JOURNAL OF EMPIRICAL LEGAL STUDIES

Journal of Empirical Legal Studies
Volume 12, Issue 4, 686–715, December 2015

Inside the Caucus: An Empirical Analysis of Mediation from Within

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This article provides a glimpse into the worlds of mediation and settlement negotiation. Because they are almost always private, there has been relatively little empirical analysis of the dynamics of settlement or mediation. This article analyzes a unique data set derived from a mediator's contemporaneous notes of mediations involving employment disputes, such as claims of discrimination or wrongful termination. Although the data set includes more than 400 cases, since they were all mediated by a single mediator, this article can be viewed as a case study. Among the most interesting facts uncovered by this analysis are the following. Mediation can be extremely effective in facilitating settlement. The mediator studied here achieved a settlement rate of over 94 percent. There are very few gender differences, whether one looks at the gender of the plaintiff or the gender of the lawyers. For example, settlement rates are the same for male and female plaintiffs and lawyers. On average, cases settle much closer to the defendant's first offer than the plaintiff's, irrespective of case type, size of law firm, or other factors. A mediator's proposal appears to be the most effective mediation technique. A mediator's proposal was used in almost 90 percent of cases and, when it was used, the settlement rate was over 99 percent.

I. Introduction

This article provides a glimpse into the worlds of mediation and settlement negotiation. Because negotiations are almost always private, there has been relatively little empirical analysis of the dynamics of settlement bargaining. In addition, although there is a large literature on the effectiveness of court-ordered mediation and the mediation of union grievances, there is little published research on consensual private mediation.[1]

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The authors thank Scott Altman, Ian Ayres, Bernard Black, Alex Capron, Sam Erman, Kuo-Chang Huang, Gillian Hadfield, Michael Heise, Eric Helland, Louis Kaplow, Greg Keating, Jacob Klerman, Russell Korobkin, Martin Krieger, Robert Mnookin, Emily Ryo, Max Schanzenbach, Steven Shavell, Kathryn Spier, Matthew Spitzer, Abby Wood, and participants at the Fifth Law & Economic Analysis Conference (Academica Sinica, Taiwan), Conference on Empirical Legal Studies, Harvard Law & Economics Seminar, UCLA Negotiation & Dispute Resolution Colloquium, USC Law School Faculty Workshop, and Yale-Quinnipiac Dispute Resolution Seminar for their comments and suggestions. The authors also thank the USC law librarians for outstanding assistance.

[1]Ralph Peeples, Catherine Harris & Thomas Metzloff, Following the Script: An Empirical Analysis of Court-Ordered Mediation of Medical Malpractice Cases, 2007 J. Disp. Resol. 101, 102 n8 (2007). See also sources cited in footnotes 10 and 11.

The presentation here is largely descriptive, but it is hoped that it will spark both theoretical elaboration and further empirical investigation.

This article is based on contemporaneous notes of more than 400 mediations conducted by one of the authors.[2] Although the large number of mediations allows multivariate regression and other forms of quantitative analysis, since the study involves a single mediator, it can also be thought of as a case study. All the cases involved employment disputes, such as claims of discrimination or wrongful termination. The mediator's notes include the amount that each side offered in each round of negotiation, whether the case settled, the amount and terms of the settlement, information about the parties and their lawyers, and whether particular techniques—such as a mediator's proposal or bracketed offers—were used. Although the use of a single mediator's notes allows examination of topics not previously studied—such as the pattern of offers and counteroffers, and the use of bracketed offers—there are also drawbacks to such a study. Findings may not generalize to other mediators, and the fact that the mediator is also one of the authors introduces possible biases.

Empirical work on mediation is particularly important because mediation is widespread and its usage is growing. A 2011 survey of Fortune 1000 corporate counsel found that mediation is now the most common form of alternative dispute resolution (ADR). It is used "frequently" or "always" by 48 percent of surveyed companies, and its use has increased since 1997. In contrast, arbitration is used "frequently" or "always" by only 19 percent of companies, and its use has been decreasing.[3]

While there is a considerable body of research on the effectiveness of mediation, because mediations are usually confidential, there has been a smaller amount of research into what happens inside mediation. Deborah Kolb observed 16 union-employer contract mediations conducted by federal and state agencies. Her study focused on the roles and strategies the mediators employed. For example, she found that state mediators were more likely to play a "dealmaker" role, keeping the sides in separate rooms, pressuring one or both sides to make concessions, and communicating proposals from one side to the other. In contrast, federal mediators tended to play an "orchestrator" role, encouraging the parties to meet in a single room and to negotiate directly with each other.[4] Lisa Bingham and collaborators conducted a number of studies of the U.S. Postal Service's grievance mediation program. USPS forbade her and fellow researchers to observe mediations or collect demographic data, but through surveys and interviews she was able to investigate a number of issues, such as party satisfaction

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[2]For a somewhat similar study, see Ralph Peeples, Catherine Harris & Thomas Metzloff, Following the Script: An Empirical Analysis of Court-Ordered Mediation of Medical Malpractice Cases, 2007 J. Disp. Resol. 101–18 (2007) (analysis based on observation of 46 mediations).

[3]Thomas J. Stipanowich & J. Ryan Lamare, Living with ADR: Evolving Perceptions and Use of Mediation, Arbitration and Conflict Management in Fortune 1000 Corporations, 19 Harv. Negot. L. Rev. 1, 44–46 (2014).

[4]Deborah M. Kolb, The Mediators (1983).

with the mediation process and whether mediators used the transformative or facilitative style.[5] Jeanne Brett and Stephen Goldberg have investigated a number of aspects of mediation. In one study, they used surveys to explore differences between mediators with judicial experience and those without.[6] In another, they analyzed their own failed attempt to mediate an intrafirm business dispute.[7] They also evaluated the effectiveness of a program they designed to mediate grievances at a unionized coal mine afflicted with wildcat strikes.[8]

The method used in this article—quantitative analysis of mediations conducted by one of the authors—provides another window into the practice of mediation. While the use of data produced by one of the authors carries with it the danger of bias and concerns about generalizability, it also possesses important advantages. For example, in contrast to Kolb, whose book was based on observation of only 14 mediations, this article is based on over 400 mediations. Similarly, whereas USPS restrictions meant that Bingham had to use surveys and interviews, and thus to rely on participants' memories, this study is based on a mediator's contemporaneous notes. These notes are likely to be highly accurate because the mediator relied on them during the mediations themselves to convey offers and to construct counteroffers and mediator's proposals. Surveys, such as those used by Goldberg and Brett, often suffer from low response rates, which introduce concerns that those who respond may not be representative. In contrast, the data used in this article come from nearly every mediation conducted by the mediator-author during the study period. To the extent that data were not available from a few mediations, those omissions reflect the loss of paper records, which is not likely to be correlated with any variable or outcome of interest.

Nevertheless, it is important to be cautious in interpreting these data. They are based on mediations by a single mediator, all relate to employment disputes, and nearly all involve southern California plaintiffs. In addition, the parties chose this mediator, so the cases are not a random sample even of southern California employment disputes. In addition, many of the factors explored—such as the kind of lawyer hired, the number of bargaining rounds, and the use of a mediator's proposal—reflect strategic decisions by the parties involved, so causal inferences should be made cautiously. Since data on the conduct of mediation and settlement negotiation are usually confidential, we believe that, even with these caveats, the results presented here shed light on important subjects about which relatively little is currently known. For example, this is the first study that

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[5]Lisa Blomgren Bingham, Transformative Mediation at the United States Postal Service, 5 Negotiation & Conflict Management Research 354–66 (2012) (surveying numerous articles by the author and her collaborators).

[6]Stephen B. Goldberg, Margaret L. Shaw & Jeanne M. Brett, What Difference Does a Robe Make? Comparing Mediators With and Without Prior Judicial Experience, 25 Negotiation J. 277–305 (2009).

[7]Stephen B. Goldberg & Jeanne M. Brett, Getting, Spending—and Losing—Power in Dispute System Design, 72 Negotiation J. 119–30 (1991).

[8]Stephen Goldberg & Jeanne Brett, An Experiment in the Mediation of Grievances, 3 Monthly Lab. Rev. 23–30 (1983).

Table 1: Case Types

Case Type	*Number*	*Percent*
Class actions	54	13.3
Discrimination	241	59.4
Whistleblower	33	8.1
Wrongful termination	30	7.4
Other	48	11.8
Total	406	100.0

SOURCE: The data in this and other tables are derived from Lisa Klerman's contemporaneous notes of mediations conducted in the period mid-2008 through mid-2013.

analyzes offers and counteroffers in settlement bargaining. In addition, it is hoped that this study will inspire other similar studies, which may shed light on whether the patterns uncovered here are typical or idiosyncratic.

Among the most interesting facts uncovered by this analysis are the following. Mediation can be extremely effective in facilitating settlement. The mediator studied here achieved a settlement rate of over 94 percent. There are very few gender differences, whether one looks at the gender of the plaintiff or the gender of the lawyers involved. For example, settlement rates are the same for male and female plaintiffs and lawyers. On average, cases settle much closer to the defendant's first offer than the plaintiff's, irrespective of case type, size of law firm, or other factors. A mediator's proposal appears to be the most effective mediation technique. A mediator's proposal was used in almost 90 percent of cases and, when it was used, the settlement rate was over 99 percent.

Section II briefly describes the mediator whose cases are analyzed here and her mediation practice. Section III analyzes the factors that influenced whether the case settled. Section IV explores settlement amounts. Section V charts the sequence of offers and counteroffers. Section VI explores in greater detail the use of bracketed offers and mediator's proposals. Section VII concludes.

II. The Mediator and the Mediation Practice

All mediations analyzed in this article were conducted by one of the authors, Lisa Klerman. Lisa Klerman has been a full-time mediator since 2004. Before that, she was a partner in the Los Angeles office of Morrison & Foerster, a large global law firm with a diversified litigation and transactional practice. At Morrison & Foerster, Lisa specialized in employment litigation and advice. Her mediation practice involves employment disputes almost exclusively. During the relevant period, she mediated four nonemployment cases, which were excluded from all tables, regressions, and analyses. Table 1 breaks down the mediated cases examined in this article by type.

The largest case category is discrimination, which includes claims alleging adverse treatment based on a protected characteristic such as race, ethnicity, gender, age, disability, national origin, or sexual orientation. These cases could be brought under either

federal or state law or both. The "Other" category includes suits under the FMLA (Family Medical Leave Act), wage and hour disputes, employment contract disputes, and other miscellaneous employment law cases. The class action cases are almost exclusively wage and hour disputes, such as cases where workers alleged that their employer systematically denied them legally required meal and rest breaks or failed to pay them overtime.

Mediations can take place at any point in the dispute process. Not infrequently, the parties studied here mediated before the plaintiff filed suit. Class action cases were often mediated before class certification.

The cases analyzed in this article come from the period 2008–2013. To keep track of the offers and facilitate resolution of the cases, Lisa Klerman kept notes on nearly all the cases in this period, although there are a small number of cases (perhaps four per year) in which she did not keep notes or in which the notes have been lost. Ms Klerman took notes on cases in the period 2004–2008 as well, and these earlier cases could have been included in this study, but they would have required additional time to code. There is no reason to think that inclusion of these additional cases would alter the analysis.

A small number of the mediations (10) were provided pro bono, and the rest were paid. In pro-bono cases, Ms Klerman mediated the first three hours for free, and then charged about $400 for each additional hour. The rate for an ordinary, full-day mediation during this period was between $4,000 and $7,500. Because of their complexity, class actions were slightly more expensive, while half-day mediations were provided at a roughly one-third discount. Over 85 percent of mediations were scheduled as full-day mediations, although some full-day mediations concluded in only a few hours, and some mediations that were scheduled for a half-day ended up taking longer. If a half-day mediation went longer than four hours, Ms Klerman would charge several hundred dollars for each additional hour. Lisa Klerman's mediation fee included reasonable followup after the core mediation day. So, for example, if the parties had agreed upon a loose framework for an agreement, she would help them finalize the terms in subsequent days without additional charge. Or, if the parties had not settled the cases on the mediation day, she might facilitate continued negotiation by email or phone for several days or even weeks until a deal had been finalized or an impasse reached. Occasionally, parties requested a second full day of mediation, and they paid separately for the second day. So the total cost of a two-day mediation would be twice the cost of a single-day mediation.

Most cases involved parties from Los Angeles or Orange Counties. Most mediations were conducted at Lisa Klerman's mediation office in Rolling Hills Estates, which is about 25 miles south of downtown Los Angeles and about 20 miles northwest of coastal Orange County. Other mediations were held at locations selected by the parties, mostly in Los Angeles and Orange Counties, but sometimes in San Diego or northern California.

Parties in Lisa Klerman's mediations were always represented by lawyers. At least a day before the mediation, the lawyers ordinarily gave Ms Klerman "mediation briefs" summarizing the facts and legal issues. Lisa Klerman would typically begin the

mediation by discussing the facts and underlying legal issues of the asserted claims in separate private caucuses (meetings) with each side. These communications were confidential in order to encourage the parties to be candid with the mediator. Ms Klerman would explore the strengths and weaknesses of the case with each side in order to set the stage for the parties to adjust their settlement expectations. In some cases, Ms Klerman would recommend an attorney caucus (a meeting between the mediator and the attorneys representing both sides, without their clients) to discuss disputed facts or novel legal arguments. It might be several hours before settlement numbers were discussed. Toward the end of the day, the parties may have stalled in their negotiations. If so, Ms Klerman would frequently make a "mediator's proposal" to settle the case. A mediator's proposal is a settlement proposal that comes from the mediator—not from either side—and is the number that the mediator believes both sides are most likely to accept. Although mediations are sometimes classified as facilitative or evaluative, Ms Klerman uses both approaches, as she thinks is most appropriate for each dispute.[9] Because of her experience as an employment litigator, her evaluation of a case had substantial credibility with lawyers and their clients.

During the period analyzed in this article, Lisa Klerman also ran the Mediation Clinic at USC Law School, served on the Board of Directors of the Southern California Mediation Association, and chaired the Labor and Employment Section of the Los Angeles County Bar Association.

The information presented in this section makes clear that Lisa Klerman is not a typical or representative mediator. Nevertheless, her background, practice, and techniques are similar to other successful, private full-time mediators.

III. Factors Influencing Settlement

Of the cases Lisa Klerman mediated, she settled over 94 percent. Compared to other studies of mediation, this is a very high percentage.[10] The high settlement rate may reflect the fact that the parties agreed voluntarily to mediation and, except in a few pro-

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[9]For a description of and survey of the literature on mediation techniques, see E. Patrick McDermott & Ruth Obar, "What's Going On" in Mediation: An Empirical Analysis of the Influence of Mediator's Style on Party Satisfaction and Monetary Benefit, 9 Harv. Negot. L. Rev. 75 (2004). The use of both techniques is not uncommon: 17 percent of mediators use both evaluative and facilitative techniques. An additional 23 percent use ambiguous "hybrid" techniques, either alone or in combination with facilitative or evaluative techniques. Id. at 95.

[10]Ralph Peeples, Catherine Harris & Thomas Metzloff, Following the Script: An Empirical Analysis of Court-Ordered Mediation of Medical Malpractice Cases, 2007 J. Disp. Resol. 101, 104 (2007) (in medical malpractice "mediated settlement conferences," 20 percent settled and 9 percent partially settled; overall settlement rate in mediated settlement conferences recorded by the North Carolina Administrative Office of the Courts was 50–60 percent); Douglas Henderson, Mediation Success: An Empirical Analysis, 11 Ohio State J. Disp. Resol. 105, 132 (1996) (survey of construction industry mediations found 57.4 percent settlements and 8.4 percent partial settlements); Jeanne M. Brett, Zoe L. Barsness & Stephen B. Goldberg, The Effectiveness of Mediation: An Independent Analysis of Cases Handled by Four Major Service Providers, 12 Negotiation J. 259, 261 (1996) (78 percent rate among mediations conducted by AAA, JAMS, CPR Institute for Dispute Resolution, and U.S. Mediation and Arbitration Service).

bono cases, paid several thousand dollars in advance. Parties are unlikely to invest that much in mediation unless they are motivated to settle. Some prior studies that found lower settlement rates involved court-ordered mediation.[11] The high settlement rate also may reflect the mediator's skill and experience.

Cases are counted as settled if they resolved either at the mediation or with Lisa Klerman's help in the days following the mediation. Some of the cases may have settled later without her help, but they are not counted as settled in this article. Table 2 shows how the settlement rate varied with various factors. Factors for which the settlement rate differs from the average by 5 or more percentage points are highlighted in bold.

Table 2 shows that only a few factors influence the settlement rate. Neither the gender of the plaintiff nor the gender of the lawyers seems to influence settlement rates significantly. Whether the mediation was scheduled for a full day or half-day also does not seem to matter.

Table 2 indicates that class action cases were much less likely to settle. There are three possible reasons for this. First, the lower settlement rate accords both with prior empirical research and with economic models of settlement, which generally predict that large cases are less likely to settle.[12] A key motivation for settlement is to save litigation costs. In class actions, although litigation costs are large in an absolute sense, as a percentage of the amount at stake, they are smaller than in individual cases. Second, the settlement rate reported in the table may underestimate the actual settlement rate. As noted above, cases are counted as settled in this article if they settled on the mediation day or with the mediator's assistance some time later. Class actions are more complicated, so they are less likely to settle on the mediation day. For example, resolution of wage and hour class action cases (the most common type of class action in Lisa Klerman's practice) requires analysis of hundreds or even thousands of employee timesheets, payroll records, and other documents. Thus, unless the defendant provided this information to the class counsel before the mediation, even if the parties reached an agreement in principle on the mediation day, the settlement could not be finalized until later. If the parties are able to work through the calculations themselves, they may not involve the mediator in finalizing their agreement, so their settlement would not be counted in this study. Third, because damages can be very high, the financial condition

[11]Ralph Peeples, Catherine Harris & Thomas Metzloff, Following the Script: An Empirical Analysis of Court-Ordered Mediation of Medical Malpractice Cases, 2007 J. Disp. Resol. 101 (2007) (study of court-ordered mediation); but see Douglas Henderson, Mediation Success: An Empirical Analysis, 11 Ohio State J. Disp. Resol. 105, 137, 140, 145 (1996) (34 percent of studied mediations were required by courts, and whether mediation was required did not influence the probability of settlement); Jeanne M. Brett, Zoe L. Barsness & Stephen B. Goldberg, The Effectiveness of Mediation: An Independent Analysis of Cases Handled by Four Major Service Providers, 12 Negotiation J. 259, 262 (1996) (settlement rate "not affected by whether the case went to mediation voluntarily or not"). For more of the literature on court-ordered mediation and its success rate, see Peeples et al., Following the Script, at 102 n8.

[12]Kuo-Chang Huang, Kong-Pin Chen & Chang-Ching Lin, An Empirical Investigation of Settlement and Litigation—The Case of Taiwanese Labor Disputes, 7 J. Empirical Legal Stud. 786 (2010); Douglas Henderson, Mediation Success: An Empirical Analysis, 11 Ohio State J. Disp. Resol. 105, 144 (1996). See, e.g., Richard Posner, Economic Analysis of Law 765 (8th ed. 2011).

Table 2: Case Factors Influencing Settlement

Factor	*Settlement Rate*	*Number (Settled and Not Settled)*
Overall	94.1%	404
Case type		
Class action	**84.9**	**53**
Discrimination	96.7	240
Whistleblower	97.0	33
Wrongful termination	**86.7**	**30**
Other	93.8	48
Plaintiff gender		
Female	95.3	191
Male	95.6	159
Plaintiff lawyer gender		
Female	97.1	70
Male	93.4	334
Defendant lawyer gender		
Female	93.5	168
Male	94.5	236
Plaintiff law firm size		
Solo practitioner	89.5	105
2–3 lawyers	94.2	120
4 or more lawyers	96.6	176
Defendant law firm size		
Solo practitioner	**88.9**	**9**
2–14 lawyers	89.7	39
15–49 lawyers	91.9	37
50–99 lawyers	95.7	46
100 or more lawyers	95.0	241
In-house lawyer	92.6	27
Plaintiff law firm specialization		
Exclusively plaintiff-side employment	94.8	365
Mixed practice	**86.5**	**37**
Defendant law firm specialization		
Exclusively defense-side employment	95.9	121
Mixed practice	93.6	282
Time scheduled		
Full day	94.0	351
Half-day	94.9	39
Two days	92.9	14
Pro bono or paid		
Paid	94.7	394
Pro bono	**70.0**	**10**

NOTE: In this and similar tables, factors possessed by less than 10 cases were omitted from the table, for example, cases involving government lawyers. Cases involving class actions were excluded from the analysis of plaintiff gender because the classes usually included both male and female members.

of the defendant is likely to be a factor in the settlement of class actions. If the defendant claims it could not pay the damages indicated by a full accounting, class counsel may demand documents relating to the defendant's ability to pay before agreeing to a lower amount. Issues about the defendant's solvency make cases harder to settle. In

addition, even if they do settle, they are likely to do so later and thus may not be recorded as settled for the purposes of this study.

The settlement rate is also somewhat lower for wrongful termination cases. As for class actions, the reason may be that the stakes are somewhat higher.[13]

Law firm size does seem to matter. Small firms, especially solo practitioner defense lawyers, are less likely to settle. There are two possible explanations. First, lawyers who practice alone may have fewer opportunities to talk about their cases with other lawyers and, as a result, may overestimate their chances of success. Overconfidence is a key impediment to settlement. While plaintiffs' lawyers have mechanisms, such as the CELA listserve,[14] by which solo practitioners can solicit advice, such networks are weaker on the defense side. Most defense lawyers work in larger firms, so they can consult with other lawyers in their firms. As a result, there is not the critical mass of solo defense lawyers necessary to create the consultative mechanisms that might help them better estimate the value of their cases. Second, attorneys willing to "hang out their shingle" and go it alone are a self-selected group of risk takers. It may not be surprising that their attitude toward risk affects their behavior in settlement negotiations as well. They may be more willing to "roll the dice" at trial than those who practice in the relative safety of a larger firm.

Law firm specialization also seems to matter, especially for plaintiffs' firms. Plaintiffs' firms with a mixed employment and nonemployment practice were less likely to settle. Lawyers in such firms may have less experience with employment cases and less ability to consult with others who know about such cases. As a result, they, like solo practitioner defense counsel, may overestimate the likelihood of success, which impedes settlement.

Pro-bono cases were also much less likely to settle. Parties to such mediations may not take them very seriously. In contrast, parties who invest several thousand dollars to mediate are likely to do so only if they are ready to make significant concessions in order to settle.

The analysis so far of settlement has focused on factors that were known before the mediation began.[15] Table 2 calls these factors "Case Factors." It is also interesting to explore the effect of factors relating to the parties' negotiation strategies and mediator's techniques. Other tables will call these "Negotiation Factors." Table 3 explores those influences.

A number of negotiation factors are associated with settlement rates that are far from the average. Of course, care must be taken in interpreting these factors causally because these factors reflect negotiation strategies and therefore are probably

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[13]See Table 5.

[14]CELA is the California Employment Lawyers Association. www.cela.org.

[15]Whether a mediation would require two full days would have been known before the second day of mediation, but not ordinarily before the first.

Table 3: Negotiation Factors Influencing Settlement

Factor	*Settlement Rate*	*Number (Settled and Not Settled)*
Overall	94.1%	404
First offer		
By defendant	**100.0**	**19**
By plaintiff	94.2	377
Ratio of plaintiff's to defendant's first offer		
≤15	96.9	95
>15 and ≤ 35	97.0	99
>35 and ≤ 75	94.7	95
>75	**89.0**	**91**
Rounds of bargaining		
1	**73.9**	**23**
2	**85.4**	**41**
3	92.1	63
4	98.8	81
5	95.8	72
6	98.0	49
7 or more	**100.0**	**65**
Bracketed offers		
No	91.8	207
Yes	96.5	197
Mediator's proposal		
No	**56.5**	**46**
Yes	**99.2**	**354**

NOTE: Factors for which the settlement rate differs from the overall average by 5 or more percentage points are highlighted in bold.

influenced by other underlying causes (such as parties' assessment of the value of the case) that are not observed directly.

When the defendant makes the first offer, the settlement rate is higher. Of course, since there are relatively few such cases, this may be the result of pure chance. If just one of the 19 cases involving first offers by the defendant had failed to settle, the settlement rate for such cases would have been 95 percent, which would be indistinguishable from the average. A first offer by the defendant may indicate that the defendant is particularly eager to settle. In addition, many such offers are offers of severance pay that had previously been communicated to the plaintiff. Cases in which the defendant is willing to offer severance pay are likely to be those in which the defendant recognizes some obligation to pay, or is at least willing to pay the plaintiff some amount proportional to his or her wages or salary.

As one would expect, the farther apart the parties are at the beginning of the negotiation, the less likely they are to settle. When the plaintiff's first offer is more than 75 times as high as the defendant's first offer, the probability of settlement is below 90 percent. It is startling to note how far apart the parties generally are at the beginning of the negotiation. The mean ratio of first offers is 67 and the median is 35. In 75 percent of the cases, the plaintiff's first offer is at least 15 times higher than the defendant's. In more than a quarter, the plaintiff's offer is more than 70 times higher. In less than 5

percent of cases is the ratio less than four. Amazingly, even though the parties start so far apart, they nearly always settle. This suggests that the opening offers are not serious indicators of where the parties expect to settle, but the beginning of an elaborate dance in which both sides expect to compromise significantly.

There is also a strong relationship between the number of bargaining rounds and the probability of settlement. For the purposes of this article, a case is considered to have had only one round of bargaining if either plaintiff or defendant or both made one offer, and neither party made more than one offer. Similarly, a case is considered to have had two rounds of bargaining if either plaintiff or defendant or both made two offers, and neither made more than two offers. And so on. The more rounds of bargaining, the more likely the case was to settle. When settlement seems hopeless, the parties are likely to break off relatively early. Conversely, they are only likely to go many rounds if they think there is a very high chance the case will settle.[16]

Bracketed bargaining is a technique that is most often used in mediation, although it could be used in other contexts. A bracketed offer is one that is contingent on the other side making a concession. For example, the plaintiff might say, "I'll reduce my offer to $700,000, if the defendant increases its offer to $400,000." The two numbers, $700,000 and $400,000, are referred to as the "brackets." Similarly, a defendant might say, "I'll increase my offer to $200,000, if the plaintiff reduces her offer to $500,000." The figures in Table 3 show that cases in which bracketed offers are made are only slightly more likely to settle than those in which ordinary offers and counteroffers are made. Nevertheless, this does not mean that bracketed bargaining has little or no positive effect. A mediator might only suggest the use of bracketed offers when the parties have not made sufficient progress using conventional bargaining methods or when they have reached an impasse. As a result, if bracketed bargaining had not been used, the settlement rate might have been much lower. Bracketed bargaining was relatively uncommon in employment law mediations until the early 2000s, when many mediators, including Lisa Klerman, began introducing and using the technique. Bracketed bargaining is sometimes suggested by the mediator, and sometimes initiated by a party's counsel. Bracketed bargaining is among a range of options that Lisa Klerman discusses with her mediation parties if conventional bargaining starts to become less productive during the negotiation phase of the mediation.

A mediator's proposal is a very common closing device. As Table 3 indicates, Lisa Klerman used this technique in almost 90 percent of her cases, and it led to settlement almost 100 percent of the time. In this technique, when the parties seem to have reached an impasse or when the mediator thinks a proposal can bridge the remaining gap, the mediator proposes a settlement to the parties that she thinks both sides will accept. The parties then respond confidentially to the mediator. If one party accepts, and the other rejects, the party that rejects the offer never finds out that the other side accepted it. This technique responds to a bargaining problem that Robert Gertner, Geoffrey Miller, Ian

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[16]See Douglas Henderson, Mediation Success: An Empirical Analysis, 11 Ohio State J. Disp. Resol. 105, 142, 143 (1996) (finding the longer mediations were more likely to succeed).

Ayres, and Jennifer Brown have highlighted.[17] Whenever a party makes an offer, it is revealing information about itself—how much it is willing to accept—that could be used against the party in later bargaining. As a result, parties strategically "hold back" settlement offers. The mediator's proposal solves this problem because it is made by the mediator and responses are confidential, unless accepted by both sides.

Lisa Klerman's frequent use of mediator's proposals probably affects every aspect of her mediations. Sophisticated parties and their lawyers realize that she is assessing their beliefs and preferences in order to ascertain their likely reservation value and thus to craft a mediator's proposal that is likely to be accepted by both sides. Plaintiff's lawyers may try to convince the mediator that their reservation value is higher than it really is, while defense counsel may try to convince her that it is lower. Nevertheless, there are constraints on how much they would want to distort their true assessments, as appearing too inflexible may cause Ms Klerman to refrain from making a mediator's proposal at all.

Of course, the fact that when a mediator's proposal was used the settlement rate was over 99 percent does not mean that it should be used in every case. Some cases settle even without a mediator's proposal. In addition, sometimes the parties are so far apart that a mediator's proposal would be unlikely to succeed. In such situations, a mediator's proposal can be harmful. For example, if both sides reject the proposal, each might think the other had accepted it and pursue future bargaining on that mistaken assumption.

The results of this simple comparison of settlement rates are confirmed by multivariate regressions. Since the dependent variable is binary (settled or not settled), the appropriate regression type is logit. Because logit is based on the log-odds ratio, there is no simple interpretation of size of the coefficients, but positive coefficients mean that the factor is associated with an increase in the probability of settlement, and a negative coefficient is associated with reduction in the probability of settlement. In addition, the more the coefficient differs from zero, the bigger the effect. *P* values of 0.05 or less are generally considered to indicate statistical significance and are marked with **, while *P* values between 0.05 and 0.10 are generally considered to indicate marginal statistical significance and are marked with *. By necessity, the variables in the regression results omit some categories in Table 4. Also, some variables corresponding to categories with relatively few observations, whose results were unlikely to be statistically significant, were also omitted from the regressions.[18] Whether the defendant made the first offer could not be included in this

[17]Jennifer Gerarda Brown & Ian Ayres, Economic Rationales for Mediation, 80 Va. L. Rev. 323 (1994); Robert Gertner & Geoffrey Miller, Settlement Escrows, 24 J. Legal Stud. 87 (1995).

[18]Some mediations took place simultaneously. For example, sometimes two plaintiffs sued the same defendant relating to the same harassment, and the two cases were mediated at the same time. Since the simultaneous mediations could influence each other, standard errors and *p* values calculated in the ordinary way might be erroneous. To check whether this was a problem, we tried three alternative approaches with this and all other reported regressions. First, we omitted the 31 observations corresponding to simultaneous mediations. Second, we ran the regressions clustering mediations held at the same time. Third, we ran the regressions using a clustered bootstrap. The results under these alternative approaches were similar to the results of the simple regressions reported in the article, except as noted in footnote 31. Since it is unclear whether clustering is appropriate given that 379 out of the 394 clusters have only one observation, and since the results are similar, we report simple regressions without clustering or dropping the simultaneous mediations.

Table 4: Regression of Factors Influencing Settlement

Variable	*Regression of Case Factors*	*Regression of Negotiation Factors*
Class action	−2.24**	
Whistleblower	−0.58	
Wrongful termination	−1.30*	
Other case type	−0.41	
Plaintiff female	0.16	
Plaintiff lawyer female	0.46	
Defendant lawyer female	−0.52	
Plaintiff lawyer solo practitioner	−1.39**	
Defendant lawyer solo practitioner	−1.04	
Plaintiff lawyer mixed practice	−1.14*	
Defendant lawyer mixed practice	−0.66	
Half-day mediation	0.35	
Two-day mediation	0.21	
Pro-bono mediation	−2.43**	
Ratio of plaintiff's to defendant's first offer		0.00
Rounds of bargaining		0.41**
Bracketed offers		−0.25
Mediator's proposal		4.23**
Constant	4.86**	−0.97
N	402	377
Pseudo r^2	0.18	0.49

NOTE: In this and other regressions, p values of 0.05 or less are marked with **;p values between 0.05 and 0.10 are marked with *. In this and other regressions, the ratio of plaintiff's to defendant's first offer and rounds of bargaining are entered as numeric rather than categorical variables. Inclusion of control variables for type of case, law firm size and specialization, time scheduled, and pro bono in the second regression do not significantly affect the results, although the statistical significance of rounds of bargaining becomes marginal.

regression because logit does not work when an independent variable predicts the outcome with 100 percent probability.

The regression analysis confirms that class actions are significantly less likely to settle, as are pro-bono mediations. The regression analysis suggests that plaintiffs' lawyers who are solo practitioners are also less likely to settle, a fact that was less clear in Table 2. As in Table 2, wrongful termination cases and cases where the plaintiff's lawyer had a mixed practice are also less likely to settle, although the effect is only marginally statistically significant. The marginal statistical significance probably reflects the relatively small number of such cases. For the same reason, the negative coefficient on defendant lawyer solo practice is also not statistically significant. As in the simple comparison of settlement rates in Table 2, the gender of the plaintiff and the lawyers is not statistically significant. In addition, it is notable that the gender coefficients are small and are not consistently of the same sign.

As expected, the number of rounds of bargaining is positively associated with settlement, as is the use of a mediator's proposal.[19] Surprisingly, the ratio of plaintiff's to defendant's first offer is not statistically significant, even though the simpler analysis in Table 4

[19]When class actions are excluded, the association is weaker (coefficient 0.30) and no longer statistically significant.

suggested that it might be. Part of the reason that it is not statistically significant in the regression is that the ratio of the offers is negatively correlated with the use of a mediator's proposal, so the effect of the ratio is absorbed by the variable for the mediator's proposal.

Of the 24 cases that did not settle, the final resolution of the case was recorded in Ms Klerman's mediation notes in only eight. Nevertheless, the results of these eight are suggestive of the reasons cases do not settle. In five of them, the defendant later prevailed on summary judgment. This suggests that when the defendant has a very strong case, the defendant may not make a sufficiently attractive settlement offer or the plaintiff and plaintiff's lawyer may fail to recognize the weakness of their position and thus fail to make or accept a suitably low settlement offer. In one case that failed to settle, the parties arbitrated their dispute. In two cases that failed to settle, the defendant went bankrupt. Impending bankruptcy need not impede settlement if the plaintiff makes or accepts settlement offers that reflect the fact that he or she is likely to have trouble collecting on a trial judgment. On the other hand, defendants not infrequently claim poverty as a negotiating strategy, so plaintiffs are generally wise to be skeptical of such claims. Defendants sometimes have difficulty rebutting that skepticism because information relating to solvency is often solely in the defendant's possession, and the defendant is often reluctant to fully open its books to the plaintiff. As a result, the plaintiff and plaintiff's lawyer may not believe the defendant's representations of impending insolvency, even when true, and may fail to bargain appropriately.

IV. Settlement Amounts

Table 5 shows how settlement amounts vary with case factors. In addition, the column labeled "Normalized Settlement Amount" shows where the settlement was, on average, in relationship to the parties' first offers: 0.5 would indicate that the settlement was halfway between the plaintiff's opening offer and the defendant's opening offer. Lower numbers indicate settlements closer to the defendant's opening offer. Higher numbers mean settlements closer to the plaintiff's opening offer. The overall normalized settlement amount of 0.24 means that the average settlement amount was slightly less than a quarter of the way between the defendant's opening offer and the plaintiff's opening offer. That is, the average settlement was much closer to the defendant's opening offer. Settlement amounts that differ from the average by more than $50,000 and normalized settlement amounts that differ from the overall average by 5 percent or more are highlighted in bold.

The remarkable thing about Table 5 is that while settlement amounts varied considerably with case factors, the normalized settlement amount was remarkably constant at about 25 percent. The finding that settlement amounts are about a quarter of the difference between the opening offers is strikingly similar to results reported by Schwab and Heise, who examined Chicago employment discrimination cases settled by federal magistrate judges in the period 1999–2004.[20] They found that settlements were between

[20]Stewart J. Schwab & Michael Heise, Splitting Logs: An Empirical Perspective on Employment Discrimination Suits, 96 Cornell L. Rev. 931 (2011).

Table 5: Case Factors Influencing Settlement Amounts

Factor	*Average Settlement Amount*	N	*Average Normalized Settlement Amount*	N
Overall	176,114	362	0.24	354
Case type				
Class action	**793,961**	**38**	0.27	37
Discrimination	**87,624**	**224**	0.24	221
Whistleblower	149,379	29	0.22	28
Wrongful termination	179,223	26	0.25	24
Other	**110,299**	**45**	0.27	44
Plaintiff gender				
Female	**91,630**	**175**	0.24	171
Male	**118,228**	**148**	0.24	145
Plaintiff lawyer gender				
Female	**99,393**	**65**	0.23	62
Male	192,906	297	0.25	292
Defendant lawyer gender				
Female	140,082	150	0.25	145
Male	201,609	212	0.24	209
Plaintiff law firm size				
Solo practitioner	**97,740**	**92**	0.24	90
2–3 lawyers	**232,844**	**105**	0.26	104
4 or more lawyers	184,784	162	0.24	157
Defendant law firm size				
Solo practitioner	**73,250**	**8**	**0.18**	**8**
2–14 lawyers	**270,735**	**34**	0.25	33
15–49 lawyers	**228,594**	**32**	0.26	32
50–99 lawyers	171,350	42	**0.29**	**40**
100 or more lawyers	166,054	218	0.23	214
In-house lawyer	**125,478**	**23**	0.26	22
Plaintiff law firm specialization				
Exclusively plaintiff-side employment	174,449	330	0.24	322
Mixed practice	195,950	30	0.27	30
Defendant law firm specialization				
Exclusively defense-side employment	203,931	112	0.24	109
Mixed practice	163,653	250	0.25	245
Time scheduled				
Full day	156,271	318	0.24	310
Half-day	**97,795**	**33**	0.23	33
Two days	**984,727**	**11**	**0.29**	**11**
Pro bono or paid				
Paid	176,545	355	0.24	347
Pro bono	154,286	7	0.28	7

NOTE: Normalized settlement amount was calculated as (settlement amount – defendant's first offer)/(plaintiff's first offer – defendant's first offer). *N* means the number of cases upon which the statistics is based. It is slightly lower for normalized settlement amount than for settlement amount because normalized settlement amount could not be calculated for those cases that settled before the parties had both made opening offers, or where one or both of the opening offers was not recorded.

21 percent and 31 percent of the difference between the opening offers. They also calculated what they called the "Power Ratio," which is what we call the Settlement Percentage, taking the natural log of each number, and found that it is usually about 50 percent.[21] In our data, the mean Power Ratio was 59 percent, which is also close to what Schwab and Heise found. Schwab and Heise suggest that "parties intuitively weigh the order of magnitude of their initial positions and then split the difference of those magnitudes."[22] Our results, however, contrast with Huang, Chen, and Lin, who found that in mediated Taiwanese labor disputes, claimants, on average, recovered over 70 percent of the amount claimed.[23]

The fact that settlements were closer to the defendant's opening offer may reflect the fact that whereas the plaintiff can start negotiations with a very high demand, the defendant's opening offer is bounded below by zero. That is, both plaintiff and defendant start with unrealistic positions that reveal little or nothing about their views of the case. There is no real limit to what the plaintiff can request, whereas the defendant's initial offer is constrained by zero. Many defendant opening offers were, in fact, very low. Twenty-five percent were $5,000 or less and 50 percent were $10,000 or less.

The fact that settlements are typically about a quarter of the difference between the opening offers is definitely not the result of mediator pressure. Before analyzing the data for this article, Lisa Klerman was unaware of the relationship between opening offers and average settlement amounts. The fact that normalized settlement amounts, including mediator's proposals, averaged about a quarter reflects the complex path of offers and counteroffers discussed in the next section, not a formula used by the mediator or the parties.

As would be expected, the biggest factor influencing settlement amounts was whether the case was a class action. Because such cases involve dozens, hundreds, or even thousands of plaintiffs, damages, and thus settlements, are much higher. The large difference between class action settlements and other settlements also renders many of the other comparisons in Table 5 misleading. For example, solo plaintiff lawyers received much lower settlement amounts. However, this mostly reflects the fact that such lawyers very seldom handle class actions rather than anything about such lawyers' negotiating skill. Similarly, the high settlement amounts when mediations took two days also reflects, in part, the high percentage of class actions among the complex cases that required more time. The interrelationship between the factors highlights the importance of the regression analysis (see Table 6) and makes unproductive further discussion of the simple statistics in Table 5.

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[21]Id at 947. Power ratio = ln [ln(settlement amount) – ln(defendant's first offer)]/[ln (plaintiff's first offer) – ln(defendant's first offer)].

[22]Id at 946.

[23]Kuo-Chang Huang, Kong-Pin Chen & Chang-Ching Lin, An Empirical Investigation of Settlement and Litigation—The Case of Taiwanese Labor Disputes, 7 J. Empirical Legal Stud. 786, 798 (2010).

Table 6: Regression of Case Factors Influencing Settlement Amounts

	Settlement Amount		*Normalized Settlement Amount*	
	All Cases	*Excluding Class Actions*	*All Cases*	*Excluding Class Actions*
Class action	649,536**		0.02	
Whistleblower	67,461	67,470**	0.00	0.00
Wrongful termination	67,956	66,221**	0.01	0.01
Other case type	22,464	20,009	0.04*	0.04*
Plaintiff female	1,045	10,087	−0.01	−0.01
Plaintiff lawyer female	−18,847	−2,460	−0.01	−0.02
Defendant lawyer female	−18,816	8,852	0.01	0.00
Plaintiff lawyer solo practitioner	−408	2,960	−0.01	−0.01
Defendant lawyer solo practitioner	−147,240	−77,812*	−0.07	−0.08*
Plaintiff lawyer mixed practice	68,583	81,137**	0.03	0.03
Defendant lawyer mixed practice	−11,803	1,217	0.01	0.01
Half-day mediation	−10,485	−23,785	−0.01	−0.02
Two-day mediation	648,757**	48,1339**	0.04	0.06
Pro-bono mediation	−35,214	−2,963	0.03	0.02
Constant	93,024**	65,741**	0.24**	0.24**
N	363	322	352	315
Adjusted r^2	0.36	0.36	0.00	0.01

Because class action damages are so much higher, we performed regressions both with and without class action cases. In the regressions of all cases (including class actions), there were only two factors that influenced the settlement amount: whether the case was a class action and whether the case was mediated two full days. Although the simple comparison of means in Table 6 suggests that some other variable might have an impact on settlement amounts, the regression suggests they did not. As discussed above, the simple comparison of means was likely misleading because it did not take into account the fact that some factors (such as the size of the law firm) were strongly correlated with whether a case was a class action.

When class actions are excluded, there are some additional factors that seem to influence settlement amounts in statistically significant ways. Both whistleblower and wrongful termination cases tend to result in higher settlements. In addition, sole defense counsel and plaintiff lawyers with mixed practices tend to be more successful in negotiating favorable settlements for their clients. It is not clear why this is the case. Interestingly, even excluding class actions, cases that mediated for a second full day tended to result in much higher settlements. This reflects the fact that only the highest-stakes, most complex cases required (or were worth) a second day of mediation.

It is notable that neither the gender of the lawyer nor the gender of the plaintiff has a statistically significant effect on the settlement amount or the normalized settlement amount, and that the signs are not even consistent. While Table 5 suggested that the gender of the plaintiff and lawyer might make a difference, the gender difference disappears in regression analysis when other factors are controlled for. This suggests that the difference in settlement amounts and normalized settlement amounts between the sexes has more to do with the types of cases (e.g., whether the case was a class

action) than anything to do with different bargaining skills or styles among men and women. The absence of gender effects contrasts sharply with the results of prior studies, which suggested that "men tend to be more competitive and concerned with 'winning' in negotiation as well as other contexts, while women tend to be more concerned with preserving and strengthening relationships."[24]

The negligible role of gender may reflect several factors. First, women who become employment litigators are a self-selected group. Although there may be differences in bargaining style among the genders more generally, women who bargain like men may be more likely to become employment litigators. In addition, even if some women with softer bargaining styles became employment litigators, they might not be hired, might learn over time to behave more like their male counterparts, or might switch to a different practice. Another possible reason for the low salience of gender may be the fact that this study looks at very recent mediations. Perhaps differences were larger a decade or two ago. Finally, the fact that the mediator herself was female may help negate the influence of gender.

No case factor consistently explains the normalized settlement amount, except "Other" case types, which tended to settle closer to the plaintiff's initial offer, and even that difference is only marginally statistically significant. The fact that case factors explain little is not surprising given the fact that in Table 5, the mean normalized settlement amount did not vary much. Defendants represented by solo practitioners were able to extract settlements closer to their initial offers, although that result is only marginally statistically significant when class actions are excluded. Again, it is not clear why there would be such an effect. One possible explanation is that first settlement offers by solo practitioners were too high, perhaps because they were unaware of the norm that defendants in employment cases start with very low offers.

Table 7 shows how various aspects of the settlement negotiation influence the settlement amounts.

Two negotiation factors seem to influence the average settlement amount to a significant degree: the ratio of plaintiff's first offer to defendant's first offer, and the number of bargaining rounds. Even for these variables, the relationship is complex and hard to explain.

Similarly, there are three variables that seem to influence the normalized settlement amount—whether the defendant made the first offer, the ratio of the plaintiff's to the defendant's first offer, and whether there was a mediator's proposal. As noted above, defendants are likely to make the first offer when they are particularly eager to settle (perhaps because they know their case is weak) and, in such cases, it is not surprising that the settlement is more favorable to the plaintiff.[25] On the other hand, that explanation is not entirely satisfactory because one would think that defendants who are

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[24]Russell Korobkin & Joseph Doherty, Who Wins in Settlement Negotiations? 11 Am. L. & Econ. Rev. 162, 177, 184, 191–94 (2009).

[25]Compare id. at 177–78, 184, predicting that the party that makes the first offer will do better because the first offer "anchors" later bargaining, but finding that who made the first offer had no effect on the settlement amount. See also Adam Galinsky & Thomas Mussweiler, First Offers as Anchors: The Role of Perspective-Taking and Negotiator Focus, 81 J. Personality & Soc. Psychol. 657–69 (2001).

Table 7: Negotiation Factors and Settlement Amounts

Factor	*Average Settlement Amount*	N	*Average Normalized Settlement Amount*	N
Overall	176,115	362	0.24	354
First offer				
By defendant	139,815	18	**0.34**	**19**
By plaintiff	178,981	340	0.24	335
Ratio of plaintiff's to defendant's first offer				
≤15	**317,942**	**91**	**0.33**	**91**
>15 and ≤ 35	142,664	94	0.25	94
>35 and ≤ 75	**100,067**	**88**	0.22	88
>75	146,785	74	**0.16**	**74**
Rounds of bargaining				
1	**324,587**	**15**	0.22	11
2	208,855	31	0.25	31
3	142,899	56	0.25	56
4	157,022	79	0.24	79
5	131,213	66	0.24	66
6	159,983	47	0.26	47
7 or more	**243,209**	**64**	0.24	64
Bracketed offers				
No	158,627	179	0.24	171
Yes	193,224	183	0.25	183
Mediator's proposal				
No	221,350	18	**0.18**	**19**
Yes	174,021	343	0.25	335

NOTE: Settlement amounts that differ from the overall average by more than $50,000 and normalized settlement amounts that differ from the average by 0.05 or more are highlighted in bold.

eager to settle (or who know they have a weak case) would also make higher first offers, so it is not clear that their weakness or eagerness to settle should be reflected in the normalized settlement amount. The fact that the normalized settlement amount goes down as the ratio of the plaintiff's to defendant's first offer goes up would be explicable if defendants calculated their opening offers in similar ways, but that there was considerable variation among plaintiffs, with some starting off by "shooting for the moon," while others open with more reasonable offers. If both types of plaintiffs end up with similar settlements, those settlements will be closer to the first offers of the plaintiff's lawyers who started with more reasonable offers.

The smaller average normalized settlement amount when there was no mediator's proposal may reflect the fact that such settlements usually occurred when the plaintiff accepted an offer made by the defendant. It is not surprising that such settlements are closer to the defendant's initial offer and thus that the average normalized settlement amount is lower.

Regressions reach similar results to the analysis of Table 7's simple averages and so are not reported. No factor is a statistically significant influence on the settlement amount. For the normalized settlement amount, whether the defendant made the first offer and the ratio of the first offers are statistically significant at the 5 percent level,

regardless of whether class actions are included. Whether there was a mediator's proposal is significant at the 10 percent level if class actions are excluded.

Settlements almost always involved nonmonetary terms, such as confidentiality clauses or provisions forbidding the former employer to provide prospective employers with information other than job title and dates of employment. Occasionally, settlements involved significant nonmonetary terms, such as reinstatement or promising to provide a positive reference letter. Such nonmonetary terms are often touted as an advantage of mediation because it is thought that mediators are more likely to come up with creative terms that make both parties better off. Nevertheless, significant nonmonetary terms were relatively uncommon in Lisa Klerman's mediations—occurring in only 14 percent of cases. Where the employee had been terminated prior to the mediation, mediation led to rehiring less than 5 percent of the time. By the time the mediation took place, the parties' relationship had usually so deteriorated that a return to an employer-employee relationship was not feasible or desired by the parties. Nevertheless, mediation often led to some reconciliation, with parties leaving more friendly, or at least less angry, than before, and usually with greater understanding of the other side. The low level of reinstatement and other significant nonmonetary terms is consistent with other studies.[26]

V. Offers and Counteroffers

The data analyzed in this article provide a rare window into the pattern of offers and counteroffers. As anyone familiar with bargaining over houses, cars, or the settlement of litigation would predict, the plaintiff starts with a high offer and the defendant starts with a low offer, and the offers gradually converge. While such a pattern is familiar, surprisingly, it is not the pattern assumed by the most influential economic models of settlement. The older "divergent expectations" model of settlement makes no prediction about the bargaining process, but only addresses whether there will be a settlement and its amount.[27] More recent asymmetric information models tend to assume that one party or the other has the ability to make take-it-or-leave-it offers.[28] Of course, those who formulated these models were aware that they were radically simplifying, and these models provide substantial insight into many aspects of settlement. Economic models of settlement that predict a sequence of offers have been formulated by Kathryn Spier and

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[26]Dwight Golann, Is Legal Mediation a Process of Repair–Or Separation? An Empirical Study, and its Implications, 7 Harv. Negot. L. Rev. 301, 311 (2002) (mediation resulted in "repaired relationship" only 17 percent of the time and resulted in settlement with an "integrative term" 30 percent of the time).

[27]See, e.g., Richard Posner, Economic Analysis of Law 763–67 (8th ed. 2011).

[28]Lucien Bebchuk, Litigation and Settlement Under Imperfect Information, 15 RAND J. Econ. 404–15 (1984); Jennifer Reinganum & Louis Wilde, Settlement, Litigation, and the Allocation of Litigation Costs, 17 RAND J. Econ. 557–66 (1986).

Yasutora Watanabe.[29] Spier's model predicts a U-shaped settlement pattern, with most cases settling at the beginning of the dispute or close to the trial date. That is inconsistent with the fact that mediation produces settlements on or soon after the mediation day, and that day is often long after the dispute started, but well before trial. Watanabe's model fits the mediations studied here better because under his model, the timing of settlement reflects the arrival of new information over time. Although delay is always costly, it is worthwhile when it allows the parties to gather better information. In mediation, parties receive three kinds of information: (1) lawyers reveal facts and evidence supporting their client's position, (2) each offer provides information about the offeror's valuation of the case and negotiating strategy, and (3) the mediator may give her opinion about the likely outcome at trial. Watanabe's model predicts that the parties are likely to delay settlement when they think they are still likely to receive significant new information, but are likely to settle when the rate of information revelation wanes. In accordance with the Watanabe model, the high volume of information exchanged during mediations increases the probability of settlement during or soon after the mediation.

Table 8 summarizes the relationship between case factors and key aspects of the offers and counteroffers.

One striking implication of Table 8 is that the number of bargaining rounds hardly varies with any case characteristics. Even the length of the mediation—half-day, full day, or two days—had only a small impact on the number of bargaining rounds.

Whether the defendant made the first offer—a factor identified above as increasing the probability of settlement—varied considerably. First offers by defendants were more common when defense counsel was a solo practitioner and when the plaintiff's firm had a mixed practice. Conversely, first offers by defendants were less common in class actions and in two-day and pro-bono mediations. These patterns are hard to explain, although first offers by solo practitioner defense lawyers and those in firms not specializing in employment law might reflect less familiarity by such lawyers with the ordinary pattern of bargaining in employment mediations.

As noted above, plaintiffs' and defendants' first offers were generally very far apart. On average, the plaintiff's first offer was 67 times higher than the defendant's first offer. That means, for example, that if the plaintiff's first offer was $670,000, the defendant's first offer was, on average, only $10,000. There were types of cases in which the spread between the first offers was even larger—whistleblower cases and cases in which the defendant was represented by in-house counsel. Conversely, in class actions, "other" cases, cases when the defense law firm was less than 15 lawyers, and half-day and pro-bono mediations, the parties were not quite as far apart at the outset, although even in such cases the average ratio was always 29 or higher. The fact that in cases involving in-house counsel, the parties started farther apart may reflect hard bargaining by a

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[29]Kathryn Spier, The Dynamics of Pretrial Negotiation, 59 Rev. Econ. Stud. 93–108 (1992); Yasutora Watanabe, Learning and Bargaining in Dispute Resolution: Theory and Evidence from Medical Malpractice Litigation (unpublished paper, 2009).

Table 8: Case Factors and Bargaining

Factor	*Percent First Offer by Defendant*	N	*Average Ratio of Plaintiff's to Defendant's First Offer*	N	*Average Rounds of Bargaining*	N
Overall	5.0%	396	67	380	4.6	394
Case type						
Class action	**0.0**	**51**	**42**	**49**	4.1	51
Discrimination	5.1	237	65	227	4.9	235
Whistleblower	6.1	33	**148**	**31**	4.5	33
Wrongful termination	3.7	27	72	27	4.5	27
Other	8.3	48	**47**	**46**	3.8	48
Plaintiff gender						
Female	4.3	188	70	182	4.8	187
Male	7.1	156	71	148	4.5	155
Plaintiff lawyer gender						
Female	4.3	69	83	63	4.6	69
Male	4.9	327	64	317	4.6	326
Defendant lawyer gender						
Female	4.9	163	86	155	4.8	161
Male	4.7	233	54	225	4.6	233
Plaintiff law firm size						
Solo practitioner	4.9	102	66	97	4.4	101
2–3 lawyers	5.9	119	68	114	4.5	118
4 or more lawyers	3.5	172	68	166	4.8	172
Defendant law firm size						
Solo practitioner	**11.1**	**9**	**30**	**9**	4.0	9
2–14 lawyers	2.6	38	**47**	**37**	4.1	38
15–49 lawyers	8.3	36	58	34	4.2	36
50–99 lawyers	8.9	45	49	42	4.4	44
100 or more lawyers	3.8	238	69	231	4.7	238
In-house lawyer	4.0	25	**150**	**23**	5.3	24
Plaintiff law firm specialization						
Exclusively plaintiff-side employment	4.2	357	68	342	4.7	355
Mixed practice	**10.8**	**37**	58	36	3.9	37
Defendant law firm specialization						
Exclusively defense-side employment	5.0	119	79	112	5.0	117
Mixed practice	4.7	276	62	267	4.4	276
Time scheduled						
Full day	4.7	344	70	330	4.6	342
Half-day	7.9	38	**45**	**36**	4.2	38
Two days	**0.0**	14	51	14	4.7	14
Pro bono or paid						
Paid	4.9	387	68	372	4.6	385
Pro bono	**0.0**	9	**29**	**8**	3.8	9

NOTE: Percentage first offers that differ from the overall average by 5 percent or more are highlighted in bold. Ratios of plaintiff's to defendant's first offers that differ from the average by 20 or more are highlighted in bold. Rounds of bargaining that differ from the overall average by one or more are highlighted in bold.

Table 9: Negotiation Factors Influencing Bargaining

Factor	*Average Ratio of Plaintiff's to Defendant's First Offer*	N	*Average Rounds of Bargaining*	N
Overall	67	380	4.6	394
First offer				
By defendant	**28**	**19**	4.3	19
By plaintiff	69	361	4.6	375
Ratio of plaintiff's to defendant's first offer				
≤ 15			4.2	95
>15 and ≤ 35			4.6	99
>35 and ≤ 75			5	95
>75			4.8	91
Bracketed offers				
No			4.6	197
Yes			4.6	197

NOTE: Average ratios of plaintiff's to defendant's first offers that differ from the average by 20 or more are highlighted in bold. Average rounds of bargaining that differ from the overall average by one or more are highlighted in bold.

defense lawyer who need not worry about the high legal bills that such an aggressive strategy might entail. It is also possible that in-house counsel were involved in the employment decision that sparked the lawsuit and may, at first, be less likely to see merit in the plaintiff's case than defense counsel called in after the dispute has begun.

Table 9 examines how negotiation factors influenced bargaining. The table excludes some factors, such as whether there was a mediator's proposal, because it does not make sense to ask how a mediator's proposal influenced the first offer or the number of rounds seeing as the mediator's proposal is usually made well after the first offers have been made. Other exclusions or blanks in the table follow the same logic. For example, the table does not show the influence of bracketed offers on the first offer because bracketed offers are very seldom used in first offers and thus could not influence them.

When the defendant made the first offer, the ratio of the first offers is much lower. This could be either because such offers were more reasonable, or because a first offer by the defendant "anchored" and thus moderated the plaintiff's response, which is here considered the plaintiff's first offer.[30] If the second interpretation is correct, it is puzzling why a first offer by the plaintiff does not have a similar effect of anchoring the defendant's first offer and thus also moderating the difference between the parties' first offers. Surprisingly, even though a first offer by the defendant leads to a much smaller gap between the parties, it has only a small effect on the number of bargaining rounds. More generally, the ratio of the parties' offers seems to have only a modest impact on the number of rounds.

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[30]Compare Korobkin supra n. 24 at 177–78, 184; Adam Galinsky & Thomas Mussweiler, First Offers as Anchors: The Role of Perspective-Taking and Negotiator Focus, 81 J. Personality & Soc. Psychol. 657–69 (2001).

Table 10: Regression of Factors Influencing Bargaining

	First Offer by Defendant	*Ratio of Plaintiff's to Defendant's First Offer*		*Rounds of Bargaining*	
Class action		−10	−11	−0.91**	−0.93**
Whistleblower	0.17	88**	88**	−0.55	−0.54
Wrongful termination	−0.76	8	6	−0.19	−0.20
Other case type	0.45	−17	−15	−1.01**	−1.01**
Plaintiff female	0.59	5	6	−0.08	−0.08
Plaintiff lawyer female	−0.11	18	18	−0.28	−0.30
Defendant lawyer female	0.11	28**	28**	0.25	0.26
Plaintiff lawyer solo practitioner	−0.09	2	2	−0.27	−0.28
Defendant lawyer solo practitioner	0.70	−63	−61	−0.50	−0.53
Plaintiff lawyer mixed practice	1.14*	−5	−1	−0.83**	−0.84**
Defendant lawyer mixed practice	−0.11	−11	−11	−0.53**	−0.52**
Half-day mediation	0.59	−14	−12	−0.43	−0.45
Two-day mediation		−15	−16	0.28	0.28
Pro-bono mediation		−20	−23	−0.58	−0.58
First offer by defendant			−43*		−0.18
Bracketed offers					−0.16
Constant	−3.32	58**	59**	5.44**	5.53**
N	328	378	378	392	392
Adjusted or pseudo-r^2	0.04	0.05	0.06	0.03	0.03

Regression analysis largely confirms the results of the simple tabular analysis (see Table 10).

The regression with first offer by defendant as the dependent variable is not very illuminating for technical reasons. Because the dependent variable is binary (first offer by defendant or not), independent variables that predict the outcome variable 100 percent of the time must be excluded—regardless of whether a case is a class action or whether the mediation was pro bono or took two days. Unfortunately, these were most of the predictive variables. Although the analysis of Table 9 suggested that a few other variables might have explanatory power, regression analysis does not confirm that suggestion.

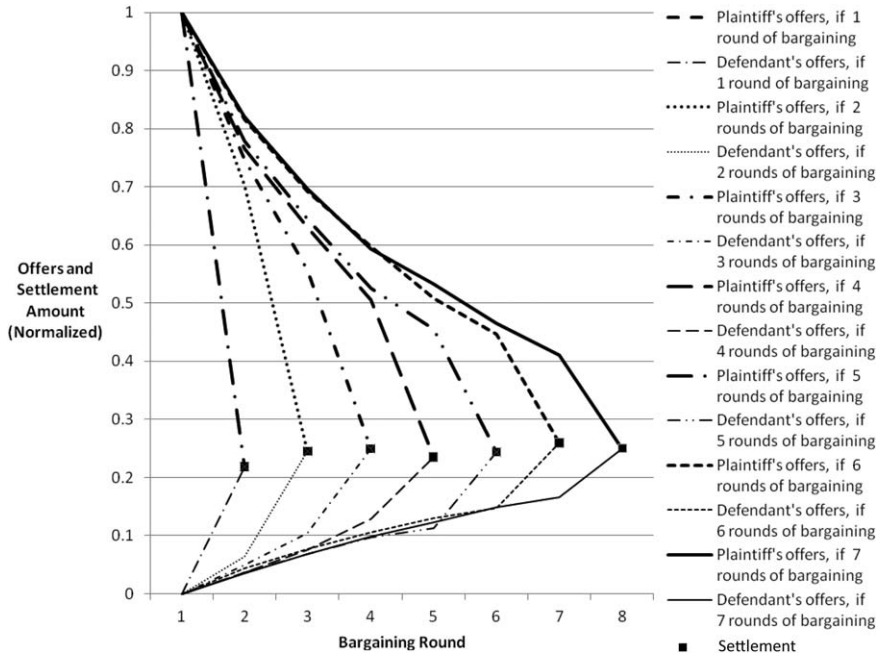
The regressions with the ratio of the first offers as the dependent variable partially confirm the tabular analysis. Whistleblower cases tend to start with the parties much farther apart, while cases with solo practitioner defendant lawyers are not different in a statistically significant way. Cases in which the defendant's lawyer is a female tend to start farther apart in a statistically significant way.[31]

The number of bargaining rounds is lower with class actions or "Other" types of cases, or when either lawyer has a mixed practice.[32] The smaller number of bargaining

[31]This difference is not statistically significant when results are clustered. See footnote 18.

[32]When class actions are excluded, the coefficient on bracketed offers becomes more negative (−0.48) and statistically significant at the 5 percent level, but the coefficients on plaintiff and defendant lawyer mixed practice become significant only at the 10 percent level.

Figure 1: Sequence of plaintiff's and defendant's offers and settlement amount (normalized).



rounds in class actions may reflect the complexity of such cases, which increases the time needed to formulate, consider, and respond to offers.

The data set also provides rare insight into the way offers and counteroffers went back and forth, as illustrated in Figure 1.

The offers are normalized so that they are all between 0 and 1. The plaintiff's first offer is always charted as 1, and the defendant's first offer is always charted as 0. Other offers are charted as a percentage of the difference between the plaintiff and defendant's first offers. So, for example, if the plaintiff first offered $150,000 and the defendant first offered $50,000, the difference between the first and second offers would be $100,000. If the plaintiff's second offer were $120,000, that would be charted as 0.7 because plaintiff's offer is $70,000 above the defendant's first offer, and $70,000 is 70 percent of the difference between their first offers ($100,000). By charting the offers, counteroffers, and settlements in this way, all offers can be charted on a common scale, regardless of whether the case involved a large or small amount.

Consider, for example, the offers that the plaintiff makes if the bargaining lasts seven rounds. This is the thick solid line that starts at the upper left in Figure 1 and is usually above all the others. As can be seen, the plaintiff's offers descend in regular fashion, with the drops decreasing in size as the bargaining progresses. The only exception is that there is a large drop between the plaintiff's seventh offer and the settlement. This reflects

the fact that the settlement amount is usually the mediator's proposal, and the mediator tries to formulate a proposal that is likely to be accepted by both sides, rather than one that will lead to further rounds of negotiation.

The defendants' offers when bargaining goes seven rounds—the thin solid line in Figure 1 that is generally lowest on the graph and that goes farthest to the right—follow a similar, but ascending, pattern; concessions that become smaller as bargaining progresses, until there is a larger concession at the end, when the mediator's proposal is accepted. Note that the settlement when there are seven rounds of bargaining is plotted as a square in the eighth bargaining round. This reflects the fact that the settlement was usually the mediator's proposal, and the acceptance of the mediator's proposal was not counted as an offer by either side and thus was not counted as an additional round of bargaining. In addition, in cases where there was no mediator's proposal, but one side accepted the other's offer, the acceptance of an offer was not counted as another offer or round of bargaining, but was plotted on the chart as though it occurred in the next round. For similar reasons, the settlement when there were fewer rounds of bargaining is plotted as an additional round.

The patterns are slightly different depending on the number of rounds. As discussed above, regardless of the number of rounds, normalized settlements cluster around 0.25. When there are fewer rounds, the parties obviously converge toward the settlement amount more quickly, which means that the concessions are larger (at least as normalized here). That is, plaintiffs and defendants generally make smaller concessions (as a percentage of the difference between the original offers) when the bargaining goes on for many rounds.

Unfortunately, it is not practical to draw figures like Figure 1 for subsets of the data (e.g., class actions only) or for negotiations with more than seven rounds because the number of cases becomes too small. Nevertheless, since neither the normalized settlement amount nor the number of rounds varies significantly with the various factors discussed in this article, the graph is unlikely to change significantly when those factors are taken into account.

As one would expect, there is some reciprocity in bargaining. Concessions by one side tend to be matched by concessions on the other side. This correlation is relatively low (0.19) in the first three rounds, but much higher in later rounds (0.51).[33]

VI. Mediator's Proposals and Bracketed Bargaining

Table 11 charts the use of two key mediation techniques: bracketed bargaining and the mediator's proposal. As mentioned above, bracketed bargaining is not associated with higher settlement rates or other differences in outcomes, but mediator's proposals are

[33]This correlation analysis is limited to cases where the plaintiff made the first offer and neither side used bracketed offers. Bracketed offers are discussed in a subsequent section. It would be difficult to combine cases in which the defendant made the first offer because the offers and counteroffers are in a different sequence. For example, when the plaintiff makes the first offer, the fourth plaintiff's offer is a response to the third defense offer. In contrast, when the defendant makes the first offer, the fourth plaintiff's offer is a response to the *fourth* defense offer. While one could, with considerable work, combine the two types of cases, since there are relatively few cases where the defense made the first offer, and since they may differ in other ways, there is little to be gained by doing so.

Table 11: Case Factors, Bracketed Bargaining, and Mediators Proposals

Factor	*Percent with Bracketed Bargaining*	*N*	*Percent with Mediator's Proposal*	*N*
Overall	49	406	89	400
Case type				
Class action	41	54	**67**	**52**
Discrimination	50	241	93	238
Whistleblower	55	33	**79**	**33**
Wrongful termination	47	30	90	30
Other	48	48	96	47
Plaintiff gender				
Female	48	191	91	189
Male	51	160	92	158
Plaintiff lawyer gender				
Female	**39**	**70**	93	70
Male	51	336	88	330
Defendant lawyer gender				
Female	52	168	89	166
Male	46	238	88	234
Plaintiff law firm size				
Solo practitioner	46	105	90	104
2–3 lawyers	48	122	90	118
4 or more lawyers	50	176	86	175
Defendant law firm size				
Solo practitioner	**22**	**9**	**56**	**9**
2–14 lawyers	49	39	89	38
15–49 lawyers	**39**	**38**	89	36
50–99 lawyers	**37**	**46**	87	46
100 or more lawyers	53	242	90	239
In-house lawyer	48	27	85	27
Plaintiff law firm specialization				
Exclusively plaintiff-side employment	49	367	89	363
Mixed practice	**38**	**37**	80	35
Defendant law firm specialization				
Exclusively defense-side employment	45	121	87	119
Mixed practice	50	284	90	280
Time scheduled				
Full day	50	353	89	349
Half-day	**33**	**39**	87	38
Two days	50	14	**69**	**13**
Pro bono or paid				
Paid	48	396	89	390
Pro bono	50	10	**70**	**10**

associated with higher settlement rates. In the table, Percent with Bracketed Bargaining or Percent with Mediator's Proposal that differ from the overall average by 10 percent or more are highlighted in bold.

Bracketed bargaining is used less often in cases with smaller defense firms (except 2–14 lawyer firms), plaintiff firms with mixed practices, and in cases scheduled for a

half-day. It is difficult to explain these patterns. In regression analysis (not reported), only half-day mediations and plaintiff female lawyer were statistically significant at the 5 percent level, so there is probably little or nothing that needs explaining. Brackets also are more likely to be used when the defendant made the first offer and when the ratio of the first offers is high.

Mediator's proposals are quite common overall (89 percent of all cases), but less common in class actions, whistleblower cases, cases where the defendant's lawyer is a solo practitioner, two-day mediations, and pro-bono mediations. In regression analysis, class actions, whistleblower cases, and pro-bono cases were statistically significant at the 5 percent level, solo practitioner defense and plaintiff lawyer solo practitioner were significant at the 10 percent level, and two-day mediations were not statistically significant. The pattern is hard to explain.

Defendant making the first offer is not correlated with significantly different use of mediator's proposals, nor with the use of bracketed offers. The use of mediator's proposals does, however, vary with the ratio of the first offers. When the ratio of the first offers is greater than 75, the fraction of cases with mediator's proposals falls to 82 percent. As noted above, when the parties are far apart, mediator's proposals are less likely to be successful, and may actually be harmful. When the parties are far apart at the beginning, they are more likely to remain far apart, so it is not surprising that mediator's proposals are less common in such cases. The importance of how far apart the parties are is confirmed by looking at the ratio of the parties' last offers. When that ratio is less than 20, mediator's proposals are used more than 90 percent of the time, but when that ratio is larger than 20, mediators proposals are used only 60 percent of the time.

On average, the mediator's proposal was 39 percent of the difference between the parties' last offers. That is, it was a little closer to the defendant's last offer than to the plaintiff's. Nevertheless, the mediator's proposal varied quite a bit. Sometimes, it was closer to the plaintiff's last offer. Ms Klerman made her mediator's proposal at the point she thought maximized the chances of settlement. So when she thought the plaintiff would be willing to make greater concessions than the defendant, her offer was closer to the defendant's last offer. On the other hand, when it seemed that the defendant was willing to make greater concessions than the plaintiff, her offer was closer to the plaintiff's last offer. The fact that the mediator's proposal was generally closer to the defendant's last offer suggests that Ms Klerman generally perceived the plaintiff as more willing to make concessions. This is consistent with the fact that, as noted above, settlements are generally closer to the defendant's initial offer than to the plaintiff's and that plaintiffs usually make larger concessions than defendants.

Table 12 analyzes bracketed offers. As noted above, when a party makes a bracketed offer, its offer is conditional on the opposing side making a concession of a particular size. So, for example, a plaintiff might offer $1,000,000 if the defendant offers at least $500,000. Conversely, a defendant might offer $200,000 if the plaintiff offered at most $400,000.

The first line of Table 12 shows that the condition in a bracketed offer is very seldom accepted. That is, if the plaintiff says "I will offer $1,000,000 if the defendant offers

Table 12: Bracketed Offers

	Bracketed Offer by Plaintiff		*Bracketed Offer by Defendant*		*Overall*	
		N		N		N
Percent of bracketed offers in which condition accepted	1.6%	364	1.8%	272	1.7%	636
Percent of bracketed offers met with overlapping brackets	2.5	364	1.1	272	1.9	636
Average concession in bracketed offer	16.7	355	3.7	260	11.2	615
Average concession in nonbracketed offer	12.0	1,051	3.0	986	7.7	2,037
Ratio of average concession in bracketed offer to average concession in nonbracketed offer	1.4	1,406	1.2	1246	1.5	2,652

$500,000," defendants very seldom respond by offering $500,000. It is also uncommon for the party to respond with a bracketed offer in which the condition is accepted conditionally. This situation is referred to as "overlapping brackets." So, for example, if the defendant offered $200,000 if the plaintiff dropped to $400,000, and if the plaintiff responded by offering $400,000 if the defendant increased its offer to $250,000, that would be an overlapping bracket.

The fact that the condition in the bracket is rarely accepted might imply that brackets were ineffective. Nevertheless, another way of looking at brackets suggests that they are helpful. Parties who make bracketed offers tend to make larger concessions than those who make ordinary offers. In Table 12, the size of a concession is measured by comparing the outer bracket (the amount the plaintiff or defendants is conditionally offering) to the amount of the prior offer. In addition, as in the prior discussion of normalized settlement amounts, the concessions are normalized by dividing them by the difference between the first offers. When plaintiffs make bracketed offers, on average, their settlement demand goes down by 16.7 percent of the difference between the plaintiff's and defendant's first offer. This is a 40 percent larger concession than plaintiffs usually make when they are making an ordinary offer. Similarly, defendants, on average, make concessions that are 20 percent larger when making bracketed offers. Of course, the concessions are not firm because they are conditional on the other side making a particular concession. Nevertheless, such concessions do help bring the parties together. In addition, the concession implicit in a bracketed offer may be significantly larger than that assumed in the table. While the table measured a party's concession by looking at the outer bracket (the amount the plaintiff or defendant would offer if the condition was met), it is customary in employment mediations to make a bracketed offer only if one is willing to settle for the midpoint of the bracket. The midpoint of the bracket is the average of the conditional offer and the condition. For example, if the plaintiff offered $1,000,000 if the defendant offered $500,000, the midpoint would be $750,000. If one measured concessions by this metric, they would be much larger.

VII. Conclusion

This study suggests that mediations can be very effective in facilitating settlement. While one cannot be confident that the parties would not have settled on their own, the very high settlement rate and the fact that parties are willing to pay thousands of dollars to mediate suggest that mediation is helpful. Women and men fared equally well in the mediations studied here, whether as plaintiffs or lawyers. Parties tended to start their bargaining very far apart, but to settle closer to the defendant's first offer. When a mediator's proposal was used, settlement followed almost 100 percent of the time, but that high settlement rate partly reflects the fact that the mediator studied here did not make mediator's offers she thought would be rejected. Parties tended to make larger concessions in early bargaining rounds than in later bargaining rounds, although if they accepted a mediator's proposal, their concessions tended to be larger than in immediately prior rounds of bargaining. Although bracketed bargaining seldom led to the acceptance of the bracketed offer or to overlapping brackets, parties using bracketed offers tended to make larger concessions.

Further research is needed to confirm the causal relationship between case factors, negotiation factors, and mediation outcomes. Most of the case factors and all the negotiation factors reflect strategic decisions by the parties. For example, the gender of lawyers, the amount of the initial offers, whether the defendant hired a large law firm, and whether the parties used bracketed offers all reflect conscious choices by the parties and their lawyers. Caution must therefore be exercised in interpreting the results of this study as implying causal relationships. The fact that this study is based on the experience of a single mediator also suggests caution about generalizing from its results. It is hoped that this article will stimulate further study of other mediators in order to ascertain which of the findings in this article are true about mediation more generally.