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## Learning from Research: The Road to Becoming a Better Mediator

Jonathan S. Rosenthal, Esq.

Wouldn't it be great if the field of ADR had empirical research that could help inform mediators about what works and what doesn't within a mediation session?

And what if, as a result of similar research, we knew more about changes in attitudes of people who experience mediation as compared to changes in attitudes of those who use the regular court processes?

And wouldn't it be helpful if that research could help mediators improve their skills so that separating families will be able to work together for the benefit of the children on a long-term basis?

Here's the good news: through a carefully structured and scientifically sound research project, we have answers to questions that mediators and mediation trainers have speculated about for many years. The Maryland Judiciary commissioned such research as part of a statewide evaluation of its court ADR programs. Over the course of five years, this research examined Maryland's District Court Day of Trial Program, contested child access programs in circuit courts, and criminal misdemeanor cases, also in the District Court. The researchers were able to (1) identify attitude changes in mediation participants who

participated in ADR and (2) determine which of several mediator strategies, or techniques, were beneficial for the participants in the mediation. They used a combination of pre- and post-session personal interviews, behavior coding by researchers observing live mediations, and follow-up interviews.

The research had many components, but for purposes of this article, the focus will be on the contested child access cases (custody and visitation) in the circuit courts and the day of trial cases in Maryland's District Court.

### Overview of what was learned:

#### SHORT TERM BENEFITS

The researchers noted a shift in attitudes of participants from before the ADR intervention to after. Those who went to ADR, regardless of whether they reached an agreement, were more likely in the short term to report that:

- They could express themselves, their thoughts, and their concerns;
- All of the topics, including underlying issues, came out and were discussed;
- They were able to resolve their issues;
- The issues were completely resolved rather than partially resolved; and
- They acknowledged responsibility for the situation.

**In mediation, parties have a forum in which they can say the things they want to say. Therefore, it should not be surprising that mediation participants indicated that they could express themselves, their thoughts, and their concerns.** Contrast that with someone who

goes through the regular trial process in which what parties get to say is usually limited by court rules and procedure, rules of evidence, attorney questioning and objections, and even further constrained by the narrow way legal issues are framed. **In mediation, tangential and ancillary issues may not only be raised and discussed, these *underlying* issues stand a reasonable chance of being addressed, and possibly resolved. Court procedures simply don't allow the same flexibility, nor do they allow parties to speak freely.**

**It should not be surprising that those who go through ADR, as compared to those who only go through a trial process, are more likely to express an increased level of responsibility for their situation.**

Consider, the court hearing is adversarial by nature; while the mediation process is less a competition, and more a facilitated conversation. It is reasonable to suggest that the type of discussion possible in mediation is the critical factor that helped create this shift. In addition, those who experienced ADR similarly experienced a shift in their need to have the other side be told they were wrong. **A shift away from the need to be declared "right or wrong" is likely to allow parents to focus less on their personal disagreements and more on what they should be doing for the benefit of their children.**

The study also compared ADR participants who developed a negotiated agreement within the session and those who reached an agreement on their own. **ADR participants who reached an agreement reported greater satisfaction with their experience in the judicial system, while those who reached an agreement on their own did not.** In this comparison, both groups

reached agreements. That suggests that *reaching an agreement in ADR* is the factor that led to increased satisfaction, rather than just the process of negotiating a settlement. This is significant because courts must have the trust and confidence of the public in their institution. Offering the opportunity for litigants to use mediation seems to increase public satisfaction with their court experience, thereby supporting that goal.

#### LONG TERM BENEFITS

The surveys revealed that participants who went through ADR are more likely than those who only experienced the court process to report:

- An improved relationship and attitude toward the other participant, as measured from before the ADR session to three to six months later;
- The outcome was working;
- They were satisfied with the outcome; and
- They were still satisfied with the judicial system post intervention.

**Based on the archival review, cases that reach agreement in ADR are less likely (by half) to return to court for an enforcement action in the 12 months following the ADR intervention as compared to cases that did not get an agreement in ADR (which includes cases that did not reach a resolution in ADR, cases that reached an agreement on their own, and cases that went to a verdict).**

These findings suggest that both in the short term and long term the benefits of participating in ADR for people who carry on a relationship will be significant and lasting.

### Mediator Strategy Research:

For this part of the research, the trained research assistants *observed* the mediation sessions (with the permission of all participants) and used software to track mediator strategies and participant behaviors. There were 35 possible strategies and behaviors that the researcher assistants could select. Then, to analyze the results, the researchers used a methodology called *regression analysis* in order to determine which mediator strategies had a statistically significant impact.

The research did not seek to “pigeon hole” mediators based on their declared mediation framework (transformative, facilitative, evaluative, etc.). Rather, the research examined a wide variety of commonly used mediation techniques and strategies, and then those techniques were grouped together and “artificially” labeled for purposes of the analysis. The following labels and descriptions were used to identify these techniques or strategies.

**Reflecting** - Reflecting strategies include: frequent use of reflecting back emotions and interests of the participants; clarifying topics identified to work on; reflecting a general summary of what the participants say; and asking open-ended questions.

**Directing** - Directing strategies include: introducing and enforcing guidelines or ground rules; explaining one participant to another; and the mediator advocating for an idea expressed by a participant.

**Eliciting** - Eliciting strategies include: asking participants to suggest solutions; summarizing the solutions mentioned; and

asking participants how solutions might work for them.

**Caucusing** – These strategies include: caucusing, or separate sessions with each participant, as opposed to the joint session. The researchers reviewed the number of caucus sessions and compared the time spent in caucus as compared to time spent in joint sessions.

### Results from the mediator strategy research:

**Reflecting strategies seemed to yield positive outcomes in terms of participant communication, understanding of one another, and improved ability to work together.** In the short term analysis, when mediators used a greater percentage of reflecting strategies, participants were more likely to indicate that the other person listened and understood them, and were less likely to reject the other person’s perspectives. Reflecting strategies also yielded an increase in the participants’ belief that they could work together and consider a range of options.

**These findings support some of the reasons that mediators learn to use active listening strategies.** For example, we often learn that people don’t really listen to each other when they are in conflict. And we learn that mediators, who reflect back what a participant says and add a check-in question, are doing two things. First, they are giving the “speaker” the opportunity to hear what they just said to acknowledge that they have been heard (at least by the mediator). Second, they allow the speaker to alter or add to what was just said if they do not feel the reflection was accurate or complete. In addition to supporting the speaker’s part of

the conversation, reflecting also supports the listener's side of the conversation.

Reflecting helps chip away at reactive devaluation, whereby the listener automatically rejects anything said by the other side merely because it was said by *the other side*. Because the listener is now hearing the statement from a neutral voice, it may make hearing the idea or option more palatable to the other side.

**Finally, in the long term analysis, mediators using a greater percentage of reflecting strategies was positively associated with an increase in participants reporting that they can talk about concerns with the other parent, they are willing to consider the other parent's perspective, and they can work as a team in raising their child(ren).**

**Eliciting** strategies did not have statistically significant findings in the long-term analysis, but did yield positive findings in the short-term analysis. **The greater the percentage of eliciting strategies used by the mediator, the more likely it is that participants will reach an agreement. This finding indicates that the other person listened to them, become clearer about their own desires, and indicate that underlying issues came out.** In addition, **eliciting participant solutions increased the likelihood that participants believed they could work together to resolve conflicts.** The nature of the on-going relationships in family cases make these results even more significant. The findings suggest that parents will feel like they are listened to more by the other parent, and that they can work together for the benefit of their child(ren).

Significantly, the research indicates that **when eliciting and reflecting strategies are used together by the mediator, there is a higher likelihood that, among other things, the participants will reach a personalized agreement.**

**Directing** strategies used by the mediator appear, in the short term, to make it less likely the participants feel the mediator respected them and did not take sides. Directing strategies may give a mediator a sense of control or leadership in the mediation. **These findings suggest that the use of directing strategies leads to parties who do not feel good about the mediator, and do not find any ability to work together with the other parent.** In addition, greater use of directing strategies is bad for the court, in that more court resources will be needed for that case. **In looking at the longer term, the higher the percentage of mediator directing strategies, the more likely participants will file an adversarial motion, and the number of motions filed will increase.**

**Impact of Caucusing.** There are several interesting findings about the correlation between the time spent in caucus, the participants' opinions of the mediator, and the participants' opinions about their ability to work together.

In the short term analysis, the greater the percentage of time spent in caucus, the more likely the participants were to report that the mediator respected them and did not take sides. This suggests that using caucus may help the mediator build rapport with the participants and establish a level of neutrality, both positive concepts. However, more time in caucus also resulted in several negative findings as well. For example, a

**greater percentage of time in caucus left participants with an increased sense of hopelessness about the situation and a decreased belief they could work with the other parent to resolve the conflict.** These findings suggest that while building rapport with the mediator and appreciating her neutrality, **caucusing may lead parents to feeling less able to problem-solve with the other parent.**

This does not lead to the conclusion that caucusing is bad or will have a negative impact upon the participants. **Rather, the results reinforce the notion that mediators must be mindful, thoughtful, and intentional about when they choose to use a caucus, and how much time they choose to spend in caucus.** There are many articles about the “vanishing joint session,” and this research should give pause to mediators who routinely keep the parties apart for extending periods of time, particularly in child access mediation cases.

Similar outcomes regarding caucusing were found in the District Court Day of Trial research on mediation strategies. Key elements of that research found that, **in the short term, the greater percentage of time spent in caucus, the more likely participants report that the ADR practitioner controlled the outcome, pressured them into solutions, and prevented issues from coming out. Further, a greater percentage of time in caucus also led to participants reporting they were less satisfied with the process and the outcome. And finally, a greater percentage of time spent in caucus also led to participants reporting an increased sense of powerlessness, and an increased desire to better understand the other participant.** The long term analysis yielded

similar findings. Among those findings, the **greater percentage of time spent in caucus, the higher the likelihood that they case will return to court in the 12 months after the mediation for some sort of enforcement action.**

These findings, taken together, suggest that while caucusing may benefit rapport building for the mediator, participants who are kept apart more will find it difficult to work with the other party going forward, and in a family conflict. **Mediators must learn to meet the parties where they are, emotions and all, and use caucuses only for deliberate and necessary purposes.** Even when caucus is strategically used, bringing the participants back together should be the common practice, as opposed to remaining in caucus for the rest of the mediation.

**Looked at overall, the research on mediator techniques and strategies suggests that keeping the parents together in joint sessions, and using reflective and elicitive strategies will yield more favorable results for the parents.**

#### Data Collection Processes:

For a full understanding of the research findings, it is important to understand a little about how the data was collected and the terms used while discussing the research findings. Generally, surveys were administered orally to participants in the ADR sessions immediately prior to the session and again immediately after the ADR session. The phrase “**short term**” is used in this paper to denote the period of time between the pre-mediation survey and the post-mediation survey.

Participants were contacted again by telephone three to six months after their final court appearance. At that time, researchers administered the same post-mediation survey to see if there had been any shifts in attitude in the “**long term.**” Finally, the researchers conducted an “archival review,” examining court files 12 months after the court proceeding to see if additional court filings had occurred, and if so, what kind.

In addition to the surveys administered to mediation participants, the mediators also completed surveys.

**The common threads through all four portions of this research must lead one to recognize that mediators, are more likely to help participants find their way toward better communication between them, better understanding, and with more personalized agreements when they reflect emotions and interests, when they elicit solutions, and when they check in with the parties about those options.**

And if the point is to help the people in the mediation session, that it would seem all mediators would want to learn more about this research, these findings, and the strategies and techniques that appear to work the best.

In Maryland, the Judiciary ADR offices are working to develop curricula to teach mediators about the research, its findings, and how to improve their use of these techniques and strategies. Presentations, workshops, and trainings are rolling out to court rosters to engage their mediators in these practices, particularly in family programs. The more accomplished the family mediators are in applying reflective listening skills and eliciting

solutions, it would seem the greater likelihood that families will be able to move past the divorce, stay out of court, and parents will be able to work together to raise their child(ren). And we are working with other trainers to provide them with the information to focus on these skill building areas within their own trainings, whether basic or advanced.

The portions of the research reviewed in this article were designed and overseen by **Dr. Lorig Charkoudian, Executive Director of Community Mediation Maryland**, in conjunction with the Maryland Administrative Office of the Courts. Dr. Charkoudian has devoted more than 20 years to mediation and recently received the Robert M. Bell Award for Outstanding contribution to ADR in Maryland.

**Jonathan S. Rosenthal, Esquire**, is the **Director of the Maryland Judiciary’s Mediation and Conflict Resolution Office (MACRO)**, and he served on the Advisory committee for the research. Additionally, Mr. Rosenthal was the Executive Director of the District Court ADR Office during the time the research was taking place.

#### End Notes

For a complete list of all of the research components, including their respective two-page summaries and their full reports, visit <http://mdcourts.gov/courtoperations/adrprojects.html>.

This article is focused on the research findings and not the data collection. For a more complete explanation of the behavior coding or the surveys, see the full reports for

each research study here:

<http://mdcourts.gov/courtoperations/adrprojects.html>