

What works in alternative dispute resolution? The impact of third-party neutral strategies in small claims cases

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Abstract

This research examines “what works” in small claims court alternative dispute resolution (ADR) processes. Using a comprehensive quasi-experimental design that combines real-time behavioral observation of authentic small claims court ADR sessions with pre- and post-intervention questionnaires, the study measures the immediate and long-term impact of various strategies by third-party neutrals on party attitudes and case outcomes. Eliciting participant solutions had the broadest range of positive impacts. Greater percentage of time spent in caucus was associated with negative outcomes. Reflecting had short-term positive associations and neutral offering solutions had long-term negative associations.

Alternative dispute resolution (ADR) has been shown to have significant benefits for small claims litigants (Charkoudian, Eisenberg, & Walter, 2017; Hann & Barr, 2001; Maiman, 1997; Wissler, 1995). Less is known about the specific aspects of the ADR process that promote positive outcomes. ADR processes such as mediation have been compared to “aspirin; it works, but we don't know exactly how or why” (Wall & Chan-Serafin, 2009, p. 287).

Rigorous testing of ADR is difficult to do. Mediation has been described as “an art rather than a science” with rigorous research “treated as a futile exercise or as hopelessly complex” (Slaikue, Culler, Pearson, & Thoennes, 1985, p. 55). ADR is a confidential and dynamic process that varies by context, case type (Wissler, 2004), third-party neutral characteristics and interventions (Charkoudian & Wayne, 2010; Wall, Dunne, & Chan-Serafin, 2011), and party attitudes, goals, and behaviors (McEwen, 1999; Wall & Chan-Serafin, 2009).

Few studies examine authentic ADR sessions at the courthouse. Simulated processes may not capture the unique, real-life interactions between disputants and third-party neutrals (Wall & Chan-Serafin, 2009). Most ADR studies use postintervention surveys of neutrals or participants, without

controlling for pre-ADR case characteristics or party attitudes and without observation of the ADR sessions (Goldberg, 2005; Goldberg & Shaw, 2007; Lim & Carnevale, 1990; McDermott & Obar, 2004). Such studies rely on parties' recall about what the neutral actually did and subjective perceptions about whether those techniques had any impact.

Many studies treat ADR like a “black box,” assuming that all neutrals do the same thing in the same way. Yet, neutrals vary in their training and approach and the specific techniques used throughout the ADR session (Charkoudian, de Ritis, Buck, & Wilson, 2009; Riskin, 2003). Many neutrals identify with a particular framework—such as evaluative, facilitative, transformative, or inclusive mediation—that guides their process choices and interventions, typically running along a continuum of directive and settlement-focused to facilitative and relationship-focused (Riskin, 1996, 2003). Comparing strategies across the literature is difficult to do because the definitions of ADR varies widely (Charkoudian, 2012), and studies use different labels to describe various behaviors used by the neutral (American Bar Association Section of Dispute Resolution, 2017).

Further complicating matters, neutrals often lack consistency between their professed framework and their actual behaviors during the ADR process (Charkoudian et al., 2009; Kressel, Henderson, Reich, & Cohen, 2012). For example, in an review of 27 civil mediation studies, mediators who self-described their approach as “facilitative” employed the following “evaluative” strategies in up to one third of cases: “evaluated the strengths and weaknesses of each side's case, suggested settlement options, predicted the outcome, or assessed or recommended the settlement value of the case” (Wissler, 2004, p. 64). Likewise, McDermott and Obar (2004) found that mediators in a program billed as “facilitative” in fact used many evaluative techniques.

To address definitional inconsistencies and the disconnect between ADR theory and practice, scholars recommend focusing on the specific ADR interventions that maximize benefits (Herrman, Hollett, & Gale, 2006; Lande, 2004; Wissler, 2002). This study answers that call, moving away from testing of a particular ADR framework or “style,” and isolating the impact of various strategies used by neutrals across many different frameworks.

To account for the wide range of factors that complicate ADR research and isolate the impact of specific interventions by the neutral on participants and case outcomes, this study uses a comprehensive quasi-experimental design, similar to that recommended by Herrman et al. (2006). The model includes a range of inputs and considers four aspects: (1) conditions prior to the ADR process, including the presession characteristics, beliefs, and attitudes of parties and neutrals; (2) the actual behaviors of both parties and neutrals during the ADR session, captured through real-time behavior observation coding; (3) parties' beliefs and attitudes and case outcomes immediately following the ADR session; and (4) the long-term impact of the ADR process on party beliefs and attitudes and outcome compliance.¹

This research moves beyond theoretical debates about ADR approaches to measure the immediate and long-term impact of particular interventions by the third-party neutral on party attitudes, the probability and durability of settlements, and other case outcomes. The study also collects and controls for a wide variety of participant demographic and case factors that could influence the outcome, resulting in one of the most rigorous and comprehensive ADR studies to date.

The study uses pre- and post-ADR session questionnaires, together with live observation coding of the behaviors of both the neutrals and participants during the ADR session at the courthouse. In addition to examining which characteristics and strategies of the neutral affect the probability of reaching agreements, the research goes further to measure the impact of observed neutral behaviors against changes in participants' attitudes and on case outcomes, both immediately after the ADR session and approximately 4 months later. The study was funded by the State Justice Institute, Grant Number SJI-12-N-003.

1 | LITERATURE ABOUT NEUTRAL STRATEGIES

To date, studies about the impact of specific neutral strategies are rare, especially in an authentic rather than simulated context. A review of existing research found that no particular actions by the neutral have clear, uniform effects on case outcomes or participant attitudes or relationships (American Bar Association Section of Dispute Resolution, 2017). In a small claims setting, “the features of the process that contributed to evaluations of the process as fair and satisfying included the session being thorough, open, providing disputants with an opportunity to tell their side of the story and with control over the presentation, and, marginally, providing disputants with control over the outcome” (Wissler, 1995, p. 345). Use of a facilitative mediation style in the small claims context has been associated with increases in parties' perceptions of fairness and satisfaction with process and outcomes, but an evaluative style was not viewed especially negatively (Alberts, Heisterkamp, & McPhee, 2005).

1.1 | Directive or evaluative strategies

The literature regarding directive or evaluative mediator strategies is mixed (American Bar Association Section of Dispute Resolution, 2017). In an observation study of general civil mediation, pressing and evaluative mediator behaviors increased settlement, but modestly reduced disputant satisfaction (Wall et al., 2011). In an observation study of community mediation, directive mediator behaviors (making suggestions, expressing opinions, telling participants how to behave, and advocating for a particular outcome) were negatively associated with participants reporting that they could express themselves, that the mediator understood what they were expressing, and that they were satisfied with the mediation process (Charkoudian & Wayne, 2010).

A summary of literature on nonfamily civil mediation reported that “when mediators disclose their views about the merits or value of a case, cases are more likely to settle and litigants are more likely to assess the mediation as fair. By contrast, when mediators keep silent about their views of a case, cases are less likely to settle and litigants' views of procedural justice are not enhanced” (McAdoo, Welsh, & Wissler, 2003, p. 9). Wissler (2006) found that while participants “were more likely to think the process was fair when mediators evaluated the case merits, they were less likely to think it was fair when mediators recommended a particular settlement” (p. 135). In a review of three studies of civil mediation, “settlement was more likely if the mediators were more active and disclosed their views about the strengths and weaknesses of the case, case settlement value, or likely court outcome than if they did not” (Wissler, 2004, p. 69). Wissler (2006) also found that “in most mediation settings...disputants who felt pressured to settle by the mediator were less likely to view the process as fair” (p. 135).

1.2 | Relational strategies

Third-party neutral strategies that focus on party emotions and relationships have been associated with positive outcomes, including settlement, but some studies have found no measurable effect (American Bar Association Section of Dispute Resolution, 2017). Most of these studies have been in family mediation rather than small claims settings. A behavioral observation study of court-connected custody mediations found that mediators' greater use of reflecting strategies (to identify emotions, values, and issues expressed by the parties) decreased settlement but increased parties' reports of improved understanding of and relationship with the opposing side (Charkoudian, Walter, & Eisenberg, 2018). In the long term (6 months later), reflecting strategies were associated

positively with an increase in parties' willingness to consider the other parent's perspective, prioritization of their children's needs, and desire to have a positive relationship with the other parent (Charkoudian et al., 2018).

Donahue, Drake, and Roberto (1994) found parties less likely to reach agreement if when mediators ignore relational concerns. Joint problem solving between disputants during mediation has been associated with improved long-term relationships approximately 4 to 8 months later, even after controlling for the level of hostility between the parties (Pruitt, Peirce, McGillicuddy, Welton, & Castrianno, 1993). Mediators' eliciting ideas or solutions from the parties had a positive effect on settlement in a behavioral observation study of custody mediations (Charkoudian et al., 2018). In community mediation, mediator behaviors that demonstrated empathy, structured the discussion, and stimulated thinking by the disputants were related positively to settlement, goal achievement, and party satisfaction (Zubek, Pruitt, Peirce, McGillicuddy, & Syna, 1992).

1.3 | Caucus

Few studies have measured the impact of one-on-one private sessions or caucuses between the neutral and one party, none of which have been in a small claims context. In custody mediations, parties who spent a greater percentage of time in caucus were more likely to report that the mediator respected them and did not take sides, but also reported feeling more hopeless about the situation, range of options for resolution, and their ability to work with the other parent (Charkoudian et al., 2018). Caucusing during employment and domestic mediations was associated with increased post-mediation relationship conflict between the parties (Swaab, 2009; Swaab & Brett, 2007). Caucus was found to have no statistically significant impact on the likelihood of settlement in community mediation, although disputants engaged in more "problem solving with the mediator" while in caucus (Welton, Pruitt, McGillicuddy, Ippolito, & Zubek, 1992).

In special education mediation, parties viewed caucus favorably when mediators used it to offer parties "full opportunity to tell their stories" or to ensure that the mediator understood their concerns (Welsh, 2004, p. 650). When mediators used caucus to persuade parties about the "validity of the other side's position," the parties "questioned the mediators' impartiality" (p. 648).

The present study examined the impact of a range of behaviors by third-party neutrals in small claims day-of-trial ADR sessions on immediate and long-term case outcomes and party attitudes. Using pre- and post-ADR session questionnaires and real-time behavioral observation coding, the analysis controls for a variety of demographic and case characteristics to isolate the impact of various strategies.

2 | METHOD

2.1 | Design and participants

To foster a representative sample, data were collected in four geographically diverse jurisdictions: one urban, one urban-suburban, and two suburban-rural. Data collection consisted of several methods: questionnaires of participants immediately before and after the ADR session and approximately 4 months later; pre-session surveys of the neutrals; live observation and coding of the behaviors of both participants and neutrals during the ADR session; and case file review 12 months after the ADR session. Regression analysis held case characteristics, participant attitudes and behaviors, and other factors constant.

Participants included 269 individuals in 116 cases, 44% were plaintiffs, 49% defendants, and 1% both (due to counterclaims). The remaining 6% were those who participated in the ADR session to support one of the parties. These individuals, although not named parties, were included because they may have been affected by the dispute in some way. For example, an adult child may assist an elderly parent with a housing claim, the results of which could affect both of them. Attorneys are not included as “participants.” Twenty-two percent of participants were represented by or had met with an attorney about the matter prior to the session. The split between genders was equal (50% male and 50% female). Racial breakdown was 41% white, 51% African American, 4% Asian, 2% Hispanic, and 2% other.

2.2 | Procedures

The study focuses on a statewide district court ADR program, a court with exclusive jurisdiction for contract and tort claims with damages of \$5,000 or less, and concurrent jurisdiction for claims between \$5,001 and \$30,000, as well as property-related and landlord-tenant claims, regardless of the value of the property or amount involved.

The ADR program offers day-of-trial mediation and settlement conferences, with the process provided on a particular day determined by the background and preferred approach of the volunteer neutral covering that day's court docket. In both processes, a third-party neutral assists the parties in discussing the dispute and negotiating potential options for resolution, using a range of strategies in the process. Pursuant to court rule, settlement conference attorneys, but not mediators, “may recommend the terms of an agreement” (Md. Rule 17-102(I); Md. Rule 17-103, 2018). In this particular program, settlement conference attorneys are akin to what some consider “evaluative mediators.” As prior research has shown, neutrals who identify with a particular framework engage in behaviors inconsistent with that orientation (Charkoudian et al., 2009; Golann, 2000; Wissler, 2004). In other words, mediators of all kinds and settlement conference attorneys may engage in identical behaviors throughout the ADR process, even if they differ in their training and theoretical approach to ADR. Because the neutrals' self-defined framework may not be what they actually practice, this study moves away from theoretical framework or process “style” and focuses on actual observed behaviors used by the neutral.

Prior to the trial dates, informed consent for observation of the ADR session was obtained from the neutrals scheduled to cover the court docket.² Neutrals completed a questionnaire about their background, demographics, ADR training and approach, and number of cases handled in the previous 12 months. The majority of neutrals identified as mediators (88%) of varying backgrounds and frameworks, with 12% identifying as settlement conference attorneys. Self-reported practice frameworks included 2% evaluative, 42% facilitative, 31% transformative, 2% analytical, 15% inclusive, 5% no specific style, and 3% other style, not specified. There were 62 unique neutrals (52% female). Some neutrals were observed more than once because they appeared on the schedule multiple days (min = 1, max = 7, $M = 2.6$, $SD = 1.9$). Of the 116 cases, 42 used comediation (two mediators working as a team) and 74 were solo neutrals.

Over the course of several months, data were collected on days on which neutrals were scheduled to cover the docket. Neutrals received case referrals from either the courtroom clerk or presiding judge, according to that court's standard ADR referral procedure. After both parties spoke to the neutral and agreed to participate in ADR, the researchers then approached the parties to explain the study and obtain informed consent. If both parties agreed, the researchers administered questionnaires prior to the ADR session, recording answers directly into a laptop. As part of standard court protocol, ADR cases that reach agreement return to the courtroom so the judge can review and read the settlement agreement into the record. If ADR cases do not settle, the judge proceeds with a trial on that

same day. The researchers administered the postintervention questionnaire as the parties left the courtroom at the very end of the process (either after the trial or after the settlement was recorded).

The pre-ADR session questionnaire collected participant demographic data (gender, race, age, household income, spoken language, military background, disabilities, and education level), and case information (role in case, relationship to the other party, attorney representation or consultation, preparation for trial, presence of support person, settlement authority, involvement in other cases, and prior involvement in ADR).

To assess the nature and intensity of the conflict, participants were asked whether they had a prior conversation with the opposing party to try to resolve the case (yes/no), the length of time of the conflict, whether and how often the police had been called relating to the conflict, and whether other cases had been filed relating to the same conflict. All of these variables were used as controls.

In both the pre- and post-ADR questionnaires, participants indicated if they thought they were responsible for what happened (not at all, somewhat, fully). To measure shifts in attitudes about the conflict, opposing party, and the court from before to after the intervention, participants were asked the same 12 questions about the issues that brought them to court on a Likert-type scale (1 = *strongly agree*; 5 = *strongly disagree*), including:

“I think there are a number of different ways to resolve the issues;
 It's important that I get my needs met;
 It's important that I understand what the other person/people want;
 The other person/people need to learn that they are wrong;
 It's important that the other person/people get their needs met;
 It's important for me to have a positive relationship with the other person/people involved;
 I feel like I have no control over what happens;
 The other person/people involved want the exact opposite of what I want;
 I can talk about my concerns to the person/people involved;
 It doesn't seem to make any difference what I do, it'll just remain the same;
 In general, conflict is a negative thing;
 The court system cares about helping people resolve disputes in a fair manner.”

The answers to these questions were used to calculate a difference score for pre- and postintervention attitudes. Positive scores indicate an increase in agreement with the statement from before to after the ADR session. On the postintervention questionnaire, participants also answered the following questions about the ADR process on a Likert-type scale (1 = *strongly disagree*; 5 = *strongly agree*):

“The Neutral³ listened to what I had to say without judging me or my ideas;
 The Neutral seemed to take sides;
 The Neutral treated me with respect;
 I was able to express myself, my thoughts, and my concerns during ADR⁴;
 I think the Neutral understood what I was expressing;
 Through ADR, I became clearer about what I want in this situation;
 Through ADR, I think I understand the other person/people involved in the conflict better;
 Through ADR, I think the other person/people involved in the conflict understand me better;

I think all of the underlying issues in this conflict came out in ADR;
The Neutral prevented us from discussing important topics;
The other person/people listened to me;
The Neutral pressured us to reach an agreement;
Together, the other person/people and I controlled the decisions made in ADR;
I feel like the Neutral controlled the decisions made in ADR;
I would bring other conflicts to ADR in the future;
I would recommend ADR to others involved in conflicts;
The meeting room was conducive to a comfortable ADR;
I am satisfied with the outcome of ADR;
I am satisfied with the ADR process.”

The postintervention questionnaire asked participants whether they reached agreement (full, partial, or no) and whether the issues that brought them to court were resolved. They indicated whether any party acknowledged responsibility or apologized, checking all of the following that applied: “I acknowledged responsibility; I apologized; The other person acknowledged responsibility; The other person apologized; Neither of us acknowledged responsibility or apologized.” Parties were asked to express their level of agreement with the following statements (Likert-type scale, 1 = *strongly agree*; 5 = *strongly disagree*): “I think the outcome reached today is fair; I think I can implement the results of the outcome reached today; I am satisfied with my interactions with the judicial system during this case.”

3 | LIVE BEHAVIOR OBSERVATION CODING

After completing the preintervention questionnaire, the ADR session proceeded, with the researchers sitting away from the table and unobtrusively observing and coding the behaviors of both neutrals and participants directly into The Observer (Noldus) program. Capturing both neutral and participant behaviors in real time permitted the measurement of the impact of third-party neutral strategies while holding constant party behaviors, such as displays of hostility or cooperation.

Behavior codes were developed based on previous observational studies of ADR strategies (Charkoudian, 2012; Charkoudian & Wayne, 2010), and adjusted based on ADR literature and feedback from other ADR researchers. Behavior codes were recorded each time a behavior occurred. The variables measure the percentage of total neutral or participant behaviors that fit specific definitions.⁵ The coders (two for neutral behaviors and three for participant behaviors) received extensive training and practiced coding during recorded and live mediations, until inter-rater reliability reached at least 80% (Yoder & Symons, 2010, p. 161). After 6 months in the field, researchers reconvened to test for any drift away from code definitions and inter-rater reliability. No measurable drift occurred.

4 | CASE CHARACTERISTICS

The researchers noted case type and whether the race and gender of the neutral and participant matched. They recorded total time in the ADR session, the percentage of total time spent in caucus, and whether the parties reached agreement during ADR (no, partial, or full).

5 | LONG-TERM INTERVIEWS

Approximately 4 months after the ADR session, participants were called for follow-up interviews about their attitudes about the conflict, the opposing party, the ADR process and outcome, and the court. The average time between the ADR session and long-term interview was 4.3 months ($SD = 1.57$), with a minimum of 2.1 and maximum of 11.4 months.

To measure long-term attitudinal changes, the follow-up interviews include the same questions from the pre- and postsession questionnaires. The analysis reflects the difference scores at this 4-month data collection as “Follow-Up.”

Participants were asked the following questions on a Likert-type scale (*not at all; a little; partially; mostly; completely*): “How likely are you to recommend (ADR) to others involved in a court case? At this point, how satisfied are you with the final outcome reached? How well is the outcome you reached working for you? How well do you think you followed through on the outcome? How well did the other/s follow through on the outcome? Are the interactions worse, the same, or better than (insert time) months ago? Since the final outcome was reached, have new problems arisen between you and the other person/people? In the last (insert time) months since (ADR) or trial, have you had any personal inconveniences (e.g. missed work, change in your routine, lack of sleep, health issues, situation weighing on your mind, etc.) as a result of this situation?”

Finally, court records were reviewed for each observed case to determine whether the parties required further court intervention in the 12 months subsequent to the court date/ADR session.

5.1 | Short-term case-level statistics

Data were collected for 116 cases, 71% of which were contract cases ($n = 82$). The parties reached agreement in ADR in 49% of cases ($n = 57$). The total time of the ADR session ranged from 5 to 155 min, with a mean of 52.97 ($SD = 30.70$). Of the 116 cases, the parties had a personal relationship in 24%, the police had been called relating to the dispute in 22%, and a related case was pending in 15%. In the 116 cases, 269 participants completed questionnaires (some cases had multiple parties). Attorneys represented 7% of participants ($n = 16$). The race of the neutral matched 45% of participants, and 53% had a gender match.

6 | CREATING NEW COMBINED VARIABLES

Factor analysis and principal component analysis are analytical tools to help determine if there are common underlying characteristics across multiple variables. Factor analysis is preferred when there is a theory which may influence how variables will merge (Tabachnick & Fidell, 2019). We applied factor analysis to the neutral behavior variables, as most neutrals have an underlying theory or framework that guide their approach during the session. Because ADR participants lack any underlying theory that might tie their answers together in any predictable way, we used principal component analysis to combine the various sets of participant variables.

Examining the findings and scree plot for neutral behaviors, the minimum Eigen value (a measure used as a cutoff in determining if variables are merging around a given vector) was set at 0.8 instead of 1. This allowed for a three-factor, rather than two-factor, solution to emerge. This strategy of selecting the factors by reviewing the scree plot pattern is considered to be methodologically valid (Cattell, 1966), only slightly less conservative than using the minimum Eigen value threshold of 1 used in the rest of this research. These three factors are more consistent with the factors found in

the long-term analysis below and a related study of mediator strategies in custody matters (Charkoudian et al., 2018), and are consistent with ADR theory. Variables with a factor loading greater than 0.3 that were also theoretically sound were then used to create new variables. These new variables of neutral strategies were then used in subsequent analyses.

Analysis of observational data was performed on neutrals' and participants' behaviors. Neutral strategies, the paramount measure of interest, revealed three factors. The first factor, "Eliciting Participant Solutions," consists of strategies in which the neutral asks participants to suggest ideas and solutions, summarizes those solutions, and explores with participants whether and how they think those ideas might work for them. The second, "Reflecting Emotions/Interests," is characterized in the positive by the neutral reflecting back what participants said, with a focus on identifying emotions, interests, or values expressed by the parties. This is also characterized by the neutral not offering his or her own opinion. The third, "Neutral Offering Solutions," is characterized by the neutral offering their opinion and advocating for their ideas for solutions.

While using factor analysis to create combined variables identifies the sets of strategies typically used together, they do not necessarily correlate with types of neutrals or ADR frameworks. One also cannot assume that a neutral used only one set of strategies in any given ADR session. Therefore, while we can identify that a specific intervention used by the neutral has a particular impact, a neutral may have used a multitude of different strategies during the same session.

These new combined variables, shown in Table 1, measure the percentage of neutral behaviors that fall within the set of strategies. A positive coefficient indicates that a greater percentage of use of these strategies increases the outcome of interest, while a negative coefficient indicates that the greater percentage of use decreases the outcome of interest.

7 | BUILDING THE MODEL

The research explores the effect of strategies used by neutrals on several outcomes, including participant attitudes and reports of their experience with ADR and case outcomes. Ordinary least squares regression and ordered logistic regression were used to control for a range of factors and isolate the impact of the ADR experience and various strategies used by neutrals. In particular, the research controlled for participant demographics collected on the pre-ADR questionnaire; a number of measures of participant attitude and actions from the behavior coding; attorney representation; previous police involvement in the matter (as a measure of conflict escalation); and any racial match between the neutrals and participants.

TABLE 1 New combined variables for neutral strategies—Case level data

(Case) Neutral eliciting participant solutions	(Case) Neutral reflecting emotions/interests	(Case) Neutral offering solutions
Open-ended question (−0.51)	Emotions (+0.78)	Fact/closed question (−0.53)
Fact/closed question (−0.38)	Interest/values (+0.73)	Neutral opinion (+0.34)
Ask for solutions/brainstorm (+0.64)	Neutral opinion (−.48)	Neutral solution (+0.45)
Summary of solution (+0.89)		Legal assessment (+0.36)
Request reaction (+0.47)		

Note: Factor loadings of neutrals' behaviors in three-factor solution.

The possibility of multicollinearity was considered and addressed by reviewing correlation tables to include in the final equations only variables that had correlations of less than 0.5. When a variable had to be dropped because of a higher correlation, the variable that was considered more crucial to the research was retained. First, however, the equation was run with the variable intended to be dropped to check for significance. Variables with several missing observations were also dropped.

For participant-level data, all equations also included whether an agreement was reached in ADR. This allows us to hold constant for whether the parties settled and isolate the impact of the other variables on the outcomes of interest.

8 | SHORT-TERM RESULTS

8.1 | Participant-level outcomes

To examine the immediate impact of the neutral's strategies on participants, referred to as post-ADR variables, ordinary least squares regressions were conducted. As seen in Table 2, results revealed that participants who reported that they listened and understood each other in the ADR session and jointly controlled the outcome was associated positively with: the neutral's greater use of eliciting participant solutions strategies; reaching an agreement; having an attorney present; and having at least one neutral's race match the race of the reporting party. This variable was negatively associated with the number of cases the neutral had handled in the previous 12 months, but with an almost negligible impact.

Participants who reported that the neutral controlled the outcome, pressured them into solutions, and prevented issues from coming out was associated positively with a greater percentage of time spent in caucus and negatively associated with the neutral eliciting participant solutions. Participants reporting they were satisfied with the process and outcome, and that the issues were resolved with a fair and implementable outcome, was associated positively with reaching an agreement and negatively with a greater percentage of time in caucus.

Ordinary least squares regressions for postintervention measures revealed that participants who reported that they took responsibility and apologized was associated positively with having an attorney present ($n = 153$, coefficient = 1.18, $SE = 2.10$, $p < .05$) but the overall model was not significant (adjusted $R^2 = 0.20$). Participants who reported that the other person took responsibility and apologized was associated positively with reaching an agreement ($n = 153$, coefficient = 0.27, $SE = 1.96$, $p < .05$) and two neutral strategies: reflecting emotions/interests ($n = 153$, coefficient = 0.36, $SE = 2.29$, $p < .05$) and eliciting participant solutions ($n = 153$, coefficient = 0.59, $SE = 3.94$, $p < .01$). No strategies or characteristics of the neutral had a statistically significant effect on the participants' reporting that the neutral respected them, listened to them, and understood them as they expressed themselves freely. Likewise, no strategies showed an impact on parties' reports that they became clearer or that the underlying issues came out in ADR.

Table 3 reports the results of the ordinary least squares regressions, analyzing the difference in participant (P) attitudes from before to immediately after the ADR session (Diff) based on actual differences in Likert-scale responses on the pre- and postintervention questionnaires. Increases in participants' sense of self-efficacy (ability to talk and make a difference) and sense that the court cares about them were associated positively with: reaching an agreement; having the race of at least one neutral match the race of the reporting participant; and greater use of reflecting emotions/interests by the neutral.

An increase in participants' sense of powerlessness, a negative view of conflict, and a desire to better understand the other party was associated positively with a greater percentage of time spent in caucus and negatively with reaching an agreement.

TABLE 2 Results of the ordinary least squares regressions for postalternative dispute resolution (ADR) variables

		Postparticipants understood	Postneutral controlled	Postoutcome workable
	Agreement	.33* (2.49)	-.17 (-1.33)	.47* (2.95)
Participant characteristics and preintervention variables	Police called	-.22 (-0.85)	-.14 (-0.59)	-.28 (-0.91)
	Contract	-.10 (-0.45)	-.14 (-0.62)	-.36 (-1.26)
	Personal relationship	-.47 (-1.94)	.01 (0.06)	-.00 (-0.01)
	Attorney present	1.01* (2.01)	.16 (0.33)	.15 (0.24)
	Plaintiff	.24 (1.08)	.15 (0.75)	-.07 (-0.28)
	Participant pre- prepared	-.12 (-1.33)	.11 (1.24)	.00 (0.06)
	Participant pre- anti-ADR	-.17 (-2.13)	.15 (2.03)	-.07 (-0.82)
Neutral characteristics	Neutral race matches participant	.45* (2.02)	-.20 (-0.94)	.33 (1.26)
	Neutral gender matches participant	.16 (0.70)	.01 (0.07)	-.15 (-0.57)
	Cases—Last 12 months	-.01** (-2.59)	.00 (-1.33)	-.00 (-0.37)
Neutral strategies	Neutral eliciting participant solutions	.33* (2.25)	-.37* (-2.74)	.39 (1.64)
	Reflecting emotions/interests	.21 (1.30)	-.15 (-1.01)	-.01 (-0.08)
	Neutral offering solutions	-.08 (-0.58)	.03 (0.25)	.06 (0.35)
ADR session	Caucus time	-.68 (-0.99)	2.01** (3.14)	-1.58* (-1.99)
	Total time ADR	.00 (-0.27)	.01 (1.45)	.00 (0.34)
Participant behaviors	Participant—My solutions	-.01 (-0.11)	-.02 (-0.24)	-.05 (-0.40)
	Participant—Attacking	-.18 (-1.94)	-.11 (-1.30)	-.02(-0.22)
	Participant—Conciliatory	.13 (1.10)	-.02 (-0.22)	.21 (1.49)
	Constant	-.21 (-0.59)	-.07 (-0.21)	-.21 (-0.49)
	Number	176	176	153
	Adjusted R-squared	0.22	0.14	0.11

Note: Post-ADR ordinary least squares regression reflects the impact of neutral's strategies on participants immediately after the ADR session.

* $p < .05$; ** $p < .01$.

No strategies or characteristics of the neutral had a statistically significant effect from before to after ADR on participants' understanding or consideration of each other's perspectives, participants' dismissal of the other person's perspective, and focus on their own needs.

8.2 | Case-level outcomes

We examined neutral strategies and participant behaviors on case outcomes—often a primary concern of court-based ADR programs. As shown in Table 4, the only neutral strategy positively associated with reaching an agreement was eliciting participant solutions.

TABLE 3 Ordinary least squares regression results for differences in attitudes

	Diff—Empowered	Diff—Powerless	Diff—Consider them	Diff—Consider me
Agreement	.30* (2.60)	-.32* (-2.64)	.29 (1.92)	-.18 (-1.37)
Participant characteristics and pre-intervention variables				
Police called	-.42 (-1.88)	.22 (0.93)	.13 (0.45)	.03 (0.13)
Contract	-.28 (-1.41)	.10 (0.47)	-.12 (-0.47)	.16 (0.72)
Personal relationship	-.35 (-1.68)	-.07 (-0.33)	-.18 (-0.67)	-.14 (-0.59)
Attorney present	-.89 (-1.97)	.25 (0.53)	-.04 (-0.07)	-.15 (-0.29)
Plaintiff	.23 (1.20)	.02 (0.13)	.28 (1.14)	.36 (1.71)
Participant pre- prepared	.29** (-3.56)	-.01 (-0.10)	-.02 (-0.16)	-.22* (-2.39)
Participant preanti-ADR	.10 (1.59)	-.13 (-1.83)	.03 (0.30)	.07 (1.01)
Neutral characteristics				
Neutral race matches me	.39* (2.08)	-.36 (-1.80)	.25 (1.01)	.05 (0.25)
Neutral gender matches me	-.20 (-1.06)	.20 (1.01)	.26 (1.02)	.02 (0.10)
Cases—Last 12 months	-.00 (-0.47)	.00 (-0.79)	.00 (0.14)	.00 (-0.72)
Neutral strategies				
Neutral eliciting participant solutions	.08 (0.66)	-.09 (-0.70)	.05 (0.29)	.10 (0.70)
Reflecting emotions/interests	.26* (2.12)	.11 (0.82)	-.06 (-0.36)	-.09 (-0.63)
Neutral offering solutions	.02 (0.18)	.04 (0.36)	-.10 (-0.65)	-.03 (-0.25)
Alternative dispute resolution (ADR) session				
Caucus time	-.87 (-1.55)	1.24* (2.11)	-.125 (-1.66)	-.52 (-0.83)
Total time ADR	.00 (0.13)	-.01 (-1.89)	.00 (0.60)	.00 (0.32)
Participant behaviors				
Participant—My solutions	-.08 (-0.94)	.03 (0.28)	.02 (0.13)	-.04 (-0.39)
Participant—Attacking	-.17* (-2.23)	.11 (1.33)	.04 (0.38)	-.02 (-0.24)
Participant—Conciliatory	.21* (2.07)	-.06 (-0.55)	.17 (1.25)	-.14 (-1.21)
Constant	.03 (0.10)	.59 (1.81)	-.61 (-1.46)	-.02 (-0.06)
Number	154	154	154	154
Adjusted R-squared	0.21	0.08	-0.03	-0.01

Note: Ordinary least squares regression analyzing the difference in participant (P) attitudes from before to after the mediation (Diff).

* $p < .05$; ** $p < .01$.

TABLE 4 Ordered logistic regression results for agreement by case

		Agreement
Case characteristics	Police called	−0.60 (−0.82)
	Contract	1.06 (1.57)
	Personal relationship	0.83 (0.99)
	Attorney present at mediation	−0.47 (−0.23)
	Plaintiff/defendant mixed race	−0.87 (−1.13)
	Related case	−1.84 (−1.65)
	Male	1.36 (1.63)
Neutral strategies	Case—Eliciting participant solutions	1.21* (2.51)
	Case—Reflecting emotions/interests	0.39 (0.68)
	Case—Offering solutions	−0.14 (−0.33)
Participant behaviors	P case antialternative dispute resolution (ADR)	−0.33 (−1.57)
	P case prepared	−0.07 (−0.23)
	P case clear and hopeful	−0.53 (−1.65)
	P case our solutions	0.17 (0.65)
	P case my solutions	0.70* (2.45)
	P case insults and apology	−0.09 (−0.35)
	P case responsible and interrupting	−0.18 (−0.60)
Neutral characteristics	Cases last 12 months	0.02 (1.78)
	Mediator—P needs agreement	0.61 (1.10)
ADR session	Caucus time	−2.98 (−1.60)
	Total ADR time	−0.02 (−1.77)
Number		99
Pseudo R^2		0.37

* $p < .05$.

9 | LONG-TERM IMPACT

Out of the 269 participants in the short-term analyses, 114 individuals (42%) participated in the long-term study. Most attrition resulted from lack of response to repeated (up to five) calls. Although \$10 was offered as an incentive for follow-up participation, this may have been insufficient. Other parties were lost due to incorrect contact information or unavailability.

While attrition is expected in any long-term study, we conducted difference of means and chi-squared tests to ensure that the parties who were lost did not have a different experience in ADR than those who remained, and that the attrition did not result from factors being studied. The following individuals were more likely to be included in the follow-up dataset: individuals from the urban-suburban county cases; individuals whose neutrals had handled more cases in the previous 12 months; and individuals who reported that the neutrals listened and understood their perspective during ADR. The following individuals were less likely to be included in the follow-up data: participants from cases in one of the suburban-rural counties; participants involved in a related case; and participants who experienced a greater increase in their sense of self-efficacy and belief that the court cared about

resolving their dispute from before to after the ADR. While these variables showed a statistically significant difference of means, all remaining variables, including the neutrals' strategies, participant behaviors and attitudes, demographics, and other ADR outcomes, were not significantly different.

10 | LONG-TERM SUMMARY STATISTICS

An examination of data collected at the outset of the study revealed 18% (20 of 114 participants) had prior police involvement relating to the dispute, 7% (7 of 102) had an attorney present at the ADR session, and 52% (57 of 111) were plaintiffs. Additionally, 42% (45 of 108) had a racial match between the participant and a neutral. In the long-term data, 35% (40 of 113) had returned to court for an enforcement action, 15% (17 of 111 participants) reported new problems had arisen with the other party, 24% (27 of 113 participants) reported personal inconvenience as a result of the situation, and 24% (27 of 113 participants) reported financial costs associated with the situation.

11 | COMBINING VARIABLES

As with the short-term data, we applied principal component analysis to participant variables and factor analysis to neutral behavior variables to create new variables that combine variables measuring similar concepts. These variables were used in subsequent analysis examining the long-term impact of neutral strategies.

Factor analysis of neutral behaviors identified three sets of strategies used in combination, shown in Table 5. Although cases were lost to attrition, the similarities in the patterns of neutral behaviors that group together in the long-term and short-term datasets reinforce our hypothesis that we have identified a latent construct of strategies that neutrals tend to use together. In the tables below, the postfix “L” on these variables indicates “long-term.”

The first set, “Neutral Eliciting Participant Solutions–L,” is characterized by strategies that involve the neutral asking participants to suggest solutions, summarizing those solutions, and checking in with participants to see how they think those ideas might work for them. The negative loading on open-ended and fact-based questions suggests that the focus on solutions is not used to elicit a broader understanding of the situation. The second, “Reflecting–L,” consists of the neutral stating back to participants the emotions and interests they expressed. The third, “Offering Opinions and Solutions–L,” is characterized by the neutral offering opinions, solutions, and legal assessments.

12 | LONG-TERM RESULTS

12.1 | Participant-level long-term outcomes

Ordinary least squares regression revealed that the Neutral's Offering Opinions and Solutions–L was negatively associated with participants reporting the outcome was working, they were satisfied with the outcome, and they would recommend ADR. Percentage of time spent in caucus was negatively associated with participants' reported increase in their consideration of the other person, self-efficacy, and sense that the court cares about resolving conflict from before ADR to months later. Participants' report that they changed their approach to conflict was positively associated with Neutral Eliciting Participant Solutions–L, and negatively associated with neutral offering opinions and solutions–L;

TABLE 5 New variables neutral strategies—Long-term data

Eliciting participant solutions–L	Reflecting–L	Offering opinions and solutions–L
Open-ended question (–0.49)	Emotions (+0.87)	Fact/closed question (–0.37)
Fact/closed question (–0.58)	Interest/value (+.81)	Neutral opinion (+0.78)
Ask for solution/brainstorm +0.44)		Ask for solution/brainstorm (–0.33)
Summary of solutions (+0.81)		Neutral solution (+0.61)
Request reaction (+.49)		Legal assessment (+0.36)

Note: Factor loadings of neutrals' behaviors in three-factor solution. "L" denotes long-term outcome analysis.

participants having a personal relationship; a contract case; and the number of days between the ADR and the follow-up interview.

Logistic regression analysis of returning to court for enforcement action in the 12 months after the ADR session is associated positively with the percentage of time spent in caucus ($n = 97$, coefficient = 5.80, $SE = 2.53$, $p < .05$) and negatively with neutral eliciting participant solutions ($n = 97$, coefficient = -1.05 , $SE = -2.25$, $p < .05$), even when controlling for case characteristics, participant behaviors, and neutral characteristics (see Table 6).

No neutral strategies or characteristics had a statistically significant effect on participants' report that there were new problems, personal inconveniences, or financial costs or participants' sense of powerlessness over the situation from before the ADR to several months later.

13 | DISCUSSION

This research is the only study in the small claims ADR context that measures the impact of actual, observed third-party neutral behaviors and characteristics on participant attitudes and case outcomes. The comprehensive information collected about pre-ADR attitudes and case characteristics, together with real-time behaviors exhibited by both neutrals and parties during the ADR session, permitted these factors to be held constant so that the impact of various strategies used by the neutral could be isolated and measured.

Small claims courts are sometimes known as "the peoples' court," in which a high percentage of litigants are self-represented. Many small claims ADR programs aim to empower individuals to resolve disputes without court intervention. Parties who reach their own agreements in ADR are less likely to return to court for an enforcement action, as compared to those who receive a judge verdict (Charkoudian et al., 2017). Research about the impact of specific interventions used by neutrals can assist ADR programs in identifying strategies that align with these desired goals.

The neutral strategy of eliciting participant solutions had the broadest impacts immediately and in the long term. This strategy involves asking participants for their ideas and solutions, brainstorming, summarizing the solutions offered by the parties, and exploring with the parties whether and how those ideas might work for them. In the short term, eliciting participant solutions was associated positively with parties reporting that they listened and understood each other in the ADR session and jointly controlled the outcome and that the other person took responsibility and apologized. Eliciting participant solutions was associated negatively with parties reporting that the neutral controlled the outcome, pressured them into solutions, and prevented issues from coming out. Of all behaviors studied, eliciting participant solutions was the only neutral strategy positively associated with the parties reaching a settlement during the ADR session.

TABLE 6 Logistic regression results for return to court for enforcement action

		Return 1 year
	Agreement	−0.79 (−1.80)
Case characteristics	Police called	−1.23 (−1.65)
	Contract	−0.22 (−0.31)
	Related case	0.02 (0.02)
	Plaintiff/defendant mixed race	−0.24 (−0.32)
	Personal relationship	−0.31 (−0.35)
	Male	−0.46 (−0.53)
	Neutral strategies	Case—Eliciting participant solutions
Case—Reflecting emotions/interests		0.13 (0.39)
Case—Offering solutions		0.01 (0.03)
Participant behaviors	P case pre antialternative dispute resolution (ADR)	0.40 (1.67)
	P case prepared	−0.52 (−1.82)
	P case clear and hopeful	0.33 (1.18)
	P case our solutions	0.34 (1.25)
	P case my solutions	0.34 (1.21)
	P case insults and apology	0.43 (1.58)
	P case responsibility and interrupting	−0.43 (−1.19)
Neutral characteristics	Cases last 12 months	−0.02 (−1.96)
	Mediator—P needs agreement	0.11 (0.18)
ADR session	Caucus time	5.80* (2.53)
	Total ADR time	−0.01 (−0.59)
	Constant	0.74 (0.58)
	Number	97
	Pseudo R^2	0.33

* $p < .05$.

In the long term, eliciting participant solutions associated positively with parties' reports that they changed their approach to conflict and negatively with parties returning to court for an enforcement action within the subsequent 12 months. In other words, parties are less likely to return to court if the neutral uses more eliciting participant solution strategies.

To some, this finding may seem unremarkable. After all, ADR processes generally seek opportunities for the parties to devise their own self-determined solutions to the dispute. Eliciting participant solutions can be considered a form of joint problem solving between the parties, which has been associated with improved long-term relationships between the parties (Pruitt et al., 1993). In addition, a related observation study of custody mediations found eliciting participant solutions positively associated with settlement (Charkoudian et al., 2018).

In the short-term analysis, neutral offering solutions (offering their own opinion and advocating for their ideas for solutions) did not have any statistically significant impacts, but in the long term, neutral offering opinions and solutions was associated negatively with participants' report that the outcome was working, that they were satisfied with the outcome, that they would recommend ADR,

and that they changed their approach to conflict. This suggests that, at least in the small claims ADR context, eliciting participant solutions may promote more durable outcomes than the strategy of neutral offering opinions and solutions.

Reflecting, a type of empathic listening, consists of the neutral summarizing or restating back to parties what they have expressed, with a focus on identifying party emotions and underlying interests. In the mediation literature, reflections are a relational listening strategy that can serve multiple purposes (Kovach, 2004, pp. 64–69; Salem, 2003). First, mediators use reflections to give parties a sense of voice and confirm they have heard them. Second, as the mediator reflects an emotion or interest to one party, the other disputant hears the opponent's perspective repeated by a third-party neutral, which can decrease defensiveness.

In the short-term, reflecting techniques were associated positively with participants reporting that the other party took responsibility and apologized. Reflecting also was positively associated with an increase in parties' sense of self-efficacy (ability to talk and make a difference). Most striking, greater use of reflecting strategies was associated with an increase in a party's sense that the court cares about them from before to after ADR, even if the parties did not settle the case during the ADR session. Perhaps reflecting strategies support a sense of voice and procedural justice for the parties (Welsh, 2017). These findings are consistent with other studies that have found positive outcomes when mediators focus on party emotional and relational needs. Reflecting did not have any statistically significant impacts on long-term outcomes.

The study adds new insights to the limited literature about the impact of caucus in small claims ADR. In the short-term, the greater the percentage of time spent in caucus, the more likely participants reported that the neutral controlled the outcome, pressured them into solutions, and prevented issues from coming out. A greater percentage of time in caucus also negatively associated with participants reporting that they were satisfied with the process and outcome and that the issues were resolved with a fair and implementable outcome. A greater percentage of time in caucus was associated positively with an increase in participants' sense of powerlessness, belief that conflict is negative, and desire to better understand the other party.

In the long-term analysis, a greater percentage of time spent in caucus was associated with a decrease in participants' consideration of the other person, self-efficacy, and sense that the court cares about resolving conflict from before the ADR session to several months later. A greater percentage of time in caucus positively associated with the likelihood of the parties returning to court in the subsequent 12 months.

There are several ways to understand the negative results related to caucus here. Greater time spent in caucus directs participant engagement more toward the neutral and less toward the other party, which may explain the decrease in consideration of the other participant and self-efficacy. When separated, a party may feel less invested in the process of making changes to accommodate the other side and view the problem as being in the hands of the third-party neutral.

The case context also may be relevant. In day-of-trial ADR, the parties arrive at the courthouse expecting to argue their case before a judge and then divert to a confidential ADR process that has different norms from a public trial. In this context, “secret” private conversations between the neutral and the opposing side may be unsettling to litigants, especially if unrepresented by counsel and waiting alone in a room, wondering what the other person is saying about them. In addition, day-of-trial ADR sessions are relatively short, with sessions lasting a range of 5 to 155 min. That may be insufficient time for the neutral to build trust with the parties and employ private caucuses without negative outcomes.

Finally, note that the findings are tied to the greater percentage of time spent in caucus as compared to the overall time in the ADR process. The results do not suggest that caucus in and of itself is detrimental, only that the overuse of caucus in this context has negative associations, even after controlling for the parties' prior level of hostility, the intensity of the conflict, and behaviors exhibited during the session.

A few other findings about neutral characteristics are notable. First, we found that a racial match between a neutral and the responding participant positively affected participants' sense of self-efficacy, belief that the court cares about resolving disputes, and hearing and understanding of each other, even after holding constant for other factors and strategies used by the neutral. This highlights the value of ensuring diversity among the roster of neutrals. The racial mismatch generally occurred with a white neutral and African American party. Because so few cases involved African American neutrals and white parties, it is difficult to determine if this finding relates to the racial match itself or something else. No other demographic variables were found to be statistically significant.

Second, the number of cases a neutral had handled in the prior 12 months was associated negatively with participants reporting that they heard and understood each other during the ADR process. Given that the magnitude was negligible and contradicts the long-term results, this finding may be spurious. In the long-term, cases facilitated by neutrals who handled a greater number of ADR cases in the previous 12 months were less likely to return to court for an enforcement action.

14 | LIMITATIONS

The primary limitation of the study is its small sample size, particularly in the long-term analysis. The comprehensive and thorough method of data collection is a strength of the study, but limited the number of cases that could be observed. A larger sample size might reveal other statistically significant relationships. In addition, although we measured outcomes associated with strategies used by the neutral, we could not measure the quality of the neutrals' interventions.

We also urge caution against generalizing the results here to other ADR or mediation contexts, given the unique aspects of small claims day-of-trial ADR. The parties do not know that they will be participating in ADR until they arrive at the courthouse. Most small claims parties are self-represented. In addition, given the time constraints of the day-of-trial ADR program, these ADR sessions are shorter than most.

The study is limited by its uniqueness given the lack of other rigorous behavioral observation studies of ADR techniques on which to compare results. This study is largely exploratory in nature. The inclusiveness of so many variables to account for the dynamic nature of the ADR process may inflate the Type I error rate. We recommend that future research refine variables with larger sample sizes in a variety of ADR contexts.

15 | CONCLUSION

This study peeks into the “black box” of small claims day-of-trial ADR, examining the impact of specific strategies of the third-party neutral on party attitudes and case outcomes. Small claims ADR programs seek to support party-devised solutions while reducing judicial case dockets. This study found that eliciting participant solutions and reflecting strategies best align with those objectives.

Neutrals who spend a greater percentage of time in caucus or offer their own solutions may work against these goals.

We encourage replication of this research model with larger samples and diverse case types to provide informed guidance for ADR programs and neutrals in a variety of ADR contexts.

ENDNOTES

- ¹ This research is part of a larger study that applied the same research methodology to examine the impact of third-party neutral strategies in both child custody (Charkoudian et al., 2018) and small claims contexts. The study was conducted by the Maryland Judiciary Administrative Office of the Courts, with funding by the State Justice Institute, Grant #SJI-12-085, in collaboration with Community Mediation Maryland, Bosserman Center for Dispute Resolution at Salisbury University, the Institute for Governmental Service and Research, University of Maryland, College Park, and the University of Maryland Francis King Carey School of Law Center for Dispute Resolution. The authors thank the research team, judges, judicial staff, neutrals, and parties for their cooperation, assistance, and support. Caroline Harmon Darrow drafted portions of the original literature review and Haleigh LaChance provided significant research assistance.
- ² The court uses the term “ADR practitioners” to refer collectively to its mediators and settlement conference attorneys. We use the simplified term “Neutrals.”
- ³ “Mediator” or “settlement conference attorney” was substituted as appropriate on all questionnaires.
- ⁴ “Mediation” or “settlement conference” was substituted as appropriate on all questionnaires.
- ⁵ For definitions of the behavioral codes, see Appendix B of Charkoudian et al. (2018).

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