2024

The Efficacy of Mandatory Mediation in Courts of Limited Jurisdiction: A Case Study from the Missoula Justice Court

Paul F. Kirgis

Brock Flynn

THE EFFICACY OF MANDATORY MEDIATION IN COURTS OF LIMITED JURISDICTION: A CASE STUDY FROM THE MISSOULA JUSTICE COURT

Brock Flynn & Paul F. Kirgis[1]

Abstract

Alternative Dispute Resolution (ADR), particularly mediation, has become an integral component of the judicial system, promising efficiency, cost savings, and enhanced litigant satisfaction. Courts of limited jurisdiction, which handle high volumes of landlord-tenant disputes, debt collection cases, and small claims, have increasingly adopted mandatory mediation programs to alleviate docket congestion and promote settlement. This article contributes to the growing body of research on mediation in courts of limited jurisdiction by analyzing case outcomes in the Justice Court for Missoula County, Montana. Through a review of public court records from 2019-2023, we examine settlement rates, compliance with mediated agreements, and the impact of legal representation and remote mediation. Our findings reveal a significant gap between initial and ultimate settlement rates: while mediation frequently results in preliminary agreements, a substantial portion of these agreements unravel, necessitating further judicial intervention. Additionally, we find that tenant representation in landlord-tenant cases is associated with lower settlement rates, raising concerns about the voluntariness and fairness of mediated resolutions. Finally, our study provides the first empirical assessment of remote mediation in courts of limited jurisdiction, finding that settlements reached via videoconference are significantly less likely to endure than those reached in person. These findings challenge common assumptions about the efficiency and effectiveness of mediation in courts of limited jurisdiction. As courts continue to expand the use of ADR, our research highlights the need for rigorous empirical analysis to ensure that mediation achieves its intended benefits without compromising procedural fairness or access to justice.

I. INTRODUCTION

Over the past several decades, Alternative Dispute Resolution (ADR) has exploded in popularity, evolving from a novel method for resolving a limited subset of disputes to a mainstay of the litigation process.[2] This surge in the use of ADR originated with the 1976 Pound Conference, a meeting of jurists and legal scholars for the purpose of considering fundamental issues with the administration of justice

[1] Brock Flynn is a Public Defender in Hamilton, Montana; Paul Kirgis is the Helen & David Mason Professor of Law at the Alexander Blewett III School of Law at the University of Montana. The authors are volunteer mediators and current or former Board members for the Community Dispute Resolution Center of Missoula. The research for this article was conducted by Mr. Flynn while working in the Mediation Clinic at the Blewett School of Law under the supervision of Professor Kirgis.

[2] Thomas O. Main, *ADR: The New Equity*, 74 U. CHI. L. REV. 329, 340 (2005) (discussing expansion of ADR generally).

and exploring the need for the judicial system to respond to the demands of an ever-changing society.[3] Conference participants advocated for the use of ADR, and particularly the use of mediation, to promote judicial efficiency and proper case management.[4] They, and ADR advocates who followed, argued that mediation could provide multiple benefits, including saving time and money for both disputants and courts,[5] reorienting litigants from positions to the interests at the root of the dispute,[6] and offering a more humanistic alternative to the imposing and impersonal nature of litigation and adjudication.[7]

One area in which the proponents of ADR saw its greatest potential—and in which critics see its biggest risks—is in courts of limited jurisdiction. These courts handle landlord-tenant disputes, tort and contract claims with an amount in controversy ranging in the low five figures, ordinance violations, misdemeanor criminal cases, and some initial hearings for felony criminal cases.[8] A large volume of cases in small claims courts involve individuals and consumers facing large business entities.[9] These are the nation's busiest courts, and they are the courts that an ordinary citizen is most likely to encounter. Indeed, courts of limited jurisdiction handled between 70 to 75 percent of the 83.2 million state court cases filed in 2017.[10]

Many states and localities have turned to court-connected mediation in courts of limited jurisdiction in an attempt to increase access to justice and clear crowded dockets.[11] Proponents argue that small claims courts can utilize mediation to democratize the litigation process, giving a forum for individual parties to vent their frustrations and fully detail their view of the case. The goal is to empower

---

[3] WARREN E. BURGER, *Agenda 2000 A.D.--Need for Systematic Anticipation*, *in* POUND CONFERENCE: NATIONAL CONFERENCE ON THE CAUSES OF POPULAR DISSATISFACTION WITH THE ADMINISTRATION OF JUSTICE 1 (Denver Bookbinding 1976).

[4] Dorothy J. Della-Noce, *Mediation Theory and Policy: The Legacy of the Pound Conference*, 17 OHIO ST. J. ON DISP. RESOL. 545, 547 (citing Frank E.A. Sander, *Varieties of Dispute Processing*, at the National Conference on the Causes of Popular Dissatisfaction with the Administration of Justice (Apr. 7-9, 1976), *in* 70 F.R.D. 111-113 (Apr. 1976) (discussing policy rationales of early ADR proponents).

[5] BURGER, *supra* note 2, at 18, 20-21.

[6] WILLIAM J. MCGILL, *Peacemaking in an Adversary Society*, *in* POUND CONFERENCE: NATIONAL CONFERENCE ON THE CAUSES OF POPULAR DISSATISFACTION WITH THE ADMINISTRATION OF JUSTICE 15 (Denver Bookbinding 1976).

[7] A. Leon Higginbotham Jr., *The Priority of Human Rights in Court Reform*, 15 JUDGES J. 34 (1976).

[8] NATIONAL CENTER FOR STATE COURTS, *Courts of Limited Jurisdiction Data Visualizations*, https://public.tableau.com/app/profile/ncscviz/viz/CourtsofLimitedJurisdiction/Story1 (last visited Nov. 12, 2024).

[9] Susan E. Raitt et al., *The Use of Mediation in Small Claims Courts*, 9 OHIO ST. J. DISP. RESOL. 55, 57 (1993).

[10] NATIONAL CENTER FOR STATE COURTS, *Limited Jurisdiction Courts Resource Guide*, https://www.ncsc.org/information-and-resources/archived-items/special-jurisdiction/limited-jurisdiction-courts/limited-jurisdiction-courts-resource-guide (last visited Dec. 27, 2024).

[11] *See* Raitt et al., *supra* note 9, at 55; Larry R. Spain, *Alternative Dispute Resolution for the Poor: Is it an Alternative?*, 70 N.D. L. REV. 269, 272 (1994). Even when mediation is not required, parties often voluntarily agree to mediate. *See* Dwight Golann, *If You Build it Will They Come? An Empirical Study of the Voluntary Use of Mediation, and Its Implications*, 22 CARDOZO J. CONFLICT RESOL. 181 (2022) (finding that litigants in Boston used mediation in two-thirds of all tort cases and almost half of complex lawsuits).

parties to engage in candid dialogue with a mediator, avoiding an all or nothing outcome in adjudication and allowing a flexible resolution without further court proceedings.[12] By giving parties more control over the resolution, mediation can also promote compliance with agreements, potentially reducing enforcement disputes.[13]

Given these differing perspectives, the rapid growth of court-connected mediation in courts of limited jurisdiction has led to calls for accountability through rigorous analysis and assessment.[14] Because these programs are invariably organized and funded locally, it is difficult to study court-connected mediation at either the national or even the state level.[15] Consequently, the research into these programs tends to focus on one or a small number of jurisdictions. Most of that research into mediation in courts of limited jurisdiction was conducted decades ago.

In this article, we add to the body of research into mediation in courts of limited jurisdiction by analyzing the outcomes of mediated cases in the Justice Court for Missoula County, Montana. The Justice Court is a court of limited jurisdiction responsible for criminal, civil, and traffic matters within the boundaries of Missoula County.[16] The court has two elected Justices of the Peace serving four-year terms.[17] In addition to certain criminal jurisdiction, the court has civil jurisdiction for claims up to $15,000[18] and small claims cases up to $7,000.[19] The court's docket includes landlord-tenant cases, debt collections, and a variety of other civil matters.

We conducted a comprehensive review of public court records from Missoula County Justice Court filings for the years 2019-2023. Using both explicit docket entries and a clerk-prepared spreadsheet, we identified mediated cases, excluding cases in which a party failed to appear and small claims filings. We determined whether an agreement was reached in mediation ("initial settlement"), and then whether further judicial intervention occurred ("ultimate settlement"). We tracked whether the parties were represented by counsel and whether the mediation was conducted in person or remotely via the Zoom videoconferencing platform. We found that: 1) despite high initial settlement rates, fewer than half of cases sent to mediation resulted in ultimate settlement; 2) the presence of counsel for tenants in possession cases dramatically lowered settlement rates; and 3) remote mediations had a significantly lower settlement rate than in-person mediations.

---

[12] *See* Raitt et al., *supra* note 9, at 61; John Bates Jr., *Using Mediation to Win for Your Client*, 38 PRAC. LAW. 23, 25 (1992).

[13] Raitt, *supra* note 9, at 89; GORDON GRILLER & DANIEL J. HALL, ADVANCING ALTERNATIVE DISPUTE RESOLUTION IN THE NEW MEXICO JUDICIARY: KEY STRATEGIES TO SAVE TIME AND MONEY, 8 (National Center for State Courts 2011).

[14] Jacqueline Nolan-Haley, *Mediation, Self-Represented Parties, and Access to Justice: Getting There from Here*, 87 FORDHAM L. REV. ONLINE 78, 79, 87 (2018).

[15] A 1979 law passed by Congress, the Minor Dispute Resolution Act, would have supported the development of local ADR programs, but was never funded. *See* Jessica Pearson, *An Evaluation of Alternatives to Court Adjudication*, 7 THE JUSTICE SYSTEM JOURNAL 420, 424 (1982).

[16] *See* https://www.missoulacounty.us/government/civil-criminal-justice/justice-court.

[17] *Id*.

[18] Mont. Code Ann. § 3-10-301 (2023).

[19] Mont. Code Ann. § 3-10-1004 (2023).

The article proceeds in Part II with a review of previous research into mediation in courts of limited jurisdiction. In Part III, we present our research methodology, and in Part IV we report our findings. In Part V, we analyze our findings and compare them with the previous research. Part VI offers concluding thoughts.

II. REVIEW OF EXISTING LITERATURE

Our literature review found seven published studies of mediation in limited jurisdiction courts. Of these, four focused on settlement rates based on referral type, while one compared outcome from mediation and adjudication, and another article focused on outcome and disputant perceptions for mediation only. Three of the articles compared disputant perceptions of mediation and litigation/adjudication, and three articles covered compliance with mediated agreements in some depth. They found conflicting data about settlement rates between mandatory and voluntary programs. Interpersonal relationships between the disputants were tied to higher settlement rates.

The articles found high disputant satisfaction with mediation, in terms fairness, outcome, and process quality, as compared to litigation/adjudication. Of the articles that included a cost analysis, the data failed to support the proposition of significant and consistently measurable cost savings from mediation. For the articles that discussed compliance, a high percentage reported compliance by the other party. Additionally, factors associated with compliance included, among other things, a long-term relationship between the disputants, reciprocal obligations, and voluntary referral. On the other hand, factors associated with breach included high-cost terms and an extended timeline for fulfillment of agreement obligations.

A. McEwen & Maiman's Studies of Small Claims Mediation in Maine

Craig McEwen and Richard Maiman conducted a study of mediation in small claims courts in Portland, Brunswick, and Augusta, Maine, in 1979.[20] The Maine program relied on non-lawyers trained in dispute resolution to serve as mediators in small claims courts, which at that time had jurisdiction over civil claims up to $800. Mediations were conducted immediately prior to scheduled trials. In some courts, mediation was offered to parties as an option they could use or not, while in others, judges assigned parties to mediate. In all instances, parties were told the mediation was voluntary and there would be no negative consequences for failing to agree. [21]

The authors collected data of four types: interviews of litigants, observations of court and mediation sessions, analysis of dockets, and analysis of state mediation records. They compared the three jurisdictions with mediation programs with three others that did not implement mediation programs. They found that outcomes differed for mediation and adjudication in several significant ways.

[20] Craig A. McEwen & Richard J. Maiman, *Small Claims Mediation in Maine: An Empirical Assessment*, 33 ME. L. REV. 237, 245-46 (1981).
[21] *Id.* at 243-44.

For example, litigants spent more time in mediation than in trial, and participants in mediation were more likely than those in adjudication to report that they had enough opportunity to fully explain their side of the case.[22] Mediated cases were also more likely to include a structured payment plan than adjudicated cases.[23] And, predictably, mediation was more likely to result in a partial settlement, whereas adjudication tended to result in the claimant receiving the entire amount or nothing.[24] Participants in mediation expressed greater levels of satisfaction "with their overall experience of mediation/court" than participants in adjudication.[25] The sense of fairness translated into higher rates of compliance: settlements agreed in mediation were almost three times as likely to be paid in full than judgments rendered after adjudication.[26]

Overall, the authors found that the parties reached an agreement in 66.1% of the mediated cases. Cases involving unpaid bills were the most likely to settle, at 85%, while car accident cases were the least likely to settle, at 41%. Consumer or contract claims settled at about the overall level. Landlord-tenant disputes differed widely depending on which party brought the claim. Where the tenant brought the claim, cases settled about 83% of the time; where the landlord brought the claim, however, cases settled just 50% of the time.[27] But the parties did not always comply with those initial agreements. Where the parties reached an agreement calling for payments in the future, payment in full was received just 51.6% of the time.[28]

In a follow-up article, McEwen and Maiman conducted a comparative analysis of compliance rates between mediated settlements and judgments from adjudication.[29] The study found that characteristics associated with higher compliance included: resource advantages of obligated parties, specificity of terms, reciprocal obligations, terms perceived as fair by the obligated parties, existence of a long-term relationship between the parties, and voluntary process. Conversely, characteristics associated with lower compliance rates included high-cost terms and a longer timeline for completing the terms.[30]

B. John Geordt's Study of Court-Annexed Small Claims Mediation in Des Moines, Iowa, Washington, D.C., and Portland, Oregon.

John Geordt, as part of a larger study of small claims courts sponsored by the National Center for State Courts (NCSC), studied mediation programs in small

---

[22] *Id.* at 255.
[23] *Id.* at 252.
[24] *Id.* at 253.
[25] *Id.* at 256-57.
[26] *Id.* at 261. 70.6% of the mediated settlements were reported to be paid in full, whereas only 33.8% of the judgments were paid in full.
[27] *Id.* at 249-51.
[28] *Id.* at 262.
[29] Craig A. McEwen & Richard J. Maiman, *Mediation in Small Claims Court: Achieving Compliance Through Consent*, 18 LAW & SOC'Y REV. 11 (1984).
[30] *Id.* at 39-40.

claims courts in Des Moines, Iowa, Washington, D.C., and Portland, Oregon, in 1990.[31]

The Des Moines program relied on a small group of non-law trained volunteer mediators, most of whom started mediating small claims cases without formal training, and eventually were required to complete twenty hours of mediation coursework.[32] At the time, the Des Moines small claims court had jurisdiction over civil cases up to $2,000. Parties who appeared for their trial date were given a pamphlet on mediation, along with an overview of the process by the clerk. Parties were clearly informed of their right to a trial if mediation resulted in impasse. This program was voluntary, and parties proceeded to mediation only if they both agreed to it. The Des Moines program reported a settlement rate of 85%.[33]

The Washington program used a mix of law-trained and lay mediators, who were paid for their time mediating. Mediators were required to complete a typical forty-hour mediation foundations training and complete several mediations with supervision from an experienced mediator who provided detailed feedback.[34] At the time, the D.C. small claims court had jurisdiction over civil claims up to $2,000.[35] Parties who appeared for their trial date were ordered to an on-site mediation room after the clerk resolved preliminary matters. At least one small claims court judge strongly endorsed mediation during calendar call, and reminded parties of probable consequences of going to adjudication and judgment. This program had a settlement rate of between 50% and 60%.[36]

The Portland program relied on a mix of law-trained and lay volunteer mediators, who completed a 32-hour mediation foundations course. New mediators conducted several supervised mediations that included feedback on performance. All mediators were evaluated once a year.[37] At the time, the Portland small claims court had jurisdiction over civil claims up to $2,500. For parties with a case involving at least one witness, mediation was voluntary. For cases without a witness, mediation was mandatory. During the calendar call, the judge strongly encouraged parties to try mediation. Most were parties to a consumer debt collection lawsuit and were admonished that a mediated settlement would not have the negative implications of a judgment on their credit score.[38]

The author collected data of four types: interviews with litigants, observations of court and mediation sessions, analysis of dockets, and analysis of the courts' mediation records. Geordt compared the experiences of litigants who settled in mediation versus those who went to trial. The author concluded that the Des Moines program's high settlement rate of 85% was attributable to two primary

---

[31] John A. Geordt, *Small Claims Mediation in Three Urban Courts,* 94-95*,* in SMALL CLAIMS AND TRAFFIC COURTS: CASE MANAGEMENT PROCEDURES, CASE CHARACTERISTICS, AND OUTCOMES IN 12 URBAN JURISDICTIONS (1992).
[32] *Id.* at 102.
[33] *Id.*
[34] *Id.* at 97.
[35] *Id.* at 95.
[36] *Id.* at 97-98.
[37] *Id.* at 99.
[38] *Id.* at 99-100.

factors. First, the program relied on a small handful of mediators with several years of experience, whereas D.C. and Portland used a large group of mediators who handled cases relatively infrequently. Second, the Des Moines program was entirely voluntary, whereas D.C. and Portland mandated mediation for at least some, if not all cases.[39]

Geordt's study compared disputants' satisfaction between mediation and adjudication. Litigant satisfaction varied drastically between mediated and adjudicated cases. Litigants who went through mediation were more likely to report satisfaction with the fairness of the outcome, and litigants going through adjudication were more likely to report dissatisfaction with the fairness of the outcome. Interestingly, litigants reported satisfaction with fairness of procedures at about the same rate for both mediation and adjudication.[40] This study did not track or analyze compliance with mediated settlements or adjudicated judgments. This study did not differentiate settlement rates based on case type or subject matter.

C. National Justice Center Field Test of Atlanta, Kansas City, and Venice/Mar Vista, California

The National Justice Center Study ("NJC Study"), by Royer Cook, Janice Roehl, and David Sheppard, was an expansive and detailed evaluation of the National Justice Centers, a neighborhood mediation program funded and developed by the U.S. Department of Justice.[41] The objectives of the Justice Centers included: resolution of minor criminal and civil disputes, diversion of cases unsuitable for adjudication away from the courts, fair and long-term dispute resolution, and as an information clearinghouse for social services equipped to assist disputants.[42]

For the process study portion, the authors collected data on the demographics of the disputants, case types, dispute resolution mechanisms, and initial outcome. For the impact study, the authors collected data on disputant satisfaction with process type (mediation and adjudication), compliance with agreements or judgments.[43] For the impact study, project staff utilized a variety of follow-up methods, from mailing surveys to in-person interviews with the parties. The impact study tracked at two junctures: a short-term follow-up two months following disposition, and a long-term follow up six months following disposition.[44]

The NJC study tracked the Justice Center programs in Atlanta, Kansas City, and Venice/Mar Vista, California, between 1978 and 1979.[45] Volunteer mediators across the three sites were selected carefully to represent the demographics of the site city. Each Justice Center varied in its training approach and curriculum, with training ranging from 48 to 70 hours.[46]

---

[39] *Id.* at 105-106.
[40] *Id.* at 105.
[41] ROYER F. COOK, JANICE A. ROEHL & DAVID I. SHEPPARD, NEIGHBORHOOD JUSTICE CENTERS FIELD TEST: FINAL EVALUATION REPORT 7 (National Institute of Justice 1980).
[42] *Id.* at 8.
[43] *Id.* at 8-9.
[44] *Id.* at 123.
[45] *Id.* at 12, 14, 16.
[46] *Id.* at 20.

Atlanta's program consisted of both civil cases (primarily landlord-tenant and consumer) and minor criminal cases involving non-strangers. The Atlanta sample included both mandatory and voluntary referrals.[47] The Atlanta sample had a settlement rate of 81%. The caseload of the Kansas City Justice Center was primarily criminal, representing 73% of all cases. The balance consisted of civil cases, primarily landlord-tenant and consumer cases. The sample included a mix of mandatory and voluntary referrals. The Kansas City sample had a settlement rate of 95%.[48]

The caseload of the Venice/Mar Vista Justice Center consisted almost entirely of small claims type civil cases, such as consumer, landlord-tenant, and disputes between individuals with an interpersonal relationship, with only a small handful of criminal cases. The sample included a mix of mandatory and voluntary referrals. The Venice/Mar Vista sample had a settlement rate of 68%.[49]

The process study found several big-picture conclusions from the three-city sample. Overall, 45% of cases were resolved through mediation. Cases most likely to settle through mediation included judicial referrals, and cases involving disputants with an interpersonal relationship.[50] The process study conducted follow up interviews with disputants, including an initial short term follow up two months following mediation, and another six months post mediation.[51] The interviews were conducted with at least one case disputant in 44% of cases from the sample.[52] The researchers inquired about disputant satisfaction with the agreement, compliance by both parties, satisfaction with the mediation process and individual mediator, and whether they would try mediation again for a dispute in the future.[53]

Most parties were satisfied with the mediation process (84%) and the individual mediator (88%), a drastic departure from satisfaction with litigation (33-42%) and the presiding judge (64-69%).[54] When asked whether the other party had complied with the terms of the agreement, over 80% of both complainants and respondents said yes. When asked whether they would return to mediation for a future dispute, 88% of complainants said yes, whereas only 46% of respondents said yes. Parties who came to mediation as a result of mandatory referral were more likely to be dissatisfied with their mediator, but not the mediation process itself, than parties from a voluntary referral.[55]

Disputants stated that they found the mediation process as more positive than litigation, finding that the mediation process allowed a greater opportunity to participate and to be heard. Most negative feedback centered on the inability to enforce mediated agreements in the event of breach.[56]

---

[47] *Id.* at 13-14, 31-33.
[48] *Id.* at 33-36.
[49] *Id.* at 38.
[50] *Id.* at 43-44.
[51] *Id.* at 123.
[52] *Id.* at 46.
[53] *Id.* at 45-46.
[54] *Id.* at 58, 100.
[55] *Id.* at 50, 58.
[56] *Id.* at 68.

D. Pearson's Comparative Study of Mandatory and Voluntary Referral Programs

Jessica Pearson's article sought to reframe scholarly analysis of court-connected mediation programs away from the quantitative goals that largely revolve around cost savings and case management towards a focus on the qualitative impact of mediation on participant perception and satisfaction with the mediation process as a whole.[57] The author collected data from existing mediation scholarship.[58] Pearson concluded that, despite criticism of the coercive nature, mandatory referral programs are successful as it brought in a high number of parties into the mediation process.[59] On the other hand, voluntary referral programs could be characterized as unsuccessful due to a dearth of participation, high program costs per participant, and a case volume insufficient to garner mediator experience.[60]

Pearson sought to clarify the reality behind one of mediation's most significant policy justification, cost savings. Based on the Denver Child Custody Program sample, a voluntary referral program, the costs savings from mediation were negligible, and such costs were strongly linked to the stage of the proceedings when mediation is used, with earlier mediation translating into higher cost savings as compared to an adjudication control group.[61] On the other hand, mandatory referral programs showed promising cost-savings value. For general civil and domestic relations cases, mandatory mediation translated into significant savings.[62] For small claims cases, the value of mediation consisted of diverting cases that would have been dismissed early on, along with diversion of cases involving interpersonal conflict ill-suited for adjudication.[63] Pearson's ultimate takeaway is that mediation's value is largely in participant satisfaction rather than savings of judicial resources with quantifiable cost savings.[64]

E. Felstiner and Williams' Study of Victim-Offender Mediation in Dorchester, Massachusetts with Comparison to Adjudicated Cases

William Felstiner and Lynda Williams conducted a study of the "Dorchester Urban Court," a court-annexed mediation program consisting of victim-offender and domestic relations cases referred from the court.[65] The program used non-lawyers trained in dispute resolution.[66]

The prerequisites for referral included an interpersonal relationship between the disputants and consent to mediation by both parties.[67] For the defendant,

---

[57] Jessica Pearson, *An Evaluation of Alternatives to Court Adjudication*, 7 JUST. SYS. J. 420, 424-25 (1982).
[58] *Id.* at 420-441.
[59] *Id*. at 426.
[60] *Id*. at 427-28.
[61] *Id*. at 436.
[62] *Id*. at 437.
[63] *Id*. at 438.
[64] *Id*. at 440.
[65] WILLIAM L.F. FELSTINER & LYNNE A. WILLIAMS, COMMUNITY MEDIATION IN DORCHESTER, MASSACHUSETTS ix, 14 (National Institute of Justice 1980).
[66] *Id.* at 8.
[67] *Id.* at ix.

successful mediation resulted in dismissal of the criminal charges, whereas impasse resulted in the reopening of pending criminal charges. For the complainant (victim), successful mediation promised resolution of the interpersonal elements of the case, whereas impasse resulted in further adjudication with a fair likelihood of favorable resolution for the defendant.[68]

The authors collected four types of data: interviews of mediators and disputants, analysis of case files, surveys of mediators and disputants, and observation of mediations.[69] They found that most disputants (83%) reported positive movement in their conflict following mediation, and about half stated that it was a direct result of mediation. Additionally, compliance with the mediated agreement was reported in two-thirds of cases. As for breach, the most frequent response of the non-breaching party was inaction.[70] Additionally, failure to fulfill monetary obligations of the agreement was the most common reason for breach (22.2%). Finally, more parties felt that the mediators validated their feelings (83.3%) than understood the issues of the dispute (70%).[71]

The authors criticized the cost-savings rationale of mediation, finding that the cost of mediation was between 2-3 times as much as any costs saved, primarily in the form of post-conviction supervision. In terms of maximizing mediation cost efficiency, the authors concluded that increasing caseload and implementing mediation-arbitration could reduce program costs, although not dramatically.[72] Additionally, the authors made recommendations for mediator training, stating that training curricula utilizing labor mediation techniques are a poor fit for educating community mediators, and that programs should emphasize continuing education and objective assessment of individual mediators for quality control.[73]

F. Kulp's Comparative Study of Mandatory, Voluntary, and Hybrid Court-Annexed Mediation of Small Claims Cases

In the most recent study of mediation in small claims courts, Heather Kulp compared settlement rates for court annexed mediation in the small claims context, with six different referral models representing a spectrum between mandatory and voluntary referrals. The author gathered data on settlement rates and the referral model.[74] Settlement rates varied widely, with a low of forty-five percent (45%) in Oahu, Hawaii, with mandatory referral, and a high of ninety percent (90%) in Coos County, Oregon, with voluntary referral.[75] Kulp noted that "automatic" referral, where the court mandated mediation on the trial date, undermined party self-determination and indicated lower settlement rates.[76] Additionally, Kulp concluded that a voluntary referral along with experienced mediators were tied to higher

[68] *Id.* at 17, 52.
[69] *Id.* at ix.
[70] *Id.* at 29-30.
[71] *Id.* at 27-28, 30.
[72] *Id.* at 42-43.
[73] *Id.* at 48.
[74] Heather Scheiwe Kulp, *Increasing Referrals to Small Claims Mediation Programs: Models to Improve Access to Justice*, 14 CARDOZO J. CONFLICT RESOL. 361, 371-85 (2013).
[75] *Id.* at 376, 387.
[76] *Id.* at 377.

settlement rates.[77] For mandatory mediation, cases settled at a high of 75% in Philadelphia, and settled at a low of 45% in Oahu, Hawaii.[78] For the model "Mediation Ordered or Recommended by Court at Hearing," cases settled at a high of 80% in Calhoun County, Michigan, and settled at a low of 47% in New York City. [79]

G. Summary of Previous Findings

It is difficult to draw firm conclusions from the research to date into mediation in courts of limited jurisdiction. Most of the published research was conducted more than forty years ago, and the most recent study, from 2013, pre-dates the widespread use of Zoom and other video platforms ushered in during the COVID-19 pandemic. Programs differ widely in the types of cases mediated, the mechanisms for initiating mediation, and the neutrals employed. With those caveats in mind, some general themes emerge from the available research:

1. Parties Express Satisfaction with Mediation

Both McEwen & Maiman and Geordt reported that mediation participants felt they had more opportunity to be heard than in litigation; this seems to have resulted in a greater sense of the fairness of the process and a greater overall satisfaction with mediation.[80] The NJC study confirmed those results, finding that 84% of litigants expressed satisfaction with the mediation process and 88% expressed satisfaction with their individual mediators, compared with 33-42% expressing satisfaction with litigation and 64-69% expressing satisfaction with their individual judge.[81]

2. Settlement Rates Vary Widely and Are Correlated with Voluntariness

The studies consistently showed higher settlement rates for voluntary programs than for mandatory programs. Kulp found the largest gap, with a 90% settlement rate in Coos County, Oregon, where parties must have chosen mediation, compared with a 41% settlement rate in Oahu, Hawaii, where parties were directed to mediation by the court.[82] Similarly, Geordt found that 85% of cases settled in Des Moines, Iowa, a voluntary program, whereas 50-60% of cases settled in the mandatory program in Washington, D.C.[83]

3. Parties Typically Comply with Mediated Agreements

Compliance rates with mediated agreements varied across studies and were often influenced by the nature of the agreement, the relationship between the disputants, and whether the mediation was voluntary. McEwen & Maiman found higher compliance (almost three times more likely) with mediated settlements

---

[77] *Id.* at 387, 389.
[78] *Id.* at 374, 376.
[79] *Id.* at 378-379.
[80] McEwen and Maiman *supra* note 22 at 255.
[81] COOK, ROEHL, & SHEPPARD, *supra* note 43 at 58, 100.
[82] Kulp, *supra* note 76, at 376, 387.
[83] Geordt, *supra* note 33 at 102, 97-98.

compared to adjudicated outcomes. Compliance dropped, however, when agreements involved future payments.[84] Similarly, Felstiner & Williams found two-thirds compliance, with financial obligations being the most common cause of breaches.[85] The NJC Study reported over 80% compliance with mediated agreements, with higher compliance rates where participants were satisfied with the mediation process.[86]

4. There Is Little Evidence of Cost Savings

While mediation is often promoted for its cost-saving benefits, the published studies reached mixed conclusions at best. Pearson's study highlighted negligible cost savings in voluntary programs but noted potential savings in mandatory mediation for certain civil cases.[87] Felstiner & Williams argued that cost savings were not a significant benefit of mediation programs.[88] Both sets of authors suggested that the qualitative benefits of mediation in terms of party satisfaction outweighed financial considerations.[89]

III. SCOPE AND METHODOLOGY OF STUDY

Mediation has been promoted for its value to both the parties—offering the potential for more creative solutions that address the parties' interests while avoiding the acrimony of litigation—and the courts—reducing congested dockets by facilitating out-of-court settlements.[90] For mediation to achieve those objectives, mediation must "work"—the parties must actually agree to resolve their disputes and then they must comply with the resulting agreements. If the parties do not reach agreement or do not comply with the terms of an agreement, then mediation may increase the burdens on parties to litigation, while providing no savings to the court. While many of the studies discussed above analyzed initial settlement rates, only the study by McEwen and Maiman analyzed the issue of compliance in any depth.[91] The primary motivation for conducting this study was to analyze the issue of compliance with mediated agreements.

A secondary goal was to assess the effect of the mode of mediation—in person or over video—and the presence of lawyers. Previous studies were conducted before video mediation became common. The COVID-19 pandemic and the shut-down of many courthouses led to widespread use of Zoom or similar platforms for court-connected mediation in courts of limited jurisdiction. To date, no published studies have examined differences in settlement rates or compliance for in-person and Zoom mediations in courts of limited jurisdiction.

---

[84] McEwen and Maiman, *supra* note 22 at 261-262.
[85] FELSTINER & WILLIAMS, *supra* note 67 at 29-30.
[86] COOK, ROEHL, & SHEPPARD, *supra* note 43 at 58.
[87] Pearson, *supra* note 58 at 436-37.
[88] FELSTINER & WILLIAMS, *supra* note 67 at 42-43.
[89] Pearson, *supra* note 58 at 440;
FELSTINER & WILLIAMS, *supra* note 67 at 27-28, 30.
[90] *See* notes 2-7 and accompanying text.
[91] McEwen & Maiman, *supra* note20.

With respect to legal representation, the National Center for State Courts' 2015 study of civil litigation found large disparities in representation in courts of limited jurisdiction.[92] Of over 200,000 cases studied, plaintiffs were represented by counsel in 86% of the cases, whereas defendants were represented in only 22% of the cases.[93] Both parties were represented in just 17% of the cases.[94] No reported studies have addressed whether representation makes settlement more or less likely.

A. Site of the Study

The court-annexed mediation program in Missoula County Justice Court is organized through the Community Dispute Resolution Center of Missoula County (CDRC).[95] The CDRC, founded in 1995, has experienced significant and steady growth in the three decades since its founding. At the outset, the CDRC encountered skepticism from major stakeholders, particularly the local courts. Gradually, the CDRC built a reputation and gained the respect of both the local bench and bar.[96] Through this process, the CDRC gained more resources and cooperation from the local courts, primarily from Missoula County Justice Court.[97] Since 2005, the Missoula County Justice Court has mandated mediation for all civil cases before a trial or final hearing.[98]

For both possession and general civil cases, mediation is ordered by the court and required prior to a final hearing. Possession lawsuits do not go to an initial hearing. A hearing to adjudicate the issue of possession occurs if mediation results in an impasse.[99] Thus, for possession lawsuits that are settled in mediation, and proceed without a breach of the agreement, the parties will not appear before a judge, unless money damages remain in dispute.[100]

This background is important as one of the primary goals of the study was to analyze a "mature" court annexed mediation program with a consistent caseload and referral process. Most of the scholarly literature on small claims court annexed mediation analyzed mediation programs in their infancy, which did not have a continuous caseload or a consistent referral process.[101]

---

[92] NATIONAL CENTER FOR STATE COURTS, THE LANDSCAPE OF CIVIL LITIGATION IN STATE COURTS (2015) (available at https://perma.cc/7T63-NZND).
[93] *Id*.
[94] *Id*.
[95] Interview with Skip Hegman, Board Member and Past President of Community Dispute Resolution Center of Missoula County, in Missoula, MT (Apr. 24, 2024)(hereinafter "Hegman Interview").
[96] *Id.*
[97] *Id.*
[98] Colin McDonald, *Working it Out: Dispute Resolution Center guides community combatants to creative solutions*, THE MISSOULIAN, Jan. 7, 2005, at A2, B2.
[99] *Id*.
[100] *Id*.
[101] Geordt *supra* note 31, at 93-10;
McEwen & Maiman *supra* note20, at 245-246.

B. Methodology

This study collected data by using public court records and going through every single case filed in the Missoula County Justice Court for 2019, 2020, 2021, 2022, and 2023.[102] We then reviewed the docket report for each case and looked in greater depth whenever the docket report indicated that a mediation was scheduled.

From there, we analyzed the docket report further for any indicators that one party failed to appear. In some instances, the docket report clearly indicated that the plaintiff or defendant failed to appear. In other instances, the researcher relied on their personal knowledge of process to exclude failures to appear. Justice Court mediators typically wait about fifteen minutes after the scheduled mediation time for parties to appear, and if one or both do not, the mediator files a "Mediator's Report" with the clerk of court indicating which party failed to appear. Thus, when the time stamp for a scheduled mediation was around fifteen minutes after the scheduled start time, this was presumed to involve a Mediator's Report filed after one or both parties failed to appear. Those cases were excluded from the data set. We also relied on a spreadsheet prepared by the clerks of Justice Court which had data for all landlord-tenant mediations conducted in 2020, 2021, 2022, and some cases from 2023.[103] This spreadsheet, in some cases, indicated a failure of one party to appear. We cross-checked the clerks' spreadsheet and excluded any failure to appear cases from the data set.

When the docket reports indicated no entries in the case following mediation, or a plaintiff's motion to dismiss, we designated these settled cases requiring no further judicial intervention.[104] The clerks note that many pro se plaintiffs never file the form motion to formally dismiss their case, despite being a requirement in the standard mediated agreement form used by the volunteer mediators.[105]

Our data tracks settlement in two stages. First, we calculated the total number of cases which reached an agreement at mediation, labeled "Initial Settlement." From there, our calculations noted the percent of all the settled cases that remained settled and required no further judicial intervention.

Cases set for mediation where the initiating party (Plaintiff) filed it as a small claims case were excluded from the sample. Cases using small claims procedure are rarely filed in Missoula County Justice Court (10 or less per year) and have drastically different rules from the general civil cases, including a cap of $7,000 on the amount in controversy and a bar on representation by an attorney.[106] For these reasons, the data set excluded small claims cases.

---

[102] MONTANA JUDICIAL BRANCH, MONTANA PUBLIC ACCESS PORTAL(S), https://courts.mt.gov/Courts/portals.

[103] Justice Court Eviction Excel Spreadsheet 2020-2023 from Jessie Buresh and Erynn Flaherty, Clerks of Missoula County Justice Court (Feb. 9, 2024) (on file with the authors).

[104] Complete Mediation Statistics Excel Spreadsheet 2019-2023 by Brock Flynn and Brianna Anderson, (Apr. 23, 2024) (on file with the authors)(hereinafter "Mediation Statistics").

[105] Interview with Jessie Buresh and Erynn Flaherty, Clerks of Missoula County Justice Court, in Missoula, MT (Feb. 6, 2024)(hereinafter "Interview with Clerks").

[106] Mont. Code Ann. § § 25-35-505(2), 25-35-502(1) (2023). *Cf*. Rule 2(a) of the Montana Justice & City Court Civil Procedure Rules, § § 25-23-1, 3-10-301(1)(a) (counsel allowed and an amount in controversy not exceeding $15,000)

C. Summary of Data Sample

A total of 358 cases were sent to mediation.[107] Cases were organized by case type. Most cases sent to mediation in the sample were lawsuits for possession, filed by a landlord against their tenant(s). Of the 358 total cases, 270 were possession lawsuits, or about 75%.[108] The non-possession cases consisted of an assortment of different case types, including, in order of frequency: civil cases not otherwise specified (30), consumer contract disputes (24), debt collection (19), claims by tenants against a landlord (8), domestic disputes (3), disputes between businesses (3), and insurance subrogation (1).[109] This article will use the term "general civil cases" to refer to non-possession cases.

The volume of possession lawsuits varied significantly by year. The first year for the study, 2019, had 76 possession cases. 2020 and 2021 had a sharp decrease in possession cases, with 29 and 51, respectively. For 2022 and 2023, possession cases went back up, with 63 and 102, respectively.[110] The low number likely stems from the national eviction moratorium, which began at the beginning of the COVID-19 pandemic in March 2020, and ended by order of the U.S. Supreme Court in August of 2021.[111]

The total possession cases rose drastically in the year following the end of the eviction moratorium. Cases for 2022 went up to 63, and in 2023, went to 102, exceeding the pre-pandemic total for 2019 of 76.[112] The site of the study, Missoula, Montana, has experienced a housing crisis that is part of a larger national trend. Missoula faced the same issues as part of the national trend, including high interest rates, along with the increased cost of building materials and labor. Problems specific to Montana and Missoula include an influx of new residents, increased rent, and low or below average wages.[113] Figure 1 provides the volume of possession cases over the study period:

---

[107] Mediation Statistics, *supra* note 104.
[108] *Id.*
[109] *Id.*
[110] *Id.*
[111] Sanford P. Shatz & Shaun Kevin Ramey, *Supreme Court Strikes Down the CDC's Second Eviction Moratorium*, AMERICAN BAR ASSOCIATION, BUSINESS LAW TODAY (Sep. 14, 2021), https://www.americanbar.org/groups/business_law/resources/business-law-today/2021-september/supreme-court-strikes-down-the-cdc/.
[112] Mediation Statistics, *supra* note 104.
[113] David Erickson, *Nowhere to go: Montana's affordable housing crisis*, THE MISSOULIAN (May 15, 2023), https://missoulian.com/news/local/nowhere-to-go-montanas-affordable-housing-crisis/article_beda4ebe-edc2-11ed-be8e-f3ae72e0fb81.html;
Susan Shaig, *Has Montana really solved its affordable housing crisis?* MONTANA FREE PRESS (Nov. 11, 2023), https://montanafreepress.org/2023/11/23/has-montana-really-solved-its-housing-crisis/.

Fig. 1 – Landlord-Tenant Cases

Year	Number
2019	76
2020	29
2021	51
2022	62
2023	102

In contrast to the possession cases, general civil cases stayed relatively constant for all five years:[114]

Fig. 2 – General Civil Cases

Year	Number
2019	21
2020	17
2021	18
2022	17
2023	15

The low volume and stable nature of general civil cases is attributable to several factors. One principal factor is the interrelationship between motivations to seek a legal claim for a grievance and the disincentives for doing so. Studies have shown that most aggrieved parties do not seek formal legal redress, because of perceived lack of redressability, costs and hassle associated with pursuing a legal claim, the grievance was resolved to the party's satisfaction, reluctance to make a claim due to a relational element, negative consequences associated with seeking a claim, and lack of knowledge about who to assert a claim against.[115] The numbers for general civil mediations represent a small portion of aggrieved parties who made it to court notwithstanding various disincentives and intervening factors.

Another explanation for the low volume of general civil cases is the process involved. These cases have an initial hearing in court, before the judge, where both

[114] Mediation Statistics, *supra* note 104.

[115] Herbert M. Kritzer, *The Antecedents of Disputes: Complaining and Claiming*, 1 ONATI SOCIO-LEGAL SERIES 1, 12 (2011). The author cites a number of studies, including: COMPENSATION AND SUPPORT FOR ILLNESS AND INJURY, 70-76 (Donald Harris ed., Oxford University Press 1984); Kristen Bumiller, *Victims in the Shadow of the Law: A Critique of the Model of Legal Protection*, 12 JOURNAL OF WOMEN IN CULTURE AND SOCIETY 421-439 (1987); Neil Vidmar, *Seeking Justice: An Empirical Map of Consumer Problems and Consumer Responses in Canada*, 26 OSGOODE HALL LAW JOURNAL 757, 780-782 (1988); W.A. BOGART & NEIL VIDMAN, *Problems and Experiences with the Ontario Civil Justice System: An Empirical Assessment*, in ACCESS TO CIVIL JUSTICE 30 (Allan C. Hutchinson ed., 1990); DEBORAH HENSLER ET. AL., COMPENSATION FOR ACCIDENTAL INJURIES IN THE UNITED STATES, 169-170 (RAND Corporation)(1991); AMERICAN BAR ASSOCIATION, FINDINGS OF THE COMPREHENSIVE LEGAL NEEDS STUDY, 25, 46 (1994); HAZEL GLENN, PATHS TO JUSTICE: WHAT PEOPLE DO AND THINK ABOUT GOING TO LAW, 106-135 (Hart Publishing) (1999); AB CURRIE, THE LEGAL PROBLEMS OF EVERYDAY LIFE – THE NATURE, EXTENT, AND CONSEQUENCES OF JUSTICIABLE PROBLEMS EXPERIENCED BY CANADIANS, 56-57 (Department of Justice Canada) (2009).

parties must be present.[116] An initial point of contact in a formal court setting, before the judge, an authority figure, may motivate uninformed parties to reconsider their expectations, and even consider settlement or alternative ways to solve their claim and underlying grievance. These factors likely impact the total number of cases that went from an initial hearing to mediation.

IV. RESULTS OF THE STUDY

The primary motivation for conducting this study was to analyze compliance with mediated agreements. A principal objective of court-annexed mediation is to advance the final disposition of cases and reduce the court's docket. The clerks of Missoula Justice Court commented that many cases initially settled in mediation ended up back in court because one party alleges a breach of the agreement.[117] We wanted to get a better idea of the extent of breach in the mediation process. In addition, we wanted to assess the impact both of legal counsel—for either or both parties—and of mediating remotely via Zoom.

A. Settlement and Breach

In this section, we provide a narrative of the settlement data, broken down by year and case type. We employ the term "ultimate settlement rate" to refer to the number of cases out of the total sent to mediation that settled at mediation and required no further judicial intervention. In other words, the ultimate settlement rate represents cases that settled at mediation and stayed settled, with no party alleging a breach of the mediated agreement.

1. 2019

In 2019, 21 civil cases were referred to mediation. Of those 21 cases, 10 settled at mediation. This represents an initial settlement rate of 48%. Of the 10 cases settled at mediation, 6 cases proceeded without breach and required no further judicial intervention. Of the 21 civil cases referred to mediation, 6 settled and required no further judicial intervention. This represents an "ultimate" settlement rate of 29%.[118]

In 2019, 76 landlord-tenant cases were ordered to mediation. Of those 76, 55 settled at mediation. 20 cases resulted in impasse, and 1 case had an unknown outcome. This represents an initial settlement rate of 72%. Of those 55 cases settled at mediation, 16 resulted in breach, while 39 required no further judicial intervention. This represents an ultimate settlement rate of 51%.[119]

Of the 97 cases total for 2019, 65 resulted in an initial settlement. Of those 65, 45 remained settled and required no further judicial intervention, while 20 breached. This represents an initial settlement rate of 67%, and an ultimate settlement rate of 46%.[120]

---

[116] Interview with Clerks, *supra* note 105.
[117] Interview with Clerks, *supra* note 105.
[118] Mediation Statistics, *supra* note 104.
[119] *Id*.
[120] *Id*.

2. 2020

In 2020, 17 civil cases were referred to mediation. Of those 17 cases, 6 settled at mediation. This represents an initial settlement rate of 35%. Of the 6 cases settled at mediation, 5 cases proceeded without breach and required no further judicial intervention. Of the 17 civil cases referred to mediation, 5 settled and required no further judicial intervention. This represents an ultimate settlement rate of 29%.[121]

In 2020, 29 landlord-tenant cases were ordered to mediation. Of those 29, 15 settled at mediation. 14 cases resulted in impasse. This represents an initial settlement rate of 51%. Of those 15 cases settled at mediation, 7 resulted in breach, while 8 required no further judicial intervention. This represents an ultimate settlement rate of 27%.[122]

Of the 46 cases total for 2020, 21 resulted in an initial settlement. Of those 21, 13 remained settled and required no further judicial intervention, while 8 breached. This represents an initial settlement rate of 46%, and an ultimate settlement rate of 28%.[123]

3. 2021

In 2021, 18 civil cases were referred to mediation. Of those 18 cases, 7 settled at mediation. This represents an initial settlement rate of 39%. Of the 7 cases settled at mediation, 5 cases proceeded without breach and required no further judicial intervention. Of the 17 civil cases referred to mediation, 5 settled and required no further judicial intervention. This represents an ultimate settlement rate of 28%.[124]

In 2021, 33 landlord-tenant cases were ordered to mediation. Of those 33, 18 settled at mediation. 15 cases resulted in an impasse. This represents an initial settlement rate of 54%. Of those 15 cases settled at mediation, 6 resulted in breach, while 9 required no further judicial intervention. This represents an ultimate settlement rate of 36%.[125]

Of the 51 cases total for 2021, 25 resulted in an initial settlement. Of those 25, 17 remained settled and required no further judicial intervention, while 8 breached. This represents an initial settlement rate of 49%, and an ultimate settlement rate of 33%.[126]

4. 2022

In 2022, 17 civil cases were referred to mediation. Of those 17 cases, 12 settled at mediation. This represents an initial settlement rate of 71%. Of the 12 cases settled at mediation, 6 cases proceeded without breach and required no further judicial intervention. Of the 17 civil cases referred to mediation, 6 settled and

[121] *Id*.
[122] *Id*.
[123] *Id*.
[124] *Id*.
[125] *Id*.
[126] *Id*.

required no further judicial intervention. This represents an ultimate settlement rate of 29%.[127]

In 2022, 45 landlord-tenant cases were ordered to mediation. Of those 45, 21 settled at mediation. 24 cases resulted in impasse. This represents an initial settlement rate of 46%. Of those 21 cases settled at mediation, 6 resulted in breach, while 15 required no further judicial intervention. This represents an ultimate settlement rate of 33%.[128]

Of the 62 cases total for 2022, 27 resulted in an initial settlement. Of those 27, 21 remained settled and required no further judicial intervention, while 8 breached. This represents an initial settlement rate of 43%, and an ultimate settlement rate of 33%.[129]

5. 2023

In 2023, 15 civil cases were referred to mediation. Of those 15 cases, 7 settled at mediation. This represents an initial settlement rate of 47%. Of the 7 cases settled at mediation, all 7 cases proceeded without breach and required no further judicial intervention. Of the 15 civil cases referred to mediation, 7 settled and required no further judicial intervention. This represents an ultimate settlement rate of 47%.[130]

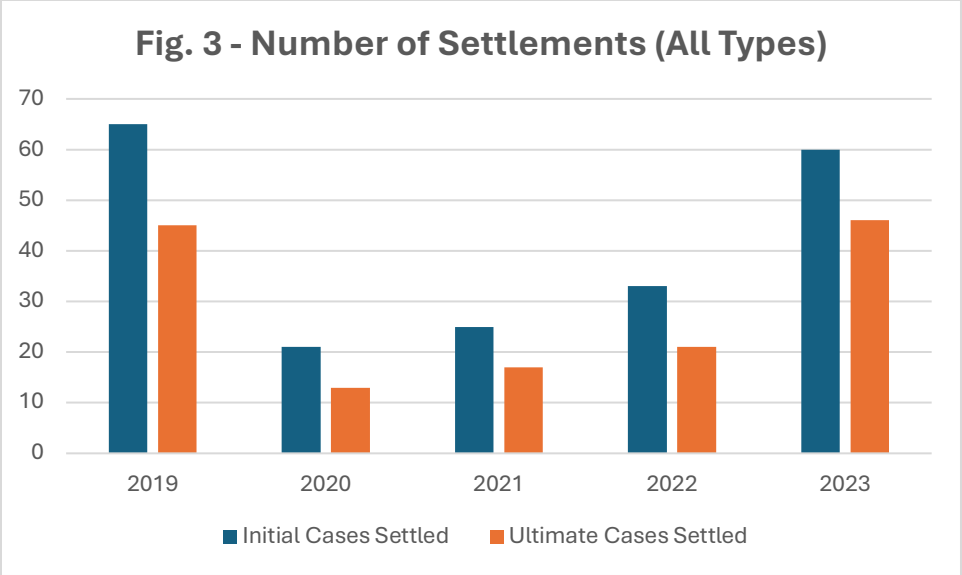
In 2023, 87 landlord-tenant cases were ordered to mediation. Of those 87, 53 settled at mediation. 34 cases resulted in an impasse. This represents an initial settlement rate of 60%. Of those 53 cases settled at mediation, 14 resulted in breach, while 39 required no further judicial intervention. This represents an ultimate settlement rate of 44%.[131]

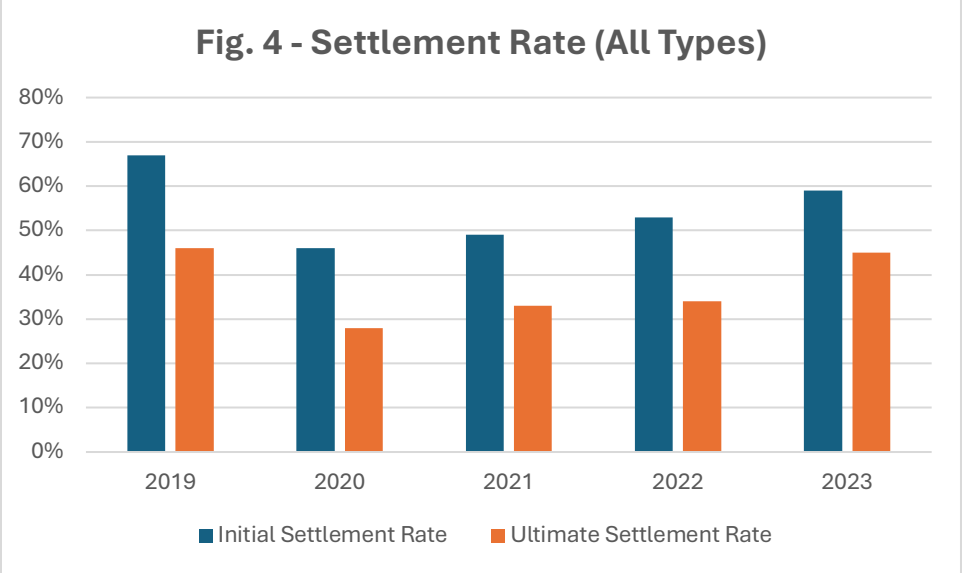
Of the 102 cases total for 2023, 60 resulted in an initial settlement. Of those 60, 46 remained settled and required no further judicial intervention, while 14 breached. This represents an initial settlement rate of 58%, and an ultimate settlement rate of 45%.[132]

6. Summary of Findings

Across all years and case types studied, we found a noticeable gap between the initial settlement rate and the ultimate settlement rate. While initial settlement rates tended to fall in the 40–60% range, ultimate settlement rates consistently fell lower, into the 28–46% range. On aggregate, 55% of cases initially settled, but only about 40% ultimately remained settled. Figures 3 & 4 show the total number of cases and the percentage of cases that initially settled and ultimately settled:

[127] *Id*.
[128] *Id*.
[129] *Id*.
[130] *Id*.
[131] *Id*.
[132] *Id*.





As the data show, a significant portion of mediated agreements fail to hold over time, raising questions about the durability and enforceability of these settlements. In sum, the data confirm the clerks' initial observations: a nontrivial subset of cases returns to court due to alleged breaches of mediated agreements. This recurrence suggests that while mediation may resolve disputes more quickly than litigation at the outset, the long-term effectiveness of mediation agreements is less assured.

B. Impact of Legal Counsel

As court-connected mediation has become ubiquitous, scholars have raised concerns about the risks of mediation for unrepresented, or pro se, parties.[133] In the

[133] *See* Joel Kurtzberg and Jamie Henikoff, *Freeing the Parties from the Law: Designing an Interest and Rights Focused Model of Landlord/Tenant Mediation*, 1997 J. DISP. RESOL. 75, 113. (1997)

words of Jackie Nolan-Haley, "[t]he "alegal character" of mediation exposes the inherent vulnerability of persons who come to court without knowledge of the law. The worst-case scenarios are unsettling: the possibility of unequal bargaining power; dominance by the more powerful party or an overbearing mediator; and unknown relinquishment of legal rights."[134] We analyzed the impact of counsel—for either or both parties—on settlement rates in landlord-tenant cases to test the effect of legal representation in mediation.

Out of the sample of 270 possession cases, the landlord had counsel but the tenant did not in 158 cases. [135] In those cases, the settlement rate was 59%.[136] In another 32 cases, both landlord and tenant had counsel.[137] In those cases, just 12% settled. Neither the landlord nor the tenant had counsel in 72 cases. Those cases resulted in a settlement rate of 27%. Finally, in just seven cases, the tenant had counsel but the landlord did not. The settlement rate for that small set was just 3%. Figure 5 shows the data graphically:

Fig. 5 – Effect of Counsel on Settlement Rates in Possession Cases

	Defendant Represented	Defendant Pro Se
Plaintiff Represented	12%	59%
Plaintiff Pro Se	3%	27%

The large discrepancy in settlement rates between cases in which the tenant had counsel and cases in which the tenant did not have counsel but the landlord did suggest that the concerns scholars have raised about the risks of mediation to unrepresented defendants may be justified. In the overwhelming majority of cases in which tenants had counsel, they did not settle in mediation. Presumably, that means defense counsel in those cases concluded that tenants would be better served by either negotiating outside mediation or proceeding to trial. If defense counsel correctly assessed their clients' interests and options, then it follows that many of the unrepresented tenants facing represented landlords in the 59% of those cases that settled in mediation must have entered into "bad" settlements. This could indicate that landlords' attorneys are able to guide the negotiation process in a manner that encourages—or pressures—tenants to settle on terms favorable to the

("Even when protection of rights is not the primary goal of mediation, the central goals of empowerment and self-determination cannot truly be fulfilled when parties are ignorant of the legal context surrounding their decisions.").

[134] Jacqueline M. Nolan-Haley, *Court Mediation and the Search for Justice through Law*, 74 WASH. U. L. Q. 47, 96-97 (1996).

[135] Mediation Statistics, *supra* note 104.

[136] *Id.*

[137] *Id*.

landlord. It may also reflect tenants' limited ability to advocate effectively without counsel or to fully understand their rights and options.

It is also possible that other factors are at work. It is unclear whether the low settlement rate indicates that parties are effectively exercising self-determination—by pursuing their legal rights rather than agreeing to a settlement that may not be in their interests—or that lawyers come to dominate the process at the expense of party self-determination. Further, when both parties have counsel, formal settlement may not occur at the mediation.[138] When a framework for an agreement is reached during the mediation, counsel often handle the formal acts of settlement outside the mediation room, such as exchanging drafts of settlement agreements following the mediation until both sides are satisfied.[139] Additionally, it is the standard practice of some landlord's attorneys to insist that the mediator not report a settlement. Rather, they keep the case open and wait to vacate the possession hearing until the tenant meets their obligations under the mediated agreement or settlement agreement. So it is possible that many cases are settling *because* of mediation, even if they are not settled *in* mediation.

C. Impact of Remote Mediation

Remote mediation, a form of Online Dispute Resolution (ODR), has experienced a significant uptick in utilization since the inception of the COVID-19 pandemic.[140] Prior to the COVID-19 pandemic, ODR had relatively limited utilization.[141] Today, remote mediation has become business as usual for many ADR practitioners and participants.[142] Our study included both in-person and remote mediations. During the early stages of the COVID-19 pandemic in 2020, the Missoula County Justice Court moved to fully remote mediations, conducted on Zoom. Beginning in 2021, the Justice Court re-introduced in-person mediations, while also keeping a slate of Zoom mediations.[143] Remote mediations spanned four out of five years of the data sample, as 2019 had all in-person mediation.

There were 107 cases total for 2020-2023.[144] Of those 107, 53 initially settled, for an initial settlement rate of 49.5%. Of those 53 that initially settled, 21 breached, with 32 cases requiring no further judicial intervention. This represents an ultimate settlement rate of 29.9 %.[145] The ultimate settlement rate for the remote mediation sample, 29.9 %, is significantly lower, by ten points, than the aggregate ultimate settlement rate, 39.6 %.[146]

The lower ultimate settlement rate for cases handled via remote mediation suggests that, while parties may initially settle in remote environments, these agreements are less likely to hold up without subsequent breach. The absence of in-

---

[138] Hegman Interview, *supra* note 95.
[139] *Id*.
[140] Sean Keefer, *Mediation Reboot: The Future of Alternative Dispute Resolution in South Carolina*, 33 S. CAROLINA LAWYER 37 (2021)
[141] *Id*. at 40.
[142] *Id*.
[143] Hegman Interview, *supra* note 95.
[144] Mediation Statistics, *supra* note 104.
[145] *Id*.
[146] *Id*.

person interaction—such as nonverbal communication cues, rapport-building, and the formality of a courthouse setting—could contribute to settlements that are more fragile or perceived as less binding. Further, remote mediation might encourage more tentative agreements if participants feel less engaged or less accountable due to the virtual environment. The physical distancing and relative informality of a video call may reduce the perceived seriousness of the agreement, making parties more prone to breaching later.

We, the authors, regularly conducted remote mediations during the years covered by the data sample. From our perspective, there are a variety of advantages and disadvantages associated with remote mediation. One significant advantage is flexibility for mediators, parties, and counsel. Remote mediation has the potential to expand the capacity of court annexed mediation programs, as volunteer mediators can conduct remote mediation from any place with internet access. The potential for an increase in the number of volunteer mediators is important for small claims court annexed mediation. Such programs typically struggle to retain volunteers due to high turnover.[147]

Importantly, there are major disadvantages with remote mediation. Small claims court annexed mediation often involves low income, pro se parties.[148] A mediation platform that requires both a digital device and broadband may greatly prejudice the ability of pro se parties to participate in the mediation process when considering the "digital divide," the disparity to internet access based on income and geographic location.[149] Confidentiality, a pillar of the process, is also a concern.[150] Without a closed and completely visible physical space, such as a jury or conference room, there is a risk that undisclosed third parties are eavesdropping on or influencing the process.[151]

D. Limitations and Caveats

It is important to recognize that many variables affect the outcomes of mediation, and that the impact of these variables may be very different depending on the specifics of the mediation program. One crucial variable involves the training and characteristics of the mediators. To give one example of how these variables can play out, the McEwen and Maiman study reported a modest overall settlement rate of 66.1%, and a compliance rate of 51.6% for future payment terms. The mediators from the study affirmatively told disputants that the process was voluntary, and no penalties associated with impasse.[152] In the authors' experience, however, mediators in the Missoula County Justice Court often have failed to advise parties that the mediation was voluntary and without penalties for impasse. This departure from the core principle of self-determination in practice may have

---

[147] Hegman Interview, *supra* note 95.
[148] Spain, *supra* note 11.
[149] GOVERNMENT ACCOUNTABILITY OFFICE, *Closing the Digital Divide for the Millions of Americans without Broadband*, https://www.gao.gov/blog/closing-digital-divide-millions-americans-without-broadband (Feb. 1, 2023).
[150] Susan Oberman, *Confidentiality in Mediation: An Application of the Right to Privacy*, 27 OHIO ST. J. ON DISP. RESOL. 539 (2012).
[151] Keefer, *supra* note 140, at 38-39.
[152] McEwen & Maiman, *supra* note 20, at 28-29, 243-44, 249-51, 262.

resulted in an atmosphere where disputants felt tethered to the bargaining table, and did not feel any confidence in the option to walk away. Without an understanding that leaving was an option, it is possible that parties agreed to terms that they could not or would not fulfill, providing an explanation for the low ultimate settlement rate.

In addition, the mediators from the sample consisted of a small group of both lay and law-trained mediators, serving as long-term volunteers. Mediators were only evaluated during their training, consisting of a typical 40-hour foundations course, four mediation observations, and four co-mediations.[153] No formal process exists for evaluation or critique of mediators following their initial training. The lack of opportunity for development and growth of individual mediators through evaluation and critique likely impacts settlement rates, as mediators could become entrenched in techniques and methods without the benefit of criticism and suggestions for improvement.

Finally, the formality of the process varies widely and may impact settlement rates. For example, John Geordt's study included the small claims courts of Portland and Washington, D.C., where disputants had an initial hearing before the judge, an authority figure, who encouraged parties to give mediation a try.[154] In contrast, the 75% of the cases in our study's sample involving possession lawsuits went to mediation without an initial hearing in court before the judge.[155] Without this formal first encounter in court in front of the judge, an authority figure, disputants do not have a moment prior to mediation where the process and potential consequences "feel real." Nor do they have an opportunity to see the judge face to face and hear an endorsement of the mediation process and potential benefits. Given that the process leading to mediation for three quarters of cases in this sample is so informal, a number of parties are unlikely to take the process seriously, or have much buy-in. This may also play a role in settlement rates.

V. CONCLUSION

While it is impossible to draw firm conclusions from such a limited data set, our findings suggest that the benefits of court-connected mediation of low-dollar-value civil cases are modest, at best. Although initial settlement rates can appear high—as high as 72% for landlord-tenant cases—those frequent initial settlements often fail to "stick." Ultimate settlement rates, for all types of cases, fall into a range between about 25% and 45%. Those percentages are not insignificant: a reduction of that magnitude in the number of cases requiring trial could result in meaningful reductions in both the backlog of cases to be adjudicated and the cost to the court system of processing those cases. But without having a baseline percentage of the settlement rate for cases that are not mediated, we cannot know whether mediation is actually diverting cases that would otherwise have been tried. Further, it is possible that the mediation program creates inefficiencies. Some amount of court resources go into maintaining and administering the mediation program. To deliver

[153] Hegman Interview, *supra* note 95.
[154] Geordt *supra* note 31, at 97-100.
[155] Interview with Clerks, *supra* note 105.

positive value, a mediation program must save more than it costs. As of now, we have no way of knowing whether that is happening.

The data on the impact of counsel in landlord-tenant cases also suggests a need for further research. The large gap between the settlement rate when both tenants and landlords have counsel (12%) and when only the landlord has counsel (59%) may indicate that tenants are regularly pressured into settlements that are worse than the outcomes they could expect from continuing to litigate. As noted earlier, however, it is possible that the reasons cases do not settle in mediation when the parties are represented have less to do with the best interests of the parties and more to do with settlement strategy or adversarial lawyering. The fact that 27% of the cases in which neither party was represented settled in mediation suggests that there is greater room for settlement when parties focus more on interests and less on legal rights and defenses.

Finally, remote mediation appears to have mixed results. Remote mediation has undeniable benefits in facilitating participation and program scalability. But those benefits come at a cost. The ultimate settlement rate for remote mediations was a full ten percentage points lower than the aggregate ultimate settlement rate. That lower ultimate settlement rate suggests that remote mediation may not foster the same level of accountability or engagement as in-person sessions.

In sum, this study confirms prior findings that parties often feel satisfied with mediation and that initial settlement rates can be substantial. Unlike most previous studies, however, we looked beyond initial settlements to assess the extent to which mediated agreements unravel, leaving parties back in court. The low ultimate settlement rates we found undermine some claims about the long-term efficacy of court-connected mediation. Our research also goes beyond past efforts by examining how legal representation affects settlement rates. We found significant impacts, potentially resulting in mediated settlements that leave tenants worse off than they would have been without mediation. This study also brings attention to the new frontier of remote mediation, suggesting that the flexibility of remote mediation may come at the cost of ultimate settlement results.