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New Studies Provide Insight into How Disputants Value Case Evaluation by Third Parties

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New studies provide insight into how disputants value case evaluation by third parties

By Gregory Todd Jones and Douglas H. Yarn

Dispute resolution is about decision making under uncertainty. In a judicial climate where the vast majority of cases settle before formal adjudication, settlement decisions reached by disputants may be deeply influenced by the opinions of other parties to the conflict, including attorneys, judges, and other intervening third-parties, such as mediators, neutral evaluators, and non-binding arbitrators.

Indeed, court-connected Alternative Dispute Resolution (ADR) programs have become ubiquitous. Judicial settlement conferences have become commonplace, and private sources of dispute resolution services proliferate. As the functioning of the judicial system becomes increasingly dependent on alternative forms of dispute resolution, the details of how these processes work becomes increasingly important and controversial.

There has been significant debate over the extent to which third parties should implicitly or explicitly evaluate the parties' cases. On one hand, do mediators associated with court-connected ADR programs exert too much influence on party decision making, allegedly putting goals of easing overburdened dockets over the self-determination of parties? Likewise, do settlement conferences guided by judges from their obvious position of authority undermine party autonomy in deciding whether

to settle? On the other hand, is it possible that in some cases self-determination may be impossible without third-party evaluation? Until recently, there has been a dearth of empirical research addressing these questions.

By examining mediation triads under experimental control, two new studies¹ provide some insight into how parties value information from third parties and integrate that information into their settlement decisions.

Estimating value

Not surprisingly to those who have dealt with the often extreme positions maintained by disputants, the studies show a pervasive inability to accurately evaluate the value of a case that may proceed to trial. As a threshold matter, it follows that typical disputants would benefit from having access to more accurate information; whether that information was provided by a judge in a settlement conference, a mediator with substantive experience, or the advice of their own attorney.

Nonetheless, the studies show a robust tendency to undervalue new information that may be garnered from participation in a third-party-guided process. Such findings have significant public policy implications that inform both the design of settlement conferences and judicial expecta-

tations regarding meaningful participation in mandatory ADR programs of various types.

Furthermore, once the parties have made the decision to engage in a third-party process, or have capitulated to required participation in a court-connected program, the studies demonstrate that information provided by these processes is poorly utilized. Parties are significantly anchored by their initial subjective expectations of case outcome and are unwilling to modify these expectations, even in the face of reliable information to the contrary.

Framing

Perhaps the most valuable insight, particularly from a pragmatic point of view, is revealed by examining the effects discussed above separately for plaintiffs and defendants. There is vast experimental evidence that the manner in which an uncertain decision is construed or framed, either as a possible gain or a possible loss, will influence the decision maker's preference for risk. In the context of a two-party dispute, the studies confirm that parties demonstrate predictable differences in preference for risk, possibly due to the circumstance that virtually any settlement outcome is viewed as a loss for defendants and a gain for plaintiffs.

1. See Gregory Todd Jones & Douglas H. Yarn, *Evaluative Dispute Resolution Under Uncertainty: An Empirical Look at Bayes' Theorem and the Expected Value of Perfect Information*, J. OF DISP. RESOL. (forthcoming 2003); Gregory Todd Jones, Douglas H. Yarn & Reidar Hagtvedt, "Evaluative Dispute Resolution Under Uncertainty: Framing, Confirmatory Evidence Bias, and the Expected Value of Imperfect Information" (2003) (unpublished working paper, available from authors).

As a result defendants place a higher value on third-party information that may inform their uncertain decision making. In fact, when specific third-party information was offered to both parties, defendants tended to *overvalue* the information whereas plaintiffs tended to more reactively devalue the same information. Subsequently, defendants came very close to the normative benchmark utilization of the new information, while plaintiffs dramatically failed to integrate the new information at rational levels.

Observations and questions

Obviously in the great majority of disputes, parties do modify their expectations and demands enough to reach settlement; however, by revealing that parties undervalue information, these studies indicate they are unwilling generally to incur

the costs associated with third-party assisted negotiation, even when that process may offer information valuable to settlement decision making. Furthermore, once engaged in such a process, the parties tend to significantly underutilize the evaluative information made available, and treat the information in systematically different ways depending on whether the party is a defendant or a plaintiff.

Among the many interesting questions raised by these results is the effect on ethical obligations of third-party interveners. At first glance, knowledge of the fact that the different parties will process third-party information in very different ways, because they come to the process with such biases, seems to counsel against the use of evaluative styles of intervention. Further reflection, however, brings to mind

the possibility that often the only hope for resolving disputes short of adjudication may be the efforts of third parties, informed by the results of empirical studies like those considered here, to facilitate unbiased analysis of risk. In this sense, third-party evaluation may be necessary to preserve self-determination. ☞

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Viewpoint

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There is no free pass allowed if the system is *trying*, or the process *seems* neutral on its face, if the result is systematic bias.

Courts can and should be diligent in insisting every citizen called to serve does so, as Allegheny County now promises to be. And states should ensure that every citizen called to serve can do so without serious economic hardship, which Pennsylvania has not yet done. But courts also must make an effort to explain to those groups which are disenfranchised from the system just why they are needed. Judge William Murray Jr. of the San Joachin, California, Superior Court, is a pioneer in this regard. His court trains a dozen minority liaisons each year in a 17-week course on the justice system. Those liaisons then spread awareness in their own communities.

Courts should monitor the race of their jurors. And if problems persist,

the courts should do what is necessary to correct them, even if it means a sort of affirmative action in jury selection. In today's climate such a suggestion is certain to raise objections. Critics say it means abandoning the so-called randomness that is taken to be a bedrock principle of the trial system. But if the juror selection process is ideally supposed to be random, it is only to serve a much higher ideal, one we should not lose sight of. And that is nothing less than

democracy itself.

Each juror, in addition to the case before him or her, serves a second purpose. It is to reaffirm to the accused, as well as to himself or herself and to society as a whole, that we the people are the government, and that we the people, all of us, each of us, hold the destiny of this nation in our hands. ☞

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two concepts both entail countering an interest group attack ad in a public forum.

The above reforms are designed to either depoliticize judicial elections or to allow judicial candidates to meet interest groups with equal rhetorical force in the campaign while also seeking to promote civil and informative campaign discourse

that balances judicial independence with political accountability. The reforms reflect a new model of judicial politics that takes into account the dramatic changes over the past 20 years in state judicial elections. In designing their models of reform, states should focus on guiding the statements candidates *can* make and activities that *should* be appropriate in light of the realities of the twenty-first century judicial campaign. ☞

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Editorial

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general standards and to sanction judges who fail to do so. Neither the judge who falsely claimed to be a Vietnam veteran nor the judge who had an affair with a fugitive (and then married him following his cap-

ture and conviction) can reasonably claim unfair surprise that their conduct was considered unethical, nor can the application of Canons 1 and 2A to their conduct by their state's conduct commission and supreme court be considered capricious or subjective.

The general rules in Canons 1 and 2A remind judges to think carefully

about what they say and do and to consider the perspective of someone in the general public who does not know them well. That is not bad advice for everyone, and it is a critical factor in maintaining public confidence in an individual judge, and the judiciary in general. ☞

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