting Short-Term Success in Mediation’ (1992) 36(3) *Journal of Conflict Resolution* 546.

¹²⁷⁵ The limitations of coding techniques are considered in the next sub-section of this Chapter.

¹²⁷⁶ Henderson, D. A., ‘Mediation Success: An Empirical Analysis’ (1996) 11(1) *Ohio State Journal on Dispute Resolution* 105; Jones, T. S., ‘Lag Sequential Analyses of Mediator-Spouse and Husband-Wife Interaction in Successful and Unsuccessful Divorce Mediation in M. A. Rahim (ed), *Managing Conflict: An Interdisciplinary Approach* (Praeger, USA, 1989).

The summary provided in Table 6.1. relies on information from only the twenty-two studies that include acknowledgement of their limitations. The information in Table 6.1. is limited by its own missing data: information that cannot be ascertained from the twenty-two “non-limitation” studies.

One of the studies included in Table 6.1. acknowledges five methodological limitations noted earlier.¹²⁷⁷ The researchers do not caution readers about their study results; however, they do acknowledge that they were unable to identify study participants who had ‘done poorly or thought little of mediation’.¹²⁷⁸ Nor do the researchers consider which study component may have caused the results to exclude negative information about mediation. Possible reasons for negative information to have been excluded might include any of: the participant selection process through which only “suitable” matters were referred into the study; the small sample size; participants’ limited capacity to provide the required information; the notably unreliable data collection method; or the researchers’ reliance on data that, by its own nature, limited what the researchers could investigate.

As is noted in Table 6.1., the potential ramifications of at least five of the listed limitation categories and their associated missing data may increase the possibility of studies producing positive results about mediation. This is a key issue for this thesis and is considered in more detail in Chapter Seven.

Other examples of missing data noted in the selected studies include: participants’ own information missing from observational studies when observers rely on their own interpretations of

¹²⁷⁷ Thoennes, N. A., and J. Pearson, ‘Predicting Outcomes in Divorce Mediation: The Influence of People and Process’ (1985) 41(2) *Journal of Social Issues* 115; the five acknowledged limitations are small sample size; skewed selection process; participant capacity to provide the required information; reliance on self-reports; and the scope of the study being limited by the nature of the data collected.

¹²⁷⁸ Thoennes, N. A., and J. Pearson, ‘Predicting Outcomes in Divorce Mediation: The Influence of People and Process’ (1985) 41(2) *Journal of Social Issues* 115, 123.

participant in-mediation behaviour;¹²⁷⁹ when recording equipment is not activated correctly (or at all);¹²⁸⁰ and when the coding schemes used for data collection and analysis cause some participant information to be excluded.¹²⁸¹ Participant information can be missing from surveys and records of interviews when some questions remain unanswered;¹²⁸² when some participant responses are not included in 'usable' survey responses;¹²⁸³ and when participants choose not to attend interviews and

¹²⁷⁹ Gale, J., R. L. Mowery, M. S. Herrman, and N. L. Hollett, 'Considering Effective Divorce Mediation: Three Potential Factors' (2002) 19(4) *Conflict Resolution Quarterly* 389; Jones, T. S., 'Lag Sequential Analyses of Mediator-Spouse and Husband-Wife Interaction in Successful and Unsuccessful Divorce Mediation in M. A. Rahim (ed), *Managing Conflict: An Interdisciplinary Approach* (Praeger, USA, 1989); Pruitt, D. G., W. R. Fry, L. Castrianno, J. Zubeck, G. L. Welton, N. B. McGillicuddy, and C. Ippolito, 'The Process of Mediation: Caucusing, Control, and Problem Solving' in M. A. Rahim (ed), *Managing Conflict: An Interdisciplinary Approach* (Praeger, USA, 1989); Pruitt, D. G., R. S. Peirce, N. B. McGillicuddy, G. L. Welton, and L. Castrianno, 'Long-Term Success in Mediation' (1993) 17(3) *Law and Human Behavior* 313; Wall, J. A., Jr, and S. Chan-Serafin, 'Processes in Civil Case Mediations' (2009) 26(3) *Conflict Resolution Quarterly* 261; Wall, J. A., Jr, and S. Chan-Serafin, 'Do Mediators Walk Their Talk in Civil Cases?' (2010) 28(1) *Conflict Resolution Quarterly* 3; Welton, G. L., D. G. Pruitt, N. B. McGillicuddy, C. A. Ippolito, and J. M. Zubeck, 'Antecedents and Characteristics of Caucusing in Community Mediation' (1992) 3(4) *International Journal of Conflict Management* 303; Zubeck, J. M., D. G. Pruitt, R. S. Peirce, N. B. McGillicuddy, and H. Syna, 'Disputant and Mediator Behaviors Affecting Short-Term Success in Mediation' (1992) 36(3) *Journal of Conflict Resolution* 546.

¹²⁸⁰ Slaikou, K. A., R. Culler, J. Pearson, and N. Thoennes, 'Process and Outcome in Divorce Mediation' (1985) 10 *Mediation Quarterly* 55.

¹²⁸¹ Burrell, N. A., W. A. Donohue, and M. Allen, 'The Impact of Disputants' Expectations on Mediation, Testing an Interventionist Model' (1990) Fall 1990 *Human Communication Research* 104; Jones, T. S., 'Lag Sequential Analyses of Mediator-Spouse and Husband-Wife Interaction in Successful and Unsuccessful Divorce Mediation in M. A. Rahim (ed), *Managing Conflict: An Interdisciplinary Approach* (Praeger, USA, 1989); Kressel, K., 'How Do Mediators Decide What To Do? Implicit Schemas of Practice and Mediator Decisionmaking' (2013) 28(3) *Ohio State Journal on Dispute Resolution* 709; Kressel, K., T. Henderson, W. Reich, and C. Cohen, 'Multi-Dimensional Analysis of Conflict Mediator Style' (2012) 30(2) *Conflict Resolution Quarterly* 135; McGillicuddy, N. B., G. L. Welton, and D. G. Pruitt, 'Third-Party Intervention: A Field Experiment Comparing Three Different Models' (1987) 53(1) *Journal of Personality and Social Psychology* 104; Peeples, R., C. Harris, and T. Metzloff, 'Following the Script: An Empirical Analysis of Court-Ordered Mediation of Medical Malpractice Cases' (2007) 2007(1) *Journal of Dispute Resolution* 101; Pruitt, D. G., W. R. Fry, L. Castrianno, J. Zubeck, G. L. Welton, N. B. McGillicuddy, and C. Ippolito, 'The Process of Mediation: Caucusing, Control, and Problem Solving' in M. A. Rahim (ed), *Managing Conflict: An Interdisciplinary Approach* (Praeger, USA, 1989); Pruitt, D. G., R. S. Peirce, N. B. McGillicuddy, G. L. Welton, and L. Castrianno, 'Long-Term Success in Mediation' (1993) 17(3) *Law and Human Behavior* 313; Slaikou, K. A., R. Culler, J. Pearson, and N. Thoennes, 'Process and Outcome in Divorce Mediation' (1985) 10 *Mediation Quarterly* 55; Wall, J. A., Jr, and S. Chan-Serafin, 'Processes in Civil Case Mediations' (2009) 26(3) *Conflict Resolution Quarterly* 261; Wall, J. A., Jr, and S. Chan-Serafin, 'Do Mediators Walk Their Talk in Civil Cases?' (2010) 28(1) *Conflict Resolution Quarterly* 3; Welton, G. L., D. G. Pruitt, and N. B. McGillicuddy, 'The Role of Caucusing in Community Mediation' (1988) 32(1) *The Journal of Conflict Resolution* 181; Welton, G. L., D. G. Pruitt, N. B. McGillicuddy, C. A. Ippolito, and J. M. Zubeck, 'Antecedents and Characteristics of Caucusing in Community Mediation' (1992) 3(4) *International Journal of Conflict Management* 303; Zubeck, J. M., D. G. Pruitt, R. S. Peirce, N. B. McGillicuddy, and H. Syna, 'Disputant and Mediator Behaviors Affecting Short-Term Success in Mediation' (1992) 36(3) *Journal of Conflict Resolution* 546.

¹²⁸² For example, see Mareschal, P. M., 'What Makes Mediation Work? Perspectives on Resolving Disputes' (2005) 44(3) *Industrial Relations* 509; Thoennes, N. A., and J. Pearson, 'Predicting Outcomes in Divorce Mediation: The Influence of People and Process' (1985) 41(2) *Journal of Social Issues* 115.

¹²⁸³ Dilts, D. A. and A. Karim, 'The Effect of Mediators' Qualities and Strategies on Mediation Outcomes' (1990) 45(1) *Relations Industrielles/Industrial Relations* 22, P 25; Karim, A. and D. Dilts, 'Determinants of Mediation Success in the Iowa Public Sector' (1990) 19(2) *Journal of Collective Negotiations* 129.

focus groups.¹²⁸⁴ Study participant input can be excluded from the data analysis when researchers exclude mediator participants whose mediation style or approach was deemed unsuitable for the study;¹²⁸⁵ and when unsuitable mediations excluded by the selection/referral process.¹²⁸⁶ When studies do not include information about their research design,¹²⁸⁷ or about mediator and non-mediator participants, it is not possible to assess if all relevant data has been included.¹²⁸⁸ Finally, ethical requirements place restrictions on the publication of some research data, and, in the context of empirical studies of mediation, there are likely to be confidentiality restrictions on some research data.¹²⁸⁹

In one cluster of studies, observers describe a complex process for assessing the presenting dispute, the disputants' within-mediation language, and the terms of the final agreement, enabling the researchers to undertake a complex statistical evaluation of the disputants' mediated achievements, and treat the evaluation outcome as a key analysis measure.¹²⁹⁰ The researchers do

¹²⁸⁴ Pruitt, D. G., R. S. Peirce, N. B. McGillicuddy, G. L. Welton, and L. Castrianno, 'Long-Term Success in Mediation' (1993) 17(3) *Law and Human Behavior* 313; Sourdin, T., *Mediation in the Supreme and County Courts of Victoria* (Report prepared for the Department of Justice, Victoria, Australia, April 2009), available on <<http://www.civiljustice.info/adreval/1/>>; Sourdin, T., *Exploring Pre-Action Requirements: Resolving Disputes Outside Courts* (ACJI, Monash University, October 2012); Wissler, R. L., 'Mediation and Adjudication in Small Claims Court: The Effects of Process and Case Characteristics' (1995) 29(2) *Law & Society Review* 323.

¹²⁸⁵ Kressel, K., 'How Do Mediators Decide What To Do? Implicit Schemas of Practice and Mediator Decisionmaking' (2013) 28(3) *Ohio State Journal on Dispute Resolution* 709; Kressel, K., E. A. Frontera, S. Forlenza, F. Butler, and L. Fish, 'The Settlement-Orientation vs the Problem-Solving Style' (1994) 50(1) *Journal of Social Issues* 67; Kressel, K., T. Henderson, W. Reich, and C. Cohen, 'Multi-Dimensional Analysis of Conflict Mediator Style' (2012) 30(2) *Conflict Resolution Quarterly* 135; McDermott, E. P., and R. Obar, 'What's Going On' in Mediation: An Empirical Analysis of the Influence of a Mediator's Style on Party Satisfaction and Monetary Benefit' (2004) 9 *Harvard Negotiation Law Review* 75; Wall, J. A., Jr, and S. Chan-Serafin, 'Processes in Civil Case Mediations' (2009) 26(3) *Conflict Resolution Quarterly* 261; Wall, J. A., Jr, and S. Chan-Serafin, 'Do Mediators Walk Their Talk in Civil Cases?' (2010) 28(1) *Conflict Resolution Quarterly* 3.

¹²⁸⁶ Thoennes, N. A., and J. Pearson, 'Predicting Outcomes in Divorce Mediation: The Influence of People and Process' (1985) 41(2) *Journal of Social Issues* 115; Posthuma, R. A., A. Richard, J. B. Dworkin, and M. S. Swift, 'Mediator Tactics and Sources of Conflict: Facilitating and Inhibiting Effects' (2002) 41(1) *Industrial Relations* 94.

¹²⁸⁷ Many of the selected studies include almost no information about research design; see Chapter Five.

¹²⁸⁸ See Chapter Six.

¹²⁸⁹ Gale, J., R. L. Mowery, M. S. Herrman, and N. L. Hollett, 'Considering Effective Divorce Mediation: Three Potential Factors' (2002) 19(4) *Conflict Resolution Quarterly* 389; Wall, J. A., Jr, and D. E. Rude, 'The Judge as a Mediator' (1991) 76(1) *Journal of Applied Psychology* 54.

¹²⁹⁰ Pruitt, D. G., W. R. Fry, L. Castrianno, J. Zubeck, G. L. Welton, N. B. McGillicuddy, and C. Ippolito, 'The Process of Mediation: Caucusing, Control, and Problem Solving' in M. A. Rahim (ed), *Managing Conflict: An Interdisciplinary Approach* (Praeger, USA, 1989); Pruitt, D. G., R. S. Peirce, N. B. McGillicuddy, G. L. Welton, and L. Castrianno, 'Long-Term Success in Mediation' (1993) 17(3) *Law and Human Behavior* 313; Welton, G. L., D.

not report having checked their evaluations with the disputants themselves, and the disputants' own perceptions of their mediated achievements could be considered to be "missing data".

Data can also go missing when selected study participants are not included in the collection of research data or their information is not included in data analysis. There is a difference between a person being selected to participate in an empirical study, and actually having their contributions included in the study's data analysis. For example, in four of the studies, researchers describe participant allocation to study conditions that reveals discrepancies between the original number of reported study participants and the actual number of "allocated" participants (or participants whose contributions were included in the study's analysis of research data). In the four studies, the number of the latter is much less than the former,¹²⁹¹ significantly reducing each study's sample size. This means that contributions from some, or even many, of the selected participants are not included in the study results and they make no contribution to the study findings. For at least twenty years, commentators have been aware of this example of missing data,¹²⁹² and, where researchers do not include transparent explanations for the differences, such discrepancies have

G. Pruitt, and N. B. McGillicuddy, 'The Role of Caucusing in Community Mediation' (1988) 32(1) *The Journal of Conflict Resolution* 181; Welton, G. L., D. G. Pruitt, N. B. McGillicuddy, C. A. Ippolito, and J. M. Zubeck, 'Antecedents and Characteristics of Caucusing in Community Mediation' (1992) 3(4) *International Journal of Conflict Management* 303; Zubeck, J. M., D. G. Pruitt, R. S. Peirce, N. B. McGillicuddy, and H. Syna, 'Disputant and Mediator Behaviors Affecting Short-Term Success in Mediation' (1992) 36(3) *Journal of Conflict Resolution* 546.

¹²⁹¹ Kressel, K., T. Henderson, W. Reich, and C. Cohen, 'Multi-Dimensional Analysis of Conflict Mediator Style' (2012) 30(2) *Conflict Resolution Quarterly* 135; Peeples, R., C. Harris, and T. Metzloff, 'Following the Script: An Empirical Analysis of Court-Ordered Mediation of Medical Malpractice Cases' (2007) 2007(1) *Journal of Dispute Resolution* 101; Wall, J. A., Jr, and S. Chan-Serafin, 'Processes in Civil Case Mediations' (2009) 26(3) *Conflict Resolution Quarterly* 261; Wall, J. A., Jr, and S. Chan-Serafin, 'Do Mediators Walk Their Talk in Civil Cases?' (2010) 28(1) *Conflict Resolution Quarterly* 3; Welton, G. L., D. G. Pruitt, and N. B. McGillicuddy, 'The Role of Caucusing in Community Mediation' (1988) 32(1) *The Journal of Conflict Resolution* 181.

¹²⁹² Beck, C. J. A., and B. D. Sales, 'A Critical Appraisal of Divorce Mediation Research and Policy' (2000) 6(4) *Psychology, Public Policy, and Law* 989.

been seen as representing ‘selective or distorted reporting’,¹²⁹³ or ‘sampling bias’,¹²⁹⁴ or ‘selective reporting’,¹²⁹⁵ or ‘reporting bias’.¹²⁹⁶

The below are summaries of four of the selected studies, which are included as examples of situations where the lack of important information might prevent a reader from understanding the reported study results.

- Study 1:¹²⁹⁷ a selected sample of 46 observed mediations are conducted by an unspecified number of mediators. Although the purpose of the study is not clearly described, it includes investigating ‘the conduct’ of subject mediations.¹²⁹⁸ The researchers include the following occupations of mediator participants: retired judge, practicing attorney, and non-practicing attorney. The researchers report that although 18 of the 46 mediations were conducted by retired judges, only two retired judges conducted 14 of those 18 (it is not clear who conducted the remaining 14); only five mediators are reported to have conducted 26 of the 46 observed mediations and, of those five, two are identified as retired judges and three are identified mediators. To gauge the credibility of the researchers’ data, it is important to know how many of the 46 observed mediations were conducted by different mediators, and how many mediators were observed more than once (ie their data contributed more to the analysis than did other mediators’ data). The following information is not provided:
 - The number of mediator participants included in the analysis of research data;
 - The number of subject mediations conducted by each mediator participant;

¹²⁹³ Ioannidis, J. P. A., ‘Why Most Published Research Findings Are False’ (2009) 18(4) *Chance* 40, P 41.

¹²⁹⁴ Bryman, A., *Social Research Methods* (5th Edition, Oxford University Press, UK, 2016), 175.

¹²⁹⁵ Goodman, S. N., D. Fanelli, and J. P. A. Ioannidis, ‘What Does Research Reproducibility Mean?’ (2016) 8(347) *Science: Translational Medicine* 1, 3.

¹²⁹⁶ Goodman, S. N., D. Fanelli, and J. P. A. Ioannidis, ‘What Does Research Reproducibility Mean?’ (2016) 8(347) *Science: Translational Medicine* 1, 3.

¹²⁹⁷ Peebles, R., C. Harris, and T. Metzloff, ‘Following the Script: An Empirical Analysis of Court-Ordered Mediation of Medical Malpractice Cases’ (2007) 2007(1) *Journal of Dispute Resolution* 101.

¹²⁹⁸ Peebles, R., C. Harris, and T. Metzloff, ‘Following the Script: An Empirical Analysis of Court-Ordered Mediation of Medical Malpractice Cases’ (2007) 2007(1) *Journal of Dispute Resolution* 101, 103.

- The number of subject mediations conducted by non-judge mediators;
 - Whether the same two retired judges who conducted 14 of the 18 mediations also conducted 26 of the 46 mediations (ie two mediator participants conducted most of the subject mediations); and
 - The exclusion criteria that led to some mediator participants' mediations not being included in the data analysis.
- Study 2:¹²⁹⁹ 62 mediations were observed in two cities (30 observed in one city, and 32 observed in the other), and 29 mediators appear to have been selected to conduct the subject mediations. In summary, the purpose of the study was to gain understanding of mediator responses to certain disputant behaviours, and it is important to know the range, variety, and scope of mediator participants whose behaviours were included in the study's analysis. The researchers do not provide the following information:
 - From the available observations, the number of mediator participants whose mediations were included for analysis;
 - The proportion of the 29 mediator participants who were observed in each city;
 - The number of mediator participants who were observed mediating more than once; and
 - It is unclear against which criteria the 29 mediator participants were selected.
 - Study 3:¹³⁰⁰ a total of 100 mediations were observed in two cities (30 in one city and 70 in the other), and 39 mediators appear to have been selected to conduct the subject mediations. In summary, the purpose of the study was not clearly stated and appears to have been to investigate mediator opening statements in general. The researchers

¹²⁹⁹ Wall, J. A., Jr, and S. Chan-Serafin, 'Processes in Civil Case Mediations' (2009) 26(3) *Conflict Resolution Quarterly* 261.

¹³⁰⁰ Wall, J. A., Jr, and S. Chan-Serafin, 'Do Mediators Walk Their Talk in Civil Cases?' (2010) 28(1) *Conflict Resolution Quarterly* 3.

later explain that only 49 of the 100 observed mediations were included in the analysis (the remaining 51 did not include required process components).¹³⁰¹ As in Study 2., it is important to know the range, variety, and scope of mediator participants on whose behaviours the study's findings are based. The researchers do not provide the following information:

- It is not clear how many of the 39 mediator participants' mediations were included in the 49 analysed observations, nor how many of the 39 were observed in each city, nor how many of the 39 were observed more than once;
- It is not clear how many of the original 39 mediators were excluded from analysis.
- Study 4:¹³⁰² 51 mediations were observed, of which only 32 incorporated the required mediation component (ie caucuses, or private meetings) and were included for analysis. In summary, the purpose of the study was to investigate mediators' use of private meetings. Separate clusters of data were included for different parts of the data analysis, none of which is clearly explained. In addition, the researchers appear to have had some difficulty in following up with disputants some months after the subject mediations. The lack of clear information about the data classification and analysis, and the limited follow-up data make it difficult to assess the reliability of the study's findings.

Important research data is missing from the researchers' descriptions in many of the 47 selected studies. Fortunately, many of the researchers explain how they have chosen to replace it.

¹³⁰¹ The missing component was the mediator's opening session.

¹³⁰² Welton, G. L., D. G. Pruitt, and N. B. McGillicuddy, 'The Role of Caucusing in Community Mediation' (1988) 32(1) *The Journal of Conflict Resolution* 181.

6.3.1. Replacing missing data

In a small number of the studies, researchers note that responders do not include answers to all survey/interview questions, and that they have replaced that missing data with a mean, or average, or median calculated from all other responses to the relevant question.¹³⁰³ A similarly small number of researchers describe choosing not to take this action when finding incomplete observer notes from observational reports.¹³⁰⁴ For example, in one of the latter studies, the researchers choose to exclude from analysis any mediations for which the observers' notes are incomplete.¹³⁰⁵ Although the exclusion of subject mediations may be an improvement on replacing participant responses with data that is created from an "averaged" response, the exclusion remains a form of missing data: the events within the excluded mediations cannot contribute to the study's results and findings, and it cannot be known what information they might have added.

None of the studies mentions investigating why responders chose not to provide answers to all survey questions, nor why specific questions remained unanswered. Where individual surveys are incomplete, the researchers could examine the unanswered questions seeking to establish if there is any commonality among them, and why participants might have chosen not to answer them. For example, it may be that the participant did not know the answer (and did not feel pressured to provide one anyway), or that the question was sensitive for them, or too personal, or that they were somehow uncomfortable trying to answer it.¹³⁰⁶

¹³⁰³ For example, see Mareschal, P. M., 'What Makes Mediation Work? Perspectives on Resolving Disputes' (2005) 44(3) *Industrial Relations* 509; Thoennes, N. A., and J. Pearson, 'Predicting Outcomes in Divorce Mediation: The Influence of People and Process' (1985) 41(2) *Journal of Social Issues* 115.

¹³⁰⁴ Alberts, J. K., B. L. Heisterkamp, and R. M. McPhee, 'Disputant Perceptions of and Satisfaction with a Community Mediation Program' (2005) 16(3) *The International Journal of Conflict Management* 218; Peeples, R., C. Harris, and T. Metzloff, 'Following the Script: An Empirical Analysis of Court-Ordered Mediation of Medical Malpractice Cases' (2007) 2007(1) *Journal of Dispute Resolution* 101;

¹³⁰⁵ Peeples, R., C. Harris, and T. Metzloff, 'Following the Script: An Empirical Analysis of Court-Ordered Mediation of Medical Malpractice Cases' (2007) 2007(1) *Journal of Dispute Resolution* 101.

¹³⁰⁶ See Chapter Seven for an exploration of the influence of sensitive survey questions.

In some studies, researchers do not access all the relevant views of participants. Instead, they replace participant views with their own interpretations of in-mediation events.¹³⁰⁷ It has been noted that this is a fraught approach because it relies on the researchers' necessarily subjective interpretation being accepted in the absence of the participants' own views.¹³⁰⁸ For example, in one observational study of court-connected mediation, the researchers attend the subject mediations, making their own notes of all statements made by mediator and non-mediator participants.¹³⁰⁹ The purpose of the study is not clearly stated; however, the researchers' descriptions focus on the levels of consistency between how mediators say they will mediate and how they are observed to mediate. Analysis does not reveal the reasons for observed changes in mediator participant approaches, and the researchers develop a complex hypothetical model of interrelated in-mediation events to explain what they have observed (the model includes proposed mediator motivations for certain changes in approach). Rather than check with the mediators that their theory might be feasible, the researchers present it as the only explanation for what they have observed.¹³¹⁰

Having sensed that some data is missing, readers may become doubtful or uncertain about the whole study. It has been suggested that, rather than replace what is missing, the uncertainty and doubt can be avoided if researchers are transparent in their reporting, even if only briefly, (eg if

¹³⁰⁷ For example, see Gale, J., R. L. Mowery, M. S. Herrman, and N. L. Hollett, 'Considering Effective Divorce Mediation: Three Potential Factors' (2002) 19(4) *Conflict Resolution Quarterly* 389; McDermott, E. P., and R. Obar, "'What's Going On" in Mediation: An Empirical Analysis of the Influence of a Mediator's Style on Party Satisfaction and Monetary Benefit' (2004) 9 *Harvard Negotiation Law Review* 75; Pruitt, D. G., R. S. Peirce, N. B. McGillicuddy, G. L. Welton, and L. Castrianno, 'Long-Term Success in Mediation' (1993) 17(3) *Law and Human Behavior* 313; Wall, J. A., Jr, and S. Chan-Serafin, 'Do Mediators Walk Their Talk in Civil Cases?' (2010) 28(1) *Conflict Resolution Quarterly* 3; Zubeck, J. M., D. G. Pruitt, R. S. Peirce, N. B. McGillicuddy, and H. Syna, 'Disputant and Mediator Behaviors Affecting Short-Term Success in Mediation' (1992) 36(3) *Journal of Conflict Resolution* 546.

¹³⁰⁸ Beck, C. J. A., and B. D. Sales, 'A Critical Appraisal of Divorce Mediation Research and Policy' (2000) 6(4) *Psychology, Public Policy, and Law* 989; Pope, C., S. Ziebland, and N. Mays, 'Qualitative Research in Health Care: Analysing Qualitative Data' (2000) 320 *BMJ* 114.

¹³⁰⁹ Wall, J. A., Jr, and S. Chan-Serafin, 'Do Mediators Walk Their Talk in Civil Cases?' (2010) 28(1) *Conflict Resolution Quarterly* 3.

¹³¹⁰ For more information about researcher interpretation of data, see above 6.2.2. Subjective data.

they acknowledge the missing data and the missing contributions of study participants who have been excluded from data analysis).¹³¹¹

6.3.2. Coding and inter-coder reliability

A further cause of missing data in qualitative research is the use of coding techniques as part of data analysis. This and the next sub-section consider the use of what are now likely to be outdated coding processes and procedures that are described in the selected studies.

Coding refers to the processes used by researchers to categorise or classify qualitative data for quantitative or statistical analysis with coders who create electronically coded information. The advantages of coding include its capacity to simplify the analytical process by converting large amounts of complex behavioural data into manageable units and themes that are readily accessible and useable.¹³¹² Coded data is created for a specific analytical task and is usually limited to that task, and coding categories are typically designed to be appropriate and suitable to the relevant study, and to its purpose.¹³¹³

The disadvantages of coding include that it necessarily fragments the data's original integrity,¹³¹⁴ which can lead to the potential misrepresentation of complex information when it is converted into quantifiable units.¹³¹⁵ Coding re-shapes data into forms that suit the coding scheme

¹³¹¹ Goodman, S., *Statistical Methods as Social Technologies versus Analytical Tools: Implications for Metascience and Research Reform* (Presentation at Metascience Symposium, Stanford University, USA, 2019).

¹³¹² Bryman, A., *Social Research Methods* (Oxford University Press, UK, 2016); Dixon-Woods, M., S. Agarwal, B. Young, D. Jones, and A. Sutton, 'Integrative Approaches to Qualitative and Quantitative Evidence' (Health Development Agency, National Health Service, UK, 2004), available on https://www.webarchive.org.uk/wayback/archive/20140616174235mp/http://nice.org.uk/nicemedia/documents/integrative_approaches.pdf; Bryman, A., *Social Research Methods* (5th Edition, Oxford University Press, UK, 2016); LeCompte, M. D., and J. P. Goetz, 'Problems of Reliability and Validity in Ethnographic Research' (1982) 52(1) *Review of Educational Research* 31.

¹³¹³ LeCompte, M. D., and J. P. Goetz, 'Problems of Reliability and Validity in Ethnographic Research' (1982) 52(1) *Review of Educational Research* 31.

¹³¹⁴ Bryman, A., *Social Research Methods* (5th Edition, Oxford University Press, UK, 2016).

¹³¹⁵ LeCompte, M. D., and J. P. Goetz, 'Problems of Reliability and Validity in Ethnographic Research' (1982) 52(1) *Review of Educational Research* 31; Dixon-Woods, M., S. Agarwal, B. Young, D. Jones, and A. Sutton, 'Integrative Approaches to Qualitative and Quantitative Evidence' (Health Development Agency, National Health Service, UK, 2004), available on

– and the researcher – and it has been suggested that the growing reliance on computerised quantitative research and analysis has contributed to increasing calls for coding-based research, in turn leading to reduced interest in incorporating qualitative research’s broader social and narrative contexts (which may require more complex coding schemes).¹³¹⁶

Another disadvantage of coding is that is also a major cause of missing data: where the original data is re-configured to suit analysis, it is unavoidable that some of the original data is lost. The nature and purpose of the coding dictates which data is retained, and which is not. It has also been suggested that the use of independent uninformed coders for data coding may lead to unintended (and undetected) loss of important data through coding, especially where the coders are not well-informed about the information they are being asked to code.¹³¹⁷ The same commentator has suggested that a single well-informed coder may appear to be less objective than a pair of uninformed coders; however, the informed coder is likely to produce more reliable research data for analysis.

Twenty-two of the studies do not include any mention of coding;¹³¹⁸ however, the nature of their data analysis suggests that some form of coding was applied. Among the remaining 25 studies,

<https://www.webarchive.org.uk/wayback/archive/20140616174235mp/http://nice.org.uk/nicemedia/documents/integrative_approaches.pdf>.

¹³¹⁶ Bryman, A., *Social Research Methods* (5th Edition, Oxford University Press, UK, 2016); Probst, B., ‘The Eye Regards Itself: Benefits and Challenges of Reflexivity in Qualitative Social Work Research’ (2015) 39(1) *Social Work Research* 37.

¹³¹⁷ Greenhalgh, T., *How to Read a Paper: The Basics of Evidence-Based Medicine* (5th Edition, Wiley and BMJ Books, UK, 2014).

¹³¹⁸ Alberts, J. K., B. L. Heisterkamp, and R. M. McPhee, ‘Disputant Perceptions of and Satisfaction with a Community Mediation Program’ (2005) 16(3) *The International Journal of Conflict Management* 218; Bingham, L. B., ‘Transformative Mediation in the United States Postal Service’ (2012) 5(4) *Negotiation and Conflict Management Research* 354; Burrell, N. A., W. A. Donohue, and M. Allen, ‘The Impact of Disputants’ Expectations on Mediation, Testing an Interventionist Model’ (1990) Fall 1990 *Human Communication Research* 104; Carnevale, P. J. D., and R. Peggnetter, ‘The Selection of Mediator Tactics in Public Sector Disputes: A Contingency Analysis’ (1985) 41(2) *Journal of Social Issues* 2; Dilts, D. A. and A. Karim, ‘The Effect of Mediators’ Qualities and Strategies on Mediation Outcomes’ (1990) 45(1) *Relations Industrielles/Industrial Relations* 22; Goldberg, S. B., and M. L. Shaw, ‘Further Investigation into the Secrets of Successful and Unsuccessful Mediators’ (2008) 26(8) *Alternatives to the High Cost of Litigation* 149; Karim, A. and D. Dilts, ‘Determinants of Mediation Success in the Iowa Public Sector’ (1990) 19(2) *Journal of Collective Negotiations* 129; Karim, A. and R. Peggnetter, ‘Mediator Strategies and Qualities and Mediation Effectiveness’ (1983) 22(1) *Industrial Relations* 105; Kimsey, W. D., R. M. Fuller, A. J. Bell, and B. C. McKinney, ‘The Impact of Mediator

two explicitly do not use coding in their data analysis,¹³¹⁹ and another two describe using coding merely to check data integrity (eg categorisation of having reached agreement in mediation).¹³²⁰ A further five describe the use of coding schemes to organise or classify information obtained from court and program records.¹³²¹ The remaining sixteen studies include some form of coding as part of

Strategic Choices: An Experimental Study' (1994) 12(1) *Mediation Quarterly* 89; Kimsey, W. D., R. M. Fuller, and B. C. McKinney, 'Mediator Listening, Dispute Reframing, and Mediation Outcome: A Pilot Study' (1993) 7(1) *Journal of the International Listening Association* 74; Kochan, T. A., and T. Jick, 'The Public Sector Mediation Process: A Theory and Empirical Examination' (1978) 22(2) *The Journal of Conflict Resolution* 209; Kressel, K., 'How Do Mediators Decide What To Do? Implicit Schemas of Practice and Mediator Decisionmaking' (2013) 28(3) *Ohio State Journal on Dispute Resolution* 709; Kressel, K., E. A. Frontera, S. Forlenza, F. Butler, and L. Fish, 'The Settlement-Orientation vs the Problem-Solving Style' (1994) 50(1) *Journal of Social Issues* 67; Shapiro, D., R. Drieghe, and J. Brett, 'Mediator Behavior and the Outcomes of Mediation' (1985) 41(2) *Journal of Social Issues* 101; Swaab, R. I., *Face First: Pre-Mediation Caucus and Face in Employment Disputes* (Presentation, Annual Association of Conflict Management Conference, June 2009); Swaab, R. I., and J. Brett, *Caucus with Care: The Impact of Pre-Mediation Caucuses on Conflict Resolution* (Meetings Paper, International Association of Conflict Management, 2007); Thoennes, N. A., and J. Pearson, 'Predicting Outcomes in Divorce Mediation: The Influence of People and Process' (1985) 41(2) *Journal of Social Issues* 115; Wall, J. A., Jr, and D. E. Rude, 'The Judge as a Mediator' (1991) 76(1) *Journal of Applied Psychology* 54; Wissler, R. L., 'Mediation and Adjudication in Small Claims Court: The Effects of Process and Case Characteristics' (1995) 29(2) *Law & Society Review* 323; Wissler, R. L., *Trapping the Data: An Assessment of Domestic Relations Mediation in Maine and Ohio Courts* (Unpublished report, 1999); Wissler, R. L., 'Court-Connected Mediation in General Civil Cases: What We Know from Empirical Research' (2002) 17(3) *Ohio State Journal on Dispute Resolution* 641; Woodward, J. G., 'Settlement Week: Measuring the Promise' (1990) 11 *Northern Illinois University Law Review* 1.

¹³¹⁹ Gale, J., R. L. Mowery, M. S. Herrman, and N. L. Hollett, 'Considering Effective Divorce Mediation: Three Potential Factors' (2002) 19(4) *Conflict Resolution Quarterly* 389; Vanderkooi, L., and J. Pearson, 'Mediating Divorce Disputes: Mediator Behaviors, Styles and Roles' (1983) 32(4) *Family Relations* 557.

¹³²⁰ Mareschal, P. M., 'What Makes Mediation Work? Perspectives on Resolving Disputes' (2005) 44(3) *Industrial Relations* 509; Posthuma, R. A., A. Richard, J. B. Dworkin, and M. S. Swift, 'Mediator Tactics and Sources of Conflict: Facilitating and Inhibiting Effects' (2002) 41(1) *Industrial Relations* 94.

¹³²¹ McEwen, C. A., *An Evaluation of the ADR Pilot Project: Final Report 1* (Unpublished report, 1992); Sourdin, T., *Dispute Resolution Processes for Credit Consumers* (Project Report, Conflict Resolution Research Centre, La Trobe University, 2007); Sourdin, T., *Mediation in the Supreme and County Courts of Victoria* (Report prepared for the Department of Justice, Victoria, Australia, April 2009), available on <<http://www.civiljustice.info/adreval/1/>>; Sourdin, T., *Exploring Pre-Action Requirements: Resolving Disputes Outside Courts* (ACJI, Monash University, October 2012); Sourdin, T., and T. Matruglio, *Evaluating Mediation – New South Wales Settlement Scheme 2002* (2004) *Mediation*. Paper 7, available on <<http://www.civiljustice.info/med/7>>.

the analysis of their qualitative data (eg coding of information about mediator and/or non-mediator in-mediation behaviour).^{1322 1323}

Of the sixteen studies that include mention of coding for analysis of qualitative data, three use coding to analyse survey responses;¹³²⁴ three use coding to analyse reports of live observations;¹³²⁵ three use coding to analyse audio-recordings of mediations;¹³²⁶ and seven use coding to analyse a

¹³²² Henderson, D. A., 'Mediation Success: An Empirical Analysis' (1996) 11(1) *Ohio State Journal on Dispute Resolution* 105; Hiltrop, J. M., 'Factors Associated with Successful Labor Mediation' in K. Kressel and D. G. Pruitt (eds), *Mediation Research: The Process and Effectiveness of Third-Party Intervention* (Jossey-Bass, USA, 1989); Jones, T. S., 'Lag Sequential Analyses of Mediator-Spouse and Husband-Wife Interaction in Successful and Unsuccessful Divorce Mediation in M. A. Rahim (ed), *Managing Conflict: An Interdisciplinary Approach* (Praeger, USA, 1989); Kressel, K., T. Henderson, W. Reich, and C. Cohen, 'Multi-Dimensional Analysis of Conflict Mediator Style' (2012) 30(2) *Conflict Resolution Quarterly* 135; McDermott, E. P., and R. Obar, "'What's Going On" in Mediation: An Empirical Analysis of the Influence of a Mediator's Style on Party Satisfaction and Monetary Benefit' (2004) 9 *Harvard Negotiation Law Review* 75; McGillicuddy, N. B., G. L. Welton, and D. G. Pruitt, 'Third-Party Intervention: A Field Experiment Comparing Three Different Models' (1987) 53(1) *Journal of Personality and Social Psychology* 104; Peeples, R., C. Harris, and T. Metzloff, 'Following the Script: An Empirical Analysis of Court-Ordered Mediation of Medical Malpractice Cases' (2007) 2007(1) *Journal of Dispute Resolution* 101; Pruitt, D. G., W. R. Fry, L. Castrianno, J. Zubeck, G. L. Welton, N. B. McGillicuddy, and C. Ippolito, 'The Process of Mediation: Caucusing, Control, and Problem Solving' in M. A. Rahim (ed), *Managing Conflict: An Interdisciplinary Approach* (Praeger, USA, 1989); Pruitt, D. G., R. S. Peirce, N. B. McGillicuddy, G. L. Welton, and L. Castrianno, 'Long-Term Success in Mediation' (1993) 17(3) *Law and Human Behavior* 313; Slaikeu, K. A., R. Culler, J. Pearson, and N. Thoennes, 'Process and Outcome in Divorce Mediation' (1985) 10 *Mediation Quarterly* 55; Wall, J. A., Jr, and S. Chan-Serafin, 'Processes in Civil Case Mediations' (2009) 26(3) *Conflict Resolution Quarterly* 261; Wall, J. A., Jr, and S. Chan-Serafin, 'Do Mediators Walk Their Talk in Civil Cases?' (2010) 28(1) *Conflict Resolution Quarterly* 3; Welton, G. L., and D. G. Pruitt, 'The Mediation Process: The Effects of Mediator Bias and Disputant Power' (1987) 13(1) *Personality and Social Psychology Bulletin* 123; Welton, G. L., D. G. Pruitt, and N. B. McGillicuddy, 'The Role of Caucusing in Community Mediation' (1988) 32(1) *The Journal of Conflict Resolution* 181; Welton, G. L., D. G. Pruitt, N. B. McGillicuddy, C. A. Ippolito, and J. M. Zubeck, 'Antecedents and Characteristics of Caucusing in Community Mediation' (1992) 3(4) *International Journal of Conflict Management* 303; Zubeck, J. M., D. G. Pruitt, R. S. Peirce, N. B. McGillicuddy, and H. Syna, 'Disputant and Mediator Behaviors Affecting Short-Term Success in Mediation' (1992) 36(3) *Journal of Conflict Resolution* 546.

¹³²³ In one of the sixteen studies, the researchers do not explicitly mention the use of data coding; however, they do thank four people for assisting with 'coding' [Kressel, K., T. Henderson, W. Reich, and C. Cohen, 'Multi-Dimensional Analysis of Conflict Mediator Style' (2012) 30(2) *Conflict Resolution Quarterly* 135, 135]; in that study, coders confirm their reliability by discussing disagreed items until they reach agreement.

¹³²⁴ Henderson, D. A., 'Mediation Success: An Empirical Analysis' (1996) 11(1) *Ohio State Journal on Dispute Resolution* 105; Hiltrop, J. M., 'Factors Associated with Successful Labor Mediation' in K. Kressel and D. G. Pruitt (eds), *Mediation Research: The Process and Effectiveness of Third-Party Intervention* (Jossey-Bass, USA, 1989); McDermott, E. P., and R. Obar, "'What's Going On" in Mediation: An Empirical Analysis of the Influence of a Mediator's Style on Party Satisfaction and Monetary Benefit' (2004) 9 *Harvard Negotiation Law Review* 75.

¹³²⁵ Peeples, R., C. Harris, and T. Metzloff, 'Following the Script: An Empirical Analysis of Court-Ordered Mediation of Medical Malpractice Cases' (2007) 2007(1) *Journal of Dispute Resolution* 101; Wall, J. A., Jr, and S. Chan-Serafin, 'Processes in Civil Case Mediations' (2009) 26(3) *Conflict Resolution Quarterly* 261; Wall, J. A., Jr, and S. Chan-Serafin, 'Do Mediators Walk Their Talk in Civil Cases?' (2010) 28(1) *Conflict Resolution Quarterly* 3.

¹³²⁶ Jones, T. S., 'Lag Sequential Analyses of Mediator-Spouse and Husband-Wife Interaction in Successful and Unsuccessful Divorce Mediation in M. A. Rahim (ed), *Managing Conflict: An Interdisciplinary Approach* (Praeger,

combination of surveys and/or audio-recordings and/or video recordings.¹³²⁷ In one study, the researchers mention that the use of inadequately reported coding schemes is one flaw in mediation research, yet they include a very limited description of the coding scheme incorporated into the analysis of their own survey and observation data.¹³²⁸

It is clear that coding of various kinds is prevalent among the selected studies (eg almost all use some form of statistical analysis which requires qualitative data to be quantified), and that researchers have been able to access coding skills. A pre-existing coding scheme is used in one study;¹³²⁹ two studies describe augmenting pre-existing schemes;¹³³⁰ and five studies describe

USA, 1989); Slaikeu, K. A., R. Culler, J. Pearson, and N. Thoennes, 'Process and Outcome in Divorce Mediation' (1985) 10 *Mediation Quarterly* 55; Welton, G. L., and D. G. Pruitt, 'The Mediation Process: The Effects of Mediator Bias and Disputant Power' (1987) 13(1) *Personality and Social Psychology Bulletin* 123.

¹³²⁷ Kressel, K., T. Henderson, W. Reich, and C. Cohen, 'Multi-Dimensional Analysis of Conflict Mediator Style' (2012) 30(2) *Conflict Resolution Quarterly* 135; McGillicuddy, N. B., G. L. Welton, and D. G. Pruitt, 'Third-Party Intervention: A Field Experiment Comparing Three Different Models' (1987) 53(1) *Journal of Personality and Social Psychology* 104; Pruitt, D. G., W. R. Fry, L. Castrianno, J. Zubeck, G. L. Welton, N. B. McGillicuddy, and C. Ippolito, 'The Process of Mediation: Caucusing, Control, and Problem Solving' in M. A. Rahim (ed), *Managing Conflict: An Interdisciplinary Approach* (Praeger, USA, 1989); Pruitt, D. G., R. S. Peirce, N. B. McGillicuddy, G. L. Welton, and L. Castrianno, 'Long-Term Success in Mediation' (1993) 17(3) *Law and Human Behavior* 313; Welton, G. L., D. G. Pruitt, and N. B. McGillicuddy, 'The Role of Caucusing in Community Mediation' (1988) 32(1) *The Journal of Conflict Resolution* 181; Welton, G. L., D. G. Pruitt, N. B. McGillicuddy, C. A. Ippolito, and J. M. Zubeck, 'Antecedents and Characteristics of Caucusing in Community Mediation' (1992) 3(4) *International Journal of Conflict Management* 303; Zubeck, J. M., D. G. Pruitt, R. S. Peirce, N. B. McGillicuddy, and H. Syna, 'Disputant and Mediator Behaviors Affecting Short-Term Success in Mediation' (1992) 36(3) *Journal of Conflict Resolution* 546.

¹³²⁸ Kressel, K., T. Henderson, W. Reich, and C. Cohen, 'Multi-Dimensional Analysis of Conflict Mediator Style' (2012) 30(2) *Conflict Resolution Quarterly* 135.

¹³²⁹ Slaikeu, K. A., R. Culler, J. Pearson, and N. Thoennes, 'Process and Outcome in Divorce Mediation' (1985) 10 *Mediation Quarterly* 55.

¹³³⁰ Jones, T. S., 'Lag Sequential Analyses of Mediator-Spouse and Husband-Wife Interaction in Successful and Unsuccessful Divorce Mediation in M. A. Rahim (ed), *Managing Conflict: An Interdisciplinary Approach* (Praeger, USA, 1989); Wall, J. A., Jr, and S. Chan-Serafin, 'Processes in Civil Case Mediations' (2009) 26(3) *Conflict Resolution Quarterly* 261.

devising coding schemes specific to their own study.^{1331 1332} The researchers comment on the limitations of coding schemes and the strictures they place on qualitative data.

Of the sixteen studies that describe coding their research data, only one describes the storage of coded data – in that case, the researchers input the coded data to an SPSS database.¹³³³

There is an obvious tension between, on the one hand, the efficiency of coding that aid data analysis and produces clear quantitative results and findings, and, on the other, alternative analysis methods that can accommodate the qualitative nuances of a process such as mediation – being able to consider the context in which the data was created, the nuances of verbal and non-verbal exchanges and interactions between mediator participants and non-mediator participants, and of exchanges between non-mediator participants.

The use of computerised data-coding and data-analysis is becoming more widespread as increasingly complex computer software becomes readily available¹³³⁴ – and its application continues to reduce research costs; however, there continues to be a risk of excluding important research data. One recent comprehensive literature review has reported that researchers are designing research to suit technological capacity, rather than technological capacity being designed to suit research needs.¹³³⁵ In future, care will need to be taken to ensure that the inevitable increase

¹³³¹ Kimsey, W. D., R. M. Fuller, A. J. Bell, and B. C. McKinney, 'The Impact of Mediator Strategic Choices: An Experimental Study' (1994) 12(1) *Mediation Quarterly* 89; Kimsey, W. D., R. M. Fuller, and B. C. McKinney, 'Mediator Listening, Dispute Reframing, and Mediation Outcome: A Pilot Study' (1993) 7(1) *Journal of the International Listening Association* 74; Kressel, K., 'How Do Mediators Decide What To Do? Implicit Schemas of Practice and Mediator Decisionmaking' (2013) 28(3) *Ohio State Journal on Dispute Resolution* 709; Kressel, K., T. Henderson, W. Reich, and C. Cohen, 'Multi-Dimensional Analysis of Conflict Mediator Style' (2012) 30(2) *Conflict Resolution Quarterly* 135; Jones, T. S., 'Lag Sequential Analyses of Mediator-Spouse and Husband-Wife Interaction in Successful and Unsuccessful Divorce Mediation in M. A. Rahim (ed), *Managing Conflict: An Interdisciplinary Approach* (Praeger, USA, 1989); Slaikeu, K. A., R. Culler, J. Pearson, and N. Thoennes, 'Process and Outcome in Divorce Mediation' (1985) 10 *Mediation Quarterly* 55.

¹³³² One study describes using two schemes: one pre-existing, and one devised for the study – Slaikeu, K. A., R. Culler, J. Pearson, and N. Thoennes, 'Process and Outcome in Divorce Mediation' (1985) 10 *Mediation Quarterly* 55.

¹³³³ Peeples, R., C. Harris, and T. Metzloff, 'Following the Script: An Empirical Analysis of Court-Ordered Mediation of Medical Malpractice Cases' (2007) 2007(1) *Journal of Dispute Resolution* 101.

¹³³⁴ Bryman, A., *Social Research Methods* (5th Edition, Oxford University Press, UK, 2016).

¹³³⁵ Sassenberg, K., and L. Ditrich, 'Research in Social Psychology Changed Between 2011 and 2016: Larger Sample Sizes, More Self-Report Measures, and More Online Studies' (2019) 2(2) *Advances in Methods and Practices in psychological Science* 107.

in the use of coding in empirical studies of mediation does not lead to increased loss of important research data.

Inter-coder reliability and discarded data

Pairs, or groups, of coders, or raters, are used by researchers as an objective means for interpreting and categorising, or coding, their data,¹³³⁶ and coders are expected to produce reliably categorised data. When they agree on the categorisation of certain items, the coders are expected to use those categorisations consistently, and, when they cannot agree on any piece of data, they are expected to reach an agreed consistent interpretation.¹³³⁷ It is important for researchers to know if, and when, the coders consistently disagree on certain items, what is the nature of those contentious items, and why they consistently disagree on them.¹³³⁸

It is inevitable that coders themselves influence the themes, categories, and analyses they interpret from the data,¹³³⁹ and those influences have been said to be affected by the time of day during which the coding takes place, as well as the complexity of the coding task, and even the coder's interest in the content of the data.¹³⁴⁰ In other words, the coders' subjective views influence

¹³³⁶ Armstrong, D., A. Gosling, J. Weinman, and T. Marteau, 'The Place of Interrater Reliability in Qualitative Research' (1997) 31(3) *Sociology* 597; Bond, T., and C. M. Fox, 'Measuring Facts Beyond Ability and Difficulty' in Bond, T., and C. M. Fox (eds), *Applying the Rasch Model: Fundamental Measurement in the Human Sciences* (3rd Edition, Taylor & Francis, UK, 2015); Bryman 2016; LeBreton, J. M., and J. L. Senter, 'Answers to 20 Questions About Interrater Reliability and Interrater Agreement' (2008) 11(4) *Organizational Research Methods* 815.

¹³³⁷ LeBreton, J. M., and J. L. Senter, 'Answers to 20 Questions About Interrater Reliability and Interrater Agreement' (2008) 11(4) *Organizational Research Methods* 815.

¹³³⁸ Bond, T., and C. M. Fox, 'Measuring Facts Beyond Ability and Difficulty' in Bond, T., and C. M. Fox (eds), *Applying the Rasch Model: Fundamental Measurement in the Human Sciences* (3rd Edition, Taylor & Francis, UK, 2015).

¹³³⁹ Armstrong, D., A. Gosling, J. Weinman, and T. Marteau, 'The Place of Interrater Reliability in Qualitative Research' (1997) 31(3) *Sociology* 597.

¹³⁴⁰ Bond, T., and C. M. Fox, 'Measuring Facts Beyond Ability and Difficulty' in Bond, T., and C. M. Fox (eds), *Applying the Rasch Model: Fundamental Measurement in the Human Sciences* (3rd Edition, Taylor & Francis, UK, 2015).

their data coding,¹³⁴¹ perhaps interfering with the objective purpose of their role. The subjectivity might also influence, and contribute to, their disagreements on certain coding items.

Of the sixteen studies that describe coding their qualitative data, twelve mention the use of coders, or 'raters',¹³⁴² who were responsible for the coding,¹³⁴³ and eleven include descriptions of procedures for maintaining coder 'reliability'.¹³⁴⁴ Researchers have sought to maintain coder

¹³⁴¹ Pope, C., S. Ziebland, and N. Mays, 'Qualitative Research in Health Care: Analysing Qualitative Data' (2000) 320 *BMJ* 114.

¹³⁴² Wall, J. A., Jr, and S. Chan-Serafin, 'Processes in Civil Case Mediations' (2009) 26(3) *Conflict Resolution Quarterly* 261, 270.

¹³⁴³ Jones, T. S., 'Lag Sequential Analyses of Mediator-Spouse and Husband-Wife Interaction in Successful and Unsuccessful Divorce Mediation in M. A. Rahim (ed), *Managing Conflict: An Interdisciplinary Approach* (Praeger, USA, 1989); Kressel, K., T. Henderson, W. Reich, and C. Cohen, 'Multi-Dimensional Analysis of Conflict Mediator Style' (2012) 30(2) *Conflict Resolution Quarterly* 135; McDermott, E. P., and R. Obar, "'What's Going On" in Mediation: An Empirical Analysis of the Influence of a Mediator's Style on Party Satisfaction and Monetary Benefit' (2004) 9 *Harvard Negotiation Law Review* 75; McGillicuddy, N. B., G. L. Welton, and D. G. Pruitt, 'Third-Party Intervention: A Field Experiment Comparing Three Different Models' (1987) 53(1) *Journal of Personality and Social Psychology* 104; Peeples, R., C. Harris, and T. Metzloff, 'Following the Script: An Empirical Analysis of Court-Ordered Mediation of Medical Malpractice Cases' (2007) 2007(1) *Journal of Dispute Resolution* 101; Pruitt, D. G., R. S. Peirce, N. B. McGillicuddy, G. L. Welton, and L. Castrianno, 'Long-Term Success in Mediation' (1993) 17(3) *Law and Human Behavior* 313; Slaikeu, K. A., R. Culler, J. Pearson, and N. Thoennes, 'Process and Outcome in Divorce Mediation' (1985) 10 *Mediation Quarterly* 55; Wall, J. A., Jr, and S. Chan-Serafin, 'Processes in Civil Case Mediations' (2009) 26(3) *Conflict Resolution Quarterly* 261; Wall, J. A., Jr, and S. Chan-Serafin, 'Do Mediators Walk Their Talk in Civil Cases?' (2010) 28(1) *Conflict Resolution Quarterly* 3; Welton, G. L., and D. G. Pruitt, 'The Mediation Process: The Effects of Mediator Bias and Disputant Power' (1987) 13(1) *Personality and Social Psychology Bulletin* 123; Welton, G. L., D. G. Pruitt, and N. B. McGillicuddy, 'The Role of Caucusing in Community Mediation' (1988) 32(1) *The Journal of Conflict Resolution* 181; Welton, G. L., D. G. Pruitt, N. B. McGillicuddy, C. A. Ippolito, and J. M. Zubeck, 'Antecedents and Characteristics of Caucusing in Community Mediation' (1992) 3(4) *International Journal of Conflict Management* 303; Zubeck, J. M., D. G. Pruitt, R. S. Peirce, N. B. McGillicuddy, and H. Syna, 'Disputant and Mediator Behaviors Affecting Short-Term Success in Mediation' (1992) 36(3) *Journal of Conflict Resolution* 546.

¹³⁴⁴ Jones, T. S., 'Lag Sequential Analyses of Mediator-Spouse and Husband-Wife Interaction in Successful and Unsuccessful Divorce Mediation in M. A. Rahim (ed), *Managing Conflict: An Interdisciplinary Approach* (Praeger, USA, 1989); McGillicuddy, N. B., G. L. Welton, and D. G. Pruitt, 'Third-Party Intervention: A Field Experiment Comparing Three Different Models' (1987) 53(1) *Journal of Personality and Social Psychology* 104; Peeples, R., C. Harris, and T. Metzloff, 'Following the Script: An Empirical Analysis of Court-Ordered Mediation of Medical Malpractice Cases' (2007) 2007(1) *Journal of Dispute Resolution* 101; Pruitt, D. G., R. S. Peirce, N. B. McGillicuddy, G. L. Welton, and L. Castrianno, 'Long-Term Success in Mediation' (1993) 17(3) *Law and Human Behavior* 313; Slaikeu, K. A., R. Culler, J. Pearson, and N. Thoennes, 'Process and Outcome in Divorce Mediation' (1985) 10 *Mediation Quarterly* 55; Wall, J. A., Jr, and S. Chan-Serafin, 'Processes in Civil Case Mediations' (2009) 26(3) *Conflict Resolution Quarterly* 261; Wall, J. A., Jr, and S. Chan-Serafin, 'Do Mediators Walk Their Talk in Civil Cases?' (2010) 28(1) *Conflict Resolution Quarterly* 3; Welton, G. L., and D. G. Pruitt, 'The Mediation Process: The Effects of Mediator Bias and Disputant Power' (1987) 13(1) *Personality and Social Psychology Bulletin* 123; Welton, G. L., D. G. Pruitt, and N. B. McGillicuddy, 'The Role of Caucusing in Community Mediation' (1988) 32(1) *The Journal of Conflict Resolution* 181; Welton, G. L., D. G. Pruitt, N. B. McGillicuddy, C. A. Ippolito, and J. M. Zubeck, 'Antecedents and Characteristics of Caucusing in Community Mediation' (1992) 3(4) *International Journal of Conflict Management* 303; Zubeck, J. M., D. G. Pruitt, R. S. Peirce, N. B. McGillicuddy, and H. Syna, 'Disputant and Mediator Behaviors Affecting Short-Term Success in Mediation' (1992) 36(3) *Journal of Conflict Resolution* 546.

reliability through the use of several techniques including pre-testing of coder capacities,¹³⁴⁵ and re-coding the data at least a second time.¹³⁴⁶ Five of the selected articles describe a coding process that includes the coders working together to compile the final coded dataset.¹³⁴⁷

It has been noted that, when it is a requirement for coders to agree on their coding, they (or the researchers) may discard the data on which they cannot agree,¹³⁴⁸ as is reported in three of the selected studies.¹³⁴⁹ Two of the studies mention excluding data on which the coders were unable to reach agreement;¹³⁵⁰ one study describes excluding coded items on which the two coders did not attain a pre-established reliability measure (ie they could not agree).¹³⁵¹ In four of the studies, the researchers describe requiring coders to agree on all coded items; however, where they disagree,

¹³⁴⁵ For example, see Jones, T. S., 'Lag Sequential Analyses of Mediator-Spouse and Husband-Wife Interaction in Successful and Unsuccessful Divorce Mediation in M. A. Rahim (ed), *Managing Conflict: An Interdisciplinary Approach* (Praeger, USA, 1989); Slaikeu, K. A., R. Culler, J. Pearson, and N. Thoennes, 'Process and Outcome in Divorce Mediation' (1985) 10 *Mediation Quarterly* 55; Welton, G. L., D. G. Pruitt, and N. B. McGillicuddy, 'The Role of Caucusing in Community Mediation' (1988) 32(1) *The Journal of Conflict Resolution* 181; Welton, G. L., D. G. Pruitt, N. B. McGillicuddy, C. A. Ippolito, and J. M. Zubeck, 'Antecedents and Characteristics of Caucusing in Community Mediation' (1992) 3(4) *International Journal of Conflict Management* 303; Zubeck, J. M., D. G. Pruitt, R. S. Peirce, N. B. McGillicuddy, and H. Syna, 'Disputant and Mediator Behaviors Affecting Short-Term Success in Mediation' (1992) 36(3) *Journal of Conflict Resolution* 546.

¹³⁴⁶ For example, see Welton, G. L., and D. G. Pruitt, 'The Mediation Process: The Effects of Mediator Bias and Disputant Power' (1987) 13(1) *Personality and Social Psychology Bulletin* 123.

¹³⁴⁷ Kressel, K., T. Henderson, W. Reich, and C. Cohen, 'Multi-Dimensional Analysis of Conflict Mediator Style' (2012) 30(2) *Conflict Resolution Quarterly* 135; McDermott, E. P., and R. Obar, "'What's Going On" in Mediation: An Empirical Analysis of the Influence of a Mediator's Style on Party Satisfaction and Monetary Benefit' (2004) 9 *Harvard Negotiation Law Review* 75; McGillicuddy, N. B., G. L. Welton, and D. G. Pruitt, 'Third-Party Intervention: A Field Experiment Comparing Three Different Models' (1987) 53(1) *Journal of Personality and Social Psychology* 104; Wall, J. A., Jr, and S. Chan-Serafin, 'Do Mediators Walk Their Talk in Civil Cases?' (2010) 28(1) *Conflict Resolution Quarterly* 3; Welton, G. L., D. G. Pruitt, and N. B. McGillicuddy, 'The Role of Caucusing in Community Mediation' (1988) 32(1) *The Journal of Conflict Resolution* 181.

¹³⁴⁸ Greenhalgh, T., *How to Read a Paper: The Basics of Evidence-Based Medicine* (5th Edition, Wiley and BMJ Books, UK, 2014).

¹³⁴⁹ McGillicuddy, N. B., G. L. Welton, and D. G. Pruitt, 'Third-Party Intervention: A Field Experiment Comparing Three Different Models' (1987) 53(1) *Journal of Personality and Social Psychology* 104; Wall, J. A., Jr, and S. Chan-Serafin, 'Processes in Civil Case Mediations' (2009) 26(3) *Conflict Resolution Quarterly* 261; Wall, J. A., Jr, and S. Chan-Serafin, 'Do Mediators Walk Their Talk in Civil Cases?' (2010) 28(1) *Conflict Resolution Quarterly* 3.

¹³⁵⁰ Wall, J. A., Jr, and S. Chan-Serafin, 'Processes in Civil Case Mediations' (2009) 26(3) *Conflict Resolution Quarterly* 261; Wall, J. A., Jr, and S. Chan-Serafin, 'Do Mediators Walk Their Talk in Civil Cases?' (2010) 28(1) *Conflict Resolution Quarterly* 3.

¹³⁵¹ McGillicuddy, N. B., G. L. Welton, and D. G. Pruitt, 'Third-Party Intervention: A Field Experiment Comparing Three Different Models' (1987) 53(1) *Journal of Personality and Social Psychology* 104.

they are required to discuss the disagreed item until they reached agreement.¹³⁵² For readers, the items excluded by coders are missing data, discarded not because they were not valuable, but because the coders proved unable to categorise events or behaviours within the subject mediation. Researchers who mention discarding unagreed data do not appear to consider how the discarded data might have affected the study results, had it been retained and included in the data analysis. For example, if coders could not agree on, say, contentious or subtle mediator behaviours, the final analysis might be based only on the coders' agreed coding of less contentious and less subtle behaviours – leading to results that omit key information about other behaviours, and misrepresent the mediation process as having been less nuanced than was actually the case.

In one of the studies,¹³⁵³ coders were required to code 6,273 non-mediator statements and 7,789 mediator statements. Due to disagreement, they excluded 567 non-mediator statements, and 545 mediator statements.¹³⁵⁴ The researchers do not describe the nature of the missing statements, nor do they give any indication if there was any consistency in types of statements the coders excluded, nor any effects their exclusion may have had on their analysis and results.

In a second study, 'intangible issues' are included as a key measure for assessing short-term success in the subject mediations (ie whether an agreement was reached).¹³⁵⁵ The researchers describe intangible issues as including values and matters of principle, being 'human needs that are

¹³⁵² Kressel, K., T. Henderson, W. Reich, and C. Cohen, 'Multi-Dimensional Analysis of Conflict Mediator Style' (2012) 30(2) *Conflict Resolution Quarterly* 135; McDermott, E. P., and R. Obar, "What's Going On" in Mediation: An Empirical Analysis of the Influence of a Mediator's Style on Party Satisfaction and Monetary Benefit' (2004) 9 *Harvard Negotiation Law Review* 75; Wall, J. A., Jr, and S. Chan-Serafin, 'Processes in Civil Case Mediations' (2009) 26(3) *Conflict Resolution Quarterly* 261; Wall, J. A., Jr, and S. Chan-Serafin, 'Do Mediators Walk Their Talk in Civil Cases?' (2010) 28(1) *Conflict Resolution Quarterly* 3.

¹³⁵³ Wall, J. A., Jr, and S. Chan-Serafin, 'Processes in Civil Case Mediations' (2009) 26(3) *Conflict Resolution Quarterly* 261.

¹³⁵⁴ Wall, J. A., Jr, and S. Chan-Serafin, 'Processes in Civil Case Mediations' (2009) 26(3) *Conflict Resolution Quarterly* 261; the researchers do not make clear what the excluded statements were or why the coders could not agree on their categorisation.

¹³⁵⁵ Zubeck, J. M., D. G. Pruitt, R. S. Peirce, N. B. McGillicuddy, and H. Syna, 'Disputant and Mediator Behaviors Affecting Short-Term Success in Mediation' (1992) 36(3) *Journal of Conflict Resolution* 546, 550.

deeply felt and are “not for trading”,¹³⁵⁶ and report a high degree of non-reliability between their coders on intangible issues. They rightly include a caution about their results; however, they do not exclude the apparently contentious item and it is retained as a key measure in their analysis and in their results.

In a third study, two coders enter their observational data into electronic coding devices while observing subject mediations.¹³⁵⁷ The devices are designed and programmed to accept data in coded format, according to a scheme devised by the researchers prior to the commencement of the observational studies. The observers are required to continuously select and enter appropriate codes while observing the subject mediations. In subsequent reliability testing of coded items, some were excluded because they did not meet reliability measures. Six out of 20 of the coded items for non-mediator participants were excluded, and four of 28 of the coded items for mediator participants were excluded. The researchers do not describe the nature of the excluded data, nor how its exclusion might have affected the study’s results.

Developments in artificial intelligence and technology will likely obviate the need for co-coding; however, the risks will remain that data will be narrowed, or shaved, to suit preferred technological approaches – and that this will apply to the nature of data that is collected and to the way in which it is analysed. Artificial intelligence is creating a capacity for simultaneous observation, coding, and analysis and, while this presents exciting opportunities for the investigation of mediation – and of mediator effectiveness – it is important for researchers not to lose sight of the important contextual details and nuances that affect the behaviour and responses of all mediation participants.

¹³⁵⁶ Zubeck, J. M., D. G. Pruitt, R. S. Peirce, N. B. McGillicuddy, and H. Syna, ‘Disputant and Mediator Behaviors Affecting Short-Term Success in Mediation’ (1992) 36(3) *Journal of Conflict Resolution* 546, 550.

¹³⁵⁷ McGillicuddy, N. B., G. L. Welton, and D. G. Pruitt, ‘Third-Party Intervention: A Field Experiment Comparing Three Different Models’ (1987) 53(1) *Journal of Personality and Social Psychology* 104.

6.4. Chapter Five and Chapter Six: Findings

In preparation for Chapter Seven, this section includes the findings from this Chapter and restates the findings from Chapter Five. Final outcomes of the systematic appraisal are reported in Chapter Seven.

6.4.0. Chapter Five: Findings

The analysis was designed to establish the representativeness, suitability, and capacity of the mediator and non-mediator participants who are responsible for contributing key research data to each of the 47 selected studies. Four key findings are reported.

- i. Researchers generally include very limited information about mediator and non-mediator participants in their studies, and a little less than half the studies do not include information about the processes and procedures for the selection of study participants;
- ii. According to the available information in the studies, the study participants (mediator and non-mediator) may not be representative of the population that typically conducts and attends mediation;
- iii. Within the selected studies, mediator and non-mediator participants have a variety of knowledge and experience about mediation and thus a variety of capacities to provide the information required by the researchers; however, these capacities appear not to have been taken into account in the allocation of research roles; and
- iv. Based on the limited information provided in the studies, the appraisal of participant capacity suggests that the selected study participants (mediator and non-mediator) were unlikely to be well-suited to the study purpose in many of the studies and may not have had the capacity to consistently provide credible research data.

6.4.1. Chapter Six: Findings

The analysis reported in this Chapter sought to establish the credibility of research data and the reliability of research findings in the selected studies. Five key findings are reported.

1. The research data in the selected studies has limited credibility, affecting the reliability of the research findings reported in the studies;
2. Data collection in the studies relies on a limited range of methodologies whose credibility and reliability have long been questioned in the mediation field as well as in other fields of research;
 - c. Use of the methodologies is widespread among the 47 selected studies;
 - d. Around half the studies acknowledge some of the data collection limitations;
3. Because of their limitations, the methodologies have limited suitability for the subject studies and for their mediator and non-participants;
4. The researchers appear not to have either reported on or considered how the methodological limitations might have affected their research data, nor do they appear to have taken those effects into account when interpreting the research data and reporting their study results; and
5. The data collection limitations are sufficiently widespread in the studies to suggest there are likely to be systemic issues constraining how research data is collected in empirical studies of mediation.

6.5. Conclusion

The analysis reported in this and the previous Chapter, suggest that the data collected by the researchers in the selected studies has limited credibility, and is therefore limited in the contribution it can make to what is known about mediation, and about mediator, effectiveness. For example:

- The study participants may have limited suitability for the purposes of the studies, and many are unlikely to have the knowledge and experience of mediation to provide the information required by the researchers;
- In a number of studies, the repeat player status of mediator and non-mediator participants is likely to have influenced the information they chose to provide to the researchers, further limiting its utility;
- The data collection methodologies described by the researchers have significant limitations, including their unreliability;
- There are numerous instances where the researchers have impacted on the interpretation and collection of the data (eg by excluding participants and/or information, by imposing their own interpretations of in-mediation events, and/or by using subjective measures); and
- The studies do not demonstrate awareness of the importance of these concerns and the effects they are likely to have on the results and findings reported in the studies.

Although some of the studies were conducted more than 30 years ago, many others are much more recent. Yet the methodologies described in the oldest studies are still being used in studies that are less than ten years old. The oldest of the studies includes a warning about the unreliability of what was then a predominant data collection methodology (ie surveys/self-reports). It is perplexing that recent published research includes acknowledgement of the unreliability of that same methodology, while continuing to use it.¹³⁵⁸

Chapter Seven concludes the systematic appraisal, considering researcher influence and reflexivity including the researchers' awareness of their influence on their studies. The Chapter includes a limited bibliometric analysis of the 47 selected studies, as well as a targeted review of

¹³⁵⁸ Ali, S. F., 'Practitioners' Perception of Court-Connected Mediation in Five Regions: An Empirical Study' (2018) 51(4) *Vanderbilt Journal of Transnational Law* 997.

constraints on mediation research which incorporates results from an online survey of professional mediators.

Chapter Seven: The researchers¹³⁵⁹

7.0. Introduction, context, and aims

In order to investigate the primary Research Question in this thesis, ‘what is an effective, or “good”, mediator?’,¹³⁶⁰ this Chapter includes a report on Part Three of the systematic appraisal, a brief bibliometric analysis of the selected studies, and a targeted review of aspects of mediation practice. This work builds on the thematic literature reviews explored in previous chapters,¹³⁶¹ and reflects and extends aspects of the systemic appraisal work undertaken in previous chapters.¹³⁶² In addition, the responses to an online survey of professional mediators have been analysed to gain greater understanding of mediators’ own preferences for future mediation research (in effect, mediator perceptions of gaps in what is known about the practice of mediation).¹³⁶³

In Chapter Two, the systematic appraisal was introduced as an analytical methodology in a metaresearch framework. In reporting on Part One of the appraisal, in Chapter Five there was an exploration of the suitability, capacity, and diversity of study participants in the 47 studies (including mediator and non-mediator participants). In reporting on Part Two of the appraisal, Chapter Six involved a consideration of the data collection methods described in the 47 studies for collecting research data from and about the study participants. This Chapter concludes the appraisal with an initial focus on researcher influence and reflexivity, recognised as the third key component of systematic appraisals.¹³⁶⁴

The analysis of researcher influence and reflexivity is based on the limited information included in the 47 studies as well as relevant information from other literature, including the

¹³⁵⁹ This Chapter incorporates Part Three of the systematic appraisal.

¹³⁶⁰ See Chapter One, 1.7.3. Research Questions.

¹³⁶¹ See Chapter Three and Chapter Four.

¹³⁶² See Chapter Five and Chapter Six.

¹³⁶³ For a description of the survey methodology, see Chapter Two, 2.5. Online survey of professional mediators.

¹³⁶⁴ Dixon-Woods, M., R. L. Shaw, S. Agarwal, and J. A. Smith, ‘The Problem of Appraising Qualitative Research’ (2004) 13 *Quality and Safety in Health Care* 223; Kuper, A., L. Lingard, and W. Levinson, ‘Qualitative Research: Critically Appraising Qualitative Research’ (2008) 337:a1035 *BMJ* 687.

literature on research integrity. Researcher influence is explored in terms of two spheres of influence. In various ways, researcher influence extends beyond the specific context of any empirical study, and, in the field of mediation, has the potential to affect the development and reinforcement of prevailing views and preferences about mediation and about mediation research. Researcher influence is also internal to any study they conduct and is then known as *researcher reflexivity*. Researcher reflexivity refers to a researcher's awareness of their own influence within their studies and how that influence may affect various research factors, including the interpretation and reporting of results. The appraisal considers the effects of both types of influence on the credibility, reliability, and justifiability of research data, research results, and research findings. A limited bibliometric analysis contributes to the appraisal of researchers' external influence.

The second part of the Chapter includes the targeted review of constraints on studies of mediation, as well as researcher and mediator perceptions of knowledge gaps in the field of mediation, including about mediation itself and about its practise. An electronic search of two online databases suggests there is not an extensive literature on *factors reported to constrain mediation research*.¹³⁶⁵ The targeted review relies on comments made within the 47 selected studies and in other studies, and provides a context for the analysis and appraisal that is at the core of this thesis, ultimately confirming research issues that are explored in some detail elsewhere in

¹³⁶⁵ Electronic searches were conducted of the University of Newcastle Library electronic database, and of Google Scholar, using the same search term for both: "constraints on conflict mediation research". The first page of the university database listed one relevant item (a publication already included in this Chapter's analysis: Wall, J. and K. Kressel, 'Research on Mediator Style: A Summary and Some Research Suggestions' (2012) 5(4) *Negotiation and Conflict Management Research* 401). The first relevant item listed by Google Scholar appeared on page 3 (a publication referenced throughout this thesis: Beck, C. J. A., and B. D. Sales, 'A Critical Reappraisal of Divorce Mediation Research and Policy' (2000) 6(4) *Psychology, Public Policy, and Law* 989). The second page of the UON search included a second article by the same two authors, published in the same journal issue, and also referenced in this Chapter (Kressel, K., and J. Wall, 'Introduction to the Special Issue on Mediator Style' (2012) 5(4) *Negotiation and Conflict Management Research* 334). References included in both the articles listed in the UON database include many of the 47 studies, as well as other publications by the same two authors. Issues related to publication and citation influence are considered later in this Chapter (see 7.1.1. Researcher influence: external).

this thesis, such as the lack of definitional consistency,¹³⁶⁶ the lack of consistent measures of mediation outcomes,¹³⁶⁷ and methodological shortcomings.¹³⁶⁸

The Chapter concludes with a summary of key findings from the systematic appraisal.

7.0.1. Aims of Chapter Seven

This Chapter includes Part Three of the systematic appraisal, and a review of constraints on mediation research incorporating a review of knowledge gaps in mediation research.

Commentators recommend that, when assessing the quality of qualitative research, appraisers take into account whether a study includes any acknowledgement of researcher reflexivity, and whether the reflexivity provides adequate coverage of the researchers' recognition of their own influence throughout the study.¹³⁶⁹

Researcher influence and reflexivity are accepted as being core components of systematic appraisals of qualitative research.¹³⁷⁰ Researcher reflexivity is a form of quality control that is said to go to the heart of a study's rigour, including of its data and of its findings.¹³⁷¹ When a researcher is reflexive, they are making their own research accountable by confirming the quality of its data, and by being transparent in their own awareness, recognition, and acknowledgement of their own influence on every aspect of their study.¹³⁷²

¹³⁶⁶ See Chapter Three, Chapter Four.

¹³⁶⁷ See Chapter Three.

¹³⁶⁸ See Chapter Five, Chapter Six.

¹³⁶⁹ For example, see Bansal, P., W. K. Smith, and E. Vaara, 'From the Editors: New Ways of Seeing Through Qualitative Research' (2018) 61(4) *Academy of Management Journal* 1189; Kuper, A., L. Lingard, and W. Levinson, 'Qualitative Research: Critically Appraising Qualitative Research' (2008) 337:a1035 *BMJ* 687.

¹³⁷⁰ Kuper, A., L. Lingard, and W. Levinson, 'Qualitative Research: Critically Appraising Qualitative Research' (2008) 337:a1035 *BMJ* 687; Spencer 2003.

¹³⁷¹ Bansal, P., W. K. Smith, and E. Vaara, 'From the Editors: New Ways of Seeing Through Qualitative Research' (2018) 61(4) *Academy of Management Journal* 1189; Weiner-Levy, N., and A. Popper-Giveon, 'The Absent, the Hidden and the Obscured: Reflections on "Dark Matter" in Qualitative Research' (2013) 47(4) *Quality and Quantity* 2177.

¹³⁷² Bansal, P., W. K. Smith, and E. Vaara, 'From the Editors: New Ways of Seeing Through Qualitative Research' (2018) 61(4) *Academy of Management Journal* 1189; Probst, B., 'The Eye Regards Itself: Benefits and Challenges of Reflexivity in Qualitative Social Work Research' (2015) 39(1) *Social Work Research* 37.

The Chapter has three sets of aims, one relating to completion of the systematic appraisal, and the others to reviewing constraints on mediation research, and gaps in knowledge about mediation and its practise:

- I. Completion of the systematic appraisal
 - a. To ascertain the levels of researcher influence in the context of the 47 studies;
and
 - b. To analyse the adequacy of researcher reflexivity in the selected 47 studies.
- II. Reviewing researcher acknowledgement of:
 - a. Constraints on mediation research;
 - b. Knowledge gaps in mediation research; and
 - c. Options for overcoming constraints and filling knowledge gaps.
- III. Reviewing professional mediator perceptions of:
 - a. Gaps in what is known about mediation practice.

7.0.2. Key findings

In this Chapter, there are four key findings.

- I. There is almost no researcher reflexivity, or acknowledgement of researcher influence, in the 47 selected studies;
- II. There is no researcher reflection on the influence of power relationships within their studies, including power relationships involving the researcher;
- III. Without information about how the researchers' influence may have affected the selection, behaviour, and survey/interview responses of study participants, it is not possible to assess the reliability and justifiability of the studies' findings; and

- IV. There is much in common between researcher-identified constraints on mediation research and the constraints identified in this thesis.

7.0.3. Scope of the Chapter

The study of mediation is complex and is centred on a process that is recognised and applied in many parts of the world. Despite its widespread practise, there is no consistency in what constitutes a mediation, nor in how its effectiveness is defined and measured, nor is there a common understanding about the role of the mediator. As noted in Chapter One and Chapter Three of this thesis, mediation is practised and studied in many contexts, including in association with legal systems and with family/divorce/custody processes, in community-based and in labour/management contexts. Researchers can conduct studies that are based on simulated mediations and they can undertake large-scale evaluations of existing mediation programs and services. However, despite the 47 selected studies being conducted in seven different contexts, the settings themselves are quite limited. For example, of the 47 studies, four occur in a family context (ie in each of the studies, the presenting disputes concerned family/divorce/child custody matters);¹³⁷³ however, all four are conducted in an institutional community-based setting relying on court referral to mediation.¹³⁷⁴ Seven of the studies are in a community-based context (the presenting disputes concerned neighbour-neighbour disputes or landlord-tenant disputes, or minor consumer complaints, and such like); however, all were conducted in institutional community-based settings relying largely on court referral to mediation.¹³⁷⁵ Of the 47 studies, nine concern

¹³⁷³ See Chapter Three for an explanation of this thesis' differentiation of study contexts relevant to the 47 selected studies.

¹³⁷⁴ Jones, T. S., 'Lag Sequential Analyses of Mediator-Spouse and Husband-Wife Interaction in Successful and Unsuccessful Divorce Mediation in M. A. Rahim (ed), *Managing Conflict: An Interdisciplinary Approach* (Praeger, USA, 1989); Kressel, K., E. A. Frontera, S. Forlenza, F. Butler, and L. Fish, 'The Settlement-Oriented vs the Problem-Solving Style' (1994) 50(1) *Journal of Social Issues* 67; Slaikeu, K. A., R. Culler, J. Pearson, and N. Thoennes, 'Process and Outcome in Divorce Mediation' (1985) 10 *Mediation Quarterly* 55; Thoennes 1985 Thoennes, N. A., and J. Pearson, 'Predicting Outcomes in Divorce Mediation: The Influence of People and Process' (1985) 41(2) *Journal of Social Issues* 115.

¹³⁷⁵ Alberts, J. K., B. L. Heisterkamp, and R. M. McPhee, 'Disputant Perceptions of and Satisfaction with a Community Mediation Program' (2005) 16(3) *The International Journal of Conflict Management* 218;

labour/management disputes and all were conducted in an institutional mediation setting using repeat player mediators and repeat player disputant representatives.¹³⁷⁶ These represent quite limited settings, despite the range of dispute contexts.

The practise of mediation can be strongly associated with western cultural norms and Eurocentric legal systems,¹³⁷⁷ and the insertion of such processes into different cultural settings has sometimes been seen to be problematic, even controversial.¹³⁷⁸ Of particular concern is that the process may be based on an individualistic worldview that does not always accommodate the approaches and values of other societies and cultures,¹³⁷⁹ including those with collectivist and

McGillicuddy, N. B., G. L. Welton, and D. G. Pruitt, 'Third-Party Intervention: A Field Experiment Comparing Three Different Models' (1987) 53(1) *Journal of Personality and Social Psychology* 104; Pruitt, D. G., W. R. Fry, L. Castrianno, J. Zubeck, G. L. Welton, N. B. McGillicuddy, and C. Ippolito, 'The Process of Mediation: Caucusing, Control, and Problem Solving' in M. A. Rahim (ed), *Managing Conflict: An Interdisciplinary Approach* (Praeger, USA, 1989); Pruitt, D. G., R. S. Peirce, N. B. McGillicuddy, G. L. Welton, and L. Castrianno, 'Long-Term Success in Mediation' (1993) 17(3) *Law and Human Behavior* 313; Welton, G. L., D. G. Pruitt, and N. B. McGillicuddy, 'The Role of Caucusing in Community Mediation' (1988) 32(1) *The Journal of Conflict Resolution* 181; Welton, G. L., D. G. Pruitt, N. B. McGillicuddy, C. A. Ippolito, and J. M. Zubeck, 'Antecedents and Characteristics of Caucusing in Community Mediation' (1992) 3(4) *International Journal of Conflict Management* 303; Zubeck, J. M., D. G. Pruitt, R. S. Peirce, N. B. McGillicuddy, and H. Syna, 'Disputant and Mediator Behaviors Affecting Short-Term Success in Mediation' (1992) 36(3) *Journal of Conflict Resolution* 546.

¹³⁷⁶ Carnevale, P. J. D., and R. Peggnetter, 'The Selection of Mediator Tactics in Public Sector Disputes: A Contingency Analysis' (1985) 41(2) *Journal of Social Issues* 2; Dilts, D. A. and A. Karim, 'The Effect of Mediators' Qualities and Strategies on Mediation Outcomes' (1990) 45(1) *Relations Industrielles/Industrial Relations* 22; Hiltrop, J. M., 'Factors Associated with Successful Labor Mediation' in K. Kressel and D. G. Pruitt (eds), *Mediation Research: The Process and Effectiveness of Third-Party Intervention* (Jossey-Bass, USA, 1989); Karim, A. and D. Dilts, 'Determinants of Mediation Success in the Iowa Public Sector' (1990) 19(2) *Journal of Collective Negotiations* 129; Karim, A. and R. Peggnetter, 'Mediator Strategies and Qualities and Mediation Effectiveness' (1983) 22(1) *Industrial Relations* 105; Kochan, T. A., and T. Jick, 'The Public Sector Mediation Process: A Theory and Empirical Examination' (1978) 22(2) *The Journal of Conflict Resolution* 209; Mareschal, P. M., 'What Makes Mediation Work? Perspectives on Resolving Disputes' (2005) 44(3) *Industrial Relations* 509; Posthuma, R. A., A. Richard, J. B. Dworkin, and M. S. Swift, 'Mediator Tactics and Sources of Conflict: Facilitating and Inhibiting Effects' (2002) 41(1) *Industrial Relations* 94; Shapiro, D., R. Drieghe, and J. Brett, 'Mediator Behavior and the Outcomes of Mediation' (1985) 41(2) *Journal of Social Issues* 101.

¹³⁷⁷ Davidheiser, M., 'Race, Worldviews, and Conflict Mediation: *Black and White Styles of Conflict* Revisited' (2008) 33(1) *Peace and Change* 60; Gelfand, M. J., and J. Brett, 'Big Questions for Negotiation and Culture Research' (2019) 12(2) *Negotiation and Conflict Management Research* 105; McConnell, B., 'To Bring Peace that Stays: Music, Conflict and Conciliation in the Gambia' (2019) 12(3) *International Journal of Community Music* 349; O'Connell, J. M., and S. E.-S. Castelo-Branco, *Music and Conflict* (University of Illinois Press, USA, and New University of Lisbon, Portugal, 2010).

¹³⁷⁸ Capulong, E. R. C., 'Mediation and the Neocolonial Legal Order: Access to Justice and Self-Determination in the Philippines' (2012) 27(3) *Ohio State Journal on Dispute Resolution* 641.

¹³⁷⁹ Sourdin, T., *Mediation in the Supreme and County Courts of Victoria* (Report prepared for the Department of Justice, Victoria, Australia, April 2009), available on <<http://www.civiljustice.info/adreval/1/>>.

communitarian values.¹³⁸⁰ In addition, it has been suggested that the research approaches and methods used in many empirical studies, including studies of mediation, rarely take into account contextual influences and this might undermine their validity.¹³⁸¹

In addition to the 47 selected studies, the material referenced in this Chapter includes reference to studies conducted in non-Western settings and contexts such as Brazil, South Africa, the Gambia, Ghana, Scandinavia, and the Philippines, as well as research from the US, Australia, England, Ireland, and Scotland.¹³⁸² The research disciplines have also been purposely broadened to include those additional to dispute/conflict resolution¹³⁸³ and law,¹³⁸⁴ and they include anthropology,¹³⁸⁵

¹³⁸⁰ For example, see Capulong, E. R. C., 'Mediation and the Neocolonial Legal Order: Access to Justice and Self-Determination in the Philippines' (2012) 27(3) *Ohio State Journal on Dispute Resolution* 641.

¹³⁸¹ Crampton, A., 'Escape from the Laboratory: Ethnographic Methods in the Study of Elder and Family Court Mediation' (2016) 32(3) *Negotiation Journal* 191; Gelfand, M. J., and J. Brett, 'Big Questions for Negotiation and Culture Research' (2019) 12(2) *Negotiation and Conflict Management Research* 105; Keikelame, M. J., and L. Swartz, 'Decolonising Research Methodologies: Lessons from a Qualitative Research Project, Cape Town, South Africa' (2019) 12 *Global Health Action* 1.

¹³⁸² The methodology for the choice of additional material is described in Chapter Two, see 2.4. Targeted review: constraints on research.

¹³⁸³ Bell, P., and A. Georgakopoulos, 'A Study of Family Mediator Perceptions of Family Mediator Effectiveness' (2018) 73(1) *Dispute Resolution Journal* 1; Ebner, N., and J. Parlamis, 'Weaving Together Theory, Research, Practice, and Teaching: A Four-Dimensional Approach to Negotiation and Conflict Management Work' (2017) 10(4) *Negotiation and Conflict Management Research* 245; Fisher, J., and B. Fisher-Yoshida, 'Educating Negotiators: Using Theory, Practice, Case Studies, and Simulations in an Integrated Learning Experience' (2017) 10(4) *Negotiation and Conflict Management Research* 286; Hansen, T., and M. Umbreit, 'State of Knowledge: Four Decades of Victim-Offender Mediation Research and Practice: The Evidence' (2018) 36 *Conflict Resolution Quarterly* 99; Storrow, R., and A. Georgakopoulos, 'Mediators and Metaphors: An Analysis of Conflict Resolution Metaphors' (2014) 69(2) *Dispute Resolution Journal* 41.

¹³⁸⁴ Adrian, L., and S. Mykland, 'Unwrapping Court-Connected Mediation Agreements' in A. Nylund, A. K. Ervasti, and L. Adrian (eds), *Nordic Mediation Research* (Springer Open, 2018); Asmussen, I. H., 'Mediation in Light of Modern Identity' in A. Nylund, A. K. Ervasti, and L. Adrian (eds), *Nordic Mediation Research* (Springer Open, 2018); De Girolamo, D., *The Fugitive Identity of Mediation: Negotiations, Shift Changes and Allusionary Action* (Routledge, UK, 2013); De Girolamo, D., 'Sen, Justice and the Private Realm of Dispute Resolution' (2018) 14(3) *International Journal of Law in Context* 353; Ervasti, K., 'Past, Present and Future of Mediation in Nordic Countries' in A. Nylund, A. K. Ervasti, and L. Adrian (eds), *Nordic Mediation Research* (Springer Open, 2018); Singletary, L., L. L. S. Smutko, G. C. Hill, G. C. Smith, S. E. Daniels, J. S. Ayers, and K. Haaland, 'Skills Needed to Help Communities Manage Natural Resource Conflicts' (2008) 25(3) *Conflict Resolution Quarterly* 303.

¹³⁸⁵ Davidheiser, M., 'Race, Worldviews, and Conflict Mediation: Black and White Styles of Conflict Revisited' (2008) 33(1) *Peace and Change* 60.

business and management,¹³⁸⁶ communications,¹³⁸⁷ musicology,¹³⁸⁸ political science,¹³⁸⁹ psychology,¹³⁹⁰ and social sciences and sociology¹³⁹¹. From this sample, twenty six articles and reports were identified that include five literature reviews;¹³⁹² twelve publications reporting on

¹³⁸⁶ Ebner, N., and J. Parlamis, 'Weaving Together Theory, Research, Practice, and Teaching: A Four-Dimensional Approach to Negotiation and Conflict Management Work' (2017) 10(4) *Negotiation and Conflict Management Research* 245; Gelfand, M. J., and J. Brett, 'Big Questions for Negotiation and Culture Research' (2019) 12(2) *Negotiation and Conflict Management Research* 105; Marin, J. R., M. Olekalns, and W. Adair, 'Normatively Speaking: Do Cultural Norms Influence Negotiation, Conflict Management, and Communication?' (2019) 12(2) *Negotiation and Conflict Management Research* 146; Olekalns, M., D. Shestowsky, S. P. Skratck, and A.-S. De Pauw, 'The Double Helix of Theory and Practice: Celebrating Stephen J. Goldberg as a Scholar, Practitioner, and Mentor' (2019) 13(1) *Negotiation and Conflict Management Research* 85.

¹³⁸⁷ Broome, B. J., 'Negotiating the Nexus: Symbiotic Relationship of Theory and Practice in Conflict Management' (2017) 10(4) *Negotiation and Conflict Management Research* 252.

¹³⁸⁸ McConnell, B., 'To Bring Peace that Stays: Music, Conflict and Conciliation in the Gambia' (2019) 12(3) *International Journal of Community Music* 349; O'Connell, J. M., and S. E.-S. Castelo-Branco, *Music and Conflict* (University of Illinois Press, USA, and New University of Lisbon, Portugal, 2010).

¹³⁸⁹ Bell, P., and A. Georgakopoulos, 'A Study of Family Mediator Perceptions of Family Mediator Effectiveness' (2018) 73(1) *Dispute Resolution Journal* 1.

¹³⁹⁰ Gaspodini, I. B., A. da Rosa Alves, and L. R. F. de Oliveira, 'Where is Conflict Mediation Used? A 20-Year Period Systematic Literature Review' (2016) 8(2) *Revista de Psicologia Da IMED* 194; Gelfand, M. J., and J. Brett, 'Big Questions for Negotiation and Culture Research' (2019) 12(2) *Negotiation and Conflict Management Research* 105; Keikelame, M. J., and L. Swartz, 'Decolonising Research Methodologies: Lessons from a Qualitative Research Project, Cape Town, South Africa' (2019) 12 *Global Health* 1.

¹³⁹¹ Crampton, A., 'Escape from the Laboratory: Ethnographic Methods in the Study of Elder and Family Court Mediation' (2016) 32(3) *Negotiation Journal* 191; Hansen, T., and M. Umbreit, 'State of Knowledge: Four Decades of Victim-Offender Mediation Research and Practice: The Evidence' (2018) 36 *Conflict Resolution Quarterly* 99.

¹³⁹² Expert Group on Mediation in Civil Justice in Scotland, *Bringing Mediation into the Mainstream in Civil Justice in Scotland* (Scottish Mediation, Report to the Scottish Government, Scotland, June 2019); Gaspodini, I. B., A. da Rosa Alves, and L. R. F. de Oliveira, 'Where is Conflict Mediation Used? A 20-Year Period Systematic Literature Review' (2016) 8(2) *Revista de Psicologia Da IMED* 194; Hansen, T., and M. Umbreit, 'State of Knowledge: Four Decades of Victim-Offender Mediation Research and Practice: The Evidence' (2018) 36 *Conflict Resolution Quarterly* 99; Kennedy Institute of Workplace Mediation Research Group, *Shaping the Agenda 1: Exploring the Competencies, Skills and Behaviours of Effective Workplace Mediators* (KIWMRG, Ireland, 2016); Crime and Justice, *An International Evidence Review of Mediation in Civil Justice* (The Scottish Government, Social Research Series, June 2019).

empirical studies;¹³⁹³ and nine that make recommendations for future research approaches.¹³⁹⁴ The purpose of including additional references was to expand the scope of acknowledged constraints on mediation (especially empirical studies of mediation), of gaps in knowledge about mediation and its practice, and of suggestions for filling those gaps

Although the database search did not reveal numerous examples of alternative empirical approaches in mediation research,¹³⁹⁵ the selected additional materials include a small number of studies that use ethnographic approaches (eg the use of focus groups and in-depth free-ranging

¹³⁹³ Adrian, L., and S. Mykland, 'Unwrapping Court-Connected Mediation Agreements' in A. Nylund, K. Ervasti, and L. Adrian (eds) *Nordic Mediation Research* (Springer Open, 2018); Bell, P., and A. Georgakopoulos, 'A Study of Family Mediator Perceptions of Family Mediator Effectiveness' (2018) 73(1) *Dispute Resolution Journal* 1; Crampton, A., 'Escape from the Laboratory: Ethnographic Methods in the Study of Elder and Family Court Mediation' (2016) 32(3) *Negotiation Journal* 191; Davidheiser, M., 'Race, Worldviews, and Conflict Mediation: Black and White Styles of Conflict Revisited' (2008) 33(1) *Peace and Change* 60; De Girolamo, D., *The Fugitive Identity of Mediation: Negotiations, Shift Changes and Allusionary Action* (Routledge, UK, 2013); De Girolamo, D., 'Sen, Justice and the Private Realm of Dispute Resolution' (2018) 14(3) *International Journal of Law in Context* 353; Keikelame, M. J., and L. Swartz, 'Decolonising Research Methodologies: Lessons from a Qualitative Research Project, Cape Town, South Africa' (2019) 12 *Global Health Action* 1; McConnell, B., 'To Bring Peace that Stays: Music, Conflict and Conciliation in the Gambia' (2019) 12(3) *International Journal of Community Music* 349; O'Connell, J. M., and S. E.-S. Castelo-Branco, *Music and Conflict* (University of Illinois Press, USA, and New University of Lisbon, Portugal, 2010).

¹³⁹⁴ Asmussen, I. H., 'Mediation in Light of Modern Identity' in A. Nylund, K. Ervasti, and L. Adrian (eds), *Nordic Mediation Research* (Springer Open, 2018); Broome, B. J., 'Negotiating the Nexus: Symbiotic Relationship of Theory and Practice in Conflict Management' (2017) 10(4) *Negotiation and Conflict Management Research* 252; Ebner, N., and J. Parlamis, 'Weaving Together Theory, Research, Practice, and Teaching: A Four-Dimensional Approach to Negotiation and Conflict Management Work' (2017) 10(4) *Negotiation and Conflict Management Research* 245; Fisher, J., and B. Fisher-Yoshida, 'Educating Negotiators: Using Theory, Practice, Case Studies, and Simulations in an Integrated Learning Experience' (2017) 10(4) *Negotiation and Conflict Management Research* 286; Gelfand, M. J., and J. Brett, 'Big Questions for Negotiation and Culture Research' (2019) 12(2) *Negotiation and Conflict Management Research* 105; Lande, J. (ed), *Theories of Change for the Dispute Resolution Movement: Actionable Ideas to Revitalize our Movement* (Conference Proceedings, USA, 2020), available on <<https://ssrn.com/abstract=3533324>>; Marin, J. R., M. Olekalns, and W. Adair, 'Normatively Speaking: Do Cultural Norms Influence Negotiation, Conflict Management, and Communication' (2019) 12(2) *Negotiation and Conflict Management Research* 146; Olekalns, M., D. Shestowsky, S. P. Skratok, and A.-S. De Pauw, 'The Double Helix of Theory and Practice: Celebrating Stephen J. Goldberg as a Scholar, Practitioner, and Mentor' (2019) 13(1) *Negotiation and Conflict Management Research* 85; Welsh, N. A., 'We Need Good Data to Know Whether What We Are Doing – and Espousing – is Good' in J. Lande (ed), *Theories of Change for the Dispute Resolution Movement: Actionable Ideas to Revitalize Our Movement* (Conference Proceedings, USA, 2020), available on <<https://ssrn.com/abstract=3533324>>.

¹³⁹⁵ It should be noted that, while the 47 selected studies were chosen for inclusion in this thesis because of their focus on mediators rather than on the mediation process, the additional materials included for this Chapter were not subjected to the same inclusion criteria and therefore include items that focus on the process as well as on the mediator.

interviews; and a “participant-observer”)¹³⁹⁶ and one that reports on content analysis of mediated agreements.¹³⁹⁷ Several of the publications report using “traditional” empirical methods such as mediator self-reports and observations of mediations.¹³⁹⁸

The additional materials were not selected with the intent of comparing researcher academic discipline and research approach; however, it is interesting to note that, of the additional 26 publications accessed for this Chapter, those from the legal and dispute/conflict resolution disciplines are the most likely to have used “traditional” research approaches for empirical studies, such as observations together with mediator self-reports, or mediator self-reports only (surveys and interviews). Only one of the publications from those disciplines applied an alternative approach in which the researcher took the role of a ‘participant-observer’ within a selection of civil and commercial mediations in England.¹³⁹⁹

It has been noted elsewhere in this thesis that the information provided in the 47 selected studies about how the studies were conducted is not always clear.¹⁴⁰⁰ Although constraints such as publication word limits inevitably restrict what can be included, the selected studies include examples that suggest the limits might not always be imposed only by the publication editor. For

¹³⁹⁶ Crampton, A., ‘Escape from the Laboratory: Ethnographic Methods in the Study of Elder and Family Court Mediation’ (2016) 32(3) *Negotiation Journal* 191; Davidheiser, M., ‘Race, Worldviews, and Conflict Mediation: *Black and White Styles of Conflict* Revisited’ (2008) 33(1) *Peace and Change* 60; De Girolamo, D., *The Fugitive Identity of Mediation: Negotiation, Shift Changes and Allusionary Action* (Routledge, UK, 2013); Keikelame, M. J., and L. Swartz, ‘Decolonising Research Methodologies: Lessons from a Qualitative Research Project, Cape Town, South Africa’ (2019) 12 *Global Health Action* 1; McConnell, B., ‘To Bring Peace that Stays: Music, Conflict and Conciliation in the Gambia’ (2019) 12(3) *International Journal of Community Music* 349; O’Connell, J. M., and S. E.-S. Castelo-Branco, *Music and Conflict* (University of Illinois Press, USA, and New University of Lisbon, Portugal, 2010).

¹³⁹⁷ Adrian, L., and S. Mykland, ‘Unwrapping Court-Connected Mediation Agreements’ in A. Nylund, K. Ervasti, and L. Adrian (eds), *Nordic Mediation Research* (Springer Open, 2018).

¹³⁹⁸ Bell, P., and A. Georgakopoulos, ‘A Study of Family Mediator Perceptions of Family Mediator Effectiveness’ (2018) 73(1) *Dispute Resolution Journal* 1; Ervasti, K., ‘Past, Present and Future of Mediation in Nordic Countries’ in A. Nylund, K. Ervasti, and L. Adrian (eds), *Nordic Mediation Research* (Springer Open, 2018); Singletary, L., L. L. S. Smutko, G. C. Hill, M. Smith, S. E. Daniels, J. S. Ayers, and K. Haaland, ‘Skills Needed to Help Communities Manage Natural resource Conflicts’ (2008) 25(3) *Conflict Resolution Quarterly* 303; Storrow, R., and A. Georgakopoulos, ‘Mediators and Metaphors: An Analysis of Conflict Resolution metaphors’ (2014) 69(2) *Dispute Resolution Journal* 41.

¹³⁹⁹ De Girolamo, D., ‘Sen, Justice and the Private Realm of Dispute Resolution’ (2018) 14(3) *International Journal of Law in Context* 353, 356.

¹⁴⁰⁰ See Chapter Three, Chapter Four, Chapter Five, and Chapter Six.

example, two publications appear in the same book, with one including useful methodological detail while the other's methodological detail is quite limited.¹⁴⁰¹

7.1. Researcher influence and reflexivity

Researcher influence can be considered from two perspectives, potential influence that is external to any specific study, and reflexivity. Each of these perspectives is considered below.¹⁴⁰²

7.1.0. Researcher influence: External

There is potential for the field of mediation research to be influenced by publication and citation networks; however, the Chapter does not present a comprehensive review of publication practices in the field, and, in the future, a more detailed analysis may reveal insights about how publication practices influence mediation research. The Chapter draws on the expertise of 32 publications related to research and publication integrity from various research fields other than

¹⁴⁰¹ Jones, T. S., 'Lag Sequential Analyses of Mediator-Spouse and Husband-Wife Interaction in Successful and Unsuccessful Divorce Mediation in M. A. Rahim (ed), *Managing Conflict: An Interdisciplinary Approach* (Praeger, USA, 1989); Pruitt, D. G., N. B. McGillicuddy, G. L. Welton, and W. R. Fry, 'Process of Mediation in Dispute Settlement Centres' in K. Kressel, and D. G. Pruitt (eds), *Mediation Research: The Process and Effectiveness of Third-Party Intervention* (Jossey-Bass, US, 1989).

¹⁴⁰² It should be note that the field of mediation research, particularly empirical studies of mediation, is a small field and any analysis of publications and citations can be expected to be affected by the small numbers available for analysis.

mediation and law, with particular relevance to the reporting of research,¹⁴⁰³ and enable the Chapter to explore issues such as the influence of publication and citation networks.^{1404 1405}

-
- ¹⁴⁰³ Hyland, K., 'Self-Citation and Self-Reference: Credibility and Promotion in Academic Publication' (2003) 54(3) *Journal of the American Society for Information Science Technology* 251; Kerr, N. L., 'Hypothesizing After the Results are Known' (1998) 2(3) *Personality and Social Psychology Review* 196; Rosenthal, R., and K. L. Fode, 'The Effect of Experimenter Bias on the Performance of the Albino Rat' (1963) 8(3) *Behavioral Science* 183; Barber, T. X., and M. J. Silver, 'Fact, Fiction, and the Experimenter Bias' (1968) 70(6, Pt 2, Supplement) *Psychological Bulletin* 1; Rosenthal, R., and R. Lawson, 'A Longitudinal Study of the Effects of Experimenter Bias on the Operant Learning of Laboratory Rates' (1964) 2 *Journal of Psychiatric Research* 61; Rosenthal, R., and L. Jacobson, 'Teachers' Expectancies: Determinants of Pupils' IQ Gains' (1966) 19 *Psychological Reports* 115;
- ¹⁴⁰⁴ Barber, T. X., and M. J. Silver, 'Fact, Fiction, and the Experimenter Bias' (1968) 70(6, Pt 2, Supplement) *Psychological Bulletin* 1; Bishop, D. V. M., 'The Psychology of Experimental Psychologists: Overcoming Cognitive Constraints to Improve Research – the 47th Sir Frederick Bartlett Lecture' (2019) 73(1) *Quarterly Journal of Experimental Psychology* 1; Chavalarias, D., and J. P. A. Ioannidis, 'Science Mapping Analysis Characterizes 235 Biases in Biomedical Research' (2010) 63(11) *Journal of Clinical Epidemiology* 1205; de Vries, Y. A., A. M. Roest, P. de Jonge, P. Cuijpers, M. R. Munafò, and J. A. Bastiaanssen, 'The Cumulative Effect of Reporting and Citation Bias on the Apparent Efficacy of Treatment: The Case of Depression' (2018) 48 *Psychological Medicine* 2453; Duyx, B., G. M. H. Swaen, M. J. E. Urlings, L. M. Bouter, and M. P. Zeegers, 'The Strong Focus on Positive Results in Abstracts May Cause Bias in Systematic Reviews: A Case Study on Abstract Reporting Bias' (2019) 8(1) *Systematic Reviews* 174; Duyx, B., M. J. E. Urlings, G. M. H. Swaen, L. M. Bouter, and M. P. Zeegers, 'Scientific Citations Favor Positive Results: A Systematic Review and Meta-Analysis' (2017) 88 *Journal of Epidemiology* 92; Goodman, S., *Statistical Methods as Social Technologies versus Analytical Tools: Implications for Metascience and Research Reform* (Presentation at Metascience Symposium, Stanford University, USA, 2019); Goodman, S. N., 'How Sure are You of Your Result? Put a Number on It' (2018) 564(7734) *Nature* 7; Goodman, S. N., D. Fanelli, and J. P. A. Ioannidis, 'What Does Research Reproducibility Mean?' (2016) 8(341) *Science Translational Medicine* 341; Greenberg, S. A., 'How Citation Distortions Create Unfounded Authority: Analysis of a Citation Network' (2009) 339:b2680 *British Medical Journal* 1; Grimes, D. R., and D. V. M. Bishop, 'Distinguishing Polemic from Commentary in Science: Some Guidelines Illustrated with the Case of Sage and Burgio' (2017) 89(1) *Child Development* 141; Hahn, U., C. Merdes, and M. von Sydow, 'How Good is Your Evidence and How Would You Know?' (2018) 10(4) *Topics in Cognitive Science* 660; Howard, G. S., M. Y. Lau, S. E. Maxwell, A. Venter, R. Lundy, and R. M. Sweeney, 'Do Research Literatures Give the Correct Answers?' (2009) 13(2) *Review of General Psychology* 116; Hyland, K., 'Self-Citation and Self-Reference: Credibility and Promotion in Academic Publication' (2003) 54(3) *Journal of the American Society for Information Science Technology* 251; Ioannidis, J. P. A., M. R. Munafò, P. Fusar-Poli, B. A. Nosek, and S. P. David, 'Publication and Other Reporting Biases in Cognitive Sciences: Detection, Prevalence, and Prevention' (2014) 18(5) *Trends in Cognitive Science* 235; John, L. K., G. Loewenstein, and D. Prelec, 'Measuring the Prevalence of Questionable Research Practices with Incentives for Truth Telling' (2012) 23(5) *Psychological Science* 524; Kaptchuk, T. J., 'Effect of Interpretive Bias on Research Evidence' (2003) 326(7404) *BMJ* 1453; Kerr, N. L., 'Hypothesizing After the Results are Known' (1998) 2(3) *Personality and Social Psychology Review* 196; Kivimäki, M., G. D. Batty, I. Kawachi, M. Virtanen, A. Singh-Manoux, and E. J. Brunner, 'Don't Let the Truth Get in the Way of a Good Story: An Illustration of Citation Bias in Epidemiological Research' (2014) 180(4) *American Journal of Epidemiology* 446; Lortie, C. J., L. W. Aarssen, A. E. Budden, and R. Leimu, 'Do Citations and Impact Factors Relate to the Real Numbers in Publications? A Case Study of Citation Rates, Impact, and Effect Sizes in Ecology and Evolutionary Biology' (2013) 94(2) *Scientometrics* 675; MacCoun, R., 'Biases in the Interpretation and Use of Research Results' (1998) 49 *Annual Review of Psychology* 259; Nissen, S. B., T. Magidson, K. Gross, and C. T. Bergstrom, 'Publication Bias and the Canonization of False Facts' (2016) 5:21451 *eLife* 1; Pennycook, G., T. D. Cannon, and D. G. Rand, 'Prior Exposure Increases Perceived Accuracy of Fake News' (2018) 147(12) *Journal of Experimental Psychology: General* 1865; Rogers, T., R. Zeckhauser, F. Gino, M. I. Norton, and M. I. Schweitzer, 'Artful Paltering: The Risks and Rewards of Using Truthful Statements to Mislead Others' (2017) 112(3) *Journal of Personality and Social Psychology* 456; Rosenthal, R., and K. L. Fode, 'The Effect of Experimenter Bias on the Performance of the Albino Rat' (1963) 8(3) *Behavioral Science* 183;

Publications and citations

Academic mediation researchers, and researchers from other fields, report being under strong pressure to publish frequently,¹⁴⁰⁶ and it is possible to review their influence through those publications and through the frequency with which others cite them.

It has been shown in many research fields, and reported by mediation researchers,¹⁴⁰⁷ that it is easier for researchers to publish findings that include positive results and support prevailing views than to publish findings that include negative results, and which are contrary to prevailing views and

Rosenthal, R., and L. Jacobson, 'Teachers' Expectancies: Determinants of Pupils' IQ Gains' (1966) 19 *Psychological Reports* 115; Rosenthal, R., and R. Lawson, 'A Longitudinal Study of the Effects of Experimenter Bias on the Operant Learning of Laboratory Rats' (1964) 2 *Journal of Psychiatric Research* 61; Sayo, A., R. G. Jennings, and J. D. Van Horn, 'Study Factors Influencing Ventricular Enlargement in Schizophrenia: A 20 Year Follow-Up Meta-Analysis' (2011) 59(1) *NeuroImage* 154; Song, F., S. Parekh, L. Hooper, Y. K. Loke, J. Ryder, A. J. Sutton, C. Hing, C. S. Kwok, C. Pang, and I. Harvey, *Dissemination and Publication of Research Findings: An Updated Review of Related Biases*, 14(8) *Health Technology Assessment* (National Institute of Health Research -Health Technology Assessment, UK, 2010); Turner, E. H., A. M. Matthews, E. Linardatos, R. A. Tell, and R. Rosenthal, 'Selective Publication of Antidepressant Trials and its Influence on Apparent Efficacy' (2008) 358(3) *New England Journal of Medicine* 252; Wang, F., J. Qiu, and H. Yu, 'Research on the Cross-Citation Relationship of Core Authors in Scientometrics' (2012) 91 *Scientometrics* 1011.

¹⁴⁰⁵ Fields of research other than mediation and law appear to be further advanced in examination of their research and reporting practices. The Centre for Open Science, and its affiliate the Open Science Foundation, were established in response to the apparent proliferation of questionable research practices, and with the aim of improving the openness, integrity, and reproducibility of research. Recent activity at the Open Science Foundation demonstrates increased access by researchers in the fields of law and of social sciences (see <<https://osf.io/search/?q=law&page=1>>; or <<https://osf.io/search/?q=social%20sciences&page=1>>).

¹⁴⁰⁶ McDermott, E. P., 'Discovering the Importance of Mediator Style – An Interdisciplinary Challenge' (2012) 5(4) *Negotiation and Conflict Management Research* 340; Sourdin, T., 'Introduction' 22(3) *ADRJ* 1; Wall J., and K. Kressel, 'Research on Mediator Style: A Summary and Some Research Questions' (2012) 5(4) *Negotiation and Conflict Management Research* 401.

¹⁴⁰⁷ McDermott, E. P., 'Discovering the Importance of Mediator Style – An Interdisciplinary Challenge' (2012) 5(4) *Negotiation and Conflict Management Research* 340; Wall, J. and K. Kressel, 'Research on Mediator Style: A Summary and Some Research Suggestions' (2012) 5(4) *Negotiation and Conflict Management Research* 401.

expectations.¹⁴⁰⁸ This is known as ‘publication bias’.¹⁴⁰⁹ Negative results can be skewed for publication, so they appear to be positive,¹⁴¹⁰ and reports can be written to include only the positive parts of a study to ensure publication (also known as ‘outcome reporting bias’).¹⁴¹¹

Although it is not confirmed that publication bias influences the mediation research field, it is noted that there are no negative findings about mediation reported among the 47 selected studies nor in the additional 26 mediation publications that have been specifically reviewed and considered in this thesis. Mediation researchers themselves have commented on publishers’ preference for articles that include positive findings about mediation, and the reported emphasis placed on numbers of publications rather than the quality of the studies they report,¹⁴¹² suggesting this could be a self-reinforcing cycle. At a mediation and DR conference in the US in 2019, the issue

¹⁴⁰⁸ de Vries, Y. A., A. M. Roest, P. de Jonge, P. Cuijpers, M. R. Munafò, and J. A. Bastiaanssen, ‘The Cumulative Effect of Reporting and Citation Biases on the Apparent Efficacy of Treatment: The Case of Depression’ (2018) 48 *Psychological Medicine* 2453; Duyx, B., M. J. E. Urlings, G. M. H. Swaen, L. M. Bouter, and M. P. Zeegers, ‘Scientific Citations Favor Positive Results: A Systematic Review and Meta-Analysis’ (2017) 88 *Journal of Clinical Epidemiology* 92; Ioannidis, J. P. A., M. R. Munafò, P. Fusar-Poli, B. A. Nosek, and S. P. David, ‘Publication and Other Reporting Biases in Cognitive Sciences: Detection, Prevalence, and Prevention’ (2014) 18(5) *Trends in Cognitive Sciences* 235; Sayo, A., R. G. Jennings, J. D. Van Horn, ‘Study Factors Influencing Ventricular Enlargement in Schizophrenia: A 20 Year Follow-Up Meta-Analysis’ (2011) 59(1) *NeuroImage* 154; Song, F., S. Parekh, L. Hooper, Y. K. Loke, J. Ryder, A. J. Sutton, C. Hing, C. S. Kwok, C. Pang, and I. Harvey, *Dissemination and Publication of Research Findings: An Updated Review of Related Biases*, 14(8) Health Technology Assessment (report published by the National Institute of Health Research – Health Technology Assessment, UK, February 2010); Tatsioni, A., N. G. Bonitsis, and J. P. A. Ioannidis, ‘Persistence of Contradicted Claims in the Literature’ (2007) 298(21) *JAMA* 2517; Turner, E. H., A. M. Matthews, E. Linardatos, R. A. Tell, and R. Rosenthal, ‘Selective Publication of Antidepressant Trials and its Influence on Apparent Efficacy’ (2008) 358(3) *New England Journal of Medicine* 252;

¹⁴⁰⁹ Turner, E. H., A. M. Matthews, E. Linardatos, R. A. Tell, and R. Rosenthal, ‘Selective Publication of Antidepressant Trials and its Influence on Apparent Efficacy’ (2008) 358(3) *New England Journal of Medicine* 252, 259.

¹⁴¹⁰ Turner, E. H., A. M. Matthews, E. Linardatos, R. A. Tell, and R. Rosenthal, ‘Selective Publication of Antidepressant Trials and its Influence on Apparent Efficacy’ (2008) 358(3) *New England Journal of Medicine* 252.

¹⁴¹¹ de Vries, Y. A., A. M. Roest, P. de Jonge, P. Cuijpers, M. R. Munafò, and J. A. Bastiaanssen, ‘The Cumulative Effect of Reporting and Citation Biases on the Apparent Efficacy of Treatment: The Case of Depression’ (2018) 48 *Psychological Medicine* 2453, 2454.

¹⁴¹² Wall, J. and K. Kressel, ‘Research on Mediator Style: A Summary and Some Research Suggestions’ (2012) 5(4) *Negotiation and Conflict Management Research* 401.

of not publishing negative findings about mediation was raised briefly, though apparently without discussion.¹⁴¹³

Related to publication are issues linked to the use of citations. It has been suggested that citations are used as a form of persuasion in that they create a researcher's authority through the numbers of citations that researcher receives, and the strength of the 'citation network' in which they participate.¹⁴¹⁴ There are many reports of problematic use of citations,¹⁴¹⁵ leading to the widespread use of the term 'citation bias',¹⁴¹⁶ a situation said to occur when the only citations

¹⁴¹³ Frenkel, D., M. Keet, J. Lande, and D. Stienstra, 'Studying What Dispute Resolution Practitioners Actually Do' in J. Lande (ed), *Theories of Change for the Dispute Resolution Movement: Actionable Ideas to Revitalize Our Movement* (Conference Proceedings, USA, 2020), available on <<https://ssrn.com/abstract=3533324>>, 254.

¹⁴¹⁴ Greenberg, S. A., 'How Citation Distortions Create Unfounded Authority: Analysis of a Citation Network' (2009) 339:b2680 *British Medical Journal* 1.

¹⁴¹⁵ Chavalarias, D., and J. P. A. Ioannidis, 'Science Mapping Analysis Characterizes 235 Biases in Biomedical Research' (2010) 63(11) *Journal of Clinical Epidemiology* 1205; de Vries, Y. A., A. M. Roest, P. de Jonge, P. Cuijpers, M. R. Munafò, and J. A. Bastiaanssen, 'The Cumulative Effect of Reporting and Citation Biases on the Apparent Efficacy of Treatment for the Case of Depression' (2018) 48 *Psychological Medicine* 2453; Duyx, B., M. J. E. Urlings, G. M. H. Swaen, L. M. Bouter, and M. P. Zeegers, 'Scientific Citations Favor Positive Results: A Systematic Review and Meta-Analysis' (2017) 88 *Journal of Clinical Epidemiology* 92; Greenberg, S. A., 'How Citation Distortions Create Unfounded Authority: Analysis of a Citation Network' (2009) 339:b2680 *British Medical Journal* 1; Hyland, K., 'Self-Citation and Self-Reference: Credibility and Promotion in Academic Publication' (2003) 54(3) *Journal of the American Society for Information Science Technology* 251; Kivimäki, M., G. D. Batty, I. Kawachi, M. Virtanen, A. Singh-Manoux, and E. J. Brunner, 'Don't Let the Truth Get in the Way of a Good Story: An Illustration of Citation Bias in Epidemiological Research' (2014) 180(4) *American Journal of Epidemiology* 446; Lortie, C. J., L. W. Aarssen, A. E. Budden, and R. Leimu, 'Do Citations and Impact Factors Relate to the Real Numbers in Publications? A Case Study of Citation Rates, Impact, and Effect Sizes in Ecology and Evolutionary Biology' (2013) 94(2) *Scientometrics* 675; Song, F., S. Parekh, L. Hooper, Y. K. Loke, J. Ryder, A. J. Sutton, C. Hing, C. S. Kwok, C. Pang, and I. Harvey, *Dissemination and Publication of Research Findings: An Updated Review of Related Biases*, 14(8) Health Technology Assessment (Report published by the National Institute of Health Research – Health Technology Assessment, UK, 2010); Tatsioni, A., N. G. Bonitsis, and J. P. A., Ioannidis, 'Persistence of Contradicted Claims in the Literature' (2007) 298(21) *JAMA* 2517.

¹⁴¹⁶ Chavalarias, D., and J. P. A., Ioannidis, 'Science Mapping Analysis Characterizes 235 Biases in Biomedical Research' (2010) 63(11) *Journal of Clinical Epidemiology* 1205; Greenberg, S. A., 'How Citation Distortions Create Unfounded Authority: Analysis of a Citation Network' (2009) 339:b2680 *British Medical Journal* 1; Tatsioni, A., N. G. Bonitsis, and J. P. A., Ioannidis, 'Persistence of Contradicted Claims in the Literature' (2007) 298(21) *JAMA* 2517, 2525.

included in a publication are supportive of that publication's views,¹⁴¹⁷ in itself influencing the acceptance and acceptability of certain research and researchers.¹⁴¹⁸

Research integrity studies have found that cross-citation of co-authors has been found to build research influence, with strong associated links between collaboration, co-authorship, cross-citations, and influence in the research field.¹⁴¹⁹ In addition, the highest number of cross-citations have been found to be self-citations.¹⁴²⁰ It has also been found that the most highly cited authors cite each other and themselves which reinforces their own status, confirms established views and preferences, and so influences a research field's homogeneity.¹⁴²¹ In a complex analysis of publication trends, it was found that 'citation network[s]' exist where researchers are observed to reliably cite each other,¹⁴²² and the numbers of citations they receive (or 'network traffic'¹⁴²³) creates a researcher's authority,¹⁴²⁴ increasing their influence on the nature of publications in their field. This self-reinforcing cycle has been recognised for more than 20 years and has been called 'majority amplification'.¹⁴²⁵

¹⁴¹⁷ de Vries, Y. A., A. M. Roest, P. de Jonge, P. Cuijpers, M. R. Munafò, and J. A. Bastiaanssen, 'The Cumulative Effect of Reporting and Citation Biases on the Apparent Efficacy of Treatment for the Case of Depression' (2018) 48 *Psychological Medicine* 2453; Tatsioni, A., N. G. Bonitsis, and J. P. A. Ioannidis, 'Persistence of Contradicted Claims in the Literature' (2007) 298(21) *JAMA* 2517; Kivimäki, M., G. D. Batty, I. Kawachi, M. Virtanen, A. Singh-Manoux, and E. J. Brunner, 'Don't Let the Truth Get in the Way of a Good Story: An Illustration of Citation Bias in Epidemiological Research' (2014) 180(4) *American Journal of Epidemiology* 446; Duyx, B., M. J. E. Urlings, G. M. H. Swaen, L. M. Bouter, and M. P. Zeegers, 'Scientific Citations Favor Positive Results: A Systematic Review and Meta-Analysis' (2017) 88 *Journal of Clinical Epidemiology* 92;

¹⁴¹⁸ Greenberg, S. A., 'How Citation Distortions Create Unfounded Authority: Analysis of a Citation Network' (2009) 339:b2680 *British Medical Journal* 1.

¹⁴¹⁹ Wang, F., J. Qiu, and H. Yu, 'Research on the Cross-Citation Relationship of Core Authors in Scientometrics' (2012) 91 *Scientometrics* 1011.

¹⁴²⁰ Wang, F., J. Qiu, and H. Yu, 'Research on the Cross-Citation Relationship of Core Authors in Scientometrics' (2012) 91 *Scientometrics* 1011.

¹⁴²¹ Wang, F., J. Qiu, and H. Yu, 'Research on the Cross-Citation Relationship of Core Authors in Scientometrics' (2012) 91 *Scientometrics* 1011.

¹⁴²² Greenberg, S. A., 'How Citation Distortions Create Unfounded Authority: Analysis of a Citation Network' (2009) 339:b2680 *British Medical Journal* 1, 1.

¹⁴²³ Greenberg, S. A., 'How Citation Distortions Create Unfounded Authority: Analysis of a Citation Network' (2009) 339:b2680 *British Medical Journal* 1, 2.

¹⁴²⁴ Greenberg, S. A., 'How Citation Distortions Create Unfounded Authority: Analysis of a Citation Network' (2009) 339:b2680 *British Medical Journal* 1.

¹⁴²⁵ MacCoun, R., 'Biases in the Interpretation and Use of Research Results' (1998) 49 *Annual Review of Psychology* 259, 278.

An example of the process through which a single study can become a source of majority amplification concerns an investigation of researcher effect on study subjects, in this case, laboratory rats.¹⁴²⁶ An original study claimed to show that researchers can influence their study participants (ie laboratory rats) in ways that produce the outcomes the researchers prefer. A subsequent analysis showed that the study included significant methodological shortcomings as well as flaws in data analysis and that, although the hypothesis about researcher influence was likely to be correct, this particular study data could not be relied upon as evidence.¹⁴²⁷ It has been reported recently that the original study continues to collect high citation rates, reinforcing what was a questionable study as the primary source of a prevailing view of researcher influence.¹⁴²⁸

A very limited review of cross-citations in the 47 selected studies suggests the potential for influential citation networks in the field of mediation research.¹⁴²⁹ In January 2019, and as part of this thesis, each of the 47 selected studies was subjected to a citation count, using Google Scholar.¹⁴³⁰ The studies were then ranked according to the respective numbers of citations, on counts of less than ten citations, on counts of 10 – 49 citations, counts of 50 – 99 citations, of 100+ citations, and of 200+ citations (at the time, none had received more than 252 citations). The latter

¹⁴²⁶ Rosenthal, R., and K. L. Fode, 'The Effect of Experimenter Bias on the Performance of the Albino Rat' (1963) 8(3) *Behavioral Science* 183.

¹⁴²⁷ Barber, T. X., and M. J. Silver, 'Fact, Fiction, and the Experimenter Bias' (1968) 70(6, Pt 2, Supplement) *Psychological Bulletin* 1.

¹⁴²⁸ Bishop, D. V. M., 'The Psychology of Experimental Psychologists: Overcoming Constraints to Improve Research – the 47th Sir Frederick Bartlett Lecture' (2019) 73(1) *Quarterly Journal of Experimental Psychology* 1.

¹⁴²⁹ Due to its small size, the field of mediation research can be expected to include high levels of cross-citation among researchers.

¹⁴³⁰ Although Google Scholar is a useful tool (though relatively basic) for this purpose, its ratings change according to the databases it chooses to access at any time.

two categories include eight studies,¹⁴³¹ of which one had been cited 252 times at the time of data collection.¹⁴³²

Analysis of cross-citation among the eight studies shows: four have contributed to the single study's 252 citations by citing that study;¹⁴³³ all eight include self-citations (including self-citations as co-authors); the co-author of one of the eight studies received 23 separate cross-citations/self-citations from the three included studies in which he is co-author, and a further seven separate citations in the remaining five studies;¹⁴³⁴ a co-author of a separate study received 13 separate citations from the remaining seven studies in addition to his five self-citations;¹⁴³⁵ and all eight of the studies include at least one citation of publications in which either or both of those highly cited authors is a sole or co-author. These figures suggest that, at least among the highly cited authors,

¹⁴³¹ Carnevale, P. J. D., and R. Pegnetter, 'The Selection of Mediator Tactics in Public Sector Disputes: A Contingency Analysis' (1985) 41(2) *Journal of Social Issues* 2; Kochan, T. A., and T. Jick, 'The Public Sector Mediation Process: A Theory and Empirical Examination' (1978) 22(2) *The Journal of Conflict Resolution* 209; Kressel, K., E. A. Frontera, S. Forlenza, F. Butler, and L. Fish, 'The Settlement-Oriented vs the Problem-Solving Style' (1994) 50(1) *Journal of Social Issues* 67; McGillicuddy, N. B., G. L. Welton, and D. G. Pruitt, 'Third-Party Intervention: A Field Experiment Comparing Three Different Models' (1987) 53(1) *Journal of Personality and Social Psychology* 104; Pruitt, D. G., R. S. Peirce, N. B. McGillicuddy, G. L. Welton, and L. Castrianno, 'Long-Term Success in Mediation' (1993) 17(3) *Law and Human Behavior* 313; Wissler, R. L., 'Mediation and Adjudication in Small Claims Court: The Effects of Process and Case Characteristics' (1995) 29(2) *Law & Society Review* 323; Wissler, R. L., 'Court-Connected Mediation in General Civil Cases: What We Know from Empirical Research' (2002) 17(3) *Ohio State Journal on Dispute Resolution* 641; Zubeck, J. M., D. G. Pruitt, R. S. Peirce, N. B. McGillicuddy, and H. Syna, 'Disputant and Mediator Behaviors Affecting Short-Term Success in Mediation' (1992) 36(3) *Journal of Conflict Resolution* 546.

¹⁴³² Kochan, T. A., and T. Jick, 'The Public Sector Mediation Process: A Theory and Empirical Examination' (1978) 22(2) *The Journal of Conflict Resolution* 209.

¹⁴³³ Carnevale, P. J. D., and R. Pegnetter, 'The Selection of Mediator Tactics in Public Sector Disputes: A Contingency Analysis' (1985) 41(2) *Journal of Social Issues* 2; McGillicuddy, N. B., G. L. Welton, and D. G. Pruitt, 'Third-Party Intervention: A Field Experiment Comparing Three Different Models' (1987) 53(1) *Journal of Personality and Social Psychology* 104; Pruitt, D. G., R. S. Peirce, N. B. McGillicuddy, G. L. Welton, and L. Castrianno, 'Long-Term Success in Mediation' (1993) 17(3) *Law and Human Behavior* 313; Zubeck, J. M., D. G. Pruitt, R. S. Peirce, N. B. McGillicuddy, and H. Syna, 'Disputant and Mediator Behaviors Affecting Short-Term Success in Mediation' (1992) 36(3) *Journal of Conflict Resolution* 546.

¹⁴³⁴ Professor D. G. Pruitt; Pruitt, D. G., R. S. Peirce, N. B. McGillicuddy, G. L. Welton, and L. Castrianno, 'Long-Term Success in Mediation' (1993) 17(3) *Law and Human Behavior* 313.

¹⁴³⁵ Professor K. Kressel; Kressel, K., E. A. Frontera, S. Forlenza, F. Butler, and L. Fish, 'The Settlement-Oriented vs the Problem-Solving Style' (1994) 50(1) *Journal of Social Issues* 67.

there might be some form of citation network which possibly functions as an influence network.¹⁴³⁶

1437

Citation bias promotes publication bias and, when combined, the two have been said to facilitate the promulgation of inaccurate information through publication.¹⁴³⁸ In time, and influenced by multiple citations, false information can become what is called ‘canonized fact’.¹⁴³⁹ A canonised fact is believed, even taken for granted, in its field – usually without any research backing – and can be readily reinforced through publication bias.¹⁴⁴⁰ Similar to canonized facts are allegiances to a field’s prevailing views which have been found to derive from a field’s culture or history and to have such long-standing status they are accepted unquestioningly as facts integral to the field’s identity.¹⁴⁴¹ Rescue bias is said to take place when researchers re-interpret a study’s findings so they are seen to reinforce a field’s established views and preferences – or a discipline’s views and preferences – and enable publication of their work.¹⁴⁴²

In mediation research, there are many ideas that could be called canonised facts, or ‘untested assumptions or dogmatic beliefs’ about, say, “good” mediation.¹⁴⁴³ One of those beliefs has been said to be strongly held: that mediation is an empowering process sensitive to the needs of the

¹⁴³⁶ The two appear prominently in the 47 selected studies as well; one is a co-author in three of the studies and one is a co-author of seven.

¹⁴³⁷ As noted at the beginning of this section, the small number of publications in this field limits the usefulness of bibliometric analysis.

¹⁴³⁸ Duyx, B., M. J. E. Urlings, G. M. H. Swaen, L. M. Bouter, and M. P. Zeegers, ‘Scientific Citations Favor Positive Results: A Systematic Review and Meta-Analysis’ (2017) 88 *Journal of Clinical Epidemiology* 92.

¹⁴³⁹ Nissen, S. B., T. Magidson, K. Gross, and C. T. Bergstrom, ‘Publication Bias and the Canonization of False Facts’ (2016) 5:21451 *eLife* 1 1/19.

¹⁴⁴⁰ Nissen, S. B., T. Magidson, K. Gross, and C. T. Bergstrom, ‘Publication Bias and the Canonization of False Facts’ (2016) 5:21451 *eLife* 1.

¹⁴⁴¹ Ioannidis, J. P. A., M. R. Munafò, P. Fusar-Poli, B. A. Nosek, and S. P. David, ‘Publication and Other Reporting Biases in Cognitive Sciences: Detection, Prevalence, and Prevention’ (2014) 18(5) *Trends in Cognitive Sciences* 235, 238.

¹⁴⁴² Kaptchuk, T. J., ‘Effect of Interpretive Bias on Research Evidence’ (2003) 326(7404) *BMJ* 1453, 1454.

¹⁴⁴³ Weiner, G., ‘A Call for Evidence Based Standards for Mediator Quality’ (2012) *Professional Standards and Ethics*, Paper 2, 1, available on <<http://www.civiljustice.info/profstan/2>>.

disputants and typified by individualised and personalised terms of agreement – a view which is not consistently supported by findings from empirical studies.¹⁴⁴⁴

Statistical analysis: Influence on publication

¹⁴⁴⁴ Weiner, G., 'A Call for Evidence Based Standards for Mediator Quality' (2012) *Professional Standards and Ethics*, Paper 2, available on <<http://www.civiljustice.info/profstan/2>>.

Of the 47 selected studies, 42.5% (20) include p-value analysis and report the statistical significance of effect size in their study;¹⁴⁴⁵ as does the Task Force Report referred to in Chapter

Two.¹⁴⁴⁶

¹⁴⁴⁵ Burrell, N. A., W. A. Donohue, and M. Allen, 'The Impact of Disputants' Expectations on Mediation, Testing an Interventionist Model' (1990) Fall 1990 *Human Communication Research* 104; Carnevale, P. J. D., and R. Pegnetter, 'The Selection of Mediator Tactics in Public Sector Disputes: A Contingency Analysis' (1985) 41(2) *Journal of Social Issues* 2; Hiltrop, J. M., 'Factors Associated with Successful Labor Mediation' in K. Kressel and D. G. Pruitt (eds), *Mediation Research: The Process and Effectiveness of Third-Party Intervention* (Jossey-Bass, USA, 1989); Kimsey, W. D., R. M. Fuller, A. J. Bell, and B. C. McKinney, 'The Impact of Mediator Strategic Choices: An Experimental Study' (1994) 12(1) *Mediation Quarterly* 89; Kimsey, W. D., R. M. Fuller, and B. C. McKinney, 'Mediator Listening, Dispute Reframing, and Mediation Outcome: A Pilot Study' (1993) 7(1) *Journal of the International Listening Association* 74; Kressel, K., E. A. Frontera, S. Forlenza, F. Butler, and L. Fish, 'The Settlement-Oriented vs the Problem-Solving Style' (1994) 50(1) *Journal of Social Issues* 67; Kressel, K., T. Henderson, W. Reich, and C. Cohen, 'Multi-Dimensional Analysis of Conflict Mediator Style' (2012) 30(2) *Conflict Resolution Quarterly* 135; Mareschal, P. M., 'What Makes Mediation Work? Perspectives on Resolving Disputes' (2005) 44(3) *Industrial Relations* 509; McDermott, E. P., and R. Obar, "'What's Going On" in Mediation: An Empirical Analysis of the Influence of a Mediator's Style on Party Satisfaction and Monetary Benefit' (2004) 9 *Harvard Negotiation Law Review* 75; McGillicuddy, N. B., G. L. Welton, and D. G. Pruitt, 'Third-Party Intervention: A Field Experiment Comparing Three Different Models' (1987) 53(1) *Journal of Personality and Social Psychology* 104; Peeples, R., C. Harris, and T. Metzloff, 'Following the Script: An Empirical Analysis of Court-Ordered Mediation of Medical Malpractice Cases' (2007) 2007(1) *Journal of Dispute Resolution* 101; Posthuma, R. A., A. Richard, J. B. Dworkin, and M. S. Swift, 'Mediator Tactics and Sources of Conflict: Facilitating and Inhibiting Effects' (2002) 41(1) *Industrial Relations* 94; Pruitt, D. G., R. S. Peirce, N. B. McGillicuddy, G. L. Welton, and L. Castrianno, 'Long-Term Success in Mediation' (1993) 17(3) *Law and Human Behavior* 313; Shapiro, D., R. Drieghe, and J. Brett, 'Mediator Behavior and the Outcomes of Mediation' (1985) 41(2) *Journal of Social Issues* 101; Slaikou, K. A., R. Culler, J. Pearson, and N. Thoennes, 'Process and Outcome in Divorce Mediation' (1985) 10 *Mediation Quarterly* 55; Sourdin, T., *Mediation in the Supreme and County Courts of Victoria* (Report prepared for the Department of Justice, Victoria, Australia, April 2009), available on <<http://www.civiljustice.info/adreval/1/>>; Sourdin, T., *Exploring Pre-Action Requirements: Resolving Disputes Outside Courts* (ACJI, Monash University, October 2012); Swaab, R. I., *Face First: Pre-Mediation Caucus and Face in Employment Disputes* (Presentation, Annual Association of Conflict Management Conference, June 2009); Swaab, R. I., and J. Brett, *Caucus with Care: The Impact of Pre-Mediation Caucuses on Conflict Resolution* (Meetings Paper, International Association of Conflict Management, 2007); Wall, J. A., Jr, and S. Chan-Serafin, 'Processes in Civil Case Mediations' (2009) 26(3) *Conflict Resolution Quarterly* 261; Wall, J. A., Jr, and S. Chan-Serafin, 'Do Mediators Walk Their Talk in Civil Cases?' (2010) 28(1) *Conflict Resolution Quarterly* 3; Wall, J. A., Jr, and D. E. Rude, 'The Judge as a Mediator' (1991) 76(1) *Journal of Applied Psychology* 54; Welton, G. L., and D. G. Pruitt, 'The Mediation Process: The Effects of Mediator Bias and Disputant Power' (1987) 13(1) *Personality and Social Psychology Bulletin* 123; Welton, G. L., D. G. Pruitt, and N. B. McGillicuddy, 'The Role of Caucusing in Community Mediation' (1988) 32(1) *The Journal of Conflict Resolution* 181; Welton, G. L., D. G. Pruitt, N. B. McGillicuddy, C. A. Ippolito, and J. M. Zubeck, 'Antecedents and Characteristics of Caucusing in Community Mediation' (1992) 3(4) *International Journal of Conflict Management* 303; Wissler, R. L., 'Mediation and Adjudication in Small Claims Court: The Effects of Process and Case Characteristics' (1995) 29(2) *Law & Society Review* 323; Wissler, R. L., *Trapping the Data: An Assessment of Domestic Relations Mediation in Maine and Ohio Courts* (Unpublished report, 1999); Wissler, R. L., 'Court-Connected Mediation in General Civil Cases: What We Know from Empirical Research' (2002) 17(3) *Ohio State Journal on Dispute Resolution* 641; Zubeck, J. M., D. G. Pruitt, R. S. Peirce, N. B. McGillicuddy, and H. Syna, 'Disputant and Mediator Behaviors Affecting Short-Term Success in Mediation' (1992) 36(3) *Journal of Conflict Resolution* 546.

¹⁴⁴⁶ American Bar Association Section of Dispute Resolution, *Report of the Task Force on Research on Mediator Techniques* (American Bar Association, USA, June 2017), available on <https://www.americanbar.org/content/dam/aba/administrative/dispute_resolution/med_techniques_tf_rep_or_authcheckdam.pdf>.

The issue of statistical analysis and the production of statistically significant effect size and statistically significant results is widely criticised.¹⁴⁴⁷ Researchers have found that the greater the effect size and statistical significance, the more likely a study is to be published,¹⁴⁴⁸ in particular when a study's statistically significant positive results are seen to confirm a field's conventional expectations.¹⁴⁴⁹ This has been reported to lead to data being analysed in ways that may not be rigorous, but which produce statistical significance.¹⁴⁵⁰ For example, using smaller sample sizes is more likely to produce positive and statistically significant results.¹⁴⁵¹

The use of p-tests and p-values are widely discouraged because they are said to produce misleading results (ie they make the evidence look stronger than it is),¹⁴⁵² when, in reality, they do not measure the size of an effect, nor do they measure the importance of a result. They simply produce measures based on the data subjected to analysis – which itself can be purposely

¹⁴⁴⁷ Bishop, D. V. M., 'The Psychology of Experimental Psychologists: Overcoming Cognitive Constraints to Improve Research: The 47th Sir Frederick Bartlett Lecture' (2019) 73(1) *Quarterly Journal of Experimental Psychology* 1; Goodman, S., *Statistical Methods as Social Technologies versus Analytic Tools: Implications for Metascience and Research Reform* (Presentation at Metascience Symposium, Stanford University, 2019); Goodman, S., 'A Dirty Dozen: Twelve P-Value Misconceptions' (2008) 45(3) *Seminars in Hematology* 135; Goodman, S. N., D. Fanelli, and J. P. A. Ioannidis, 'What Does Research Reproducibility Mean?' (2016) 8(341) *Science Translational Medicine* 341; Spiegelhalter, *The Art of Statistics: Learning from Data* (Pelican Books, 2019).

¹⁴⁴⁸ Ioannidis, J. P. A., M. R. Munafò, P. Fusar-Poli, B. A. Nosek, and S. P. David, 'Publication and Other Reporting Biases in Cognitive Sciences: Detection, Prevalence, and Prevention' (2014) 18(5) *Trends in Cognitive Sciences* 235; Sayo, A., R. G. Jennings, and J. D. van Horn, 'Study Factors Influencing Ventricular Enlargement in Schizophrenia: A 20 Year Follow-Up Meta-Analysis' (2011) 59(1) *NeuroImage* 154; Song, F., S. Parekh, L. Hooper, Y. K. Loke, J. Ryder, A. J. Sutton, C. Hing, C. S. Kwok, C. Pang, and I. Harvey, *Dissemination and Publication of Research Findings: An Updated Review of Related Biases*, 14(8) Health Technology Assessment (Report published by the National Institute of Health Research – Health Technology Assessment, UK, 2010).

¹⁴⁴⁹ Sayo, A., R. G. Jennings, and J. D. van Horn, 'Study Factors Influencing Ventricular Enlargement in Schizophrenia: A 20 Year Follow-Up Meta-Analysis' (2011) 59(1) *NeuroImage* 154.

¹⁴⁵⁰ Ioannidis, J. P. A., M. R. Munafò, P. Fusar-Poli, B. A. Nosek, and S. P. David, 'Publication and Other Reporting Biases in Cognitive Sciences: Detection, Prevalence, and Prevention' (2014) 18(5) *Trends in Cognitive Sciences* 235.

¹⁴⁵¹ Bishop 2019; Ioannidis, J. P. A., M. R. Munafò, P. Fusar-Poli, B. A. Nosek, and S. P. David, 'Publication and Other Reporting Biases in Cognitive Sciences: Detection, Prevalence, and Prevention' (2014) 18(5) *Trends in Cognitive Sciences* 235; Sayo, A., R. G. Jennings, and J. D. van Horn, 'Study Factors Influencing Ventricular Enlargement in Schizophrenia: A 20 Year Follow-Up Meta-Analysis' (2011) 59(1) *NeuroImage* 154.

¹⁴⁵² Bishop 2019; Goodman, S., 'A Dirty Dozen: Twelve P-Value Misconceptions' (2008) 45(3) *Seminars in Hematology* 135; Goodman, S., *Statistical Methods as Social Technologies versus Analytic Tools: Implications for Metascience and Research Reform* (Presentation at Metascience Symposium, Stanford University, USA, 2019).

selected.¹⁴⁵³ ‘The effect best supported by the data from a given experiment is always the observed effect, regardless of its significance.’¹⁴⁵⁴

Meta-analysis and reviews

It has been reported that the meta-analysis process relies on published results and findings and so perpetuates any anomalies or biases that may be associated with its subject studies.¹⁴⁵⁵ Many meta-analyses also rely only on publication *abstracts* which themselves have been reported to include only positive results (even if the associated article includes negative results).¹⁴⁵⁶ Many systematic reviews use electronic data collection and analysis and themselves rely on meta-analysis as data sources, again with the potential to perpetuate dubious data that is based on published positive findings.¹⁴⁵⁷ This appears to create a cascading sequence of review and analysis processes, likely to include flaws deriving from the original subject studies and from the reliance on electronic analysis methods.

Summary

The above review suggests that there is a range of strategies available to researchers and to journals that ensure publication of positive research studies and maintain citation networks that effectively support and uphold the prevailing views and preferences in their research field. The review also suggests that the field of mediation research may be subject to similar reinforcing

¹⁴⁵³ Spiegelhalter, D., *The Art of Statistics: Learning from Data* (Pelican Books, 2019); pages 348-352 describe some well-known examples of questionable use of statistical analysis, including so-called ‘p-hacking’, [351] during which data is subjected to ‘tweaks, fiddles and selective reporting’ until a satisfactory $P < 0.05$ is achieved [352].

¹⁴⁵⁴ Goodman, S., ‘A Dirty Dozen: Twelve P-Value Misconceptions’ (2008) 45 *Seminars in Hematology* 135, 136.

¹⁴⁵⁵ Howard, G. S., M. Y. Lau, S. E. Maxwell, A. Venter, R. Lundy, and R. M. Sweeney, ‘Do Research Literatures Give the Correct Answers?’ (2009) 13(2) *Review of General Psychology* 116; Ioannidis, J. P. A., M. R. Munafò, P. Fusar-Poli, B. A. Nosek, and S. P. David, ‘Publication and Other Reporting Biases in Cognitive Sciences: Detection, Prevalence, and Prevention’ (2014) 18(5) *Trends in Cognitive Sciences* 235.

¹⁴⁵⁶ Duyx, B., G. M. H. Swaen, M. J. E. Urlings, L. M. Bouter, and M. P. Zeegers, ‘The Strong Focus on Positive Results in Abstracts May Cause Bias in Systematic Reviews: A Case Study on Abstract Reporting Bias’ (2019) 8(1) *Systematic Reviews* 174.

¹⁴⁵⁷ Duyx, B., G. M. H. Swaen, M. J. E. Urlings, L. M. Bouter, and M. P. Zeegers, ‘The Strong Focus on Positive Results in Abstracts May Cause Bias in Systematic Reviews: A Case Study on Abstract Reporting Bias’ (2019) 8(1) *Systematic Reviews* 174.

research and publication networks. Limitations in terms of journal publication are considered in more detail later in this Chapter.¹⁴⁵⁸

The next section reviews what is known about a second dimension of researcher influence, researcher reflexivity, and its relevance to mediation research.

7.1.1. Researcher influence: reflexivity

Introduction

Reflexivity, or ‘engaged scholarship’,¹⁴⁵⁹ is a research approach in which the researcher is aware of, recognises, and acknowledges their own influence throughout any study they conduct. It is based on the acceptance of absolute objectivity being unattainable, and on the assumption that the researcher’s presence in itself influences any research they conduct. It is not a question of preventing the influences (which would likely be impossible), but a matter of recognising and acknowledging its existence. The focus is on the rigour of the study, its data, and its findings, making it a form of quality control.¹⁴⁶⁰

Reflexivity is a complex ethical concept described over sixty years ago in the context of sociological research,¹⁴⁶¹ and is now an established key measure in systematic appraisals.¹⁴⁶² It concerns the researcher’s awareness of their own influence on every aspect of research they conduct and has particular relevance in empirical studies that include other people. The benefits of reflexivity relate to the accountability and integrity of the research process; to the quality of its

¹⁴⁵⁸ See below, 7.2.2. Journals and publications.

¹⁴⁵⁹ Bansal, P., W. K. Smith, and E. Vaara, ‘From the Editors: New Ways of Seeing Through Qualitative Research’ (2018) 61(4) *Academy of Management Journal* 1189, 1191.

¹⁴⁶⁰ Bansal, P., W. K. Smith, and E. Vaara, ‘From the Editors: New Ways of Seeing Through Qualitative Research’ (2018) 61(4) *Academy of Management Journal* 1189; Berger, R., ‘Now I See It, Now I Don’t: Researcher’s Position and Reflexivity in Qualitative Research’ (2015) 15(2) *Qualitative Research* 219; Weiner-Levy, N., and A. Popper-Giveon, ‘The Absent, the Hidden and the Obscured: Reflections on “Dark Matter” in Qualitative Research’ (2013) 47(4) *Quality and Quantity* 2177.

¹⁴⁶¹ Hammond, P., *Sociologists at Work* (Basic Books, USA, 1964).

¹⁴⁶² Kuper, A., L. Lingard, and W. Levinson, ‘Qualitative Research: Critically Appraising Qualitative Research’ (2008) 337:a1035 *BMJ* 687; Spencer, L., J. Ritchie, J. Lewis, and L. Dillon, *Quality in Qualitative Education: A Framework for Assessing Research Evidence – A Quality Framework* (National Centre for Social Research, report for the Government Chief Social Researcher’s Office, UK, 2003).

information and data; to the respectful treatment of participants; and to the researcher's own well-being.¹⁴⁶³

Australia's *National Statement on Ethical Conduct in Human Research* includes mention of the need for 'ethical reflection', including consideration of potential conflicts of interest, throughout a research project, an aim that is achievable through reflexive practise.¹⁴⁶⁴ It has been suggested that the standards of researcher ethics incorporated in institutional ethical requirements can be best met through the openness and transparency inherent to reflexive practice.¹⁴⁶⁵

Reflexivity differs from the Hawthorne effect¹⁴⁶⁶ in that the latter concerns only observable changes in participant behaviour that are attributable to the presence of the researcher, or to the participants' knowledge of being observed and studied.^{1467 1468} Reflexivity concerns the researcher's influence on everything to do with their research study, including its design and methodology, the choice of its participants, and the interpretation and reporting of the research data.

Reflexivity – meaning and purpose

¹⁴⁶³ Probst, B., 'The Eye Regards Itself: Benefits and Challenges of Reflexivity in Qualitative Social Work Research' (2015) 39(1) *Social Work Research* 37.

¹⁴⁶⁴ National Health and Medical Research Council, Australian Research Council, and Universities Australia, *National Statement on Ethical Conduct in Human Research* (Commonwealth of Australia, 2007 [updated 2018]), 9.

¹⁴⁶⁵ Carpenter, D., 'Ethics, Reflexivity and Virtue' in R. Iphofen and M. Tolich (eds), *The SAGE Handbook of Qualitative Research Ethics* (SAGE Publishing, UK, 2018).

¹⁴⁶⁶ Named for the location of the subject factory: Hawthorne in Chicago, USA.

¹⁴⁶⁷ Coombs, S. J., and I. D. Smith, 'The Hawthorne Effect: Is It a Help or a Hindrance in Social Work Research?' (2003) 6(1) *Change: Transformations in Education* 97; Franke, R. H., and J. D. Kaul, 'The Hawthorne Experiments: First Statistical Interpretation' (1978) 43(5) *American Sociological Review* 623.

¹⁴⁶⁸ Recent research has challenged the apparently negative ramifications of the Hawthorne effect by suggesting it may be less a factor of researcher influence and, in cases such as the Hawthorne factory, more a demonstration of the benefits of participatory action research in which study participants work in collaboration with researchers rather than as research "subjects"; see Coombs, S. J., and I. D. Smith, 'The Hawthorne Effect: Is It a Help or a Hindrance in Social Science Research?' (2003) 6(1) *Change: Transformations in Education* 97; see also Chapter Six of this thesis for discussion of participatory action research.

It has been said that it is not possible for data to be collected, analysed, and interpreted in a completely neutral and detached way,¹⁴⁶⁹ and that there is no such thing as an uninterpreted fact, or a ‘disembodied bystander’ who can give an account that is totally free of personal influences.¹⁴⁷⁰

When researchers conduct any study, they bring with them their gender, age, culture, ethnicity, and socio-economic status; their personal, social, work, and political allegiances; their life experiences and biases; their knowledge and experience; as well as their status and reputation.¹⁴⁷¹ They also bring their curiosity. This researcher “package” is an integral part of the research, and influences all aspects of any study, including relationships between study participants and researchers.¹⁴⁷² Reflexive researchers transparently acknowledge their influence and its possible effects on their research and its outcomes, including recognition that their own subjective views and preferences are likely to affect the study participants, their responses, and the study outcomes.¹⁴⁷³ It has been described as being integral to the integrity of qualitative research,¹⁴⁷⁴ enabling readers to assess that the researcher’s claims are justifiable.¹⁴⁷⁵ It has been acknowledged that the concept of

¹⁴⁶⁹ Probst, B., ‘The Eye Regards Itself: Benefits and Challenges of Reflexivity in Qualitative Social Work Research’ (2015) 39(1) *Social Work Research* 37.

¹⁴⁷⁰ Horsburgh, D., ‘Evaluation of Qualitative Research’ (2003) 12 *Journal of Clinical Nursing* 307, 308.

¹⁴⁷¹ Breuer, F., K. Mruck, and W.-M. Roth, ‘Subjectivity and Reflexivity: An Introduction’ (2002) 3(3) *Forum: Qualitative Research* 1; Guillemin 2004; Horsburgh, D., ‘Evaluation of Qualitative Research’ (2003) 12 *Journal of Clinical Nursing* 307; Riley, S., W. Schouten, and S. Cahill, ‘Exploring the Dynamics of Subjectivity and Power Between Researcher and Researched’ (2003) 4(2) *Forum: Qualitative Research* 1.

¹⁴⁷² Horsburgh, D., ‘Evaluation of Qualitative Research’ (2003) 12 *Journal of Clinical Nursing* 307..

¹⁴⁷³ Horsburgh, D., ‘Evaluation of Qualitative Research’ (2003) 12 *Journal of Clinical Nursing* 307; Kuper, A., S. Reeves, and W. Levinson, ‘Qualitative Research Methodologies: Ethnography’ (2008) 337:a288 *BMJ* 404; Pillow, W., ‘Confession, Catharsis, or Cure? Rethinking the Uses of Reflexivity as Methodological Power in Qualitative Research’ (2003) 16(2) *Qualitative Studies in Education* 175; Poland, F., and L. Birt, ‘Protecting and Empowering Research with the Vulnerable Older Person’ in R. Iphofen and M. Tolich (eds), *The SAGE Handbook of Qualitative Research Ethics* (SAGE Publishing, UK, 2018); Probst, B., ‘The Eye Regards Itself: Benefits and Challenges of Reflexivity in Qualitative Social Work Research’ (2015) 39(1) *Social Work Research* 37; Reeves, S., A. Kuper, and B. D. Hodges, ‘Qualitative Research Methodologies: Ethnography’ (2008) 337:a1020 *BMJ* 512; Riley, S., W. Schouten, and S. Cahill, ‘Exploring the Dynamics of Subjectivity and Power Between Researcher and Researched’ (2003) 4(2) *Forum: Qualitative Research* 1; Tracy, S. J., ‘Qualitative Quality: Eight “Big-Tent” Criteria for Excellent Qualitative Research’ (2010) 16(10) *Qualitative Inquiry* 837.

¹⁴⁷⁴ Kuper, A., L. Lingard, and W. Levinson, ‘Qualitative Research: Critically Appraising Qualitative Research’ (2008) 337 *BMJ* 687.

¹⁴⁷⁵ Horsburgh, D., ‘Evaluation of Qualitative Research’ (2003) 12 *Journal of Clinical Nursing* 307.

reflexivity includes researcher responsibility for the dignity, respect, and safety of study participants.¹⁴⁷⁶

It has been proposed that there are three types of situations that create the context of a researcher's influence: 1) when the researcher has similar experiences and views as those of the study participants (ie a form of "insider" status) and it is easier for the researcher's views and preferences to be predominant; 2) the researcher starts the study as an "outsider" and gradually becomes an "insider" during the course of the study; and 3) the researcher has nothing in common with the study participants and seeks to remain separated from them with minimal engagement.¹⁴⁷⁷

There are also said to be three conceptual areas on which a researcher can focus their reflexive practice: 1) the researcher's consideration of their own beliefs and values; 2) the researcher's consciousness of how their presence might affect the research methods and the study participants; and 3) throughout the research project, the researcher constantly tracking how they affect the research process and how the research process affects them.¹⁴⁷⁸

Acknowledgement of reflexivity may reveal additional important data and information which otherwise would not be exposed, such as how researcher influence has affected aspects of the study.¹⁴⁷⁹ For example, if study participants are more comfortable with one researcher, they might provide more, or different, information than with a different researcher. Reflexive acknowledgement of such differences influences a reader's acceptance of the study findings.¹⁴⁸⁰

The scope of researcher influence

¹⁴⁷⁶ Guillemin, M., and L. Gillam, 'Ethics, Reflexivity and "Ethically Important Moments" in Research' (2004) 10(2) *Qualitative Inquiry* 261.

¹⁴⁷⁷ Berger, R., 'Now I See It, Now I Don't: Researcher's Position and Reflexivity in Qualitative Research' (2015) 15(2) *Qualitative Research* 219.

¹⁴⁷⁸ Bryman, A., *Social Research Methods* (5th Edition, Oxford University Press, UK, 2016).

¹⁴⁷⁹ Annink, A., 'Using the Research Journal During Qualitative Data Collection in a Cross-Cultural Context' (2017) 7(1) *Entrepreneurship Research Journal* 1, DOI: 10.1515/erj-2015-0037; Berger, R., 'Now I See It, Now I Don't: Researcher's Position and Reflexivity in Qualitative Research' (2015) 15(2) *Qualitative Research* 219.

¹⁴⁸⁰ Berger, R., 'Now I See It, Now I Don't: Researcher's Position and Reflexivity in Qualitative Research' (2015) 15(2) *Qualitative Research* 219.

Commentators agree that researcher influence affects all aspects and phases of the study they conduct, including: research setting; research questions and purpose; study design; terminological choices; participant selection, behaviour, and responses to surveys/interviews; data collection, analysis and interpretation, as well as results and findings; and the way the study is reported, and to whom.¹⁴⁸¹ Conversely, researcher influence also affects choices about what is *not* included in a study: the questions that are not included on a survey; the selected study participants who are ultimately excluded from final data collection and analysis; and the data that is excluded, removed or ignored during analysis, interpretation, and reporting.¹⁴⁸² Issues relevant to missing data in the selected studies are considered in some detail in Chapter Six.¹⁴⁸³

It has also been observed that researchers are likely to have different influences in different settings,¹⁴⁸⁴ and that different researchers will interpret the same data differently under the influence of their own values and beliefs. Results and findings have been said to be less “facts” than they are a reflection of the various interactions between the researcher, the participants, and the data.¹⁴⁸⁵ In situations where a researcher is known to be familiar with, and within, the research field, their influence may cause participants to withhold information they think the researcher already knows, or may lead the researcher to make assumptions, based on familiarity, that misconstrue, or exclude, or ignore some information.¹⁴⁸⁶ In other words, researchers may

¹⁴⁸¹ Annink, A., ‘Using the Research Journal During Qualitative Data Collection in a Cross-Cultural Context’ (2017) 7(1) *Entrepreneurship Research Journal* 1, DOI: 10.1515/erj-2015-0037; Berger, R., ‘Now I See It, Now I Don’t: Researcher’s Position and Reflexivity in Qualitative Research’ (2015) 15(2) *Qualitative Research* 219; Guillemin, M., and L. Gillam, ‘Ethics, Reflexivity, and “Ethically Important Moments” in Research’ (2004) 10(2) *Qualitative Inquiry* 261; Horsburgh, D., ‘Evaluation of Qualitative Research’ (2003) 12 *Journal of Clinical Nursing* 307; Kuper, A., L. Lingard, and W. Levinson, ‘Qualitative Research: Critically Appraising Qualitative Research’ (2008) 337:a1035 *BMJ* 687; Kuper, A., S. Reeves, and W. Levinson, ‘Qualitative Research: An Introduction to Reading and Appraising Qualitative Research’ (2008) 337 *BMJ* 404.

¹⁴⁸² Guillemin, M., and L. Gillam, ‘Ethics, Reflexivity and “Ethically Important Moments” in Research’ (2004) 10(2) *Qualitative Inquiry* 261.

¹⁴⁸³ See 6.3. Missing data.

¹⁴⁸⁴ Berger, R., ‘Now I See It, Now I Don’t: Researcher’s Position and Reflexivity in Qualitative Research’ (2015) 15(2) *Qualitative Research* 219.

¹⁴⁸⁵ Horsburgh, D., ‘Evaluation of Qualitative Research’ (2003) 12 *Journal of Clinical Nursing* 307.

¹⁴⁸⁶ Berger, R., ‘Now I See It, Now I Don’t: Researcher’s Position and Reflexivity in Qualitative Research’ (2015) 15(2) *Qualitative Research* 219.

increasingly rely on their own assumptions and interpretations, a tendency that has been noted in the mediation literature.¹⁴⁸⁷

Reflexivity, power, and ethics

It has been proposed that qualitative research has three key ethical issues: confidentiality, reflexivity, and power,¹⁴⁸⁸ and that reflexivity provides an opportunity for researchers to explore the various dimensions of power relationships within the study, in particular those between the researcher and the study participants.¹⁴⁸⁹ The process of reflexivity can give the researcher insight into the power dynamics at play in the study,¹⁴⁹⁰ and thus opportunities to take into account and seek to minimise the effects of those dynamics on the study's outcomes.

Issues of power in empirical research are quite complex and inherent to them are the many moral codes that guide people's behaviour, including the researcher's awareness of their own moral code and the importance of not imposing it on the study participants.¹⁴⁹¹

The reflexive researcher

Commentators emphasise that the point of reflexivity is its transparency, and this can be achieved in various ways, including, if there is a team of researchers, discussion about assumptions, values, philosophy, perspectives, and experiences, and how they might affect any aspect of the study.¹⁴⁹² If there is a sole researcher, s/he can maintain some form of account of having considered

¹⁴⁸⁷ See Chapter Six, 6.3.2. Replacing missing data; see also Beck, C. J. A., and B. D. Sales, 'A Critical Reappraisal of Divorce Mediation Research and Policy' (2000) 6(4) *Psychology, Public Policy, and Law* 989.

¹⁴⁸⁸ Kuper, A., L. Lingard, and W. Levinson, 'Qualitative Research: Critically Appraising Qualitative Research' (2008) 337:a1035 *BMJ* 687.

¹⁴⁸⁹ Kuper, A., L. Lingard, and W. Levinson, 'Qualitative Research: Critically Appraising Qualitative Research' (2008) 337:a1035 *BMJ* 687; Pillow, W., 'Confession, Catharsis, or Cure? Rethinking the Uses of Reflexivity as Methodological Power in Qualitative Research' (2003) 16(2) *Qualitative Studies in Education* 175.

¹⁴⁹⁰ Riley, S., W. Schouten, and S. Cahill, 'Exploring the Dynamics of Subjectivity and Power Between Researcher and Researched' (2003) 4(2) *Forum: Qualitative Research* 1.

¹⁴⁹¹ Carpenter, D., 'Ethics, Reflexivity and Virtue' in R. Iphofen and M. Tolich (eds), *The SAGE Handbook of Qualitative Research Ethics* (SAGE Publishing, UK, 2018).

¹⁴⁹² Spencer, L., J. Ritchie, J. Lewis, and L. Dillon, *Quality in Qualitative Evaluation: A Framework for Assessing Research Evidence – A Quality Framework* (National Centre for Social Research, Report for the Government Chief Social Researcher's Office, UK, 2003).

their own assumptions, values, philosophy, perspectives, and experiences, and how those might affect any aspect of the study.¹⁴⁹³

Ultimately, it is necessary for research reports to include an accounting for reflexivity, and for other related ethical issues,¹⁴⁹⁴ while, at the same time, respecting participant data in ways that enable appropriate analysis and interpretation.¹⁴⁹⁵ Commentators have recommended that researchers treat reflexivity as one component in an overall ethical research practice,¹⁴⁹⁶ ensuring it has the status of being an enduring approach to research that is constant throughout a research study, and not a one-off consideration for the purposes of ethics approval.¹⁴⁹⁷

Reflexivity – disadvantages

Reflexivity is not intended to be an exhaustive, self-focused and self-indulgent confessional in which there is so much self-detail that it becomes a ‘personal catharsis’,¹⁴⁹⁸ and loses its purpose and meaning: to ensure readers have enough information to assess the justifiability of the study’s claims.

Reflexivity in mediation research

Empirical studies of mediation involve a complex mix of relationships between disputants who may have extensive or minimal experience in mediation, disputant advisers who are likely to have

¹⁴⁹³ Kuper, A., L. Lingard, and W. Levinson, ‘Qualitative Research: Critically Appraising Qualitative Research’ (2008) 337:a1035 *BMJ* 687; Reeves, S., A. Kuper, B. D. Hodges, ‘Qualitative Research Methodologies: Ethnography’ (2008) 337:a1020 *BMJ* 512; Tracy, S. J., ‘Qualitative Quality: Eight “Big-Tent” Criteria for Excellent Qualitative Research’ (2010) 16(10) *Qualitative Inquiry* 837.

¹⁴⁹⁴ Kuper, A., S. Reeves, and W. Levinson, ‘An Introduction to Reading and Appraising Qualitative Research’ (2008) 337:a288 *BMJ* 404.

¹⁴⁹⁵ Horsburgh, D., ‘Evaluation of Qualitative Research’ (2003) 12 *Journal of Clinical Nursing* 307.

¹⁴⁹⁶ Bryman, A., *Social Research Methods* (5th Edition, Oxford University Press, UK, 2016); Guillemin, M., and L. Gillam, ‘Ethics, Reflexivity, and “Ethically Important Moments” in Research’ (2004) 10(2) *Qualitative Inquiry* 261.

¹⁴⁹⁷ Carpenter, D., ‘Ethics, Reflexivity and Virtue’ in R. Iphofen and M. Tolich (eds), *The SAGE Handbook of Qualitative Research Ethics* (SAGE Publishing, UK, 2018); Poland, F., and L. Birt, ‘Protecting and Empowering Research with the Vulnerable Older Person’ in R. Iphofen and M. Tolich (eds), *The SAGE Handbook of Qualitative Research Ethics* (SAGE Publishing, UK, 2018).

¹⁴⁹⁸ Tracy, S. J., ‘Qualitative Quality: Eight “Big-Tent” Criteria for Excellent Qualitative Research’ (2010) 16(10) *Qualitative Inquiry* 837, 842.

extensive experience in mediation, mediators with a mix of mediation experience and reputations, and the researchers. The researchers may or may not have experience as mediators and they may or may not be known to other participants (eg through their mediation experience, through their professional networks, or through their research experience). There may also be status differentials among study participants (eg where mediators are ex-judges or senior legal practitioners, or where researchers have high academic status, and where disputants are perceived to have little status). This mix of relationships can be expected to create various power differentials likely to influence what happens during the research study, and the data and results emerging from it.

The 47 selected studies include no references to reflexivity or its precepts, and very limited reference to researcher influence on study participants,¹⁴⁹⁹ or the ways in which researchers might affect the purpose, design, methods, and data analysis as well as the behaviour of mediator and non-mediator participants and their survey and interview responses. Above all, this makes it very difficult for readers to judge the justifiability of study results and findings because they cannot ascertain the extent of the researchers' involvement and influences.

Reflexivity does occur in mediation research and an example is included in a recent ethnographic study of mediation conducted over a period of 12 months in London, UK.¹⁵⁰⁰ The reflexive components canvass the research setting, the researcher's views on mediation, her relevant experience, her progression from being an "outsider" to becoming an "insider", and her research role in the study. It also includes some consideration of the philosophies of mediator participants and the organisation with which they were affiliated at the time of the study.¹⁵⁰¹

¹⁴⁹⁹ Hiltrop, J. M., 'Factors Associated with Successful Labor Mediation' in K. Kressel and D. G. Pruitt (eds), *Mediation Research: The Process and Effectiveness of Third-Party Intervention* (Jossey-Bass, USA, 1989); Shapiro, D., R. Drieghe, and J. Brett, 'Mediator Behavior and the Outcomes of Mediation' (1985) 41(2) *Journal of Social Issues* 101; Slaikeu, K. A., R. Culler, J. Pearson, and N. Thoennes, 'Process and Outcome in Divorce Mediation' (1985) 10 *Mediation Quarterly* 55.

¹⁵⁰⁰ De Girolamo, D., *The Fugitive Identity of Mediation: Negotiations, Shift Changes and Allusionary Action* (Routledge, UK, 2013), Chapter Two 'My Village'.

¹⁵⁰¹ See below (at 7.2.3. The social desirability effect) for a brief analysis of a recent mediation publication which demonstrates the potential effects when there is a lack of researcher reflexivity.

It is likely that improved understanding about researcher influence and about its effects could improve how empirical studies of mediation are designed, conducted, and reported, leading to improvements in what is known about mediation and about mediators.

7.2. Constraints on mediation research¹⁵⁰²

This section reviews mediation researcher perceptions of constraints on their work. The factors acknowledged by mediation researchers as being constraints on their work can be either systemic (eg access to research funding; researcher skills and expertise) or endemic (eg access to appropriate study participants; the collection of suitable research data). The next section applies systemic and endemic frameworks to facilitate analysis of researchers' observations about constraints on their work.

Many mediation researchers refer to constraints associated with reporting and publishing their work. These are considered below at para 7.2.2.¹⁵⁰³ The mediation process, and what happens within it, are recognised as being particularly complex to investigate,¹⁵⁰⁴ and, in itself, that complexity might be a compelling constraint on designing suitable empirical studies that produce credible research data and increase what is known about mediation, and about mediators, and improve the practice of mediation.

7.2.0. Systemic constraints

In this thesis, systemic constraints include factors that are likely to be fundamental to a research "system" and could be expected to impede most aspects of the field's research activities. Although the following constraints are raised by mediation researchers, they are likely to have

¹⁵⁰² This section includes neither commentary nor analysis, allowing researchers' and commentators' observations to stand alone as a compilation of their views of the constraints on their research work.

¹⁵⁰³ See 7.3.4. Journals and publications.

¹⁵⁰⁴ Bingham, L. B., 'Transformative Mediation in the United States Postal Service' (2012) 5(4) *Negotiation and Conflict Management Research* 354; Kochan, T. A., 'Commentary' (2012) 5(4) *Negotiation and Conflict Management Research* 392; McDermott, E. P., 'Discovering the Importance of Mediator Style – An Interdisciplinary Challenge' (2012) 5(4) *Negotiation and Conflict Management Research* 340; Wall, J. and K. Kressel, 'Research on Mediator Style: A Summary and Some Research Suggestions' (2012) 5(4) *Negotiation and Conflict Management Research* 401.

similar constraining effects for researchers in other fields. For example, all research fields need access to funding and support, researcher skills and expertise, and definitional and conceptual clarity.

I. Funding and support

Core factors enabling empirical studies of mediation are linked to the funding and support for them, and it is recognised that, without specific funding and support, many empirical studies would not happen,¹⁵⁰⁵ and, in particular, there would be even fewer studies that are designed to collect more than rudimentary quantitative data about mediation's achievement of simple effectiveness.¹⁵⁰⁶ Commentators have noted that, in order to understand what happens during mediation, research design needs to include complex, time-intensive, multi-faceted methods none of which can happen in the absence of adequate funding and support.¹⁵⁰⁷ It is not often noted that there is almost no funding for investigations of *mediator* effectiveness.¹⁵⁰⁸

It has also been observed that, where studies are funded by mediation programs and services, the funders might support only research proposals that are designed to produce positive results for

¹⁵⁰⁵ Charkoudian, L., 'Just My Style: The Practical, Ethical, and Empirical Dangers of the Lack of Consensus about Definitions of Mediation Styles' (2012) 5(4) *Negotiation and Conflict Management Research* 367; Kochan, T. A., 'Commentary 2' (2012) 5(4) *Negotiation and Conflict Management Research* 392; McDermott, E. P., 'Discovering the Importance of Mediator Style – An Interdisciplinary Challenge' (2012) 5(4) *Negotiation and Conflict Management Research* 340; Sourdin, T., 'Introduction' 22(3) *ADRJ* 1; Wall, J., and K. Kressel, 'Research on Mediator Style: A Summary and Some Research Questions' (2012) 5(4) *Negotiation and Conflict Management Research* 401.

¹⁵⁰⁶ For example, see Charkoudian, L., 'Just My Style: The Practical, Ethical, and Empirical Dangers of the Lack of Consensus about Definitions of Mediator Style' (2012) 5(4) *Negotiation and Conflict Management Research* 367; Kochan, T. A., 'Commentary' (2012) 5(4) *Negotiation and Conflict Management Research* 392; McDermott, E. P., 'Discovering the Importance of Mediator Style – An Interdisciplinary Challenge' (2012) 5(4) *Negotiation and Conflict Management Research* 340; Sourdin, T., 'Introduction' 22(3) *ADRJ* 1; Wall, J. and K. Kressel, 'Research on Mediator Style: A Summary and Some Research Suggestions' (2012) 5(4) *Negotiation and Conflict Management Research* 401.

¹⁵⁰⁷ Charkoudian, L., 'Just My Style: The Practical, Ethical, and Empirical Dangers of the Lack of Consensus about Definitions of Mediator Style' (2012) 5(4) *Negotiation and Conflict Management Research* 367; Kochan, T. A., 'Commentary' (2012) 5(4) *Negotiation and Conflict Management Research* 392; McDermott, E. P., 'Discovering the Importance of Mediator Style – An Interdisciplinary Challenge' (2012) 5(4) *Negotiation and Conflict Management Research* 340.

¹⁵⁰⁸ Sourdin, T., email communication with the author, June 2018.

the program and so confirm its continued operation.¹⁵⁰⁹ A related problem reported to be common to other fields as well as to mediation research, is the influence of funders in the selection of research objectives and study participants, potentially influencing research findings if the purpose of the research project is to evaluate that same funder's program or service.¹⁵¹⁰

In addition to analysis of co-author affiliations and disciplines,¹⁵¹¹ observations of mediation researchers suggest that, in the absence of their own academic research base, they also lack a dedicated career path within which to pursue studies of mediation.¹⁵¹² Such observations suggest that mediation researchers are required to meet the requirements of other disciplines (such as law) in order to gain career advancement. Such structural impediments may affect the institutional levels of support given to mediation research.

II. Ethics and confidentiality

Ethical constraints can prevent detailed investigation of mediation when institutional ethical requirements designed to protect human participants in research are seen to prevent some studies from occurring.¹⁵¹³ They can also include, in court-connected mediations, the professional ethical constraints inherent to the privileged relationship between a legal advisor and her/his client when they are participants in mediation research.¹⁵¹⁴ There can also be ethical constraints associated with the recruitment of study participants through their lawyers (rather than directly with disputants –

¹⁵⁰⁹ McDermott, E. P., 'Discovering the Importance of Mediator Style – An Interdisciplinary Challenge' (2012) 5(4) *Negotiation and Conflict Management Research* 340.

¹⁵¹⁰ McDermott, E. P., 'Discovering the Importance of Mediator Style – An Interdisciplinary Challenge' (2012) 5(4) *Negotiation and Conflict Management Research* 340; Sayo, A., R. G. Jennings, and J. D. Van Horn, 'Study factors Influencing ventricular Enlargement in Schizophrenia: A 20 Year Follow-Up Meta-Analysis' (2011) 59(1) *NeuroImage* 154.

¹⁵¹¹ See this section below III. Researcher skills and expertise.

¹⁵¹² This has been observed through regular contact with the Australian-based ADR Research Network whose members are dedicated DR/mediation researchers, yet are established in various disciplines including law. Further information can be obtained on <<https://adrresearch.net/>>.

¹⁵¹³ Anecdotal reports based on conversational comments by mediation researchers to the author; because the studies have not been undertaken, it is difficult to confirm their purpose and setting.

¹⁵¹⁴ McDermott, E. P., 'Discovering the Importance of Mediator Style – An Interdisciplinary Challenge' (2012) 5(4) *Negotiation and Conflict Management Research* 340; Sourdin, T., *Dispute Resolution Processes for Credit Consumers* (Project Report, Conflict Resolution Research Centre, La Trobe University, 2007); Sourdin, T., 'Introduction' 22(3) *ADRJ* 1.

see Chapter Five). In addition, the confidentiality of the process has been reported to limit researcher access and investigation of what happens during mediation.¹⁵¹⁵

III. Researcher skills and expertise

The three associated factors described in this section have been said to constrain mediation research: the small size of the research field, its lack of a dedicated academic base, and the associated limited levels of research expertise.

The field of dedicated mediation research is relatively small, and, within it, the number of empirical studies is limited, resulting in a continuing lack of researcher expertise which has been observed to constrain rigorous empirical studies of mediation. In particular, researchers have noted that most mediation research has been reported to occur in law schools where there may be a lack of research expertise in terms of qualitative or quantitative studies,¹⁵¹⁶ leading to mediation research that is focused more on theoretical discussion than on empirical investigation.¹⁵¹⁷ In response to the field's lack of a clearly differentiated identity, it has been suggested that a range of research and associated activities could be aimed at 'normalising' mediation in the context of the legal system,¹⁵¹⁸ which may lead to support for the development of additional research skills.

¹⁵¹⁵ Beck, C. J. C., and B. D. Sale, 'A Critical Appraisal of Divorce Mediation Research and Policy' (2000) 6(4) *Psychology, Public Policy, and Law* 989; Bingham, L. B., 'Transformative Mediation in the United States Postal Service' (2012) 5(4) *Negotiation and Conflict Management Research* 354; Burrell, N. A., W. A. Donohue, and M. Allen, 'The Impact of Disputants' Expectations on Mediation, Testing an Interventionist Model' (1990) Fall 1990 *Human Communication Research* 104; Kochan, T. A., 'Commentary' (2012) 5(4) *Negotiation and Conflict Management Research* 392; Mareschal, P. M., 'What Makes Mediation Work? Perspectives on Resolving Disputes' (2005) 44(3) *Industrial Relations* 509; Sourdin, T., *Dispute Resolution Processes for Credit Consumers* (Project Report, Conflict Resolution Research Centre, La Trobe University, 2007); Wall, J. and K. Kressel, 'Research on Mediator Style: A Summary and Some Research Suggestions' (2012) 5(4) *Negotiation and Conflict Management Research* 401; Wall, J. A., Jr, and D. E. Rude, 'The Judge as a Mediator' (1991) 76(1) *Journal of Applied Psychology* 54.

¹⁵¹⁶ Sourdin, T., 'Introduction' 22(3) *ADRJ* 1; Wall, J., and K. Kressel, 'Research on Mediator Style: A Summary and Some Research Suggestions' (2012) 5(4) *Negotiation and Conflict Management Research* 401.

¹⁵¹⁷ Sourdin, T., 'Introduction' 22(3) *ADRJ* 1.

¹⁵¹⁸ Expert Group on Mediation in Civil Justice in Scotland, *Bringing Mediation into the Mainstream in Civil Justice in Scotland* (Scottish Mediation, Report to the Scottish Government, Scotland, June 2019), 7.

Within the university context, the study of mediation lacks its own academic discipline, and research is conducted in a range of subject backgrounds.¹⁵¹⁹ For example, authors' academic disciplines acknowledged in the 47 selected studies, include business and management;¹⁵²⁰ child and family development;¹⁵²¹ communications;¹⁵²² government and public policy;¹⁵²³ industrial

¹⁵¹⁹ The researcher affiliations described in this section are based on the affiliations listed by authors and co-authors of the 47 selected studies and the 26 additional studies; in some instances, not all co-authors of a study share the same affiliations and research disciplines.

¹⁵²⁰ Carnevale, P. J. D., and R. Pegnetter, 'The Selection of Mediator Tactics in Public Sector Disputes: A Contingency Analysis' (1985) 41(2) *Journal of Social Issues* 2; Dilts, D. A. and A. Karim, 'The Effect of Mediators' Qualities and Strategies on Mediation Outcomes' (1990) 45(1) *Relations Industrielles/Industrial Relations* 22; Hiltrop, J. M., 'Factors Associated with Successful Labor Mediation' in K. Kressel and D. G. Pruitt (eds), *Mediation Research: The Process and Effectiveness of Third-Party Intervention* (Jossey-Bass, USA, 1989); Karim, A. and D. Dilts, 'Determinants of Mediation Success in the Iowa Public Sector' (1990) 19(2) *Journal of Collective Negotiations* 129; Posthuma, R. A., A. Richard, J. B. Dworkin, and M. S. Swift, 'Mediator Tactics and Sources of Conflict: Facilitating and Inhibiting Effects' (2002) 41(1) *Industrial Relations* 94; Shapiro, D., R. Drieghe, and J. Brett, 'Mediator Behavior and the Outcomes of Mediation' (1985) 41(2) *Journal of Social Issues* 101; Swaab, R. I., *Face First: Pre-Mediation Caucus and Face in Employment Disputes* (Presentation, Annual Association of Conflict Management Conference, June 2009); Swaab, R. I., and J. Brett, *Caucus with Care: The Impact of Pre-Mediation Caucuses on Conflict Resolution* (Meetings Paper, International Association of Conflict Management, 2007); Wall, J. A., Jr, and D. E. Rude, 'The Judge as a Mediator' (1991) 76(1) *Journal of Applied Psychology* 54; Wall 209; Wall, J. A., Jr, and S. Chan-Serafin, 'Do Mediators Walk Their Talk in Civil Cases?' (2010) 28(1) *Conflict Resolution Quarterly* 3.

¹⁵²¹ Gale, J., R. L. Mowery, M. S. Herrman, and N. L. Hollett, 'Considering Effective Divorce Mediation: Three Potential Factors' (2002) 19(4) *Conflict Resolution Quarterly* 389.

¹⁵²² Alberts, J. K., B. L. Heisterkamp, and R. M. McPhee, 'Disputant Perceptions of and Satisfaction with a Community Mediation Program' (2005) 16(3) *The International Journal of Conflict Management* 218; Burrell, N. A., W. A. Donohue, and M. Allen, 'The Impact of Disputants' Expectations on Mediation, Testing an Interventionist Model' (1990) Fall 1990 *Human Communication Research* 104; Kimsey, W. D., R. M. Fuller, A. J. Bell, and B. C. McKinney, 'The Impact of Mediator Strategic Choices: An Experimental Study' (1994) 12(1) *Mediation Quarterly* 89; Kimsey, W. D., R. M. Fuller, and B. C. McKinney, 'Mediator Listening, Dispute Reframing, and Mediation Outcome: A Pilot Study' (1993) 7(1) *Journal of the International Listening Association* 74.

¹⁵²³ Bingham, L. B., 'Transformative Mediation in the United States Postal Service' (2012) 5(4) *Negotiation and Conflict Management Research* 354; Gale, J., R. L. Mowery, M. S. Herrman, and N. L. Hollett, 'Considering Effective Divorce Mediation: Three Potential Factors' (2002) 19(4) *Conflict Resolution Quarterly* 389; Mareschal, P. M., 'What Makes Mediation Work? Perspectives on Resolving Disputes' (2005) 44(3) *Industrial Relations* 509.

relations;¹⁵²⁴ law;¹⁵²⁵ psychology;¹⁵²⁶ sociology;¹⁵²⁷ and statistics.¹⁵²⁸ The additional 26 publications included in this Chapter are drawn from the following disciplines: anthropology;¹⁵²⁹ business and

¹⁵²⁴ Karim, A. and R. Pagnetter, 'Mediator Strategies and Qualities and Mediation Effectiveness' (1983) 22(1) *Industrial Relations* 105; Kochan, T. A., and T. Jick, 'The Public Sector Mediation Process: A Theory and Empirical Examination' (1978) 22(2) *The Journal of Conflict Resolution* 209.

¹⁵²⁵ Goldberg, S. B., and M. L. Shaw, 'Further Investigation into the Secrets of Successful and Unsuccessful Mediators' (2008) 26(8) *Alternatives to the High Cost of Litigation* 149; McDermott, E. P., and R. Obar, "'What's Going On" in Mediation: An Empirical Analysis of the Influence of a Mediator's Style on Party Satisfaction and Monetary Benefit' (2004) 9 *Harvard Negotiation Law Review* 75; McEwen, C. A., *An Evaluation of the ADR Pilot Project: Final Report* 1 (Unpublished report, 1992); Peeples, R., C. Harris, and T. Metzloff, 'Following the Script: An Empirical Analysis of Court-Ordered Mediation of Medical Malpractice Cases' (2007) 2007(1) *Journal of Dispute Resolution* 101; Sourdin, T., *Dispute Resolution Processes for Credit Consumers* (Project Report, Conflict Resolution Research Centre, La Trobe University, 2007); Sourdin, T., *Mediation in the Supreme and County Courts of Victoria* (Report prepared for the Department of Justice, Victoria, Australia, April 2009), available on <<http://www.civiljustice.info/adreval/1/>>; Sourdin, T., *Exploring Pre-Action Requirements: Resolving Disputes Outside Courts* (ACJI, Monash University, October 2012); Sourdin, T., and T. Matruggio, *Evaluating Mediation – New South Wales Settlement Scheme 2002* (2004) *Mediation*. Paper 7, available on <<http://www.civiljustice.info/med/7>>; Wissler, R. L., 'Mediation and Adjudication in Small Claims Court: The Effects of Process and Case Characteristics' (1995) 29(2) *Law & Society Review* 323; Wissler, R. L., *Trapping the Data: An Assessment of Domestic Relations Mediation in Maine and Ohio Courts* (Unpublished report, 1999); Wissler, R. L., 'Court-Connected Mediation in General Civil Cases: What We Know from Empirical Research' (2002) 17(3) *Ohio State Journal on Dispute Resolution* 641.

¹⁵²⁶ Carnevale, P. J. D., and R. Pagnetter, 'The Selection of Mediator Tactics in Public Sector Disputes: A Contingency Analysis' (1985) 41(2) *Journal of Social Issues* 2; Kressel, K., 'How Do Mediators Decide What To Do? Implicit Schemas of Practice and Mediator Decisionmaking' (2013) 28(3) *Ohio State Journal on Dispute Resolution* 709; Kressel, K., E. A. Frontera, S. Forlenza, F. Butler, and L. Fish, 'The Settlement-Oriented vs the Problem-Solving Style' (1994) 50(1) *Journal of Social Issues* 67; Kressel, K., T. Henderson, W. Reich, and C. Cohen, 'Multi-Dimensional Analysis of Conflict Mediator Style' (2012) 30(2) *Conflict Resolution Quarterly* 135; McGillicuddy, N. B., G. L. Welton, and D. G. Pruitt, 'Third-Party Intervention: A Field Experiment Comparing Three Different Models' (1987) 53(1) *Journal of Personality and Social Psychology* 104; Pruitt, D. G., R. S. Peirce, N. B. McGillicuddy, G. L. Welton, and L. Castrianno, 'Long-Term Success in Mediation' (1993) 17(3) *Law and Human Behavior* 313; Welton, G. L., and D. G. Pruitt, 'The Mediation Process: The Effects of Mediator Bias and Disputant Power' (1987) 13(1) *Personality and Social Psychology Bulletin* 123; Welton, G. L., D. G. Pruitt, and N. B. McGillicuddy, 'The Role of Caucusing in Community Mediation' (1988) 32(1) *The Journal of Conflict Resolution* 181; Welton, G. L., D. G. Pruitt, N. B. McGillicuddy, C. A. Ippolito, and J. M. Zubeck, 'Antecedents and Characteristics of Caucusing in Community Mediation' (1992) 3(4) *International Journal of Conflict Management* 303; Zubeck, J. M., D. G. Pruitt, R. S. Peirce, N. B. McGillicuddy, and H. Syna, 'Disputant and Mediator Behaviors Affecting Short-Term Success in Mediation' (1992) 36(3) *Journal of Conflict Resolution* 546.

¹⁵²⁷ Peeples, R., C. Harris, and T. Metzloff, 'Following the Script: An Empirical Analysis of Court-Ordered Mediation of Medical Malpractice Cases' (2007) 2007(1) *Journal of Dispute Resolution* 101.

¹⁵²⁸ McDermott, E. P., and R. Obar, "'What's Going On" in Mediation: An Empirical Analysis of the Influence of a Mediator's Style on Party Satisfaction and Monetary Benefit' (2004) 9 *Harvard Negotiation Law Review* 75.

¹⁵²⁹ Davidheiser, M., 'Race, Worldviews, and Conflict Mediation: *Black and White Styles of Conflict* Revisited' (2008) 33(1) *Peace and Change* 60.

management;¹⁵³⁰ communications;¹⁵³¹ dispute/conflict resolution;¹⁵³² law;¹⁵³³ musicology;¹⁵³⁴ political science;¹⁵³⁵ psychology;¹⁵³⁶ social work and sociology.¹⁵³⁷ The ten empirical studies among

¹⁵³⁰ Gelfand, M. J., and J. Brett, 'Big Questions for Negotiation and Culture Research' (2019) 12(2) *Negotiation and Conflict Management Research* 105; Marin, J. R., M. Olekalns, and W. Adair, 'Normatively Speaking: Do Cultural Norms Influence Negotiation, Conflict Management, and Communication' (2019) 12(2) *Negotiation and Conflict Management Research* 146; Olekalns, M., D. Shestowsky, S. P. Skratck, and A.-S. De Pauw, 'The Double Helix of Theory and Practice: Celebrating Stephen J. Goldberg as a Scholar, Practitioner, and Mentor' (2019) 13(1) *Negotiation and Conflict Management Research* 85; Ebner, N., and J. Parlamis, 'Weaving Together Theory, Research, Practice, and Teaching: A Four-Dimensional Approach to Negotiation and Conflict Management Work' (2017) 10(4) *Negotiation and Conflict Management Research* 245.

¹⁵³¹ Broome, B. J., 'Negotiating the Nexus: Symbiotic Relationship of Theory and Practice in Conflict Management' (2017) 10(4) *Negotiation and Conflict Management Research* 252.

¹⁵³² Bell, P., and A. Georgakopoulos, 'A Study of Family Mediator Perceptions of Family Mediator Effectiveness' (2018) 73(1) *Dispute Resolution Journal* 1; De Girolamo, D., *The Fugitive Identity of Mediation: Negotiation, Shift Changes and Allusionary Action* (Routledge, UK, 2013); De Girolamo, D., 'Sen, Justice and the Private Realm of Dispute Resolution' (2018) 14(3) *International Journal of Law in Context* 353; Fisher and Fisher-Yoshida; Hansen, T., and M. Umbreit, 'State of Knowledge: Four Decades of Victim-Offender Mediation Research and Practice: The Evidence' (2018) 36 *Conflict Resolution Quarterly* 99; Storrow, R., and A. Georgakopoulos, 'Mediators and Metaphors: An Analysis of Conflict Resolution Metaphors' (2014) 69(2) *Dispute Resolution Journal* 41.

¹⁵³³ Adrian, L., and S. Mykland, 'Unwrapping Court-Connected Mediation Agreements' in A. Nylund, A. K. Ervasti, and L. Adrian (eds), *Nordic Mediation Research* (Springer Open, 2018); Asmussen, I. H., 'Mediation in Light of Modern Identity' in A. Nylund, K. Ervasti, and L. Adrian (eds), *Nordic Mediation Research* (Springer Open, 2018); Ervasti, K., 'Past, Present and Future of Mediation in Nordic Countries' in A. Nylund, K. Ervasti, and L. Adrian (eds), *Nordic Mediation Research* (Springer Open, 2018); Singletary, L., L. S. Smutko, G. C. Hill, G. C. Smith, S. E. Daniels, J. S. Ayers, and K. Haaland, 'Skills Needed to Help Communities Manage Natural Resource Conflicts' (2008) 25(3) *Conflict Resolution Quarterly* 303.

¹⁵³⁴ McConnell, B., 'To Bring Peace that Stays: Music, Conflict and Conciliation in the Gambia' (2019) 12(3) *International Journal of Community Music* 349; O'Connell, J. M., and S. E.-S. Castelo-Branco, *Music and Conflict* (University of Illinois Press, USA, and New University of Lisbon, Portugal, 2010).

¹⁵³⁵ Bell, P., and A. Georgakopoulos, 'A Study of Family Mediator Perceptions of Family Mediator Effectiveness' (2018) 73(1) *Dispute Resolution Journal* 1.

¹⁵³⁶ Gaspodini, I. B., A. da Rosa Alves, and L. R. F. de Oliveira, 'Where is Conflict Mediation Used? A 20-Year Period Systematic Literature Review' (2016) 8(2) *Revista de Psicologia Da IMED* 194; Gelfand, M. J., and J. Brett, 'Big Questions for Negotiation and Culture Research' (2019) 12(2) *Negotiation and Conflict Management Research* 105; Keikelame, M. J., and L. Swartz, 'Decolonising Research Methodologies: Lessons from a Qualitative Research Project, Cape Town, South Africa' (2019) 12 *Global Health Action* 1.

¹⁵³⁷ Bell, P., and A. Georgakopoulos, 'A Study of Family Mediator Perceptions of Family Mediator Effectiveness' (2018) 73(1) *Dispute Resolution Journal* 1; Crampton, A., 'Escape from the Laboratory: Ethnographic Methods in the Study of Elder and Family Court Mediation' (2016) 32(3) *Negotiation Journal* 191; Hansen, T., and M. Umbreit, 'State of Knowledge: Four Decades of Victim-Offender Mediation Research and Practice: The Evidence' (2018) 36 *Conflict Resolution Quarterly* 99.

those 26 are from anthropology;¹⁵³⁸ dispute/conflict resolution;¹⁵³⁹ law;¹⁵⁴⁰ musicology;¹⁵⁴¹ political science;¹⁵⁴² psychology;¹⁵⁴³ and sociology.¹⁵⁴⁴ Although the range of disciplines demonstrates the broad application of mediation, they also confirm the lack of any discipline specific mediation research base.

A lack of discipline based research approaches might perpetuate reduced academic capacity for mediation research and lead to a research field with limited capacity for extension in both theory and practise,¹⁵⁴⁵ particularly in the field of law where, despite limited empirical research expertise, it is reported that there has been an increase in ADR research.¹⁵⁴⁶ The lack of a clear academic base for mediation and ADR research is reflected in the very limited range of dedicated journals. This issue is considered in more detail later in this Chapter.¹⁵⁴⁷

¹⁵³⁸ Davidheiser, M., 'Race, Worldviews, and Conflict Mediation: *Black and White Styles of Conflict* Revisited' (2008) 33(1) *Peace and Change* 60.

¹⁵³⁹ Bell, P., and A. Georgakopoulos, 'A Study of Family Mediator Perceptions of Family Mediator Effectiveness' (2018) 73(1) *Dispute Resolution Journal* 1; Storrow, R., and A. Georgakopoulos, 'Mediators and Metaphors: An Analysis of Conflict Resolution Metaphors' (2014) 69(2) *Dispute Resolution Journal* 41.

¹⁵⁴⁰ Bell, P., and A. Georgakopoulos, 'A Study of Family Mediator Perceptions of Family Mediator Effectiveness' (2018) 73(1) *Dispute Resolution Journal* 1; De Girolamo, D., *The Fugitive Identity of Mediation: Negotiation, Shift Changes and Allusionary Action* (Routledge, UK, 2013); Ervasti, K., 'Past, Present and Future of Mediation in Nordic Countries' in A. Nylund, K. Ervasti, and L. Adrian (eds), *Nordic Mediation Research* (Springer Open, 2018); Singletary, L., L. L. S. Smutko, G. C. Hill, G. C. Smith, S. E. Daniels, J. S. Ayers, and K. Haaland, 'Skills Needed to Help Communities Manage Natural Resource Conflicts' (2008) 25(3) *Conflict Resolution Quarterly* 303.

¹⁵⁴¹ McConnell, B., 'To Bring Peace that Stays: Music, Conflict and Conciliation in the Gambia' (2019) 12(3) *International Journal of Community Music* 349; O'Connell, J. M., and S. E.-S. Castelo-Branco, *Music and Conflict* (University of Illinois Press, USA, and New University of Lisbon, Portugal, 2010).

¹⁵⁴² Bell, P., and A. Georgakopoulos, 'A Study of Family Mediator Perceptions of Family Mediator Effectiveness' (2018) 73(1) *Dispute Resolution Journal* 1.

¹⁵⁴³ Keikelame, M. J., and L. Swartz, 'Decolonising Research Methodologies: Lessons from a Qualitative Research Project, Cape Town, South Africa' (2019) 12 *Global Health Action* 1.

¹⁵⁴⁴ Crampton, A., 'Escape from the Laboratory: Ethnographic Methods in the Study of Elder and Family Court Mediation' (2016) 32(3) *Negotiation Journal* 191.

¹⁵⁴⁵ Sourdin, T., 'Introduction' 22(3) *ADRJ* 1.

¹⁵⁴⁶ Kressel, K., and J. A. Wall, 'Introduction to the Special Issue on Mediator Style' (2012) 5(4) *Negotiation and Conflict Management Research*; McDermott, E. P., 'Discovering the Importance of Mediator Style – An Interdisciplinary Challenge' (2012) 5(4) *Negotiation and Conflict Management Research*; Sourdin, T., 'Introduction' 22(3) *ADRJ* 1; Wall, J. A., Jr., and T. C. Dunne, 'Mediation Research: A Current Review' (2012) 28(2) *Negotiation Journal* 217; Wall, J., and K. Kressel, 'Research on Mediator Style: A Summary and Some Research Questions' (2012) 5(4) *Negotiation and Conflict Management Research* 401.

¹⁵⁴⁷ See 7.2.3. Journals and publications.

It has been suggested that researcher affiliations can influence the choice of research approach, as well as study design, choice of data analysis methods and choice of data interpretation,¹⁵⁴⁸ all providing access to a variety of research approaches, but might also prevent the development of methodological consistency.

IV. Definitional consistency

According to mediation researchers, there are three key areas lacking definitional consistency: the mediation process, mediated outcomes, and models of mediation practice or mediator styles or approaches.

Mediation process

If researchers do not make clear what they are investigating and how it is to be measured, the purpose of the study and the nature of its findings cannot be readily understood. The issue of definitional consistency has been considered in Chapters Three and Four of this thesis,¹⁵⁴⁹ and is a widely acknowledged issue in the mediation literature.¹⁵⁵⁰ It is well accepted that the term “mediation” does not enjoy a common understanding and it has been noted that studies do not routinely provide clear differentiation between the mediation process and the mediator.¹⁵⁵¹ The continuing lack of definitional clarity is demonstrated by descriptions of mediation during the past eight years: in 2012, it could be ‘assistance to two or more interacting parties by a third party who – at that time – has no power to prescribe agreements or outcomes’;¹⁵⁵² in 2013, it could be a means

¹⁵⁴⁸ Sourdin, T., ‘Introduction’ (2011) 22(3) *ADRJ* 1; Wall, J. and K. Kressel, ‘Research on Mediator Style: A Summary and Some Research Suggestions’ (2012) 5(4) *Negotiation and Conflict Management Research* 401.

¹⁵⁴⁹ See Chapter Three and Chapter Four.

¹⁵⁵⁰ For example, see Boule, L., *Mediation: Principles, Process, Practice* (3rd Edition, LexisNexis Butterworths, Australia, 2011); De Girolamo, D., *The Fugitive Identity of Mediation: Negotiation, Shift Changes and Allusionary Action* (Routledge, UK, 2013); Kennedy Institute of Workplace Mediation Research Group, *Shaping the Agenda 1: Exploring the Competencies, Skills and Behaviours of Effective Workplace Mediators* (KIWMRG, Ireland, 2016); Expert Group on Mediation in Civil Justice in Scotland, *Bringing Mediation into the Mainstream in Civil Justice in Scotland* (Scottish Mediation, Report to the Scottish Government, Scotland, June 2019); Sourdin, T., *Alternative Dispute Resolution* (6th Edition, Thomson Reuters, Australia, 2020).

¹⁵⁵¹ Pruitt, D. G., ‘Commentary 1’ (2012) 5(4) *Negotiation and Conflict Management Research* 384.

¹⁵⁵² Wall, J. A., Jr, and T. C. Dunne, ‘Mediation Research: A Current Review’ (2012) 28(2) *Negotiation Journal* 217, 219.

‘by which to achieve negotiated order’;¹⁵⁵³ and, in 2018, it could be a process ‘where a mediator helps the parties to find their own solution’.¹⁵⁵⁴

The mediation process is recognised as being a complex event typified by constantly changing dynamics, and incorporating a variety of mediator actions and behaviours,¹⁵⁵⁵ and it has been suggested that researchers tend to treat the mediation process as one that is self-contained, even homogeneous.¹⁵⁵⁶ This narrow perspective can lead to minimal consideration or clear understanding of what the process does include, such as mediator activities during the preliminary exchanges and meetings that occur before the designated date for the mediation session; the various joint and private sessions that occur on the designated date; and the time lag between the end of the mediation session and the implementation of any mediated agreement.¹⁵⁵⁷

It has been suggested that mediation researchers should clarify the mediation’s end point which, for the purposes of assessing the effectiveness of the process could include points beyond the mediation itself, such as when the mediated agreement is implemented, or even later (in terms of assessing the agreement’s durability).¹⁵⁵⁸

Outcomes

¹⁵⁵³ De Girolamo, D., *The Fugitive Identity of Mediation: Negotiations, Shift Changes and Allusionary Action* (Routledge, UK, 2013), 11.

¹⁵⁵⁴ Ervasti, K., ‘Past, Present and Future of Mediation in Nordic Countries’ in A. Nylund, K. Ervasti, and L. Adrian (eds), *Nordic Mediation Research* (Springer Open, 2018), 229.

¹⁵⁵⁵ Bingham, L. B., ‘Transformative Mediation in the United States Postal Service’ (2012) 5(4) *Negotiation and Conflict Management Research* 354; De Girolamo, D., *The Fugitive Identity of Mediation: Negotiations, Shift Changes and Allusionary Action* (Routledge, UK, 2013); Wall, J. A., Jr., and T. C. Dunne, ‘Mediation Research: A Current Review’ (2012) 28(2) *Negotiation Journal* 217.

¹⁵⁵⁶ Charkoudian, L., ‘Just My Style: The Practical, Ethical, and Empirical Dangers of the Lack of Consensus about Definitions of Mediator Style’ (2012) 5(4) *Negotiation and Conflict Management Research* 367.

¹⁵⁵⁷ Charkoudian, L., ‘Just My Style: The Practical, Ethical, and Empirical Dangers of the Lack of Consensus about Definitions of Mediator Style’ (2012) 5(4) *Negotiation and Conflict Management Research* 367; McDermott, E. P., ‘Discovering the Importance of Mediator Style – An Interdisciplinary Challenge’ (2012) 5(4) *Negotiation and Conflict Management Research* 340; Wall, J. and K. Kressel, ‘Research on Mediator Style: A Summary and Some Research Suggestions’ (2012) 5(4) *Negotiation and Conflict Management Research* 401.

¹⁵⁵⁸ Asmussen, I. H., ‘Mediation in Light of Modern Identity’ in A. Nylund, K. Ervasti, and L. Adrian (eds), *Nordic Mediation Research* (Springer Open, 2018); Sourdin, T., *The Timeliness Project* (Background Report, ACJI, October 2013).

There seems little doubt that measuring “success” in mediation is problematic due in part to the definitional inconsistency of the terms “success” and “effectiveness” and it is a recognised point of inconsistency: ‘Defining what is considered as “success” in mediation is not straightforward.’¹⁵⁵⁹ Despite being regularly acknowledged, the definitional inconsistency is rarely addressed in the literature, and occasionally commentators may opt for a definition or interpretation suitable to their own purpose.¹⁵⁶⁰ This key definitional inconsistency has been acknowledged to be a contributor to the difficulties experienced by researchers investigating effectiveness in court-connected mediations and seeking to measure outcomes other than simple effectiveness.¹⁵⁶¹

*Models of practice, mediator styles, and approaches*¹⁵⁶²

It has been noted that the terms “models of practice”, “mediator styles”, and “mediator approaches” are not always clearly differentiated and are often used interchangeably;¹⁵⁶³ that researchers do not always clearly articulate which concepts, mediator actions, and data measurements are included when they use any of those terms;¹⁵⁶⁴ and that models are analysed in

¹⁵⁵⁹ Crime and Justice, *An International Evidence Review of Mediation in Civil Justice* (The Scottish Government, Social Research Series, June 2019), 14; Charkoudian, L., ‘Just My Style: The Practical, Ethical, and Empirical Dangers of the Lack of Consensus about Definitions of Mediation Styles’ (2012) 5(4) *Negotiation and Conflict Management Research* 367; Della Noce, D. J., ‘Mediator Style and the Question of “Good” Mediation: A Call for Theoretical Development’ (2012) 5(4) *Negotiation and Conflict Management Research* 396; McDermott, E. P., ‘Discovering the Importance of Mediator Style – An Interdisciplinary Challenge’ (2012) 5(4) *Negotiation and Conflict Management Research* 340; Pruitt, D. G., ‘Commentary 1’ (2012) 5(4) *Negotiation and Conflict Management Research* 384; Wall, J., and K. Kressel, ‘Research on Mediator Style: A Summary and Some Research Questions’ (2012) 5(4) *Negotiation and Conflict Management Research* 401.

¹⁵⁶⁰ For example, see Expert Group on Mediation in Civil Justice in Scotland, *Bringing Mediation into the Mainstream in Civil Justice in Scotland* (Scottish Mediation, Report to the Scottish Government, Scotland, June 2019).

¹⁵⁶¹ Crime and Justice, *An International Evidence Review of Mediation in Civil Justice* (The Scottish Government, Social Research Series, June 2019).

¹⁵⁶² Interpretations of models of practice are included as systemic constraints because conceptual models are common to many fields of research where they provide the conceptual structure around which relevant theory and practice can develop.

¹⁵⁶³ Kennedy Institute of Workplace Mediation Research Group, *Shaping the Agenda 1: Exploring the Competencies, Skills and Behaviours of Effective Workplace Mediators* (KIWMRG, Ireland, 2016).

¹⁵⁶⁴ Beck, C. J. C., and B. D. Sale, ‘A Critical Appraisal of Divorce Mediation Research and Policy’ (2000) 6(4) *Psychology, Public Policy, and Law* 989; Charkoudian, L., ‘Just My Style: The Practical, Ethical, and Empirical Dangers of the Lack of Consensus about Definitions of Mediator Style’ (2012) 5(4) *Negotiation and Conflict Management Research* 367; Kochan, T. A., ‘Commentary’ (2012) 5(4) *Negotiation and Conflict Management Research* 392.

terms of practice standards and ‘what ought to happen’ rather than what actually happens.¹⁵⁶⁵

When researchers use the term “style” it is not always clear which of the many reported and associated mediator behaviours, actions and micro skills they are intending to incorporate in their study, nor how they will be measured.¹⁵⁶⁶

It has been observed that, when investigating models of mediation practice, not only is there a lack of clarity about what is meant by facilitative mediation, or by evaluative mediation, or even by conciliation,¹⁵⁶⁷ the conceptual differences can be influenced by context and by geography. For example, it has been noted that, in the Nordic context, differentiating mediation and conciliation can be difficult because there is no linguistic differentiation between them.¹⁵⁶⁸

It is reported that not all research designs for investigating models of practice have taken into account the potential effects research findings might have on the strong commitment, even polarisation, that is associated with certain models.¹⁵⁶⁹ Mediators themselves have been reported to disagree on the attributes of particular models, or styles, of practice, and on the professional acceptability of particular models and styles, and their views are likely to influence what they report in research surveys about their own practice.¹⁵⁷⁰ It has been suggested that these apparent inconsistencies would be likely to impede analysis of the research data mediators provide to researchers,¹⁵⁷¹ as well as affect quality assurance in the industry.¹⁵⁷²

¹⁵⁶⁵ Crampton, A., ‘Escape from the Laboratory: Ethnographic Methods in the Study of Elder and Family Court Mediation’ (2016) 32(3) *Negotiation Journal* 191, 193.

¹⁵⁶⁶ T. A. Kochan, ‘Commentary 2’ (2012) 5(4) *Negotiation and Conflict Management Research*, 392.

¹⁵⁶⁷ Crime and Justice, *An International Evidence Review of Mediation in Civil Justice* (The Scottish Government, Social Research Series, June 2019); Sourdin, T., ‘Introduction’ 22(3) *ADRJ* 1.

¹⁵⁶⁸ Ervasti, K. ‘Past, Present and Future of Mediation in Nordic Countries’ in A. Nylund, K. Ervasti, and L. Adrian (eds), *Nordic Mediation Research* (Springer Open, 2018).

¹⁵⁶⁹ McDermott, E. P., ‘Discovering the Importance of Mediator Style – An Interdisciplinary Challenge’ (2012) 5(4) *Negotiation and Conflict Management Research* 340.

¹⁵⁷⁰ Charkoudian, L., ‘Just My Style: The Practical, Ethical, and Empirical Dangers of the Lack of Consensus about Definitions of Mediator Style’ (2012) 5(4) *Negotiation and Conflict Management Research* 367; Della Noce, D. J., ‘Mediator Style and the Question of “Good” Mediation: A Call for Theoretical Development’ (2012) 5(4) *Negotiation and Conflict Management Research* 396.

¹⁵⁷¹ Charkoudian, L., ‘Just My Style: The Practical, Ethical, and Empirical Dangers of the Lack of Consensus about Definitions of Mediator Style’ (2012) 5(4) *Negotiation and Conflict Management Research* 367.

¹⁵⁷² Ervasti, K., ‘Past, Present and Future of Mediation in Nordic Countries’ in A. Nylund, K. Ervasti, and L. Adrian (eds), *Nordic Mediation Research* (Springer Open, 2018).

The continued assessment of models of mediation practice has been criticised for encouraging strict compliance with certain activities,¹⁵⁷³ and detracting from investigations of mediator actions and microskills.¹⁵⁷⁴ Researchers report problems in assessing mediator application of models and styles when the mediators do not consistently conduct their mediations according to the stylistic requirements, and, instead, demonstrate more flexible approaches.¹⁵⁷⁵ Researchers also report data collection difficulties when mediators use behaviours and actions typically associated with one style or model, and yet do not consistently practise the model itself.¹⁵⁷⁶

Two recent mediation literature reviews have confirmed the lack of conceptual and terminological clarity around mediator styles and behaviours, noting that many relevant terms are used interchangeably in the literature, and often without any definition or clarification.¹⁵⁷⁷ One researcher has suggested addressing the definitional inconsistencies by reviewing mediation's theoretical underpinnings.¹⁵⁷⁸

7.2.1. Endemic constraints

In this thesis, endemic constraints include factors that are reported to be specific to empirical studies of mediation (and, perhaps, to theoretical mediation research).¹⁵⁷⁹ For example, mediation researchers report constraints that affect their capacity to develop suitable research approaches and study designs specifically appropriate to empirical studies of mediation; that encumber their

¹⁵⁷³ Davidheiser, M., 'Race, Worldviews, and Conflict Mediation: *Black and White Styles of Conflict* Revisited' (2008) 33(1) *Peace and Change* 60.

¹⁵⁷⁴ Della Noce, D. J., 'Mediator Style and the Question of "Good" Mediation: A Call for Theoretical Development' (2012) 5(4) *Negotiation and Conflict Management Research* 396; Sourdin, T., 'Introduction' (2011) 22 *ADRJ* 1.

¹⁵⁷⁵ Ervasti, K., 'Past, Present and Future in Nordic Mediation' in A. Nylund, K. Ervasti, and L. Adrian (eds), *Nordic Mediation Research* (Springer Open, 2018); see also Chapter Four of this thesis.

¹⁵⁷⁶ McDermott, E. P., and R. Obar, "'What's Going On" in Mediation: An Empirical Analysis of the Influence of a Mediator's Style on Party Satisfaction and Monetary Benefit' (2004) 9 *Harvard Negotiation Law Review* 75.

¹⁵⁷⁷ Kennedy Institute of Workplace Mediation Research Group, *Shaping the Agenda 1: Exploring the Competencies, Skills and Behaviours of Effective Workplace Mediators* (KIWMRG, Ireland, 2016); *An International Evidence Review of Mediation in Civil Justice* (Report for the Scottish Government, June 2019).

¹⁵⁷⁸ Della Noce, D. J., 'Mediator Style and the Question of "Good" Mediation: A Call for Theoretical Development' (2012) 5(4) *Negotiation and Conflict Management Research* 396.

¹⁵⁷⁹ It is likely that generalised versions of these issues have application in other fields of research.

capacity to enlist the participation of suitable and diverse representative population groups; that impede their capacity to collect credible research data; and that make it difficult for them to ensure the practical relevance of research findings.

I. External influences on choice of research approaches and study design

The credibility of research data and the reliability of study findings are founded on the choice of an appropriate research approach and design, as well as data collection and analysis methods that are suited to the purpose of the study. Attaining these relies in part on the skills and expertise of researchers or their access to such skills and expertise (see above, (iii) Researcher skills and expertise).

The mediation literature suggests that there are many external factors likely to influence researcher choice of how a study is to be conducted, including the influence of interest groups, funders, and researcher affiliations.¹⁵⁸⁰ The concerns of interest groups can be at odds with research rigour,¹⁵⁸¹ and, where a mediation program funds a study, that program's interest in results that reflect well on the program (such as rates of settlement)¹⁵⁸² may take precedence over results that are relevant to ADR (such as disputant satisfaction, compliance, or improved future relationships).¹⁵⁸³ It has been suggested that program evaluations tend not to specify the design of evaluations or the expertise of evaluators and that evaluation reports tend to have limited circulation,¹⁵⁸⁴ thus minimising their contribution to the development of a rigorous research culture. In two of the 47 selected studies, researchers have noted that, where their research design included selection into the study by either court or program staff, the selection was based on case suitability

¹⁵⁸⁰ E. P. McDermott, 'Discovering the Importance of Mediator Style – An Interdisciplinary Challenge' (2012) 5(4) *Negotiation and Conflict Management Research* 340; Wall, J., and K. Kressel, 'Research on Mediator Style: A Summary and Some Research Questions' (2012) 5(4) *Negotiation and Conflict Management Research* 401.

¹⁵⁸¹ Sourdin, T., 'Introduction' 22(3) *ADRJ* 1.

¹⁵⁸² Wall, J. and K. Kressel, 'Research on Mediator Style: A Summary and Some Research Suggestions' (2012) 5(4) *Negotiation and Conflict Management Research* 401.

¹⁵⁸³ Sourdin, T., 'Introduction' 22(3) *ADRJ* 1.

¹⁵⁸⁴ Sourdin, T., 'Introduction' 22(3) *ADRJ* 1.

and the high settlement rates in the studies may have been skewed by the selection process,¹⁵⁸⁵ perhaps making positive study results more likely. Overall, it could be said that the external influences reported by researchers are likely to affect the development of researcher skills and even risk perpetuating the use of relatively unskilled approaches.

Researchers have noted that empirical studies tend to be based in single homogeneous settings with little consideration of broader, more diverse, settings and that they tend not to take into account the various contextual factors that are likely to influence the mediation process and the behaviour of its participants (including the mediator).¹⁵⁸⁶ Researchers have identified that mediation research design includes limited, if any, consideration of additional cultural contextual influences such as social norms, values, and cultural practices,¹⁵⁸⁷ and it has been suggested that this has ethical ramifications because of its exclusion of certain population groups.¹⁵⁸⁸ The usefulness of research findings from narrowly-based studies is necessarily limited and cannot explore broader systemic issues that might influence the nature of the mediation process and the mediators' choice

¹⁵⁸⁵ Posthuma, R. A., A. Richard, J. B. Dworkin, and M. S. Swift, 'Mediator Tactics and Sources of Conflict: Facilitating and Inhibiting Effects' (2002) 41(1) *Industrial Relations* 94; Thoennes, N. A., and J. Pearson, 'Predicting Outcomes in Divorce Mediation: The Influence of People and Process' (1985) 41(2) *Journal of Social Issues* 115.

¹⁵⁸⁶ Asmussen, I. H., 'Mediation in Light of Modern Identity' in A. Nylund, K. Ervasti, and L. Adrian (eds), *Nordic Mediation Research* (Springer Open, 2018); Beck, C. J. C., and B. D. Sale, 'A Critical Appraisal of Divorce Mediation Research and Policy' (2000) 6(4) *Psychology, Public Policy, and Law* 989; Bingham, L. B., 'Transformative Mediation in the United States Postal Service' (2012) 5(4) *Negotiation and Conflict Management Research* 354; Gelfand, M. J., and J. Brett, 'Big Questions for Negotiation and Culture Research' (2019) 12(2) *Negotiation and Conflict Management Research* 105; Kochan, T. A., 'Commentary' (2012) 5(4) *Negotiation and Conflict Management Research* 392; Sourdin, T., 'Introduction' 22(3) *ADRJ* 1; Welsh, N. A., 'We Need Good Data to Know Whether What We Are Doing – and Espousing – is Good' in J. Lande (ed), *Theories of Change for the Dispute Resolution Movement: Actionable Ideas to Revitalize Our Movement* (Conference Proceedings, USA, 2020), available on <<https://ssrn.com/abstract=3533324>>.

¹⁵⁸⁷ Crampton, A., 'Escape from the Laboratory: Ethnographic Methods in the Study of Elder and Family Court Mediation' (2016) 32(3) *Negotiation Journal* 191; De Girolamo, D., *The Fugitive Identity of Mediation: Negotiation, Shift Changes and Allusionary Action* (Routledge, UK, 2013); Federal Court of Australia's Indigenous Dispute Resolution & Conflict Management Case Study Project, *Solid Work You Mob are Dong – Case Studies in Indigenous Dispute Resolution & Conflict Management in Australia* (Commonwealth of Australia, 2009); Keikelame, M. J., and L. Swartz, 'Decolonising Research Methodologies: Lessons from a Qualitative Research Project, Cape Town, South Africa' (2019) 12 *Global Health Action* 1; McConnell, B., 'To Bring Peace that Stays: Music, Conflict and Conciliation in the Gambia' (2019) 12(3) *International Journal of Community Music* 349.

¹⁵⁸⁸ Keikelame, M. J., and L. Swartz, 'Decolonising Research Methodologies: Lessons from a Qualitative Research Project, Cape Town, South Africa' (2019) 12 *Global Health Action* 1.

of actions and approaches.¹⁵⁸⁹ Many of the 47 selected studies have noted that their own narrow scope has limited the generalisability of their findings.¹⁵⁹⁰

Commentators have been critical of one research practice that may be caused by a lack of original research data: the re-use and analysis of data collected for a different purpose in a separate study.¹⁵⁹¹

II. Population groups

In empirical studies of mediation, study participants (mediators and non-mediators) are key to the collection of research data (data that is both collected from them and about them) that is specifically informative about the mediation process, the mediator's role and actions, and what happens during the mediation.

Researchers acknowledge that it can be difficult to access mediations,¹⁵⁹² and that where only small numbers of participants are enlisted into a study, the generalisability of the findings is limited.¹⁵⁹³ It has been suggested that possible causes for low enlistment and response rates include

¹⁵⁸⁹ Sourdin, T., 'Introduction' 22(3) *ADRJ* 1.

¹⁵⁹⁰ Burrell, N. A., W. A. Donohue, and M. Allen, 'The Impact of Disputants' Expectations on Mediation, Testing an Interventionist Model' (1990) Fall 1990 *Human Communication Research* 104; Carnevale, P. J. D., and R. Peggnetter, 'The Selection of Mediator Tactics in Public Sector Disputes: A Contingency Analysis' (1985) 41(2) *Journal of Social Issues* 2; Karim, A. and R. Peggnetter, 'Mediator Strategies and Qualities and Mediation Effectiveness' (1983) 22(1) *Industrial Relations* 105; Kochan, T. A., and T. Jick, 'The Public Sector Mediation Process: A Theory and Empirical Examination' (1978) 22(2) *The Journal of Conflict Resolution* 209; Kressel, K., T. Henderson, W. Reich, and C. Cohen, 'Multi-Dimensional Analysis of Conflict Mediator Style' (2012) 30(2) *Conflict Resolution Quarterly* 135; Mareschal, P. M., 'What Makes Mediation Work? Perspectives on Resolving Disputes' (2005) 44(3) *Industrial Relations* 509; Pruitt, D. G., N. B. McGillicuddy, G. L. Welton, and W. R. Fry, 'Process of Mediation in Dispute Settlement Centres' in K. Kressel, and D. G. Pruitt (eds), *Mediation Research: The Process and Effectiveness of Third-Party Intervention* (Jossey-Bass, US, 1989); Shapiro, D., R. Drieghe, and J. Brett, 'Mediator Behavior and the Outcomes of Mediation' (1985) 41(2) *Journal of Social Issues* 101; Wall, J. A., Jr, and S. Chan-Serafin, 'Processes in Civil Case Mediations' (2009) 26(3) *Conflict Resolution Quarterly* 261.

¹⁵⁹¹ Beck, C. J. C., and B. D. Sale, 'A Critical Appraisal of Divorce Mediation Research and Policy' (2000) 6(4) *Psychology, Public Policy, and Law* 989.

¹⁵⁹² See Wall, J. A., Jr., and T. C. Dunne, 'Mediation Research: A Current Review' (2012) 28(2) *Negotiation Journal* 217; Wall, J. and K. Kressel, 'Research on Mediator Style: A Summary and Some Research Suggestions' (2012) 5(4) *Negotiation and Conflict Management Research* 401.

¹⁵⁹³ Beck, C. J. C., and B. D. Sale, 'A Critical Appraisal of Divorce Mediation Research and Policy' (2000) 6(4) *Psychology, Public Policy, and Law* 989; Kressel, K., E. A. Frontera, S. Forlenza, F. Butler, and L. Fish, 'The Settlement-Oriented vs the Problem-Solving Style' (1994) 50(1) *Journal of Social Issues* 67; Wall, J. A., Jr, and S. Chan-Serafin, 'Do Mediators Walk Their Talk in Civil Cases?' (2010) 28(1) *Conflict Resolution Quarterly* 3.

mediator concerns about their own reputations,¹⁵⁹⁴ and that these could be overcome if researchers were to establish their respect for the views and input from practitioners.¹⁵⁹⁵

Researchers have noted the lack of diversity in sample populations from whom study participants are selected for mediation research, and the field's lack of focus on diverse populations.¹⁵⁹⁶ Lack of variety in sample populations can limit both the application of mediation and information about its effectiveness and can limit understanding about the process if researchers continue to access the same sample populations for their studies.¹⁵⁹⁷

Commentators have noted that research findings can affect various interest groups and stakeholders who might choose not to support, or cooperate with, a particular study,¹⁵⁹⁸ or who can influence research design, as well as influence potential participants' willingness to participate in empirical studies.¹⁵⁹⁹ This issue is also considered earlier (see above 7.2.0. Systemic constraints I. Funding and support).

III. Research data

¹⁵⁹⁴ Slaikeu, K. A., R. Culler, J. Pearson, and N. Thoennes, 'Process and Outcome in Divorce Mediation' (1985) 10 *Mediation Quarterly* 55; Sourdin, T., *Mediation in the Supreme and County Courts of Victoria* (Report prepared for the Department of Justice, Victoria, Australia, April 2009), available on <<http://www.civiljustice.info/adreval/1/>>.

¹⁵⁹⁵ Wall, J. and K. Kressel, 'Research on Mediator Style: A Summary and Some Research Suggestions' (2012) 5(4) *Negotiation and Conflict Management Research* 401.

¹⁵⁹⁶ Gelfand, M. J., and J. Brett, 'Big Questions for Negotiation and Culture Research' (2019) 12(2) *Negotiation and Conflict Management Research* 105; Hansen, T., and M. Umbreit, 'State of Knowledge: Four Decades of Victim-Offender Mediation Research and Practice: The Evidence' (2018) 36 *Conflict Resolution Quarterly* 99; Marin, J. R., M. Olekalns, and W. Adair, 'Normatively Speaking: Do Cultural Norms Influence Negotiation, Conflict Management, and Communication' (2019) 12(2) *Negotiation and Conflict Management Research* 146; Sourdin, T., *Mediation in the Supreme and County Courts of Victoria* (Report prepared for the Department of Justice, Victoria, Australia, April 2009), available on <<http://www.civiljustice.info/adreval/1/>>.

¹⁵⁹⁷ Sourdin, T., 'Introduction' 22(3) *ADRJ* 1.

¹⁵⁹⁸ McDermott, E. P., 'Discovering the Importance of Mediator Style – An Interdisciplinary Challenge' (2012) 5(4) *Negotiation and Conflict Management Research* 340; Slaikeu, K. A., R. Culler, J. Pearson, and N. Thoennes, 'Process and Outcome in Divorce Mediation' (1985) 10 *Mediation Quarterly* 55; Sourdin, T., *Mediation in the Supreme and County Courts of Victoria* (Report prepared for the Department of Justice, Victoria, Australia, April 2009), available on <<http://www.civiljustice.info/adreval/1/>>; Wall, J. and K. Kressel, 'Research on Mediator Style: A Summary and Some Research Suggestions' (2012) 5(4) *Negotiation and Conflict Management Research* 401.

¹⁵⁹⁹ McDermott, E. P., 'Discovering the Importance of Mediator Style – An Interdisciplinary Challenge' (2012) 5(4) *Negotiation and Conflict Management Research* 340.

Researchers note a lack of ready access to institutional mediation data (eg from courts and institutional mediation programs and services),¹⁶⁰⁰ and a lack of access to information about more diverse populations and study participants (ie racial, ethnic, socio-economic diversity).¹⁶⁰¹ They also note a lack of acknowledgement of how the lack of diversity might influence, or limit, empirical studies and their findings.¹⁶⁰²

It has been noted that the current range of research methodologies make comparative studies difficult and prevent examination of systemic issues, leading to limited availability of data and information about both.¹⁶⁰³

Data collection using participant self-reports

In this thesis, the term “participant self-report” describes either of two data collection methods. In one, a mediator participant either completes a written survey or takes part in a structured/semi-structured interview during which the researchers obtain research data about the subject mediation and the actions of the mediator and/or other participants. In the other, non-mediator participants (ie disputants, their advisers, or their representatives) complete a written survey or take part in a structured/semi-structured interview during which the researchers obtain research data about the subject mediation and the actions of the mediator and/or other participants.¹⁶⁰⁴

¹⁶⁰⁰ Sourdin, T., *Mediation in the Supreme and County Courts of Victoria* (Report prepared for the Department of Justice, Victoria, Australia, April 2009), available on <<http://www.civiljustice.info/adreval/1/>>.

¹⁶⁰¹ Sourdin, T., ‘Introduction’ 22(3) *ADRJ* 1; Davidheiser, M., ‘Race, Worldviews, and Conflict Mediation: *Black and White Styles of Conflict* Revisited’ (2008) 33(1) *Peace and Change* 60; Crampton, A., ‘Escape from the Laboratory: Ethnographic Methods in the Study of Elder and Family Court Mediation’ (2016) 32(3) *Negotiation Journal* 191; Keikelame, M. J., and L. Swartz, ‘Decolonising Research Methodologies: Lessons from a Qualitative Research Project, Cape Town, South Africa’ (2019) 12 *Global Health Action* 1.

¹⁶⁰² Sourdin, T., ‘Introduction’ 22(3) *ADRJ* 1; Davidheiser, M., ‘Race, Worldviews, and Conflict Mediation: *Black and White Styles of Conflict* Revisited’ (2008) 33(1) *Peace and Change* 60; Crampton, A., ‘Escape from the Laboratory: Ethnographic Methods in the Study of Elder and Family Court Mediation’ (2016) 32(3) *Negotiation Journal* 191; Keikelame, M. J., and L. Swartz, ‘Decolonising Research Methodologies: Lessons from a Qualitative Research Project, Cape Town, South Africa’ (2019) 12 *Global Health Action* 1.

¹⁶⁰³ Sourdin, T., ‘Introduction’ 22(3) *ADRJ* 1.

¹⁶⁰⁴ Data collection methods are analysed in detail in Chapter Six.

Researchers have commented on the unreliability of collecting research data through the use of mediator and non-mediator self-reports, generally because it is claimed that neither mediators nor non-mediators accurately recall the events of a mediation.¹⁶⁰⁵ Eight years ago, it was reported that, even by then, there had been over 20 years of warnings in the mediation literature about the unreliability of this data collection method.¹⁶⁰⁶ On the other hand, it has been suggested that self-report surveys offer a faster and less expensive method for obtaining large amounts of readily quantifiable data that is suitable for statistical analysis.¹⁶⁰⁷

In a recent study conducted in a non-mediation court-connected context, researchers acknowledge the inadequacies of existing empirical data collection approaches and methods, and report having developed and piloted a more nuanced approach to the design of surveys, ensuring their capacity to collect qualitative, self-reported, attitudinal data that is more reliable than data

¹⁶⁰⁵ Beck, C. J. C., and B. D. Sale, 'A Critical Appraisal of Divorce Mediation Research and Policy' (2000) 6(4) *Psychology, Public Policy, and Law* 989; Carnevale, P. J. D., and R. Pegnetter, 'The Selection of Mediator Tactics in Public Sector Disputes: A Contingency Analysis' (1985) 41(2) *Journal of Social Issues* 2; Charkoudian, L., 'Just My Style: The Practical, Ethical, and Empirical Dangers of the Lack of Consensus about Definitions of Mediation Styles' (2012) 5(4) *Negotiation and Conflict Management Research* 367; Della Noce, D. J., 'Mediator Style and the Question of "Good" Mediation: A Call for Theoretical Development' (2012) 5(4) *Negotiation and Conflict Management Research* 396; Hiltrop, J. M., 'Factors Associated with Successful Labor Mediation' in K. Kressel and D. Pruitt (Eds), *Mediation Research: The Process and Effectiveness of Third-Party Intervention* (Jossey-Bass, USA, 1989); Karim, A. and D. Dilts, 'Determinants of Mediation Success in the Iowa Public Sector' (1990) 19(2) *Journal of Collective Negotiations* 129; Kochan, T. A., 'Commentary 2' (2012) 5(4) *Negotiation and Conflict Management Research* 392; Kochan, T. A., and T. Jick, 'The Public Sector Mediation Process: A Theory and Empirical Examination' (1978) 22(2) *The Journal of Conflict Resolution* 209; Mareschal, P. M., 'What Makes Mediation Work? Perspectives on Resolving Disputes' (2005) 44(3) *Industrial Relations* 509; McDermott, E. P., 'Discovering the Importance of Mediator Style – An Interdisciplinary Challenge' (2012) 5(4) *Negotiation and Conflict Management Research* 340; McEwen, C. A., *An Evaluation of the ADR Pilot Project: Final Report 1* (Unpublished report, 1992); Sourdin, T., 'Introduction' 22(3) *ADRJ* 1; Wall, J., and K. Kressel, 'Research on Mediator Style: A Summary and Some Research Questions' (2012) 5(4) *Negotiation and Conflict Management Research* 401; Wall, J. A., Jr, and D. E. Rude, 'The Judge as a Mediator' (1991) 76(1) *Journal of Applied Psychology* 54; Wissler, R. L., *Trapping the Data: An Assessment of Domestic Relations Mediation in Maine and Ohio Courts* (Unpublished report, 1999).

¹⁶⁰⁶ Wall, J. and K. Kressel, 'Research on Mediator Style: A Summary and Some Research Suggestions' (2012) 5(4) *Negotiation and Conflict Management Research* 401.

¹⁶⁰⁷ Wall, J. and K. Kressel, 'Research on Mediator Style: A Summary and Some Research Suggestions' (2012) 5(4) *Negotiation and Conflict Management Research* 401.

collected through traditional surveys.¹⁶⁰⁸ This approach may be suitable for surveys of participants in mediation research.

Mediator self-reports

The literature includes many references to the unreliability of self-reports. One researcher has noted that data collected from mediator self-reports is affected by ‘mediator mythology, self-presentation bias, social desirability bias, and even a lack of meaningful insight or shared vocabulary.’¹⁶⁰⁹ The same researcher has suggested that mediators may be subjected to various pressures affecting the information they provide on surveys (eg peer pressure, program pressure, and the need for future work).¹⁶¹⁰ Another has suggested two other possible reasons for discrepancies between what mediators report they do and what they are observed to do: mediators use different techniques and strategies according to the situation, and they report what they believe they have been doing and are not aware of any discrepancy.¹⁶¹¹

Researchers have included examples to demonstrate the data inconsistencies that self-reports can produce such as mediator participants reporting that they do use flexible styles despite being observed not using flexible styles.¹⁶¹² They have questioned the usefulness of self-reports when investigating mediator styles because, they claim, self-reports cannot take into account either contextual influences on mediator style choices, or the effects of certain styles.¹⁶¹³

¹⁶⁰⁸ Pleasence, P., and N. Balmer, ‘Measuring the Accessibility and Equality of Civil Justice’ (2018) 10 *Hague Journal on the Rule of Law* 255; Pleasence, P., and N. J. Balmer, ‘Development of a Generic Legal Confidence Scale: A First Implementation of the Rasch Measurement Model in Empirical Legal Studies’ (2019) 16(1) *Journal of Empirical Legal Studies* 143.

¹⁶⁰⁹ Della Noce, D. J., ‘Mediator Style and the Question of “Good” Mediation: A Call for Theoretical Development’ (2012) 5(4) *Negotiation and Conflict Management Research* 396, 309.

¹⁶¹⁰ Della Noce, D. J., ‘Mediator Style and the Question of “Good” Mediation: A Call for Theoretical Development’ (2012) 5(4) *Negotiation and Conflict Management Research* 396.

¹⁶¹¹ Charkoudian, L., ‘Just My Style: The Practical, Ethical, and Empirical Dangers of the Lack of Consensus about Definitions of Mediator Style’ (2012) 5(4) *Negotiation and Conflict Management Research* 367.

¹⁶¹² Wall, J. and K. Kressel, ‘Research on Mediator Style: A Summary and Some Research Suggestions’ (2012) 5(4) *Negotiation and Conflict Management Research* 401.

¹⁶¹³ Wall, J. and K. Kressel, ‘Research on Mediator Style: A Summary and Some Research Suggestions’ (2012) 5(4) *Negotiation and Conflict Management Research* 401.

One researcher, in the role of “observer-participant” and conducting an ethnographic study of mediation, includes a footnoted comment on the practical impossibility of focusing on the finer detail of what happens during mediation due to the demands on the mediator role during the whole process.¹⁶¹⁴ None of the 47 selected studies, nor the 26 additional publications, provides a clear explanation of the field’s continued use of data collection methods known to be unreliable.

Data collection methods – non-mediator participants

Data collection from non-mediator participants includes information collected from disputants as well as from their advisers (typically legal advisers). It has been observed that this may not be a reliable data collection method because of its reliance on the disputants’ capacity to provide the required information. In other words, disputants in particular may not have sufficient knowledge about mediation to discriminate and recall the finer details of what the subject mediators actually did and the events of a mediation.¹⁶¹⁵ It has also been suggested that the reliability of disputant reports of their satisfaction with the mediation process, and with the mediator, are likely to be more influenced by whether an agreement was reached than by the process itself,¹⁶¹⁶ although others disagree with this reasoning.¹⁶¹⁷

In relation to definitional consistency and the lack of what has been called a ‘shared vocabulary’,¹⁶¹⁸ it has been suggested that, if the knowledgeable researchers and mediators cannot

¹⁶¹⁴ De Girolamo, D., ‘Sen, Justice and the Private Realm of Dispute Resolution’ (2018) 14(3) *International Journal of Law in Context* 353.

¹⁶¹⁵ Alberts, J. K., B. L. Heisterkamp, and R. M. McPhee, ‘Disputant Perceptions of and Satisfaction with a Community Mediation Program’ (2005) 16(3) *The International Journal of Conflict Management* 218; Karim, A. and D. Dilts, ‘Determinants of Mediation Success in the Iowa Public Sector’ (1990) 19(2) *Journal of Collective Negotiations* 129; Kochan⁷⁸; Thoennes, N. A., and J. Pearson, ‘Predicting Outcomes in Divorce Mediation: The Influence of People and Process’ (1985) 41(2) *Journal of Social Issues* 115; Wissler, R. L., ‘Court-Connected Mediation in General Civil Cases: What We Know from Empirical Research’ (2002) 17(3) *Ohio State Journal on Dispute Resolution* 641.

¹⁶¹⁶ Kochan, T. A., ‘Commentary’ (2012) 5(4) *Negotiation and Conflict Management Research* 392.

¹⁶¹⁷ Wissler, R. L., ‘Court-Connected Mediation in General Civil Cases: What We Know from Empirical Research’ (2002) 17(3) *Ohio State Journal on Dispute Resolution* 641.

¹⁶¹⁸ Della Noce, D. J., ‘Mediator Style and the Question of “Good” Mediation: A Call for Theoretical Development’ (2012) 5(4) *Negotiation and Conflict Management Research* 396, 399.

agree on key terms, it is likely to be even more difficult for the less-informed non-mediator participants to provide useful research data about their own mediation experience.¹⁶¹⁹

It has been noted that disputants and their advisers have differing perceptions of the mediation process, the mediator, and any outcomes,¹⁶²⁰ in particular because the advisers are repeat players who are likely to have more experience of mediation and to be more knowledgeable about it than their clients. Although it appears not to be routine practice for mediation researchers to differentiate between disputants and their advisers, it has been suggested that researchers not rely on data collected only from repeat players such as legal practitioners, whose perceptions are likely to be limited by their own cultural context (ie the legal system).¹⁶²¹

Access to data

Researchers have noted the lack of ready access to existing research data from court and program records,¹⁶²² as well as the lack of accessible researcher databases.¹⁶²³

¹⁶¹⁹ Charkoudian, L., 'Just My Style: The Practical, Ethical, and Empirical Dangers of the Lack of Consensus about Definitions of Mediator Style' (2012) 5(4) *Negotiation and Conflict Management Research* 367.

¹⁶²⁰ Global Pound Conference Series, *Global Data Trends and Regional Differences* (Report of Global Pound Conferences, 2018); Rundle, O., 'The Purpose of Court-Connected Mediation from the Legal Perspective' (2007) 10(2) *ADR Bulletin* 28; Wissler, R. L., 'Court-Connected Mediation in General Civil Cases: What We Know from Empirical Research' (2002) 17(3) *Ohio State Journal on Dispute Resolution* 641.

¹⁶²¹ Sourdin, T., 'Introduction' 22(3) *ADRJ* 1.

¹⁶²² Lande, J. (ed), *Theories of Change for the Dispute Resolution Movement: Actionable Ideas to Revitalize our Movement* (Conference Proceedings, USA, 2020), available on <<https://ssrn.com/abstract=3533324>>; Expert Group on Mediation in Civil Justice in Scotland, *Bringing Mediation into the Mainstream in Civil Justice in Scotland* (Scottish Mediation, Report to the Scottish Government, Scotland, June 2019); Sourdin, T., *Mediation in the Supreme and County Courts of Victoria* (Report prepared for the Department of Justice, Victoria, Australia, April 2009), available on <<http://www.civiljustice.info/adreval/1/>>; Welsh, N. A., 'We Need Good Data to Know Whether What We Are Doing – and Espousing – is Good' in J. Lande (ed), *Theories of Change for the Dispute Resolution Movement: Actionable Ideas to Revitalize Our Movement* (Conference Proceedings, USA, 2020), available on <<https://ssrn.com/abstract=3533324>>.

¹⁶²³ American Bar Association Section of Dispute Resolution, *Report of the Task Force on Research on Mediator Techniques* (American Bar Association, USA, June 2017), available on <https://www.americanbar.org/content/dam/aba/administrative/dispute_resolution/med_techniques_tf_rep_or_authcheckdam.pdf>; Wall, J. and K. Kressel, 'Research on Mediator Style: A Summary and Some Research Suggestions' (2012) 5(4) *Negotiation and Conflict Management Research* 401.

7.2.2. Journals and publications¹⁶²⁴

Many researchers have mentioned the influence that academic journals are reported to have on the design and reporting of research in many fields, including mediation.¹⁶²⁵ It has been suggested that the very limited number of specialist ADR and mediation journals may push researchers to seek publication in journals whose primary focus is other research disciplines where ADR and mediation are not well-known and peer reviewers may not be familiar with ADR or knowledgeable about mediation research.¹⁶²⁶ This may lead to researchers shaping their publications to suit relevant discipline norms. For example, research in the field of law tends to be theoretical and doctrinal, and it has been acknowledged that law journals tend not to include methodological issues,¹⁶²⁷ perhaps suggesting that they do not recognise its importance, leading authors to not include such information in law journal articles.¹⁶²⁸

The limited number of specialist mediation and DR journals can be demonstrated by bibliometric analysis of the 47 selected studies.¹⁶²⁹ Eleven of the studies are not included in this analysis because they were not published in an industry journal. Four were published as reports;¹⁶³⁰

¹⁶²⁴ Issues relevant to journals and publication are reviewed earlier in this Chapter (see above, 7.2.2. Journals and publications).

¹⁶²⁵ For examples in the mediation field, see McDermott, E. P., 'Discovering the Importance of Mediator Style – An Interdisciplinary Challenge' (2012) 5(4) *Negotiation and Conflict Management Research* 340; Sourdin, T., 'Introduction' 22(3) *ADRJ* 1; Wall, J. and K. Kressel, 'Research on Mediator Style: A Summary and Some Research Suggestions' (2012) 5(4) *Negotiation and Conflict Management Research* 401. For examples in other fields, see Duyx, B., M. J. E. Urlings, G. M. H. Swaen, L. M. Bouter, and M. P. Zeegers, 'Scientific Citations Favor Positive Results: A Systematic Review and Meta-Analysis' (2017) 88 *Journal of Clinical Epidemiology* 92; Greenberg, S. A., 'How Citation Distortions Create Unfounded Authority: Analysis of a Citation Network' (2009) 339:b2680 *British Medical Journal* 1; Lortie, C. J., L. W. Aarssen, A. E. Budden, and R. Leimu, 'Do Citations and Impact Factors Relate to the Real Numbers in Publications? A Case Study of Citation Rates, Impact, and Effect Sizes in Ecology and Evolutionary Biology' (2013) 94(2) *Scientometrics* 675.

¹⁶²⁶ Sourdin, T., email exchange with the author, January 2019.

¹⁶²⁷ Langbroek, P., K. van den Bos, M. S. Thomas, M. Milo, and W. van Kossum, 'Utrecht Law Review, Editorial' (2017) 13(3) *Utrecht Law Review* 1.

¹⁶²⁸ This focus is perhaps demonstrated by the existence of a law journal designed to have a specific focus on empirical work: *The Journal of Empirical Legal Studies*.

¹⁶²⁹ The selected studies may not be representative of general mediation research: they have been selected into this research specifically because they include empirical investigation of specific mediator actions and behaviours. This characteristic may make it more likely for them to be published in, say, psychology journals, and less likely for them to be published in, say, law journals.

¹⁶³⁰ Sourdin, T., *Dispute Resolution Processes for Credit Consumers* (Project Report, Conflict Resolution Research Centre, La Trobe University, 2007); Sourdin, T., *Mediation in the Supreme and County Courts of*

three were published as chapters in books;¹⁶³¹ two were conference presentations;¹⁶³² and two are unpublished.¹⁶³³ The remaining thirty-six studies have been published in twenty-one different journals, of which eight are DR or mediation specific.¹⁶³⁴ The thirteen non-DR/mediation journals in which the studies were published include four specialist psychology journals;¹⁶³⁵ three specialist law journals;¹⁶³⁶ three specialist industrial relations journals;¹⁶³⁷ two specialist communications journals;¹⁶³⁸ and one journal specialising in family issues.¹⁶³⁹

Eighteen of the thirty-six journal-published studies were published in specialist DR/mediation journals.¹⁶⁴⁰ Eighteen were published in non-DR/mediation journals: seven in psychology

Victoria (Report prepared for the Department of Justice, Victoria, Australia, April 2009), available on <<http://www.civiljustice.info/adreval/1/>>; Sourdin, T., *Exploring Pre-Action Requirements: Resolving Disputes Outside Courts* (ACJI, Monash University, October 2012); Sourdin, T., and T. Matruglio, *Evaluating Mediation – New South Wales Settlement Scheme 2002 (2004) Mediation*. Paper 7, available on <<http://www.civiljustice.info/med/7>>.

¹⁶³¹ Hiltrop, J. M., 'Factors Associated with Successful Labor Mediation' in K. Kressel and D. G. Pruitt (eds), *Mediation Research: The Process and Effectiveness of Third-Party Intervention* (Jossey-Bass, USA, 1989); Jones, T. S., 'Lag Sequential Analyses of Mediator-Spouse and Husband-Wife Interaction in Successful and Unsuccessful Divorce Mediation in M. A. Rahim (ed), *Managing Conflict: An Interdisciplinary Approach* (Praeger, USA, 1989); Pruitt, D. G., W. R. Fry, L. Castrianno, J. Zubeck, G. L. Welton, N. B. McGillicuddy, and C. Ippolito, 'The Process of Mediation: Caucusing, Control, and Problem Solving' in M. A. Rahim (ed), *Managing Conflict: An Interdisciplinary Approach* (Praeger, USA, 1989).

¹⁶³² Swaab, R. I., *Face First: Pre-Mediation Caucus and Face in Employment Disputes* (Presentation, Annual Association of Conflict Management Conference, June 2009); Swaab, R. I., and J. Brett, *Caucus with Care: The Impact of Pre-Mediation Caucuses on Conflict Resolution* (Meetings Paper, International Association of Conflict Management, 2007).

¹⁶³³ McEwen, C. A., *An Evaluation of the ADR Pilot Project: Final Report 1* (Unpublished report, 1992); Wissler, R. L., *Trapping the Data: An Assessment of Domestic Relations Mediation in Maine and Ohio Courts* (Unpublished report, 1999).

¹⁶³⁴ *Alternatives to the High Cost of Litigation; Conflict Resolution Quarterly* (incorporating the *Mediation Quarterly* since November 2003); *Harvard Negotiation Law Review*; the *International Journal of Conflict Management*; the *Journal of Conflict Resolution*; the *Journal of Dispute Resolution*; *Negotiation and Conflict Management Research*; the *Ohio State Journal on Dispute Resolution*.

¹⁶³⁵ The *Journal of Applied Psychology*; the *Journal of Personality and Social Psychology*; the *Journal of Social Issues*; the *Personality and Social Psychology Bulletin*. The first three listed journals are published in the name of the American Psychological Association (APA).

¹⁶³⁶ *Law and Human Behavior*; *Law & Society Review*; *Northern Illinois University Law Review*.

¹⁶³⁷ The *Journal of Collective Negotiations*; *Industrial Relations*; *Relations Industrielles/Industrial Relations*.

¹⁶³⁸ *Human Communications Research*; the *Journal of the International Listening Association*.

¹⁶³⁹ *Family Relations* (published by the National Council on Family Relations, USA).

¹⁶⁴⁰ Alberts, J. K., B. L. Heisterkamp, and R. M. McPhee, 'Disputant Perceptions of and Satisfaction with a Community Mediation Program' (2005) 16(3) *The International Journal of Conflict Management* 218; Bingham, L. B., 'Transformative Mediation in the United States Postal Service' (2012) 5(4) *Negotiation and Conflict Management Research* 354; Gale, J., R. L. Mowery, M. S. Herrman, and N. L. Hollett, 'Considering Effective Divorce Mediation: Three Potential Factors' (2002) 19(4) *Conflict Resolution Quarterly* 389; Goldberg, S. B., and M. L. Shaw, 'Further Investigation into the Secrets of Successful and Unsuccessful Mediators' (2008) 26(8)

journals;¹⁶⁴¹ five in industrial relations journals;¹⁶⁴² three in law journals;¹⁶⁴³ and two in communications journals;¹⁶⁴⁴ and one in a journal for family issues.¹⁶⁴⁵ The range of journals in which 50% of the journal-published studies have been published, demonstrates the divergent fields

Alternatives to the High Cost of Litigation 149; Henderson, D. A., 'Mediation Success: An Empirical Analysis' (1996) 11(1) *Ohio State Journal on Dispute Resolution* 105; Kimsey, W. D., R. M. Fuller, A. J. Bell, and B. C. McKinney, 'The Impact of Mediator Strategic Choices: An Experimental Study' (1994) 12(1) *Mediation Quarterly* 89; Kochan, T. A., and T. Jick, 'The Public Sector Mediation Process: A Theory and Empirical Examination' (1978) 22(2) *The Journal of Conflict Resolution* 209; Kressel, K., 'How Do Mediators Decide What To Do? Implicit Schemas of Practice and Mediator Decisionmaking' (2013) 28(3) *Ohio State Journal on Dispute Resolution* 709; Kressel, K., T. Henderson, W. Reich, and C. Cohen, 'Multi-Dimensional Analysis of Conflict Mediator Style' (2012) 30(2) *Conflict Resolution Quarterly* 135; McDermott, E. P., and R. Obar, "'What's Going On" in Mediation: An Empirical Analysis of the Influence of a Mediator's Style on Party Satisfaction and Monetary Benefit' (2004) 9 *Harvard Negotiation Law Review* 75; Peeples, R., C. Harris, and T. Metzloff, 'Following the Script: An Empirical Analysis of Court-Ordered Mediation of Medical Malpractice Cases' (2007) 2007(1) *Journal of Dispute Resolution* 101; Slaikeu, K. A., R. Culler, J. Pearson, and N. Thoennes, 'Process and Outcome in Divorce Mediation' (1985) 10 *Mediation Quarterly* 55; Wall, J. A., Jr, and S. Chan-Serafin, 'Processes in Civil Case Mediations' (2009) 26(3) *Conflict Resolution Quarterly* 261; Wall, J. A., Jr, and S. Chan-Serafin, 'Do Mediators Walk Their Talk in Civil Cases?' (2010) 28(1) *Conflict Resolution Quarterly* 3; Welton, G. L., D. G. Pruitt, and N. B. McGillicuddy, 'The Role of Caucusing in Community Mediation' (1988) 32(1) *The Journal of Conflict Resolution* 181; Welton, G. L., D. G. Pruitt, N. B. McGillicuddy, C. A. Ippolito, and J. M. Zubeck, 'Antecedents and Characteristics of Caucusing in Community Mediation' (1992) 3(4) *International Journal of Conflict Management* 303; Wissler, R. L., 'Court-Connected Mediation in General Civil Cases: What We Know from Empirical Research' (2002) 17(3) *Ohio State Journal on Dispute Resolution* 641; Zubeck, J. M., D. G. Pruitt, R. S. Peirce, N. B. McGillicuddy, and H. Syna, 'Disputant and Mediator Behaviors Affecting Short-Term Success in Mediation' (1992) 36(3) *Journal of Conflict Resolution* 546.

¹⁶⁴¹ Carnevale, P. J. D., and R. Pegnetter, 'The Selection of Mediator Tactics in Public Sector Disputes: A Contingency Analysis' (1985) 41(2) *Journal of Social Issues* 2; Kressel, K., E. A. Frontera, S. Forlenza, F. Butler, and L. Fish, 'The Settlement-Orientation vs the Problem-Solving Style' (1994) 50(1) *Journal of Social Issues* 67; McGillicuddy, N. B., G. L. Welton, and D. G. Pruitt, 'Third-Party Intervention: A Field Experiment Comparing Three Different Models' (1987) 53(1) *Journal of Personality and Social Psychology* 104; Shapiro, D., R. Drieghe, and J. Brett, 'Mediator Behavior and the Outcomes of Mediation' (1985) 41(2) *Journal of Social Issues* 101; Thoennes, N. A., and J. Pearson, 'Predicting Outcomes in Divorce Mediation: The Influence of People and Process' (1985) 41(2) *Journal of Social Issues* 115; Wall, J. A., Jr, and D. E. Rude, 'The Judge as a Mediator' (1991) 76(1) *Journal of Applied Psychology* 54.

¹⁶⁴² Diltz, D. A. and A. Karim, 'The Effect of Mediators' Qualities and Strategies on Mediation Outcomes' (1990) 45(1) *Relations Industrielles/Industrial Relations* 22; Karim, A. and D. Diltz, 'Determinants of Mediation Success in the Iowa Public Sector' (1990) 19(2) *Journal of Collective Negotiations* 129; Karim, A. and R. Pegnetter, 'Mediator Strategies and Qualities and Mediation Effectiveness' (1983) 22(1) *Industrial Relations* 105; Mareschal, P. M., 'What Makes Mediation Work? Perspectives on Resolving Disputes' (2005) 44(3) *Industrial Relations* 509; Posthuma, R. A., A. Richard, J. B. Dworkin, and M. S. Swift, 'Mediator Tactics and Sources of Conflict: Facilitating and Inhibiting Effects' (2002) 41(1) *Industrial Relations* 94.

¹⁶⁴³ Pruitt, D. G., R. S. Peirce, N. B. McGillicuddy, G. L. Welton, and L. Castrianno, 'Long-Term Success in Mediation' (1993) 17(3) *Law and Human Behavior* 313; Wissler, R. L., 'Mediation and Adjudication in Small Claims Court: The Effects of Process and Case Characteristics' (1995) 29(2) *Law & Society Review* 323; Woodward, J. G., 'Settlement Week: Measuring the Promise' (1990) 11 *Northern Illinois University Law Review* 1.

¹⁶⁴⁴ Burrell, N. A., W. A. Donohue, and M. Allen, 'The Impact of Disputants' Expectations on Mediation, Testing an Interventionist Model' (1990) Fall 1990 *Human Communication Research* 104; Kimsey, W. D., R. M. Fuller, and B. C. McKinney, 'Mediator Listening, Dispute Reframing, and Mediation Outcome: A Pilot Study' (1993) 7(1) *Journal of the International Listening Association* 74.

¹⁶⁴⁵ Vanderkooi, L., and J. Pearson, 'Mediating Divorce Disputes: Mediator Behaviors, Styles and Roles' (1983) 32(4) *Family Relations* 557.

in which the researchers have chosen to publish their empirical studies of mediation. It also suggests that mediation researchers and mediators may not readily access such published work.

Researcher choice of non-DR/mediation journals may also influence the rates at which their work might be cited.^{1646 1647} For example, three of the selected studies were published in a psychology journal,¹⁶⁴⁸ and two DR/mediation journals.¹⁶⁴⁹ At the time of checking (January 2019), the article published in the psychology journal had been cited 144 times and the two published in DR/mediation journals had received 30 and 4 citations respectively. That is a notable difference in citations. A second example concerns three of the selected studies which were conducted in the family/divorce/child custody contexts, and all published in the same year.¹⁶⁵⁰ Around twice as many citations were received by the study published in a psychology journal than the two published in DR/mediation journals.

The above analysis suggests that many mediation researchers appear to publish their work in non-DR/mediation specialist journals that fellow mediation researchers and mediators may not access; editors and reviewers at those journals may not be knowledgeable about mediation or mediation research perhaps affecting the rigour of final publications; and, given the diverse range of journal specialisations in which mediation research is published, it is unclear which publication restrictions (eg word limits) may apply in any particular case.

Pressure to publish

¹⁶⁴⁶ Issues concerning citations are considered earlier in this Chapter (see 7.1.1. Research influence: external).

¹⁶⁴⁷ The citation data reported in this section was collected at the same time using the same methods and sources as the citation data reported above at 7.1.1. Researcher influence: external.

¹⁶⁴⁸ Kressel, K., E. A. Frontera, S. Forlenza, F. Butler, and L. Fish, 'The Settlement-Oriented vs the Problem-Solving Style' (1994) 50(1) *Journal of Social Issues* 67.

¹⁶⁴⁹ Kressel, K., 'How Do Mediators Decide What To Do? Implicit Schemas of Practice and Mediator Decisionmaking' (2013) 28(3) *Ohio State Journal on Dispute Resolution* 709; Kressel, K., T. Henderson, W. Reich, and C. Cohen, 'Multi-Dimensional Analysis of Conflict Mediator Style' (2012) 30(2) *Conflict Resolution Quarterly* 135.

¹⁶⁵⁰ Slaikau, K. A., R. Culler, J. Pearson, and N. Thoennes, 'Process and Outcome in Divorce Mediation' (1985) 10 *Mediation Quarterly* 55 (46 citations); Thoennes, N. A., and J. Pearson, 'Predicting Outcomes in Divorce Mediation: The Influence of People and Process' (1985) 41(2) *Journal of Social Issues* 115 (92 citations); Vanderkooi, L., and J. Pearson, 'Mediating Divorce Disputes: Mediator Behaviors, Styles and Roles' (1983) 32(4) *Family Relations* 557 (50 citations).

It has been observed that there is pressure on DR and mediation academics to publish as frequently as possible,¹⁶⁵¹ that research ability is assessed by the number of publications rather than by the quality of reported studies,¹⁶⁵² and that publishers give preference to articles that confirm the success of mediation.¹⁶⁵³ An academic may consider whether to undertake research by considering the number of publications its results might produce, without necessarily having a simultaneously clear focus on the quality of its design, or of its findings.¹⁶⁵⁴ More generally, it has been suggested that strong pressure to publish might lead researchers to apply research approaches and methods that have been perceived to be less resource intensive.¹⁶⁵⁵ This observation has been reiterated by mediation researchers who suggest it may lead to researchers using students in simulated disputes,¹⁶⁵⁶ or relying on survey-style data collection methods, such as mediator and disputant self-reports.^{1657 1658}

Summary of constraints

In summary, mediation researchers report that their work is constrained by systemic issues relating to funding and support; ethics and confidentiality; research skills and expertise; and

¹⁶⁵¹ McDermott, E. P., 'Discovering the Importance of Mediator Style – An Interdisciplinary Challenge' (2012) 5(4) *Negotiation and Conflict Management Research*; Sourdin, T., 'Introduction' 22(3) *ADRJ* 1; Wall, J., and K. Kressel, 'Research on Mediator Style: A Summary and Some Research Questions' (2012) 5(4) *Negotiation and Conflict Management Research* 401.

¹⁶⁵² Wall, J., and K. Kressel, 'Research on Mediator Style: A Summary and Some Research Questions' (2012) 5(4) *Negotiation and Conflict Management Research* 401.

¹⁶⁵³ Wall, J., and K. Kressel, 'Research on Mediator Style: A Summary and Some Research Questions' (2012) 5(4) *Negotiation and Conflict Management Research* 401.

¹⁶⁵⁴ Wall, J. and K. Kressel, 'Research on Mediator Style: A Summary and Some Research Suggestions' (2012) 5(4) *Negotiation and Conflict Management Research* 401.

¹⁶⁵⁵ Baumeister, R. F., K. D. Vohs, and D. C. Funder, 'Psychology as a Science of Self-Reports and Finger Movements: Whatever Happened to Actual Behavior?' (2007) 2(4) *Perspectives on Psychological Science* 396; Sassenberg, K., and L. Ditrich, 'Research in Social Psychology Changed Between 2011 and 2016: Larger Sample Sizes, More Self-Report Measures, and More Online Studies' (2019) 2(2) *Advances in Methods and Practices in Psychological Science* 107.

¹⁶⁵⁶ McDermott, E. P., 'Discovering the Importance of Mediator Style – An Interdisciplinary Challenge' (2012) 5(4) *Negotiation and Conflict Management Research* 340.

¹⁶⁵⁷ Wall, J. and K. Kressel, 'Research on Mediator Style: A Summary and Some Research Suggestions' (2012) 5(4) *Negotiation and Conflict Management Research* 401.

¹⁶⁵⁸ The observations by mediation researchers may not have fully accounted for the complexities inherent to the administration of mediation participant surveys, despite the authors having used them in the relevant studies that are among the 47 selected studies.

definitional consistency (the mediation process; mediated outcomes; models of practice, mediator styles, and approaches); and lack of a dedicated academic base. Reported endemic constraints are related to external influences on choice of research approach and study design; access to appropriate population groups; the unreliability of data collection methods; access to court and institutional research data; and issues relating to journals and publications, including pressure to publish.

The next section explores the social desirability effect, a likely influence on the reported unreliability of self-reports for data collection in empirical studies of mediation.¹⁶⁵⁹

7.2.3. The social desirability effect

It has been suggested that the acceptance of many widely practised research methods is based on trust. For example, researchers are said to trust that, when a study includes randomisation, it will produce certain results and, similarly, when asked to report on their own behaviour and perceptions, study participants will do so truthfully.¹⁶⁶⁰ Investigations of research methods suggest this is not so.

As with most other fields of empirical research, it is likely that the collection of research data in empirical studies of mediation is influenced by the social desirability effect. This section reviews what is known about this effect and its associated interviewer and deference effects.

Closely associated with the research constraints identified in this section are the many human foibles that interfere with people's capacity to provide required research data through self-reports and so affect the quality of empirical studies. A primary foible is people's susceptibility to the social desirability effect (or bias), also called 'social desirability responding'.¹⁶⁶¹ Based on what is known in

¹⁶⁵⁹ Despite its likely effect on the reliability of research data in empirical studies of mediation, the social desirability effect is almost never mentioned, and is not mentioned at all in the 47 selected studies.

¹⁶⁶⁰ Howard, G. S., M. Y. Lau, S. E. Maxwell, A. Venter, R. Lundy, and R. M. Sweeney, 'Do Research Literatures Give Correct Answers?' (2009) 13(2) *Review of General Psychology* 116.

¹⁶⁶¹ Bekkers, R., and P. Wiepking, 'Accuracy of Self-reports on Donations to Charitable Organisations' (2011) 45(6) *Quality and Quantity* 1369, 1372.

other research fields, the social desirability effect is the most likely cause of the unreliability reported by mediation researchers in relation to self-reports as data collection methods. There is extensive research material on the social desirability effect and this section is limited to an overview of what is known.

What is the social desirability effect?

Social desirability arises from people's interest in being seen to conform,¹⁶⁶² and being socially acceptable.¹⁶⁶³ It is most associated with researchers' use of self-reports for data collection and is typified by responders answering questions in ways that conform with social norms rather than deviating from them.¹⁶⁶⁴

When completing a survey or participating in an interview, people assess the applicable social norms (including the deduced expectations of the researcher), as well as the social gains or losses to them, in providing a true answer, a false answer, or no answer at all.¹⁶⁶⁵ The intent of the responder is to maximise their positive feelings (ie social approval) and avoid negative feelings, criticism or social dismissal by others.¹⁶⁶⁶ It is widely recognised that responders overreport socially acceptable

¹⁶⁶² Tourangeau, R., and T. Yan, 'Sensitive Questions in Surveys' (2007) 133(5) *Psychological Bulletin* 859.

¹⁶⁶³ Krumpal, I., 'Determinants of Social Desirability Bias in Sensitive Surveys: A Literature Review' (2013) 47 *Quality and Quantity* 2025.

¹⁶⁶⁴ van de Mortel, T., 'Faking It: Social Desirability Response Bias in Self-Report Research' (2008) 25(4) *Australian Journal of Advanced Nursing* 40.

¹⁶⁶⁵ Krumpal, I., 'Determinants of Social Desirability Bias in Sensitive Surveys: A Literature Review' (2013) 47 *Quality and Quantity* 2025; Phillips, D. L., and K. J. Clancy, 'Some Effects of "Social Desirability" in Survey Studies' (1972) 77(5) *American Journal of Sociology* 921.

¹⁶⁶⁶ Krumpal, I., 'Determinants of Social Desirability Bias in Sensitive Surveys: A Literature Review' (2013) 47 *Quality and Quantity* 2025; van de Mortel, T., 'Faking It: Social Desirability Response Bias in Self-Report Research' (2008) 25(4) *Australian Journal of Advanced Nursing* 40.

behaviours or attitudes (such as self-reported levels of donations to charity)¹⁶⁶⁷, and underreport socially undesirable behaviours and attitudes (such as racially motivated actions and beliefs)^{1668, 1669}

How is the effect triggered?

It is the responder who assesses what is socially acceptable in the context of the survey and of their own responses to what is being asked.¹⁶⁷⁰ When providing an answer, responders are said to read (or listen to) and understand the question in the way the researchers intended; they retrieve the relevant information; and they provide the relevant information without any distortion.¹⁶⁷¹

Misreporting can result from misinterpreting the question (and incorrectly inferring what is required), not having the required information, or not wanting to provide the required information.¹⁶⁷² It can also be influenced by the setting.

The responder's assessment of what might be socially acceptable at any time is based on their own assessment of the setting, the survey topic, the question topic and wording, as well as the presence of other people such as an interviewer or others (interviewer and deference effect are

¹⁶⁶⁷ Bekkers, R., and P. Wiepking, 'Accuracy of Self-reports on Donations to Charitable Organisations' (2011) 45(6) *Quality and Quantity* 1369, 1372; Gittleman, S., V. Lange, W. A. Cooke, S. M. Frede, P. J. Lavrakas, C. Pierce, and R. K. Thomas, 'A Model for Predicting and Calibrating the Direction and Magnitude of Social Desirability Bias' (2015) Sept 2015 *Journal of Advertising Research* 242.

¹⁶⁶⁸ Gittleman, S., V. Lange, W. A. Cooke, S. M. Frede, P. J. Lavrakas, C. Pierce, and R. K. Thomas, 'A Model for Predicting and Calibrating the Direction and Magnitude of Social Desirability Bias' (2015) Sept 2015 *Journal of Advertising Research* 242.

¹⁶⁶⁹ Brenner, P. S., and J. D. DeLamater, 'Social Desirability Bias in Self-Reports of Physical Activity: Is An Exercise Identity the Culprit?' (2014) 117 *Social Indicators Research* 489; Krumpal, I., 'Determinants of Social Desirability Bias in Sensitive Surveys: A Literature Review' (2013) 47 *Quality and Quantity* 2025; Tourangeau, R., and T. Yan, 'Sensitive Questions in Surveys' (2007) 133(5) *Psychological Bulletin* 859.

¹⁶⁷⁰ Brenner, P. S., and J. D. DeLamater, 'Social Desirability Bias in Self-Reports of Physical Activity: Is An Exercise Identity the Culprit?' (2014) 117 *Social Indicators Research* 489; Gittleman, S., V. Lange, W. A. Cooke, S. M. Frede, P. J. Lavrakas, C. Pierce, and R. K. Thomas, 'A Model for Predicting and Calibrating the Direction and Magnitude of Social Desirability Bias' (2015) Sept 2015 *Journal of Advertising Research* 242; Krumpal, I., 'Determinants of Social Desirability Bias in Sensitive Surveys: A Literature Review' (2013) 47 *Quality and Quantity* 2025; Phillips, D. L., and K. J. Clancy, 'Some Effects of "Social Desirability" in Survey Studies' (1972) 77(5) *American Journal of Sociology* 921; Tourangeau, R., and T. Yan, 'Sensitive Questions in Surveys' (2007) 133(5) *Psychological Bulletin* 859.

¹⁶⁷¹ Tourangeau, R., and T. Yan, 'Sensitive Questions in Surveys' (2007) 133(5) *Psychological Bulletin* 859.

¹⁶⁷² Tourangeau, R., and T. Yan, 'Sensitive Questions in Surveys' (2007) 133(5) *Psychological Bulletin* 859.

considered later in this section).¹⁶⁷³ It has been found that the presence of others can create additional normative influence if those people are familiar with the information being sought (and may approve of the socially desirable response¹⁶⁷⁴), or if the responder considers there might be ramifications from or through that person for any disclosure they make.¹⁶⁷⁵ Increased levels of personal interaction between the responder and the researcher, or interviewer, is likely to lead to an increased influence from the social desirability effect.¹⁶⁷⁶

It has been reported that people are able to ascertain the purpose of a survey, or an interview, and to couch their responses accordingly, as a way of impressing the researchers.¹⁶⁷⁷ People's assessments of socially acceptable behaviours are likely to vary across cultural and social settings, under the influence of factors such as collectivist or individualist social norms.¹⁶⁷⁸

It has been reported that people's sense of identity is likely to influence their choice of response, and, if the survey is relevant to an important feature of their sense of identity (eg physical fitness), the person is likely to overreport on that feature.¹⁶⁷⁹ For example, if they pride themselves on their physical fitness, they will overreport their involvement in any activities related to physical

¹⁶⁷³ Gittleman, S., V. Lange, W. A. Cooke, S. M. Frede, P. J. Lavrakas, C. Pierce, and R. K. Thomas, 'A Model for Predicting and Calibrating the Direction and Magnitude of Social Desirability Bias' (2015) Sept 2015 *Journal of Advertising Research* 242; Krumpal, I., 'Determinants of Social Desirability Bias in Sensitive Surveys: A Literature Review' (2013) 47 *Quality and Quantity* 2025; Tourangeau, R., and T. Yan, 'Sensitive Questions in Surveys' (2007) 133(5) *Psychological Bulletin* 859.

¹⁶⁷⁴ Bekkers, R., and P. Wiepking, 'Accuracy of Self-reports on Donations to Charitable Organisations' (2011) 45(6) *Quality and Quantity* 1369.

¹⁶⁷⁵ Krumpal, I., 'Determinants of Social Desirability Bias in Sensitive Surveys: A Literature Review' (2013) 47 *Quality and Quantity* 2025; Tourangeau, R., and T. Yan, 'Sensitive Questions in Surveys' (2007) 133(5) *Psychological Bulletin* 859.

¹⁶⁷⁶ Bekkers, R., and P. Wiepking, 'Accuracy of Self-reports on Donations to Charitable Organisations' (2011) 45(6) *Quality and Quantity* 1369.

¹⁶⁷⁷ Krumpal, I., 'Determinants of Social Desirability Bias in Sensitive Surveys: A Literature Review' (2013) 47 *Quality and Quantity* 2025; Tourangeau, R., and T. Yan, 'Sensitive Questions in Surveys' (2007) 133(5) *Psychological Bulletin* 859.

¹⁶⁷⁸ Bekkers, R., and P. Wiepking, 'Accuracy of Self-reports on Donations to Charitable Organisations' (2011) 45(6) *Quality and Quantity* 1369; Krumpal, I., 'Determinants of Social Desirability Bias in Sensitive Surveys: A Literature Review' (2013) 47 *Quality and Quantity* 2025.

¹⁶⁷⁹ Brenner, P. S., and J. D. DeLamater, 'Social Desirability Bias in Self-Reports of Physical Activity: Is An Exercise Identity the Culprit?' (2014) 117 *Social Indicators Research* 489.

fitness.¹⁶⁸⁰ Some people have been reported to be more prone to social desirability bias;¹⁶⁸¹

however, this is not yet clearly established, and a stronger known predictor of its effect is the use of survey questions covering sensitive topics.

Sensitive topics include anything that causes embarrassment or discomfort to the responder.¹⁶⁸² They might be perceived as an invasion of privacy, or represent a personal threat if information is disclosed.¹⁶⁸³ Generally, sensitive topics have been found to elicit some form of misreporting – underreporting, overreporting, denying what is unacceptable, or simply not answering the question.¹⁶⁸⁴ It has been suggested that online surveys might elicit less misreporting on sensitive questions and it is assumed this is due to the absence of perceived external influences.¹⁶⁸⁵

Tools and techniques have been developed with the intent of detecting and controlling for the social desirability effect (eg the Marlowe-Crowne Scale);¹⁶⁸⁶ however, they have been shown to have limited reliability in that they detect generalised tendencies to misreport and can miss the detection of individual responses that are deliberately misreported.¹⁶⁸⁷

A review of 14,274 self-report surveys found that 0.21% (31) included a detection technique for the social desirability effect, and that a social desirability effect was detected in 45.1% (14) of those.¹⁶⁸⁸ This finding suggests likely high rates of misreporting in the remaining 14,244 surveys

¹⁶⁸⁰ Brenner, P. S., and J. D. DeLamater, 'Social Desirability Bias in Self-Reports of Physical Activity: Is An Exercise Identity the Culprit?' (2014) 117 *Social Indicators Research* 489.

¹⁶⁸¹ Gittleman, S., V. Lange, W. A. Cooke, S. M. Frede, P. J. Lavrakas, C. Pierce, and R. K. Thomas, 'A Model for Predicting and Calibrating the Direction and Magnitude of Social Desirability Bias' (2015) Sept 2015 *Journal of Advertising Research* 242.

¹⁶⁸² Tourangeau, R., and T. Yan, 'Sensitive Questions in Surveys' (2007) 133(5) *Psychological Bulletin* 859.

¹⁶⁸³ Tourangeau, R., and T. Yan, 'Sensitive Questions in Surveys' (2007) 133(5) *Psychological Bulletin* 859.

¹⁶⁸⁴ Tourangeau, R., and T. Yan, 'Sensitive Questions in Surveys' (2007) 133(5) *Psychological Bulletin* 859.

¹⁶⁸⁵ Kreute, F., S. Presser, and R. Tourangeau, 'Social Desirability Bias in CATI, IVR, and Web Surveys' (2008) 72(5) *Public Opinion Quarterly* 847.

¹⁶⁸⁶ Gittleman, S., V. Lange, W. A. Cooke, S. M. Frede, P. J. Lavrakas, C. Pierce, and R. K. Thomas, 'A Model for Predicting and Calibrating the Direction and Magnitude of Social Desirability Bias' (2015) Sept 2015 *Journal of Advertising Research* 242; van de Mortel, T., 'Faking It: Social Desirability Response Bias in Self-Report Research' (2008) 25(4) *Australian Journal of Advanced Nursing* 40.

¹⁶⁸⁷ Tourangeau, R., and T. Yan, 'Sensitive Questions in Surveys' (2007) 133(5) *Psychological Bulletin* 859.

¹⁶⁸⁸ van de Mortel, T., 'Faking It: Social Desirability Response Bias in Self-Report Research' (2008) 25(4) *Australian Journal of Advanced Nursing* 40.

which did not include detection techniques, and consequent high levels of unreliability in their research. It has been suggested that the social desirability effect and its focus on acceptability ensure the submission of survey responses intended to impress researchers, leading to a preponderance of positive data.¹⁶⁸⁹

Interviewer effect and deference effect

A closely related issue is the influence of the interviewer effect on face-to-face data collection.

A recent literature review on the interviewer effect confirms that interviewers can have a very influential impact on interviewees' behaviour during interviews, and on their responses to interview questions.¹⁶⁹⁰ Relevant literature reports a range of interview and interviewer characteristics that have been found to influence interviewees, including:¹⁶⁹¹ the interviewer's gender, social dynamics (race) and ethnicity;¹⁶⁹² the interviewee's perceptions of the interviewer's acceptability (including trustworthiness); the interviewer's apparent levels of education and socio-economic status; the interviewer's demeanour; the level of assured confidentiality (an assurance that interviewees and survey responders do not always accept¹⁶⁹³); stereotype-based assumptions (on the part of the interviewer and the interviewee); assessments of normative expectations based on the context and

¹⁶⁸⁹ van de Mortel, T., 'Faking It: Social Desirability Response Bias in Self-Report Research' (2008) 25(4) *Australian Journal of Advanced Nursing* 40

¹⁶⁹⁰ West, B. T., and A. G. Blom, 'Explaining Interviewer Effects: A Research Synthesis' (2017) 5 *Journal of Statistics and Methodology* 175.

¹⁶⁹¹ The reported influences are drawn from six sources: Adida, C. L., K. E. Ferree, D. N. Posner, and A. L. Robins, 'Who's Asking? Coethnicity Effects in African Survey Data' (2016) 49(12) *Comparative Political Studies* 160; Bryman, A., *Social Research Methods* (5th Edition, Oxford University Press, UK, 2016); Gorard, S., *Research Design: Creating Robust Approaches for the Social Sciences* (SAGE Publications, 2013); Krysan, M., and M. P. Couper, 'Race in the Live and the Virtual Interview: Racial Deference, Social Desirability, and Activation Effects in Attitude Surveys' (2003) 66(4) *Social Psychology Quarterly* 364; Maruyama, G., and C. S. Ryan, *Research Methods in Social relations* (8th Edition, Wiley Blackwell, UK, 2014); West, B. T., and A. G. Blom, 'Explaining Interviewer Effects: A Research Synthesis' (2017) 5 *Journal of Statistics and Methodology* 175.

¹⁶⁹² Due to its associations with slavery terminology, the word "race" is becoming a less acceptable description of people's differing social situation and context; the American Psychological Association uses the term 'social dynamics' in general reference to the differences in social and cultural settings and people's varied responses within those settings: Levitt, H. M., M. Blamberg, J. W. Creswell, D. M. Frost, R. Josselson, and C. Suárez-Orozco, 'Journal Article Reporting Standards for Qualitative Primary, Qualitative Meta-Analytic, and Mixed Methods Research in Psychology: The APA Publications and Communications Task Force Report' (2018) 73(1) *American Psychologist* 26, 29.

¹⁶⁹³ Tourangeau, R., and T. Yan, 'Sensitive Questions in Surveys' (2007) 133(5) *Psychological Bulletin* 859.

setting of the interview; and the types of questions that are asked. The interviewer's influence is said to increase for questions that the interviewee perceives to be 'attitudinal, sensitive, ambiguous, complex' and open-ended, leading to a higher likelihood that such questions will elicit misreporting than will less controversial or intrusive questions.¹⁶⁹⁴

Face-to-face interviews are likely to have an increased social desirability effect,¹⁶⁹⁵ in addition to being affected by what is called 'deference vulnerability',¹⁶⁹⁶ or the deference effect.

Interpersonal deference is typified by a situation in which one person has less status than the other and the former accedes to the 'perceived desires' of the other (who is perceived to be in a position of authority).¹⁶⁹⁷ In other words, responders can be expected to defer to perceived sources of power, and the power can be perceived to be in the researcher or in a group.^{1698 1699}

It has been found that, when interviews are conducted over the telephone, the interviewee can have the sense of an interviewer being present, thus eliciting the interviewer effect.¹⁷⁰⁰

Self-reported satisfaction

A seminal longitudinal study conducted over 40 years ago found significant discrepancies between satisfaction levels reported by participants, and the relevant events in their lives. The discrepancies showed that the data did not reflect what actually had occurred, leading the researchers to confirm that participant reports of their satisfaction about any service does not mean

¹⁶⁹⁴ West, B. T., and A. G. Blom, 'Explaining Interviewer Effects: A Research Synthesis' (2017) 5 *Journal of Statistics and Methodology* 175, 185.

¹⁶⁹⁵ Gittleman, S., V. Lange, W. A. Cooke, S. M. Frede, P. J. Lavrakas, C. Pierce, and R. K. Thomas, 'A Model for Predicting and Calibrating the Direction and Magnitude of Social Desirability Bias' (2015) Sept 2015 *Journal of Advertising Research* 242.

¹⁶⁹⁶ Poland, F., and L. Birt, 'Protecting and Empowering Research with the Vulnerable Older Person' in R. Iphofen and M. Tolich (eds), *The SAGE Handbook of Qualitative Research Ethics* (SAGE Publishing, UK, 2018), 384.

¹⁶⁹⁷ Kipnis, K., *Vulnerability in Research Subjects: A Bioethical Taxonomy* (Ethical and Policy Issues in research Involving Human Participants, National Bioethics Advisory Commission, USA, 2001), G-9.

¹⁶⁹⁸ van Bochove, M., J. Burgers, A. Geurts, W. de Koster, and J. van der Waal, 'Questioning Ethnic Identity: Interviewer Effects in Research About Immigrants' Self-Definition and Feelings of Belonging' (2015) 46(5) *Journal of Cross-Cultural Psychology* 652.

¹⁶⁹⁹ Group effect is considered in Chapter Five of this thesis.

¹⁷⁰⁰ Tourangeau, R., and T. Yan, 'Sensitive Questions in Surveys' (2007) 133(5) *Psychological Bulletin* 859.

that they are actually satisfied.¹⁷⁰¹ This discrepancy has been investigated numerous times and is confirmed in a recent study.¹⁷⁰² It has been proposed that, in such situations, responders are treating the researcher as an expert, or a person in authority, who they are seeking to respect and please (see deference effect, above).¹⁷⁰³

It is now well-established that researchers should not rely on data obtained from self-reports in which responders are asked to provide an assessment of their satisfaction with an institutional or bureaucratic process or service. Such data is inevitably and unreliably positive because the measure itself is likely to relate more to the attention people gain from being invited to complete the survey.¹⁷⁰⁴

In other fields of research, it has been recommended that researchers not use self-report methods for data collection because people rarely recall correctly what they do or why they do it, and this lack of recall compounds other problems inherent to self-reports,¹⁷⁰⁵ (such as social desirability and deference effect).¹⁷⁰⁶ However, this is a narrow response to a complex behavioural problem, especially when recent research shows that self-report surveys, being less resource intensive to administer, are likely to continue to be the preferred data collection methods.¹⁷⁰⁷

Recently reported pilot studies using alternative survey approaches and instrument design suggest it might be feasible to develop more reliable methods for data collection from participants in

¹⁷⁰¹ McCord, J., 'A Thirty Year Follow-Up of Treatment Effects' (1978) 33(3) *American Psychologist* 284.

¹⁷⁰² Willis, R., M. Evandrou, P. Pathak, and P. Khambhaita, 'Problems with Measuring Satisfaction with Social Care' (2016) 24(5) *Health and Social Care in the Community* 587.

¹⁷⁰³ Bush, M., and A. C. Gordon, 'Client Choice and Bureaucratic Accountability: Possibilities for Responsiveness in a Social Welfare Bureaucracy' (1978) 34(4) *Journal of Social Issues* 22.

¹⁷⁰⁴ Maruyama, G., and C. S. Ryan, *Research Methods in Social Relations* (8th Edition, Wiley Blackwell, UK, 2014).

¹⁷⁰⁵ Baumeister, R. F., K. D. Vohs, and D. C. Funder, 'Psychology as a Science of Self-Reports and Finger Movements: Whatever Happened to Actual Behavior?' (2007) 2(4) *Perspectives on Psychological Science* 396.

¹⁷⁰⁶ Sassenberg, K., and L. Ditrich, 'Research in Social Psychology Changed Between 2011 and 2016: Larger Sample Sizes, More Self-Report Measures, and More Online Studies' (2019) 2(2) *Advances in Methods and Practices in Psychological Sciences* 107, 113.

¹⁷⁰⁷ Sassenberg, K., and L. Ditrich, 'Research in Social Psychology Changed Between 2011 and 2016: Larger Sample Sizes, More Self-Report Measures, and More Online Studies' (2019) 2(2) *Advances in Methods and Practices in Psychological Science* 107.

empirical studies of mediation, making it possible for researchers to obtain more reliable information about, say, disputant satisfaction with aspects of the mediation process.¹⁷⁰⁸

Social desirability, interviewer, and deference effects in mediation research

Mediation includes dynamic, complex human relationships – between disputants, between disputants and their advisers, and between disputants, advisers, and mediators – as well as relationships external to the process but important to participants. When all those are included in empirical studies of mediation, there is significant scope for the influences of social desirability, interviewer, and deference effects.

None of the 47 selected studies includes any reference to such influences or to their potential effects on the mediation process or on the research data collected by the researchers. Analysis of a recently published, 40 page article suggests that this lack remains unaddressed, and that mediation researchers may not yet be considering how their own involvement is likely to influence participant behaviour and the research data they collect.¹⁷⁰⁹ The authors describe an interesting empirical study of mediation in which the researchers have applied an innovative qualitative method known as Consensual Qualitative Research (CQR).¹⁷¹⁰ CQR has the potential to be a particularly intrusive methodology and one of its explicit requirements is that researchers be conscientiously reflexive about their possible influence on study participants and on data collection. The mediation study does not include such considerations despite the likelihood of the research data being influenced by social desirability or deference effect, and despite possible conflicts of interest between one of the researchers and at least one of the study participants. While the article includes descriptions of data

¹⁷⁰⁸ Pleasence, P., and N. J. Balmer, 'Development of a Generic Legal Confidence Scale: A First Implementation of the Rasch Measurement Model in Empirical Legal Studies' (2019) 16(1) *Journal of Empirical Legal Studies* 143.

¹⁷⁰⁹ Wall, J. A., and K. Kressel, 'Mediator Thinking in Civil Cases' (2017) 34(3) *Conflict Resolution Quarterly* 331.

¹⁷¹⁰ Hill, C. E., B. J. Thompson, E. N. Williams, S. A. Hess, and N. Ladany, 'Consensual Qualitative Research: An Update' (2005) 52(2) *Journal of Counselling Psychology* 196.

collection activities, the lack of reflexivity makes it difficult to assess the credibility of the research data or the reliability of the study findings.

7.3. Knowledge gaps

This section draws on the 47 selected studies, the 26 additional publications, and the responses to an online survey of professional mediators conducted as part of the research for this thesis.¹⁷¹¹ Many of the same knowledge gaps are identified in all three sources.

Conceptual and theoretical gaps

Researchers have identified a lack of clear conceptual and theoretical development around mediation,¹⁷¹² including in relation to models of practice and mediator styles and approaches.¹⁷¹³

Systemic gaps

Systemic issues and gaps are accepted as relating to the broader mediation “system” and the systemic contexts in which mediation takes place. Researchers acknowledge the lack of information about mediation that occurs beyond the court-connected context and the context of institutional mediation programs and services, including a lack of information about mediation that is conducted privately,¹⁷¹⁴ a lack of information about specialist mediation programs,¹⁷¹⁵ and a lack of

¹⁷¹¹ Information about the online survey is provided below in 7.4.1. professional mediators online survey.

¹⁷¹² Della Noce, D. J., ‘Mediator Style and the Question of “Good” Mediation: A Call for Theoretical Development’ (2012) 5(4) *Negotiation and Conflict Management Research* 396; Lande, J. (ed), *Theories of Change for the Dispute Resolution Movement: Actionable Ideas to Revitalize our Movement* (Conference Proceedings, USA, 2020), available on <<https://ssrn.com/abstract=3533324>>; Olekalns, M., D. Shestowsky, S. P. Skratek, and A.-S. De Pauw, ‘The Double Helix of Theory and Practice: Celebrating Stephen J. Goldberg as a Scholar, Practitioner, and Mentor’ (2019) 13(1) *Negotiation and Conflict Management Research* 85; Wall, J., and K. Kressel, ‘Research on Mediator Style: A Summary and Some Research Questions’ (2012) 5(4) *Negotiation and Conflict Management Research* 401.

¹⁷¹³ Della Noce, D. J., ‘Mediator Style and the Question of “Good” Mediation: A Call for Theoretical Development’ (2012) 5(4) *Negotiation and Conflict Management Research* 396; Wall, J., and K. Kressel, ‘Research on Mediator Style: A Summary and Some Research Questions’ (2012) 5(4) *Negotiation and Conflict Management Research* 401; see Chapter Three.

¹⁷¹⁴ Sourdin, T., ‘Introduction’ 22(3) *ADRJ* 1.

¹⁷¹⁵ Singletary, L., L. L. S. Smutko, G. C. Hill, G. C. Smith, S. E. Daniels, J. S. Ayers, and K. Haaland, ‘Skills Needed to Help Communities Manage Natural Resource Conflicts’ (2008) 25(3) *Conflict Resolution Quarterly* 303.

information about how systemic issues might influence mediation practice.¹⁷¹⁶ There is also concern that little is known about how a mediation context might affect the mediation process and what happens within it.¹⁷¹⁷

Mediation process gaps

Researchers note that little is known about mediation outcomes other than settlement/agreement,¹⁷¹⁸ and that research focused only on mediation outcomes can limit consideration of the mediation process itself and events within it.¹⁷¹⁹ There is also little known about disputant and mediator responses to mediation outcomes.¹⁷²⁰ On the other hand, survey responses from professional mediators have focused on mediation outcomes in that they would like to see investigations of how sustainable and durable outcomes can be achieved.

There is recognition of the lack of knowledge about the practice of ADR and mediation in diverse cultural settings (ie racial, ethnic, and socio-economic diversity),¹⁷²¹ and this issue was also raised in professional mediators' online survey responses.

Knowledge gaps about the role and actions of mediators

¹⁷¹⁶ E. P. McDermott, 'Discovering the Importance of Mediator Style – An Interdisciplinary Challenge' (2012) 5(4) *Negotiation and Conflict Management Research*; Wall, J. A., Jr, and T. C. Dunne, 'Mediation Research: A Current Review' (2012) 28(2) *Negotiation Journal* 217.

¹⁷¹⁷ Bingham, L. B., 'Transformative Mediation in the United States Postal Service' (2012) 5(4) *Negotiation and Conflict Management Research* 354; Kochan, T. A., 'Commentary 2' (2012) 5(4) *Negotiation and Conflict Management Research*; Sourdin, T., 'Introduction' 22(3) *ADRJ* 1.

¹⁷¹⁸ See Chapter Three.

¹⁷¹⁹ Wall, J., and K. Kressel, 'Research on Mediator Style: A Summary and Some Research Questions' (2012) 5(4) *Negotiation and Conflict Management Research* 401.

¹⁷²⁰ Wall, J. A., Jr, and T. C. Dunne, 'Mediation Research: A Current Review' (2012) 28(2) *Negotiation Journal* 217; see Chapter Six, Chapter Seven.

¹⁷²¹ Capulong, E. R. C., 'Mediation and the Neocolonial Legal Order: Access to Justice and Self-Determination in the Philippines' (2012) 27(3) *Ohio State Journal on Dispute Resolution* 641; Crampton, A., 'Escape from the Laboratory: Ethnographic Methods in the Study of Elder and Family Court Mediation' (2016) 32(3) *Negotiation Journal* 191; Davidheiser, M., 'Race, Worldviews, and Conflict Mediation: *Black and White Styles of Conflict* Revisited' (2008) 33(1) *Peace and Change* 60; Gelfand, M. J., and J. Brett, 'Big Questions for Negotiation and Culture Research' (2019) 12(2) *Negotiation and Conflict Management Research* 105; Marin, J. R., M. Olekalns, and W. Adair, 'Normatively Speaking: Do Cultural Norms Influence Negotiation, Conflict Management, and Communication' (2019) 12(2) *Negotiation and Conflict Management Research* 146; Sourdin, T., *Mediation in the Supreme and County Courts of Victoria* (Report prepared for the Department of Justice, Victoria, Australia, April 2009), available on <<http://www.civiljustice.info/adreval/1/>>; see Chapter Six.

Researchers acknowledge that little is known about what mediators do, about their actions and microskills, and about what influences those.¹⁷²² This issue was also raised frequently in the professional mediators' online survey responses and was discussed at a US-based ADR conference in 2019.¹⁷²³ The literature informing this thesis suggests this has been a knowledge gap since at least 1989.¹⁷²⁴

Lack of knowledge about models of practice and mediator styles and approaches

Despite significant numbers of studies of models of mediation practice, researchers note that there is still little known about the specific mediator actions that are considered to be typical of each.¹⁷²⁵ In addition, researchers would like more information about mediators' consistency in their use of models or styles,¹⁷²⁶ about the levels of mediator flexibility in how they implement models and styles,¹⁷²⁷ and about how mediators choose which model or style to adopt at any time during

¹⁷²² Charkoudian, L., 'Just My Style: The Practical, Ethical, and Empirical Dangers of the Lack of Consensus about Definitions of Mediator Style' (2012) 5(4) *Negotiation and Conflict Management Research* 367; Della Noce, D. J., 'Mediator Style and the Question of "Good" Mediation: A Call for Theoretical Development' (2012) 5(4) *Negotiation and Conflict Management Research* 396; Pruitt, D. G., 'Commentary 1' (2012) 5(4) *Negotiation and Conflict Management Research* 384; Sourdin, T., 'Introduction' 22(3) *ADRJ* 1; Wall, J. A., Jr, and T. C. Dunne, 'Mediation Research: A Current Review' (2012) 28(2) *Negotiation Journal* 217; Wall, J., and K. Kressel, 'Research on Mediator Style: A Summary and Some Research Questions' (2012) 5(4) *Negotiation and Conflict Management Research* 401; Wissler, R. L., 'Court-Connected Mediation in General Civil Cases: What We Know from Empirical Research' (2002) 17(3) *Ohio State Journal on Dispute Resolution* 641; see Chapter Four, Chapter Five, Chapter Six of this thesis.

¹⁷²³ Frenkel, D., M. Keet, J. Lande, and D. Stienstra, 'Studying What Dispute Resolution Practitioners Actually Do' in Lande, J. (ed), *Theories of Change for the Dispute Resolution Movement: Actionable Ideas to Revitalize our Movement* (Conference Proceedings, USA, 2020), available on <<https://ssrn.com/abstract=3533324>>.

¹⁷²⁴ Hiltrop, J. M., 'Factors Associated with Successful Labor Mediation' in K. Kressel and D. G. Pruitt (eds), *Mediation Research: The Process and Effectiveness of Third-Party Intervention* (Jossey-Bass, USA, 1989).

¹⁷²⁵ Charkoudian, L., 'Just My Style: The Practical, Ethical, and Empirical Dangers of the Lack of Consensus about Definitions of Mediator Style' (2012) 5(4) *Negotiation and Conflict Management Research* 367; Wall, J., and K. Kressel, 'Research on Mediator Style: A Summary and Some Research Questions' (2012) 5(4) *Negotiation and Conflict Management Research* 401.

¹⁷²⁶ Pruitt, D. G., 'Commentary 1' (2012) 5(4) *Negotiation and Conflict Management Research* 384; Wall, J., and K. Kressel, 'Research on Mediator Style: A Summary and Some Research Questions' (2012) 5(4) *Negotiation and Conflict Management Research* 401.

¹⁷²⁷ Pruitt, D. G., 'Commentary 1' (2012) 5(4) *Negotiation and Conflict Management Research* 384; Wall, J., and K. Kressel, 'Research on Mediator Style: A Summary and Some Research Questions' (2012) 5(4) *Negotiation and Conflict Management Research* 401.

mediation,¹⁷²⁸ including how their personal values and goals influence their choice of model or style.¹⁷²⁹

Researchers claim there is very little known about which model or style is the most effective (in terms of outcomes).¹⁷³⁰ Survey responses from professional mediators suggest that this is a knowledge gap in mediation practice.

Research approaches and methods

Researchers suggest there is little known about the complete mediation process, including preliminary and post-mediation activities, and that this is likely to be caused by a narrow focus on the mediation session itself.¹⁷³¹ The research undertaken for this thesis reveals that there is a lack of knowledge about how researchers might influence investigations of mediation, including the research approach and design; the choice of study context and study participants; the type of data to be collected and how it is to be collected, analysed, and interpreted; and how the study findings are to be reported and made available, and to whom.¹⁷³²

Above all, this thesis has found there is a lack of knowledge about mediator effectiveness.¹⁷³³

¹⁷²⁸ Della Noce, D. J., 'Mediator Style and the Question of "Good" Mediation: A Call for Theoretical Development' (2012) 5(4) *Negotiation and Conflict Management Research* 396; Wall, J. A., Jr, and T. C. Dunne, 'Mediation Research: A Current Review' (2012) 28(2) *Negotiation Journal* 217; Wall, J., and K. Kressel, 'Research on Mediator Style: A Summary and Some Research Questions' (2012) 5(4) *Negotiation and Conflict Management Research* 401.

¹⁷²⁹ Della Noce, D. J., 'Mediator Style and the Question of "Good" Mediation: A Call for Theoretical Development' (2012) 5(4) *Negotiation and Conflict Management Research* 396.

¹⁷³⁰ Charkoudian, L., 'Just My Style: The Practical, Ethical, and Empirical Dangers of the Lack of Consensus about Definitions of Mediator Style' (2012) 5(4) *Negotiation and Conflict Management Research* 367; Wall, J., and K. Kressel, 'Research on Mediator Style: A Summary and Some Research Questions' (2012) 5(4) *Negotiation and Conflict Management Research* 401; see Chapter Three, Chapter Four of this thesis.

¹⁷³¹ Charkoudian, L., 'Just My Style: The Practical, Ethical, and Empirical Dangers of the Lack of Consensus about Definitions of Mediator Style' (2012) 5(4) *Negotiation and Conflict Management Research* 367; Kochan, T. A., 'Commentary' (2012) 5(4) *Negotiation and Conflict Management Research* 392; McDermott, E. P., 'Discovering the Importance of Mediator Style – An Interdisciplinary Challenge' (2012) 5(4) *Negotiation and Conflict Management Research* 340.

¹⁷³² See above at 7.1. Researcher influence and reflexivity.

¹⁷³³ See Chapter Three, Chapter Four, Chapter Five, Chapter Six, and this Chapter.

7.4. Addressing constraints and filling gaps

Suggesting there is a gap between the focus of mediation research and the focus of mediation practitioners,¹⁷³⁴ researchers have proposed the development of collaborative research approaches aimed at ensuring researchers' perceptions are in keeping with those of practitioners, and that research is designed to suit the needs of both groups.^{1735 1736}

It has been suggested that researchers adopt a broad focus on local perspectives and approaches rather than on taking a "top-down" approach (ie investigate what is actually happening not what should be happening).¹⁷³⁷ A similar approach has been recommended in relation to models of practice: that researchers shift their focus from seeking to confirm practices according to models and investigate what mediators actually do – their skills, actions, behaviours, responsiveness, and flexibility.¹⁷³⁸

It has been recommended that, because studies of simulated mediation cannot adequately represent the dynamic nature of mediation, mediation researchers could design comparative studies

¹⁷³⁴ Wall, J., and K. Kressel, 'Research on Mediator Style: A Summary and Some Research Questions' (2012) 5(4) *Negotiation and Conflict Management Research* 401; Lande, J. (ed), *Theories of Change for the Dispute Resolution Movement: Actionable Ideas to Revitalize our Movement* (Conference Proceedings, USA, 2020), available on <<https://ssrn.com/abstract=3533324>>; Sourdin, T., 'Introduction' 22(3) *ADRJ* 1; Welsh, N. A., 'We Need Good Data to Know Whether What We Are Doing – and Espousing – is Good' in J. Lande (ed), *Theories of Change for the Dispute Resolution Movement: Actionable Ideas to Revitalize Our Movement* (Conference Proceedings, USA, 2020), available on <<https://ssrn.com/abstract=3533324>>.

¹⁷³⁵ Broome, B. J., 'Negotiating the Nexus: Symbiotic Relationship of Theory and Practice in Conflict Management' (2017) 10(4) *Negotiation and Conflict Management Research* 252; Ebner, N., and J. Parlamis, 'Weaving Together Theory, Research, Practice, and Teaching: A Four-Dimensional Approach to Negotiation and Conflict Management Work' (2017) 10(4) *Negotiation and Conflict Management Research* 245; Fisher and Fisher-Yoshida; Hansen, T., and M. Umbreit, 'State of Knowledge: Four Decades of Victim-Offender Mediation Research and Practice: The Evidence' (2018) 36 *Conflict Resolution Quarterly* 99.

¹⁷³⁶ The online survey responses from professional mediators show that the two groups have many ideas in common and that the gap between them may not be as wide as is reported.

¹⁷³⁷ McConnell, B., 'To Bring Peace that Stays: Music, Conflict and Conciliation in the Gambia' (2019) 12(3) *International Journal of Community Music* 349.

¹⁷³⁸ Davidheiser, M., 'Race, Worldviews, and Conflict Mediation: *Black and White Styles of Conflict* Revisited' (2008) 33(1) *Peace and Change* 60; McDermott, E. P., 'Discovering the Importance of Mediator Style – An Interdisciplinary Challenge' (2012) 5(4) *Negotiation and Conflict Management Research* 340; Sourdin, T., 'Introduction' 22(3) *ADRJ* 1; Storrow, R., and A. Georgakopoulos, 'Mediators and Metaphors: An Analysis of Conflict Resolution Metaphors' (2014) 69(2) *Dispute Resolution Journal* 41.

of “real” mediations to investigate mediator approaches in various settings.¹⁷³⁹ For example, investigations could be conducted of similar mediator models, styles and approaches in different contexts, and of different mediator models styles and approaches in the same context.¹⁷⁴⁰

In terms of specific research design and methods, researchers have recommended the use of more orthodox approaches (including hypothesis testing);¹⁷⁴¹ more use of randomised studies and the inclusion of control groups;¹⁷⁴² more observational studies;¹⁷⁴³ and less reliance on data collection from surveys.¹⁷⁴⁴ Another suggestion is for the design of studies that include the structured selection of study participants, the recording or observation of subject mediations, the inclusion of mediator and disputant self-reports (including their perceptions of contextual influences), the development of coding schemes for data analysis, and the capacity to conduct such studies at all points of a dispute’s history.¹⁷⁴⁵ It has also been suggested that the problems inherent to self-report surveys could be overcome by making the surveys longer, enabling participants to

¹⁷³⁹ Bingham, L. B., ‘Transformative Mediation in the United States Postal Service’ (2012) 5(4) *Negotiation and Conflict Management Research* 354; Ervasti, K., ‘Past, Present and Future of Mediation in Nordic Countries’ in A. Nylund, K. Ervasti, and L. Adrian (eds), *Nordic Mediation Research* (Springer Open, 2018); Kochan, T. A., ‘Commentary’ (2012) 5(4) *Negotiation and Conflict Management Research* 392; Sourdin, T., *Mediation in the Supreme and County Courts of Victoria* (Report prepared for the Department of Justice, Victoria, Australia, April 2009), available on <<http://www.civiljustice.info/adreval/1/>>.

¹⁷⁴⁰ Kochan, T. A., ‘Commentary 2’ (2012) 5(4) *Negotiation and Conflict Management Research*; Wall, J. and K. Kressel, ‘Research on Mediator Style: A Summary and Some Research Suggestions’ (2012) 5(4) *Negotiation and Conflict Management Research* 401.

¹⁷⁴¹ Pruitt, D. G., ‘Commentary 1’ (2012) 5(4) *Negotiation and Conflict Management Research* 384.

¹⁷⁴² Pruitt, D. G., ‘Commentary 1’ (2012) 5(4) *Negotiation and Conflict Management Research* 384; Wall, J. A., Jr., and T. C. Dunne, ‘Mediation Research: A Current Review’ (2012) 28(2) *Negotiation Journal* 217; Wall, J. and K. Kressel, ‘Research on Mediator Style: A Summary and Some Research Suggestions’ (2012) 5(4) *Negotiation and Conflict Management Research* 401.

¹⁷⁴³ Kochan, T. A., ‘Commentary 2’ (2012) 5(4) *Negotiation and Conflict Management Research* 392; McDermott, E. P., ‘Discovering the Importance of Mediator Style – An Interdisciplinary Challenge’ (2012) 5(4) *Negotiation and Conflict Management Research* 340; Wall, J. A., Jr., and T. C. Dunne, ‘Mediation Research: A Current Review’ (2012) 28(2) *Negotiation Journal* 217; Wall, J. and K. Kressel, ‘Research on Mediator Style: A Summary and Some Research Suggestions’ (2012) 5(4) *Negotiation and Conflict Management Research* 401.

¹⁷⁴⁴ Wall, J. A., Jr., and T. C. Dunne, ‘Mediation Research: A Current Review’ (2012) 28(2) *Negotiation Journal* 217.

¹⁷⁴⁵ Kochan, T. A., ‘Commentary’ (2012) 5(4) *Negotiation and Conflict Management Research* 392; McDermott, E. P., ‘Discovering the Importance of Mediator Style – An Interdisciplinary Challenge’ (2012) 5(4) *Negotiation and Conflict Management Research* 340; Wall, J. and K. Kressel, ‘Research on Mediator Style: A Summary and Some Research Suggestions’ (2012) 5(4) *Negotiation and Conflict Management Research* 401.

provide greater detail about their mediation experience.¹⁷⁴⁶ Other researchers have suggested greater use of ethnographic approaches,¹⁷⁴⁷ and the incorporation of researcher reflexivity in empirical studies of mediation.¹⁷⁴⁸

Researchers have also suggested that studies of mediation include the whole process and all participants,¹⁷⁴⁹ and that such studies be conducted at many points during the history of a dispute.¹⁷⁵⁰ Finally, there have been suggestions for researchers to use grounded theory as a research approach (ie observe mediations, develop theories to explain what has been observed, then test the theories with further observations) and ¹⁷⁵¹ that interdisciplinary teams of researchers be used to ensure a broad range of research skills.¹⁷⁵²

The next section is a summary report of responses from professional mediators to an online survey conducted as part of the research for this thesis.

7.4.1. Professional mediators online survey¹⁷⁵³

The research undertaken for this thesis includes an online survey of practicing mediators conducted in May 2019 in association with an Australian mediation conference.¹⁷⁵⁴ In the survey, one textbox formatted question sought from responders their own ideas for future mediation research. In part, the purpose of the survey was to obtain from practising mediators their ideas for future mediation research.

¹⁷⁴⁶ McDermott, E. P., 'Discovering the Importance of Mediator Style – An Interdisciplinary Challenge' (2012) 5(4) *Negotiation and Conflict Management Research* 340.

¹⁷⁴⁷ Crampton, A., 'Escape from the Laboratory: Ethnographic Methods in the Study of Elder and Family Court Mediation' (2016) 32(3) *Negotiation Journal* 191.

¹⁷⁴⁸ Keikelame, M. J., and L. Swartz, 'Decolonising Research Methodologies: Lessons from a Qualitative Research Project, Cape Town, South Africa' (2019) 12 *Global Health Action* 1.

¹⁷⁴⁹ McDermott, E. P., 'Discovering the Importance of Mediator Style – An Interdisciplinary Challenge' (2012) 5(4) *Negotiation and Conflict Management Research* 340.

¹⁷⁵⁰ Kochan, T. A., 'Commentary 2' (2012) 5(4) *Negotiation and Conflict Management Research* 392.

¹⁷⁵¹ Wall, J. and K. Kressel, 'Research on Mediator Style: A Summary and Some Research Suggestions' (2012) 5(4) *Negotiation and Conflict Management Research* 401.

¹⁷⁵² McDermott, E. P., 'Discovering the Importance of Mediator Style – An Interdisciplinary Challenge' (2012) 5(4) *Negotiation and Conflict Management Research* 340.

¹⁷⁵³ Additional information about the online survey is provided in Chapter Two and at Appendix D; a compilation of all survey responses is provided at Appendix D.

¹⁷⁵⁴ The National Mediation Conference convened in April 2019 in Canberra, Australia.

Overview of the survey

The online survey of professional mediators includes responses specific to the focus of future mediation research, offering a useful comparison with the researcher views that have been reviewed in earlier sections of this Chapter and a perspective on knowledge gaps and ways of filling them as seen from the practitioner viewpoint.

The online survey was designed to enable differentiation of responses from mediators and only those responses are included in this analysis summary. Included among the mediator responders is a small number submitted by mediator-academics, and although responses were received from mediators who work as Family Dispute Resolution Practitioners (FDRPs), the majority were submitted by mediators who do not work in that specialist sector.

Three survey responses encapsulate the majority of others, suggesting that researchers investigate ‘what works [in mediation]’¹⁷⁵⁵ or ‘what is a good mediator’¹⁷⁵⁶ or even ‘providing an evidence-base’.¹⁷⁵⁷ The majority of responses related to these three suggestions, though individual responses used different terminology and a range of specific detail.

192 separate research ideas were submitted in survey responses and they suggest that the participating mediators were most interested in future research that clarifies:¹⁷⁵⁸

- The effectiveness of the mediator;
- Measures of effectiveness of the mediation process;
- Mediator skills and approaches;
- Techniques for achieving durable outcomes; and

¹⁷⁵⁵ Three responses included a version of this phrase [ID numbers 58, 83, 93]; the quotation is from ID number 93.

¹⁷⁵⁶ ID number 86.

¹⁷⁵⁷ ID number 57.

¹⁷⁵⁸ Participation in the survey was confidential and responses are identifiable only via database-generated numbers (ID numbers).

- Effective mediation processes, in particular those that lead to outcomes, and to outcome durability.¹⁷⁵⁹

The ideas submitted by practicing mediators demonstrate a consistent interest in empirical research designed to help them improve their mediation practice. Responses request the establishment of an evidence base for ‘what works well and what doesn’t work well in mediation’,¹⁷⁶⁰ including the relative effectiveness of recognised models of practice, the relative effectiveness of mediator actions and approaches, and how mediators can best help disputants achieve sustainable and durable agreements.¹⁷⁶¹ Analysis of the 192 submitted research ideas suggests that 168 would be likely to require empirical studies (eg Measuring the financial and/or time benefits of participating in mediation for commercial disputes;¹⁷⁶² investigating the difference between mediators’ espoused and actual mediation practice;¹⁷⁶³ a comparison of mediation methods and results in court-connected mediations and in private and “agency” mediations¹⁷⁶⁴), sixteen could be explored using only theoretical (or non-empirical) research (eg How interest-based approaches in organisations and our political structure can support more sustainable, long term outcomes¹⁷⁶⁵), and ten would be likely to require a combination of theoretical clarification and empirical investigation (eg Investigating strategies for balancing perceptions of fairness [which would likely require theoretical clarification of the concept of fairness in the context of mediation generally; subsequent empirical studies could investigate actual interpretations of fairness in that

¹⁷⁵⁹ The responses tended to use the terms “outcome” and “effectiveness” without clarification. It is not always clear if responders are referring to settlements as outcomes, or to disputant satisfaction, or to any other type of mediation outcome.

¹⁷⁶⁰ Survey response ID number 58.

¹⁷⁶¹ Many survey responses referred to mediation or mediator “effectiveness” though very few explained what the term meant in the context of their response.

¹⁷⁶² Survey response ID number 33.

¹⁷⁶³ Survey response ID number 53.

¹⁷⁶⁴ Survey response ID number 76.

¹⁷⁶⁵ Survey response ID number 30.

mediation context, as well as the strategies used by mediators to ensure the mediation process is considered “fair” by all participants]¹⁷⁶⁶).

Survey contribution to this research

The research undertaken to inform this thesis has shown that the inconsistencies apparent in mediation research make it difficult to determine “what works” in terms of mediation practice and of mediator actions and approaches. Although it is possible that survey responders are aware of existing mediation research, and its inconsistencies, it is also possible that many professional mediators are not so aware. The survey responses suggest that mediators are seeking reliable guidance in their practice that well-designed research can provide.

The survey responses are consistent with each other. They are also consistent with the overarching objectives of mediation described in the 47 selected studies and outlined in Chapter Two of this thesis:¹⁷⁶⁷

1. To establish and confirm mediation’s effectiveness as a process for resolving conflicts and disputes;
2. To increase understanding and knowledge about mediation, and about the role of the mediator; and
3. To improve the practice of mediation.

Despite the survey being designed after the commencement of this research, the responses are also consistent with this thesis’ Research Questions:¹⁷⁶⁸

2. What is an effective, or “good”, mediator?
 - a. What are the attributes of “good” mediators?

¹⁷⁶⁶ Survey response ID number 64.

¹⁷⁶⁷ See Chapter Two, 2.6. Online survey of professional mediators.

¹⁷⁶⁸ See Chapter One, 1.7.3. Research Questions.

- b. What are the behaviours of “good” mediators?
- c. What do “good” mediators do well?

In the survey, professional mediators are asking for researchers to provide an evidence base that informs and supports their work. Despite there having been more than 40 years of mediation research, the findings of the research that informs this thesis suggest there may be systemic constraints that have prevented researchers from doing so.

7.5. Systematic appraisal: Outcomes

Chapter Two of this thesis outlined the methodological approaches that would be applied in order to establish what is known about mediator effectiveness and what makes a “good” mediator. Initial thematic analysis of the findings and units of analysis reported in a selection of 47 studies suggest that little is known about mediator effectiveness.¹⁷⁶⁹ The findings of that analysis suggest that, in part, this might be due to a lack of common understanding of key terminologies, such as “effectiveness”, and to the disparate ways in which researchers describe and measure what mediators say and do in mediation. Despite their divergent definitions and measures of key units of analysis, the selected studies demonstrate consistent reporting of positive results about mediation – in all study contexts, and, apparently, regardless of events within the subject mediations (such as mediator behaviour and disputant behaviour).¹⁷⁷⁰ They also report very little about mediator effectiveness. Mediation researchers themselves – in particular those who conduct empirical studies – describe a range of obstacles to their work including research objectives (often the focus is on mediation rather than the mediator), funding restrictions, methodological limitations, limited research skills, and their own limited access to mediation because of confidentiality restrictions. In addition, researchers report publication constraints imposed by editors and publishers in the form of

¹⁷⁶⁹ See Chapter Three and Chapter Four.

¹⁷⁷⁰ It has been suggested that, based on existing research, ‘any [mediator] behavior’ produces agreements and settlements: Druckman, D., and J. A. Wall, ‘A Treasure Trove of Insights: Sixty Years of JCR Research on Negotiation and Mediation’ (2017) 61(9) *Journal of Conflict Resolution* 1898, 1915.

word and content limitations, making it difficult for readers to ascertain how studies were approached and conducted.

All these factors suggest there may be systemic issues influencing the validity of findings reported in the 47 selected studies. For this reason, the systematic appraisal was devised with two aims:

1. To ascertain whether there are systemic issues affecting the validity of the findings described in the 47 selected studies; and
2. If there are systemic issues, to identify them.

1. *Are there systemic issues?*

i. Study participants

- a. The representativeness, diversity, and research capacity of population samples and of selected study participants (mediator and non-mediator) is sufficiently narrow to limit the credibility of research data and the reliability of study findings.

ii. Data collection

- a. The researchers' consistent application of unreliable data collection methods limits the credibility of research data and the reliability of study findings.

iii. Researcher influence and reflexivity

- a. The absence of researcher reflexivity reporting prevents any assessment of the credibility of research data, and the reliability and justifiability of study findings.

The above findings are likely to constrain the capacity of mediation research (as described in the selected studies) to contribute to its own overarching aims: to establish and confirm mediation's

effectiveness as a process for resolving conflicts and disputes; to increase what is known and understood about mediation; and to improve the practice of mediation.

The widespread temporal and contextual incidence of the problematic approaches and methodologies suggests there are systemic issues constraining this field of research, the credibility of its data, and the reliability of its findings.

2. *The systemic issues*

- i. The analysis reported in this thesis suggests there may be two factors contributing to the perpetuation of the systemic problems.
 - a. The influence, or absence, of funders, supporters, and publishers of mediation research may perpetuate the use of inadequate research approaches and unreliable methodologies; and
 - b. In what is a small field of research, researchers' own influence networks may reinforce the application of unreliable methodologies, inadequate conceptual and terminological frameworks, and the absence of reflexive approaches.

7.6. Alternative research approaches and methods

A key issue for mediation researchers is whether they can retain funder interest in investigations mediator effectiveness, including how the mediator might influence the achievement of simple effectiveness, as well as the achievement of less tangible outcomes such as disputant "satisfaction". Institutional support for mediation research (and for the practice of mediation) is likely to be dependent upon what researchers can confirm about the effectiveness of the process, about the effectiveness of mediators, as well as the factors that can be shown to influence both. The research underpinning this thesis, and the reports of researchers themselves, suggest that

continuing with existing approaches and methods is unlikely to produce information that is more reliable than has been produced in the past, despite a recent suggestion to the contrary.¹⁷⁷¹

Traditional approaches to mediation research tend to rely on the linear development of causal links and lack the capacity to accommodate the unpredictably dynamic complexities of human behaviour.¹⁷⁷² Having acknowledged the constraints of traditional approaches and methods that have been applied in mediation research, the final Chapter of this thesis explores innovative approaches and methods that are being applied in the social sciences. Noting recent increases in the application of ethnographic approaches across diverse research fields,¹⁷⁷³ Chapter Eight discusses recent developments that are intended to improve the credibility of qualitative research data and to increase research's relevance for mediator communities.¹⁷⁷⁴

In particular, Chapter Eight considers innovative ethnographic approaches such as participatory action research and 'collaborative ethnography';¹⁷⁷⁵ the use of online technologies to improve participant interview and other qualitative data collection methods.¹⁷⁷⁶

7.7. Conclusion

This Chapter incorporates a discussion of the final aspects of the systematic appraisal that has informed this research. Taking into account what is practicable and feasible for mediation

¹⁷⁷¹ Druckman, D., and J. A. Wall, 'A Treasure Trove of Insights: Sixty Years of JCR Research on Negotiation and Mediation' (2017) 61(9) *Journal of Conflict Resolution* 1898.

¹⁷⁷² Druckman, D., and J. A. Wall, 'A Treasure Trove of Insights: Sixty Years of JCR Research on Negotiation and Mediation' (2017) 61(9) *Journal of Conflict Resolution* 1898.

¹⁷⁷³ Seligmann, L. J., and B. P. Estes, 'Innovations in Ethnographic Methods' (2020) 64(2) *American Behavioral Scientist* 176.

¹⁷⁷⁴ Druckman, D., and W. Donohue, 'Innovations in Social Science Methodologies: An Overview' (2020) 64(1) *American Behavioral Scientist* 3; Iphofen, R., and M. Tolich (eds), *The SAGE Handbook of Qualitative Research Ethics* (SAGE Publishing, UK, 2018).

¹⁷⁷⁵ Firchow, P., *Reclaiming Everyday Peace: Local Voices in Measurement and Evaluation After War* (Cambridge University Press, UK, 2018); Seligmann, L. J., and B. P. Estes, 'Innovations in Ethnographic Methods' (2020) 64(2) *American Behavioral Scientist* 176, 185.

¹⁷⁷⁶ Buchanan, E., 'Researching digitally' in R. Iphofen, and M. Tolich (eds), *The SAGE Handbook of Qualitative Research Ethics* (SAGE Publishing, UK, 2018); Crump, L., 'Conducting Field Research Effectively' (2020) 64(2) *American Behavioral Scientist* 198; Druckman, D., and W. Donohue, 'Innovations in Social Science Methodologies: An Overview' (2020) 64(1) *American Behavioral Scientist* 3; Seligmann, L. J., and B. P. Estes, 'Innovations in Ethnographic Methods' (2020) 64(2) *American Behavioral Scientist* 176.

researchers at any time, it is suggested that a range of systemic constraints on mediation research, in particular on empirical studies of mediation result in ongoing obstacles in terms of research about mediator effectiveness.

Above all, there is almost no investigation of mediator effectiveness or of the mediator's influence on the achievement of either simple or complex effectiveness. The outcome of the systematic appraisal is not unexpected. Research conducted and reported on in this thesis has referenced and reviewed researcher reports of systemic constraints on their work including the lack of conceptual and terminological clarity; limited access to appropriate and suitable study settings and participants; and widespread use of unreliable data collection methods. It could be said that the systematic appraisal has merely consolidated what researchers have already acknowledged.

Chapter Eight: The future

It was recently concluded that ‘almost any [mediator] behavior tends to engender agreements’.¹⁷⁷⁷ An analysis of the research about mediator effectiveness that is presented in this thesis suggests that the lack of information and research about mediator behaviour would not enable that conclusion to be drawn, nor indeed many others about the impacts of mediator behaviour on outcomes. However, the dynamic nature of interactions during any mediation is likely to be more complex than researchers have been yet been able to ascertain, and the mediator’s role, while being largely unexplored, is likely to be an important influence. A recent ethnographic investigation of restorative justice has confirmed the important influence of facilitator activities, including those that can be observed during a restorative justice conference, and those that are not observed, but which appear to influence all participants’ preparation for and participation in the conference.¹⁷⁷⁸

This Chapter presents responses to the Research Questions set out below and proposes research options that may assist in the investigation of what happens during mediation as well as in exploration of the role, actions, and influence of the mediator.

8.0. The Research Questions

One primary and four secondary Research Questions were posed in Chapter One of this thesis:

1. What is an effective, or “good”, mediator?
 - a. What are the attributes of “good” mediators?
 - b. What are the behaviours of “good” mediators?

¹⁷⁷⁷ Druckman, D., and J. A. Wall, ‘A Treasure Trove of Insights: Sixty Years of JCR Research on Negotiation and Mediation’ (2017) 61(9) *Journal of Conflict Resolution* 1898,1915.

¹⁷⁷⁸ Bruce, J., ‘Understanding “Back Stage” and “Front Stage” Work in Restorative Justice Conferences: The Benefits of Using Ethnographic Techniques’ (2018) 25(1) *Current Issues in Criminal Justice* 517.

- c. What do “good” mediators do well?
- d. What are the limitations of existing empirical studies of mediator effectiveness?

Chapters Three to Seven of this thesis have explored 47 selected empirical studies of mediation in terms of research issues and methodological, legal, social, and behavioural issues. Applying five methodologies (two thematically-based literature reviews;¹⁷⁷⁹ a systematic appraisal of those same selected studies and reported in three parts;¹⁷⁸⁰ a limited bibliometric analysis of those studies;¹⁷⁸¹ a targeted review of constraints on mediation research;¹⁷⁸² and an online survey of professional mediators),¹⁷⁸³ those Chapters have reported that the field of mediation research, in particular empirical studies of mediation, is constrained by a range of issues, including inadequate conceptual frameworks and terminologies,¹⁷⁸⁴ unreliable research methodologies, and a lack of recognition of researcher influence.¹⁷⁸⁵ Researches themselves have reported that, in addition, systemic constraints, such as the influence of research funders and publishers, affect their research choices.¹⁷⁸⁶

The outcomes and findings of the research supporting this thesis suggest that, based on the selected studies, the answer to the Research Questions is that it is not known what is an effective, or good, mediator. Nor is it known what are the attributes or the behaviours of a good mediator, nor what a good mediator does well. The research undertaken for this thesis suggests that there are two reasons for there being so little known about mediator effectiveness:

- The researchers have not studied what mediators do; and

¹⁷⁷⁹ See Chapter Three and Chapter Four.

¹⁷⁸⁰ See Chapter Five, Chapter Six, and Chapter Seven.

¹⁷⁸¹ See Chapter Seven.

¹⁷⁸² See Chapter Seven.

¹⁷⁸³ See Chapter Seven.

¹⁷⁸⁴ See Chapter Three and Chapter Four.

¹⁷⁸⁵ See Chapter Seven.

¹⁷⁸⁶ See Chapter Seven.

- The research approaches and methods described in the 47 selected studies (and in other mediation literature) have not produced credible research data or reliable study results and findings about what happens during mediation - providing the answer to the fourth secondary research question.

8.1. Future research: Alternative approaches and methods

It has been noted that, in many countries, when researchers in legal systems seek to evaluate the quality of processes, they tend to focus on efficiency measures and do not take into account the various qualitative contextual factors that influence the legal process (eg institutional and social contexts), and they do not take into account the potential influence of the preferences and ideologies of the evaluators.¹⁷⁸⁷ According to the research reported in this thesis, similar limitations may apply to investigations of mediation, and of the “quality” of mediator interventions. The rest of this Chapter explores some alternative research approaches and methods, focusing on those with the capacity for addressing the constraints on research that are described in Chapter Seven, as well as minimising, or even preventing, the problematic research issues identified throughout this thesis. It is not suggested that all existing mediation research approaches and methods be abandoned. Rather that some alternative approaches and methods might be explored as additional options for mediation researchers.

The options are presented and explored in the context of a proposed framework for mediation research that includes the reinforcement of its role in evaluating public policy and programs related to mediation. Suitable theoretical frameworks are proposed within which appropriate qualitative empirical methods can be developed, implemented, reported and published. Although no firm recommendations are included, the proposals have been considered in terms of their suitability, their feasibility, and their potential cost-effectiveness. Comparisons are also made

¹⁷⁸⁷ Bencze, M., and G. Y. Ng (eds), *How to Measure the Quality of Judicial Reasoning* (2019) 69 *Ius Gentium: Comparative Perspectives on Law and Justice*.

to research approaches and methods that are applied in similar fields of research, such as restorative justice.

8.1.1. Addressing research constraints

(a) *The public sphere*

Analysis of the 47 selected studies shows that they are dominated by investigations of publicly funded mediation programs and services,¹⁷⁸⁸ and, in Australia, the effectiveness of court-connected mediation can be measured by reference to a range of factors including the avoidance of wasted *public funds*.¹⁷⁸⁹ Although the domination by publicly funded mediation and public mediation programs and services is an acknowledged limitation to this thesis, such programs and services influence the broader practice and development of mediation and should remain an important consideration in any mediation research, and the public sphere is said to include all issues of public importance as well as critical social issues. Public policy in all fields has been described as being dominated by quantitative measures of its achievements which tend to be used for policy evaluations.¹⁷⁹⁰

It has been suggested that public policy cannot be properly evaluated using such quantitative methods whose focus is on revealing linear causation because they do not have the capacity to accommodate the unpredictable influences of context and setting or the idiosyncratic interests of affected communities: they cannot analyse how a public policy works, or why.¹⁷⁹¹ Public policy has been said to have three dimensions which any evaluation must take into account: the policy's meaning and how it is perceived in the community (including the influence of people's values and

¹⁷⁸⁸ For a description of that dominance, see Chapter Two of this thesis. See also Chapter Five and Chapter Seven.

¹⁷⁸⁹ Australian Law Reform Commission, *Rethinking the Federal Civil Litigation System* (Issues Paper 20, ALRC, 1998); see also Chapter Three of this thesis.

¹⁷⁹⁰ Flick, U., 'Hearing and Being Heard, Seeing and Being Seen: Qualitative Inquiry in the Public Sphere – Introduction to the Special Issue' (2020) 26(2) *Qualitative Inquiry* 135.

¹⁷⁹¹ Flick, U., 'Hearing and Being Heard, Seeing and Being Seen: Qualitative Inquiry in the Public Sphere – Introduction to the Special Issue' (2020) 26(2) *Qualitative Inquiry* 135; Maxwell, J. A., 'The Value of Qualitative Inquiry for Public Policy' (2020) 26(2) *Qualitative Inquiry* 177.

beliefs on their interpretations of policy); the policy's effectiveness in the various contexts and settings in which it operates; and the processes through which (ie how) the policy achieves its required results.¹⁷⁹² As public policy has a "public interest" component, any evaluation must engage with the public (in particular with those communities and end-users for whom it is most relevant) and be designed to suit the policy context as well as the unpredictable complexities of societal responses.¹⁷⁹³ It has also been suggested that, when evaluating public policy, researchers take into account not only the public perspective, but also any relevant institutional perspective, and political considerations.¹⁷⁹⁴

In summary, mediation research is likely to benefit from adopting a broader public policy and public issues focus so that simple quantitative measures are not adopted to determine effectiveness.

(b) Collaborative research networks

It is proposed that research about mediation will be enhanced by the development of collaborative researcher/end-user research relationships and networks – with potential participants including mediators, lawyers, public policy-makers, program administrators, and other researchers (including researchers from other disciplines). It would also be useful to include disputants and community members from a variety of sectors. Existing research and practice networks might be able to coalesce for this purpose.

Exploration of key effectiveness measures and mediator terminologies lend themselves to a collaborative research approach, in which researchers could engage with mediators from all sectors, perhaps using a grounded theory approach.¹⁷⁹⁵ Using such an approach has the potential to lead to the development and acceptance of common, though contextually differentiated, effectiveness

¹⁷⁹² Maxwell, J. A., 'The Value of Qualitative Inquiry for Public Policy' (2020) 26(2) *Qualitative Inquiry* 177.

¹⁷⁹³ Flick, U., 'Hearing and Being Heard, Seeing and Being Seen: Qualitative Inquiry in the Public Sphere – Introduction to the Special Issue' (2020) 26(2) *Qualitative Inquiry* 135.

¹⁷⁹⁴ Flick, U., 'Hearing and Being Heard, Seeing and Being Seen: Qualitative Inquiry in the Public Sphere – Introduction to the Special Issue' (2020) 26(2) *Qualitative Inquiry* 135

¹⁷⁹⁵ Grounded theory is considered in more detail below, see 8.2.2. Mediation research: overcoming limitations.

concepts and measures. Although they may not differ significantly from existing terms and measures, their contextual relevance will be confirmed rather than assumed. It is also possible that through their participation in collaborative research networks, policy-makers and program administrators might gain further insight into the value of qualitative and community-focused research approaches.

Researcher access to mediations

One constraint identified by mediation researchers relates to the confidentiality requirements that exist in mediation.¹⁷⁹⁶ Confidentiality can be supported by legislation, agreement or scheme guidelines, or even potentially implied in a mediation.¹⁷⁹⁷ Confidentiality requirements could be interpreted to mean that access to baseline data, access to observe a mediation and surveys of mediation participants cannot take place. Confidentiality requirements vary extensively and the range of legislative approaches can result in a lack of clarity for researchers even in terms of access to baseline data that might enable them to determine whether participants would consent to waive confidentiality requirements. All those involved in a mediation can be required to waive confidentiality protections for the purpose of any research and further study. Such waivers may require complex consent arrangements, likely imposing practical limits on researcher capacity for large group surveying that can reveal demographic and other differences in community use of mediation services.

On the one hand, the NMAS allows for confidentiality exceptions in situations ‘where non-identifying information is required for legitimate research, supervisory or educational purposes’,¹⁷⁹⁸ yet often mediator agreements, scheme guidelines and legislation do not allow for such exceptions. For example, in its *Judicial Mediation Guidelines*, the Supreme Court of Victoria specifies complete

¹⁷⁹⁶ See also Chapter Five and Chapter Seven.

¹⁷⁹⁷ For coverage of legislated confidentiality protections, see Sourdin, T., *Alternative Dispute Resolution* (6th Edition, Thomson Reuters, Australia, 2020).

¹⁷⁹⁸ NMAS, July 1925, Part III – Practice Standards, 9 Confidentiality, 9.1(b), available on <<https://msb.org.au/themes/msb/assets/documents/national-mediator-accreditation-system-2015.pdf#page=9>>.

confidentiality protection ‘of all that is said and done by any person in the course of the conduct of a mediation’ (apart from the requirements of the relevant *Evidence Act 2008*, and *Civil Procedure Act 2010*).¹⁷⁹⁹ From the perspective of mediation participants, the latter restrictions can be interpreted as meaning they would be in breach of the Guidelines if they were to participate in mediation research.

Researchers wishing to explore what happens during mediation do not seek to report on personal identifying information about disputants, or about their presenting disputes. It could be possible to enable access to mediations for research purposes if the NMAS wording (or similar wording) were to be included in judicial and other court guidelines, as well as in program/service policy documents and guidelines, and even in any “Agreement to Mediate” in which participants formally consent to take part in mediation. To support researcher access to mediation, some legislative amendments may also be necessary. Mediation participants might be further assured if the statements enabling research exceptions were worded in ways that ensured researcher responsibility for respecting and protecting relevant disputant and dispute privacy.

Gaining documented and legal support for mediation research could be a joint task for collaborative research networks, the Mediator Standards Board (which oversees the NMAS), and the Australian Dispute Resolution Advisory Council (ADRAC). It would also be strategically important to gain the early support of repeat player mediation participants, such as legal practitioners. Such an approach would create consistency between NMAS and various mediation practice guidelines, and, through system-wide endorsement of mediation research, it could have the additional benefit of enhancing wider confidence and interest in the work of mediation researchers.

(c) *Key concepts and terminology*

¹⁷⁹⁹ Supreme Court of Victoria, Practice Note SC Gen 6: *Judicial Mediation Guidelines*, 1 January 2020, No 6.1, available on <https://www.supremecourt.vic.gov.au/sites/default/files/2020-01/gen_6_-_judicial_mediation_-_web_3.pdf>.

In qualitative studies, researchers can use common or diverse terminology to describe their work; however, it has been suggested that they include clarification of how they have interpreted terms included in their own study.¹⁸⁰⁰ When considering key concepts and terminology in mediation, it may be that the use of terminology in relation to mediation effectiveness is contextual, in which case future research can be designed for exploring whether that might be so. Terminology in relation to the role and actions of mediators may also be contextual which could also be a future research focus. It would be an important contribution if the field of mediation can establish that its key concepts have different levels of emphasis/importance according to their context. By accepting and promoting contextual differentials in concepts and terms, collaborative research networks have the potential to confirm mediation commonalities rather than maintaining a historical perspective on what have been referred to as divisive concepts such as styles and models of practice.¹⁸⁰¹

(d) *Access to baseline and research data*

(i) *Online storage of baseline data*

Mediation researchers have acknowledged that one constraint on their work is their lack of ready access to baseline quantitative mediation data, such as the numbers of mediations occurring during any period in any sector or location, or in association with any court or tribunal. Through collaborative research networks, options could be explored for creating a curated online site for the storage of baseline data to be accessible by researchers. Pre-existing data storage websites may be able to host such an online data storage capacity to which public entities such as courts and tribunals could complete, say, monthly or quarterly uploads of generalised quantitative data related to their mediation referral and usage. Institutional mediation programs and services could upload similar

¹⁸⁰⁰ Levitt, H. M., M. Blamberg, J. W. Creswell, D. M. Frost, R. Josselson, and C. Suárez-Orozco, 'Journal Article Reporting Standards for Qualitative Primary, Qualitative Meta-Analytic, and Mixed Methods Research in Psychology: The APA Publications and Communications Task Force Report' (2018) 73(1) *American Psychologist* 26.

¹⁸⁰¹ McDermott, E. P., 'Discovering the Importance of Mediator Style – An Interdisciplinary Challenge' (2012) 5(4) *Negotiation and Conflict Management Research* 340.

generalised information about mediation usage to the same online storage facility, as could membership and professional organisations (though the latter would upload generalised information about mediation referrals and appointments rather than numbers of actual mediations).¹⁸⁰² The curated online storage and accessibility of such quantitative data would be a valuable information resource for informing qualitative studies of mediation.

(ii) Online storage of research data

A similar curated data storage facility could be established for the storage of researcher resources and data (eg the data accumulated in support of any qualitative study), with the two online storage facilities having a single host. The research database could be treated as either open access, or with access restricted to registered researchers. Researcher resources that could be included are survey instruments, outlines of data collection methods, and other resources that could accumulate over time into a collection of “best practice” researcher resources.

(iii) Online pre-process peer review

The same hosted online facility could be a repository for mediation researchers to submit their proposed research methodology for pre-process review, a review process that could include consideration and feedback prior to commencement of any intended study. Pre-process reviews could be stored in an online data base for future access by other researchers.

(e) *Publishing and publications*

It is important for mediation researchers and their publishers to recognise that how they conduct their research is at least as important as what they study.¹⁸⁰³ Mediation researchers (and researchers in other fields) have noted the constraining effects of publication requirements and,

¹⁸⁰² Perhaps organisations and services who upload baseline data could access collated versions of data, for a fee that contributes to the cost of maintaining the database.

¹⁸⁰³ Druckman, D., and W. Donohue, ‘Innovations in Social Science Methodologies: An Overview’ (2020) 64(1) *American Behavioural Scientist* 3.

because publications are accepted as a tangible measure of research activity, the pressure to produce them is unlikely to disappear. However, the nature and focus of publications can be more flexible. For example, it has been suggested that publishers expand the word limit of articles to enable inclusion of methodological information or, where that is impractical, that they require researchers to submit such information for the publishers to make available on a dedicated portion of the journal's website.¹⁸⁰⁴ In circumstances where, say, an online pre-process review has been completed (as per above), the submitted paper could reference that review and cite its accessibility. Where publication editors exclude methodological information from publication, researchers can make use of online publishing websites and upload a copy of the paper with a methodology attachment to the website of any of a number of online journals.¹⁸⁰⁵

An alternative approach is to promote the concept of so-called 'slow scholarship',¹⁸⁰⁶ an approach encouraged by a group of academics who claim to have drawn on the principles of the 'Slow Food' movement. Slow scholarship is a reaction to the "publish or perish" academic ethos and is said to focus on hesitation, thoughtfulness, attentiveness, and care. It is seen as the opposite of 'speedy scholarship'.¹⁸⁰⁷ Slow scholarship is reported to have international adherents whose work has been published in the disciplines of general science, social science, sports science, and library science, and, in the field of mediation research, might enable deeper consideration of the complexities inherent to the mediation process and the mediator's role.

(f) *Researcher reflexivity*

¹⁸⁰⁴ Levitt, H. M., M. Blamberg, J. W. Creswell, D. M. Frost, R. Josselson, and C. Suárez-Orozco, 'Journal Article Reporting Standards for Qualitative Primary, Qualitative Meta-Analytic, and Mixed Methods Research in Psychology: The APA Publications and Communications Task Force Report' (2018) 73(1) *American Psychologist* 26.

¹⁸⁰⁵ For example, see the Social Science Research Network (SSRN) website, available on <<https://www.ssrn.com/index.cfm/en/>>.

¹⁸⁰⁶ Bozalek, V., 'Slow Scholarship in Writing Retreats: A Diffractive Methodology for Response-able Pedagogies' (2017) 31(2) *South African Journal of Higher Education* 40, 44.

¹⁸⁰⁷ Bozalek, V., 'Slow Scholarship in Writing Retreats: A Diffractive Methodology for Response-able Pedagogies' (2017) 31(2) *South African Journal of Higher Education* 40, 44.

The 47 selected studies are noteworthy for their lack of reporting about researcher reflexivity. As noted in Chapter Seven, the inclusion of reflexivity tacitly acknowledges that absolute objectivity is impossible and thus demonstrates researchers' awareness of their own influence on every aspect of their work. The importance of transparent reflexivity, both during a study, and as part of its reporting, is widely recognised, especially for its capacity to enable readers to assess for themselves the credibility of research data, and the reliability and justifiability of the reported findings.^{1808 1809}

To encourage and support the inclusion of transparent acknowledgement of researcher influence in empirical studies of mediation, publishers could make it a requirement that submitted papers include at least a statement relating to the key elements of reflexivity.

8.1.2. Research approaches and methods

Recently, the research field of psychology has been the subject of criticism about its research approaches and methods.¹⁸¹⁰ In 2018, the American Psychological Association Publications and Communications Board Working Group on Journal Article Reporting Standards for Qualitative Research ('the Working Group') published a guide for researchers, reviewers and editors.¹⁸¹¹ In that guide, the authors suggest that the reporting standards which they outline are applicable across all social sciences. They describe the importance of qualitative research as an approach that is based on human activities and experiences and is not intended to confirm immutable 'natural laws' about

¹⁸⁰⁸ Bozalek, V., and M. Zembylas, 'Diffraction or Reflection? Sketching the Contours of Two Methodologies in Educational Research' (2017) 30(2) *International Journal of Qualitative Studies in Education* 111; Levitt, H. M., M. Blamberg, J. W. Creswell, D. M. Frost, R. Josselson, and C. Suárez-Orozco, 'Journal Article Reporting Standards for Qualitative Primary, Qualitative Meta-Analytic, and Mixed Methods Research in Psychology: The APA Publications and Communications Task Force Report' (2018) 73(1) *American Psychologist* 26.

¹⁸⁰⁹ Agential realism is a theoretical framework (see below) that goes beyond reflexivity, accepting the researcher role as a fully integrated and collaborative part of any research.

¹⁸¹⁰ Open Science Collaboration, 'Estimating the Reproducibility of Psychological Science' (2015) 349(6251) *Science* 943.

¹⁸¹¹ Levitt, H. M., M. Blamberg, J. W. Creswell, D. M. Frost, R. Josselson, and C. Suárez-Orozco, 'Journal Article Reporting Standards for Qualitative Primary, Qualitative Meta-Analytic, and Mixed Methods Research in Psychology: The APA Publications and Communications Task Force Report' (2018) 73(1) *American Psychologist* 26.

human behaviour,¹⁸¹² but to contribute knowledge that is contextually driven, including the researchers' contexts, the study context, and the participants' context.

Mediation researchers themselves have criticised the mediation field's continued use of unreliable data collection methods, and this thesis has reported similarly.¹⁸¹³ The proposals outlined in the next sections have been included for their capacity to prevent, or at least to minimise, the factors known to reduce data credibility, as well as for their capacity to enable in-depth investigation of what happens during mediation.

(a) *Theoretical frameworks*

Although sometimes overlooked, or bypassed, theoretical frameworks provide a philosophical structure through which research data can be explained and interpreted.¹⁸¹⁴ Mediation research does not yet appear to have a clear supporting theoretical framework and this section considers several options for its development. Generalised theoretical frameworks can be relatively simple, such as so-called reductionist theories that support relatively straight forward causal analysis of quantitative data. Qualitative research relies on more complex theoretical frameworks that can include positivist theories requiring that research data derive from direct observation and other experience; and systems theories that provide the framework for analysis of complex systems (ie those that are more complex than the sum of their parts), and complex adaptive systems. Complex adaptive systems can mutate (or adapt) and self-organise in response to events.¹⁸¹⁵ Examples of complex adaptive systems are climate analysis and traffic flow. This section considers three

¹⁸¹² Levitt, H. M., M. Blamberg, J. W. Creswell, D. M. Frost, R. Josselson, and C. Suárez-Orozco, 'Journal Article Reporting Standards for Qualitative Primary, Qualitative Meta-Analytic, and Mixed Methods Research in Psychology: The APA Publications and Communications Task Force Report' (2018) 73(1) *American Psychologist* 26, 29.

¹⁸¹³ See Chapter Seven.

¹⁸¹⁴ Ellen, R., 'Theories in Anthropology and "Anthropological Theory"' (2010) 16 *Journal of the Royal Anthropological Institute* 387.

¹⁸¹⁵ Ellen, R., 'Theories in Anthropology and "Anthropological Theory"' (2010) 16 *Journal of the Royal Anthropological Institute* 387.

theoretical frameworks relevant to qualitative research, and likely to enhance empirical studies of mediation.

(i) Grounded theory

Grounded theory is an iterative approach in that researchers gather data from study participants to inform the ongoing development of theories or hypotheses.¹⁸¹⁶ It is a qualitative research approach whose purpose includes the development of theories and hypotheses that are “grounded” in iterative, cyclic data analysis.¹⁸¹⁷ As one cycle of data is collected and analysed, it informs the next data collection cycle, and, as a result of constant comparative analysis of the accumulating data, a theoretical construct can be refined and developed.

Grounded theory is claimed to enable people (ie study participants) to describe their own lived experience in their own words without needing to comply with, or be guided by, the researcher’s own pre-conceptions and expectations.¹⁸¹⁸ Research based on grounded theory typically includes coding and categorisation of data as it is being collected – the categories being developed from the data. Because data interpretation and coding are necessarily influenced by the researcher’s own background knowledge, researchers using grounded theory are expected to include transparency and reflexivity in their reporting.

It is possible that grounded theory offers an approach for addressing conceptual and terminological clarity in the field of mediation (and in mediation research). For example, in future research, researchers could conduct semi-structured interviews with professional mediators and other end-users and stakeholders in a range of contexts and settings, seeking their views and

¹⁸¹⁶ Bryman, A., *Social Research Methods* (5th Edition, Oxford University Press, UK, 2016); Glaser, B. G., and A. L. Strauss, *The Discovery of Grounded Theory: Strategies for Qualitative Research* (Aldine Transaction, Transaction Publishers, USA, 1967); Maruyama, G., and C. S. Ryan, *Research Methods in Social Relations* (8th Edition, Wiley Blackwell, 2014).

¹⁸¹⁷ Lingard, L., M. Albert, and W. Levinson, ‘Grounded Theory, Mixed Methods, and Action Research’ (2008) 337a567 *BMJ* 459.

¹⁸¹⁸ Moustakim, M., ‘Restorative Youth Justice: A Grounded Theory Approach to Understanding its Benefits and Limitations’ (2017) *SAGE Research Methods Cases* 1.

interpretations of key terms such as “effectiveness”, mediator approaches and styles, and perceptions of the mediation process. Such an approach might clarify whether the use, meaning, and interpretation of concepts and terms is contextually dependent. Alternatively, collaborative research networks could collectively apply a grounded theory approach to their own examination of mediation terms and concepts.

(ii) Actor-Network Theory (A-NT)¹⁸¹⁹

Actor-Network Theory (A-NT) is a theoretical, conceptual, and analytical framework, as well as a methodological approach to empirical research that is held to enable examination of ‘the processes of the social world’,¹⁸²⁰ that has been applied in many research fields, including in the field of justice.¹⁸²¹ Devised in France, its focus is on the analysis of social relations, though with the inclusion of various non-human “actants” which are seen to be integral to the functioning of any given network.¹⁸²² The non-human actants can be any object, including telephones and computers, and they can also be a concept such as the internet; however, every non-human and human actant contributes actions to the network through attributed agency. Agency is attributed by those who analyse a network, and is exercised through actant actions. Where that attributed agency is exercised in unexpected ways, it is said to result in the actant leaving the network and joining in the creation of a new network with different actants.

¹⁸¹⁹ Actor-Network Theory is a complex conceptual and analytical framework which many continue to see as controversial, in particular its focus on power as a key constructive component of A-NT networks (for example, see below, Agential realism). This section does not explore the theory in full, and includes a fairly simplistic generalised summary of the theory’s key components and their potential relevance to some areas of mediation research.

¹⁸²⁰ Michael, M., *Actor-Network Theory: Trials, Trails and Translations* (SAGE Research Methods, 2018), 2 [of ‘Introduction’].

¹⁸²¹ Heinsch, M., T., Sourdin, C. Brosnan, and H. Cootes, ‘Death Sentencing by Zoom: An Actor-Network Theory Analysis’ (2020) (*pre-submission draft*).

¹⁸²² The term “actant” was adopted by LaTour because it was seen to have the capacity to describe human “actors” as well as non-human “actors” without using differential language. To use LaTour’s own explanatory example, while an actant can refer to any non-human object, it can also refer to a political belief, to a ‘corporate body’, to an individual, or to ‘a loose aggregate of individuals’ [LaTour, B., *Reassembling the Social: An Introduction to Actor-Network-Theory* (Oxford University Press, UK, 2005), 54. It can also refer to so-called ‘mundane technology’ [Michael, M., *Actor-Network Theory: Trials, Trails and Translations* (SAGE Research Methods, 2018), 5 (of ‘Introduction’)].

An Actor-Network is perceived to exist when a key, or prime, actor (or actant) is able to gain the committed alignment of other actants whose individual agency strengthens the network. A network is perceived to have failed when actants exercise unexpected agency elsewhere that dissociates them from the original network. The prime actant is seen to be the “power” holding the network together.

A foundational example of analysis using Actor-Network Theory examines the failure of a trial of sustainable scallop farming in France, in particular the integral importance of non-human actants in a network.¹⁸²³ The scallop farming experiment had been designed to improve long-term scallop harvests; however, the trial failed. A-NT analysis identified the actants in the network as being scallop fishermen, scallop farming nets, ocean activity (including ocean tides), the scallops themselves, and scallop larvae. The network also included the researchers overseeing the study who were the prime actors, drawing all the others into the network with a common aim of improving sustainable scallop farming. It was anticipated that scallop larvae would exercise their agency by attaching to farming nets in large numbers, and that scallop farmers would be judicious in their harvesting. A-NT analysis shows that the network failed when two actants exercised their agency in unexpected ways, resulting in their dissociation from the network: ocean tides prevented sufficient numbers of scallop larvae from growing on the nets, and the fishermen continued to overfish the bay.¹⁸²⁴

It has been suggested that buildings can be actants in A-NT analysis, as in a study that examined the influences on continued Unionist-Republican antagonism in Northern Ireland.¹⁸²⁵ In the analysis, network actants were identified as being Unionists and Republicans; however,

¹⁸²³ LaTour, B., *Reassembling the Social: An Introduction to Actor-Network-Theory* (Oxford University Press, UK, 2005); Michael, M., *Actor-Network Theory: Trials, Trails and Translations* (SAGE Research Methods, 2018), 5 (of ‘Introduction’).

¹⁸²⁴ LaTour, B., *Reassembling the Social: An Introduction to Actor-Network-Theory* (Oxford University Press, UK, 2005); Michael, M., *Actor-Network Theory: Trials, Trails and Translations* (SAGE Research Methods, 2018).

¹⁸²⁵ Neill, W. J. V., ‘Beyond the Balm of Communicative Planning: Can Actor-Network Theory Insights and a More Agonistic Practice Help Unlock “Post Conflict” Potential?: Towards a Renewed Research Horizon in Northern Ireland’ (2017) 32(3) *Planning Practice & Research* 319.

additional actants were identified as key buildings: the Maze Prison (a key Republican monument) and the Titanic shipyards (a key Unionist monument), both of which are imbued with their adherents' emotional history. The analysis shows that the existence of both buildings is key to maintaining the people's antagonism and it could be said that both buildings exercise agency through that emotional history. The analysis suggests that, by combining the two buildings into a single monument, their separate agency can be combined into a single actant incorporating their joint agency.

A recent example of A-NT analysis in a legal context demonstrates the importance of an actant that is an apparently mundane and ubiquitous technology such as a device for accessing the internet and its video communications software.¹⁸²⁶ The analysis explores the relationships between technology and humans in the specific context of death sentencing in the justice system. During the social restrictions enforced through the virus, SARS-CoV-2, and its associated coronavirus disease, Covid-19, some courts have introduced virtual hearings with attendance via computer or by telephone. Of particular concern are instances where death sentences have been delivered via Zoom. The researchers report that using A-NT analysis, they were able to show that Zoom's exercise of agency may have detracted from the import of the process of issuing a death sentence with possible additional emotional effects for the sentenced prisoner.¹⁸²⁷ There is a similar possibility of additional emotional effects for the sentencing judge.

A-NT seeks to analyse what exists and does not seek either linear causality or rightness/wrongness. Through its incorporation of human and non-human actors, in future

¹⁸²⁶ Heinsch, M., T., Sourdin, C. Brosnan, and H. Cootes, 'Death Sentencing by Zoom: An Actor-Network Theory Analysis' (2020) (*pre-submission draft*).

¹⁸²⁷ The analysis does not include as network actants the court building or the prison building; however, each of these could exercise agency that reinforces or subverts the network. For example, the agency of the prison building may give "prisoner" identity to the person being sentenced and the agency of the court building may give authority to the sentencing judge. Additional actants with agency could include prison guards present in the room with the prisoner, perhaps a lawyer, and perhaps even a family member. Not being present in the formality of a court room may cause family members to exercise their agency in unexpected ways, creating a new network within the prison room that still includes the electronic device and the Zoom software.

research, A-NT analysis may offer a method for examining lines of influence in mediation. For the purpose of such an analysis, network actants could be identified as being humans (eg mediator, disputants, and disputant advisers), as well as non-humans, such as the court setting, the dispute context, the mediation venue (in particular where non-human factors are likely to exercise agency in such a network), enabling investigations of internal and external lines of influence during mediation.

(iii) Agential realism

Agential realism, too, focuses on what “is”, as well as the perpetual state of “becoming”, and has no concerns with cause-effect or right and wrong. It is being increasingly used to investigate complex social situations and their influences on human behaviour. The theory was developed by a US-based physicist and derives from quantum physics.¹⁸²⁸ In summary all “things” (or agents) exist only through their intra-actions with other agents. An agent can be any human or non-human and can include concepts such as time and space, while “Intra-action” refers to agents’ constant and cooperative state of exchange and influence between and among each other, producing observable phenomena.¹⁸²⁹ Rather than linear concepts such as cause and effect, the theory postulates that, through constant intra-actions, everything exists in a perpetual state of ‘becoming’.¹⁸³⁰ According to the theory, researcher objectivity is an impossibility because the researchers, as well as their research techniques and instruments, are as much part of the study as are the designated participants. While A-NT analysis is based on an actant’s attributed assertion of power in any network, agential realism looks only at what “is”, without any assumption or interpretation. There has been some comparison of agential realism and reflexivity and, while the latter is acknowledged for developing researcher consideration of their own influence over their work, it is seen to be limited in that its perceptions are necessarily from the same viewpoint (ie the self), and they tend to

¹⁸²⁸ Barad, K., *Meeting the Universe Halfway: Quantum Physics and the Entanglement of Matter and Meaning* (Duke University Press, USA, 2007).

¹⁸²⁹ Josephson, B. D., ‘A Structural Theory of Everything’ (2019) 15(1) *Cosmos and History: The Journal of Natural and Social Philosophy* 225.

¹⁸³⁰ Barad, K., *Meeting the Universe Halfway: Quantum Physics and the Entanglement of Matter and Meaning* (Duke University Press, USA, 2007), e-book 31 Chapter Four.

occur in isolation, taking only humans into account. Agential realism is seen to be more focused on engagement with all the entanglements of all agents (human and non-human), accepting all viewpoints and the intra-actions among them, and observing how they build on and through each other.¹⁸³¹

In addition to intra-action, key terms in agential realism include “entanglement” and “diffraction”. Put simply, the concept of entanglement is a reference to all things/agents being constantly and inseparably intra-acting with each other (ie entangled) and the impossibility of any separate, or independent, existence: ‘Existence is not an individual affair. Individuals do not preexist their interactions; rather, individuals emerge through and as part of their entangled intra-relating.’¹⁸³² The theory’s concept of “diffraction” derives from the observed behaviour of light waves, and refers to the ways in which, say, insights, appear through one another, and illuminate one another, or to the acceptance that ‘Each moment is an infinite multiplicity’.¹⁸³³ It has been suggested that, despite its apparent implausibility, agential realism is analogous to the complex intra-active and cooperative entanglements that typify human neural networks and produce observable human activity and behaviour.¹⁸³⁴ It has also been suggested that the concept of agential realism may underlie the function of complex systems.¹⁸³⁵

Three research examples illustrate the value of unexpected insights that are achievable through the application of agential realism. In one study, researchers sought to investigate potential influences on widely reported incidents of ‘school girls’ (ill)health’ in Sweden.¹⁸³⁶ The researchers

¹⁸³¹ Bozalek, V., and M. Zembylas, ‘Diffraction or Reflection? Sketching the Contours of Two Methodologies in Educational Research’ (2017) 30(2) *International Journal of Qualitative Studies in Education* 111.

¹⁸³² Barad, K., *Meeting the Universe Halfway: Quantum Physics and the Entanglement of Matter and Meaning* (Duke University Press, USA, 2007), e-book 1 Preface and Acknowledgements.

¹⁸³³ Barad, K., ‘Diffracting Diffraction: Cutting Together-Apart’ (2014) 20(3) *Parallax* 168, 169.

¹⁸³⁴ Josephson, B. D., ‘A Structural Theory of Everything’ (2019) 15(1) *Cosmos and History: The Journal of Natural and Social Philosophy* 225.

¹⁸³⁵ Josephson, B. D., ‘A Structural Theory of Everything’ (2019) 15(1) *Cosmos and History: The Journal of Natural and Social Philosophy* 225.

¹⁸³⁶ Taguchi, H. L., and A. Palmer, ‘A More “Livable” School? A Diffractive Analysis of the Performative Enactments of Girls’ Ill-/Well-Being with(in) School Environments’ (2013) 25(6) *Gender and Education* 671, 674.

sought to identify how the intra-actions within a complete school environment (including all its agents) might influence the girls' mental and physical health and well-being. The findings from a necessarily complex research design suggests that the schoolgirls' changeable and varying states of ill-health and well-being are not individually-based and arise from collective multiple intra-actions that occur within and among the school environment. According to the researchers, the findings removed the focus and responsibility from each girl, and enabled a broad examination of the school environment and all the complex agential intra-actions that are influential within it.

A second complex, randomised controlled study sought to prevent falls in hospitalised older people.¹⁸³⁷ The researchers report that it was only through the application of agential realism that they were able to gain insights into the inadequacies of their own study, as well as into the many agential intra-actions within the hospital environment that influence informal targeted care of patients. They note that the inclusion of randomisation derives from a need for objective measures, and is intended to produce clear delineation of cause and effect, and thus requires inflexible research methods that treat all key study components (including participants) as inflexible and their various actions as predictable. In their analysis, the researchers found that the study environment (ie the hospital) was one in which there were constant unpredictable intra-actions among all agents. The researchers conclude that their application of an agential realist approach enabled their insights into what might otherwise have been reported as a research "failure" (ie their randomly allocated emergency buzzers had no effect of the incidence of hospital falls among older hospitalised patients, or on nurse responses to them).

A third study describes a comparative analysis of how researchers and their work might be affected by reflexive and diffractive approaches.¹⁸³⁸ The analysis has two parts, one involving an

¹⁸³⁷ Timmons, S., P. Vezyridis, and O. Sahota, 'Trialling Technologies to Reduce In-Patient Falls: An Agential Realist Analysis' (2019) 41(6) *Sociology of Health & Illness* 1104.

¹⁸³⁸ Bozalek, V., and M. Zembylas, 'Diffraction or Reflection? Sketching the Contours of Two Methodologies in Educational Research' (2017) 30(2) *International Journal of Qualitative Studies in Education* 111; the two groups were not established for the purpose of the comparative study.

international academic reading and research group, and the other involving a reflective research group. The authors are in both groups. The reading and research group is not co-located and communicates using various internet technologies. It jointly considers key works from the agential realism field, which are read between and during group meetings, and discussed during meetings. The reflective research group has a different membership, and its key activity is for each member to maintain a weekly written journal in which they examine their own motivations when, during the week, they act to encourage equal participation in classes. The researchers conclude that the reading group is more fulfilling for them because it emphasises intra-active entanglement, engagement and “presentness”, while the journal group is less fulfilling because it emphasises individual hindsight and separation from the group itself.

It has been observed that agential realism incorporates an ethical approach by assuming inherently responsible participation in intra-actions and engagement with the world – it does not seek to assert dominance or control.¹⁸³⁹ It could be said that, agential realism’s capacity for revelation of so many unexpected and unpredictable participatory intra-actions and influences, makes it the reverse of traditional linear causal analysis. If future mediation research were to work within the theoretical framework of agential realism, it would have the potential to patiently investigate all the complex, dynamic inter-relationships and influences at play during mediation.

(b) Alternative research methods

There seems little doubt that qualitative research approaches afford the most suitable means of investigating what happens during mediation. Qualitative research has been said to be distinguished by its capacity for dealing with the complexities of human behaviour, for identifying

¹⁸³⁹ Barad, K., *Meeting the Universe Halfway: Quantum Physics and the Entanglement of Matter and Meaning* (Duke University Press, USA, 2007); Bozalek, V., and M. Zembylas, ‘Diffraction or Reflection? Sketching the Contours of Two Methodologies in Educational Research’ (2017) 30(2) *International Journal of Qualitative Studies in Education* 111; Scottish Graduate School of Social Science, University of Stirling, Scotland (2016), available on <<https://www.sgsss.ac.uk/methods-resource/socio-material-approaches/>>.

iterative patterns in that behaviour,¹⁸⁴⁰ and for its capacity to explore people's intentions and their interpretations of their own lives and life events.¹⁸⁴¹ These are all likely to be key factors in future investigations of how mediation works, and why.

This section explores recent applications of innovative survey techniques, as well as ethnographic research approaches and methods. Ethnography is likely to enable in-depth investigation of how and why mediation works, particularly when combined with other inclusive approaches and the use of technology.

(i) Innovative survey methods

As explored in Chapters Five and Six, the use of surveys can be for the purpose of obtaining information from mediator participants and non-mediator participants (including disputants and their legal advisors), and the surveys can seek information about what happened during mediation (including information about the mediator, the process, the disputants, and their presenting dispute).

Recently trialled survey methods have investigated aspects of the legal sector using nuanced survey instruments and analysis approaches, which could have applicability in the context of mediation. In both sets of studies, applying psychometric modelling and techniques in the design of the survey instruments appears to have avoided at least the risks of social desirability and deference effects.¹⁸⁴²

Surveys of non-mediator participants (disputants)

¹⁸⁴⁰ Levitt, H. M., M. Blamberg, J. W. Creswell, D. M. Frost, R. Josselson, and C. Suárez-Orozco, 'Journal Article Reporting Standards for Qualitative Primary, Qualitative Meta-Analytic, and Mixed Methods Research in Psychology: The APA Publications and Communications Task Force Report' (2018) 73(1) *American Psychologist* 26.

¹⁸⁴¹ Maruyama, G., and C. S. Ryan, *Research Methods in Social Relations* (8th Edition, Wiley Blackwell, 2014).

¹⁸⁴² See Chapter Seven for information about social desirability and deference effects.

Two innovative surveys, conducted as part of a single larger research project in Great Britain, sought to investigate general community attitudes towards the civil justice system,¹⁸⁴³ and people's sense of their own 'general legal confidence'.¹⁸⁴⁴ Drawing on research in other fields, the researchers applied psychometric modelling to the design and analysis of their survey instruments seeking to establish reliable measures for such concepts as 'trust', 'respect', 'fairness', and 'equity'.¹⁸⁴⁵ In both studies, they subjected survey results to the complex Rasch analysis technique. In their second study, the same researchers equated legal confidence with 'knowledge of law, the ability to spot legal issues, awareness of legal services, understanding of and the ability to assess dispute resolution options, planning and management skills, communication skills, confidence and emotional fortitude',¹⁸⁴⁶ and drew on advances in other fields for the measurement of attitudinal intangibles, such as 'self-efficacy', or personal traits, such as confidence.¹⁸⁴⁷ Both studies have clear relevance to future mediation research that seeks to investigate disputant perceptions of and responses to mediation, and it may be possible to develop survey methods based on them. They could also be a guide for using surveys to explore disputants' attitudinal responses to mediation.

Surveys of mediator participants

Research currently being reported in Australia is exploring judicial well-being and 'work-related stress', using a combined quantitative and qualitative approach in which a participant survey obtains quantitative data and semi-structured interviews of participants for obtaining qualitative

¹⁸⁴³ Pleasence, P., and N. Balmer, 'Measuring the Accessibility and Equality of Civil Justice' (2018) August 2018 *The Hague Journal on the Rule of Law* 1.

¹⁸⁴⁴ Pleasence, P., and N. Balmer, 'Development of a General Legal Confidence Scale: A First Implementation of the Rasch Measurement Model in Empirical Legal Studies' (2019) 16(1) *Journal of Empirical Legal Studies* 143, 143.

¹⁸⁴⁵ Pleasence, P., and N. Balmer, 'Measuring the Accessibility and Equality of Civil Justice' (2018) August 2018 *The Hague Journal on the Rule of Law* 1, 22/40.

¹⁸⁴⁶ Pleasence, P., and N. Balmer, 'Development of a General Legal Confidence Scale: A First Implementation of the Rasch Measurement Model in Empirical Legal Studies' (2019) 16(1) *Journal of Empirical Legal Studies* 143, 144.

¹⁸⁴⁷ Pleasence, P., and N. Balmer, 'Development of a General Legal Confidence Scale: A First Implementation of the Rasch Measurement Model in Empirical Legal Studies' (2019) 16(1) *Journal of Empirical Legal Studies* 143, 148.

data.¹⁸⁴⁸ The survey was designed using recognised psychometric measures of relatively intangible emotional indicators, such as satisfaction, stress, and anxiety. The interview questions focused on perceptions of judicial stress, and, subsequently, were thematically analysed and coded. The preliminary results of the study suggest that similar methods may be usefully applied in investigations of mediator responses to their own roles.

Although the described innovative survey designs may have limited utility in investigating the effectiveness of mediation or of mediators, they do have the potential to provide valuable insights into disputant perceptions of mediation, and into how the mediator role affects those who exercise it.

(ii) Collaborative research approaches

Collaborative research approaches can be beneficial to empirical studies of mediation by: avoiding some of the complex power differentials (eg researcher vs participant) and ethical problems (eg researcher influence) that can affect the reliability of results and findings reported in mediation research; limiting the influence of social desirability and deference effects; and giving researchers access to in-depth research data. These are achieved by engaging study participants (eg mediators and non-mediators) in the research. Collaborative research approaches include participatory action research (also called ‘inclusive research’¹⁸⁴⁹), which was mentioned in Chapter Five of this thesis.

Participatory action research

¹⁸⁴⁸ Shrever, C., C. Hulbert, and T. Sourdin. ‘The Psychological Impact of Judicial Work: Australia’s First Empirical Research Measuring Judicial Stress and Wellbeing’ (2019) 28 *Journal of Judicial Administration* 141, 142.

¹⁸⁴⁹ Fielding, N., ‘Critical Qualitative Research and Impact in the Public Sphere’ (2020) 26(2) *Qualitative Inquiry* 142, 150.

Participatory action research (PAR) is a recognised approach in which study participants are treated as co-researchers, or collaborators.¹⁸⁵⁰ They are part of the research team and help design, conduct, and assess studies, including helping with the choice of what data is to be collected as well as how that will happen (ie data collection methods); however, the researcher retains overall authority over the study.¹⁸⁵¹ In a study conducted in Africa, participation in the research is reported to have enhanced commitment to peace-sustaining initiatives developed as part of the research.¹⁸⁵²

In Australia, Citizen Science is a form of PAR in which members of the community can volunteer to participate in and contribute to research projects by collecting and submitting their own data, using technologies such as phone apps and internet blogs.¹⁸⁵³ Current projects include: investigations of the effects of temperature and rainfall variations on seasonal changes;¹⁸⁵⁴ monitoring urban wetlands and investigating volunteer engagement;¹⁸⁵⁵ monitoring bushfire recovery;¹⁸⁵⁶ and exploring the social and personal impacts of social restrictions associated with Covid-19.¹⁸⁵⁷

In terms of empirical studies of mediation, collaborative research networks might have the capacity to enlist lawyers in PAR investigations of the role and influence of repeat players in mediation. Citizen Science offers mediation researchers a platform for the collection of citizen data on attitudes to conflicts and disputes.

(iii) Ethnography

¹⁸⁵⁰ Carpenter, D., 'Ethics, Reflexivity and Virtue' in R. Iphofen and M. Tolich (eds), *The SAGE Handbook of Qualitative Research Ethics* (SAGE Publishing, UK, 2018).

¹⁸⁵¹ Seligmann, L. J., and B. P. Estes, 'Innovations in Ethnographic Methods' (2020) 64(2) *American Behavioral Scientist* 176.

¹⁸⁵² Firchow, P., *Reclaiming Everyday Peace: Local Voices in Measurement and Evaluation After War* (Cambridge University Press, UK and USA, 2018).

¹⁸⁵³ See <<https://citizenscience.org.au/>>.

¹⁸⁵⁴ In association with the Earthwatch Institute.

¹⁸⁵⁵ In association with Flinders University.

¹⁸⁵⁶ In association with the Blue Mountains World Heritage Institute.

¹⁸⁵⁷ In association with the University of Sydney.

As a research methodology, ethnography may be the most appropriate for investigating what happens during mediation. When researchers are “embedded” and participate in the context and setting of their study, with their study participants, they can access much richer data about power differentials, norms, and the changing dynamics of human interactions. Recent developments in ethnography include short-term field-work, the incorporation of technology and social media, the inclusion of participatory and collaborative approaches, and combined methods (such as observations combined with in-depth interviews). Where ethnographic studies are conducted on multiple sites, they offer valuable opportunities for comparative analysis. As noted in Chapter Seven, there is a growing body of researchers and commentators who recommend that empirical studies of mediation include ethnographic techniques.¹⁸⁵⁸

One key issue relevant to ethnographic approaches and methods is the need to ensure that studies are socially accountable, in particular to their end-users and other stakeholders who are affected by the research and its outcomes, and that researchers and others continue to treat them as ‘responsible scientific investigation’.¹⁸⁵⁹ Making research reports available in plain English and through forums other than academic journals (eg through the curated online facility mentioned earlier) enhances social accountability and the inclusion of transparency in research reports and published articles contributes to scientific responsibility.

Embedded ethnography

Embedded ethnography has been applied in the study of mediation.¹⁸⁶⁰ In a key study conducted in Great Britain, the researcher embedded herself in the study mediation community by

¹⁸⁵⁸ For example, see Crampton, A., ‘Escape from the Laboratory: Ethnographic Methods in the Study of Elder and Family Court Mediation’ (2016) 32(3) *Negotiation Journal* 191; Davidheiser, M., ‘Race, Worldviews, and Conflict Mediation: *Black and White Styles of Conflict Revisited*’ (2008) 33(1) *Peace and Change* 60; De Girolamo, D., *The Fugitive Identity of Mediation: Negotiation, Shift Changes and Allusionary Action* (Routledge, UK, 2013); Druckman, D., and W. Donohue, ‘Innovations in Social Science Methodologies: An Overview’ (2020) 64(1) *American Behavioural Scientist* 3.

¹⁸⁵⁹ Druckman, D., and W. Donohue, ‘Innovations in Social Science Methodologies: An Overview’ (2020) 64(1) *American Behavioural Scientist* 3, 11.

¹⁸⁶⁰ De Girolamo, D., *The Fugitive Identity of Mediation: Negotiation, Shift Changes and Allusionary Action* (Routledge, UK, 2013).

taking a volunteer staffing position at a mediation agency for twelve months, and making herself available to attend mediations (where all participants consented) as a mediator participant-observer.¹⁸⁶¹ In each subject mediation, she co-mediated with the appointed mediators.¹⁸⁶² Being an active staff member gave her access to the organisational culture, the social context, and the philosophical outlook within which the mediators operated. Attending mediations as a participant gave her access to in-depth information about what happened during the mediations, including the changing dynamics and the variety of mediator actions. A key drawback that she notes is the difficulty in observing all that was happening during the mediation when she herself was actively mediating and concentrating on the demands of that role. Artificial intelligence has a refined capacity for contributing to ethnographic studies through augmented observation and through analysis of human speech.

Embedded ethnography has also been applied successfully in Great Britain as an approach for building research partnerships between police and research institutions.¹⁸⁶³

Collaborative ethnography

Collaborative ethnography is similar to PAR in that researchers engage with study participants and seek their contributions to the design and conduct of the ethnographic study they are undertaking. The researcher does not impose their own views or preferences, and the full engagement of participants ensures that the research data is enriched by ongoing access to participant developments during the study including changes in power relationships and levels of participation.¹⁸⁶⁴

¹⁸⁶¹ The study required a complex sequence of ethics approvals and participation/observation consents, all being described in the report of the study.

¹⁸⁶² Unbeknown to the non-mediator participants, her mediator role was quite limited so she could observe the mediation.

¹⁸⁶³ Lumsden, K., and J. Goode, 'Public Criminology, Reflexivity and the Enterprise University: Experiences of Research, Knowledge Transfer Work and Co-Option with Police Forces' (2018) 22(2) *Theoretical Criminology* 243.

¹⁸⁶⁴ Seligmann, L. J., and B. P. Estes, 'Innovations in Ethnographic Methods' (2020) 64(2) *American Behavioral Scientist* 176.

Ethnography in restorative justice

Research in the field of restorative justice has confirmed that conferences produce outcomes that are satisfactory to all participants; however, such studies have been said to lack a capacity for investigating what actually happens during restorative justice conferences.¹⁸⁶⁵

Two studies demonstrate the capacity of ethnography to reveal more about how and why the conferences produce their outcomes.¹⁸⁶⁶ Both studies use a combination of observations, in-depth interviews, and case file data to investigate what happens during a conference. In one study, the results are reported to have provided insights into what happens during a restorative justice conference, in particular from a victim's perspective. In the other, the results are reported to have provided valuable insights into how and why the conferences "work" and, in particular, the key role of conference facilitators in preparing all participants for conference participation, as well as their active role throughout a conference.

Innovations to enhance ethnographic practice

Recent developments in ethnographic practice are likely to improve its feasibility as a research method,¹⁸⁶⁷ in particular for empirical studies of mediation. For example, an ethnographic study can include short-term investigations at more than one research site, enabling comparative studies of contextual influences, as well as exploration of complex systemic issues that may not otherwise be accessible. Ethnography can also incorporate a systems approach in which mediators and other stakeholders are consulted about key process factors such as lines of influence during mediation, with the resulting information being presented in the form of a causal loop diagram. Causal loop

¹⁸⁶⁵ Bruce, J., 'Understanding "Back Stage" and "Front Stage" Work in Restorative Justice Conferences: The Benefits of Using Ethnographic Techniques' (2018) 25(1) *Current Issues in Criminal Justice* 517.

¹⁸⁶⁶ Bolitho, J., 'Putting Justice Needs First: A Case Study of Best Practice in Restorative Justice' (2015) 3(2) *Restorative Justice* 256; Bruce, J., 'Understanding "Back Stage" and "Front Stage" Work in Restorative Justice Conferences: The Benefits of Using Ethnographic Techniques' (2018) 25(1) *Current Issues in Criminal Justice* 517.

¹⁸⁶⁷ Seligmann, L. J., and B. P. Estes, 'Innovations in Ethnographic Methods' (2020) 64(2) *American Behavioral Scientist* 176.

diagrams can depict the dynamic, responsive and unpredictable aspects of human interactions, and have been used to analyse the human systems associated with the achievement of sustainable peace, suggesting the approach may enhance any investigation of what happens during mediation.¹⁸⁶⁸

Well-designed ethnographic studies can incorporate so-called ‘digital ethnographic methods’, such as the “observation” of online activity on, say, chat blogs, and social media messaging.¹⁸⁶⁹ The 47 selected studies that have been the focus of this thesis include data collection through the use of technology (ie audio-recordings and video-recordings); however, ongoing technological and software advances mean that, in future mediation research, technology such as artificial intelligence (AI) could be enlisted to assist in observing mediations and to contribute to analysis of verbal and non-verbal components of what people say during mediation. Naturally, any use of digital methods and technologies would require additional and, likely, complex ethical approvals.

(iv) Analysing terminology and language

There is also scope for in-depth analysis of the terminology and language used in mediated agreements, and how they might reflect what happened during the mediation, as well as the cultural context and setting in which they are created. Such studies can provide valuable and unexpected insights into the mediation process that preceded the agreement. A recently published Nordic exploration of the language (ie words and terms) used in mediated agreements applied three types of analysis: qualitative content analysis (seeking key elements of agreement); a quantitative creativity analysis (including a coding scheme for creativity,¹⁸⁷⁰ and quantitative data about the parties to the mediation, the duration of the mediation, and the nature of the presenting dispute);

¹⁸⁶⁸ Liebovitz, L. S., P. T. Coleman, and J. Fisher, ‘Approaches to Understanding Sustainable Peace: Qualitative Causal Loop Diagrams and Quantitative Mathematical Models’ (2020) 64(2) *American Behavioral Scientist* 123.

¹⁸⁶⁹ Analysis of online blogs can also contribute to the field of research itself; for example, analysis of blogs submitted to a researcher website may reveal information about research trends that has more immediacy than the trends revealed by journal publications.

¹⁸⁷⁰ The researchers report that they each maintained a coding logbook throughout the study in which they each recorded coding procedures and any discussions about the coding of specific items.

and a quantitative linguistic analysis, seeking linguistic patterns. The reported outcomes of the study show that around two thirds of the agreements met the creativity measures; however, they also found that the agreements were dominated by legal and administrative language which, according to the applied Readability Test, was categorised as “difficult” (ie that the disputants were unlikely to have fully understand the terms to which they had agreed).¹⁸⁷¹ The researchers suggest this may mean that, although disputants may exercise self-determination during the mediation (as demonstrated through the other two measures), they appear to have limited opportunity to exercise their self-determination during the writing of the mediated agreements.

A separate study designed to demonstrate the application of automated text analysis software, analysed the language used in public statements and interviews by the Israeli and Palestinian delegations during the several months of negotiations leading to the Oslo I Peace Accords in 1993.¹⁸⁷² The language analysis revealed distinct patterns in issues development for both sides, as well as changes in their style of language as they drew closer to agreement in the Accords (ie their public language became less antagonistic).

Future mediation research could use both studies as templates for comparative analysis of the terms and language in mediated agreements across different contexts and settings; and for analysis of changes in the use of terms and concepts during the mediation process. Noting that the language in mediated agreements can be revealing of what happened during a mediation, and that analysis of people’s spoken language can track conciliatory developments, such studies could contribute to understanding about mediator influence and effectiveness.

(v) Technology-assisted and technology-based research

¹⁸⁷¹ Adrian, L., and S. Mykland, ‘Unwrapping Court-Connected Mediation Agreements’ in A. Nylund, A. K. Ervasti, and L. Adrian (eds), *Nordic Mediation Research* (Springer Open, 2018).

¹⁸⁷² Donohue, W. A., Q. Hao, R. Spreng, and C. Owen, ‘Understanding the Role of Language in Conflict’ (2020) 64(1) *American Behavioral Scientist* 97.

Technology can be used in mediation research for data collection, data analysis, and to assist in ethnographic studies. There are many online platforms that can facilitate so-called data mining (ie analysis of large scale online data).¹⁸⁷³ One benefit of online textual data analysis is the removal of the researcher's subjective influence (apart from choice of analysis terms). Comparative textual analysis can be simplified using automated methods, although it does rely on the quality of the subject data.¹⁸⁷⁴ Specific software enables textual analysis of so-called 'microposts' and 'microblogs' (eg Twitter and Instagram);¹⁸⁷⁵ however, researchers need to remain aware that the nature of different types of online media is likely to affect how they are used.¹⁸⁷⁶ Analysis of online research blogs might reveal useful information about trends in research topics. As with Australia's Citizen Science, microposts can be used in participant action research, as well as being a data collection component in any empirical study. Online messaging technology can also be used to access potential study participants who are located away from main centres.

(vi) Data coding

Two limitations associated with the coding of research data are the exclusion of some data, and the loss of contextual information.¹⁸⁷⁷ A recently reported coding procedure applied to thematic analysis, avoided both limitations by allocating colours to themes *in situ* rather than disjointing documents for analysis.¹⁸⁷⁸ To analyse study participant interviews (which had been transcribed), a colour was allocated to each theme and, within each transcript, sections related to that theme were given an appropriately coloured font. For example, one colour was allocated to

¹⁸⁷³ Kliegr, T., S. Bahník, and J. Fürnkranz, 'Advances in Online Learning for the Behavioral Sciences' (2020) 64(2) *American Behavioral Scientist* 145.

¹⁸⁷⁴ See Chapter Two for an explanation of why automated data analysis was not appropriate for this research, and see Chapter Seven for further information about some limitations of automated online data analysis.

¹⁸⁷⁵ Kliegr, T., S. Bahník, and J. Fürnkranz, 'Advances in Online Learning for the Behavioral Sciences' (2020) 64(2) *American Behavioral Scientist* 145, 146.

¹⁸⁷⁶ Seligmann, L., and B. P. Estes, 'Innovations in Ethnographic Methods' (2020) 64(2) *American Behavioral Scientist* 176.

¹⁸⁷⁷ See Chapter Six of this thesis.

¹⁸⁷⁸ Scottish Graduate School of Social Science, University of Stirling, Scotland (2016), available on <<https://www.sgsss.ac.uk/methods-resource/socio-material-approaches/>>.

“human relations”, another colour to “technological practices”, and a third colour to “technological devices”. It was reported that themes were readily identifiable throughout each transcript, and, importantly for the researcher, they retained their contextual setting. The researcher also reported that she always had access to the complete transcript.¹⁸⁷⁹ It is worth noting that the study was conducted within an agential realism framework and the coding procedure made it easier to track intra-actions within the study setting.

This coding procedure could enrich the analysis of data from empirical studies of mediation where there is complex observational data or in-depth interview data, in particular where it is important to consider contextual factors.

This section has proposed some research approaches and methods for future mediation research that do not need to be resource-intensive, that have practical feasibility for mediation researchers, and that are likely to clarify the concepts and terms that are used in mediation as well as being able to provide insights into what happens during mediation, including insights into mediator effectiveness.

8.2. Conclusion

This thesis has reported on an investigation of empirical studies of mediation in particular 47 selected studies that refer to mediators, with a view to establishing what is known about mediator effectiveness. The key conclusion is that continued application of existing approaches to research about mediators is unlikely to reveal that knowledge. When new empirical approaches and methods are adopted, with a focus on the qualitative nature of the complex interactions that occur during mediation and that are guided by the involvement of mediation’s end-users, progress can be made in what is known and understood about mediation and about mediators, and improvements can be suggested for mediation practice. Many years ago, it was said that, in the hands of a skilful

¹⁸⁷⁹ Coincidentally, a similar coding procedure was devised for the research underlying this thesis; although similar benefits were observed, it used coloured pencils rather than electronic fonts.

mediator, there is 'magic in mediation'.¹⁸⁸⁰ Adopting new research approaches and methods may provide unexpected insights into the process of mediation and the role of the mediator, perhaps providing evidence to confirm that magic.

¹⁸⁸⁰ Davis, A., 'The Logic Behind the Magic of Mediation' 5(1) *Negotiation Journal* 17, 23.

Appendix A.

Bibliography and references

Articles

- Adida, C. L., K. E. Ferree, D. N. Posner, and A. L. Robins, 'Who's Asking? Coethnicity Effects in African Survey Data' (2016) 49(12) *Comparative Political Studies* 160
- Adler, P. S., 'Resolving Public Policy Conflicts Through Mediation' (1990) 1(2) *ADRJ* 69
- Aerny-Perreten, N., F. Dominguez-Berjon, M. D. Esteban-Vasallo, and C. Garcia-Riolobos, 'Participation and Factors Associated with Late or Non-Response to an Online Survey in Primary Care' (2015) 21 *Journal of Evaluation in Clinical Practice* 688
- afWahlberg, A. E., and L. Poom, 'An Empirical Test of Nonresponse Bias in Internet Surveys' (2015) 37(6) *Basic and Applied Social Psychology* 336
- Akin Ojelabi, L., 'Community Legal Centres' Views on ADR as a Means of Improving Access to Justice – Pt II' (2011) 22 *ADRJ* 173
- , 'Mediation and Justice: An Australian Perspective Using Rawls' Categories of Procedural Justice' (2012) 31(3) *Civil Justice Quarterly* 318
- , and M. A. Noone, 'ADR Processes: Connections Between Purpose, Values, Ethics and Justice' (2017) 35(1) *Law in Context* 5
- , and T. Sourdin, 'Using a Values-Based Approach in Mediation' (2011) 22 *ADRJ* 5
- Aksu, G., and C. O. Güzeller, 'Analysis of Scientific Studies on Item Response Theory by Bibliometric Analysis Method' (2019) 15(2) *International Journal of Progressive Education* 44
- Alberstein, M., 'Forms of Mediation and Law: Cultures of Dispute Resolution' (2007) 22(2) *Ohio State Journal of Dispute Resolution* 321
- Alberts, J. K., B. L. Heisterkamp, and R. M. McPhee, 'Disputant Perceptions of and Satisfaction with a Community Mediation Program' (2005) 16(3) *The International Journal of Conflict Management* 218
- Alexander, N., 'The Mediation Metamodel: Understanding Practice' (2008) 26(1) *Conflict Resolution Quarterly* 97
- Alfini, J. J., 'Evaluative versus Facilitative Mediation: A Discussion' (1997) 24 *Florida State University Law Review* 919
- Ali, S. F., 'Practitioners' Perception of Court-Connected Mediation in Five Regions: An Empirical Study' (2018) 51(4) *Vanderbilt Journal of Transnational Law* 997
- Almeida, F., and L. G. de Paula, 'The Place of Uncertainty in Heterodox Economics Journals: A Bibliometric Study' (2019) 53(2) *Journal of Economic Issues* 553
- Altmann, A., 'The God of Religion, the God of Metaphysics and Wittgenstein's "Language-Games"' (1987) 39(4) *Zeitschrift für Religious und Geistesgeschichte* 289
- Armstrong, D., A. Gosling, J. Weinman, and T. Marteau, 'The Place of Interrater Reliability in Qualitative Research' (1997) 31(3) *Sociology* 597
- Astor, H., *Mediator Neutrality: Making Sense of Theory and Practice* (Legal Studies Research Paper No 07/46, University of Sydney, Sydney Law School, July 2007)
- Bansal, P., W. K. Smith, and E. Vaara, 'From the Editors: New Ways of Seeing Through Qualitative Research' (2018) 61(4) *Academy of Management Journal* 1189

- Barad, K., 'Diffracting Diffraction: Cutting Together-Apart' (2014) 20(3) *Parallax* 168
- Barber, T. X., and M. J. Silver, 'Fact, Fiction, and the Experimenter Bias' (1968) 70(6, Pt 2, Supplement) *Psychological Bulletin* 1
- Bartunek, J. M., A. A. Benton, and C. B. Keys, (1975) Third Party Intervention and the Bargaining Behavior of Group Representatives (1975) 19(3) *The Journal of Conflict Resolution* 532
- Baruch Bush, R. A. and J. P. Folger, 'Mediation and Social Justice: Risks and Opportunities' (2012) 27(1) *Ohio State Journal on Dispute Resolution* 1
- , and J. P. Folger, 'Reclaiming Mediation's Future: Re-Focusing on Party Self-Determination' (2015) 16(3) *Cardozo Journal of Conflict Resolution* 741
- Baumeister, R. F., K. D. Vohs, and D. C. Funder, 'Psychology as a Science of Self-Reports and Finger Movements: Whatever Happened to Actual Behavior?' (2007) 2(4) *Perspectives on Psychological Science* 396
- Beck, C. J. A., and B. D. Sales, 'A Critical Reappraisal of Divorce Mediation Research and Policy' (2000) 6(4) *Psychology, Public Policy, and Law* 989
- Beery, A. K., and I. Zucker, 'Sex Bias in Neuroscience and Biomedical Research' (2011) 35 *Neuroscience and Biobehavioral Reviews* S565
- Beety, V. E., 'What the Brain Saw: The Case of Trayvon Martin and the Need for Eyewitness Identification Reform' (2013) 90(2) *Denver University Law Review* 331
- Bekkers, R., and P. Wiepking, 'Accuracy of Self-reports on Donations to Charitable Organisations' (2011) 45(6) *Quality and Quantity* 1369
- Bell, P., and A. Georgakopoulos, 'A Study of Family Mediator Perceptions of Family Mediator Effectiveness' (2018) 73(1) *Dispute Resolution Journal* 1
- Bencze, M., and G. Y. Ng (eds), How to Measure the Quality of Judicial Reasoning' (2019) 69 *Ius Gentium: Comparative Perspectives on Law and Justice*
- Bercovitch, J., 'International Mediation: A Study of the Incidence, Strategies and Conditions of Successful Outcomes' (1986) 21 *Cooperation and Conflict* 155
- , and S-M. Lee, 'Mediating International Conflicts: Examining the Effectiveness of Directive Strategies' (2003) 8 *International Journal of Peace Studies* 1
- Berger, R., 'Now I See It, Now I Don't: Researcher's Position and Reflexivity in Qualitative Research' (2015) 15(2) *Qualitative Research* 219
- Bingham, L. B., 'Transformative Mediation in the United States Postal Service' (2012) 5(4) *Negotiation and Conflict Management Research* 354
- , L. B., C. J. Hallberlin, D. A. Walker, and W.-T. Chung, 'Dispute System Design and Justice in Employment Dispute Resolution: Mediation at the Workplace' (2009) 14(1) *Harvard Negotiation Law Review* 1
- , L. B., S. S. Raines, T. Hedeem, and L. M. Napoli, 'Mediation in Employment and Creeping Legalism: Implications for Dispute Systems Design' (2010) 2010 *Journal of Dispute Resolution* 129

- Bishop, D. V. M., 'The Psychology of Experimental Psychologists: Overcoming Cognitive Constraints to Improve Research: The 47th Sir Frederick Bartlett Lecture' (2019) 73(1) *Quarterly Journal of Experimental Psychology* 1
- Bolitho, J., 'Putting Justice Needs First: A Case Study of Best Practice in Restorative Justice' (2015) 3(2) *Restorative Justice* 256
- Boyle, A., 'Effectiveness in Mediation: A New Approach' (2017) 12 *Newcastle Law Review* 148
- Bozalek, V., 'Slow Scholarship in Writing Retreats: A Diffractive Methodology for Response-able Pedagogies' (2017) 31(2) *South African Journal of Higher Education* 40
- , and M. Zembylas, 'Diffraction or Reflection? Sketching the Contours of Two Methodologies in Educational Research' (2017) 30(2) *International Journal of Qualitative Studies in Education* 111
- Brett, J. M., Z. I. Barsness, and S. B. Goldberg, (1996) 'The Effectiveness of Mediation: An Independent Analysis of Cases Handled by Four Major Service Providers' (1996) 12 *Negotiation Journal* 259
- Broome, B. J., 'Negotiating the Nexus: Symbiotic Relationship of Theory and Practice in Conflict Management' (2017) 10(4) *Negotiation and Conflict Management Research* 252
- Bruce, J., 'Understanding "Back Stage" and "Front Stage" Work in Restorative Justice Conferences: The Benefits of Using Ethnographic Techniques' (2018) 25(1) *Current Issues in Criminal Justice* 517
- Burrell, N. A., W. A. Donohue, and M. Allen, 'The Impact of Disputants' Expectations on Mediation, Testing an Interventionist Model' (1990) Fall 1990 *Human Communication Research* 104
- Burstyner, N., T. Sourdin, C. Liyange, and B. Ofoghi, 'Why do some civil cases end up in a full hearing? Formulating litigation and process referral indicia through text analysis' (2016) 25 *Journal of Judicial Administration* 257
- Busch, D., 'Does Conflict Mediation Research Keep Track with Cultural Theory?' (2016) 4(2) *European Journal of Applied Linguistics* 181
- Bush, M., and A. C. Gordon, 'Client Choice and Bureaucratic Accountability: Possibilities for Responsiveness in a Social Welfare Bureaucracy' (1978) 34(4) *Journal of Social Issues* 22
- Capulong, E. R. C., 'Mediation and the Neocolonial Legal Order: Access to Justice and Self-Determination in the Philippines' (2012) 27(3) *Ohio State Journal on Dispute Resolution* 641
- Carey, M. A., and M. W. Smith, 'Capturing the Group Effect in Focus Groups: A Special Concern in Analysis' (1994) 4(1) *Qualitative Health Research* 123
- Carminati, L., 'Generalizability in Qualitative Research: A Tale of Two Traditions' (2018) 28(13) *Qualitative Health Research* 2094
- Carnevale, P. J. D., and R. Pagnetter, 'The Selection of Mediator Tactics in Public Sector Disputes: A Contingency Analysis' (1985) 41(2) *Journal of Social Issues* 2
- Charkoudian, L., 'Just My Style: The Practical, Ethical, and Empirical Dangers of the Lack of Consensus about Definitions of Mediator Style' (2012) 5(4) *Negotiation and Conflict Management Research* 367

- , C. De Ritis, R. Buck, and C. L. Wilson, 'Mediation by Any Other Name Would Smell as Sweet – or Would IT? The Struggle to Define Mediation and Its Various Approaches' (2009) 26(3) *Conflict Resolution Quarterly* 293
- , and E. K. Wayne, Fairness, Understanding, and Satisfaction: Impact of Mediator and Participant Race and Gender on Participants' Perception of Mediation (2010) 28(1) *Conflict Resolution Quarterly* 23
- Chavalarias, D., and J. P. A. Ioannidis, 'Science Mapping Analysis Characterizes 235 Biases in Biomedical Research' (2010) 63(11) *Journal of Clinical Epidemiology* 1205
- Cheung, S. O., and K. T. W. Yiu, 'A Study of Construction Mediator Tactics – Part 1: Taxonomies of Dispute Sources, Mediator Tactics and Mediation Outcomes' (2007) 42 *Building and Environment* 752
- Clark, A. J., 'Empathy and Alfred Adler: An Integral Perspective' (2016) 72(4) *The Journal of Individual Psychology* 238
- Coburn, C., B. Batagol, and K. Douglas, 'How a Dose of Humour May Help the Mediators and Disputants in Conflict' (2013) 24(18) *ADRJ* 18
- Cohn, L. P., 'Mediation: A Fair and Efficient Alternative to Trial' (1996) October 1996 *DuPage County Bar Brief* 1
- Colquitt, J. A., D. E. Conlon, M. J. Wesson, C. Porter, and K. Y. Ng, 'Justice at the Millennium: A Meta-Analytic Review of 25 Years of Organizational Justice Research' (2001) 86(3) *Journal of Applied Psychology* 425
- Coombs, S. J., and I. D. Smith, 'The Hawthorne Effect: Is it a Help or a Hindrance in Social Science Research?' (2003) 6(1) *Change: Transformations in Education* 97
- Côté, S., M. W. Kraus, B. H. Cheng, C. Oveis, I. van der Löwe, H. Lian, and D. Keltner, 'Social Power Facilitates the Effect of Prosocial Orientation on Empathic Accuracy' (2011) 101(2) *Journal of Personality and Social Psychology* 217
- Crampton, A., 'Escape from the Laboratory: Ethnographic Methods in the Study of Elder and Family Court Mediation' (2016) 32(3) *Negotiation Journal* 191
- Crawford, S. H., L. Dabney, J. M. Filner, and P. R. Maida, 'From Determining Capacity to Facilitating Competencies: A New Mediation Framework' (2003) 20(4) *Conflict Resolution Quarterly* 385
- Crowe, J., and R. Field, 'The Empty Idea of Mediator Impartiality' (2019) 29 *ADRJ* 273
- Curran, C., T. Burchardt, M. Knapp, D. McDaid, and B. Li, 'Challenges in Multidisciplinary Systematic Reviewing: A Study on Social Exclusion and Mental Health Policy' (2007) 41(3) *Social Policy & Administration* 289
- Curry, O. S., and R. I. M. Dunbar, 'Sharing a Joke: The Effects of a Similar Sense of Humour on Affiliation and Altruism' (2013) 34 *Evolution and Human Behavior* 125
- Davidheiser, M., 'Race, Worldviews, and Conflict Mediation: *Black and White Styles of Conflict Revisited*' (2008) 33(1) *Peace and Change* 60
- Davis, A., 'The Logic Behind the Magic of Mediation' 5(1) *Negotiation Journal* 17

- De Girolamo, D., 'Sen, Justice and the Private Realm of Dispute Resolution' (2018) 14(3) *International Journal of Law in Context* 353
- Della Noce, D. J., 'Mediator Style and the Question of "Good" Mediation: A Call for Theoretical Development' (2012) 5(4) *Negotiation and Conflict Management Research* 396
- , J. R. Antes, R. A. Baruch Bush, and J. A. Saul, 'Signposts and Crossroads: A Model for Live Action Mediator Assessment' (2008) 23(2) *Ohio State Journal on Dispute Resolution* 197
- DeRouen, Jr., K., and F. Möller, 'The Short-Term Effects of Mediation on Low-Intensity Civil Wars' (2013) October 2013 *Negotiation Journal* 413
- de Vries, Y. A., A. M. Roest, P. de Jonge, P. Cuijpers, M. R. Munafò, and J. A. Bastiaanssen, 'The Cumulative Effect of Reporting and Citation Biases on the Apparent Efficacy of Treatment: The Case of Depression' (2018) 48 *Psychological Medicine* 2453
- Dilts, D. A. and A. Karim, 'The Effect of Mediators' Qualities and Strategies on Mediation Outcomes' (1990) 45(1) *Relations Industrielles/Industrial Relations* 22
- Dixon-Woods, M., S. Agarwal, B. Young, D. Jones, and A. Sutton, 'Integrative Approaches to Qualitative and Quantitative Evidence' (Health Development Agency, National Health Service, UK, 2004), available on https://www.webarchive.org.uk/wayback/archive/20140616174235mp/http://nice.org.uk/nicemedia/documents/integrative_approaches.pdf
- , R. L. Shaw, S. Agarwal, and J. A. Smith, 'The Problem of Appraising Qualitative Research' (2004) 13 *Quality and Safety in Health Care* 223
- Donohue, W. A., M. Allen, and N. Burrell, 'Mediator Communicative Competence' (1985) 10 *Mediation Quarterly* 22
- , L. Drake, and A. J. Roberto, (1994) 'Mediator Issue Intervention Strategies: A Replication and Some Conclusions' (1994) 11(3) *Mediation Quarterly* 261
- , Q. Hao, R. Spreng, and C. Owen, 'Understanding the Role of Language in Conflict' (2020) 64(1) *American Behavioral Scientist* 97
- Douglas, K., and B. Batagol, 'The Role of Lawyers in Mediation: Insights from Mediators at Victoria's Civil and Administrative Tribunal' (2014) 40(3) *Monash University Law Review* 758
- Douglas, S., 'Neutrality, Self-Determination, Fairness and Differing Models of Mediation' (2012) 19 *James Cook University Law Review* 19
- Druckman, D., and W. Donohue, 'Innovations in Social Science Methodologies: An Overview' (2020) 64(1) *American Behavioural Scientist* 3
- , and J. A. Wall, 'A Treasure Trove of Insights: Sixty Years of JCR Research on Negotiation and Mediation' (2017) 61(9) *Journal of Conflict Resolution* 1898
- Dufresne, M., 'The Illusion of Teaching and Learning: Zhuangzi, Wittgenstein, and the Groundlessness of Language' (2017) 49(12) *Educational Philosophy and Theory* 1207
- Duyx, B., G. M. H. Swaen, M. J. E. Urlings, L. M. Bouter, and M. P. Zeegers, 'The Strong Focus on Positive Results in Abstracts May Cause Bias in Systematic Reviews: A Case Study on Abstract Reporting Bias' (2019) 8(1) *Systematic Reviews* 174

- , M. J. E. Urlings, G. M. H. Swaen, L. M. Bouter, and M. P. Zeegers, 'Scientific Citations Favor Positive Results: A Systematic Review and Meta-Analysis' (2017) 88 *Journal of Clinical Epidemiology* 92
- Ebner, N., and J. Parlamis, 'Weaving Together Theory, Research, Practice, and Teaching: A Four-Dimensional Approach to Negotiation and Conflict Management Work' (2017) 10(4) *Negotiation and Conflict Management Research* 245
- Ellen, R., 'Theories in Anthropology and "Anthropological Theory"' (2010) 16 *Journal of the Royal Anthropological Institute* 387
- Enserink, M. (ed), 'Research on Research' 361(6408) *Science* 1178
- Faulkes, W., 'The Modern Development of Alternative Dispute Resolution in Australia' (1990) 1(2) *ADRJ* 61
- Fidler, F., Y. E. Chee, B. C. Wintle, M. A. Burgman, M. A. McCarthy, and A. Gordon, 'Metaresearch for Evaluating Reproducibility in Ecology and Evolution' (2017) 67(3) *Bioscience* 282
- Field, R., and J. Crowe, 'Playing the Language Game of Family Mediation: Implications for Mediator Ethics' (2017) 35(1) *Law in Context* 92
- Fielding, N., 'Critical Qualitative Research and Impact in the Public Sphere' (2020) 26(2) *Qualitative Inquiry* 142
- Firestone, G., 'Empowering Parents in Child protection Mediation: Challenges and Opportunities' (2009) 47(1) *Family Court Review* 98
- Ford, J. B., And A. Merchant, 'A Ten-Year Retrospective of Advertising Research Productivity, 1997 – 2006' (2008) 37(3) *Journal of Advertising* 69
- Franke, R. H., and J. D. Kaul, 'The Hawthorne Experiments: First Statistical Interpretation' (1978) 43(5) *American Sociological Review* 623
- Freeman, M., K. deMarrais, J. Preissle, K. Roulston, and E. A. St Pierre, 'Standards of Evidence in Qualitative Research: An Incitement to Discourse' (2007) 36(1) *Educational Researcher* 25
- Gale, J., R. L. Mowery, M. S. Herrman, and N. L. Hollett, 'Considering Effective Divorce Mediation: Three Potential Factors' (2002) 19(4) *Conflict Resolution Quarterly* 389
- Gallardo-Gallardo, E., S. Nijs, N. Dries, and P. Gallo, 'Towards an Understanding of Talent Management as a Phenomenon-Driven Field Using Bibliometric and Content Analysis' (2015) 25 *Human Resource Management Review* 264
- Garth, B. G., and M. Cappelletti, 'Access to Justice: The Newest Wave in the Worldwide Movement to make Rights Effective' (1978) *Articles by Maurer Faculty, Paper 1142*, available on <https://www.repository.law.indiana.edu/facpub/1142>
- , M. Cappelletti, and N. Trocker, 'Access to Justice – Variations and Continuity of a World-Wide Movement' (1985) *Articles by Maurer Faculty, Paper 1064*, available on <http://www.repository.law.indiana.edu/facpub/1064>
- Garwood, M., 'Alternative Dispute Processes for Commercial Disputes – Quality and Style: A Survey' (1999) 10(2) *ADRJ* 84

- Gaspodini, I. B., A. da Rosa Alves, and L. R. F. de Oliveira, 'Where is Conflict Mediation Used? A 20-Year Period Systematic Literature Review' (2016) 8(2) *Revista de Psicologia Da IMED* 194
- Gelfand, M. J., and J. Brett, 'Big Questions for Negotiation and Culture Research' (2019) 12(2) *Negotiation and Conflict Management Research* 105
- Genn, H., 'What is Civil Justice? Reform, ADR, and Access to Justice' (2012) 24 *Yale Journal of Law & the Humanities* 397
- Glänzel, W., 'Bibliometric Methods for Detecting and Analysing Emerging Research Topics' (2012) 21(2) *El Profesional de la Informacion* 194
- Glenn, P., and R. Kuttner, 'Dialogue, Dispute Resolution, and Talk-in-Interaction: On Empirical Studies of Ephemeral Phenomena' (2013) 6(1) *Negotiation and Conflict Management Research Journal* 13
- Golafshani, N., 'Understanding Reliability and Validity in Qualitative Research' (2003) 8(4) *The Qualitative Report* 597
- Golann, D., 'Is Legal Mediation a Process of Repair – or Separation? An Empirical Study, and its Implications' (2002) 7 *Harvard Negotiation Law Review* 301
- Goldfien, J., and J. K. Robbennolt, 'What if the Lawyers Have Their Way? An Empirical Assessment of Conflict Strategies and Attitudes Toward Mediation Styles' (2006) 22 *Ohio State Journal on Dispute Resolution* 277
- Goldberg, S. B., 'The Secrets of Successful Mediators' (2005) 21(3) *Negotiation Journal* 365
- , 'Mediators Reveal Their Essential Techniques for Successful Settlements' (2006) 24(5) *Alternatives to the High Cost of Litigation* 1
- , and M. L. Shaw, 'The Secrets of Successful (and Unsuccessful) Mediators Continued: Studies Two and Three' (2007) October 2007 *Negotiation Journal* 393
- , and M. L. Shaw, 'Further Investigation into the Secrets of Successful and Unsuccessful Mediators' (2008) 26(8) *Alternatives to the High Cost of Litigation* 149
- Goodman, S. N., 'How Sure Are You of Your Result? Put a Number On It' (2018) 564(7734) *Nature* 7
- , D. Fanelli, and J. P. A. Ioannidis, 'What Does Research Reproducibility Mean?' (2016) 8(347) *Science: Translational Medicine* 1
- Goodwin, R., and K. Douglas, 'Dealing with Conflict in Local Planning: Reflections from Australian Planners' (2017) 32(4) *Planning Practice and Research* 345
- Granello, D. H., and J. E. Wheaton, 'Online Data Collection: Strategies for Research' (2004) 82(4) *Journal of Counselling and Development* 387
- Greenberg, S. A., 'How Citation Distortions Create Unfounded Authority: Analysis of a Citation Network' (2009) 339:b2680 *British Medical Journal* 1
- Greenhalgh, T., et al [76 co-authors], 'An Open Letter to *The BMJ* Editors on Qualitative Research' (2016) 352:i563 *BMJ* 1
- Grimes, D. R., and D. V. M. Bishop, 'Distinguishing Polemic from Commentary in Science: Some Guidelines Illustrated with the Case of Sage and Burgio' (2017) 89(1) *Child Development* 141

- Guillemin, M., and L. Gillam, 'Ethics, Reflexivity, and "Ethically Important Moments" in Research' (2004) 10(2) *Qualitative Inquiry* 261
- Gunn, G., 'The Unreliability of the Eyewitness – The Death of Von Richthofen' (1996) XXXVII *Sabretache* 3
- Guo, F., G. Ye, L. Hudders, W. Lv, M. Li, and V. G. Duffy, 'Product Placement in Mass Media: A Review and Bibliometric Analysis' (2019) 48 *Journal of Advertising* 215
- Hahn, V., C. Merdes, and M. von Sydow, 'How Good is Your Evidence and How Would You Know?' (2018) 10 *Topics in Cognitive Science* 660
- Hammersley, M., 'On "Systematic" Reviews of Research Literatures: a "Narrative" Response to Evans and Benefield' (2001) 27(5) *British Educational Research Journal* 544
- Hansen, T., and M. Umbreit, 'State of Knowledge: Four Decades of Victim-Offender Mediation Research and Practice: The Evidence' (2018) 36 *Conflict Resolution Quarterly* 99
- Hedeen, T., 'Coercion and Self-Determination in Court-Connected Mediation: All Mediations are Voluntary, but Some are more Voluntary than Others' (2005) 26(3) *The Justice System Journal* 273
- Heinsch, M., T., Sourdin, C. Brosnan, and H. Cootes, 'Death Sentencing by Zoom: An Actor-Network Theory Analysis' (2020) (*pre-submission draft*)
- Henderson, D. A., 'Mediation Success: An Empirical Analysis' (1996) 11(1) *Ohio State Journal on Dispute Resolution* 105
- Henrich, J., S. J. Heine, and A. Norenzayan, 'The Weirdest People in the World?' (2010) 33(2) *Behavioural and Brain Sciences* 61
- Herrman, M. S., N. L. Hollett, D. G. Eaker, and J. Gale, 'Mediator Reflections on Practice: Connected Selected Demographics and Preferred Orientations' (2003) 20(4) *Conflict Resolution Quarterly* 403
- Hill, C., S. Know, B. J. Thompson, E. N. Williams, and S. A. Hess, 'Consensual Qualitative Research: An Update' (2005) 52(2) *Journal of Counselling Psychology* 196
- Hiltrop, J. M., 'Mediator Behavior and the Settlement of Collective Bargaining Disputes in Britain' (1985) 41(2) *Journal of Social Issues* 83
- Hodges, B. D., A. Kuper, and S. Reeves, 'Qualitative Research: Discourse Analysis' (2008) 337:a879 *BMJ* 570
- Hoffman, M., 'Sex Differences in Empathy and Related Behaviors' (1977) 84(4) *Psychological Bulletin* 712
- Holmberg, U. and K. Madsen, 'Rapport Operationalized as a Humanitarian Interview in Investigative Interview Settings' (2014) 21(4) *Psychiatry, Psychology, and Law* 591
- Horsburgh, D., 'Evaluation of Qualitative Research' (2003) 12 *Journal of Clinical Nursing* 307
- Howard, G. S., M. Y. Lau, S. E. Maxwell, A. Venter, R. Lundy, and R. M. Sweeney, 'Do Research Literatures Give Correct Answers?' (2009) 13(2) *Review of General Psychology* 116
- Howieson, J., 'Procedural Justice in Mediation: An Empirical Study and a Practical Example (2002) 5(7) *ADR Bulletin* 1

- Hussey, I., and S. Hughes, 'Hidden Invalidity Among Fifteen Commonly Used Measures in Social and Personality Psychology' (2019), available on
https://www.researchgate.net/publication/329050268_Hidden_invalidity_among_fifteen_commonly_used_in_social_and_personality_psychology
- Hyland, K., 'Self-Citation and Self-Reference: Credibility and Promotion in Academic Publication' (2003) 54(3) *Journal of the American Society for Information Science Technology* 251
- Hyman, J. M., 'Four Ways of Looking at a Lawsuit: How Lawyers Can Use the Cognitive Frameworks of Mediation' (2010) 34(11) *Journal of Law and Policy* 11
- Ingleby, R., 'Catholics, Communists, Alternative Dispute Resolution and Bob Dylan' (1990) 1(1) *ADRI* 18
- Ioannidis, J. P. A., 'Why Most Published Research Findings are False' (2009) 18(4) *Chance* 40
- , 'Meta-Research: Why Research on Research Matters' (2018) 16(3) *PLoS Biology* 1,
<https://doi.org/10.1371/journal.pbio.2005468>
- , M. R. Munafò, P. Fusar-Poli, B. A. Nosek, and S. P. David, 'Publication and Other Reporting Biases in Cognitive Sciences: Detection, Prevalence, and Prevention' (2014) 18(5) *Trends in Cognitive Sciences* 235
- John, L. K., G. Loewenstein, and D. Prelec, 'Measuring the Prevalence of Questionable Research Practices with Incentives for Truth Telling' (2012) 23(5) *Psychological Science* 524
- Josephson, B. D., 'A Structural Theory of Everything' (2019) 15(1) *Cosmos and History: The Journal of Natural and Social Philosophy* 225
- Kahneman, D., and G. Klein, 'Conditions for Intuitive Expertise: A Failure to Disagree' (2009) 64(6) *American Psychologist* 515
- Kaptchuk, T. J., 'Effect of Interpretive Bias on Research Evidence' (2003) 326(7404) *BMJ* 1453
- Karim, A., and D. Dilts, 'Determinants of Mediation Success in the Iowa Public Sector' (1990) 19(2) *Journal of Collective Negotiations* 129
- , and R. Pagnetter, 'Mediator Strategies and Qualities and Mediation Effectiveness' (1983) 22(1) *Industrial Relations* 105
- Keikelame, M. J., and L. Swartz, 'Decolonising Research Methodologies: Lessons from a Qualitative Research Project, Cape Town, South Africa' (2019) 12 *Global Health Action* 1
- Kerr, N. L., 'Hypothesizing After the Results are Known' (1998) 2(3) *Personality and Social Psychology Review* 196
- Kimsey, W. D., R. M. Fuller, A. J. Bell, and B. C. McKinney, 'The Impact of Mediator Strategic Choices: An Experimental Study' (1994) 12(1) *Mediation Quarterly* 89
- , R. M. Fuller, and B. C. McKinney, 'Mediator Listening, Dispute Reframing, and Mediation Outcome: A Pilot Study' (1993) 7(1) *Journal of the International Listening Association* 74
- Kivimäki, M., G. D. Batty, I. Kawachi, M. Virtanen, A. Singh-Manoux, and E. J. Brunner, 'Don't Let the Truth Get in the Way of a Good Story: An Illustration of Citation Bias in Epidemiological Research' (2014) 180(4) *American Journal of Epidemiology* 446

- Klerman, D., and L. Klerman, 'Inside the Caucus: An Empirical Analysis of Mediation from Within' (2015) 12(4) *Journal of Empirical Legal Studies* 686
- Kliegr, T., S. Bahník, and J. Fürnkranz, 'Advances in Online Learning for the Behavioral Sciences' (2020) 64(2) *American Behavioral Scientist* 145
- Kochan, T. A., 'Commentary' (2012) 5(4) *Negotiation and Conflict Management Research* 392
- , and T. Jick, 'The Public Sector Mediation Process: A Theory and Empirical Examination' (1978) 22(2) *The Journal of Conflict Resolution* 209
- Kosch, I. M., 'Lemmitisation of Fixed Expressions: The Case of Proverbs in Northern Sotho' (2016) 26 *Lexikos* 145
- Kovach, K. K., 'Privatization of Dispute Resolution: In the Spirit of Pound, but Mission Incomplete: Lessons Learned and a Possible Blueprint for the Future' (2006) 48(1) *South Texas Law Review* 1003
- , 'The Mediation Coma: Purposeful or Problematic?' (2014) 16(3) *Cardozo Journal of Conflict Resolution* 755
- , and L. P. Love, "'Evaluative" Mediation is an Oxymoron' (1996) 14(3) *Alternatives to the High Cost of Litigation* 31
- Kressel, K., 'In Practice – Practice-Relevant Research in Mediation: Toward a Reflective Research Paradigm' (1997) April 1997 *Negotiation Journal* 143
- , 'How Do Mediators Decide What To Do? Implicit Schemas of Practice and Mediator Decisionmaking' (2013) 28(3) *Ohio State Journal on Dispute Resolution* 709
- , E. A. Frontera, S. Forlenza, F. Butler, and L. Fish, 'The Settlement-Oriented vs the Problem-Solving Style' (1994) 50(1) *Journal of Social Issues* 67
- , T. Henderson, W. Reich, and C. Cohen, 'Multi-Dimensional Analysis of Conflict Mediator Style' (2012) 30(2) *Conflict Resolution Quarterly* 135
- , and J. Wall, 'Introduction to the Special Issue on Mediator Style' (2012) 5(4) *Negotiation and Conflict Management Research* 334
- Kuper, A., L. Lingard, and W. Levinson, 'Qualitative Research: Critically Appraising Qualitative Research' (2008) 337:a1035 *BMJ* 687
- , S. Reeves, and W. Levinson, 'Qualitative Research: An Introduction to Reading and Appraising Qualitative Research' (2008) 337:a288 *BMJ* 404
- Le Baron, M., and Z. D. Zumeta, 'Windows on Diversity: Lawyers, Culture, and Mediation Practice' (2003) 20(4) *Conflict Resolution Quarterly* 463
- Le Breton, J. M., and J. L. Senter, 'Answers to 20 Questions About Interrater Reliability and Interrater Agreement' (2008) 11(4) *Organizational Research Methods* 815
- LeCompte, M. D., and J. P. Goetz, 'Problems of Reliability and Validity in Ethnographic Research' (1982) 52(1) *Review of Educational Research* 31
- Levitt, H. M., M. Blamberg, J. W. Creswell, D. M. Frost, R. Josselson, and C. Suárez-Orozco, 'Journal Article Reporting Standards for Qualitative Primary, Qualitative Meta-Analytic, and Mixed

- Methods Research in Psychology: The APA Publications and Communications Task Force Report' (2018) 73(1) *American Psychologist* 26
- Lietz, C., K. E. Gerdes, F. Sun, J. M. Geiger, M. A. Wagaman, and E. A. Segal, 'The Empathy Assessment Index (EAI): A Confirmatory Factor Analysis of a Multidimensional Model of Empathy' (2011) 2(2) *Journal of the Society for Social Work and Research*, 105
- Lim, R. G. and P. J. D. Carnevale, 'Contingencies in the Mediation of Disputes' (1990) 58(2) *Journal of Personality and Social Psychology* 259
- Lindsay, P., T. Pitt, and O. Thomas, 'Bewitched by our Words: Wittgenstein, Language-Games, and the Pictures that Hold Sport Psychology Captive' (2014) 10(1) *Exercise Psychology Review* 41
- Lingard, L., M. Albert, and W. Levinson, 'Grounded Theory, Mixed Methods, and Action Research' (2008) 337:a567 *BMJ* 459
- Lomangio, K. M., 'Countering Cognitive Bias: Tips for Recognizing the Impact of Potential Bias on Research' (2016) 116(2) *Journal of the Academy of Nutrition and Dietetics* 204
- Lortie, C. J., L. W. Aarssen, A. E. Budden, and R. Leimu, 'Do Citations and Impact Factors Relate to the Real Numbers in Publications? A Case Study of Citation Rates, Impact, and Effect Sizes in Ecology and Evolutionary Biology' (2013) 94(2) *Scientometrics* 675
- Lovasz, N., and K. L. Slaney, 'What Makes a Hypothetical Construct "Hypothetical"? Tracing the Origins and Uses of the 'hypothetical construct' Concept in Psychological Science' (2013) 31 *New Ideas in Psychology* 22
- Lowton, K., 'He Said, She Said, We Said: Ethical Issues in Conducting Dyadic Interviews' in R. Iphofen, and M. Tolich (eds), *The SAGE Handbook of Qualitative Research Ethics* (SAGE Publishing, UK, 2018)
- Lumsden, K., and J. Goode, 'Public Criminology, Reflexivity and the Enterprise University: Experiences of Research, Knowledge Transfer Work and Co-Option with Police Forces' (2018) 22(2) *Theoretical Criminology* 243
- Lundberg, D., and L. Moloney, 'Being in the Room: Family Dispute Resolution Practitioners' Experience of High Conflict Family Dispute Resolution' (2010) 16(3) *Journal of Family Studies* 209
- Maass, A., J. C. Brigham, and S. G. West, 'Testifying on Eyewitness Reliability: Expert Advice is not Always Persuasive' (1985) 15(3) *Journal of Applied Social Psychology* 207
- MacCoun, R., 'Biases in the Interpretation and Use of Research Results' (1998) 49 *Annual Review of Psychology* 259
- Manning, C. M., 'Transformative and Facilitative Mediation Case Studies: Workplace Conflict' (2007) 10(2) *ADR Bulletin* 35
- Mareschal, P. M., 'What Makes Mediation Work? Perspectives on Resolving Disputes' (2005) 44(3) *Industrial Relations* 509
- Marin, J. R., M. Olekalns, and W. Adair, 'Normatively Speaking: Do Cultural Norms Influence Negotiation, Conflict Management, and Communication' (2019) 12(2) *Negotiation and Conflict Management Research* 146

- Marsh, E. J., B. Tversky, and M. Hutson, 'How Eyewitnesses Talk About Events: Implications for Memory' (2005) 19 *Applied Cognitive Psychology* 531
- Maxwell, J. A., 'The Value of Qualitative Inquiry for Public Policy' (2020) 26(2) *Qualitative Inquiry* 177
- Mazzei, L. A., 'Beyond an Easy Sense: A Diffractive Analysis' (2014) 20(6) *Qualitative Inquiry* 742
- McConnell, B., 'To Bring Peace that Stays: Music, Conflict and Conciliation in the Gambia' (2019) 12(3) *International Journal of Community Music* 349
- McCord, J., 'A Thirty-Year Follow-up of Treatment Effects' (1978) 33(3) *American Psychologist* 284
- McDermott, E. P., 'Discovering the Importance of Mediator Style – An Interdisciplinary Challenge' (2012) 5(4) *Negotiation and Conflict Management Research* 340
- , and R. Obar, "'What's Going On" in Mediation: An Empirical Analysis of the Influence of a Mediator's Style on Party Satisfaction and Monetary Benefit' (2004) 9 *Harvard Negotiation Law Review* 75
- McGillicuddy, N. B., G. L. Welton, and D. G. Pruitt, 'Third-Party Intervention: A Field Experiment Comparing Three Different Models' (1987) 53(1) *Journal of Personality and Social Psychology* 104
- McLaughlin, M. E., R. G. Lim, and P. Carnevale, 'Professional Mediators' Judgements of Mediation Tactics: Multidimensional Scaling and Cluster Analyses' (1991) 76(3) *Journal of Applied Psychology* 465
- Meierding, N. R., 'Does Mediation Work? A Survey of Long-Term Satisfaction and Durability Rates for Privately Mediated Agreements' (1993) 11(2) *Mediation Quarterly* 157
- Menkel-Meadow, C., 'Unsettling the Lawyers: Other Forms of Justice in Indigenous Claims of Expropriation, Abuse, and Injustice' (2014) 64 *University of Toronto Law Journal* 620
- Menzel, K. E., 'Judging the Fairness of Mediation: A Critical Framework' (1991) 9(1) *Mediation Quarterly* 3
- Morris, M., W. K. Halford, J. Petch, and D. Hardwick, 'Predictors of Engagement in Family Mediation and Outcomes for Families that Fail to Engage' (2018) 57(1) *Family Process* 131
- Morse, J. M., 'The Politics of Developing Research Methods' (2006) 16(1) *Qualitative Health Research* 3
- , 'The Critique of Research' (2006) 16(2) *Qualitative Health Research* 171
- , 'It Is Time to Revise the Cochrane Methods' (2006) 16(3) *Qualitative Health Research* 315
- Neill, W. J. V., 'Beyond the Balm of Communicative Planning: Can Actor-Network Theory Insights and a More Agonistic Practice Help Unlock "Post Conflict" Potential?: Towards a Renewed Research Horizon in Northern Ireland' (2017) 32(3) *Planning Practice & Research* 319
- Nesbit, R., T. Nabatchi, and L. B. Bingham, 'Employees, Supervisors, and Workplace Mediation: Experiences of Justice and Settlement' (2012) 32(3) *Review of Public Personnel Administration* 260
- Nissen, S. B., T. Magidson, K. Gross, and C. T. Bergstrom, 'Publication Bias and the Canonization of False Facts' (2016) 5:21451 *eLife* 1

- Noone, M. A., 'The Disconnect Between Transformative Mediation and Social Justice' (2008) 19 *ADRJ* 114
- , 'ADR Public Interest Law and Access to Justice: The Need for Vigilance' (2011) 37(1) *Monash University Law Review* 57
- NSW Attorney-General, *Impact of ADR on Pre-Trial Procedures* (Discussion Paper extract, Attorney-General's Department, 1990) 1(2) *ADRJ* 96
- Olekalns, M., D. Shestowsky, S. P. Skratek, and A.-S. De Pauw, 'The Double Helix of Theory and Practice: Celebrating Stephen J. Goldberg as a Scholar, Practitioner, and Mentor' (2019) 13(1) *Negotiation and Conflict Management Research* 85
- Open Science Collaboration, 'Estimating the Reproducibility of Psychological Science' (2015) 349(6251) *Science* 943
- Palanza, P., and S. Parmigiani, 'How Does Sex Matter? Behavior, Stress, and Animal Models of Neurobehavioral Disorders' (2017) 76 *Neuroscience and Biobehavioral Reviews* 134
- Peeples, R., C. Harris, and T. Metzloff, 'Following the Script: An Empirical Analysis of Court-Ordered Mediation of Medical Malpractice Cases' (2007) 2007(1) *Journal of Dispute Resolution* 101 .
- Pennycook, G., T. D. Cannon, and D. G. Rand, 'Prior Exposure Increases Perceived Accuracy of Fake News' (2018) 147(12) *Journal of Experimental Psychology* 1865
- Pignault, A., R. Meyers, and C. Houssmande, 'Mediators' Self-Perception of their Work and Practice: Content and Lexical Analysis' (2017) 22(6) *The Qualitative Report* 1589
- Pleasence, P., and N. Balmer, 'Measuring the Accessibility and Equality of Civil Justice' (2018) 10 *Hague Journal on the Rule of Law* 255
- , and N. J. Balmer, 'Development of a Generic Legal Confidence Scale: A First Implementation of the Rasch Measurement Model in Empirical Legal Studies' (2019) 16(1) *Journal of Empirical Legal Studies* 143
- Pope, C., S. Ziebland, and N. Mays, 'Qualitative Research in Health Care: Analysing Qualitative Data' (2000) 320 *BMJ* 114
- Posthuma, R. A., A. Richard, J. B. Dworkin, and M. S. Swift, 'Mediator Tactics and Sources of Conflict: Facilitating and Inhibiting Effects' (2002) 41(1) *Industrial Relations* 94
- Poynton, T. A., E. R. DeFouw, and L. J. Morizo, 'A Systematic Review of Online Response Rates in Four Counselling Journals' (2019) 97 *Journal of Counselling and Development* 33
- Press, S., 'Institutionalization of Mediation in Florida: At the Crossroads' (2003) 108(1) *Penn State Law Review* 43
- , 'Court-Connected Mediation and Minorities: Has Any Progress Been Made?' (2013) Summer 2013 *Dispute Resolution Magazine* 36, available on
<http://www.americanbar.org/publications/dispute_resolution_magazine/2013/summer.html>
- Prior, A., and R. Thompson, 'Are Pre-Mediation Sessions Helpful? A Client Evaluation of 100 Pre-mediation Sessions at Relationships Australia (SA) Inc' (1999) 10(3) *ADRJ* 285

- , and R. Thompson, 'Is To and Fro the Way to Go? A Discussion of the Practice and Effectiveness of Shuttle Mediation' (2001) 12(3) *ADRJ* 160
- Pritchard, A., 'Statistical Bibliography or Bibliometrics?' (1969) 25(4) *Journal of Documentation* 348
- Probst, B., 'The Eye Regards Itself: Benefits and Challenges of Reflexivity in Qualitative Social Work Research' (2015) 39(1) *Social Work Research* 37
- Pruitt, D. G., 'Process and Outcome in Community Mediation' (1995) 11 *Negotiation Journal* 365
- , 'Commentary 1' (2012) 5(4) *Negotiation and Conflict Management Research* 384
- , R. S. Peirce, N. B. McGillicuddy, G. L. Welton, and L. Castrianno, 'Long-Term Success in Mediation' (1993) 17(3) *Law and Human Behavior* 313
- Reeves, S., M. Albert, A. Kuper, and B. D. Hodges, 'Why Use Theories in Qualitative Research?' (2008) 337:a949 *BMJ* 631
- , A. Kuper, and B. D. Hodges, 'Qualitative Research Methodologies: Ethnography' (2008) 337 *BMJ* 512
- Reybold, L. E., J. D. Hammert, and S. M. Stribling, 'Participant Selection as a Conscious Research Method: Thinking Forward and the Deliberation of "Emergent" Findings' (2012) 13(6) *Qualitative Research* 699
- Riekert, J., 'Alternative Dispute Resolution in Australian Commercial Disputes: Quo Vadis?' (1990) 1(1) *ADRJ* 31
- Riskin, L. L., 'Understanding Mediators' Orientations, Strategies, and Techniques: A Grid for the Perplexed' (1996) 1(7) *Harvard Negotiation Law Review* 7
- , 'Decisionmaking in Mediation: the New Old Grid and the New New Grid System' (2003) 79(1) *Notre Dame Law Review* 1
- , 'Beginning with Yes: A Review Essay on Michael Wheeler's the Art of Negotiation: How to Improve Agreement in a Chaotic World' (2015) *University of Florida Levin College of Law, Legal Studies Research Paper Series*, Paper No. 15-38
- , and N. Welsh, 'Is That All There Is? 'The Problem' in Court-Oriented Mediation' (2008) *University of Florida Levin College of Law Research Paper* No 2008-08
- Rogers, T., R. Zeckhauser, F. Gino, M. I. Norton, and M. I. Schweitzer, 'Artful Paltering: The Risks and Rewards of Using Truthful Statements to Mislead Others' (2017) 112(3) *Journal of Personality and Social Psychology* 456
- Rojas, H., and S. Valenzuela, 'A Call to Contextualise Public Opinion-Based Research in Political Communication' (2019) *Political Communication* 1, DOI: 10.1080/10584609.2019.1670897
- Rosenberg, J. D., and H. J. Folberg, (1994). *Alternative Dispute Resolution: An Empirical Analysis* (1994) 46 *Stanford Law Review* 148
- Rosenthal, R., and K. L. Fode, 'The Effects of Experimenter Bias on the Performance of the Albino Rat' (1963) 8(3) *Behavioral Science* 183
- , and L. Jacobson, 'Teachers' Expectancies: Determinants of Pupils' IQ Gains' (1966) 19 *Psychological Reports* 115

- , and R. Lawson, 'A Longitudinal Study of the Effects of Experimenter Bias on the Operant Learning of Laboratory Rats' (1964) 2 *Journal of Psychiatric Research* 61
- Rundle, O., 'The Purpose of Court-Connected Mediation From the Legal Perspective' (2007) 10(2) *ADR Bulletin* 28
- , 'Barking Dogs: Lawyer Attitudes Towards Disputant Participation in Court-Connected Mediation of General Civil Cases' (2008) 8(1) *QUTLJ* 77
- Sage, C., T. Wright, and C. Morris, *Case Management Reform: A Study of the Federal Court's Individual Docket System* (2002) Law and Justice Foundation of New South Wales, available on <[http://www.lawfoundation.net.au/ljf/site/templates/reports/\\$file/CaseManagementReform.pdf](http://www.lawfoundation.net.au/ljf/site/templates/reports/$file/CaseManagementReform.pdf)>
- Sassenberg, K., and L. Ditrich, 'Research in Social Psychology Changed Between 2011 and 2016: Larger Sample Sizes, More Self-Report Measures, and More Online Studies' (2019) 2(2) *Advances in Methods and Practices in Psychological Science* 107
- Sayo, A., R. G. Jennings, and J. D. van Horn, 'Study Factors Influencing Ventricular Enlargement in Schizophrenia: A 20 Year Follow-Up Meta-Analysis' (2011) 59(1) *NeuroImage* 154
- Schmidt, S., 'Shall We Really Do It Again? The Powerful Concept of Replication is Neglected in the Social Sciences' (2009) 13(2) *Review of General Psychology* 90
- Sefton, C., 'No square pegs in round holes: What mediators want lawyers to do in mediation and how they get it' (2011) 22 *ADRJ* 22
- Seligmann, L. J., and B. P. Estes, 'Innovations in Ethnographic Methods' (2020) 64(2) *American Behavioral Scientist* 176
- Shapiro, D., R. Drieghe, and J. Brett, 'Mediator Behavior and the Outcomes of Mediation' (1985) 41(2) *Journal of Social Issues* 101
- Shrever, C., C. Hulbert, and T. Sourdin, 'The Psychological Impact of Judicial Work: Australia's First Empirical Research Measuring Judicial Stress and Wellbeing' (2019) 28 *Journal of Judicial Administration* 141
- Siddaway, A. P., A. M. Wood, and L. V. Hedges, 'How to do a Systematic Review: A Best Practice Guide for Conducting and Reporting Narrative Reviews, Meta-Analyses, and Meta-Syntheses' (2019) 70 *Annual Review of Psychology* 747
- Silbey, S. S., and S. E. Merry, 'Mediator Settlement Strategies' (1986) 8(1) *Law & Policy* 7
- Singletary, L., L. L. S. Smutko, G. C. Hill, G. C. Smith, S. E. Daniels, J. S. Ayers, and K. Haaland, 'Skills Needed to Help Communities Manage Natural Resource Conflicts' (2008) 25(3) *Conflict Resolution Quarterly* 303
- Slaikue, K. A., R. Culler, J. Pearson, and N. Thoennes, 'Process and Outcome in Divorce Mediation' (1985) 10 *Mediation Quarterly* 55
- Soumerai, S. B., D. Starr, and S. R. Majumdar, 'Effectiveness Research You Can Trust: A Guide to Study Design for the Perplexed' (2015) 12(E101) *Public Health Research, Practice, and Policy* 1
- Sourdin, T., 'Avoiding the Credentialing Wars: Mediation Accreditation in Australia' (2008) 27(2) *The Arbitrator and Mediator* 21

- , 'Introduction' (2011) 22 *ADRJ* 1
- , *Exploring Pre-Action Requirements: Resolving Disputes Outside Courts* (ACJI, Monash University, October 2012)
- , and N. Balvin, 'Mediation styles and their impact: Lessons from the Supreme and County Courts of Victoria Research Project' (2009) 20 *ADRJ* 142
- , and T. Matruglio, *Evaluating Mediation – New South Wales Settlement Scheme 2002* (2004) *Mediation*. Paper 7, available on <<http://www.civiljustice.info/med/7>>
- Stark, J. H., and D. N. Frenkel, 'Changing Minds: The Work of Mediators and Empirical Studies of Persuasion' (2013) 28(2) *The Ohio State Journal on Dispute Resolution* 263
- Stevenson, E., 'The Use of Community Mediation in the Family Mediation Centre (NSW)' (1990) 1(1) *ADRJ* 24
- Storrow, R., and A. Georgakopoulos, 'Mediators and Metaphors: An Analysis of Conflict Resolution Metaphors' (2014) 69(2) *Dispute Resolution Journal* 41
- Stokstad, E. 'The Truth Squad' in M. Enserink (ed), 'Research on Research' (2019) 361(6408) *Science* 1178
- Street, The Hon Sir L., AC KCMG QC, 'The Court System and Alternative Dispute Resolution Procedures' (1990) 1(1) *ADRJ* 5
- Tannen, D., 'Framing and Face: The Relevance of the Presentation of Self to Linguistic Discourse Analysis' (2009) 72(4) *Social Psychology Quarterly*, 300
- Tatsioni, A., N. G. Bonitsis, and J. P. A. Ioannidis, 'Persistence of Contradicted Claims in the Literature' (2007) 298(21) *JAMA* 2517
- Tay, S. W., P. Ryan, and C. A. Ryan, 'Systems 1 and 2 Thinking Processes and Cognitive Reflection Testing in Medical Students' (2016) 7(2) *Canadian Medical Education Journal* e97
- Thibaut, J., L. Walker, S. LaTour, and P. Houlden, 'Procedural Justice as Fairness' (1974) 26 *Stanford Law Review* 1271
- Thoennes, N. A., and J. Pearson, 'Predicting Outcomes in Divorce Mediation: The Influence of People and Process' (1985) 41(2) *Journal of Social Issues* 115
- Timmons, S., P. Vezyridis, and O. Sahota, 'Trialling Technologies to Reduce In-Patient Falls: An Agential Realist Analysis' (2019) 41(6) *Sociology of Health & Illness* 1104
- Tracy, S. J., 'Qualitative Quality: Eight "Big Tent" Criteria for Excellent Qualitative Research' (2010) 16(10) *Qualitative Inquiry* 837
- Turner, E. H., A. M. Matthews, E. Linardatos, R. A. Tell, and R. Rosenthal, 'Selective Publication of Antidepressant Trials and its Influence on Apparent Efficacy' (2008) 358(3) *New England Journal of Medicine* 252
- Tyler, T. R., 'What is Procedural Justice? Criteria Used by Citizens to Assess the Fairness of Legal Procedures' (1988) 22(1) *Law and Society Review* 103
- Vallano, J. P., J. R. Evans, N. S. Compo, and J. M. Kieckhaefer, 'Rapport-Building During Witness and Suspect Interviews: A Survey of Law Enforcement' (2015) 29(3) *Applied Cognitive Psychology* 369

- van Bochove, M., J. Burgers, A. Geurts, W. de Koster, and J. van der Waal, 'Questioning Ethnic Identity: Interviewer Effects in Research About Immigrants' Self-Definition and Feelings of Belonging' (2015) 46(5) *Journal of Cross-Cultural Psychology* 652
- Vanderkooi, L., and J. Pearson, 'Mediating Divorce Disputes: Mediator Behaviors, Styles and Roles' (1983) 32(4) *Family Relations* 557
- Van Gramberg, B., 'Facilitation in the Workplace: An Exploratory Case Study' (2001) 12(3) *AD RJ* 171
- von Krogh, G., C. Rossi-Lamastra, and S. Haeffliger, 'Phenomena-Based Research in Management and Organisation Science: When Is It Rigorous and Does It Matter?' (2012) 45 *Long Range Planning* 277
- Wade, John H., 'Strategic Interventions Used By Mediators, Facilitators and Conciliators' (1994) 5(4) *AD RJ* 292
- Walker, L., E. A. Lind, and J. Thibaut, 'The Relation Between Procedural and Distributive Justice' (1979) 65(8) *Virginia Law Review* 1401
- Walker, P. O., 'Storians: Building on Indigenous Knowledge to Enhance Ni-Vanuatu Mediative Capacity' (2015) 30(3) *Conflict Resolution Quarterly* 309
- Wall, J. A., Jr, and S. Chan-Serafin, 'Processes in Civil Case Mediations' (2009) 26(3) *Conflict Resolution Quarterly* 261
- , and S. Chan-Serafin, 'Do Mediators Walk Their Talk in Civil Cases?' (2010) 28(1) *Conflict Resolution Quarterly* 3
- , and T. C. Dunne, 'Mediation Research: A Current Review' (2012) 28(2) *Negotiation Journal* 217
- , T. C. Dunne, and S. Chan-Serafin, Suzanne 'The Effects of Neutral, Evaluative, and Pressing Mediator Strategies' (2011) 29 *Conflict Resolution Quarterly* 127
- , and K. Kressel, 'Research on Mediator Style: A Summary and Some Research Suggestions' (2012) 5(4) *Negotiation and Conflict Management Research* 401
- , and K. Kressel, 'Mediator Thinking in Civil Cases' (2017) 34(3) *Conflict Resolution Quarterly* 331
- , and D. E. Rude, 'The Judge as a Mediator' (1991) 76(1) *Journal of Applied Psychology* 54
- Wang, F., J. Qiu, and H. Yu, 'Research on the Cross-Citation Relationship of Core Authors in Scientometrics' (2012) 91 *Scientometrics* 1011
- Weiner, G., 'A Call for Evidence-based Standards for Mediator Quality' (2012) *Professional Standards and Ethics., Unpublished Paper*, Paper 2. Available on <<http://www.civiljustice.info/profstan/2>>
- Weiner-Levy, N., and A. Popper-Giveon, 'The Absent, the Hidden and the Obscured: Reflections on "Dark Matter" in Qualitative Research' (2013) 47(4) *Quality and Quantity* 2177
- Welsh, N. A., 'The Thinning Vision of Self-Determination in Court-Connected Mediation: The Inevitable Price of Institutionalization?' (2001) 6 *Harvard Negotiation Law Review* 1
- , 'Disputants' Decision Control in Court-Connected Mediation: A Hollow Promise Without Procedural Justice' (2002) 2002(1) *Journal of Dispute Resolution* 179
- , 'Perceptions of Fairness in Negotiation' (2003) 87 *Marquette Law Review* 753

- , 'Remembering the Role of Justice in Resolution: Insights from Procedural and Social Justice Theories' (2004) 54(1) *Journal of Legal Education* 49
- Welton, G. L., and D. G. Pruitt, 'The Mediation Process: The Effects of Mediator Bias and Disputant Power' (1987) 13(1) *Personality and Social Psychology Bulletin* 123.
- , D. G. Pruitt, and N. B. McGillicuddy, 'The Role of Caucusing in Community Mediation' (1988) 32(1) *The Journal of Conflict Resolution* 181
- , D. G. Pruitt, N. B. McGillicuddy, C. A. Ippolito, and J. M. Zubeck, 'Antecedents and Characteristics of Caucusing in Community Mediation' (1992) 3(4) *International Journal of Conflict Management* 303
- West, B. T., and A. G. Blom, 'Explaining Interviewer Effects: A Research Synthesis' (2017) 5 *Journal of Statistics and Methodology* 175
- Willis, R., M. Evandrou, P. Pathak, and P. Khambhaita, 'Problems with Measuring Satisfaction with Social Care' (2016) 24(5) *Health and Social Care in the Community* 587
- Wissler, R. L., 'Mediation and Adjudication in Small Claims Court: The Effects of Process and Case Characteristics' (1995) 29(2) *Law & Society Review* 323
- , 'Court-Connected Mediation in General Civil Cases: What We Know from Empirical Research' (2002) 17(3) *Ohio State Journal on Dispute Resolution* 641
- , and R. W. Rack, Jr., 'Assessing Mediator Performance: The Usefulness of Participant Questionnaires' (2004) 1 *Journal of Dispute Resolution* 229
- Woodward, J. G., 'Settlement Week: Measuring the Promise' (1990) 11 *Northern Illinois University Law Review* 1
- Zaki, J., 'Empathy: A Motivated Account' (2014) 140(6) *Psychological Bulletin* 1608
- Zheng, Y., and Xue, W., 'Group Effect and Its Influence on Economic Decision-making Based on Brain Evoked Potential Analysis' (2018) 16(5) *NeuroQuantology* 256
- Zubeck, J. M., D. G. Pruitt, R. S. Peirce, N. B. McGillicuddy, and H. Syna, 'Disputant and Mediator Behaviors Affecting Short-Term Success in Mediation' (1992) 36(3) *Journal of Conflict Resolution* 546

Books

- Adrian, L., and S. Mykland, 'Unwrapping Court-Connected Mediation Agreements' in A. Nylund, A. K. Ervasti, and L. Adrian (eds), *Nordic Mediation Research* (Springer Open, 2018)
- Alvesson, M., and J. Sandberg, *Constructing Research Questions: Doing Interesting Research* (Sage Publications Ltd, UK, 2013)
- Asmussen, I. H., 'Mediation in Light of Modern Identity' in A. Nylund, K. Ervasti, and L. Adrian (eds), *Nordic Mediation Research* (Springer Open, 2018)
- Astor, H., and C. M. Chinkin, *Dispute Resolution in Australia* (Butterworths, Australia, 1992)
- Barad, K., *Meeting the Universe Halfway: Quantum Physics and the Entanglement of Matter and Meaning* (Duke University Press, USA, 2007)
- Baruch Bush, R. A., and J. P. Folger, *The Promise of Mediation* (Jossey-Bass, USA, 1994, and 2005)
- Benjamin, R. D., 'Managing the Natural Energy of Conflict: Mediators, Tricksters, and the Constructive Use of Deception' in D. Bowling and D. Hoffman (eds), *Bringing Peace into the Room* (Jossey-Bass, USA, 2003)
- Bercovitch, J. (1989) 'International Dispute Mediation: A comparative empirical analysis' in K. Kressel, and G. D. Pruitt (eds), *Mediation Research: The Process and Effectiveness of Third-Party Intervention* (Jossey-Bass, USA, 1989)
- Bernard, H. R., *Research Methods in Anthropology: Qualitative and Quantitative Approaches* (Rowman & Littlefield, USA, 2018)
- Bond, T., and C. M. Fox, 'Measuring Facts Beyond Ability and Difficulty' in T. Bond and C. M. Fox (eds), *Applying the Rasch Model: Fundamental Measurement in the Human Sciences* (3rd Edition, Taylor & Francis, UK, 2015)
- Boulle, L., *Mediation: Principles, Process, Practice* (3rd Edition, LexisNexis Butterworths, Australia, 2011)
- Bowling, G. D., 'Foreword' in M. LeBaron, C. MacLeod, and A. Acland (eds), *The Choreography of Resolution: Conflict, Movement, and Neuroscience* (American Bar Association, USA, 2014)
- Boyle, A., *Mediation: A Practitioner's Guide* (Institute of Arbitrators and Mediators Australia, 2006, 2009)
- Bryman, A., *Social Research Methods* (5th Edition, Oxford University Press, UK, 2016)
- Carpenter, D., 'Ethics, Reflexivity and Virtue' in R. Iphofen and M. Tolich (eds), *The SAGE Handbook of Qualitative Research Ethics* (SAGE Publishing, UK, 2018)
- David, J., 'Alternative Dispute Resolution – What Is It?' in J. Mugford (ed), *Alternative Dispute Resolution, AIC Seminar Proceedings, No 15* (Institute of Criminology, Canberra, 1986)
- De Girolamo, D., *The Fugitive Identity of Mediation: Negotiation, Shift Changes and Allusionary Action* (Routledge, UK, 2013)
- Eco, U., *How to Write a Thesis*, tr C. M. Farina, and G. Farina (The MIT Press, UK, 2015)

- Ervasti, K., 'Past, Present and Future of Mediation in Nordic Countries' in A. Nylund, K. Ervasti, and L. Adrian (eds), *Nordic Mediation Research* (Springer Open, 2018)
- Faulkes, W., 'Managing Programmes – Setting Up Programmes – Quality Control and Training – Legislative Issues and Management Structures' in J. Mugford (ed) *Alternative Dispute Resolution, AIC Seminar Proceedings, No 15* (Institute of Criminology, Canberra, 1986)
- Firchow, P., *Reclaiming Everyday Peace: Local Voices in Measurement and Evaluation After War* (Cambridge University Press, UK, and USA, 2018)
- Fisher, R., W. Ury, and B. Patton, *Getting to Yes: Negotiating an Agreement Without Giving In* (Random Century, Australia, 1981, 1991).
- Forgas, J. P., J. Cooper, and W. D. Crano (eds) *The Psychology of Attitudes and Attitude Change* (Psychology Press, Taylor & Francis, USA, 2011)
- Frenkel, D., M. Keet, J. Lande, and D. Stienstra, 'Studying What Dispute Resolution Practitioners Actually Do' in J. Lande (ed), *Theories of Change for the Dispute Resolution Movement: Actionable Ideas to Revitalize Our Movement* (Conference Proceedings, USA, 2020), available on <https://ssrn.com/abstract=3533324>
- Friedman, G., and J. Himmelstein, *Challenging Conflict: Mediation Through Understanding* (American Bar Association, USA, 2008)
- Glaser, B. G., and A. L. Strauss, *The Discovery of Grounded Theory: Strategies for Qualitative Research* (Aldine Transaction, Transaction Publishers, USA, 1967)
- Gorard, S., *Research Design: Creating Robust Approaches for the Social Sciences* (SAGE Publications Limited, UK/USA/India, 2013)
- Greenhalgh, T., *How to Read a Paper: The Basics of Evidence-Based Medicine* (5th Edition, Wiley and BMJ Books, UK, 2014)
- Haddock, G., and G. R. Maio, *The Psychology of Attitudes and Attitude Change* (SAGE Publications, 2009)
- Harley, A., and J. Langdon, 'Ethics and Power in Visual Research Methods' in R. Iphofen and M. Tolich (eds), *The SAGE Handbook of Qualitative Research Ethics* (SAGE Publishing, UK, 2018)
- Hensler, D. R., (2000) 'In Search of "Good" Mediation: Rhetoric, Practice, and Empiricism' in J. Sanders, and V. L. Hamilton (eds), *Handbook of Justice Research in Law* (Springer, USA, 2000)
- Hiltrop, J. M., 'Factors Associated with Successful Labor Mediation' in K. Kressel and D. G. Pruitt (eds), *Mediation Research: The Process and Effectiveness of Third-Party Intervention* (Jossey-Bass, USA, 1989)
- Hoffman, D., 'Paradoxes of Mediation' in D. Bowling and D. Hoffman (eds), *Bringing Peace into the Room – How the Personal Qualities of the Mediator Impact the Process of Conflict Resolution* (Jossey-Bass, US, 2003)
- Holmes, J., and Wilson, N., *An Introduction to Sociolinguistics* (Routledge, UK, 2017)
- Hook, D., B. Franks, and M. W. Bauer, *The Social Psychology of Communication* (Palgrave Macmillan, UK, 2011)

- Higgins, J., and S. Green, *Cochrane Handbook for Systematic Reviews* (Wiley-Blackwell, UK, 2008)
- Iphofen, R., and M. Tolich (eds), *The SAGE Handbook of Qualitative Research Ethics* (SAGE Publishing, UK, 2018)
- Jesson, J. K., L. Matheson, and F. M. Lacey, *Doing Your Literature Review: Traditional and Systematic Techniques* (Sage Publications Ltd, U.K., 2012)
- Jones, T. S., 'A Taxonomy of Effective Mediator Strategies and Tactics for Nonlabor – Management Mediation' in M. A. Rahim (ed), *Managing Conflict: An Interdisciplinary Approach* (Praeger, USA, 1989)
- , 'Lag Sequential Analyses of Mediator-Spouse and Husband-Wife Interaction in Successful and Unsuccessful Divorce Mediation in M. A Rahim (ed), *Managing Conflict: An Interdisciplinary Approach* (Praeger, USA, 1989)
- Kahneman, D., *Thinking, Fast and Slow* (Penguin Books, USA, 2011)
- Kressel, K., 'The Mediation of Conflict: Context, Cognition, and Practice' in P. Coleman, M. Deutsch, and E. Marcus (eds), *The Handbook of Conflict Resolution [Theory and Practice]* (Jossey-Bass, US, 2014)
- Lande, J. (ed), *Theories of Change for the Dispute Resolution Movement: Actionable Ideas to Revitalize our Movement* (Conference Proceedings, USA, 2020), available on <https://ssrn.com/abstract=3533324>
- LaTour, B., *Reassembling the Social: An Introduction to Actor-Network-Theory* (Oxford University Press, UK, 2005)
- Lewin, K., *Resolving Social Conflicts: Field Theory in Social Science* (American Psychological Association, USA, 1997)
- Maruyama, G., and C. S. Ryan, *Research Methods in Social Relations* (8th Edition, Wiley Blackwell, 2014)
- Mauthner, N. S. 'A Posthumanist Ethics of Mattering: New Materialisms and the Ethical Practice of Inquiry' in R. Iphofen and M. Tolich (eds), *The SAGE Handbook of Qualitative Research Ethics* (SAGE Publishing, UK, 2018)
- McKee, A., *Textual Analysis: A Beginner's Guide* (Sage Publications Ltd, 2003), available on www1.cs.columbia.edu/~sbenus/Teaching/APTD/McKee_Ch1.pdf
- Melbourne University Law Review Association Incorporated, and Melbourne Journal of International Law Incorporated, *Australian Guide to Legal Citation* (Melbourne University Law Review Association Incorporated, and Melbourne Journal of International Law Incorporated, Melbourne, Australia, 2019)
- Menkel-Meadow, C., 'Empirical Studies of ADR: The Baseline Problem of What ADR is and What it is Compared To' in P. Cane, and H. Kritzer (eds), *The Oxford Handbook of Empirical Legal Research* (Oxford University Press, UK, 2010), available on <http://ssrn.com/abstract=1485563>
- Michael, M., *Actor-Network Theory: Trials, Trails and Translations* (SAGE Research Methods, 2018)
- Mugford, J., 'Overview' in J. Mugford (ed), *Alternative Dispute Resolution, AIC Seminar Proceedings, No 15* (Institute of Criminology, Canberra, 1986)

- O'Connell, J. M., and S. E.-S. Castelo-Branco, *Music and Conflict* (University of Illinois Press, USA, 2010)
- Olson, K., 'Ethical Issues in Grounded Theory' in R. Iphofen and M. Tolich (eds), *The SAGE Handbook of Qualitative Research Ethics* (SAGE Publishing, UK, 2018)
- O'Mathúna, D., 'The Dual Imperative in Disaster Research Ethics' in R. Iphofen and M. Tolich (eds), *The SAGE Handbook of Qualitative Research Ethics* (SAGE Publishing, UK, 2018)
- Poland, F., and L. Birt, 'Protecting and Empowering Research with the Vulnerable Older Person' in R. Iphofen and M. Tolich (eds), *The SAGE Handbook of Qualitative Research Ethics* (SAGE Publishing, UK, 2018)
- Pruitt, D. G., W. R. Fry, L. Castrianno, J. Zubeck, G. L. Welton, N. B. McGillicuddy, and C. Ippolito, 'The Process of Mediation: Caucusing, Control, and Problem Solving' in M. A. Rahim (ed), *Managing Conflict: An Interdisciplinary Approach* (Praeger, USA, 1989)
- , N. B. McGillicuddy, G. L. Welton, and W. R. Fry, 'Process of Mediation in Dispute Settlement Centres' in K. Kressel, and D. G. Pruitt (eds), *Mediation Research: The Process and Effectiveness of Third-Party Intervention* (Jossey-Bass, US, 1989)
- Reynolds, K. J., and N. R. Branscombe, *Psychology of Change: Life Contexts, Experiences, and Identities* (Psychology Press, Taylor and Francis, UK/USA, 2015)
- Ritzer, G. (ed), *Encyclopedia of Social Theory* (SAGE Publishing, USA, 2004)
- Roberts, M., (ed) *Developing the Craft of Mediation: Reflections on Theory and Practice* (Jessica Kingsley Publishers, USA, 2007)
- Sander, F. E. A., 'Varieties of Dispute Processing' in A. Levin, and R. Wheeler (eds), *Proceedings of the National Conference on the Causes of Popular Dissatisfaction with the Administration of Justice* (West Publishing Company, St Paul, Minnesota, USA, 1979)
- Shorter Oxford English Dictionary* (5th Edition, 2002)
- Sourdin, T., *Alternative Dispute Resolution* (6th Edition, Thomson Reuters, Australia, 2020)
- Spiegelhalter, D., *The Art of Statistics: Learning from Data* (Pelican Books, 2019)
- Street, the Hon, Sir L., AC KCMG QC, 'Opening Address' in J. Mugford (ed), *Alternative Dispute Resolution, AIC Seminar Proceedings, No 15* (Institute of Criminology, Canberra, 1986)
- Tannen, D., 'Language and Culture' in R. Fasold and J. Connor-Linton (eds), *Introduction to Language and Linguistics* (Cambridge University Press, UK, 2006)
- , *Talking Voices: Repetition, Dialogue, and Imagery in Conversational Discourse* (2nd Edition, Cambridge University Press, USA, 2007)
- Warren, M. A., and S. I. Donaldson (eds), *Scientific Advances in Positive Psychology* (Praeger, USA, 2017)
- Welsh, N. A., 'We Need Good Data to Know Whether What We Are Doing – and Espousing – is Good' in J. Lande (ed), *Theories of Change for the Dispute Resolution Movement: Actionable Ideas to Revitalize Our Movement* (Conference Proceedings, USA, 2020), available on <https://ssrn.com/abstract=3533324>

- Wittgenstein, L., *Philosophical Investigations*, tr M. Carino (Basil Blackwell, UK, 1953-1986)
- Wrangham, R., *The Goodness Paradox: The Strange Relationship Between Virtue and Violence in Human Evolution* (Pantheon Books, USA, 2019)
- , and D. Peterson, *Demonic Males: Apes and the Origin of Human Violence* (Mariner Books, Houghton Mifflin, USA 1996)
- Wright, J., (ed-in-chief), *International Encyclopaedia of Social and Behavioral Sciences* (2nd Edition, Elsevier, 2015)
- Wynn, L. L., 'Why Ethics Review Boards Get Ethnographic Research Wrong' in R. Iphofen and M. Tolich (eds), *The SAGE Handbook of Qualitative Research Ethics* (SAGE Publishing, UK, 2018)

Reports, Discussion Papers, and Issues Papers

- American Bar Association Section of Dispute Resolution, *Report of the Task Force on Research on Mediator Techniques* (American Bar Association, USA, June 2017), available on https://www.americanbar.org/content/dam/aba/administrative/dispute_resolution/med_techniques_tf_report.authcheckdam.pdf
- Australian Dispute Resolution Advisory Council (ADRAC), *Conciliation: A Discussion Paper* (ADRAC, October 2019), available on <https://www.adrac.org.au/publications>
- Australian Law Reform Commission, *Rethinking the Federal Civil Litigation System* (Issues Paper 20, ALRC, 1998)
- Bourne, C., *Mediation and Community Justice Centres: An empirical Study* (Research Report 12, New South Wales Law Reform Commission, 2004)
- Crime and Justice, *An International Evidence Review of Mediation in Civil Justice* (The Scottish Government, Social Research Series, June 2019)
- Dixon-Woods, M., S. Agarwal, B. Young, D. Jones, and A. Sutton, *Integrative Approaches to Qualitative and Quantitative Evidence* (Report to the Health Development Agency, UK, 2004)
- Expert Group on Mediation in Civil Justice in Scotland, *Bringing Mediation into the Mainstream in Civil Justice in Scotland* (Scottish Mediation, Report to the Scottish Government, Scotland, June 2019)
- Federal Court of Australia's Indigenous Dispute Resolution and Conflict Management Case Study Project, *Solid Work You Mob are Doing – Case Studies in Indigenous Dispute Resolution and Conflict Management in Australia* (Commonwealth of Australia, 2009)
- Global Pound Conferences, *Shaping the Future of Dispute Resolution & Improving Access to justice: the Singapore Report* (Report of Global Pound Conferences, 2016)
- Global Pound Conference Series, *Global Data Trends and Regional Differences* (Report of Global Pound Conferences, 2018)

- Kakalik, J. S., T. Dunworth, L. A. Hill, D. M. McCaffrey, M. Oshiro, N. M. Pace. And M. E. Vaiana, *An Evaluation of Mediation and Early Neutral Evaluation Under the Civil Justice Reform Act* (Report for The Institute for Civil Justice, RAND, USA, 1996)
- Kennedy Institute of Workplace Mediation Research Group (KIWMRG), *Shaping the Agenda 1: Exploring the Competencies, Skills and Behaviours of Effective Workplace Mediators* (KIWMRG, Ireland, 2016)
- , *Shaping the Agenda 2: Implications for Workplace Mediation Training, Standards and Practice in Ireland* (KIWMRG, Ireland, 2016)
- Mack, K., *Court Referral to ADR: Criteria and Research* (Report, NADRAC & Australian Institute of Judicial Administration [AIJA], 2003)
- McWilliam, N., A. Grey, H. Zhang, T. Yeung, and D. Padhi, *Court-Referred Alternative Dispute Resolution: Perceptions of Members of the Judiciary* (Report to the AIJA, October 2017)
- NADRAC, *Issues of Fairness and Justice in ADR* (Discussion Paper, Commonwealth of Australia, 1997)
- , *A Fair Say* (Guide, Commonwealth of Australia, 1999)
- , *The Development of Standards for ADR* (Discussion Paper, Commonwealth of Australia, March 2000)
- , *A Framework for ADR Standards* (Report to the Federal Attorney-General, Commonwealth of Australia, April 2001)
- , *Dispute Resolution Terms – The use of terms in (alternative) dispute resolution* (Commonwealth of Australia, September 2003)
- , *National Principles for Resolution of Disputes* (Interim Report to the Federal Attorney General, Commonwealth of Australia, 2011)
- Productivity Commission, *Access to Justice Arrangements* (Inquiry Report No 72, Overview, Productivity Commission, September 2014)
- Riskin, L. L., and N. A. Welsh, *Is That All There Is? “The Problem” in Court-Oriented Mediation* (University of Florida Levin College of Law, Research Paper Series No. 2008-08, 2008)
- Sage, C., T. Wright, and C. Morris, *Case Management Reform: A Study of the Federal Court’s Individual Docket System* (2002) Law and Justice Foundation of New South Wales available on <[http://www.lawfoundation.net.au/ljf/site/templates/reports/\\$file/CaseManagementReform.pdf](http://www.lawfoundation.net.au/ljf/site/templates/reports/$file/CaseManagementReform.pdf)>
- Song, F., S. Parekh, L. Hooper, Y. K. Loke, J. Ryder, A. J. Sutton, C. Hing, C. S. Kwok, C. Pang, and I. Harvey, *Dissemination and Publication of Research Findings: An Updated Review of Related Biases*, 14(8) Health Technology Assessment (Report published by the National Institute of Health Research – Health Technology Assessment, UK, 2010)
- Sourdin, T., *Dispute Resolution Processes for Credit Consumers* (Project Report, Conflict Resolution Research Centre, La Trobe University, 2007)
- , *Mediation in the Supreme and County Courts of Victoria* (Report prepared for the Department of Justice, Victoria, Australia, April 2009), available on <<http://www.civiljustice.info/adreval/1/>>
- , *The Timeliness Project* (Background Report, ACJI, October 2013)

Spencer, L., J. Ritchie, J. Lewis, and L. Dillon, *Quality in Qualitative Evaluation: A Framework for Assessing Research Evidence* (Government Chief Social Researcher's Office, UK, 2003); available on <<https://www.alnap.org/help-library/quality-in-qualitative-evaluation-a-framework-for-assessing-research-evidence>>

Unpublished reports

McEwen, C. A., *An Evaluation of the ADR Pilot Project: Final Report 1* (unpublished report, 1992)

Wissler, R. L., *Trapping the Data: An Assessment of Domestic Relations Mediation in Maine and Ohio Courts* (Unpublished report, 1999)

Conference presentations

Adler, P. S., *Expectation and Regret: A Look Back at How Mediation has Fared in the United States*, (Paper presented at the 7th National Conference, Civil Mediation Council, London, UK, 2013)

Ali, S., *Advancing Research and Practice in the Governance of Dispute Resolution Institutions Through Inclusive Devolved Refection* (Conference presentation, Advances in Comparative and Transnational ADR: Research and Practice, Hong Kong, 2019)

Bishop, H., *Aboriginal Decision Making, Problem Solving and Alternative Dispute Resolution – Challenging the Status Quo* (Keynote address, Native Title Services Victoria, Alternative Dispute Resolution in Indigenous Communities [ADRIC], Symposium, Victoria, July 2015)

Boyle, A., *Self-Determination, Empowerment, and Empathy in Mediation: Rehumanising Mediation's Effectiveness* (Conference Paper, Law and Society Association Annual Meeting, Toronto, Canada, 2018)

Goodman, S., *Statistical Methods as Social Technologies versus Analytic Tools: Implications for Metascience and Research Reform* (Presentation at Metascience Symposium, Stanford University, USA, 2019)

Leathes, M., *The Future of ADR in 2020* (Presented at Opening Plenary Panel, Singapore Alternative Dispute Resolution Conference, October 2012)

Nabatchi, T., Y. Moon, and L. B. Bingham, *Evaluating Transformative Mediation in Practice: The Premises, Principles, & Behaviors of USPS Redress © Mediators* (Meeting Paper, International Association of Conflict Management, 2006), available on <<http://ssrn.com/abstract=916008>>

Swaab, R. I., *Face First: Pre-Mediation Caucus and Face in Employment Disputes* (Presentation, Annual Association of Conflict Management Conference, June 2009)

—, and J. Brett, *Caucus with Care: The Impact of Pre-Mediation Caucuses on Conflict Resolution* (Meeting Paper, International Association of Conflict Management, 2007)

Theses

Elix, J., *More Than Resolution: System Design for the Management of Intractable Natural Resource Conflict in Australia* (PhD Thesis, School of Law and Legal Studies, Faculty of Law and Management, La Trobe University, Australia, 2005)

Flint, D., *Perceptions of Procedural Justice: Group Polarization Effects* (PhD Thesis, Rotman School of Management, University of Toronto, Canada, 2001)

Standards, regulations, and guidelines

American Bar Association, *Model Standards of Conduct for Mediators* (ABA, 2005), available on <https://www.americanbar.org/content/dam/aba/administrative/dispute_resolution/dispute_resolution/model_standards_conduct_april2007.pdf>

Law Society of NSW, available on <<https://www.lawsociety.com.au/community/disputesandmediation/ADR/index.htm>>.

NMAS, July 2015, available on <<http://www.msb.org.au/sites/default/files/documents.NMAS%20July%202015.pdf>>.

Family Law (Family Dispute Resolution Practitioners) Regulations 2008 (Cth), available on <<https://www.legislation.gov.au/Details/F2008L03470>>

Mediation Act (1997) (Australian Capital Territory) [repealed 2015], and *Mediation Act 1997 (ACT) Regulations*, available on <<https://www.legislation.gov.au/Details/C2019Q00036>>

Mediator Standards Board, *National Mediator Accreditation System (2015)*, available on <www.msb.org.au>

Supreme Court of Victoria, Practice Note SC Gen 6: *Judicial Mediation Guidelines*, 1 January 2020, No 6.1, available on <https://www.supremecourt.vic.gov.au/sites/default/files/2020-01/gen_6_-_judicial_mediation_-_web_3.pdf>

Websites and other media

Assessing the Methodological Quality of Systematic Reviews (AMSTAR), available on <<http://amstar.ca>>

Alternative Dispute Resolution Research Network, available on <<https://adrresearch.net/>>

American Bar Association, available on <<https://www.americanbar.org/>>

Australian Legal Information Institute, available on <<http://www.austlii.edu.au/>>

Australian Mediation Association, available on <<http://ama.asn.au/>>

Beyond Intractability, available on <<https://www.beyondintractability.org/moos>>

BibExcel, available on <<https://homepage.univie.ac.at/juan.gorraiz/bibexcel/>>

Centre for Evidence-Based Medicine (CEBM), available on <<https://www.cebm.net>>

Chartered Institute of Arbitrators, available on <<https://www.ciarb.net.au/>>

Cochrane (Collaboration), available on <<https://www.cochrane.org/>>

Community Justice Centres, New South Wales, available on <<http://www.cjc.justice.nsw.gov.au/>>

Community Justice Centres, Northern Territory, available on <<http://www.cjc.nt.gov.au/>>

Conflict Resolution Service, Australian Capital Territory, available on <<http://www.crs.org.au/>>

Critical Appraisal Skills Program (CASP), available on <<https://casp-uk.net/>>

Dispute Settlement Centre, Victoria, available on <<http://www.disputes.vic.gov.au/>>

Dispute Resolution Branch, Queensland, available on <<https://www.qld.gov.au/dispute-resolution>>

Family Dispute Resolution, available on <<https://www.ag.gov.au/FamiliesAndMarriage/>>

Gephi, available on <<https://gephi.org/>>

International Mediation Institute, available on <<https://imimediation.org/>>

Joanna Briggs Institute, available on <<http://joannabriggs.org/>>

Kluwer Mediation Blog, available on <<http://mediationblog.kluwerarbitration.com/>>

Law Society of New South Wales, available on <<http://lawsociety.com.au/>>

Law Institute of Victoria, available on <<http://www.liv.asn.au/>>

Mary Parker Follett Network, available on <<http://mpfollett.ning.com/mpf/follett-writings>>

Mediator Standards Board, available on <<https://msb.org.au/>>

Relationships Australia, available on <<http://www.relationships.org.au/>>

Resolution Institute, available on <<http://www.resolution.institute/>>

SciMAT Science Mapping Analysis Tool, available on <<https://sci2s.ugr.es/scimat/description.html>>

Scottish Graduate School of Social Science, University of Stirling, Scotland, available on <<https://www.sgsss.ac.uk/methods-resource/socio-material-approaches/>>

Stanford University Natural Language Processing Group, available on <<https://nlp.stanford.edu/IR-book/html/htmledition/stemming-and-lemmatization-1.html>>

The Singapore Convention, available on <<https://www.singaporeconvention.org/>>, and on <<https://undocs.org/en/a/cn.9/wg.ii/wp.205>>

Web of Science, available on <<http://wokinfo.com/>>

Workers Compensation Commission, New South Wales, available on <<https://www.wcc.nsw.gov.au/types-of-disputes/damages-dispute-pathway>>

Podcasts

‘New Normal?’, *Radiolab* (New York Public Radio, 19 October 2009), available on <<https://www.wnycstudios.org/podcasts/radiolab/podcasts/35>>

Appendix B.

The 47 selected empirical studies

Articles

- Alberts, J. K., B. L. Heisterkamp, and R. M. McPhee, 'Disputant Perceptions of and Satisfaction with a Community Mediation Program' (2005) 16(3) *The International Journal of Conflict Management* 218
- Bingham, L. B., 'Transformative Mediation in the United States Postal Service' (2012) 5(4) *Negotiation and Conflict Management Research* 354
- Burrell, N. A., W. A. Donohue, and M. Allen, 'The Impact of Disputants' Expectations on Mediation, Testing an Interventionist Model' (1990) 17(1) *Human Communication Research* 104
- Carnevale, P. J. D., and R. Pagnetter, 'The Selection of Mediator Tactics in Public Sector Disputes: A Contingency Analysis' (1985) 41(2) *Journal of Social Issues* 2
- Dilts, D. A., and A. Karim, 'The Effect of Mediators' Qualities and Strategies on Mediation Outcomes' (1990) 45(1) *Relations Industrielles/Industrial Relations* 22
- Gale, J., R. L. Mowery, M. S. Herrman, and N. L. Hollett, 'Considering Effective Divorce Mediation: Three Potential Factors' (2002) 19(4) *Conflict Resolution Quarterly* 389
- Goldberg, S. B., and M. L. Shaw, 'Further Investigation into the Secrets of Successful and Unsuccessful Mediators' (2008) 26(8) *Alternatives to the High Cost of Litigation* 149
- Henderson, D. A., 'Mediation Success: An Empirical Analysis' (1996) 11(1) *Ohio State Journal on Dispute Resolution* 105.
- Karim, A. and D. Dilts, 'Determinants of Mediation Success in the Iowa Public Sector' (1990) 19(2) *Journal of Collective Negotiations* 129
- Karim, A. and R. Pagnetter, 'Mediator Strategies and Qualities and Mediation Effectiveness' (1983) 22(1) *Industrial Relations* 105
- Kimsey, W. D., R. M. Fuller, A. J. Bell, and B. C. McKinney, 'The Impact of Mediator Strategic Choices: An Experimental Study' (1994) 12(1) *Mediation Quarterly* 89
- Kimsey, W. D., R. M. Fuller, and B. C. McKinney, 'Mediator Listening, Dispute Reframing, and Mediation Outcome: A Pilot Study' (1993) 7(1) *Journal of the International Listening Association* 74
- Kochan, T. A. and T. Jick, 'The Public Sector Mediation Process: A Theory and Empirical Examination' (1978) 22(2) *The Journal of Conflict Resolution* 209
- Kressel, K., 'How Do Mediators Decide What To Do? Implicit Schemas of Practice and Mediator Decisionmaking' (2013) 28(3) *Ohio State Journal on Dispute Resolution* 709
- Kressel, K., E. A. Frontera, S. Forlenza, F. Butler, and L. Fish, 'The Settlement-Oriented vs the Problem-Solving Style' (1994) 50(1) *Journal of Social Issues* 67
- Kressel, K., T. Henderson, W. Reich, and C. Cohen, 'Multi-Dimensional Analysis of Conflict Mediator Style' (2012) 30(2) *Conflict Resolution Quarterly* 135
- Mareschal, P. M., 'What Makes Mediation Work? Perspectives on Resolving Disputes' (2005) 44(3) *Industrial Relations* 509

- McDermott, E. P., and R. Obar, "'What's Going On' in Mediation: An Empirical Analysis of the Influence of a Mediator's Style on Party Satisfaction and Monetary Benefit' (2004) 9 *Harvard Negotiation Law Review* 75
- McGillicuddy, N. B., G. L. Welton, and D. G. Pruitt, 'Third-Party Intervention: A Field Experiment Comparing Three Different Models' (1987) 53(1) *Journal of Personality and Social Psychology* 104
- Peeples, R., C. Harris and T. Metzloff, 'Following the Script: An Empirical Analysis of Court-Ordered Mediation of Medical Malpractice Cases' (2007) 2007(1) *Journal of Dispute Resolution* 101
- Posthuma, R. A., A. Richard, J. B. Dworkin, and M. S. Swift, 'Mediator Tactics and Sources of Conflict: Facilitating and Inhibiting Effects' (2002) 41(1) *Industrial Relations* 94
- Pruitt, D. G., R. S. Peirce, N. B. McGillicuddy, G. L. Welton, and L. Castrianno, 'Long-Term Success in Mediation' (1993) 17(3) *Law and Human Behavior* 313
- Shapiro, D., R. Drieghe, and J. Brett, 'Mediator Behavior and the Outcomes of Mediation' (1985) 41(2) *Journal of Social Issues* 101
- Slaikue, K. A., R. Culler, J. Pearson, and N. Thoennes, 'Process and Outcome in Divorce Mediation' (1985) 10 *Mediation Quarterly* 55
- Sourdin, T., and T. Matruggio, *Evaluating Mediation – New South Wales Settlement Scheme 2002* (2004) *Mediation*. Paper 7, available on <<http://www.civiljustice.info/med/7>>
- Sourdin, T., *Exploring Pre-Action Requirements: Resolving Disputes Outside Courts* (ACJI, Monash University, October 2012)
- Thoennes, N. A. and J. Pearson, 'Predicting Outcomes in Divorce Mediation: The Influence of People and Process' (1985) 41(2) *Journal of Social Issues* 115
- Vanderkooi, L. and J. Pearson, 'Mediating Divorce Disputes: Mediator Behaviors, Styles and Roles' (1983) 32(4) *Family Relations* 557
- Wall, J. A., Jr, and S. Chan-Serafin, 'Processes in Civil Case Mediations' (2009) 26(3) *Conflict Resolution Quarterly* 261
- Wall, J. A., Jr, and S. Chan-Serafin, 'Do Mediators Walk Their Talk in Civil Cases?' (2010) 28(1) *Conflict Resolution Quarterly* 3
- Wall, J. A., Jr, and D. E. Rude, 'The Judge as a Mediator' (1991) 76(1) *Journal of Applied Psychology* 54
- Welton, G. L., and D. G. Pruitt, 'The Mediation Process: The Effects of Mediator Bias and Disputant Power' (1987) 13(1) *Personality and Social Psychology Bulletin* 123
- Welton, G. L., D. G. Pruitt, and N. B. McGillicuddy, 'The Role of Caucusing in Community Mediation' (1988) 32(1) *The Journal of Conflict Resolution* 181
- Welton, G. L., D. G. Pruitt, N. B. McGillicuddy, C. A. Ippolito, and J. M. Zubeck, 'Antecedents and Characteristics of Caucusing in Community Mediation' (1992) 3(4) *International Journal of Conflict Management* 303
- Wissler, R. L., 'Mediation and Adjudication in Small Claims Court: The Effects of Process and Case Characteristics' (1995) 29(2) *Law & Society Review* 323

- Wissler, R. L., 'Court-Connected Mediation in General Civil Cases: What We Know from Empirical Research' (2002) 17(3) *Ohio State Journal on Dispute Resolution* 641
- Woodward, J. G., 'Settlement Week: Measuring the Promise' (1990) 11 *Northern Illinois University Law Review* 1
- Zubeck, J. M., D. G. Pruitt, R. S. Peirce, N. B. McGillicuddy, and H. Syna, 'Disputant and Mediator Behaviors Affecting Short-Term Success in Mediation' (1992) 36(3) *Journal of Conflict Resolution* 546

Books

- Hiltrop, J. M., *Factors Associated with Successful Labor Mediation Research*, in K. Kressel and D. G. Pruitt (eds) *Mediation Research: The Process and Effectiveness of Third-Party Intervention* (Jossey-Bass, US, 1989)
- Jones, T. S., *Lag Sequential Analyses of Mediator-Spouse and Husband-Wife Interaction in Successful and Unsuccessful Divorce Mediation*, in M. A. Rahim (ed) *Managing Conflict: An Interdisciplinary Approach* (Praeger, US, 1989)
- Pruitt, D. G., W. R. Fry, L. Castrianno, J. Zubeck, G. L. Welton, N. B. McGillicuddy, and C. Ippolito, 'The Process of Mediation: Caucusing, Control, and Problem Solving', in M. A. Rahim (ed) *Managing Conflict: An Interdisciplinary Approach* (Praeger, US, 1989)

Reports, Discussion Papers, and Issues Papers

- Sourdin, T., *Dispute Resolution Processes for Credit Consumers* (Project Report, Conflict Resolution Research Centre, La Trobe University, 2007)
- Sourdin, T., *Mediation in the Supreme and County Courts of Victoria* (Report prepared for the Department of Justice, Victoria, Australia, April 2009), available on <http://www.civiljustice.info/adreval/1/>

Unpublished reports

- McEwen, C. A., *An Evaluation of the ADR Pilot Project: Final Report 1* (1992) [Unpublished report]
- Wissler, R. L., *Trapping the Data: An Assessment of Domestic Relations Mediation in Maine and Ohio Courts* (1999) [Unpublished report]

Conference presentations

- Swaab, R. I., *Face First: Pre-Mediation Caucus and Face in Employment Disputes* (Conference presentation, Annual International Association of Conflict Management Conference, 15 June 2009)
- Swaab, R. I. and J. Brett, *Caucus with Care: The Impact of Pre-Mediation Caucuses on Conflict Resolution* (Meetings Paper, International Association of Conflict Management, 2007)

Appendix C.

Data collection instruments

(i) Master data collection

Where repeat players are study participants, do researchers include design components incorporated to control for their familiarity with mediation, with researcher/s and/or with purpose of study?

Note the study periods that specify data collection period and analysis period – in some instances these two appear to be markedly different.

1. Reference: [ie short title]		2. Journal/Book + Year of publication: 2a. # citations =		3. Context:	
4. Researcher professions					
Academic discipline/s:		Non-academic researcher	Attorney	Mediator	Other
5. Researcher affiliations					
University/location:		Based in a non-academic research centre:	Based in an ADR research centre:		
6. Research Design					
Quick reference – list any of collection codes included in “Legend_Coding_for_Data_Collection”]					
(i) Objectives/Hypothesis/Research question/s					
(ii) Population sample					
(iii) Methodology				<div>Approach Orthodox Y/N Unorthodox Y/N DNS* Quantitative Y/N DNS Qualitative Y/N DNS</div>	
Study period					
(iv) Data collection methods (incl coding)					

<p>Use of coding Y/N</p> <p>Description</p>
<p>(v) Data analysis [incl statistical methodology if used]</p>
<p>(vi) Findings</p> <p><i>Are the findings linked to the objectives?</i></p>
<p>(vii) Noted limitations (by researchers)</p>
<p>(viii) Ethical and integrity considerations</p> <p>Reflexivity:</p>
<p>7. Statistical Methodology</p>
<p>8. Researcher consideration of transferability</p>

Notes:

(ii) Data collection methods

Data Collection from subject mediators only – surveys/questionnaires, interviews

<i>Study/short title</i>	MSD	MSM	MSMD	MSP	MID	MIM	MIMD	MIP

Notes:

CR (Case/Court Records) – purpose of data collection and analysis in each study

Data Collection from non-mediator participants (disputants/"parties"/advisors) only – surveys/questionnaires, interviews

[illegible]

Notes:

CR [CR includes Case Records, Court Records/Files, and any mediation documents such as a finalised agreement] – purpose of data collection and analysis in each study:

Data collection from observations only – audio, live, video

<i>Study/short title</i>	OAD	OADU	OAM	OAP	OLD	OLDU	OLM	OLP	OVD	OVDU	OVM	OVP

Notes:

CR [CR includes Case Records, Court Records/Files, and any mediation documents such as a finalised agreement] – purpose of data collection and analysis in each study:

Data collection from mediator participants + non-mediator participants (disputants +/- advisors)

Study/short title	MSD	MSDU	MSM	MSP	MSMD	DSD	DSDU	DSM	DSP	ASDU	ASM	ASP

Notes:

CR [CR includes Case Records, Court Records/Files, and any mediation documents such as a finalised agreement] – purpose of data collection

Data collection from observation + mediator surveys/interviews

Data collection from observation + non-mediator participants (disputants or advisors)

<i>Study/short title</i>	<i>OAD</i>	<i>OAM</i>	<i>DID</i>	<i>DIDU</i>	<i>DIM/DSM</i>	<i>DIP</i>	<i>OLD</i>	<i>OLM</i>	<i>OLP</i>

Notes:

CR [CR includes Case Records, Court Records/Files, and any mediation documents such as a finalised agreement] – Purpose of CR

Other data collection methodologies (eg interviews + focus groups + CR)

Data collection: observation + disputants + mediator participants

<i>Study/short title</i>	DSD/DID	DSDU	DSM/DIM	DSP/DIP	MSD/MID	MSM/MIM	MSMD	MSP/MIP	OA	OL	OV	CR (Data collect)

Notes:

CR [CR includes Case Records, Court Records/Files, and any mediation documents such as a finalised agreement] – Purpose of CR

Four most frequently occurring stated purposes of data collection: evaluation/commentary on mediator; evaluation/commentary on mediation process (incl outcome/s); commentary on disputants; commentary on dispute. NB, the selected studies must be expected to focus on evaluation/commentary about the mediator; they were selected for links between mediator interventions and outcomes.

1. Sources of evaluation/commentary on the mediator

[illegible]

Notes:

Mediator data collection on mediator (ie self-reports) =

Disputant data collection on mediator =

Advisor data collection on mediator =

Observation data collection on mediator =

Combination of data sources:

Studies that do not include any evaluation/commentary on the mediator:

2. Sources of evaluation and commentary on the mediation process

[illegible]

Notes:

Mediator data collection on mediation process =

Disputant data collection on mediation process =

Advisor data collection on mediation process =

Observation data collection on mediation process =

Combination of data sources:

Studies that do not include any evaluation/commentary on the mediation process:

3. Sources of commentary on the disputants

[illegible]

Notes:

Mediator data collection on disputants =

Disputant data collection on disputants (ie self and other) =

Advisor data collection on disputants (ie clients) =

Observation data collection on disputants =

Combination of data sources:

Studies that do not include evaluation/commentary on the disputants:

4. Sources of commentary on the presenting dispute

[illegible]

Notes:

Mediator data collection on presenting dispute =

Disputant data collection on presenting dispute =

Advisor data collection on presenting dispute =

Observation data collection on presenting dispute =

Combination of data sources:

Studies that do not include evaluation/commentary on the presenting dispute:

(iii) Legend for coding of data collection methodologies described in the 47 selected studies

Acronym	Meanings	
AI	AID	Advisor interview commentary on client disputant and/or both disputants
	AIDU	Advisor interview commentary on dispute
	AIM	Advisor interview evaluation/commentary on mediator
	AIP	Advisor interview evaluation/commentary on mediation process
AS	ASD	Advisory survey commentary on client disputant and/or both disputants
	ASDU	Advisory survey commentary on dispute
	ASM	Advisory survey evaluation/commentary on mediator
	ASP	Advisory survey evaluation/commentary on mediation process
CR	CRA	Finalised agreement from subject mediation
	CRC	Court records/case files
	CRP	Program records/files
	Case records include: court files, program records/files, and mediation documents incl finalised agreements.	
DI	DID	Disputant interview evaluation of each other
	DIDDe	Disputant interview description of own demographics
	DIDU	Disputant interview commentary on dispute
	DIM	Disputant interview evaluation/commentary on mediator
	DIP	Disputant interview evaluation/commentary on mediation process
DS	DSD	Disputant survey commentary on each other
	DSDDe	Disputant survey description of own demographics
	DSDU	Disputant survey commentary on dispute
	DSM	Disputant survey evaluation/commentary on mediator
	DSP	Disputant survey evaluation/commentary on mediation process
FG	FGDP	Disputants focus group discuss mediation process
	FGAP	Advisors focus group discuss mediation process
	FGMP	Mediators focus group discuss mediation process
	FGO	Focus group of others (e.g., stakeholders)
MI	MID	Mediator interview reporting on disputants
	MIDU	Mediator interview reporting on dispute
	MIM	Mediator interview evaluation/commentary on mediator
	MIMD	Mediator interview reporting on mediator demographics
	MIP	Mediator interview reporting on mediation process
MS	MSD	Mediator survey reporting on disputants
	MSDU	Mediator survey reporting on dispute
	MSM	Mediator survey evaluation/commentary on mediator
	MSMD	Mediator survey reporting mediator demographics
	MSMR	Standard mediator written report (outcome, # attendees, duration, etc)
	MSP	Mediator survey evaluation/commentary on mediation process
OA	OAD	Audio observation of what disputants said
	OAM	Audio observation of what mediator said
	Observation of mediation process not possible with audio-recording	
OL	OLD	Live observation of disputants
	OLM	Live observation of mediator
	OLP	Live observation of mediation process
OV	OVD	Observe video for disputants' behaviours
	OVM	Observe video for mediator's behaviours
	OVP	Observe video for mediation process
SI	SAI	Survey instrument available on request
	SII	Sample of survey instrument included in study
	SINM	Survey instrument availability not mentioned in study

Appendix D.

Online survey of professional mediators, 2019

[Includes separately paginated insertions]

What mediators want mediation researchers to investigate

Information Statement

ID 4

Information Statement

Professor Tania Sourdin
School of Law, Faculty of Business and Law
University Building
409 Hunter St, Newcastle NSW 2300
Phone: 02 4921 8666
Tania.Sourdin@uon.edu.au

Information Statement for the Research Project:

What do mediators want mediation researchers to investigate?

You are invited to participate in the research project identified above which is being conducted by Alysoun Boyle, PhD candidate, from the School of Law at the University of Newcastle (UON).

The research is part of Alysoun Boyle's studies at UON, supervised by Professor Tania Sourdin from the School of Law in the Faculty of Business and Law.

Why is the research being done?

There are two aims of the research: (i) to gauge practising mediators' voluntary participation in mediation research, and (ii) to ascertain what practising mediators want mediation researchers to investigate.

The study is part of a much larger research project that is also being conducted by Alysoun Boyle. That project is exploring what is known about mediator effectiveness, and is scheduled for completion in 2020. The larger project has revealed that mediator researchers cannot always achieve the active involvement of practising mediators in their research, despite the apparent benefits of being able to do so. One potential benefit of mediator involvement in mediation research could be their contributions to the focus of future mediation research; in themselves, such contributions may ensure that future mediation research is relevant to practising mediators.

Who can participate in the research?

The invitation email is being sent to all delegates at the National Mediation Conference convened in Canberra in April 2019. People who are not registered conference delegates will not receive an email inviting them to participate and will not be able to participate.

What would you be asked to do?

All conference delegates will receive an email inviting them to participate in the on-line survey. If you agree to participate, you will be asked to complete a short on-line survey. The survey uses the Survey Gizmo platform, contains 4 questions, and will be accessible on mobile devices, laptops and desktop computers. The on-line survey will take around 5 minutes to complete.

Question 1 asks that you confirm that you are at least 18 years of age; question 2 asks for confirmation of the types of dispute resolution processes you have conducted; question 3 asks if you are an academic or mediation researcher; and question 4 asks you what you would like mediation researchers to investigate. Question 2 is designed to enable differentiation of responses from mediators and other dispute resolvers; question 3 enables differentiation of responses from academics and mediation researchers.

All submitted surveys will included for analysis. All responses to question 4 will be analysed using a narrative thematic approach. There will also be comparative analysis of responses from various dispute resolvers and from academics and researchers.

You will not be asked to provide any personal identifiers or details as part of your participation.

Your involvement will be limited to completion and submission of the on-line survey.

What choice do you have?

Participation in this research is entirely your choice. When you click the hyperlink at the end of this form, you are consenting to participate in the study. Clicking on the hyperlink is an acknowledgement that you understand the details of the study that are explained in this Information Statement, and that you have been provided with a downloadable version of it – which you can retain. Only those people who click the hyperlink and submit a completed survey will be included in the project. Whether or not you decide to participate, your decision will not disadvantage you.

If you do decide to participate, you may withdraw from the project at any time, before submitting your completed survey, without giving a reason; you can delete any unprocessed data that you have provided.

How much time will it take?

Completion of the on-line survey will take about 5 minutes.

What are the risks and benefits of participating?

The study provides an opportunity for practising mediators, and other delegates at the National Mediation Conference 2019, to influence future mediation research.

There are no known risks associated with participation in the study.

How will your privacy be protected?

No personal identification data will be collected. No personal identifier required to access the survey.

Participants will access the survey via a survey ID hyperlink included at the end of this Information Sheet.

Where participants wish to access and complete the survey during separate periods of access, Survey Gizmo will establish a personal link for that purpose. The link will include no personal identifiers, and will be permanently deleted once the completed survey is submitted. In consultation with UON IT Support, a Custom SSL certificate will establish a secure

connection for transportation of data between each participant and the survey.

The study does not include any direct contact between the participants and the student researcher.

How will the information collected be used?

Results and findings will be published on the conference website [<http://nmc2019.com.au>] before 31 August 2019, where it will be accessible by all conference delegates. The results and findings will also be included in a chapter of the final thesis to be submitted for Alysoun Boyle's degree. The results and findings may also be reported in journal articles and other research papers.

The survey is anonymous and it will not be possible to identify you from your answers.

Individual participants will not be identified in any reports arising from the study.

The on-line survey will be hosted by Survey Gizmo via a secure encrypted connection.

Survey data will be retained on UON's own Cloud secure server. In line with UON policy provisions for research conducted by University staff and students, at least a copy of the data used for analysis will be held at UON for at least five years. Non-identifiable data may be also be shared with other parties to encourage scientific scrutiny, and to contribute to further research and public knowledge, or as required by law.

What do you need to do to participate?

Please read this Information Statement and be sure you understand its contents before you consent to participate. If there is anything you do not understand, or you have questions, contact the researcher.

If you would like to participate, please click the hyperlink at the bottom of this page and you will be automatically forwarded to the start of the survey. Clicking on the hyperlink will be taken as your informed consent to participate.

Further information

If you would like further information please contact Professor Tania Sourdin (Tania.Sourdin@newcastle.edu.au) or Alysoun Boyle (Alysoun.Boyle@uon.edu.au). Thank you for considering this invitation.

Professor Tania Sourdin Alysoun Boyle

Supervisor Student Researcher

Dean, School of Law

Complaints about this research

This project has been approved by the University's Human Research Ethics Committee, Approval No. H- [insert the protocol reference number which will be identified in the written acknowledgement of your application].

Should you have concerns about your rights as a participant in this research, or you have a complaint about the manner in which the research is conducted, it may be given to the researcher (Alysoun Boyle, email Alysoun.Boyle@uon.edu.au) or, if an independent person

is preferred, to the Human Research Ethics Officer, Research Services, NIER Precinct, The University of Newcastle, University Drive, Callaghan NSW 2308, Australia, telephone (02) 4921 6333, email Human-Ethics@newcastle.edu.au.

Survey questions

ID 13

1. I am 18 years or over *

☐ Yes

☐ No

2. Please identify every type of dispute resolution you have conducted (click all that apply to you) *

- ☐ Adjudication
- ☐ Arbitration
- ☐ Assisted negotiation
- ☐ Collaborative law
- ☐ Conciliation
- ☐ Conferencing
- ☐ Dispute Avoidance Board
- ☐ Dispute management
- ☐ Dispute Resolution Adviser
- ☐ Dispute Review Board
- ☐ Expert appraisal
- ☐ Facilitation
- ☐ Family Dispute Resolution
- ☐ Mediation
- ☐ Peace-building
- ☐ Restorative justice
- ☐ Other - Write In (Required)
- ☐ I am not a dispute resolution practitioner

*

ID 10

3. I am an academic *

- ☐ Yes
- ☐ No

ID 11

4. I conduct research into mediation and/or dispute resolution *

- ☐ Yes
- ☐ No

ID 12

5. What would you like mediation researchers to investigate you can provide as many ideas as you wish)? *

Thank You!

ID 1

Thank you for taking this survey. Your response will contribute to, and inform, future mediation research. The findings of the survey will be: published on the website <http://nmc2019.com.au> by the end of August 2019, and will be included in the researcher's PhD thesis which is scheduled for completion in 2020.

ID 3

Question 5: “What would you like mediation researchers to investigate?”

By Alysoun Boyle

In May 2019, all registered delegates at the National Mediation Conference 2019 were invited to participate in an online survey ('The Survey') seeking their suggestions for mediation research. The University of Newcastle Human Research Ethics Committee approved the Survey, as part of the researcher's much larger PhD project. As agreed at a meeting with the MSB in April 2019, this summary document includes the submitted suggestions for mediation research (i.e. Survey Question 5). Question 5 was designed with a textbox essay format, enabling responders to write long answers including their own ideas, without any guidance or suggestions.

The Survey included a separate tickbox question requesting responders to self-identify their own areas of DR practice, according to a list of eighteen practice options, including mediation and Family Dispute Resolution (FDR). There was no limit on the number of processes that responders could identify. The below responses include only those from self-identified practising mediators and/or Family Dispute Resolution Practitioners (FDRPs).

Sample population

All registered delegates at the conference received an email inviting their participation. To minimise any potential personal influence from the researcher, the email was sent by, and in the name of, the Professional Conference Organiser. The email included information about the Survey, and its purpose, and a direct link to the Survey whereby people could choose whether or not to participate.

The number of practising mediators in Australia has not been ascertained, and it would be quite complex to make such an assessment; so it is not possible to know if the 550 conference delegates is a significant proportion of the larger mediator (and FDRP) population. Although the conference represents a unique opportunity for accessing a number of practising mediators in Australia, the representativeness of the conference population might be limited by some conference characteristics, including: the conference is reasonably costly to attend, including delegate fees, travel, and accommodation; conference delegates appear to be from “mainstream” population groups, with limited representation from more diverse cultural backgrounds; and the logistics of attending the conference can limit attendance by DR practitioners who do not reside in capital cities.

In addition, online surveys are recognised for having low response rates; and researchers have reported poor research participation, in general, by practising mediators. In part, the Survey included components designed specifically to counteract the reported impediments to online survey response rates; hence it sought to ascertain if certain design characteristics would result in increased response rates – and to gauge the response rates among practising mediators. Unfortunately, the overall response rate was quite low, confirming other researchers' findings from online surveys; however, a small number of responses to the survey suggest that some practising mediators were keen to participate in the Survey despite having no ideas to contribute for future mediation research. In other words, there appeared to be interest in participating in mediation research. This could be re-examined in future research.

Despite well-entrenched views that nonresponses to online surveys affect, or skew, survey data, recent research has been unable to confirm this. In particular, the recent research found that, if nonresponders were representative of the sample population, a nonresponder bias could not be established. Thus, although a significant proportion of conference delegates did not respond to the Survey, they are considered to be representative of the sample population (i.e. conference delegates) and no consideration is given to their nonresponses' potential skewing of the Survey data.

Categorisation of Responses

Based on the content of the relevant submitted responses to Question 5 of the survey, two core categories have been devised: non-FDR (responses whose content appeared not to be relevant to FDR); and FDR (responses whose content included either specific reference to FDR, or mentioned issues directly relevant to FDR). The number of the former far out-weighs the number of the latter, in itself an interesting result.

Within each of those two categories, sub-categories (listed below) enable further differentiation of the responses. To enable comparison, a single set of sub-categories was devised that would be equally applicable to the non-FDR and to the FDR responses. Based on specific responses, FDR has an additional sub-category, “Children”, that does not warrant inclusion in Non-FDR. Similarly, Non-FDR has an additional category, “ODR”, that does not warrant inclusion in FDR.

Apart from the above comments, this document does not include any analysis or observations about the Survey responses to Question 5. The Survey invitation email included a statement that analysis and observations of survey data would be included in the researcher’s PhD thesis. This document is provided to the MSB on the understanding that it will be used to inform that body’s future activities.

The below-listed suggestions for mediation research are quotes from actual Survey responses.¹ Notably one survey respondent commented:

“Really all aspects of DR can benefit from further research. There are too many topics to cover here. A priority would be providing an evidence base to support the claims made by DR practitioners.”²

A. Non-FDR sub-categories	B. FDR sub-categories
<ul style="list-style-type: none"> i) Process <ul style="list-style-type: none"> a. Specific outcomes b. Non-specific outcomes c. Specific effectiveness d. Non-specific effectiveness e. Models/styles f. Gender issues g. ODR h. Standards i. Access j. Context ii) Mediator <ul style="list-style-type: none"> a. Skills/expertise b. Accreditation/standards (includes training) c. Collegiality iii) Disputants iv) Advisors 	<ul style="list-style-type: none"> i) Process <ul style="list-style-type: none"> a. Specific outcomes b. Non-specific outcomes c. Specific effectiveness d. Non-specific effectiveness e. Models/styles f. Gender issues g. Standards h. Access i. Context j. Children ii) FDRPs [= Mediators] <ul style="list-style-type: none"> a. Skills/expertise b. Accreditation/standards (includes training) c. Collegiality iii) Parents [= Disputants] iv) Advisors

¹ In some responses, minor edits have been made (e.g. correcting spelling errors).

² Responder ID# 36.

Responses categorised as being relevant to **Non-FDR mediation**, by sub-category

<i>Sub-category</i>	<i>Responses to Survey Question 5 – Research ideas</i>
<i>i) Process</i> <i>a. Specific outcomes</i>	<ul style="list-style-type: none"> Statistics about successful mediations and following up in coming years to see if the agreement "stuck".
<i>b. Non-specific outcomes</i>	<ul style="list-style-type: none"> Access and Outcomes Compliance with outcomes Perceptions of outcomes/statistics on outcomes. Success rates and major blockages to successful outcomes Outcomes versus Expectations of the parties. Perceptions as to why mediation failed to reach a solution/outcome. How confidential are outcomes Outcomes (measurement) Measured outcomes of mediation Early utilization of Mediation reduces the negative outcomes that happen when resolution is sought through the courts. Factors influencing mediation outcomes
<i>c. Non-specific effectiveness</i>	<ul style="list-style-type: none"> Mediation Effectiveness What works well and what doesn't work well in mediation.
<i>d. Specific effectiveness</i>	<ul style="list-style-type: none"> Balancing perceptions of fairness
<i>e. Models/styles/approaches</i>	<ul style="list-style-type: none"> Co-mediation and its strengths Why some mediators don't like [co mediation] What could be done to encourage non-believers in co mediation to participate in it What could be done to mentor new mediators in co-mediation? Whether facilitative mediation or a more interventionist form is quicker In what situations shorter mediation sessions (3 hours) are preferable to longer ones How we reconcile the values of facilitative mediation with those of traditional justice institutions. I would like some practical [options] that can be used in an upscale way for large numbers of similar disputes, e.g. an effective, efficient, repeatable process. Explore the gap between training and practice Explore satisfaction levels with judicial mediation Prevalence of different models of mediation in practice Effectiveness of different models of mediation in practice - sustainability of agreements, party satisfaction with outcomes, cost benefit analysis Study of models of early intervention by neutral third party dispute resolvers in various countries dealing with domestic and gang violence, small business conflict etc. The availability and effectiveness of different school peer mediation models around the country and particularly their application to bullying. Study of use of different mediation strategies in different contexts/with different dispute subjects e.g. pure facilitation, intensive questioning in private meeting, single text strategy, shuttle mediation, co-mediation etc.

	<ul style="list-style-type: none"> • As outcome is such a fickle thing in my line of practice, I would be more interested in research regarding the scaffolding of the process, e.g. what would be the best preparation for mediation. • Most importantly: how could mediation training be shaped to lead it beyond the focus of a singular approach basically nation-wide, when in reality, mediators will work with many models, etc ... • The difference between espoused and actual mediation practice. • Unpack peace-making and problem solving practices in Australia. • Sustainability of outcomes – what approaches create more sustainable outcomes • Mediation styles • Effectiveness of models and the transitions between them. • Research comparing mediator methods such as reflective practice and directive practice • Research on prevalence of facilitative mediation, dispute resolution and of evaluative mediation, dispute resolution and comparing process and outcomes of same • Differences in mediation models • Mediation models presented in the mediator training programs and the contribution of such models to the containment of mediation within prescriptive mediation parameters such that mediation is an unresponsive / non-creative process. • Changing modalities of mediation • Understanding diversity in practice methods - what works.
<i>f. Gender issues</i>	<ul style="list-style-type: none"> • The impact of gendered workplace practices on the mediation process • How to make mediation fair to women when the "neutral" process of mediation can replicate the discriminatory practices they experience in their workplaces • What kind of training needs to be integrated within the current mediation courses to ensure that all mediators - men and women - understand how gendered practices and inherent discrimination can impact on how they prepare for and conduct mediations
<i>g. ODR</i>	<ul style="list-style-type: none"> • I am really interested in the British Columbian Civil Resolution Tribunal model of online dispute resolution which combines providing information with case management and mediation involving a real live mediator. I am interested in the effectiveness (resolution rates) and participant satisfaction rates, compared with other forms of ODR such as Adieu's Consensus Accelerator. • The various forms of ODR and any evidence of effectiveness – for whom, when, how and why. • It would be helpful to research into working and collaboration with other countries in areas such as: ADR and online mediation, Elder mediation
<i>h. Standards</i>	<ul style="list-style-type: none"> • Level of adherence to the model of mediation outlined in the National Standards by NMAC accredited mediator in practice • Is there any evidence to suggest that video recording is an effective way of providing quality assurance to organizations? Has anyone researched the impact of video recording of sessions with the parties consent?
<i>i. Access (including awareness)</i>	<ul style="list-style-type: none"> • The timing for intervention and what difference it makes. • Community awareness of mediation in various sectors of practice

	<ul style="list-style-type: none"> • The relationship between use and demand for ADR and the lack of access to the legal system. • The reasons for continuing levels of domestic violence with particular reference to perpetrator motivation, re-education, and access to DR programs. • Comparison of the impact of mainland eastern states having large departmentally-based non-family mediation services with the situation in the other three states with their drastically limited resources. • The efficacy of using neutral venues as opposed to other options such as advocate or counsellor offices and on-site mediations in neighbour and building disputes. • Public perception of mediation and awareness of the availability of services and how this is impacted by media (e.g. forthcoming "Trial By Kyle" TV program). • Encouraging awareness of mediation in the ordinary business community. • Is there a non-financial obstacle to accessing a mediator for unlitigated dispute[s]?
<i>j. Context</i>	<ul style="list-style-type: none"> • Exploring more thoroughly traditional and contemporary First Nation peace making practices. • Examine the challenges and benefits of peace-making in First Nation communities. • How might Australia build the capacity of ADR, facilitative problem solving and peacemaking practices into a legal framework particular to working effectively with First Nations people? • Analysis the commonalities and distinctions between western and First Nation ADR and peacemaking. • It would be helpful to research into working and collaboration with other countries in areas such as: ADR and online mediation, Elder mediation • Cultural perspectives • Why commercial disputes do not have compulsory mediation prior to commencing action in court • Effectiveness of lasting outcomes of workplace mediation between staff. • Court annexed mediation methods and results compared with private and agency mediation results and methods/process • Why is it so difficult to obtain outcomes engaging with CALD and ATSI ? • Using interpreters in Mediation, the right approach to select and manage interpreters. • How mediation could be considered part of a continuum of health services. i.e. conflict reduction skills can be learned in a mediation process. this in turn could reduce the number of psychotherapy sessions that are often utilized ongoing especially when there is no resolution. • Research into whether there is any link between the ethnic/cultural background of a mediator and his or her clientele. That is - do people from diverse cultural background feel more comfortable with people coming from the same or similar, or even any, ethnic or cultural background. • Update Kathy Mack's research comparing outcomes in voluntary and mandatory mediation
<i>ii) Mediator</i> <i>a. Skills/expertise</i>	<ul style="list-style-type: none"> • Support for self-determination by mediators • Support for human rights by mediators

	<ul style="list-style-type: none"> • The difference (if any) between mediators perception of their effectiveness and parties perception. • Is there a difference in mediation when the parties choose a mediator with the subject expertise but still want mediation? • Could it be true that a mediator does not need subject expertise where the issues are not expert or are relationship issues but could have subject expertise when the issue is expert. • I think research into key dispute resolution organizations such as ombudsmans, and where dispute resolution skillsets could be refined and implemented would help a lot. • Close analysis of verbal exchanges between mediators and parties to illuminate effective and ineffective techniques. • There is little evidence-based research on the formal qualifications and EQ skills required for effective mediation. • Research into the forms of clinical supervision which most effectively both support and enhance the capacity of mediators. • Whether particular techniques are more/less suited to particular types of disputes. • Effective strategies for dealing with particularly difficult kinds of disputes such as cases of entrapment, feuds, and cases where one party has mental health issues. • Themes that arise in mediation and how you might prevent disputes • What are best "interventions" to prevent disputes • How best to use information collected by mediators to build capacity to prevent disputes • Mediator effectiveness • What factors do mediators consider when determining whether a mediation was effective in supporting the parties? • How important is it to mediators that parties are able to find a resolution? ["skill", as in capacity for this] • How important is "not knowing" or "not being influential" to mediators? ["skill" as in capacity for this] • Do mediators see their own ego as being involved in mediation? How do they address that? • What techniques are most effective in regards to assisting positive outcomes? • What makes a good mediator?
<i>b. Accreditation/standards (includes training)</i>	<ul style="list-style-type: none"> • Whether mediator accreditation makes a difference to perceptions • Relevance and importance of professional conduct rules including NMAS. • The importance of all mediators/dispute resolution practitioners to adhere to a credible standard.
<i>c. Collegiality</i>	<ul style="list-style-type: none"> • Do mediators feel like colleagues or a community of professionals? If so how can that expand? If not what can they suggest to create ongoing development of their professional learning and connections? • Are mediators willing to share what they find effective with other mediators?
<i>iii) Disputants (includes "parties")</i>	<ul style="list-style-type: none"> • Perceptions of processes • Do clients feel less stressed about their dispute after mediation? If so, in what way does mediation achieve this?

	<ul style="list-style-type: none"> • What attributes of mediators do clients find most helpful? • Does age of mediator matter to clients? If so, why or why not? • Is gender of mediator important to clients? Why? • How disputants choose their mediator? • What is the most important quality disputants look for in a mediator? • Participants' perceptions of the effects of their participation in a structured process To what extent is there a parallel, benefits or detriments between giving evidence in chief and speaking as a party at a mediation? Does the latter meet the needs usually given when the former goes well? • Psychological influences and disincentives to resolve disputes • I WOULD like some research done on whether parties who settle legal proceedings now, in mediation processes, feel any better about the settlement than they did in "the old days" when they settled "at the door of the Court". They "should" feel better if mediation is the quality process we like to think it is • To explore region of the brain that protects, and the ethics of around family feeling forced to come up with agreements that may not work if brain is not using the cortex or the prefrontal cortex, to reason with. <ul style="list-style-type: none"> ○ Ways of supporting an unregulated (fight/flight or freeze) brain to down regulate prior to mediating. ○ Researching type of language that promotes the brain to down regulate, prompting peace language. ○ Testing person capacity [to participate in] mediation and the need for advocacy to support person through mediation process. ○ Mediation preparation, for very unregulated anxious clients: visuals of mediation process. ○ Training mediators, in all the above expanding their view of conflict in the room strategizing peacemaking language. • Key factors involved in selection of the mediator for your dispute.³ • Perceptions of mediation pre- and post- participation by parties. • Extent of party self-determination in mediation. • Feedback from mediation parties • The extent to which the disposition of the disputants affects the interventions and effectiveness of the mediator, by comparison with the type of dispute or its perceived "ripeness". • Qualitative research on participants' understanding and satisfaction in relation to mediation and dispute resolution • How to promote mediation readiness? • The importance of financial literacy /equality before a mediation/dispute resolution commences • Decision making – how does “positive psychology” affect it • Emotional Coaching Techniques for high conflict clients.
<i>iv) Advisors</i>	<ul style="list-style-type: none"> • The reasons for lawyer reluctance to embrace facilitative mediation. • The reasons for lawyers' enthusiasm to transform mediation into a rules based process. • The effectiveness of having legal representation at a mediation (does it hinder or help) • The role of legal advisers in mediation.

³ This suggestion could equally be categorised under “Advisors”; it is widely reported and well-known that legal advisors will often select the mediator on behalf of their clients.

	<ul style="list-style-type: none"> • Legally assisted mediation, what role the lawyer can play in the discussion. • Lawyers' influences in mediation practice
<i>General statistics/data</i>	<ul style="list-style-type: none"> • Hours of mediation undertaken [by mediators] each month • Cost of mediation v other processes • I would NOT want research which is based on "statistics" as in my experience (a) the numbers are too small to mean anything, and (b) statistics never capture quality information anyway. • The costs of mediation -v- the costs of [court] proceedings. • Measuring the financial and/or time benefits of participating in mediation in commercial disputes (leases or business to business contracts) • Creating a regional map of (a) frequency of mediation, and (b) issues in a mediation in commercial disputes • Cost effectiveness of mediation.
<i>Philosophy, values, ethics</i>	<ul style="list-style-type: none"> • The philosophy (as opposed to the psychology) of interests, values and "principles" i.e. the way people think about them and the common logical faults. • What are philosophical/theoretical underpinnings of mediation/mediators and how do they shape practice. • Deeper understanding of ethical frameworks to inform practice in a real way. • Challenges for ethical and effective practice and ways to manage them.

Non-mediation processes

- How to legitim[ise] Conciliation as an ADR process
- The effect of use of conciliation in cases where there is an enormous imbalance of power and effective inability to access justice (e.g. Fair Work, AHRC and similar jurisdictions where one party is typically government or a corporation and the other an individual).
- Multiple party conciliation outcomes.
- The lack of responsible and qualified people conducting restorative justice and what it means to be qualified.
- I am more interested in understanding how interests based approaches in organisations and in our political structure can support more sustainable, long term outcomes.
- How conflict coaching affects participation in mediation (does it assist)
- Conflict coaching - should this be a part of all mediation processes?

<i>Sub-category</i>	<i>Responses to Survey Question 5 – Research ideas</i>
<i>i) FDR (= Process)</i> <i>a. Specific outcomes</i>	<ul style="list-style-type: none"> • The improvement, if any, of parties' ability to resolve conflict post mediation. • Whether parties would recommend mediation to others in similar disputes. • Benefits of short and longer time agreements or parenting plans including umbrella agreements • Client satisfaction with FDR • How the parenting relationship works after FDR?
<i>b. Non-specific outcomes</i>	<ul style="list-style-type: none"> • What happens post FDR?
<i>c. Non-specific effectiveness</i>	
<i>d. Specific effectiveness</i>	
<i>e. Models/styles/approaches</i>	<ul style="list-style-type: none"> • There is still very basic knowledge missing about how effective different styles of FDR are. For example, how effective are shuttle mediation sessions / telephone sessions, compared to face to face FDR? • Effectiveness of shuttle mediation v face-to-face mediation • Safety, screening and assessment process. • Who is more facilitative, transformative etc • Impact on clients, post FDR, of decisions to use shuttle or same room mediation • The best approach to manage and mitigate risk in the FDR processes. • My particular interest is in family mediation. I would like to know more about the longitudinal effects for children and families on having been through a more facilitated process (FDR) rather than just litigation or lawyer-assisted negotiation. • I am also interested in how we can embed more therapeutic approaches into FDR more generally
<i>f. Gender issues</i>	<ul style="list-style-type: none"> • The differential impact on women of family law mediation practices when domestic violence is a feature of the marital home. • Economic recovery of women post separation compared to men. • Gender differences in FDR • Power differential in FDR around family violence
<i>h. Standards</i>	
<i>i. Access (including awareness)</i>	
<i>j. Context</i>	<ul style="list-style-type: none"> • How can mediation be effective/empowering for victims of FV/DV • Ongoing family law reforms and their impact on sector of Family Dispute Resolution. • Family violence - Who is our work affecting and are we helping? • Community perceptions of equal shared parental responsibility vs equal time • We want to developing family dispute resolution in [our country]. Your benefits and experiences must [help/inform] us

<i>K. Children</i>	<ul style="list-style-type: none"> • In family law especially, the extent to which mediated agreements about children survive over different periods post mediation. • How effective is child inclusive FDR • Impacts of father's rights groups on FDR arrangements for children including the implementation of 'equal shared' parental responsibility • Proportion of pre-separation care arrangements for children by each parent to post -separation care arrangements • Longitudinal study of 50/50 arrangements - particularly when beginning in early childhood on children's mental health and general well-being. • I would like more research into including children in the preparation for mediation. For example could mediators meet with the children from a relationship prior to the mediation to help children understand the process and what general results could be obtained. e.g. "Mum and Dad are coming to talk about how they can work together as your parents." I believe that this would enable children to feel more empowered as they would be aware of the process their parents are undertaking and although specific results could not be guaranteed, this may reduce anxiety in the child. • The views of the children and how they impact on parental decision making. • Impact on children (involvement in FDR) and age [? How does children's involvement in FDR affect them; does a child's age change the affects?] • Involving the child more • The impact on children • Family conferencing including teenage kids. • Child focused mediation. • The impact on child focused outcomes by including Property and Parenting Matters at FRC's.
<i>ii) FDRP (= Mediator)</i>	
<i>a. Skills/expertise</i>	<ul style="list-style-type: none"> • Correlation between successful property mediations and mediator qualifications and experience • Correlation between successful parenting disputes and mediator qualifications and experience. • How prepared are mediators to mediate property disputes • Successful strategies in FDR • I would like to see some more research which investigates how emotion and dynamics of power are managed and responded to by FDRPs. • How to manage high conflict in the room?
<i>b. Accreditation/standards (includes training)</i>	<ul style="list-style-type: none"> • What level of accreditation should property mediators have?
<i>c. Collegiality</i>	
<i>iii) Disputants (= Parents; includes "parties")</i>	<ul style="list-style-type: none"> • What does it take to 'ripen' parents (to prepare them) to reach agreement in Family Dispute Resolution? • Parties' views of why mediation was successful or unsuccessful. • Parties' views on what makes a good mediator. • What was helpful to clients and what was unhelpful

<i>iv) Advisors</i>	<ul style="list-style-type: none"> • The extent to which mediated property agreements are formalised in essentially the same terms as the mediated agreement or whether conflict re-ignites at the point when parties seek formalisation of their agreements via lawyers. • Efficacy with positional lawyers • How to stop lawyers jumping to positional bargaining, avoiding exploration phase with parties together, and generally advocating and representing. They find any excuse to move to shuttle!
<i>General statistics/data</i>	<ul style="list-style-type: none"> • Savings generated since implementation of 'mandatory' FDR and why this has not translated into greater recognition of remuneration for mediators/FDRPs • General longevity of FDRPs in profession and ways to retain FDRPs. • S601 certificates – use nationally [it seems this response relates to data on the use of S601 certificates in different States/Territories; perhaps general rates of use, and under which circumstances they tend to be used more/less].
<i>Philosophy, values, ethics</i>	<ul style="list-style-type: none"> • Positiveness in dispute resolution, positive supervision/reflective practice and ethical decision making.

Appendix E.

Report of the ABA Task Force, 2017

[Includes separately paginated insertions]

ABA SECTION OF DISPUTE RESOLUTION

**REPORT OF THE TASK FORCE ON
RESEARCH ON MEDIATOR TECHNIQUES**

June 12, 2017

Task Force Members and Acknowledgments

Gary Weiner, Chair

Lawyer Mediator
Sebastopol, CA

Roselle Wissler, Principal Author

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

Task Force Members

Alysoun Boyle

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

Doug Frenkel

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

Teresa Frisbie

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

Chris Honeyman

Managing Partner
Convenor Conflict Management
Washington, D.C.

Bobbi McAdoo

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

Craig McEwen

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

Jennifer Robbennolt

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

Jennifer Shack

Director of Research
Resolution Systems Institute
Chicago, IL

Tania Sourdin

Dean and Professor of Law
University of Newcastle
Newcastle, Australia

Donna Stienstra

Senior Researcher
Federal Judicial Center
Washington, D.C.

Beth Trent

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

James Wall

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

Howard Herman

Liaison to the Section Executive Committee and
Council

Matthew Conger

Section Staff Counsel

Former Members

Kenneth Kressel
Dwight Golann
Tim Hedeem

Acknowledgements

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

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

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

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

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

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

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

Gary Weiner, Chair

Table of Contents

Task Force Members and Acknowledgments	i
Executive Summary	1
A. Methodology and Overview of the Studies Reviewed	1
B. Mediator Actions and Mediation Outcomes Examined	1
C. Empirical Findings Regarding the Effects of Mediator Actions on Mediation Outcomes	2
D. Next Steps and Recommendations	4
E. Conclusion	6
I. Introduction	7
II. Methodology	8
A. Establishing the Scope of Inquiry	8
B. Identifying Relevant Studies and Recording Empirical Findings and Other Pertinent Information	9
III. Descriptive Overview of the Studies Reviewed	9
IV. Difficulties Drawing Causal Inferences about the Effects of Mediator Actions on Mediation Outcomes	11
V. Empirical Findings: The Effect of Mediator Actions on Mediation Outcomes	14
A. Pressing or Directive Styles and Actions	15
1. Effect on Settlement and Related Outcomes	15
2. Effect on Disputants' Perceptions and Relationships	19
3. Effect on Attorneys' Perceptions	21
B. Offering Recommendations, Suggestions, Evaluations, or Opinions	21
1. Effect on Settlement and Related Outcomes	21
2. Effect on Disputants' Perceptions and Relationships	26
3. Effect on Attorneys' Perceptions	30
C. Eliciting Disputants' Suggestions or Solutions	31
1. Effect on Settlement and Related Outcomes	31
2. Effect on Disputants' Perceptions and Relationships	32
3. Effect on Attorneys' Perceptions	33
D. Addressing Disputants' Emotions, Relationships, or Hostility	33
1. Effect on Settlement and Related Outcomes	34
2. Effect on Disputants' Perceptions and Relationships	35
3. Effect on Attorneys' Perceptions	38
E. Working to Build Rapport and Trust, Expressing Empathy, Structuring the Agenda, or Other "Process" Styles and Actions	38
1. Effect on Settlement and Related Outcomes	38
2. Effect on Disputants' Perceptions and Relationships	42
3. Effect on Attorneys' Perceptions	44
F. Using Pre-mediation Caucuses	44

1. Effect on Settlement and Related Outcomes	44
2. Effect on Disputants' Perceptions and Relationships	45
3. Effect on Attorneys' Perceptions	46
G. Using Caucuses During Mediation	46
1. Effect on Settlement and Related Outcomes	46
2. Effect on Disputants' Perceptions and Relationships	47
3. Effect on Attorneys' Perceptions	49
H. Summary of Findings	49
VI. Next Steps and Recommendations	57
A. Proposed Next Steps	57
1. Disseminate the Report and Establish a Repository for the Studies	57
2. Conduct a More Detailed Examination of Existing Studies	57
3. Develop More Uniform, Reliable, and Valid Measures of Mediator Actions and Mediation Outcomes	58
4. Increase Researcher Access to Mediation	59
5. Conduct Additional Research to Address Identified Gaps and Issues	59
6. Disseminate Future Empirical Findings to Researchers and Practitioners	60
B. Recommendations	60
1. Recommendations for the ABA Section of Dispute Resolution's Working Group	61
2. Recommendations for Researchers in the Consortium of Universities	61
C. Conclusion	61
Appendix A Empirical Studies with Relevant Data on the Impact of Mediator Behaviors on Mediation Outcomes	62
Appendix B Template Used to Record Information from Studies	65

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

Executive Summary

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

A. Methodology and Overview of the Studies Reviewed

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

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

B. Mediator Actions and Mediation Outcomes Examined

The Task Force conceptually organized the wide range of mediator actions and styles examined in the studies into the following seven categories: (1) pressing or directive actions or approaches; (2) offering recommendations, suggestions, evaluations, or opinions; (3) eliciting disputants’ suggestions or solutions; (4) addressing disputants’ emotions, relationships, or hostility; (5) working to build rapport and trust, expressing empathy, structuring the agenda, or other “process” styles and actions; (6) using pre-mediation caucuses; and (7) using caucuses during mediation. The Task Force grouped the mediation outcomes examined in the studies into the following three categories: (1) settlement and

related outcomes, including joint goal achievement, personalization of the mediated agreement, reaching a subsequent consent order, or filing post-mediation motions or actions; (2) disputants' relationships or ability to work together and their perceptions of the mediator, the mediation process, or the outcome; and (3) attorneys' perceptions of mediation. (See *infra* Tables V.H.1 to V.H.3.) The Task Force examined the empirical findings regarding the effects of each category of mediator actions on each set of mediation outcomes, to the extent permitted by the available data, and reports the findings separately for each of these mediator action-mediation outcome pairs.

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

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

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

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

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

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

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

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

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

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

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

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

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

D. Next Steps and Recommendations

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

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

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

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

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

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

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

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

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

Recommendations for researchers in the consortium of universities include:

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

E. Conclusion

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

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

I. Introduction

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

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

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

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

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

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

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

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

II. Methodology

A. Establishing the Scope of Inquiry

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

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

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

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

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

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

B. Identifying Relevant Studies and Recording Empirical Findings and Other Pertinent Information

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

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

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

III. Descriptive Overview of the Studies Reviewed

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

A. Pressing or Directive Styles and Actions

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

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

1. Effect on Settlement and Related Outcomes

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

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

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

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

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

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

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

process and trust, and not suggesting particular solutions. “Referee” included attempting to control disputants’ hostility and not focusing on closure.

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

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

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

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

⁸ Wissler, 1995.

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

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

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

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

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

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

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

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

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

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

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

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

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

¹⁸ Karim & Pegnetter, 1983.

¹⁹ Dilts & Karim, 1990.

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

progress of mediation, settlement was less likely.²¹ Several studies in general civil,²² community,²³ and divorce²⁴ mediation found no relationship between mediators' criticizing the disputants and settlement.

2. Effect on Disputants' Perceptions and Relationships

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

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

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

²¹ Karim & Pegnetter, 1983.

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

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

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

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

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

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

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

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

other disputant perceptions assessed either at the conclusion of mediation³⁰ or six months later,³¹ including views of the mediator, mediation process, agreement, or ability to work with the other party. Mediators' greater use of "directive" actions in community mediation was related to disputants' feeling less able to express themselves, less understood by the mediator, and less satisfied with the process, but was not related to several other perceptions.³² When mediators criticized the other party, disputants in general civil cases were less satisfied overall with the mediation process.³³ When mediators criticized disputants in community mediation, disputants were less satisfied with the conduct of the session, but their satisfaction with the outcome was not affected.³⁴

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

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

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

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

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

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

³³ Wall et al., 2011.

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

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

3. Effect on Attorneys’ Perceptions

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

B. Offering Recommendations, Suggestions, Evaluations, or Opinions

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

1. Effect on Settlement and Related Outcomes

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

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

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

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

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

³⁹ Wissler, 2002.

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

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

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

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

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

⁴³ WISSLER, 1999, MAINE STUDY.

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

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

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

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

The second set of mediator actions in this category included suggesting possible settlement options or solutions. One study found settlement was less likely when mediators suggested some options for settlement in divorce mediation.⁴⁷ Several other studies found these actions increased settlement. Settlement appeared more likely when mediators created alternate proposals in divorce cases⁴⁸ and suggested solutions in general civil cases.⁴⁹ Settlement also was more likely when mediators in divorce cases spent more time discussing possible solutions in general terms, but was not affected by mediators' making suggestions about possible solutions or reacting to disputants' solutions.⁵⁰ When mediators suggested proposals that specifically helped avoid the appearance of defeat of either party, settlement was more likely in three studies of labor-management disputes.⁵¹ And when mediators used a

⁴⁷ WISSLER, 1999, MAINE STUDY.

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

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

⁵⁰ Slaikeu et al., 1985.

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

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

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

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

⁵³ Wissler, 2002.

⁵⁴ WISSLER 1999, OHIO STUDY.

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

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

⁵⁷ McEWEN, 1992. The separate effect of each of these actions was not reported.

⁵⁸ Wall et al., 2011.

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

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

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

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

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

⁶¹ Hensler, 2001.

⁶² Brett et al., 1996.

⁶³ Henderson, 1996.

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

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

⁶⁶ WISSLER, 1999, OHIO STUDY.

⁶⁷ Peebles et al., 2007.

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

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

2. Effect on Disputants' Perceptions and Relationships

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

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

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

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

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

⁷² Wissler, 2002.

⁷³ WISSLER, 1999, MAINE STUDY.

⁷⁴ WISSLER, 1999, MAINE STUDY.

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

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

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

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

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

⁷⁸ Wissler, 2002.

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

⁸⁰ WISSLER, 1999, MAINE STUDY.

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

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

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

approach to conflict, though other perceptions were not affected.⁸⁴ In child custody mediation, mediators' "offering perspectives" was not related to any of the disputants' perceptions at the conclusion of mediation⁸⁵ or six months later.⁸⁶ In a study simulating a dispute between students, disputants thought mediators were more controlling and imposed solutions more when they used an "integration" strategy than when they used an "inaction" or "compensating" strategy; there were no differences in these perceptions between "integration" and "pressing" strategies.⁸⁷ In the same study, disputants engaged in more reframing and problem-solution redefinition when mediators used an "integration" strategy than any of the other strategies. The "integration" strategy, however, did not differ from the other strategies in terms of disputants' conflict management style, views of whether mediation clarified their positions, or views of the mediators' "fairness" or "attentiveness."⁸⁸

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

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

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

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

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

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

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

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

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

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

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

3. Effect on Attorneys’ Perceptions

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

⁹¹ McDermott & Obar, 2004. For the responding parties’ perceptions not related to mediators’ actions, see the perceptions listed *supra* note 90 and accompanying text.

⁹² Wall et al., 2011.

⁹³ Wissler, 2002.

⁹⁴ WISSLER, 1999, OHIO STUDY. For both cases that did and did not settle, disputants’ perceptions not related to mediators’ evaluating the case merits included whether they were satisfied with the outcome, their children’s circumstances improved, and their ability to deal with the other party regarding the children improved. In cases that settled, mediators’ evaluating the case merits also was not related to disputants’ views of the fairness of the process or their chance to help decide the outcome. In cases that did not settle, evaluation also was not related to disputants’ understanding of the other party’s views.

⁹⁵ WISSLER, 1999, OHIO STUDY. See *supra* note 94 for the perceptions examined.

⁹⁶ Wissler, 2002.

⁹⁷ Wissler, 2002.

⁹⁸ Hensler, 2001.

⁹⁹ WISSLER, 1999, MAINE STUDY.

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

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

C. Eliciting Disputants' Suggestions or Solutions

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

1. Effect on Settlement and Related Outcomes

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

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

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

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

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

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

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

2. Effect on Disputants' Perceptions and Relationships

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

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

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

¹⁰⁵ Karim & Pegnetter, 1983.

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

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

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

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

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

3. Effect on Attorneys' Perceptions

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

D. Addressing Disputants' Emotions, Relationships, or Hostility

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

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

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

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

1. Effect on Settlement and Related Outcomes

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

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

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

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

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

¹¹⁵ Slaikou et al., 1985.

¹¹⁶ MARYLAND ADMINISTRATIVE OFFICE OF THE COURTS, 2016, CHILD ACCESS MEDIATION. For these analyses, "reflecting emotions/interests" consisted of a large number of actions including: addressing and encouraging disputants to express their feelings; paraphrasing or reflecting back the interests, values, or goals disputants expressed; pointing out things the disputants had in common; not giving their opinion about the situation or solutions, etc.

¹¹⁷ WISSLER, 1999, MAINE STUDY.

¹¹⁸ MARYLAND ADMINISTRATIVE OFFICE OF THE COURTS, 2016, DAY OF TRIAL MEDIATION. For these analyses, "reflecting emotions/interests" included addressing and encouraging disputants to express their feelings; paraphrasing or reflecting back the interests, values, or goals the disputants expressed; and not giving their opinion about the situation or solutions.

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

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

2. Effect on Disputants' Perceptions and Relationships

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

¹¹⁹ Cohn, 1996. The "referee" style also involved not focusing on closure. *See supra* note 3 for the actions constituting the other styles. No statistical significance tests or settlement rates were reported, so these might not be "true" (i.e., statistically significant) differences.

¹²⁰ Hiltrop, 1985.

¹²¹ Dilts & Karim, 1990.

¹²² Posthuma et al., 2002. These two actions were combined into a single measure. "Settlement" included whether the dispute was settled; anything was left unclear; and the agreement reached was mutually beneficial, lasting, had no political ramifications, and felt like their own.

¹²³ Kressel et al., 1994. *See supra* note 112 for definitions of the styles.

¹²⁴ Pruitt et al., 1993. Mediators with a "relationship" orientation focused on building capacity for future problem-solving; mediators with a "settlement" orientation focused on reaching agreement. These analyses involved the same mediation and med-arb cases as in Zubek et al., *supra* note 1, but were based on information obtained four to eight months after mediation.

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

In limited jurisdiction civil cases, when mediators “reflected emotions/interests,” disputants were more likely to say the other party took responsibility and apologized, they can talk with the other party about their concerns, the situation would change, and the court cares about helping resolve problems fairly. However, most disputant perceptions assessed at the conclusion of mediation,¹²⁷ and all disputant perceptions assessed at follow-up several months later,¹²⁸ were not related to mediators’ “reflecting emotions/interests.” In child custody mediation, when mediators “reflected emotions/interests,” disputants were more likely to say the other person listened to them, they understood each other better, together controlled the decisions made in mediation, saw a range of options for resolving issues, can work with the other party regarding the children,¹²⁹ can talk with the other parent and work as a team for the sake of the children, and the children were doing well.¹³⁰ However, most disputant perceptions assessed at the conclusion of mediation¹³¹ and six months after mediation¹³² were not related to mediators’ “reflecting emotions/interests.”

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

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

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

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

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

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

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

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

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

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

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

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

¹³⁴ WISSLER, 1999, OHIO STUDY.

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

3. Effect on Attorneys' Perceptions

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

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

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

1. Effect on Settlement and Related Outcomes

The first set of mediator actions and styles in this category involved working to build rapport and trust with and between the parties, expressing empathy, or praising the disputants. When mediators in varied mediation settings used either a "reflexive" or a "contextual/trust" style to a greater degree, "general settlement" was more likely.¹³⁷ In labor-management disputes, settlements generally increased when mediators tried to gain the parties' trust¹³⁸ or used "friendliness,"¹³⁹ although mediators' use of "reflexive" tactics was not related to settlement.¹⁴⁰ Settlement appeared "slightly" less likely when mediators used a "facilitator" style in general civil cases than when they used an "instigator" or "evaluator" style.¹⁴¹ In international disputes, "non-directive" strategies that included "communication-facilitation" strategies generally appeared less likely to produce "successful outcomes" than "directive" strategies.¹⁴²

¹³⁶ WISSLER, 1999, MAINE STUDY.

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

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

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

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

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

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

Mediators' use of empathy was related to more settlement and greater joint goal achievement in community mediation.¹⁴³ However, mediators' use of empathy was not related to settlement in general civil¹⁴⁴ or in labor-management disputes.¹⁴⁵ In a study simulating a campus-based business dispute, settlement was more likely when mediators used "empathic" listening rather than "discriminative" listening, but there was no difference in settlement between "empathic" and "critical" listening.¹⁴⁶ Praising the disputants was not related to settlement or joint goal achievement in community mediation,¹⁴⁷ but was related to more settlement in general civil disputes.¹⁴⁸

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

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

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

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

¹⁴⁴ Wall & Chan-Serafin, 2009.

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

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

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

¹⁴⁸ Wall et al., 2011.

settlement” was more likely.¹⁴⁹ Mediators’ suggesting an agenda in community mediation was not related to settlement, but was related to greater joint goal achievement.¹⁵⁰ Mediators’ identifying or enforcing topics or the agenda was not related to settlement in divorce mediation.¹⁵¹ In labor-management disputes, mediators’ simplifying the agenda¹⁵² and building or helping devise a framework for negotiation¹⁵³ were generally related to increased settlement. In labor-management mediation, mediators’ suggesting separating issues to reach a partial deal and emphasizing the need to make concessions increased settlement, but mediators’ suggesting parties deal with the most difficult issues first, grouping multiple issues to create a package, and asking parties to identify their bottom-line positions decreased settlement.¹⁵⁴ One study of labor-management disputes found increased “settlement” with a broad set of mediator “process” actions that included structuring the agenda,¹⁵⁵ but another found no effect on settlement of a somewhat similar set of “nondirective” mediator actions.¹⁵⁶ In a study of divorce cases, the two mediators with the highest settlement rates both actively structured the mediation, though each did that in different ways.¹⁵⁷

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

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

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

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

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

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

¹⁵⁴ Hiltrop, 1989, Study 2.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

¹⁶⁶ Dilts & Karim, 1990.

¹⁶⁷ Karim & Pegnetter, 1983.

negotiators to present possible agreement to their constituents¹⁶⁸ or assisted negotiators with their relationship with their constituents,¹⁶⁹ settlement was more likely.

2. Effect on Disputants' Perceptions and Relationships

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

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

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

¹⁶⁸ Hiltrop, 1989, Study 2.

¹⁶⁹ Hiltrop, 1985.

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

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

¹⁷² Zubek et al., 1992.

¹⁷³ Wall et al., 2011.

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

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

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

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

¹⁷⁵ Zubeck et al., 1992. *See also supra* note 1.

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

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

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

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

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

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

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

3. Effect on Attorneys' Perceptions

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

F. Using Pre-mediation Caucuses

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

1. Effect on Settlement and Related Outcomes

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

¹⁸¹ Kimsey et al. 1994. For the specific items making up these measures, *see supra* note 36.

¹⁸² WISSLER, 1999, MAINE STUDY.

¹⁸³ WISSLER, 1999, MAINE STUDY. *See supra* note 182 and accompanying text for the other disputant perceptions examined.

¹⁸⁴ WISSLER, 1999, OHIO STUDY. In cases that did not settle, disputant perceptions not related to mediators' summarizing were whether they had a chance to help decide the outcome and whether their children's circumstances improved.

¹⁸⁵ WISSLER, 1999, OHIO STUDY. *See supra* note 184 and accompanying text for the disputant perceptions examined.

¹⁸⁶ WISSLER, 1999, OHIO STUDY.

¹⁸⁷ WISSLER, 1999, MAINE STUDY.

¹⁸⁸ Hiltrop, 1985.

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

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

2. Effect on Disputants' Perceptions and Relationships

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

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

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

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

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

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

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

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

3. Effect on Attorneys' Perceptions

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

G. Using Caucuses During Mediation

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

1. Effect on Settlement and Related Outcomes

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

In other settings, however, there was no relationship between caucusing during mediation and settlement. Using caucuses had no effect on settlement in construction disputes¹⁹⁷ and had no effect on settlement or on disputants' joint goal achievement in community mediation.¹⁹⁸ The percentage of time spent in caucus did not affect settlement in limited-jurisdiction civil cases; however, disputants who spent more time in caucuses were more likely to return to court for an enforcement action in the year after mediation.¹⁹⁹ In child custody mediation, the percentage of time spent in caucuses did not affect reaching an agreement, having a more personalized agreement, making progress toward a consent order, having a consent order entered, or whether and how many adversarial motions were filed after

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

¹⁹⁶ Dilts & Karim, 1990.

¹⁹⁷ Henderson, 1996.

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

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

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

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

2. Effect on Disputants' Perceptions and Relationships

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

3. Effect on Attorneys' Perceptions

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

H. Summary of Findings

None of the categories of mediator actions has clear, uniform effects across the studies – that is, none consistently has negative effects, positive effects, or no effects -- on any of the three sets of mediation outcomes.²¹² Tables V.H.1 to V.H.3 at the end of this section show the pattern of empirical findings for each category of actions, separately for each set of outcomes. This variation in findings across the studies shows why drawing conclusions about the effectiveness of mediator actions based on the findings of a single study could lead to recommendations not supported by the overall pattern of research findings. And seeing that some mediator actions have different effects on disputants' relationships and perceptions of mediation than on settlement demonstrates the need to look at the impact of mediator actions on both sets of outcomes²¹³ before reaching conclusions about the actions' effectiveness.

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

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

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

²¹¹ Rosenberg & Folberg, 1994.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

TABLE V.H.2. Effect of Mediators' Actions and Styles on Disputants' Perceptions and Relationships

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

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

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

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

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

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

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

Dispute types: D = divorce, GC = general civil

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

VI. Next Steps and Recommendations

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

A. Proposed Next Steps

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

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

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

2. Conduct a More Detailed Examination of Existing Studies

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

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

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

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

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

²¹⁵ For examples of how empirical data from other disciplines can inform our understanding of effective mediation, see, e.g. James H. Stark & Douglas N. Frenkel, *Changing Minds: The Work of Mediators and Empirical Studies of Persuasion*, 28 OHIO STATE JOURNAL ON DISPUTE RESOLUTION 263 (2013); JENNIFER K. ROBBENOLT & JEAN R. STERNLIGHT, *PSYCHOLOGY FOR LAWYERS: UNDERSTANDING THE HUMAN FACTORS IN NEGOTIATION, LITIGATION, AND DECISION MAKING* (ABA Publishing, 2012) (see Chapter 11 applying social and cognitive psychology to mediation); Russell Korobkin, *Psychological Impediments to Mediation Success*, 21 *Ohio State Journal on Dispute Resolution* 281 (2006).

²¹⁶ E. ALLAN LIND & TOM R. TYLER, *THE SOCIAL PSYCHOLOGY OF PROCEDURAL JUSTICE* 245 (1988). In the Appendix, they listed common measures used in several studies to measure key concepts relevant to studying procedural justice (e.g., perceptions of procedural fairness, process control, and decision control) so that other researchers could use, test, and refine those measures. See *infra* note 218 and accompanying text.

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

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

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

4. Increase Researcher Access to Mediation

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

5. Conduct Additional Research to Address Identified Gaps and Issues

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

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

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

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

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

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

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

6. Disseminate Future Empirical Findings to Researchers and Practitioners

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

B. Recommendations

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

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

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

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

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

2. Recommendations for Researchers in the Consortium of Universities

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

C. Conclusion

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

Appendix A

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

- Jean Marie Hiltrop, *Factors Associated with Successful Labor Mediation*, in *MEDIATION RESEARCH: THE PROCESS AND EFFECTIVENESS OF THIRD-PARTY INTERVENTION* 211 (Kenneth Kressel and Dean G. Pruitt eds., 1989) (Study 2 only)
- Ahmad Karim and Richard Peggnetter, *Mediator Strategies and Qualities and Mediation Effectiveness*, 22 *INDUSTRIAL RELATIONS* 105 (1983)
- William D. Kimsey, Rex M. Fuller, and Bruce C. McKinney, *Mediator Listening, Dispute Reframing, and Mediation Outcome: A Pilot Study*, 7 *JOURNAL OF THE INTERNATIONAL LISTENING ASSOCIATION* 74 (1993)
- William D. Kimsey, Rex M. Fuller, Andrew J. Bell, and Bruce C. McKinney, *The Impact of Mediator Strategic Choices: An Experimental Study*, 12 *MEDIATION QUARTERLY* 89 (1994)
- Daniel Klerman and Lisa Klerman, *Inside the Caucus: An Empirical Analysis of Mediation from Within*, 12 *JOURNAL OF EMPIRICAL LEGAL STUDIES* 686 (2015)
- Thomas A. Kochan and Todd Jick, *The Public Sector Mediation Process: A Theory and Empirical Examination*, 22 *THE JOURNAL OF CONFLICT RESOLUTION* 209 (1978)
- Kenneth Kressel, Edward A. Frontera, Samuel Forlenza, Frances Butler, and Linda Fish, *The Settlement-Orientation vs. the Problem-Solving Style in Custody Mediation*, 50 *JOURNAL OF SOCIAL ISSUES* 67 (1994)
- Rodney G. Lim and Peter J. D. Carnevale, *Contingencies in the Mediation of Disputes*, 58 *JOURNAL OF PERSONALITY AND SOCIAL PSYCHOLOGY* 259 (1990)
- E. Patrick McDermott and Ruth Obar, *“What’s Going On” in Mediation: An Empirical Analysis of the Influence of a Mediator’s Style on Party Satisfaction and Monetary Benefit*, 9 *HARVARD NEGOTIATION LAW REVIEW* 75 (2004)
- CRAIG A. MCEWEN, *AN EVALUATION OF THE ADR PILOT PROJECT: FINAL REPORT* (1992) (available at: <https://www.bowdoin.edu/faculty/c/cmcewen/pdfs/an-evaluation-of-the-adr-pilot-project-final-report-1992.pdf>)
- MARYLAND ADMINISTRATIVE OFFICE OF THE COURTS, *WHAT WORKS IN DISTRICT COURT DAY OF TRIAL MEDIATION: EFFECTIVENESS OF VARIOUS MEDIATION STRATEGIES ON SHORT- AND LONG-TERM OUTCOMES* (2016) (available at: <http://www.courts.state.md.us/courtoperations/pdfs/districtcourtstrategiesfullreport.pdf>)
- MARYLAND ADMINISTRATIVE OFFICE OF THE COURTS, *WHAT WORKS IN CHILD ACCESS MEDIATION: EFFECTIVENESS OF VARIOUS MEDIATION STRATEGIES ON SHORT- AND LONG-TERM OUTCOMES* (2016) (available at: <http://www.courts.state.md.us/macro/pdfs/reports/whatworksinchildaccessmediation201409report.pdf>)
- Ralph Peeples, Catherine Harris, and Thomas Metzloff, *Following the Script: An Empirical Analysis of Court-Ordered Mediation of Medical Malpractice Cases*, 2007 *JOURNAL OF DISPUTE RESOLUTION* 101 (2007)
- Richard A. Posthuma, James B. Dworkin, and Maris Stella Swift, *Mediator Tactics and Sources of Conflict: Facilitating and Inhibiting Effects*, 41 *INDUSTRIAL RELATIONS* 94 (2002)
- Dean G. Pruitt, Robert S. Peirce, Neil B. McGillicuddy, Gary L. Welton, and Lynne M. Castrianno, *Long-Term Success in Mediation*, 17 *LAW AND HUMAN BEHAVIOR* 313 (1993)

- Joshua D. Rosenberg and H. Jay Folberg, *Alternative Dispute Resolution: An Empirical Analysis*, 46 STANFORD LAW REVIEW 1487 (1994)
- Karl A. Slaikeu, Ralph Culler, Jessica Pearson and Nancy Thoennes, *Process and Outcome in Divorce Mediation*, 10 MEDIATION QUARTERLY 55 (1985)
- Roderick I. Swaab, *Face First: Pre-Mediation Caucus and Face in Employment Disputes*, presented at THE INTERNATIONAL ASSOCIATION OF CONFLICT MANAGEMENT (2009) (Study 1 only) (available at: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1493514)
- Roderick I. Swaab and Jeanne Brett, *Caucus with Care: The Impact of Pre-Mediation Caucuses on Conflict Resolution*, presented at THE INTERNATIONAL ASSOCIATION OF CONFLICT MANAGEMENT (2007) (available at: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1080622)
- Lois Vanderkooi and Jessica Pearson, *Mediating Divorce Disputes: Mediator Behaviors, Styles and Roles*, 32 FAMILY RELATIONS 557 (1983)
- James A. Wall, Jr., *Mediation: The Effects of Mediator Proposals, Number of Issues, and Altered Negotiator Aspirations*, 10 JOURNAL OF MANAGEMENT 293 (1984)
- James A. Wall, Jr. and Suzanne Chan-Serafin, *Processes in Civil Case Mediations*, 26 CONFLICT RESOLUTION QUARTERLY 261 (2009)
- James A. Wall, Jr. and Suzanne Chan-Serafin, *Do Mediators Walk Their Talk in Civil Cases?*, 28 CONFLICT RESOLUTION QUARTERLY 3 (2010)
- James A. Wall, Jr., Timothy C. Dunne, and Suzanne Chan-Serafin, *The Effects of Neutral, Evaluative, and Pressing Mediator Strategies*, 29 CONFLICT RESOLUTION QUARTERLY 127 (2011)
- James A. Wall, Jr. and Dale E. Rude, *Judicial Mediation: Techniques, Strategies, and Situational Effects*, 41 JOURNAL OF SOCIAL ISSUES 47 (1985) (Study 2 only)
- James A. Wall, Jr. and Dale E. Rude, *The Judge as a Mediator*, 76 JOURNAL OF APPLIED PSYCHOLOGY 54 (1991) (Study 2 only)
- Gary L. Welton, Dean G. Pruitt, Neil B. McGillicuddy, Carol A. Ippolito and Jo M. Zubek, *Antecedents and Characteristics of Caucusing in Community Mediation*, 3 INTERNATIONAL JOURNAL OF CONFLICT MANAGEMENT 303 (1992)
- Roselle L. Wissler, *Mediation and Adjudication in Small Claims Court: The Effects of Process and Case Characteristics*, 29 LAW & SOCIETY REVIEW 323 (1995)
- ROSELLE L. WISSLER, TRAPPING THE DATA: AN ASSESSMENT OF DOMESTIC RELATIONS MEDIATION IN MAINE AND OHIO COURTS (1999) (Reported separately as WISSLER, 1999, MAINE STUDY and WISSLER, 1999, OHIO STUDY)
- Roselle L. Wissler, *Court-Connected Mediation in General Civil Cases: What We Know from Empirical Research*, 17 OHIO STATE JOURNAL ON DISPUTE RESOLUTION 641 (2002)
- James G. Woodward, *Settlement Week: Measuring the Promise*, 11 NORTHERN ILLINOIS UNIVERSITY LAW REVIEW 1 (1990)
- Josephine M. Zubek, Dean G. Pruitt, Robert S. Peirce, Neil B. McGillicuddy, and Helena Syna, *Disputant and Mediator Behaviors Affecting Short-Term Success in Mediation*, 36 JOURNAL OF CONFLICT RESOLUTION 546 (1992)

Appendix B

Template Used to Record Information from Studies

Q1 Citation:

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

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

Q4.1 Additional Other Mediation Outcome(s) Examined

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

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

- ☐ Specify how this outcome was defined and measured in this study

Q6 During the mediation session(s):

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

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

Q7 After the mediation session(s):

- ☐ Whether or not the mediator engaged in any action to follow up with the disputants.
 - ☐ Specify how these actions were defined and measured in this study

General: The mediator behaviors examined were general approaches or styles instead of, or in addition to, more specific behaviors.

- ☐ Specify how these actions were defined and measured in this study

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

Q9 Type of Process

- ☐ Mediation
- ☐ Early Neutral Evaluation
- ☐ Med-Arb with the same person serving as the neutral for both processes
- ☐ Med-Arb with different people serving as the neutral for each process
- ☐ Other
 - specify

Q10 The Mediators Were:

- ☐ non-attorneys
 - describe
- ☐ attorneys but not judges
- ☐ retired or former judges
- ☐ sitting judges not assigned to the case
- ☐ sitting judges assigned to the case
- ☐ other
 - specify
- ☐ simulation
 - specify who the neutrals were supposed to be in the simulation

Q11 If the mediation was court-connected, also indicate if the mediators were:

- ☐ roster or panel neutral
- ☐ staff neutral
- ☐ other
 - specify
- ☐ not stated

Q12 Were the mediators:

- ☐ volunteers
- ☐ paid
- ☐ not stated
- ☐ not applicable (e.g., simulation)
- ☐ other
 - specify

Q13 How many mediators mediated each case?

- ☐ a single mediator
- ☐ two co-mediators
- ☐ a panel of more than two neutrals

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

Q14 Context within which the mediations took place?

- ☐ within an organization
- ☐ private
- ☐ community
- ☐ court-connected
- ☐ government or agency (but NOT intra-agency)
- ☐ other
 - specify
- ☐ simulation
 - specify what the setting was supposed to be in the simulation

Q15 The mediations took place:

- ☐ in person
- ☐ by telephone
- ☐ online
- ☐ other
 - specify

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

- ☐ 1=Yes 2 = No
- specify

Q17 Dispute Type (check all that apply)

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

METHODOLOGY

Q18 What was the sample size on which the findings linking mediator behaviors and outcomes are based?

- ☐ Number of cases
- ☐ Number of sessions
- ☐ Number of mediators
- ☐ Number of parties
- ☐ Number of attorneys
- ☐ Other
-specify

Q19 What was the response rate for each applicable sample?

- ☐ cases
- ☐ sessions
- ☐ mediators
- ☐ parties
- ☐ attorneys
- ☐ other
-specify

Q20 How were the mediator's actions measured/indicated/obtained?

- ☐ mediator report (via questionnaire, interview, log, etc.)
- ☐ attorney report (via questionnaire, interview, etc.)
- ☐ party report (via questionnaire, interview, etc.)
- ☐ observation by researcher (e.g., coding of behaviors, video of session)
- ☐ simulation (i.e., mediator's actions were controlled and varied systematically)
- ☐ other
-specify

Q21 How were the mediation outcomes measured/indicated/obtained?

- ☐ mediator report (via questionnaire, interview, log, etc.)
- ☐ attorney report (via questionnaire, interview, etc.)
- ☐ party report (via questionnaire, interview, etc.)
- ☐ observation by researcher
- ☐ court docket sheets or other court records
- ☐ program log/records
- ☐ other
- specify

Q22 Are the actual survey or coding instruments included in the article?

- ☐ 1 = Yes ☐ 2 = No

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

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

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

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

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

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

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

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

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

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