

RELATIVE EFFECTIVENESS OF MEDIATORS AND ATTORNEY-MEDIATORS
IN A COURT ANNEXED MEDIATION PROGRAM

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Are attorney-mediators more effective than non-attorney mediators in resolving cases that are already in the court system? In order to provide insight into that question, and propose some answers, a 2009 study looked at all civil cases assigned to mandatory mediation by the Ventura County, California, Superior Court between January 1, 2005 and December 31, 2008.

The Study

The study was designed to compare settlement rates as between attorney-mediators and non-attorney mediators according to three metrics: absolute settlement rates, case type settlement rates, and case value settlement rates. The study compared those metrics among the 73 mediators who were identified as having cases assigned to them for mandatory mediation during the study period. Of that number, forty-two (58%) were identified as attorney-mediators and thirty-one (42%) were non-attorney mediators. Mediators are asked to identify at least one day each month on which they will make themselves available to conduct mediations. When a case is identified by a judge as being subject to the Court's rules for mandatory mediation it is sent to the mediation clerk for assignment. Assignments are done randomly by the clerk to whichever mediator has indicated availability on the date for which the mediation is set, typically 6 weeks after the order of assignment is made.

California civil cases can be filed as Limited Jurisdiction cases in which claimed damages cannot exceed \$25,000 and Unlimited Jurisdiction cases in which there is no ceiling on the claimed damages. Unlimited jurisdiction cases have a filing fee that is higher than the filing fee charged in limited jurisdiction cases. Discovery rules are more generous in unlimited jurisdiction cases than in limited jurisdiction cases, thereby potentially affecting the costs associated with discovery in the various cases. As a result of those two considerations, there is some incentive for plaintiffs' attorneys to honestly evaluate their cases and to file smaller value cases as limited jurisdiction cases.

The Ventura Superior Court identifies each case filing by its predominant legal theory, even if many different legal theories, or causes of action, are included in the complaint. The categories of case filings include automobile tort, torts involving personal injury, torts involving property damage, miscellaneous other torts, employment, contract, real property, unlawful detainer, judicial review, complex litigation, collection, enforcement of judgment, lemon law (automobile defect), small claims appeals, and miscellaneous others. Not all types of cases are subject to assignment to mediation. Complex litigation matters, judicial review matters, enforcement of judgment matters, and small claims appeals are not subjects to the court's mandatory mediation program. Although the Court has a Family Law Mediation program, none of those cases were included in the study because all of the mediators were attorneys and because the program is not a true mediation program but rather an advisory process for the Court.

A total of 529 civil case files were identified by the Clerk's Office as having been subject to mandatory mediation during the study period. Preliminary examination resulted in the elimination of 22 of the files as duplicates of other entries. Analysis began using the remaining 507 unduplicated cases that had been identified by the Clerk.

Of the 507 unduplicated cases, 194 cases were eliminated from analysis either because no mediation session had occurred or no result had been reported. The eliminated cases included:

- Cases that were settled before the mediation session was to have occurred;
- Others in which the parties elected to have a private mediator handle the matter instead of the court-appointed mediator;
- Those for which a mediator had disqualified him or herself and no new mediator was appointed;
- Those cases in which one or more parties failed to appear for the mediation and no new mediation was scheduled;
- Cases in which one or more of the parties filed for Federal bankruptcy protection and the case was stayed or disposed of in the bankruptcy proceedings;
- One case that was returned to the court by the mediator because it exceeded the jurisdictional limit for mandatory mediation pursuant to the state’s Code of Civil Procedure;
- One case for which the mediator failed to appear for the mediation and no new mediation was scheduled.

With the elimination of the excluded cases from the original population of 507, analysis was conducted on the remaining 313 cases involving actual mediation sessions.

Study Findings General Analysis

The study identified 183 of those 313 cases as settled. For purposes of this study, settled cases include those that were resolved in whole or in part during the mediation session as well as cases settled within 60 days of the mediation session. The remaining 130 cases either did not settle at all or settled more than 60 days after the mediation session was held. Of the 183 cases that did settle as a result of mediation, an attorney-mediator was involved in 91 of the cases and a non-attorney mediator was involved in 92 of the cases. Among the cases that did not settle, an attorney-mediator was involved with 62 and a non-attorney mediator was involved with 68.

Mediated Cases	Total	%	Atty Mediators	%	Non-Atty Mediators	%
Settled within 60 days of mediation	183	58%	91	59%	92	58%
Not Settled within 60 days of mediation	130	42%	62	41%	68	42%
Total	313	100%	153	100%	160	100%

A cursory review of the above figures indicates no significant difference in the settlement rates between the attorney and non-attorney mediator groups.

Case Value Analysis

One way to seek a greater depth of information from the data developed in the study was to evaluate cases based upon their value. In each instance, the court files provided information about whether the case had filed as a limited jurisdiction case or an unlimited jurisdiction case. The study found that among the 313 cases in which mediations were conducted, 238 sought monetary relief of more than \$25,000 cases while 75 sought damages of less than \$25,000. Among the 183 cases that were settled as a result of mediation, 135 sought monetary relief in excess of \$25,000 and 48 sought monetary relief of

less than \$25,000. Among the 130 cases that were not settled as a result of mediation, 103 sought monetary relief in excess of \$25,000 and 27 sought relief of less than \$25,000.

Mediated Cases	Value >\$25k	%	Value <\$25k	%	Total	%
Settled	135	57%	48	64%	183	58%
Not Settled	103	43%	27	36%	130	42%
Total	238	100%	75	100%	313	100%

The study determined that attorney-mediators settled 66 of the 112 unlimited cases assigned to them (59%) while they failed to settle 46 of 112 of those cases (41%). Non-attorney mediators settled 69 of 126 of the unlimited cases (55%), and failed to settle 57 of 126 (45%) of those cases.

Mediated >\$25k	Atty Mediator	%	Non-Atty Mediator	%	Total	%
Settled	66	59%	69	55%	135	57%
Not Settled	46	41%	57	45%	103	43%
Total	112	100%	126	100%	238	100%

The study looked at the same type of data in order to analyze the smaller value cases, and found that attorney-mediators settled 61% (25 of 41) of the cases under \$25,000 while they failed to settle 39% (16 of 41) such cases. Non-attorney mediators settled 68% (23 of 34) of those cases and failed to settle 32% (11 of 34).

Mediated <\$25k	Atty Mediator	%	Non-Atty Mediator	%	Total	%
Settled	25	61%	23	68%	48	64%
Not Settled	16	39%	11	32%	27	36%
Total	41	100%	34	100%	75	100%

Simple mathematical analysis of the above described settlement rates suggest that there is a slightly greater rate of settlement of higher value cases by attorney-mediators than by non-attorney mediators, and a slightly higher settlement rate for lower value cases by non-attorney mediators than by attorney-mediators.

Case Type Analysis

As described above, the Ventura Court uses a number of categories to identify the case type. For purposes of the study, and due to the fact that some categories had individually small numbers of cases, the cases were grouped into 6 categories: Collections, Contracts, Employment, Other, Real Property and Tort.

Settlement rates were analyzed for each of those 6 categories among the 313 cases in which mediation sessions were actually conducted. Attorney or non-attorney status of the mediator was overlaid against the case type and settlement rates for analysis.

There were 24 Collection cases mediated and these seemed especially amenable to settlement through mediation as 83% settled (20 of 24). Attorney-mediators settled 11 of 13 of those cases and non-attorney mediators settled 9 of 11 of those cases, both groups having success rates over 80%. Contract cases represented the largest single group of case types – 120 of 313 (38%) – and more than half of those cases, 70 of 120 (58%) were settled. Coincidentally, those contract cases were split evenly between attorney and non-attorney mediators – 60 cases to each group. Non-attorneys settled 38 of 60 (63%) and attorneys 32 of 60 (53%) of the contract cases assigned to them.

There were 32 Employment cases mediated, of which 47% (15 of 32) settled. Examination of settlement rate by attorney and non-attorney status shows the most divergent results of this study. Attorney mediators settled 82% (9 of 11) of their cases while non-attorney mediators settled only 29% (6 of 21) of those cases.

There were 53 Other type cases mediated, of which 55% cases (29 of 53) settled. Attorney mediators settled 59% (17 of 29) of their cases and non-attorney mediators settled 50% (12 of 24) of theirs.

Forty-three Real Property cases were mediated, of which 53% (23 of 43) settled. Attorney mediators settled 45% (9 of 20) of their cases and non-attorney mediators settled 61% (14 of 23) of theirs. There were 41 Tort cases mediated, of which 63% (26 of 41) settled. Attorney mediators settled 67% (14 of 21) of their cases and non-attorney mediators settled 60% (12 of 20) of theirs.

Case Type – Mediations Conducted	Total	%	Atty Mediator	%	Non-Atty Mediators	%
Collection	24	8%	13	54%	11	46%
Settled within 60 days	20	83%	11	85%	9	82%
Not Settled w/in 60 days	4	17%	2	15%	2	18%
Contract	120	38%	60	50%	60	50%
Settled within 60 days	70	58%	32	53%	38	63%
Not Settled w/in 60 days	50	42%	28	47%	22	37%
Employment	32	10%	11	34%	21	66%
Settled within 60 days	15	47%	9	82%	6	29%
Not Settled w/in 60 days	17	53%	2	18%	15	71%
Other	53	17%	29	55%	24	45%
Settled within 60 days	29	55%	17	59%	12	50%
Not Settled w/in 60 days	24	45%	12	41%	12	50%
Real Property	43	14%	20	47%	23	53%
Settled within 60 days	23	53%	9	45%	14	61%
Not Settled w/in 60 days	20	47%	11	55%	9	39%
Tort	41	13%	21	51%	20	49%
Settled within 60 days	26	63%	14	67%	12	60%
Not Settled w/in 60 days	15	37%	7	33%	8	40%
Total	313	100%	154	49%	159	51%

A review of the settlement rates for the various types of cases indicates that more than half of all Collection, Contract, Other, Real Property and Tort cases were settled. Only in the Employment case category were fewer than half the cases resolved in mediation. As previously noted, Collections cases seemed especially amenable to resolution by mediation with more than 80% of the mediated cases

being resolved, with similar success rates between attorneys and non-attorneys. Attorney-mediators settled a proportionately higher percentage of Employment, Other and Tort cases, while non-attorney mediators settled proportionately more Contract and Real Property cases.

Case Value + Case Type Analysis

In a final attempt to tease information from the data that might provide some meaningful insights from analysis, the study looked at a combination of both the case type and the case value, then compared settlement success rates for attorney-mediators and non-attorney mediators.

Only a few of the intersections of value and case type presented any significant or interesting variation from those issues previously reported.

Collections cases were almost all valued at less than \$25,000 (21 of 24 or 88%). All 3 higher value cases (>\$25K) were settled (100%) by both types of mediators, and about 80% of the lower value (<\$25K) cases were settled by attorneys (83%) and non-attorneys (78%). Extending the conclusion noted previously, Collections cases seemed to be especially amenable to settlement in court-annexed mediation in the Ventura Court program, and case value seemed to have no significant impact on that.

Among the Contract cases, 68% (82 of 120) sought relief in excess of \$25,000 and 32% (38 of 120) cases sought relief under \$25,000. Of the 82 higher value cases, 61% (50 of 82) cases were resolved through mediation. Non-attorney mediators settled 66% (29 of 44) of the higher value contracts cases they handled, while attorney mediators settled 55% (21 of 38). Non-attorney mediators settled 56% (9 of 16) of the lower value contracts cases while attorney mediators resolved 50% (11 of 22) of those type cases assigned to them.

There was only one Employment type case involving a claim of less than \$25,000 and that case was resolved by a non-attorney mediator (100%). There were 31 Employment cases in which the damages sought exceeded \$25,000, of which 45% (14 of 31) were settled. Attorney-mediators settled 82% (9 of 11) of the higher value employment cases assigned to them, while non-attorney mediators resolved 25% (5 of 20) of that type of case assigned to them. Because of the small number (1) of lower value Employment cases, the addition of case value analysis contributed no new information to the study, whereas among the lower value cases differences are notable as attorney mediators had a significantly stronger settlement rate.

Among the 53 Other category of cases, 89% (47 of 53) sought damages exceeding \$25,000 and 11% (6 of 53) sought damages of less than \$25,000. Of the lower value cases 67% (4 of 6) were settled, with attorneys settling 50% (2 of 4) and non-attorneys 100% (2 of 2) of the cases assigned to them. In the higher value case group, 53% (25 of 47) were settled, with attorney-mediators posting a somewhat higher success rate of 60% (15 of 25) than the non-attorneys at 45% (10 of 22).

Analysis of the 43 Real Property cases that went to mediation showed that the vast majority of cases, some 91% (39 of 43), sought damages exceeding \$25,000. Of that higher value group, 54% (21 of 39) were settled. Non-attorney mediators settled 62% (13 of 21) of the cases while attorney mediators settled 44% (8 of 18) of those cases. Among the lower value cases, 50% (2 of 4) were settled by each group.

Tort cases were the final group of cases reviewed in this analysis by type and value. The great majority of these were higher value cases, 88% (36 of 41). Of the higher value Tort cases, 61% (22 of 36) were settled, with attorney-mediators settling 65% (13 of 20) while non-attorneys settled 56% (9 of 16). Both groups were highly successful with the lower value Tort cases, as attorney mediators settled 100% (1 of 1) and non-attorneys settled 75% (3 of 4).

Cases Mediated by Value & Type	Attorney				Non-Attorney				Combined			
	<\$25k	%	>\$25k	%	<\$25k	%	>\$25k	%	<\$25k	%	>\$25k	%
Collection	12		1		9		2		21		3	
Settled	10	83%	1	100%	7	78%	2	100%	17	81%	3	100%
Not settled	2	17%	0	0%	2	22%	0	0%	4	19%	0	0%
Contract	22		38		16		44		38		82	
Settled	11	50%	21	55%	9	56%	29	66%	20	53%	50	61%
Not settled	11	50%	17	45%	7	44%	15	34%	18	47%	32	39%
Employment	0		11		1		20		1		31	
Settled	0	0%	9	82%	1	100%	5	25%	1	100%	14	45%
Not settled	0	0%	2	18%	0	0%	15	75%	0	0%	17	55%
Other	4		25		2		22		6		47	
Settled	2	50%	15	60%	2	100%	10	45%	4	67%	25	53%
Not settled	2	50%	10	40%	0	0%	12	55%	2	33%	22	47%
Real Property	2		18		2		21		4		39	
Settled	1	50%	8	44%	1	50%	13	62%	2	50%	21	54%
Not settled	1	50%	10	56%	1	50%	8	38%	2	50%	18	46%
Tort	1		20		4		16		5		36	
Settled	1	100%	13	65%	3	75%	9	56%	4	80%	22	61%
Not settled	0	0%	7	35%	1	25%	7	44%	1	20%	14	39%
Totals	41		113		34		125		75		238	

Summary

The data developed during the study provided an interesting glimpse at a question that has been much discussed and debated for more than a decade. Although there can be found some variation in settlement results between the attorney-mediators and non-attorney mediators who conducted mediations for the Court during the study period, there is no overwhelming evidence that either group was significantly better or worse than the other. Rather, the evidence tends to indicate a level of successful competency in both groups. Perhaps a later and larger study will be able to provide more

discrete distinctions between them, but the above reported study did not find anything to suggest that attorney-mediators were more effective in resolving cases than were their non-attorney brethren.

Statistical Analysis and Conclusion

After the initial analysis for the study had been completed, a further attempt was made to validate the observational conclusions that seemed obvious. To that end the data obtained from the study was subjected to rigorous statistical analysis by two graduate students at the University of Chicago, Jonathan Williams and Nick Simmons. Logistic analysis was performed on the data using statistical software package "R". After concluding their analysis, Mr. Williams prepared a written report which concluded as follows:

"The above described more rigorous statistical approach to the data confirms what seemed apparent upon casual inspection. Among the data gathered in California's Ventura County Superior Court system between 2005 and 2008, [and with the exception of employment cases] mediators who were lawyers were not more effective at successfully mediating disputes than non-lawyer mediators."