

When Ignorance Is Not Bliss: An Empirical Study of Litigants' Awareness of Court- Sponsored Alternative Dispute Resolution Programs

Donna Shestowsky¹

State courts have been overburdened with litigants seeking civil justice in a system still recovering from the economic downturn of 2008. In many cases, alternative dispute resolution procedures can provide litigants with relief from the expense and waiting time associated with trial. However, such procedures provide little opportunity for justice to litigants who are unaware of their existence. The present study examines litigants' ability to identify their court's mediation and arbitration programs. Following the disposition of their cases, litigants from three state courts were asked whether their court offered mediation or arbitration. Although all litigants had cases that were eligible for both procedures through their court, less than one-third correctly reported that their court offered either procedure. Represented litigants

1. Professor of Law and Martin Luther King Jr. Scholar, University of California, Davis, School of Law. J.D., Stanford Law School; Ph.D. (Psychology), Stanford University; M.S. (Psychology), Yale University; B.S., Yale University. Correspondence should be addressed to Dr. Donna Shestowsky, University of California, Davis, School of Law, 400 Mrak Hall Drive, Davis, CA 95616. This material is based upon work supported by the National Science Foundation under Grant Number 0920995. The American Bar Association's Section on Litigation, and the Institute for Governmental Affairs at the University of California, Davis provided financial support during the first year of the study. The University of California, Davis, School of Law provided ongoing financial and human resources to ensure the success of this project. Generous funding from the Norm Brand '75 & Nancy Spero ADR Research Fund contributed greatly to this Article. I wish to thank Heather Myers of Myers Statistical Consulting and Pega Davoudzadeh for conducting many of the statistical analyses. I also appreciate the contributions made by research assistants Olga Bykov, Laura Flynn, Linh Luong, and Kimberly Procida, law librarians Susan Llano and Elisabeth McKechnie, and faculty support assistant Linda Cooper. I am also grateful to Rose Cuison-Villazor, Elayne Greenberg, Jasmine Harris, Art Hinshaw, Peter Lee, Lisa Pruitt, Leticia Saucedo, Donna Stienstra, Madhavi Sunder, and Roselle Wissler for their input on earlier versions of this work.

were not significantly more likely to identify their court's programs than their unrepresented counterparts. Repeat-players expressed less uncertainty regarding their court's offerings compared to first-time litigants. Litigants had significantly more favorable views of their court when they knew it offered mediation, but a similar result did not emerge for arbitration. The implications of these novel findings for litigants, lawyers, and courts are discussed.

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I. INTRODUCTION

Several decades ago, the idea that litigants should actively participate in decisions regarding which procedures to use for their cases was a rather controversial idea. In a 1990 published debate, Harvard Law Professor Frank Sander argued “[if] our mission is to help clients find the best way to handle their disputes . . . why shouldn’t it be part of our explicit professional obligation to canvass those options with clients? How would we feel about a doctor who suggested surgery without exploring other possible choices?”² Michael L. Prigoff argued in reply that attorneys should be able to make such tactical decisions for their clients without explaining every option.³ Since then, scholars have asserted that litigants should ultimately determine which procedures to use, since no one — not judges, lawyers or court personnel — are more affected by the financial, psychological, and other consequences of such decisions.⁴ Over time, changes in state law, court policy, and rules of professional responsibility have reinforced the notion that attorneys should counsel clients about Alternative Dispute Resolution (“ADR”) so that they understand that a trial is not their only recourse. Notwithstanding such attempts to encourage or require attorneys to have such discussions, it is unclear whether litigants are aware of the procedures at their disposal. Considering the significant resources that many courts devote to their ADR programs, it is particularly important to examine how accurately litigants identify court-connected options. This Article presents a novel

2. Frank E. A. Sander & Michael L. Prigoff, *Professional Responsibility: Should There Be a Duty to Advise of ADR Options?*, 76 A.B.A. J. 50, 50 (1990). See also Katerina Lewinbuk, *First, Do No Harm: The Consequences of Advising Clients About Litigation Alternatives in Medical Malpractice Cases*, 2 ST. MARY’S J. ON LEGAL MALPRACTICE & ETHICS 416, 427 (2012) (pointing out that “[a] lawyer’s responsibility as it relates to ADR is often compared to a doctor’s duty to obtain informed consent from patients (i.e., to allow each patient to make the final decision concerning a course of treatment after having been introduced to all possible options”) and citing sources that support and counter this view).

3. Sander & Prigoff, *supra* note 2 at 51.

4. See, e.g., Robert F. Cochran, Jr., *Legal Representation and the Next Steps toward Client Control: Attorney Malpractice for the Failure to Allow the Client to Control Negotiation and Pursue Alternatives to Litigation*, 47 WASH. & LEE L. REV 819 (1990) (arguing that attorneys should be subject to malpractice for interfering with a client’s autonomy in selecting ADR); Carrie Menkel-Meadow, *Whose Dispute Is It Anyway?: A Philosophical and Democratic Defense of Settlement (In Some Cases)*, 83(7) GEO L.J. 2663, 2680 (1995) (arguing that disputes belong to the disputants); Donna Shestowsky, *Disputants’ Preferences for Court-Connected Dispute Resolution Procedures: Why We Should Care and Why We Know So Little*, 23 OHIO ST. J. ON DISP. RESOL. 549, 572–73 (2008) (discussing how and why courts should prioritize disputant preferences for procedures when they design their ADR programs and also give disputants some flexibility to tailor the procedures to their needs on a case-by-case basis).

empirical investigation into litigants' awareness of their court's ADR programs.

Exploring how well litigants can identify court-connected procedures can help us shed light on important issues relating to litigation practices as well as the perceived institutional legitimacy of the courts. First, it can help us better understand whether lawyers and courts are adequately educating litigants about their procedural options.⁵ Second, and related, it can help us understand whether informed consent constitutes the basis of their participation in legal procedures. Absent such knowledge, consent cannot truly be informed and party self-determination cannot be achieved.⁶ Third, exploring litigant awareness of court programs can provide a window into how litigants perceive the courts.⁷ If courts devote resources to build and maintain ADR programs that are appreciated by those who know about them but many litigants do not know of their existence, courts might not enjoy the level of respect and perceived institutional legitimacy that they deserve. Courts might also experience significant challenges in terms of raising voter support for continuing their

5. We should not assume that lawyers understand ADR options. See e.g., Roselle L. Wissler, *Barriers to Attorneys' Discussion and Use of ADR*, 19 OHIO STATE J. ON DISPUTE RES. 459, 479–81 (2004) [hereinafter *Barriers*] (reporting survey results suggesting that even though a majority of attorneys reported that they could explain mediation, binding arbitration, non-binding arbitration, or judge *pro tem* settlement conferences very well, fewer than half indicated that they could explain summary jury trials or Early Neutral Evaluation very well).

6. See Jennifer W. Reynolds, *Luck v. Justice: Consent Intervenes, but for Whom?*, 14 PEPP. DISP. RESOL. L.J. 245, 276 (2014) (noting that informed consent requires “appropriate levels of information or sufficient competency to make choices, an individual cannot exercise true self-determination, because she may not understand how the process works, what the issues are, or whether the proposed outcome actually meets her interests”). Mark Spiegel, *Lawyering and Client Decisionmaking: Informed Consent and the Legal Profession*, 128 U. PA. L. REV. 41, 72 (1979) (“[T]he value of the right to decide is questionable if the client is not told when decisions must be made and that he has the power to make them.”). This informed consent argument applies to both voluntary and mandatory ADR programs. In voluntary programs, wherein litigants can freely choose an ADR procedure, litigants should know what their options are so that they can meaningfully consent to the procedures they use. In mandatory programs wherein courts require parties to use a particular procedure for certain cases before they are permitted to have a trial, litigants should be told what the mandatory procedure is and whether they can opt out to other procedures.

7. See *American Bar Association: Clearinghouse of Court ADR Programs*, AM. BAR ASS'N (2007) at 2, available at <http://apps.americanbar.org/dch/committee.cfm?com=DR014500> (reviewing court ADR programs across the country and finding that most are funded in whole or in part by legislative appropriations); *ADR: State Links*, NAT'L. CTR. FOR STATE COURTS, <http://www.ncsc.org/Topics/Civil/Alternative-Dispute-Resolution-ADR/StateLinks.aspx?cat=state%20Appropriations%20and%20Other%20Funding%20Sources%20for> (last visited Apr. 19, 2017) (reviewing sources of court ADR funding, by state).

efforts, especially during economic downturns when court budgets face major cuts, as they have in recent years.⁸

We begin, in Part II, by explaining why it is important for litigants to know about their procedural options. In this light, we emphasize the goals of party self-determination and court efficiency. We then provide an overview of rules and policies that support the idea that litigants should participate in decisions regarding procedure, and highlight the importance of litigants knowing about their court's ADR offerings as distinct alternatives to private ADR. Next, we review the existing survey research on attorneys concerning how often they discuss ADR with their clients. This background sets the stage for our novel investigation into whether litigants can identify their court's ADR programs and the factors that predict their ability to do so. In Part III, we describe the methodology of our study and the variables used in our analysis.

We report our results in Part IV. In this Part, we report analyses that examine how accurately litigants identified their court's mediation and arbitration programs. We find that most litigants are unable to identify either program at their court. We then explore the factors that predict litigants' success in identifying these options. Specifically, we examine whether represented litigants are better able to identify these programs compared to their unrepresented counterparts,⁹ and whether those with more experience with litigation — namely, repeat-players — more accurately identify the options compared to first-time litigants. We find that represented litigants are not significantly better at identifying court programs than unrepresented litigants, and that repeat players report less uncertainty about whether these programs exist. We also analyze whether litigants' ability to identify court ADR programs is associated with how favorably they view the court, and find that they do for mediation but

8. See, e.g., *Economic Downturn and the Use of Court Mediation*, RESOL. SYSTEMS INST. (2012), <http://www.aboutrsi.org/pfimages/CourtADRbudgetcuts.pdf> (last visited Apr. 19, 2017) (in 2011-2012, “[t]he California Administrative Office of the Courts’ budget to support trial court ADR programs for civil cases was cut by more than 95%, from \$1.74 million to \$75,000); Heather Scheiwe Kulp, *Top Ten Court ADR Developments in 2011, Trends for 2012*, RESOL. SYSTEMS INST. (Jan. 10, 2012), <http://blog.aboutrsi.org/2012/program-evaluation/top-ten-court-adr-developments-in-2011-trends-for-2012> (last visited Apr. 19, 2017) (reporting that, in 2011, “North Carolina completely eliminated state funding for court ADR”).

9. In this Article, we consider litigants “represented” if they had a lawyer for their case or if they were themselves a lawyer. For example, if a litigant owned a small business that was being sued, and she happened to be a lawyer, we considered her “represented” whether or not she retained counsel to help with her case. Six participants were lawyers themselves and did not also retain counsel.

not for arbitration. In addition, we examine whether those who correctly identify their court's programs are more likely to consider using mediation or arbitration for their case. We find that litigant awareness of court-sponsored arbitration — but not court-sponsored mediation — is associated with higher rates of procedure consideration. In Part V, we discuss the implications of our findings for lawyer-client relationships, and court policy more broadly, highlighting how lawyers and court personnel might better educate litigants about court-connected procedures. We conclude in Part VI, by discussing how party self-determination and court efficiency might be advanced by some of the measures we propose.

II. LITERATURE REVIEW

A. *Why Litigants Should Know about their Procedural Options*

The reason that litigants with active cases should know about their procedural options is simple: their preferences should guide which procedures they use. Litigants' ability to exercise their preferences rests on the gateway issue of whether they know about (and then come to understand) the options that are available. As other scholars have argued, litigants should participate in decisions regarding procedural choice for philosophical and pragmatic reasons that implicate party self-determination and court efficiency.

The concept of party self-determination plays an important role in the history of ADR. As Carrie Menkel-Meadow has noted, "the animating impulse behind most of the 'ADR movement' has advocated for client choice in dispute resolution and 'self-determination' in mediation."¹⁰ Through nonadjudicative procedures such as mediation and non-binding arbitration, litigants can gain "involvement in, power over, and sense of responsibility for, the resolution of their

10. Carrie Menkel-Meadow, *The Lawyer as Consensus Builder: Ethics For a New Practice*, 70 TENN. L. REV. 63, 88 (2002); see also Roger L. Carter, *Oh, Ye of Little [Good] Faith: Questions, Concerns and Commentary on Efforts to Regulate Participant Conduct in Mediations*, 2002 J. DISP. RESOL. 367, 396 (2002) (noting that "[e]mpowerment and ADR go hand-in-hand. Autonomy and ADR go hand-in-hand. ADR promotes such democratic values as self-determination and freedom from interference by the state"); Caroline Harris Crowne, *The Alternative Dispute Resolution Act of 1998: Implementing a New Paradigm of Justice*, 76 N.Y.U. L. REV. 1768, 1784 (2001) (noting that ADR operates "in the sphere of disputant self-determination"); Bobbi McAdoo & Nancy Welsh, *Court-Connected General Civil ADR Programs: Aiming for Institutionalization, Efficient Resolution, and the Experience of Justice*, in ADR HANDBOOK FOR JUDGES 33 n.188 (Donna Stienstra & Susan M. Yates eds., 2004) (noting that although self-determination is most frequently discussed in connection with mediation, it is also associated with ADR more broadly).

problems.”¹¹ ADR options offer a more democratic form of dispute resolution compared to trial because they offer parties the opportunity to participate more directly in the process and craft outcomes that are more responsive to their needs and interests.¹² If litigants want to engage in informal conversation, involve a third party who will suggest outcomes that they can veto, or craft an outcome shaped by industry norms rather than the rule of law, they can elect procedures that provide such options. When courts sponsor ADR procedures, they essentially present litigants with a choice between trial and procedures that can offer such attributes.¹³

The idea that litigants should play a role in choosing the procedures they use also aligns with the goal of making courts more efficient. When courts began experimenting with different approaches to expediting case resolution, the goal for many courts was to save time and money.¹⁴ To that end, many courts adopted mandatory non-binding arbitration and mediation to minimize the resources they devoted to resolving cases involving smaller amounts in controversy and make judges more available for more complex cases. This goal of court efficiency remains a reason many courts sponsor ADR today.¹⁵

11. See Wayne D. Brazil, *Comparing Structures for the Delivery of ADR Services by Courts: Critical Values and Concerns*, 14 OHIO ST. J. ON DISP. RESOL. 715, 726 (1999); Carrie Menkel-Meadow, *supra* note 4, at 2689. Scholars have gone so far as to argue that party autonomy is a key feature of binding arbitration. See Franco Ferrari, *Limits to Party Autonomy in International Commercial Arbitration xvii* (2016) (pointing out that “[c]ourts and commentators have often stated that in arbitration ‘party autonomy is everything’”; but then presenting a series of chapters which conclude that “[a]s soon as the arbitration proceedings are initiated, the parties lose at least part of their autonomy, and the issue arises of who really owns the arbitration proceedings”).

12. On this front, ADR stands in contrast to court adjudication which typically favors public interests over those of individuals. Caroline Harris Crowne, *supra* note 10, at 1777.

13. Although this point is especially true in courts with voluntary ADR programs, it is also true for many mandatory ADR programs. Many courts that mandate a particular procedure, such as mediation, allow litigants to exercise their autonomy by stipulating that they will use another form of ADR instead. For example, in Utah, at the time we collected our data, state court litigants assigned to mandatory mediation per judicial administration rules could file a written agreement opting out of mediation and into non-binding arbitration. See UTAH CODE JUD. ADMIN. R. 4-510(6)(A)(ii)-(iii) (2012).

14. Shestowsky, *supra* note 4, at 557–66 (describing the history and goals of court-connected ADR programs).

15. See Dorothy Wright Nelson, *ADR in the Federal Courts—One Judge’s Perspective: Issues and Challenges Facing Judges, Lawyers, Court Administrators, and the Public*, 17 OHIO ST. J. ON DISP. RESOL. 1, 9 (2001) (cataloging the values associated with court-connected ADR programs and concluding that “efficiency and reducing cost and delay appear to be the values that account for much of the interest of the courts”). Many states have rules that explicitly acknowledge these party autonomy and court

To the extent that courts value efficiency, they should also value educating litigants about their ADR programs so that they can make informed decisions about which procedures to use for their case.¹⁶ Research has found that litigants are more likely to comply with the outcome of their dispute when they are satisfied with their dispute resolution experience.¹⁷ Thus, when litigants select procedures that subjectively appeal to them, we would expect courts to face fewer appeals when trial verdicts are at issue, and fewer breach-of-contract claims when outcomes derive from settlement procedures such as mediation. Either situation would result in less need for court intervention, and therefore greater efficiency. Moreover, as empirical research by Tom Tyler from Yale Law School has persuasively demonstrated, when people regard the government as offering subjectively attractive and fair procedures, they tend to better comply with even unrelated laws and regulations.¹⁸ Courts benefit from such voluntary compliance with the law.

Although ADR procedures such as mediation and arbitration are widely available outside of the court context (“private ADR”), court-connected options stand as distinct alternatives to their private ADR counterparts. As a practical matter, court programs are geared towards facilitating ready access to ADR procedures. Some courts highly subsidize mediator’s fees or facilitate connections to those who

efficiency goals. For example, Colorado’s Dispute Resolution Act recognizes the importance of prompt and efficient dispute resolution as well as the value of having litigants individually “defin[e] and articulat[e] [their] particular problem [for] possible resolution.” COLO. REV. STAT. § 13-22-305 (2007). New Hampshire’s local court rules state that their mediation provisions are intended to “increase access to justice; to increase parties’ satisfaction with the outcome; to reduce future litigation by the same parties; to make more efficient use of judicial resources; and to expand dispute resolution resources available to the parties.” N.H. DIST. CT. R. 3.28(A) (2011).

16. Other researchers have remarked on the possibility that litigants are ill-informed about court-connected ADR. See, e.g., Josh A. Arnold & Peter J. Carnevale, *Preferences for Dispute Resolution Procedures as a Function of Intentionality, Consequences, Expected Future Interaction, and Power*, 27 JOURNAL OF APPLIED PSYCHOL. 371, 383 (1997) (“One comment of professionals involved in court-based mediation is that prospective clients simply do not know about mediation and thus do not opt for it when given a choice between mediation and adjudication.”).

17. For a review of this work, see TOM R. TYLER, *WHY PEOPLE OBEY THE LAW* 82 (2d ed. 2006).

18. Tom R. Tyler, *The Psychology of Disputant Concerns in Mediation*, 3 NEGOTIATION J. 367, 368 (1987); cf. Mark Umbreit et al., *Victim-Offender Mediation: Three Decades of Practice and Research*, 22 CONFLICT RESOL. Q. 279, 298 (2004). As Tom Tyler has argued, based on compelling empirical research, procedures that subjectively appeal to litigants can inspire people to “obey the law” and reduce the need for government intervention to ensure legal compliance. TYLER, *supra* note 17, at 3–7.

offer services free-of-charge.¹⁹ When courts offer arbitration, services are generally offered on a pro bono basis,²⁰ which especially benefits those who would otherwise struggle to afford arbitration. Moreover, many courts have rules in conjunction with their programs that encourage ADR to take place early, before litigants expend significant

19. See *District Court of Maryland Alternative Dispute Resolution (ADR)*, MD. COURTS, <http://www.courts.state.md.us/district/adr/home.html> (last visited Apr. 19, 2017) (providing that mediation and settlement conferences for civil disputes are available for free through the District Court ADR Program; MULTNOMAH CTY. SUPP. LOCAL R. 12.045(12)(c) (2017), available at <http://courts.oregon.gov/Multnomah/docs/CourtRules/2017DraftSLR.pdf> (last visited Apr. 19, 2017) (providing rules that indigent parties “shall not be kept from mediation” and that such parties can file to waive or defer arbitration fees); “*Civil & Probate ADR Program Financial Aid Request Instructions*,” *Multi Option ADR Project*, SUP. CT. OF CAL., CTY. OF SAN MATEO, http://www.sanmateocourt.org/documents/forms_and_filing/adr-9.pdf (last visited Apr. 19, 2017) (providing a form for full or partial financial aid for up to six hours of work by a mediator or ADR neutral). As the Honorable Wayne Brazil has argued:

[O]ne of the very few ways a court can be useful to a substantial segment of the population is to offer a free or low-cost ADR program. By offering such a program, a court acknowledges the real-world limitations, for many people, of the services it traditionally has offered. As important, the court demonstrates that it understands that its mission is to offer useable and respect-worthy service to as large a percentage of the people who have judicially cognizable disputes as possible. This kind of acknowledgment and demonstration earn a court the gratitude and respect of the people and—gratitude toward and respect for our public institutions is essential to the long-range health of our polity.

Wayne D. Brazil, *Should Court-Sponsored ADR Survive*, 20 OHIO ST. J. ON DISP. RESOL. 241, 243 (2005). See also Ettie Ward, *Mandatory Court-Annexed Alternative Dispute Resolution in the United States Federal Courts: Panacea or Pandemic?*, 81 ST. JOHN’S L. REV. 77, 92 (2007). (“[S]ome programs require parties to pay for court-annexed ADR. It is ironic that parties who opted to litigate rather than to pay for private dispute resolution may be required to pay in any event before being allowed to use the public ‘free’ dispute resolution traditionally offered by courts.”)

20. David F. Herr, Roger S. Haydock & Jeffrey W. Stempel, *FUNDAMENTALS OF LITIGATION PRACTICE* §34:5 (2014) (reporting that court arbitration programs are “considered a *pro bono* activity in most legal communities” and that “attorneys must normally have at least five years of experience and are selected by court staff”).

resources on discovery or become psychologically committed to having their day in court.²¹ Such rules can help litigants avoid the escalation of commitment²² that often impedes settlement when ADR is attempted later in the life course of the dispute. Another benefit is that litigants who are wary of for-profit lawyers acting as neutrals might find court-sponsored options easier to embrace.²³

With respect to mediation specifically, courts can essentially “regulate” mediators by determining how neutrals are added and removed from their rosters. For example, some courts require a specific amount of training or experience, proof of continuing education in mediation, or annual pro bono hours for those on their roster.²⁴ Some

21. See, e.g., *Alternative Dispute Resolution (ADR) Information Guide*, MERCED SUPER. CT. (2008), available at <http://www.mercedcourt.org/files/adrguide.pdf> (last visited Apr. 19, 2017) (noting that “it is worth considering using ADR early in a lawsuit, or even before you file a lawsuit” and assigning cases to its Early Mediation Program “within 120 days from the filing of the Complaint”). *Michigan Judges Guide to ADR Practice and Procedure*, MICH. SUPREME CT. OFFICE OF DISPUTE RESOLUTION (2015), available at <http://courts.mi.gov/Administration/SCAO/OfficesPrograms/ODR/Documents/ADR%20Guide%2004092015.pdf> (last visited Apr. 19, 2017) (“In Michigan’s business courts, judges are meeting face-to-face with the attorneys (and sometimes the parties) approximately 45-90 days after the filing of an action . . . judges are [] able to encourage the early selection of an ADR provider to help remove obstacles to settlement that would otherwise consume significant judicial time through discovery and other motions.”).

22. Escalation of commitment refers to a pattern of behavior in which an individual or group will continue to rationalize its decisions, actions, and investments to a course of action that is failing in the hope of recouping losses, rather than altering course. For a review of relevant literature, see Barry M. Staw & Jerry Ross, *Behavior in Escalation Situations: Antecedents, Prototypes, and Solutions*, in RESEARCH IN ORGANIZATIONAL BEHAVIOR, (L.L. Cummings & Barry M. Staw eds, 1987).

23. Litigants who are wary of for-profit neutrals might prefer mediators or arbitrators who are endorsed by the court. Insofar as litigants place great weight on the court’s stamp of approval on such neutrals, however, they might find any hint of impropriety or abuse of power on their part to be especially egregious. See Robert W. Rack, Jr., *Thoughts of a Chief Circuit Mediator on Federal Court-Annexed Mediation*, 17 OHIO ST. J. ON DISP. RESOL. 609, 617 (2002). Conversely, litigants who distrust the government might prefer private mediators to ones recommended by the court and they might be suspicious of rules which grant court neutrals quasi-judicial immunity. See, e.g., *ADR Local Rules*, UNITED STATES DIST. CT., N. DIST. OF CAL., available at <http://cand.uscourts.gov/localrules/ADR> (last visited Apr. 19, 2017) (defining “Immunities” for neutrals).

24. See, e.g., *Oregon Judicial Department Court-Connected Mediator Qualification Rules*, OR. JUDICIAL DEPT. (Aug. 1, 2005), available at http://courts.oregon.gov/Multnomah/docs/CivilCourt/Mediation/Mediation_CJO_05028.pdf (Last visited Apr. 19, 2017) (describing the training, experience, and continuing education required for general civil mediators); *Civil Mediation Program Guidelines*, SUPER. CT. OF CAL. CTY. OF ORANGE § 12, available at <http://www.occourts.org/directory/civil/alternative-dispute-resolution/pdfs/civil-mediation-program-guidelines.pdf> (last visited Apr. 9,

have procedures for removing neutrals who do not comply with ethical standards or court rules.²⁵ This aspect of court-connected mediation, if well done, can provide some quality control in a profession that is otherwise largely unregulated by the government.²⁶

Courts also regulate non-binding arbitrations that take place under their purview. Court-sponsored arbitration is often associated with financial penalties for those who do not participate in good faith²⁷ or who reject the arbitration award in favor of a trial *de novo*.²⁸ Some states impose strong penalties on those who elect a trial

2017) (describing the requirements for civil mediation panel members including training and experience); *New York State Unified Court System Office of Alternative Dispute Resolution and Court Improvement Programs Court-Connected ADR Programs*, N.Y. SUP. CT., COMMERCIAL DIVISION (Mar. 2014) <https://www.nycourts.gov/ip/adr/CourtAnnexedADRPrograms.pdf> (last visited Apr. 19, 2017) (listing prerequisites for mediators interested in joining different court ADR programs throughout New York).

25. *Resignation, Suspension, and Removal from Multi-Option ADR Panel*, SUPER. CT. OF CAL., CTY. OF SAN MATEO, available at http://www.sanmateocourt.org/court_divisions/adr/civil/grounds_for_removal.php (last visited Apr. 19, 2017) (describing ADR panel removal procedures); MICH. SUPREME COURT RULES OF CIV. P. R. 2.411(E)(4) (1985), available at <http://courts.mi.gov/Courts/MichiganSupremeCourt/rules/Documents/Michigan%20Court%20Rules.pdf> (last visited Apr. 19, 2017) (listing reasons for which the ADR clerk can remove a mediator from their court's roster); *Rules for Alternative Dispute Resolution*, IND. RULES OF COURT, R. 7.1, available at http://www.in.gov/judiciary/rules/adr/#_Toc428450676 (last visited Apr. 19, 2017) (providing that a registered mediator can be removed from its roster for violating the rules of court or other good cause).

26. One criticism of court mediation, however, is that it is often evaluative in style — court-connected mediators tend to focus on evaluating the litigants' weaknesses under the law to encourage settlement rather than facilitating understanding or creative problem-solving between the parties. See Kimberlee K. Kovach & Lela P. Love, "Evaluative" Mediation is an Oxymoron, 14 ALTERNATIVES TO THE HIGH COST OF LITIG. 31 (1996). See also Art Hinshaw, *Regulating Mediators*, 21 HARV. NEGOT. L. REV. 163 (2016) (arguing that "evaluators who are unable to connect on a human level with their clients often fail to get cases settled" regardless of their evaluative skills); Jeffery W. Stempel, *Beyond Formalism and False Dichotomies: The Need for Institutionalizing a Flexible Concept of the Mediator's Role*, 24 FL. STATE UNIV. L. REV. 949, 972–73 (warning against the dangers of evaluation-heavy mediation ordered by the courts).

27. See ILL. SUP. CT. R. ART. I R. 91(b) (1993); HAW. CIR. CT. R. 34, Ex. A. Haw. Arbitration R. 28 (1995) (describing sanctions that can be imposed on parties or attorneys for not participating in arbitration "in a meaningful manner" including "costs, expert fees and attorney's fees"); General Order, W. DIST. OF MO. MEDIATION AND ASSESSMENT PROGRAM, § X (Aug. 1, 2013) ("If a party or counsel fails to make a good faith effort to participate in the Program in accordance with the provisions and spirit of this Order, the assigned Judge or Court may impose appropriate sanctions."); E.D. PA. LOCAL R. OF CIVIL PROCEDURE, RULE 53.2(5)(C) (2016) ("In the event, however, that a party fails to participate in the trial in a meaningful manner, the Court may impose appropriate sanctions . . .").

28. See D.N.J. LOCAL RULES AND APPENDICES M (IV) (2010) ("The goals of the arbitration program and the authority of the Court will be seriously undermined if a party were permitted to refuse to attend an arbitration hearing and then demand trial *de*

de novo but then fail to obtain a trial verdict that is more favorable than what the arbitrators awarded them.²⁹ The imposition of such penalties can give advisory arbitration some “teeth” to ensure that parties take arbitration seriously and give the advisory award due consideration. Further, because lawyers can, theoretically, be found in violation of the Rules of Professional Conduct for not participating in court-sponsored arbitration in good faith,³⁰ court sponsorship can motivate counsel to use arbitration earnestly.

Disputants can, of course, agree to incorporate some of these attributes of court-connected ADR into their private ADR procedures. For example, parties can agree to use non-binding arbitration outside of the court system and impose sharp penalties on any party who rejects the award. However, insofar as submissions to private ADR stem from agreements between the parties, the terms will largely depend on the relative bargaining power between them. Court rules, by contrast, are generally not negotiable. Moreover, litigants who use ADR simply to gain information for trial have little incentive to agree to restrictive measures, and, in such cases, opposing parties who are genuinely interested in attempting settlement can greatly benefit from court-imposed rules. Thus, courts can offer litigants unique ADR opportunities. To advance both party self-determination and court efficiency, it is vital that litigants know about such options.

B. *Rules and Policies that Endorse Litigants' Decision-Making about Procedures*

The court rules, legislation, and professional codes of conduct in many jurisdictions now support the idea that litigants should be informed about their procedural options and participate in decisions about which procedures to use. Some Federal District Courts, for example, require attorneys to certify that they have discussed ADR

novo. Accordingly the Court has, in the same Rule, allowed for the imposition of ‘appropriate sanctions, including, but not limited to, the striking of any demand for a trial de novo’ filed by a party who fails to participate in the arbitration process in such a ‘meaningful manner.’”)

29. Herr, Haydock & Stempel, *supra* note 20, at §34:5.

30. *Id.* (“Where opposing counsel seems to be solely going through the motions in a court-annexed arbitration, other counsel can consider seeking to enforce requirements (present in almost every program and tacitly required by the Rules of Professional Conduct) that the parties participate in good faith when using court-annexed arbitration. But as a practical matter, the absence of good faith is hard to prove, meaning less scrupulous counsel can often simply use the arbitration to flush out a case.”).

with each client³¹ and impose sanctions on lawyers who fail to do so.³² Massachusetts, in its rules of court, provides that “[w]herever appropriate, people should be given a choice of dispute resolution processes and providers and information upon which to base the choice.”³³ The Virginia State Bar Professional Guidelines provide that lawyers “shall advise the client about the advantages, disadvantages, and availability of dispute resolution processes that might be appropriate in pursuing [their] objectives.”³⁴ In New Jersey, “[a]ttorneys have a responsibility to become familiar with available [ADR] programs and inform their clients of them.”³⁵ In Oregon, a statute provides that “[a]ll civil disputants shall be provided with written information describing the mediation process . . . along with information on established court mediation opportunities.”³⁶ And, in

31. See, e.g., N.D. CAL. ADR LOCAL RULES R.3.5 (2015), available at <http://www.cand.uscourts.gov/localrules/ADR> (last visited Apr. 19, 2017).

32. *Id.* R.2–4(c):

If, upon receiving an appropriately presented and supported complaint or report of a material violation of these ADR local rules, the ADR Magistrate Judge determines that the matter warrants further proceedings, the ADR Magistrate Judge may refer the matter to the ADR Director to explore the possibility of resolving the complaint informally in accordance If no such referral is made, or if the matter is not resolved informally, the ADR Magistrate Judge shall take appropriate action. The ADR Magistrate Judge may issue an order to show cause why sanctions should not be imposed The ADR Magistrate Judge will afford all interested parties an opportunity to be heard before deciding whether to impose sanctions Under *Zambrano v. City of Tustin*, 885 F.2d 1473 (9th Cir. 1989), a district court may impose fee shifting sanctions for a violation of a local rule only on a finding of bad faith, willfulness, recklessness, or gross negligence.

33. MA. SUP. JUD. CT. R. 1:18 r. 1(b)(iv) (1998).

34. VA. RULES OF PROF'L CONDUCT r.1.2 cmt. 1 (2013). See also *id.* at r.1.4 cmt. 1: This continuing duty to keep the client informed includes a duty to advise the client about the availability of dispute resolution processes that might be more appropriate to the client's goals than the initial process chosen. For example, information obtained during a lawyer-to-lawyer negotiation may give rise to consideration of a process, such as mediation, where the parties themselves could be more directly involved in resolving the dispute"); *id.* at r. 2.1 cmt. 2:

Advice couched in narrowly legal terms may be of little value to a client, especially where practical considerations, such as cost or effects on other people, are predominant. Purely technical legal advice, therefore, can sometimes be inadequate. It could also ignore, to the client's disadvantage, the relational or emotional factors driving a dispute. In such a case, advice may include the advantages, disadvantages and availability of other dispute resolution processes that might be appropriate under the circumstances.

35. RULES GOVERNING THE COURTS OF THE STATE OF NEW JERSEY, r. 1:40-1 (2000), available at https://www.judiciary.state.nj.us/rules/Rule_01-40-01_-12_09-01-2015.pdf (last visited Apr. 19, 2017).

36. OR. REV. STAT. § 36.185 (2016).

Arkansas, attorneys are encouraged to “advise [their] client[s] about the dispute resolution process options available . . . and to assist [them] in the selection of the technique or procedure, including litigation, deemed appropriate for dealing with the client’s dispute, case, or controversy.”³⁷ Other states have similar rules.³⁸

The American Bar Association (“ABA”) Model Rules of Professional Conduct (“Model Rules”) suggest — but do not overtly or unequivocally require — that attorneys inform clients about their procedural options.³⁹ Model Rule 1.2(a) provides that “[a] lawyer shall abide by a client’s decisions concerning the objectives of representation . . . and shall consult with the client as to the means by which they are to be pursued.”⁴⁰ Similarly, Model Rule 1.4(b) states that “[a] lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation.”⁴¹ Finally, Model Rule 3.2 requires that “[a] lawyer

37. ARK. CODE ANN. § 16-7-204 (West 1999). *See also* DE. R S. CT. RULE 71(b)(ii) (“Before choosing a forum, a lawyer should review with the client all alternatives, including alternate methods of dispute resolution.”); MINN. GEN. R. PRAC. r. 114.03 (2005) (“Attorneys shall provide clients with the ADR information.”); MO. R BAR r. 17.02 (1997) (“[C]ounsel shall advise their clients of the availability of alternative dispute resolution programs.”).

38. *See, e.g.*, COLO. RULES OF PROF’L CONDUCT r. 2.1 (2008) (amended 2016) (“In a matter involving or expected to involve litigation, a lawyer should advise the client of alternative forms of dispute resolution that might reasonably be pursued to attempt to resolve the legal dispute or to reach the legal objective sought.”); State Bar of Michigan, Standing Comm’n on Prof’l & Judicial Ethics, Formal Op. No. RI-262 (May 7, 1996) (“A lawyer has an obligation to recommend alternatives to litigation when an alternative is a reasonable course of action to further the client’s interests, or if the lawyer has any reason to think that the client would find the alternative desirable”); MD R ATTORNEYS RULE r. 19-302.1 cmt. n. 5 (2016) (“[W]hen a matter is likely to involve litigation and, in the opinion of the lawyer, one or more forms of alternative dispute resolution are reasonable alternatives to litigation, the lawyer should advise the client about those reasonable alternatives.”).

39. When the ABA’s Ethics Commission revised the Model Rules in 2000, the CPR-Georgetown Commission and the ABA’s Section on Dispute Resolution proposed revisions that would include language requiring attorneys to educate their clients about ADR. *See* Gerald F. Phillips, *The Obligation of Attorneys to Inform Clients About ADR*, 31 W. ST. U. L. REV. 239, 241–42 (2004) (“[We] recommend[] that Rule 1.2(a) be amended to read: A lawyer shall . . . consult with the client as to the means by which [the client’s objectives] are to be pursued, *including discussion of the process by which those objectives are to be achieved . . .*”) (emphasis added). This language was not adopted into the revised rules. *See id.* at 242 (“However, the Commission finally recommended only [an] addition to the Comment to Rule 2.1”). *See also* Lewinbuk, *supra* note 2 at 419 (“[A] number of states currently have an ‘implied ethical duty,’ which boils down to lawyers at least considering the exploration of possible litigation alternatives with their clients. Such a duty can be found in state statutes, ‘ethics advisory committee opinions,’ court rules, and lawyers’ creeds.”)

40. MODEL RULES OF PROF’L CONDUCT r. 1.2(a) (AM. BAR ASS’N 2013).

41. MODEL RULES OF PROF’L CONDUCT r. 1.4(b) (AM. BAR ASS’N 2013).

shall make reasonable efforts to expedite litigation consistent with the interests of the client.”⁴² This rule supports the idea that the client’s interests — and not those of the lawyer — regarding the speed of resolution should determine how the case is handled. Thus, clients should be informed of procedures that might resolve their dispute before trial. In 2000, a Comment was added to Rule 2.1⁴³ to provide that “when a matter is likely to involve litigation, it may be necessary under Rule 1.4 to inform the client of forms of dispute resolution that might constitute reasonable alternatives to litigation.”⁴⁴ Taken together, these rules imply that lawyers should advise clients about their procedural options so that they can participate in determining which options to pursue.⁴⁵ These rules implicate litigants who have legal representation and say nothing of obligations to those who are unrepresented.

C. *Research Concerning Attorney-Client Discussions about ADR*

Notwithstanding the movement towards ensuring that litigants are informed of their options, survey data from attorneys present a mixed view regarding how often lawyer-client discussions about ADR actually take place. Roselle Wissler, for example, surveyed attorneys in Arizona to examine how often, within the preceding two years, they discussed ADR with clients in their state court civil practice.⁴⁶ At the time of the study, court rules did not require them to have such conversations. Wissler found that attorneys discussed the possible use of a voluntary ADR procedure with their clients, on average, “in 78% of their filed civil cases. 40% of attorneys discussed ADR with clients in all of their cases, and 35% of attorneys did so in 75% to 99% of their cases. Only 13% of attorneys indicated that they discussed ADR with clients in fewer than half of their cases.”⁴⁷ Other research, examining how often lawyers recommend ADR to their clients, found

42. MODEL RULES OF PROF’L CONDUCT r. 3.2 (AM. BAR ASS’N 2013).

43. MODEL RULES OF PROF’L CONDUCT r. 2.1 (AM. BAR ASS’N 2013) (“In representing a client, a lawyer shall exercise independent professional judgment and render candid advice. In rendering advice, a lawyer may refer not only to law but to other considerations such as moral, economic, social and political factors that may be relevant to the client’s situation.”).

44. MODEL RULES OF PROF’L CONDUCT r. 2.1 cmt. 5 (AM. BAR ASS’N 2013).

45. Marshall J. Breger, *Should an Attorney be Required to Advise a Client of ADR Options?*, 13 GEO. J. OF LEGAL ETHICS 427, 430 (2000). See also STEPHEN GILLERS & ROY D. SIMON, REGULATION OF LAWYERS: STATUTES AND STANDARDS 20 (5th ed. 1998) (noting that some attorneys believe that it is at least arguable that Model Rule 3.2 includes a duty to inform a client regarding alternatives to litigation).

46. Wissler, *Barriers*, *supra* note 5, at 473–74, 463.

47. *Id.* at 474.

that of the nearly 1,300 civil litigators who were surveyed, slightly more than half reported that they at least sometimes advised mediation or arbitration and roughly one-quarter said they never advised their clients to use either mediation or arbitration.⁴⁸

Other studies have explored how frequently attorneys discuss ADR with clients in contexts where rules were changed to require such conversations. One such study examined changes to Supreme Court Rule 17 in Missouri, the revised version of which gave “judges the power to order a case to non-binding arbitration, early neutral evaluation, mediation, mini-trial, or summary jury trial” and required lawyers to “‘advise their clients of the availability’ of the ADR options under the Rule in each civil action.”⁴⁹ The researchers surveyed lawyers identified as civil litigators in Missouri state courts.⁵⁰ Although the researchers did not calculate the difference in how often the lawyers participating in their study discussed ADR with clients before versus after the rule came into effect, they were able to conclude that, after the rule was implemented, “[n]early two-thirds of respondents stated that they discussed ADR options with their clients within the first six months of the filing of suit, with another 18% doing so within a year of the filing of suit.”⁵¹ Thus, in many cases, early discussions did not take place. Most attorneys indicated that their clients never (40%) or rarely (27%) initiated conversations about ADR on their own,⁵² which suggests that a rule of this nature could, at least in theory, make such discussions more likely.

48. Roselle L. Wissler, *When Does Familiarity Breed Content? A Study of the Role of Different Forms of ADR Education and Experience in Attorneys' ADR Recommendations*, 2 PEPP. DISP. RESOL. L.J. 199, 220–22 (2002) [hereinafter *When Does Familiarity Breed Content?*] (finding that, when it came to arbitration, 16% of the surveyed attorneys often advised their clients to try it, 61% sometimes recommended it, and 23% never advised it. As for mediation, 14% of attorneys often advised it, 59% sometimes did, and 27% never did. 75% of the surveyed attorneys indicated that they never advised their clients to try neutral evaluation). It is important to note the distinction between discussing ADR and recommending it; “recommendations” are a subset of communications within a larger “discussion” umbrella.

49. Bobbi McAdoo & Art Hinshaw, *The Challenge of Institutionalizing Alternative Dispute Resolution: Attorney Perspectives on the Effect of Rule 17 on Civil Litigation in Missouri*, 67 Mo. L. REV. 473, 477, 496 (2002).

50. *Id.* at 479–80.

51. *Id.* at 496, 506 (“The remaining respondents reported either hardly ever discussing ADR options with their clients (16%) or waiting until right before trial to have such a conversation (4%).” In addition, “[m]ore than 60% of the respondents discussed ADR options with their clients within six months of the filing of suit (62%), [but] . . . 16% of the respondents reported they ‘hardly ever’ discussed ADR options with their clients.”).

52. *Id.* at 497–98.

Another study examined the effects of changes to Civil Procedure rules in Arizona that required opposing counsel, or unrepresented parties, to confer about ADR within ninety days of the answer and specified what they needed to report to the court regarding the outcomes of those discussions.⁵³ The study concluded that this rule did not have its intended effect of increasing early settlement and ADR discussions with opposing counsel within the desired litigation time-frame, but that the frequency of ADR discussion at *some* point did appear to increase.⁵⁴ Moreover, although only about 40% of the surveyed lawyers indicated that they conferred with their clients about ADR in every case before the rule was implemented,⁵⁵ approximately 55% reported doing so after the rule was enacted.⁵⁶

It is important to emphasize that these studies investigated the perceptions of attorneys. Even in cases where lawyers discuss procedures with their clients, it is unclear how much information these clients attend to, understand or retain. It is possible that if these researchers had surveyed the *clients* in the same cases, they may have discovered that litigants had a different perspective regarding whether discussions about procedures took place. Moreover, because these were studies of attorneys, they do not provide a picture of how well unrepresented litigants come to know about their options.

Notwithstanding the growing acknowledgement within the legal community that litigants should be informed about available procedures, it is unclear if, and to what extent, litigants are informed. One important open question is whether litigants can identify their own court's ADR options. Our own search for relevant empirical studies on this issue failed to produce any relevant published data on this issue.⁵⁷ We therefore embarked on an initial examination of this question by analyzing survey data from state court litigants who

53. Roselle Wissler & Bob Dauber, *Leading Horses to Water: The Impact of an ADR "Confer and Report" Rule*, 26 JUSTICE SYSTEM J. 253, 253–254 (2005).

54. *Id.* at 258, 263. The authors noted that one possible explanation for this "paradox" is that judges were more likely to suggest ADR post-rule than pre-rule, but because judges were typically not involved in the early conversations about ADR procedures or settlement, their encouragement could not affect *early* discussions.

55. *Id.* at 263–64. Although they administered surveys to the same population of lawyers both pre- and post-rule, they were unable to compare any individual lawyer's responses to the two surveys. Thus, they reported whether there was a change from pre- to post-rule for the lawyers as a group. *Id.* at 256.

56. *Id.* at 263.

57. Searches were conducted in a variety of databases including Westlaw, Lexis-Nexis, Hein Online, EconLit, Social Science Citations, PsycInfo, Academic Source Complete and Google using the following search parameters: (litigant! or disputant! or plaintiff! or defendant! or party or parties) /5 (know! or aware! or understand! or identify! or inform! or educate!) /10 court! /5 (ADR or "dispute resolution!" or mediate! or

were eligible for court-sponsored mediation and arbitration to determine whether they could identify such offerings shortly after their cases were closed.

III. METHOD

STUDY COURTS AND THEIR PROGRAMS: We collected data from litigants from three state courts: the Third Judicial District Court, Salt Lake City, Utah (“Utah Court”), the Superior Court of California, County of Solano, (“California Court”) and the Fourth Judicial District, Circuit Court of the State of Oregon for the County of Multnomah (“Oregon Court”). We selected these courts because they offered both mediation and non-binding arbitration, in addition to trial, for the *same* causes of action.⁵⁸ These courts also had online databases that would allow us to track each case remotely, which was important for our data collection procedures.

During the study period, each court offered a choice of procedure for each type of case included in our study.⁵⁹ In the California court, litigants were free to opt-in to mediation or non-binding arbitration, or to not use ADR at all.⁶⁰ In Utah, litigants were assigned to mediation, but they could opt-out to binding arbitration, non-binding arbitration or trial.⁶¹ Subject to narrow exceptions, the Oregon Court required some form of ADR within 270 days of the filing of the first complaint or petition in the action.⁶² In this court, eligible civil cases

arbitrat! or procedur! or settle! or program!) /10 (statistic! or study or studies or empiric! or survey!). Additionally, we searched the websites of the Pew Research Center, Rand, the National Center for State Courts, and uscourts.gov on October 16, 2015. The author also solicited information regarding any relevant research via the Dispute Resolution Listserv established by the University of Missouri School of Law which serves as an important resource for dispute resolution experts and scholars nationwide. Many people expressed an interest in learning about any relevant data, and only one person indicated that she was aware of possibly relevant research, which she conducted herself “in LA [i]n the early 1990s but it is not published for many reasons.” See *Dispute Resolution Listserv*, UNIVERSITY OF MISSOURI SCHOOL OF LAW, <http://law.missouri.edu/drle/dispute-resolution-listserv/> (last visited May 21, 2017).

58. See Donna Shestowsky, *The Psychology of Procedural Preference: How Litigants Evaluate Legal Procedures Ex Ante*, 99 IOWA L. REV. 637, 654–55 (2014).

59. See *id.* at 695–700, and the Appendix in the present Article, for more information about each court’s program. Some of the court rules and program details have changed since our data collection period ended.

60. *Id.* at 696–97.

61. *Id.* at 695–96.

62. “The parties must sign and file, within 270 days from the filing of the first complaint or petition in the action, a certificate . . . indicating that the parties have participated in such ADR mechanisms. If the action is fully disposed of in the circuit court within 270 days from the filing of the first complaint or petition in the action, no certificate need be filed under this rule.” MULTNOMAH CTY. SUPP. LOCAL r. 7.075(2)

with an amount in controversy lower than \$50,000 were mandated by statute to use non-binding arbitration.⁶³ Litigants could opt-out by filing a “Motion for Exemption from Arbitration,” which would be considered by the presiding judge, or by having both parties stipulate to the use of mediation.⁶⁴ Each court maintained a list of approved mediators and arbitrators, which is a common structure for court ADR programs.⁶⁵ Each court also provided online information about its programs. This information is summarized in the Appendix.⁶⁶ None of the courts had explicit requirements requiring attorneys to counsel their clients about ADR.⁶⁷

DATA COLLECTION: As part of an earlier set of investigations, we mailed written surveys to litigants within three weeks of the date on which their case was filed.⁶⁸ Only individuals for whom both court-connected mediation and non-binding arbitration were options were invited to participate in the study.⁶⁹ Ultimately, 413 litigants completed this survey. Each week after receiving the completed surveys, research assistants used the online court databases to track each litigant’s case to determine when the court designated it as closed. Within three weeks after a case was closed, a research assistant contacted the litigant for a follow-up phone survey and inputted survey responses into Survey Monkey in real-time. Cases in our sample opened as early as May 2010 and closed as late as November 2014. As

(2010) (current version at MULTNOMAH CTY. SUPP. LOCAL r. 7.016(2) (2016)) available at <http://www.courts.oregon.gov/Multnomah/docs/CourtRules/SLR2010EffectiveFebruary1.2010.pdf> (last visited Apr. 19, 2017). The 2016 version of this Rule changed the 270-day requirement to 365 days. MULTNOMAH CTY. SUPP. LOCAL r. 7.016(2) (2016), available at <http://courts.oregon.gov/Multnomah/docs/CourtRules/2016SLREffectiveFebruary12016.pdf> (last visited Apr. 19, 2017).

63. Shestowsky, *supra* note 58, at 698.

64. Shestowsky, *supra* note 58, at 698–699.

65. *American Bar Association: Clearinghouse of Court ADR Programs*, *supra* note 7, at 2.

66. Additional information about the courts’ ADR programs as they existed at the time of our study can be found at Shestowsky, *supra* note 58, at 695–700.

67. For relevant rules regarding attorney communications, see CAL. RULES OF PROF’L CONDUCT r.3-500 (2015); OR. RULES OF PROF’L CONDUCT r.1.4(a) (2015); UTAH RULES OF PROF’L CONDUCT r.1.4(a) (2015). Arguably, when courts require ADR and also require parties to sign a form indicating that they participated in a settlement procedure, they impose an *indirect* obligation on the part of lawyers to inform clients about at least some ADR procedures. See, e.g., Certificate of Alternative Dispute Resolution 05-31 – Oregon, WORKFLOW, available at <http://www.formsworkflow.com/d123190.aspx> (last visited Apr. 19, 2017).

68. See Donna Shestowsky, *How Litigants Evaluate the Characteristics of Legal Procedures: A Multi-Court Empirical Study*, 49 U.C. DAVIS L. REV. 793 (2016).

69. See *id.* See Shestowsky, *supra* note 58, at 656–58 for detailed information regarding the methodology used to recruit prospective participants and locate their mailing addresses.

measured by the difference in time between the dates on which cases opened and closed at the court, cases took an average of 9.03 months to close. Of those who were eligible for this follow-up survey, 30 could not complete the survey due to unforeseen circumstances or unreachability.⁷⁰ Of the remaining 383 litigants, 336 completed the follow-up survey, reflecting an 89% response rate.⁷¹ Table 1 provides background information about the participants.

A variety of civil actions are included in our sample, including property, personal injury, contracts, and medical malpractice cases. The mean and median amounts in controversy were \$2,053,051.23 and \$35,000.00, respectively. The mode was \$15,000. 15.78% of participants had cases filed in the California Court; 46.43% had filings in the Oregon court; 37.79% had cases filed in the Utah Court. The survey questions that are relevant to our exploration of litigant awareness of court-sponsored ADR, and details regarding how answers to the questions were used as variables in our analyses, are reported below.

LITIGANT AND CASE VARIABLES: On the initial written survey, litigants indicated whether they had been involved in litigation as a plaintiff or defendant in a prior case (“repeat player”),⁷² and whether they had a lawyer for their case or were themselves a lawyer (“lawyer representation”).⁷³ Both of these variables were dummy coded with 0

70. The 413 individuals who completed the earlier written survey were eligible to complete the follow-up phone survey. 30 of these individuals were ultimately unable to complete the survey due to 1) becoming deceased (five litigants); 2) becoming incarcerated (one litigant); 3) being unable to recall the case (five litigants); 4) their cases not being over as of November 2014, which was the predetermined end of our data collection period (eight litigants); 5) invalidated and unlisted phone numbers or mailing addresses (eleven litigants). We tried to acquire the contact information of each unreachable litigant on at least eight different occasions, spread out over time, using a variety of investigatory tools.

71. To calculate the response rate for the follow-up survey, we excluded the thirty litigants who were unreachable or otherwise unable to complete the survey. See *id.* For a description of the challenges associated with estimating the response rate for the written survey due to the unique methodology of the study, see Shestowsky, *supra* note 58, at 687–90.

72. We created the “repeat player” variable based on responses to two questions: “Have you, or your company/group/organization (if you are answering this survey on behalf of a company/group/organization) been a defendant/respondent in any kind of case before this one” [yes/no]. “Have you, or your company/group/organization (if you are answering this survey on behalf of a company/group/organization) been a plaintiff/complainant in any kind of case before this one” [yes/no]. Litigants who answered “yes” to either question were given a “1” value for the repeat player variable; those who answered “no” to both were awarded a “0” value.

73. We created the “lawyer representation” variable based on responses to the following question: “did you choose your lawyer in this case?” Possible responses were

TABLE 1

Participant Information

	Frequency	%
Role in Case		
Plaintiff	191	56.8
Defendant	139	41.4
Both	6	1.8
Party Type*		
Individual	235	69.9
Company	81	24.1
Group / Organization	20	5.9
Missing Data	4	1.2
Type of Opposing Party*		
Individual	164	48.8
Company	127	37.8
Group / Organization	24	7.1
Missing Data	24	7.1
Repeat Player Status		
No	150	44.6
Yes	152	45.2
Missing Data	34	10.1
Age Group		
18-35	76	22.6
36-55	139	41.4
56-75	105	31.2
Over 75	7	2.1
Missing Data	9	2.7
Ethnicity/Race		
White	261	77.7
Non-White	66	19.6
Missing Data	9	2.7
Gender		
Female	145	43.2
Male	182	54.2
Missing Data	9	2.7
Lawyer Representation		
Yes	273	81.3
No	41	12.2
Missing Data	22	6.5

Note. N = 336. *Missing data* indicates litigants for whom a response to the question was not obtained. *Party Type and Opposing Party Type calculations include litigants (n = 4 and n = 6, respectively) who indicated that more than one type applied to their case.

representing “no” and 1 representing “yes.” As part of the follow-up phone survey, litigants rated their impression of the court where their case was filed (“On a scale from 1 to 9 where 1 = extremely negative, 9 = extremely positive and 5 is right in the middle, neutral,

“yes,” “no,” or “don’t have a lawyer.” Litigants who indicated “don’t have a lawyer” were counted as not having a lawyer; those who replied “yes” or “no” were counted as having a lawyer. Litigants who indicated in any open-ended question that they were a lawyer or had a law degree were also counted as having a lawyer.

what is your impression of the court where this case was filed?” (“impression of the court”). We also collected court location information (“court location”), which constituted a categorical variable with three different possible responses (Utah, California, and Oregon). This variable was dummy coded, using California as the reference group.

PROGRAM AWARENESS VARIABLES: Litigants were asked whether the court where their case was filed offered a mediation or arbitration program (“Did the court where your case was filed offer a mediation program?”⁷⁴ “Did the court where your case was filed offer an arbitration program?”⁷⁵). Litigant responses were classified as “yes,” “no,” or “don’t know.” For all participants, the correct response to either question was “yes.”

PROCEDURES CONSIDERED VARIABLES: As part of the phone survey, litigants were asked, in an open-ended fashion, to list all of the procedures that were contemplated for their case (“Before you started thinking about what procedure was best for your case, you or your lawyer probably thought about all the possible ways that could resolve your case. What are all the procedures you or your lawyer considered?”).⁷⁶ Research assistants noted each procedure that the litigants listed using the following categories: arbitration, mediation, negotiation, trial, hearing or motion, judicial settlement conference, dropping the case, or “other.” For each option, we created a dichotomous variable for which litigants received a “1” if they had considered that procedure or a “0” if they had not.⁷⁷

74. If participants required clarification, the research assistants were instructed to state: “did the court have a list of mediators that the parties or their lawyers could choose from?”

75. If participants required clarification, the research assistants were instructed to state: “did the court have a list of arbitrators that the parties or their lawyers could choose from?”

76. We first asked litigants to specify the procedure that ultimately resolved their case. We then asked them to list all of the procedures that they or their lawyer considered. Litigants who gave a response of “don’t know” with respect to the procedure that ended their case were not asked this second question. When a litigant answered the question about all the procedures they considered without mentioning the procedure that resolved their case, we imputed that procedure as part of their response. Given that these questions were asked sequentially, we did not expect litigants to list the same procedure for both questions.

77. We intend to report analyses specific to the procedures that ultimately resolved the cases in a separate Article.

IV. RESULTS

A. *How Accurately Did Litigants Identify their Court's ADR Programs?*

Figures 1 and 2 report the percentage of litigants who correctly identified their court's mediation or arbitration program, respectively, as well as the percentages of those who stated that the court did not have such programs, or indicated that they did not know whether such programs existed. These descriptive statistics reveal that nearly 24% of litigants correctly identified their court as offering mediation, and roughly 27% correctly identified their court as offering arbitration. Approximately half of the litigants expressed uncertainty regarding either program. Overall, nearly 77% of litigants did not correctly identify their court's mediation program (i.e., indicated "no" or "don't know") and 73% did not correctly identify the arbitration program (i.e., indicated "no" or "don't know"). As a follow-up, we examined only those litigants whose cases ultimately went to trial. The majority of these were not aware of their court's programs: only 40% identified the arbitration program and 10% identified the mediation program.⁷⁸

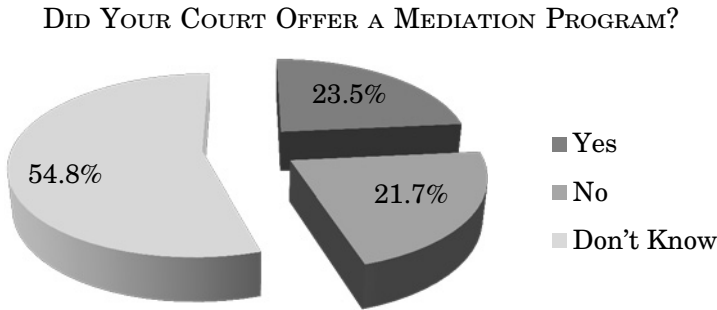


Figure 1. Litigant Awareness of Court-Sponsored Mediation

Note: N = 221.

78. Of the 300 litigants who identified the procedure that ultimately resolved their case, 11 indicated that they had a jury or bench trial. Of these, 10 litigants answered our questions regarding whether their court offered a mediation or arbitration program. The reported percentages are based on these 10 litigants.

DID YOUR COURT OFFER AN ARBITRATION PROGRAM?

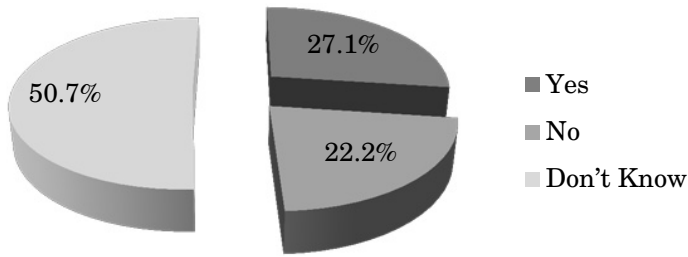


Figure 2. Litigant Awareness of Court-Sponsored Arbitration
Note: $N = 221$.

We wanted to determine whether litigants were more likely to correctly identify their court's arbitration program if they correctly identified their court's mediation program. Such an analysis would illuminate whether knowledge about court offerings for one procedure were independent or related to knowledge about court offerings for the other procedure. We answered this question using a chi-square test of independence. For each procedure, we combined those who replied "no" and "don't know" into a single category, and compared this group with the group that said "yes" for that procedure. This categorization provides a clear comparison of those who correctly identified the court programs with those who did not. We found that litigants were more likely to provide a "yes" response to whether their court offered one procedure if they also answered "yes" to whether their court offered the other procedure, $\chi^2(1, N = 221) = 45.33, p < .001$. The relevant data for this analysis is reported in Table 2. The odds ratio was large at 9.14.⁷⁹ Put simply, those who identified one procedure at their court were very likely to identify the other. But, it is worth noting that only 14.93% of litigants correctly identified both procedures at their court.⁸⁰

79. See Henian Chen, Patricia Cohen & Sophie Chen, *How Big is a Big Odds Ratio? Interpreting the Magnitudes of Odds Ratios in Epidemiological Studies*, 39(4) COMM. IN STAT. - SIMULATION AND COMPUTATION 860, 864 (2010) (explaining that an Odds Ratio ("OR") of 6.71 is equivalent to Cohen's $d = 0.08$, which is large). Thus, an OR of 9 is very strong.

80. This calculation is based on the number of participants who answered "yes" to both the arbitration and the mediation question, as reported in Table 2, divided by the total number of participants who responded to both questions (33/221).

TABLE 2

Contingency Table for Responses to Whether the Court Offered Mediation and Arbitration (“no” and “don’t know” categories combined)

		Arbitration Program at your Court?		
		Yes	No/ Don’t Know	Total
Mediation Program at your Court?	Yes	33	19	52
	No/ Don’t Know	27	142	169
Total		60	161	221

Odds Ratio = $(33/27)/(19/142) = 9.14$

B. *What Predicted Correct Identification of Court ADR Programs?*

To explore program awareness more deeply, we examined factors that might be associated with whether litigants correctly identify their court’s ADR programs. We ran two multinomial logistic regression analyses to evaluate the likelihood of litigants indicating a “yes” response compared to a “no” or “don’t know” response to our questions about whether their court offered mediation or arbitration. In the first multinomial regression model, the likelihood that the litigants answered “yes” as opposed to “no” or “don’t know” in response to our question concerning whether their court offered mediation was our outcome variable. In the second multinomial regression model, the likelihood of choosing a “yes” response over a “no” or “don’t know” response for whether their court offered arbitration was our outcome variable. We used the same predictor variables (described above) for both models: repeat player, lawyer representation, impression of the court, and court location.

Only one predictor influenced the likelihood of choosing a “yes” response compared to a “no” response. The significant predictor was for the model with answers to the mediation question as the outcome variable: those who answered “yes” to the question about their court offering mediation gave significantly more favorable ratings of their court than those who answered “no.” Results of this analysis are catalogued in Table 3.

TABLE 3

Results from Model with Likelihood of Choosing “No” Versus “Yes” Response to Whether the Court Offered Mediation (N = 164)

Predictor	Estimate	SE	P	Odds Ratio
Intercept	1.286	0.962	.181	
lawyer representation	-0.917	0.623	0.141	.400
repeat player status	-0.147	0.469	0.754	.863
location: CA vs. OR	0.255	0.681	0.708	1.291
location: CA vs. UT	-0.054	0.710	0.939	0.947
impression of court	-.215	.111	0.052	0.806

Note: bolded *p*-values represent significance at the *p* = .05 level.

For the model with answers to the mediation question as the outcome variable, the litigants’ impressions of the court and whether they were a repeat player were associated with the likelihood of choosing a “don’t know” response compared to a “yes” response. Results of the analysis are presented in Table 4. Specifically, as impression of the court increased, the odds of litigants indicating “don’t know” as opposed to “yes” decreased by .82. That is, litigants were more likely to think highly of the court when they correctly identified it as offering mediation, as opposed to being unsure. We also found that repeat players were nearly 2.21 times less likely to choose a “don’t know” response over a “yes” response. Figure 3 displays the counts for each response category separated by whether litigants were repeat players or not.

TABLE 4

Results from Model with Likelihood of Choosing “Don’t Know” Versus “Yes” Response to Whether the Court Offered Mediation (N = 164)

Predictor	Estimate	SE	P	Odds Ratio
Intercept	1.515	0.811	0.062	
lawyer representation	-0.541	0.482	0.261	.582
repeat player status	0.793	0.389	0.042	2.209
location: CA vs. OR	0.168	0.572	0.769	1.183
location: CA vs. UT	0.072	0.587	0.902	1.075
impression of court	-0.204	0.093	0.029	0.815

Note: bolded *p*-values represent significance at the *p* < .05 level.

For the model with answers to the arbitration question as the outcome variable, the only variable associated with the likelihood of indicating “don’t know” compared to “yes” was repeat player status. Table 5 reports the results of the analysis. The results were in the same direction as they were for the previous model. Repeat players

were 2.53 times less likely to indicate “don’t know” over “yes” in response to whether their court offered arbitration. Figure 4 displays the percentages for each response category separated by whether litigants were repeat players or not.

TABLE 5
Results from Model with Likelihood of Choosing “Don’t Know” Versus “Yes” Response to Whether the Court Offered Arbitration (N = 164)

Predictor	Estimate	SE	P	Odds Ratio
Intercept	0.877	0.773	0.257	
lawyer representation	-0.206	0.480	0.667	.813
repeat player status	0.928	0.375	0.013	2.531
location: CA vs. OR	-0.780	0.570	0.171	0.458
location: CA vs. UT	-0.244	0.602	0.685	0.783
impression of court	-0.086	0.085	0.312	0.918

Note: bolded p-values represent significance at the $p < .05$ level.

AWARENESS OF MEDIATION PROGRAM BY REPEAT PLAYER STATUS

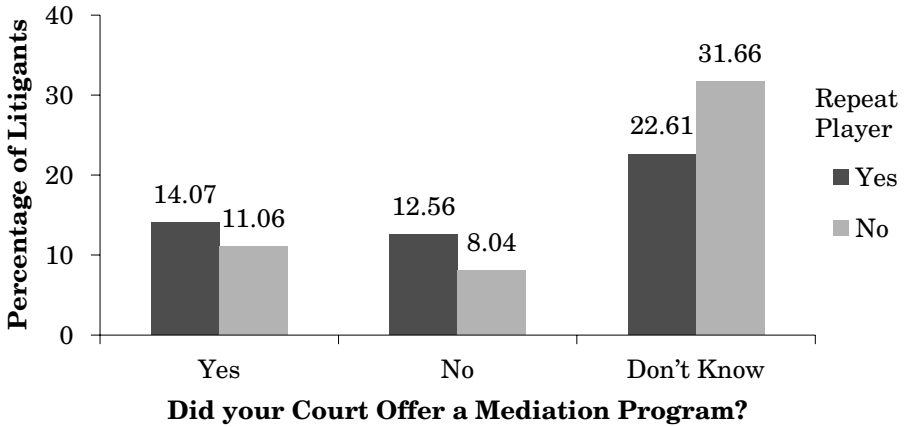


Figure 3. Litigant Awareness of Court-Sponsored Mediation, Separated by Repeat Player Status

Note: N = 199.

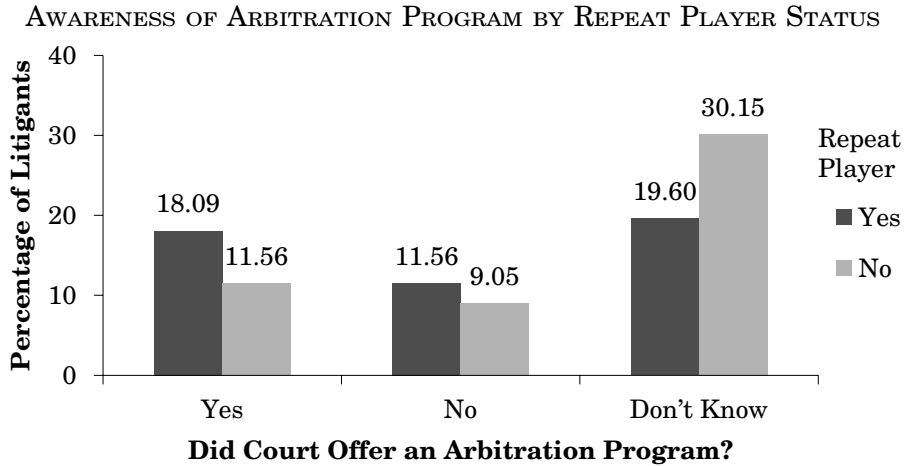


Figure 4. Litigant Awareness of Court-Sponsored Arbitration, Separated by Repeat Player Status

Note: $N = 199$.

C. Program Awareness and its Relation to Procedure Consideration

We asked litigants, in open-ended format, to list each procedure that they or their lawyer contemplated for their case. Figure 5 reports these procedures and their frequencies. The most frequently contemplated procedure was negotiation; the second most frequently contemplated was trial. Of the litigants who listed trial, the majority (70.23%) were plaintiffs. The least contemplated procedure was the judicial settlement conference. Less than one third reported that they contemplated mediation; slightly less than one quarter reported that they considered arbitration. The most commonly reported “other” procedures were filing countersuits and bankruptcy. The mean number of procedures they considered was 2.21.

To investigate the relation between litigants’ awareness of court-sponsored mediation and arbitration and whether they considered using mediation or arbitration, we ran two chi-square tests of independence. In the first chi-square test, we assessed the dependence between whether litigants did or did not identify their court’s mediation program (i.e., we compared those who answered “yes” to whether their court offered mediation with those who answered either “no” or “don’t know”) and whether they responded “yes” or “no” to whether they considered using mediation. There was no significant dependence between these two variables, $X^2(1, N = 182) = 2.85, p = 0.09$.

Thus, whether or not litigants identified their court’s mediation program was not associated with whether or not they contemplated mediation. Although one might expect a lack of relationship between these variables when litigants automatically consider mediation at such high rates that knowledge of court sponsorship does not make a difference, this possibility fails to explain our data: the contemplation rate for mediation was quite low.

In the second chi-square test, we assessed the dependence between whether litigants did or did not identify their court’s arbitration program (i.e., we compared those who answered “yes” to whether their court offered arbitration with those who answered either “no” or “don’t know”) and whether they responded “yes” or “no” to whether they considered using arbitration. There was a significant relationship between these two variables, $X^2(1, N = 182) = 7.19, p < 0.01$. In fact, when litigants correctly identified their court as offering arbitration, they were 2.62 times more likely to have considered using arbitration.

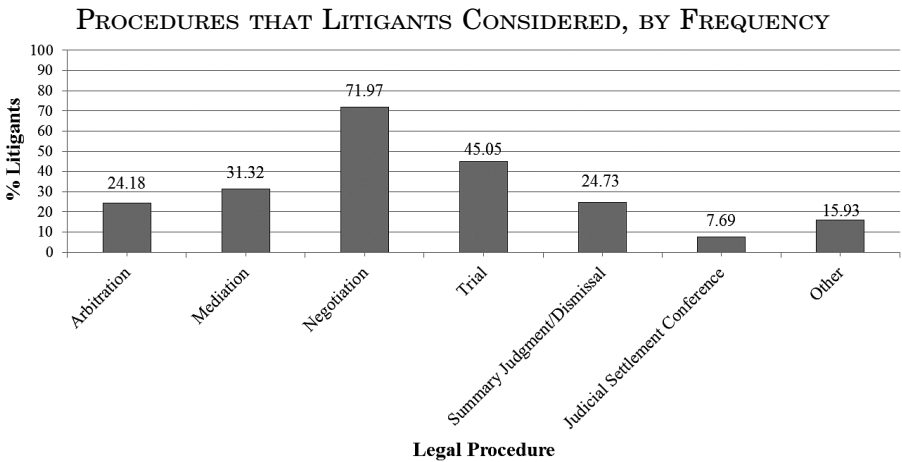


Figure 5. Procedures that Litigants Considered, by Frequency
 Note: $N = 182$.

V. DISCUSSION

Our study yielded several novel and surprising results. First, we found that only a minority of litigants correctly identified their court as offering mediation or arbitration. Second, represented litigants were not significantly more likely to correctly identify either court-connected program compared to those who were not represented. Third, compared to first-time litigants, repeat players exhibited less

confusion over whether their court offered mediation and arbitration. Fourth, litigants who knew their court offered mediation had significantly more favorable impressions of their court compared to those who believed that it did not offer mediation as well as those who were unsure whether their court offered it. Fifth, litigants did not consider using mediation more when they knew their court offered mediation, but those who identified their court as offering arbitration were significantly more likely to consider using arbitration. Each of these major findings, along with their implications for court policy and lawyering, is discussed more fully below.

A. *Most Litigants did not Correctly Identify their Court's Programs*

Although all litigants participating in our study were eligible for both court-sponsored mediation and arbitration, only a minority of litigants correctly identified these offerings at their court — approximately 27% for arbitration and 24% for mediation. Roughly half of the litigants indicated uncertainty regarding whether their court offered arbitration or mediation, and the rest incorrectly believed that their court offered neither of them.

These statistics are particularly surprising because in both Utah and Oregon, for many cases, mediation or arbitration were default procedures and the parties were required to take action to avoid using them. And yet litigants from Utah and Oregon were not more likely to know their court offered these procedures compared to their Californian counterparts. During the relevant data collection period, the Utah Court had an “opt-out” rule by which civil matters automatically proceeded to mediation thirty days after the filing of the responsive pleading, but litigants could opt out by filing a written agreement to submit the case to binding or non-binding arbitration,⁸¹ or filing a statement indicating their desire to defer ADR consideration. These opt-out requests had to be signed by all parties and their counsel,⁸² except for deferral requests which needed to be signed only by the requesting litigant and her lawyer.⁸³ Although all Utah cases in our sample were subject to this rule, only 22.22% of those from Utah who responded to our question about the court’s mediation program knew about it. Similarly, all civil cases in Oregon with an amount in controversy less than \$50,000 were mandated by statute

81. Shestowsky, *supra* note 58, at 696–96.

82. *Id.*

83. Shestowsky, *supra* note 58, at 695–96. See UTAH CODE JUD. ADMIN. r. 4-510(6)(A)(i) (2010) for the rules in place during the time of our data collection.

to use non-binding arbitration.⁸⁴ Litigants could try to opt-out by filing a “Motion for Exemption from Arbitration,” signed by either the lawyer or the party, which would be considered by the presiding judge, or by having both parties stipulate to the use of mediation.⁸⁵ Only 42.85% of participants whose cases fell into this amount-in-controversy category correctly identified their court’s arbitration program, and 30.95% identified the mediation program. These statistics are rather striking. They raise questions about whether the affected litigants knew they could opt out of these default procedures and whether informed consent constituted the basis of their participation in the procedures they ended up using. In situations where litigants were required to sign a form to opt-out of a court-connected procedure, these possibilities are especially problematic: did they understand what they were signing?

Future research should replicate this study across other jurisdictions to get a broader sense of how widespread lack of litigant awareness about procedure is, and the factors that explain it. Until then, we can rely on literature from psychology, as well as our existing dataset, to consider some possible explanations for our own multi-jurisdictional findings. One possibility is that our participants had poor memory in general. This explanation would seem especially likely if the litigants had difficulty recalling other information about their case. To test this possibility, we asked participants to report the initial amount in controversy (i.e., at the time of filing) in their case and then compared those figures with what was objectively reported in the court databases, when such information was available.⁸⁶ The modal difference between what litigants reported and what was indicated in their court’s database was 0, and the median difference was merely \$500.00.⁸⁷ It is important to emphasize that we asked litigants about the initial amount in controversy spontaneously during the course of a phone survey. Had we asked the question in a written or online survey, which would have given them an opportunity to research this information before answering our question, we would be less confident that their responses reflected their ability to recall it. Their ability to report the initial dollar value of the case so well is also surprising because we did not emphasize a need to be precise. In

84. *Id.* at 698.

85. *Id.* at 698–699.

86. The correlation was positive and unusually high, $r = 1.0$, $p < .0001$.

87. We consider this amount very small in light of the mean amount in controversy (\$2,053,051.23), as well as the median (\$35,000.00) and mode (\$15,000.00).

sum, given litigants' overall ability to recall the initial amount in controversy, their general memory skills do not seem obviously problematic. Thus, although memory issues might explain the responses of some participants, it is highly unlikely to explain our aggregate descriptive statistics.

Alternatively, the low program awareness rates that we observed might reflect a situation wherein many litigants were never informed about their court's programs. After all, it is not possible for someone to recall information that he or she never received. This possibility would help to explain why such a notable percentage of litigants indicated responses along the lines of "I'm not sure" or "I don't know." If litigants never obtained information about their court's programs in the first place, then the solution to this problem is twofold: attorneys should ensure that their clients receive such information; and, given that represented litigants were not significantly more knowledgeable about their court's programs compared to unrepresented litigants, courts should proactively educate litigants as well.⁸⁸

Psychological research on memory offers a third possibility for the low program awareness levels we observed: litigants may have received information about their court's programs but not learned it well enough to recall it at the time of our survey. Studies have demonstrated that mere exposure to information is not enough to guarantee learning — elaboration is important.⁸⁹ Elaboration — a form of deep processing — involves associating new information with material that is already recorded in long-term memory, thereby incorporating it into a broader, coherent narrative which is already familiar.⁹⁰ People are more likely to elaborate information when they appreciate its importance or personal relevance,⁹¹ which could explain why litigants generally had little difficulty remembering the amount in controversy but could not identify their court's ADR programs. The amount in controversy is often the very basis and purpose of the lawsuit to begin with, and, for that reason, litigants are likely

88. See discussion *infra* Part V.B.

89. See JOHN R. ANDERSON, *LEARNING AND MEMORY: AN INTEGRATED APPROACH* 161–63; 204–10 (1st ed., 1995); DAVID G. MYERS, *PSYCHOLOGY* 345–46 (7th ed. 2004).

90. ANDERSON, *supra* note 89, at 204–10. Deep processing can be encouraged by placing the material into context, relating it to material that is already known, and making personal implications of the material clear. *Id.*

91. See MYERS, *supra* note 89, at 346 (describing how the brain focuses on important information over other stimuli when processing information for memory). See also Robyn Westmacott & Morris Moscovitch, *The Contribution of Autobiographical Significance to Semantic Memory*, 31(5) *MEMORY & COGNITION* 761, 770 (2003) (finding that participants demonstrated enhanced performance on recall tests for autobiographically significant information).

to view the amount as personally relevant and salient. By contrast, litigants may not find the various procedures for resolving their dispute to be as important or relevant. If litigants heard about mediation and arbitration only in passing, and their lawyers did not have in-depth conversations with them about the pros and cons of these procedures for their particular situation or explain that they could have a role in deciding which procedure to use, they might not have elaborated information about these options deeply enough to recall them later. What seems particularly problematic is that so many litigants in Utah and Oregon who, as per court rules, had to take affirmative action to opt out of default procedures to exercise a choice — and in many cases had to sign forms themselves — did not accurately identify their court's programs.

Roselle Wissler's empirical work suggests that lawyers are less prone to explore ADR options with their clients when they have less knowledge about ADR procedures.⁹² Some lawyers might avoid suggesting settlement procedures if they believe they will be compensated more for cases that go to trial.⁹³ Others might be reluctant to suggest ADR because they believe that settling cases will jeopardize their job security or harm their reputation.⁹⁴ For others, overconfidence in their ability to achieve a good trial outcome can act as a barrier to discussing ADR with their clients.⁹⁵ Any of these possibilities could explain the low program awareness rates we found in our study. Reasons relating to lawyers' desire to go to trial might help to explain why we found that only 10% of those whose cases were ultimately tried knew about their court's mediation program — an

92. See Wissler, *Barriers*, *supra* note 5, at 480–81. Attorneys' level of experience with ADR is also associated with how likely they are to suggest it to their clients. Wissler, *When Does Familiarity Breed Content?*, *supra* note 48 at 224–26.

93. Leonard L. Riskin, *Mediation and Lawyers*, 43 OHIO ST. L. J. 29, 49 (1982) (arguing that, for lawyers who are compensated based on a portion of the amount recovered, “[m]ediation threatens to reduce the amount recovered, because in settling their dispute, the parties may wish to include nonmaterial considerations: for instance, to trade money for respect or recognition”). Lawyers who are paid on an hourly basis may be concerned that they will be paid less for cases that settle early, and therefore favor fuller discovery that delays settlement. Wissler, *Barriers*, *supra* note 5, at 467.

94. Wissler, *Barriers*, *supra* note 5, at 467 (arguing that attorneys' perceived potential for “long-term compensation, advancement and prestige” will affect decisions to utilize ADR).

95. See *id.*, at 466 (“[I]f ‘optimistic overconfidence’ leads to overestimates of the likelihood of favorable case outcomes, attorneys will be less likely to see a need to use ADR to facilitate settlement.”).

awareness level far below the 23.5% rate we observed overall.⁹⁶ This finding raises questions about the relationship between litigation strategy and litigants' awareness of ADR that should be explored in future research.

In sum, our results suggest that discussions about procedure did not take place at all, were not flagged as important, or were not conducted in an in-depth or personalized enough way to trigger deep processing. To promote elaboration on the part of their clients, lawyers should emphasize why they should view information regarding procedural options as personally relevant. They might accomplish this goal by ensuring that clients know they have the power to participate in decisions regarding procedure, barring limitations such as those imposed by agreements, court rules, or the opposing party. They should also engage in collaborative learning strategies. For example, lawyers and clients could review information about the court's programs together with the aim of producing a list of questions relevant to applying the information to the client's specific case.⁹⁷ Lawyers could then counsel their clients by answering these questions or, if needed, help them obtain such information from the court.

B. *Represented Litigants were No Better than Unrepresented Litigants at Identifying Court Programs*

Past research on lawyers suggests that many do not discuss ADR with their clients.⁹⁸ Our own study of litigants paints a similar picture.⁹⁹ In fact, we found that represented litigants were not significantly better at identifying court ADR options than their unrepresented counterparts.¹⁰⁰ Our findings resonate with the ongoing debate concerning how much value lawyers provide to their clients.¹⁰¹ In their review of empirical research on lawyer effectiveness,

96. Only one litigant who went to trial reported not having a lawyer and not being one herself.

97. ANDERSON, *supra* note 89, at 209–10.

98. *See supra* Part II.C.

99. *See supra* Part IV.C.

100. *See supra* Part II.C.

101. *See* Orley Ashenfelter, David E. Bloom & Gordon B. Dahl, *Lawyers as Agents of the Devil in a Prisoners Dilemma Game*, 10 J. EMPIRICAL LEGAL STUD., 399, 419 (2013) (empirically examining whether lawyers add value to a party's outcome in arbitration or whether the decision to obtain representation is congruent to the 'prisoner's dilemma'); Jean Poitras, Arnaud Stimec & Jean-François Roberge, *The Negative Impact of Attorneys on Mediation Outcomes: A Myth or a Reality?*, 26 NEGOTIATION J. 9, 10, 17–20 (2010) (arguing that "[t]he impact of the presence of attorneys at the mediation table has been a source of much debate and great tension between dispute resolution professionals" and then empirically comparing mediations which involved

Emily Poppe and Jeff Rachlinski concluded that, with a few exceptions mainly in the areas of juvenile and government benefits cases, studies have shown that represented litigants tend to obtain better case outcomes than ones who are not represented.¹⁰² Rebecca Sandefur's earlier meta-analysis¹⁰³ of the same line of research reached a similar conclusion. She observed that represented litigants tend to have an advantage with respect to win rates, but that lawyers add the most value in cases that are procedurally complex or for which relationships with the court tend to matter.¹⁰⁴

The empirical research investigating the impact of representation on case outcomes has focused on win rates,¹⁰⁵ which do not factor in the magnitude that plaintiffs gain or defendants save as a result of a win, or the costs that the litigants incur in paying for representation. And, in cases that have a small amount of controversy to begin with — which is arguably the situation for most if not all the studies included in the two comprehensive reviews of the literature to-date

lawyers with ones that did not); Emily S. Taylor Poppe & Jeffrey J. Rachlinski, *Do Lawyers Matter? The Effect of Legal Representation in Civil Disputes*, 43 PEPP. L. REV. 881, 885 (2016) (stating that “[e]ven if laypeople can make plausible appearances in court, they cannot reasonably be expected to understand all of the tools available to litigators . . . [b]ut if lawyers are truly helpful, then empirical studies of the profession should reflect their value” and then reviewing the relevant empirical literature); Nourit Zimmerman & Tom R. Tyler, *Between Access to Counsel and Access to Justice: A Psychological Perspective*, 37 FORDHAM URB. L. J. 473, 486 (2010) (suggesting that attorneys can increase litigants' perceptions of self-determination because “due to their professional expertise lawyers can only increase the litigant's perceived control over the process”).

102. See Poppe & Rachlinski, *supra* note 101, at 933.

103. Rebecca L. Sandefur, *Elements of Professional Expertise: Understanding Relational and Substantive Expertise through Lawyers' Impact*, 80 AM. SOC. REV. 909, 920–24 (2015) (using meta-analysis and other statistical techniques to examine trends across studies on the effect that lawyers have on case outcomes).

104. *Id.* at 910, 921–24.

105. See *id.* 927–28 (reporting how outcomes in studies used in the meta-analysis were measured). See Poppe & Rachlinski, *supra* note 101, at 932–33 (reviewing the relevant literature on civil cases outside of small claims, and citing just one study showing that representation was, in some cases, associated with payouts high enough to offset attorney's fees). For more details on the study cited by Poppe and Rachlinski, see 2 JAMES K. HAMMITT, *AUTOMOBILE ACCIDENT COMPENSATION* 34, 36–38 (1985), available at <http://www.rand.org/pubs/reports/R3051.html> (last visited Apr. 19, 2017). Thus, cases in which a plaintiff “wins” but is awarded some very nominal amount are still considered a “win.” The relevant gains and losses would be especially hard to capture objectively when the fact-finder might have discretion in terms of how much could be awarded (for example, in the case of punitive damages), if such data could be obtained. See Poppe & Rachlinski, *supra* note 101, at 935–37 (discussing the analytical challenges of assessing the effectiveness of lawyers by relying on win rates).

— financial “wins” might easily be swamped by the fees that attorneys charge for their representation, greatly diminishing the practical value that a “win” might bring, at least from an economic perspective.¹⁰⁶ However, an obvious way that lawyers *can* provide value to their clients apart from helping them achieve an economic gain (or despite a lack thereof) stems from their knowledge of procedures and their ability to guide litigants to options from which they will derive satisfaction on a procedural or psychological level, win or lose.¹⁰⁷ The first step down this path would involve attorneys advising their clients about their options and then educating them so that they can make informed decisions.¹⁰⁸

What can be done to motivate lawyers to better educate their clients? Court rules could follow the informed consent models in other disciplines, such as medicine, by requiring parties to sign a disclosure indicating that their attorney provided them with information about their options.¹⁰⁹ The protocol of United States District Court for the Northern District of California provides a useful example. The court requires parties and their lawyers to sign an “ADR Certification by Parties and Counsel” form¹¹⁰ whereby they confirm that they have read the court’s handbook describing its ADR procedures, which is

106. See 2 HAMMITT, *supra* note 105, at 37.

107. See Poppe & Rachlinski, *supra* note 101, at 889:

[U]nderstanding whether lawyers actually improve the outcomes of their clients in litigation is the issue of most critical import. That emphasis, however, excludes consideration of process values. That is, even if representation would not alter a case’s outcome, a litigant might feel much differently about the legal system if he or she is represented. People value process in legal systems. A lawyer can explain the legal system, provide reasons for the outcome, and give greater assurance that the court hears the client’s story. Those who feel they have had their voices heard by courts come to believe the legal system is more fair compared to those who do not. In turn, people who feel they have been heard are more likely to obey the law in the future. The effect of representation on perceived fairness in the civil justice system is important, but the research on representation does not directly address these questions.

108. After such preliminary education, it would be the litigant’s (informed) prerogative to decide that his or her lawyer should make the decision on his or her behalf.

109. See, e.g., *Notice of Alternative Dispute Resolution and Case Management Procedures, Litigants’ Bill of Rights*, S.D. GA. LR 16.7, available at <http://www.gasd.uscourts.gov/lr/pdf/LNAppendix.pdf> (last visited Apr. 19, 2017). Some courts already have such measures in place whereas others require only that the attorneys sign a form to indicate that they advised their clients. See *supra* notes 31–38 and accompanying text. To the extent that courts care about litigants’ perceptions of whether their attorney actually educated them, these attorney signatures may not mean much.

110. *ADR Forms*, UNITED STATES DIST. CT., N. DIST. OF CAL., <http://www.cand.uscourts.gov/adrfirms> (last visited Apr. 19, 2017).

available online,¹¹¹ discussed the procedures offered by the court as well as private entities, and considered whether their case might benefit from any of the options. By instituting such detailed requirements for litigant education, and building in penalties for attorneys who do not comply with such rules,¹¹² courts can take a significant step toward promoting litigant awareness.

Remedies that rely on attorneys to educate their clients will be effective only insofar as lawyers themselves are well-educated on the available options. In her research on the barriers to lawyer-client conversations about ADR, Roselle Wissler found that when attorneys were less familiar with ADR, they were less likely to discuss ADR with their clients.¹¹³ This finding underscores the important connection between attorney knowledge and litigant education. Wissler also investigated different forms of ADR education and experience and found that the strongest predictor of whether attorneys advised their clients to try ADR was their own past experience acting as counsel in a case that used ADR.¹¹⁴ They were also significantly more likely to recommend ADR when they had served as a third-party neutral or had taken continuing legal education (“CLE”) courses on the topic of dispute resolution.¹¹⁵ Thus, one way to increase attorneys’ willingness to recommend ADR to clients is to mandate their exposure to it.¹¹⁶

111. *Dispute Resolution Procedures in the Northern District of California*, UNITED STATES DIST. CT., N. DIST. OF CAL., <http://www.cand.uscourts.gov/adrandbook> (last visited Apr. 19, 2017).

112. *See supra* note 39 and accompanying text.

113. *Wissler, Barriers*, *supra* note 5, at 480–81. Some of the other barriers to lawyer-client discussions might be harder to mitigate. For example, lawyers might be more reluctant to discuss ADR when they overestimate a trial win, underestimate the chances of early settlement, or face financial incentives to prolong discovery and proceed into trial. *See id.* at 466–67. *See also* Nancy H. Rogers & Craig A. McEwan, *Employing the Law to Increase the Use of Mediation and to Encourage Direct and Early Negotiations*, 13 OHIO ST. J. ON DISP. RESOL. 831, 846–47 (1998); *Wissler, When Does Familiarity Breed Content?*, *supra* note 48, at 208.

114. *Wissler, When Does Familiarity Breed Content?*, *supra* note 48, at 223.

115. *Id.* at 223–224. Similar results were not observed for courses taken in law school. *Id.* at 227. This pattern in her findings reinforces our earlier point about elaboration. Lawyers are more likely to appreciate the personal relevance of ADR than law students and therefore process information pertaining to ADR procedures more deeply. Lawyers also often have the opportunity to select CLE programs tailored to their specific practice area, which can further enhance the personal relevance of the material and promote message elaboration. It is possible that this difference between courses during versus after law school might diminish when law school courses emphasize skills that place ADR into context for the lawyering profession as opposed to focusing on theoretical and abstract issues (e.g., reading case law).

116. *Id.* at 227–228.

Recognizing how important it is for lawyers to understand ADR, some observers have advocated for mandatory ADR education. Such advocates hope that by making such education mandatory through CLE programs, or even establishing ADR as a bar exam topic, more attorneys will become familiar with ADR procedures, and consequently, more competently pass on such knowledge to their clients.¹¹⁷ As law school accreditation standards more actively emphasize the importance of skills courses, ADR courses are likely to become a greater focus of legal education — both in law schools and CLE programs — than they have been to-date.¹¹⁸ Perhaps with a new generation of well-informed attorneys, litigants will become better informed.

More immediately, one implication of our findings is that courts should consider playing a more active role in litigant education. These steps could include giving educational material to litigants directly, without expecting lawyers to act as intermediaries, and ensuring that court staff members can effectively describe their programs. Ideally, courts would provide opportunities for litigants to get detailed and personalized information. These ideas are supported by analogies to studies in the medical context which suggest that patients are more knowledgeable and more likely to make decisions that are consistent with their preferences, values, and goals when they are given decision aids such as interactive tools to help them make treatment choices.¹¹⁹ Following the *pro se* assistance model in

117. See Dori Cohen, *Making Alternative Dispute Resolution (ADR) Less Alternative: The Need for ADR as Both a Mandatory Continuing Legal Education Requirement and a Bar Exam Topic*, 44 F.A.M. CT. REV. 640, 648–51 (2006).

118. In 2013, the ABA Standards Review Committee increased the experiential coursework requirement for law schools from one credit hour to six credit hours. The ABA instructs law schools to ensure that students are competent in “professional skills needed for competent and ethical participation as a member of the legal profession.” *ABA Standards and Rules of Procedure for Approval of Law Schools 2016-2017*, AM. BAR ASS’N (2016), at 15, available at http://www.americanbar.org/content/dam/aba/publications/misc/legaleducation/Standards/20162017standardschapter3.auth_checkdam.pdf (last visited Apr. 19, 2017). These professional skills include negotiation and conflict resolution. See *id.* at 16. The American Association of Law Schools (“AALS”) has simultaneously been making its own advances in this area. The AALS now encourages member schools to offer additional instruction in dispute resolution, planning and problem solving, drafting, and counseling. See *Statement of Position Regarding the State Bar of California Task Force on Admissions Regulation Reform (TFARR) Experiential Education Requirement*, AALS (Aug. 18, 2015), <https://www.aals.org/scle-tfarr/#fn1> (last visited Apr. 19, 2017).

119. Gil Siegal, Richard J. Bonnie & Paul S. Appelbaum, *Personalized Disclosure by Information-on-Demand: Attending to Patients’ Needs in the Informed Consent Process*, 40 J.L. MED & ETHICS 359 (2012); Erica S. Spatz, Harlan M. Krumholz & Benjamin W. Moulton, *Prime Time for Shared Decision Making*, 317 (13) J. OF THE AM. MEDICAL ASS’N 1309, 1309–1310 (2017).

some jurisdictions, courts could create help desks staffed by attorneys who could answer litigants' questions about procedures.¹²⁰ They could also hold ADR informational meetings on a periodic basis and encourage parties to attend within, for example, 90 days of filing. Some courts already offer orientation and training sessions for small claims and family law cases.¹²¹ Having judges hold these informational meetings may be particularly influential due to the special authority granted to judges; litigants and lawyers may be more willing to take the information seriously if it comes from a judge directly.¹²² The effectiveness of this measure would, of course, depend on judges being well-versed in the relevant ADR options.¹²³ Although face-to-face discussions with litigants at case management or other pretrial conferences can also have an educational value,¹²⁴ it is important that these conversations happen early on in the life of the dispute, before litigants and their attorneys become too committed to a particular pathway for the case.

120. Jerome B. Simandle, *Enhancing Access to ADR for Unrepresented Litigants Federal Court Programs Provide Models for Helping Pro Se Parties — and the Justice System*, DISP. RESOL. MAG. 7, 8 (2016), available at http://www.americanbar.org/content/dam/aba/publications/dispute_resolution_magazine/spring2016/3_simandle_Enhancing_access.authcheckdam.pdf (last visited Apr. 19, 2017).

121. For examples in the small claims context, see WI FOND DU LAC CTY. CT. R. r. 5.4 (2015) (stating that “both parties shall be required to attend a mediation orientation meeting” and that a failure to do so “may result in the entry of a default judgment or a dismissal, with costs, with or without prejudice”); MULTNOMAH CTY. SUPP. LOCAL r. 12.035(1) (“All small claims actions shall go to mediation orientation before going to trial.”). For examples in the family law context, see *Mediation*, MARION CTY. CIR. CT., OR. JUDICIAL DEPT., <http://www.courts.oregon.gov/Marion/Services/Pages/Mediation.aspx> (last visited Apr. 19, 2017) (stating that, prior to mediation for family cases, “the court will schedule a time for you to learn more about the process When you come to court, you will hear a judge speak and you will view an orientation video”). Other jurisdictions have mandatory divorce education classes and mediation orientation training for parties involved in divorce cases involving custody or parenting disputes involving minor children. See, e.g., SUPP. LOCAL TRIAL CT. R., COOS/CURRT CTY. CIR. CTS. r. 8.011 (2016), available at [https://web.courts.oregon.gov/Web/ojdpublications.nsf/Files/CoosCurry_SLR_2016_eff_2016-02-06.pdf/\\$File/Coos-Curry_SLR_2016_eff_2016-02-06.pdf](https://web.courts.oregon.gov/Web/ojdpublications.nsf/Files/CoosCurry_SLR_2016_eff_2016-02-06.pdf/$File/Coos-Curry_SLR_2016_eff_2016-02-06.pdf) (last visited Apr. 19, 2017).

122. This idea is supported by a long line of social psychological research on how authority figures tend to influence attitudes. For an accessible review, see ROBERT CIALDINI, *INFLUENCE: THE PSYCHOLOGY OF PERSUASION* 208–36 (2006). See also Wissler, *Barriers*, *supra* note 5, at 489–91 (analyzing data from lawyers and finding that “the factor that had by far the strongest relationship with how frequently attorneys discussed and used ADR was how frequently judges suggested the use of ADR processes”).

123. See Wissler, *Barriers*, *supra* note 5, at 570 (summarizing research — albeit quite dated — suggesting that judges may not be very familiar with ADR procedures).

124. Wissler, *Barriers*, *supra* note 5, at 503 (providing examples of states in which ADR is a permissible or required topic at pretrial conferences and arguing that these conversations should take place early).

Many courts, including the ones used for the present study, post information about their ADR programs online.¹²⁵ Although web-based education may be convenient for both litigants and courts, the low program awareness rates we observed in the present study suggest that it may not be a sufficient litigant-education tool. Moreover, internet usage is hardly universal. The latest Pew Report, which tabulated data from 97 surveys on the issue of internet usage across the United States from 2000 to 2015, found that although 84% of Americans report using the internet, there are notable income, age, and race disparities in internet use.¹²⁶ For example, only 58% of senior citizens use the internet,¹²⁷ and only 74% of those living in households with an annual income under \$30,000 use it, compared to 97% of those from households reporting annual incomes of at least \$75,000.¹²⁸ Another study, also by the Pew Research Center, reported that only “[f]ifty-four percent of adults living with a disability” use the internet.¹²⁹ Together, these statistics should propel courts to promulgate their ADR programs in ways that reach these vulnerable communities.

Courts can be reluctant to play an active role in educating litigants due to concerns over perceived bias. Many judges are wary of crossing the line between remaining neutral and offering legal information in a way that interferes with the lawyer-client relationship.¹³⁰ But it is possible for courts to provide educational tools that

125. See *infra* Appendix for a summary of this information.

126. See Andrew Perrin & Maeve Duggan, *Americans' Internet Access: 2000-2015*, PEW RESEARCH CTR. 2-3 (June 26, 2015), http://www.pewinternet.org/files/2015/06/2015-06-26_internet-usage-across-demographics-discover_FINAL.pdf (last accessed Apr. 19, 2017).

127. *Id.* at 4; Thom File & Camille Ryan, *Computer and Internet Use in the United States: 2013*, U.S. DEPT. COM. 5 (Nov. 2014), https://www.census.gov/history/pdf/2013computer_use.pdf (last visited Apr. 19, 2017).

128. Perrin & Duggan, *supra* note 126, at 6.

129. Susannah Fox, *Americans living with disabilities and their technology profile*, PEW RESEARCH CTR. 3 (Jan. 21, 2011), http://www.pewinternet.org/files/old-media//Files/Reports/2011/PIP_Disability.pdf (last visited Apr. 19, 2017).

130. Cohen, *supra* note 117 at 645 (“It has become progressively difficult for judges to maintain neutrality and offer legal information, rather than forbidden legal advice, in the face of an unprepared pro se litigant inexperienced with court procedures.”); Natalie A. Knowlton, Logan Cornett, Corina D. Gerety & Janet L. Drobinske, *Cases Without Counsel: Research on Experiences of Self-Representation in U.S. Family Court*, INST. FOR THE ADVANCEMENT OF THE AMERICAN LEGAL SYS. 1, 27 (2016), available at http://iaals.du.edu/sites/default/files/documents/publications/cases_without_counsel_research_report.pdf (last visited Apr. 19, 2017) (noting “[t]he main referenced challenge centered on court staff erring on the side of caution in walking the line between providing legal information and legal advice . . . [T]his highlights a discrepancy in understanding between litigants and court staff concerning what questions

do not give rise to concerns over bias.¹³¹ The ABA, for example, offers material that educates litigants on the differences amongst ADR options, the benefits of arbitration, and how they can prepare for mediation.¹³² Courts offer litigants similar information. The help desks and ADR informational sessions already in place at some courts provide other examples.¹³³ However, to be especially effective, information about procedures should be somewhat detailed and personalized.¹³⁴ In the initial written survey that we sent our participants, we provided short descriptions of mediation and arbitration (as well as other options such as binding arbitration and trial) and asked them to rate the attractiveness of each procedure for their particular dispute, without specifying which procedures were offered by their court. Our findings suggest that short and non-personalized descriptions like these, and the rather generic website information provided by the courts used in our study, are insufficient for prompting litigants to learn about their court's offerings in a way that they retain over the long-run.¹³⁵

Recent research in the small claims context also suggests that more detailed and personalized education is key. In situations where

can appropriately be answered"); Wissler, *When Does Familiarity Breed Content?*, *supra* note 48, at 205 (citing research suggesting that some judges feel that they should not be the source of ADR information for litigants because that might interfere with the lawyer-client relationship).

131. See, e.g., *Alternative Dispute Resolution (ADR)*, N. DIST. OF CAL., <http://www.cand.uscourts.gov/adr> (last visited Apr. 19, 2017).

132. See, e.g., *Dispute Resolution Processes*, AM. BAR ASS'N, http://www.americanbar.org/groups/dispute_resolution/resources/DisputeResolutionProcesses.html (last visited Apr. 19, 2017); *Benefits of Arbitration*, AM. BAR. ASS'N, http://www.americanbar.org/content/dam/aba/events/dispute_resolution/committees/arbitration/arbitrationguide.authcheckdam.pdf (last visited Apr. 19, 2017); *Preparing for Mediation*, AM. BAR. ASS'N, http://www.americanbar.org/content/dam/aba/events/dispute_resolution/committees/arbitration/arbitrationguide.authcheckdam.pdf (last visited Apr. 19, 2017).

133. See *supra* notes 120–121 and accompanying text.

134. See *supra* Part V.A (discussing “elaboration”).

135. It is possible that our short descriptions prompted some litigants to consider or even prefer mediation more than otherwise would have been the case. In an interesting set of laboratory studies, Josh Arnold and Peter Carnevale asked people, in open-ended form, how they would handle a particular hypothetical dispute. They subsequently listed and described procedures and asked participants to rate and rank them. Although they observed that the procedural choices that emerged from responses to their open-ended question corresponded highly with how the participants then ranked and rated the procedures, participants preferred mediation significantly more when mediation was listed out as an option and they were provided with a working definition of it. Arnold & Carnevale, *supra* note 16, at 391–92. They concluded that their finding “supports the notion that many people are not aware of mediation as an alternative and that once people become aware of the procedure, they find it attractive.” *Id.* at 392.

mediation was optional, litigants were “more likely to choose mediation if an authority figure [gave] them a number of legitimate, easy-to-understand incentives for doing so.”¹³⁶ The researchers concluded that it is not enough for a judge to simply say, “I think you should go to mediation,” or “want to try mediation?” as those kinds of statements did not include an explanation of what the procedure entailed. Instead, in order for litigants to seriously consider mediation as a plausible option, the judge should “literally or figuratively [step] down off the bench, [talk] with litigants in a casual way, [use] plain language to explain the incentives that mediation has over trial, and [ask] if litigants have any questions.”¹³⁷ In other words, court personnel must do more than simply name “mediation” or “arbitration” as options; they must also explain what these procedures involve and how the parties may or may not benefit from using them compared to alternative procedures.¹³⁸

C. Repeat Players were Less Unsure about Court Programs than First-time Litigants

One important finding from our study concerns repeat players. Although repeat players were not significantly less likely to be incorrect (i.e., say “no” than provide the correct answer of “yes”) than first-time litigants, they were significantly less confused or unsure (i.e., less likely to say “don’t know” versus “yes”). Repeat players are unique in that they have prior experience with litigation, and this experience often works in their favor.¹³⁹ Knowledge about court-sponsored ADR options appears to be a yet another domain in which they have an advantage.

136. Heather Schiewe Kulp, *Increasing Referrals to Small Claims Mediation Programs: Models to Improve Access to Justice*, 14 CARDOZO J. CONFLICT RESOL. 361, 386–387 (2013).

137. *Id.* It is worth noting that some recommendations stemming from this research resemble strategies that promote “elaboration.” See ANDERSON, *supra* note 89.

138. It is important that such education and encouragement not cross the line into pressure. Richard D. Freer, *Exodus from and Transformation of American Civil Litigation*, 65 EMORY L. J. 1491, 1491–92 (2016) (“Court administrators and judges actively promoted the use of ADR, in certain cases “twisting [parties’] arms” to consent to ADR. At a certain point, some ADR schemes shifted from a consensual model to one in which participation in ADR was mandatory in the hope of expanding use of ADR”).

139. See Lisa B. Bingham, *Employment Arbitration: The Repeat Player Effect*, 1 EMP. RTS. & EMP. POL’Y J. 189, 208–12 (1997); Lisa B. Bingham, *On Repeat Players, Adhesive Contracts, and the Use of Statistics in Judicial Review of Employment Arbitration Awards*, 29 MCGEORGE L. REV. 223, 232–35 (1998).

Ultimately, our findings suggest that extra reinforcement to first-time litigants may be in order. Although court personnel and lawyers should be effective in disseminating information about ADR offerings to new and experienced litigants alike, they should take note that those who are new to litigation might feel especially uncertain or confused about their options.

D. *Procedures that Litigants Considered*

The majority of our participants indicated that they considered using neither mediation nor arbitration. Negotiation was at the forefront of their minds: over 70% of them considered negotiation, and no procedure obtained a higher contemplation rate than that. Trial was the next most commonly contemplated procedure. And yet, still less than half of the litigants reported that they considered going to trial. When we break down these descriptive statistics further, we find that only half (49.57%) of the plaintiffs indicated that they considered going to trial. This finding resonates with earlier research observing that some disputants file lawsuits not to force the conflict to trial but to express their negative emotions¹⁴⁰ or to motivate the opposing party to negotiate.¹⁴¹ Defense counsel might share these statistics with their clients to alleviate some of their anxiety regarding how committed plaintiffs are to pursuing litigation to its fullest extent.

Our earlier study — based on the same dataset — found that, *ex ante*, litigants had three favorite procedures: negotiation that includes clients and attorneys, mediation, and the judge trial.¹⁴² In this light, the high frequency for negotiation contemplation makes sense, but the rather low contemplation rates for mediation and trial are perplexing. For represented litigants, this pattern might be explained in part by our earlier finding concerning the factors that litigants expect to rely on when they eventually decide which procedures to use for their case. We found that the most common response concerned input from their lawyer (e.g., “I would rely on counsel”; “I will ask my attorney which to choose”). It could be that if their lawyers quickly

140. This resonates with findings from a much older study of Manhattan small claims litigants. See Austin Sarat, *Alternatives in Dispute Processing: Litigation in a Small Claims Court*, 10 LAW & SOC'Y REV. 341, 346 (1976) (“Almost half the plaintiffs failed to appear even though no out of court settlement was reached. Of these, 38% indicated that they had never intended to go “all the way” with the case. They were upset and used litigation to express their feelings.”).

141. Tamara Relis, *Civil Litigation from Litigants' Perspectives: What We Know and What We Don't Know About the Litigation Experience of Individual Litigants*, 25 STUD. L., POL. & SOC'Y, 151, 157 (2002).

142. Shestowsky, *supra* note 58, at 673–74.

dismissed the idea of mediation or trial, they may not have perceived themselves or their lawyers as having contemplated these procedures for their case. Although we would expect that factors other than litigants' initial preferences would influence the procedures they ultimately chose to *use*, once the complexities of their cases become more fully developed, it is surprising that two of the procedures that litigants tended to like best were not commonly contemplated. It is worth emphasizing that our study was designed to capture litigants' perceptions; it is possible that attorneys contemplated some procedures without informing their clients, or that litigants misremembered what was contemplated because they did not elaborate the alternatives themselves.

E. *Implications of Litigant Awareness for Court Programs: Procedures that Litigants Considered and How Litigants Viewed their Court*

Recent research — using the same dataset used for the present study — found that when litigants evaluate procedures near the start of their cases,¹⁴³ they have little enthusiasm for binding and non-binding arbitration. In fact, they view them as the least attractive alternatives out of all the common legal procedures they were asked to evaluate.¹⁴⁴ Given this finding, it is interesting that litigants were significantly more likely to consider using arbitration when they identified their court as offering it as compared to when they did not. One interpretation is that if litigants perceived their court as placing its stamp of approval on arbitration, they were encouraged to consider using it. Mediation, which was a litigant favorite in this earlier study, did not get a similar boost.¹⁴⁵

143. Litigants rated how attractive they found each of the following procedures for their recently filed case: Attorneys Negotiate without the Clients, Attorneys Negotiate with the Clients Present, Mediation, Non-binding Arbitration, Binding Arbitration, Judge Decides without Trial, the Judge Trial, and the Jury Trial. *See id.* at 664–65, 673–74. *See also id.* at 670–72, 693–710 (describing the procedures that participants rated).

144. *Id.* at 665 (Figure 1 illustrates how litigants rated the attractiveness of legal procedures and showing that Binding and Non-binding Arbitration received the lowest mean ratings). Similarly, analyses that examined whether litigants were significantly more likely to give any of the procedures the lowest (1 = “not attractive at all”) versus the highest (9 = “extremely attractive”) possible rating found that Binding Arbitration and Non-binding Arbitration were the only options that fell into this category. *See id.* at 666–67, 676.

145. It is worth noting, however, that given this high enthusiasm for mediation, the rate of reported contemplation for mediation was lower than we would expect. *See* Figure 5, *supra* Part IV.C.

Litigants did, however, view their court significantly more favorably when they knew it offered mediation. Specifically, litigants who knew their court offered mediation thought more highly of their court than those who incorrectly believed it did not offer mediation or were unsure whether it did. One interpretation of this result is that litigants who think highly of their court are more inclined to learn about court procedures. Another interpretation is more intuitive: litigants are more pleased with their court when they know it offers mediation. This interpretation aligns with our earlier finding that mediation is a fan favorite *ex ante*.¹⁴⁶ If litigants favor mediation, they might think more highly of courts that clearly endorse it programmatically. Given that we found this relation between litigants' impressions of their court and their knowledge of court ADR offerings after their cases ended, our findings suggest that courts should market their mediation programs in ways that litigants will find memorable over the long run. Courts might even remind them at several intervals, including at the end of their case. The latter proposal might be accomplished through exit surveys or by providing litigants with a "in case you need our help again in the future" pamphlet that reminds them about their ADR programs once their case is closed.

To round out our analysis regarding court impressions, we wanted to ensure that litigants' awareness of their court's mediation program, as opposed to the actual act of using mediation to resolve their case, was driving the court impression effect we found. To do so, we compared those who resolved their case via mediation¹⁴⁷ with those who did not to determine whether these groups differed in how they rated the court. We restricted our analysis to those who correctly identified their court as offering mediation in order to hold this variable constant. We found no significant difference between those who settled through mediation versus those who did not in terms of their impressions of the court.¹⁴⁸ This result suggests that our finding that litigants who are aware that their court offered mediation had a more favorable view of their court was not driven by people who resolved their case through mediation.

146. Shestowsky, *supra* note 58, at 673.

147. The full set of procedures that ultimately resolved the cases in our sample will be reported in a separate Article.

148. Impressions of the court ratings for those who settled through mediation ($M = 7.00$; $SD = 2.83$) versus those who did not ($M = 6.40$; $SD = 2.39$), $t(45) = -.52$, *ns*.

VI. CONCLUSION

Court ADR programs are often designed to promote litigants' self-determination or to increase court efficiency.¹⁴⁹ Litigant awareness of court-sponsored procedures is a crucial first step towards achieving these goals. Shedding light on litigant awareness was the motivation of this project.

Our results suggest that both courts and attorneys should consider doing more to strengthen the realization of party self-determination in the litigation process. Such self-determination can be achieved when litigants participate in decisions regarding the procedures they use for their dispute. This exercise requires that they know about their dispute resolution options, and understand them enough to make informed decisions. Although assessing how well litigants understand what each procedure entails was beyond the scope of the current project, and certainly worth exploring in future research, our findings suggest that courts and attorneys should make greater efforts to inform parties about the options that are available to them.

The traditional distinction of "ends" and "means" in the process of representation should also be modified to require attorneys to inform their clients about ADR in ways that promote greater litigant autonomy and informed consent. The Model Rules of Professional Conduct instruct attorneys to "consult with the client as to the means by which [the objectives of the litigation] are to be pursued."¹⁵⁰ As part of the expectation created by this rule, lawyers should educate clients about available procedures and discuss the implications of each for their client's situation.¹⁵¹ Once adequately informed, clients

149. Shestowsky, *supra* note 4, at 551–52.

150. MODEL RULES OF PROF'L CONDUCT r. 1.2(a) (AM. BAR ASS'N 2013). See Breger, *supra* note 45, at 437 (noting that "[i]t has been suggested that [Model Rule 1.2] gives the client the right to information about ADR, but does not give the client the right to decide whether to pursue it" and pointing out that one observer has argued that "courts will label the decision to pursue ADR a 'means' decision, rather than an 'objectives' decision" and that "the rule simply requires an attorney to consult with the client concerning ADR"); Nancy A. Welsh, *The Thinning Vision of Self-Determination in Court-Connected Mediation: The Inevitable Price of Institutionalization?*, 6 HARV. NEGOT. L. REV. 1, 4 (2001) (describing the "originally dominant vision of self-determination" as one in which the parties to a dispute would be the principal actors. They would "1) actively and directly participate in the communication and negotiation that occurs during mediation, 2) choose and control the substantive norms to guide their decision-making, 3) create the options for settlement, and 4) control the final decision regarding whether or not to settle.").

151. Breger, *supra* note 45, at 439–40 (analyzing the implications of requiring attorneys to "analyz[e] and explain[] all of the ADR options available to a client"). See also Ariel M. Kiefer & Stanley A. Leasure, *Arkansas Lawyers: An Ethical Obligation*

can exercise their autonomy by more meaningfully guiding their case to resolution.¹⁵² Rules that require attorney-client discussions about ADR are a good start. But, given that research suggests that they do not always have their intended effect, additional measures — such as requirements that such discussions take place early and penalties for not following such rules — should be implemented.

Attorneys should balance the freedom that litigants need to exercise self-determination with constructs that ensure that they understand the choices they are making. When an attorney advises clients about procedures, it should be tailored to that client's goals. Attorneys should keep in mind that litigants' *ex post* perceptions of fairness and satisfaction with procedures are typically less linked to how long the procedure takes, how much it costs, or whether they "win" or "lose," and more related to psychological considerations.¹⁵³ Thus, attorneys can improve their clients' satisfaction with procedures by

to Give ADR Advice?, 50 THE ARK. LAW., 32, 32–34 (2015) (discussing the differences in states' "encouragement standard[s]" and "explicit duty standard[s]" of professional conduct).

152. See Yishai Boyarin, *Court-Connected ADR — A Time of Crisis, A Time of Change*, 50 FAM. CT. REV. 377, 381 (2012) (noting that overemphasizing efficiency comes at the expense of justice and how well litigants understand procedures: "[t]he primary goal for mediation . . . has become more and more the efficient — quick and cheap — settlement of cases, which is certainly an important goal for court ADR programs, but one that must not trump other important goals, such as self-determination, fairness, and justice.").

153. E. Allan Lind, Robert J. Maccoun, Patricia A. Ebener, William L. F. Felstiner, Deborah R. Hensler, Judith Resnik & Tom R. Tyler, *In the Eye of the Beholder: Tort Litigants' Evaluations of Their Experiences in the Civil Justice System*, 24 LAW & SOC'Y REV. 953, 957 (1990):

Although the theories sometimes disagree about which specific factors are most important to the perception of procedural justice, all agree that people are remarkably sensitive to the process and procedures they experience in encounters with the law."); *id.*, at 968 ("Especially remarkable is the finding that there was no consistent relationship between procedural justice judgments and the objective measures of case outcome, litigation cost, or case duration."). See Deborah R. Hensler, *Our Courts, Ourselves: How the Alternative Dispute Resolution Movement Is Re-Shaping Our Legal System*, 108 PENN ST. L. REV. 165, 197 n. 63 (2003) ("'Procedural justice' scholars have found that individuals use fairness standards to evaluate both the outcomes of dispute resolution processes and the procedures that yield those outcomes, and that they evaluate these two dimensions separately. Individuals who believe that both the process they encountered and the outcomes they received were fair are most satisfied with dispute resolution procedures, but those who believe the process was fair and the outcomes were unfair are almost as satisfied A variety of explanations have been put forward to explain the power of procedural justice in shaping assessments of dispute resolution, including the importance to one's self-esteem of being treated fairly by authoritative individuals and institutions . . . and the possibility that lay individuals

making sure they know what to expect and make informed decisions as a result.

Courts should play a similar role in increasing transparency to promote litigant self-determination and informed consent. Doing so could help them provide better access to justice on a procedural level. They should function like safety nets: they should ensure that litigants know about, and understand, their options — especially their court-connected ones — by educating them directly. Our findings should offer some motivation on this front. After all, when litigants correctly identified their court's programs, it had implications for the court: for arbitration, litigants were more likely to consider using it,¹⁵⁴ and for mediation, litigants viewed their court more favorably.

Litigant education about procedures can increase not only party self-determination, but court efficiency. Litigants who discover only after their cases have ended that other procedures had been available to them may, understandably, feel less inclined to voluntarily comply with the outcome and may even develop a distrust of lawyers or the courts for not having adequately educated them. Even if lawyers or court personnel *do* inform litigants of their options, if litigants do not process the information deeply enough for them to recall it later, they are not likely to *feel* as though they had been informed.

To be sure, our data suggest that if litigants are not using a given court-sponsored program at high rates, it could be because they do not know it exists. If litigants are unaware of their options, then usage statistics are meaningless indicators of how attractive they find the procedures to be. Some courts ask parties to evaluate their experience with court-sponsored ADR procedures after they have used

use their assessment of process fairness to help them assess ambiguous outcomes.;

Rebecca Hollander-Blumoff & Tom R. Tyler, *Procedural Justice and the Rule of Law: Fostering Legitimacy in Alternative Dispute Resolution*, 2011 J. DISP. RESOL. 1, 10 (2011):

They found in experimental studies that disputants were concerned about the fairness of decision making and that that concern was distinct from their reactions to the outcome. However, subsequent field studies of both trials and alternative procedures showed that people's procedural concerns extended beyond this more formal definition of procedural justice. They included elements of interpersonal treatment, such as courtesy and respect for rights. In addition, whether disputants said that they trusted the authority that was making decisions played an important role in reactions to the decisions, and trust was shaped by both decision making and interpersonal treatment. As a consequence of these findings, subsequent models of procedural justice have expanded to include both issues of decision making and interpersonal treatment.

154. See *supra* Part IV.C.

them. They should also survey litigants who did *not* use their programs to determine why they did not do so. To the extent that litigants *were* aware of their programs but did not use them, courts should explore what could be done to make the options more appealing from the litigants' perspective, and attempt to dismantle any institutional or systemic barriers that they can address. Courts might discover, as we did here, that many litigants were not aware of their programs, in which case they could obtain feedback to discern what they could do to better promulgate them. Our findings regarding mediation suggest that litigants' views of the court are at stake in such situations — litigants were significantly less pleased with their court when they believed it did not offer mediation or were uncertain about whether it did.¹⁵⁵ If courts make their inquiries in a systematic and reliable manner, over time, they could use the accumulated data on litigant perceptions to shape their programs in ways that will better meet the needs of litigants and improve access to justice.

Although designing ADR programs that appeal to litigants should be a serious goal of any court, our study suggests that courts should also invest resources to ensure that litigants know about them. Although such measures may seem like extra work for a system designed in part to lighten the workload of the courts, by making these efforts, litigants might be more apt to consider using the programs in which the courts have already invested, and give courts the credit they deserve.

155. *See supra* Part IV.B.

APPENDIX

The three courts used in the present study vary in the degree of information they provide online regarding their ADR offerings. The California court provides a brief synopsis of its ADR procedures: mediation, arbitration, and neutral evaluation.¹⁵⁶ It also provides general information about access to these procedures, an ADR panel member database,¹⁵⁷ required forms, and a list of additional “Helpful Links.”¹⁵⁸ Among the available forms is a “Confidential ADR Program Evaluation Form” (under “Evaluation Forms”) which ADR participants are to submit to the ADR Administrator.¹⁵⁹

The Utah court has a website with information on mediation and arbitration, the two types of ADR it offers litigants.¹⁶⁰ The court provides a link to an online YouTube video describing how ADR works in the Utah courts.¹⁶¹ The website also offers information on how to access the ADR programs, including frequently asked questions, and a list of available mediators and arbitrators.¹⁶² Additionally, the site includes a link to the “Governing Rules and Statutes” of ADR in Utah.¹⁶³ Among these statutes is the Utah Alternative Dispute Resolution Act,¹⁶⁴ which provides in relevant part; “[t]he Administrative Office of the Courts shall establish programs for training ADR providers and orienting attorneys and their clients to ADR programs and

156. *Alternative Dispute Resolution (ADR)*, SUPER. CT. OF CAL., CTY. OF SOLANO, <http://www.solano.courts.ca.gov/AlternativeDisputeResolutionADR.html> (last visited Apr. 19, 2017).

157. *ADR Panel Member Database*, SUPER. CT. OF CAL., CTY. OF SOLANO, <http://www.solano.courts.ca.gov/adr.html> (last visited Apr. 19, 2017).

158. *Alternative Dispute Resolution (ADR)*, SUPER. CT. OF CAL., CTY. OF SOLANO, *supra* note 156.

159. *Confidential ADR Program Evaluation Form*, SUPER. CT. OF CAL., CTY. OF SOLANO, <http://solano.courts.ca.gov/materials/ADR/3900%20-%20Evaluation%20Form.pdf> (last visited Apr. 19, 2017).

160. *Alternative Dispute Resolution (ADR)*, UTAH CTS., <http://www.utcourts.gov/mediation/> (last visited Apr. 19, 2017).

161. Utah State Courts, *Alternative Dispute Resolution in Utah State Courts*, YOUTUBE (Sep. 9, 2011), <https://www.youtube.com/watch?v=ANMPCskFhBY> (last visited Apr. 19, 2017).

162. *See Alternative Dispute Resolution (ADR)*, UTAH CTS., *supra* note 161.

163. *Alternative Dispute Resolution (ADR) in Utah — Governing Rules and Statutes*, <https://www.utcourts.gov/mediation/roster/sanctions/rules.html> (last visited Apr. 19, 2017).

164. Utah Alternative Dispute Resolution Act, UTAH CODE ANN. § 78B-6-201-6-209 (West 2011).

procedures.”¹⁶⁵ The court does not ask litigants with the case types included in our study to evaluate their neutrals.¹⁶⁶

Although the Oregon court has a website dedicated to ADR, it provides the least and most basic information of all the study courts.¹⁶⁷ It provides very brief descriptions of the two ADR options that the court offers for civil cases: mediation and arbitration.¹⁶⁸ The website provides a list of approved mediators¹⁶⁹ but not a list of approved arbitrators. Parties who click on a given approved mediator’s name can see their detailed “Court-Connected Mediator Application Form.” The site offers a variety of mandatory forms but does not specify how to use them. Much of the online information seems targeted toward attorneys and neutrals rather than litigants. The court does not yet have a form for litigants to evaluate their experiences with ADR.¹⁷⁰

165. UTAH CODE ANN. § 78B-6-204 (West 2011). All mediators included on the Utah State Court Roster must have formal mediation training. *Utah State Court Roster Mediator and Arbitrator Qualifications*, UTAH CTS., <https://www.utcourts.gov/mediation/provider/qualifications.html> (last visited Apr. 19, 2017).

166. E-mail from Nini Rich, ADR Program Director, Administrative Office of the Courts, Utah State Courts, to Donna Shestowsky (March 01, 2017, 1:58PM PST) (on file with author).

167. *Alternative Dispute Resolution*, OR. JUDICIAL DEPT., MULTNOMAH CTY. CIR. CT., http://www.courts.oregon.gov/Multnomah/General_Info/Civil/pages/civil.aspx#adr2 (last visited Apr. 19, 2017).

168. *Id.*

169. *Court-Connected Mediators*, OR. JUDICIAL DEPT., MULTNOMAH CTY. CIR. CT., http://www.courts.oregon.gov/Multnomah/General_Info/Civil/pages/CourtConnectedMediators.aspx? (last visited Apr. 19, 2017).

170. E-mail from Rachel McCarthy, Public Information Analyst for the Fourth Judicial District, to Donna Shestowsky (February 3, 2017, 6:44 AM PST) (on file with author).

