

Encouragement in Mediation Practice – Individual and Collective Applications

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Overview

- Existing research findings on the psychology of encouragement
- Applications to individual mediation practice and institutional program design
- Discussion



abstract

While encouragement is widely understood as a common practice in everyday life, its applications to individual and collective efforts at mediating resolution of civil justice conflicts requires further examination. This presentation will examine research findings regarding the nature of encouragement and its applications at the individual and collective level including in formal court settings in diverse contexts.





The Psychology of Encouragement: Theory, Research and Applications

Re-definition of encouragement

❖ Y.J. Wong describes encouragement as:

“expression of affirmation through language or other symbolic representations to instil courage, perseverance, confidence, inspiration or hope in a person(s) within the context of addressing a challenging situation or realising a potential.”



Three Levels of Encouragement (Y. J. Wong)

❖ Basic Level:

- ❖ Encouragement as an act of interpersonal communication

❖ Second level:

- ❖ Encouragement as character strength
- ❖ Implies that encouragement can and should be taught to others, and will yield benefits to both the recipient of encouragement and the encourager.



3 levels of encouragement...



❖ Third level:

- ❖ Encouragement as an ecological group norm
- ❖ Members in an organisation characterised with a strong culture of encouragement will value encouragement, and consider it as a tool of frequent and effective expression

Implications:

- ❖ Corrects the individual basis that exists in most research
- ❖ Combines positive psychological concepts of virtues to the science of organisational behaviour

Small group discussion



- ❖ When was the last time you felt encouraged (or provided encouragement) in an interpersonal context?
- ❖ What was the behavior/source of encouragement?

Applying insights to further research...

1. Researchers can assess the effectiveness of encouragement interventions
2. Explore how the trait of encouragement correlate with other strengths in relation to mediation practice
3. Understand when encouragement produces desirable/undesirable outcomes





Why Positive Encouragement Works Better than Criticism

Scientific research on positivity



❖ Positivity plays an influential role in our brains and behavioral patterns

- ❖ In comparison to negative emotions, feelings of happiness etc. can generally encourage an inclusive focus and better performance in cognitively demanding tasks
- ❖ When positive emotions arise, the prefrontal cortex will be heightened, enhancing mental abilities such as creative thinking and processing of information

(see Daniel Goleman in *Social Intelligence: The New Science of Human Relationships*)

The impact of mode of communication

- ❖ Leaders/facilitators are able to utilise positivity when communicating with others. **This impacts the latter's emotional wellbeing and performance.**
- ❖ Emotional tone or state impacts participants regardless of the feedback:

Positive	Negative
<ul style="list-style-type: none">❖ A warm tone boosts positive feelings❖ By focusing on the positive, leaders improve the efficiency and coordination	<ul style="list-style-type: none">❖ A negative interaction leaves employees feeling bad, with a higher tendency to remember these events and spread negativity❖ Negative discussions increase feelings of guilt, fear and anxiety, hindering one's cognitive ability to improve

The impact of mode/sense of communication

→ Research from Boyatzis & Marcial Losada:

- ❖ Discussing positive goals can boost a brain's reward circuitry
- ❖ This in turn encourages participants to be happier and more productive

→ Research from Michelle LeBaron (2016) The Deepest Sense: Revitalizing Links Between Law and Touch

- ❖ Encouraging sensory/touch in informal mediation – positive emotional impact



Discussion

❖ What do you see the implications of positive tone and aspirations on mediation practice?



Facilitation to improve team's positivity

1. When leaders/facilitators listen and show empathy, this encourages participants to be more creative and take risks
2. Expressions of care make participants feel understood and release tension
3. Ensuring a positive interpersonal chemistry within the group to enhance satisfaction & performance (See: Goleman, *Focus; Social Intelligence*)

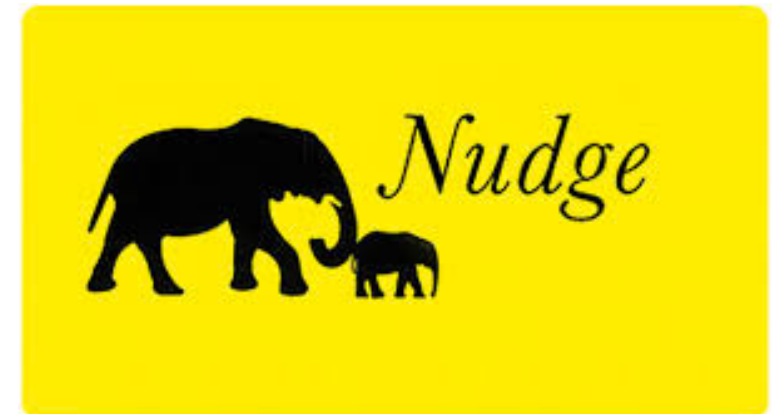


Nudging Civil Justice: Examining Voluntary and Mandatory Court Mediation Experience in Diverse regions

This research examines whether and if so how 'nudges' oriented toward encouraging voluntary mediation, have a differential effect on civil justice outcomes as compared with mandated processes: See: Ali, S. (2018) Court Mediation Reform: Efficiency, Confidence and Perceptions of Justice, (Edward Elgar) * thanks to GRF Grant: 17603215

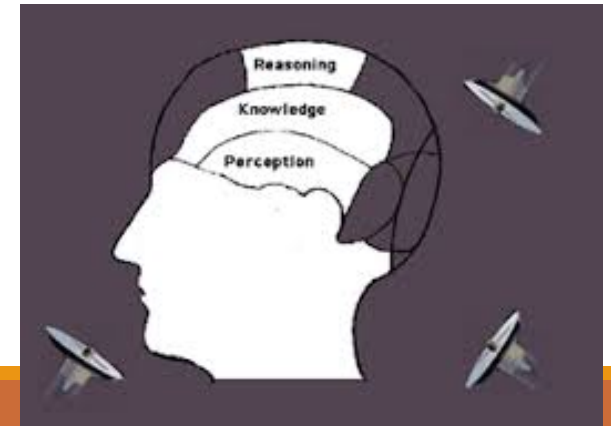
Overview of 'nudge theory'

- ❖ Research has shown that 'nudges' (or positive encouragement) is at least as effective, if not, more effective than traditional directions issued through legislation in encouraging non-forced compliance
- ❖ Nudges are designed to positively influence behaviour, and are applied in fields such as business management, health, safety and corporate culture (putting fruit at eye level, targets in urinals)



Contributions of neuroscience -> nudging & autonomy

- ❖ The work of Dr. Peter Reiner et al. has contributed to insights into the underlying neuroscience that provides a framework for considering the relative effectiveness of nudges & impact on autonomy
- ❖ “Decision Variable” – includes sensory evidence, stored memory & subjective value of options – together may make one choice more likely but not determine the choice – safeguarding autonomy (a ‘graded phenomenon’)
- ❖ Further questions: how to avoid ‘nudge dependency’ and maintain optimal autonomous decision making



Variations in mediation models



- ❖ At an institutional level, the design of mediation models varies – from mandatory assignment of particular cases to ‘nudged’ attempts at resolution
- ❖ Whether through robust encouragement or voluntary selection, parties determine the final outcome
- ❖ a spectrum of approaches exist:
 - ❖ judges provided by courts or private mediators
 - ❖ ‘opt-out’ and ‘opt-in’ mechanisms; or cost sanctions on ‘unreasonable refusal’

Impetus for nudging mediation across jurisdictions



- ❖ The adoption of various mediation practices across jurisdictions is fuelled by varying intrinsic (case reduction/efficiency) and extrinsic (relational/process based/peace building) rationales motivating the encouragement of mediation
- ❖ At the global level, soft law making bodies e.g. UNCITRAL generally leaves open the question of how mediation is encouraged based on domestic circumstances

Insights: legal theory



- Diversity of mediation systems reflects unresolved debates regarding the broader question of the place of mediation within civil justice.
- Owen Fiss argued that adjudication provides a public forum to enact public values; Fuller saw mediation as useful when parties are heavily interdependent.
- Court mediation reflects distinct approaches to individual and collective responsibility for the financial, social and temporal resources for resolution

Mediation Reform – degrees of encouragement

Mandatory ['robust encouragement']

- Mandatory assignment for all cases falling under a particular amount/type.
- Compelled orders to mediation after settlement conferences.
- Mediators provided by courts.

Voluntary ['Nudged encouragement']

- Informal party directed mediation.
- Private mediators.
- Cost-sanctions –refusal of reasonable attempts at mediation
- An opt-out mechanism

Comparative Study

- Empirical/mixed-method study exploring the operation of CJR in 10 regions with respect to variation in user experience of mandatory ['robust encouragement'] and voluntary or [nudged encouragement'] mediation programs:
 - 10 country case studies : (Vol/nudged) the United Kingdom, Hong Kong, France, the Netherlands, Malaysia, (Mand) the United States, Australia, Italy, China and India.
 - Analysis of court user data (WJP/ROL index; world wide governance indicators);
 - single year comparison (2016) and
 - Positive change over 5 year period in perceptions of justice, efficiency, and confidence in courts
 - Survey research (83 mediation practitioners)

Findings – 2016 t-test

Sampled countries implementing voluntary ‘nudged’ encouragement of court mediation programs on average are associated with higher overall jurisdictional scores for:

- efficiency,
- quality of civil justice,
- effective enforcement,
- accessibility and affordability,
- with lower scores for levels of reported discrimination,
- and no significant difference with respect to impartiality and effectiveness
- **Limitations:** Given small-n; non-random sample; intervening variables - not generalizable; also dual direction of influence

Figure 1 - Percentage of Regions Experiencing Positive Change over a 5 Year Period in Efficiency, Confidence and Perceptions of Justice by Voluntary/Mandatory Program Type

Table 1 - *Average Civil Justice Indicator Scores by Voluntary and Mandatory Mediation Program Type*

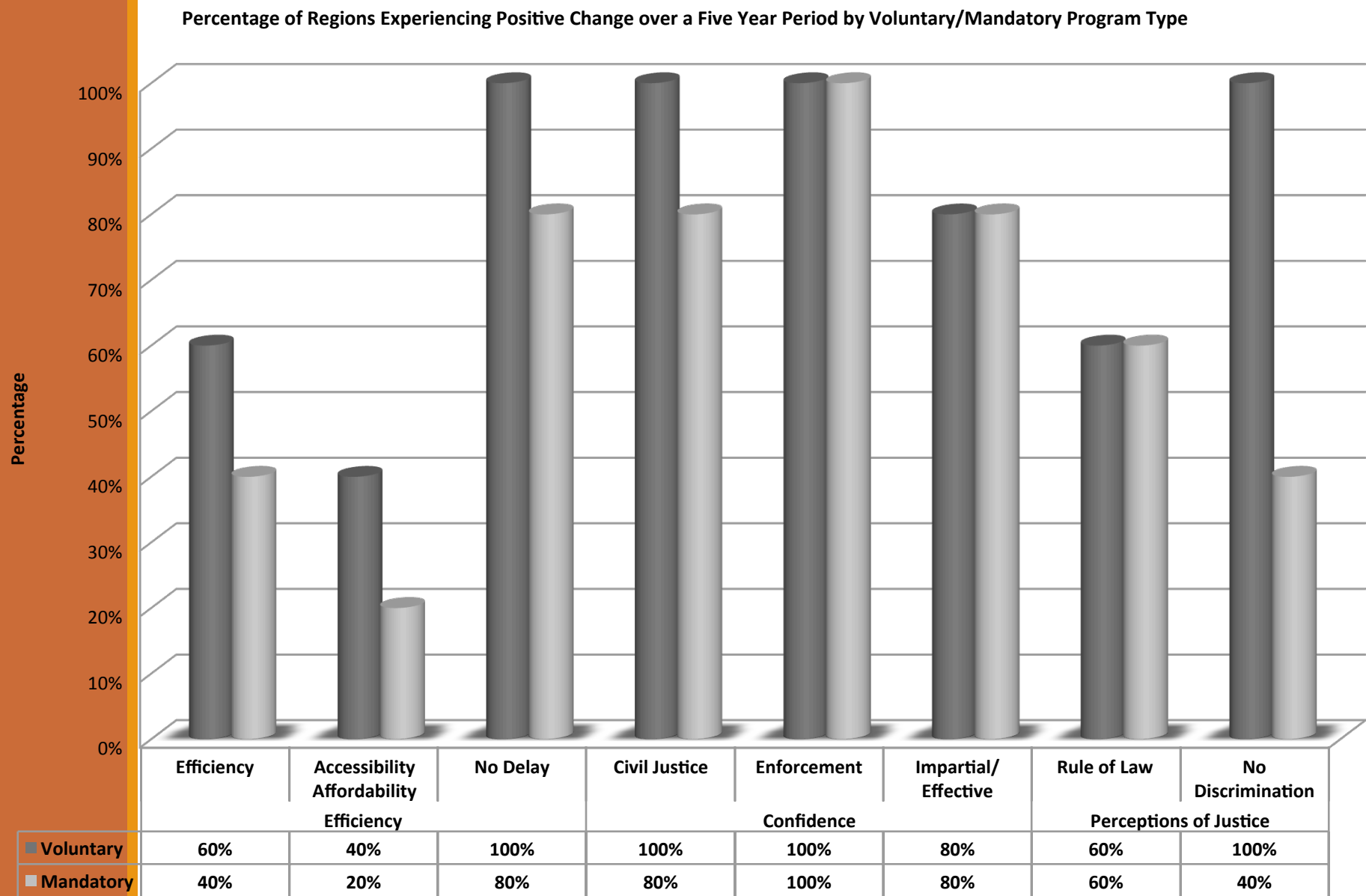
	Voluntary Average	Std. Deviation	Mandatory Average	Std. Deviation
Percentile Scores (out of 100)				
Accessibility and Affordability*	62.40	10.62	48.8	12.25
Impartiality/Effectiveness	79	5.7	70.8	13.29
No Discrimination*	71.8	15.36	51.2	10.15
Effective Enforcement*	74.4	11.7	57.2	17.9
Ranking				
Efficiency* [138 countries]	12.2	8.4	52.4	47.6
Quality of Civil Justice* [113 countries]	20.2	17.96	48.6	30.73

* Indicates statistically significant difference

Findings – 5 year change

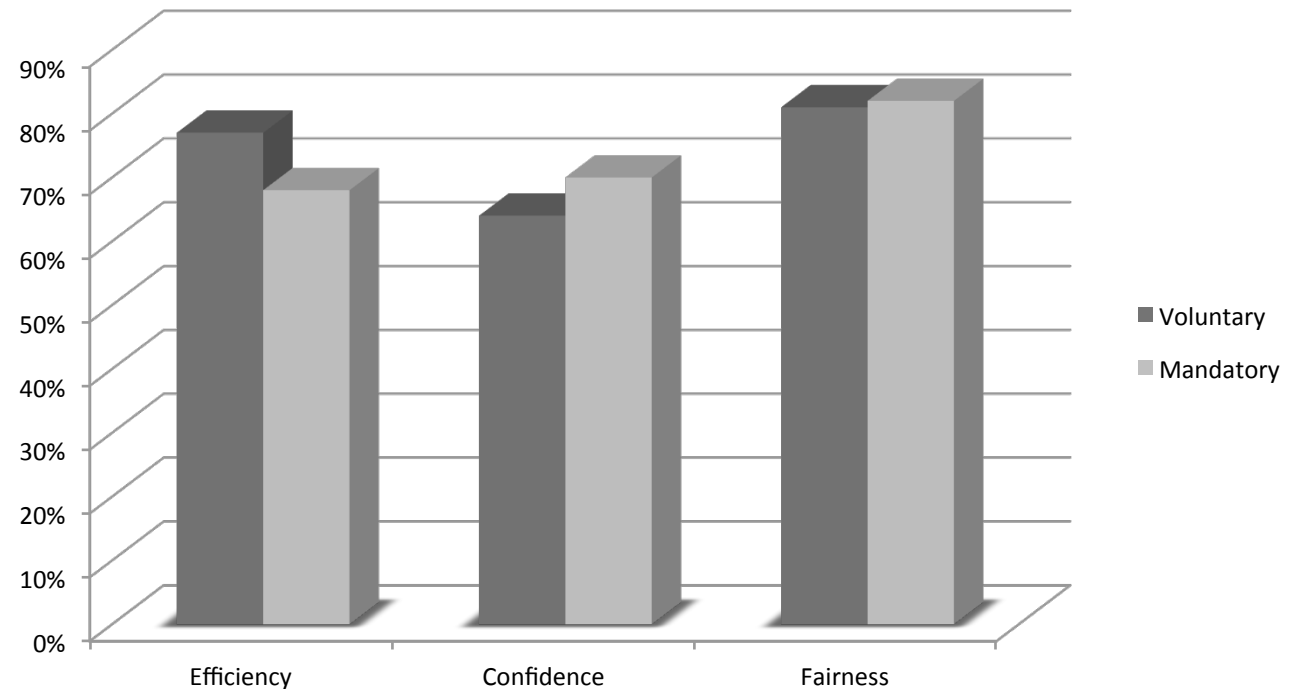
- Both robust encouragement [mandatory] mediation and voluntary ‘nudged encouragement’ of mediation have resulted in positive gains in civil justice outcomes in all regions.
- Voluntary [“nudged”] mediation associated with a slightly higher percentage of countries experiencing positive change (over a 5 year period) in terms of efficiency, confidence and perceptions of justice.
- **Limitations:** small-n; dual direction of influence

Positive Change in Civil Justice Indicators by Form of Mediation Encouragement



Survey findings

- Practitioners report higher levels of confidence in [robustly encouraged] mandatory mediation; higher perceptions of efficiency in voluntary [nudged] programs; & regard both programs with relatively equal perceptions of fairness.
- not statistically significant



Survey Findings (Strengths & Challenges)

Robustly Encouraged Programs:

- Strengths: normalising party-driven resolution, improved efficiency, and speed through effective case screening and contributing to relational repair.
- Challenges: limited party understanding of the process, lawyer conflicts of interest, mediator quality, lack of good faith, inexperience in managing power imbalances and resource limitations.

Nudged voluntary programs:

- Strengths: development of simple procedures, high quality mediators and on-going monitoring and evaluation
- Challenges: difficulties associated with encouraging party participation and limited resources.

Underlying Values & Key takeaway

- in resolving interpersonal/civil conflict - voluntary/nudged engagement tends to result in higher perceptions of fairness, confidence, efficiency than mandated
- however there is an important place for mandated processes – particularly in the family context/relationships of ‘heavy interdependence’ where, absent abuse/harassment, the underlying relationship is too valuable to leave to cold formal processes in the first instance.



Conclusion

Mandatory [robustly encouraged] or voluntary [light nudge] policy must be sensitive to unique socio-political factors in each country; program design is highly context dependent;

Findings generally appears to support insights from 'nudge theory' that non-forced compliance with a given social objective, is at least as effective as directions issued through legislation.

Environments of higher reported discrimination, additional support through the provision of targetted training and legal safeguards must be provided to address the potential for lax civil rights and procedural justice compliance (Edelman, 1992; Feeley, 1979; , Genn,1999; Albiston 1999).

Small-scale pilot mediation programs can provide a useful base of experience; Followed by the assistance of public information programs.

Much still remains to be examined as to the complexities surrounding civil justice dynamics.