

Creativity of Mediated Agreements: A Quantitative Analysis

Hayley Laker

Abstract

This paper asserts that mediation is associated with a higher degree of creativity than more traditional forms of dispute resolution, such as litigation. This creativity often culminates in the mediated agreement. Using a quantitative analysis, this paper attempts to identify potential sources of creativity in mediated agreements. Despite the common assertion that parties control the results of their mediation, this paper asserts that various attributes of the mediator may, in fact, play a role in the results of mediation.

Introduction

When faced with a dispute, individuals are often confused about the options available to them for resolution. They turn to lawyers for advice, and with increasing frequency, are directed towards mediation as an option. Disputants are informed that mediation offers a variety of positive attributes, with perhaps the most important being the opportunity to generate creative resolutions to their problems.

It is said that mediation is empowering; that it allows parties to maintain control over the outcomes of their disputes. Arguably, the role of the mediator in interest-based mediation¹ is to guide the process without influencing the particulars of the mediated solution. The solution, it is often thought, should be developed by the parties with the mediator acting only to facilitate communication, and formalize the party-created solution. Mediation offers disputing parties an opportunity to work together to come up with mutually agreeable solutions with the assistance of a neutral third party – the mediator. Mediators help to facilitate discussion, and guide the process towards resolution. While there are many factors that may impact on the creative solutions

¹ As opposed to evaluative mediation.

emerging from mediation, this paper proposes that the mediator's particular skill set and experience may influence the outcome. This research will be of interest to parties (and their lawyers) considering mediation (and in particular, their choice of mediator), and will also be of interest to mediators attempting to assess their skills, abilities, and areas for development². Given that mediations are commonly credited with the ability to result in creative resolutions to disputes, this paper makes the logical inquiry into the potential causes of this creativity.

Part 1 of this paper consists of a discussion of the methodology utilized. A description of the data, including its source (the BC Court Mediation Program in Small Claims Court), will give readers insight into the applicability of the findings in other jurisdictions and mediation arenas. This section also includes a discussion of the models used for this analysis, asserting that it serves as an important tool in the analysis of the determinants of creativity of mediated agreements. Part 2 will discuss the results, identifying the factors that cause a mediated agreement to be more or less creative. Following the discussion of the results, the paper will conclude with remarks on the implications of the findings, along with an identification of avenues for further research.

Part 1: Methodology

While judicial decisions are largely constrained to monetary settlements (that will most often include a payment schedule), mediated agreements have a variety of creative options for dispute resolution (including sincere apologies and letters of reference). The

² Additionally, this research will be of interest to policymakers facing such decision as whether to allow non-lawyer to mediate in court etc., and to bodies that are beginning to credential mediators.

availability and frequent use of more flexible remedies renders mediated resolutions more creative than judicial resolutions³.

Using data collected by the Court Mediation Program at the British Columbia Provincial Court, Small Claims Division an in depth quantitative analysis is presented to identify the factors underlying these creative mediated agreements. There are two ways that a case can go to mediation in the BC Small Claims Court Mediation Program. The first is mandatory referral of two groups of cases: all construction cases plus a random sample of cases referred by date of filing of reply. In these mandatory cases parties must attend to avoid dismissal of their claim or default judgment. If a case falls into this category, the Court Mediation Program will send the parties a notice telling them when and where the mediation is going to be held. Upon receipt of this notice, both parties must *attend* one meeting involving a mediator and all the parties; they are not required to mediate. The second way that a case may be referred to mediation is a party-driven process. Both parties can proceed by voluntarily electing to resolve their dispute through mediation. Alternatively (with the enactment of Small Claims Rule 7.2 in April 2003), these cases can proceed by Notice to Mediate, under which one party may choose to mediate and will file a Notice to Mediate with the court registry. A Notice to Mediate requires the other party or parties to attend a mediation. This alternative therefore can result in involuntary mediation for one or more of the parties.

³ While judicial decisions are constrained by the limited availability of alternative remedies, mediation offers remedies that are tailored to both the particular dispute and the parties involved.

1.1 Data

The BC Small Claims Court Mediation Program collects data relating to the dispute and agreement. The background information of the mediators comes from various applications for participation as mediators and mentors in the BC Small Claims Court Mediation Program. A variety of agreements (over 1,400 agreements) were matched with the backgrounds of the mediators of their disputes. Any cases without mediator backgrounds were rejected from the dataset (as they would not provide the information needed to undergo the foregoing analysis). The result was a dataset of 1,146 agreements.

A creativity variable was then calculated according to the various attributes of the mediated agreement. The creativity variable is based upon a formula that gives each variable a weighting of 1, 1.5 or 2 (see Table A for a breakdown). A value of 1 is for 'boiler plate' elements while 2 was given for elements that usually reflected a high level of creativity – a result that was not seen in court decisions, for instance. Between these two weights were the elements that were weighed at a 1.5, which reflected a slight deviation from a simple solution yet was still fairly commonplace and did not usually signal a high level of creativity but did suggest input from both parties in tailoring a solution to their own specific circumstances.

Table A.

Element	Weight
Payment	1
Payment Method	If = "Other" 1, otherwise 0
Payment Frequency	0
Payment Method	0
Payment Penalty	1.5
Payment Security	1.5
Payment Upon a Condition	1.5
Specific Performance	1.5
Warranty of the Work completed as a part of the agreement	1.5
Apology	1.5
Recognition of a Compromise	1.5
Not an Admission of Liability	1
Delivery of Goods	1.5
Deal on Goods	2
Documents as Proof (either of the claim, or of compliance)	1
Withdrawal of Claim(s) and/or Release(s) of Liability	1
Confidentiality	1.5
Letter to Third Party	1.5
Future Resolution Methods (for future disputes, not for eventualities of the agreement falling apart)	2
Third Party Inspection	1.5
Third Party Quote	1.5
Other	2

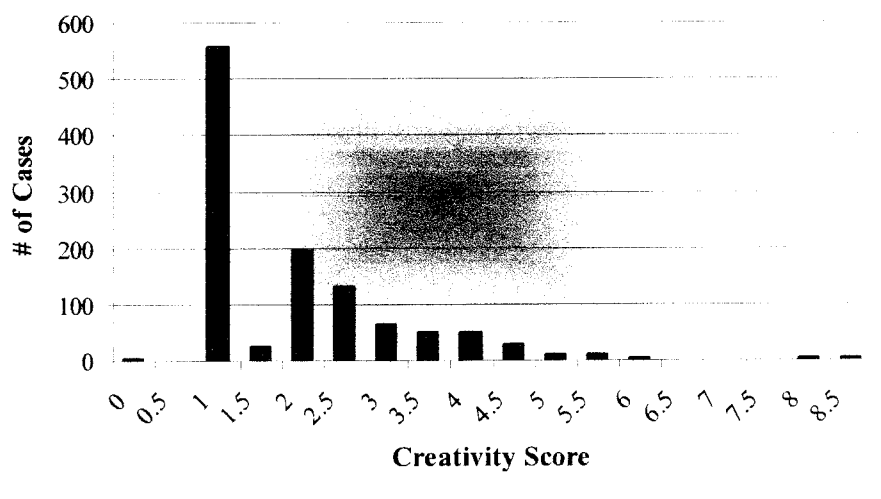
For agreements that contained several of these elements, the weight attributed to each element was then aggregated, to get the resulting overall calculated creativity of the agreement.

Taking these elements, a comparison can be made between judgments and mediated agreements. Most judgments are strictly monetary in nature. They generally involve a payment order. Thus, for the most part, the highest creativity score that a

judgment will have is a one⁴. Mediated agreements generally score at least a one, and on average much higher. This is evidence that mediation results in more creative outcomes.

Figure 1 reveals the calculated creativity of the dataset. The vast majority of cases scored a creativity value of only 1, indicating a relatively uncreative result of mediation (likely a simple payment).

Figure 1: Mediation Creativity Score



The average creativity score is 1.938, while the median score is 1.5. There are relatively few highly creative mediation results in the dataset.

Figure 2 depicts the creativity of each case as assessed by the mediator of that case. The way that the mediator subjectively assessed the outcome of the mediation is an interesting consideration. The mediator considered the outcome to be “creative” (according to their own subjective standard) in only 8% of the mediations (96 cases). In the remaining 1,050 cases (representing 92% of all mediations in the dataset), the mediator found that the result was not one that could be labeled as creative.

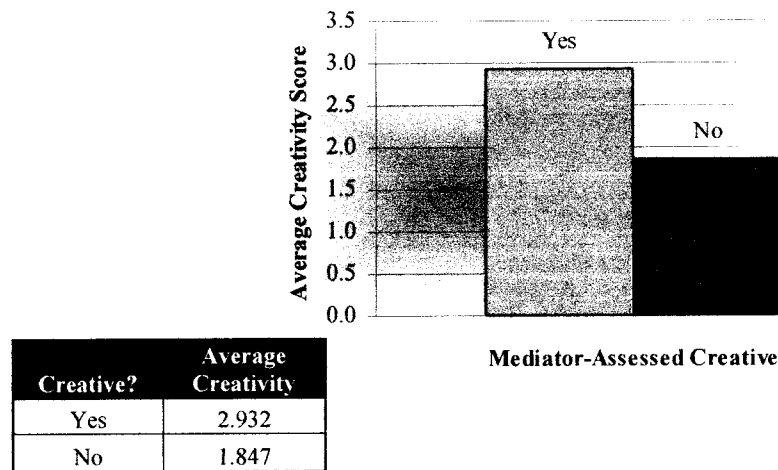
⁴ The average score, however, may be even lower than 1, given that payments will not always be awarded in a judgment (claims may simply be dismissed).

Figure 2: Mediator Assessment of Creativity



When comparing this outcome with the objectively calculated creativity variable, we see that mediators were relatively successful in identifying the creativity of mediated agreements. The average creativity score of the cases in which the mediators subjectively assessed the outcome to have been creative, was 2.932. This was substantially higher than in other cases, as is revealed in Figure 3 table below.

Figure 3: Relationship Between Mediator Assessed and Calculated Creativity

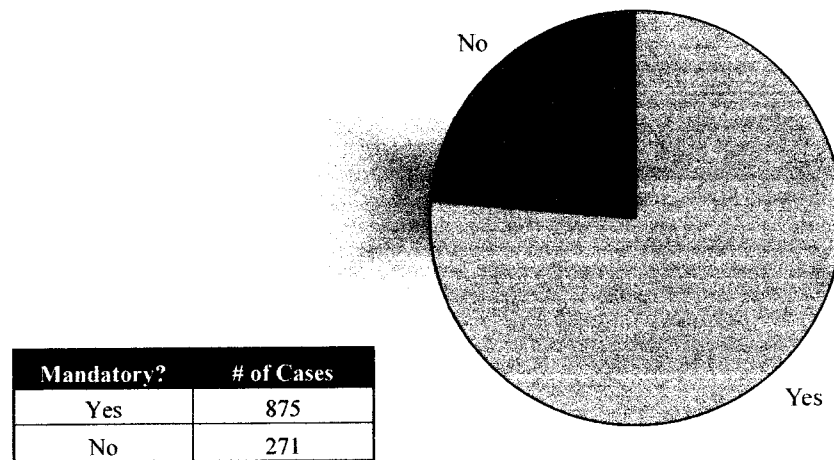


The next variable of interest is whether or not the mediation was mandatory. In the BC Small Claims Court system, there are several types of mediations that are mandatory (these cases cannot proceed through the legal system without the parties having attempted mediation)⁵. Table B illustrates the breakdown of mediations by referral source.

Referral Source	Mandatory or Voluntary	Number of Cases
Referred by Judge	Mandatory	1
Voluntary Both	Voluntary	28
Voluntary Claimant	Voluntary	105
Voluntary Defendant	Voluntary	138
Mandatory Construction	Mandatory	275
Mandatory Other	Mandatory	599

Of the cases examined, approximately 24 percent of the cases were not mandatory⁶.

Figure 4: Mandatory Mediation?



⁵ For a breakdown of the classification of mediations into mandatory versus voluntary, refer to the appendix.

⁶ Interestingly, because of constraints in the data set, Notice to Mediate cases were not included in this analysis (the data for this analysis is for a discrete period ending before the introduction of the Notice to Mediate regulations). Further development of this relationship is an excellent direction for further research. Presumably, an extension of the data set would reveal additional insight and would allow comparisons between “voluntary” (through party election and agreement) and “voluntary” (through Notice to Mediate).

Critics of the mandatory system have argued that forcing the parties to participate mediation destroys the benefits of mediation (including the creativity of the process and outcomes). This argument will be further examined in the model introduced in the following section, but can be addressed with a cursory consideration of the raw data. Figures 5(a) and 5(b) illustrate that the creativity of the mediated agreements are relatively comparable across mandatory and voluntary mediations.

**Figure 5(a): Creativity of Mediation
(Mandatory versus Voluntary)**

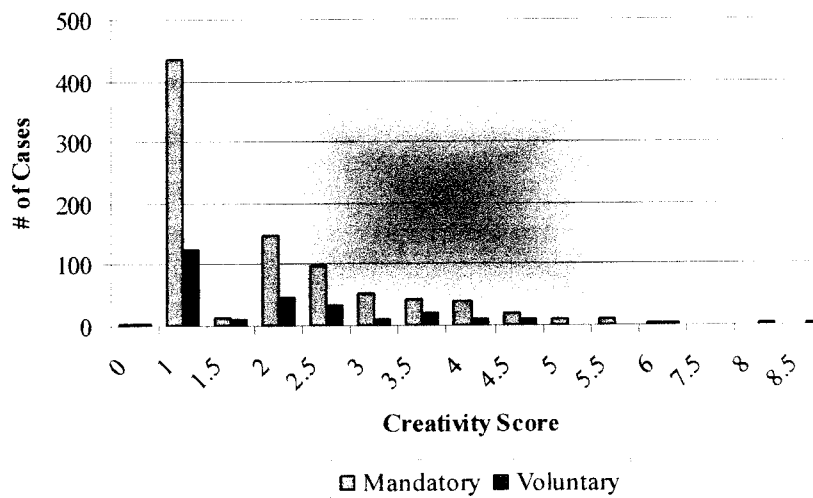
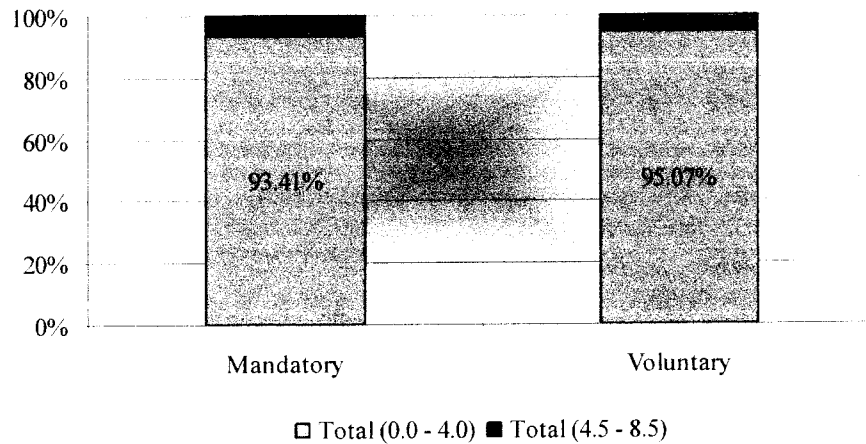


Figure 5(b): Aggregated Creativity of (Mandatory versus Voluntary)



In 6.59 percent of the mandatory cases, the outcome was relatively creative (scoring a 4.5 or higher), while 4.93 percent of the voluntary cases had high creativity scores. This serves to bolster the argument that the mandatory nature of some mediations does not bear a negative impact on the ability of mediation to result in creative agreements. While not conclusive, this lends support to counterarguments against the critics of mandatory mediation.

1.2. Model

Using the calculated creativity variable as the dependent variable, a model is constructed to determine the factors that might cause increased or decreased creativity in a mediated agreement. While a variety of functional forms were considered, the most appropriate was a simple linear model. The following simple linear regression model is used to analyze the relationships between the variables of interest:

$$\text{creativity} = \alpha + \beta X + \varepsilon,$$

where X is a vector of explanatory variables including: whether the mediation was mandatory, the amount of the claim, whether there was a counterclaim, whether there was an interpreter present, the duration of the mediation, the number of counsel present, the location of the registry in which the mediation took place, the experience of the mediator (in total mediation hours), the number of degrees held by the mediator, whether the mediator was legally trained, and a series of dummy variables to control for the type of claim.

The secondary claim type takes the claim itself into account, deducing the type of complaint that resulted in the dispute. It therefore provides a more detailed description of the matter involved. The results of this model are reported in Output 2.

Output 2.			
<i>Regression Statistics</i>			
Multiple R		0.1826	
R Square		0.0334	
	<i>Coefficients</i>	<i>t Stat</i>	<i>P-value</i>
Intercept	1.8803	11.5764	0.00%
<u>Mandatory Mediation?</u>	<u>-0.1104</u>	<u>-1.2490</u>	<u>21.19%</u>
Duration of Mediation	0.1162	2.2625	2.39%
<u>Interpreter Coded</u>	<u>0.2668</u>	<u>1.1345</u>	<u>25.68%</u>
<i>Registry</i>	<i>0.0718</i>	<i>1.6279</i>	<i>10.38%</i>
<i># of Counsel Present</i>	<i>0.0000</i>	<i>-0.0000</i>	<i>98.10%</i>
Total Mediation Hours	-0.0012	-2.4196	1.57%
Legally trained	0.1514	1.9327	5.35%
<i>Amount of Time</i>	<i>0.0000</i>	<i>0.0000</i>	<i>97.87%</i>
<i>Amount of Counsel Time</i>	<i>0.0000</i>	<i>0.0000</i>	<i>98.10%</i>
<u>Damage to Property (P)</u>	<u>-0.2177</u>	<u>-1.3864</u>	<u>16.59%</u>
Debt/Loan (K)	-0.2970	-2.2164	2.69%
Unpaid Account (K)	-0.2234	-2.7995	0.52%
<u>Wills/Estates (P)</u>	<u>-0.6488</u>	<u>-1.2002</u>	<u>23.03%</u>

2.1. Mediation Characteristics

At first glance, the negative value of the coefficient on the variable for mandatory mediation appears to lend support to critics of the mandatory system in place in British Columbia. It appears to reveal that mandatory mediations are associated with lower levels of creativity in the mediated agreement. This phenomenon is not statistically significant in the first model, but becomes moderately significant in the second model. Thus, while the first model provides no interpretive insight into the relationship, we can assess the impact revealed in the second model with some degree of certainty (the predicted relationship will hold approximately 79 percent of the time). The coefficient tells us that when the mediation is mandatory, this reduces the creativity score by 0.11. A

mediation that would have otherwise scored a 4 (meaning that it was moderately creative), once mandatory, becomes almost 3% less creative (lowering the score to 3.89).

The duration of the mediation is also positively correlated with the creativity of the agreement. The longer the mediation, the more likely the agreement is to be more creative. This impact is relatively modest; a one hour increase in the duration of the mediation is associated with a 0.115 increase in the creativity score in the first model (and a 0.116 increase in the second model). This observation is logical, because it often takes more time both to construct more creative agreements, and while less meaningful, it also clearly would take more time to write these agreements.

The presence of an interpreter bears a positive impact on the creativity of the mediated agreement. The presence of an interpreter is associated with a 0.287 increase in the creativity score (in the first model)⁸. At first glance, this is surprising, as one would imagine that language barriers would act to impede parties' abilities to be as creative as they might like to be. However, the fact that there is a language barrier may actually be causing parties to look to more creative ways to resolve their disputes, as a result of more clear communications of their interests with the presence of an interpreter in the mediation itself.

The location of the mediation does bear an impact on the creativity. This variable is included not for interpretive purposes, but rather to control for innate differences across geographic locations of the mediations. Interestingly, a casual consideration of the coding of this variable leads to a finding that the further from Vancouver the mediations are held, the more creative they are likely to be.

⁸ The second model reveals a slightly lower impact.

Surprisingly, the presence of counsel at the mediation bears no significant impact on the creativity of the mediation. Many mediators claim that the presence of lawyers can bring a legalistic and uncreative approach to the mediation process. Others assert that the presence of skilled mediation advocates will allow the parties to explore their interests more thoroughly, with the outcome being more creative as a result. The data is unable to reveal whether either of these assertions is correct. It is possible that lawyers bear no impact on the creativity of the outcome. It is also possible that different lawyers with different skill sets will bear differing impacts on the outcome of mediation. These impacts may counteract each other. An interesting direction for further research in this area would be to control for the impact of an individual lawyer. This would allow us to determine whether counsel's particular skills in mediation bear a positive or negative impact on the creativity of a mediated agreement.

2.2. Mediator Characteristics

The more hours of training that a mediator has (total mediation hours), the less likely the mediated agreement is to be creative, though the impact is relatively small⁹. This is a surprising outcome, as one would anticipate that the more experienced the mediator, the more likely they are to help the parties to arrive at more creative solutions to their disputes. This result is consistent even after controlling for individual differences across mediators. A possible explanation for this result is that mediators who have more formal training are less inclined to work in an in depth way to facilitate creative

⁹ The coefficients of the two models are 0.0011 and 0.0012 respectively. This can be interpreted as a 1 hour increase in the mediator's experience being associated with a 0.001 reduction in the creativity score. This extent of this relationship is only meaningful if one considers, for example a 100 hour difference in the mediator's experience. This would lead to a 0.1 change in the creativity score.

resolutions to disputes. This finding might serve to encourage highly trained mediators to continually revisit their skills (such as active listening, reframing, etc. that serve to encourage creativity in mediated agreements). Another possible explanation is that a better proxy for mediator experience would serve to better capture the skills of the mediator. The number of training hours does not accurately reflect the overall mediation experience of the mediator. A better measure of this would be to examine the number of cases mediated. This may help to get a more thorough picture of the impact of mediator experience on the creativity of the agreement.

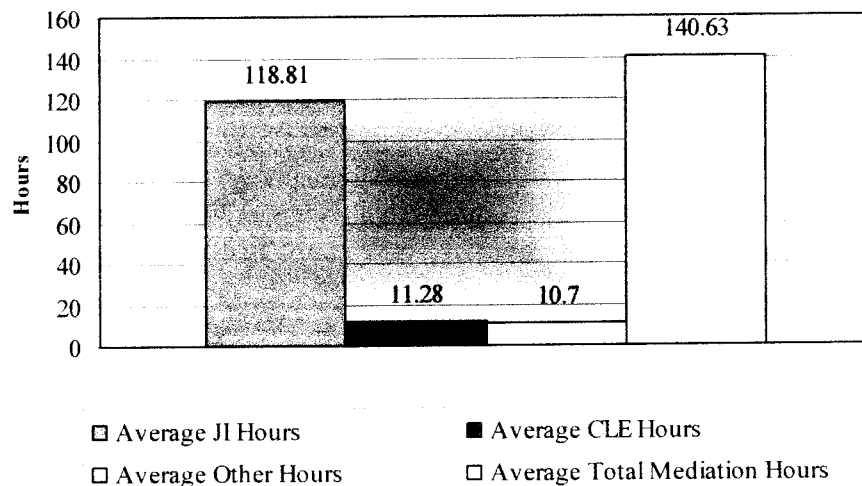
Another factor of potential importance is not captured in this variable. In some of the mediations, there is more than one mediator present (these cases may have a mentor and trainee). Due to constraints in the data, this analysis is unable to distinguish between the impact of the mentor and that of the trainee. Thus mediations with one very experienced mediator may appear less creative than would otherwise be the case because there trainee is influencing the outcome. This is an excellent direction for further research, as analysis and data collection of this issue will serve to investigate the possibility of the impact of this relationship.

Legally trained mediators are more likely to write creative agreements. At first blush, this positive relationship is surprising. One might expect legally trained mediators to be more inclined to encourage settlement of matters in a less creative legalistic fashion focused on the likely results at court. However, further consideration leads to the understanding that legally trained mediators may have a higher degree of comfort with highly complex claims. They might also have more in-depth experience drafting

agreements, and would therefore be more skillful at drafting complex, creative agreements.

A variety of alternative explanatory characteristics of mediators were examined, but none bore a statistically significant impact on the creativity of a mediated agreement. These variables included the type of degree held by the mediator, the number of degrees held, the type of training hours that the mediators had accumulated. Summary statistics on a variety of these variables are presented below, to reveal the qualifications and characteristics of the mediators in the BC Small Claims Court Mediation Program. There were 96 mediators in the dataset. The maximum number of cases dealt with by a single mediator was 182 (the average number of cases per mediator was 12). The average number of degrees held by the mediators was 1.539. There were mediators that held zero degrees, while others held up to four degrees. Of the 96 mediators, almost half were not legally trained (48.96%). The type of mediation training is outlined in Figure 6.

Figure 6: Average Mediation Experience



2.3. Claim Characteristics

The amount of the claim is slightly positively related to the creativity of the agreement in the first model (but bears no impact in the second model). However, the amount of the counterclaim (or whether there is a counterclaim) does not bear any impact in either model. An increase in the claim amount of \$1,000 is associated with an increase in the creativity score of 0.16. This is a relatively small impact. While the impact is small, the relationship is still of interest, because it reveals that parties are more likely to come to creative resolutions when their claims are for higher amounts. This lends support to increasing the scope of mediations to claims for larger quantum, as they will be given the opportunity to come to lower cost, creative resolutions to their substantially costly disputes.

The first model considers the “primary vetting type” to examine the type of claim at a cursory level. At this level, the type of claim bears little impact on the creativity of the mediation. While a variety of claim types were examined, only 2 bore any significant impact: business claims and professional claims. Interestingly, while one might think that business and professional cases would bear a similar impact on creativity, this is not the case. Business claims have a positive impact, while professional claims have a negative impact. If the claim type is business-related, the creativity score is 0.434 higher than otherwise. Conversely, if the claim type is professional, the creativity score is 0.221 lower. The relationships that these variables have with creativity may be a result of the data collection methods. The primary vetting type from which these variables emerge is collected by examining the parties to the dispute. If they are “professionals” (including lawyers, accountants, doctors, etc.), they fall into the professional category. Businesses

can fall into a variety of categories, but if they bear no discernable characteristic (i.e. if they are not a bank, a real estate company, etc.), they fall into the other business category reported in model 1. Because the business category is a “catch-all” it provides little interpretive quality. The “professional” category, conversely, provides some interesting insight. The model reveals that when there is at least one party to the dispute that is a “white collar professional”, the dispute is less likely to result in a creative resolution.

2.4. Further Considerations

While several of the explanatory variables bear a statistically significant impact on the overall creativity of the mediated agreement, none of the variables appear to bear a substantially large impact. In fact, the model serves only to predict approximately 5 to 22 percent of the variation in creativity. This means that the majority of the variability in creativity remains unexplained. There are several possible explanations for this: (1) that further information should be collected to determine the causes of creativity of mediated agreements; (2) that further more sophisticated statistical manipulation would unveil the underlying causes of creativity; or most importantly (3) that the creativity of mediated agreements is primarily caused by the individual litigants themselves. This reveals an area for further research: the individuals themselves. While the collection of individual information likely poses privacy problems, it would provide interesting insight into the factors contributing to the overall creativity in mediations.

Part 3: Concluding Remarks

The results of this analysis offer insight into the factors related to the creativity of mediated agreements. This study has been limited by the availability of data, insofar as it has only considered variables related to the agreement itself and to the mediator¹⁰. There is no information relating to the parties to the dispute – factors that likely bear a significant impact on the creativity of mediation. This study is, however, of interest for several reasons. First, it demonstrates that mediated agreements are more creative than judgments. This is an important result, as it supports the claims made by those advocating mediation as a creative alternative form of dispute resolution. Second, while the variables presented have not predicted a substantial degree of the variability in the creativity of mediated agreements they have identified some very interesting relationships. The skill set of mediators (including their training and background) is important. The characteristics of the mediator can bear an impact on the creativity of the mediation. Further, the characteristics of the mediation itself bear an impact. The length of time, parties present, and location of the mediation can be contributing factors to the degree of creativity. Third, it reveals a finding that creativity is extremely difficult to predict. It is likely more a function of the individual parties' situations, approaches and mindsets. Finally, this research indicates the potential value in future research on this topic. The continuous and increasing collection of data relating to mediations will allow us to further examine the creativity of mediation, and could potentially allow policymakers to enhance the degree of creativity in mediation.

¹⁰ As pointed out previously, the study would also benefit from additional data on the mediator characteristics.

5. Appendix

MediationType

Mediation Type Name	Mandatory Mediation?
Referred by Judge RULE 7.2	Yes
Notice to Mediate Both RULE 7.2	No
Notice to Mediate Defendant RULE 7.2	No
Notice to Mediate Claimant RULE 7.2	No
Mandatory Other RULE 7.2	Yes
Mandatory Construction RULE 7.2	Yes
Referred by Judge PRACTICE DIRECTION	Yes
Conf. Referral PRACTICE DIRECTION	Yes
Voluntary Both PRACTICE DIRECTION	No
Voluntary Claimant PRACTICE DIRECTION	No
Voluntary Defendant PRACTICE DIRECTION	No
Mandatory Construction PRACTICE DIRECTION	Yes
Mandatory Other PRACTICE DIRECTION	Yes