

# Barriers to Attorneys' Discussion and Use of ADR

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## I. INTRODUCTION

Although a majority of general civil cases settle,<sup>1</sup> settlements tend to occur late, after discovery has been completed and close to the date of trial.<sup>2</sup> Alternative dispute resolution (ADR) programs have been increasingly adopted in federal and state courts<sup>3</sup> as a way to facilitate negotiations so that earlier and better settlements can be achieved.<sup>4</sup>

In most surveys, a majority of attorneys report having used an ADR process in at least one case.<sup>5</sup> But relatively few attorneys typically report

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<sup>1</sup> See, e.g., Jay Folberg et al., *Use of ADR in California Courts: Findings & Proposals*, 26 U.S.F. L. REV. 343, 357 (1992). These findings were based on a 1991 survey of 125 California state trial judges, plus interviews with 38 judges and 11 court administrators in nine California counties. *Id.* at 346 n.1, 355 n.54, 365 n.104. See also JONATHAN M. HYMAN ET AL., CIVIL SETTLEMENT: STYLES OF NEGOTIATION IN DISPUTE RESOLUTION 26 (1993). The information discussed in the present Article is from the 1992 survey of 515 New Jersey civil litigators and 55 judges. *Id.* See also Herbert M. Kritzer, *Adjudication to Settlement: Shading in the Gray*, 70 JUDICATURE 161, 162–64 (1986).

<sup>2</sup> See, e.g., HYMAN ET AL., *supra* note 1, at 28, 39, 97 (noting also that most attorneys and judges think cases should settle sooner than they do).

<sup>3</sup> See generally SARAH R. COLE ET AL., MEDIATION: LAW, POLICY, PRACTICE apps. B, C (Supp. 2002); JUDITH FILNER ET AL., COMPENDIUM OF STATE COURT RESOURCE MATERIALS 8–10 (1995); ELIZABETH PLAPINGER & DONNA STIENSTRA, ADR AND SETTLEMENT IN THE FEDERAL DISTRICT COURTS: A SOURCEBOOK FOR JUDGES & LAWYERS 3–5, 14–17 (1996).

<sup>4</sup> See, e.g., Bobbi McAdoo, *A Report to the Minnesota Supreme Court: The Impact of Rule 114 on Civil Litigation Practice in Minnesota*, HAMLIN L. REV. 401, 409–10, 449 (2002). These findings were based on a 1996 survey of 748 Minnesota attorneys involved in civil litigation, conducted after Rule 114 required attorneys to provide clients with court-prepared information on ADR and to confer with the other side regarding ADR. *Id.* at 411–12. See also Nancy H. Rogers & Craig A. McEwen, *Employing the Law to Increase the Use of Mediation and to Encourage Direct and Early Negotiations*, 13 OHIO ST. J. ON DISP. RESOL. 831, 834–35, 864 (1998). These findings were based on interviews conducted from 1993 to 1995 with business principals and corporate counsel in six large, national corporations and a review of their case files in business-to-business disputes. *Id.* at 840. See also PATRICIA A. EBENER, COURT EFFORTS TO REDUCE PRETRIAL DELAY: A NATIONAL INVENTORY 16–26 (1981); JAMES S. KAKALIK ET AL., AN EVALUATION OF JUDICIAL CASE MANAGEMENT UNDER THE CIVIL JUSTICE REFORM ACT xxvi–xxvii (1996). A full discussion of the effectiveness of ADR and other approaches in achieving these goals is beyond the scope of this Article. See *infra* notes 219–22 and accompanying text for a limited discussion of these issues.

<sup>5</sup> See John Lande, *Getting the Faith: Why Business Lawyers and Executives Believe in Mediation*, 5 HARV. NEGOT. L. REV. 137, 169 (2000). These findings were based primarily on a 1994 survey in four states of 70 outside counsel in commercial practice, 58 inside counsel, and 50 executives. *Id.* at 162–64. See also McAdoo, *supra* note 4, at 416 fig.2; Bobbi McAdoo & Art Hinshaw, *The Challenge of Institutionalizing Alternative Dispute Resolution: Attorney Perspectives on the Effect of Rule 17 on Civil Litigation in*

using ADR processes frequently.<sup>6</sup> And attorneys' ADR use often is the result of a judicial referral, a pre-dispute contractual agreement between the parties, or a statute or court rule mandating ADR use in certain types of cases rather

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*Missouri*, 67 MO. L. REV. 473, 487 (2002). These findings were based on a 1999 survey of 232 Missouri attorneys involved in civil litigation, conducted after Rule 17 required attorneys to advise clients about ADR. *Id.* at 478-80. See also Morris L. Medley & James A. Schellenberg, *Attitudes of Attorneys Toward Mediation*, 12 MEDIATION Q. 185, 188-89 (1994). These findings were based on a 1993 survey of 226 Indiana State Bar Association Members. *Id.* at 187-91. See also Gerald F. Phillips, *The Entertainment Industry Is Accepting ADR*, 21 ENT. L. REP., June 1999, at 5, 7 tbl.3, 8 tbl.4. These findings were based on a survey of 75 entertainment attorneys, some working as in-house counsel and others in private firms. *Id.* at 5. See also Bonnie Powell, Paper presented at the Conference on the Reflective/Best Practices in Evaluating Court-Connected ADR discussing The Georgia ADR Study 6 (Nov. 2000) (paper on file with author). These findings were based on a 1999 survey of 525 Georgia State Bar Association members, conducted when attorneys had an ethical duty to advise their clients about various forms of dispute resolution and alternatives to litigation. *Id.* at 1, 3, 7. See also Thomas J. Stipanowich, *Beyond Arbitration: Innovation and Evolution in the United States Construction Industry*, 31 WAKE FOREST L. REV. 65, 90 tbl.A-1, 132 tbl.AA-1 (1996). These findings were based on a 1991 survey of 552 attorneys and a 1994 survey of 459 attorneys who were members of the ABA Forum on the Construction Industry. *Id.* at 83, 89, 129. See also 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, 220-21. These findings were based on a 1995 survey of 1,299 Ohio attorneys in civil litigation practice. *Id.* at 219-20. *But cf.* Richard C. Reuben, *The Lawyer Turns Peacemaker*, A.B.A. J. August 1996, at 54, 55 (reporting that "fewer than half" of the attorneys had used ADR in the preceding five years). These findings were based on a 1996 survey of 402 American Bar Association members. *Id.* at 60. These and other ADR surveys discussed in this Article differed on a number of dimensions (*e.g.*, which ADR processes were considered, the attorneys' area of law practice, when and where the survey was conducted), any of which could produce differences in the findings that were sometimes observed among the studies.

<sup>6</sup> See, *e.g.*, Thomas D. Cavenagh, *A Quantitative Analysis of the Use and Avoidance of Mediation by the Cook County, Illinois, Legal Community*, 14 MEDIATION Q. 353, 359-60 (1997). These findings were based on a 1996 survey of 54 attorneys in Chicago. *Id.* at 354-55. See also Lande, *supra* note 5, at 222; McAdoo & Hinshaw, *supra* note 5, at 491; Archie Zariski, *Lawyers and Dispute Resolution: What Do They Think and Know (And Think They Know)? Finding Out Through Survey Research*, 4 MURDOCH UNIV. ELECTRONIC J. L., app. A at 5 (June 1997). These findings were based on a 1996 survey of 418 lawyers who were members of either the Law Society or the Australian Corporate Lawyers' Association in the state of Western Australia. *Id.* at para. 24, 26, 44. See also Stipanowich, *supra* note 5, at 90 tbl.A-1, 132 tbl.AA-1. *But cf.* McAdoo, *supra* note 4, at 467 (reporting that post-Rule 114, 64% of Minnesota attorneys used ADR in "most" or "all" of their cases). These surveys did not distinguish between voluntary and compulsory ADR use.

than the result of a voluntary, mutual agreement by both parties after a dispute has arisen.<sup>7</sup>

Various methods to increase voluntary ADR use have been proposed and adopted, including providing ADR information or education to attorneys,<sup>8</sup> encouraging or requiring attorneys to discuss ADR options with clients,<sup>9</sup> and requiring attorneys to discuss possible ADR use with opposing counsel.<sup>10</sup> Underlying these approaches<sup>11</sup> is the assumption that certain factors operate

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<sup>7</sup> Voluntary ADR use tends to be low. See, e.g., GENERAL ACCOUNTING OFFICE, GAO/HRD-91-38, MEDICAL MALPRACTICE: FEW CLAIMS RESOLVED THROUGH MICHIGAN'S VOLUNTARY ARBITRATION PROGRAM 6-7 (December 1990) [hereinafter GAO REPORT]; Craig A. McEwen et al., *Lawyers, Mediation, and the Management of Divorce Practice*, 28 LAW & SOC'Y REV. 149, 154 (1994); Susan Keilitz, *A Court Manager's Guide to the Alternative Dispute Resolution Database*, ST. CT. J., Fall 1990, at 24, 28; JAMES S. KAKALIK ET AL., AN EVALUATION OF MEDIATION AND EARLY NEUTRAL EVALUATION UNDER THE CIVIL JUSTICE REFORM ACT 52-53 (1996); COLE ET AL., *supra* note 3, § 6:4; Joshua D. Rosenberg & H. Jay Folberg, *Alternative Dispute Resolution: An Empirical Analysis*, 46 STAN. L. REV. 1487, 1538 (1994). But cf. Stipanowich, *supra* note 5, at 111 (reporting that almost two-thirds of construction cases went to mediation as the result of a post-dispute agreement). For a discussion of the routes to ADR, see COLE ET AL., *supra* note 3, § 7:2; Richard C. Reuben, *Public Justice: Toward a State Action Theory of Alternative Dispute Resolution*, 85 CAL. L. REV. 577, 594-95 (1997).

<sup>8</sup> See *infra* notes 160-61 and accompanying text.

<sup>9</sup> See *infra* note 167 and accompanying text.

<sup>10</sup> See *infra* note 168 and accompanying text.

<sup>11</sup> These policies, and this Article, focus on attorneys rather than litigants because (a) litigants typically do not initiate the discussion of ADR and (b) attorneys have a great deal of influence on their clients' perceptions and decisions in the litigation process, including the use of ADR. See, e.g., GAO REPORT, *supra* note 7, at 8; Gary Goodpaster, *Lawsuits as Negotiations*, 8 NEGOT. J. 221, 223 (1992); Milton Heumann & Jonathan M. Hyman, *Negotiation Methods and Litigation Settlement Methods in New Jersey: "You Can't Always Get What You Want,"* 12 OHIO ST. J. ON DISP. RESOL. 253, 254 (1997). These findings were based on a 1992 survey of 515 New Jersey civil litigators. *Id.* at 260 n.13. See also John Lande, *How Will Lawyering and Mediation Practices Transform Each Other?*, 24 FLA. ST. U. L. REV. 839, 879-80, 889-92 (1997); McAdoo, *supra* note 4, at 425; McAdoo & Hinshaw, *supra* note 5, at 497-98; Barbara McAdoo & Nancy Welsh, *Does ADR Really Have a Place on the Lawyer's Philosophical Map?*, 18 HAMLINE J. PUBLIC L. & POL'Y 376, 391 (1997); Jessica Pearson et al., *The Decision to Mediate: Profiles of Individuals Who Accept and Reject the Opportunity to Mediate Contested Child Custody and Visitation Issues*, J. DIVORCE, Fall/Winter 1982, at 17, 29; Roselle L. Wissler et al., *Resolving Libel Disputes Out of Court: The Libel Dispute Resolution Program*, in REFORMING LIBEL LAW 286, 295-96, 306 (John Soloski & Randall P. Bezanson eds., 1992). Accordingly, attorneys' acceptance of and support for ADR is critical to its utilization and impact. See, e.g., Elizabeth Ellen Gordon, *Why Attorneys Support Mandatory Mediation*, 82 JUDICATURE 224, 231 (1999); Julie Macfarlane, *Culture Change? A Tale of Two Cities and Mandatory Court-Connected*

as barriers that constrain attorneys from regularly considering and using ADR processes. Commonly cited impediments include attorneys' lack of knowledge about ADR processes, attorneys' unfavorable views of ADR, attorneys' concerns that proposing ADR will be seen as a "sign of weakness," the routines and economics of law practice, and the lack of judicial involvement.<sup>12</sup>

Little empirical research has been conducted to explore how frequently attorneys voluntarily discuss ADR options with clients and opposing counsel when not explicitly required to do so by contract, court rule, or ethical code.<sup>13</sup> There also has been little empirical examination of the factors thought to act as barriers in order to ascertain how widespread they are and what impact they have on attorneys' discussion and use of ADR.

The present Article reports the findings of an empirical study involving a survey of Arizona civil litigators that examines these issues. Section II of this Article reviews the commentary and the empirical research to date regarding asserted barriers to attorneys' discussion and use of ADR. Section III describes the survey procedure used in the present study. Section IV presents the findings regarding how often attorneys voluntarily discussed ADR, when those discussions first took place, and how often attorneys voluntarily used ADR processes. Section V describes the prevalence of several ADR-specific factors thought to act as "barriers" and their influence on how frequently attorneys discussed and used ADR. Section VI summarizes the findings and explores their implications for the likely effectiveness of various proposals to increase voluntary ADR use.

## II. A REVIEW OF POTENTIAL BARRIERS TO ATTORNEYS' DISCUSSION AND USE OF ADR

### A. Attorneys' Knowledge of ADR Processes

Commentators maintain that attorneys should be informed about ADR in order to be able to counsel clients about litigation and ADR options and to

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*Mediation*, 2002 J. DISP. RESOL. 241, 244 (2002). These findings were based on 2000–2001 interviews with 40 litigators in Toronto and Ottawa, conducted after Rule 24.1 required mediation within 90 days of filing a statement of defense. *Id.* at 251–52. See also Leonard L. Riskin, *Mediation and Lawyers*, 43 OHIO ST. L.J. 29, 41 (1982).

<sup>12</sup> See *infra* Part II.

<sup>13</sup> Several surveys have been conducted in jurisdictions where attorneys were required by court rule or ethical code to discuss ADR with clients or opposing counsel. See generally McAdoo, *supra* note 4; McAdoo & Hinshaw, *supra* note 5; Powell, *supra* note 5.

participate effectively in a range of dispute resolution processes.<sup>14</sup> Attorneys who do not feel sufficiently familiar with ADR processes to discuss them with clients and opposing counsel and to participate in them might be reluctant to discuss or use ADR.<sup>15</sup>

Several surveys, conducted primarily in the mid-1990s, found that a sizeable proportion of attorneys were not familiar with the full range of ADR processes. In general, half or more of the attorneys were familiar with the processes of arbitration and mediation.<sup>16</sup> Fewer attorneys, however, were familiar with other ADR processes such as mini-trial, early neutral evaluation, and summary jury trial.<sup>17</sup> This reported level of familiarity is consistent with findings that typically half or fewer attorneys had taken a law school or continuing education ADR course,<sup>18</sup> served as a third-party ADR neutral,<sup>19</sup> or made frequent use of ADR processes.<sup>20</sup>

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<sup>14</sup> A.B.A. SECTION OF LEGAL EDUCATION & ADMISSIONS TO THE BAR, STATEMENT OF FUNDAMENTAL LAWYERING SKILLS & PROFESSIONAL VALUES 2, § 8 (1992) (listing these among the “fundamental lawyering skills” that every attorney should have); Marshall J. Breger, *Should an Attorney Be Required to Advise a Client of ADR Options?*, 13 GEO. J. LEGAL ETHICS 427, 450 (2000); Carrie Menkel-Meadow, *Ethics and Professionalism in Non-Adversarial Lawyering*, 27 FLA. ST. U. L. REV. 153, 167 (1999). In jurisdictions where attorneys are required to advise clients about ADR or where parties are required to “consider” ADR, attorneys are implicitly, and sometimes explicitly, required to be informed about ADR. *See, e.g.*, Suzanne J. Schmitz, *Giving Meaning to the Second Generation of ADR Education: Attorneys’ Duty to Learn about ADR and What They Must Learn*, 1999 J. DISP. RESOL. 29, 31–35; Plapinger & Stienstra, *supra* note 3 at 8; COLE ET AL., *supra* note 3, § 4:3.

<sup>15</sup> Wayne D. Brazil, *For Judges: Suggestions About What to Say About ADR at Case Management Conferences—and How to Respond to Concerns or Objections Raised by Counsel*, 16 OHIO ST. J. ON DISP. RESOL. 165, 171–83 (2001) [hereinafter *ADR Conference*] (explaining that some of the attorneys’ possible objections to using ADR suggest misperceptions of ADR and lack of familiarity with the different processes); Wayne D. Brazil, *Court ADR 25 Years After Pound: Have We Found a Better Way?*, 18 OHIO ST. J. ON DISP. RESOL. 93, 132–33 (2002) [hereinafter *Court ADR*]; Edward A. Dauer, *Impediments to ADR*, 18 COLO. LAW. 839, 841, 849 (1989). These findings were based on three focus groups concerning impediments to the greater use of ADR, conducted with lawyers in private firms. *Id.* at 839–41. *See also* Wissler et al., *supra* note 11, at 306; Riskin, *supra* note 11, at 41, 49; KAKALIK ET AL., *supra* note 7, at 52; Folberg et al., *supra* note 1, at 383; Rosenberg & Folberg, *supra* note 7, at 1541; Nancy Welsh & Barbara McAdoo, *The ABCs of ADR: Making ADR Work in Your Court System*, JUDGES’ J., Winter 1998, at 11, 13.

<sup>16</sup> Cavenagh, *supra* note 6, at 356; Reuben, *supra* note 5, at 60; Stipanowich, *supra* note 5, at 91 tbl.B, 136 tbl.BB-1; Zariski, *supra* note 6, app. A at 2.

<sup>17</sup> Stipanowich, *supra* note 5, at 91 tbl.B, 136 tbl.BB-1; Zariski, *supra* note 6, app. A at 2.

<sup>18</sup> Lande, *supra* note 5, at 170 tbl.1; Medley & Schellenberg, *supra* note 5, at 189; Cavenagh, *supra* note 6, at 356; McAdoo & Hinshaw, *supra* note 5, at 485; Wissler,

Empirical support for the putative link between attorneys' ADR knowledge and whether they discuss ADR with clients or use ADR varies depending on how that knowledge was acquired. Attorneys' general familiarity with or training in dispute resolution had little or no relationship with whether attorneys recommended ADR to clients<sup>21</sup> or whether they used ADR.<sup>22</sup> Attorneys' direct experience with ADR as a third-party neutral or as counsel in a prior case, however, was related to whether attorneys recommended and used ADR.<sup>23</sup>

### B. Attorneys' Views of ADR

Attorneys' views of ADR, negotiation, and litigation are thought to play a role in their willingness to discuss and use ADR. Attorneys who view ADR as offering few advantages, while creating disadvantages relative to negotiation and trial, might be hesitant to consider ADR.<sup>24</sup>

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*supra* note 5, at 220; Zariski, *supra* note 6, app. A at 10. *But cf.* Stipanowich, *supra* note 5, at 137 tbl.CC (reporting that about 60% of construction attorneys had mediation or arbitration training, and 21% had training in other processes).

<sup>19</sup> Lande, *supra* note 5, at 169; McAdoo, *supra* note 4, at 464 q.9; McAdoo & Hinshaw, *supra* note 5, at 575 q.11; Medley & Schellenberg, *supra* note 5, at 188–89; Powell, *supra* note 5, at 7; Zariski, *supra* note 6, app. A at 5–6. *But cf.* Wissler, *supra* note 5, at 220 (reporting that 71% of Ohio attorneys had served as a neutral).

<sup>20</sup> *See supra* note 6.

<sup>21</sup> Wissler, *supra* note 5, at 224 (finding that ADR CLEs had little relationship, and law school dispute resolution courses had no relationship, with whether attorneys recommended ADR to clients.). However, ADR education played a larger role for attorneys with no prior ADR experience. *Id.* at 228–29.

<sup>22</sup> *See* Cavenagh, *supra* note 6, at 361; Rogers & McEwen, *supra* note 4, at 842; Wissler, *supra* note 5, at 234–35 (finding that taking law school courses was not related to ADR use and that taking an ADR CLE was not related to overall ADR use, but was related to the increased use of some processes). Few attorneys felt that lack of information about ADR processes was an important reason they had not used ADR. *See* Cavenagh, *supra* note 6, at 356–57; McAdoo, *supra* note 4, at 466 q.12; McAdoo & Hinshaw, *supra* note 5, at 489 tbl.7. *But see* McAdoo, *supra* note 4, at 447 n.144 (noting that some attorneys commented that ADR processes such as early neutral evaluation and summary jury trial were seldom used because attorneys lacked sufficient information about them).

<sup>23</sup> Rogers & McEwen, *supra* note 4, at 842, 845; Stipanowich, *supra* note 5, at 108–09; Wissler, *supra* note 5, at 235; Wissler et al., *supra* note 11, at 306.

<sup>24</sup> Of course, clients' views of ADR and their policies regarding the handling of disputes also will affect attorneys' consideration and use of ADR. *See, e.g.,* Craig A. McEwen, *Managing Corporate Disputing: Overcoming Barriers to the Effective Use of Mediation for Reducing the Cost and Time of Litigation*, 14 OHIO ST. J. ON DISP. RESOL. 1, 9–14 (1998); Macfarlane, *supra* note 11, at 318; Robert H. Mnookin & Lee Ross,

Attorneys' concerns about ADR could reflect misperceptions as a result of unfamiliarity with ADR.<sup>25</sup> In addition, attorneys might not see the appropriateness or value of ADR because their training, "philosophical map," and practice emphasize an adversarial rather than a problem-solving perspective.<sup>26</sup> And for some attorneys, negative perceptions of ADR could be the direct result of experience with a poor quality ADR session.<sup>27</sup>

Several cognitive barriers that hinder negotiation and settlement<sup>28</sup> also might affect attorneys' views and impede their use of ADR. For instance, if "optimistic overconfidence" leads to overestimates of the likelihood of favorable case outcomes,<sup>29</sup> attorneys will be less likely to see a need to use ADR to facilitate settlement. If their consideration of ADR is "framed" in terms of what will be lost relative to litigation rather than what will be gained,<sup>30</sup> attorneys will be less likely to use ADR. And if their opponent proposes ADR, "reactive devaluation"<sup>31</sup> will lead attorneys to suspect that using ADR will be to their disadvantage and to view it less positively.

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*Introduction to BARRIERS TO CONFLICT RESOLUTION* 2, 6, 19-20 (Kenneth J. Arrow et al. eds., 1995); Wissler et al., *supra* note 11, at 301-04.

<sup>25</sup> See *supra* note 15.

<sup>26</sup> Riskin, *supra* note 11, at 44-45; William F. Coyne, Jr., *Using Settlement Counsel for Early Dispute Resolution*, 15 NEGOT. J. 11 (1999) (arguing that a problem-solving mind-set is incompatible with the mind-set of an effective trial advocate); Heumann & Hyman, *supra* note 11, at 295 (suggesting that attorneys' habitual practices in litigation explained why positional negotiations took place in a majority of cases, even though attorneys would prefer problem-solving negotiations); Carrie Menkel-Meadow, *The Transformation of Disputes by Lawyers: What the Dispute Paradigm Does and Does Not Tell Us*, 1985 MO. J. DISP. RESOL. 25, 30-34 (1985); HERBERT KRITZER, *LAWYERS WHO LITIGATE: BACKGROUND, WORK SETTING, AND ATTITUDES* 21 (Disputes Processing Research Program, Working Papers Series 9:5, 1988) (reporting that civil litigators were substantially more likely to rate "arguing and trying cases" rather than "negotiating" as the aspect of their work they liked best); Macfarlane, *supra* note 11, at 282, 302.

<sup>27</sup> See, e.g., Wissler et al., *supra* note 11, at 306.

<sup>28</sup> See generally, Mnookin & Ross, *supra* note 24, at 6-19; Jean R. Sternlight, *Lawyers' Representation of Clients in Mediation: Using Economics and Psychology to Structure Advocacy in a Nonadversarial Setting*, 14 OHIO ST. J. ON DISP. RESOL. 269, 307-14 (1999) (summarizing the psychological research on barriers to settlement); Lee Ross & Constance Stillinger, *Barriers to Conflict Resolution*, 7 NEGOT. J. 389, 392-96 (1991).

<sup>29</sup> Daniel Kahneman & Amos Tversky, *Conflict Resolution: A Cognitive Perspective*, in *BARRIERS TO CONFLICT RESOLUTION* 44, 45-48 (Kenneth J. Arrow et al. eds., 1995).

<sup>30</sup> *Id.* at 54.

<sup>31</sup> Lee Ross, *Reactive Devaluation in Negotiation and Conflict Resolution*, in *BARRIERS TO CONFLICT RESOLUTION* 27, 28, 38 (Kenneth J. Arrow et al. eds., 1995).



In addition, attorneys' economic interests could color their views of the relative benefits of ADR and litigation. Attorneys who are paid on a contingent-fee basis might give insufficient weight to the importance of their client's non-monetary goals<sup>32</sup> and, thus, attach less importance to ADR's potential for addressing those interests. And because contingent-fee lawyers have an interest in resolving modest cases quickly,<sup>33</sup> they might view ADR as producing a more expensive and slower resolution than a negotiated settlement. By contrast, attorneys paid on an hourly fee basis might attach extra weight to full, formal discovery<sup>34</sup> and to the benefits their clients can derive by delaying settlement or threatening to go to trial. And attorneys' estimates of whether their long-term compensation, advancement, and prestige would benefit more from clients' increased use of ADR or of litigation<sup>35</sup> also could affect their views of these options.<sup>36</sup>

The structural and strategic aspects of litigation that are thought to impede early settlement are also likely to affect attorneys' views of when or whether to discuss ADR. The demands of numerous other active cases and the lack of early court deadlines contribute to not assessing cases early for their ADR or settlement potential.<sup>37</sup> The virtually automatic progression of litigation and the inertia of following the usual process,<sup>38</sup> combined with the

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<sup>32</sup> Sternlight, *supra* note 28, at 321–22; HERBERT M. KRITZER, LET'S MAKE A DEAL: UNDERSTANDING THE NEGOTIATION PROCESS IN ORDINARY LITIGATION 45–46, 155 (1991) (reporting that contingent-fee lawyers were more likely to avoid non-monetary cases and were more likely to report money-only exchanges in negotiation than were lawyers paid hourly); Wissler et al., *supra* note 11, at 296.

<sup>33</sup> See Kritzer, *supra* note 32, at 32, 44, 105, 125–26, 132 (reporting that most “ordinary” cases settled with one or two offer-demand exchanges and limited attorney time devoted to negotiation); HYMAN ET AL., *supra* note 1, at 82 (reporting that negotiations involved only limited steps and exchange of information).

<sup>34</sup> Macfarlane, *supra* note 11, at 291–92 (reporting that attorneys noted tensions between discovery and early settlement due to a loss of income); Mnookin & Ross, *supra* note 24, at 20–21; Rogers & McEwen, *supra* note 4, at 842, 863; Folberg et al., *supra* note 1, at 358–59.

<sup>35</sup> John Lande, *Failing Faith in Litigation? A Survey of Business Lawyers' and Executives' Opinions*, 3 HARV. NEGOT. L. REV. 1, 24 (1998). These findings were based primarily on a 1994 survey in four states of 70 outside counsel in commercial practice, 58 inside counsel, and 50 executives. *Id.* at 10–11. See also Macfarlane, *supra* note 11, at 283; Lande, *supra* note 5, at 180; Reuben, *supra* note 5, at 59.

<sup>36</sup> *Court ADR*, *supra* note 15, at 133; Folberg et al., *supra* note 1, at 358–59; Riskin, *supra* note 11, at 43, 48–49; Rogers & McEwen, *supra* note 4, at 846.

<sup>37</sup> Macfarlane, *supra* note 11, at 279, 309; McEwen et al., *supra* note 7, at 172–74; Coyne, Jr., *supra* note 26 at 13–14; Folberg et al., *supra* note 1, at 359.

<sup>38</sup> HYMAN ET AL., *supra* note 1, at 81, 118, 138, 162–64; McEwen et al., *supra* note 7, at 155; McEwen, *supra* note 24, at 24–26; Lande, *supra* note 35, at 36; Macfarlane,

escalation of commitment and strategic moves in negotiation,<sup>39</sup> make it difficult to stop the process and propose ADR.<sup>40</sup>

One specific view of ADR that is frequently mentioned as a barrier is the concern that proposing ADR is viewed as a sign of weakness. Attorneys might be reluctant to discuss ADR if they think it will be interpreted by clients as a lack of commitment to their case or by opposing counsel as a lack of confidence or resolve.<sup>41</sup> In addition to strategic considerations in the instant case, some attorneys might have a more general interest in establishing a reputation for being a fierce litigator and, thus, might not propose ADR if they think doing so will make them look weak.<sup>42</sup>

Across a number of surveys, more attorneys had favorable than unfavorable general attitudes toward ADR processes, although a sizeable number held intermediate or noncommittal views.<sup>43</sup> And when they assessed

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*supra* note 11, at 279, 309; Heumann & Hyman, *supra* note 11, at 295.

<sup>39</sup> For a discussion of strategic barriers to settlement, which lead each side to take more extreme or contentious actions in an effort to maximize their outcomes and minimize the chance of being exploited, see, for example, Mnookin & Ross, *supra* note 24, at 6–19; Robert J. Condlin, *Bargaining in the Dark: The Normative Incoherence of Lawyer Dispute Bargaining Role*, 51 MD. L. REV. 1, 3–16 (1992); McEwen et al., *supra* note 7, at 157–59; Ronald J. Gilson & Robert H. Mnookin, *Cooperation and Competition in Litigation: Can Lawyers Dampen Conflict?*, in BARRIERS TO CONFLICT RESOLUTION 184, 187 (Kenneth J. Arrow et al. eds., 1995).

<sup>40</sup> Goodpaster, *supra* note 11, at 224; Lande, *supra* note 35, at 36; Mnookin & Ross, *supra* note 24, at 18–19; Craig A. McEwen & Thomas W. Milburn, *Explaining a Paradox of Mediation*, 9 NEGOT. J. 23, 25–28 (1993); Max H. Bazerman & Margaret A. Neale, *Negotiator Reality and Negotiator Cognition: The Interactive Roles of Prescriptive and Descriptive Research*, in NEGOTIATION ANALYSIS 109, 115 (H. Peyton Young ed., 1991).

<sup>41</sup> Dauer, *supra* note 15, at 840–41; Marguerite Millhauser, *The Unspoken Resistance to Alternative Dispute Resolution*, 3 NEGOT. J. 29, 31–32 (1987); KAKALIK ET AL., *supra* note 7, at 52; Sternlight, *supra* note 28, at 320–21; Barbara Mahan, *Why Corporations Hesitate to Mediate*, CAL. LAW. Feb. 1989, at 42, 44; Folberg et al., *supra* note 1, at 358.

<sup>42</sup> Sternlight, *supra* note 28, at 321–22; Dauer, *supra* note 15, at 840; Breger, *supra* note 14, at 449–50.

<sup>43</sup> See, e.g., COLE ET AL., *supra* note 3, § 4:7 (citing a survey of 900 litigators and corporate counsel that found a majority thought ADR should be used more frequently); Lande, *supra* note 5, at 172–73; McAdoo, *supra* note 4, at 418; McAdoo & Hinshaw, *supra* note 5, at 493 tbl.10; Phillips, *supra* note 5, at 7 tbl.3, 8 tbl.4; Powell, *supra* note 5, at 6; Wissler, *supra* note 5, at 221. *But see*, Reuben, *supra* note 5, at 56 (reporting that although more attorneys preferred mediation over litigation for resolving disputes (51% vs. 31%), fewer attorneys preferred arbitration over litigation (31% vs. 43%)). See also Macfarlane, *supra* note 11, at 254–59 (describing five sets of attorney attitudes toward mediation and adjudication).

their general ADR experience or evaluated a specific ADR program in which they recently had participated, a majority of attorneys in most studies gave favorable ratings.<sup>44</sup> Limited survey data suggest that few attorneys thought that proposing ADR to an opponent would be interpreted as a sign of weakness.<sup>45</sup> With regard to attorneys' assessments of litigation, one study found that a majority were satisfied with the *results* of litigation, but that fewer were satisfied with the litigation *process*, particularly its slowness and high costs.<sup>46</sup>

The empirical evidence regarding the relationship between attorneys' attitudes about ADR or litigation and their use of ADR is mixed. One study found that attorneys who had more favorable attitudes toward the use of mediation in civil cases were more likely to recommend mediation to clients and to use mediation.<sup>47</sup> Several studies have found that attitudes favorable to ADR did not necessarily ensure greater ADR use.<sup>48</sup> One study found that attorneys who were concerned that proposing ADR would signal weakness were unwilling to communicate their interest in using an alternative process to opposing counsel, even through an intermediary.<sup>49</sup> The evidence regarding

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<sup>44</sup> See, e.g., Lande, *supra* note 5, at 176; Phillips, *supra* note 5, at 5 tbl.1, 6 tbl.2, 7 tbl.3, 8 tbl.4; Stipanowich, *supra* note 5, at 121; Roselle L. Wissler, *Court-Connected Mediation in General Civil Cases: What We Know from Empirical Research*, 17 OHIO ST. J. ON DISP. RESOL. 641, 663 (2002); Rosenberg & Folberg, *supra* note 7, at 1487, 1497–1510; David I. Levine, *Early Neutral Evaluation: The Second Phase*, 1989 J. DISP. RESOL. 1, 16–17, 45–46; James J. Alfani, *Summary Jury Trials in State and Federal Courts: A Comparative Analysis of the Perceptions of Participating Lawyers*, 4 OHIO ST. J. ON DISP. RESOL. 213, 230, 233 (1989); Keith O. Boyum, *Afterword: Does Court-Annexed Arbitration "Work"?*, 14 JUST. SYS. J. 244, 245–46 (1991); BARBARA S. MEIERHOEFER, COURT-ANNEXED ARBITRATION IN TEN DISTRICT COURTS 6, 77–81 (1990).

<sup>45</sup> Stipanowich, *supra* note 5, at 95; see also Rob Davis, *Negotiating Personal Injury Cases: A Survey of the Attitudes and Beliefs of Personal Injury Lawyers*, 68 AUSTL. J. L. 734, 735, 747 (1994) (reporting that about 10% of personal injury litigators in Queensland, Australia thought that making the first settlement offer was seen as a sign of weakness).

<sup>46</sup> Lande, *supra* note 35, at 16–17, 23, 35–36.

<sup>47</sup> Wissler, *supra* note 5, at 226 n.146.

<sup>48</sup> Lande, *supra* note 5, at 199, 218, 222 ("Respondents described the familiar 'not in my case' reaction of ostensible mediation believers when presented with opportunities to mediate their cases."); Rogers & McEwen, *supra* note 4, at 841–42, 847; Rosenberg & Folberg, *supra* note 7, at 1487; Medley & Schellenberg, *supra* note 5, at 194–95.

<sup>49</sup> Roselle L. Wissler et al., *Resolving Libel Cases Out of Court: How Attorneys View the Libel Dispute Resolution Program*, 75 JUDICATURE 329, 332 (1992). These findings were based on telephone interviews conducted from 1987 to 1990 with 222 attorneys who had considered an alternative process for resolving media libel disputes. *Id.* at 330.

whether there is a relationship between attorneys' perceptions of negotiation or litigation and their ADR use also is mixed.<sup>50</sup>

### C. Judicial Involvement

Given the many impediments to ADR use discussed above, judicial involvement in the consideration of ADR processes might be needed to overcome them.<sup>51</sup> Judges' support for the use of ADR can enhance attorneys' views of the value and appropriateness of ADR.<sup>52</sup> Of course, some of the same factors that are thought to keep attorneys from discussing ADR might also act as barriers to greater judicial encouragement of ADR. For instance, judges might be reluctant to suggest ADR if they themselves are not knowledgeable about or supportive of ADR.<sup>53</sup> In addition, judges are likely to be hesitant to discuss ADR with litigants due to concerns about interfering with the attorney-client relationship.<sup>54</sup> And unless the discussion of ADR options is integrated into an existing case management system, caseload and scheduling pressures are likely to prevent judicial involvement.

One study found that judges were not very familiar with ADR processes and that they had more favorable attitudes toward those processes with which they were more familiar.<sup>55</sup> In another study, a majority of judges had generally favorable attitudes toward mediation, including toward mandating its use when neither party requested it.<sup>56</sup> These studies, however, did not

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<sup>50</sup> See Lande, *supra* note 35, at 42 tbl.3 (reporting that for outside counsel, those who thought the court system was working well used ADR in fewer cases, but for inside counsel there was no relationship between views of litigation and ADR use); McAdoo, *supra* note 4, at 466 q.12 (reporting that 40% of attorneys who had not used ADR said it was because they settle their cases without the use of ADR); McAdoo & Hinshaw, *supra* note 5, at 576 q.14 (reporting that 30% of attorneys who had not used ADR said it was because they preferred a trial).

<sup>51</sup> See generally *ADR Conference*, *supra* note 15 (discussing how judges can respond to attorneys' various concerns about ADR); KAKALIK ET AL., *supra* note 7, at 52; Welsh & McAdoo, *supra* note 15, at 13.

<sup>52</sup> Lande, *supra* note 5, at 221; Macfarlane, *supra* note 11, at 315.

<sup>53</sup> *Court ADR*, *supra* note 15, at 124-32 (discussing some reasons judges may be ambivalent about or hostile to ADR); Folberg et al., *supra* note 1, at 364-65, 415-16 (listing judges' ratings of their familiarity with and concerns about ADR processes). An uninformed or nonsupportive judge could not hold the kind of ADR discussions presented in *ADR Conference*, *supra* note 15.

<sup>54</sup> Folberg et al., *supra* note 1, at 371.

<sup>55</sup> *Id.* at 364-65, 415.

<sup>56</sup> Morris L. Medley & James A. Schellenberg, *Attitudes of Indiana Judges Toward Mediation*, 11 *MEDIATION Q.* 329, 332-33 (1994). These findings were based on a 1992 survey of 187 Indiana state trial court judges. *Id.* at 330-33.

examine whether judges' familiarity with or attitudes toward ADR were related to their encouragement of ADR use. And with regard to the impact of judicial involvement, the combined findings of two studies suggested that knowing that judges would encourage or order the use of ADR stimulated attorneys to consider and voluntarily use ADR, whereas knowing the court would not encourage or order ADR had the opposite effect.<sup>57</sup>

### III. THE PRESENT STUDY: SURVEY PROCEDURE AND RESPONDENT CHARACTERISTICS

Questionnaires<sup>58</sup> were mailed to all members of the Trial Practice Section<sup>59</sup> of the State Bar of Arizona in June 2001. At that time, Arizona attorneys had no explicit obligation to consider ADR.<sup>60</sup> The questionnaire

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<sup>57</sup> McAdoo, *supra* note 4, at 466 q.12, 470 q.28, 472 q.37, 476 q.48 (reporting that Minnesota judges took some action in a majority of cases in which attorneys did not agree on ADR, and only 16% of attorneys who had not used ADR gave as their reason that the court did not actively encourage or order ADR; 44% of the attorneys who voluntarily used mediation, 42% of those who used non-binding arbitration, and 15% of those who used binding arbitration said they did so because they anticipated the court would order ADR). *Cf.* McAdoo & Hinshaw, *supra* note 11, at 489 tbl.7, 501 tbl.19, 513 tbl.25, 533 tbl.34 (reporting that Missouri judges took some action in a minority of cases in which attorneys did not agree on ADR, and 34% of attorneys who had not used ADR gave as their reason that the court did not actively encourage or order ADR; only 7% of the attorneys who voluntarily used mediation (and none who used non-binding arbitration) said they did so because they anticipated the court would order ADR).

<sup>58</sup> The questionnaire was accompanied by a cover letter signed by the Chief Justice of the Arizona Supreme Court. Names and mailing addresses of the attorneys were obtained from the State Bar of Arizona. Bob Dauber and Ann Woodley also were involved in planning the study and designing the questionnaire. Patrick Scott and the Administrative Office of the Courts distributed the questionnaires and Susan Minchuk processed the completed questionnaires.

<sup>59</sup> We selected the Trial Practice Section because we assumed this group of attorneys would devote a substantial portion of their practice to civil litigation and, thus, would be the group for whom questions about the use of ADR in civil cases would be most relevant. *See* Wissler, *supra* note 5, at 220 n.118 (reporting that Ohio attorneys in civil litigation practice were more likely than those in non-litigation or criminal law practice to say that mediation was relevant to their practice and to say they had used ADR).

<sup>60</sup> The survey was conducted to collect information on attorneys' practices and attitudes prior to the adoption of an amendment to Rule 16(g) of the Arizona Rules of Civil Procedure. The questionnaires, which did not mention the proposed amendment, were completed after the petition to amend the rule had been filed and during the comment period for the proposed amendment. The amendment, which was subsequently adopted and took effect in December 2001, requires parties to confer about the possibility of settlement or ADR use within three months after the defendant's appearance (*i.e.*, filing of an answer or responsive motion) and to report the outcome of that discussion to

asked the attorneys about their discussions and use of ADR in the context of their Arizona state court civil practice during the preceding two years. The attorneys also were asked about their knowledge of different ADR processes, potential benefits of and barriers to using ADR, and the nature of their law practice.

Four hundred forty-six completed questionnaires were received, for a response rate of 45%.<sup>61</sup> Eighty-two percent of the respondents (363 attorneys) practiced primarily in Maricopa County (which includes the Phoenix metropolitan area), 15% (67 attorneys) practiced primarily in Pima County (which includes the Tucson metropolitan area), and 3% (15 attorneys) practiced primarily in the 13 other counties.<sup>62</sup>

Consistent with expectations, most attorneys (82%) devoted most of their practice (90% or more) to civil litigation.<sup>63</sup> Because we assumed that attorneys whose practice involved a greater proportion of civil litigation would provide more informed judgments, we limited the analyses reported in this Article to those attorneys who devoted half or more of their practice to civil litigation. This excluded 17 (4%) of the respondents. Thus, the findings reported in this article are based on the 426 Trial Practice Section members who devoted at least half of their practice to civil litigation. On average, these attorneys devoted 94% of their practice to civil litigation.<sup>64</sup>

Fifty-four percent of attorneys said the majority of their civil litigation practice was in the tort or personal injury area,<sup>65</sup> 42% practiced in the

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the court. ARIZ. R. CIV. P. 16(g)(2).

<sup>61</sup> Four questionnaires were returned as undeliverable. Two attorneys returned the questionnaire without completing it, indicating that their practice did not currently involve civil litigation. We did not have information that would permit us to assess whether attorneys who responded were representative of all attorneys in the sample, or whether they differed in some way from those who did not respond.

<sup>62</sup> One attorney did not specify a county. The response rate for the non-urban counties was lower than for the two urban counties. We did not have information that would permit us to ascertain whether this pattern for the non-urban counties reflected a true lower rate of returning questionnaires in those counties, or whether it was due to the fact that some attorneys practiced primarily in an urban county, even though their mailing address was in a non-urban county.

<sup>63</sup> The attorneys devoted from 1% to 100% of their practice to civil litigation, with an average of 90%. Throughout the article, when we report the "average" response, we are reporting the mean (*i.e.*, the sum of the values of the responses divided by the number of responses). RICHARD P. RUNYON & AUDREY HABER, FUNDAMENTALS OF BEHAVIORAL STATISTICS 90 (5th ed. 1984).

<sup>64</sup> Sixty-three percent of attorneys spent all of their practice in civil litigation, 29% spent three-fourths to 90% of their practice in civil litigation, and 8% spent half to three-fourths of their practice in civil litigation.

<sup>65</sup> Forty-seven percent of personal injury attorneys primarily represented plaintiffs

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business or commercial area, 2% practiced in the family law area, and 2% practiced in other areas.<sup>66</sup> The attorneys had been practicing law, on average, for seventeen years, with a range of one to fifty years. Twelve percent of the attorneys were solo practitioners, 32% worked in small firms, 23% in medium-sized firms, and 28% worked in large firms.<sup>67</sup> Only 3% of the attorneys were corporate or in-house counsel, and 2% worked in a governmental, public, or tribal agency.

### IV. ATTORNEYS' VOLUNTARY DISCUSSION AND USE OF ADR

In this section, we report how often attorneys voluntarily discussed ADR in their state court civil practice during the two years preceding the survey. We explore in what proportion of their cases attorneys discussed ADR with clients and with opposing counsel and when those discussions first took place. In addition, we examine how frequently attorneys voluntarily used ADR and which processes they tended to use.<sup>68</sup>

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and 53% primarily represented defendants. Throughout the Article, we report when personal injury plaintiffs and defense attorneys differed significantly in their actions or views. Similarly, we report when attorneys practicing in the personal injury area differed significantly from those practicing in the business area.

<sup>66</sup> "Other" practice areas listed by the attorneys included environmental law, probate and trust litigation, administrative law, condemnation or eminent domain, and government employment and civil rights.

<sup>67</sup> The size of the firm in which attorneys worked varied significantly depending on whether they practiced primarily in the business area or in the personal injury area, and for the latter group, depending on whether they primarily represented plaintiffs or defendants ( $\chi^2(6, N = 387) = 89.33, p < .001$ ). Attorneys who represented plaintiffs in personal injury cases were more likely than personal injury defense attorneys and attorneys who primarily handled business cases to be in solo (30% vs. 3% and 7%, respectively) or small firm practice (51% vs. 29% and 27%), and were less likely to be in medium (15% vs. 30% and 26%) or large firm practice (4% vs. 38% and 40%).

To determine whether apparent differences are "true" differences (*i.e.*, statistically significant differences) or merely reflect chance variation, tests of statistical significance must be conducted. Throughout the Article, we use one of the following statistical tests, depending on the question at issue: chi-square ( $\chi^2$ ), t-test (*t*), or analysis of variance (*F*). See RUNYON & HABER, *supra* note 63, at 278, 297–98, 363–64. The conventional level of probability for determining the statistical significance of findings for all of these tests is the .05 level (*i.e.*,  $p < .05$ ). *Id.* at 229–31.

<sup>68</sup> The questionnaire included judicial settlement conferences among the examples of voluntary ADR processes and specifically excluded unassisted settlement negotiations. See *infra* note 89 for a description of settlement conference programs.

### A. Frequency and Timing of ADR Discussions

Attorneys discussed the possible use of a voluntary ADR process with their clients, on average, in 78% of their filed civil cases. Forty percent of attorneys discussed ADR with clients in all of their cases, and 35% of attorneys did so in 75% to 99% of their cases.<sup>69</sup> Only 13% of attorneys discussed ADR with clients in fewer than half of their cases.<sup>70</sup>

In this percentage of their cases:	This percentage of attorneys discussed ADR with clients	This percentage of attorneys discussed ADR with opposing counsel
none of their cases	3%	5%
less than 1/4 of cases	6%	12%
1/4 to less than half of cases	4%	11%
half to less than 3/4 of cases	12%	25%
3/4 to 99% of cases	35%	34%
all of their cases	40%	13%

Attorneys discussed the possible use of a voluntary ADR process with opposing counsel,<sup>71</sup> on average, in 60% of their filed civil cases. Almost half of the attorneys (47%) discussed ADR with opposing counsel in three-fourths or more of their cases, and 25% did so in half to three-fourths of their cases.<sup>72</sup>

<sup>69</sup> See Table 1.

<sup>70</sup> For the frequency of client consultation in jurisdictions where it is required, see *infra* notes 174–75 and accompanying text.

<sup>71</sup> Comments written on the questionnaires indicated that a few attorneys considered claims representatives or insurance adjusters as “opposing counsel” when answering this question.

<sup>72</sup> See Table 1. The proportion of attorneys who seldom voluntarily discussed ADR with opposing counsel in the present study is comparable to that observed in another survey. See McAdoo & Hinshaw, *supra* note 5, at 500 tbl.17 (finding that 15% of attorneys “hardly ever” discussed ADR options with opposing counsel). Based on the comments a few attorneys had written on the questionnaire in the present study, some attorneys who never discussed *voluntary* ADR with opposing counsel primarily handled



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Thus, attorneys discussed ADR in a larger proportion of their cases with clients than with opposing counsel.<sup>73</sup> For instance, attorneys who discussed ADR with clients in all of their cases discussed ADR with opposing counsel, on average, in 77% of their cases. Nonetheless, there was a strong relationship between discussing ADR with clients and with opposing counsel, such that attorneys who discussed ADR with clients in more cases also discussed ADR with opposing counsel in more cases.<sup>74</sup> These observed patterns would be consistent with what would be expected if attorneys typically discuss ADR with opposing counsel only after conferring with their clients.<sup>75</sup>

ADR discussions, however, did not routinely occur early in the litigation process. One-third of attorneys often, almost always, or always discussed ADR with opposing counsel before the complaint was filed or within three months after the defendant's appearance.<sup>76</sup> Fifty percent of attorneys sometimes discussed ADR with opposing counsel early in the case, while 17% never or hardly ever discussed ADR early.<sup>77</sup>

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cases subject to *mandatory* ADR. In Arizona state courts, non-binding arbitration is required for all filed civil cases in which the amount in controversy does not exceed a jurisdictional limit established by each county (e.g., \$50,000 in Maricopa County). ARIZ. REV. STAT. ANN. § 12-133; ARIZ. R. CIV. P. 72-76; SUPER. CT. OF MARICOPA CO., ARIZ. R. 3.10.

<sup>73</sup>  $t(416) = 14.28, p < .001$ . Few attorneys (7%) reported talking about ADR more often with opposing counsel than with their clients.

<sup>74</sup>  $r(415) = .661, p < .001$ . The Pearson  $r$  statistic assesses whether an apparent relationship between two variables is a "true" relationship (i.e., is statistically significant) or merely reflects chance variation. The conventional level of probability for determining the statistical significance of findings is the .05 level (i.e.,  $p < .05$ ). The value of  $r$  (the correlation coefficient) indicates the strength of the relationship and ranges from +1.00 to -1.00, with 0.00 representing no relationship between the variables. RUNYON & HABER, *supra* note 63, at 140-42, 229-31. As a rough guide to interpreting the size of correlation coefficients,  $r = .10$  is considered a small relationship,  $r = .30$  is considered medium, and  $r = .50$  is considered a large relationship. ROBERT ROSENTHAL & RALPH L. ROSNOW, *ESSENTIALS OF BEHAVIORAL RESEARCH* 361 (1984).

<sup>75</sup> See also McAdoo & Hinshaw, *supra* note 5, at 497 tbl.14, 500 tbl.17 (showing that in the first three months after the case was filed, attorneys were almost twice as likely to discuss ADR with clients as with opposing counsel).

<sup>76</sup> We defined this time period as "early" to correspond with the amendment to Rule 16(g)(2), which now requires the parties to confer about settlement and ADR use within the first 90 days after the defendant's appearance. ARIZ. R. CIV. P. 16(g)(2). This time period generally corresponds to four to nine months after the complaint was filed, depending on how quickly the plaintiff serves the defendant and how quickly the defendant responds. ARIZ. R. CIV. P. 4(i), 12(a)(1).

<sup>77</sup> See Table 2. Attorneys who practiced primarily in the business area were more likely than personal injury attorneys to discuss ADR with opposing counsel early in the

	ADR	Settlement
never or hardly ever	17%	5%
sometimes	50%	42%
often	26%	35%
always or almost always	7%	18%

Attorneys who were more likely to discuss ADR with opposing counsel early also tended to discuss ADR with clients and with opposing counsel in more of their cases.<sup>78</sup> For instance, attorneys who often, almost always, or always discussed ADR early talked about ADR with opposing counsel, on average, in 72% of their cases. In contrast, attorneys who never or hardly ever discussed ADR early talked about ADR with opposing counsel, on average, in 51% of their cases.

Attorneys were more likely to discuss *settlement* early in their cases than to discuss *ADR* early.<sup>79</sup> Over half (53%) of the attorneys often, almost always, or always discussed settlement early.<sup>80</sup> Of those attorneys who regularly discussed settlement early in their cases, fewer than half (44%) regularly discussed ADR during the same time period. Nonetheless, attorneys who were more likely to discuss settlement with opposing counsel early in their cases also were more likely to discuss the possible use of ADR early.<sup>81</sup>

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case ( $t(376) = 3.15, p < .01$ ), although they did not discuss ADR more frequently. Thirty-nine percent of business attorneys, compared to 28% of personal injury attorneys, said they often, almost always, or always discussed ADR early. The difference in the timing of discussions would be consistent with assumptions that business and personal injury cases differ in ways that might permit earlier discussions in business cases (e.g., that business cases are more likely to involve disputes in which more information is known early and in which the parties have an existing or on-going relationship). See also Macfarlane, *supra* note 11, at 281 (reporting that business attorneys felt mediation could be useful early, while personal injury attorneys wanted to wait until they had a more stable assessment of damages).

<sup>78</sup> Opposing counsel:  $r(393) = .236, p < .001$ . Clients:  $r(391) = .209, p < .001$ .

<sup>79</sup>  $t(391) = 9.35, p < .001$ .

<sup>80</sup> See Table 2. As for ADR discussions, attorneys who practiced primarily in the business area were more likely to discuss settlement early than were personal injury attorneys ( $F(1,401) = 19.06, p < .001$ ). Sixty-six percent of business attorneys, compared to 41% of personal injury attorneys, said they often, almost always, or always discussed settlement early. See *supra* note 77.

<sup>81</sup>  $r(390) = .292, p < .001$ .

These observed patterns would be consistent with what would be expected if attorneys typically discuss ADR use only after they first try unassisted settlement negotiations.

### B. Frequency of ADR Use

Almost all attorneys (95%) had used a voluntary ADR process in at least one case in the prior two years.<sup>82</sup> This does not mean, however, that most attorneys used ADR in most of their cases; on average, they used a voluntary ADR process in 41% of their cases.<sup>83</sup> Twenty percent of attorneys used ADR in three-fourths or more of their cases, and 25% used ADR in half to three-fourths of their cases.<sup>84</sup> One-third of attorneys used ADR in fewer than one-fourth of their cases.

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<sup>82</sup> Almost all attorneys had used mediation (96%) and a majority had used judge *pro tem* settlement conferences (71%) (*see infra* note 89) or private arbitration (58%), but few had used shorttrial/summary jury trial (SJT) (18%) (*see infra* note 91) or early neutral evaluation (ENE) (12%). Personal injury attorneys used mediation ( $t(380) = 3.43, p < .01$ ) and shorttrial/SJT ( $t(356) = 2.69, p < .01$ ) more frequently than did business attorneys.

Other surveys also typically have found that a majority of attorneys have used ADR. *See supra* note 5 and accompanying text. Surveys of civil litigators or general attorney populations also have found a similar pattern of use among the ADR processes: a majority of attorneys have used mediation, an intermediate number have used arbitration, and relatively few have used ENE, SJT, or mini-trial. *See* McAdoo, *supra* note 4, at 468–69 q. 20; McAdoo & Hinshaw, *supra* note 5, at 578 q.18; Powell, *supra* note 5, at 6; Wissler, *supra* note 5, at 220–21; Zariski, *supra* note 6, app. A at 5. But surveys of attorneys who practiced in the construction and entertainment areas found greater use of binding arbitration than mediation. *See* Phillips, *supra* note 5, at 7 tbl.3, 8 tbl.4; Stipanowich, *supra* note 5, at 90 tbls.A-1, A-2, 132 tbl.AA-1.

<sup>83</sup> Attorneys who practiced primarily in the personal injury area used voluntary ADR in a larger proportion of their cases (46%) than did attorneys who practiced primarily in the business area (36%) ( $t(401) = -3.55, p < .001$ ). This finding does not seem to be explained by the relative frequency or timing of ADR discussions by business versus personal injury attorneys.

<sup>84</sup> *See* Table 3. *See supra* note 6 for other studies that reported the frequency of ADR use (voluntary and compulsory use combined).

In this percentage of their cases:	This percentage of attorneys used ADR
none of their cases	5%
less than 1/4 of cases	28%
1/4 to less than half of cases	22%
half to less than 3/4 of cases	25%
3/4 to all of their cases	20%

### C. Relationships Between the Discussion and Use of ADR

We examined the relationship between the frequency and timing of attorneys' ADR discussions and the frequency of voluntary ADR use. Because attorneys would need to discuss voluntary ADR processes in order to use them, it is not surprising that attorneys who more frequently discussed ADR with clients and with opposing counsel also tended to use ADR more often.<sup>85</sup> Interestingly, attorneys who were more likely to discuss ADR early in their cases did not use ADR more frequently.<sup>86</sup>

The frequency of ADR discussions with clients and with opposing counsel, taken together, accounted for 50% of the variation in the frequency of voluntary ADR use.<sup>87</sup> That is, half of the differences among attorneys in how often they used voluntary ADR processes could be explained by how

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<sup>85</sup> Clients:  $r(415) = .496, p < .001$ . Counsel:  $r(420) = .709, p < .001$ . However, attorneys used ADR in a smaller proportion of their cases than those in which they discussed ADR with clients ( $t(421) = 16.98, p < .001$ ) or with opposing counsel ( $t(416) = 25.94, p < .001$ ). For instance, attorneys who discussed ADR with clients in all of their cases used ADR, on average, in 55% of their cases.

<sup>86</sup> Although more frequent early ADR discussions were not associated with more frequent ADR use ( $r(393) = .080, p = .114$ ), they were associated with earlier settlements ( $r(392) = .135, p < .01$ ). More frequent early settlement discussions also were associated with earlier settlements ( $r(418) = .171, p < .001$ ), but were associated with less frequent ADR use ( $r(415) = -.119, p < .05$ ).

<sup>87</sup>  $F(2,414) = 204.99, p < .001$ ;  $R = .707, R^2 = .50$ .  $R$  indicates the strength of the relationship between a set of measures being used as predictors (e.g., discussing ADR with clients and with opposing counsel) and the measure being predicted (e.g., ADR use). See BARBARA G. TABACHNICK & LINDA S. FIDELL, USING MULTIVARIATE STATISTICS 53 (1983).  $R^2$  indicates the proportion of variation in the measure being predicted (here, ADR use) that is explained or accounted for by the set of predictors. *Id.* at 97.

often they discussed ADR options. Accordingly, factors that act as barriers to attorneys' discussions of ADR could potentially also play a sizeable role in how often attorneys use ADR.

## V. POTENTIAL BARRIERS: THEIR PREVALENCE AND IMPACT ON VOLUNTARY ADR DISCUSSIONS AND USE

In this section, we examine a set of ADR-specific factors that are thought to constrain attorneys' discussion and use of ADR, including attorneys' knowledge of ADR processes; attorneys' views of ADR and attitudes toward policies mandating ADR discussion and use; and the extent to which courts encourage the use of ADR. We explore how widespread these factors are, as well as whether they are related to attorneys' voluntary discussions about and use of ADR.

### A. Attorneys' Knowledge of ADR Processes

Attorneys were more knowledgeable about some ADR processes than others.<sup>88</sup> A majority of attorneys said they could explain "very well" the processes of mediation (83%), binding arbitration (83%), non-binding arbitration (78%) or judge *pro tem* settlement conference<sup>89</sup> (75%).<sup>90</sup> Fewer than half of the attorneys, however, said they could explain "very well" the

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<sup>88</sup> See Table 4. To assess attorneys' ADR knowledge, we asked them to rate how well they could explain each of several ADR processes to clients. They made their ratings on a 5-point scale, with "1" labeled "not at all," "3" labeled "somewhat," and "5" labeled "very well." The percentages reported here for "not at all or a little" are the percentage of ratings of "1" or "2"; "somewhat" is the percentage of ratings of "3"; "well" is the percentage of ratings of "4"; and "very well" is the percentage of ratings of "5."

<sup>89</sup> The judges *pro tempore* generally were attorneys serving pro bono. Maricopa County had a civil settlement conference program within its ADR Programs Office, and the conferences were conducted primarily by judges *pro tem* or by court commissioners. See SUPER. CT. OF MARICOPA COUNTY, ARIZ., ALTERNATIVE DISPUTE RESOLUTION PROGRAMS INFORMATION SHEET (2002). In Pima County, judges *pro tem* conducted 45% of the settlement conferences held. See SUPER. CT. OF PIMA COUNTY, ARIZ., 2002 REP., SETTLEMENT CONFERENCES. Although the questionnaire specified "judge *pro tem* settlement conference," we cannot be sure whether attorneys answered based on this more narrow categorization or whether they also considered judicial settlement conferences in their answers.

<sup>90</sup> Attorneys' familiarity with mediation and binding arbitration did not differ, nor did their familiarity with judge *pro tem* settlement conference and non-binding arbitration differ. However, attorneys felt better able to explain binding arbitration and mediation than non-binding arbitration and judge *pro tem* settlement conference ( $p$ 's < .01).

processes of shorttrial/summary jury trial (SJT)<sup>91</sup> (40%)<sup>92</sup> or early neutral evaluation (ENE) (35%).<sup>93</sup> Attorneys who were more familiar with one ADR process also tended to be more familiar with each of the other ADR processes.<sup>94</sup>

Table 4. How Well Attorneys Said They Could Explain ADR Processes to Clients

	Mediation	Binding arb.	Non-binding arb.	Settlement conference	Shorttrial or SJT	ENE
not at all, a little	1%	1%	3%	3%	14%	18%
somewhat	3%	4%	5%	7%	26%	23%
well	13%	12%	14%	15%	19%	15%
very well	83%	83%	78%	75%	40%	35%

Attorneys' knowledge of ADR was related to the frequency of their ADR discussions and use. Specifically, attorneys who were less familiar with ADR

<sup>91</sup> In a shorttrial, a four-person jury hears an abbreviated presentation of trial evidence and then renders a binding verdict. See Christopher M. Skelly, *Want a "Shorttrial"? Here's How*, MARICOPA LAW., March 1999, at 16. A shorttrial differs from a summary jury trial in that the latter involves a six-person jury rendering a non-binding verdict. See, e.g., Thomas D. Lambros, *The Summary Jury Trial—An Alternative Method of Resolving Disputes*, 69 JUDICATURE 286, 288–90 (1986). In at least one county, however, attorneys and judges often used these terms interchangeably. Accordingly, we combined the attorneys' responses regarding these two processes for reporting in this Article.

<sup>92</sup> Personal injury attorneys were more familiar with shorttrial/SJT than were business attorneys ( $t(397) = 3.59, p < .001$ ), but they did not differ in their knowledge of any other process.

<sup>93</sup> Attorneys were more familiar with shorttrial/SJT than ENE ( $t(416) = 6.89, p < .001$ ). Attorneys were more knowledgeable about mediation, binding and non-binding arbitration, and judge *pro tem* settlement conference than about either shorttrial/SJT or ENE ( $p$ 's  $< .001$ ). These findings of greater familiarity with mediation and arbitration than with SJT and ENE generally parallel those of other surveys. See *supra* notes 16–17 and accompanying text.

<sup>94</sup> The  $r$ 's ranged from .307 to .664,  $p$ 's  $< .001$ . For use in subsequent analyses, the measures of how well attorneys could explain each of the ADR processes were combined into a single measure of how well they could explain ADR processes overall. This measure had a Cronbach's alpha of .831. Cronbach's alpha indicates the reliability and internal consistency of a scale, and its values range from a low of 0.00 to a high of 1.00. EDWARD G. CARMINES & RICHARD A. ZELLER, RELIABILITY AND VALIDITY ASSESSMENT 44–47 (1979).

were less likely to discuss ADR with clients<sup>95</sup> and with opposing counsel,<sup>96</sup> and were less likely to discuss ADR early in the case.<sup>97</sup> For instance, attorneys who felt “somewhat” or less able to explain ADR processes discussed ADR with clients, on average, in 61% of their cases, whereas attorneys who felt they could explain ADR processes “very well” discussed ADR with clients, on average, in 83% of their cases. Similarly, attorneys who were less familiar with ADR processes<sup>98</sup> used a voluntary ADR process in fewer cases.<sup>99</sup>

### B. Attorneys' Views of ADR

We asked the attorneys to indicate their views<sup>100</sup> regarding several potential benefits of ADR and possible concerns about using ADR, as well as their attitudes toward policies mandating ADR discussion and use.

<sup>95</sup>  $r(408) = .226, p < .001$ .

<sup>96</sup>  $r(414) = .224, p < .001$ . Attorneys who felt “somewhat” or less able to explain ADR processes discussed ADR with opposing counsel, on average, in 42% of their cases, whereas attorneys who felt they could explain ADR processes “very well” discussed ADR with opposing counsel, on average, in 65% of their cases.

<sup>97</sup>  $r(387) = .158, p < .01$ . Attorneys who felt “somewhat” or less able to explain ADR processes routinely discussed ADR early, on average, in 23% of their cases, whereas attorneys who felt they could explain ADR processes “very well” routinely discussed ADR early, on average, in 37% of their cases.

<sup>98</sup>  $r(413) = .103, p < .05$ . Attorneys who felt “somewhat” or less able to explain ADR processes used ADR, on average, in 33% of their cases, whereas attorneys who felt they could explain ADR processes “very well” used ADR, on average, in 43% of their cases.

Because our data are based on correlations between measures of ADR knowledge and ADR use that were obtained at the same point in time, we cannot tell whether this correlation reflects that attorneys who are less familiar with ADR are less likely to use ADR, that attorneys who have used ADR less frequently are less familiar with ADR, that some third factor (*e.g.*, case mix or firm or client policies) underlies both less ADR knowledge and less ADR use, or that some combination of all three processes is operating. See RUNYON & HABER, *supra* note 63, at 180–81 (explaining that correlations assess whether two variables are associated with one another but not whether one causes the other or whether both are caused by a third variable).

<sup>99</sup> We also examined the relationship between familiarity with and use of each ADR process. Attorneys who felt less able to explain a particular ADR process tended to use that process less often ( $r$ 's ranged from .133 to .254,  $p$ 's < .01); the only exception was that familiarity with non-binding arbitration was not significantly related to using private arbitration. As an example, 27% of the attorneys who could explain mediation only “somewhat” or less well used mediation often, almost always, or always, whereas 82% of the attorneys who could explain mediation “very well” used mediation that frequently.

<sup>100</sup> We asked the attorneys to answer these questions with regard to ADR processes

## 1. Benefits of ADR

More attorneys thought that ADR processes offered benefits than thought they did not. Forty-one percent of attorneys thought clients were more satisfied as a result of using ADR, whereas 14% thought they were not.<sup>101</sup> Sixty-one percent of attorneys thought cases settled earlier in ADR, while only 12% thought they did not.<sup>102</sup> Seventy-one percent of attorneys felt the benefits involved in using ADR outweighed the costs; only 5% felt they did not.<sup>103</sup> Not surprisingly, attorneys who thought that ADR resulted in earlier settlement and higher client satisfaction also thought the benefits of using ADR outweighed the costs.<sup>104</sup> Interestingly, attorneys who were less knowledgeable about ADR were less likely to think that ADR provided benefits.<sup>105</sup>

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*other than compulsory arbitration. See supra note 72. The attorneys rated each dimension on a 5-point scale, with "1" labeled "strongly disagree" and "5" labeled "strongly agree." The percentages reported here for "disagree" are the percentage of ratings of "1" or "2"; "agree" reflects the percentage of ratings of "4" or "5"; and "neither agree nor disagree" is the percentage of ratings of "3."*

<sup>101</sup> See Table 5. It is worth noting that almost half (45%) of the attorneys were noncommittal or uncertain as to whether ADR produced greater client satisfaction, a larger proportion than for the other questions about ADR's benefits. Other surveys also have found that a minority of attorneys thought mediation or arbitration produced greater client satisfaction than litigation. See McAadoo, *supra* note 4, at 473 q.42, 477 q.49; McAadoo & Hinshaw, *supra* note 5, at 585 q.42, 592 q.52, 593 q.54; Reuben, *supra* note 5, at 56.

<sup>102</sup> See also McAadoo & Hinshaw, *supra* note 5, at 495 tbl.12 (35% of attorneys thought cases usually or always settled faster when ADR was used, and 48% thought they sometimes did). In several surveys that asked about specific types of ADR processes, a majority of attorneys thought that cases settled earlier in mediation than in litigation, but the percentage who thought that arbitration resolved cases faster than litigation varied across the surveys. See Medley & Schellenberg, *supra* note 5, at 190; McAadoo, *supra* note 4, at 473 q.42, 477 q. 49; McAadoo & Hinshaw, *supra* note 5, at 585 q.42, 592 q.52, 593 q.54; Stipanowich, *supra* note 5, at 148.

<sup>103</sup> For attorneys' general views of ADR in other surveys, see *supra* note 43.

<sup>104</sup> The *r*'s ranged from .399 to .423, *p*'s < .001. For use in subsequent analyses, these three dimensions were combined into a single measure of attorneys' perceptions of ADR's benefits, which had a Cronbach's alpha of .674. Personal injury defense attorneys thought ADR was less likely to produce benefits than did personal injury plaintiffs' attorneys ( $t(225) = 3.83, p < .001$ ).

<sup>105</sup>  $r(410) = .113, p < .05$ .



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Table 5. Attorneys' Views of Benefits of ADR

	Greater client satisfaction	Cases settle earlier	Benefits outweigh costs
agree	41%	61%	71%
neither agree nor disagree	45%	27%	24%
disagree	14%	12%	5%

Attorneys reported that, on average, 69% of their cases that went to ADR settled as a result of the ADR process. Thirty-seven percent of attorneys reported that 90% or more of their ADR cases settled as a result of the process, and almost one-fourth said that 75% to 89% of their ADR cases settled. Twenty-two percent of attorneys said half to three-fourths of their ADR cases settled as a result of the process, and 17% said that fewer than half of their ADR cases settled. Not surprisingly, attorneys who reported a lower rate of settlement in their cases that used ADR thought that ADR offered fewer benefits.<sup>106</sup>

Attorneys' views of whether ADR offered benefits were related to the frequency of their ADR discussions and use. Attorneys who thought ADR provided fewer benefits were less likely to discuss ADR with their clients<sup>107</sup> and with opposing counsel<sup>108</sup> and were less likely to have those discussions early in their cases.<sup>109</sup> Similarly, attorneys whose cases had a lower rate of settlement in ADR processes were less likely to discuss ADR with their clients<sup>110</sup> and with opposing counsel.<sup>111</sup> The rate of settlement attorneys

<sup>106</sup>  $r(393) = .413, p < .001$ .

<sup>107</sup>  $r(411) = .234, p < .001$ . Attorneys who thought that ADR did not provide benefits discussed ADR with clients, on average, in 65% of their cases, whereas attorneys who thought ADR offered benefits discussed ADR with clients, on average, in 85% of their cases.

<sup>108</sup>  $r(416) = .306, p < .001$ . Attorneys who thought that ADR did not provide benefits discussed ADR with opposing counsel, on average, in 43% of their cases, while attorneys who thought ADR offered benefits discussed ADR with opposing counsel, on average, in 72% of their cases.

<sup>109</sup>  $r(391) = .174, p < .01$ . Attorneys who thought ADR did not provide benefits regularly discussed ADR early, on average, in 18% of their cases, whereas attorneys who thought ADR offered benefits regularly discussed ADR early, on average, in 44% of their cases.

<sup>110</sup>  $r(394) = .191, p < .001$ . Attorneys who reported that half or fewer of their ADR cases settled discussed ADR with clients, on average, in 75% of their cases, whereas attorneys who reported that 90% or more of their ADR cases settled discussed ADR with clients, on average, in 84% of their cases.

<sup>111</sup>  $r(396) = .260, p < .001$ . Attorneys who reported settlement in half or fewer of their ADR cases discussed ADR with opposing counsel, on average, in 52% of their

experienced in their ADR cases, however, was not related to whether they discussed ADR early. Nonetheless, attorneys who thought that ADR offered fewer benefits<sup>112</sup> and who reported a lower rate of settlement in their ADR cases<sup>113</sup> were less likely to use voluntary ADR processes.

## 2. "Sign of Weakness"

Relatively few attorneys felt that clients or other attorneys perceived suggesting ADR as a sign of weakness (17% and 13%, respectively).<sup>114</sup> In contrast, over half of the attorneys did not think others viewed proposing ADR as signaling weakness.<sup>115</sup> Interestingly, attorneys who were less familiar with ADR were more likely to think that others viewed proposing ADR as a sign of weakness.<sup>116</sup>

	By clients	By other attorneys
agree	17%	13%
neither agree nor disagree	30%	30%
disagree	53%	57%

cases, whereas attorneys who reported settlement in 90% or more of their ADR cases discussed ADR with opposing counsel, on average, in 69% of their cases.

<sup>112</sup>  $r(415) = .246, p < .001$ . Attorneys who thought ADR did not provide benefits used ADR, on average, in 25% of their cases, whereas those who thought ADR offered benefits used ADR, on average, in 51% of their cases.

<sup>113</sup>  $r(396) = .235, p < .001$ . Attorneys who reported settlement in half or fewer of their ADR cases used ADR, on average, in 33% of their cases, while attorneys who reported settlement in 90% or more of their ADR cases used ADR, on average, in 48% of their cases.

<sup>114</sup> Table 6. See *supra* note 45 and accompanying text for the findings of other surveys.

<sup>115</sup> Attorneys who thought that other attorneys viewed proposing ADR as a sign of weakness also tended to think that clients viewed proposing ADR as a sign of weakness ( $r(422) = .520, p < .001$ ). These two measures of perceived weakness were combined into a single measure, which had a Cronbach's alpha of .684, for use in subsequent analyses. Business attorneys were more likely than personal injury attorneys to think that others viewed proposing ADR as signaling weakness ( $t(404) = 3.02, p < .01$ ).

<sup>116</sup>  $r(413) = -.225, p < .001$ ; see also Stipanowich *supra* note 5, at 108–09 (attorneys with more mediation experience were less likely to think proposing mediation signaled weakness).

Attorneys who were more likely to think others viewed proposing ADR as a sign of weakness were less likely to discuss ADR with their clients<sup>117</sup> and with opposing counsel.<sup>118</sup> Surprisingly, attorneys' views about whether proposing ADR signaled weakness were not related to whether they discussed ADR early in their cases. Nonetheless, attorneys who were more likely to think proposing ADR was viewed as a sign of weakness were less likely to use voluntary ADR processes.<sup>119</sup>

### 3. Other Concerns About ADR

Attorneys' views regarding other possible concerns about ADR were mixed. Twenty-six percent of attorneys thought that ADR provided free discovery for the other side, whereas 42% thought it did not.<sup>120</sup> Thirty-nine percent of attorneys felt that the supply of qualified ADR neutrals was insufficient, while 30% thought it was sufficient.<sup>121</sup> Attorneys who were less knowledgeable about ADR tended to think that ADR provided free discovery,<sup>122</sup> but ADR knowledge was not related to views about the supply of neutrals.

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<sup>117</sup>  $r(414) = -.174, p < .001$ . Attorneys who thought proposing ADR was seen as a sign of weakness discussed ADR with clients, on average, in 69% of their cases, whereas attorneys who thought proposing ADR did not signal weakness discussed ADR with clients, on average, in 86% of their cases.

<sup>118</sup>  $r(419) = -.179, p < .001$ . Attorneys who thought proposing ADR was seen as a sign of weakness discussed ADR with opposing counsel, on average, in 50% of their cases, while attorneys who thought proposing ADR did not signal weakness discussed ADR with opposing counsel, on average, in 69% of their cases.

<sup>119</sup>  $r(418) = -.207, p < .001$ . Attorneys who thought proposing ADR was seen as a sign of weakness used ADR, on average, in 32% of their cases, whereas attorneys who thought proposing ADR did not signal weakness used ADR, on average, in 46% of their cases.

<sup>120</sup> See Table 7. Business attorneys were more likely than personal injury attorneys to think that ADR provided free discovery for the other side ( $t(403) = 2.60, p < .05$ ). Other surveys also have found that relatively few attorneys view ADR as providing free discovery. See McAdoo & Hinshaw, *supra* note 5, at 576 q.14; Stipanowich, *supra* note 5, at 121.

<sup>121</sup> See Table 7. The findings of other surveys varied greatly with regard to attorneys' views on the issue of qualified neutrals. See, e.g., Medley & Schellenberg, *supra* note 5, at 190 (28% thought there were not enough adequately trained mediators); Reuben, *supra* note 5, at 58 (70% were at least "somewhat" concerned about neutrals' qualifications or personal biases).

<sup>122</sup>  $r(412) = -.128, p < .01$ .

	Provides free discovery	Insufficient qualified neutrals
agree	26%	39%
neither agree nor disagree	32%	31%
disagree	42%	30%

Attorneys' views about whether ADR provided free discovery and whether the supply of qualified neutrals was sufficient were not related to how frequently they discussed ADR with clients or with opposing counsel, to whether they discussed ADR early in their cases, or to how frequently they used voluntary ADR processes.

#### 4. Attitudes Toward Mandatory ADR Policies

A majority (62%) of attorneys felt that ADR should be used only when both parties to a dispute wanted to use it.<sup>123</sup> One-fourth, however, supported mandatory ADR use.

Attorneys were significantly more supportive of requirements to *discuss* ADR than requirements to *use* ADR.<sup>124</sup> Almost half of the attorneys (46%) felt that the court should require them to attend a pretrial conference to discuss ADR when they and opposing counsel cannot agree on an ADR process, while 37% felt they should not be required to attend such a conference. Attorneys were even more supportive of a requirement to discuss ADR options early in their cases.<sup>125</sup> Over half of the attorneys (53%) felt that they should be required to discuss ADR options early, whereas 30% felt that early ADR discussions should not be required.<sup>126</sup>

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<sup>123</sup> See Table 8. The findings of other surveys varied greatly with regard to attorneys' views on mandatory ADR use. See, e.g., Medley & Schellenberg, *supra* note 5, at 190 (57% thought civil mediation should be used only when both parties wanted to, while 32% disagreed); Reuben, *supra* note 5, at 57 (51% felt mandatory ADR programs should be encouraged, whereas 18% thought they should be discouraged). Similarly, attorneys' views on ADR contract provisions varied across surveys and with the type of ADR clause being considered. See, e.g., Phillips, *supra* note 5, at 7 tbl.3, 8 tbl.4; Stipanowich, *supra* note 5, at 95 tbl.D, 108 tbl.G, 161-62 tbl.HH-1; Wissler, *supra* note 5, at 222.

<sup>124</sup> Conferences:  $t(423) = 9.78, p < .001$ . Discussions:  $t(422) = 12.65, p < .001$ .

<sup>125</sup>  $t(423) = 3.49, p < .01$ .

<sup>126</sup> These three measures of attitudes toward mandatory ADR policies were combined into a scale, which had a Cronbach's alpha of .603, for use in subsequent

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Table 8. Attorneys' Attitudes Toward ADR Policies

	Should use ADR only when <u>both</u> sides want to	Should <u>not</u> require ADR conference	Should <u>not</u> be required to discuss ADR
agree	62%	37%	30%
neither agree nor disagree	13%	17%	17%
disagree	25%	46%	53%

Attorneys' support for mandatory ADR policies was related to their views of ADR's benefits. Attorneys who thought that ADR offered fewer benefits and who reported a lower rate of settlement in their ADR cases were less supportive of policies requiring ADR discussions and use.<sup>127</sup> However, attorneys' level of ADR knowledge or their concerns that ADR signaled weakness, provided free discovery, or had an insufficient pool of qualified neutrals were not related to their attitudes toward mandatory ADR policies.

Attorneys who were less supportive of mandatory ADR policies were less likely to discuss ADR with their clients<sup>128</sup> and with opposing counsel.<sup>129</sup> Attorneys' overall attitudes toward mandatory ADR policies, however, were not related to whether they discussed ADR early in their cases.<sup>130</sup> But

analyses. Personal injury defense attorneys were less supportive of mandatory ADR policies than were personal injury plaintiffs' attorneys ( $t(226) = -2.69, p < .01$ ); *see also* WAYNE D. BRAZIL, *SETTLING CIVIL SUITS* 112 (1985) (noting that defense counsel were less likely than plaintiffs' attorneys to "believe that settlement conferences should be mandatory in most cases in federal court").

<sup>127</sup> Benefits:  $r(417) = -.411, p < .001$ . Settlement rate:  $r(394) = -.151, p < .01$ .

<sup>128</sup>  $r(414) = -.134, p < .01$ . Attorneys who strongly opposed being required to discuss or use ADR actually discussed ADR with clients, on average, in 74% of their cases, while attorneys who strongly supported those requirements discussed ADR with clients, on average, in 84% of their cases.

<sup>129</sup>  $r(419) = -.202, p < .001$ . Attorneys who strongly opposed being required to discuss or use ADR actually discussed ADR with opposing counsel, on average, in 51% of their cases, whereas attorneys who strongly supported those requirements discussed ADR with opposing counsel, on average, in 72% of their cases.

<sup>130</sup> Although attorneys' *overall* attitudes toward mandatory ADR discussions and use were not related to the timing of ADR discussions, views about a requirement to discuss ADR early were. Attorneys who opposed being required to discuss ADR early, not surprisingly, were less likely to actually discuss ADR early ( $r(392) = -.122, p < .05$ ). Attitudes toward mandatory ADR conferences and mandatory ADR use were not related to the timing of attorneys' ADR discussions.

attorneys who were less supportive of ADR conferences and mandated ADR use were less likely to use voluntary ADR processes.<sup>131</sup>

### C. Judicial Encouragement of ADR

Attorneys reported that the court suggested the use of an ADR process, on average, in 30% of their cases.<sup>132</sup> Twenty-eight percent of attorneys said the court suggested using ADR in three-fourths or more of their cases,<sup>133</sup> whereas 39% said the court suggested ADR in fewer than one-fourth of their cases.

In this percentage of their cases:	This percentage of attorneys said the court suggested ADR
none of their cases	14%
less than 1/4 of cases	25%
1/4 to less than half of cases	15%
half to less than 3/4 of cases	18%
3/4 to all of their cases	28%

Attorneys who reported that the court suggested ADR in fewer of their

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<sup>131</sup>  $r(418) = -.173, p < .001$ . Attorneys who strongly opposed being required to discuss or use ADR actually used ADR, on average, in 36% of their cases, whereas attorneys who strongly supported those requirements used ADR, on average, in 52% of their cases.

<sup>132</sup> The attorneys appear to have answered this question in terms of the percentage of their cases in which a judge would have had the opportunity to suggest ADR, rather than in terms of the percentage of all of their filed cases, because there was no relationship between the frequency of judicial encouragement of ADR and the rate of bilateral negotiated settlements or early settlements. (Obviously, judges would not meet with, nor suggest using ADR to, attorneys in cases that had already settled.) This suggests that the frequency of judicial encouragement of ADR is not confounded with the rate of negotiated settlements, thus limiting this possible alternative interpretation of the findings of the relationships between judicial encouragement and ADR discussions and use. See *infra* notes 134–37 and accompanying text.

<sup>133</sup> See Table 9.

cases were less likely to discuss ADR with their clients<sup>134</sup> and with opposing counsel.<sup>135</sup> They were also less likely to discuss ADR early in their cases.<sup>136</sup> In addition, attorneys who reported that the court suggested ADR in fewer of their cases also used voluntary ADR processes in fewer cases.<sup>137</sup>

#### *D. Summary: The Relative and Combined Impact of the Barriers on ADR Discussions and Use*

The research findings are consistent with assumptions that certain ADR-specific factors act as barriers to attorneys' voluntary discussion and use of ADR. In terms of both their relative and combined impacts, the factors had fairly similar effects on the frequency of attorneys' ADR discussions with clients and with opposing counsel, and on the frequency of their ADR use. The factors had different effects, however, on the timing of ADR discussions.

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.<sup>138</sup> Attorneys' views regarding ADR's benefits tended to have the second strongest relationship with the frequency of ADR discussions and use, followed by the settlement rate they had experienced in their ADR cases. Attorneys' familiarity with ADR, beliefs that proposing ADR would be viewed as a sign of weakness, and opposition to mandatory ADR policies also had statistically significant relationships with the

<sup>134</sup>  $r(409) = .372, p < .001$ . Attorneys who said the court suggested using ADR in fewer than one-fourth of their cases discussed ADR with clients, on average, in 63% of their cases, whereas attorneys who said the court suggested using ADR in more than three-fourths of their cases discussed ADR with clients, on average, in 90% of their cases.

<sup>135</sup>  $r(413) = .450, p < .001$ . Attorneys who said the court suggested using ADR in fewer than one-fourth of their cases discussed ADR with opposing counsel, on average, in 42% of their cases, whereas attorneys who said the court suggested using ADR in more than three-fourths of their cases discussed ADR with opposing counsel, on average, in 78% of their cases.

<sup>136</sup>  $r(387) = .106, p < .05$ . Attorneys who said the court suggested using ADR in fewer than one-fourth of their cases regularly discussed ADR early, on average, in 25% of their cases, whereas attorneys who said the court suggested using ADR in more than three-fourths of their cases regularly discussed ADR early, on average, in 38% of their cases.

<sup>137</sup>  $r(413) = .424, p < .001$ . Attorneys who said the court suggested using ADR in fewer than one-fourth of their cases used ADR, on average, in 27% of their cases, whereas attorneys who said the court suggested using ADR in more than three-fourths of their cases used ADR, on average, in 57% of their cases.

<sup>138</sup> See Table 10.

frequency of ADR discussions and use. However, attorneys' views about whether ADR provided free discovery or whether the supply of qualified neutrals was sufficient were not related to how frequently they discussed or used ADR.<sup>139</sup>

In contrast, only three factors had statistically significant, and generally smaller, relationships with how frequently attorneys discussed ADR with opposing counsel early in their cases: whether they thought ADR offered benefits, their familiarity with ADR, and the frequency with which the court suggested ADR.<sup>140</sup>

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<sup>139</sup> Accordingly, these two measures are not included in analyses examining the combined impact of the factors.

<sup>140</sup> See Table 10.



**BARRIERS TO DISCUSSION AND USE OF ADR**

Table 10. Relationships between ADR-Specific Factors and How Frequently Attorneys:				
ADR-Specific Factors	Discussed ADR with their clients	Discussed ADR with opposing counsel	Discussed ADR early in cases	Used ADR
court suggested ADR more often	.37	.45	.11	.42
thought ADR has benefits	.23	.30	.17	.25
had more settlements in ADR	.19	.26	<i>ns</i>	.24
had greater ADR knowledge	.23	.22	.16	.10
thought ADR seen as weakness	-.17	-.18	<i>ns</i>	-.21
opposed mandatory ADR policies	-.13	-.20	<i>ns</i>	-.17
thought ADR gave free discovery	<i>ns</i>	<i>ns</i>	<i>ns</i>	<i>ns</i>
thought not enough qualified neutrals	<i>ns</i>	<i>ns</i>	<i>ns</i>	<i>ns</i>
<i>Notes:</i> Numbers in table are Pearson $r$ 's; <i>ns</i> indicates the correlation coefficient was not statistically significant.				

Taken together, these factors were strongly related to *how often* attorneys discussed and used ADR, but were only modestly related to *when* they discussed ADR. Combined, judicial encouragement of ADR and attorneys' knowledge and views of ADR explained 20% of the variation in how often attorneys discussed ADR with their clients,<sup>141</sup> 29% of the variation in how often they discussed ADR with opposing counsel,<sup>142</sup> and 26% of the variation in how often they used voluntary ADR processes.<sup>143</sup> But these factors explained only 6% of the variation in how often attorneys discussed ADR early in their cases.<sup>144</sup> These findings suggest that other factors not included in the present study, such as perceived or real information needs, lack of deadlines, and the habits and routines of practice account for some of the variation not explained by the present factors, particularly with regard to the timing of ADR discussions.<sup>145</sup>

To illustrate the potential cumulative impact of the barriers, we took a subset of the factors—specifically, attorneys' ADR knowledge, views, and attitudes—and compared attorneys who were below the median on each of these dimensions with those who were above the median on each.<sup>146</sup> Attorneys who were below the median on each of these dimensions discussed ADR with clients in 59% of their cases and with opposing counsel in 46% of their cases, and used ADR in 30% of their cases. By comparison, attorneys who were above the median on each of these dimensions discussed ADR with clients in 91% of their cases and with opposing counsel in 83% of their cases, and used ADR in 61% of their cases.

Taken together, the extent of judicial encouragement of ADR, attorneys' knowledge and views of ADR, and attorneys' ADR discussions with clients and opposing counsel explained 50% of the variation in the frequency of attorneys' ADR use.<sup>147</sup> Judicial encouragement and attorneys' ADR knowledge and views primarily exerted their influence on attorneys' use of

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<sup>141</sup>  $F(6, 373) = 15.36, p < .001, R = .447, R^2 = .20.$

<sup>142</sup>  $F(6, 375) = 25.20, p < .001, R = .539, R^2 = .29.$

<sup>143</sup>  $F(6, 375) = 22.54, p < .001, R = .510, R^2 = .26.$

<sup>144</sup>  $F(6, 367) = 4.08, p < .01, R = .245, R^2 = .06.$

<sup>145</sup> That case mix, negotiation routines, or other aspects of litigation practice might play a larger role in the timing of ADR discussions than ADR-specific factors is supported by several findings: the relationship between the timing of ADR and settlement discussions, and the fact that business attorneys were more likely than personal injury attorneys to discuss both settlement and ADR early. See *supra* notes 77, 80 and accompanying text.

<sup>146</sup> The *median* is the value corresponding to the 50th percentile. RUNYON & HABER, *supra* note 63, at 95. For the purpose of this analysis, adjustments were made so that "above the median" would correspond to greater familiarity with and more favorable views of ADR.

<sup>147</sup>  $F(8, 371) = 45.55, p < .001, R = .704, R^2 = .496.$

ADR indirectly, through their influence on how often attorneys discussed ADR with clients and opposing counsel, which in turn strongly affected ADR use.<sup>148</sup> After controlling for the frequency of attorneys' discussions with both clients and opposing counsel, judicial encouragement and attorneys' knowledge and views of ADR had a statistically significant but small independent impact on ADR use, explaining only an additional 4% of the variation in ADR use.<sup>149</sup>

## VI. SUMMARY AND IMPLICATIONS OF THE RESEARCH FINDINGS FOR ADR POLICY

### A. Summary

Discussing ADR processes has become a common practice for Arizona civil litigation attorneys, although not in all of their cases. Three-fourths of attorneys discussed ADR with their clients in three-fourths or more of their cases.<sup>150</sup> Attorneys discussed ADR with opposing counsel less frequently, with nearly half of the attorneys doing so in three-fourths or more of their cases.<sup>151</sup> These ADR discussions generally did not take place early in the life of a case.<sup>152</sup> Nor did ADR discussions automatically translate into ADR use: one-fifth of attorneys used voluntary ADR processes in three-fourths or more of their cases.<sup>153</sup> Although attorneys who more *frequently* discussed ADR with clients and opposing counsel used voluntary ADR processes more often, those who tended to discuss ADR *early* were not more likely to use ADR.<sup>154</sup>

The findings are consistent with assumptions that certain ADR-specific

<sup>148</sup> See *supra* note 87 and accompanying text.

<sup>149</sup>  $R^2$  change = .044,  $F(6, 371) = 5.34$ ,  $p < .001$ . By comparison, the frequency of attorneys' ADR discussions with clients and opposing counsel explained an additional 23% of the variation in the frequency of ADR use, after controlling for judicial encouragement and attorneys' ADR knowledge and views ( $R^2$  change = .231,  $F(2,371) = 85.04$ ,  $p < .001$ ).  $R^2$  change indicates the extent to which a second set of variables adds to the correlation, over and above the contribution of a prior set of variables. See Mark H. Licht, *Multiple Regression and Correlation*, in *READING AND UNDERSTANDING MULTIVARIATE STATISTICS* 19, 42–43 (Laurence G. Grimm & Paul R. Yarnold eds., 1995); TABACHNICK & FIDELL, *supra* note 87, at 102–03. The timing of discussions was not included in these analyses because it was not related to the frequency of ADR use. See *supra* note 86.

<sup>150</sup> See Table 1 and accompanying text.

<sup>151</sup> *Id.*

<sup>152</sup> See Table 2 and accompanying text.

<sup>153</sup> See Table 3 and accompanying text.

<sup>154</sup> See *supra* notes 85–86 and accompanying text.

factors constrain attorneys' voluntary discussion and use of ADR. Attorneys who reported less judicial encouragement of ADR, a lower rate of settlement in ADR cases, less familiarity with ADR, less favorable views of ADR, and less support for mandatory ADR policies tended to discuss and use ADR in a smaller proportion of their cases.<sup>155</sup> Taken together, these factors were strongly related to how often attorneys voluntarily discussed and used ADR. Attorneys' views regarding whether ADR provided free discovery or whether the supply of qualified neutrals was sufficient were not related to how often they discussed or used ADR.

Only a subset of these factors—attorneys' views regarding ADR's benefits, their familiarity with the processes, and the degree of judicial encouragement of ADR use—were related to how often attorneys first discussed ADR early in a case, and their combined impact was small.<sup>156</sup> These ADR-specific factors apparently play less of a role in the timing of ADR discussions than do other factors, such as those that affect the timing of the negotiation process more generally.<sup>157</sup>

Despite the strong relationship between these factors and attorneys' discussion and use of ADR, most of the barriers were not widespread. That is, fewer than one-fifth of the attorneys were unfamiliar with the various ADR processes, thought others viewed proposing ADR as a sign of weakness, reported that fewer than half of their ADR cases had settled, or thought ADR did not offer substantial benefits, greater client satisfaction, and earlier settlements.<sup>158</sup> A larger proportion of attorneys, however, reported a low rate of judicial encouragement of ADR and were opposed to mandates requiring the discussion and use of ADR.<sup>159</sup>

### *B. Implications for Policies to Increase Voluntary ADR Use*

In this section, we discuss what the findings of the present study and other empirical studies suggest about the potential effectiveness of two approaches for increasing voluntary ADR use, namely expanded ADR education and mandated ADR consideration. First, however, we must note a caution in extrapolating from the findings of the present study, based on data regarding voluntary discussions, to situations that involve mandatory consideration of ADR. Once the voluntary aspect of ADR discussions is

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<sup>155</sup> See Table 10 and accompanying text.

<sup>156</sup> *Id.*

<sup>157</sup> See *supra* notes 141–44 and accompanying text.

<sup>158</sup> See Tables 4–6 and accompanying text.

<sup>159</sup> See Tables 8 and 9 and accompanying text.

removed, the comparative and the combined impacts of the various factors on ADR use could be dramatically different.

### 1. Expanding ADR Education and Information

One set of proposals to increase voluntary ADR use focuses on increasing attorneys' familiarity with ADR, either through the expansion of law school or continuing education course offerings<sup>160</sup> or through ADR information provided by the court at the time of filing.<sup>161</sup> The present study found that attorneys who were less familiar with ADR were less likely to discuss and use ADR. In addition, attorneys who were less knowledgeable about ADR were less likely to think ADR offered benefits and were more likely to think proposing ADR signaled weakness, and attorneys who held these views discussed and used ADR less often.

Thus, these findings suggest that efforts to increase attorneys' familiarity with ADR processes might increase how often they discuss and use ADR. And, presumably, educational efforts also would enhance the effective use of ADR by giving attorneys a better understanding of which processes address which sources of impasse or client goals and how the different processes could be structured or combined to address case-specific needs.<sup>162</sup> The findings of other studies, however, suggest that the impact of increased ADR education on ADR use might be small, and smaller than if the increased familiarity had been acquired instead through direct experience with ADR processes.<sup>163</sup>

The impact of ADR information, education, and training might be enhanced if it is targeted not only at attorneys but also at judges and regular

<sup>160</sup> See, e.g., *Court ADR*, *supra* note 15, at 133; Folberg et al., *supra* note 1, at 370–71, 397–98; Riskin, *supra* note 11, at 49–51; Rosenberg & Folberg, *supra* note 7, at 1542; Schmitz, *supra* note 14, at 31.

<sup>161</sup> See, e.g., CENTER FOR DISPUTE SETTLEMENT AND THE INSTITUTE OF JUDICIAL ADMINISTRATION, NATIONAL STANDARDS FOR COURT-CONNECTED MEDIATION PROGRAMS §§ 1.6, 3.1, 3.2 and associated commentary (1992); Folberg et al., *supra* note 1, at 371, 384, 409; Rosenberg & Folberg, *supra* note 7, at 1542; see also, CAL. R. CT. 201.9 (2003); MASS. R. SUP. JUD. CT. 1:18, 5 (2003); MINN. GEN. R. PRAC. 114.03(a) (2001); MO. SUP. CT. R. 17.02(a) (2002); PLAPINGER & STIENSTRA, *supra* note 3, at 71–308 (summarizing the practices in each federal district court).

<sup>162</sup> See, e.g., Folberg et al., *supra* note 1, at 392–94; Frank E.A. Sander & Stephen B. Goldberg, *Fitting the Forum to the Fuss: A User-Friendly Guide to Selecting an ADR Procedure*, 10 NEGOT. J. 49, 51–59 (1994); McAdoo & Hinshaw, *supra* note 5, at 537–39.

<sup>163</sup> See *supra* notes 21–23 and accompanying text. This is one argument for mandating ADR use, at least in the short term. See, e.g., Folberg et al., *supra* note 1, at 398; Rogers & McEwen, *supra* note 4, at 864; Wissler, *supra* note 5, at 238.

users of legal services.<sup>164</sup> In the present study, judicial encouragement of ADR use was the factor that had the strongest impact on the frequency of attorneys' discussion and use of ADR. Judges' greater familiarity with the various ADR processes might enhance their ability to discuss ADR with attorneys and their willingness to suggest the use of ADR.<sup>165</sup> Efforts to inform "repeat player" litigants about ADR processes<sup>166</sup> might lead them to be more receptive to their attorneys' presentation of those options, although direct experience with ADR is likely to have an even greater effect. Educational efforts alone, however, are likely to have a limited impact on ADR use because they address only a subset of the barriers to considering ADR.

## 2. Mandating ADR Discussions with Clients or Opposing Counsel

Other proposed approaches to increase voluntary ADR use are to encourage or require attorneys to discuss the possible use of ADR with their clients,<sup>167</sup> with opposing counsel,<sup>168</sup> or with both. These duties have been

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<sup>164</sup> See also Welsh & McAdoo, *supra* note 15, at 13–14; Folberg et al., *supra* note 1, at 365, 371, 381; McAdoo, *supra* note 4, at 443; McAdoo & Hinshaw, *supra* note 5, at 537.

<sup>165</sup> See *supra* notes 53–55 and accompanying text.

<sup>166</sup> See Phillips, *supra* note 5, at 6 tbl.2 (finding that 60% of in-house entertainment counsel reported their executives were not knowledgeable about mediation and arbitration); Goodpaster, *supra* note 11, at 235.

<sup>167</sup> See, e.g., MINN. GEN. R. PRAC. 114.03(b) (2001); MASS. R. SUP. JUD. CT. 1:18, 5 (2003); MASS. R. SUP. JUD. CT. 3:07, 1.4, Cmt. [5] (2002); MO. SUP. CT. R. 17.02(b) (2002); N.J. R. GEN. APPLIC. 1:40-1 (2002); N.D. R. CT. 8.8(a) (2002); ARK. CODE ANN. § 16-7-204 (Michie 1999); STARK COUNTY, OHIO LOCAL R. CT. 16.03 (2002); NUECES COUNTY, TEX. R. 7 (2002); TEX. LAWYER'S CREED—A MANDATE FOR PROFESSIONALISM II.11 (2003); ALASKA R. PROF. CONDUCT 2.1 (2001); LA. REV. STAT. ANN. § 9:4102 (West Supp. 2002); COLO. R. PROF. CONDUCT 2.1 (2003); OHIO SUP. CT. R. FOR THE GOV'T OF THE BAR, app. V, A Lawyer's Aspirational Ideals (b)(1) (2002); HAW. R. PROF. CONDUCT 2.1 (2002); DEL. SUP. CT. R. 71(b)(ii), STATEMENT OF PRINCIPLES OF LAWYER CONDUCT B (2003); CENTER FOR DISPUTE SETTLEMENT AND THE INSTITUTE OF JUDICIAL ADMINISTRATION, *supra* note 161, § 3.3 and associated commentary (stating that courts should encourage attorneys to inform clients about mediation); Folberg et al., *supra* note 1, at 384, 409. All federal district courts require litigants in most categories of civil cases "to consider" the use of an ADR process. 28 U.S.C. § 652(a) (2003). In jurisdictions where attorneys are required to confer about ADR with opposing counsel, attorneys would implicitly be required to discuss ADR options with their clients. See *infra* note 168. This would also be the case where ADR use is discussed during a pretrial or scheduling conference. See *infra* notes 202–03. For additional rules, statutes, professional conduct codes, or ethics opinions encouraging or requiring attorneys to discuss ADR with clients, see Breger, *supra* note 14, app. I; COLE ET AL., *supra* note 3, § 4.3 (noting a

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incorporated in aspirational creeds, professional responsibility or ethics codes, and statutes or court rules.<sup>169</sup> The nature of the obligation to consult with clients about ADR ranges from simply advising clients of the availability of ADR processes or giving them the court's ADR brochure,<sup>170</sup> to providing an assessment of the advantages and disadvantages of available ADR options and assistance in selecting the most appropriate process.<sup>171</sup>

Will these suggestions or requirements increase the frequency of attorneys' ADR discussions and, if so, will that result in increased voluntary ADR use? Several empirical studies<sup>172</sup> that examined the effects of different types of obligations to discuss ADR shed some light on these issues, but they do not provide a clear picture of the effectiveness of such requirements.

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"small movement" to require or encourage attorneys to advise clients regarding ADR); Robert F. Cochran, Jr., *ADR, the ABA, and Client Control: A Proposal that the Model Rules Require Lawyers to Present ADR Options to Clients*, 41 S. TEX. L. REV. 183, 188–89, 197 (1999); Arthur Garwin, *Show Me the Offer: When Opposing Counsel Suggests Mediation, Your Client Needs to Know*, A.B.A. J., June 1997, at 84, 84.

Several commentators argue that even when attorneys do not have an explicit duty to discuss ADR with their clients, they have an implicit obligation under many existing codes of conduct and professional responsibility. *See, e.g.*, Frank E.A. Sander, *Professional Responsibility: Should There Be a Duty to Advise of ADR Options? Yes: An Aid to Clients*, A.B.A. J., Nov. 1990, at 50, 50; Robert B. Moberly, *Ethical Standards for Court-Appointed Mediators and Florida's Mandatory Mediation Experiment*, 21 FLA. ST. U. L. REV. 701, 726 (1994); Schmitz, *supra* note 14, at 33–35; Breger, *supra* note 14, at 458. *But see* Michael L. Prigoff, *Professional Responsibility: Should There Be a Duty to Advise of ADR Options? No: An Unreasonable Burden*, A.B.A. J., Nov. 1990, at 51, 51.

<sup>168</sup> *See, e.g.*, ARIZ. R. CIV. P. 16(g)(2) (2002); MINN. GEN. R. PRAC. 114.04 (2001); STARK COUNTY, OHIO LOCAL R. CT. 16.03 (2002); N.D. R. CT. 8.8(a) (2002); ALASKA R. CIV. P. 26(f) (2001); HAW. R. CIR. CTS. 12(b)(6) (2002); D.C. R. CIV. P. 16(c)(7) (2003); Folberg et. al., *supra* note 1, at 386, 409. In their local rules, many federal district courts explicitly require attorneys to discuss ADR with opposing counsel at the Rule 26(f) conference. *See, e.g.*, D. ALASKA, LOCAL R. 16.2(b)(2) (2002); D.D.C. LOCAL CIV. R. 16.3(c)(5) (2003); D. IDAHO CIV. R. 16.1 (2003); N.D. IND. LOCAL R. 16.6(b) (2002); D. MINN. LOCAL R. 16.1(d), 26.1(f)(2) (2003); D. ME. CIV. R. 83.11(b)(1) (2002); D. MASS. LOCAL R. 16.1(D)(3)(b) (2003); *see also* PLAPINGER & STIENSTRA, *supra* note 3, at 8, 71–308 (summarizing the practices in each federal district court).

<sup>169</sup> Breger, *supra* note 14, at 452–57; Cochran, Jr., *supra* note 167, at 200.

<sup>170</sup> *See, e.g.*, MINN. GEN. R. PRAC. 114.03(b) (2001); MO. SUP. CT. R. 17.02(b) (2002); N.J. R. GEN. APPLIC. 1:40-1 (2002).

<sup>171</sup> *See, e.g.*, MASS. R. SUP. JUD. CT. 1:18, 5 (2003); MASS. R. SUP. JUD. CT. 3:07, 1.4, Cmt. [5] (2002); MO. SUP. CT. R. 17.02(b) (2002); STARK COUNTY, OHIO LOCAL R. CT. 16.03 (2002); *see* Breger, *supra* note 14, at 439–41 (referring to these extremes as "weak" and "hard" consultation).

<sup>172</sup> *See generally* McAdoo, *supra* note 4; McAdoo & Hinshaw, *supra* note 5; Powell, *supra* note 5.

The studies reported a moderate level of ADR discussions,<sup>173</sup> revealing less-than-complete attorney compliance with their obligation. Although almost all Georgia attorneys felt they had an obligation to counsel clients about ADR under an ethical code provision, only 27% always told their clients about ADR, and 37% frequently did so.<sup>174</sup> Under a mandatory advising rule, 32% of Missouri attorneys discussed ADR with clients within the first three months of filing suit, and another 30% did so within the next three months.<sup>175</sup> Under a mandatory conferring rule, 40% of Minnesota attorneys usually or always conferred with opposing counsel about ADR within the time period by which they were required to confer and report to the court.<sup>176</sup> The rate of compliance appeared to be higher (54%) in a county in which the court devoted substantial resources to enforcing the rule.<sup>177</sup>

Two of these studies also examined the frequency of attorneys' ADR use, and both reported an increase following the enactment of mandatory discussion rules. In one study, half of the Missouri attorneys said their ADR use increased in the two years following the adoption of a rule requiring them to inform clients of the availability of ADR programs.<sup>178</sup> In addition to requiring client advising, the rule specified that the court would notify the parties about ADR services<sup>179</sup> and authorized the implementation of new ADR programs and the judicial referral of cases to non-binding ADR

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<sup>173</sup> We cannot tell whether this rate of ADR discussions represents an increase or no change from prior practice, as the studies did not obtain baseline data before the discussion obligations went into effect.

<sup>174</sup> Powell, *supra* note 5, at 6 (finding that 30% occasionally told their clients about ADR and 6% never did). At the time of the survey, Ethical Consideration 7-5 read: "A lawyer as advisor has a duty to advise the client as to various forms of dispute resolution. When a matter is likely to involve litigation, a lawyer has a duty to inform the client of forms of dispute resolution which might constitute reasonable alternatives to litigation." RULES AND REGULATIONS FOR THE ORG. AND GOV'T OF THE STATE BAR OF GA., 3-107 (EC 7-5) (1999).

<sup>175</sup> McAdoo & Hinshaw, *supra* note 5, at 497 tbl.14 (finding that 22% discussed ADR later, and 16% hardly ever discussed ADR options with clients). The rule did not contain either a deadline for conferring with clients or a certification or reporting requirement. *See* MO. SUP. CT. R. 17.02(b) (2001).

<sup>176</sup> McAdoo, *supra* note 4, at 425 (finding that 33% sometimes conferred with opposing counsel during this time period, and 26% never or rarely did so). *See* MINN. GEN. R. PRAC. 114 (2001).

<sup>177</sup> McAdoo, *supra* note 4, at 425 n.70.

<sup>178</sup> McAdoo & Hinshaw, *supra* note 5, at 490-91 tbl.8 (finding that 40% reported no change, and 4% reported less ADR use). Despite their reports of increased ADR use, only 3% of attorneys used ADR in more than half of their cases during those two years, and 80% used ADR in fewer than one-fourth of their cases. *Id.* at 577 q.17.

<sup>179</sup> MO. SUP. CT. R. 17.02(a) (2002).



processes.<sup>180</sup> Accordingly, we do not know how much of the reported increase in ADR use was due to the mandatory advising requirement per se and how much was due to these other changes authorized by the rule.<sup>181</sup>

In the second study, 78% of Minnesota attorneys reported that they used ADR more in the two years that a mandatory conferring rule had been in effect.<sup>182</sup> This rule required attorneys to give their clients court-provided information on available ADR processes and neutrals, to discuss ADR with opposing counsel, and to report the outcome of those discussions to the court within sixty days after the case was filed.<sup>183</sup> In addition, the rule authorized judges to schedule a conference within one month of that reporting deadline if the attorneys could not agree on an ADR process or if the judge did not approve of their agreement.<sup>184</sup> We cannot discern the relative contributions that these various components of the rule made to the reported increase in ADR use. Further, because the rule also authorized judges to order the use of non-binding ADR processes, and they did so,<sup>185</sup> an unknown amount of the increased ADR use was truly voluntary.<sup>186</sup>

<sup>180</sup> MO. SUP. CT. R. 17.01(a), 17.03(a)–(b) (2002).

<sup>181</sup> Because judges intervened in approximately only one-fourth of cases in which parties disagreed about ADR or agreed that it was not appropriate, judicial involvement probably played a limited role in the reported increase in ADR use. See McAdoo & Hinshaw, *supra* note 5, at 582 q.29, 31. The point remains, however, that the reported increase in ADR use could be due to any relevant changes that might have occurred following the adoption of the rule, and the study did not examine or control for these potential confounds. In addition, because the attorneys were surveyed about both their pre- and post-rule use *after* the rule went into effect, the survey findings are more subject to potential problems of recall and reactivity (*i.e.*, attorneys altering their responses in reaction to the perceived purpose of the survey) than if the attorneys had been surveyed about their pre-rule ADR use *before* its implementation. See generally CLAIRE SELTZ ET AL., RESEARCH METHODS IN SOCIAL RELATIONS 125–27 (3d ed. 1976); FLOYD J. FOWLER, JR., SURVEY RESEARCH METHODS 92–93 (1988).

<sup>182</sup> McAdoo, *supra* note 4, at 467 q.14 (finding that 18% reported no change in ADR use, and fewer than 1% reported decreased ADR use). Sixty-four percent of attorneys used ADR in most or all of their cases during those two years. *Id.* q.18.

<sup>183</sup> See MINN. GEN. R. PRAC. 114.03, 114.04(a) (2001).

<sup>184</sup> MINN. GEN. R. PRAC. 114.04(b) (2001). The court scheduled a conference in 40% of the cases in which parties disagreed about ADR and 25% of the cases in which the parties agreed that ADR was not appropriate. McAdoo, *supra* note 4, at 470–71 q.28, 30.

<sup>185</sup> MINN. GEN. R. PRAC. 114.04(b) (2001). The court selected an ADR process or ordered the parties to find one in 64% of the cases in which the parties disagreed about ADR and in 19% of the cases in which the parties agreed that ADR was not appropriate. McAdoo, *supra* note 4, at 470–71 q.28, 30.

<sup>186</sup> The other methodological concerns discussed above also apply to this study. See *supra* note 181.

Drawing conclusions from these studies about how effective discussion requirements could be in increasing voluntary ADR use is difficult because the studies examined different rules with different components in different jurisdictions with different legal and judicial ADR cultures. Overall, the findings seem to suggest that the components of a mandatory discussion rule that would enhance its effectiveness include: a requirement that attorneys provide their clients ADR information and discuss ADR with opposing counsel; a deadline by which the discussions must take place, a reporting requirement, and enforcement; a court conference to assist attorneys in choosing an ADR process; and active judicial involvement. The findings of the present study shed further light on why these components seem likely to enhance the effectiveness of mandatory ADR discussion requirements in increasing voluntary ADR use, and on what other components might be helpful.

A rule that requires ADR discussions would enable attorneys to attribute their discussion of ADR processes to that obligation rather than to their own or their client's interest, which might reduce "sign of weakness" concerns.<sup>187</sup> The present study found that attorneys who thought proposing ADR signaled weakness were less likely to discuss ADR with clients or with opposing counsel, and less likely to use ADR. Thus, if a discussion requirement reduces weakness concerns, the frequency of ADR discussions and use might increase. Requiring attorneys to confer with opposing counsel should be more effective than requiring them only to advise clients, as this would reduce the effects of weakness concerns that were observed at both of these steps. In addition, to the extent that the opponent's proposal of ADR would be attributed to a discussion requirement rather than to an effort to gain strategic advantage, reactive devaluation of ADR proposals should be reduced, which could increase ADR use. But these concerns would be successfully eliminated only if virtually all attorneys comply with the mandatory discussion rule; otherwise, speculations about the motivation underlying ADR discussions would remain.

If such rules do not induce or require attorneys to become more knowledgeable about the different ADR processes and their relative appropriateness in different cases, they might still be reluctant to discuss ADR, and their discussions might not produce increased ADR use. Because attorneys in the present study who were less familiar with ADR were less likely to discuss and use ADR, adding an educational component to mandatory advising rules might be necessary to increase not only the frequency of ADR discussion and use, but also the more effective choice of a process from among ADR options.

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<sup>187</sup> See also Folberg et al., *supra* note 1, at 386.

Obviously, mandatory discussion rules do not require that attorneys enthusiastically recommend the use of ADR. Attorneys with unfavorable views might present ADR in a negative light, engage in a perfunctory discussion that barely meets their obligation, or avoid discussing ADR altogether.<sup>188</sup> To the extent that attorneys interpret discussion requirements as a sign of court support for ADR, their views of ADR's value and appropriateness might be enhanced.<sup>189</sup> If so, attorneys' willingness to discuss and use ADR might be increased, based on the present study's finding of a relationship between attorneys' views of ADR and their frequency of ADR discussions and use. However, because attorneys' views of ADR will be only as favorable as the experiences they and their colleagues have with the ADR processes they use, courts also need to address issues of the quality and availability of their ADR programs.<sup>190</sup>

To enhance their effectiveness, mandatory ADR discussion rules would need to include additional components that address those barriers to ADR discussion and use that are associated with strategic behavior and the routines of negotiation and litigation practice.<sup>191</sup> In order that attorneys do not indefinitely put off assessing the ADR potential of cases while discovery progresses and the parties jockey for strategic advantage, rules would need to include a deadline by which discussions<sup>192</sup> have to take place.<sup>193</sup> The

<sup>188</sup> See Breger, *supra* note 14, at 441 (speculating that attorneys will do only minimal client advising unless a more thorough consultation is specified); Cochran, Jr., *supra* note 167, at 200 (suggesting that under mandatory advising rules, attorneys might present ADR options "in a pro forma manner that is unlikely to cause clients to seriously consider ADR"); Lande, *supra* note 5, at 223 ("Parties and attorneys who do not believe in mediation can certainly find ways to evade and subvert mandates for consultations about ADR . . . . They can 'go through the motions' of having consultations . . . without seriously intending to consider ADR. . . .").

One wonders whether the exchange, "I don't think ADR is appropriate for this case, do you?" "No," would meet the "discussion" requirement. If so, this would provide attorneys with an easy "out," because courts appear reluctant to intervene when the parties have agreed that ADR is not appropriate. See McAdoo, *supra* note 4, at 470-71 qq.29-30; McAdoo & Hinshaw, *supra* note 5, at 582 qq.30-31. In both studies, approximately three-fourths of attorneys had at least one case in the prior two years in which they and opposing counsel both agreed that ADR was not appropriate, and the court did not get involved in a majority of those cases.

<sup>189</sup> See Breger, *supra* note 14, at 455; Rogers & McEwen, *supra* note 4, at 845; Lande, *supra* note 5, at 221; Macfarlane, *supra* note 11, at 315, 321.

<sup>190</sup> See also *Court ADR*, *supra* note 15, at 133 (arguing that programs need to have a publicized quality control mechanism to address attorneys' concerns); Folberg et al., *supra* note 1, at 400.

<sup>191</sup> See *supra* notes 35-38 and accompanying text.

<sup>192</sup> Perhaps if discussion rules required attorneys to discuss not only ADR use but also more general settlement possibilities, this might further encourage attorneys to focus

discussion deadline should be set early enough to promote earlier settlements,<sup>194</sup> but not so early that the parties are unable to make an informed decision about settlement or ADR use.<sup>195</sup> The appropriate timing likely will vary across different jurisdictions depending on existing practice norms and case management practices.<sup>196</sup> Some mechanism of making the

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on the case earlier and to view the consideration of ADR as part of the routine litigation and case management processes. *See* Folberg et al., *supra* note 1, at 386. Many existing rules that require opposing counsel to confer about ADR also require the discussion of settlement, discovery, or other case management issues at the same time. *See supra* note 168. The findings of the present study suggest that attorneys tended to discuss ADR with opposing counsel only after they first tried to negotiate a settlement. To the extent that attorneys would prefer to try to settle cases without assistance, they may dismiss the use of ADR if they are required to consider ADR before they have explored settlement possibilities.

<sup>193</sup> *See* Macfarlane, *supra* note 11, at 289–90; *Court ADR, supra* note 15, at 133; Folberg, et al., *supra* note 1, at 359; HYMAN ET AL., *supra* note 1, at 81, 157, 164 (noting that attorneys' negotiation practices seemed to involve repetition of habitual patterns rather than planning and active management). *See, e.g.,* ARIZ. R. CIV. P. 16(g)(2)(A) (2002); W.D. OF WIS. CT. R. 3(A) (2002); McAdoo, *supra* note 4, at 425. In jurisdictions where ADR must be discussed at a Rule 26(f) conference, the conference date serves as a deadline if no earlier deadline is specified. *See supra* note 168. This is also the case in jurisdictions where ADR must be discussed during a scheduling or pretrial conference. *See infra* notes 202–03.

<sup>194</sup> In the present study, attorneys who were more likely to discuss settlement or ADR early in their cases reported earlier settlements. *See supra* note 86.

<sup>195</sup> *See, e.g.,* HYMAN ET AL., *supra* note 1, at 161 (“learning or developing the settlement value of the case is a necessary condition for settlement”); McAdoo, *supra* note 4, at 425 (finding that some attorneys said the 60-day post-filing deadline was too early to choose an appropriate ADR process); RICHARD J. MAIMAN ET AL., THE MAINE SUPERIOR COURT ALTERNATIVE DISPUTE RESOLUTION PILOT PROJECT, PROGRAM EVALUATION FINAL REPORT app. C at 11 (Jan. 31, 1999) (finding that nearly all of the interviewed attorneys and neutrals who had participated in a court conference to discuss ADR and settlement thought the conference was more effective when it was held six months rather than three months after case filing, because they had more information about the case). For instance, the date by which Arizona attorneys are required to discuss ADR and settlement with opposing counsel is nearly two months after they are required to disclose the factual and legal bases of their claims and defenses and exchange relevant documents, so presumably they would have basic case information before they must confer. ARIZ. R. CIV. P. 16(g)(2), 26.1 (2002).

<sup>196</sup> *See, e.g.,* DONNA STIENSTRA ET AL., REPORT TO THE JUDICIAL CONFERENCE COMMITTEE ON COURT ADMINISTRATION AND CASE MANAGEMENT: A STUDY OF THE FIVE DEMONSTRATION PROGRAMS ESTABLISHED UNDER THE CIVIL JUSTICE REFORM ACT OF 1990 at 237, 271 (Jan. 24, 1997) (finding that more than twice as many attorneys in one court in which mediation generally occurred after discovery was completed said mediation took place “too early” as in another court in which mediation occurred within a month or two after the case was filed). Different deadlines might be appropriate for

deadline enforceable, such as requiring attorneys to certify their compliance or to report the outcome of their discussions to the court,<sup>197</sup> accompanied by active enforcement, might increase the likelihood that timely ADR discussions actually occur.<sup>198</sup> Of course, enforcement is not without potential costs for the courts, attorneys, and litigants.<sup>199</sup>

A level of court involvement in the process of ADR discussions that is more substantive than simply monitoring compliance is likely to further increase ADR use. The present study found that judicial encouragement was the factor that had the single greatest impact on the frequency of attorneys' ADR discussions and use. The Minnesota and Missouri studies, taken together, suggest that active judicial involvement in considering ADR stimulated attorneys to discuss and voluntarily use ADR, while lack of judicial involvement had the opposite effect.<sup>200</sup> Several studies have found that attorneys welcome active judicial involvement in settlement negotiations.<sup>201</sup> And in the present study, almost half of the attorneys supported a mandatory pretrial conference to discuss ADR if the parties could not agree on an ADR process.

One method of increasing court involvement would be to include the consideration of ADR options in a status, case management, or other pretrial conference. ADR already is a permissible topic of discussion at pretrial conferences in some jurisdictions<sup>202</sup> and is a required topic in others.<sup>203</sup> But

different types of cases to accommodate apparent differences in when critical information is available. *See supra* note 77.

<sup>197</sup> *See, e.g.*, ARIZ. R. CIV. P. 16(g)(2)(B) (2002); N.D. R. CT. 8.8 (2002); MINN. GEN. R. PRAC. 114.04 (2001); MASS. R. SUP. JUD. CT. 1:18, 5 (2003); ALASKA R. CIV. P. 26(f) (2001); HAW. R. CIR. CTS. 12(b)(6) (2002); D. MASS. LOCAL R. 16.1(D)(3) (2003); W.D. OKLA. LOCAL CIV. R. 16.3(c) (2003); D. S.C. LOCAL CIV. R. 16.03 (2003); W.D. TEX. CIV. R. CV-88(b) (2003). In federal district courts that do not explicitly ask attorneys to certify that ADR was discussed, the local rules typically require attorneys to report their decisions about the use of ADR as part of the Rule 26(f) case management plan they must file with the court. *See, e.g.*, S.D. IND. LOCAL R. 16.1(d)(2)(J) (2003); D. MINN. LOCAL R. 16.1(d) (2003); D. N.D. LOCAL R. 16.2(B) (2003); N. AND S.D. MISS. UNIF. LOCAL R. 16.1(B)(1)(e) (2002).

<sup>198</sup> *See supra* notes 176–77 and accompanying text. But even with the enforcement of a required deadline for reporting to the court, just over half of Minnesota attorneys usually or always discussed ADR options within the required time period. *See* McAdoo, *supra* note 4, at 425.

<sup>199</sup> *See* Breger, *supra* note 14, at 441–46, 455–57.

<sup>200</sup> *See supra* note 57 and accompanying text.

<sup>201</sup> BRAZIL, *supra* note 126, at 1–2; Heumann & Hyman, *supra* note 11, at 287; HYMAN ET AL., *supra* note 1, at 40–41.

<sup>202</sup> *See, e.g.*, ALASKA R. CIV. P. 16(a)(5), 16(c)(9) (2002); IDAHO R. CIV. P. 16(a)(6), 16(c)(7) (2003); IND. R. TRIAL P. 16(A)(6) (2003); KAN. CIV. P. CODE § 60-

while some of these conferences occur early, others occur late in the life of the case, reducing their potential to facilitate earlier settlements and reduce litigation costs.<sup>204</sup> Thus, discussion rules might need to include a provision that specifies that ADR is a topic to be discussed at an early case management conference or that establishes an early ADR conference.<sup>205</sup> The impact of discussing ADR on ADR use at such conferences is not clear.<sup>206</sup>

At a minimum, an early conference would provide another deadline and an event that would help force busy attorneys to assess the settlement and ADR potential of their cases earlier.<sup>207</sup> But a court conference also could

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216(b)(2) (2002); WYO. R. CIV. P. 16(c)(9) (2003); MICH. CT. R. 2.401(C)(1)(h) (2003); N.H. R. SUPER. CT. 62 (2002); MD. R. CIV. P. 2-504.1(c)(1) (2002); D. KAN. R. OF PRAC. 16.2 (b)(10) (2002); E.D. CAL. LOCAL R. PRAC. 16-240(a)(16) (2003); *see generally* FED. R. CIV. P. 16(c)(9) (“the use of special procedures to assist in resolving the dispute” is a subject for consideration at pretrial conferences). For additional rules regarding the discussion of ADR at pretrial conferences, see Breger, *supra* note 14, at app. II.

<sup>203</sup> *See, e.g.*, STARK COUNTY, OHIO LOCAL R. CT. 16.03 (2002); CONN. R. SUPER. CT. § 14-13(9) (2002); HAW. R. CIR. CTS. 12(c)(1)(B) (2002); ILL. S. CT. R. 218(a)(7) (2003); CAL. CODE CIV. P. § 1734(b) (2003); D.C. R. CIV. P. 16(b) (2003); E., M., AND W.D. OF LA. UNIF. LOCAL R. ADR app. 16.3.1M(C-1)(b) (2003); D. DEL. R. CIV. PRAC. 16.2(b)(4) (2002); D. ME. CIV. R. 16.3(b)(5), 16.3(c)(4) (2002). For additional rules regarding the discussion of ADR at pretrial conferences, see Breger, *supra* note 14, at app. II.

<sup>204</sup> Early case management has been found to contribute to shorter case disposition times. *See infra* note 222 and accompanying text. In addition, scheduling a conference earlier could help reduce delay that might arise if attorneys refrain from discussing ADR and settlement until the conference. *See* Robert J. MacCoun, *Unintended Consequences of Court Arbitration: A Cautionary Tale from New Jersey*, 14 JUST. SYS. J. 229, 241 (1991) (reporting that attorneys did not conduct negotiations before the scheduled arbitration hearing).

<sup>205</sup> *See, e.g.*, MINN. GEN. R. PRAC. 114.04(b) (2001); ARIZ. R. CIV. P. 16(g)(2)(C) (2002). These conferences would not necessarily have to be conducted by judges. *See, e.g.*, ARIZ. R. CIV. P. 16(g)(2)(C) (2002) (providing for ADR discussion conducted by a court-appointed ADR specialist); MAIMAN ET AL., *supra* note 195, at 1–2, 4, 11 (noting that volunteer lawyer neutrals conducted early mandatory conferences to discuss ADR options and encourage parties to use them, as well as to discuss parties’ positions, interests, and settlement possibilities).

<sup>206</sup> *See e.g.*, MAIMAN, ET AL., *supra* note 195, at 16 (reporting that the conference’s impact on ADR use could not be ascertained due to the lack of adequate court records, but “marginally reliable” docket data suggested a possible increase in ADR use). Seventy percent of the neutrals spent some or a great deal of time discussing ADR options during the conference, and 57% of attorneys and 76% of parties found the conference “fairly” or “very” useful in providing information on dispute resolution methods. *Id.* at 17, 19. The conferences tended to produce more and somewhat earlier settlements. *Id.* at 22, 24.

<sup>207</sup> *See supra*, note 192 and accompanying text; *see also* Craig A. McEwen et al., *Bring in the Lawyers: Challenging the Dominant Approaches to Ensuring Fairness in*

## BARRIERS TO DISCUSSION AND USE OF ADR

help to overcome other barriers to ADR consideration and use. Active court involvement in ADR consideration could motivate attorneys to become better informed about ADR.<sup>208</sup> The conference also could serve educational functions by providing attorneys with more information on the potential contributions of ADR processes to case resolution<sup>209</sup> and on selecting an ADR process to meet the needs of the instant case.<sup>210</sup> Importantly, a higher degree of court involvement makes clear judges' support for ADR and more fully incorporates ADR into the litigation process, which might change attorneys' views regarding ADR's appropriateness and usefulness.<sup>211</sup> Knowing they will have to attend a conference might motivate attorneys to have more serious discussions on their own.<sup>212</sup>

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*Divorce Mediation*, 79 MINN. L. REV. 1317, 1387 (1995) (noting that lawyers reported that mandated mediation sessions forced them to prepare the case); MEIERHOEFER, *supra* note 44, at 103 (finding that 54% of attorneys in cases that were closed after referral to court-annexed arbitration but before the hearing said the arbitration referral resulted in earlier settlement discussions); Karl A. Slaikeu & Ralph H. Hasson, *Not Necessarily Mediation: The Use of Convening Clauses in Dispute Systems Design*, 8 NEGOT. J. 331, 332 (1992) (noting that without a mechanism to bring parties to the table to discuss ADR, "there is the very real possibility that ADR processes will be skipped altogether, or brought in too late to allow for significant cost savings or for more productive resolutions").

<sup>208</sup> See also, John Haynes, *Mediators and the Legal Profession: An Overview*, MEDIATION Q., Spring 1989, at 5, 10 (noting that more lawyers attended ADR training sessions in states that had mandatory mediation); Welsh & McAdoo, *supra* note 15, at 11. Attorneys might be motivated to become better informed about ADR processes if they knew the judge was going to have the type of discussion described in *ADR Conference*, *supra* note 15.

<sup>209</sup> Attorneys might not see how ADR could help resolve a case that they previously had not been able to settle on their own. See *supra* notes 79–81 and accompanying text; see also, McEwen et al., *supra* note 207, at 1387–88 ("Attorneys report they were often mistaken in their predictions about the uselessness of mediation for particular cases."). For a discussion of how ADR processes can assist negotiation, see Craig A. McEwen, *Improving on Negotiation: The Potential of Mediation*, 3 ME. LAW. REV. 11, 18–19 (Sept. 13, 1995); Robert H. Mnookin, *Why Negotiations Fail: An Exploration of Barriers to the Resolution of Conflict*, 8 OHIO ST. J. ON DISP. RESOL. 235, 248–49 (1993); Robert A. Baruch Bush, "What Do We Need a Mediator For?": *Mediation's "Value-Added" for Negotiators*, 12 OHIO ST. J. ON DISP. RESOL. 1, 8–14 (1996); DEAN G. PRUITT & PETER J. CARNEVALE, NEGOTIATION IN SOCIAL CONFLICT 81–99, 169–171 (1993); Sternlight, *supra* note 28, at 332–45; *ADR Conference*, *supra* note 15, at 171–73, 181–83.

<sup>210</sup> See generally *ADR Conference*, *supra* note 15; McAdoo, *supra* note 4, at 443 (reporting that attorneys appreciated judges who helped them select the right ADR process for their case).

<sup>211</sup> See *supra* note 189.

<sup>212</sup> See also Macfarlane, *supra* note 11, at 289–90 (reporting that mandatory mediation led to earlier and more intensive settlement talks in order to avoid the

In addition, the conference might help reduce some cognitive biases such as optimistic overconfidence and reactive devaluation that otherwise might limit ADR use. For instance, a suggestion to use a particular ADR process is more likely to be received favorably if it comes from the neutral conducting the conference than from the other side,<sup>213</sup> increasing the likelihood that ADR will be used. Further, even when both parties are willing to consider ADR, it can be difficult for them to reach that decision at the same point in time or to agree on the many details of which process should be used when, conducted by whom, using what approach.<sup>214</sup> The neutral conducting the conference can assist the parties in negotiating these details, thus facilitating their use of ADR.

An early ADR conference might need to include the discussion of discovery issues in order to facilitate ADR use and to expedite the resolution of cases.<sup>215</sup> Attorneys' real or perceived need for information can lead them to delay their consideration of ADR as well as to reject its use.<sup>216</sup> Thus, if a conference addressed attorneys' information needs in conjunction with discussing ADR processes, attorneys might be more willing to use ADR. In addition, because studies have found that ADR use was accompanied by little

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mediation session). *But cf.* MacCoun, *supra* note 204, at 241.

<sup>213</sup> See also Ross, *supra* note 31, at 29, 41.

<sup>214</sup> Wissler et al., *supra* note 11, at 299–300, 308; McAdoo, *supra* note 4, at 470 q.27 (finding that 54% of attorneys had at least one case in which they and opposing counsel could not agree on which ADR process was appropriate); McAdoo & Hinshaw, *supra* note 5, at 581 q.28 (reporting that 24% of attorneys had at least one case in which they and opposing counsel could not agree on which ADR process was appropriate); Davis, *supra* note 45, at 741, 748 (finding that personal injury plaintiffs and defendants are not both highly motivated to settle at the same point during negotiations, except shortly before trial); see also Mahan, *supra* note 41, at 45 (noting that problems inherent in designing rules to which both sides must agree can defeat an attempt to use ADR, even when both sides want to); Slaikeu & Hasson, *supra* note 207, at 332 (suggesting that contracts include a generic dispute resolution clause providing for a third party to meet with the parties after negotiations have broken down to help them select a dispute resolution process and provider).

<sup>215</sup> See also McAdoo, *supra* note 4, at 442–43; HYMAN ET AL., *supra* note 1, at 163–64; Folberg et al., *supra* note 1, at 397.

<sup>216</sup> See Rogers & McEwen, *supra* note 4, at 842–43, 863 (describing attorneys' perceived information needs, how a change in incentives regarding discovery increased mediation use, and how mediation use led to informal information exchanges instead of formal discovery); HYMAN ET AL., *supra* note 1, at 89, 161, 164 (attorneys actually learned little about the merits or value of the case from the negotiation process). The present study's findings that attorneys who were more likely to discuss settlement early also were more likely to discuss ADR early, and that business attorneys were more likely to have early settlement and ADR discussions than were personal injury attorneys, might suggest that the timing of discussions was in part affected by information needs.



change in attorneys' discovery practices,<sup>217</sup> addressing issues of structuring or limiting discovery at an early ADR conference might help to reduce delay and costs even in cases that use ADR.

### 3. Conclusion

Based on the limited empirical evidence available to date, requiring attorneys to both assess ADR options with clients and confer about using ADR with opposing counsel seems to hold promise as a means to increase voluntary ADR use. Mandatory discussion rules that address many of the barriers to voluntary ADR use discussed in this Article are likely to be more effective in increasing ADR use than are those that address fewer barriers. However, discussion rules cannot address all of the factors, particularly the economic and strategic incentives thought to limit attorneys' or litigants' interest in ADR.<sup>218</sup>

The empirical studies of attorneys' ADR discussions and use do not provide evidence as to whether increased ADR use is likely to achieve the underlying goals of earlier and better settlements. Although attorneys believe that ADR, at least in some cases, produces earlier and more creative settlements,<sup>219</sup> more "objective" empirical findings comparing ADR to litigation are mixed.<sup>220</sup> As other research has demonstrated, aspects of ADR

<sup>217</sup> McAdoo, *supra* note 4, at 432; McAdoo & Hinshaw, *supra* note 5, at 515–16; Stevens H. Clarke & Elizabeth Ellen Gordon, *Public Sponsorship of Private Settling: Court-Ordered Civil Case Mediation*, 19 JUST. SYS. J. 311, 332 (1997).

<sup>218</sup> See *supra* notes 32–36 and accompanying text; see also Davis, *supra* note 45, at 748–49 (noting that insurers are not interested in earlier settlement because they derive equal or greater benefits from strategies other than reasonable early offers); Goodpaster, *supra* note 11, at 236 (“Unless reforms address the economic structures and incentives behind litigation, simply making alternative dispute resolution services available or mandating them may not have the desired effect.”).

<sup>219</sup> See *supra*, notes 44, 102 and accompanying text; see also, McAdoo, *supra* note 4, at 472 q.37 (finding that 31% of attorneys chose mediation because it increased the potential for creative solutions); McAdoo & Hinshaw, *supra* note 5, at 584 q. 37 (finding that 23% of attorneys chose mediation because it increased the potential for creative solutions).

<sup>220</sup> See, e.g., Wissler, *supra* note 44, at 669; Deborah R. Hensler, *Court-Annexed Arbitration*, in *ADR AND THE COURTS* 23, 37–38 (Erika S. Fine & Elizabeth S. Plapinger eds., 1987) [hereinafter *Court-Annexed Arbitration*]; Deborah Hensler, *Arbitration and the Pace of Litigation*, in *THE PACE OF LITIGATION: CONFERENCE PROCEEDINGS* 129, 129–137 (Jane W. Adler et al. eds., 1982) [hereinafter *Pace of Litigation*]; Herbert Kritzer, *Arbitration and the Pace of Litigation*, in *THE PACE OF LITIGATION: CONFERENCE PROCEEDINGS* 114, 118–121 (Jane W. Adler et al. eds., 1982); KAKALIK ET AL., *supra* note 7, at 34–35; KAKALIK ET AL., *supra* note 4, at 74; MEIERHOEFER, *supra* note 44, at 6, 85–89, 95–102; STIENSTRA ET AL., *supra* note 196, at 215–16, 243–44.

program design, such as the scheduling of ADR referrals and sessions, affect the timing of settlements.<sup>221</sup> Thus, if attention is not paid to issues of program structure and availability, an increased willingness to use ADR might not lead to earlier settlements. And there is some empirical evidence to suggest that ADR might be less effective in facilitating earlier settlements than are other approaches to case management, such as early judicial management, strict scheduling of case events, and discovery cutoffs.<sup>222</sup> Thus, many questions about the ultimate impact of increased voluntary ADR use remain to be answered.

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<sup>221</sup> See, e.g., Wissler, *supra* note 44, at 671; *Court-Annexed Arbitration*, *supra* note 220, at 37–38; *Pace of Litigation*, *supra* note 220, at 129–137; STIENSTRA ET AL., *supra* note 196, at 215–16, 243–244; MacCoun, *supra* note 204, at 241; MEIERHOEFER, *supra* note 44, at 106.

<sup>222</sup> See KAKALIK ET AL., *supra* note 4, at 74, 89; KAKALIK ET AL., *supra* note 7, at 34–35; see also JOHN GOERDT, EXAMINING COURT DELAY 32–36 (1989) (finding that the best predictors of faster case processing time included the early scheduling of case events, strict disposition time goals, and firm trial dates).