

# Does the Institutionalization of Mediation Help to Reform Institutions or Does it Distort Mediation?



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# Overview

- Context and Definitions
  - Answering the Question
  - Recommendations for the Future
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# Institutionalization

- ▶ I use the term “institutionalization” to refer to any entity (governmental or otherwise) which, as an entity, adopts ADR procedures as a part of doing business. Some examples include schools that develop peer mediation programs, courts that establish rules to govern referral to ADR procedures, and government agencies that incorporate ADR processes in developing rules and regulations.
- ▶ *Institutionalization: Savior or Saboteur of Mediation?*



# Mediation Defined

- **Directive 2008/52/EC of the European Parliament:** Mediation a structured process, however named or referred to, whereby two or more parties to a dispute attempt by themselves, on a voluntary basis, **to reach an agreement on the settlement** of their dispute with the assistance of a mediator. This process may be initiated by the parties or suggested or ordered by a court or prescribed by the law of a Member State.
- **US Model Standards of Conduct for Mediators:** a process in which an impartial third party facilitates communication and negotiation and **promotes voluntary decision making by the parties** to the dispute
- **US Uniform Mediation Act:** a process in which a mediator facilitates communication and negotiation between parties to assist them in reaching a **voluntary agreement regarding their dispute**



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➤ Maryland Judiciary Statewide Evaluation of  
Alternative Dispute Resolution Results and  
Implications

➤ Full report:

[www.mdcourts.gov/publications/reports.html](http://www.mdcourts.gov/publications/reports.html)



# Mediator Strategies – Results: Caucus

- ▶ More time in caucus =
  - ▶ participant reports that the ADR practitioner controlled the outcome, pressured them into solution, and prevented issues from coming out
  - ▶ Increase in sense of powerlessness, increase in belief that conflict is negative, and increase in desire to better understand the other participant
- ▶ Long term: More time in caucus, more likely the case will return to court for enforcement AND
  - ▶ **less likely** for participants to report
    - ▶ Consideration of the other person
    - ▶ Self-efficacy
    - ▶ Court cares



# Recommendations

- ▶ If we want to be able to answer the question in a positive manner, that is that institutionalization of mediation is a positive development, as a “profession” we need to speak up to preserve the fundamental nature of mediation
- ▶ Starts with defining mediation more narrowly



# Merci

- ▶ *The slides that follow were not in my presentation but may be helpful to those of you who are interested in the findings from the research completed by the Maryland Judiciary.*
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# Maryland Evaluation

- ▶ Pre and Post Surveys to compare **attitudes and changes in attitudes** of participants who went through ADR to an equivalent comparison group who went through the standard court process.
- ▶ Coding of mediator interventions to evaluate **effectiveness of various mediation strategies** on short-term and long-term outcomes



# Mediator Strategies – Results: Reflecting Strategies

- ▶ Positively correlated with participants reporting:
  - ▶ The other person took responsibility and apologized
  - ▶ Increase in self-efficacy
  - ▶ Increase from before ADR to after ADR that court cares



# Mediator Strategies – Results: Eliciting

- Positively associated with reaching an agreement
- Positively correlated with participants reporting
  - They listened and understood each other & jointly controlled the outcome
  - The other person took responsibility and apologized
- Long term – participants were more likely to report a change in their approach to conflict and were less likely to return to court for an enforcement action



# Mediator Strategies – Results: Offering Strategies

- ▶ Long term – the more offering strategies used, the **less** participants report
  - ▶ Outcome was working
  - ▶ Satisfaction with outcome
  - ▶ Recommend ADR
  - ▶ Change in approach to conflict



# Statistically Significant Findings

- ▶ Those who went to mediation, *regardless of whether they reached an agreement*, are more likely to report:
  - ▶ They could express themselves, their thoughts, and their concerns
  - ▶ All of the underlying issues came out
  - ▶ The issues were completely resolved (rather than partially resolved)
  - ▶ They acknowledged responsibility for the situation
  - ▶ They increased their rating of level of responsibility for the situation from before to after the intervention
  - ▶ They disagreed more with the statement “the other people need to learn they are wrong” from before to after the process



# Significantly Significant Findings cont.

- ▶ Participants who developed a negotiated agreement in mediation were more likely to be satisfied with the judicial system than others (*including those who reached a negotiated agreement on their own*)

Participants who went through mediation were more likely, 3 – 6 months later, to report:

- ▶ Improved relationship & attitude toward the other participant
- ▶ The outcome was working
- ▶ Satisfaction with the outcome
- ▶ Satisfaction with the judicial system



# Implications

- Mediation is effective as an intervention – not just because it is **not** court
- Supports what we know intuitively about “supportive/facilitative” versus “directive/evaluative” mediator interventions
- Underscores result of “overuse” of caucus
- Length of time needed for mediation
- Lessons for training and qualifications
- If need evaluative processes, create options