# Exploring the Role of Representation in Employment Mediation at the USPS

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## I. INTRODUCTION

During the past twenty years, alternative or appropriate dispute resolution (ADR) programs have begun to change the way employers deal with both labor and employment disputes. Arbitration, mediation, neutral fact finding, and ombuds offices are common ADR programs. Organizations with unions have long used arbitration as a tool to address disputes. More recently, organizations have adopted ADR, including mediation programs, in non-unionized settings to provide an alternative to costly and adversarial litigation in the courts.[1] This is often referred to as employment dispute resolution.[2] Mediation is a process in which parties negotiate a mutually agreeable resolution to their dispute with the help of a third party neutral; it is usually confidential.[3]

This study investigates the role of representation in an employment dispute resolution program independent from the collective bargaining agreement. More specifically, this study uses data from exit surveys completed by mediating parties and data tracking forms completed by mediators as part of the United States Postal Service's (USPS) "Resolve Employment Disputes Reach Equitable Solutions Swiftly" (REDRESS®) program. This research examines the relationship between the presence and nature of disputant representatives and mediation duration, mediation outcomes, and aspects of disputant satisfaction.

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[1] *See generally* CATHY A. COSTANTINO & CHRISTINA SICKLES MERCHANT, DESIGNING CONFLICT MANAGEMENT SYSTEMS: A GUIDE TO CREATING PRODUCTIVE AND HEALTHY ORGANIZATIONS (1996); JOHN T. DUNLOP & ARNOLD M. ZACK, MEDIATION AND ARBITRATION OF EMPLOYMENT DISPUTES (1997); KARL A. SLAIKEU & RALPH H. HASSON, CONTROLLING THE COSTS OF CONFLICT: HOW TO DESIGN A SYSTEM FOR YOUR ORGANIZATION (1998); WILLIAM URY ET AL., GETTING DISPUTES RESOLVED: DESIGNING SYSTEMS TO CUT THE COST OF CONFLICT (1993).

[2] *See* Adrienne E. Eaton & Jeffrey H. Keefe, *Introduction and Overview*, *in* EMPLOYMENT DISPUTE RESOLUTION AND WORKER RIGHTS IN THE CHANGING WORKPLACE 1, 5 (Adrienne E. Eaton & Jeffrey H. Keefe eds., 1999); *see also* Mary Rowe, *Dispute Resolution in the Non-Union Environment*, *in* WORKPLACE DISPUTE RESOLUTION: DIRECTIONS FOR THE TWENTY-FIRST CENTURY 79, 79 (Sandra E. Gleason ed., 1997) (discussing recent innovations in non-union conflict management).

[3] *See* CHRISTOPHER MOORE, THE MEDIATION PROCESS: PRACTICAL STRATEGIES FOR RESOLVING CONFLICT 14, 118 (1986). For a review of the empirical literature, see James A. Wall, Jr. et al., *Mediation: A Current Review and Theory Development*, 45 J. CONFLICT RESOL. 370 (2001).

First, we set this research in the context of other empirical and theoretical work. We briefly address research on employment dispute resolution generally and relevant theories for researching employment dispute resolution. We review empirical research on the impact specific kinds of representatives or agents have on dispute processing, such as union stewards and labor lawyers in collectively bargained grievance-arbitration processes and attorneys in mediation of disputes in civil litigation. We next outline a useful theoretical frame for the instant study drawn from principal-agency theory as applied to negotiation and dispute resolution by Professors Mnookin, Peppet, and Tulumello.[4] The remaining sections address the design and history of the USPS employment mediation program (REDRESS®), the data and methods used, analysis and results, and a discussion of results.

We conclude that representation in general makes a valuable contribution to the mediation process, and that union representation specifically can play a constructive role in an employment mediation program outside the collective bargaining context. We also conclude that there is evidence suggesting that union representatives, complainants' lawyers, and respondents' lawyers play different roles in the mediation process, and that these differences are consistent with what principal-agency theory would predict.

## II. RESEARCHING EMPLOYMENT DISPUTE RESOLUTION

Workplace ADR programs are becoming increasingly common. A 1995 study found that 57% of 111 large manufacturing firms had instituted some form of ADR to manage workplace conflict,[5] while a GAO study placed the percentage of large private employers with ADR programs for nonunion employees at approximately 52%.[6] Organizations adopt mediation, arbitration, or other ADR programs for a number of reasons, including the desire to reduce the costs of dispute resolution while improving workplace communication and interpersonal relationships.[7] Some authors suggest that

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[4] *See* ROBERT H. MNOOKIN ET AL., BEYOND WINNING: NEGOTIATING TO CREATE VALUE IN DEALS AND DISPUTES (2000).

[5] Peter Feuille & Denise R. Chachere, *Looking Fair or Being Fair: Remedial Voice Procedures in Nonunion Workplaces*, 21 J. OF MGMT. 27, 33, 37 (1995).

[6] GEN. ACCOUNTING OFFICE, EMPLOYMENT DISCRIMINATION: MOST PRIVATE-SECTOR EMPLOYERS USE ALTERNATIVE DISPUTE RESOLUTION, GAO/HEHS-95-150, at 21 (1995).

[7] Lisa B. Bingham & Denise R. Chachere, *Dispute Resolution in Employment: The Need for Research*, *in* EMPLOYMENT DISPUTE RESOLUTION AND WORKER RIGHTS IN THE CHANGING WORKPLACE, *supra* note 2, at 95, 98–99; *see also* Jonathon F. Anderson & Lisa Bingham, *Upstream Effects from Mediation of Workplace Disputes: Some Preliminary Evidence from the USPS*, 48 LAB. L.J. 601, 602 (1997).

corporations may adopt employment dispute resolution programs to deal with workplace disputes because of a desire to avert unionization.[8] In fact, there is evidence that when a union covers some but not all employees in an organization, ADR policies are less likely to be offered to the non-unionized employees.[9] Still other commentators surmise that unions could play a useful role in employment arbitration through some form of associate membership in exchange for representation services.[10]

In addition to the growth of ADR in private corporations, governmental bodies are also increasing their use of ADR.[11] In recent years, legislation has been introduced into the United States House of Representatives to mandate federal agency participation in employment mediation upon the request of the employee.[12] As these programs spread, it is important that program designers and program participants better understand the factors that influence settlements and participant satisfaction.

Representation is one element of dispute system design, an element that is judged to be fundamental to fairness according to the *Due Process Protocol for Mediation and Arbitration of Statutory Disputes Arising out of the Employment Relationship* (*Protocol*).[13] The *Protocol* does not have the force of law, but it does represent one statement of best practice in employment dispute system design.

Although there is relatively little empirical research on employment dispute resolution,[14] there is a body of work on the collectively bargained

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[8] DAVID B. LIPSKY & RONALD L. SEEBER, THE APPROPRIATE RESOLUTION OF CORPORATE DISPUTES: A REPORT ON THE GROWING USE OF ADR BY U.S. CORPORATIONS 15–19 (1998); *See generally* David B. Lipsky & Ronald L. Seeber, *In Search of Control: The Corporate Embrace of ADR*, 1 U. PA. J. LAB. & EMP. L. 133, 134 (1998).

[9] John Thomas Delaney & Peter Feuille, *The Determinants of Nonunion Grievance and Arbitration Procedures*, *in* PROCEEDINGS OF THE FORTY-FOURTH ANNUAL MEETING OF THE INDUSTRIAL RELATIONS RESEARCH ASSOCIATION 529, 533–34 (John F. Burton Jr. ed., 1992); *see* Feuille & Chachere, *supra* note 5, at 39.

[10] Lisa B. Bingham, *Emerging Due Process Concerns in Employment Arbitration: A Look at Actual Cases*, 47 LAB. L.J. 108, 119 (1996).

[11] FEDERAL ADMINISTRATIVE DISPUTE RESOLUTION DESKBOOK 507 (2001); Lisa B. Bingham & Charles R. Wise, *The Administrative Dispute Resolution Act of 1990: How Do We Evaluate its Success?*, 6 J. PUB. ADMIN. RES. & THEORY 383, 384 (1996); Rosemary O'Leary et al., *The State of the States in Environmental Dispute Resolution*, 14 OHIO ST. J. ON DISP. RESOL. 515, 515 (1999).

[12] The National Employment Dispute Resolution Act, H.R. 4593, 106th Cong. (2000).

[13] A Due Process Protocol for Mediation and Arbitration of Statutory Disputes Arising out of the Employment Relationship, *at* http://www.adr.org/rules/employment/protocol.html (May 9, 1995).

[14] For a review of the literature, see BINGHAM & CHACHERE, *supra* note 7, at 97.

grievance procedure.[15] This work is sufficiently well developed that it has yielded a set of theories that can help frame research on employment dispute resolution processes. The theories relevant to this study include systems theory, human resource management theory, industrial relations theory, and procedural-distributive justice theory.[16] Each of these theoretical perspectives is briefly discussed below.

Systems theory and human resource management theory are alike in that they examine the relationship between the grievance procedure and the organization.[17] Specifically, systems theorists examine the connections among several variables and the different stages of grievance procedures, emphasizing a correlation between labor relations and the filing, processing, settlement, and post-settlement outcomes of grievances.[18] Similarly, to the extent that a union representative plays a role in a complaint process that is parallel to, but independent from, the grievance procedure, industrial relations theory suggests that the labor relations system and climate might influence how the union representative executes his or her role.[19]

Those who examine grievance procedures from the perspective of human resource management theory suggest that human resource practices encouraging worker participation in work teams, problem-solving, and other high-involvement activities can improve grievance procedures and have a positive effect on organizational performance.[20] An employment dispute resolution program that promotes employee direct participation, with any representative of his or her choice, might similarly have a positive effect on how employment disputes get processed.

Procedural justice theorists argue that organizational decisions will be more readily accepted if the processes by which they are achieved are perceived to be fair.[21] Distributive justice theorists, in contrast, focus on "the

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[15] *See generally* David Lewin, *Theoretical and Empirical Research on the Grievance Procedure and Arbitration: A Critical Review*, *in* EMPLOYMENT DISPUTE RESOLUTION AND WORKER RIGHTS IN THE CHANGING WORKPLACE, *supra* note 2, at 137, 137 (summarizing and evaluating empirical research as to the grievance procedure).

[16] For a comprehensive review and synthesis, see *id.*

[17] *Id.* at 139–41.

[18] *See, e.g.*, DAVID LEWIN & RICHARD B. PETERSON, THE MODERN GRIEVANCE PROCEDURE IN THE UNITED STATES 204–10 (1988).

[19] *See* Lewin, *supra* note 2, at 140.

[20] *Id.* at 141.

[21] Jerald Greenberg, *Looking Fair vs. Being Fair: Managing Impressions of Organizational Justice*, *in* 12 RES. ORGANIZATIONAL BEHAV. 111, 112 (Barry M. Staw & L.L. Cummings eds., 1990). *See generally* BLAIR H. SHEPPARD ET AL., ORGANIZATIONAL JUSTICE: THE SEARCH FOR FAIRNESS IN THE WORKPLACE (1992) (applying the justice theory).

fairness of the distribution of the conditions and goods that affect individual well-being."[22] Previous work on procedural justice has shown that parties are more likely to be satisfied with the outcome of a dispute resolution process when they perceive that the process itself is fair.[23] Parties in a dispute are most likely to perceive the process as fair when they have an opportunity to participate in the process, when they feel a sense of control over the process, and when they are treated with respect. The right to representation is one element relevant to process fairness. Many advocates for ADR feel that disputants have more opportunities to participate during ADR proceedings than in traditional court proceedings. This ability to voice concerns, be treated with respect, and have control over the outcome of the mediation may lead to higher satisfaction levels. Higher settlement rates and increased party satisfaction may result in cost savings to employers as protracted litigation is reduced or avoided. Employee turnover may also be reduced.[24] Perceptions of the fairness of the grievance procedure affect perceptions about the effectiveness of those procedures;[25] indeed, researchers have found that employee satisfaction is more strongly influenced by the perceived fairness of the grievance procedure than by the perceived fairness of the grievance outcome.[26] In short, perceptions of process fairness significantly influence employee perceptions and attitudes toward grievance procedures.[27]

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[22] MORTON DEUTSCH, DISTRIBUTIVE JUSTICE: A SOCIAL-PSYCHOLOGICAL PERSPECTIVE 1 (1985). For a general introduction to procedural and distributive justice, see Morton Deutsch, *Justice and Conflict, in* THE HANDBOOK OF CONFLICT RESOLUTION: THEORY AND PRACTICE (Morton Deutsch & Peter T. Coleman eds., 2000).

[23] *See generally* E. ALLAN LIND & TOM R. TYLER, THE SOCIAL PSYCHOLOGY OF PROCEDURAL JUSTICE (1988) (exploring how judgments on whether procedures and social processes are fair can influence an individual's reaction to an experience); SHEPPARD ET AL., *supra* note 21 (exploring the theme of justice in organizations); JOHN W. THIBAUT & LAURENS WALKER, PROCEDURAL JUSTICE: A PSYCHOLOGICAL ANALYSIS (1975).

[24] Denise R. Chachere, Does Employee Voice Reduce Turnover? Some Evidence from Nonunion Grievance Procedures, Presentation at the Industrial Relations Research Association Annual Meeting (Jan. 5, 1997).

[25] LEWIN & PETERSON, *supra* note 18, at 132–36.

[26] Gerald E. Fryxell & Michael E. Gordon, *Workplace Justice and Job Satisfaction as Predictors of Satisfaction with Union and Management*, 32 ACAD. MGMT. J. 851, 862–63 (1989).

[27] R. Folger & J. Greenberg, *Procedural Justice: An Interpretive Analysis of Personnel Systems, in* RESEARCH IN PERSONNEL AND HUMAN RESOURCE MANAGEMENT 141, 141–83 (M. Rowland & G.R. Ferris, eds., 1985); Fryxell & Gordon, *supra* note 26, at 862–63.

## III. ATTORNEYS AND UNION REPRESENTATIVES

Although there has been a growing body of commentary regarding what constitutes appropriate lawyer-client representation in mediation,[28] there has been limited empirical research regarding the role of representatives in employment dispute resolution.[29] The extant empirical research addresses the role of union stewards in collectively bargained grievance procedures, the role of labor lawyers in grievance arbitration, and the role of lawyers in mediation of lawsuits.

Industrial relations and organizational behavior scholars have examined the role that shop stewards play in the collectively bargained grievance procedure by seeking to quantify determinants of grievance activity.[30] One study developed a model of grievance initiation by examining the grievance-related behaviors of supervisors, employees, and shop stewards.[31] Researchers found that stewards with more years of education and

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[28] A review of that literature is beyond the scope of this article. For a helpful recent review and synthesis of that literature, see Jean R. Sternlight, *Lawyers' Representation of Clients in Mediation: Using Economics and Psychology to Structure Advocacy in a Nonadversarial Setting*, 14 OHIO ST. J. ON DISP. RESOL. 269 (1999) (examining in detail arguments for and against adversarial advocacy by lawyers on behalf of clients in mediation, and framing a way of examining how lawyers can help clients overcome barriers to settlement and reach well-advised settlements in mediation). *See generally* John Lande, *How Will Lawyering and Mediation Practices Transform Each Other*, 24 FLA. ST. U. L. REV. 839 (1997) (arguing for high-quality consent by principals, including explicit consideration of principals' goals and interests, explicit identification of plausible options, principals' explicit choice of options for consideration, careful consideration of options, mediators' restraint in pressuring principals to select particular options, limitation on use of time pressure, and confirmation of consent, all in light of evolving "liti-mediation" culture in which mediators view lawyers or agents as clients); Jacqueline M. Nolan-Haley, *Lawyers, Clients, and Mediation*, 73 NOTRE DAME L. REV. 1369 (1998) (arguing against adversarial representation and for a deliberative process model of client representation and informed client consent in the mediation process).

[29] *See generally* Bingham & Chachere, *supra* note 7 (examining recent empirical research on alternative dispute resolution processes in the employment context).

[30] For recent reviews of empirical literature on grievance procedures, see Peter Feuille, *Dispute Resolution Frontiers in the Unionized Workplace*, *in* WORKPLACE DISPUTE RESOLUTION 17 (Sandra E. Gleason ed., 1997); Peter Feuille, *Grievance Mediation*, *in* EMPLOYMENT DISPUTE RESOLUTION AND WORKER RIGHTS IN THE CHANGING WORKPLACE, *supra* note 2, at 187; David Lewin, *Theoretical and Empirical Research on the Grievance Procedure and Arbitration: A Critical Review*, *in* EMPLOYMENT DISPUTE RESOLUTION AND WORKER RIGHTS IN THE CHANGING WORKPLACE, *supra* note 2, at 137.

[31] Brian Bemmels et al., *The Roles of Supervisors, Employees, and Stewards in Grievance Initiation*, 45 INDUS. & LAB REL. REV. 15, 15 (1991).

completion of the union's steward training were more likely to informally resolve grievances.[32] More frequent attempts to resolve grievances informally in turn reduced the grievance rate.[33] In general, the authors found that the grievance behaviors of employees and stewards were more useful in predicting grievance rates than other characteristics, including race or gender of employees and stewards, work groups, and technology.[34] One study of a sample of southern labor locals found that while most grievance procedures provided for an oral first step (85%), the majority of those interviewed (74%) reported that few or no grievances were settled at that step, because first line supervisors had no authority to settle.[35]

Using principal-agency theory as his frame, Professor Brian Bemmels found that shop stewards are most satisfied with grievance procedures that permit oral presentation of grievances at the first step and screening by grievance committees and others in union leadership.[36] Moreover, the higher the grievance rate and larger the work group, the less satisfied stewards were with the procedure, while the greater the proportion of grievances successfully resolved by year end, the more satisfied the stewards.[37] This makes sense, in that the grievance rate and number of employees represented affect the steward's workload, while the resolution rate is a measure of the steward's success as an agent. Bemmels observes that successful and timely resolution of grievances "will enhance stewards' intrinsic rewards."[38]

Studies have examined the impact of attorneys on labor arbitration, but not mediation, outcomes.[39] In their work, Block and Stieber found that a party received a more favorable labor arbitration outcome when they had legal counsel and the other party did not.[40] When both parties lacked legal counsel, the outcomes were similar to those cases where both sides brought

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[32] *Id.* at 22.

[33] *Id.* at 23.

[34] *Id.* at 27.

[35] Judith L. Catlett & Edwin L. Brown, *Union Leaders' Perceptions of the Grievance Process*, 15 LAB. STUD. J 54, 58 (1990).

[36] Brian Bemmels, *Shop Stewards' Satisfaction with Grievance Procedures*, 34 INDUS. REL. 578, 590–92 (1995).

[37] *Id.* at 590.

[38] *Id.*

[39] *See, e.g.*, David E. Bloom & Christopher L. Cavanaugh, *An Analysis of the Selection of Arbitrators*, 76 AM. ECON. REV. 408, 416–19 (1986).

[40] Richard N. Block & Jack Stieber, *The Impact of Attorneys and Arbitrators on Arbitration Awards*, 40 INDUS. & LAB. REL. REV. 543, 553 (1987).

legal counsel.[41] Some researchers found that the presence of legal counsel reduced delay in grievance arbitration.[42]

The above research addresses the collectively bargained grievance-arbitration process, not employment dispute resolution outside the collective bargaining relationship. However, the role of union representatives and coworker representatives in employment dispute resolution is the subject of evolving legal standards under federal labor laws. An employee in a unionized workplace may seek the assistance of a union representative when using a dispute resolution program as one form of concerted activity for mutual aid and protection.[43] Employee protests of discrimination have been held protected forms of concerted activity.[44] The National Labor Relations Board recently opened the door to coworkers as representatives in nonunion work places, at least in investigatory interviews that may result in discipline.[45] In contrast to work on lawyers in labor arbitration, we have found no relevant empirical research examining the role that union or coworker representatives play in outcomes or perceptions of fairness in mediation.

There is another body of empirical work examining lawyers in litigation and ADR. Researchers examined the role of legal representation as part of a comprehensive evaluation of litigants' perceptions of trials, court-annexed arbitration, and judicial settlement conferences. They found, in general, that disputants perceived litigation and arbitration as fairer and were more satisfied with the outcomes of these than judicial settlement conferences.[46] They also found a statistically significant correlation between evaluations of counsel and procedural justice and satisfaction.[47] However, they found that

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[41] *Id.* at 553–54.

[42] Allen Ponak et al., *Using Event History Analysis To Model Delay in Grievance Arbitration*, 50 INDUS. & LAB. REL. REV. 105, 118 (1996).

[43] *See generally* 1 SECTION OF LABOR & EMPLOYMENT LAW, AM. BAR. ASS'N, THE DEVELOPING LABOR LAW 137 (Patrick Hardin et al., eds., 3d ed. 1992) [hereinafter THE DEVELOPING LABOR LAW] (describing employee activity for mutual aid and protection as including, for example, protests of violations of state law). Although the authors have found no cases on point, this is the likely rule.

[44] *Id.* at 159–60 (citing NLRB v. Magnetics Int'l, 699 F.2d 806 (6th Cir. 1983) *enforcing* 254 N.L.R.B. 520 (1981) (filing and pursuing Title VII claim held protected concerted activity)).

[45] Epilepsy Found. of N.E. Ohio, 331 N.L.R.B. No. 92 (July 10, 2000) (holding that *Weingarten* rights to a representative extend to nonunion employees as a form of concerted activity for mutual aid and protection).

[46] E. ALLAN LIND ET AL., THE PERCEPTION OF JUSTICE 79 (1989).

[47] *Id.* at 61.

participation did not appear to be an important factor in the parties' judgments of procedural justice or satisfaction.[48]

Stuart and Savage examined the impact of attorney representation on ADR settlement rates in civil cases in a "multi-door" courthouse offering mediation, arbitration, early neutral evaluation, and other ADR services.[49] They concluded that cases with attorney representation had settlement rates of 48% compared to a settlement rate of 75% for those in which parties did not have legal counsel.[50] A number of scholars have examined the impact of attorney representatives on the ability of parties to settle disputes in litigation. These studies have particularly emphasized the potential conflict of interest between resolving disputes efficiently and billing clients by the hour.[51] Arrow et al. state that the payoff structures inherent in most attorney-client relationships generally reward adversarial behavior and may increase the transaction costs of settling disputes.[52] On the other hand, attorneys receive a significant percentage of their business from referrals. Those attorneys with reputations as efficient problem-solvers may increase the amount of business they receive overall, rather than the number of billable hours per client. On the whole, the authors conclude that "sometimes lawyers help and sometimes they hurt, when it comes to cooperatively resolving conflict."[53]

Some researchers have examined the role of lawyers in mediation of certain kinds of cases. In divorce mediation, researchers observed that some states forbid attorneys from directly participating in mediation, while others regulate the process.[54] "The typical rationale for excluding lawyers is that they 'spoil' mediation: 'Lawyers will interfere with candid expression by the parties and thwart a problem-solving style of negotiation.'"[55] However, in an interview study of Maine divorce lawyers with experience in mandatory mediation, Professors McEwen, Rogers, and Maiman found that the family

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[48] *Id.* at 63.

[49] Kenneth K. Stuart & Cynthia A. Savage, *The Multi-Door Courthouse: How It's Working*, 26 COLO. LAW., Oct. 1997, at 13–17 (1997).

[50] *Id.* at 14.

[51] *See generally* BARRIERS TO CONFLICT RESOLUTION (Kenneth J. Arrow et al. eds., 1995); CATHY A. COSTANTINO & CHRISTINA SICKLES MERCHANT, DESIGNING CONFLICT MANAGEMENT SYSTEMS: A GUIDE TO CREATING PRODUCTIVE AND HEALTHY ORGANIZATIONS (1996).

[52] BARRIERS TO CONFLICT RESOLUTION, *supra* note 51, at 205.

[53] *Id.* at 211.

[54] Craig A. McEwen et al., *Bring in the Lawyers: Challenging the Dominant Approaches to Ensuring Fairness in Divorce Mediation*, 79 MINN. L. REV. 1317, 1331 (1995).

[55] *Id.*

law bar readily adapted to mediation and that lawyers learned with experience the appropriate role to play in representing their divorce clients.[56] Settlement rates for cases with lawyers in mandatory mediation compared favorably to those reported for programs without lawyers.[57]

In a study of how corporations manage disputing, Professor McEwen observed that the training that attorneys receive prepares them for the adversarial relationships more commonly found in courtrooms than in boardrooms, where joint-problem solving skills might prove more efficient.[58] This training combines with a professional culture that encourages extremely thorough and very costly discovery.[59] As a result, McEwen argues that the activities of outside counsel can sometimes make dispute resolution more costly and less efficient.[60] Moreover, there are differences between the incentive structures of outside counsel, who may be paid by the hour worked, and in-house counsel, who earn a fixed annual salary regardless of caseload.[61] However, as corporations seek to reduce overhead and target high costs for outside counsel, some inside counsel take a different, more proactive approach to managing disputing, and are moving toward earlier efforts at dispute analysis and resolution.[62]

Professor John Lande similarly has found that while outside counsel continue to have faith in litigation, business executives have less faith, and in-house lawyers fall somewhere in the middle.[63] In a subsequent study, Professor Lande found that there was more congruence in attitudes toward mediation among outside counsel, business executives and inside counsel, but that inside lawyers believed that greater ADR use would improve their prestige and opportunities to do satisfying work, while business executives believed that ADR would provide greater autonomy from their lawyers.[64]

One study of the ADR program implemented by the Massachusetts Commission Against Discrimination examined attorneys' perceptions of the

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[56] *Id.* at 1368.

[57] *Id.* at 1364.

[58] Craig A. McEwen, *Managing Corporate Disputing: Overcoming Barriers to the Effective Use of Mediation for Reducing the Cost and Time of Litigation*, 14 OHIO ST. J. ON DISP. RESOL. 1, 13 (1998).

[59] *Id.*

[60] *Id.* at 11.

[61] *Id.* at 11–12.

[62] *Id.* at 18–19.

[63] John Lande, *Failing Faith in Litigation? A Survey of Business Lawyers' and Executives' Opinions*, 3 HARV. NEGOT. L. REV. 1, 15–16 (1998).

[64] John Lande, *Getting the Faith: Why Business Lawyers and Executives Believe in Mediation*, 5 HARV. NEGOT. L. REV. 137, 209–10 (2000).

program.[65] However, the program was limited to parties with counsel; pro se litigants were excluded.[66] Attorneys reported quick resolution and liking the process as leading advantages, while they cited the lack of settlement and cost as the leading disadvantages.[67]

This empirical research on lawyers, clients, and dispute resolution suggests that there are differences in incentive structures among inside and outside counsel, and divergent interests between principals including business executives and their outside counsel agents. However, we have uncovered no previous research examining the correlation between different types of representatives, such as attorneys or union representatives, and employment mediation duration, settlement rates, and participant satisfaction.

## IV. PRINCIPALS AND AGENTS: A THEORETICAL FRAME

Mnookin, Peppet and Tulumello provide a framework for thinking about how different kinds of representatives might affect the dynamics of employment mediation.[68] In an analysis of the tension between principals and agents, they observe that benefits of using an agent or representative include: (1) specialized knowledge about market conditions, formal or informal norms, risks or opportunities; (2) resources such as access based on the agent's reputation; (3) skills in negotiation because of experience, training or ability; and (4) strategic advantages in the form of negotiation tactics.[69] There are costs of agency, including the direct cost of the agent's fees and the hidden costs of building a relationship of trust with the agent, despite the possible conflicting interests the agent may have with the principal.[70] They note that principals and agents may differ as to preferences, incentives and information.[71] For example, as to preferences, the principal may be a one-shot player interested in the best outcome in a single deal, while the agent may be a repeat player concerned about relationships with

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[65] Thomas A. Kochan et al., *An Evaluation of the Massachusetts Commission Against Discrimination Alternative Dispute Resolution Program*, 5 HARV. NEGOT. L. REV. 233, 239–40 (2000).

[66] *Id.* at 276–77.

[67] *Id.* at 257.

[68] MNOOKIN ET AL., *supra* note 4, at 69–91 (examining the tension between principals and agents).

[69] *Id.* at 71.

[70] *Id.* at 75.

[71] *Id.*

other professionals and reputation in future deals.[72] As to incentives, if the agent is working on a fixed percentage commission, the agent may have an interest in getting a quick deal, while the principal may want the agent to work harder and longer for the best deal.[73] The agent may have information that has a bearing on the strength of the principal's position, but because the agent either wants the principal to close a deal or wants the principal to reject settlement, the agent may withhold that information.[74]

These tensions are likely to play out differently with different kinds of representatives or agents. At the USPS, an employee complainant must obtain his or her own legal counsel, but may use the assistance of a union representative for no cost. For this reason, in the employment setting, a plaintiff's lawyer is more likely to be a one-shot player than a union representative, who is a repeat player. Literature from game theory suggests that repeat players and one-shot players operate differently in litigation and dispute resolution.[75] This may give lawyers different preferences than union representatives in the course of their representation of similarly situated principals, i.e., the employee complainants. The plaintiff's lawyer will probably place a lower priority than a union representative on continuing relationships at the workplace, and a higher priority on a one-time cash settlement. Similarly, a friend, family member, or co-worker acting in a representative capacity is likely to give priority to the employee complainant's preferences and/or be more sensitive to continuing working relationships.

There are also likely to be significant differences in incentives. Mnookin observes that the incentives for lawyers have taken the form of a variety of fee structures, including the contingency fee, the hourly fee, the fixed fee, the mixed fee, as well as salary; however each of these has a flaw.[76] In the employment setting, a plaintiff's lawyer will not take a case on a contingency fee unless he or she believes that there is a good likelihood of recovery because he or she bears the risk of loss.[77] Since plaintiffs' lawyers often have a direct financial interest in the outcome of a case, they are likely to advise against a settlement unless it provides for a sufficient fund to cover their fees.

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[72] *Id.*; *see also* Marc Galanter, *Why the "Haves" Come Out Ahead: Speculations on the Limits of Legal Change*, 9 LAW & SOC'Y REV. 95, 97–104 (1974).

[73] MNOOKIN ET AL., *supra* note 4, at 75–76.

[74] *Id.* at 76. Differing rules of professional responsibility for lawyers as compared to layperson representatives may also play a role.

[75] *See id.* at 97–126; Galanter, *supra* note 72, at 98.

[76] MNOOKIN ET AL., *supra* note 4, at 83.

[77] *Id.*

In contrast, the union representative's relationship to a fee structure is attenuated. Employees pay union dues or agency service fees annually to cover the costs of representation in collective bargaining and contract administration.[78] There is no direct relationship between a given representative's caseload and compensation. The union representative will not personally recover anything in a cash settlement. Similarly, when friends or family act in a representative capacity, they typically take no financial interest in the case. Thus, both of these latter categories of representatives would be less concerned about a settlement involving non-economic components.

Systems theory and industrial relations theory both suggest that union representatives have incentives related to the health and well-being of the union as an organization.[79] These incentives might influence the union representative to resist or advise against any settlement that would conflict with, undermine, or set a poor precedent in relation to the collective bargaining agreement or relationship. In addition, union representatives may have incentives apart from the union as an organization, for example, concerns about managing a large caseload. To the extent that mediation provides opportunities for resolving multiple cases in different complaint streams, a union representative's incentives may differ from those of lawyers, coworkers, family, or friends. A lawyer paid by the hour may not have the same motivation.

There are also likely to be significant differences in information among different categories of representatives. For example, lawyers will have substantial knowledge and information regarding the merits of the underlying legal claim, the legal process steps beyond mediation necessary to pursue that claim, the attendant costs, and the likelihood of success.[80] Union representatives may also acquire specialized expertise regarding employment law, but the quality of that knowledge is likely to be more variable. Friends, family and co-workers are likely to have the least technical knowledge about relevant law. On the other hand, union representatives and co-workers will have more information regarding the workplace. Union representatives in particular will have more information about what is possible or workable in terms of a settlement, especially one not primarily economic, such as alternative work assignments.

It is important to acknowledge an interaction here between the nature of the representative and the principal's power to choose. A principal makes a conscious decision either to select a certain representative or to appear pro se,

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[78] *See* 1 THE DEVELOPING LABOR LAW, *supra* note 43, at 376.

[79] Lewin, *supra* note 15, at 139–40.

[80] MNOOKIN ET AL., *supra* note 4, at 70–71.

that is, represent himself or herself.[81] Several factors influence this choice. An awareness of the advantages and disadvantages of different kinds of representatives probably informs this choice. For example, it is likely that a principal with a stronger economic case will be more likely to seek out legal counsel, and the strength of the case will induce the lawyer to accept it on a contingent fee. On the other hand, a principal with a weaker economic case might choose a coworker or family member because the principal primarily seeks moral support. A principal with limited financial resources, but a desire for more experienced representation, might seek a union representative. A principal confident of his or her ability to advocate may opt to forego representation. The principal's power to choose may also be influenced by the strength of his or her case on the merits. How principals make these choices is beyond the scope of this study. Thus, we cannot conclude here that particular kinds of representatives produce particular outcomes. This study can identify patterns, but it cannot prove cause and effect.

The existing empirical literature does not sufficiently address the relationship between different types of representatives and the outcome of the dispute resolution process or the parties' satisfaction levels, especially concerning mediation and other forms of ADR processes. This study is intended as an initial exploration of relevant data.

## V. EMPLOYMENT MEDIATION AT THE USPS

In the spring of 1998, the USPS undertook national implementation of the REDRESS® mediation program, which offers optional, voluntary mediation to employees filing Equal Employment Opportunity (EEO) complaints alleging prohibited discrimination.[82] Under the rule in *Alexander*

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[81] While early procedural justice research found a correlation between process satisfaction and the power to choose an attorney in adversarial, contrasted with inquisitory, litigation, Thibaut and Walker have found no direct empirical research on how participants in dispute resolution choose different types of representatives. THIBAUT & WALKER, *supra* note 23, at 94.

[82] For a description of the program and national roll-out, see James R. Antes et al., *Transforming Conflict Interactions in the Workplace: Documented Effects of the USPS REDRESS® Program*, 18 HOFSTRA LAB. & EMP. L.J. 429 (2001); Lisa B. Bingham & Lisa-Marie Napoli, *Employment Dispute Resolution and Workplace Culture: The REDRESS® Program at the United States Postal Service*, *in* FEDERAL ADMINISTRATIVE DISPUTE RESOLUTION DESKBOOK 507 (Marshall J. Breger ed. 2001); Traci Gabhart Gann & Cynthia J. Hallberlin, *Recruiting and Training Outside Neutrals*, *in* FEDERAL ADMINISTRATIVE DISPUTE RESOLUTION DESKBOOK, *supra*, at 623; Cynthia J. Hallberlin, *Transforming Workplace Culture Through Mediation: Lessons Learned from Swimming Upstream*, 18 HOFSTRA LAB. & EMP. L.J. 375 (2001); Karen A. Intrater & Traci Gabhart

*v. Gardner-Denver Co.*,[83] all employees have the right to submit EEO complaints to a process independent from the collectively bargained grievance-arbitration procedure. Unlike other federal employers, the USPS is subject to the jurisdiction of the National Labor Relations Board.[84] The USPS is among the largest unionized employers in the United States.[85] In 1997, USPS employees comprised approximately 30% of all federal employees; they accounted for more than 50% of all EEO complaints.[86] Some proportion of this disparity may be attributable to the availability of dual filing. As the General Accounting Office noted in its 1997 study, the USPS has a long and ongoing history of difficult labor-management relations, making it fertile ground for programs designed to resolve disputes and improve communication.[87] While the USPS has an apparently disproportionate number of EEO filings, incidents of violence occur no more frequently within the USPS than in other organizations.[88] The high rate of EEO complaint filing, the history of problems in labor-management relations, and the sheer size of the USPS workforce of over 800,000 union and non-union employees, makes the USPS an interesting case to study to better understand the influence of representatives in mediation. Thus, the study of the USPS can provide insights that are useful to other organizations.

The USPS selected the transformative model of mediation for its national program. The premise of transformative mediation is that "the mediation process contains within it a unique potential for transforming people—engendering moral growth—by helping them wrestle with difficult circumstances and bridge human differences, in the very midst of conflict."[89] Transformative mediation's potential lies in its power to give people control over resolving their own conflict. Neutrals practicing transformative

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Gann, *The Lawyer's Role in Institutionalizing ADR*, 18 HOFSTRA LAB. & EMP. L.J. 469 (2001).

[83] Alexander v. Gardner-Denver Co., 415 U.S. 36, 47 (1974).

[84] 39 U.S.C. §§ 1202–1204, 1208–1209 (1994).

[85] Gann & Hallberlin, *supra* note 82, at 623; Bingham & Napoli, *supra* note 82, at 507.

[86] Lisa B. Bingham & C.H. Hallberlin, *Postal Service Expanding Workplace Dispute Program*, 40 CONSENSUS, Oct. 1998, at 1.

[87] GEN. ACCOUNTING OFFICE, U.S. POSTAL SERVICE—LITTLE PROGRESS MADE IN ADDRESSING PERSISTENT LABOR-MANAGEMENT PROBLEMS REPORTS, GAO/GGD-98-1 (1997).

[88] THE NAT'L CTR. ON ADDICTION & SUBSTANCE ABUSE AT COLUMBIA UNIV., A REPORT OF THE UNITED STATES POSTAL SERVICE COMMISSION ON A SAFE AND SECURE WORKPLACE 1–5 (2000).

[89] ROBERT A. BARUCH BUSH & JOSEPH P. FOLGER, THE PROMISE OF MEDIATION: RESPONDING TO CONFLICT THROUGH EMPOWERMENT AND RECOGNITION 2 (1994).

mediation seek to promote opportunities for empowerment and recognition.[90] Parties become empowered when they "grow calmer, clearer, more confident, more organized, and more decisive—and thereby establish or regain a sense of strength and take control of their situation."[91] The parties give recognition when they "voluntarily choose to become more open, attentive, sympathetic, and responsive to the situation of the other party, thereby expanding their perspective to include an appreciation for another's situation."[92] The mediators do not provide therapy for the parties; instead, they attempt to help the parties to take control of their own decision-making.[93]

There is preliminary evidence that mediation can have transformative effects at the workplace. Early studies found that traditional facilitative mediation in the REDRESS® program contributed to improving supervisors' conflict management skills.[94] The early facilitative REDRESS® mediation model provided a positive alternative to the traditional adversarial EEO complaint process because participants were highly satisfied with both the process and the mediators and were generally satisfied with the outcome of the mediation; these findings were consistent with the procedural justice model.[95] Moreover, there is evidence that participants have higher satisfaction with the fairness of the mediation process when an outside neutral is used as opposed to when an inside neutral is used.[96] By emphasizing opportunities for voice and control, the transformative model is consistent with procedural justice theory.

Another key element of the mediation program's design is representation. Some private sector employers are designing employment dispute resolution programs that provide arbitration but prohibit employees

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[90] *Id.* at 84.

[91] *Id.* at 85.

[92] *Id.* at 89.

[93] For a review of therapeutic and other models of mediation, see Ellen A. Waldman, *Identifying the Role of Social Norms in Mediation: A Multiple Model Approach*, 48 HASTINGS L.J. 703 (1997); Ellen A. Waldman, *The Evaluative-Facilitative Debate in Mediation: Applying the Lens of Therapeutic Jurisprudence*, 82 MARQ. L. REV. 155 (1998).

[94] Jonathon F. Anderson & Lisa Bingham, *Upstream Effects from Mediation of Workplace Disputes: Some Preliminary Evidence from the USPS*, 48 LAB. L.J. 601, 607–08 (1997).

[95] Lisa B. Bingham, *Mediating Employment Disputes: Perceptions of REDRESS at the United States Postal Service*, 17 REV. PUB. PERSONNEL ADMIN. 20, 29–30 (1997).

[96] Lisa B. Bingham et al., *Mediating Employment Disputes at the United States Postal Service: A Comparison of In-House and Outside Neutral Mediator Models*, 20 REV. PUB. PERSONNEL ADMIN. 4, 5 (2000).

bringing legal counsel with them to the arbitration hearing.[97] In compliance with EEOC directives, the USPS program provides that parties may bring any representative they wish to the mediation session: union representatives, attorneys, co-workers, or even friends and family, or they can choose not to bring any representative at all. Representatives often offer moral support and can provide parties with a "second opinion" about the fairness of settlement options discussed.

There are significant differences between the representatives brought to mediations by rank-and-file workers (known as "craft employees," which include letter carriers, mail handlers, clerks and others) and those brought by supervisors and managers. Supervisors and managers most frequently are respondents, but sometimes they are complainants. Craft employees are covered by collective bargaining agreements, and the unions' representatives serve to ensure that any settlement does not violate the relevant collective bargaining agreement. However, union representatives participate on behalf of the individual employee, and not in an official capacity on behalf of the union.

In contrast, supervisors and managers do not have the right to form a union, nor do they have a collective bargaining agreement; however, there are management associations that provide services to dues-paying members.[98] More than three-quarters of all postal supervisors and managers are members of either the National Association of Postal Supervisors (NAPS) or the National Association of Postmasters of the United States (NAPUS). As a result of their membership in these organizations, they receive services such as representatives accompanying them to REDRESS® mediations.[99] Unlike union representatives for craft employees, these representatives are not present to ensure that a collective bargaining agreement is followed because none exists. They can provide moral support or raise issues regarding policies or postal regulations for a supervisor or manager acting as complainant or respondent. Due to the differing roles held by union representatives for craft workers and representatives for supervisors and managers, it is likely that their impacts on mediation outcomes and participation may also be somewhat different.

The impact of representatives on the duration of mediation sessions is an important consideration for program participants and sponsors. To our knowledge, little research exists which examines the impact of

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[97] Mei L. Bickner et al., *Developments in Employment Arbitration: Analysis of a New Survey of Employment Arbitration Programs*, DISP. RESOL. J., Jan. 1997, at 80.

[98] *See* 39 U.S.C. § 1004 (1994) (providing for a program of USPS consultation with recognized organizations of supervisory and other managerial personnel).

[99] Personal communications with USPS Headquarters staff.

representatives on the duration of mediation sessions. The REDRESS® program thus affords an opportunity to explore the role of union and other representatives in an employment dispute resolution program outside the collective bargaining agreement's grievance procedure. If the presence of representatives does not add significantly to the length and cost of mediation, but does increase the satisfaction of parties or the likelihood of settlement, then program designers may wish to revisit the question of excluding representatives.

## VI. DATA AND METHODS

This study uses two different sources of data: data tracking reports and exit surveys.

### A. *Data Tracking Reports*

At the conclusion of each mediation session, the mediators complete a data tracking report. This report is a simple, one-page questionnaire designed to help track response rates on participant exit surveys. This study uses 7651 data tracking reports to examine the numbers of complainants, respondents, and representatives present; which parties had representatives; the mediation's duration; and its outcome. In addition, the data tracking report specifies how many exit surveys the mediator distributed to the parties and their representatives.

### B. *Exit Surveys*

The second source of data is mediation exit surveys. Mediators distribute these surveys at the close of each mediation session and participants in the session who are USPS employees may complete them during working time. They are entirely anonymous and confidential and are mailed directly to Indiana University. The surveys ask participants about their perceptions of the mediation process, the mediator, and the outcome of the mediation. Exit surveys allow for a more in-depth analysis of representation issues by providing more precise information about the type of representative. Exit surveys ask whether the representative(s) is an attorney, a union official, a coworker, or some other person (friend or family member), and whether the complainants and respondents are supervisors, managers, or rank-and-file employees.

Analysis of the surveys reflects 88% of the parties filing complaints (i.e., complainants) are rank-and-file, bargaining unit employees, and 98% responding to the complaints (i.e., respondents) are supervisors and managers

outside the various USPS bargaining units. Only about 8% of all complainants are supervisors, and 4% are not USPS employees at all, but contractors or temporary workers. This makes sense, since most EEO complaints allege discrimination in hiring, promotion, the distribution of overtime, and so forth, and it is the supervisors and managers who generally have the responsibility for implementing the relevant policies or rules.[100] On rare occasions, a bargaining unit employee may serve on detail in a supervisory capacity. As mentioned above, while the NAPS and NAPUS are not actual "unions," they do provide many similar services, such as attending disciplinary hearings and mediations with supervisors and managers. To simplify our discussion we refer to union representatives, and NAPS or NAPUS representatives as "union or association reps." The dataset includes the complainants' responses, with a sample size of 7989. It also examines respondents' responses, with a sample size of 6794. The response rate was 70.3%.

## VII. RESULTS AND ANALYSIS

This section first discusses results and analysis of the data tracking reports and then turns to the exit surveys.

### A. *Data Tracking Reports from Mediators*

The first round of analyses used the data tracking surveys to examine the relationship between representation, mediation duration, and settlement. On these surveys, mediators report representation of the parties, settlement, and duration of the mediation session. In this analysis, the "representation" variable has four possible conditions or manifestations: both the complainant and the respondent have a representative; none of the disputants have representatives; the complainant has a representative while the respondent does not, or the respondent has a representative while the complainant does not. The data tracking reports provide no data on the *type* of representative (i.e., lawyer or union representative). In this model, settlement is coded as either "settled" or "not settled." "Settled" cases include those resulting in a mutually agreeable resolution either during or immediately after mediation. To better understand the relationship between representatives and settlement rates, we employed a Chi-Square test based on information obtained from the data tracking reports.

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[100] Personal communication with USPS Headquarters staff (notes on file with authors); EEOC Form 462 for FY 2001.

## B. *Settlement Rates*

Table 1 shows the distribution of settlements by the condition of representation. As the table shows, complainants have representatives in most mediation sessions, and 93% of the settlements occur when the complainants have some kind of representative. Note that this table reports only settlements, not all mediations.

**Table 1. Distribution of Settlements by Condition of Representation**

| Complainants | Respondents | Settlements |
|---|---|---|
| Yes | Yes | 1533 (34%) |
| Yes | No | 2705 (59%) |
| No | Yes | 63 (1%) |
| No | No | 267 (6%) |

Table 2 shows the settlement rates within each of four conditions of representation: complainants only represented, respondents only represented, both represented, and neither represented. As the table shows, cases in which neither party brought a representative had settlement rates approximately 6% lower than those cases in which both parties brought representatives. Table 2 also shows that complainants decide to bring some form of representative in the great majority of cases. When the complainant brought a representative(s) and the respondent did not, settlement was more likely than for those cases in which the reverse was true. It is possible that representatives lend moral support, that their presence may help the parties feel more at ease during the mediation process, and that they are able to offer their opinions as to the reasonableness of any particular settlements the parties consider. It is also possible that representatives exert pressure on the parties to reach a settlement.

**Table 2. Settlement Rates by Condition of Representation**

| Representation | Settled | Not Settled | Totals |
|---|---|---|---|
| Complainants only | 2705 (60%) | 1831 (40%) | 4536 (100%) |
| Respondents Only | 63 (50%) | 62 (50%) | 125 (100%) |
| Both Represented | 1533 (61%) | 969 (39%) | 2502 (100%) |
| Neither Represented | 267 (55%) | 221 (45%) | 488 (100%) |

As Table 2 shows, there is a 10% difference in settlement rates between the cases in which the "complainants only" were represented and those in which the "respondent only" was represented. This difference might be attributable to the differing positions these individuals often hold. Since complainants are more likely to be rank-and-file workers while respondents are more likely to be supervisors or managers, differing power levels may influence settlement rates. It is possible that the assistance complainants receive from their representatives aids in the equalization of power between the disputants. Many theorists have argued that settlements are more likely to occur when the disputants are equally powerful.[101] This theoretical lens could explain why settlement rates are lowest when the respondent brings a representative and the complainant does not. On the other hand, when respondents bring representatives it may be a reflection of their belief that the case is particularly contentious. If this is true, then lower settlement rates for the "respondent only" condition could be a reflection of the nature of those cases. Future research should attempt to control for the type and severity of the case in order to investigate these possibilities.

### C. *Mediation Duration*

Table 3 shows the mean duration of mediation sessions in minutes by condition of representation. In general, mediation sessions are scheduled for four-hour time blocks.

[101] *See, e.g.*, MORTON DEUTSCH, THE RESOLUTION OF CONFLICT: CONSTRUCTIVE AND DESTRUCTIVE PROCESSES 343–47 (1973).

**Table 3. Representation and Mediation Duration, in Minutes**

| Representation | Mean | Standard Deviation | Frequencies |
|---|---|---|---|
| Complainants only* | 168 | 175 | 4536 |
| Respondents Only** | 137 | 72 | 125 |
| Both Represented*** | 184 | 96 | 2502 |
| Neither Represented**** | 152 | 79 | 488 |

* F=6.05, p<.01; ** F=7.05, p<.01; *** F=24.08, p<.001; **** F=9.54, p<.01

In examining the relationship between representation and mediation duration, we employed one-way ANOVA for each category. All of the relationships were statistically significant at the level of .05 or better. In terms of the length of mediation sessions, as one might expect, mediation lasted longer when representatives were present. As shown in Table 3, when both parties had representatives, the mean average length of the mediation sessions was 184 minutes. This was 32 minutes longer than the average length of mediation when neither party brought a representative. When the complainant was the only party with representation, the average mediation lasted 168 minutes compared to 137 minutes when the respondent was the sole party represented. Therefore, the shortest mediation occurred when the respondent was the sole represented party, and the longest occurred when both parties were represented. However, the gap between the longest and shortest mediation session was only 47 minutes. While anecdotal reports and exit surveys suggest that supervisors have concerns about how much time they spend in mediation, Table 3 suggests that the cost of this time is likely outweighed by the benefit of the process.

### D. *Data Analysis of Participant Exit Surveys*

The second phase of analysis examined participants' reports of settlement, perceptions of fairness and participation, and satisfaction with outcome as reported on exit surveys completed immediately after mediation concluded. The study examined separate samples of surveys from complainant/employees and respondent/supervisors. Once again using Chi-Squares, we examined three relationships: the relationship between the types of complainants' and respondents' representatives and the outcome of mediation; the relationship between the types of representatives and the

disputants' satisfaction with the fairness of the mediation process; and the relationship between the types of representatives and the disputants' satisfaction with their participation levels during mediation.

Table 4 describes the frequency with which complainants and respondents bring various sorts of representatives.

**Table 4. Comparisons of Frequencies and Percentages of Representative**

| Types of representative | Complainants | Respondents |
|---|---|---|
| No representative | 2603 (33%) | 4422 (65%) |
| Fellow employee | 1077 (13%) | 1077 (16%) |
| Attorney | 251 (3%) | 36 (1%) |
| Union or association representative | 3399 (43%) | 74 (1%) |
| Other | 659 (8%) | 1185 (17%) |
| Total | 7989 (100%) | 6794 (100%) |

In our study, about one-third of complainants chose not to bring a representative at all, while more than half of all respondents chose not to bring a representative.

## E. *Participants' Reports of Mediation Outcomes*

Table 5 shows the complainants' and respondents' reported distribution of mediation outcomes. The results are distributed among three possible outcomes: complete, partial, and no resolution. In participant exit surveys, the disputes were reported either completely or partially resolved in about 63–64% of the cases.[102] This number is different than the case closure rate. The overall case closure rate was 80% for all cases in the REDRESS® Program.[103] This closure rate includes full settlements reached at the table during mediation, cases where the parties finalized a settlement within thirty days after the close of mediation, cases where the complainant unilaterally withdrew the complaint after mediation, and cases where after mediation the

[102] The participant exit surveys are completed immediately at the close of mediation and include only what has occurred during the mediation session up to that point. They do not include activity on the case after the mediation session is over.

[103] Mickey Meece, *The Very Model of Conciliation: Companies Adopting Postal Service Grievance Process*, N.Y. TIMES, Sept. 6, 2000, at C1.

complainant declined to pursue the complaint to the formal complaint level according to USPS statistics.[104]

**Table 5. A Comparison of Complainants' and Respondents' Reports of Complete, Partial or No Resolution, Frequencies (Percentages)**

| Mediation Resolution | Complainants | Respondents |
|---|---|---|
| Complete resolution | 2320 (29%) | 2691 (40%) |
| Partial resolution | 2696 (34%) | 1650 (24%) |
| No resolution | 2973 (37%) | 2453 (36%) |
| Total | 7989 (100%) | 6794 (100%) |

Interestingly, respondents were more likely to report that their case was completely resolved than were complainants. It is possible that some supervisors (usually respondents) leave the mediation session feeling that the dispute has been completely resolved, while the rank-and-file employees feel that some issues remain unresolved or that some negative feelings remain. This finding should encourage mediators to work to make sure that both parties leave the mediation with a very clear sense of what has been resolved and what work remains unfinished.

Next, we examined the complainant exit survey sample for reports of resolution by representation condition. Table 6 shows the relationship between different types of complainant's representatives and the outcome of mediation. The earlier analysis, based on the data tracking reports, allowed us to conclude, for example, that settlement rates were different when both parties were represented compared to those cases where only one party was represented. The analysis shown in Table 6 allowed us to examine the correlation between the type of representative and the complainants' reports of mediation outcomes. If the complainant had a union representative, the frequency at which either a complete or partial resolution was reported was higher than in any other case, at 65%. On the other hand, when an attorney represented complainants, the frequency that complainants reported resolution was the lowest, at 50%. Both the union representative and the no representative categories yielded reports of complete settlement 30% of the time, while the attorney category yielded reports of complete settlement only 16% of the time. Chi-square analysis shows that these differences are statistically significant at the level of .01.

[104] Personal communication with USPS Headquarters staff (notes on file with authors).

**Table 6. Complainants' Reports of Mediation Resolution by Types of Representatives**

| Mediation Resolution | Type of Representation | | | | | |
|---|---|---|---|---|---|---|
| | No Rep. | Fellow Employee | Attorney | Union or Ass'n Rep. | Other | Total |
| Complete | 772 (30%) | 295 (27%) | 41 (16%) | 1025 (30%) | 187 (28%) | 2320 (29%) |
| Partial | 822 (32%) | 356 (33%) | 85 (34%) | 1203 (35%) | 230 (35%) | 2696 (34%) |
| No | 1009 (39%) | 426 (40%) | 125 (50%) | 1171 (34%) | 242 (37%) | 2973 (37%) |
| Total | 2603 (101%) | 1077 (100%) | 251 (100%) | 3399 (99%) | 659 (100%) | 7989 (100%) |

Note. Pearson chi-square = 44.6, P< 0.0001; total percentage may not be 100 due to rounding

For a comparison, we turned to the respondents' exit survey sample. This sample reflected only the responses of the supervisor/respondents in the mediation. Table 7 shows the distribution of mediation outcomes based on respondent's comments. As was the case for complainants, the highest settlement rates for respondents occurred when a union or association representative was present, with complete and partial settlement rates at 78%. However, while the presence of attorneys for complainants corresponded to significantly lower settlement rates for complainants (50%), the presence of an attorney corresponded to a 67% settlement rate for respondents, second only to those cases where a union representative is present. This is an interesting finding that can be at least partially traced to the differences between attorneys brought by craft workers versus those brought by supervisors and managers. Unlike the attorneys for craft employees, attorneys for supervisors and managers are supplied by the Postal Service itself when the USPS determines that an attorney's presence is needed. These attorneys are well versed in Postal Service policy and come at no cost to the supervisors and managers. This may explain why the presence of attorneys for respondents corresponded with a higher settlement rate than it did for complainants. In addition, respondents reported that they had attorney representatives in fewer than one percent of the surveys. This suggests these cases might be different on the merits from the great majority in the sample.

**Table 7. Respondents' Reports of Mediation Resolution by Types of Representatives**

| Mediation resolution | Types of Representative | | | | | |
|---|---|---|---|---|---|---|
| | No rep. | Fellow employee | Attorney | Union or Ass'n Rep. | Other | Total |
| Complete | 1720 (39%) | 415 (39%) | 14 (39%) | 32 (43%) | 510 (43%) | 2691 (40%) |
| Partial | 1069 (24) | 273 (25%) | 10 (28%) | 26 (35%) | 272 (23%) | 1650 (24%) |
| No | 1633 (37%) | 389 (36%) | 12 (33%) | 16 (22%) | 403 (34%) | 2453 (36%) |
| Total | 4422 (100%) | 1077 (100%) | 36 (100%) | 74 (100%) | 1185 (100%) | 6794 (100%) |

Note. Pearson chi-square = 16.5, $P < 0.05$.

## F. *Participants' Reports of Their Satisfaction with Aspects of Mediation:*

Next, we examined the relationship between the types of representatives and the reported satisfaction with the fairness of the mediation process. Complainants and respondents were asked to rate their satisfaction levels on a five-point scale ranging from "very satisfied" to "very dissatisfied," with a rating of three corresponding to neither or no opinion. As shown in Table 8, almost 90% of the complainants and 93% of the respondents were somewhat satisfied or very satisfied with the fairness of the mediation process. The REDRESS® program has consistently produced similarly high satisfaction levels since its inception.

**Table 8. Comparison of Satisfaction Levels with Mediation Fairness**

| Satisfaction Level | Complainants | Respondents |
|---|---|---|
| Very satisfied | 5022 (63%) | 4786 (70%) |
| Somewhat satisfied | 2124 (27%) | 1536 (23%) |
| Neither | 435 (5%) | 309 (5%) |
| Somewhat dissatisfied | 233 (3%) | 107 (2%) |
| Very dissatisfied | 175 (2%) | 56 (1%) |
| Total | 7989 (100%) | 6794 (101%) |

Note. Total percentage is not 100 due to rounding

While mediation participants were satisfied overall, their levels of satisfaction varied with the type of representative present during mediation. Moreover, complainants' and respondents' reports differed. Tables 9 and 10 show different satisfaction levels according to various types of representatives. Table 9 reports complainants' satisfaction with mediation fairness.

**Table 9. Complainants' Satisfaction with Mediation Fairness by Types of Representatives**

| Satisfaction with Fairness of Mediation | No Rep. | Fellow employee | Attorney | Union or Ass'n Rep. | Other | Total |
|---|---|---|---|---|---|---|
| Very satisfied | 1749 (67%) | 664 (62%) | 115 (46%) | 2127 (63%) | 367 (56%) | 5022 (63%) |
| Somewhat satisfied | 621 (24%) | 279 (26%) | 76 (30%) | 937 (28%) | 211 (32%) | 2124 (27%) |
| Neither | 125 (5%) | 67 (6%) | 28 (11%) | 174 (5%) | 41 (6%) | 435 (5%) |
| Somewhat dissatisfied | 58 (2%) | 40 (4%) | 22 (9%) | 90 (3%) | 23 (3%) | 233 (3%) |
| Very dissatisfied | 50 (2%) | 27 (3%) | 10 (4%) | 71 (2%) | 17 (3%) | 175 (2%) |
| Total | 2603 (100%) | 1077 (101%) | 251 (100%) | 3399 (101%) | 659 (100%) | 7989 (100%) |

Note. Pearson chi-square = 105.2, P< 0.0001; total percentage may not be 100 due to rounding

When complainants had a union or association representative present in mediation, they were likely to be more satisfied with the fairness of the

mediation process compared to other types of representatives, with 91% claiming to be either "very" or "somewhat satisfied." In contrast, complainants represented by an attorney reported the lowest level of satisfaction with the fairness of the mediation process, even though the level was still high at 76%. Interestingly, when complainants were not represented at all, they reported being somewhat or very satisfied with the fairness of the mediation process at approximately the same 91% rate as when they had a union or association representative. However, the proportion of those reporting that they were very satisfied was slightly higher among the no representative category than among the union representative category (67% compared with 63%). The presence of a union or association representative was associated with the highest settlement rates for complainants. In other words, complainants accompanied by a union or association representative were more likely to settle their cases, but they were also likely to be slightly less highly satisfied with the fairness of the process than were those complainants who represented themselves. Perhaps the presence of a representative made it somewhat more difficult for complainants to participate as fully in mediation. Union or association representatives may encourage settlement because of incentives such as their caseload or status as repeat players with long-term relationships. A complainant who settles under pressure may not feel fully vindicated. Another possibility is that the cases were systematically different kinds of cases. The former issue is examined in greater detail later in the paper. The latter issue is a subject for future research.

Table 10 reports satisfaction with mediation fairness results for respondents. As illustrated in Table 10, in the sample of respondents, those with attorneys reported the highest levels of satisfaction at 95% either very or somewhat satisfied. This was a substantial difference from complainants' reports. This corresponded to the earlier findings showing that respondents' reports of an attorney correlates with higher settlement rates. The second-highest levels of satisfaction occurred when union or association representatives accompanied respondents, or when they brought no representatives at all, with both showing 94% very or somewhat satisfied.

**Table 10. Respondents' Reports of Satisfaction with Fairness by Types of Representatives**

| Satisfaction with Fairness of Mediation | No Rep. | Fellow employee | Attorney | Union or Ass'n Rep. | Other | Total |
|---|---|---|---|---|---|---|
| Very satisfied | 3165 (72%) | 737 (68%) | 29 (81%) | 47 (64%) | 808 (68%) | 4786 (70%) |
| Somewhat satisfied | 976 (22%) | 240 (22%) | 5 (14%) | 22 (30%) | 293 (25%) | 1536 (23%) |
| Neither | 181 (4%) | 72 (7%) | 1 (3%) | 1 (1%) | 54 (5%) | 309 (5%) |
| Somewhat dissatisfied | 70 (2%) | 17 (2%) | 1 (3%) | 3 (4%) | 16 (1%) | 107 (2%) |
| Very dissatisfied | 30 (1%) | 11 (1%) | 0 (0%) | 1 (1%) | 14 (1%) | 56 (1%) |
| Total | 4422 (101%) | 1077 (100%) | 36 (101%) | 74 (100%) | 1185 (100%) | 6794 (101%) |

Note. Pearson chi-square = 31.51, $P < 0.01$; total percentage may not be 100 due to rounding

Some of the differences between complainants and respondents may be explained by the differences between the attorneys and the union or association representatives utilized by the two groups. Complainants' attorneys generally come from outside the USPS while respondents' attorneys are generally from the USPS. However, these differences between respondents and complainants led us to wonder if the types of representatives influenced the extent to which disputants were able to fully participate in the mediation sessions. For example, it might be possible that the presence of an attorney could result in reduced participation levels—with this effect being particularly true for complainants because they generally hire private counsel, while respondents' lawyers are usually supplied by the USPS, and USPS lawyers have been trained in the goals of the program and the transformative mediation process. If participation is key, it would make sense for disputants to express fairly high levels of satisfaction when they bring no representatives at all. Based on the questions raised by these findings, we undertook an examination of the relationship between the types of representatives and disputants' satisfaction with their own participation levels during the mediation process.

Table 11 shows satisfaction levels concerning complainants' participation according to different types of representatives.

**Table 11. Complainants' Satisfaction Level with Participation by Types of Representatives**

| Satisfaction with Participation in Mediation | No Rep. | Fellow employee | Attorney | Union or Ass'n Rep. | Other | Total |
|---|---|---|---|---|---|---|
| Very satisfied | 1976 (76%) | 757 (70%) | 137 (55%) | 2457 (72%) | 461 (70%) | 5788 (72%) |
| Somewhat satisfied | 536 (21%) | 264 (25%) | 92 (37%) | 801 (24%) | 165 (25%) | 1858 (23%) |
| Neither | 49 (2%) | 35 (3%) | 11 (4%) | 73 (2%) | 19 (3%) | 187 (2%) |
| Somewhat dissatisfied | 27 (1%) | 17 (2%) | 7 (3%) | 51 (2%) | 12 (2%) | 114 (1%) |
| Very dissatisfied | 15 (1%) | 4 (0%) | 4 (2%) | 17 (1%) | 2 (0%) | 42 (1%) |
| Total | 2603 (101%) | 1077 (100%) | 251 (101%) | 3399 (101%) | 659 (100%) | 7989 (99%) |

Note. Pearson chi-square = 71.5, P< 0.0001; total percentage may not be 100 due to rounding

As Table 11 shows, the findings about participation were similar to those measuring satisfaction with process fairness. When complainants were not represented at all, they were most likely to be satisfied with their level of participation in the mediation process, with 97% reporting satisfaction. Complaints accompanied by a union or association official came in a close second, with 96% reporting satisfaction. Even though the complainants were less likely to be satisfied with participation when accompanied by an attorney, the level was still very high at 92% compared to that of satisfaction with the fairness of the process, at 76%.

In contrast to the results for complainants, respondents reported the highest levels of satisfaction with their level of participation when an attorney was present, at 97%. For respondents, the presence of a union or association representative corresponded to the lowest levels of satisfaction with their own participation levels.

**Table 12. Respondents' Satisfaction with Participation by Types of Representatives**

| Satisfaction with Participation in Mediation | No Rep. | Fellow employee | Attorney | Union or Ass'n Rep. | Other | Total |
|---|---|---|---|---|---|---|
| Very satisfied | 3215 (73%) | 750 (70%) | 27 (75%) | 40 (54%) | 812 (69%) | 4844 (71%) |
| Somewhat satisfied | 1021 (23%) | 258 (24%) | 8 (22%) | 28 (38%) | 322 (27%) | 1637 (24%) |
| Neither | 122 (3%) | 46 (4%) | 1 (3%) | 1 (1%) | 37 (3%) | 207 (3%) |
| Somewhat dissatisfied | 50 (1%) | 12 (1%) | 0 (0%) | 5 (7%) | 9 (1%) | 76 (1%) |
| Very dissatisfied | 14 (0%) | 11 (1%) | 0 (0%) | 0 (0%) | 5 (0%) | 30 (0%) |
| Total | 4422 (100%) | 1077 (100%) | 36 (100%) | 74 (100%) | 1185 (100%) | 6794 (99%) |

Note. Pearson chi-square = 58.7, P< 0.0001; total percentage may not be 100 due to rounding

## VIII. DISCUSSION

The data point to a number of interesting directions for future research. First, the presence of complainants' union or association representatives in REDRESS™ mediations is associated with higher reported settlement rates, compared to those cases in which another kind of representative is present. Why are union or association representatives associated with more frequent settlement? They are repeat players in the system, familiar with workplace norms, and they have ongoing relationships with managers and their representatives.[105] They have different knowledge about possibilities for settlement as compared with the average co-worker, who may have limited experience settling grievances and working out deals with management. They have different preferences from private lawyers, who may be looking to create a cash pool from which to recover attorneys' fees. Most settlements in the REDRESS™ program involve continuing employment relationships and are non-economic.[106] Non-economic settlements include removal of

[105] Communications with staff at USPS Headquarters (notes on file with authors).

[106] Communications with staff at USPS Headquarters (notes on file with authors); EEOC Form 462 for FY 2001. In contrast, in the MCAD program, researchers found that

discipline, reinstatement of leave, overtime eligibility, and the like. Moreover, a substantial proportion of non-economic settlements include an apology and an agreement to communicate differently, for example, with mutual respect and civility in the future.[107] A union or association representative would have no reason to resist a non-economic solution. Moreover, these types of settlements may be easier for management to implement.

Second, complainants accompanied by union or association representatives were more satisfied than were those with other types of representatives. However, as to their own participation and the fairness of mediation, complainants with any type of representative were less satisfied than complainants who represented themselves. The largest differences arose between complainants with attorneys and those with no representatives, although the effect was present for all the conditions involving some kind of complainants' representative. In contrast, respondents with attorneys reported the highest levels of satisfaction with the mediation's fairness and with their own participation in mediation. This may also reflect management structure in that they are more likely to be executives.

These findings reflect the tension between principal and agent, and differences as to preferences, incentives and information. Principals and agents may have different preferences as to how much each of them should participate directly in the mediation, that is, who gets to talk and how much. In the transformative model of mediation, the parties are encouraged to participate more directly.[108] Internal marketing of the program to employees and supervisors stresses this aspect of the model. When complainants bring any type of representative to mediation, it is likely that their direct participation declines. Procedural justice research has revealed that the control over the dispute resolution process is an important factor influencing perceptions of process fairness.[109] The ability to participate in a process is one form of process control.[110] Thus, when an agent speaks for the principal,

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most of the 636 settled cases had economic settlements with a median of $25,000 and a mean of $51,730. They also found 15% of the settlements called for change in employer practices, and 17% called for apologies. Most cases involved the end of an employment relationship. Kochan et al., *supra* note 65, at 259–60.

[107] Communications with REDRESS™ Task Force and USPS Headquarters, and a review of settlement documents are both on file with authors.

[108] *See* BUSH & FOLGER, *supra* note 89, at 84–89; Antes et al., *supra* note 82, at 466; Hallberlin, *supra* note 82, at 378–80; Intrater & Gabhart Gann, *supra* note 82, at 472–73.

[109] *See* LIND & TYLER, *supra* note 23, at 94–101; THIBAUT & WALKER, *supra* note 23, at 119–22.

[110] While some researchers found that participation was not an important factor, that study did not compare different types of representatives within mediation, but instead

this may contribute to decreased satisfaction with participation, and in turn, lower satisfaction with fairness. Our findings were consistent with this interpretation because the complainants' satisfaction with participation co-varied with their perception that the process was fair. Those complainants represented by attorneys reported the lowest level of participation satisfaction, at 91%, and were least satisfied with the fairness of the process, at 76%. Complainants without representatives reported the highest level of satisfaction with their own participation, at 97%, and were most likely to be satisfied with the fairness of the process, at 91%. It makes sense that lawyers, trained to protect their clients from making damaging admissions against their own interests, would make more effort to control what and how much complainants said during mediation. Moreover, complainants' lawyers have not necessarily received training in the transformative model of mediation. Their expectations regarding appropriate advocacy in mediation may have been formed with more evaluative and directive mediation models used in court-annexed mediation. In contrast, respondents' lawyers from inside the USPS have most likely received transformative mediation training, at least in the form of initial briefings regarding the model. In contrast to their lawyers, complainants may prefer to have their say during the mediation session rather than waiting for some unknown future trial date. These findings have important practical implications, as attorneys and other types of representatives may wish to encourage greater direct participation by the complaining party in mediation sessions.

Importantly, this relationship did not hold true for respondents. Unlike complainants, respondents were most satisfied with the mediation's fairness and with their own levels of participation when an attorney accompanied them—even though their settlement rates were higher when they had a union or association representative. This difference may partially be explained by the differences between the private outside attorneys hired by complainants and the inside counsel supplied to supervisors and managers by the Postal Service. In addition, although our sample size overall was very large, the sample size for respondents with lawyers was small.

Our review of the research predicted differences between inside and outside counsel representing clients in mediation. Inside counsels' incentive structure is more closely aligned with that of their principal. Another possible explanation is control over the process.[111] USPS attorneys have higher status and power within the organization than the average immediate supervisor;

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examined parties with lawyers in third party processes, judicial settlement conferences, arbitration, and trial. LIND ET AL., *supra* note 46, at 2, 62. One might expect that participation by the disputants might not vary as much where they are represented by the same kind of agent, namely lawyers.

[111] LIND & TYLER, *supra* note 23, at 94–101; SHEPPARD ET AL., *supra* note 21, at 32.

therefore, when they are present to provide assistance and support, supervisors may feel that they have cover, that is, more control over the process and protection from any adverse ramifications of a settlement. Moreover, supervisors are likely to have preferences that are very similar to those of their USPS lawyers, because they are both part of the management chain of the organization.

The rival explanation for these findings points to the possibility that complainants seek lawyers for cases that are stronger on the merits, more contentious, and complex.[112] These may also be the cases that predictably would have been less likely to reach a mediated resolution. Complainants in these cases may be distrustful of the process itself and more reticent to participate directly.[113] Without controlling for the severity of the case or for the relationship of case severity to representation, it is not possible to definitively state that the presence of a lawyer representative directly decreases settlement rates or decreases the complainants' participation levels and their sense that the process was fair. Both explanations may contribute to the findings. Controlling for the type and severity of the case in future research should increase our understanding of these issues.

## IX. CONCLUSIONS

This article has examined the effects of representation on resolution (complete, partial, or no resolution), duration of the mediation session, satisfaction with the fairness of mediation, and satisfaction with level of participation. It has examined the effects of different kinds of representation, including lawyers, union representatives, fellow employees, other representatives such as family, or no representative.

We found that the highest resolution rates occurred when the complainant had some sort of representative. Mediation lasted longest when both parties had representatives, and was of shortest duration when only the respondent was represented. In the USPS program, complainants most often brought a union representative, while respondents most often have no representative in the mediation sessions. While the highest complete

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[112] *See* Kenneth Kressel, *Mediation, in* THE HANDBOOK OF CONFLICT RESOLUTION: THEORY AND PRACTICE 522, 524 (Morton Deutsch & Peter T. Coleman eds., 2000) (observing that research shows high level of conflict is associated with difficulty in settlement in mediation).

[113] One study of mediation and arbitration of discrimination complaints found that the most important barrier to participation in the ADR program was the lack of willingness of one party to the dispute. Kochan et al., *supra* note 65, at 257. However, this barrier was identified by their *lawyers*; the response rate from the parties themselves was too low to analyze.

resolution rate occurred when complainants had union or association representatives, complainants' highest level of satisfaction with the fairness of mediation occurred when they brought no representative. In contrast, respondents' highest level of satisfaction with the fairness of mediation occurred when they had a USPS lawyer as a representative. The parties' satisfaction with fairness was related to their satisfaction with their level of participation in the process. Complainants were more satisfied with their level of participation when they had no representative or a union association representative. Respondents were more satisfied with their level of participation when they had an attorney. In general, there was no evidence that the policy of allowing free choice of representatives had any negative effect on the program. The various findings are consistent with what we might expect in light of principal-agency theory and differences in agents' preferences, incentives, and information.

While further research in this area is needed, these preliminary results suggest that union representation during mediation sessions may have benefits for both the employee and the employer. Given current economic trends, including the increased globalization of labor competition, it is unlikely that a new wave of private sector unionization will occur any time soon in the U.S. or in other economically developed countries.[114] However,

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[114] Samuel Estreicher, *Labor Law Reform in a World of Competitive Product Markets*, 69 CHI.-KENT L. REV. 3, 13 (1993) ("This story has changed because American industry and the U.S. place in the world economy has changed. The ability of unions to 'take wages out of competition' has declined substantially thanks to the competitive forces unleashed by the emergence of global product markets; the deregulation of previously union-dense industries, such as airlines, trucking, and telecommunications; and technological change altering needs for skilled labor and reducing the advantages of local producers."); Samuel Estreicher, *The Dunlop Report and the Future of Labor Reform*, 12 LAB. LAW. 117, 118 (1996) ("The principal cause of labor's decline, however, lies elsewhere: the model of employee organization promoted by the labor laws has failed to keep pace with the unleashing of competitive forces in product markets as a result of deregulation, technological advances, and global competition."); Kenneth M. Piper, *Labor Law Reform in a World of Competitive Product Markets*, 69 CHI.-KENT L. REV. 3, 3 (1993) ("U.S. private sector unionism is in decline. From a high watermark in 1953 of around 35.7% of the private nonagricultural workforce, union membership has fallen to 11.5% and unions represent under 13% of private sector workers. Absent reform of the labor relations system, the trend is clear. Unions will remain a significant force in government employment, big-city commercial construction, rail and air transportation, and certain shrinking mining and manufacturing industries. Aside from these pockets of unionism, however, the size of unions peaked in the 1950's and union density began to decline relative to an expanding work force. By the late 1970's, private sector union membership was dropping sharply in absolute size and even more steeply in relative terms. At present, private sector union membership is approximately 12% of private employment, roughly the level it was before the NLRA was enacted in 1935. Unless an

there is nothing to stop an individual from joining a union and paying dues in exchange for certain services, such as representation during ADR proceedings. Many unions already have dues structures that allow for "associate members" to join and receive some benefits. Because union representation is associated with higher settlement rates for both complainants and respondents and higher satisfaction levels for complainants than occurs with other types of representatives, unionized private sector employers may want to rethink opposition to some form of union participation in employment dispute resolution. The dispute resolution field needs more empirical research regarding how these systems actually function. This study empirically supports what the *Protocol* calls for in principle: dispute resolution systems that permit employees their choice of representatives are likely to function at least as effectively, if not better, than systems where employees have no right to bring a representative.[115]

unexpected turnaround occurs, by the beginning of the twenty-first century, less than 10% of private sector employees will have their interests represented through collective bargaining, and unionism will be largely isolated in a number of aging industrial ghettos.").

[115] *Id.*