The Alternative Dispute Resolution Section and the Litigation Section proudly present...

#6 SETTLING DISPUTES AND THE BEHAVIORAL SCIENCES:
RESEARCH RESULTS AND SUCCESSFUL SETTLEMENT STRATEGIES

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Mark LeHocky – Judicate West

Agenda

   a. Research goal: Understanding how litigants evaluate legal procedures at the start of their cases
   b. Methodology: Jurisdictions, case-types, litigant characteristics
   c. Evaluating the attractiveness of legal procedures: Negotiation, mediation, non-binding and binding arbitration, and trial
   d. The relationship between litigants’ confidence in a trial win and their preferences for procedures
   e. Egocentric or “self-serving” bias
   f. Takeaways from the data

II. The Empirical Data: Attorney Overconfidence and Its Costs
    a. Attorney perception and handicapping
    b. The results
    c. Takeaways from the data

III. Practical Settlement Strategies Based Upon the Research Results
    a. The hallmarks of modern civil mediation practice
    b. What’s wrong with this picture?
    c. Steps to minimize the egocentric bias
    d. Practical steps before and at the mediation
    e. The critical role of civility

IV. Questions / Comments


Mark LeHocky, *Negotiating in Mediation: Why Did We Stop Talking? Practical advice for engaging your adversary in dialogue to ensure the most productive mediation*, California Lawyer (July 25, 2016) (attached)
Donna Shestowsky
Professor of Law, University of California Davis School of Law

Education
B.S. Psychology, Yale University; M.S. Psychology, Yale University; J.D., Stanford University; Ph.D. Psychology, Stanford University

Biography
Dr. Shestowsky teaches Criminal Law, Negotiation Strategy, Alternative Dispute Resolution (ADR), and a Seminar in Legal Psychology. Her main research objective is to examine basic assumptions underlying the structure of the legal system and to explore ways in which the legal system might be improved using the methodological and analytic tools of psychological theory and research.

Dr. Shestowsky is the sole principal investigator of a multi-year research project, funded by the National Science Foundation and the American Bar Association, which examines how litigants evaluate legal procedures. Her recent scholarship based on this work was awarded the 2016 Mangano Dispute Resolution Advancement Award.

Dr. Shestowsky’s legal and psychological commentary has appeared in national sources such as CNN, NPR, and the New York Times. She advises courts in the development of court-connected ADR programs and provides negotiation education services to corporations, law firms, and national organizations. She also coaches the King Hall Negotiation team, which ranked 1st in the world in the international law student negotiations competition in 2009. She was the 2007 recipient of the Distinguished Teaching Award.

Her research has been published in top journals in both Psychology and Law, including the Stanford Law Review, Law and Human Behavior (twice), and the Journal of Personality and Social Psychology. She is dedicated to helping legal practitioners make use of empirical research. To that end, she also publishes in journals with broader audiences, such as Court Review and Dispute Resolution Magazine.

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Mark LeHocky is a mediator and arbitrator with Judicate West who works throughout the United States. Mark previously served as general counsel and a senior executive to Nestlé / Dreyer’s Grand Ice Cream, Inc. and Ross Stores, Inc., where he managed all major litigation. Prior to his general counsel work, Mark spent two decades litigating complex antitrust, commercial, IP and employment disputes for individual and corporate clients ranging from small businesses to Fortune 100 companies.

As general counsel, Mark designed and installed company-wide early dispute resolution programs. He also helped design Dreyer’s multi-stage merger transaction with Nestlé, S.A., the world’s largest food company, and later developed ADR and litigation management training for Nestlé attorneys from around the world.

Mark began mediating in the late 1990s when first appointed by the federal court in San Francisco to help resolve complex cases. Since retiring as general counsel in 2012, Mark’s private ADR practice encompasses commercial, intellectual property, antitrust, consumer, insurance, employment, technology-related and other business disputes. In addition, he has taught Mediation Advocacy at the University of California, Davis’ School of Law, lectures at the University of California, Berkeley’s School of Law and Haas School of Business on litigation management, ADR and intellectual property, and writes and speaks extensively on all these topics. See www.marklehocky.com.

Mark earned his BA from the University of California, Los Angeles and his JD from the University of California, Berkeley. He has been appointed a Distinguished Fellow by the International Academy of Mediators and named a Best Lawyer in America for Mediation for successive years by U.S. News – Best Lawyers©.
Although portions of the United States economy have begun to recover from the economic crisis that the country experienced from 2007 to 2009, the nation's judicial system has rebounded more slowly. Forty-three states have substantially cut their judicial budgets. In many jurisdictions, the waiting time for civil trials in state courts has dramatically increased—in at least one major metropolitan area, the waiting time for many litigants has risen to five years. Budgets for alternative dispute resolution (“ADR”) programs have also shrunk considerably. In light of these realities, many litigants struggle to obtain civil justice.

Empirical research designed to elucidate litigants’ preferences for legal procedures can help courts to better serve their constituents moving forward. For example, many courts offer either mediation or arbitration as the only alternative to trial. But which of these two procedures do litigants prefer? Procedural preference research can provide such information and consequently help inform program design. Such research can also help lawyers be more responsive to their clients’ needs as they consider their procedural options and better predict the preferences of opposing parties.

It is important for empirical research to elucidate how litigants perceive procedures ex ante (before a legal procedure resolves the dispute) as well as how they evaluate them ex post (after the case has received a final disposition). Ex ante perceptions are relevant for understanding litigants’ viewpoints regarding how to “fit the forum to the fuss.” Research on such perceptions can help court personnel effectively “market” ADR options to litigants, thereby mitigating burdens related to over-stretched budgets, court dockets, and the waiting time for trial. It can also be useful for anticipating resistance toward, or over-eagerness to engage in, certain procedures in light of the case-related, demographic, or relationship factors at play in a given dispute. For these reasons, an understanding of litigants’ pre-experience conceptualizations of legal procedures should be considered foundational.

In contrast, litigants’ ex post perceptions are important because they tend to affect how inclined litigants are to voluntarily comply with the terms of the agreement or decision that is reached for their case and how willing they are to abide by the law moving forward. Although the architects of court policy are rightfully influenced by multiple factors, research on litigants’ perceptions—both ex ante and ex post—can help to inform the design and use of procedures that maximize the subjective satisfaction of litigants and increase citizens’ respect for the legal system.

To contribute to this body of psychological literature, my research team and I spearheaded the first multi-court study of how civil litigants assess legal procedures ex ante. We noticed that several aspects of litigant perceptions had not been fully examined through empirical research. One open issue concerned how litigants compare legal procedures such as mediation, judge trials, and non-binding arbitration. Nearly all of the past studies had consisted of laboratory research, which typically involved surveying undergraduates who evaluated options for resolving hypothetical disputes. How actual civil litigants

This article was adapted from Donna Shestowsky, The Psychology of Procedural Preference: How Litigants Evaluate Legal Procedures Ex Ante, 99 IOWA L. REV. 637 (2014), available at http://ssrn.com/abstract=2378622. Additional findings can be found in the original work. The research was funded by the National Science Foundation under Grant Number 0920995. The American Bar Association, Section on Litigation, and the Institute for Governmental Affairs at the University of California, Davis, provided financial support during the first year of the study. The University of California, Davis, School of Law also provided ongoing financial and human resources to support this project.

Footnotes
1. Mary McQueen, President, Nat’l Ctr. for State Courts, National Public Radio Interview (Oct. 4, 2011).
4. The idea of “marketing” ADR options to litigants is reminiscent of Frank Sander’s work during the 1970s, which focused on “fitting the forum to the fuss” through ex ante screening and determination of the most appropriate procedures to be used, based on the particulars of individual cases. See, e.g., 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 (1994); see also Timothy Hedeen, Remodeling the Multi-Door Courthouse to “Fit the Forum to the Folks”: How Screening and Preparation Will Enhance ADR, 95 MARQ. L. REV. 941, 941 (2012) (proposing a structural change in the delivery of ADR services through a pre-mediation consultation process of screening and preparation that focuses not only on disputes but on litigants as well).
5. Donna Shestowsky, Disputants’ Preferences for Court-Connected Dispute Resolution Procedures: Why We Should Care and Why We Know So Little, 23 OHIO ST. J. ON DISP. RESOL. 549, 577-79 (2008) (providing an overview of the relevant findings); see also Tom R. Tyler, WHY PEOPLE OBEY THE LAW 4-5 (2006) (discussing the benefits of voluntary compliance from the perspective of the authorities).
6. We are presently collecting data on the same litigants regarding their ex post perceptions.
7. See Shestowsky, supra note 5, for review of the relevant literature.
assess their options with respect to actual cases was not clear.\(^8\)
To our knowledge, only two past field studies had examined the
ex ante perceptions of real litigants, and both were conducted in
a single jurisdiction and made limited inquiries into litigant
decision-making.\(^9\) Another open issue was whether litigants’
attraction to procedures is associated with demographic, relation-
ship or attitudinal factors, or the substantive issues involved in
their cases. Laboratory research on ex ante preferences, and
arguably even lawyer intuition, suggest that many factors influ-
ence how desirable litigants perceive procedures to be, including
their culture, race or ethnicity, gender, the role they have in the
case (i.e., defendant or plaintiff), and the causes of action that
are involved.\(^10\) A third open issue was whether litigants have a
preference between the two ADR procedures that courts commonly
offer—mediation and non-binding arbitration.

Our project differs from past field research on ex ante litigant
assessments of procedures in several ways. First, it surveys liti-
gants from three distinct state court systems, making it the first
multi-jurisdictional study of litigants’ ex ante preferences. Sec-
ond, the courts from which litigants were recruited offered both
mediation and non-binding arbitration, in addition to trial, for
the same cases. Thus, the study investigates preferences within
a real-world environment while maintaining a “laboratory-like”
setting by keeping the most important variables (i.e., the proce-
dures offered by the courts) relatively constant. Third, com-
pared to earlier research, this work examines how litigants eval-
uate a much larger variety of procedures and assesses a broader
set of factors that might predict attraction to procedures.

METHOD

Participants were recruited from general jurisdiction trial
courts (the “study courts”) in three states:
Third Judicial District Court, Salt Lake City, Utah
(“Utah Court”),\(^11\)
Superior Court of Solano County, California (“California
Court”),\(^12\) and
Fourth Judicial District, Multnomah County, Oregon
(“Oregon Court”).\(^13\)

For six two-week periods between May 2010 and May 2011,
we identified litigants who met the following study criteria in
each study court: their case must have been filed in one of the
courts during the two-week period and have been eligible for
trial as well as both mediation and non-binding arbitration at that
court. When the court did not provide litigant contact
information, the team researched addresses for the litigants to
prevent the data contamination that may have occurred by
sending the surveys to the attorneys to distribute to their
clients. Surveys were mailed to litigants within three weeks of
the date on which their case was filed. An introductory letter
and consent form explained that they would be compensated
for returning the survey.

The survey collected demographic information (e.g., gender,
age group) about the litigants, the kind of litigant they were
(e.g., whether they were involved in the case as an individual or
were representing a company, organization, or group) as well as
some details about their case (e.g., whether they were the plain-
tiff, the defendant, or both (in cases involving counter-claims),
the type of legal issues that were involved, whether the parties
had a pre-existing relationship with each other, and how much
they valued a future relationship with the other party). They
rated the confidence they had in their case by providing a 0-
100% chance estimate of winning their case (“If you go to trial
for this case, what do you think your chances are of ‘winning’?”). They also indicated their impression of the court
where the case was filed (1 = extremely negative to 9 =
exremely positive). See Table 1 for more details regarding the
information that was collected.

Other questions assessed how attractive litigants regarded
the following legal procedures: (1) Attorneys Negotiate without
Clients, (2) Attorneys Negotiate with Clients Present, (3) Medi-
ation, (4) Judge Decides without Trial,\(^14\) (5) Jury Trial, (6)
Judge Trial, (7) Binding Arbitration, and (8) Non-binding Arbi-
tration. Litigants read brief descriptions of these procedures
to ensure construct validity\(^15\) and then rated each in terms of how
attractive they perceived it to be for their own case (1 = not
attractive at all to 9 = extremely attractive).\(^16\)

\(^8\) See Robert J. MacCoun, Voice, Control, and Belonging: The Double-
\(^9\) For review, see Shestowsky, supra note 3, at 651-53.
\(^10\) Id.
\(^11\) The Utah Court is located in Salt Lake City. In 2010, litigants filed
55,074 civil cases in the Utah Court. See Utah Dist. COURTS, Fy2010 CASE TYPE By COURT (2010), available at
\(^12\) The California Court is located in northern California, with
branches in Fairfield and Vallejo. For the 2010–2011 fiscal year,
the Solano County Court received 13,910 civil filings. JUDICIAL
\(^13\) The Oregon Court is located in Multnomah County. In 2010, the
Oregon Court received 18,203 civil-case filings. OR. JUDICIAL DEPT., STATISTICAL REPORT RELATING TO THE CIRCUIT COURTS OF THE STATE OF
\(^14\) This procedure was described to participants as follows: Sometimes
a judge can decide a case early on, so that a trial is never required.
This is because the judge has determined there is no question
about the facts, and the case can be decided on the basis of law
alone. The lawyers submit documents to the court and may make
a presentation to the judge at a hearing. Clients rarely attend and,
if they do, they do not speak during the hearing. The judge later
announces the outcome in writing, and explains why they decided
as they did. This outcome is based on legal rules or principles. A
party who is dissatisfied with the outcome can appeal it to a higher
court, which will require additional time and proceedings.
\(^15\) For descriptions, see Shestowsky, supra note 3, 701-03. “Construct
validity” refers to the “degree to which certain explanatory con-
cepts or constructs account for performance on [a] test.” SAMUEL
Messenick, Validity of Test Interpretation and Use 7 (1990), available
\(^16\) We created three versions of the survey, with the same questions
presented in different orders in each version.
### TABLE 1: PARTICIPANT INFORMATION

<table>
<thead>
<tr>
<th>Court Location</th>
<th>FREQUENCY</th>
<th>%</th>
</tr>
</thead>
<tbody>
<tr>
<td>California</td>
<td>59</td>
<td>14.3</td>
</tr>
<tr>
<td>Oregon</td>
<td>190</td>
<td>46.0</td>
</tr>
<tr>
<td>Utah</td>
<td>155</td>
<td>37.5</td>
</tr>
<tr>
<td>Missing Data</td>
<td>9</td>
<td>2.2</td>
</tr>
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</table>

<table>
<thead>
<tr>
<th>Role in Case</th>
<th>FREQUENCY</th>
<th>%</th>
</tr>
</thead>
<tbody>
<tr>
<td>Defendant Only</td>
<td>156</td>
<td>37.8</td>
</tr>
<tr>
<td>Plaintiff Only</td>
<td>235</td>
<td>56.9</td>
</tr>
<tr>
<td>Both</td>
<td>12</td>
<td>2.9</td>
</tr>
<tr>
<td>Other</td>
<td>1</td>
<td>0.2</td>
</tr>
<tr>
<td>Missing Data</td>
<td>9</td>
<td>2.2</td>
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</table>

<table>
<thead>
<tr>
<th>Party Type (Litigant)</th>
<th>FREQUENCY</th>
<th>%</th>
</tr>
</thead>
<tbody>
<tr>
<td>Individual</td>
<td>287</td>
<td>69.5</td>
</tr>
<tr>
<td>Company</td>
<td>97</td>
<td>23.5</td>
</tr>
<tr>
<td>Group/Organization</td>
<td>27</td>
<td>6.5</td>
</tr>
<tr>
<td>Missing Data</td>
<td>6</td>
<td>1.5</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>Party Type (Opposing Party)</th>
<th>FREQUENCY</th>
<th>%</th>
</tr>
</thead>
<tbody>
<tr>
<td>Individual</td>
<td>202</td>
<td>48.9</td>
</tr>
<tr>
<td>Company</td>
<td>156</td>
<td>37.8</td>
</tr>
<tr>
<td>Group/Organization</td>
<td>32</td>
<td>7.7</td>
</tr>
<tr>
<td>Missing Data</td>
<td>30</td>
<td>7.3</td>
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</table>

<table>
<thead>
<tr>
<th>Was the Litigant a Defendant or Plaintiff Before?</th>
<th>FREQUENCY</th>
<th>%</th>
</tr>
</thead>
<tbody>
<tr>
<td>Yes, Defendant Only</td>
<td>52</td>
<td>12.6</td>
</tr>
<tr>
<td>Yes, Plaintiff Only</td>
<td>70</td>
<td>16.9</td>
</tr>
<tr>
<td>Yes, Both</td>
<td>69</td>
<td>16.7</td>
</tr>
<tr>
<td>No, Neither</td>
<td>176</td>
<td>42.6</td>
</tr>
<tr>
<td>Missing Data</td>
<td>46</td>
<td>11.1</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>Litigant Age Group</th>
<th>FREQUENCY</th>
<th>%</th>
</tr>
</thead>
<tbody>
<tr>
<td>18-25</td>
<td>14</td>
<td>3.4</td>
</tr>
<tr>
<td>26-35</td>
<td>80</td>
<td>19.4</td>
</tr>
<tr>
<td>36-45</td>
<td>74</td>
<td>17.9</td>
</tr>
<tr>
<td>46-55</td>
<td>92</td>
<td>22.3</td>
</tr>
<tr>
<td>56-65</td>
<td>82</td>
<td>19.9</td>
</tr>
<tr>
<td>66-75</td>
<td>48</td>
<td>11.6</td>
</tr>
<tr>
<td>76-80</td>
<td>6</td>
<td>1.5</td>
</tr>
<tr>
<td>Over 80</td>
<td>5</td>
<td>1.2</td>
</tr>
<tr>
<td>Missing Data</td>
<td>12</td>
<td>2.9</td>
</tr>
</tbody>
</table>

### TABLE 1: PARTICIPANT INFORMATION (CONTINUED)

<table>
<thead>
<tr>
<th>Litigant Ethnicity/Race</th>
<th>FREQUENCY</th>
<th>%</th>
</tr>
</thead>
<tbody>
<tr>
<td>American Indian or Alaska Native</td>
<td>6</td>
<td>1.5</td>
</tr>
<tr>
<td>Asian</td>
<td>17</td>
<td>4.1</td>
</tr>
<tr>
<td>Hispanic</td>
<td>12</td>
<td>2.9</td>
</tr>
<tr>
<td>Black or African American</td>
<td>20</td>
<td>4.8</td>
</tr>
<tr>
<td>Native Hawaiian or Other Pacific Islander</td>
<td>4</td>
<td>1.0</td>
</tr>
<tr>
<td>White Non-Hispanic</td>
<td>324</td>
<td>78.5</td>
</tr>
<tr>
<td>Other</td>
<td>16</td>
<td>3.9</td>
</tr>
<tr>
<td>Missing Data</td>
<td>14</td>
<td>3.4</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>Litigant Gender</th>
<th>FREQUENCY</th>
<th>%</th>
</tr>
</thead>
<tbody>
<tr>
<td>Female</td>
<td>176</td>
<td>42.6</td>
</tr>
<tr>
<td>Male</td>
<td>225</td>
<td>54.5</td>
</tr>
<tr>
<td>Missing Data</td>
<td>12</td>
<td>2.9</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>Relationship with Opposing Party Before Filing?</th>
<th>FREQUENCY</th>
<th>%</th>
</tr>
</thead>
<tbody>
<tr>
<td>No</td>
<td>218</td>
<td>52.8</td>
</tr>
<tr>
<td>Yes</td>
<td>180</td>
<td>43.6</td>
</tr>
<tr>
<td>Missing Data</td>
<td>15</td>
<td>3.6</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>Insurance Company has an Interest in the Outcome?</th>
<th>FREQUENCY</th>
<th>%</th>
</tr>
</thead>
<tbody>
<tr>
<td>Yes, Plaintiff’s insurance has an interest</td>
<td>26</td>
<td>6.3</td>
</tr>
<tr>
<td>Yes, Defendant’s insurance has an interest</td>
<td>83</td>
<td>20.1</td>
</tr>
<tr>
<td>Yes, Both Parties’ insurance have an interest</td>
<td>42</td>
<td>10.2</td>
</tr>
<tr>
<td>No, Neither Party’s insurance has an interest</td>
<td>190</td>
<td>46.0</td>
</tr>
<tr>
<td>Don’t Know</td>
<td>57</td>
<td>13.8</td>
</tr>
<tr>
<td>Missing Data</td>
<td>15</td>
<td>3.6</td>
</tr>
</tbody>
</table>

Note: N = 413. Missing data indicates litigants for whom a response to the question was not obtained. Party Type and Opposing Party Type calculations include participants (n = 4 and n = 7, respectively) who indicated that more than one type applied to their case.

### PARTICIPANTS AND TYPES OF CASES

Four hundred thirteen litigants participated in this study. The majority of their cases involved only personal injury (28.6%) or contracts (24.5%) issues. A variety of other kind of cases were included in the sample: property (11.1%), civil rights (2.9%), employment (5.3%), medical practice (1.7%), and...
and “other” (10.9%). About one-eighth of cases (12.6%) involved multiple causes of action.18

RESULTS AND DISCUSSION

We used our data to determine (1) litigants’ relative preferences for the various legal procedures and (2) whether case-type, demographic, relationship or attitudinal factors predicted how desirable litigants regarded each procedure. As with any empirical study, it is important to keep in mind how to interpret our findings. First, because ours was not a controlled laboratory study, our data cannot be used to conclusively determine causal relationships between litigants’ attraction to certain procedures and the other factors we measured (e.g., that litigants’ attitudes towards the court cause their level of attraction to the Judge Trial, or that being female causes a relative dislike for Binding Arbitration). Thus, although our interpretations of the findings are certainly consistent with the analyses that we report, they should not be taken as evidence that we discovered particular causal relationships. Second, it is important to note that the results do not necessarily generalize to how litigants might evaluate these same procedures ex post. Third, although, to our knowledge, the data collected for this study represents the largest data set of litigants’ ex ante perceptions of procedures published to date, the response rate was 10%.19 Notably, and perhaps expectedly, defendants opted out of the research at higher rates than plaintiffs did.

A. PROCEDURAL PREFERENCES

Litigants indicated the attractiveness of each procedure for their case (1 = not attractive at all to 9 = extremely attractive). To determine their relative preferences, we compared how attractive they found the Judge Trial—the default legal procedure—to the other options. Litigants found the Judge Trial significantly more attractive than all other examined procedures except for Attorneys Negotiate with Clients Present and Mediation. Litigant attraction to these two procedures did not significantly differ from that of the Judge Trial. See Figure 1.

Additional analyses revealed that litigants preferred Mediation to all other procedures except for the Judge Trial and Attorneys Negotiate with Clients Present (whose attractiveness ratings did not significantly differ from that of Mediation). They also liked Attorneys Negotiate with Clients Present more than all of the other procedures except for the Judge Trial and Mediation (whose attractiveness ratings did not significantly differ from that of Attorneys Negotiate with Clients Present). Thus, litigants preferred the Judge Trial, Mediation, and Attorneys Negotiate with Clients Present to all other examined procedures,21 and within this group of best-liked procedures, they did not have a statistically significant preference.

From these results, we can infer some interesting facts regarding litigant preferences. Notably, litigants preferred Mediation to Non-binding Arbitration. This finding has important implications for court-connected ADR programs because court administrators who want to encourage the use of their voluntary programs should strive to offer ADR options that litigants find more appealing (or at least as appealing) than trial itself, ex ante. The present study suggests that litigants found Non-binding Arbitration to be significantly less appealing than both the Judge and Jury Trial, but liked Mediation significantly more than the Jury Trial (and viewed the attractiveness of Mediation and the Judge trial as statistically equivocal). From this perspective, Mediation seems like a better choice for voluntary programs. Insofar as litigants preferred the Judge Trial, Mediation, and Attorneys Negotiate with Clients Present to all other examined procedures,21 and within this group of best-liked procedures, they did not have a statistically significant preference.

18. The percentages were calculated using n = 403, due to missing data regarding case types.
19. As calculated, the 10% response rate likely reflects a gross underestimate of the true response rate and may significantly underestimate the representativeness of the sample. Significant research was often required to locate the addresses of litigants; it is possible that in many cases none of the addresses used to reach a particular litigant were correct, and thus, we should not have expected any of our attempts to yield a completed survey. A 10% response rate is not unusual for a survey study of laypeople who are contacted randomly through the mail.
20. A civil litigant must take affirmative action to demand a jury trial. See Cal. Civ. Proc. Code § 631(f) (West 2012) (stating that “A party waives trial by jury . . . (4) By failing to announce that a jury is required, at the time the cause is first set for trial . . . or within five days after notice of setting . . . .”); OB. REV. STAT. ANN. § 52.570 (West 2013) (stating that “[i]f either party . . . demands a jury trial and deposits with the justice such trial fee as is required . . . the issue must be tried by a jury and not the justice; but otherwise it must be tried by the justice”); Utah R. Civ. P. 38(b) (stating that “Any party may demand a trial by jury . . . not later than 10 days after the service of the last pleading directed to such issue”).
21. Hierarchical Linear Model analysis using Attorneys Negotiate with Clients Present as the reference group confirmed this conclusion. The results of this analysis are on file with the author.
litigants might be more apt to participate in good faith in settlement procedures they find especially attractive, the fact that litigants favored Mediation to Non-binding Arbitration could be an important finding for mandatory programs as well.

Litigants also preferred negotiations that would include the attorneys along with their clients to negotiations that would involve only the attorneys. They liked Mediation as much as the former but significantly more than the latter. This finding—along with the fact that litigants preferred Mediation to all adjudicative procedures except the Judge Trial—suggests that they want to be present for, and have the option to informally participate in, the resolution process.22 This finding may come as a surprise to attorneys who assume that they should conduct settlement discussions on their own. Although case strategy might sometimes call for excluding litigants from settlement negotiations, lawyers might anticipate a desire on the part of clients to observe or participate in the discussions themselves and should discuss the advantages and disadvantages of that option in light of their particular case.

Litigants also liked the Judge Trial significantly more than the Jury Trial. The reasons for this preference were not assessed. Thus, at this juncture, explanations for this finding are necessarily speculative. Perhaps litigants prefer the judge as fact-finder based on negative depictions of jury trials in the mainstream American media.23 Alternatively, some litigants may believe that judges are better able to keep an open mind during the trial and not predetermine the outcome.24 Other litigants may value expediency and suspect that bench trials are more likely to promote it.25 Future research should seek to explore the greater enthusiasm for the Judge Trial as compared to the Jury Trial.

B. PREDICTORS OF ATTRACTIVENESS OF SPECIFIC PROCEDURES

One goal of this project was to determine whether case-type, demographic, relationship or attitudinal variables predicted lit-

<table>
<thead>
<tr>
<th>VARIABLE NAME</th>
<th>LEVELS OF VARIABLE</th>
</tr>
</thead>
<tbody>
<tr>
<td>Case Type/</td>
<td>personal injury, contract, employment, property, other, or two or more case types</td>
</tr>
<tr>
<td>Substantive Issue</td>
<td></td>
</tr>
<tr>
<td>Role in Case</td>
<td>defendant, plaintiff, or both</td>
</tr>
<tr>
<td>Party Type</td>
<td>individual, company, or group or organization</td>
</tr>
<tr>
<td>Opposing Party Type</td>
<td>individual, company, or group or organization</td>
</tr>
<tr>
<td>Defendant or Plaintiff Before</td>
<td>whether the litigant had been involved as either a defendant or plaintiff in a previous case; yes or no</td>
</tr>
<tr>
<td>Age Group</td>
<td>whether the litigant was between 18–25, 26–35, 36–45, 46–55, 56–65, 66–75, 76–80, or over 80</td>
</tr>
<tr>
<td>Race</td>
<td>white/Caucasian or other</td>
</tr>
<tr>
<td>Gender</td>
<td>male or female</td>
</tr>
<tr>
<td>Relationship</td>
<td>whether the litigant knew or had a relationship with the opposing party before the case was filed; yes or no</td>
</tr>
<tr>
<td>Before Filing</td>
<td>whether an insurance company had any interest in the outcome of the case; yes or no</td>
</tr>
<tr>
<td>Insurance</td>
<td>1 to 5 rating of the importance of having a relationship with the opposing party in the future; 1 = not at all important, 5 = extremely important</td>
</tr>
<tr>
<td>Importance of Future Relationship</td>
<td></td>
</tr>
<tr>
<td>Confindence in Trial Win</td>
<td>0–100% estimate of chances of winning at trial</td>
</tr>
<tr>
<td>Court Location</td>
<td>California, Oregon, or Utah</td>
</tr>
<tr>
<td>Impression of Court</td>
<td>1 to 9 rating of the litigant’s impression of the court where the case has been filed; 1 = extremely negative, 9 = extremely positive</td>
</tr>
</tbody>
</table>

22. The “shuttle” model of mediation was not mentioned in the description of Mediation that was provided to the participants. See Shestowsky, supra note 3, at Appendix D. Shuttle mediation occurs when mediators meet with the parties separately rather than in joint session and “shuttle” information back and forth between the parties in an effort to reach an agreement.

23. See, e.g., Valerie P. Hans, Jury Jokes and Legal Culture, CORNELL LAW FACULTY PUBLICATIONS, Paper 635 (2013) (conducting a systemic analysis of a body of jokes about the jury system, collected from a variety of print and online sources).


25. See Kevin M. Clermont & Theodore Eisenberg, Litigation Realities, 88 CORNELL L. REV. 119, 131 (2002) (explaining that the waiting time for a judge’s trial and decision in federal court is shorter than the waiting time in the jury queue).

26. To explore this issue, simultaneous multiple regression analyses were conducted using the attraction rating for each procedure as the outcome variable and a series of case-type, demographic, relationship, and attitudinal variables as predictors. Multiple regression is a common type of analysis used to predict an outcome (in this case, the attractiveness rating for a procedure) based on multiple predictor variables. For each procedure, the intercept of the regression models represents the mean attractiveness of the reference group. Thus, significant nominal predictors in the regression model indicate groups within the variable that are associated with a significant change in the attractiveness rating for a procedure compared to the reference group’s average attractiveness rating for that procedure. Similarly, significant continuous predictor variables are variables for which changes in the outcome variable correspond significantly with changes in the predictor. The reference group used in our model consisted of individual white males, between 18 and 25 years of age, who have an individual opposing party with whom they did not have a relationship before the lawsuit and have no interest in having a future relationship, who have a personal injury case, where an insurance company had no interest in the outcome of the case, who have not had experience as either a plaintiff or defendant before, who have zero expectancy of winning in trial, who filed in Oregon, who are plaintiffs in the current case, and who have an extremely negative perception of the court where their case is filed.
| TABLE 3 |
|------------------|------------------|------------------|------------------|------------------|------------------|
| Case Type/Substantive Issue | ATTYS NEGOTIATE W/O CLIENTS PRESENT | ATTYS NEGOTIATE W/ CLIENTS PRESENT | MEDIATION | NON-BINDING ARBITRATION | BINDING ARBITRATION | JUDGE DECIDES W/O TRIAL | JUDGE TRIAL | JURY TRIAL |
| Litigants whose cases concerned personal injury issues only liked this option less than those with “other” case types | | | | | | Litigants with 2+ case types liked this option more than those whose cases concerned personal injury issues only | Litigants with 2+ case types liked the judge trial more than those whose cases concerned personal injury issues only | Litigants whose cases involved property issues only liked the jury trial less than those whose cases concerned personal injury issues only |
| Role in Case | | | | | | Litigants acting as both plaintiff and defendant liked binding arbitration more than those acting as plaintiff only | | |
| Party Type | Companies liked this option more than individuals | Groups and organizations liked this option less than individuals | | | | | | |
| Opposing Party Type | Those opposing a company liked binding arbitration more than those opposing an individual | | | | | | |
| Defendant or Plaintiff Before | | | | | | | | |
| Relationship Before | Those who had a previous relationship with opposing party liked this option less than those who did not | | | | | | |
| Gender | | | | | | | | |
| Race | | | | | | | | |
| Age Group | Younger litigants liked this option more than older litigants | | | | | | |
| Insurance | Those reporting that an insurance company had an interest in the case liked this option more than those that did not | | | | | | |
| Future Relationship | Those who desired a future relationship with the opposing party liked this option more than those that did not | | | | | | |
| Confidence in a Trial Win | The more confidence litigants had in their case, the less they liked this option | | | | | | |
| Court Location | | | | | | CA litigants liked the jury trial less than OR litigants | | |
| Impression of Court | The more favorably the litigants viewed the court, the more they liked this option | | | | | | |
| | | | | | | | | |
| | | | | | | | | |

**Notes:**

- **Case Type/Substantive Issue**
  - Litigants whose cases concerned personal injury issues only liked this option less than those with “other” case types.
  - Litigants with 2+ case types liked this option more than those whose cases concerned personal injury issues only.
  - Litigants with 2+ case types liked the judge trial more than those whose cases concerned personal injury issues only.
  - Litigants whose cases involved property issues only liked the jury trial less than those whose cases concerned personal injury issues only.

- **Role in Case**
  - Litigants acting as both plaintiff and defendant liked binding arbitration more than those acting as plaintiff only.

- **Party Type**
  - Companies liked this option more than individuals.
  - Groups and organizations liked this option less than individuals.

- **Opposing Party Type**
  - Those opposing a company liked binding arbitration more than those opposing an individual.

- **Defendant or Plaintiff Before**
  - Repeat litigants liked binding arbitration more than first-time litigants.

- **Relationship Before**
  - Those who had a previous relationship with opposing party liked this option less than those who did not.

- **Gender**
  - Women liked this option less than men.

- **Race**
  - | | |

- **Age Group**
  - Younger litigants liked this option more than older litigants.

- **Insurance**
  - Those reporting that an insurance company had an interest in the case liked this option more than those that did not.

- **Future Relationship**
  - Those who desired a future relationship with the opposing party liked this option more than those that did not.

- **Conference in a Trial Win**
  - The more confidence litigants had in their case, the less they liked this option.

- **Court Location**
  - CA litigants liked the jury trial less than OR litigants.

- **Impression of Court**
  - The more favorably the litigants viewed the court, the more they liked this option.

**Notes:**

- **Case Type/Substantive Issue**
  - Litigants whose cases concerned personal injury issues only liked this option less than those with “other” case types.
  - Litigants with 2+ case types liked this option more than those whose cases concerned personal injury issues only.
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- **Role in Case**
  - Litigants acting as both plaintiff and defendant liked binding arbitration more than those acting as plaintiff only.

- **Party Type**
  - Companies liked this option more than individuals.
  - Groups and organizations liked this option less than individuals.

- **Opposing Party Type**
  - Those opposing a company liked binding arbitration more than those opposing an individual.

- **Defendant or Plaintiff Before**
  - Repeat litigants liked binding arbitration more than first-time litigants.

- **Relationship Before**
  - Those who had a previous relationship with opposing party liked this option less than those who did not.

- **Gender**
  - Women liked this option less than men.

- **Race**
  - | | |

- **Age Group**
  - Younger litigants liked this option more than older litigants.

- **Insurance**
  - Those reporting that an insurance company had an interest in the case liked this option more than those that did not.

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  - Those who desired a future relationship with the opposing party liked this option more than those that did not.

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  - The more confidence litigants had in their case, the less they liked this option.

- **Court Location**
  - CA litigants liked the jury trial less than OR litigants.

- **Impression of Court**
  - The more favorably the litigants viewed the court, the more they liked this option.
tently favor the predilections of a subset of the litigants they serve. Table 3 reports the statistically significant predictors for each procedure. Some of these findings are especially worthy of discussion.

1. Repeat Litigants Liked Binding Arbitration More Than First-Time Litigants

Binding Arbitration was the only procedure for which attraction was significantly associated with litigants’ past litigation experience. Specifically, repeat litigants liked Binding Arbitration more than their first-time counterparts. This finding resonates with empirical research suggesting that Binding Arbitration awards tend to favor repeat players. It also aligns with the notion that repeat litigants are more likely to appreciate the hardship of protracted discovery and the threat of an appeal following a trial. This appreciation might lead repeat litigants to prefer Binding Arbitration because it can limit the likelihood of both extensive discovery and appeals. In light of this finding, lawyers might attempt to “even the information playing field” by having early discussions about the possible advantages associated with Binding Arbitration, even for cases already filed in court. Courts, too, can provide such information to litigants on court websites or informational material that explains different alternatives to trial.

The comparative benefits of Binding Arbitration may be mitigated in large commercial disputes, which could explain why companies did not like Binding Arbitration significantly more than individual litigants did. Such disputes tend to introduce costs traditionally associated with “big case” litigation. What is unexpected is that litigants whose opposing party was a company liked Binding Arbitration more than litigants who opposed an individual. This result is surprising given the bad press concerning consumer and employment arbitration, which typically involves cases wherein an individual opposes a corporation.

2. Confidence in Trial Win was Associated with Attraction to Court-Sponsored Adjudicative Procedures

The more confidence that litigants expressed regarding a trial win, the more they liked the Judge Decides without Trial, Jury Trial, and Judge Trial options. One interpretation of this pattern is that the more confident litigants were about their case, the more they expected jurors and judges to feel positively about their case too, and vice versa.

The only other procedure significantly associated with trial-win estimates was Attorneys Negotiate without the Clients. The more litigants believed they would win at trial, the less they wanted a negotiation that opened the door for compromise if they would not be present for settlement discussions. The fact that their estimates of success at trial were not associated with how favorably they regarded the other procedures—including trial-like Binding Arbitration—suggests that they were more agnostic about whether these options would produce results that reflected their own predictions.

From a psychological perspective, litigants’ attraction to court-sponsored adjudication as a function of the confidence they have in their case might be due in part to the egocentric bias. The egocentric bias, which is observed when individuals construe information in a self-serving way, can lead litigants to believe their case is much stronger than it is. In our study, 57% of litigants thought they had at least a 90% chance of prevailing at trial, and 24% believed they had a 100% chance. Only 16% thought they had at most a 50% chance of winning. The fact that higher confidence was associated with greater interest in time-consuming and expensive procedures such as jury and judge trials reinforces the importance of lawyers having early discussions about procedures with their clients. Conversations about the risks (as well as the financial and emotional costs) associated with trial might provide litigants a broader perspective from which to consider their options. Courts can encourage such litigant education by enacting court rules that require lawyers to have such discussions early in the litigation process, and can reinforce it themselves via pamphlets or court websites. The latter set of options would be especially important for litigants who represent themselves.

3. Women Liked Jury Trial and Binding Arbitration Less Than Men

Another intriguing finding that emerged was that women liked the Jury Trial and Binding Arbitration less than men did. In fact, these procedures were the only ones for which gender was found to significantly predict procedure attraction. In light of research suggesting that women favor conflict avoidance,
this pattern makes sense. What is unexpected, however, is that no gender difference emerged with regard to the Judge Trial, which is also adversarial in character. An implication of the lack of gender differences in this category is that women find an exception for Judge Trials compared to these other forms of adjudication.

4. Personal Injury Litigants Liked Jury Trial More Than Property Litigants, but Case Type Was Not a Major Predictor Otherwise

Litigants whose cases concerned personal injury matters only liked the Jury Trial significantly more than those whose cases involved property issues only. This finding fits with the widely held perception that jury sympathy in personal injury cases results in high damage awards to plaintiffs. Yet, the appeal of the Jury Trial was not higher for plaintiffs than defendants. This pattern is curious until one considers that attraction to the Jury Trial was found to be related to confidence (i.e., higher confidence was associated with greater attraction to the Jury Trial, and vice versa). Thus, it is possible that plaintiffs and defendants in personal injury cases were equally attracted to the Jury Trial but that their confidence in a trial win better explained how attracted they were to this procedure. A follow-up analysis designed to test this possibility revealed that the relation between attraction to the Jury Trial and confidence in a trial win for personal injury litigants did not differ significantly between plaintiffs and defendants. This result supports the notion that litigants’ attraction to the Jury Trial in personal injury cases was better explained by the confidence they had in their case than by their role as either a plaintiff or defendant.

Case type mattered in relatively few other instances. Personal injury litigants liked the Attorneys Negotiate with Clients Present option less than those with other kinds of cases. They also liked the Judge Decides without Trial option and the Judge Trial significantly less than those with multiple causes of action. The latter result suggests that those with more substantively complicated disputes valued the prospect of having a judge decide their case more than did those whose cases concerned personal injury matters only.

5. Relationship Variables Were Associated with Attraction to the Negotiation Options, but Not with Attraction to Adversarial Procedures such as Binding Arbitration or Trial

An interesting pattern emerged regarding the parties’ relationship with one another and how they perceived the two negotiation options. Litigants who had a pre-existing relationship with the opposing party liked Attorneys Negotiate without the Clients Present less than those who did not, and vice versa. But those with pre-existing relationships did not differ from litigants without one in terms of how much they liked the Attorneys Negotiate with the Clients Present option. This somewhat counterintuitive pattern suggests that although litigants with a relationship history were agnostic about the negotiations that would allow them to interact with the other party, the idea of negotiations that would take place without them was relatively unappealing. By contrast, the more litigants valued a future relationship with the other party, the more they liked Attorneys Negotiate with the Clients Present, and vice versa. Thus, the more litigants desired a future relationship, the more interested they were in informally collaborating to resolve the conflict.

Although one might intuit that the more interested litigants are in a future relationship with the opposing party, the less interested they would be in adjudicative or adversarial procedures (i.e., Judge Trial, Jury Trial, Judge Decides without Trial, and Binding Arbitration), the data did not support this theory. Accordingly, these findings suggest that litigants might not appreciate the negative effects that such procedures might have on their relationships or that they expect the benefits of having a third party decide their case to outweigh any negative consequences.

6. Court Impressions Related to Attraction to Judicial Procedures

The more favorably the litigants rated the court where their case was filed, the more they liked the two options that granted decision control to a judge—namely, the Judge Trial and Judge Decides without Trial. The less favorably they viewed the court, the less attracted they were to these two options. This pattern resonates with findings by Tom Tyler and others, suggesting that greater perceived institutional legitimacy is associated with a greater preference for, and acceptance of, court decisions. The only other procedure that was significantly associated with litigants’ regard for the court was Attorneys Negotiate without the Clients Present: the more litigants liked the court, the more they liked this procedure, and vice versa.

7. Demographic Variables

Surprisingly, the findings suggest that factors that previous scholars have speculated or observed to be associated with procedural preferences were rarely, if ever, significant predictors of attraction to procedures. For example, litigants’ role in the case

31. See Alissa J. Strong, “But He Told Me It Was Safe!”: The Expanding Tort of Negligent Misrepresentation, 40 U. MEM. L. REV. 105, 142 (2009) (“A problem that arises in personal injury cases is that juries sympathize with and strongly desire to compensate the victim.”). But see Philip G. Peters, Jr., Hindsight Bias and Tort Liability: Avoiding Premature Conclusions, 31 ARIZ. ST. L.J. 1277, 1293 (1999) (“It is widely believed that plaintiffs benefit from jury sympathies. Yet, an increasing body of evidence suggests that jurors begin their sympathy in personal injury cases is that juries sympathize with and strongly desire to compensate the victim.”). But see Philip G. Peters, Jr., Hindsight Bias and Tort Liability: Avoiding Premature Conclusions, 31 ARIZ. ST. L.J. 1277, 1293 (1999) (“It is widely believed that plaintiffs benefit from jury sympathies. Yet, an increasing body of evidence suggests that jurors begin their sympathy in personal injury cases is that juries sympathize with and strongly desire to compensate the victim.”).

32. See Shestowsky, supra note 3, at 685.

33. Some empirical research suggests that trial has more of a negative impact on underlying relationships between the parties than mediation. See Craig A. McEwen & Richard J. Maiman, Small Claims Mediation in Maine: An Empirical Assessment, 33 ME. L. REV. 237, 256-68 (1981); Roselle L. Wissler, Mediation and Adjudication in the Small Claims Court: The Effects of Process and Case Characteristics, 29 LAW & SOC'Y REV. 323, 351, 354-58 (1995). But see Richard J. Maiman, An Evaluation of Selected Mediation Programs in the Massachusetts Trial Court 7-9, 35, 37 (1997) (finding that litigants were as likely to report that mediation had not improved their relationship as to indicate that it had).

34. See Tyler, supra note 5, at 25.
was statistically significant only for Binding Arbitration (i.e., litigants acting as both a plaintiff and defendant liked Binding Arbitration more than those acting only as plaintiffs), and court location was a significant predictor only for the Jury Trial (i.e., those with cases in California liked the Jury Trial less than those with cases in Oregon).

Even though previous studies found some factors to be predictive when evaluated individually, the overall pattern suggests that when a multitude of case-type, demographic, relationship, and attitudinal factors are considered simultaneously, relatively few may actually be associated with attraction to procedures. This finding is likely to come as a surprise to lawyers or court administrators who have strong views regarding which procedure is likely to appeal to a “certain kind of litigant” or “someone with a certain kind of case.”

**CONCLUSION**

An important conclusion from this study is that litigants do indeed have procedural preferences. They have great enthusiasm for procedures that theoretically provide litigants with the opportunity for direct participation in the resolution of their cases—namely, Mediation and negotiations that include the parties along with their attorneys. They also have great interest in the Judge Trial, which might reflect respect for authority and perceived procedural fairness through the democratic functioning of the courts. In terms of court-connected ADR, findings from the present study support the choice of Mediation over Non-binding Arbitration.35

To the extent that lawyers’ attitudes towards procedures differ from those of litigants, some of these differences might be due to litigants’ misconceptions about those procedures, whereas others might reflect incorrect assumptions that lawyers have about how litigants view those same options. Rather than relying on their own intuitions about the litigant point-of-view, legal actors could use research findings such as those presented here to anticipate how litigants will perceive their options as a function of factors such as how much litigants value a future relationship with the other party or their perception of the court where their case was filed.

More globally, using research to uncover litigants’ perceptions of procedures could lead to a more nuanced understanding of the need for court intervention in the regulation of disputes in the first place. Past research suggests that litigants are less likely to continue their dispute, and more likely to voluntarily comply with the terms of resolution agreements, when they are satisfied with the legal procedures used to resolve their dispute.36 Thus, offering litigants ADR options that they find subjectively attractive could lead to fewer breach-of-contract claims due to noncompliance with settlement agreements. This scenario would result in diminished demand for scarce court resources. Moreover, when people regard the government as offering subjectively attractive and fair procedures, they subsequently demonstrate greater respect for the legal system and tend to more readily comply with even unrelated laws and regulations.37 Courts undoubtedly benefit from such voluntary compliance with the law. Thus, as applied to court-connected programs, this kind of empirical research can have important implications for governments stricken by budgetary crises. By better understanding litigants’ preferences and designing their programs accordingly, governments might be able to reduce some of the challenges associated with maintaining the civil justice system.

Further research on litigants’ perceptions of procedures can continue to fill gaps in the literature in ways that will be useful to lawyers as they serve their clients, as well to court policy. Ultimately, the advancement of procedural justice in light of litigants’ preferences will depend on legal actors doing their part to implement such research.

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35. See supra Figure 1.
36. See, e.g., Craig A. McEwen & Richard J. Maiman, Mediation in Small Claims Court: Achieving Compliance Through Consent, 18 Law & Soc'y Rev. 11, 20-22 (1984) (concluding that litigants in consensual procedures such as mediation are more likely to perceive the outcome as fair and just and, subsequently, are more likely to comply with the outcome than in adjudicated cases); Mark S. Umbreit et al., Victim-Offender Mediation: Three Decades of Practice and Research, 22 Conflict Resol. Q. 279, 298 (2004) (concluding that offenders who participate in programs that offer them more opportunity to shape the outcome are more likely to comply with the outcome and are less likely to re-offend than those who engage in procedures that are more adjudicative).
37. As Tom Tyler has argued, on the basis of compelling empirical research, procedures that subjectively appeal to litigants can inspire them to “obey the law” and reduce the need for governmental intervention to ensure legal compliance. See Tyler, supra note 3, at 3-4, 62.
A successful mediation typically depends upon three key steps:

- engaging the client on why and when to mediate;
- actively engaging the adversary prior to the mediation; and
- advocating at the mediation session itself.

The first installment in this series offered a path for counsel and clients to overcome their initial mediation anxiety. In this installment, let’s focus on early, active and ongoing dialogue with the other side to ensure the most productive mediation.

GET TOGETHER AND TALK BEFORE MEDIATION

Isn’t this step obvious? You might think so, but it seldom happens. After nearly two decades serving as a neutral, I continue to be struck by the number of times opposing counsel introduce themselves to each other for the first time at the mediation session. I’m also struck by how frequently those attorneys are still sorting out the core facts as the mediation unfolds.

Mind you, counsel have communicated before, whether by way of pleadings, email, discovery demands and responses. In addition, their respective position statements assert and deny certain facts. But more often than not, those battling lawyers haven’t taken the time (or the opportunity) to speak directly – and by directly, I mean face-to-face, in person if possible – to parse through strengths, weaknesses as well as those facts that shouldn’t be in dispute (even if their legal consequence may still be debated).

Sadly, in this age of instant electronic communication, the practice of talking directly has, in many cases, still sorting out the core facts as the mediation unfolds.

WHAT’S HOLDING US BACK?

Initially, a few thoughts as to what may be going on. Keeping in mind that mediation is still an evolving area, many counsel seem to believe that substantive conversations should be deferred to the mediation, because, well…isn’t that the whole purpose of mediating?

Actually, it’s not. Indeed, experience teaches that the prospect for success at mediation is often tied directly to an active pre-mediation exchange between the adversaries – what do you see differently and why? What do you think of this witness? This document? This fact? This argument?

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Understanding those differences early on helps everyone calibrate (and re-calibrate) their respective strengths and weaknesses. It also allows parties to set appropriate expectations before they step into the formal mediation session.

Delaying a substantive exchange until the mediation session often hampers progress. Armed with most, but not all, of the key facts and a sketchy picture of the other side’s strengths and weaknesses, counsel and clients often start mediating with an incomplete and unrealistic view of their likely prospects. As a result, parties tend to open with, and cling to, extreme positions. They have difficulty adjusting to, and ultimately accepting, a reasonable outcome.

Why make this any harder for your client and yourself than need be?

Here as well, another aspect of mediation anxiety kicks in, namely the suspicion that the other side won’t engage on a professional level, won’t reciprocate in a meaningful exchange, or worst of all, may misread your overtures as a sign of weakness (particularly if you suggested mediation in the first place). No need to fear.

TAKE THE HIGH ROAD

The suspicion that the other side is incapable of engaging in a civil dialogue about strengths and weaknesses typically stems from a prior bad experience – the failure of simple courtesies, unreasonable demands, slights and obstreperous behavior, you name it. Fact is, that stuff happens.

However, rather than allow such examples to impede progress, keep in mind the anxiety (and potential client issues) that may exist on the other side. You may be on edge – but your opposing counsel may be on edge as well, and maybe even more so. They are likely struggling, just as you are, with unduly high client expectations and myopic low opinions of their adversary’s position.

With all this in mind, it is even more important to take the high road. Initiate the conversation and overlook any perceived shortcomings or slights from the other side. Whether you practice the “count to 10 before you respond” rule or use humor to change the tone of a difficult conversation, trust in these truths: persistence pays off; diplomacy reduces anxiety on the other side; and frank, honest, courteous discussion will almost always prompt a more substantive exchange of views.

Remember: the more you know, the better prepared you (and your client) will be to negotiate.

THERE IS NO SCORERCARD

Don’t keep a tally of the amount of information exchanged. Ignore the old saw that the other side is only looking for “free discovery.” Free, or at least less expensive, discovery is not a bad thing. Recognize that in many instances – for example, class and representative actions – the amount of core information is not held equally by both sides. Worry less about the mythical scorecard and focus instead on information your side may offer that could alter the other side’s perceptions. In most instances, that information is discoverable, will be turned over later (at greater expense), and may indeed readjust the other side’s assessment to your benefit now. All the more reason to communicate sooner rather than later.

In addition, don’t rule out other forms of reciprocity that can be negotiated to help narrow the dispute. While one side may have more information than the other, the other side may be asked to more specifically identify the claims at the core of the controversy. Whether by amending pleadings or otherwise, explore a potential quid pro quo that focuses everyone on the central claims that triggered the battle. Time, money and energy will be saved all around.

AVOID MISIMPRESSIONS

Many attorneys still equate mediation with settlement and the suggestion of mediation as a form of capitulation. You proposed mediation because you expect to lose at trial. Because you expect to lose, I can drive a hard bargain at the mediation.

In fact, the opposite is often true, and how you explain your proposal makes all the difference.

To avoid any misimpression, it is critical to explain why you are proposing mediation as well as engaging in substantive conversations before it takes place: Our investigation so far doesn’t support your claims or defenses, so we would like to better understand what you have and share what we have found. Hopefully this direct exchange will help us both see what separates our views and then make the best decisions about our dispute. If our direct exchange doesn’t do the trick, let’s bring in a mediator to take a fresh look and see where that process takes us.

Think about it. This approach conveys confidence — the antithesis of anxiety — both as to your own investigation and your belief as to how a neutral third party should evaluate the dispute. Ideally, the exchange that follows helps the other side reset their expectations prior to any mediation, and may in some instances obviate the need for a mediation at all.

This type of direct exchange of information may also clarify facts or problems your side hasn’t seen before, which may in turn shift your view of the dispute. But isn’t it always better to uncover those problems as soon as possible? How many times have we heard clients (and lawyers too) say the fateful words: I wish I’d known that when…

Worse case, the exchange does not bridge the gap between the parties. But even there, providing you have accurately handicapped your dispute, you will be better prepared for the mediation and your client will have the most realistic assessment of the likely litigated outcome.

PREPARATION IS EVERYTHING

Seasoned attorneys do not go to trial without thorough preparation. Why go to mediation underprepared? The more you understand upfront what the other side sees, and they in turn understand your view and the facts your position is based upon, the more likely your mediation will be productive. Pick up the phone. Better yet, meet your opposing counsel in person, perhaps over a cup of coffee. No letters. No emails. No texts. No tweets. Talk through the case in detail with your opponent prior to mediation.

If you do, you will learn, as I have, that thoughtful live conversation trumps all else.