
Court-Ordered Civil Case Mediation in North Carolina: An Evaluation of Its Effects

**Stevens H. Clarke
Elizabeth D. Ellen
Kelly McCormick**

**Prepared for
The North Carolina Administrative Office of the Courts
1995**



Court-Ordered Civil Case Mediation in North Carolina: An Evaluation of Its Effects

Stevens H. Clarke

Elizabeth D. Ellen

Kelly McCormick

Prepared for
The North Carolina Administrative Office of the Courts
1995



INSTITUTE *of* GOVERNMENT
The University of North Carolina at Chapel Hill

THE INSTITUTE OF GOVERNMENT of The University of North Carolina at Chapel Hill is devoted to teaching, research, and consultation in state and local government.

Since 1931 the Institute has conducted schools and short courses for city, county, and state officials. Through monographs, guidebooks, bulletins, and periodicals, the research findings of the Institute are made available to public officials throughout the state.

Each day that the General Assembly is in session, the Institute's *Daily Bulletin* reports on the Assembly's activities for members of the legislature and other state and local officials who need to follow the course of legislation.

Over the years the Institute has served as the research agency for numerous study commissions of the state and local governments.

Michael R. Smith, DIRECTOR

FACULTY

Stephen Allred	Richard D. Ducker	Ben F. Loeb, Jr.
A. Fleming Bell, II	Robert L. Farb	Janet Mason
Frayda S. Bluestein	Joseph S. Ferrell	Richard R. McMahon
Mark F. Botts	Cary M. Grant	Laurie L. Mesibov
Joan G. Brannon	Milton S. Heath, Jr.	David W. Owens
Anita R. Brown-Graham	Cheryl Daniels Howell	John Rubin
William A. Campbell	Joseph E. Hunt	John L. Saxon
Margaret S. Carlson	Kurt J. Jenne	Roger M. Schwarz
K. Lee Carter, Jr.	Robert P. Joyce	Thomas H. Thornburg
Stevens H. Clarke	Jeffrey S. Koeze	A. John Vogt
Anne S. Davidson	Patricia A. Langelier	Michael L. Williamson
Anne M. Dellinger	David M. Lawrence	
James C. Drennan	Charles D. Liner	

© 1996

INSTITUTE OF GOVERNMENT
The University of North Carolina at Chapel Hill

⊗ This publication is printed on permanent, acid-free paper
in compliance with the North Carolina General Statutes.
Printed in the United States of America

ISBN 1-56011-277-8

♻️ Printed on recycled paper

Acknowledgments

We would like to thank a number of people who assisted with this study. Dr. Laura F. Donnelly of the Administrative Office of the Courts' (AOC) Research Division helped with the initial design. The AOC's Administrator of Information Services, Francis J. Taillefer, and his staff, especially Patrick Tamer, Thomas Havener, and Richard Little, assisted by providing data from the AOC's civil case database and excellent documentation. Thanks also to Sally Maddox of the North Carolina Bar Association, who provided data on attorneys.

In the courthouses, we received much help from court administrators and clerks in finding and using records, especially Kimbrell Tucker, Amanda Byrd, Deborah Barker, and Lucy Rowell in Cumberland County; Jane Clare and Betty Boyles in Forsyth County; Deborah Burr, Gerry Smith, Barbara McGee, and Lois Hinely in Guilford County; and Susan Royster in Surry County. We greatly appreciate their assistance and patience with our process.

We also wish to thank the attorneys and litigants who were willing to take their time to respond to our questionnaires and interviews.

The study was funded by grants obtained by the North Carolina Bar Association (no state funds were used). We are grateful for the support of the grantors, which include The State Justice Institute (a private, nonprofit agency); the Interest on Lawyers' Trust Accounts (IOLTA) Board of Trustees; the North Carolina Bar Foundation Endowment; the Broyhill Family Foundation; and the Hanes Family Foundation. *Neither the Bar Association nor any of the grantors is responsible for any of the statements or data in this report.* This report was developed under grant SJI-94-049 from the State Justice Institute. The points of view expressed are those of the authors and do not necessarily reflect the official position or policies of the State Justice Institute.

Summary

The MSC program. Pursuant to 1991 legislation, North Carolina's Administrative Office of the Courts (AOC) conducted a pilot program of court-ordered mediated settlement conferences (MSCs) in superior court civil cases in eight judicial districts comprising thirteen counties. The legislation forbade any expenditure of state funds for either the program or its evaluation. All civil cases were eligible for the program except those involving actions for extraordinary writs. A majority (55.6 percent) of cases subject to the program involved negligence suits (primarily motor vehicle negligence). Other cases involved contractual disputes; collection on accounts; real property disputes; issues regarding wills, trusts, and estates; and other civil matters.

In the pilot districts, senior resident judges were authorized (but not required) to order a mediated settlement conference in contested (answered) cases, which the parties, their attorneys, and representatives of their insurance companies were compelled to attend. Mediators were experienced attorneys certified by the AOC after completing forty hours of approved training; their fees were paid by the parties in each case. Parties could choose their own mediator, but in most cases the parties did not do so and the senior resident judge made the selection from the list of certified mediators.

Study. The 1991 legislation required the AOC to investigate whether the program "[made] the operation of the superior courts more efficient, less costly, and more satisfying to the litigants." At the AOC's request, the Institute of Government conducted an evaluation of the MSC program using data from direct observations, local court records, questionnaires and interviews with litigants and attorneys, and the AOC's civil case database.

Much of the analysis focused on three intensive-study counties—Cumberland, Guilford, and Surry. In these counties, cases filed from March 1992 through January 1993 were randomly assigned to either a Mediation Group (eligible to be ordered to conduct MSCs) or a Control Group (excluded from MSCs). For additional comparison, a Preprogram Group of civil cases filed in 1989 was used. Other analysis examined four counties—Forsyth County plus the three intensive-study counties—which together handled about three-fourths of all civil cases filed in the thirteen pilot counties. For analysis of all thirteen counties, the AOC's civil case data were used.

Conference procedures. MSCs lasted up to 10.3 hours with a median time of 2.5 hours; only 14.4 percent were continued beyond the initial session. The attorneys did most of the negotiating, frequently caucusing (holding separate meetings) with the mediator and communicating with each other through the

mediator. Litigants did little direct negotiating themselves; their attorneys submitted possible settlement offers or demands to them for approval. Mediators often explained issues to litigants and gave them opportunities to express personal concerns that went beyond strictly legal issues.

Participation in MSCs. Despite initial expectations that most eligible contested cases would go to mediated conferences, only 49 percent actually did. One-fourth did not receive MSC orders, usually because they reached conventional (unmediated) settlement relatively early. Another fourth were ordered to mediate but did not do so; most of these settled conventionally before the deadline to mediate. Of the cases in which conferences were held, 44.4 percent reached settlement at the conference (almost always resolving all issues). Cases that reached an impasse at the conference usually ended in conventional settlement later.

Conventional negotiation continued to be the usual settlement procedure in the four counties, despite the MSC program. Excluding cases in the Control and Preprogram Groups, 68.3 percent of settlements in Cumberland, Forsyth, Guilford, and Surry counties were conventional, not mediated.

Percentages of eligible cases that actually participated in MSCs varied widely among the four counties, from 30.7 percent in Cumberland to 73.7 percent in Surry. Yet the “success rate”—the percentage of mediations that ended in settlement—was about the same (41.5 percent to 50.0 percent) across the four counties. This finding suggests that increasing participation in counties where it is now low would not reduce the success rate.

Case outcomes. The program was not expected to affect case outcomes, in terms of money or other relief received by the parties, and in fact it did not. The Control Group and Mediation Group did not differ significantly in case outcomes.

In terms of what parties received, mediated settlement was indistinguishable from conventional settlement, and both were quite different from trial. Plaintiffs who settled, with or without mediation, were more likely to receive *some* money than plaintiffs who went to trial. The proportions of plaintiffs who received money were about the same for mediated settlement (88.3 percent) and conventional settlement (82.7 percent), and much lower for trial (52.7 percent). But plaintiffs could get more at trial if they were willing to take the risk. Including zero amounts, the average received at trial (\$58,451) was greater than the average received in either mediated settlement (\$37,673) or conventional settlement (\$34,364).

Disposition time. Comparison of the Mediation Group with both the Control Group and the Preprogram Group indicated that the MSC program reduced the median filing-to-disposition time in contested cases by about seven weeks—from 407 days to 360 days. The program apparently not only had a direct effect on the disposition time of cases that mediated successfully, but also an indirect effect by spurring earlier conventional settlement. *Considering only cases that settled*, the median filing-to-disposition time of cases was 378 days in the Preprogram Group and 381 days in the Control Group. In the Mediation Group, including both mediated and conventional settlement, it was 329 days—about two

months less than in the comparison groups. The Mediation Group's mediated settlement median was 315 days; for conventional settlement, it was 363 days. Thus, both forms of settlement were faster than usual when cases were exposed to the MSC program.

Settlement and trial. The MSC program evidently did not affect the probability of settlement, which remained about 72 percent in contested cases. Also, it did not significantly reduce the trial rate, which was normally about 10 percent.

Motions, orders, and judges' time. Court record data showed no indication that the MSC program reduced court workload in terms of the numbers of motions processed by judges and orders issued by judges or clerks. Several senior resident judges said that the program freed judges' time by encouraging earlier settlement, thereby reducing the number of cases that were placed on trial calendars only to be settled at the last minute. The study provided no independent confirmation of this assertion, but it is consistent with the finding that the program hastened settlement.

Litigants' satisfaction. Although most litigants did not participate in mediated settlement conferences, those who did generally were quite favorable toward the conferences. A majority said they thought highly of the mediators, felt the procedures were fair, understood what was going on, had a chance to tell their side of the story, thought that the conferences were the best way to handle cases like theirs, and would recommend the program to a friend.

Satisfaction with MSCs did not carry over to the litigants' overall satisfaction with their cases, in terms of satisfaction scores based on their responses to a variety of questions. There was no significant difference in satisfaction between the Mediation Group and the Control Group, with respect to either (1) case outcomes and procedures or (2) costs and time.

Plaintiffs who settled—with or without mediation—were more satisfied with their entire cases than were those who went to trial. For defendants, the reverse was true; those who settled were less satisfied than those who went to trial. (These findings may be due to the fact that plaintiffs were more likely to receive money at settlement than at trial, and defendants more likely to lose it.) But there were no significant differences in case satisfaction between mediated and conventional settlement.

For plaintiffs, participating in MSCs carried a certain risk: those who participated, reached impasse, and later reached a conventional settlement were even less satisfied with their entire cases than were those who went to trial. The unsuccessful mediation may have produced feelings of frustration.

Litigants' time and costs in their cases. While the study's results on this point were inconclusive, the data suggested that the MSC program produced savings for litigants. For plaintiffs, average attorney fees and costs were \$6,717 for mediated settlement, \$9,667 for conventional settlement, and \$30,146 for trial. For defendants, these averages were \$4,507, \$8,072, and \$13,238, respectively. However, these differences were not significant and also could have been due to the inherent characteristics of litigants or cases rather than to modes of disposition. Mediation Group/Control Group differences were not significant.

Compliance with settlements and judgments. The program evidently had no effect on parties' compliance with what they agreed to pay or do in settlements or what was required of them by verdicts or other court-imposed awards. Compliance was quite high in settlements (mediated or not); usually, the parties would not sign an agreement unless prompt compliance was assured. The rate of compliance was the same in the Mediation and Control groups. Compliance was much higher with settlements than with trial verdicts, but no higher with mediated than with conventional settlement.

Lawyers' attitudes toward program. A survey of attorneys in the thirteen pilot counties, as well as certified mediators statewide, found that almost all favored continuing the program, and three-fourths wanted it expanded beyond the pilot districts. Most had favorable views regarding the program—for example, most believed that mediators were fair, the program reduced the likelihood of trial, and the program hastened settlement. Attorneys who were certified mediators were somewhat more favorable than were nonmediator attorneys.

Conclusions and suggestions. The study showed that the MSC program achieved its goals of greater efficiency and satisfaction to some degree, but not as much as its proponents may have hoped. The state's earlier (1987) experiment with court arbitration was more effective, but it involved much simpler, smaller cases than did the MSC program.

The court system might reasonably conclude that the MSC program already is sufficiently effective. But if it wishes to increase the effects of the program, it may want to consider making participation in MSCs happen more often and quicker. Improved participation might actually increase the rate of settlement at mediation as well as enhance the program's effects on court efficiency and litigants' costs.

One change that could improve participation would be to adopt rules setting shorter time limits from (1) filing of the defendant's answer to the court's issuance of the order to mediate, and (2) issuance of the order to actual holding of the mediated conference. Also, it may be worthwhile to adopt a rule that would prohibit a trial from occurring without a prior MSC. Testing such a rule would show whether the trial rate could be reduced, if that is desired.

In addition to stricter rules, more vigorous case management by the court may be necessary to improve MSC participation. In counties that had relatively high rates of participation in MSCs, court administrators were more aggressive and persistent in following up to make sure that deadlines were met for appointing a mediator and for holding the mediated conference. Also, senior judges may need to make it clear that authorized sanctions will be used against those who willfully fail to mediate. At present, getting the parties to the table by the court-imposed deadline is too often left to the mediator.

Contents

Acknowledgments	iii
Summary	v
I. Introduction	1
II. Description of MSC Program	3
A. Theory and Origins	3
B. Administration and Rules	6
C. Description of a Typical MSC	9
1. Setting	9
2. Opening	9
3. Negotiation	10
4. Caucuses	12
5. Mediators' Tactics	12
6. Results of an MSC	13
7. Common Problems at MSCs	14
D. Example of a Typical MSC: The Case of <i>Costanza v. Bell</i>	15
III. The Study: Issues, Design, Data, and Methods	19
A. Issues	19
B. Design	20
C. Data	22
D. Methods of Analysis	23
IV. Court Disposition and Workload	25
A. Implementation of the MSC Program	25
1. Overall Participation and Caseload	25
2. Differences in Participation among Counties	27
3. Did Participation Improve in the Second Year?	28
B. Court Outcome: Money and Other Relief that Parties Received; Incentives for Settling and for Going to Trial	29
C. Pace of Disposition: Intensive-Study Counties Plus Forsyth	31
D. Pace of Disposition: All Thirteen Pilot Counties	33
E. Mode of Disposition	35
F. Court Workload: Motions and Orders	37
G. Possible Program Effect on Scheduling of Judges' Time	38

V. Litigants' Satisfaction, Time, and Costs	39
A. Satisfaction with Participation in Mediated Settlement Conferences	39
B. Litigants' Satisfaction with the Entire Experience in Their Cases	41
1. Method of Measuring Satisfaction	41
2. Results	42
C. Litigants' Time and Costs	45
VI. Comparisons within Counties and Types of Claims	47
VII. Compliance with Settlements and Judgments	51
VIII. Attorneys' Attitudes toward Program	53
IX. Conclusion	55
A. Review of Findings	55
B. Implications and Suggestions	56
Tables and Figures	59
Appendix: Data Collection	77

I.

Introduction

Civil lawsuits in North Carolina's superior courts, like the typical automobile negligence case described in the next section, often remain pending for more than a year and rarely end in a trial. If the defendant contests the claim, the most likely form of resolution is a settlement worked out between the lawyers and approved by the parties. The settlement negotiation is an attenuated process involving the lawyers and carried on by mail, by telephone, or in person. Usually the plaintiff and defendant do not participate directly in this negotiation; instead, their attorneys consult with them separately as the process proceeds.

The Mediated Settlement Conference (MSC) program is intended to provide a better way to resolve superior court civil cases. Mediation is legislatively defined as "an informal process conducted by a mediator with the objective of helping parties voluntarily reach a mutually acceptable settlement of their dispute," and a mediator as "a neutral person who acts to encourage and facilitate a resolution of a pending civil action" but "does not render a judgment as to the merit of the action."¹

In 1990 and 1991, a planning committee comprising trial and appellate judges, members of the North Carolina Bar Association, court administrative officials, and others planned a process of court-ordered mediation that would not only hasten the disposition of civil cases but also make the parties more satisfied with the procedure and the outcome. As a result of their efforts, in 1991 the North Carolina General Assembly enacted legislation requiring the state's Administrative Office of the Courts (AOC) to conduct a pilot program in superior court "to determine whether a system of mediated settlement conferences may make the operation of the superior courts more efficient, less costly, and more satisfying to the litigants."² The AOC asked the Institute of Government to carry out a study evaluating the MSC program. This report describes the study's results.

1. N.C. GEN. STAT. § 7A-38(a).

2. *Ibid.* The legislation forbade state funding for the program. The program and our study were paid for by federal and foundation grants.

II. Description of MSC Program

The involvement of attorneys for the participants sets North Carolina's MSC program apart from earlier forms of court-annexed mediation in the state, like mediation of family disputes³ and disputes in related-party misdemeanor cases.⁴ Some see attorney involvement in mediation and other forms of alternative dispute resolution as part of an "institutionalization and legalization of ADR" in which lawyers have captured or co-opted innovative ways of resolving disputes and returned them to the adversarial system.⁵ However, whether or not this criticism is fair, it is difficult to imagine how most litigants could mediate effectively in superior court civil cases without a trained legal advisor at their side. The legal issues of these cases are usually too complex for the layperson to effectively handle.

The planners of North Carolina's MSC program were influenced by their visits to the state of Florida and took Florida's program as their starting point in drafting what became North Carolina's rules. Florida legislation enacted in 1987 authorized supreme court rules that gave judges the discretion to order mediation of contested nondivorce civil cases and required the parties to assume the costs.

Under the Florida rules, mediation of nondivorce civil cases was limited to certified mediators with rare exceptions.⁶ Only experienced attorneys and retired judges, after completing a forty-hour approved training program, could be certified as mediators in the Florida program. This requirement was much criticized by leaders in the field of mediation, who argued that qualifications should be based on interpersonal qualities and actual performance rather than on professional or academic credentials. In any event, the rules "spawned in Florida's circuit courts a mediation industry populated by experienced trial lawyers and retired judges." By 1990, 649 people had completed the certification training required for nondivorce mediation.⁷ A 1990 study of the Florida program, which

A. Theory and Origins

3. For a description of child custody and visitation mediation in North Carolina, see Leslie C. Ratliff, "A Case Study in Child-Custody Mediation," *Popular Government* 60 (3) (1995): 2, 12-22.

4. For a discussion of North Carolina's community mediation programs, which handle mainly related-party misdemeanor cases referred from district court, see Stevens H. Clarke, Ernest Valente, Jr., and Robyn R. Mace, *Mediation of Interpersonal Disputes: An Evaluation of North Carolina's Programs* (Chapel Hill, N.C.: Institute of Government, The University of North Carolina, 1992).

5. Carrie Menkel-Meadow, "Pursuing Settlement in an Adversary Culture: A Tale of Innovation Co-Opted or 'The Law of ADR,'" *Florida State University Law Review* 19 (1) (1991): 16.

6. The parties may select an uncertified mediator with the approval of the presiding judge.

7. For a history of the Florida program, see James J. Alfani, "Trashing, Bashing, and Hashing It Out: Is This the End of 'Good Mediation'?" *Florida State University Law Review* 19 (1) (1991): 47-75, 48-49.

did not employ controlled comparison, asserted that it shortened case disposition time and helped to reduce judicial workloads. Also, participants in mediation thought the procedure was fair, and that it provided “greater access to justice” and was less costly than standard procedure.⁸

The legislation creating North Carolina’s MSC program defined mediation as “an informal process conducted by a mediator with the objective of helping parties voluntarily reach a mutually acceptable settlement of their dispute.” For further clues as to what the planners of North Carolina’s program had in mind, we can look at the training materials provided by Mediation, Inc., a principal trainer of mediators in North Carolina:

Mediation is a process of resolving disputes through collaboration. Mediators are neutral third parties who help litigants work out their own agreements. Mediators do not have the power to impose settlement; instead, they facilitate settlement by leading the disputants through a structured discussion process, by exploring their needs and interests, and by helping them formulate specific solutions that will advance their interests.⁹

How does North Carolina’s use of mediation in the MSC program jibe with currently accepted principles of mediation? This question may not pertain to whether the program has achieved its legislated objectives, but is important to ask in order to understand the program.

Some of the key concepts in current thinking about mediation are that it involves voluntary participation, preserves ongoing relationships, solves problems at the root of the dispute, and addresses the underlying needs of the parties. Voluntary participation in mediation is thought to be more effective than compulsory adjudication because (1) the parties themselves can best fashion a solution to their dispute, and (2) a voluntary resolution is more likely to be complied with than a court-imposed judgment. While the resolution is voluntary in North Carolina’s MSC, the mediation process is compelled by court order.¹⁰

Preserving ongoing relationships is a cornerstone of mediation ideology: disputants need to preserve, or make tolerable, an ongoing relationship with each other. Furthermore, related disputants may influence each other’s behavior. Mediation, Inc., reflects this thinking in its training materials:

8. Karl D. Schultz, *Florida’s Alternative Dispute Resolution Demonstration Project: An Empirical Assessment* (Tallahassee, Fla.: Florida Dispute Resolution Center, Florida Supreme Court, 1990). The Florida study did not employ randomly selected mediation and control groups; it simply compared cases that judges selected for mediation with other contemporaneous cases that were not selected. Thus, any differences it reported could have been due to selection bias (i.e., to the inherent characteristics of the selected cases) rather than to program effects. The conclusion that the program was less costly than conventional procedure was based on attorney questionnaires in which the attorneys were asked for their opinions about the program’s costs compared to the costs of standard procedure, rather than asked to indicate what their costs were in specific cases. In determining satisfaction with the program (with regard to perceived fairness rather than access to justice), the study questioned attorneys and litigants, but only those who had participated in mediation, not others. It was unclear, for example, how litigants reached the conclusion that the program provided “greater access to justice” than other procedures if they had no experience with other procedures.

9. J. Anderson Little, “What Is Mediation?” in *Forty Hour Mediator Training for Court Ordered Mediated Settlement Conferences in North Carolina* (privately printed training notebook by Mediation, Inc., 1995): 2-1.

10. However, as explained later, actual participation in MSCs was so low that participation should not be described as fully compulsory.

The cases most often referred to mediation include child custody, visitation and support issues to *maintain good continuing relationships* . . . [but] it is not only the domestic case which can benefit from mediation. Of increasing interest to lawyers are cases involving business disputes with substantial amounts in controversy. These cases frequently involve business relationships which historically have gone smoothly and which the parties wish to salvage for the future. Mediation suits this type of dispute, because of the desire of the parties to *maintain good working relationships*.¹¹

In the MSC program, in which so many cases involved stranger-to-stranger negligence, many litigants did not need to preserve or improve an ongoing relationship. The parties often (42.3 percent of the time) had no preexisting relationship.¹² Where they did have a preexisting relationship, it was usually of a business nature (60.3 percent of the time). When a prior relationship existed, the parties seldom said that it was important to continue it (18.1 percent of plaintiffs, 18.6 percent of defendants). Even the interest in getting the other side to comply with a future court order—which can be seen as a continuing relationship—frequently was missing in these cases. Settlement negotiations, when successful, usually ended with a handshake, a check, and a written agreement that discharged all obligations.

Another key concept in mediation theory is its focus on solving the problem. One view sees mediation as part of “quality” settlement negotiation. In this view, the goal of settlement, including mediated settlement, is not simply to end a dispute, either with an all-or-nothing win-lose result (as in adjudication), or a split-the-difference compromise, which “may not satisfy the underlying needs or interests of the parties.”¹³ Rather, the goal should be to solve problems at the root of a dispute, “making both parties better off without worsening the position of the other.”

In the most typical case in the MSC program—one involving alleged negligence between parties with no prior relationship and where liability is not conceded—the MSC process may not be able to solve the root problem. The heart of this kind of dispute appears to be simple (or at least it is treated as such in the MSC process): the plaintiff alleges that he or she was harmed by the defendant’s negligence and the defendant denies it. This kind of issue usually does not call for a resolution extending into the future. The dispute involves only past behavior, not an ongoing problem likely to affect these parties again, which is what the mediation theorists are concerned with.¹⁴

Mediation theorists stress the importance of exploring the “real needs” of the parties as a problem-solving strategy. These needs may go beyond what can be readily converted to monetary compensation or property interests. For example, the injured plaintiff may want emotional vindication, punishment of the person at fault, compensation for lifelong physical disability, and otherwise “to be made truly whole.” The defendant, if he or she denies liability, may have the

11. Little, “What Is Mediation?”: 2-2, 2-3 (emphasis added).

12. These percentages were based on litigants’ responses to questionnaires.

13. Menkel-Meadow, *supra* note 5, at 16.

14. On the other hand, if the problem that needs to be solved is that the defendant is *dangerous to society generally*, it is unlikely to be addressed in a private, confidential proceeding.

same kinds of needs.¹⁵ The mediated conference (described in Section II.C below) addresses the plaintiff's need for compensation for injury or other loss as well as the defendant's and insurer's need not to pay an unmeritorious claim. The process also allows for a certain amount of venting of feelings by both sides. Mediators may, for example, encourage plaintiffs to express their feelings about their injuries or the loss of a loved one. This may be beneficial but also is risky. As explained in Section II.C, exploring feelings may facilitate settlement, but it also may cause the conference to get out of control. But in the typical stranger-to-stranger negligence case, the MSC may not be able to address all the real needs of the parties.

B. Administration and Rules

The North Carolina Administrative Office of the Courts (AOC) initially chose eight judicial districts across the state, comprising thirteen counties, to participate in the MSC program.¹⁶ The MSC program did not involve any additional local court staff to manage cases involved with the program. This is in contrast to the AOC's earlier experiment with court-ordered arbitration of civil cases involving claims under \$15,000, in which one additional court employee in each pilot district (known as an arbitration coordinator), working under the supervision of trial court administrators in their districts, made sure that parties and attorneys were notified of their responsibilities in the program and that deadlines set in court orders were met.¹⁷ In the MSC program, it was expected that existing court staff, judges, and mediators would be able to make the program run according to the rules and the courts' orders.

Under the authority of the program legislation, the North Carolina Supreme Court first issued its *Rules Implementing Court Ordered Mediated Settlement Conferences* (hereinafter referred to as the rules) in October 1991. The rules provided that in almost all types of contested civil cases,¹⁸ the senior resident superior court judge in each pilot district "may, by written order, require" the parties, their attorneys, and the representatives of any insurance companies involved to participate in a pretrial mediated settlement conference.¹⁹ Note that the judge has discretion *not* to order the conference. Also, for good cause, the judge may grant a party's motion to dispense with a conference; this authority is

15. Carrie Menkel-Meadow, "Toward Another View of Legal Negotiation: The Structure of Problem Solving" *UCLA Law Review* 31 (1984): 754, 795-801.

16. The eight original pilot districts are 6A (Halifax County); 12 (Cumberland County); 13 (Bladen, Brunswick, and Columbus counties); 15B (Orange and Chatham counties); 18 (Guilford County); 21 (Forsyth County); 17B (Surry and Stokes counties); and 30B (Haywood and Jackson counties). Later, in 1994, the program was expanded to include four additional districts and counties: 26 (Mecklenburg County), 28 (Buncombe County), 8B (Wayne County), and 10 (Wake County). The last four counties could not be included in our study.

17. On the court-ordered arbitration program, see Stevens H. Clarke, Laura F. Donnelly, and Sara A. Grove, *Court-Ordered Arbitration in North Carolina: An Evaluation of Its Effects* (Chapel Hill, N.C.: Institute of Government, The University of North Carolina at Chapel Hill, 1989).

18. A contested case is one in which the defendant files a formal "answer" denying some aspect of the plaintiff's claim.

19. Rule 1(a) N.C. Supreme Court, *Rules Implementing Court Ordered Mediated Settlement Conferences* (1991). (Hereinafter cited as "Rule.")

seldom exercised.²⁰ The parties may or may not reach a mediated agreement, but they must attend the mediated settlement conference and may be held in contempt of court or face other court-ordered sanctions if they do not.²¹

Rule 1(e) provided that the judge must exempt a random sample of cases from mediation orders “to create a control group to be used for comparative analysis.” (As explained later, control groups were used only in Cumberland, Guilford, and Surry counties.) Apart from control groups, the only civil cases exempted from the program were the rare actions involving habeas corpus or other extraordinary writs.²²

What kinds of civil cases were involved in the program? Data from four counties (Cumberland, Forsyth, Guilford, and Surry) that accounted for three-fourths of the cases filed in the thirteen pilot counties indicate that of 1,008 cases²³ eligible for the program, 55.3 percent involved negligence suits (41.6 percent, motor vehicle negligence; 2.8 percent, medical malpractice; and 10.9 percent, other negligence); 18.8 percent, contractual issues; 7.0 percent, collection on accounts; 5.6 percent, real property matters; 1.8 percent, issues concerning wills, trusts, and estates; 0.9 percent, appeals from actions of administrative agencies; and 10.7 percent, other disputes. Damage amounts claimed normally exceeded \$10,000 with no upper limit.²⁴

The first set of supreme court rules concerning the MSC program (effective October 1, 1991) underwent minor amendments (effective December 1, 1993). The first rules applied to all of the cases considered in our study; the later amendments had little or no effect on them. The original rules did not specify a time for the court to order that a mediated settlement conference be held. The current version of Rule 1(b) allows the order to be issued “at any time after the time for the filing of answers has expired.” (Our data indicated that a median time of about four months elapsed from answer to MSC order.) Under the original rules, the mediated settlement conference was to begin *no earlier* than 120 days after the filing of the “last required pleading” (usually this is the defendant’s answer) and *no later* than 60 days after the court’s MSC order.²⁵ (In fact, we found that a median of 77.0 days elapsed from the order to the holding of the mediated settlement conference.) In the MSC order, the judge normally sets a time limit, rather than a specific date, for holding the conference.

20. Rule 1(d).

21. Under Rule 5, the resident or presiding judge may punish a failure to attend a duly-ordered MSC without good cause by imposing attorney fees, mediator’s fees, and expenses incurred by persons attending the conference; contempt; or any other sanction authorized by Rule 37(b) of the North Carolina Rules of Civil Procedure. Although, as explained later, our study suggests that enforcement of MSC orders was not vigorous, there has been some use of sanctions. In *Triad Mack Sales and Service, Inc. v. Clement Brothers Co.*, 113 N.C. App. 405, 438 S.E.2d 485 (1994), the North Carolina Court of Appeals upheld the entry of a default judgment against a defendant for failing without good cause to attend an MSC ordered in Forsyth County.

22. Appeals from revocations of driver’s licenses also are superior court civil cases and technically were not exempt from the MSC program. However, in practice these cases—which were few in number—generally were not considered appropriate for mediation. We did not collect data on these cases (approximately fifteen) that we encountered in our samples.

23. Including cases exempted from the program because of assignment to the Control Group.

24. See Section IV.B for further discussion of monetary claims.

25. Rule 3(b). The supreme court later changed the timing of MSCs. Under rules 1(b) and 3(c) of the supreme court’s latest rules effective December 1, 1993 (which had little or no effect on the cases we studied), the MSC must be completed between 90 and 180 days after the judge issues the order.

How are mediators selected? Rule 1(b) of the original rules required the senior resident judge's MSC order to make a tentative appointment of a mediator, but also to inform the parties that they have fourteen days [under Rule 2(a)] to agree on their own selection.²⁶ We asked senior resident judges in the eight pilot districts how they appointed mediators and how often parties selected their own mediator. Judges estimated that in the first two years of the program (1992 and 1993), fewer than 20 percent of parties selected their mediator by agreement among themselves; in most cases, judges made the selection.²⁷ Judges usually selected mediators by going "down the line" or choosing at random from the list of qualified mediators. Often, judges would assign several cases at one time to a single mediator. Some judges said that they occasionally appointed mediators based on experience, specialization, or proximity to the court.

Under Rule 8, mediators must be certified by the AOC. Under the original version of this rule, to be certified a person had to be a member of the North Carolina State Bar and have at least five years experience as a practicing attorney, judge, law professor, or mediator. (This rule was changed²⁸ recently to allow nonattorneys to be certified, but the change apparently has not yet produced a substantial involvement of nonattorney mediators—certainly not in the cases in our study.) Under original Rule 2(a)(2), with the judge's approval, the parties could choose a mediator who had not been formally certified, including one who was not an attorney, and a similar procedure is authorized by Rule 2(b) of the current rules. Certification also requires completing at least forty hours of approved training in mediation.²⁹

Mediators' reports in court record data indicated that the duration of mediated settlement conferences ranged from a few minutes to up to 10.3 hours, with a median of 2.5 hours. Most conferences (85.6 percent) were completed in one session; 13.4 percent required two sessions, and 1.0 percent needed three sessions.

The mediator normally charges a fee that is paid by the parties. If the parties choose the mediator, they agree on the fee among themselves. If the court appoints the mediator, the standard fee set by the AOC is \$100 per hour for time spent in the mediated settlement conference plus a \$100 preparation fee. Court record data indicated that mediators' fees ranged from \$100 to \$1,125, with a

26. Later, this rule was changed to encourage parties to choose their own mediator. Under Rule 1(c) of the current rules, the court's MSC order does *not* include a tentative appointment. Instead, Rule 2 gives the parties twenty-one days to agree on their own selection. If the parties cannot agree on a mediator, the plaintiff's attorney must notify the court within twenty-one days of the MSC order and ask the court to appoint a mediator. In any event, if the plaintiff's attorney does not notify the court of a selection within twenty-one days, the senior resident judge must appoint a mediator.

27. Our data on cases filed in 1992 in the three intensive-study counties indicated that only 9 percent of parties selected the mediator themselves.

28. Under Rule 8(b)(2) (amended effective July 1, 1994), a nonattorney may be certified if he or she meets certain requirements. For example, the applicant must (1) have completed twenty hours of mediation training acceptable to the AOC; (2) have had (after the mediation training) five years of experience as a mediator involving at least twelve cases and twenty hours each year; (3) receive six hours of AOC-certified training on North Carolina legal terminology and civil court procedure, mediator ethics, and confidentiality; (4) provide to the AOC three letters of reference as to the applicant's good character; and (5) have a four-year degree from an accredited college or university. As of May 1995, only six of 329 certified mediators were nonattorneys.

29. At the time this report was written, two AOC-certified training programs were operating: one conducted by Dispute Management, Inc., a Florida company, and one by Mediation, Inc.

median amount of \$375. Rule 7(c) provides that where the court finds a party is indigent, it must excuse him or her from paying a fee.³⁰

A mediated settlement conference ends when either the parties have reached a voluntary written agreement settling all or part of the lawsuit or the mediator has declared that there is an impasse. The mediator then reports the results to the court on the AOC's Report of Mediator form. If the parties have reached an agreement resolving all issues, it normally ends the case except for the filing of a dismissal with prejudice. Usually, any payment agreed to is made immediately or within a few days. If the parties fail to resolve the case fully at the mediated settlement conference, it still may reach settlement later through conventional (unmediated) negotiations. If there is no settlement, the case may go on to a trial and end in a judgment, or it may result in dismissal or other court-imposed disposition.

This description is based on our observation of thirty-four actual mediated settlement conferences involving a variety of claims. While this small sample is not perfectly representative in a statistical sense, we believe that the procedures we observed were typical of the program.

Mediated settlement conferences are often held at lawyers' offices. Typically, counsel for one of the parties hosts the conference, perhaps the attorney with the best conference facilities or location. Less frequently, conferences are held at the mediator's office, a courthouse, or some other building such as a bank. At the very least the facilities must have (1) a conference room large enough to accommodate the mediator, the litigants, and all the attorneys; (2) a table that everyone can sit around; and (3) at least one other separate meeting room that can be used for caucuses.

As the conference begins, all participants are present. The mediator opens the conference with introductions and an explanation of the mediation ahead, and the lawyers present their versions of the events leading to the case. Parties may produce evidence such as photographs, medical records, and depositions. In some cases at this opening stage, the litigants may describe their situation in their own words. The mediator asks questions of the attorneys and litigants to clarify what is in dispute and then verbally summarizes the parties' initial positions.

C. Description of a Typical MSC

1. Setting

2. Opening

³⁰. Rule 8(h) of the current rules also provides that to be certified as mediators, attorneys must agree to mediate indigent cases without pay.

3. Negotiation

During the negotiation phase the mediator brings out the advantages and disadvantages of trial and settlement; this often is done indirectly through questioning the attorneys. Mediators often ask attorneys to estimate their side's risk should the case go to trial—an important consideration as most settlements are based on compromise. Typically the mediator will discuss a range of reasonable jury verdicts with each party, and if the parties agree to settle, the settlement figure is usually within that range but is neither the maximum nor the minimum. Making parties aware of the monetary and emotional costs associated with trials helps make settlement more attractive. Without consideration of risk, parties would be less likely to take a suboptimal settlement. The mediator often points out to litigants that a trial will increase their legal expenses and may require them to lose time at work. Going to trial will prolong the unpleasantness of a lawsuit and may require parties to testify. Also, the trial's outcome is unpredictable. In contrast, settlement produces a known, agreed-upon result, enabling litigants to put the case behind them and get on with their lives.

Many other topics may be discussed in negotiation, depending on the case. In cases where liability is disputed, parties may spend a lot of time discussing facts, including the events leading up to the case and the strength of evidence on each side. If liability has already been established, negotiations may be solely centered on the amount of damages. If the cause of a personal injury is disputed, the discussion will focus on medical records and the credibility of expert medical witnesses. In some cases legal discussions about precedent and the intricacies of specific laws are key to the negotiations.

In the mediations we observed, the attorneys did most of the negotiating. Much of their communication with each other was through the mediator in separate caucuses (discussed later), rather than directly to the other side. The mediator might then present the information to the other side in a way most conducive to reaching settlement. However, it was not uncommon for the mediator to meet with both opposing attorneys without their clients present to try to work out something without the emotional input of the litigants. We also saw a conference in which the opposing attorneys met separately while the mediator, the plaintiffs, the insurance representative, and the observers waited. When the attorneys reached a possible settlement, each received approval from his client, and then they let the mediator know the settlement figure.

According to our observations, litigants do little direct negotiating. Instead, the attorneys negotiate and submit possible settlement offers or demands to the litigants for approval. The litigants can also provide specific information about the events leading up to the case, and the mediator will often ask them directly for clarification of facts. Litigants rarely suggest possible solutions, speak to each other, or speak to opposing counsel. Even though attorneys generally direct their clients' participation in MSCs, we observed a case where the client (a very young man) ignored his attorney, who had taken on the case a few days before the conference. The attorney, who was relatively quiet and passive, let the client do and say whatever he wanted. In this case the mediator stepped in and told the litigant that he needed to consult his attorney about procedures and rules associated with his civil suit.

Litigants can benefit greatly from interacting with the mediator as an impartial, but knowledgeable and sympathetic, participant. One benefit is that mediators can point out weaknesses in a litigant's case—weaknesses that their own attorneys may have been reluctant to emphasize. Or the attorney may already have tried to explain the weaknesses to the litigant, but the litigant may understand better when the mediator explains. Mediators usually point out such weaknesses not by conclusory statements (such as "Your case is weak because of contributory negligence"), but rather by posing careful questions to the litigant and his or her lawyer (for example, "What do you think a jury will do with the policeman's evidence that you failed to stop before entering the intersection?").

Another benefit of interacting with the mediator is that litigants usually derive some satisfaction from expressing their frustration and hostility to the mediator. Whether this happens (and how it happens) depends upon the type of case and the mediator's style. We observed a wide range of mediator attitudes toward the emotional aspects of mediation, from those who are very patient and sympathetic to those who have no interest in letting litigants express their feelings. Allowing emotions to come out in the open increases the risk of the mediator losing control over the conference, but sometimes it can effectively clear the way for settlement. To this end, a mediator might even allow a party to engage in "show and tell." In a case arising from a fatal automobile accident, the family showed videos of the deceased victim. At another conference the plaintiff explained how she had been emotionally shaken by her automobile accident because she had lost her daughter several years before in a wreck. The mediator encouraged her to talk about and show pictures of her daughter.

Mediators may suggest that the parties split the difference in their offers and demands. But they can be much more creative in their proposals. In one observed case the insurers were unwilling to settle because they were waiting for the outcomes of declaratory actions in court, which would determine to what extent the insurance companies were obliged to provide coverage. The mediator prepared a plan in which settlement amounts were fixed for all possible outcomes of the declaratory actions. All the parties were willing to sign this agreement. In another case, in which one young man had assaulted and injured another, the mediator sensed that the plaintiff really wanted to punish the defendant for assaulting him. The mediator suggested that the plaintiff demand a smaller settlement amount but insist that it come directly from the defendant's paycheck, not from his parents. In a third case, involving wrongful death in an automobile accident, the parties finally signed a settlement agreement stipulating that the defendant, who was prone to seizures, would not drive again for five years. In private the defendant had already told the mediator that he did not want to drive again. In this case, the plaintiffs were more satisfied than if they had received only a monetary settlement.

Frequently, insurance representatives are key negotiators in mediations. In motor vehicle cases the defendant (an insured driver) often is not present. Instead, a representative of the defendant's insurance company takes the role of defendant in negotiations. Without the defendant's presence, the mediation usually is less emotionally charged. The insurance representative is simply

doing his or her job and makes offers based on business considerations. However, in this situation the plaintiff may lose the emotional satisfaction of confronting the defendant.

4. Caucuses

Most of the activity in a mediated conference occurs in caucuses—meetings between the mediator and some of the people assembled for the mediation, excluding others. Typically a mediator caucuses with a litigant and his or her counsel. The mediator also may meet separately with one or more attorneys, or with an insurance representative.

In most of the mediations we observed, the parties separated into their own rooms after the mediator's opening remarks and each side's presentation. In caucusing, the mediator may shuttle back and forth, or the parties may come in and out of the mediator's room. Either way, this technique allows for freer expression on the parts of counsel and litigants. Parties can share information with the mediator in confidence that may influence the way the mediator directs negotiations. Caucuses also help to remove emotional impediments to settlement, creating a less charged atmosphere in which the mediator can communicate demands and offers. In one mediation we observed, the case involved complex issues of business law and contracts, but problems in the litigants' relationship were at the root of the legal conflict. The parties were very hostile toward one another and separating them was the only way to make progress.

While the most common kind of caucus is one in which the mediator meets with both litigant and counsel, in some circumstances mediators leave the litigants out of it completely and speak only to attorneys. In one motor vehicle case, caucuses consisted of the mediator speaking privately to the plaintiff's attorney, to the defense attorney, and to the insurance representative, and eventually to all three together. The mediator, instead of dealing with the litigants directly, let their attorneys explain to them what was going on. We did not observe the *reverse*, however; there were no instances of a mediator meeting with a litigant without counsel present.

Caucuses can be seen as a "divide and conquer" strategy. By meeting with each side separately, showing sympathy for that side, and looking at the situation through that side's eyes, the mediator can tailor his or her presentation of a settlement option so that each side concentrates on the benefits to its side. In this way a good mediator will present a settlement that both sides can accept without "losing face," which is an especially important consideration in an emotionally charged case.

5. Mediators' Tactics

Mediators, who often use creative thinking to push past tough spots in a mediation, employ many sorts of tactics to encourage a settlement. The following paragraphs describe some examples that we observed.

Time. Acknowledgment of either unlimited or limited time can be useful in resolving a case. For example, a mediator might indicate a willingness to meet all night as long as progress is being made. As fatigue sets in, parties and attorneys

might become more open to settlement. On the other hand, one mediator announced that he had a plane to catch and was willing to mediate up to the minute he had to leave for the airport. This presence of a hard and fast deadline imparts a feeling of urgency to the proceedings.

Hunger. Some mediators don't want to break up negotiations for lunch. As the hours stretch on without food, hunger takes its toll on the litigants' resolve.

Pressure. Mediators can enlist the aid of a party or attorney in convincing another party or attorney to accept a settlement. For example, in a particularly complex mediation involving four or five attorneys, the mediator asked an attorney who was agreeable to the proposed settlement to speak privately with the one hold-out attorney. Then, when all parties met together again, people took turns making the stubborn attorney feel guilty for blocking a reasonable settlement plan until he finally gave in.

Anger. While mediators usually try to maintain a manner of reasonable calm, anger has its place as a mediation technique. In one mediation we observed, the two sides in a personal injury case came to final positions that were only \$500 apart in a \$10,000 case. The attorneys had already pulled out all the stops to get the parties together; the plaintiff's attorney even waived his fees completely to reduce the plaintiff's demand. At the point of impasse, the mediator took the attorneys into a room and yelled at them. He pointed out how ridiculous it was to let negotiations fail because of such a small difference, a sum that was no more than his mediation fee. (In this case, even anger didn't work, because the stumbling block was not an attorney but an insurance representative who wouldn't budge.)

Humor. Mediators often use humor (with discretion) to diffuse tension and put things into perspective. One mediator brought very large chocolate chip cookies to the conference. The mediator then jokingly used the cookies as the rewards and bribes as the parties met in caucuses.

The main goal of a mediated settlement conference is to come to a settlement and thereby end the court action, but conferences often yield other important results. For example, information may be exchanged more quickly and efficiently during a settlement conference than in conventional settlement negotiation.

Discovery is a statutorily recognized process of obtaining information on the case from the other side, usually in the early stages of preparing a case.³¹ This process involves considerable amounts of lawyers' time and paperwork. Attorneys conduct discovery to prepare for a mediated conference, but they tend to do less than they would do to get ready for trial, thereby reducing their clients' fees and costs. The mediated conference tends to provide some of the same information as extensive discovery would have provided. And even if the conference ends in an impasse, information discussed in the conference may lead to a subsequent settlement.

31. See N.C. GEN. STAT. § 1A-1, Rule 26.

6. Results of an MSC

In a mediated settlement conference, attorneys can evaluate the strength of their own case as well as the other side's. From the opening of the mediation, in which each attorney tells his or her client's side of the story, an attorney can assess opposing counsel's most important points and can perceive those facets of the case he or she will likely try to hide. An attorney might also see how the opposing litigant would appear on the witness stand should there be a trial.

In addition, a conference can build up goodwill between opposing attorneys—if all parties come prepared to negotiate in good faith and if attorneys make reasonable demands and offers. Even if the case is not ready to settle at conference time, having made progress in an atmosphere of reasonableness and honesty at the conference may help to settle the case in subsequent, nonmediated negotiations.

7. Common Problems at MSCs

Insufficient preparation by attorneys. Sometimes attorneys do not, for whatever reason, complete adequate discovery in time for the settlement conference. Attorneys recognize that there is a certain balance to be struck in terms of depth and breadth of discovery. For negotiation at the MSC to be fruitful, there needs to be enough discovery to allow for reasonable assessment of risks, costs, and benefits. However, completing full discovery before the conference can increase litigants' expenses. The costs already incurred may then incline parties to go to trial. After all, one of the main arguments for settlement used in MSCs is to avoid the extra costs associated with preparation for and completion of a trial. If these costs have already been incurred and much preparation work already done, this argument loses much of its persuasive force.

Attorneys who are not prepared for the MSC may cause delays in the conference. For example, we observed a conference in which a good portion of the time was consumed in doing on-the-spot discovery, namely, contacting a physician and waiting for his staff to fax medical records to the law office where the mediation was occurring. Likewise, lack of discovery can preclude some settlement options. In one conference involving a contract dispute, the option of defendants paying damages was impossible because the plaintiffs had not completely assessed and documented damages. The only real option was to buy back the item under contract, and even that could not occur without some on-site inspection. The result of this conference was a continuance and another meeting a month later.

Not including the right people at an MSC. The rules require that all parties with full settlement authority be present at the conference. In practice, however, parties often come with partial authority and phone their headquarters for permission to exceed certain limits. This practice is particularly common with insurance agents. In many cases (especially in motor vehicle negligence cases), the actual named defendant is not present, and the insurance agent is the only person on the defense side who can agree to a settlement. Sometimes the insurance agent's lack of authority from the insurance company can bog down the negotiation process. Similarly, young people negotiating in a mediated conference might lack real settlement power if their parents have been taking charge of the case. In

one observed case the litigants, two young men who had just graduated from college, attended the conference without their parents. It soon became clear that the parents needed to be there because unsuccessful negotiations had taken place between the parties' fathers before the conference. Neither litigant was comfortable settling without consulting his father, especially the defendant, whose father would have to contribute most of the money to settle the case.

Another problem concerning the mediated conference group is the inclusion of extraneous people. Sometimes a litigant will bring someone who is not named in the suit, or even someone not directly involved in the matter at hand. This extra person is often a relative or spouse. In some situations extra people are not detrimental and may help the litigant feel more comfortable in negotiations. In cases where the named litigant is a very young adult (who perhaps was a minor at the time of filing), parents often attend and act as major participants. Sometimes, though, extra persons interfere. For example, in one motor vehicle case the plaintiff's husband appeared to be pushing her to hold out for more money than she could reasonably have expected.

The following example, although fictitious, is based on our observations of actual mediated settlement conferences. We believe it is typical of what is experienced with mediated settlement conferences, except that (as explained later in Section IV) fewer than half of them end in settlement.

The settlement meeting begins as lawyers, litigants, an insurance agent, and the observers gather just before 10:00 A.M. at the law offices of Peter Beckett. In the large conference room reserved for today's mediation, Daniel Talbott, the mediator, introduces himself and sits at the end of a long table. The parties sit on either side, facing one another. Introductions are made, going around the table. Mary Costanza is the plaintiff and her husband, Robert, has accompanied her. Alicia Stewart is the plaintiff's attorney. Peter Beckett explains that he is an attorney for the defendant's insurance company. The defendant, Jonathan Bell, is the older gentleman sitting next to Beckett. The last participant is Joe McPherson, the insurance adjuster handling this claim. The mediator then explains the rules and process of mediation, primarily to inform the litigants.

Each side now presents its case. First, Alicia Stewart describes the Costanzas before the accident as a wonderful family with two young sons. Mary was driving home from her job as an office manager at a furniture factory one March evening in 1992. Heading southeast on Highway 801, she neared the blinking red light that signaled the intersection with Old Pine Road. She did not see the gray Oldsmobile that had begun to cross the highway until too late. At the last moment Mary braked and pulled hard to the right. The impact swung both cars around and the rear end of Mary's Ford Escort smashed into a tree. Mary was hospitalized for a few days with a concussion, cuts, and bruises. She complains now of chronic back pain. The plaintiff is asking for \$80,000 to cover medical expenses, lost wages,

D.
Example of a
Typical MSC:
The Case of
Costanza v. Bell

and damages for pain and suffering. Stewart asserts that there is clear liability on the part of the defendant; he entered the road without taking adequate precautions. Talbott, taking notes, asks the Costanzas some questions about their family and how the accident has changed their lives.

Peter Beckett now explains Mr. Bell's side of the story. Jonathan Bell is a seventy-year-old widower and retiree. He was running errands when he approached the intersection with Highway 801, noticed the blinking red light and came to a complete stop. The sun shone brightly into his eyes, but Bell felt he had a good enough view to proceed. Partway into the intersection Bell saw Mary's car speeding towards him from the right; he was too far out to back up safely, though. Hoping to get through the intersection in time, he put his foot to the gas pedal. The defense contends that Mary Costanza was recklessly speeding before she noticed the other car. Visibility was poor due to the position of the sun, and Mary was contributorily negligent in the way she approached the intersection.

Beckett now allows Bell to apologize to the Costanzas. He appears upset over the pain he has caused them. The mediator asks Bell a few questions about his family and how he spends his time. He also asks Beckett if there is an offer on the table. Consulting his files, Beckett says an offer was made some time ago by the insurance company for \$15,000.

The mediator Talbott summarizes the case as he understands it, listing the points made by each side and noting ones in dispute. The parties split up, and he asks Beckett to take his party to the other room reserved for the conference. Talbott asks many questions of the plaintiff and her attorney. What are Stewart's best- and worse-case scenarios if the lawsuit goes to trial? How probable does she think a winning judgment is? Even a winning judgment could give the couple much less money than they hope for. Talbott works hard to elicit weaknesses in the case from Stewart. Talbott has Stewart itemize their demand. It turns out that approximately \$30,000 of the demand is actual losses—medical expenses and wages lost. The other \$50,000 is for future lost earnings and damages for pain and suffering. Talbott says it is time to talk to the other side, but that he wants this party to consider a demand that is lower than their original one, a compromise that could settle the case.

In caucus with the defendant's party, the mediator starts by talking about money. Talbott wants to know if the insurance adjuster has full authority to settle this case. Joe McPherson assures him that he has come with authority to cover the defendant's policy limits. Talbott shows the list of actual expenses from the plaintiff and tells the defense attorney and insurance adjuster that they're going to have to determine what a reasonable settlement amount would be. As in the first caucus, he asks the defense attorney to honestly assess their chances at trial. Naturally, the defense attorney is more positive about his case. He thinks the contributory negligence claim is very strong; they have the police report of the accident stating that the plaintiff was traveling at least 5 mph over the speed limit before she began to brake. Bell doesn't speak for most of the caucus, but finally says that

beyond what was said in group session he has little to add to the conference. The mediator understands and asks if he wants to go; Joe McPherson is the one who can settle the case, not Jonathan Bell. Bell leaves. McPherson asks if he and Beckett can consider their offer in private. Obliging them, Talbott begins a routine of shuttling between parties.

Alicia Stewart discusses the plaintiff's desire for settling on the one hand, and not giving up too much on the other. Stewart reveals an approximate bottom line, but \$75,000 will be the first demand. Talbott returns to the defendant's party. He does not relate the plaintiff's demand yet. Beckett puts \$30,000 on the table. Between rooms, Talbott tells us the defense offer was a good sign, they think the plaintiff will win some money at trial, and they are starting to deal. The next half hour is spent conveying offers and counteroffers. When the parties are at \$45,000 and \$55,000, the plaintiff balks. She has already gone below their original bottom line; her husband feels they are giving away the bank. The mediator proceeds carefully. He asks what strain the case has put on their family, what is it worth to be done with the case and walk away with money in their pockets. Also, they shouldn't forget that additional money must be spent in order to go to trial. Ms. Stewart is handling the case on a contingency basis; she will get 30 percent of what they win no matter what. Costs for expert witness fees and other miscellaneous items will increase significantly. The mediator lets the plaintiff's group confer alone.

It is almost 1:00 P.M. Returning to Beckett and McPherson, Talbott asks how can they get the case settled. McPherson reveals that they are very close to his absolute limit. Beckett admits carefully that they might be willing to split the \$10,000 difference. Talbott likes the idea, but he wants them to sweeten the deal. Attorney and insurance adjuster look at Talbott, suspecting what he is getting at. McPherson offers to pay the cost of mediation as well and Talbott smiles and starts to head for the door. Beckett stops him; he doesn't want this to come as an offer from the defendants, rather as a suggestion of the mediator. Talbott agrees that is the best approach and the mediator and observers return to the plaintiff's group once more.

Mary and Rob do not look very happy as the mediator enters the room. Stewart says they will take \$52,500 and nothing less. Talbott explains that he appreciates the effort Mary and Rob have made so far; it's obvious they have made some difficult decisions to get to this point. He has a proposition, though, that will settle the case—if they will go for it. He relates the offer discussed in the other room and asks the plaintiffs what they think. They look at each other and ask us to leave. The mediator and observers wait. It is 1:25 P.M. when Alicia Stewart motions us back into their conference room. They will settle if the other side will pay court costs, too. She has reduced her contingency fee to 20 percent so that the plaintiffs can afford to do this. In between conference rooms, the mediator tells the observers that this is the deciding moment. The plaintiff's party has pushed a little and if the defense thinks they have pushed too far, there will be an impasse. Talbott presents the plaintiff's last demand and tells what Stewart

has offered in order to get her client to do this. Beckett and McPherson appear impressed that Stewart is willing to reduce her fee to settle the case. McPherson says that he believes they will be able to settle.

All participants are assembled as at the beginning of the conference. Talbott announces that a settlement has been agreed upon. In the presence of the parties and their attorneys, he draws up an agreement, reciting the terms as he does so. Copies are made and the parties sign them (one will be filed later with the court). The mediation has taken just over three and a half hours to complete.

III.

The Study: Issues, Design, Data, and Methods

The main issues for our study came from the MSC program legislation: Did the program make “the operation of the superior courts more efficient, less costly, and more satisfying to the litigants”? The study measured the program’s achievement of these legislated goals and also looked at some related questions. These questions, discussed below, are addressed in more detail in the following report sections.

A. Issues

Implementation of the program. A program can be effective only to the extent that it is actually applied. We therefore asked the following questions about implementation of the MSC program: To what extent did cases eligible for mediation actually participate in mediated settlement conferences? How much time elapsed between the program’s procedural steps? What happened to cases that were subject to mediation but did not go to mediation? What happened to those that reached impasse at mediation?

Program effects on case outcomes. The MSC program was designed to change settlement procedures, not settlement outcomes. It was important to determine whether it affected outcomes; if it had, litigant satisfaction could have been determined by outcomes rather than through procedures. We therefore asked whether the MSC program had any effect on the parties’ chances of receiving money or other relief, or on the amount of money they received.

Program effects on court efficiency. The first goal mentioned in the program’s legislation was to make the courts’ operation “more efficient.” The study examined court efficiency by addressing these questions:

- Did the program reduce the time from filing to disposition of cases?
- Did the program increase the frequency of settlement, and did it reduce the frequency of trial?
- Did the program reduce work for judges and other court officials?

Program effects on litigants’ costs and satisfaction. The legislation also asked whether the program made the operation of the courts “less costly, and more satisfying” for litigants. Therefore, the study asked (1) how litigants who participated in mediation evaluated their experience with mediation, and (2) whether the program made litigants more satisfied with the entire procedure and outcome of their cases.

Program effects on compliance with settlements and judgments. Was there a greater degree of compliance with mediated settlements than with other settlements or court judgments? This issue was suggested by theory as well as

research in small claims cases; mediated settlement supposedly requires more active participation by litigants than other procedures do and therefore increases their commitment to honor its outcome.³²

Differences among counties and types of claims. It seemed possible that the program's effects might vary with the type of subject matter involved in the case. Also, because of differences in local court administration or attitudes of the local bar, the program's effects might vary across counties. We looked for both types of interaction.

Differences between mediated settlement, conventional settlement, and trial. Proponents of mediated settlement tend to dwell on its advantages compared to trial. Certainly MSC procedure is different from trial procedure, but so is conventional settlement procedure. Those familiar with civil litigation knew, before the MSC program began, that conventional settlement, not trial, was the most common form of disposition. Therefore the study compared mediated settlement to conventional settlement as well as to trial.

B. Design

Our design focused on four of the thirteen counties involved in the MSC program: Guilford County (including the cities of Greensboro and High Point); Cumberland County (including the city of Fayetteville); Forsyth County (including the city of Winston-Salem); and Surry County (a predominantly rural county). These four counties accounted for 75.0 percent of all superior court civil cases filed in the thirteen counties in 1991–92, and 72.9 percent in 1992–93.³³

Three of the study counties—Guilford, Cumberland, and Surry—are referred to as “intensive-study counties” because we established control groups in those three counties and collected data from local court records, litigants, and attorneys concerning those counties’ cases. In Forsyth County, we collected a sample of court data, but did not establish a control group or collect litigant and attorney data. With regard to the other nine counties involved in the program (Bladen, Brunswick, Chatham, Columbus, Halifax, Haywood, Jackson, Orange, and Stokes), we analyzed trends in disposition time and jury trial rates, using data from the AOC’s computerized civil case database. Throughout this report, discussion of the analysis refers to the three intensive-study counties unless otherwise noted.

To determine whether the MSC program had an effect on court operation and litigant satisfaction, a group of cases exposed to the program needed to be compared to one or more comparable groups of cases not exposed to the program. For the program intake period, we chose filing dates from March 1, 1992,

32. Studies of court-ordered mediation of small claims cases have suggested that parties may be more likely to comply with a settlement arrived at through mediation than with a judgment or other settlement. Small claims studies in Maine, New Jersey, and Ontario, Canada, are reviewed by Stevens H. Clarke in *National Symposium on Court-Connected Dispute Resolution Research: A Report on Current Research Findings—Implications for Courts and Future Research Needs*, ed. Susan Keilitz (Williamsburg, Va.: National Center for State Courts, 1994), 23–27.

33. The four counties had 3,229 of a total of 4,303 civil cases filed in the thirteen counties in 1991–92 and 3,063 of 4,200 in 1992–93.

through January 31, 1993. Cases filed in the three intensive-study counties during that time (a total of 1,986, on a list supplied by the AOC) were randomly assigned: half to the **Mediation Group**, in which they were subject to be ordered (by the senior resident judge) to conduct mediated settlement conferences, and half to the **Control Group**, in which they were to be excluded from mediated settlement conferences. Also, in some analyses (those involving court record data) we used a third group of cases, the **Preprogram Group**, those filed from March 1, 1989, through December 31, 1989. The Preprogram Group cases would have been eligible for the MSC program if it had existed at that time.

Two things should be kept in mind about the Preprogram, Control, and Mediation groups: (1) *the Preprogram, Control, and Mediation groups were defined and maintained only for the three intensive-study counties—Cumberland, Guilford, and Surry*; (2) *cases in the Mediation Group did not necessarily go to mediated settlement conferences*. They were subject to be ordered into mediation, but judges were not required to issue the orders, and even if orders were issued, cases could—and often did—end in conventional settlement, trial, dismissal, or other dispositions without going through mediation (see Section IV.A).

In a few Control Group cases, senior resident judges in the three intensive-study counties departed from the study design and ordered MSCs.³⁴ We do not believe that this departure compromises the study's findings. The departure, which usually was requested by attorneys, was rare and had virtually no effect on the Control Group as a whole.³⁵ In the results presented in this report, when the Control Group is mentioned, all its cases are included, including the few that went to MSCs.

Although the MSC program did not exist for several years after the Preprogram Group cases (cases filed in 1989) were filed, the court ordered one especially slow case in the Preprogram Group to mediation. It went to an MSC (resulting in settlement) in February 1993, nearly four years after it was filed. We excluded this single, quite unusual case from the Preprogram Group.

34. It was also possible that a case in the Control Group could go to mediation without a court order by voluntary consent of the parties, and indeed this would have been possible before or after the MSC program began, in the Control Group, Preprogram Group, or Mediation Group. However, we believe that voluntary mediation rarely, if ever, occurred because, before the court-ordered program began, mediation was a new, untried approach in superior court civil cases.

35. The following are the considerations that led us to conclude that exceptions made in the Control Group did not damage the study's findings: (1) The amount of departure allowed was small. It occurred in only 5.5 percent of the Control Group cases captured in our court record data, judging from the existence of mediators' reports in the court files. (2) In analyses performed with court record data, we had another comparison group, the Preprogram Group, and Mediation Group/Preprogram Group comparisons generally came out the same as Mediation Group/Control Group comparisons. Also, the Control and Preprogram groups appear to have been quite similar in relevant respects such as mediation disposition time, settlement rate, and trial rate, despite the fact that a few Control Group cases went to MSCs. (3) The Control Group cases that senior resident judges permitted to go to MSCs probably would have settled if the MSCs had not taken place. In most of these cases (ten of thirteen in the court record data), the senior judge had ordered the MSC, presumably because the parties requested it. *All* of these cases in fact reached full or partial settlement at their MSCs; this contrasts sharply with the normal rate of settlement at MSCs for Mediation Group cases and for cases throughout the thirteen counties that went to MSCs, which was less than half. (4) As a precaution we performed separate Mediation Group/Control Group comparisons excluding the few cases from the Control Group in which MSCs were held; these did not turn out differently from comparisons in which the entire Control Group was involved.

We also looked at possible trends in disposition time and jury trial rates in all thirteen pilot counties that could be attributable to the MSC program. For this purpose, we used data provided from the AOC's civil case database.

C. Data

We used several sets of data in our various analyses, which examined only *contested* cases—that is, cases where the defendant filed an answer denying the plaintiff's claim.³⁶ The **court record data** comprised three random samples of approximately equal size consisting of contested cases filed in the three intensive-study counties (Guilford, Cumberland, and Surry): one from the Mediation Group filed from March 1 to December 31, 1992 (254 cases); one from the Control Group filed from March 1 to December 31, 1992 (244 cases); and one from the Preprogram Group filed from March 1 to December 31, 1989 (243 cases). The total number of cases from the three intensive-study counties was 741. We also collected a more limited set of court record data for a random sample of 104 closed (disposed of) contested Forsyth County cases filed from March 1 to December 31, 1992 (no control group was established for Forsyth County).³⁷

The **litigant/attorney questionnaire data** were from litigants and attorneys involved in contested, closed cases filed March 1, 1992, through January 31, 1993, in the three intensive-study counties. Obtaining names and addresses of attorneys and litigants from court files, we wrote first to attorneys, asking them for more information about litigants and also about settlement or other outcomes in these specific cases. We then mailed questionnaires to litigants, asking them about their satisfaction (1) with their entire experience in their cases and (2) with mediated settlement conferences if they had participated in conferences (which most had not), and also about the settlement or other outcome of their cases and their expenditure of time and money on the cases. We made repeated attempts to reach attorneys and litigants who did not respond to initial mailings, first by mail and then by telephone (response rates and other details are discussed in the Appendix). This work eventually yielded a dataset of 628 responses from litigants—plaintiffs and defendants—involved in 526 cases.³⁸ The litigant/attorney questionnaire data also included court record information on the cases involved, such as subject matter of claim, filing and disposition dates, type of disposition (trial, dismissal, etc.), and information from mediators' reports (if any).

36. Roughly 40 percent of cases are uncontested. These cases often end in default judgment for the plaintiff.

37. The added sample from Forsyth was proportional to the Mediation Group samples from the three intensive-study counties.

38. We received questionnaire responses from at most one plaintiff and one defendant in each case, even if there were multiple plaintiffs or defendants involved. We selected among multiple plaintiffs in the order that the court file listed them, which generally went according to their degree of involvement in the case; thus, where there was a choice to be made, we favored the major plaintiff. If we could not obtain a response from the first choice and there was another possible choice, we elicited a response from that party.

The **AOC civil case database** contains a few essential items of data on superior court civil cases, including filing and disposition dates, type of subject matter, and mode of disposition. The AOC furnished copies of records from this database for cases filed in the thirteen program counties from July 1, 1985, through February 14, 1995. These data provided a way to look for trends in disposition time and jury trial rates in all of the counties, including the nine counties for which we did not collect data from local court records.

The **compliance questionnaire data** were responses from 138 litigants who were supposed to receive money or nonmonetary relief from a settlement, judgment, or other final court order. These questionnaires were not mailed until at least six months had elapsed after the settlement or judgment.³⁹

Compliance questionnaires were sent to 476 litigants in 415 separate cases in which at least one party had been awarded either money or nonmonetary relief, according to the litigant/attorney questionnaire data. A total of 209 litigants responded, and of these, 138 responses dealt with what the respondents themselves received. We thought that the most reliable information on compliance with a settlement or judgment would come from the intended recipients themselves rather than from what their opponents said they received.

The 138 responses used in this report (all from separate cases) included 122 plaintiffs as well as 16 defendants who were awarded something by a settlement, judgment, or court order. Of the 138, 117 were awarded money and 25 something else; 4 were awarded both. These 138 exclude a few responses in which the respondent was due to receive something pursuant to a “structured settlement” (involving a payment plan or other action in the future), but the future payment or other action was not yet due.

The **attorney survey data** came from questionnaires returned by 424 attorneys, of whom 132 were certified mediators and 292 were other attorneys residing in the thirteen pilot counties. These data are described further in Section VIII.

The quantitative analysis in this report usually involves comparison of proportions (percentages), means (averages), and medians (a median is the midpoint of a distribution of values). The clearest comparisons are those that contrast the entire Mediation Group with the entire Control Group or the entire Preprogram Group, because these groups have similar “mixes” of cases.

In comparing groups with differing modes of disposition—for example, cases that settled at MSCs, cases that settled without mediation, and cases that went to trial—one must be cautious in interpreting any differences found. Such differences may be due to the inherent characteristics of the cases or the litigants rather than to the disposition procedures.

39. The responses were received in a minimum of 193 days and a maximum of 791 days after the settlement or judgment; the median time was 404 days.

D. Methods of Analysis

We performed generally recognized tests of statistical significance on many comparisons of proportions, means, and medians. When we say a difference that we observed was statistically significant, this means that the difference was very unlikely the result of random variation in sampling (a probability of less than 5 percent). That is, it is unlikely to have occurred unless there was a true difference among the compared samples in the underlying population of cases from which the samples were drawn. When we say that an observed difference is *not* statistically significant, this means that we cannot dismiss the possibility that the observed difference occurred simply by random variation in sampling. Observed differences that are not statistically significant are considered unreliable or inconclusive.⁴⁰

In the figures and tables section at the end of the book, when a statistic such as a mean, median, or proportion is given, it is often accompanied by a number in parentheses. This number, known as “N,” is the number of cases or responses from which that statistic was computed. Sometimes the Ns have different values for different statistics computed from the same group of cases. For example, in Table 1, first row, the proportion of Control Group plaintiffs receiving any money shows an N of 228, while the mean amount of money received shows an N of 219.⁴¹ Information was available for 228 plaintiffs on whether any money was received, but for only 219 plaintiffs on the actual amount of money received. In calculating a statistic for a variable like money the plaintiff received, we counted only the cases that had information for that particular variable.

Of the 741 cases in these three counties, 19 were still open (not disposed of) when our data collection ended—1 in the Preprogram Group, 9 in the Control Group, and 9 in the Mediation Group. In analyzing median filing-to-disposition times, we included the open cases because they were followed up well beyond the computed medians for their groups and thus did not distort the calculations. Other analysis was restricted to the closed cases.

40. Statistical significance is often confusing. It is not simply a matter of, say, the number of percentage points by which two proportions differ or the amount by which two averages differ. Rather, statistical significance involves both the sizes of the samples of cases or litigants being compared, and the amount of variation in each sample. The observed difference in percentages may be large, but this means little if one or both of the samples are quite small—the result could easily be just an accident of sampling. Or, even if both samples are large, an observed difference in means may not be significant if there is a large degree of variation within the groups being compared.

41. In this particular example, there were nine cases in which we had information that the plaintiff received some money, but did not have sufficiently reliable information on how much it was.

IV. Court Disposition and Workload

Evaluating a program first requires determining to what extent the program was implemented before measuring its effects. With respect to the MSC program, participation in mediated settlement conferences is the best measure of implementation of the program. Examining the flow of cases that were subject to MSC orders also helps in understanding how the program works.

Full participation of eligible cases in mediated conferences was not a statutory goal of the MSC program, and the supreme court's rules gave senior resident judges discretion in whether to order a mediated conference in each case. Nevertheless, the initial expectation of those who planned the program was that for most superior court civil cases in the pilot counties, MSC orders would be issued and MSCs would be conducted.

Data from four counties—from the three intensive-study counties' Mediation Group plus Forsyth County—were used to analyze participation and caseflow in the MSC program. The Forsyth County sample was reduced to adjust for the fact that the sampling fraction was higher for that county than for the three intensive-study counties.⁴²

Figure 1 (see page 70) shows the flow of 349 closed, contested cases from the four counties.⁴³ *Note that all the cases considered in Figure 1 were eligible to be ordered into mediation*—the cases in the Mediation Group in the three intensive-study counties as well as all the Forsyth County cases. No Control or Preprogram Group cases were included in the graph.

Perhaps the most important thing Figure 1 shows is that half of the contested cases in the four counties did not go to a mediated settlement conference—a fourth because they were never ordered to mediate, and another fourth because although they were ordered to mediate they reached disposition without mediation. This was surprising in view of the initial expectations concerning

A. Implementation of the MSC Program

1. Overall Participation and Caseflow

42. In the court record sample for the Mediation Group in Cumberland, Guilford, and Surry counties, the sampling fraction was 0.1371 (254 cases out of 1,853 filed from March 1 through December 31, 1992). The sampling fraction for Forsyth was 0.3393 (266 out of 784 cases filed in the same period). To adjust for the imbalance, a randomly selected 40.41 percent of the Forsyth sample was included ($0.4041 = 0.1371/0.3393$). This procedure was used rather than weighting the entire Forsyth sample to facilitate computation of median times.

43. These data leave out fifteen cases (six in Forsyth County and nine in Cumberland, Guilford, and Surry) that were still open when data collection ended.

the program. Although full participation in mediated conferences was not a statutory goal of the MSC program and the rules left judges discretion not to order conferences, those who planned the program had anticipated that, in most superior court civil cases in the pilot counties, MSC orders would be issued and MSCs would be conducted.

One reason for the low participation in the program is that courts did not order MSCs in 89 (25.5 percent) of the cases. Most of these 89 cases (58.4 percent) settled through conventional (unmediated) negotiation, while 10.1 percent went to trial (the remainder received other dispositions, such as dismissal without prejudice by the plaintiff, dismissal by the court, or summary judgment). Another reason why so many cases did not go to MSCs is that mediated conferences sometimes did not actually take place after the courts ordered them. Of the 260 cases in which MSCs were ordered, 89 (34.2 percent of those ordered and 25.5 percent of the total of 349) did not actually go to an MSC. Instead, most of these cases (58.4 percent) ended in conventional settlement and a few (4.5 percent), in trial.⁴⁴

Mediated conferences actually were conducted in 171 cases (49.0 percent of the total and 65.8 percent of those in which MSC orders were issued). Just over half of these 171 (90, or 52.6 percent) reached an impasse at the conference; 63.3 percent of the impasse cases eventually reached a conventional settlement, but a relatively high percentage—16.7 percent—went to trial.

Seventy-six of the 171 cases that actually participated in a mediated conference (44.4 percent of the 171 that were actually mediated, and 21.8 percent of the total cases) reached a settlement at the mediated conference. Usually (in 70 of 76 cases) this settlement was described as a full settlement in the mediator's report, but a partial settlement (covering some but not all issues in dispute) also was possible. In another five cases, incomplete court and mediator records made it impossible to determine whether the conference ended in settlement or impasse.

The rate of full settlement at mediated settlement conferences that we found in the court record data for Cumberland, Forsyth, Guilford, and Surry counties is consistent with the AOC's status reports on the MSC program covering all thirteen counties involved in the MSC program. The AOC's reports indicate that as of June 30, 1994, 1,147 (45.9 percent) of 2,501 cases in which conferences had been conducted resulted in full settlement at the conferences. In comparison, we calculated the full-settlement rate for the four counties as 40.9 percent (70 of 171 cases).

Figure 1 also shows the median times between each of the processing stages for cases in the four counties that were subject to have MSC orders issued, as well as the trial and settlement rates at each of those stages. (Trial and settlement rates are discussed further in Section IV.D, below). These processing times provide insight into participation in the program as well as the timing contemplated by the MSC rules.

44. Also, an unknown but probably very small number of these cases did not mediate because the parties obtained an order from the senior judge to dispense with the conference, under Rule 1(d).

Under the original rules in effect when most of these cases were processed, the court could issue the order for the mediated settlement conference at any time. The conference could not begin sooner than 120 days after the filing of the last required pleading (which usually was the defendant’s answer), but had to begin within 60 days of the court’s order. For the 260 cases in the four-county court record sample that received an MSC order, the median time from answer to order was 123.5 days. The 89 cases that never received an MSC order reached disposition in a median of 153.5 days after the answer was filed. This relatively quick pace probably explains why many cases avoided MSC orders. While the court waited to issue the order to mediate, the lawyers and their clients did what came naturally—they settled.

For the 171 cases in the four-county sample that were ordered to mediate and actually went to conferences, the median order-to-conference time was 77.0 days, which indicates that the 60-day limit often was exceeded.⁴⁵ During this delay, another 89 cases that were ordered to mediate in fact reached disposition without mediation. These 89 cases proceeded to disposition in a median of 95.5 days after the MSC order; many of them simply settled before the conference was to take place, with attorneys in some instances postponing the conference date while unmediated negotiation continued.

Among the four counties, participation in mediated conferences differed greatly. This was due to variations in (1) the percentage of cases ordered to mediate, and (2) the “MSC-held rate” (the percentage of orders that actually resulted in mediated conferences), but much more to the latter than the former. However—and this finding is important if the court system wishes to increase participation in the MSC program—in the conferences that took place, the four counties had nearly the same rates of settlement in mediation (around 44 percent).

Differences among the four counties in program participation are illustrated in Figure 2 (see page 71). The overall participation rates (the percentage of all contested cases in which MSCs actually were conducted, shown in the leftmost set of bars in Figure 2) were highest in Surry County (73.7 percent) and Forsyth County (66.3 percent). They were much lower in Guilford (43.0 percent) and Cumberland (30.7 percent). The MSC-order rate (percentage of all cases in which courts issued MSC orders) also varied, although not as much: Forsyth (84.6 percent), Surry (84.2 percent), Cumberland (73.3 percent), and Guilford (66.9 percent). The major factor that influenced the participation rate is the MSC-held rate; this rate was much higher for Surry (87.5 percent) and Forsyth (78.4 percent) than for Guilford (64.4 percent) and Cumberland (41.8 percent). Looking at

2. Differences in Participation among Counties

45. Court records showed that often parties successfully requested the courts to issue extensions beyond the limit set in the initial MSC order and even beyond the 60-day limit and the 180-day limit. Both the original version of the rules [Rule 1(c), permitting the court to grant a motion to “defer the conference”] and the current version of the rules [Rule 3(c), allowing the court to grant a motion to “extend the deadline for completion of the conference”] provided a way of extending the time for holding the conference beyond what was set in the court’s initial order. It is unclear whether these provisions were intended to authorize judges to postpone conferences beyond the time limit of Rule 3(b).

the percentage of MSCs held that resulted in settlement at the conference (rightmost portion of Figure 2), there was little difference; this rate was not much higher for the high-participation counties (Forsyth—46.4 percent, Surry—50.0 percent) than for the low-participation counties (Cumberland—43.5 percent, Guilford—41.5 percent).

One cause of low participation in Cumberland and Guilford was simply the delay in conducting MSCs. In those two counties, the median time from filing of the answer to actually holding a mediated conference was 197 days. In other words, half the cases that actually went to mediation required more than 197 days after the answer to do so. But by that time, according to Control Group data, 30.5 percent of cases that normally would have settled (without mediation) had already reached settlement.

Administrative differences among the counties may explain the variation in the session-held rate. While the courts' administrative procedures (reported to us in interviews with court staff) were generally similar in all four counties, our impressions are that in Forsyth and Surry counties, compared with Guilford and Cumberland counties, the case management assistants were more active and persistent in following up to make sure that deadlines were met for appointing a mediator and for holding the mediated conference. Also, as explained earlier, the court in Forsyth County established a credible threat of a sanction for noncompliance with MSC orders.⁴⁶ Finally, the small caseload in Surry county probably made it easier for the case management assistant to get lawyers to meet deadlines.

Judicial attitudes probably also affected participation. One likely reason participation was so high in Surry County was that the senior resident judge at the time of this study was a vigorous and effective advocate of mediation in civil cases, as well as one of the planners of the MSC program. In Guilford County, where participation was much lower, the senior judge had a different outlook. He told us that if attorneys in a case were opposed to mediation, he saw no reason to force them and did not order an MSC. He usually ordered MSCs in cases involving construction and those with two or more business litigants, but where negligence was involved and liability the primary issue (this describes many, if not a majority, of superior court civil cases), he felt that mediation often was a waste of time. His approach was to introduce mediation slowly, without forcing it against attorneys' wishes.

The "success rate"—the settlement rate at mediated conferences—was about the same in all four counties (between 41.5 percent and 50.0 percent) despite the large differences in participation rates (Figure 2). This suggests that once the parties were brought to the table, the mediation process worked equally well regardless of differences in premediation case management.

3. Did Participation Improve in the Second Year?

The data previously described on participation in MSCs pertain to cases filed during the first year of the MSC program. We thought that participation might increase in the second year of the program, especially in counties where it was low

46. See *supra* note 21.

initially, as attorneys and judges became more familiar with the program. In fact, in Guilford County the opposite occurred.⁴⁷

To compare Guilford County MSC participation in 1992 filed cases with that in 1993 filed cases, cases were followed for 420 days from filing, and only those disposed of within that time were considered.⁴⁸ The proportion in which an MSC was ordered was 73.2 percent for 1992 cases and only 36.1 percent for 1993 cases. The participation rate (proportion that actually went to MSCs) was 42.3 percent for 1992 cases and only 16.7 percent for 1993 cases.

The MSC program was not intended to affect case outcomes, in terms of money recovered or other kinds of relief received by parties, and in fact it did not. This is our conclusion from an analysis of the litigant/attorney questionnaire data concerning cases in the three intensive-study counties (see Table 1, page 61).

Court records and other available data usually did not indicate how much money (or what other kinds of relief) plaintiffs wanted or expected. There are several reasons for the lack of information. First, plaintiffs often did not know what to demand or expect, and their attorneys could only estimate a possible range of jury awards and other possible relief if the case went to trial. Second, in negligence actions (the majority of cases in our study) where the damages exceeded \$10,000 (the amount necessary to establish the superior court's jurisdiction),⁴⁹ North Carolina's Rules of Civil Procedure forbid stating the exact amount demanded in the plaintiff's claim for relief, and require that it simply state that the damages exceed \$10,000.⁵⁰ Consequently, this study's analysis of monetary awards and other relief relied on what parties actually received either in settlement (as indicated by litigant/attorney questionnaires and mediators' reports) or by verdict or other court order (as shown by court records), without regard to what they may have expected to receive. Because of random selection, the range of what the parties expected—to the extent that they had clear expectations—probably was about the same in the Mediation Group and the Control Group.

Table 1 shows the awards plaintiffs received, including amounts they obtained from settlements (conventional or mediated) and trials. It indicates (1) the percentage receiving any monetary award; (2) the mean amounts of the monetary award (zero values were included in these calculations); and (3) the percentage receiving any nonmonetary relief.

**B.
Court Outcome:
Money and Other
Relief that Parties
Received;
Incentives for
Settling and for
Going to Trial**

47. Initial participation also was low in Cumberland County, but we were unable to check later participation there because the trial court administrator did not keep records on cases in the MSC program after the initial study period.

48. The resulting sample sizes were: 1992 cases—97; 1993 cases—72.

49. Under N.C. GEN. STAT. § 7A-243.

50. N.C. R. Civ. P. 8(a)(2). Not stating the exact amount of damages sought also is common practice in civil actions other than negligence. This rule also provides that any party may request a written statement of the exact amount, which the claimant must provide, but these requests and responses rarely appeared in court records.

With regard to both monetary and nonmonetary relief⁵¹ that plaintiffs received, small differences can be observed comparing the Control Group with the Mediation Group. However, *none of these differences was statistically significant.*

Defendants, by way of counterclaims, also occasionally received monetary awards (8.4 percent)⁵² and nonmonetary relief (20.0 percent). Here, too, we found no significant differences comparing the Control Group with the Mediation Group.

Table 1 provides some insight into why litigants settle, as well as the similarities between mediated and standard settlement in terms of the ultimate outcome. Table 1 compares plaintiffs who reached settlement at MSCs with four groups: (1) those who settled after their MSCs reached an impasse, (2) those who settled conventionally (without mediation), (3) those who went to trial, and (4) those whose cases were disposed of in other ways.⁵³ Plaintiffs who settled at MSCs were significantly more likely (88.3 percent) to receive *some amount* of money than those who went to trial (52.7 percent), but no more likely than those who settled conventionally (82.7 percent) or after impasse (93.0 percent).⁵⁴ Thus, settlement at an MSC in this respect was no different from regular settlement.

Mediated and conventional settlement also did not differ with regard to the amount of money that plaintiffs received. The average for MSC settlement (\$37,673) was less than for those who went to trial (\$58,541),⁵⁵ but about the same as for those who settled conventionally (\$34,364). (These computations include zero amounts.)

An interesting phenomenon showed up in this study. Experienced attorneys know that plaintiffs who go to trial have a substantial probability of receiving nothing. This is the risk that prompts plaintiffs' lawyers to advise their clients to consider settlement. But for this study, plaintiffs that did go to trial received an average award that was greater than for those who settled (whether at MSCs or without mediation), even taking into account those who received nothing.⁵⁶ The larger average received at trial, of course, is one reason why some plaintiffs go to trial despite the high odds of losing, and also why *defendants'* lawyers often counsel their clients to consider settling.

The mean award for plaintiffs who settled after impasse was comparatively high. Perhaps this is because when defendants were close to trial, they were willing to offer more to avoid a disastrous verdict. Or perhaps some defense attor-

51. Examples of nonmonetary relief were transfers of property such as land, material goods, or securities; grants of usage rights concerning land, such as right-of-way privileges; promises to repair or replace something for which the defendant was responsible; and rehiring of the plaintiff or restoration of his/her employee status or benefits.

52. Forty percent of defendants' monetary awards occurred in cases involving condemnation of real property.

53. In comparing these groups, one must remember that they were not matched like the Control and Mediation groups were; rather, the litigants and their attorneys "selected themselves" for these various kinds of dispositions. In Table 1, conventional settlements in the Mediation and Control groups were combined, and the few mediated settlements in the Control Group were combined with those in the Mediation Group.

54. Plaintiffs could settle without receiving any money. They might receive something other than money or (less often) might agree to give money or something else to, or do something for, the defendant (thus settling a counterclaim).

55. This difference was not statistically significant, however.

56. For the twenty-nine who received *some* money at trial, the average was \$110,855.

neys had procrastinated with regard to settlement negotiation and were forced to offer more at the eleventh hour.

Some studies of mediation in small claims cases have suggested that where a settlement is mediated, plaintiffs are more likely to receive part of their claim, but less likely to receive either the whole amount or nothing, than they would be at trial (adjudication by a magistrate).⁵⁷ Our results in the present study of much larger civil cases are consistent with the small claims research, but also indicate that with respect to avoiding all-or-nothing outcomes, mediated settlement is no different from conventional settlement.

For plaintiffs, in all forms of settlement (mediated, post-impasse, and conventional) the percentages who received something besides money were significantly lower than for those who went to trial (29.6 percent). Perhaps this was because nonmonetary relief, such as transfers of land or land rights, involved more complex legal issues that were harder to settle and more likely to go to trial than were claims that could readily be expressed in dollars.

To determine the MSC program's effect on the pace of disposition, we measured the time in contested cases from the filing of the plaintiff's complaint to superior court disposition.⁵⁸ Figure 3 (top three bars, see page 72) compares the Control, Preprogram, and Mediation groups in the three intensive-study counties.⁵⁹ The median disposition times for the Control and Preprogram groups were virtually the same: 406.5 and 410.0 days, respectively. This equivalence of disposition times is one indication that, as expected, the Preprogram and Control groups were similar groups of cases. The median disposition time of these two groups combined, 408 days, can be considered a standard median disposition time for contested cases in the absence of the MSC program.

For the entire Mediation Group (labeled "Mediation Group/Closed Cases" in Figure 3) the median disposition time was 360.0 days—48 days less than the standard. The clear implication of this comparison is that the MSC program reduced the median disposition time by about seven weeks. Due to random selection, the Mediation Group was similar to the other two groups. Therefore, it is likely that the MSC program was responsible for the difference in disposition times.

How did the MSC program shorten disposition time? Its effects appear to be both direct and indirect. To address this question, we subdivided the cases in

C. Pace of Disposition: Intensive-Study Counties Plus Forsyth

57. For a review of research on small claims mediation, see *National Symposium on Court-Connected Dispute Resolution Research: A Report on Current Research Findings—Implications for Courts and Future Research Needs*, ed. Susan Keilitz (Williamsburg, Va.: National Center for State Courts, 1994), 23–27.

58. We might have started the time measurement with the date of the defendant's answer rather than the plaintiff's initial filing. The program could not be expected to affect the time from initial filing to answer. However, we did not use the answer date for two reasons: (1) court records concerning the answer date were not fully reliable; and (2) in similar groups, the filing-to-answer periods should have about the same distributions.

59. This comparison includes the few cases that had not reached disposition when data collection ended. Including the open cases did not distort computation of the median disposition times because all open cases had been open longer than the computed medians.

the Mediation Group (see the lower portion of Figure 3)⁶⁰ into four modes of disposition: (1) mediation not ordered; (2) mediation ordered but not held; (3) settled by a full or partial settlement that occurred at the mediated settlement conference; and (4) disposed of after an MSC resulted in impasse. Figure 3 indicates the median disposition times for these four subgroups in the bottom four bars.

Unlike the entire Mediation Group, which because of random assignment is similar in its composition to the Preprogram and Control groups, these four subgroups of the Mediation Group are not necessarily similar to the Preprogram and Control groups. They may be quite different in composition because they “selected themselves” for their mode of resolution. For example, cases in which mediation was not ordered may have tended to be relatively easy to resolve (hence they settled early and “selected themselves” out of mediation), while cases that went to mediated conferences but reached impasse probably were difficult to resolve (otherwise they would have reached an agreement at or before the conference). Nevertheless, comparing each subgroup with the standard 408-day median disposition time provided by the Preprogram and Control groups in the three counties provides further insight into the program’s effects on disposition time.

The median disposition time for Mediation Group cases where a mediated settlement conference was not ordered (253.0 days—see Figure 3) was quite short compared to the standard median time. It is unclear whether this reflects the influence of the MSC program. On the one hand, knowing that an order to mediate could be issued may have prompted the attorneys and litigants in some of these cases to settle quickly. On the other hand, perhaps they would have settled quickly without the program.

Cases in which a mediated settlement conference was ordered but not held had a considerably shorter median disposition time (315.5 days) than the standard. The setting of a date for a conference may have caused attorneys and litigants in these cases to reach a conventional settlement quickly. Cases that reached settlement at the conference had a median disposition time of 315.0 days, suggesting that settlement at a mediated settlement conference shortened disposition time considerably compared to the standard.

In the cases that reached an impasse in a mediated settlement conference, the median disposition time was 416.5 days. Impasse cases probably were the most difficult cases to resolve; otherwise they would have settled before the conference or at the conference. If the MSC program were effective only in easy-to-resolve cases, we would expect to find very long disposition times in impasse cases. However, their median time was close to the standard value of 408 days. This fact suggests that the MSC program could have helped to speed up these cases despite the impasse. Several mediators told us that a case that fails to settle in mediation may still benefit from mediation, because what the participants learn at the conference may help them reach a settlement later. Although

60. Note that the lowest five bars in Figure 3 include only cases that were disposed of by the time data collection ended.

impasse cases had a high trial rate, having gone through a mediated conference may have expedited settlement for those that did not go to trial.

Another way to see that the program hastened conventional settlement is to compare the median filing-to-disposition time of cases that settled.⁶¹ This median was 388.5 days in the Preprogram Group and 381.0 days in the Control Group. In the Mediation Group, it was 329.0 days, including both mediated and conventional settlement—about two months less than in the comparison groups. Breaking this down further: for mediated settlement, the median was 315.0 days, and for conventional settlement, 363.0 days.⁶² Thus, both forms of settlement were faster than usual when cases were exposed to the MSC program.

The cumulative percentage of cases that reached disposition over time (see Figure 4, page 73) provides a third way to examine the MSC program's effects. In the three intensive-study counties there was not much difference in the percentage disposed of in the Preprogram, Control, and Mediation groups until about 200 days from filing. In other words, the MSC program apparently did not accelerate cases that reached disposition (usually because of early settlement) in less than 200 days from filing. After the 200-day point, the Mediation Group pulled ahead while the other two groups stayed together. By 210 days, the Mediation Group was about 4 percentage points ahead; by 270 days, about 9 percentage points ahead; and by 330 days, about 11 points ahead. Thereafter, the Preprogram and Control groups began to “catch up”; by 570 days from filing, the percentages disposed of were approximately equal.

Thus far, we have discussed data suggesting that the MSC program hastened case disposition in the three intensive-study counties (Cumberland, Guilford, and Surry). Did it have the same effect in the other ten counties involved in the study?⁶³ To address this question we examined data from the AOC's civil case database for cases filed since July 1, 1985. In these data, there was no way to remove uncontested cases, which were ineligible for the program and whose disposition times presumably were not affected by it. (Data for the three intensive-study counties indicated that about 40 percent of cases were uncontested.)

Figure 5 (see page 74) shows the median filing-to-disposition time, in months, for contested and uncontested cases filed in six-month periods beginning with July–December 1985.⁶⁴ Lines are shown (1) for all thirteen counties, (2)

D. Pace of Disposition: All Thirteen Pilot Counties

61. Here we use the “proxy definition” of settlement as explained in Section IV.E Comparing only the cases that settled is legitimate, because (as explained in Section IV.E) the program apparently did not affect whether cases settled or went to trial.

62. The 75th percentile filing-to-settlement time (i.e., the time within which 75 percent of cases settled) also was considerably less in the Mediation Group (458.0 days) than in either the Preprogram Group (511.5) or the Control Group (504.0).

63. The other ten were Bladen, Brunswick, Chatham, Columbus, Forsyth, Halifax, Haywood, Jackson, Orange, and Stokes.

64. For the last filing period beginning in July 1993, we only have data through September 1993, which was the last time the AOC's database had been updated at the time it was read for us. In Figure 4, we omitted data from cases in the Control Group in Cumberland, Guilford, and Surry counties because these cases were not subject to the MSC program.

for the three intensive-study counties (excluding the Control Group), and (3) for the other ten counties. Generally the median disposition time has declined since 1985. One likely explanation for declining disposition time is that the jury trial rate generally has gone down since 1985.⁶⁵ The MSC program did not go into effect in most of the study counties until spring or early summer of 1992, so it was not responsible for the earlier drop in disposition time. However, the program probably helped to continue the trend after 1991.

In all thirteen counties, a trend computation (Figure 6, page 75) shows the median declining from approximately 10.5 months for cases filed in July–December 1985 to about 9.0 months for cases filed in July–December 1993. The decrease was considerably less if measured from the year before the program went into effect—about 0.5 months from July–December 1991 to July–December 1993. This drop in median time measured from the AOC data was considerably less than the seven-week decrease in the median that we ascribed to the MSC program as explained earlier in this section.⁶⁶ But the latter was measured from local court records for contested cases only, while the AOC data included uncontested cases. Including the uncontested cases (about 40 percent of the total filed) tended to conceal the speed-up effect of the MSC program.

The trend lines in Figure 6 also show that the other ten counties' cases experienced a downward trend in median disposition time from 1985 to 1993, as did the three intensive-study counties. In fact, in the other ten counties, the downward trend was somewhat steeper, showing a decline from about 10.5 months for 1985 cases to about 8.7 months for 1993 cases. These results suggest that cases in the other ten counties were experiencing the same gradual speed-up as cases in the three intensive-study counties. If the MSC program helped to continue that trend in the intensive-study counties, these data suggest it may have done the same in the other study counties.

One caveat here: The downward trend in median disposition time may not be a continuing one. In the last few periods, the medians computed from the AOC data stopped declining and in fact increased slightly, especially in the three intensive-study counties.⁶⁷ If one of the MSC program's goals is to reduce disposition time, more vigorous administrative effort may be needed to increase participation in the program. As the program continues, participation may not necessarily increase—in fact, it may decrease as we found in Guilford County (Section IV.A.3, above).

65. AOC data for the thirteen counties indicate that the rate of jury trial (which the AOC defines as any disposition in which a jury is impaneled, regardless of whether a jury verdict is issued) generally declined from 6.7 percent for cases filed in the second half of 1985 to 2.9 percent for cases filed in the first half of 1993.

66. Also, the median time shown in figures 5 and 6 generally is less than the values discussed earlier, but that probably is because the data from the AOC include uncontested cases, which reach disposition sooner than contested ones.

67. The increase shown by the AOC data in median disposition time in the three intensive-study counties after July–December 1992 is not inconsistent with our finding (see Section IV.C above) of a decrease, which we attributed to the MSC program. Our estimated decrease in the median in these three counties, based on court record data, was 48 days—1.6 months. The AOC data show that the median for cases filed in 1992 in these three counties was about 0.6 months less than the median for cases filed in 1989 (which included our Preprogram Group). The AOC data show less of a difference, probably because they include a large number of uncontested cases that were unaffected by the program. (Control Group cases were not included in computation with the AOC data.)

E. Mode of Disposition

The MSC program appears to have had no effect on the probability of trial in contested cases, the probability of settlement (including both mediated and conventional settlement), and the number of motions and orders that require work by the judge and court clerks.

Proportions of various modes of disposition for the Preprogram, Control, and Mediation groups appear in Table 2 (see page 62). The percentages shown are the proportions of the closed cases in each group (the small numbers still open at the end of the study are shown in the bottom row). Because court records did not indicate whether a case settled (unless a consent judgment was entered, which rarely occurred), we used a proxy definition of settlement based on our litigant/attorney questionnaire data. In the court record data, we considered a case settled if court records indicated that (1) the plaintiff or both parties filed a voluntary dismissal with prejudice; (2) a consent judgment was entered; or (3) a mediated settlement conference was held and the mediator's report indicated that a settlement occurred. Analysis of the litigant/attorney questionnaire data, in which attorneys and litigants more accurately identified cases that settled, indicated that this proxy definition captured 90.7 percent of actual settlements.⁶⁸

The MSC program apparently did not affect the probability of settlement in the three intensive-study counties. Settlement occurred in virtually the same proportion in the Preprogram Group (64.1 percent), the Control Group (65.1 percent), and the Mediation Group (65.7 percent) (see Table 2). These proportions were calculated using the proxy definition of settlement. Assuming that that definition captured 90.7 percent of actual settlements, the true settlement rate was about 72 percent in all three groups.

The litigant/attorney questionnaire data also failed to show any program effect on the likelihood of settlement. Of 229 closed Control Group cases in that dataset, using information provided by the attorneys and litigants, 168 (73.4 percent) were settled, compared to 220 (74.1 percent) of the 297 Mediation Group cases in that dataset.⁶⁹ Looking at full settlement and partial settlement separately, the rates also were almost equal: full settlement—Control, 72.9 percent and Mediation, 73.1 percent; partial settlement—Control, 0.4 percent and Mediation, 1.0 percent.

68. The best information on whether settlement occurred was provided by the litigant/attorney questionnaire data. In those data, we treated a case as having been settled if (1) the attorney for either side, or either one of the parties, said it was settled, (2) a consent judgment was entered, or (3) the plaintiff entered a dismissal with prejudice and the attorneys or parties indicated that either side had received either money or nonmonetary compensation. (Despite what the attorneys and parties responded, we ruled out settlement if court records indicated a trial, summary judgment, or judgment on the pleadings had occurred.) Most settlements (384 of 388) were described as full settlements, the remainder as partial. Looking at 526 contested closed cases in the litigant/attorney questionnaire data, we found that of 388 cases in which the attorneys, litigants, or court records indicated there had been a settlement, 352 (90.7 percent) satisfied the proxy definition for settlement described in the text. Conversely, in 363 cases where the proxy definition was satisfied, 352 (97.0 percent) were said by attorneys or litigants to have settled. Only 3.0 percent of nonsettlements met the definition.

69. The main reason the settlement rate was about 74 percent in the litigant/attorney questionnaire data, according to what those sources told us, and only about 65 percent in the court record data, is that—as explained earlier in this subsection—the proxy definition of settlement that we applied to the court record data did not capture quite all the actual settlements. Also, we did not have litigant/attorney questionnaire data on all the cases that were in the court record sample.

Court record data indicate that even when exposed to the MSC program, most cases settled conventionally rather than in mediation. In Mediation Group cases in the three intensive-study counties, using the proxy definition of settlement, only 27.3 percent (44) of the 161 cases that settled did so at a mediated settlement conference. (Including the Forsyth County sample, the proportion was 31.7 percent—76 of 240 cases.) These proportions underscore the limited effect that the program had on whether the parties reached a settlement.

In the intensive-study counties, only 102 (41.6 percent) of the 245 closed Mediation Group cases actually went to a conference. The 102 cases that went to a conference had a relatively high settlement rate (74.5 percent) despite the fact that over half reached impasse at the conference.⁷⁰ But because most contested cases did not go to a conference, the program may not have had as much of an effect on the overall rate of settlement as it might have had with higher participation.

The “success rate” at mediation—the proportion of MSCs that resulted in agreements—might have been higher if more cases had participated. About 60 percent of the cases that did not go to mediation settled conventionally, using the proxy definition of settlement (which, as explained earlier, slightly understates the settlement rate). If these cases had been brought into mediation, the majority might well have reached agreements there, and the overall success rate at mediation might have been higher than the 44 percent that we measured.

The MSC program also seems not to have significantly affected the probability of trial. This conclusion follows from the fact that the program did not increase settlements—the only way in which it could be expected to reduce trials. The absence of a trial effect also can be seen by comparing the trial rates computed from court record data (see Table 2). Although the Mediation Group had slightly lower rates of all trials and of jury trials than did the other two groups, the differences were not statistically significant.⁷¹ The combined rate of all trials (including jury and judge trials), computed as a fraction of closed cases, was 11.9 percent in the Preprogram Group, 9.8 percent in the Control Group, and 9.4 percent in the Mediation Group. The jury trial rates were 7.4 percent, 6.8 percent, and 5.7 percent, respectively, for the Preprogram, Control, and Mediation groups.

Data from the AOC’s civil case database are consistent with the conclusion that the MSC program did not reduce the jury trial rate. Figure 7 (see page 76) shows the results of a fixed-length 600-day follow up of cases in the AOC database, including uncontested as well as contested cases. The jury trial rate (as defined in the AOC data)⁷² in the thirteen study counties generally has been

70. Of the 54 cases that reached impasse, 55.6 percent settled eventually, according to our proxy definition.

71. Neither the three-way comparison (Mediation/Control/Preprogram) nor the two-way Mediation/Preprogram comparison showed a statistically significant difference in the proportions of all trials or of jury trials only.

72. The AOC’s definition of a jury trial is broader than ours; it includes any situation in which a jury is impaneled, regardless of whether a jury verdict is issued, while our definition counts only a jury verdict. (For example: In the AOC’s definition, the “jury trial” category would include a case in which a jury was impaneled but the parties then settled and the plaintiff filed a voluntary dismissal.

dropping since 1985, long before the program began. Starting at 6.7 percent for cases filed in July–December 1985, it gradually declined, with some fluctuation, to 2.9 percent for cases filed in January–May 1993.

Possibly, the MSC program had no effect on the trial rate because it was already irreducibly low. The few cases that were trial-bound under standard court procedures may have remained trial-bound when the MSC program was in operation.

Lacking a reliable way to measure the amount of time that judges and other court officials spent on cases, we looked instead at the number of transactions requiring judges' and clerks' time in contested cases. The frequency of trials, which require substantial amounts of their time, was analyzed in the previous subsection. This section deals with the number of motions and orders the courts handled.

In the court record data, we counted (1) motions and stipulations for discovery⁷³; (2) other motions and stipulations; (3) orders signed by a judge; and (4) orders signed by a clerk. The mean numbers of motions and orders, per closed case, for the three groups are shown in Table 3 (see page 63). Regarding the number of motions for discovery, the Mediation Group's mean (0.76) was slightly higher than either the Control Group's (0.72) or the Preprogram Group's (0.65). With regard to other motions, the Mediation Group's mean (2.34) was a bit lower than the Preprogram Group's (2.88) but slightly higher than the Control Group's (2.00).

The Mediation group's mean number of orders signed by a judge (1.95) was more than those of both the other groups (Preprogram—1.54, Control—1.21). This relatively high mean number of judicial orders shows that judges often issued mediation orders in Mediation Group cases. Excluding that particular type of order, the Mediation Group's mean would be 1.37—lower, but not significantly less than the other two groups' means. In any event, we believe that judicial mediation orders should be included because, like other orders, they require judges' time and in a sense are part of the price paid for the MSC program. With regard to orders signed by a court clerk, the Mediation Group's mean (1.24) was about the same as the Preprogram Group's (1.32) and the Control Group's (1.14).

Thus, despite the fact that (as explained in subsection C above) the MSC program shortened the median filing-to-disposition time, it does not seem to have reduced the courts' workload in terms of trials, motions, or orders.

In our court record data, we found that forty-four of fifty-four cases that the AOC counted as jury trials actually ended in jury verdicts; six actually were tried by a judge, two were voluntarily dismissed, one was dismissed by the court, and one was actually still open when we last checked the records.) We did not include the AOC's category of "judge trials," which includes any case in which a judge hears evidence (even in chambers) regardless of the actual disposition that follows.

⁷³ A motion for discovery is a request to the court to order discovery. A stipulation for discovery states an agreement between the parties on something—for example, a timetable for discovery. Stipulations do not require orders but do call for the attention of judges or clerks.

F. Court Workload: Motions and Orders

**G.
Possible Program
Effect on
Scheduling of
Judges' Time**

Some judges in the pilot districts said that the MSC program reduced judges' time that otherwise would have been needlessly tied up in trial dockets (schedules). Without the program, they said, cases often are placed on the trial docket, committing judges' time for certain dates in the near future, but then are settled just before trial, making it difficult to re-allocate judges' time to other cases. The MSC program, according to these judges, reduced eve-of-trial settlement by prompting earlier settlement, both mediated and conventional. In other words, in their view, while the same number of cases may eventually have gone to trial, fewer were placed on the trial docket.

We did not study trial docketing or measure the use of judges' time and therefore cannot confirm the judges' assertion. However, it is consistent with our finding that the program hastened settlement.

V.

Litigants' Satisfaction, Time, and Costs

We asked litigants about their experience with mediated settlement conferences in cases where (1) they said they had participated in an MSC and (2) court records showed that an MSC in fact had taken place. A total of 169 (91 plaintiffs and 78 defendants) responded.⁷⁴

Our litigant questionnaire presented a number of statements and asked the litigant whether he or she “disagreed strongly,” “disagreed somewhat,” “agreed somewhat,” or “agreed strongly.” We varied the phrasing of the statements to improve the reliability of measurement. In Table 4 (see page 64), questionnaire statements are divided into these groups: (1) the litigant’s over all evaluation of his or her experience with the conference; (2) the sense of control and self-expression; (3) satisfaction with the outcome and procedure; (4) fairness of the outcome and procedure; (5) understanding of the outcome and procedure; (6) evaluation of the mediator; and (7) cost and disruption.

Generally the litigants’ perceptions of their conferences were favorable, but some were not. First, the favorable responses: Fifty-seven and two-tenths percent said that mediation was the best way to handle a case like theirs, and 66.3 percent would recommend it to a friend. Sixty-six and nine-tenths percent said that mediation brought the dispute out in the open, and 65.9 percent thought that mediation had addressed all the important facts. A majority (66.5 percent) felt that mediation did not make it hard for them to express themselves, and 66.5 percent felt that they were an important part of the process.

Most responding litigants were satisfied with the mediation process (66.9 percent) and with the rules and procedures involved (75.2 percent). An even larger proportion (81.4 percent) viewed the rules and procedures of mediation as *fair*. Litigants’ understanding of mediated settlement conferences was good, as they saw it: 75.3 percent said they understood why the conference turned out as it did, and 87.0 percent that they understood what was going on.

Litigants’ regard for mediators was especially high. Most trusted the mediator (85.5 percent). Most thought the mediator was fair (86.8 percent), well-qualified (86.1 percent), and effective (81.9 percent). Seventy-one and seven-tenths percent felt that the mediator made sure all the issues were examined carefully, and

A.

Satisfaction with Participation in Mediated Settlement Conferences

74. For 11 of these 169 respondents, the MSC had not been officially ordered by the court, but the same type of conference was conducted (and reported by a certified mediator) as was involved where a conference was court ordered.

60.7 percent said the mediator helped them to think about things from a practical point of view.

Now, the unfavorable responses: Thirty-eight and nine-tenths percent doubted that they would want to participate in mediation again; 39.6 percent said the mediated settlement conference cost them too much money; 41.7 percent said that it took too much time; and 75.0 percent said it disrupted their daily affairs. At first glance, these percentages seem inconsistent with the other high endorsements of the conferences—for example, the majority who regarded mediation as the “best way to handle a case like mine.” But the negative responses may reflect a distaste for getting involved in a lawsuit rather than a disaffection with mediation. An analogy: One of the authors once had surgery to repair a dislocated shoulder. He thinks that his surgeon was highly competent and that surgery was the best way to handle a case like his, but he definitely does not want to participate in surgery again, and it certainly disrupted his daily affairs!

While most respondents were satisfied with the mediated settlement conference *process*, including its rules and procedures, considerably fewer were satisfied with the conference’s *outcome* (40.5 percent) or with the way it “*turned out*” (41.4 percent). Only 50.9 percent felt the conference’s outcome was fair. This may reflect dissatisfaction with losing rather than with the mediation. Of those dissatisfied with how the conference turned out, most (70.1 percent) thought that either the other side, or nobody, “won” the case, while only 40.6 percent of those who were *satisfied* with how the conference turned out thought that either the other side or nobody had won. Perhaps mediated settlement did not change the way people felt about losing, even though they generally liked mediation procedures and mediators.

A majority of responding litigants felt they had no control over the handling of the conference (63.2 percent) or over its outcome (63.5 percent). This may have been a realistic assessment. As explained in Section II.C, in the conferences that we observed counsel and mediators did most of the negotiating.

How did plaintiffs’ experiences with mediated conferences compare with defendants’? A slightly greater proportion of defendants (63.6 percent) than plaintiffs (52.8 percent) felt that either their opponent or “nobody” had won the case, but this difference was not statistically significant. Fewer defendants (11.7 percent) than plaintiffs (24.7 percent) responded “I won,” but more defendants (19.5 percent) than plaintiffs (12.4 percent) responded “Both sides won.”

Generally plaintiffs and defendants did not differ significantly in their evaluations of conferences they attended, but there were some important differences.⁷⁵ Defendants were more likely than plaintiffs to regard mediation as the best way to handle a case like theirs (71.4 percent versus 44.9 percent). More defendants than plaintiffs were satisfied with the outcome of the conference (50.7 percent versus 31.9 percent) and with how it “turned out” (50.0 percent versus 34.1 percent). More defendants than plaintiffs found the conference disrupted their daily affairs (84.6 percent versus 66.7 percent); however, more

75. All the differences mentioned in this paragraph were statistically significant.

plaintiffs than defendants felt that participating in mediation cost them too much money (48.8 percent versus 28.8 percent).

The legislation authorizing the MSC program called for study of whether the program makes the courts' operation "more satisfying to litigants." We interpreted this provision to be concerned primarily with direct effects of the program—that is, direct effects on litigants who participated in conferences rather than some indirect effect on litigants who did not participate in conferences. Viewed in this light, the program's effect on superior court litigants' satisfaction must have been limited, at best, because about half of eligible litigants did not participate.⁷⁶

In closed, contested cases in the three intensive-study counties, we asked litigants for their agreement or disagreement with a variety of evaluative statements concerning their experience in their case. These questions were phrased like those described in the preceding section, except that they applied to the entire case experience, not just to mediation—to conventional negotiation and settlement, trial (if any), and all other aspects of the case including mediation (if any).

When we asked a person to evaluate his or her experience in a particular case, that person responded, implicitly, in terms of what he or she expected going into the case. People's initial expectations may have differed—for example, those with prior knowledge of litigation may have had different expectations from those with none. Responses of groups are comparable as long as the range of types of expectations are similar in the groups. The Mediation and Control groups were designed to have about the same "mix" of litigants and case characteristics; therefore, the distribution of initial expectations probably were about the same in both groups. Asking people to rate their experience with a dispute-resolution procedure on the basis of their initial expectations is a standard procedure in research of this type.⁷⁷

In preliminary presentations of this study's findings, some listeners—lawyers who were strong believers in mediation—criticized our approach in measuring satisfaction with cases. They said that we should have asked people to compare two different ways of handling the same case: using the standard procedure and using mediation. Without having knowledge of standard litigation, these critics said, it is impossible for the respondent to properly appreciate the value of mediation.

76. Court record data in Cumberland, Forsyth, Guilford, and Surry counties—which accounted for about three-fourths of the cases filed in the thirteen pilot counties—indicated that only 49.0 percent of contested superior court civil cases in the Mediation Group actually went to conferences; see Section IV.A, above.

77. For many examples, see E. Allan Lind and Tom R. Tyler, *The Social Psychology of Procedural Justice* (New York: Plenum Press, 1988).

B. Litigants' Satisfaction with the Entire Experience in Their Cases

1. Method of Measuring Satisfaction

We disagree with this criticism. It would be impossible to put litigants through the same case twice, using different procedures, or to guarantee that litigants had the same kinds of previous involvement with litigation that they could compare with mediation. Furthermore, even litigants without prior involvement in litigation have expectations about going to court formed through their education and life experiences. If mediation is a more satisfying procedure than standard litigation, then the proportion of litigants who express satisfaction with their cases (in terms of whatever their initial expectations are) should be higher in a group exposed to mediation than in a similar group not exposed to mediation.

To make the most efficient use of litigants' responses, we combined them into two different scores on the basis of a statistical technique known as *principal components analysis*. One score, called the Outcome/Procedure Satisfaction Score, was based on responses to statements concerning satisfaction with and perceived fairness of the outcome and procedure in the case. Examples of these statements are: "The rules and procedures affecting my case were fair," "I was satisfied with the outcome of my case," "I had a chance to tell my side of the story," and "I understand why my case turned out the way it did." We formed the Outcome/Procedure Satisfaction Score by adding the coded responses to these statements.⁷⁸ This score had a 42-point range—from -21 points (representing the most negative evaluation) to +21 points (representing the most favorable evaluation).

The other score, called the Cost Dissatisfaction Score, was based on responses to these three statements: "I spent too much money trying to resolve this case"; "I spent too much time trying to resolve this case"; and "This case disrupted my daily affairs." The Cost Dissatisfaction Score had a 9-point range—from -4.5 points (representing the *least* dissatisfaction with costs, time, and disruption) to +4.5 points (representing the *most* dissatisfaction).⁷⁹

2. Results

In our analysis of litigants' satisfaction scores, we found no evidence that the MSC program increased the sense of overall satisfaction with one's case. This was true of litigants in the Mediation Group as a whole, as well as the relatively few who actually participated in mediated settlement conferences.

For plaintiffs, the mean Outcome/Procedure Satisfaction Score was not significantly different in the Mediation Group (0.93 points) and the Control Group (0.81 points) (Table 5, top two rows, page 65). Plaintiffs' mean Cost Dissatisfac-

78. The rationale for adding the responses to the various statements together was as follows. First, all statements concerned the procedure and outcome in the case; and second, all the responses loaded highly on a single factor in the principal components analysis, suggesting that they constituted a single dimension of litigants' feelings about their cases. Each of the responses was one of four levels: "strongly disagree," "disagree," "agree," and "strongly agree." These responses were assigned values of -1.5, -0.5, +0.5, and +1.5, respectively. In adding the responses, we treated negative statements ("The rules and procedures affecting my case made it hard for me to express myself") as negative numbers and the positive statements ("I was satisfied with the outcome of my case") as positive numbers.

79. The Cost Dissatisfaction Score was computed in similar fashion to the Outcome/Procedure Satisfaction Score by adding the responses to the three questions concerning costs, time, and disruption of daily affairs. Note that the three statements were pejorative; consequently, the higher the value of the score, the more negatively the respondent felt about costs, time, and disruption.

tion Score also did not differ significantly in the two groups (Mediation Group, 1.45 points; Control Group, 1.02 points).

For defendants, the mean Outcome/Procedure Satisfaction Score was 1.26 points in the Mediation Group and 4.50 points in the Control Group (Table 5, defendants' section). This difference was statistically significant, suggesting that the program may have reduced defendants' satisfaction with the outcome and procedure in their cases. However, the amount of reduction was small—about 3 points in a score whose full range was 42 points. Defendants' mean Cost Dissatisfaction Score was 1.40 in the Mediation Group and 1.13 in the Control Group; this difference was not significant.

The remaining rows of Table 5 (other than the rows labeled “Control Group: All” and “Mediation Group: All”) include both Mediation Group and Control Group cases. They compare settlement at a mediated conference with conventional settlement, trial, and other dispositions.⁸⁰ There were no significant differences in satisfaction scores favoring mediated settlement over either conventional settlement or trial, for either plaintiffs or defendants. The mean Cost Dissatisfaction Score was significantly higher for plaintiffs who settled at MSCs (1.93) than for those who settled conventionally (0.95), suggesting that plaintiffs regarded mediated settlement as more disruptive or costly than conventional settlement, but the difference was quite small compared to the 9-point range of this score.

For plaintiffs, the mean Outcome/Procedure Satisfaction Score was higher for those who settled at MSCs (3.97) than for those who went to trial (-1.14), but this difference was not statistically significant. In any event, the mean score for plaintiffs who settled conventionally (3.32) was almost the same as for those who settled at MSCs. In other words, settling may have been, on average, more satisfactory for plaintiffs than going to trial, but this was true of all settlement, not just mediated settlement. Perhaps it was due to the fact that settlements were more likely than trials to produce money for plaintiffs.

Among defendants, satisfaction with outcome and procedure actually was significantly less in the Mediation Group than in the Control Group, but the difference was small (means 1.26 points versus 4.50 points in a score that ranged from -21 to +21). The average Outcome/Procedure Satisfaction Score for defendants who settled at MSCs (2.62) was lower (but not significantly) than the average for those who went to trial (5.15), and about the same for those who settled conventionally (1.79). (Perhaps defendants, unlike plaintiffs, may have liked settlement less than trial because they were more likely to *lose* money in settlement.) Defendants' mean Cost Dissatisfaction Score, like plaintiffs', was approximately the same for mediated settlement, conventional settlement, and trial.

80. In these rows, conventional settlements in the Mediation and Control groups were combined and the few mediated settlements in the Control Group were combined with those in the Mediation Group. The rows of Table 5, with the exception of the rows labeled “Control Group: All” and “Mediation Group: All,” do not include the few litigants who did not attend the MSCs held in their cases. There were eight nonattending litigants in cases that ended in settlement at an MSC where we received litigant responses to questions about case satisfaction.

For plaintiffs, mediation had a negative side—the strong possibility of impasse (more frequent than agreement), which apparently reduced their satisfaction. Plaintiffs who reached impasse in mediation were less satisfied with their entire cases than were those who went to trial, and significantly less satisfied than those who settled without mediation—even if they eventually reached a settlement after the impasse.⁸¹ Perhaps mediation created hopes that were dashed by impasse, producing a loss of satisfaction, which subsequent settlement did not compensate for.

To summarize: (1) Litigants who participated in mediation generally evaluated the experience favorably but (2) settling at mediation did not significantly affect either plaintiffs' or defendants' satisfaction with their cases as a whole, compared to settling without mediation.

Are these two findings contradictory? Not necessarily. For example, conventional settlement—by far the most frequent form of disposition—may have been quite satisfactory to most litigants, more so than the advocates of mediation thought. The study did not ask litigants to specifically evaluate conventional settlement; perhaps they liked it as much as MSC participants liked mediation.

Another possible explanation of why settling at MSCs did not raise overall case satisfaction, compared to conventional settlement, is that although most litigants thought of the mediation experience as worthwhile and competently conducted, they may have separated that experience from their other feelings about their litigation overall. The few hours that litigants spend in mediation is only one of many factors that may influence how they feel about litigation, which may go on for longer than a year. It may be that satisfaction with one's experience in a superior court lawsuit involves factors beyond the reach of the mediation process—factors like financial loss; physical injury, disfigurement, and pain; humiliation; and emotional stress. To put it another way, although people like mediation, it may not make them feel better about accidents, contract disputes, and lawsuits.⁸²

81. The mean Outcome/Procedure Satisfaction score was -3.55 for all plaintiffs who experienced impasse and -2.83 for those who settled after impasse, compared to -1.14 for those who went to trial and 3.32 for those who settled conventionally. Most plaintiffs who went to trial without mediation probably had experienced failed attempts at conventional settlement, and they too may have experienced disappointment analogous to that of those who reached impasse at mediation. These plaintiffs' satisfaction was captured in the mean score for those who went to trial. Note that the mean for those who mediated to impasse was even lower than for those who went to trial.

82. We developed regression models of both satisfaction scores, using the information available to us. The factors used as independent variables in the models included the amount of the plaintiff's monetary award (if any) and defendant's monetary award (if any); whether the plaintiff and defendant received anything besides money; the plaintiff's or defendant's attorney costs; the type of subject matter (negligence versus other); the type of litigant (individual versus corporation or other organization); the kind of relationship between the litigant and his/her adversary (business/other/none); the litigant's rating of the importance of continuing the relationship with his/her adversary; whether the case settled; whether an MSC was held that the respondent attended; and whether the settlement occurred at an MSC attended by the respondent. These models, which were fitted separately for plaintiffs and defendants, in fact did not explain much of the variation and therefore were of little use in understanding what makes litigants happy or unhappy. As expected, the models showed that monetary and other types of awards affected plaintiffs' and defendants' satisfaction, and that reaching a settlement (conventional or mediated) increased plaintiffs' satisfaction and reduced defendants'. But the models did not indicate that either participating in an MSC or reaching a settlement in an MSC significantly added to this satisfaction. (The values of R^2 for the Outcome/Procedure Satisfaction Score, adjusted for sample size, were 0.21 for plaintiffs and 0.13 for defendants. For the Cost Dissatisfaction Score, the R^2 's were 0.09 for the plaintiffs' model and 0.11 for the defendants' model. R^2 is the proportion of total variance in the score that is explained by the variables in the model.)

C. Litigants' Time and Costs

One of the goals of the MSC program was to make the handling of superior court civil cases “less costly.” Therefore, we sought to determine whether the program affected litigants’ expenditure of time and money. The data failed to show conclusively that the program reduced plaintiffs’ and defendants’ attorney costs, personal time, or travel costs in their cases, but suggested that it produced some savings.

In the litigant/attorney questionnaires, we asked attorneys and litigants in each case to indicate the fees and costs that attorneys charged their clients in that case. (Where mediators were involved, mediators’ fees usually were passed on to litigants by including them in attorney fees.) We also asked litigants to indicate the amount of time they spent and travel costs they incurred.

The data on attorney fees and costs probably are fairly accurate.⁸³ The time and travel data should be considered rough estimates, since most litigants probably did not keep accurate records on their time and travel.⁸⁴

Looking at plaintiffs and defendants separately, the Mediation and Control groups, when compared, revealed no significant differences in any of these cost measurements (see Table 6, page 66).⁸⁵

Comparisons also were made in terms of mode of disposition (settlement, trial, etc.).⁸⁶ Plaintiffs’ mean attorney fee was \$6,717 for those who settled at mediation, \$9,667 for those who settled conventionally, and \$30,146 for those who went to trial. In other words, settling at MSCs was less expensive than going to trial, but so was conventional settlement. While the mediated/conventional settlement difference was not significant, this comparison suggests that settling at mediation may have lowered plaintiffs’ costs compared to conventional settlement. Why should this be so? Perhaps mediation was a more efficient settlement process, requiring somewhat less attorney time than the more protracted and less focused conventional settlement negotiations.

The mean personal time spent on the case reported by plaintiffs who settled at MSCs (101 hours) was greater than for those who settled without mediation (85 hours), although it was less than for those who went to trial (145 hours) (none of these differences was significant). Thus, settling at mediation may have saved plaintiffs some money in attorney costs compared to conventional settlement, but also may have taken somewhat more of their personal time. Average travel costs reported by plaintiffs were much higher (although not significantly) for MSC settlement (\$429) than for either conventional settlement (\$239) or trial (\$335), but clearly these costs were not as concerning as attorney fees.

For defendants, there was a somewhat stronger showing of cost and time savings for those who settled at MSCs. There were differences comparing (1) defendants who settled in mediation with (2) those who settled conventionally and

83. In obtaining information on each litigant’s attorney costs, we first used what the litigant indicated, even if there was a response from his or her attorney that disagreed. If we had no response from the litigant but had a response from his/her attorney, we used the attorney’s response.

84. A few responses indicated extremely large numbers of hours (1,000 or more) and travel costs (\$7,500 or more). We believed these responses were exaggerated, or at least extremely atypical, and therefore excluded them from the calculations.

85. Means were compared using the T test for comparison of group means. When homogeneity of variance was rejected using the F test, the T test for unequal variances was used.

86. All mode-of-disposition categories included litigants from both the Control and Mediation groups.

(3) those who went to trial: mean attorney cost—\$4,507 versus \$8,072 and \$13,128, respectively; mean personal time—29 hours versus 49 hours and 55 hours; and mean travel cost—\$98 versus \$145 and \$151. Of these differences, the only statistically significant one was in defendants' mean attorney costs comparing mediated settlement and trial.

These results suggest that litigants, especially defendants, may have saved some money and time in settling at mediation in comparison with trial as well as with standard settlement. However, the observed differences were not statistically significant, and it also may be that the inherent characteristics of the cases involved (or the litigants themselves) were responsible for these differences, rather than the procedures.⁸⁷

87. For example, perhaps cases that “selected themselves” to go to mediation (rather than settle conventionally) simply generated lower legal fees because of some inherent characteristics of the cases or the litigants.

VI.

Comparisons within Counties and Types of Claims

To check for the possibility that the MSC program's effects might vary among counties or types of claims, we analyzed data for the three intensive-study counties. For this purpose, we divided claims into three categories by type of subject matter: (1) negligence, including motor vehicle, medical malpractice, and other negligence; (2) contracts and collection on accounts; and (3) all other matters (for example: real property, wills, trusts, and estates; appeals of state government administrative actions; and alienation of affections).

Differences in the rates of MSC participation in the three counties, as well as Forsyth County, were discussed in Section IV.A of this report. Rates also differed among types of subject matter. Both negligence and contract/collection cases were considerably more likely to go to mediated conferences than were cases involving other types of claims. On the other hand, when cases in the "other" category went to mediation, they were somewhat more likely to reach agreements than were either negligence or contract/collection cases.

With regard to median disposition time, the data in Table 7 (see page 67) suggest that the program may have hastened disposition more in Guilford County—where disposition time was longer to begin with—than in Cumberland County. For Surry County, there probably were too few cases for time calculations to be reliable. In comparing the three types of claims, we see that the program may have had less effect on disposition times in the "other subject matter" category of claims than in either negligence or contract/collection actions. However, the other subject matter category is so heterogeneous and the samples are so small (some around forty cases) that it is difficult to reach a conclusion about that group of cases.⁸⁸

The three counties' individual trial rates did not differ significantly comparing the Mediation Group with the Preprogram and Control groups. The low trial rate for the Surry County Mediation Group (5.3 percent) is somewhat suspect because it is based on a sample of only 19 cases.

In both negligence and other types of actions, the Mediation Group trial rate was between, and close to, the rates for the Preprogram and Control groups. In

88. Note, for example, how much larger the Control Group median time (486 days) is than the Preprogram Group median time (426 days). With samples this small, there could easily have been a shift in the "mix" of cases in this category from 1989 (when the Preprogram Group cases were filed) to 1992-93 (when the Control Group and Mediation Group cases were filed). Such a shift could explain the differences in median times.

contract/collection cases, the Mediation Group trial rate (4.6 percent) was considerably lower than either the Preprogram Group rate (13.0 percent) or the Control Group rate (10.7 percent). Although these differences were not statistically significant, they suggest an interaction of program effects with claim subject matter: the MSC program may have lowered the trial rate in contract/collection cases even though it did not do so in other types of actions.

If this apparent differential effect is real, what would explain it? One possible clue is the fact that contract/collection cases were much more likely to involve a previous business relationship (79.2 percent did) than either negligence cases (15.5 percent) or other types of actions (32.2 percent).⁸⁹ Perhaps the litigants in contract/collection cases often had a stake in maintaining a business relationship, which tended to make their mediation more successful and thereby reduced their chances of going to trial. Conventional settlement procedures might not have focused on the importance of the parties' ongoing business ties as much as mediated conferences did, and therefore might have been less effective in reminding them what they had to lose by fighting out their dispute at trial. Nevertheless, despite this speculation, it should be kept in mind that over all types of subject matter, the MSC program did not produce a significant drop in the trial rate.

The settlement rates shown in Table 7 were computed from court records using our proxy definition of settlement explained earlier in Section IV.E, which captures all but about 9.3 percent of actual settlements. Surry County's settlement rate was different from Cumberland's and Guilford's rates: it was lower in the Preprogram and Control groups (i.e., in the absence of the MSC program) and higher in the Mediation Group. The data suggest that the program did substantially increase Surry's settlement rate—a rate that was rather low to begin with; however, any conclusion about Surry County must be tentative because of its small number of cases. The program had no such effect on the other two counties, which handled far more cases.

For contract/collection cases, the settlement rate for the Mediation Group (69.2 percent) was greater than that of either the Preprogram Group (52.2 percent) or the Control Group (58.9 percent), although the differences were not significant. Like the trial rate differences discussed previously in this section, this settlement rate difference suggests that the MSC program may have been more effective with contract/collection cases than with other types of actions. For other types of claims, there were no significant settlement rate differences comparing the Preprogram, Control, and Mediation groups.

The comparison of the two satisfaction scores for plaintiffs, broken down by county and by type of subject matter, yielded only one significant difference favoring the Mediation Group over the Control Group—in Surry County. The difference (1.35 points versus 2.65 points) was small compared with the 9-point range of the score.

89. These figures come from the litigant/attorney questionnaire data. Also, the litigants in contract/collection cases were more likely to have *some* kind of previous relationship (92.3 percent) than were negligence cases (31.0 percent) or other kinds of cases (83.5 percent).

The bottom rows of Table 7 deal with (1) the proportion of plaintiffs who received monetary awards and (2) the mean amount they received.⁹⁰ In negligence cases, the proportion of plaintiffs receiving money was significantly less in the Mediation Group (78.5 percent) than in the Control Group (88.4 percent). Yet combining all counties, the difference (70.6 percent versus 75.0 percent) was not significant. Mean plaintiffs' award amounts showed some Mediation/Control Group differences—for example, in Surry County and in contract/collection and other actions except negligence—but none of these differences was significant. Again, combining all types of subject matter, the mean awards were virtually the same. Further statistical analysis showed no indication that conducting a mediated settlement conference affected the mean amount that the plaintiff received, regardless of the county or subject matter.⁹¹

90. In calculating these means, the zeroes for plaintiffs who received nothing were included.

91. We performed (1) a logistic regression analysis of the probability of the plaintiff receiving any money and (2) an ordinary least-squared regression analysis of the amount the plaintiff received. The independent variables in both models were county, type of subject matter, whether an MSC was held, and the first-order interactions of the MSC variable with county and subject matter. The MSC-held main effects and the MSC interaction terms did not test significantly different from zero in either model, with one exception: Plaintiffs in cases in the other subject matter category were significantly less likely than those in contract/collection cases to receive money (this effect—which can be seen in Table 7—may be due to the fact that such claims often involved something other than money), but the effect was significantly less when MSCs took place. This interaction effect may well be due to special characteristics of “other” claims that went to MSCs. Such claims were much less likely to go to MSCs than either negligence or contract/collection claims (see Table 7).

VII.

Compliance with Settlements and Judgments

Prior research in small claims cases suggests that if a case is resolved through mediation rather than through adjudication, the parties may be more likely to comply with the result—i.e., pay what they are supposed to pay or do other things that the settlement or judgment requires them to do. For example, in a small claims study in Maine, full compliance resulted from 70.6 percent of successfully mediated cases but only from 33.8 percent of adjudicated cases. The researchers concluded that parties were more likely to comply with a result that they had participated in and agreed to rather than one ordered by the court.⁹²

The small claims research raised the issue of whether mediated settlement of superior court civil cases in North Carolina increased compliance, compared with court judgment and also compared with conventional settlement. While conventional settlement is a consensual process, arguably it involves less direct participation by parties than MSCs do.

To determine whether the MSC program improved compliance, we analyzed the responses of 138 litigants who were supposed to receive some sort of award—money or nonmonetary relief or both—from a settlement, judgment, or other court order. The program seems to have had no effect.

Compliance was essentially the same in the Mediation and Control groups. In terms of money payment, the respective proportions were: full payment—83.1 percent versus 79.3 percent; partial payment—3.4 percent versus 3.5 percent; payment according to a structured settlement (i.e., a future payment plan)—5.1 percent and 10.3 percent; and no payment at all—8.5 percent versus 6.9 percent (the differences were not significant).

Looking at payment by mode of disposition, nonpayment was very rare for all kinds of settlement (mediated, post-impasse, and conventional). The percentage of litigants receiving full payment was 90.9 in mediated settlement and 86.9 in conventional settlement—virtually the same. It was slightly less for post-impasse settlement (78.6 percent); post-impasse settlement was more likely to result in partial payment (14.3 percent). It is important to keep in mind that in settlement of superior court civil cases (whether mediated or conventional), full compliance is almost automatic. Settlement negotiation or mediation seldom ends in agree-

92. See Craig A. McEwen and Richard J. Maiman, "Small Claims Mediation in Maine: An Empirical Assessment," *Maine Law Review* 33 (1981): 237–68; also see sources *supra* note 57.

ment unless one side is willing to write the other side a check immediately or in a few days. (Thus, superior court MSCs differed in this respect from the small claims mediation referred to previously; full compliance evidently was *not* automatic in those mediations.)

For the few litigants who went to trial, full payment was only 53.9 percent, while nonpayment was 30.8 percent. For the seven litigants who received other dispositions (six of these received summary judgments, and one received another type of final order from the court), full payment was 57.1 percent and nonpayment was 42.9 percent. This tends to support the findings of small-claims research that court-imposed awards are less likely to be complied with than settlements. But this may be due to self-selection rather than the voluntary nature of settlement. For example, where defendants are unable to pay, they may be unwilling to settle and be forced to go to trial, after which they cannot comply with the verdict.

The patterns for compliance with nonmonetary awards were similar. There was no significant difference between the Mediation Group (full compliance—68.8 percent, partial—18.8 percent, none—12.5 percent) and the Control Group (full—88.9 percent, partial—11.1 percent, none—0.0 percent). Compliance was nearly complete for all forms of settlement, but not for trial and other dispositions.

VIII.

Attorneys' Attitudes toward Program

Our survey of attorneys found them quite favorable toward the MSC program. This was no surprise given that the North Carolina Bar Association had planned and advocated the program.

To elicit attorneys' views, we mailed 1,310 questionnaires: 210 to all persons on the statewide list of certified mediators at the time of the mailing, plus 1,100 to a random sample of other attorneys with active state bar membership in the thirteen pilot counties. We received 424 completed questionnaires, 132 from certified mediators and 292 from other attorneys (whom we refer to here as "nonmediators"). All respondents were attorneys. The responses, shown in Table 8 (see page 69), are shown separately for mediators and nonmediators; responses for nonmediators are further divided into those who had experience with cases in MSCs and those who had no experience. The sample of those lacking experience with MSCs was quite small, perhaps because such attorneys were less likely to respond to our survey or, if they did, were reluctant to answer specific questions about the program.⁹³

Almost none of the respondents said the MSC program should be discontinued. Almost all either favored continuing it as is or wanted it expanded to other districts, and most preferred expansion. Not surprisingly, mediators were somewhat more likely than nonmediators to feel that the program should be expanded.

Attorneys were positive toward the program in terms of other evaluative criteria as well (Table 8). In fact, their responses were more favorable toward the program than were our findings from court records and litigant interviews. For example, most respondents believed that mediation reduces the likelihood that a case will be tried. But our analysis indicated that the program has neither reduced trials nor increased settlements (see Section IV.E of this report).

93. Thus, the rate of response to the questionnaires was 62.9 percent among certified mediators but only 26.5 percent among nonmediator attorneys. One reason for the low response rate among nonmediator attorneys is that we were unable to eliminate in advance attorneys who were not active practitioners (despite keeping up their bar membership); such attorneys were unlikely to return the questionnaire. Another reason is that we eliminated any responses from those who said that they did not currently practice law and/or civil case mediation in North Carolina. A third reason for the low response may be that specialists in criminal law tended not to respond to the questionnaire. Of responding practitioners who were not certified mediators, 80.0 percent said their practice involved primarily civil cases, 18.6 percent indicated a mixture of civil and criminal cases, but only 1.4 percent indicated primarily criminal cases.

Most attorneys thought that mediation speeds up the discovery process, and most believed that it encourages earlier settlement. This opinion was consistent with our finding that the program hastened case processing, including conventional settlement.

Most attorneys thought that mediation gave litigants greater control over case outcome than they would normally have. Our data do not seem to support this view. About two-thirds of litigants who attended MSCs felt that they had no control over either the outcome or the procedure of the conferences (see Section V.A). However, we did not ask litigants the same question about conventional settlement or trial, and perhaps equal proportions would have thought they had no control in those modes of disposition.

Most attorneys disagreed that their brethren are less satisfied with mediation than with the conventional settlement process. In this respect, the attorneys were like litigants, who (as we found) were equally satisfied with both mediated and conventional settlement (see Section V.B.2).

Virtually all attorneys thought that mediators were fair. In this respect, too, they agreed with the great majority of litigants (see Section V.A).

A substantial proportion of attorneys (although not a majority) thought that mediation orders do not allow enough time for sufficient discovery before mediation occurs. Although our study did not address this concern, it is an important one. As noted in Section II.C.7, if an MSC is to reduce the parties' expenses, it needs to take place before too much costly case preparation has occurred; however, *some* preparation is necessary for the mediation to be effective.

In most of the responses shown in Table 8, mediators were more favorable toward the MSC program than were nonmediators—again, an unsurprising finding, given mediators' commitment to the program. Differences were also detected in comparing nonmediators who had some experience with MSCs with those who had none. Inexperienced nonmediators were slightly less favorable toward expansion of the program than were experienced nonmediators. Perhaps experience with the program convinces attorneys of its merits—or perhaps those who favor it more to begin with are more likely to participate in it.

On the other hand, nonmediators without MSC experience were somewhat more likely than those with MSC experience to believe that (1) mediation speeds up discovery and (2) mediation encourages earlier settlement. It is possible that experience with MSCs tempers attorneys' initial optimism.

IX.

Conclusion

The MSC program seems to have accomplished some of its objectives. The conferences themselves generally were satisfying to litigants who participated. A majority thought highly of the mediators, felt the procedures were fair, said they understood what was going on, had a chance to tell their side of the story, and said that the conferences were the best way to handle cases like theirs. Also, the program increased court efficiency in contested cases in the sense that it reduced the median filing-to-disposition time. This speed-up affected not only cases that went to mediated conferences, but also those that were ordered to MSCs but settled without mediation.

However, our study suggests that the program did not achieve as much as its advocates may have hoped. Participation in MSCs was lower than expected. Mediated conferences actually were conducted in just half of the cases that were eligible to be ordered to mediate, according to data from the counties handling the bulk of the cases in the pilot program. A fourth of the cases reached disposition before mediation orders were issued, and another fourth received orders to mediate but reached disposition without mediation; the usual disposition in these cases was conventional settlement. Despite the MSC program, most settlements continued to be conventional, not mediated.

The MSC program apparently did not affect compliance with settlements. Compliance with settlements was high compared to compliance with trial verdicts or other court-ordered awards, but it was not significantly higher for mediated settlements than for conventional settlements.

Although litigants usually gave high ratings to the MSCs that they attended, a majority did not think they had control of either the outcome or the procedure of the conferences. This probably reflects the fact that it was generally the lawyers who negotiated, not the litigants, at the conferences.

Plaintiffs who settled—with or without mediation—were more satisfied with their entire cases than were those who went to trial. For defendants, the reverse was true; those who settled were less satisfied than those who went to trial. (These findings may be due to the fact that plaintiffs were more likely to receive money at settlement than at trial, and defendants more likely to lose it.) But there were no significant differences in case satisfaction between mediated and conventional settlement.

Mediated conferences resulted in impasse more often than agreement. For plaintiffs, this had a disadvantage: those who participated and reached impasse, and then later reached a conventional settlement, were even less satisfied than

A.

Review of Findings

those who went to trial. The unsuccessful mediation may have produced feelings of frustration in these plaintiffs.

The litigants' positive evaluation of MSCs did not translate into increased satisfaction with their entire experience in their cases, even if their conferences ended in settlements. One possible explanation is that satisfaction with one's entire experience in a superior court lawsuit involves factors that override the positive aspects of the mediation process.

The MSC program reduced median case disposition time from 58 weeks to about 51 weeks. Evidently it did not reduce court workload. The settlement rate, unaffected by the program, continued to be about 72 percent in contested cases, and consequently the trial rate did not change significantly. Nor was there any significant change in the number of orders and motions that judges and clerks had to handle. However, several senior resident judges said that the program freed some judicial time by encouraging earlier settlement and thereby reducing the number of cases needlessly placed on trial calendars.

The data suggested that settling at mediation may have reduced plaintiffs' and defendant's attorney fees compared to settling without mediation or going to trial. However, this fee reduction was not conclusively established because (1) the differences were not statistically significant and (2) they may have been due to inherent characteristics of cases rather than to mediated settlement.

B. Implications and Suggestions

One reaction to our study's results—a reasonable one, in our view—may be that the MSC program is working well enough. Litigants who attend MSCs generally are satisfied with the experience, and attorneys overwhelmingly favor it. The program shortens disposition time, and may save judges' time as well as reduce attorney costs. It costs the court system virtually nothing. Therefore, why not continue it as is?

Another response to our findings may be that the program needs improvement and further testing. More participation in MSCs, and at an earlier stage, might help the program further reduce disposition time, court workload, and litigants' costs. Also, more participation would bring more litigants into a process with which most previous participants have been well satisfied. If the court system wishes to increase and hasten MSC participation, the study's results suggest that this could be done by tightening the program's current rules and by more active court management of the program.

One possible rule change would be to set a short time limit for the court to issue an order to conduct an MSC. The current rules set no limit, allowing the senior resident judge to issue the order at any time after the deadline for the defendant to file an answer.⁹⁴

94. Rule 1(b). The time allowed for filing of the answer is thirty days after the defendant is served with notice of the plaintiff's action [N.C. R. Civ. P. 12(a)(1)].

Another possible rule change would be to shorten the maximum time from issuance of the order to holding the MSC. The current rule provides that the conference must be held *no less than* 90 days from the order, and in no more than 180 days.⁹⁵ The original version of this rule required the conference to be held no later than 60 days after the court's order, but this limit frequently was exceeded (the median time from order to conference was 77.0 days).⁹⁶

Mediation could replace conventional settlement negotiation in many cases if the time were reduced between filing the defendant's answer and when the mediated settlement conference is held. These cases now settle without mediation before they are ordered to mediate or before the time to mediate expires. (Data from four counties indicate that 43.3 percent of cases that settled did so without a mediated settlement conference being held.) *Only if court administrators believe that mediation is an inherently better procedure for achieving settlement* would this substitution be desirable.

Mediation might also replace going to trial by reducing the order-to-conference time in some cases that currently go to trial before the time to mediate expires. This would then free the time that judges and other court officials would otherwise spend on those trials. (Of all trials in the four-county sample, 46.4 percent took place without an MSC being held.)

A third possible rule change would be to require that not trial will take place unless the parties have first participated in a mediated settlement conference. Testing a no-trial-without-mediation rule would show whether it is possible to reduce the trial rate through the MSC program.

We also believe that if court administrators want to increase participation in MSCs, more active case management by the courts may be needed. In counties that had relatively high rates of participation in MSCs, court administrators were more aggressive and persistent in following up to make sure that deadlines were met for appointing a mediator and for holding the mediated conference. This kind of intervention may be essential to increase MSC participation. Also, senior judges need to make it clear that willful failure to mediate will result in the use of authorized sanctions. In some cases at present, getting the parties to the table within the time the MSC order allows seems to be left up to the mediator, although arguably it is really the court's responsibility.

In responding to some of our preliminary talks on the study, some judges and attorneys have been skeptical about the idea of increasing participation in MSCs through shorter deadlines and more intensive case management. In their view, cases settle depending primarily on factors outside the court's control. They are concerned that if cases are brought into mediation sooner, some will

95. Rule 3(b).

96. Court records showed that often, parties successfully requested the courts to issue extensions beyond the limit set in the initial MSC order and even beyond the 60-day limit and the 180-day limit. Both the original version of the rules (Rule 1(c), permitting the court to grant a motion to "defer the conference") and the current version of the rules (Rule 3(c), allowing the court to grant a motion to "extend the deadline for completion of the conference") provided a way of extending the time for holding the conference beyond what was set in the court's initial order. It is unclear whether these provisions really were intended to authorize judges to let conferences be postponed beyond the time limit of Rule 3(b).

fail to reach settlement in mediation because they are not ready to settle. As they see it, making MSCs happen faster and more often would lose more mediated settlements than it would gain.

A different view underlies the MSC program: by changing court procedures, it is possible to encourage parties to settle earlier in a substantial number of cases. This view receives support in the findings of this study: (1) the MSC program shortened settlement times in both mediated and conventional settlement, without reducing the overall settlement rate (see sections IV.C and IV.D); and (2) the “success rate” at mediation was the same in high-participation counties as in low-participation counties (see Section IV.A.2). Regardless of which view is correct (and both may be partially correct), it would be easy to see whether increased participation produces a net gain or net loss in mediated settlement. If the court system wants to increase participation and adopts changes like those we have suggested, it would only be necessary to keep data on the number of eligible cases, the number of MSCs, and the number of mediated settlements.

Although our study suggests that the MSC program has not been as successful as its advocates may have expected, it should not be greeted with discouragement. The MSC program is the first instance in which the state has experimented on a broad scale with alternative dispute resolution in large, civil cases. The state’s earlier experiment with court-ordered arbitration was more successful, but that program concerned much smaller civil cases with claims limited to \$15,000 (two-thirds were under \$3,000), involving mostly contractual or bill collection matters.⁹⁷ The MSC program handles cases that are much more difficult with respect to legal issues, complexity of evidence, and size and type of claims. We hope that the results of this study will encourage further careful planning and testing to improve the civil justice system in North Carolina.

⁹⁷ See Stevens H. Clarke, Laura F. Donnelly, and Sara A. Grove, *Court-Ordered Arbitration in North Carolina: An Evaluation of Its Effects* (Chapel Hill, N.C.: Institute of Government, The University of North Carolina at Chapel Hill, 1989).

Tables and Figures

Table 1.
Damage Awards and Other Relief Received by Plaintiffs, Comparing Control and Mediation Groups (Source: litigant/attorney questionnaires)

	Proportion of Plaintiffs Receiving Any Money	Mean Amount of Money Received by Plaintiffs	Proportion of Plaintiffs Receiving Nonmonetary Relief
Control Group: All cases	75.0% (228)	\$36,335 (219)	14.9% (228)
Mediation Group: All cases	70.6% (296)	\$37,675 (280)	18.3% (295)
Settlement at MSC	88.3% (77)	\$37,673 (74)	11.4% (79)
Settlement after impasse	93.0% (57)	\$57,260 (53)	15.4% (52)
Conventional settlement (without mediation)	82.7% (254)	\$34,364 (239)	17.7% (254)
Trial	52.7% (55)	\$58,451 (55)	29.6% (54)
Other disposition	24.7% (81)	\$16,103 (78)	11.3% (80)

Table 2.
Mode of Disposition Compared for Preprogram, Control, and Mediation Groups
(Percentage base = number of closed cases)

Disposition as of Latest Examination of Court Records	Preprogram Group Filed Mar.-Dec. 1989	Control Group Filed Mar.-Dec. 1992	Mediation Group Filed Mar.-Dec. 1992
All trials (jury or judge)	29 (12.0%)	23 (9.8%)	23 (9.4%)
Jury trial	18 (7.4%)	16 (6.8%)	14 (5.7%)
Judge trial	11 (4.6%)	7 (3.0%)	9 (3.7%)
Settlement, using proxy variable ¹	155 (64.1%)	153 (65.1%)	161 (65.7%)
Dismissal without prejudice by plaintiff	29 (12.0%)	36 (15.3%)	31 (12.7%)
Summary judgment or judgment on pleadings	11 (4.5%)	12 (5.1%)	13 (5.3%)
Other disposition	18 (7.4%)	11 (4.7%)	17 (6.9%)
Total Closed Cases	242 (100.0%)	235 (100.0%)	245 (100.0%)
[Cases still open]	[1]	[9]	[9]

1. The settlement proxy variable was defined as follows: The case was considered settled if (1) plaintiff or both parties filed voluntary dismissal with prejudice, (2) a consent judgment was entered, or (3) the mediator's report indicated that the case reached full or partial settlement at a MSC. Otherwise the case was considered not settled. In the litigant-attorney questionnaire data, this definition captured 90.7 percent of actual settlements, and only 3.0 percent of nonsettlements met the definition.

Table 3.
Mean Number of Motions and Orders Per Closed Case Compared
for Preprogram, Control, and Mediation Group Cases (court record data)

Type of Motion/Order	Preprogram Group	Control Group	Mediation Group
Motions for discovery	0.64	0.72	0.76
Other motions	2.88	2.00	2.34
Order signed by judge	1.53	1.21	1.95
Order signed by clerk	1.30	1.14	1.24
(Total closed cases)	(242)	(235)	(245)

Table 4.
Satisfaction with Mediated Settlement Conference among Participating Litigants

Statement	Proportion Who Agreed	(N=Number responding)
Overall Evaluation		
Because of the way it was conducted, I doubt that I will want to participate in mediation again. [MSNOTAGN]	38.9%	(167)
Going through mediation is the best way to handle a case like mine. [MSBEST]	57.2%	(166)
If a friend had a problem similar to mine, I would recommend that he or she go through mediation to solve it. [MSFRIEND]	66.3%	(166)
Mediation brought the dispute out in the open. [MSOPEN]	66.9%	(169)
We addressed all the important facts during mediation. [MSIMPFAC]	65.9%	(167)
Control and Self-Expression		
I had control over the <i>outcome</i> of the settlement conference. [MSCONOUT]	36.5%	(167)
I had control over the way the settlement conference was <i>handled</i> . [MSCONHAN]	36.8%	(166)
The rules of the mediation procedure made it hard for me to express myself. [MSHARDEX]	33.5%	(167)
During mediation, I had a chance to tell my side of the story. [MSTELL]	78.0%	(168)
I felt like an important part of the settlement conference. [MSIMPPRT]	66.5%	(167)
Satisfaction with Outcome and Procedure		
I am satisfied with the mediation <i>process</i> . [MSATPROC]	66.9%	(169)
I am satisfied with the <i>outcome</i> of the settlement conference. [MSATOUTC]	40.5%	(168)
I am satisfied with the way the settlement conference turned out. [MSATTURN]	41.4%	(169)
I am satisfied with the <i>rules</i> and <i>procedures</i> involved in mediation. [MSATRULE]	75.2%	(169)
Fairness of Outcome and Procedure		
The final <i>outcome</i> of the settlement conference was fair. [MSOUTCFR]	50.9%	(165)
The <i>rules</i> and <i>procedures</i> of mediation were fair. [MSPROCFR]	81.4%	(167)
Understanding of Outcome and Procedure		
I understand why the settlement conference turned out the way it did. [MSUNDTRN]	75.3%	(166)
I understood what was going on while I was in mediation. [MSUNDRST]	87.0%	(169)
Evaluation of Mediator		
I trusted the mediator. [MSTRUST]	85.5%	(166)
The mediator helped us to think about things from a practical point of view. [MSMHELPD]	60.7%	(168)
The mediator made sure that we examined all the issues carefully. [MSISSUES]	71.7%	(166)
The mediator performed his/her role effectively. [MSMEFFEC]	81.9%	(166)
The mediator was fair. [MSMDFAIR]	86.8%	(166)
The mediator was well-qualified to lead the settlement conference. [MSMQUALF]	86.1%	(166)
Cost and Disruption		
Participating in mediation cost me too much money. [MSTMMONY]	39.6%	(159)
Participating in mediation took too much of my time. [MSTMTIME]	41.7%	(168)
The settlement conference disrupted my daily affairs. [MSDISRUP]	75.0%	(168)

Table 5.
Mean Satisfaction Scores Compared for Modes of Disposition
(Source: litigant questionnaires) (sample sizes in parentheses)¹

	Outcome/Procedure Satisfaction Score		Cost Dissatisfaction Score	
	Mean Score ²	(N)	Mean Score ³	(N)
Plaintiffs:				
Control Group: All	0.81	(118)	1.02	(131)
Mediation Group: All	0.93	(152)	1.45	(174)
Settlement at MSC	3.97	(37)	1.93	(40)
Settlement after impasse	-2.83	(24)	1.87	(27)
Conventional settlement (without mediation)	3.32	(130)	0.95	(150)
Trial	-1.14	(28)	1.78	(32)
Other disposition	-6.12	(42)	0.97	(47)
Defendants:				
Control Group: All	4.50	(107)	1.13	(126)
Mediation Group: All	*1.26	(132)	1.40	(147)
Settlement at MSC	2.62	(37)	1.59	(35)
Settlement after impasse	2.29	(21)	1.41	(22)
Conventional settlement (without mediation)	1.79	(103)	0.81	(121)
Trial	5.15	(26)	1.40	(30)
Other disposition	4.29	(31)	2.17	(42)

1. All numbers, except in the rows "Control Group: All" and "Mediation Group: All," exclude litigants who did not attend the MSCs held in their cases.

2. Outcome/Procedure Satisfaction Score ranges from -21 (least satisfaction) to +21 (most satisfaction).

3. Cost Dissatisfaction Score ranges from -4.5 (least dissatisfaction with cost, time, and disruption) to +4.5 (most dissatisfaction).

* Mediation Group mean was significantly less than Control Group mean.

Table 6.
Plaintiffs' and Defendants' Mean Attorney Fees, Hours Respondent Spent on Case, and Travel Costs, Compared for Control and Mediation Groups and Modes of Disposition (sample sizes in parentheses)¹

	Mean Attorney Fees and Costs	Mean Hours Personally Spent on Case	Mean Personal Travel Costs
Plaintiffs:			
Control Group: All Cases	\$10,685 (132)	94 hrs. (115)	\$294 (109)
Mediation Group: All Cases	\$11,255 (168)	106 hrs. (147)	\$287 (134)
Settlement at MSC	\$6,717 (41)	101 hrs. (33)	\$429 (31)
Settlement after impasse	\$10,734 (32)	118 hrs. (25)	\$335 (26)
Conventional settlement (without mediation)	\$9,667 (150)	85 hrs. (137)	\$239 (121)
Trial	\$30,146 (32)	145 hrs. (29)	\$335 (30)
Other disposition	\$5,950 (45)	109 hrs. (38)	\$273 (35)
Defendants:			
Control Group: All Cases	\$8,303 (108)	47 hrs. (125)	\$151 (100)
Mediation Group: All Cases	\$8,961 (129)	52 hrs. (140)	\$158 (121)
Settlement at MSC	\$4,507 (38)	29 hrs. (38)	\$98 (31)
Settlement after impasse	\$12,772 (28)	64 hrs. (34)	\$290 (29)
Conventional settlement (without mediation)	\$8,072 (110)	49 hrs. (117)	\$145 (102)
Trial	\$13,128 (24)	55 hrs. (31)	\$151 (24)
Other disposition	\$8,672 (37)	54 hrs. (45)	\$125 (35)

1. Source: litigant/attorney questionnaires. Values shown are means. Unless designated as Control Group or Mediation Group, each row of table may include litigants from both groups.

Table 7. Mediation Group Caseflow, Disposition Time, Settlement and Trial Rates, Plaintiffs' Satisfaction Scores, and Plaintiffs' Awards, by County and Type of Subject Matter (Source: court records and litigant/attorney questionnaires) (number of respondents in parentheses)

	County			Subject Matter			Totals
	County			Subject Matter			
	Cumberland	Guilford	Surry	Negligence	Contract and Collection	Other Subject Matter	
Mediation Group Caseflow (Closed Cases):¹							
MSC Not Ordered	26.7%	33.1%	15.8%	27.3%	29.2%	37.5%	29.8%
MSC Ordered but Not Held	42.7%	23.8%	10.5%	25.8%	27.7%	37.5%	28.6%
Impasse at MSC	16.0%	23.2%	36.8%	24.2%	26.2%	10.4%	22.0%
Settled at MSC	13.3%	17.9%	36.8%	20.5%	15.4%	14.6%	18.0%
MSC Held but Outcome Unknown	1.3%	2.0%	0.0%	2.3%	1.5%	0.0%	1.6%
(Total Closed Med. Group Cases)	(75)	(151)	(19)	(132)	(65)	(48)	(245)
Median Disposition Time (Days):²							
Preprogram Group	406 days (71)	427 days (152)	339 days (20)	389 days (130)	395 days (70)	426 days (43)	409 days (243)
Control Group	392 days (75)	445 days (146)	382 days (23)	382 days (141)	410 days (61)	486 days (42)	407 days (244)
Mediation Group	362 days (78)	355 days (157)	454 days (19)	345 days (138)	347 days (68)	431 days (48)	360 days (254)
Proportion Going to Trial (Judge or Jury Verdict)¹							
Preprogram Group	8.5% (71)	13.3% (151)	15.0% (20)	11.5% (130)	13.0% (69)	11.6% (43)	12.0% (242)
Control Group	9.6% (73)	8.6% (139)	17.4% (23)	7.2% (139)	10.7% (56)	17.5% (40)	9.8% (235)
Mediation Group	12.0% (75)	8.6% (151)	5.3% (19)	9.9% (132)	4.6% (65)	14.6% (48)	9.4% (245)
Proportion Settled (Using Proxy Definition of Settlement):¹							
Preprogram Group	59.2% (71)	68.2% (151)	50.0% (20)	70.8% (130)	52.2% (69)	62.8% (43)	64.1% (242)
Control Group	63.0% (73)	69.8% (139)	43.5% (23)	72.7% (139)	58.9% (56)	47.5% (40)	65.1% (235)
Mediation Group	58.7% (75)	66.2% (151)	*89.5% (19)	68.2% (132)	69.2% (65)	54.2% (48)	65.7% (245)

1. Includes closed cases from court record data.

2. Includes both open and closed cases from court record data.

* Mediation Group significantly different from Control Group or from Control Group and Preprogram Group.

**Table 7.
Continued**

	County			Subject Matter			Totals
	Cumberland	Guilford	Surry	Negligence	Contract and Collection	Other Subject Matter	
Plaintiffs' Mean Outcome/Procedure Satisfaction Score³							
Control Group	1.61 (41)	0.91 (65)	-2.42 (12)	-0.90 (70)	7.17 (24)	-0.54 (24)	0.81 (118)
Mediation Group	-2.09 (46)	2.09 (88)	3.00 (18)	-1.91 (65)	3.52 (50)	2.43 (37)	0.93 (152)
Plaintiffs' Mean Cost Dissatisfaction Score³							
Control Group	0.71 (47)	0.92 (71)	2.65 (13)	1.12 (76)	0.71 (28)	1.06 (27)	1.02 (131)
Mediation Group	1.46 (54)	1.47 (100)	*1.35 (20)	1.01 (74)	* 1.77 (55)	1.79 (45)	1.45 (174)
Proportion of Plaintiffs Who Received Money⁴							
Control Group	81.6% (76)	72.4% (127)	68.0% (25)	88.4% (129)	78.0% (50)	36.7% (49)	75.0% (228)
Mediation Group	70.3% (91)	68.5% (168)	81.1% (37)	* 78.5% (149)	81.5% (81)	39.4% (66)	70.6% (296)
Mean Amount Plaintiffs Received⁴							
Control Group	\$29,556 (71)	\$44,328 (123)	\$16,262 (25)	\$35,336 (122)	\$26,811 (48)	\$48,151 (49)	\$36,335 (219)
Mediation Group	\$35,066 (87)	\$40,243 (157)	\$32,786 (36)	\$27,564 (138)	\$63,539 (77)	\$28,504 (65)	\$37,675 (280)

* Mediation Group significantly different from Control Group or from Control Group and Preprogram Group.

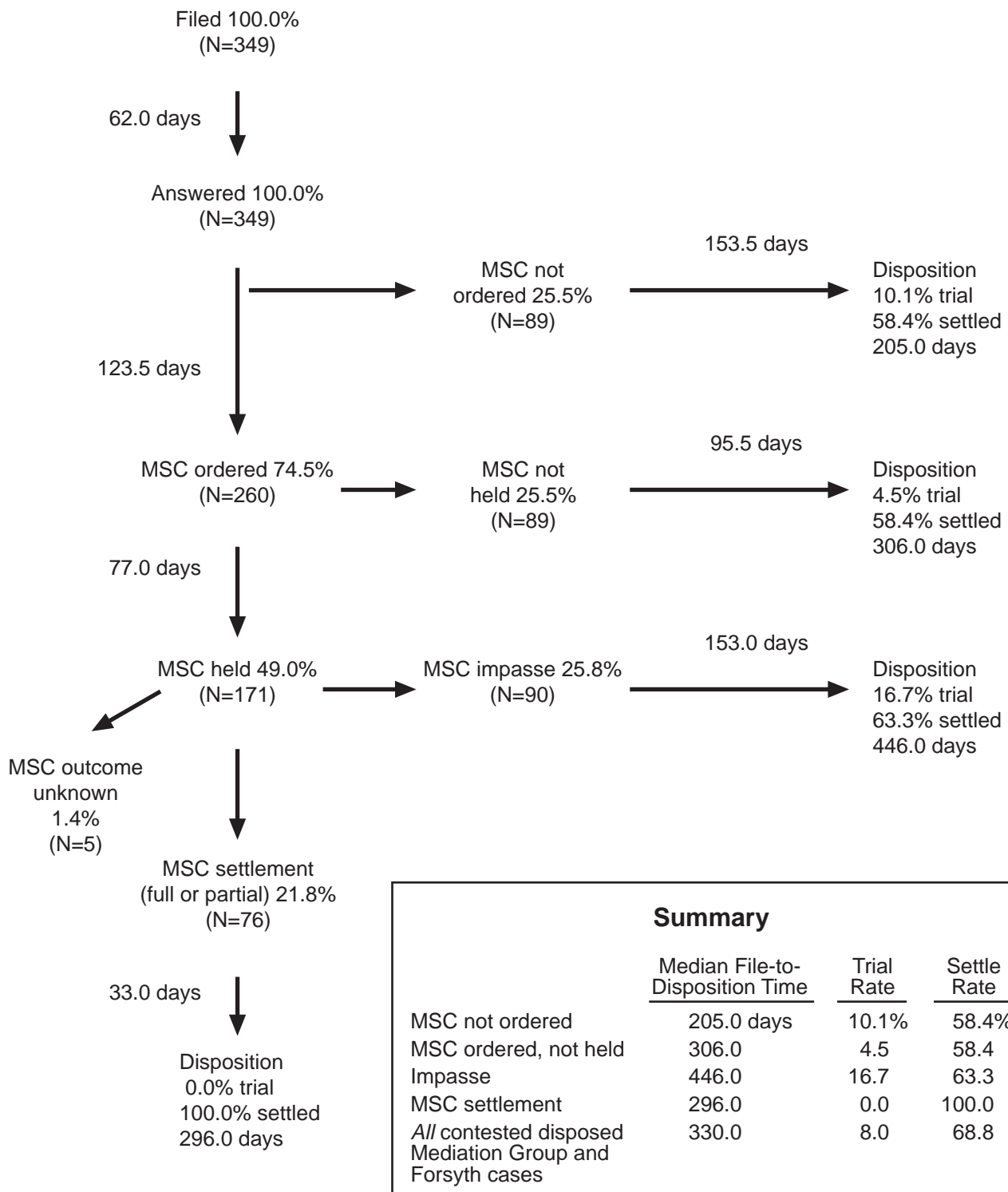
3. From litigant/attorney questionnaires.

4. From litigant/attorney questionnaires; zero amounts included in computations.

Table 8.
Attorneys' Attitudes: Percentages Who Agreed with Evaluative Statements about MSC Program (number of respondents in parentheses)

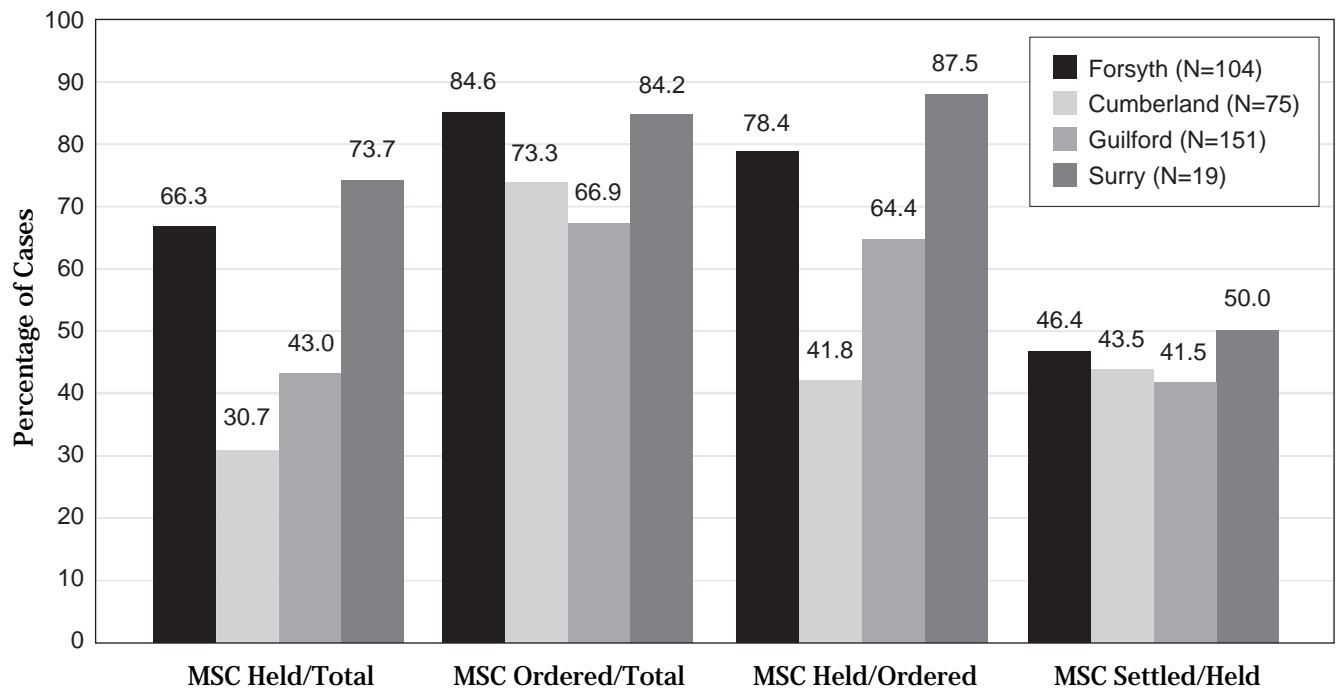
Statement	Attorneys Who Were Certified Mediators	Attorneys Who Were NOT Certified Mediators	Non-Mediator Attorneys Who Had Experience in MSCs	Non-Mediator Attorneys Who DID NOT Have Experience in MSCs
Statements about Continuation of Program:				
The MSC program should be discontinued.	0 % (130)	3.3 % (270)	4.1 % (219)	0 % (51)
The MSC program should be continued in present districts.	1.5 % (130)	14.8 % (270)	11.4 % (219)	29.4 % (51)
The MSC program should be expanded to other districts.	93.1 % (130)	74.8 % (270)	77.2 % (219)	64.7 % (51)
Other Statements about Program:				
Mediation reduces the likelihood that a case will be tried.	97.0 % (132)	92.3 % (285)	90.7 % (225)	98.33 % (60)
Mediation speeds up the discovery process.	82.3 % (130)	67.1 % (280)	63.2 % (223)	82.5 % (57)
Attorneys are less satisfied with mediation than with the conventional settlement process.	6.2 % (129)	16.6 % (277)	14.0 % (222)	27.3 % (55)
Mediation gives the litigant greater control over case outcome.	97.7 % (132)	64.3 % (277)	64.9 % (222)	61.8 % (55)
Mediation orders do not allow for sufficient discovery to take place before mediation has to occur.	36.2 % (127)	44.7 % (271)	45.3 % (223)	41.7 % (48)
Knowledge that mediation is pending encourages settlement sooner than would otherwise happen.	87.5 % (128)	69.3 % (277)	66.1 % (224)	83.0 % (53)
In my experience most mediators have been fair.	100.0 % (125)	97.7 % (256)	98.2 % (224)	93.8 % (32)

**Figure 1.
Mode of Disposition and Inter-Event Median Times: Closed Contested Cases in
Mediation Group (Cumberland, Guilford, Surry Counties) and Forsyth County***



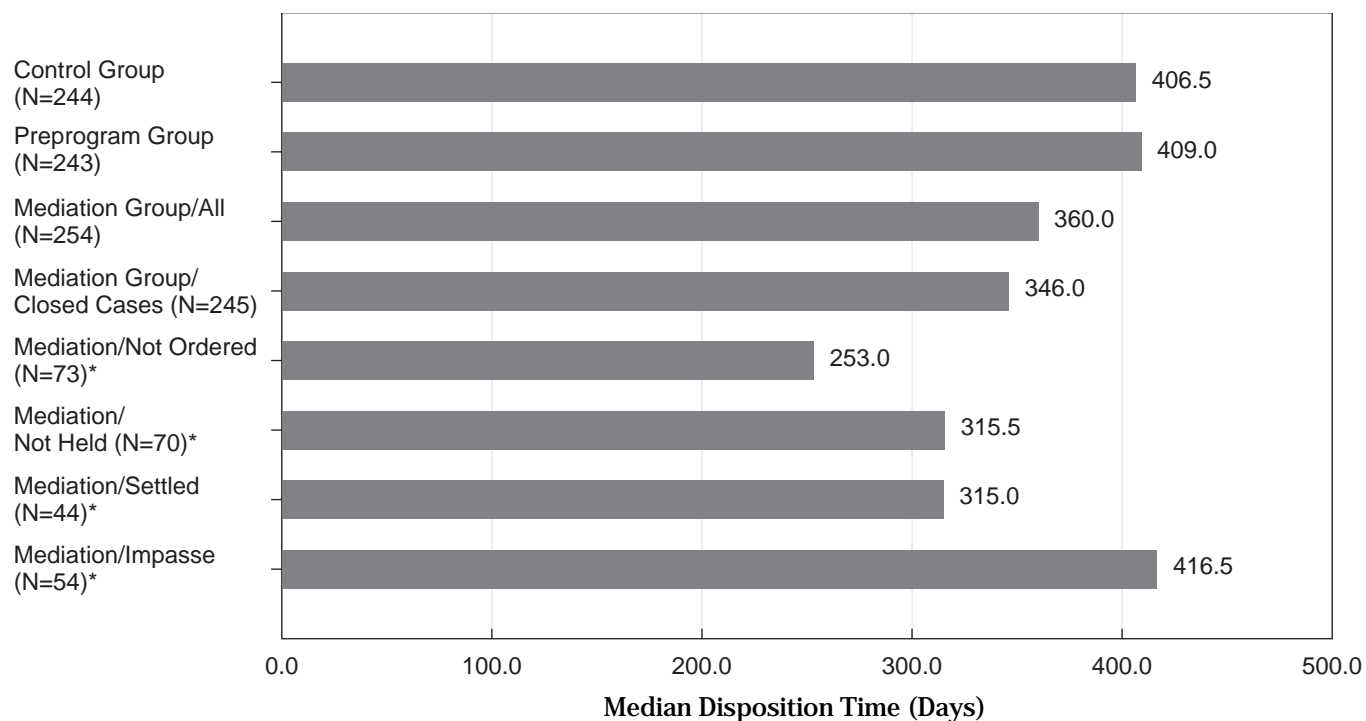
* All cases included were filed from March 1 to December 31, 1992, and were eligible to have MSCs ordered. Control and Preprogram groups not included.

Figure 2.
Participation in MSC Program by County: Forsyth County Plus Mediation Groups
in Cumberland, Guilford, and Surry Counties*



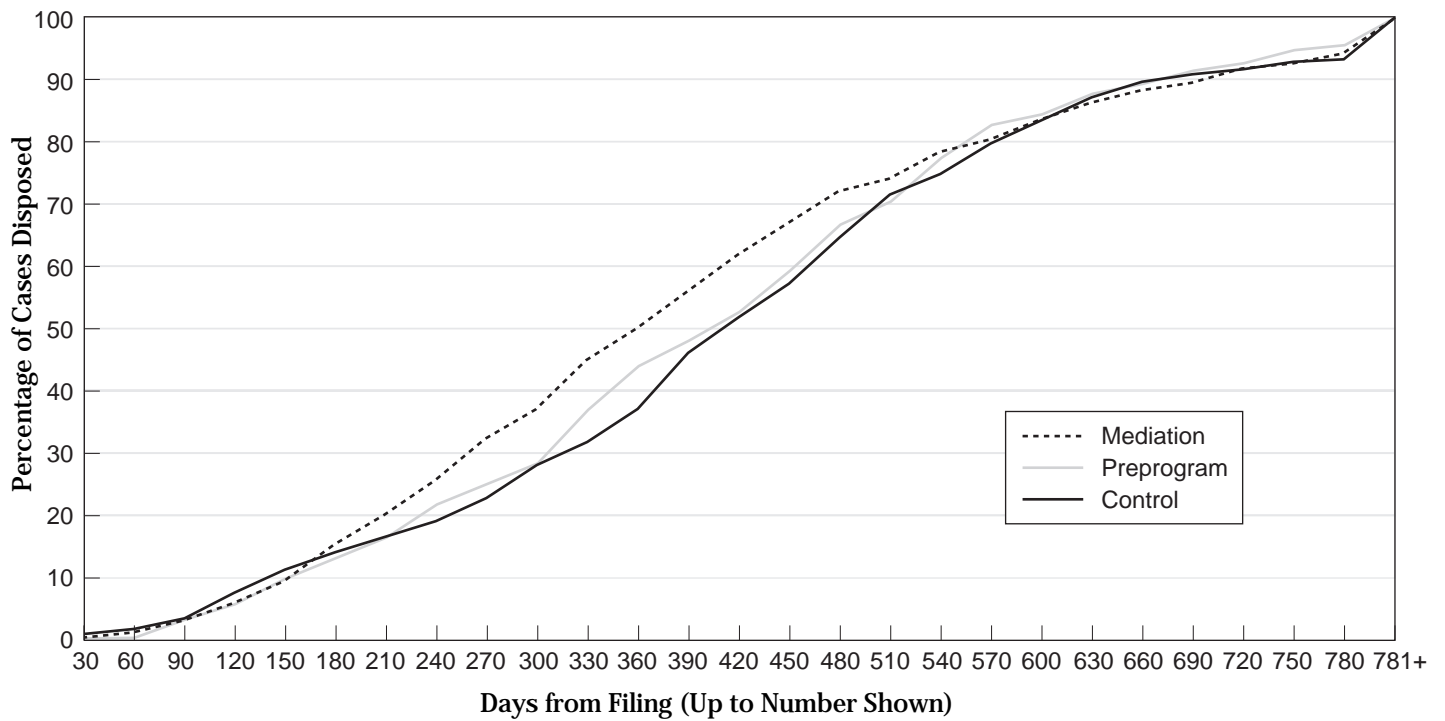
*MSC Held/Ordered=MSCs Held/MSC Orders; MSC Settled/Held=Settlements/MSCs Held.

Figure 3.
Median Filing-to-Disposition Time in Mediation, Control, and Preprogram Groups
(Cumberland, Guilford, and Surry Counties)



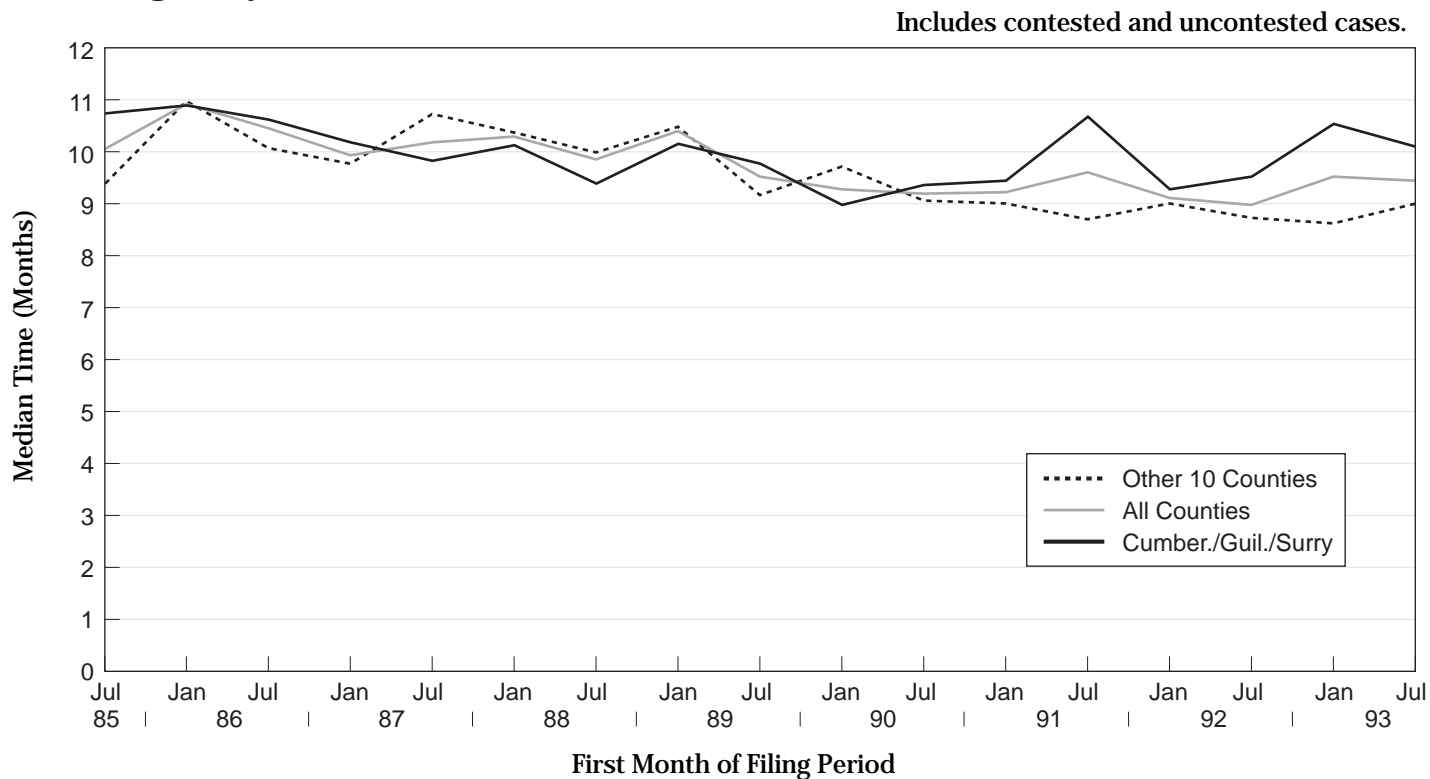
*Excludes open cases plus four with unknown MSC outcome.

Figure 4.
Percentage of Cases that Reached Disposition over Time in Cumberland, Guilford, and Surry Counties (Preprogram, Control, and Mediation Groups*)



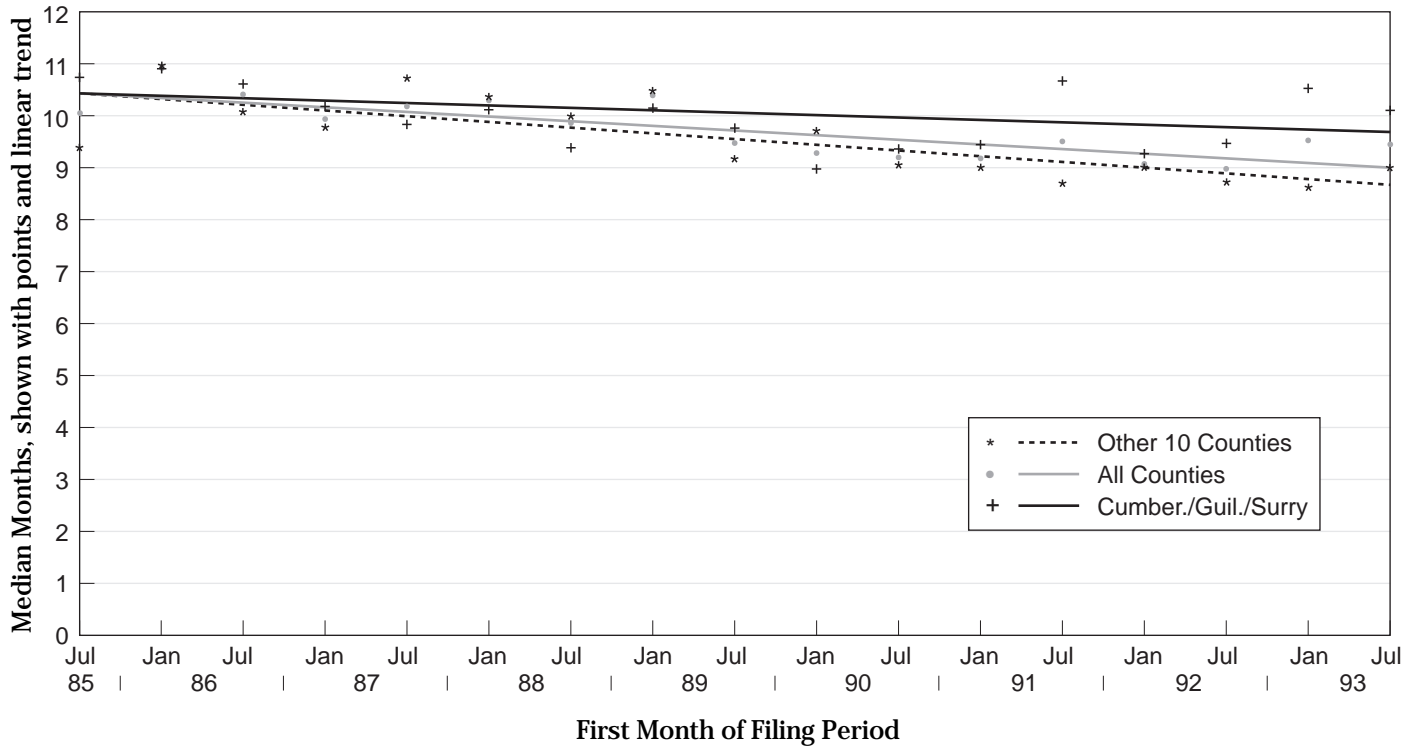
* Totals: P=243, C=244, M=254

Figure 5.
Median Disposition Time (Mos.) by Six-Month Filing Periods Beginning July 1985
through July 1993*



*Excludes Control Group in Cumberland, Guilford, and Surry counties.

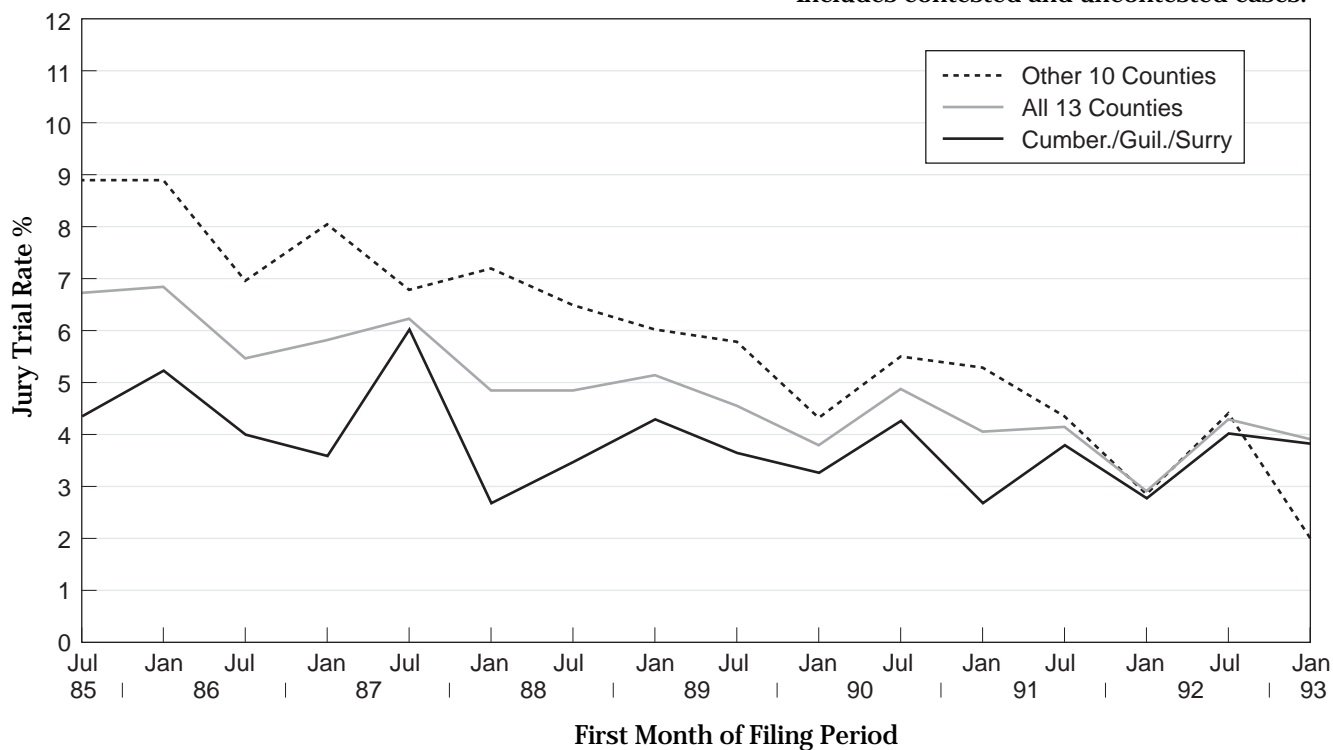
Figure 6.
Median Disposition Time (Mos.) by Six-Month Filing Periods Beginning July 1985
through July 1993*



* Last period is three months, July-September 1993.

Figure 7.
Jury Trial Rates, Closed Cases, 600-Day Follow Up, by Filing Periods
July–December 1985 through January–May 1993*

Includes contested and uncontested cases.



*Excludes Control Group plus cases filed in June 1993.

Appendix: Data Collection

Appendix:

Data Collection

Litigant/attorney questionnaire data. This dataset originated in a master list of cases, supplied by the AOC, filed from March 1, 1992, through January 31, 1993, in Cumberland, Guilford, and Surry counties—a total of 1,986 cases. Each case was assigned randomly to either the Mediation Group or the Control Group.¹

The AOC supplied biweekly updates from the AOC informing us when cases on the master list reached disposition. As cases were disposed of, we examined data kept in the local court clerk's files, and, where necessary, the trial court administrator's files. We did not collect data regarding cases found not to have been contested (answered) by defendants. A few other cases also were excluded from data collection: those that involved driver's license revocation, changes of venue out of the three intensive-study counties, or foreign judgments. With these exclusions, the master list was reduced from 1,986 to 1,222 cases. Our goal was to obtain the following from as many as possible of these cases: completed questionnaires from one plaintiff, one defendant, and one attorney from each side, as well as certain pieces of court record data about the case.

From court files, we found names and addresses of attorneys and litigants for each case. Litigant addresses in these files often were missing or outdated. Writing to the attorneys first, we sent each side a questionnaire about the case and a request for litigant information. A total of 1,901 questionnaires were mailed to attorneys, asking for such information as whether or not a specific case had settled, if so for how much money or other type of relief, and if that case went to a mediated settlement conference. We received 1,006 completed questionnaires, which were entered into the litigant/attorney questionnaire database.

The next step was to mail questionnaires, to the litigants, using information provided by attorneys (if any), as well as from the court files and telephone directories. We mailed 1,849 questionnaires to litigants, and received 628 completed questionnaires involving 526 distinct cases.² The litigant questionnaires asked many more questions than the attorney questionnaires, not only dealing with what the respondent won or lost, but also with how the litigants perceived the processes and results of their cases, including mediation if it occurred.

Litigant/attorney questionnaire data: differences in response rates between Mediation and Control Groups. The table at the end of this section describes the

1. This was done by a computer program that, from each batch of twenty consecutive cases, assigned ten at random to the Mediation Group and ten to the Control Group.

2. The table at the end of the Appendix indicates a total of 634 responses, but six were eliminated in later checking.

attrition of the original samples of both the Control Group and the Mediation Group as we attempted to collect the litigant/attorney questionnaire data. Although the two groups were the same size when the collection process began, at the end there were more usable litigant responses in the Mediation Group (355) than in the Control Group (279). Why the difference? And more importantly, does the difference in response rates (35.8 percent versus 27.1 percent) indicate some sort of response bias that would affect the comparison of the two groups?

Attorneys responded in differing numbers to our attorney questionnaire: 537 attorneys in Mediation Group cases versus 469 in Control Group cases. We believe that attorneys might have made more effort to participate in the study if a MSC was ordered in the case; in other cases that settled conventionally (including most in the Control Group), they may have thought that the study did not apply to those cases. (This was not true, and the letters we sent explained that we were interested in every superior court civil case.) In any event, we do not think that this differential response from attorneys biases our results. The attorney data were used only if at least one litigant in the case responded, primarily to supplement information received from litigant questionnaires. The litigants' own responses were used as the source of satisfaction data, and as the main source of information on such other variables as settlement awards.

Litigants also varied in responding. While the numbers of litigant questionnaires mailed were almost the same in the Mediation Group (928) and the Control Group (921), unequal numbers responded: 355 versus 279, a difference of 76 responses. This differential response was a matter of concern. It could mean, for example, that those who were more favorable to mediation might have been more likely to respond, thus biasing the Mediation Group/Control Group comparisons in favor of mediation. Or it could mean that those who were most dissatisfied with regular procedures (in the Control Group) were least likely to respond, thus distorting the comparisons to the disadvantage of mediation. Nevertheless, we do not believe that the differential litigant response produced substantial bias. Most of the difference in responses (a total of 76) was due to the fact that we were unable to locate 39 more litigants in the Control Group than in the Mediation Group; the difference in refusals to participate was only 19 responses. Inability to locate litigants probably had much more to do with the correctness of names, addresses, and telephone numbers supplied by court records and attorneys, than it did with litigants' satisfaction.

Court record data linked to litigant/attorney questionnaires. We gathered a limited amount of court record information for 519 cases in which one or both litigant questionnaires were completed.³

Court record data. Another significant dataset resulted from a more exhaustive probe of court records. The court record database was made up of cases included in the master list of cases described previously, excluding those filed in January 1993, as well as a sample of preprogram cases that were randomly selected from a list of superior court cases filed from March

3. Court record information was collected for 519 cases, even though there were 528 cases represented in the litigant/attorney questionnaire data. We were unable to find court records for 9 cases.

Litigant Questionnaires: Responses and Nonresponses

Mediation Group		Control Group
992	Total cases in sample	994
612	Total eligible cases	610
928	Total mailings to litigants (all litigants for whom we had an address from attorneys, court files, or telephone directories)	921
-105	Litigants who refused to participate	-124
-229	Litigants dropped from study after several efforts to reach	-230
-48	Litigants who knew nothing about case	-43
-179	Litigants we could not locate because of incorrect addresses and incorrect or unlisted telephone numbers	-218
-3	Litigants who would not respond because they believed their cases had not yet been disposed of	-9
-5	Incomplete, unusable questionnaires	-8
-4	Miscellaneous problems	-10
355	Completed litigant questionnaires	279
$355/992 = 35.8\%$	Response Rate	$279/994 = 27.1\%$

through December 1989. The unit in this dataset was the individual case: an action by a single plaintiff against one or more defendants.⁴

Our goal was to have 750 cases in the court record sample, evenly divided among the Preprogram, Mediation, and Control groups. Using estimated answer rates for each county, we created a list of 1,194 cases, reviewed the court records, and ended with 742 cases. The information extracted from court records included names and categorizations of up to seven plaintiffs and seven defendants in each case, the relationships among the various parties, judgment information when applicable, mediation information, as well as the number of motions, stipulations, and orders in the file and the dates of important events in the case.

Compliance data. The compliance data came from completed litigant questionnaires in which the respondent said that he or she had won or lost something. We did not send compliance questionnaires to litigants until at least six months had passed since the disposition of the case. (The compliance data are described further in Section III.C of this report.)

Survey of attorneys and certified mediators. We surveyed a random sample of attorneys who were believed to be actively practicing civil law in the thirteen pilot counties, as well as every mediator in the state certified before April 27, 1994,⁵ on their attitudes toward superior court mediation. The survey was mailed to 1,101 attorneys and 208 certified mediators; 424 usable responses were received. The questions dealt with the respondent's background, familiarity with the mediation program, satisfaction with mediation in general, the role of attorneys in traditional negotiation, and the role of attorneys in MSCs.

AOC civil case database. The North Carolina Administrative Office of the Courts maintains a database on superior court civil cases. It includes a few essential variables on each case filed: parties' names, case numbers, county of filing, dates of filing and disposition, type of claim subject matter, and type of disposition (trial, dismissal, etc.). The AOC provided copies of these files at our request.

4. A very small number of the cases included were associated with one or more other concurrently pending cases. In the entire court record dataset, twenty-six cases were involved in multiple-case clusters: ten in the Preprogram Group, eight in the Control Group, and eight in the Mediation Group. Most of the "companion cases" were not included in the court record sample.

5. At that time, all certified mediators were also attorneys.

About the Author

A member of the Institute of Government faculty since 1971, Stevens H. Clarke has published widely in the area of criminal justice. His areas of specialty include law regarding sentencing; prisons; probation and parole; alternative dispute resolution; analysis of policies concerning administration of justice; and evaluation of programs affecting the courts, criminal justice, and correction.

Other Publications by the Author Include...

Mediation of Interpersonal Disputes: An Evaluation of North Carolina's Programs

Stevens H. Clarke, Ernest Valente, Jr., and Robyn R. Mace. 1993

84 pages. [92.05] ISBN 1-56011-208-5

\$16.00 plus 6% tax for North Carolina residents

Court-Ordered Arbitration: An Evaluation of Its Effects

Stevens H. Clarke, Laura F. Donnelly, and Sara A. Grove. 1989

82 pages. [89.13] ISBN 1-56011-158-5

\$12.00 plus 6% tax for North Carolina residents

Juvenile Detention Facilities in North Carolina: Use in 1993

Stevens H. Clarke, Lina E. James, and Karen L. Carl. 1994

43 pages. [94.15] ISBN 1-56011-228-X

\$13.00 plus 6% tax for North Carolina residents

North Carolina's Community Penalties Program:

An Evaluation of Its Impact on Felony Sentencing in 1987-88

Laura F. Donnelly and Stevens H. Clarke. 1990

24 pages. [90.02] ISBN 1-56011-160-7

\$8.00 plus 6% tax for North Carolina residents

Recidivism of Criminal Offenders Assigned to Community Correctional Programs or Released from Prison in North Carolina in 1989

Stevens H. Clarke and Anita L. Harrison. 1992

Prepared for the North Carolina Sentencing and Policy Advisory Commission

56 pages. [92.02] ISBN 1-56011-204-2

\$12.00 plus 6% tax for North Carolina residents

Reducing the Pretrial Jail Population and the Risks of Pretrial Release: A Study of Catawba County North Carolina

Stevens H. Clarke, Charles R. Zeugner, Margarita Cassini Cummings, and Yuan-Huei W. Lin. 1988

40 pages. [88.26] ISBN 1-56011-140-2

\$8.00 plus 6% tax for North Carolina residents

To place an order or for more information on these and other publications, call the Institute of Government Publications Sales Office at **(919) 966-4119**, fax **(919) 962-2707**, send e-mail to **kwhunt.iog@mhs.unc.edu**, or find us at **<http://ncinfo.iog.unc.edu>** on the Internet.