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Easing the Road to Civil Justice: Improving Litigants' Awareness of ADR Options

Donna Shestowsky

In an overburdened justice system, litigants often wade through years of court proceedings and incur significant expenses as they seek civil justice. In many instances, alternative dispute resolution (ADR) procedures can offer litigants relief from the expense and waiting time associated with trial. In addition, compared to trials, ADR options often allow litigants to resolve their disputes in ways that better meet their objectives. For example, ADR permits litigants to set aside the rule of law in the interest of shared goals or industry norms. Further, court-sponsored ADR can increase the efficiency of the judicial system. When litigants are satisfied with their dispute resolution experience, they are more likely to voluntarily comply with the outcome.¹ This compliance can mean fewer breach-of-contract claims stemming from settlement agreements and fewer appeals. However, court ADR programs cannot realize these benefits if litigants are unaware of their existence. To assess litigant awareness of court ADR offerings, I conducted a survey study of litigants across three state courts. I review the rather sobering findings, and then discuss specific actions that courts and lawyers can take to improve litigants' awareness of such programs.

METHODOLOGY

My research team and I collected data from 336 litigants eligible for their court's mediation and arbitration programs to determine whether they were aware of these offerings. Litigants were surveyed by phone within three weeks of their cases being closed. Participants were selected from three state courts: the Third Judicial District Court, Salt Lake City, Utah; the Superior Court of California, County of Solano; and the Fourth Judicial District, Multnomah County, Oregon. These courts were chosen because they offer *both* mediation and non-binding arbitration (in addition to trial) for the same causes of action. Only cases eligible for both procedures were eligible for the study. The resulting sample includes litigants involved in a wide range of cases, including property, personal injury, contracts, and medical malpractice.

We asked litigants to rate their impression of their court ("On a scale from 1 to 9 where 1 = extremely negative, 9 = extremely positive, and 5 = right in the middle, neutral, what is your impression of the court where this case was filed?"). Litigants also listed the procedures that they or their lawyer had considered using for their case ("Before you started thinking about what procedure was best for your case, you or your lawyer probably thought about all the possible ways that could resolve your case. What are all the procedures you or your lawyer considered?"). In addition, we asked whether their court offered a mediation or arbitration program. We classified

responses as "yes," "no," or "don't know." For all participants, the correct response to both questions was "yes."

Using information collected from the surveys, we categorized litigants based on both representation status and repeat experience with litigation. Specifically, litigants were classified as (1) "represented" if they had a lawyer or were themselves a lawyer or "unrepresented" if they did not have a lawyer and were not themselves a lawyer, and (2) "repeat player" if they had been a plaintiff or defendant in a prior case or "first-time litigant" if they had no past experience as a party.

MAIN FINDINGS

The survey data revealed several novel and surprising results:

- Only about 25% of litigants were aware of their court's mediation program and only about 27% were aware of their court's arbitration program. See Figures 1 and 2.

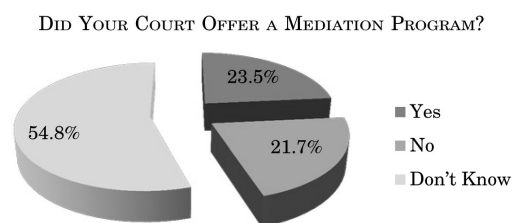


Figure 1. Litigant Awareness of Court-Sponsored Mediation
Note: N = 221.

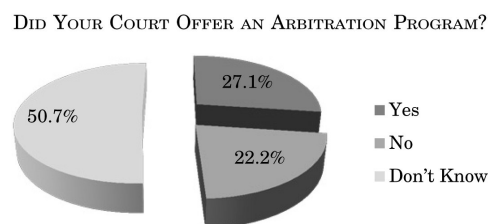


Figure 2. Litigant Awareness of Court-Sponsored Arbitration
Note: N = 221.

- Only 15% of participants identified both programs at their court.
- Represented litigants were no more likely than unrepresented parties to correctly identify their court's programs.
- Litigants who knew their court offered mediation were more likely to think highly of their court. However, this was not the case for arbitration.
- Compared to first-time litigants, repeat players were less likely to exhibit confusion about whether their court

Footnotes

1. See TOM R. TYLER, WHY PEOPLE OBEY THE LAW 82 (2d ed. 2006).

offered mediation (the ratio of “don’t know” to “yes” replies was 2.2 times higher among first-timers than among repeat players) and arbitration (the ratio was 2.53 higher among first-timers than among repeat players).

- Less than one-third of litigants reported that they or their lawyer had considered using mediation or arbitration. Negotiation was the most commonly contemplated procedure, followed by trial. The judicial settlement conference was the procedure least likely to be considered. Nearly 16% indicated that they had contemplated “other” courses of action, most typically filing a countersuit or bankruptcy.
- Litigants who knew their court offered mediation were not more likely to consider using mediation than those who thought it did not. In contrast, litigants who knew their court offered arbitration were 2.6 times more likely to consider using that procedure than those who were unaware of this possibility, suggesting that the court’s stamp of approval boosted the odds that litigants would consider arbitration.

Additional research should explore why litigants are unable to identify their courts’ ADR offerings. The level of unawareness we observed may be the result of litigants never learning about their courts’ programs. Research on memory offers another possible explanation: Litigants may have received material about their court’s ADR offerings but been unable to recall this information at the time of the survey, which they completed after the conclusion of their cases. Studies have shown that mere exposure to information is not enough to guarantee learning.² To learn and retain information, people often need to engage in a deep form of processing called “elaboration.” Elaboration involves associating new information with knowledge already recorded in long-term memory, thus incorporating the new information into a broader familiar narrative.³ If litigants heard about mediation or arbitration in passing and had superficial conversations (not tailored to their situation) about the procedures with their lawyers, the information may not have been committed to long-term memory.

IMPROVING LITIGANT AWARENESS OF COURT ADR

Regardless of the reasons for their lack of awareness, when litigants do not know their options, they cannot make informed decisions about how to resolve their disputes. Our findings suggest several ways that both courts and attorneys can better educate litigants about available procedures. The following sections outline several possibilities.

RECOMMENDATIONS FOR COURTS

1. Courts can institute rules that require attorneys to discuss ADR with their clients.⁴ Ideally, these rules would encourage lawyers to start these discussions early in the litigation process and revisit them at various points as a case develops. Because prior research suggests that rules requiring lawyers to discuss ADR with their clients are not always effective,⁵ courts should implement additional measures to ensure the enforcement of these rules. For example, they could require both attorneys *and* litigants to sign a disclosure form indicating that the attorney has reviewed both private and court-sponsored ADR options for the case. Some courts, such as the U.S. District Court for the Northern District of California, already do this. Courts could also impose penalties on attorneys who do not comply with the rules.
2. Courts can directly provide litigant education by giving litigants educational materials about their programs (and ADR in general), without expecting lawyers to act as intermediaries. Courts could reap benefits from this course of action: we found that litigants who were aware that their courts offered mediation had more favorable impressions of the court.
3. Courts can create attorney-staffed help desks to answer questions about ADR procedures.⁶
4. Courts can hold periodic in-person, judge-facilitated ADR informational meetings. Having authority figures such as judges hold these sessions may make litigants and lawyers more willing to fully consider the information.⁷
5. Courts should remind litigants about their ADR options at several points in time while their cases are pending. Psychological research suggests that reminders that are salient to the particular litigant are likely to be particularly effective education tools. For example, litigants might be more likely to remember information about ADR if they are reminded about their options after they lose a Motion for Summary Judgement.
6. Some courts already use exit surveys to assess litigant satisfaction with ADR procedures after litigants have used them. Courts should also survey parties who did not use these programs, to learn why. To the extent that litigants are aware of these programs but do not use them, courts should explore how they can make their programs more appealing and dismantle any institutional or systemic barriers. If courts discover (as we did) that many litigants are not aware of their programs, they should obtain feedback from litigants (and lawyers) to determine how to better advertise them.

Although these measures may seem like extra work for a

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

3. ANDERSON, *supra* note 2 at 204-10 (1995) (outlining how deep processing can be achieved by placing the material into context for the person trying to learn the material, relating it to material that the person already knows, and helping the person understand why the material is personally relevant).

4. Donna Shestowsky, *When Ignorance Is Not Bliss: An Empirical Study of Litigants’ Awareness of Court-Sponsored Alternative Dispute Reso-*

lution Programs, 22 HARV. NEGOT. L. REV. 224-225, 234-235 (2017).

5. See, e.g., Bobbi McAdoo & Art Hinshaw, *The Challenge of Institutionalizing Alternative Dispute Resolution: Attorney Perspectives on the Effect of Rule 17 on Civil Litigation in Missouri*, 67 MO. L. REV. 473 (2002).

6. Jerome B. Simandle, *Enhancing Access to ADR for Unrepresented Litigants: Federal Court Programs Provide Models for Helping Pro Se Parties — and the Justice System*, DISP. RESOL. MAG., Spring 2016 at 7, 8.

7. Shestowsky, *supra* note 4, at 227.

system designed in part to lighten the workload of the courts, our research suggests notable benefits. First, these efforts might encourage litigants to consider using programs in which courts have already invested, which might ease overburdened court dockets. Second, such efforts may improve litigants' impressions of the court. Third, to the extent that, for some litigants, access to ADR is the only reasonable pathway to justice, improved awareness of these alternatives to trial is paramount. Although the changes I recommend for courts are important, attorneys also have a crucial role to play in increasing awareness of ADR procedures.

RECOMMENDATIONS FOR ATTORNEYS

1. Lawyers should be better educated about ADR. Roselle Wissler found that one major impediment to lawyer-client conversations about ADR is attorneys' lack of knowledge about such procedures.⁸ To rectify this situation, skills-based education focused on ADR procedures should be a mandatory part of law school, and attorneys should further hone their advocacy skills in ADR contexts through CLE programs.
2. Lawyers should receive training on how to counsel clients about ADR in ways that will facilitate the retention of information over time. To promote elaboration and memory recall, lawyers should emphasize how the advantages and disadvantages of ADR procedures relate to litigants' goals and values. Further, lawyers should ensure that clients know they have the power to participate in decisions regarding which dispute resolution procedure will be used (limited by any court rules and the need for consent from the other party).
3. Even if not required by local rules or the applicable rules of professional responsibility, attorneys should educate clients about ADR in every case that might include litigation. Lawyers should help them review their options *after* learning about their clients' priorities and values, to avoid inadvertently injecting their own priorities and values into the decision-making process.⁹ Ideally, lawyers would provide clients with detailed and personalized information on how ADR options would impact them. This suggestion is supported by analogy to medical studies showing that patients are more knowledgeable and more likely to make decisions consistent with their preferences, values, and goals when they use decision aids, such as interactive tools, to help them make treatment choices.¹⁰

CONCLUSION

Many courts, including the ones in this study, provide information about their ADR programs online. However, our results suggest that offering general education via the Internet is insufficient to ensure litigant awareness of court-sponsored ADR programs. Moreover, this method of providing information tends to disadvantage vulnerable populations that are less likely to have access to the Internet, including low-income individuals, those with disabilities, and the elderly.¹¹ Therefore, courts should consider playing a more active role in litigant education. Their efforts should involve requiring lawyers to educate their clients, but also incorporate practices that do not assume that lawyers will act as intermediaries. Such changes would benefit both unrepresented and represented parties.

In addition to implementing changes at the court level, more needs to be done regarding attorney education. Lawyers should be able to adequately educate their clients about ADR. Attorneys must have a concrete understanding of the advantages and disadvantages of specific procedures in a variety of contexts so they can effectively counsel clients, tailoring their advice to their client's goals and values. When litigants are adequately informed about their options and thus can have a meaningful influence on the trajectory of their dispute's resolution, courts should become more efficient and litigants should find the road to civil justice easier to travel.



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Ignorance Is Not Bliss: An Empirical Study of Litigants' Awareness of Court-Sponsored Alternative Dispute Resolution Programs, 22 HARV. NEGOT. L. REV. 189 (2017), available at <https://ssrn.com/abstract=2945706>. This material is based upon work supported by the National Science Foundation under Grant Number 0920995. Funding from the Norm Brand '75 & Nancy Spero ADR Research Fund also contributed to this article.

8. Roselle L. Wissler, *Barriers to Attorneys' Discussion and Use of ADR*, 19 OHIO STATE J. DISP. RESOL. 459, 480-81 (2004). Other barriers to lawyer-client discussions might be harder to mitigate. For example, lawyers might be more reluctant to discuss ADR when they overestimate a trial win, or underestimate the chances of early settlement, or face financial incentives to prolong discovery and head to trial. *Id.* at 466-67. See Nancy H. Rogers & Craig A. McEwan, *Employing the Law to Increase the Use of Mediation and to Encourage Direct and Early Negotiations*, 13 OHIO ST. J. DISP. RESOL. 831, 846-47 (1998); 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, 208 (2002).
9. Donna Shestowsky, *Inside the Mind of the Client: An Analysis of Lit-*

igants' Decision Criteria for Choosing Procedures. CONFLICT RESOL. Q. 1-19 (2018). <https://doi.org/10.1002/crq.21228>.

10. Gil Siegal, Richard J. Bonnie & Paul S. Appelbaum, *Personalized Disclosure by Information-on-Demand: Attending to Patients' Needs in the Informed Consent Process*, 40 J. L. MED & ETHICS 359 (2012); Erica S. Spatz, Harlan M. Krumholz & Benjamin W. Moulton, *Prime Time for Shared Decision Making*, 317 (13) JAMA 1309, 1309-1310 (2017).
11. See Andrew Perrin & Maev Duggan, *Americans' Internet Access: 2000-15*, PEW RES. CTR. 2-3 (June 26, 2015), http://pewinternet.org/files/2015/06/2015-06-26_internet-usage-across-demographics-discover_FINAL.pdf (last accessed Sept. 5, 2018).