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Building a Knowledge-Based Foundation for Mediation Practice & Program Administration

by
Susan S. Raines, Ph.D.

About the Author



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If asked, mediators and mediation program administrators will tell you that mediation is generally faster, cheaper and more empowering than the traditional adversarial approach. Along with overcrowded court dockets and a somewhat broken legal system, these assumptions have fueled the use of mediation and alternative dispute resolution (ADR) in the U.S. and elsewhere over the past forty years. Yet in some ways, promises about the benefits of mediation were not supported by research simply because much of the research had not yet been undertaken by the academic community. In the 1980's, when ADR grew rapidly, researchers struggled to keep up, but we may have reached a tipping point: ADR providers are now trying to keep up with research that could inform, improve, and support the field's growth and bolster the quality of our mediation services. This article will summarize some recent, groundbreaking research that tests long-held assumptions made by supporters of mediation and ADR. It turns out that some were warranted, while others were not. Only by building our mediation practice upon a firm foundation of knowledge can we ensure its future sustainability.

Assumption 1:

MEDIATION IS BETTER THAN GOING TO COURT

It stands to reason that if parties are able to settle in mediation, especially if they settle early in the life cycle of the case rather than the eve of trial, they are apt to save money related to attorney's fees, missed work, and emotional stress. When parties are likely to have an on-going relationship after the litigation process, it also stands to reason that working together in mediation may help preserve that relationship better than arguing against one another in court. Yet these were hard assumptions to test--If a case went to mediation and did not settle, couldn't mediation result in increased rather than decreased costs? Might it end up being more frustrating rather than less so? Methodologically, we often resigned ourselves to the belief that overall, mediation saved money but if mediation failed to end in agreement, then it might leave the parties worse off. Now we know more.

The potential cost savings of mediation are logically greater when the case settles early in its life-cycle, before large legal bills are incurred. This

is a challenge for attorneys, who must be sure their client is getting the best deal possible, and therefore often dive deep into depositions and discovery. The goal is for a case to settle once enough information is known to evaluate whether a proposed settlement is a "good deal." A recent study by Jenkins et al ("Mandatory Pre-Suit Mediation," *Conflict Resolution Quarterly*, 35: 73-88) examined the impact of a mandatory pre-suit mediation program for medical malpractice claims in Florida. They found an 87% savings in attorney's fees as compared to traditional litigation, and average resolution time of less than six months. Beyond financial savings for all involved, patients routinely report that they want an explanation of how and why an injury occurred. This need often outranks the desire for compensation. The confidential nature of mediation allows patients to learn more about why a medical error occurred, and what the health care provider intends to do to prevent future similar incidents, along with exploring possible compensation. All parties, as well as future patients, have the potential to gain from this collaborative, rather than adversarial process.

In a groundbreaking, methodologically rigorous study of small claims court cases in Maryland, Lorig Charkoudian, Deborah Thompson Eisenberg and Jamie L. Walter ("What Difference Does ADR Make?" *Conflict Resolution Quarterly*, 35: 2017) found that even when a case did not settle in mediation, those who had participated in mediation reported greater satisfaction with the justice system than those who went to court without mediation. They reported a greater sense of having been able to express themselves, a belief that all the issues in the dispute had been discussed, a greater feeling that the issues had been resolved, and acknowledgement of responsibility for the situation at higher levels. Parties who reached an agreement in mediation were 21% less likely to return to court to collect on the debt or seek enforcement of the agreement than those who did not mediate. Similarly, in her study of mediation's "windfalls beyond settlement," Ansley Barton (*Mediation windfalls: Value beyond settlement? Conflict Resolution Quarterly*, 2005, 22: 419-435). found that disputants who failed to reach agreement in mediation, "go into court less afraid, better able to articulate their case, more cognizant of their own and the other side's positions, and with an enhanced appreciation

for the perspective of the other party because of the mediation experience. It turns out mediation is better even IF you still go to court.

Based on these studies, we can conclude that mediation has significant benefits for parties, even when they do not reach an agreement in the mediation itself. This research is helpful to ADR program administrators seeking to build or expand mediation offerings in their regions and to apply for grant funding.

Assumption 2:

VICTIMS/SURVIVORS OF DOMESTIC VIOLENCE (DV) SHOULD AVOID MEDIATION BECAUSE THEIR ABUSER MAY COERCE THEM INTO GIVING AWAY TOO MUCH.

Mediators who specialize in high-conflict divorce often report that parties with long and deep histories of domestic violence are much less likely to settle in mediation. Bringing these parties together for mediation raises significant ethical and practical dilemmas: Can mediation be done safely? Will one party coerce or threaten the other into reaching an unfair agreement, thereby undermining self-determination? Might mediation be a time when the abuser sweet-talks his/her target into reconciliation? To deny victims the right to mediate is to disempower them, just as it is to force them to mediate. It's an ethical minefield. Yet, mediation is occurring on a regular basis, even when the parties have a history of domestic violence. (See Kelly Riley's article, later in this issue, for a statewide model.)

There are dozens of protocols used to screen mediating parties for domestic violence (often called intimate partner violence/abuse—IPV/A), yet none of these protocols tell us what to do with the information they reveal. What mediators and program administrators need to know is this: Which cases will benefit from mediation, even when there is a history of domestic violence? With these questions in mind, my colleagues and I gathered data on more than 50 parties in family law cases in the state of Georgia in order to develop a screening protocol that will help us predict the likelihood of settlement based on the presence/absence of various DV risk factors and the parties' perceptions regarding safety. What we found surprised us!

The good news is that the parties did not feel their agreements were coerced, even when a history of DV existed (Raines & Choi, "Safety, Satisfaction, and Settlement in Domestic Relations Mediations" *Family Court Review*, 54: 603–619). This contradicts long-standing assumptions and arguments against the use of mediation for divorce matters in which DV has occurred or been threatened. Similarly, parties felt the agreements were adequately protective of the children, regardless of the presence or absence of DV. What explains this finding? While further research is necessary to be certain, it is likely that mediators are terminating the process when they detect coercion or outright threats. Ending a mediation without agreement is the preferred income when one or both parties are leverag-

ing power inappropriately—this could include both the power of fear and violence or the power to bring/drop criminal charges that may be pending.

In an effort to predict which cases are likely to benefit from family mediation, the survey asked parties which, if any, DV behaviors and risk factors existed within their relationship. We correlated those behaviors and risk factors to the likelihood of settlement. Again, the results were surprising: Settlement rates were lowest when *threats* of violence and generalized fear of the other party were present, rather than a history of

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actual violence. For example, if there had been "verbal threats to harm the other party," settlement rates dropped from 67% to 32%, whereas "punching, slapping, hitting, punching & choking" reduced settlement rates from 66% to 43%. Experts in domestic violence often differentiate "intimate terrorism," including the use of threats to terrorize and control the behavior of the target" from "situational couples' violence," involving physical outbursts of violence occurring when one or both parties becomes frustrated during disputes (Johnson & Leone, "The Differential Effects of Intimate Terrorism and Situational Couple Violence," *Journal of Family Issues*, 4/1/2005). Intimate terrorists may threaten the target's children or pets, stalk them, interfere with their ability keep a job, isolate them from friends and family. They have a higher incidence of homicide than other perpetrators of DV. For these reasons, it is not surprising that behaviors associated with intimate terrorism have a more deleterious impact on settlement. This is important because many of the screening tools used by mediation programs screen for actual violence rather than threats of violence.

In summary, while many in the DV advocacy community have argued that mediation should be avoided in cases of DV due to the fear that agreements would be coerced, there is no support for the idea that agreements reached in these cases are coercive or result from less empowerment than in non-DV cases. Similarly, more than 70% of parties to mediation stated they were "highly" or "somewhat" satisfied with mediation regardless of the presence or absence of DV risk factors (Raines et al 2016:608). By looking for specific risk factors related to DV, ADR

program administrators and mediators may be better able to screen out cases unlikely to benefit from mediation while still allowing mediation to go forward when the parties feel it can be of use in their particular circumstances.

In many areas of our lives, mediation is available and increasingly common. Even in court-connected cases such as divorce, more and more cases are being mediated prior to being filed in court in order to reduce costs and preserve relationships.

Assumption 3:

MEDIATORS MUST TAKE COURT CASES TO BUILD A CAREER

Mediation as a career has become a reality for tens of thousands of conflict resolution professionals across the US and other countries. The field of mediation was featured as one of the "Top 30 Careers for the Next Decade" by *U.S. News and World Report* (2007/12/19), due to rapid growth and relatively low barriers to entry. In 2017, the Bureau of Labor (www.bls.gov/ooh/legal/arbitrators-mediators-and-conciliators.htm) lists the mediation field as having 11% growth, significantly faster than the average career category. Since the 1980's, many courts have increased their use of mediation as a tool for pre-trial settlement, generally to good results. In many jurisdictions mediation is required before disputants can come before a judge and use the court's scarce resources. While vast differences exist between and within U.S. states in regard to the prevalence of court-mandated mediation, much of the growth in professional mediation has occurred in and around litigated cases. Yet, in many regions, court based mediation has nearly "topped out," meaning all the cases that can go to mediation are going there. In these areas, as in others, we are seeing tremendous growth *outside* of the court system. Additionally, many courts use unpaid, volunteer mediators. Those seeking to build a mediation career often gain valuable experience within small claims or other courts, but then market themselves as mediators to other case types or venues.

More than a decade ago, the term "mediation" was frequently confused with "meditation" in the popular mindset. Also, the average person couldn't explain the difference between arbitration and mediation. These terms are now common enough to be used in the popular media without an accompanying definition. We are seeing an increase in the number of people requesting, rather than being ordered to, mediation. Thanks in part to peer mediation programs in

schools, the idea of a neutral third party who helps facilitate dispute resolution is no longer foreign to many people and within many organizations.

As a result, in areas where court-connected mediation is common, the biggest growth in the field of mediation appears to be outside of the court system. Elder issue mediation services (e.g. estate planning and division; long-term care decisions, etc.) are increasingly being offered to seniors and their families through referrals from health care providers or residential facilities. Homeowners associations are realizing that mediation is more conducive to neighborly relationships than arbitration or litigation. Better Business Bureaus and Chambers of Commerce are offering low-cost services to their members and their customers. Special education mediation brings parents, teachers and administrators together to improve educational outcomes for kids with learning disabilities or unique needs. Organizational ombuds/ombudsmen are working to prevent and manage conflict in our workplaces and civic organizations. The Ombuds blog, for example, (<http://ombuds-blog.blogspot.com>), lists 434 universities and 187 other NGOs, government, and business entities with ombuds offices.

In many areas of our lives, mediation is available and increasingly common. Even in court-connected cases such as divorce, more and more cases are being mediated prior to being filed in court in order to reduce costs and preserve relationships. Parent-teen mediation is being used to negotiate rights/responsibilities and help families improve their ability to communicate productively in the future. Marital mediation is offered to couples considering divorce, but trying to remain together. These agreements help clarify expectations between the parties, reach agreements that help prevent the recurrence of past conflict, and sometimes allow a peek through the keyhole to see what child support, alimony and parenting schedules might look like they were to proceed with a divorce. This information helps couples make informed decisions about the potential costs of divorce, while equipping them with the conflict resolution skills needed to succeed in overcoming existing problems (often while going through counseling rather than as a substitute for it). In short, the range of cases using mediation is growing by leaps and bounds, with the potential to affect our lives, communities and careers in positive ways.

While court-connected mediation remains a familiar source for cases, many mediators are building careers without ever stepping inside a courthouse.

CONCLUSION:

Some of our long-held assumptions about mediation have turned out to be accurate, once put under the researcher's microscope, while others have not. As a group, mediators tend to be inquisitive and open to new ideas, even when those ideas contradict their previously held beliefs. As the field of mediation and ADR has expanded rapidly over the past four decades, it is an important that we inform our practice with the best that current research has to offer. ■