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## What We Know (and Need to Know) About Court-Annexed Dispute Resolution

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## WHAT WE KNOW AND NEED TO KNOW ABOUT COURT-ANNEXED DISPUTE RESOLUTION

Deborah Thompson Eisenberg\*

Over the past several decades, courts in the United States have integrated alternative dispute resolution (ADR) processes into their case management.<sup>1</sup> All fifty states (plus Washington, D.C. and Puerto Rico) offer various dispute resolution options,<sup>2</sup> the most common being mediation.<sup>3</sup> Many state courts also use diversionary processes such as restorative justice conferencing or victim-offender mediation for criminal and juvenile matters.<sup>4</sup> All federal district and appellate courts, and some bankruptcy courts, provide mediation or some other type of dispute resolution process as well.<sup>5</sup>

We know that mediation and related processes are no longer simply “alternatives” to litigation—they have become core components of the judiciary and integrated into the litigation process.<sup>6</sup> But do we know the impact of such processes for courts, litigants, and society more generally? What *are* the costs and benefits of court-annexed mediation and other processes as compared to trial? These important questions are not easy to study in a way that provides meaningful, reliable results. One of the challenges inherent in ADR research is the lack of uniformity in the definitions and practice of the various processes.<sup>7</sup>

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1. See Thomas J. Stipanowich, *ADR and the Vanishing Trial: The Growth and Impact of Alternative Dispute Resolution*, 19 J. EMPIRICAL LEGAL STUD. 843 (2004).

2. See Am. Bar Ass’n, *Clearinghouse of Court ADR Programs*, 2007 A.B.A. SEC. DISP. RESOL. 1, 2. Other processes include early neutral case evaluation, settlement conferences, collaborative law, community conferencing, arbitration, facilitation, and other processes. *Id.*

3. MODEL STANDARDS OF CONDUCT FOR MEDIATORS pmbl. (2005), [http://www.americanbar.org/content/dam/aba/migrated/dispute/documents/model\\_standards\\_conduct\\_april2007.authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/migrated/dispute/documents/model_standards_conduct_april2007.authcheckdam.pdf) (“Mediation is a process in which an impartial third party facilitates communication and negotiation and promotes voluntary decision making by the parties to the dispute.”).

4. See, e.g., Mark S. Umbriet et al., *Victim-Offender Mediation: Three Decades of Practice and Research*, 22 CONFLICT RESOL. Q. 279, 281 (2004) (noting that “restorative justice policies and programs, including victim-offender mediation, are developing in nearly every state and range from small and quite marginal programs in many communities to a growing number of state and county justice systems that are undergoing major systemic change”).

5. See DONNA STIENSTRA, FED. JUDICIAL CTR., *ADR IN THE FEDERAL DISTRICTS COURTS: AN INITIAL REPORT* 2–3 (2011), [http://www.fjc.gov/public/pdf.nsf/lookup/adr2011.pdf/\\$file/adr2011.pdf](http://www.fjc.gov/public/pdf.nsf/lookup/adr2011.pdf/$file/adr2011.pdf) (stating the ADR Act of 1998 mandated courts to provide ADR services to civil litigants); ROBERT J. NIEMIC, FED. JUDICIAL CTR., *MEDIATION & CONFERENCE PROGRAMS IN THE FEDERAL COURTS OF APPEALS: A SOURCEBOOK FOR JUDGES AND LAWYERS* 3 (2d ed. 2006), <http://www2.fjc.gov/sites/default/files/2012/MediCon2.pdf> (stating “all thirteen federal courts of appeals have implemented appellate mediation or settlement programs . . .”).

6. See Stipanowich, *supra* note 1, at 843.

7. See ROBERT A. BARUCH BUSH & JOSEPH P. FOLGER, *THE PROMISE OF MEDIATION: THE TRANSFORMATIVE APPROACH TO CONFLICT* 13–14 (2004) (stating that transformative mediators

Even within the same ADR program, mediators and other types of ADR practitioners may vary in their professed style and approach.<sup>8</sup> Unlike public trials, ADR processes are private and confidential, presenting additional research obstacles.<sup>9</sup> Consequently, most studies have relied on participant surveys and settlement rates to measure the efficiency and effectiveness of the process.<sup>10</sup>

Given the challenges and expense of rigorous ADR research, the debate about the benefits and disadvantages of ADR as compared to adjudication has been largely theoretical.<sup>11</sup> For decades, the primary question in court-based ADR research has been: *should* the court offer some type of alternative process, like mediation, rather than litigation?<sup>12</sup> The first generation of ADR research suggested that courts should invest in mediation and other alternatives to litigation, finding that mediation promoted judicial efficiency, saved time and money, satisfied the parties, and led to greater compliance rates than traditional court trials.<sup>13</sup> Some studies revealed that ADR also promoted positive social goals, such as increased respect for the judiciary and the law, greater party empowerment and dignity, lower recidivism in criminal matters, and fewer trips back to court in civil cases.<sup>14</sup> Yet, others have criticized ADR as unsupported

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consider mediation as an opportunity to transform the parties conflict interaction by allowing shifts in the parties' sense of "empowerment" and "recognition"); Lorig Charkoudian, *Mediation by Any Other Name Would Smell as Sweet—or Would It? The Struggle to Define Mediation and Its Various Approaches*, 26 CONFLICT RESOL. Q. 293, 313 (2009) (noting that "there is no accepted agreement as to the definition of mediation or even the definition of approaches to mediation."); *id.* at 293–94 (defining various approaches to mediation as mediation include *transformative*, *facilitative*, and *evaluative*); MD. PROGRAM FOR MEDIATOR EXCELLENCE, MEDIATION DESCRIPTIONS (2010) [hereinafter MPME DESCRIPTIONS], <http://www.courts.state.md.us/macro/pdfs/mediationframeworkdescriptions.pdf> (defining various mediation frameworks); *id.* at 1 (stating evaluative or analytical mediators tend to have more subject matter expertise regarding the dispute and may assist the parties in evaluating strengths and weaknesses of their claims and developing settlement options); *id.* at 2 (stating the goal of inclusive mediation is "to support the parties in having difficult conversations and to guide a problem solving process to develop solutions that meet everyone's needs, with all content decisions made by the participants"); *id.* (stating that facilitative mediators use a variety of strategies, without offering their own advice or opinions about settlement options, to encourage the parties to discuss and negotiate a mutually satisfactory resolution of the dispute); Len Riskin, *Mediator Orientations, Strategies and Techniques*, 12 ALTERNATIVES TO HIGH COST OF LITIGATION 111, 111 (1994) (describing how mediators vary in their approaches to problem definition and intervention strategies).

8. See Charkoudian, *supra* note 7, at 313 (stating there is no accepted definition of mediation or definitions of the approaches to mediation); Riskin, *supra* note 7, at 112–14 (citing differences between spectrums of evaluative and facilitative mediators).

9. See Stipanowich, *supra* note 1, at 846.

10. See *id.* at 858–59.

11. See *id.* at 850, 858.

12. See Susan S. Silbey, *The Emperor's New Clothes: Mediation Mythology and Markets*, 2002 J. DISP. RESOL. 171, 173 (2002) (stating that mediation is cheaper and faster than litigation or arbitration but it is not clear that the solutions are equivalent or better).

13. See *infra* Part I (summarizing ADR empirical research). This Paper focuses on court-annexed ADR and does not address the vast industry of private dispute resolution.

14. *Id.*

political ideology—even manipulative “mythology”<sup>15</sup> designed to support an emerging industry of professional mediators. Others contend that ADR may threaten justice and legal rights, particularly for those who lack power, money, or access to legal counsel.<sup>16</sup>

With court-annexed ADR well integrated into and likely to remain part of the judicial landscape, ADR research questions should look beyond party satisfaction and settlement rates. Many ADR studies are decades old<sup>17</sup> and have not kept pace with the tremendous growth of court-affiliated ADR in the 21st century.<sup>18</sup> The second generation of ADR research should focus not on *whether* courts should use ADR but on *how* mediation and other ADR processes should be conducted.<sup>19</sup> Which ADR program characteristics and mediator interventions are correlated with the positive results for the parties and judiciary? How do different demographic groups fare in mediation as compared to trial?

A recent ground-breaking study by the Maryland judiciary grapples with these deeper questions about the costs and benefits of court-connected ADR.<sup>20</sup> Before discussing this study, Part I provides a brief snapshot of what we know from existing empirical research about court-annexed ADR, especially mediation. Part II discusses the results from the Maryland ADR study that have been released so far. Part III concludes with thoughts about the implications of this research for courts and the legal profession and suggests areas for future ADR research.

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15. See Silbey, *supra* note 12, at 173–74 (claiming that benefits of mediation are not empirically proven and that “mediation ideologues” seek to grow mediation to “promote professional and occupational interests”); see also Deborah R. Hensler, *Suppose It's Not True: Challenging Mediation Ideology*, 2002 J. DISP. RESOL. 1, 1 (2002) (arguing that individuals may prefer adversarial litigation rather than mediation and that courts should not mandate mediation over litigation).

16. See, e.g., Owen Fiss, *Against Settlement*, 93 YALE L.J. 1073, 1075–76 (1984) (arguing that alternative dispute resolution rests on questionable premises and threatens important public values protected by adjudication).

17. See, e.g., *Court ADR Research Library*, RSI'S COURT ADR RES. CTR., <http://courtdr.org/library/> (summarizing empirical studies of court-connected ADR during the 1990s, when pilot ADR programs began to blossom).

18. See Joan B. Kelly, *Family Mediation Research: Is There Empirical Support for the Field?*, 22 CONFLICT RESOL. Q. 3, 29–30 (2004) (noting that “second-generation research” about family law mediation has not occurred “in part due to a chronic lack of research funding for mediation, the complexity of what is required, and an apparent diminishing interest in research questions in the field”).

19. Jennifer Shack, *Mediation Can Bring Gains, But Under What Conditions?*, 9 DISP. RESOL. MAG. 11, 11 (2003) (stating the focus of ADR research “should shift from *whether* mediation saves time, reduces cost, and increases satisfaction to a more constructive examination of *under what circumstances* it is most likely to do so”) (emphasis added).

20. See ADMIN. OFFICE OF THE COURTS, ST. JUSTICE INST., *IMPACT OF ALTERNATIVE DISPUTE RESOLUTION ON RESPONSIBILITY, EMPOWERMENT, RESOLUTION AND SATISFACTION WITH THE JUDICIARY: COMPARISON OF SELF-REPORTED OUTCOMES IN DISTRICT COURT CIVIL CASES* (2014) [hereinafter *DISTRICT COURT STUDY*], <http://www.courts.state.md.us/macro/pdfs/reports/impactadrdistrictcivilcases2014report.pdf>.

## I. WHAT WE KNOW FROM FIRST-GENERATION ADR RESEARCH

A. *Positive Impacts on Participants*

ADR research reveals that the majority of participants like mediation<sup>21</sup> and believe the process is fair.<sup>22</sup> Likewise, most attorneys have become comfortable with mediation as an option for their clients, reporting high satisfaction with mediation processes and outcomes.<sup>23</sup> Mediation has been shown to allow parties to develop customized agreements that may not be possible to achieve through litigation, especially in family law matters.<sup>24</sup> Many studies point to high settlement rates as another benefit of mediation.<sup>25</sup>

Some ADR proponents tout improved relationships between the parties as a benefit of mediation as compared to trial but, prior to the Maryland ADR study, empirical evidence to support this assertion was limited.<sup>26</sup> Some studies of family law mediation have found that separating parents who resolved their cases at mediation experienced long-term benefits, including an ability to work

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21. Shack, *supra* note 19, at 11 (finding that a combined review of 62 studies that evaluated effectiveness of more than 100 court mediation programs showed that 70% of parties are satisfied with the mediation process and that a similar percentage is satisfied with its outcomes).

22. *See id.* at 11 (“In total, more than 80% of parties thought the process was fair and of those who resolve their case at mediation, 70% believed their agreement was fair.”); Roselle L. Wissler, *Court-Connected Mediation in General Civil Cases: What We Know from Empirical Research*, 17 OHIO ST. J. DISP. RESOL. 641, 661 (2002) (finding that the majority of parties who mediated thought the process was fair (72%), felt they had sufficient chance to tell their views of the dispute (84%), and had considerable input in determining the outcome (63%)).

23. Roger A. Hanson, *Appellate Mediation in New Mexico: An Evaluation*, 4 J. APPELLATE PRACTICE AND PROCESS 167, 178 (Spring 2002) (noting 86% of attorneys surveyed believed that the mediated agreement was fair); NANCY THOENNES, CTR. FOR POL’Y RESEARCH, PERMANENT CUSTODY MEDIATION LUCAS COUNTY COURT OF COMMON PLEAS—JUVENILE DIVISION (Nov. 2001) (presenting randomized, comparative study of family law cases in which 86.2% of parents’ attorneys reported that mediation was better than going to court); Roselle L. Wissler, *The Effectiveness of Court-Connected Dispute Resolution in Civil Cases*, 22 CONFLICT RESOL. Q. 55, 66 (2004) (finding twenty studies of civil mediation found “most attorneys felt the mediated agreement was fair or were satisfied with it”).

24. *See, e.g.*, Jo Daugherty Bailey & Susan P. Robbins, *Couple Empowerment in Divorce: A Comparison of Mediated and Nonmediated Outcomes*, 22 CONFLICT RESOL. Q. 453, 468 (2005) (finding in randomized, two-year sample of family cases in Houston, Texas, that couples who mediated were “more likely to forge their own solutions than nonmediating couples”).

25. *See, e.g.*, Kelly, *supra* note 18, at 4, 28 (finding settlement rates ranging between 50% and 90% in nine empirical studies of family mediation); CTR. FOR DISP. RESOL., U. OF MD. FRANCIS KING CAREY SCH. OF LAW, AN ANALYSIS OF THE MARYLAND COURT OF SPECIAL APPEALS ADR DIVISION JANUARY 2012 APPELLATE MEDIATION PROGRAM NATIONAL QUESTIONNAIRE 4 (2012), <http://mdcourts.gov/cosappeals/mediation/pdfs/cosaadrsurveyanalysis.pdf> (finding that national average settlement rate in state appellate court-annexed ADR programs was 54.33%, with settlement rates in the programs that conducted more than twenty mediations a year ranging between 54% and 94.74%); Wissler, *supra* note 23, at 58 (noting that studies of civil court-connected mediation report settlement rates between 47% and 78%).

26. *See* DISTRICT COURT STUDY, *supra* note 20, at 2 (finding that ADR participants were more likely to take responsibility for the situation or apologize than those who went to trial).

things out cooperatively over time and increased involvement with the child by the non-custodial parent.<sup>27</sup> The Maryland ADR study, discussed below in Part II, sheds new light on the positive impact of mediation on party attitudes towards the opposing side.

*B. Mediation Outperforms Litigation on Some Measures*

Randomized studies comparing mediation to litigation have found that mediation outperforms litigation on several measures.<sup>28</sup> First, mediation participants generally are more satisfied with the process and outcome than those who litigate.<sup>29</sup> In fact, two studies of small claims mediation programs found that “almost twice as many litigants who went to trial after not settling in mediation said they would prefer to use mediation rather than trial in a future case.”<sup>30</sup> Second, some studies have found the rate of compliance for settlement agreements reached in mediation to be higher than for court-imposed orders.<sup>31</sup> Third, as discussed below, mediation may result in quicker disposition times and cost savings for the court and the parties.<sup>32</sup>

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27. See Bailey & Robbins, *supra* note 24, at 468 (finding that parents who mediated were more likely to make changes to possession order than parents who litigated, and concluding that mediating couples have greater degree of “empowerment” and “are more likely to forge their own solution than nonmediating couples”); Robert E. Emery et al., *Divorce Mediation: Research and Reflections*, 43 FAM. CT. REV. 22, 30 (2005) (finding increased contact between nonresidential parents and children in mediation group 12 years after settlement); Kelly, *supra* note 18, at 29 (finding that nine rigorous empirical studies of family mediation found decreased conflict during divorce and one to two years later for parents who used extended mediation process).

28. See Lori Anne Shaw, *Divorce Mediation Outcome Research: A Meta-Analysis*, 27 CONFLICT RESOL. Q. 447, 460–61 (2010) (finding in meta-analysis of five comparison studies in divorce cases that mediation outperformed litigation with regard to party satisfaction with process and outcome, improved spousal relationship, and increased understanding of children’s needs); Wissler, *supra* note 22, at 58–59 (reviewing empirical ADR studies and stating that “the studies that included a comparison group of adjudicated cases generally found that litigants in mediated cases had more favorable assessments of the process and the third party than did litigants in tried cases”).

29. See Emery et al., *supra* note 27, at 28 (finding in randomized study of family law cases that mediation produced higher levels of satisfaction than litigation and that parents who mediated were more satisfied with the agreement six weeks out, 1.5 years later, and twelve years following initial settlement); THOENNES, *supra* note 23, at 13 (finding in randomized, comparative study of cases assigned to mediation or traditional court process that 68% of parents, 86.2% of parents’ attorneys, and 71.4% of caseworkers said mediation was better than going to court).

30. Wissler, *supra* note 23, at 58.

31. See Emery et al., *supra* note 27, at 27 (randomized, longitudinal study of family law cases over twelve years finding rates of compliance for mediated agreements higher than for court-imposed orders, but noting that noncompliance was high for both groups); Wissler, *supra* note 23, at 60 (finding “a higher rate of full or partial compliance with mediated agreements than with trial decisions . . .”). *But see* Roselle L. Wissler, *Mediation and Adjudication in the Small Claims Court: The Effects of Process and Case Characteristics*, LAW & SOC. REV. 323, 351 (1995) (finding that compliance rates in mediated cases were only “marginally greater” than adjudicated cases).

32. See *infra* note 33.

C. *Mediation Saves Judicial Resources, but Results Mixed for Parties*

Most studies have found that cases sent to mediation have quicker disposition times,<sup>33</sup> fewer motions, and fewer trials, but some studies have found no differences or mixed results.<sup>34</sup> For example, three studies found that appellate mediation programs “resolved a number of cases equal to the caseload of one to two judges and their staff.”<sup>35</sup>

Although the cost savings of ADR for courts is well documented, evidence about whether mediation saves the parties time and money is mixed.<sup>36</sup> Some studies have found cost savings for parties, especially if the case settles at mediation.<sup>37</sup> If the case does not settle at mediation, however, the parties bear

33. See HEATHER ANDERSON & RON PI, JUDICIAL COUNCIL OF CALIF., ADMIN. OFFICE OF THE COURTS, EVALUATION OF THE EARLY MEDIATION PILOT PROGRAMS 29 (Feb. 27, 2004), <http://www.courts.ca.gov/documents/empprept.pdf> (finding that cases resolved at mediation resulted in reduced trial rates, shorter case disposition time, and reduction in courts’ workload); STEVENS H. CLARKE ET AL., N.C. ADMIN. OFFICE OF THE COURTS, COURT-ORDERED CIVIL CASES IN MEDIATION IN NORTH CAROLINA: AN EVALUATION OF ITS EFFECTS 31 (1995), <http://ncsc.contentdm.oclc.org/cdm/ref/collection/civil/id/99> (finding mediation program decreased disposition time by about seven weeks); SOPHIA GATOWSKI ET AL., MEDIATION IN CHILD PROTECTION CASES: AN EVALUATION OF THE WASHINGTON D.C. FAMILY COURT CHILD PROTECTION MEDIATION PROGRAM, NAT’L COUNCIL OF JUVENILE & FAM. COURT JUDGES, PERMANENCY PLANNING FOR CHILD. DEP’T 6 (Apr. 2005) (finding that mediated cases reached adjudication, disposition, and case closure significantly more quickly than non-mediated cases); Hanson, *supra* note 23, at 180 (finding that mediated cases resolved in an average of 266 days and non-mediated cases resolved in an average of 450 days); MARVIN B. MANDELL & ANDREA MARSHALL, MD. INST. FOR POL’Y ANALYSIS & RES., THE EFFECTS OF COURT-ORDERED MEDIATION IN WORKERS’ COMPENSATION CASES FILED IN CIRCUIT COURT: RESULTS FROM AND EXPERIMENT CONDUCTED IN THE CIRCUIT COURT FOR BALTIMORE COUNTY 13–14 (2002), <http://www.courts.state.md.us/macro/pdfs/reports/baltcityworkercompreportfinal.pdf> (finding mediation of workers compensation cases resulted in fewer discovery motions and less time to disposition); Nancy Thoennes, *Dependency Mediation: Help for Families and Courts*, 51 JUVENILE & FAM. CT. J. 13, 21 (2000) (finding that vast majority of mediated cases reached partial or full resolution and concluding that mediation saved the court money on individual cases and overall); THOENNES, *supra* note 23, at 1 (finding that 30% of mediated cases went to trial as compared to 71.2% trial rate for nonmediated cases).

34. See LAURA F. DONNELLY & REBECCA G. EBRON, N.C. ADMIN. OFFICE OF THE COURTS, THE CHILD CUSTODY AND VISITATION MEDIATION PROGRAM IN NORTH CAROLINA 27–28 (2000) (finding no difference in median time to disposition or trial rate between mediated and non-mediated cases); ROGER E. HARTLEY, ALTERNATIVE DISPUTE RESOLUTION IN CIVIL JUSTICE SYSTEMS 135 (Eric Rise ed., 2002) (finding mediation had no effect on disposition time in family cases).

35. Wissler, *supra* note 23, at 74.

36. Stevens H. Clarke & Elizabeth Ellen Gordon, *Public Sponsorship of Private Settling: Court-Ordered Civil Case Mediation*, 19 JUST. SYS. J. 311, 324–25 (1997) (finding that those who settled at mediation paid less in legal fees than those who went to trial, but no substantial difference between fees of those who settled on their own and those who settled in mediated settlement conference).

37. See ANDERSON & PI, *supra* note 33 (finding that cases resolved at mediation resulted in substantial benefits to litigants and court, including reduced trial rates, shorter case disposition time, reduced court workloads, increased litigant satisfaction with the court’s services, and decreased

the extra expense of attorneys' fees at both the mediation and subsequent litigation stages.<sup>38</sup>

#### *D. Restorative Justice*

Criminal and juvenile courts, and states' attorneys' offices, have increasingly used diversionary restorative justice processes such as victim-offender mediation or group conferencing.<sup>39</sup> Studies have found high satisfaction rates for both victims and offenders who participate in restorative justice programs.<sup>40</sup> Some comparative studies have found that both victims and offenders are more satisfied and more likely to report that they were treated fairly by the criminal justice system if they used victim-offender mediation rather than the traditional legal process.<sup>41</sup> Researchers note, however, that there is a strong selection bias inherent in these studies because offenders typically must admit they committed the crime as a condition of using a diversionary restorative justice option.<sup>42</sup>

Like civil mediation programs, studies have shown that victim-offender mediation often results in resource savings for courts, including fewer trials.<sup>43</sup>

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litigant costs); DONNELLY & EBON, *supra* note 34 (stating that 73% of attorneys reported that mediation reduced their clients' costs and 76% reported mediation reduced the time spent on the case); NANCY THOENNES, CTR. FOR POL'Y RESEARCH, HAMILTON COUNTY JUVENILE COURT PERMANENT CUSTODY MEDIATION (Oct. 2002) (reporting that 45% of parents' attorneys, and 65% of agency attorneys, said mediation reduced their time spent on the case, with an estimated cost savings of 39% per case).

38. TASK FORCE ON APPELLATE MEDIATION, MANDATORY MEDIATION IN THE FIRST APPELLATE DISTRICT OF THE COURT OF APPEAL, REPORT AND RECOMMENDATIONS (Sept. 2001) (reporting that attorneys estimated cost savings of \$76,298 for mediated cases, but an increase of \$7,444 per case if not settled at mediation).

39. See William R. Nugent et al., *Participation in Victim-Offender Mediation and the Prevalence and Severity of Subsequent Delinquent Behavior: A Meta-Analysis*, 2003 UTAH L. REV. 137, 137-38 (2003).

40. Mark S. Umbreit et al., *Restorative Justice Dialogue: Evidence-Based Practice*, CTR. FOR RESTORATIVE JUSTICE & PEACEMAKING (Jan. 1, 2006), [http://www.cehd.umn.edu/ssw/rjp/PDFs/RJ\\_Dialogue\\_Evidence-based\\_Practice\\_1-06.pdf](http://www.cehd.umn.edu/ssw/rjp/PDFs/RJ_Dialogue_Evidence-based_Practice_1-06.pdf) (reporting that overview of several studies shows that satisfaction with victim-offender mediation is generally high). See also Jeff Latimer et al., *The Effectiveness of Restorative Justice Processes: A Meta-Analysis*, 85 PRISON J. 127, 136 (2005) (presenting meta-analysis of thirteen restorative justice studies found that victims and offenders were more satisfied with restorative justice than with traditional criminal justice process).

41. See LAWRENCE W. SHERMAN & HEATHER STRANG, RESTORATIVE JUSTICE: THE EVIDENCE 62-65 (2007), [http://www.iirp.edu/pdf/RJ\\_full\\_report.pdf](http://www.iirp.edu/pdf/RJ_full_report.pdf) (reviewing studies that found victims to be satisfied with restorative justice processes).

42. Latimer et al., *supra* note 40, at 141-42.

43. MARK S. UMBREIT ET AL., CTR. FOR RESTORATIVE JUSTICE & PEACEMAKING, JUVENILE VICTIM OFFENDER MEDIATION IN SIX OREGON COUNTIES (Nat'l Org. for Victim Assistance 2001), [http://www.cehd.umn.edu/ssw/rjp/Resources/Research/Juvenile\\_VOM\\_%20Oregon.pdf](http://www.cehd.umn.edu/ssw/rjp/Resources/Research/Juvenile_VOM_%20Oregon.pdf) (presenting meta-analysis of victim-offender mediation programs in the United States and four other countries found resource savings to courts); Umbreit et al., *supra* note 40 (finding reduction in court trials



Some studies have shown higher compliance rates with the outcomes reached through restorative justice interventions as compared to traditional court processes.<sup>44</sup> The data about whether restorative justice results in reduced recidivism is mixed, with some studies finding decreased recidivism rates and others finding no difference.<sup>45</sup> For example, a meta-analysis of thirty-six restorative justice studies concluded that “rigorous tests of restorative justice in diverse samples have found substantial reductions in repeat offending for both violence and property crime” but that other tests failed to find such effects.<sup>46</sup> These studies suggest that restorative justice “seems to reduce crime more effectively with more, rather than less, serious crimes.”<sup>47</sup> In addition, restorative justice seems to work “better with crimes involving personal victims than for crimes without them.”<sup>48</sup>

*E. Community ADR and Reduction in Use of Public Resources*

Some studies have found that community mediation may reduce the parties’ future involvement with the police or criminal justice system.<sup>49</sup> This type of mediation is similar to mediation in civil cases.<sup>50</sup> Unlike the restorative justice processes described above, community mediation of criminal matters does not differentiate between the roles of victim and offender and treats all participants in the same manner.<sup>51</sup> The limited studies of standard mediation of criminal cases have found high party satisfaction rates, decreased trial and conviction

resulting from victim-offender mediation programs). *See also* SHERMAN & STRANG, *supra* note 41, at 86 (arguing that restorative justice may reduce costs in three ways: reducing use of courts to bring offenses to justice; reducing incarceration costs; and reducing health costs to victims who may experience post-traumatic stress disorder after a crime).

44. Lauren Abramson & D. Moore, *Transforming Conflict in the Inner City: Community Conferencing in Baltimore*, 4 CONTEMP. JUST. REV. 321 (2001) (reporting 85% compliance rate with agreements reached in community conferencing program in Baltimore); Latimer et al., *supra* note 40, at 137 (presenting meta-analysis finding restorative justice programs have higher rates of compliance with restitution payments); UMBREIT ET AL., *supra* note 43, at 7 (presenting meta-analysis finding restorative justice programs have higher rates of compliance with restitution payments).

45. *See* SHERMAN & STRANG, *supra* note 41, at 8.

46. *Id.*

47. *Id.*

48. *Id.*

49. Lorig Charkoudian, *Giving Police and Courts a Break: The Effect of Community Mediation on Decreasing the Use of Police and Court Resources*, 28 CONFLICT RESOL. Q. 141 (2010) (finding participants in mediated cases decreased their use of court and law enforcement after mediation compared to participants in cases not mediated).

50. *See* Brian Jarrett, *The Future of Mediation: A Sociological Perspective*, 2009 J. DISP. RESOL. 49, 57 (2009) (finding that all types of mediation involve some sort of data gathering exercise).

51. *Id.* at 70–71 (finding that in the area of restorative justice, mediators have to put aside the concept of neutrality).

rates, and high rates of compliance with mediated agreements.<sup>52</sup> Two studies also found that individuals who used community mediation for criminal matters were less likely to call the police after participating in mediation as compared to those who used traditional court processes.<sup>53</sup>

Another promising area of conflict resolution research examines the use of restorative processes in schools as an alternative to “zero-tolerance” disciplinary policies that emphasize punishment.<sup>54</sup> Previous studies found a troubling correlation between the disproportionate use of suspensions and expulsions for African-American youth and their overrepresentation in the juvenile and criminal justice system.<sup>55</sup> This prompted the U.S. Department of Education to call for more positive discipline models, such as restorative practices, to stem the “school to prison pipeline” and improve academic achievement.<sup>56</sup> Restorative

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52. See, e.g., DANIEL MCGILLIS, NAT’L INST. OF JUSTICE, COMMUNITY MEDIATION PROGRAMS: DEVELOPMENTS AND CHALLENGES (1997), <https://www.ncjrs.gov/txtfiles/165698.txt>; S.H. CLARKE, E. VALENTE JR., & R.R. MACE, MEDIATION OF INTERPERSONAL DISPUTES: AN EVALUATION OF NORTH CAROLINA’S PROGRAMS (1992). A study of a partnership between a community mediation program and state’s attorney’s office in Maryland found that the vast majority of prosecutors interviewed thought that the mediation program was “worthwhile” and that mediation was “an effective alternative to prosecution.” B. POLKINGHORN, H. LACHANCE, & M. HOPSON, AN ANALYSIS OF THE UTILITY AND PERCEIVED IMPACT OF MEDIATION ON CASE MANAGEMENT WITHIN THE CITY OF BALTIMORE OFFICE OF THE STATE’S ATTORNEY: MEANS OF IMPROVING THE FLOW AND QUALITY OF CASES GOING TO MEDIATION 32 (2010).

53. See Charkoudian, *supra* note 49. See also Lorig Charkoudian, *A Quantitative Analysis of the Effectiveness of Community Mediation in Decreasing Repeat Police Calls for Service*, 23 CONFLICT RESOL. Q. 87 (2005) (finding an average decrease of 8.53 calls to the Baltimore City Police Department in the six months after mediation for cases mediated as compared to non-mediated cases).

54. See U.S. DEP’T OF JUSTICE & EDUCATION, CIVIL RIGHTS DIVISIONS, JOINT “DEAR COLLEAGUE” LETTER (Jan. 8, 2014), <http://www2.ed.gov/about/offices/list/ocr/letters/colleague-201401-title-vi.html> (summarizing racial disparities in administration of school discipline and recommending, among other things, more positive discipline models).

55. TONY FABELO ET AL., JUSTICE CTR. & PUBLIC POL’Y RESEARCH INST., BREAKING SCHOOLS’ RULES: A STATEWIDE STUDY OF HOW SCHOOL DISCIPLINE RELATES TO STUDENTS’ SUCCESS AND JUVENILE JUSTICE INVOLVEMENT (July 2011), [http://csgjusticecenter.org/wp-content/uploads/2012/08/Breaking\\_Schools\\_Rules\\_Report\\_Final.pdf](http://csgjusticecenter.org/wp-content/uploads/2012/08/Breaking_Schools_Rules_Report_Final.pdf) (presenting a six-year longitudinal study in Texas finding that “African-American students and those with particular educational disabilities were disproportionately likely to be removed from the classroom for disciplinary reasons” and that students who were suspended or expelled had a significantly increased likelihood of being involved in the juvenile justice system).

56. See, e.g., BARBARA J. MCMORRIS ET AL., UNIV. OF MINN., APPLYING RESTORATIVE PRACTICES TO MINNEAPOLIS PUBLIC SCHOOLS STUDENTS RECOMMENDED FOR POSSIBLE EXPULSION: A PILOT PROGRAM EVALUATION OF THE FAMILY & YOUTH RESTORATIVE CONFERENCE PROGRAM (Dec. 2013), [http://www.nursing.umn.edu/prod/groups/nurs/@pub/@nurs/documents/content/nurs\\_content\\_488712.pdf](http://www.nursing.umn.edu/prod/groups/nurs/@pub/@nurs/documents/content/nurs_content_488712.pdf) (finding after two-year evaluation that restorative practices increased student attendance, decreased disciplinary incidents, and improved school climate); David Simson, *Restorative Justice and Its Effects on (Racially Disparate) Punitive School Discipline* (7th Annual Conference on Empirical Legal Studies Paper, May 12, 2012), [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2107240](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2107240) (finding restorative programs reduced school reliance on punitive disciplinary measures and reduced the disproportionate numbers of suspensions of African-American students); MICHAEL D. SUMNER ET AL., THELTON E. HENDERSON

practices emphasize community-building processes, such as circles, to build a climate of trust and support.<sup>57</sup> When misconduct or harmful incidents occur, restorative practices provide discipline models based on restorative justice. These include a range of dialogic processes from informal impromptu conversations to formal group conferencing. Rather than simply imposing a punishment, restorative processes seek to repair the harm done by the misconduct. Studies of restorative practices in schools have found empirically impressive results, including dramatic decreases in suspension and expulsion rates and improved academic achievement.<sup>58</sup> At a time when criminal justice reform has become a critical public policy issue in the United States, researchers, courts, and policymakers should examine the inter-relationship between conflict resolution programs in schools and communities and the justice system.<sup>59</sup>

## II. A CLOSER ANALYSIS OF THE COSTS AND BENEFITS OF COURT-CONNECTED ADR

### A. *The Maryland Judiciary ADR Study*

The State of Maryland has been an international model for court-annexed dispute resolution programs, with mediation and other processes integrated at five court levels: the limited jurisdiction (or small claims) District Court; the general jurisdiction Circuit Court; the Orphan's Court, and the intermediate appellate court, the Maryland Court of Special Appeals.<sup>60</sup> Maryland law mandates mediation for all child access or custody cases.<sup>61</sup> Most jurisdictions in Maryland offer mediation and settlement conferences for various types of civil cases, including marital property, child welfare, general civil, orphans' court matters, and small claims.<sup>62</sup> In some jurisdictions, criminal victim-offender

CTR. FOR SOC. JUST., SCHOOL-BASED RESTORATIVE JUSTICE AS AN ALTERNATIVE TO ZERO-TOLERANCE POLICIES: LESSONS FROM WEST OAKLAND (2010), [https://www.law.berkeley.edu/files/thcsj/10-2010\\_School-based\\_Restorative\\_Justice\\_As\\_an\\_Alternative\\_to\\_Zero-Tolerance\\_Policies.pdf](https://www.law.berkeley.edu/files/thcsj/10-2010_School-based_Restorative_Justice_As_an_Alternative_to_Zero-Tolerance_Policies.pdf) (finding that restorative practices decreased average suspension rate at school by 87% and reduced expulsions to zero).

57. See Ted Wachtel, *Defining Restorative*, INT'L INST. FOR RESTORATIVE PRACTICES 2 (2013), <http://www.iirp.edu/pdf/Defining-Restorative.pdf>.

58. See, e.g., McMorris et al., *supra* note 56 (finding after three-year evaluation that restorative practices increased student attendance, decreased disciplinary incidents, and improved school climate); Simson, *supra* note 56 (finding restorative programs reduced school reliance on punitive disciplinary measures and reduced the disproportionate numbers of suspensions of African-American students); Sumner et al., *supra* note 56 (finding that restorative practices decreased average suspension rate at school by 87% and reduced expulsions to zero).

59. See Locke E. Bowman, *Lemonade Out of Lemons: Can Wrongful Convictions Lead to Criminal Justice Reform?*, 98 J. CRIM. L. & CRIMINOLOGY 1501 (2008).

60. See STATE JUSTICE INST., STATEWIDE EVALUATION OF ADR IN MD., *Executive Summary*, <http://www.marylandadrresearch.org/landscape/executive-summary> (last visited Mar. 22, 2016) [hereinafter *Executive Summary*].

61. MD. CT. R. 9-205(b).

62. *Executive Summary*, *supra* note 60, at 2.

mediation is available and community conferencing is offered as a diversionary process for juvenile delinquency matters.<sup>63</sup> Maryland also has a growing collaborative law practice for family matters.<sup>64</sup>

Given the tremendous investment the Maryland Judiciary has made in court-connected ADR over the past two decades, it sought funding from the State Justice Institute to evaluate the costs and benefits of its ADR offerings.<sup>65</sup> In developing the research methodology, the Maryland interdisciplinary research team sought advice from national ADR experts about the shortcomings of prior ADR empirical studies and the ideal design for a cost-benefit analysis.<sup>66</sup> The resulting product is an example of rigorous “second generation” ADR research that will provide a deeper understanding of the impact of ADR processes beyond party satisfaction and settlement rates.<sup>67</sup> All of the different aspects of the study are not yet completed or published.<sup>68</sup> The results that have been released so far include a comparison of the impact of ADR versus litigation on party attitudes and outcome in small claims court and an analysis of the effectiveness of specific mediator interventions in child custody cases.<sup>69</sup>

### 1. *The Impact of ADR in Small Claims Court*

The Maryland study of small claims ADR included a comparative analysis of those parties who used ADR (the “treatment” cases) and those who had their cases resolved through a standard court trial without ADR (the “control” cases).<sup>70</sup> The majority of ADR cases involved mediation, although a small portion used a settlement conference facilitated by an attorney.<sup>71</sup> The researchers conducted in-person surveys of participants in mediation and

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63. *Id.*

64. In a collaborative law process, the parties agree that they and their counsel will work cooperatively to share information and negotiate a resolution. If an agreement is not reached, the collaborative attorneys must withdraw and the parties need to hire new counsel to litigate. *See* MD. ADMIN. OFFICE OF THE COURTS & INST. FOR GOV. SERV. & RESEARCH, THE CURRENT AND PROSPECTIVE USE OF COLLABORATIVE LAW IN MARYLAND vi (Sept. 2013).

65. *See* STATE JUSTICE INST., STATEWIDE EVALUATION OF ADR IN MARYLAND, *Articles & Publications*, <http://www.marylandadrresearch.org/publications> (last visited Mar. 23, 2016).

66. *See* STATE JUSTICE INST., STATEWIDE EVALUATION OF ADR IN MD., *Methodology*, *supra* note 60.

67. *Id.*

68. *See* STATE JUSTICE INST., *supra* note 65.

69. *Id.*

70. DISTRICT COURT STUDY, *supra* note 20, at 1]. *See also id.* at 3–4, 8–24 (explaining the data collection and how the researchers controlled for potential selection bias).

71. *See id.* at n.1 (noting that the ADR process studied included both mediation and settlement conferences, with the majority of cases using mediation (80% of cases in Baltimore City and 97% in Montgomery County, or 88% overall). The District Court of Maryland offers two dispute resolution processes: mediation (in facilitative, inclusive, or transformative frameworks only) or settlement conferences facilitated by an attorney. Unlike a mediator, a settlement conference attorney may provide neutral evaluations of the case and recommend terms of an agreement to the parties. *See* MD. CT. R. 17-101(a).

litigation both immediately before and after the processes.<sup>72</sup> The survey included questions designed to evaluate each party's: (1) attitude toward the other participant; (2) sense of empowerment and "voice" in the process; (3) sense of responsibility for the situation; (4) belief that the conflict had been resolved; and (5) satisfaction with the judicial system.<sup>73</sup>

Unique among ADR research, the Maryland study isolated the impact of simply going through an ADR process, separate from any effect of reaching an agreement.<sup>74</sup> The research accounted for potential selection bias, using regression analysis to control for a wide range of other factors that could potentially affect participants' attitudes and perspectives, including their role (whether plaintiff or defendant), legal representation, their general outlook before they got to court, the history of the relationship between the litigants, history of the conflict, type of case, and other factors.<sup>75</sup>

The study found several areas in which a party's experience of participating in an ADR process had a statistically significant impact as compared to those who went through trial, *regardless* of whether an agreement was reached in ADR.<sup>76</sup> First, ADR participants were more likely than those who litigated to experience a shift in their acknowledgement of responsibility for the underlying dispute from before to immediately after the mediation or trial. The study found that ADR participants showed "an increase in their rating of their level of responsibility for the situation from before" to after the ADR process.<sup>77</sup> ADR participants were also more likely to exhibit a shift toward disagreement with the statement that "the other people need to learn they are wrong" from before to after the ADR process.<sup>78</sup> These findings applied regardless of whether an agreement was reached during ADR.<sup>79</sup> Thus, the Maryland study supports the notion that mediation helps disputants appreciate the perspective of the opposing side and take responsibility for their own role in the dispute.<sup>80</sup>

Second, parties who used ADR rather than a trial were more likely to report that: all of the underlying issues came out, the issues were resolved, and that the issues were completely resolved rather than partially resolved.<sup>81</sup> ADR participants were more likely to reach a negotiated agreement.<sup>82</sup> The study found that individuals who reached a settlement in ADR were more likely to be

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72. DISTRICT COURT STUDY, *supra* note 20, at 9.

73. *Id.* at 1. *See also id.* at 12–17 (listing the specific questions the researchers asked the parties).

74. *Id.* at 1–2.

75. *Id.* at 1.

76. *See id.* at 2 (finding that the researchers only reported conclusions that were statistically significant at a 95% confidence level).

77. *Id.*

78. *Id.*

79. *Id.*

80. *See id.* at 2.

81. *Id.*

82. *Id.* at 30.

satisfied with the judicial system than litigants who reached a negotiated agreement on their own “on the courthouse steps.”<sup>83</sup> Those who reached agreement without going through ADR “were not more likely to be satisfied with the judicial system than those without agreements.”<sup>84</sup> Some critics of ADR contend that mediation is superfluous because litigants can simply reach agreement on their own, without the assistance of a third-party neutral.<sup>85</sup> The Maryland ADR study suggests that there is something significant about participating in the mediation or ADR process itself that generates greater party satisfaction and confidence in the judiciary, separate from the outcome of reaching a settlement on their own.<sup>86</sup>

Third, the parties in the ADR group were more likely than those in the litigation group to report that “they could express themselves, their thoughts, and their concerns.”<sup>87</sup> There were a few notable exceptions when controlling for different party demographics: plaintiffs were more likely to report that they expressed themselves in court rather than ADR and, conversely, defendants were more likely than plaintiffs to report that they expressed themselves in ADR.<sup>88</sup> When one considers that many of the plaintiffs in small claims court are creditors collecting debts or landlords collecting rent, these findings may inform the question of whether mediation benefits litigants who have less money or power. Perhaps defendants—who may have less power and fewer viable defenses to non-payment in a traditional trial—find greater voice and empowerment in a mediation process that allows them to explain *why* the payment was not made. In a trial, only recognized legal defenses may be asserted for non-payment of rent or a contractual debt.<sup>89</sup> Mediation allows defendants to explain special circumstances and negotiate more flexible and creative outcomes, such as payment plans.<sup>90</sup>

The Maryland study also found that parties who were represented by counsel were more likely to report that they expressed themselves in court and less likely to report that they expressed themselves in mediation.<sup>91</sup> It could be that represented parties feel better prepared to express themselves in court simply because that is what counsel has prepared them to do. In small claims court, the

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83. *See id.*

84. *Id.* at 2–3.

85. *Id.* at 1–2.

86. *Id.* at 3.

87. *Id.* at 2.

88. *Id.* at 3.

89. *See, e.g., Contracts—Defenses—Performance Rendered Impossible by Law*, 18 HARV. L. REV. 64 (1904); 43 AM. JUR. 3D *Proof of Facts* § 329 (1997); UNIF. CONDO. ACT § 4-114 (UNIF. LAW COMM’N 2005).

90. *See* Gail M. Valentine-Rutledge, *Mediation as a Trial Alternative: Effective Use of the ADR Rules*, 57 AM. JUR. TRIALS 555 (1995) (stating that mediation allows the parties to creatively fashion a noncoercive resolution of their dispute).

91. DISTRICT COURT STUDY, *supra* note 20, at 3.

parties come to court expecting a trial and have not prepared for a mediation.<sup>92</sup> Some attorneys may also do more talking than their clients in mediation, perhaps inadvertently denying their clients some of the benefits of experiencing a sense of voice and empowerment in mediation.<sup>93</sup> Attorneys should consider how they prepare themselves, and their clients, for mediation versus trial.<sup>94</sup>

The Maryland study of small claims ADR indicates that mediation has significant positive impacts, regardless of whether the parties reached an agreement.<sup>95</sup> Nevertheless, the study's relatively small sample size limited its ability to explore the impact of a range of demographic variables.<sup>96</sup> This is an important issue for future exploration in ADR research.

## 2. *The Impact of Mediator Strategies in Child Access Mediation*

In addition to isolating the impact of participating in ADR versus trial, the Maryland ADR study is the first to examine the impact of specific mediator interventions on the parties' attitudes and outcomes.<sup>97</sup> Most ADR studies treat mediation as a "black box" and assume that all mediators use the same strategies.<sup>98</sup> Prior studies have relied on mediator self-reports about what they did and how it worked,<sup>99</sup> which can be tainted by the mediator's own biases and perspectives. Many have debated the effectiveness and desirability of various "styles" of mediation, the most common being facilitative, evaluative, and

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92. Compare David Ganz, *Small Claims Court Defense*, 121 AM. JUR. TRIALS 189 (2011) (discussing preparing for small claims court), with L. Randolph Lowry, *Preparing Your Client . . . for Mediation*, 53 DISP. RESOL. J. 30, 30, 31 (1998) (discussing preparing for mediation).

93. See Geetha Ravindra, *Role of Attorneys in Mediation Process*, AM. BAR ASS'N (2011), [http://www.americanbar.org/content/dam/aba/migrated/2011\\_build/dispute\\_resolution/role\\_of\\_attorney\\_in\\_mediation\\_process.authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/migrated/2011_build/dispute_resolution/role_of_attorney_in_mediation_process.authcheckdam.pdf).

94. See James K.L. Lawrence, *Mediation Advocacy: Partnering with the Mediator*, 15 OHIO ST. J. ON DISP. RESOL. 425, 425 (2000) (arguing that "the skills and strategies that are most effective in the courtroom are not effective at the mediation table"); Jean R. Sternlight, *Lawyers' Representation of Clients in Mediation Using Economics and Psychology to Structure Advocacy in Nonadversarial Settings*, 14 OHIO ST. J. ON DISP. RESOL. 269 (1999) (reviewing literature about effective legal representation in mediation and urging attorneys to adjust their style and strategy depending on the forum and the case).

95. See DISTRICT COURT STUDY, *supra* note 20, at 2.

96. *Id.* at 47.

97. STATE JUSTICE INST. & ADMIN. OFFICE OF THE COURTS, WHAT WORKS IN CHILD ACCESS MEDIATION: EFFECTIVENESS OF VARIOUS MEDIATION STRATEGIES ON CUSTODY CASES AND PARENTS' ABILITY TO WORK TOGETHER 29 (Sept. 2014), <http://www.courts.state.md.us/macro/pdfs/reports/whatworksinchildaccessmediation201409report.pdf> [hereinafter WHAT WORKS IN CHILD ACCESS MEDIATION].

98. *Id.* at 30.

99. See, e.g., E. Patrick McDermott & Ruth Obar, "What's Going On" in Mediation: An Empirical Analysis of the Influence of a Mediator's Styles on Party Satisfaction and Monetary Benefit, 9 HARV. NEGOT. L. REV. 75, 75 (2004) (using mediator self-reporting of techniques used to evaluate impact of evaluative and facilitative mediation styles).

transformative.<sup>100</sup> Even within these mediation frameworks, mediators employ a variety of techniques, such as reflecting emotions and values, breaking the parties into separate private sessions or caucuses, and eliciting ideas from the parties about how the dispute should be resolved.<sup>101</sup> Rather than focusing on a particular professed mediation style, the Maryland study isolated the impact of specific mediator strategies on the parties' attitudes and outcomes.<sup>102</sup>

The Maryland ADR study employed behavior coding, similar to methods used by behavioral scientists and psychologists.<sup>103</sup> After receiving permission from the parties and mediator, trained researchers observed mediation sessions and used a computer coding program to track every mediator intervention and party behavior.<sup>104</sup> To gauge any shifts in the participants' attitudes about the other party or the dispute, the researchers also conducted surveys of the parties immediately before and after the mediation sessions.<sup>105</sup> The aggregate data was analyzed using regression analysis to determine whether any specific mediator strategies led to statistically significant outcomes.<sup>106</sup>

*a. Reflections*

Many mediators use reflections to acknowledge and validate the participants' emotions and values and clarify the issues that the parties would like to discuss during the mediation.<sup>107</sup> The study found that reflections helped to promote party understanding and cooperation.<sup>108</sup> Specifically, the more mediators used reflection strategies, the more likely parties were to say that the other person "listened to them and increased understanding of them through the process."<sup>109</sup> In addition, reflective strategies resulted in "a decrease in the dismissal of the other participants' perspective."<sup>110</sup> The use of reflections also

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100. See Kenneth Kressel et al., *A Multidimensional Analysis of Conflict Mediator Styles*, 30 CONFLICT RESOL. Q. 135 (2012) (summarizing observation study of various mediator styles); Nancy A. Welsh, *Stepping Back Through the Looking Glass: Real Conversations with Real Disputants about Institutionalized Mediation and Its Value*, 19 OHIO ST. J. ON DISP. RES. 573, 575–76 (2004) (summarizing debate about goals, general approach, and mediator interventions that should be used) (citing Leonard L. Riskin, *Decisionmaking in Mediation: The New Old Grid and the New New Grid System*, 79 NOTRE DAME L. REV. 1, 30–34 (2004)).

101. See *id.* at 585 (citing Leonard L. Riskin, *Mediator Orientations, Strategies and Techniques*, 12 ALTERNATIVES TO HIGH COST LITIG. 111, 111–12 (1994)).

102. See WHAT WORKS IN CHILD ACCESS MEDIATION, *supra* note 97, at 1.

103. See *id.* at 3.

104. See *id.* at 2–3.

105. *Id.*

106. *Id.* at 2.

107. *Id.* at 31.

108. *Id.* at 23.

109. *Id.* at 31.

110. *Id.*



led parties to agree that they believed they “could work together to resolve their conflicts and consider a range of options.”<sup>111</sup>

Reflections, standing alone, were found to be negatively associated with reaching an agreement.<sup>112</sup> Nevertheless, if the parties reached an agreement in mediation, reflecting strategies resulted in more personalized or customized agreements.<sup>113</sup> If the mediator combined reflecting strategies with eliciting techniques—such as asking participants to think of solutions, summarizing solutions, and asking the parties how solutions might work for them—the parties were more likely to report a positive shift in their ability to work together, say that the other person listened and understood them better, indicate that all of the underlying issues came out, and reach a personalized agreement.<sup>114</sup> In other words, the study suggests that mediators who combine reflecting and eliciting strategies together are most likely to be successful in accomplishing the dual goals of (1) helping the parties better understand each other and (2) reaching a settlement agreement.<sup>115</sup>

*b. Caucusing*

Many lawyers and mediators debate the effectiveness of using private sessions or caucuses with the parties.<sup>116</sup> Some mediators rely heavily on caucus and keep the parties separated in different rooms during most or all of the mediation.<sup>117</sup> The mediator bounces back and forth between the rooms and the parties engage in little to no direct communication. Other mediators rarely or never use caucus.<sup>118</sup>

The Maryland study of child custody mediations found that private sessions caused the parties to have more positive attitudes toward the mediator but more negative attitudes about the other party and the conflict in general.<sup>119</sup> Specifically, the longer the parties spent in caucus with the mediator, the more likely they were to report that the mediator respected them and did not take sides.<sup>120</sup> This suggests that caucus can be a useful tool for mediators to establish a sense of trust and rapport with the parties, which some mediators have identified as an important factor in reaching a settlement.<sup>121</sup>

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111. *Id.*

112. *Id.*

113. *See id.*

114. *See id.* at 26–29.

115. *See id.*

116. *See id.* at 30.

117. *See* James J. Alfani, *Trashing, Bashing, and Hashing It Out: Is This the End of “Good Mediation”?*, 19 FLA. ST. U. L. REV. 47, 66–67 (1991).

118. *Id.* at 53–54.

119. WHAT WORKS IN CHILD ACCESS MEDIATION, *supra* note 97, at 30.

120. *Id.*

121. Stephen B. Goldberg, *The Secrets of Successful Mediators*, 21 NEGOT. J. 365, 366–69, 372 (2005).

On the flip side, mediators should be careful not to overuse caucus in custody cases. Specifically, the more time participants spent in caucus, the more likely they were to say that they felt hopeless about the situation, the less likely they were to believe that they could work with the other side, and the less likely they were to think there were a range of options to resolve the dispute.<sup>122</sup> This finding occurred even holding constant other factors such as the history of the relationship and the participants' attitudes toward each other.<sup>123</sup> In addition, the "sense of hope" variable was measured from before to after the mediation, with longer caucusing causing a decrease in parties' hopefulness for a resolution from the beginning to end of the mediation.<sup>124</sup> The study therefore suggests that caucus may not be the most effective strategy to overcome impasse, and, if overused, may worsen party attitudes towards each other.<sup>125</sup> If the parties remain separated throughout most of the mediation—talking only to the mediator rather than to each other—it makes sense that the parties may develop a better relationship with the mediator, but not with each other.<sup>126</sup>

Of course, this portion of the Maryland study focused on child custody mediation only.<sup>127</sup> All parties in the child custody study did not have counsel present at the mediation. Additional research is needed to determine whether and how the presence of attorneys may change the impact of mediation caucuses. Another component of the Maryland research analyzing the impact of caucusing and other mediator strategies in the small claims civil court will be released soon. Future ADR studies should examine the impact of caucus in a variety of mediation contexts, including commercial cases involving mostly distributive bargaining.

### *c. Telling*

The dispute resolution community often debates the use of evaluative mediator strategies, such as sharing opinions or predictions about the case, offering potential solutions, assessing legal options, or introducing topics for discussion.<sup>128</sup> The Maryland ADR study labeled these as "telling" strategies.<sup>129</sup> Telling strategies did not have any statistically significant impact—positive or negative—on the parties' attitudes or on the outcome of the process in child custody mediations.<sup>130</sup> In short, the Maryland study suggests that mediator

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122. See WHAT WORKS IN CHILD ACCESS MEDIATION, *supra* note 97, at 30.

123. *Id.*

124. *See id.* at 18–19, 30.

125. *See id.* at 30.

126. *See id.*

127. *Id.* at 2.

128. *See id.* at 32.

129. *Id.*

130. *See id.* at 32.

telling strategies are a bit innocuous in child custody cases—not necessarily helpful or harmful in changing party attitudes or facilitating settlement.<sup>131</sup>

*d. Directing*

The Maryland ADR study found that directing strategies harmed the parties' perception of the mediator.<sup>132</sup> Directing strategies include introducing and enforcing process guidelines (such as “don't interrupt” or “respect each other”), explaining one participant to another, or advocating for one participant's ideas.<sup>133</sup> The more mediators used directing strategies, the less likely parties were to report that the mediator listened to and respected them.<sup>134</sup>

*e. Eliciting*

Mediators frequently use eliciting strategies to encourage creative problem-solving by the parties.<sup>135</sup> These eliciting strategies include asking the participants to think of potential solutions, summarizing solutions mentioned by the parties, or asking the parties how various solutions might work for them.<sup>136</sup> The Maryland ADR study found that the more the mediator used eliciting strategies, the more likely it was that the parties would settle in mediation, report that the other person listened and understood them during the mediation, become clearer about their desires, and say that the underlying issues came out during the mediation.<sup>137</sup> Eliciting was the *only* mediator intervention positively correlated with reaching an agreement.<sup>138</sup> When the mediator combined eliciting with reflecting strategies, the parties were more likely to reach personalized agreements.<sup>139</sup> This finding suggests that mediators should spend more time listening, reflecting emotions, values, and issues, and asking the parties how they want to resolve the case—rather than telling them what to do (which does not have a significant impact), or directing them to something (which can harm the parties' perception of the mediator).

### III. WHAT WE NEED TO KNOW ABOUT COURT-CONNECTED ADR

The first generation of ADR research taught us that court-connected mediation and other non-litigation processes can benefit both the judiciary and

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131. *See id.*

132. *Id.* at 30–31.

133. *Id.*

134. *Id.*

135. *Id.* at 32.

136. *Id.* at 31.

137. *Id.* at 31–32.

138. *Id.* at 32.

139. *Id.*

the parties by saving time and money, increasing party satisfaction, and improving long-term compliance with the ultimate outcome.<sup>140</sup> The Maryland Judiciary's ambitious and ground-breaking study exemplifies the type of second generation ADR empirical research that will probe the specific impact of going through an ADR process rather than litigation, and the most effective mediator strategies to promote positive outcomes.<sup>141</sup> The Maryland ADR research should be replicated in other jurisdictions to deepen our knowledge about what makes mediation and other ADR processes most effective for the parties and judiciary.

Significant gaps in ADR research remain. We still do not know whether mediation and other processes affect specific demographic groups more positively or negatively. Some research has found that there are no significant differences in party attitudes or outcome among different demographic groups.<sup>142</sup> For example, one study found that there was no difference in settlement rates or outcome for indigent and non-indigent couples in family law mediation.<sup>143</sup> Nevertheless, the question of whether mediation benefits or harms particular groups goes to the core of many concerns about ADR. The importance of the issue demands additional exploration in future ADR research.

Court programs should also consider how ADR can be used in constructive ways to assist litigants in making informed decisions about their procedural and substantive options for resolving legal matters. In the early days of ADR, mediation and litigation were presented as binary alternatives, but today both processes are integrated in the life of a case.<sup>144</sup> Some courts have experimented with combining legal counseling with ADR processes to help parties navigate particular types of cases with better information about their legal rights and options for resolution.<sup>145</sup> For example, Illinois courts used foreclosure mediation to respond to the housing crisis.<sup>146</sup> To assist homeowners, the program provided housing counselors to advise homeowners about their rights and options and evaluate whether mediation would be an appropriate process for resolving the dispute.<sup>147</sup> There may be other ways for court programs to integrate access to legal counsel with ADR processes to help litigants who do not understand their rights and options to make informed choices about whether to use mediation or litigation to resolve their disputes.

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140. *See supra* Part I.

141. DISTRICT COURT STUDY, *supra* note 20, at 6.

142. *Id.* at 3.

143. *See* Judith V. Caprez & Micki A. Armstrong, *A Study of Domestic Mediation Outcomes with Indigent Parents*, 39 FAM. CT. REV. 415, 418, 425 (Oct. 2001).

144. *See* Edward F. Sherman, *Impact on Litigation Strategy of Integrating Alternative Dispute Resolution into the Pretrial Process*, 15 REV. LITIG. 503, 506 (1996).

145. *See* Lela P. Love & Kimberlee K. Kovach, *ADR: An Electric Array of Processes, Rather Than One Eclectic Process*, 2000 J. DISP. RESOL. 295, 296 (2000).

146. *See* JENNIFER SHACK, RESOLUTION SYS. INST., SIX PROGRAMS, SIX MODELS: AN EVALUATION OF THE FORECLOSURE MEDIATION PROGRAMS FUNDED BY THE OFFICE OF THE ILLINOIS ATTORNEY GENERAL 3 (2015).

147. *See id.* at 5.

We should also consider the implications of ADR research for legal education and the practice of law. If most legal cases are now resolved through negotiation, mediation, and non-litigation processes, lawyers should be prepared to navigate this landscape. Although dispute resolution classes and programs have grown at many law schools, legal education has not caught up with the reality that most cases are resolved through an ADR process or negotiation rather than litigation.<sup>148</sup>

We also need more information about the lawyer's role in mediation. Some commentators argue that lawyers improve the fairness and effectiveness of mediation.<sup>149</sup> Others contend that lawyers impede the benefits of mediation for their clients by dominating the process with adversarial tactics.<sup>150</sup> Should lawyers represent their clients differently in mediation than they would in a courtroom? ADR scholars and experienced mediators recommend that lawyers modify their strategies for mediation,<sup>151</sup> but empirical data about what works best is lacking. Future ADR research should examine the impact of various lawyer strategies in mediation on the outcome for their clients. For example, some lawyers insist that mediators use a caucus-based model for the mediation, sometimes waiving any joint session in which all parties and counsel talk together with the mediator. What impact does this model have on their clients and case outcomes? Does it make any difference if the client does more talking in the mediation than the lawyer, and vice versa? How should lawyers prepare themselves and their clients for a mediation session? These are important questions for lawyers and legal educators that lack empirically-based answers.

Finally, longitudinal ADR research should explore how community-based conflict resolution programs impact the courts and justice system. For example, does community mediation reduce the incidence of crime and violence in neighborhoods? Do school conflict resolution initiatives assist in reducing juvenile and criminal offending and stemming the "school to prison pipeline"? Can ADR processes be used to improve relationships between the law enforcement and the communities they serve? Some policymakers and jurists see a strong connection between community-based conflict resolution and the

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148. See Andrea Kupfer Schneider et al., *Teaching Students to Be Problem-Solvers and Dispute-Resolvers*, in BUILDING ON BEST PRACTICES: TRANSFORMING LEGAL EDUCATION IN A CHANGING WORLD, 382 (Deborah A. Maranville et al. eds., 2015); Carrie Menkel-Meadow, *Crisis in Legal Education or the Other Things Students Should Be Learning and Doing*, 45 MCGEORGE L. REV. 133, 155, 156 (2013).

149. See Roselle L. Wissler, *Representation in Mediation: What We Know from Empirical Research*, 37 FORDHAM URBAN L.J. 419, 424–25 (2010) (describing the debate about the impact of the presence of lawyers on mediation process).

150. See *id.* at 425.

151. See, e.g., ERIC GALTON, REPRESENTING CLIENTS IN MEDIATION 1–6 (Diane Bruch Beckham ed., 1994); Jacqueline M. Nolan-Haley, *Lawyers, Clients, and Mediation*, 73 NOTRE DAME L. REV. 1369, 1390 (1998); Jean R. Sternlight, *Lawyers' Representation of Clients in Mediation: Using Economists and Psychology to Structure Advocacy in a Non-Adversarial Setting*, 14 OHIO ST. J. ON DISP. RESOL. 269, 280 (1999).

courts, and support community mediation centers, community conferencing, and school conflict resolution programs.<sup>152</sup> ADR research should continue to explore these connections. Indeed, at a time when criminal justice reform is an urgent public policy issue in the United States, we should explore how dispute resolution can be used proactively—well before someone is arrested or sued—rather than only reactively after a case reaches the courts.

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152. For example, the Maryland Judiciary's former Chief Judge, Robert M. Bell, supported community and school-based conflict resolution programs. See Deborah Thompson Eisenberg et al., *Alternative Dispute Resolution and Public Confidence in the Judiciary: Chief Judge Bell's "Culture of Conflict Resolution,"* 72 MD. L. REV. 1112, 1113 (2013).