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ADR Is Not a Household Term: Considering the Ethical and Practical Consequences of the Public's Lack of Understanding of Mediation and Arbitration

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ADR Is Not a Household Term: Considering the Ethical and Practical Consequences of the Public's Lack of Understanding of Mediation and Arbitration

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I. INTRODUCTION

The field of alternative dispute resolution (ADR) experienced its "Big Bang" moment in 1906 when Roscoe Pound, then University of Nebraska College of Law Dean, delivered his famous address, "The Causes of Popular Dissatisfaction with the Administration of Justice."[1] On the seventieth anniversary of the address, Chief Justice Warren E. Burger convened a conference, now known as the "Pound Conference," to revisit those ideas in the 1906 address and discuss ways to promote greater satisfaction with the judiciary and conflict resolution.[2] Harvard Law Professor Frank Sander delivered the keynote address, outlining the possibility of a "multi-door courthouse" in

1. Lara Traum & Brian Farkas, *The History and Legacy of the Pound Conferences*, 18 CARDOZO J. CONFLICT RESOL. 677, 679 (2017).
2. *Id.* at 683–84 (discussing the formation of the Pound Conference and its purposes).

which litigants could be triaged into the most appropriate forum for their individual dispute, such as mediation, arbitration, or litigation.[3]

ADR expanded rapidly over the next forty years, both as a practice and an academic discipline. Supporters for the ADR movement included Congress, legislatures, law schools, and community dispute resolution centers, among others.[4] Mediation programs, in particular, flourished, and courts have also experimented with arbitration programs since the Pound Conference.[5]

ADR scholars have long touted the many advantages of non-litigation options for disputants. Those advantages include cost and time efficiencies, creative problem-solving, confidentiality, party autonomy and control over the process and outcome, and flexible and accessible processes.[6] Scholars also emphasize the necessity of "buy in" by participants, courts, and providers, so that the benefits of ADR can be fully realized.[7] Questions have always lingered, however, regarding the public's understanding of ADR, thus implicating assumptions that parties know enough about these processes to participate knowingly.

This Article confirms what many in the field have long feared: ADR processes, such as mediation and arbitration, are still not well understood by the general public. Despite the many programs and advances, the lay public generally self-reports very low familiarity with, knowledge of, and experience with ADR processes. However, this Article goes beyond confirming low self-reported knowledge by the public by comparing community perceptions (from those community members who were at least minimally familiar with the necessary mechanisms)

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3. *Id.* at 685–86 (discussing Professor Sander's keynote address); *see also* Lisa Blomgren Amsler, *Dispute System Design and the Global Pound Conference*, 18 CARDOZO J. CONFLICT RESOL. 621, 621 (2017) ("Frank Sander's speech at the 1976 Pound Conference marked a turning point in the field's [ADR's] growth and development within the United States.").
4. Traum & Farkas, *supra* note 1, at 689–93 (outlining the various ways that dispute resolution has expanded since the Pound Conference).
5. Kimberlee K. Kovach, *Privatization of Dispute Resolution: In the Spirit of Pound, but Mission Incomplete: Lessons Learned from a Possible Blueprint for the Future*, 48 S. TEX. L. REV. 1003, 1005–07 (2007) (summarizing effects of Pound Conference on mediation, arbitration, and other processes).
6. KRISTEN M. BLANKLEY & MAUREEN A. WESTON, UNDERSTANDING DISPUTE RESOLUTION 5 (2017) (describing attributes of ADR processes).
7. *See generally* Yishai Boyarin, *Court-Connected ADR—A Time of Crisis, a Time of Change*, 95 MARQ. L. REV. 993 (2012) (providing a general overview of the buy in and self-determination necessary for successful dispute resolution programs); John Lande, *The Dispute Resolution Movement Needs Good Theories of Change*, 2020 J. DISP. RESOL. 121, 123–25 (2020) (considering best structuring of ADR programs after robust consideration of interests and obstacles by relevant stakeholders); Gerald F. Phillips, *Support for a Full Program: Last Year's Lessons on Company Conflict Resolution Efforts Resonate*, 27 ALTERNATIVES TO HIGH COST LITIG. 67, 69 (2009) (noting the importance of buy in across an organization to implement a system-wide ADR program).

to expert perceptions of various ADR mechanisms and the key features of those mechanisms. We found that although community members and experts have similar perceptions for some mechanisms, there are mechanisms for which their perceptions differ significantly. This distinction suggests that even community members who report being familiar with a mechanism may misunderstand important aspects of that mechanism.

These findings implicate core ethical and practical considerations for lawyers, ADR neutrals, and court systems. As discussed below,[8] lawyers and ADR practitioners rely on informed consent of their clients who are participating in these processes. If the general public is still unfamiliar with these processes forty years after their existence, the implication is that lawyers, neutrals, and courts may not be fulfilling their educational duty to ensure the requirement of informed consent. This Article not only examines these ethical issues but also considers ways to change practice to meet these ethical requirements and conform to best practices.

This Article proceeds in five main parts. Part II examines the research to date in both legal and social science publications regarding the general public's knowledge of ADR processes.[9] Part III provides an overview of the study and how it relates to the literature.[10] Part IV sets forth the study's methodology,[11] and Part V provides the applicable results of the study.[12] Part VI considers the far-reaching implications of the study, including how such implications affect lawyers' ethical obligations related to client counseling and how third parties conduct their practices.[13]

II. LITERATURE REVIEW

Current research about people's awareness or knowledge of ADR processes is sparse. Lawyers and academics commonly presume low knowledge of ADR processes by the general public with little clarity regarding what people in the general public do and do not know. For example, one dominant view of lawyering is the "traditional model," which defines the lawyer as expert and the client as a person or entity needing guidance.[14] In the literature, discussions of "client control" and of the ethical responsibilities of lawyers (e.g., to offer their clients

8. *See infra* section VI.A.
9. *See infra* Part II.
10. *See infra* Part III.
11. *See infra* Part IV.
12. *See infra* Part V.
13. *See infra* Part VI.
14. BLANKLEY & WESTON, *supra* note 6, at 11 (describing the primary differences between the lawyer-centered model and the client-centered model of the attorney–client relationship).

information and process choices that match client values) often portray the legal actors as experts on the process, while the clients' expertise pertains to their own personal goals and values.[15] Meanwhile, individual scholars have made broad assertions such as, "Many litigants do not know that dispute resolution procedures other than litigation exist, many do not understand the fundamental workings of how various procedures operate to resolve disputes, and many do not appreciate the strategic application of these procedures to their case."[16] Others point to a "commonly held belief [among those in legal circles] . . . that resistance to the mediation process is a direct result of the widespread lack of information about the process [among clients]."[17] Although these scholars primarily refer to client knowledge of mediation, one could assume similarly low knowledge of arbitration and other specialized processes.[18]

The presumption that lawyers and their clients have different expertise (in processes and values respectively) could be viewed as an appropriate and acceptable separation of roles and responsibilities. Significant barriers to entry exist to practice law, such as educational requirements, character and fitness assessments, and bar passage mandates.[19] The bar exam tests subjects relating to process, such as civil procedure, evidence, and criminal procedure.[20] The expert model of law services can also be viewed as appropriate given the low success

15. *See, e.g.*, Robert F. Cochran, Jr., *Legal Representation and the Next Steps Toward Client Control: Attorney Malpractice for the Failure to Allow the Client to Control Negotiation and Pursue Alternatives to Litigation*, 47 WASH. & LEE L. REV. 819, 825–27 (1990) (discussing the means/ends model of the attorney–client relationship and its shortfalls). See *infra* subsection VI.A.2 for additional discussion of the ethical rules regarding decision-making in an attorney–client relationship.

16. Elayne E. Greenberg, . . . *Because "Yes" Actually Means "No": A Personalized Prescriptive to Reactualize Informed Consent in Dispute Resolution*, 102 MARQ. L. REV. 197, 200 (2018).

17. Maria R. Volpe & Charles Bahn, *Resistance to Mediation: Understanding and Handling It*, 10 SOCIO. PRAC. 26, 28 (1992).

18. And it seems like this is indeed presumed, sometimes with supporting evidence. *See infra* notes 19–21 and accompanying text; *see also* Amy J. Schmitz, *Legislating in the Light: Considering Empirical Data in Crafting Arbitration Reforms*, 15 HARV. NEGOT. L. REV. 115, 143 (2010) ("Overall, the available research about process satisfaction indicates a lack of consumer information and understanding about arbitration.") (supporting the assumption that consumer information relating to ADR is low); Donna Shestowsky & Jeanne Brett, *Disputants' Perceptions of Dispute Resolution Procedures: An Ex Ante and Ex Post Longitudinal Empirical Study*, 41 CONN. L. REV. 63, 96 (2008) (suggesting that less knowledge of non-adjudicative procedures may influence younger disputants' preferences for processes with a more powerful third-party decision maker).

19. Carol Goforth, *Why the Bar Exam Fails to Raise the Bar*, 42 OHIO N.U. L. REV. 47, 52–53 (2015) (describing modern requirements to practice law).

20. *Understanding the Uniform Bar Exam*, NAT'L CONF. B. EXAMINERS (July 2017), https://www.ncbex.org/pdfviewer/?file=%2Fdmsdocument%2F209 [https://perma.unl.edu/JFQ9-7BT3] (listing Uniform Bar Exam topics).

rates of pro se parties in courts, which is often attributable to lack of process knowledge.[21]

Despite the potential appropriateness of such a separation of roles, some scholars and legal actors have nevertheless suggested the importance of considering and addressing low client knowledge of legal processes. At a very basic level, some note it is reasonable to question whether clients are giving "meaningful informed consent" if they agree to a process that they do not understand or for which they do not know the alternatives.[22] Others note that clients should be given process choices because they are most affected by the outcomes of their cases, which are impacted by those processes.[23] Further, client knowledge is important to empower clients to make choices between different forms of dispute resolution in a manner that is consistent with their values.[24] Client knowledge of alternative mechanisms, and the advantages of those mechanisms, is also necessary to potentially sway their preferences away from default mechanisms like litigation,[25] which are often more costly and less effective at meeting client goals. Client knowledge of various process options, especially if that knowledge results in positive evaluations, may increase the use of ADR processes[26] and potentially increase client "buy in" when offered or ordered to use ADR options.[27]

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21. Kristen M. Blankley, *Adding by Subtracting: How Limited Scope Agreements for Dispute Resolution Representation Can Increase Access to Attorney Services*, 28 OHIO ST. J. ON DISP. RESOL. 659, 665–72 (2013) (describing limitations for pro se parties and providing statistics on pro se party success rates).
22. Greenberg, *supra* note 16, at 200–01.
23. 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, 550 (2008) ("The disputants—more than anyone else—must endure the psychological, financial, and other consequences of the outcomes that are reached.").
24. Greenberg, *supra* note 16, at 200–01.
25. Volpe & Bahn, *supra* note 17, at 33 (suggesting lack of knowledge discourages disputants from selecting mediation).
26. 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, 202–05 (2002) (discussing how litigants are unlikely to propose ADR mechanisms but are often willing to use ADR processes when given the option by their attorney). Two scholars explained:

> The newness of the [mediation] program may have resulted in some skepticism about it. In fact, one of the program's directors reported to us that, years ago, when a different division of the Circuit Court instituted an arbitration program (for certain types of civil cases where the amount in controversy is less than $30,000), it took nearly a decade after its inception to garner noticeable attorney support. This fact highlights the idea that general familiarity with ADR procedures in a jurisdiction, and support of the bar, can influence procedural choice.

Shestowsky & Brett, *supra* note 18, at 97 (footnotes omitted).
27. *See generally* Robert Rubinson, *Client Counseling, Mediation, and Alternative Narratives of Dispute Resolution*, 10 CLINICAL L. REV. 833 (2004) (discussing how

To address client knowledge and understanding, we need to know something about that knowledge and understanding.[28] As we review below, the research exploring client knowledge of various dispute resolution mechanisms, while generally supporting a thesis of low public knowledge, does little to clarify the characteristics and qualities of what people do and do not "know."[29] According to cognitive psychologists, knowledge is not a unitary or unidimensional construct of which one simply has more or less; knowledge comes in different types, which can exist at different levels, encompass different characteristics, and develop in different ways.[30] Knowledge can, for example, be explicit, implicit,[31] situated,[32] factual, conceptual, procedural, metacognitive,[33] subjective, objective, tacit,[34] expert, novice, empirical, experience-based, narrative-based, discipline-based, conscious, unconscious, rational, conventional, cognitive, affective, psychomotor, and so on and so forth.[35]

One of the most well-known knowledge taxonomies was first developed by Benjamin Bloom in the 1950s.[36] Bloom's taxonomy distinguishes types of knowledge in terms of what is required for people to demonstrate a particular level of knowledge.[37] Do people need to remember, understand, apply, analyze, evaluate, or create with the things they "know"?[38] Each level of Bloom's taxonomy requires

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common narratives around conflict bias disputants against ADR procedures unless disrupted by attorneys).

28. *Cf.* Shestowsky & Brett, *supra* note 18, at 63 (explaining that for clients to be adequately advised about their procedural options, courts and attorneys must understand how disputants evaluate and experience different ADR options). While our focus is on client knowledge of procedures rather than perception, the principle is essentially the same.
29. *See infra* notes 45–59 and accompanying text.
30. *See, e.g.*, HOWARD GARDNER, INTELLIGENCE REFRAMED – MULTIPLE INTELLIGENCES FOR THE 21ST CENTURY (1999).
31. *E.g.*, Daniel L. Schacter, Mary Pat McAndrews & Morris Moscovitch, *Access to Consciousness: Dissociations Between Implicit and Explicit Knowledge in Neuropsychological Syndromes*, *in* THOUGHT WITHOUT LANGUAGE 242–78 (Lawrence Weiskrantz ed., 1988).
32. *E.g.*, JEAN LAVE & ETIENNE WENGER, SITUATED LEARNING: LEGITIMATE PERIPHERAL PARTICIPATION (1991).
33. *E.g.*, A TAXONOMY FOR LEARNING, TEACHING, AND ASSESSING: A REVISION OF BLOOM'S TAXONOMY OF EDUCATIONAL OBJECTIVES (Lorin W. Anderson & David R. Krathwohl eds., 2001).
34. *See* Charlotte Linde, *Narrative and Social Tacit Knowledge*, 5 J. KNOWLEDGE MGMT. 160 (2001).
35. *E.g.*, Robert N. Carson, *A Taxonomy of Knowledge Types for Use in Curriculum Design*, 35 INTERCHANGE 59, 68–73 (2004) (describing different types of knowledge).
36. BENJAMIN S. BLOOM ET AL., TAXONOMY OF EDUCATIONAL OBJECTIVES, HANDBOOK I: COGNITIVE DOMAIN (1956).
37. *See, e.g.*, Anderson & Krathwohl, *supra* note 33.
38. David R. Krathwohl, *A Revision of Bloom's Taxonomy: An Overview*, 41 THEORY INTO PRAC. 212, 212–18 (2002). Specifically, Table 3 on page 215 categorizes the

deeper, more complicated cognitive operations involving what someone "knows."[39] In the case of remembering, people simply need to bring to mind something to which they have been exposed—understanding does not matter.[40] For example, remembering whether or not one had mediation as an option for resolving a dispute requires no understanding of what mediation actually is, only a memory of whether or not it (whatever *it* is) was offered. To demonstrate understanding, on the other hand, one might accurately summarize what mediation entails.[41] In many cases, however, the reason for giving a client information about different dispute resolution process options is to involve the client in the very complex process of "evaluating" one or more process options so that the lawyer and client can together determine which options meet the client's needs and goals. Evaluation requires complex cognitive operations, including many of the lower levels of Bloom's taxonomy.[42] For example, evaluating dispute resolution process options may require being aware of, remembering, and distinguishing between different features of various process options; understanding and analyzing the implications and potential effects of such differentiating features; and applying those comparisons to one's situation-specific priorities.

We thus can argue that for clients to be empowered to choose, or even to form a preference for, some form of ADR over litigation based on accurate knowledge, they need not only be *aware* of the various mechanisms. At the very least, they also need to have access to (be able to *remember* at the time of their decision) the different features of the mechanisms, have an *understanding* (at the time of their decision) of the relevance and potential benefits or drawbacks of those features, and then be able to *apply* their knowledge and understanding to their own situations in light of their personal values. Achieving these different levels of knowledge—that is, learning at these different levels—involves different cognitive processes.[43] Experience with (as opposed to simply being told about) the mechanisms can enhance numerous levels of the taxonomy including memory, understanding, application, and other higher-level forms of knowledge expression.[44]

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cognitive process to include "remember, understand, apply, analyze, evaluate, and create" with respect to knowledge. *Id.*

39. *Id.*

40. *Id.*

41. *Id.*

42. *Id.*

43. *See, e.g.*, Anderson & Krathwohl, *supra* note 33; Alison Crowe, Clarissa Dirks & Mary Pat Wenderoth, *Biology in Bloom: Implementing Bloom's Taxonomy to Enhance Student Learning in Biology*, 7 CBE—LIFE SCI. EDUC. 368 (2008).

44. *See generally* Alice Y. Kolb & David A. Kolb, *Learning Styles and Learning Spaces: Enhancing Experiential Learning in Higher Education*, 4 ACAD. MGMT. LEARNING & EDUC. 193 (2005).

What does the past research say about what the general public "knows" (e.g., is aware of, remembers, understands, and applies) about ADR mechanisms? Professor Donna Shestowsky's work in this area is especially relevant. Relating to the lowest levels of knowledge in Bloom's taxonomy, few laypeople seem to be aware of or able to remember whether their court offers mediation and/or arbitration, especially if they lack experience (i.e., it was their first time in court).[45] Professor Shestowsky surveyed litigants in three different state courts that offered litigation, mediation, and arbitration options.[46] Approximately three-quarters of the litigants could not properly identify that their court offered mediation, and a similar number were not aware or did not remember that the court offered arbitration. Only 15% of the sample recalled that their court offered both mediation and arbitration.[47] In other words, the study uncovered "widespread lack of litigant awareness" about available options.[48] Shestowsky also found no statistically significant difference in ability to remember the different options when comparing represented and unrepresented clients,[49] calling to question whether lawyers meaningfully counseled clients regarding their options, or counseled them about ADR options at all.

We found little research that directly and purposely examined layperson *understanding* of or *application of knowledge* about dispute resolution processes. One rare survey study by Professors Jill Gross and Barbara Black examined perceptions of securities arbitrations among arbitration participants, including 1359 customers, 926 lawyers/representatives, 460 associated persons, and 202 corporate representatives.[50] Customers, who are most like laypersons, indicated "don't know" at a higher rate than other participants in the survey on a number of the survey questions.[51] For example, less than 50% of customers (compared to 94% of other participants) indicated they knew that one of the arbitrators in the case would be an "industry arbitrator," or an arbitrator with professional or familial connections to the securities industry.[52] Similarly, less than 50% of customers (compared to 88% of other participants) indicated they knew which

45. Donna Shestowsky, *When Ignorance Is Not Bliss: An Empirical Study of Litigants' Awareness of Court-Sponsored Alternative Dispute Resolution Programs*, 22 HARV. NEGOT. L. REV. 189 (2017) [hereinafter *Ignorance*].
46. *Id.* at 206–07 (discussing the method of the study).
47. *Id.* at 211–12 (discussing results).
48. *Id.* at 219.
49. *Id.* at 222 (discussing results).
50. Jill I. Gross & Barbara Black, *When Perception Changes Reality: An Empirical Study of Investors' Views of the Fairness of Securities Arbitration*, 2008 J. DISP. RESOL. 349, 362 (2008).
51. *Id.* at 388.
52. FINRA currently classifies its arbitrators as "public" or "non-public." A "public arbitrator" cannot be a securities broker, dealer, investment advisor, or someone who has served as a lawyer for any of the foregoing, among other conditions.

arbitrators were "public" versus "industry." A substantial percentage of customers (and significantly more than other participants) also indicated "don't know" when asked their opinions about whether the arbitration panel applied the law, appeared competent, understood the legal arguments, and so on, suggesting many customers felt their knowledge level was not sufficient to make such judgments.[53]

Other research has at least tangential relevance to what laypersons might understand about dispute resolution processes more generally. Professors Shestowsky and Brett's 2008 longitudinal field study included assessing layperson disputants' preferences for different dispute resolution features prior to their case being resolved.[54] Professors Shestowsky and Brett did not ask participants to identify which court processes were associated with which features.[55] Still, their factor analysis of the preference ratings for their fourteen features suggested that "disputant control" and "third party control" were characteristics that may be salient to disputants.[56] Given this finding, we might expect to find that laypeople are more attentive to, and therefore achieve an understanding more readily regarding, the extent to which various processes give disputants control versus give third parties control.

Even less research pertains to layperson application of their understanding to choices of processes, but the research that does exist suggests such application is lacking. Professors Shestowsky and Brett's 2008 study[57] found "disputants' initial preferences did not predict the procedural model they used," which the authors suggested might be because time and cost factors prevented preference from being realized, the opposing disputants' preferences interfered, or their lawyers' preferences exerted more influence over choices than the clients' own preferences. What Professors Shestowsky and Brett did not mention, however, is the possibility that clients are not aware of which processes match their feature preferences, thereby impairing their ability to apply that knowledge to advocate for the processes that would match those preferences. This would be consistent with Professor Shestowsky's 2016 study, which found a disconnect between macro preferences for certain processes and micro preferences for specific features of those processes.[58] Professor Shestowsky surmised the disconnect could be due to complex preferences for combinations of fea-

FINRA, Rule 12100 (aa) (2007). A "non-public arbitrator" is one who does not meet the requirements of a public arbitrator. FINRA, Rule 12100 (t).

53. Gross & Black, *supra* note 50, at 388 (discussing results).
54. Shestowsky & Brett, *supra* note 18, at 82.
55. *Id.*
56. *Id.* at 94–95.
57. *Id.* at 97.
58. Donna Shestowsky, *How Litigants Evaluate the Characteristics of Legal Procedures: A Multi-Court Empirical Study*, 49 U.C. DAVIS L. REV. 793, 832–33 (2016).

tures, rather than a single feature, but that a "more compelling and troubling explanation for the apparent disconnect is that it might stem from an inaccurate understanding of which attributes actually characterize various procedures."[59]

It is worth noting that one way for disputants to become aware of and increase their understanding of their alternate dispute process options is through their attorneys during client counseling.[60] Prior investigations suggest that clients are willing to use ADR procedures when they are suggested as an option, even if they do not initiate requests for those procedures.[61] Yet, when the litigants in the aforementioned 2016 Shestowsky study were asked, in an open-ended matter, which processes they or their attorneys contemplated using to resolve their dispute, roughly one-third reported mediation and only about one-quarter reported arbitration, suggesting attorneys were not often informing their clients about these processes.[62] For attorneys to pass along such information to their clients, the attorneys must know something about the specific options and also believe the processes could be beneficial to their clients. It seems unlikely that attorneys will waste their clients' time explaining processes that they do not recommend. Research by Professor Roselle Wissler indicates that lawyers are more likely to discuss ADR options when they are more familiar and have more experience with those processes.[63]

III. CURRENT STUDY

As reviewed, academics and practitioners assume that public knowledge of ADR processes is relatively low,[64] and, to the extent that lawyers are the experts in process,[65] many may consider the lack of public understanding of ADR processes acceptable. To the extent the public does not understand ADR processes, though, there is arguably an additional burden for attorneys and other ADR practitioners to inform and assist clients.[66] But, to truly understand the needs of the client and fully appreciate the role of attorneys in informing and assisting their clients, it is necessary to have an empirically informed

59. *Id.* at 833.
60. Wissler, *supra* note 26, at 205 (noting that attorneys' central roles in litigation makes them an appropriate person to educate disputants on ADR processes and options in their case).
61. *Id.* at 203–05 (discussing litigants' reasons for not using ADR).
62. Shestowsky, *supra* note 45, at 216–17.
63. *See* Wissler, *supra* note 26; *see also* Roselle L. Wissler, *Barriers to Attorneys' Discussion and Use of ADR*, 19 OHIO ST. J. ON DISP. RESOL. 459, 465 (2004) [hereinafter *Barriers*] (explaining that attorneys' knowledge of ADR affects whether they discuss ADR with their clients).
64. Wissler, *supra* note 26, at 203.
65. *Id.*
66. *See infra* Part VI.

understanding of the public's knowledge of ADR processes, rather than relying on unsubstantiated assumptions. Unfortunately, the reviewed literature suggests a lack of empirical evidence characterizing the broader public's knowledge of various dispute resolution processes. Thus, lawyers and other legal practitioners lack the necessary information to adequately and appropriately inform and assist their clients.

To help fill this gap, this Article presents self-reported data on community members' familiarity with, knowledge of, and experience with various dispute resolution mechanisms. The community member participants—unlike those in the studies discussed in the literature review—were not currently engaged in conflict or litigation. They were simply members of the general public. Although we did not specifically seek to extensively examine public knowledge of dispute resolution, this data provides some, albeit limited, insight. In sharing these findings, we seek to provide context for discussing the ethical and practical implications of working with clients who are less knowledgeable about their potential dispute resolution options and highlight the need to better understand the public's awareness of and knowledge about such options.

This data is based on secondary data analyses from a study designed to (1) differentiate dispute resolution processes by using specific features for five dispute resolution mechanisms based on experts' understanding of those processes, and (2) compare experts' and community members' perceptions of the dispute resolution mechanisms.[67] The original study involved generating a comprehensive list of dispute resolution features from descriptions of dispute resolution processes available in academic and practitioner literature.[68] With this comprehensive list of dispute resolution features, we then generated plain language statements,[69] and using these statements, participants

67. The results of this study are reported in Ashley M. Votruba, Logen M. Bartz, Lisa M. PytlikZillig & Kristen M. Blankley, *Breaking Up Is Hard to Do: Distinguishing ADR Processes by Their Features* (forthcoming) (on file with authors).

68. Our review included sources such as: (1) well-regarded textbooks (located based on recommendations from law faculty teaching alternative dispute resolution courses; *e.g.*, MICHAEL L. MOFFITT & ROBERT C. BORDONE, THE HANDBOOK OF DISPUTE RESOLUTION (2005)); (2) treatises and law review articles (located using search terms like "alternative dispute resolution + processes/mechanisms/definitions" in Lexis, Westlaw, HeinOnline, and Google Scholar); and (3) practitioner-oriented mechanism descriptions (located using similar search terms; *e.g.*, *Dispute Resolution Processes*, AM. B. ASS'N, https://www.americanbar.org/groups/dispute_resolution/resources/DisputeResolutionProcesses [https://perma.unl.edu/5FFD-3EY6] (last visited June 29, 2020)).

69. One example of a plain language statement is: "In this dispute resolution mechanism how often do the people involved in the dispute resolution process . . . [d]ecide for themselves whether to participate," to measure whether "voluntariness" is a characteristic of each dispute resolution mechanism.

rated how often they considered a feature to be a characteristic of each dispute resolution mechanism. Members of the scientific and practitioner communities reviewed the measure to ensure the list of features was comprehensive and offered feedback on the individual items. These items comprised the primary measure of interest in the study for both the community and expert samples.

In the study, the participants were asked to rate how often the features were a characteristic of the process for five dispute resolution mechanisms: litigation, arbitration, evaluative mediation, facilitative mediation, and negotiation. We chose to focus on these dispute resolution processes because they represent much of the variability in dispute resolution process features and are processes that are of interest in empirical studies examining dispute resolution preferences.[70] We specifically included two types of mediation (evaluative and facilitative) because they involve a distinct difference in the role of the mediator, which is a key feature difference.[71] Further, this distinction was necessary for the expert sample, which is accustomed to distinguishing between evaluative and facilitative mediation, and questions about the role of the third party could not be meaningfully answered without drawing this distinction. Notably, because this research sought to validate commonly used definitions of dispute resolution mechanisms by practitioners and experts in the field, the survey instrument simply used the names of the mechanisms and made no attempt to define them for the participants.

In the study, we also obtained from the community sample self-reported data of familiarity with, knowledge of, and experience with the dispute resolution mechanisms in the study. The purpose of collecting this information was to ensure that the community participants had at least some minimal level of familiarity with each of the dispute resolution mechanisms so that we would be able to collect meaningful data. We included multiple measures in the study, recognizing that they represent distinct concepts that impact what psychology classifies more broadly as knowledge. The findings from those measures are the focal analyses in this Article. Although we had no specific hypotheses regarding familiarity, knowledge, and experience, we were surprised to find the extremely low levels of each in our community sample.

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70. *E.g.*, Larry B. Heuer & Steven Penrod, *Procedural Preference as a Function of Conflict Intensity*, 51 J. PERSONALITY & SOC. PSYCHOL. 700 (1986); Kwok Leung, *Some Determinants of Reactions to Procedural Models for Conflict Resolution: A Cross-National Study*, 53 J. PERSONALITY & SOC. PSYCHOL. 898 (1986); E. Allen Lind, Yuen J. Huo & Tom R. Tyler, . . . *And Justice For All: Ethnicity, Gender, and Preferences for Dispute Resolution Procedures*, 18 L. & HUM. BEHAV. 269 (1994); Shestowsky & Brett, *supra* note 18.

71. *E.g.*, ENVIRONMENTAL LAW PRACTICE GUIDE: STATE AND FEDERAL LAW § 11C.03(2) (Michael B. Gerrard ed., vol. 2A 2020).

In addition to the primary results focusing on the community participants' self-reported familiarity with, knowledge of, and experience with dispute resolution process, this Article also details three findings from this dataset that are reported more extensively in our other paper.[72] These findings highlight how community members and experts differ in their understanding of the features of the five dispute resolution processes of interest. We expect to see differences in community members' and experts' perceptions of how often certain features are present for those dispute resolution processes that community members are less knowledgeable about. We focus on perceptions of self-determination, voluntary participation, and whether the process is collaborative since these are each essential features distinguishing between dispute resolution processes. Prior to discussing our methods, we provide a brief overview of these three characteristics from the literature.

Self-determination, or the ability of a party to determine the outcome of a dispute, is an essential feature of consensual processes such as negotiation and mediation.[73] On the other hand, adjudicatory processes such as litigation and arbitration place the decision-making authority in the hands of a third-party judge or arbitrator.[74] Given this stark difference on the "who decides" question (party vs. neutral), comparing these answers between experts and community samples provides insight in how different people view these characteristics.

Voluntariness has multiple meanings within the ADR literature. At one level, ADR processes are voluntary when parties choose to use the process.[75] The concept of voluntariness can extend to pre-dispute agreements to use a dispute resolution process in the event that a conflict occurs at a later date.[76] For some processes, voluntariness also

72. Votruba et al., *supra* note 67.

73. BLANKLEY & WESTON, *supra* note 6, at 51 ("The consensual nature of the process puts an incredible amount of power (sometimes described as party autonomy) in the hands of the parties . . . . Compared to adjudicatory processes (such as litigation and arbitration), mediation is the parties' process . . . .").

74. *Id.* at 177 ("Arbitration is a process of dispute resolution in which a third-party neutral—the arbitrator—renders a decision after a hearing. . . . This description probably sounds very similar to litigation, and arbitration and litigation share many characteristics.").

75. *See, e.g.*, John R. Phillips, *Mediation as One Step in Adversarial Litigation: One Country Lawyer's Experience*, 2002 J. DISP. RESOL. 143, 149–50 (2002) (discussing results of a jurisdiction's experience with a mediation program requiring participants to opt into the program); Shestowsky, *supra* note 23, at 552 ("[T]ruly voluntary ADR programs . . . allow parties to select and shape the procedure they use."). *See generally* Elizabeth Plapinger & Margaret Shaw, *Court ADR: Elements of Program Design*, 10 ALTERNATIVES TO HIGH COST LITIG. 151 (1992) (contrasting programs with voluntary participation to those with mandatory participation).

76. Arbitration, in particular, relies on pre-dispute resolution clauses. Arbitration is still considered voluntary if the parties give voluntary consent to the agreement. *See* Stephen J. Ware, *Employment Arbitration and Voluntary Consent*, 25 HOF-

refers to the participants' desire to stay in and continue the process through completion.[77] In mediation, for example, a party may be court-referred or statutorily required to attend mediation, but the process still has aspects of voluntariness because the parties still decide whether to settle and on what terms.[78]

Whether a process is collaborative largely turns on whether the parties have the opportunity to work together to resolve their dispute. Specifically, in collaborative processes, the parties decide the outcome, not a third party.[79] In this context, the term "collaborative" is essentially synonymous with "consensual," meaning the parties decide whether to settle and on what terms.[80]

IV. METHODS

As part of this data collection effort, the research team collected considerable information about the community members' familiarity with five forms of dispute resolution, knowledge about those processes, and their personal experience. We focus the first part of the results on these questions. The second part of the results compares knowledgeable community members' and experts' perceptions of the five dispute resolution processes along the dimension of self-determination, voluntariness, and collaboration, key features that distinguish between different types of dispute resolution processes.

A. Participants

The dataset for the broader project included two groups of participants: community members and experts. Although we focus primarily on the community sample's knowledge questions, we also report findings explicitly comparing the two samples. Thus, the sample information and recruitment methods for both types of participants are described in the subsequent subsections.

STRA L. REV. 83, 107–08 (1996) ("A pre-dispute arbitration agreement is a contract. . . . Voluntary consent occurs prior to performance, at the time of contract formation.").

77. BLANKLEY & WESTON, *supra* note 6, at 105 (noting that "voluntariness means coming to a voluntary resolution," even when attendance is mandated by a court, statute, or court rule).

78. *Id.*

79. *See, e.g.*, UNIFORM COLLABORATIVE LAW RULES R. 2.3 (UNIF. LAW COMM'N 2010) (defining a "collaborative law process" as one that resolves a matter "without intervention by a tribunal").

80. *See, e.g.*, Kristen M. Blankley, *Agreeing to Collaborate in Advance*, 32 OHIO ST. J. DISP. RESOL. 559, 581–82 (2017) ("Mediation is a consensual process, meaning that all decision-making authority lies in the hands of the participants and that the neutral has no ability to impose a decision upon the parties."); *id.* at 583–84 ("Like mediation, negotiation is a consensual process.").

1. Community Sample

We sought a diverse sample of community members from the United States to assess the general public's perceptions of dispute resolution processes using CloudResearch,[81] a platform for online research and surveys that recruits participants from Amazon's MechanicalTurk (MTurk), a platform for recruiting participants that vary widely in age, education, socioeconomic status, ethnicity, and geographic location.[82] Data collected on MTurk is generally comparable to data collected using more traditional sources,[83] and quality data can be achieved if proper screening measures and attention checks are employed.[84] For example, prior to entering the study, potential participants were screened using questions designed to detect bots (e.g., a captcha check) and participants from outside of the United States. Only those who successfully completed those questions were able to access the study. The participants that completed the study were compensated $2.00. The median amount of time it took the community participants to complete the study was just over 15 minutes. In total, 632 community participants completed the study (*Mean age* = 39.60; *SD* = 12.51). Additional demographic information is reported in Table 1 for the participants who provided that information.

2. Expert Sample

The expert sample was recruited using professional listservs for alternative dispute resolution professionals.[85] The participants who

81. *See* CLOUDRESEARCH, https://www.cloudresearch.com/ [https://perma.unl.edu/8FSP-WVM2] (last visited Feb. 5, 2021); AMAZON MECHANICAL TURK, https://www.mturk.com/ [https://perma.unl.edu/XJ44-EYE7] (last visited Feb. 5, 2021) (MTurk is a crowdsourcing marketplace of "workers" who complete tasks (HITs)—such as participation in research—online for payment); *see also* KIM BARTEL SHEEHAN & MATTHEW PITTMAN, AMAZON'S MECHANICAL TURK FOR ACADEMICS: THE HIT HANDBOOK FOR SOCIAL SCIENCE RESEARCH, ch. 1 (2016) (providing a general overview of MTurk).

82. *E.g.*, Matthew J. C. Crump, John V. McDonnell & Todd M. Gureckis, *Evaluating Amazon's Mechanical Turk as a Tool for Experimental Behavioral Research*, 8 PLOS ONE 1, 2 (2013); Winter Mason & Siddharth Suri, *Conducting Behavioral Research on Amazon's Mechanical Turk*, 44 BEHAV. RES. METHODS 1, 3 (2012).

83. *See generally* Crump, *supra* note 82; Mason & Suri, *supra* note 82; BARTEL SHEEHAN & PITTMAN, *supra* note 81.

84. *E.g.*, Ryan Kennedy et al., *The Shape of and Solutions to the MTurk Quality Crisis*, POL. SCI. RES. & METHODS, Sept. 2020, at 1, 13. Our recruitment criteria limited participation to individuals over the age of majority who are located within the United States and have successfully completed 500 HITs with a 97% acceptance rate (as recommended by BARTEL SHEEHAN & PITTMAN, *supra* note 81, at 32).

85. The researchers utilized national and regional listservs to recruit experts to take the survey. Those listservs included: 1) the DRLE listserv of dispute resolution academics, hosted by the University of Missouri School of Law; 2) the Nebraska ADR listserv, hosted by the Nebraska State Bar Association; 3) the Nebraska

completed the study were compensated with a $10 gift card. The median amount of time it took the expert participants to complete the study was approximately 22 minutes. 254 expert participants completed the study (*Mean age* = 55.76; *SD* = 16.06). Additional demographic information for the expert participants is also found in Table 1.

Table 1 - Participants' Demographic Information

Variable/ Response Option	All # (%)	Community # (%)	Expert # (%)
Gender			
Male/Man/Masculine	456 (51.5%)	348 (55.1%)	108 (42.5%)
Female/Woman/Feminine	389 (43.9%)	276 (43.7%)	113 (44.5%)
Transman/Transmasculine	2 (0.2%)	2 (0.3%)	0
Transwoman/Transfeminine	0	0	0
Gender nonconforming	5 (0.6%)	5 (0.8%)	0
Ethnicity			
White/European American	549 (62.0%)	413 (65.3%)	136 (53.5%)
African American/Black	59 (6.7%)	49 (7.8%)	10 (3.9%)
Lantina/o/x or Hispanic	43 (4.9%)	34 (5.4%)	9 (3.5%)
Asian/Asian American	139 (15.7%)	111 (17.6%)	28 (11.0%)
Native American	1 (0.1%)	0	1 (0.4%)
Middle Eastern	5 (0.6%)	0	5 (2.0%)
Biracial/Multiracial	22 (2.5%)	18 (2.8%)	4 (1.6%)
Not captured above	7 (0.8%)	1 (0.2%)	6 (2.4%)

B. Survey Instrument

As previously described, the primary purpose of the data collection effort was to compare community members' and experts' perceptions of features of five dispute resolution processes: litigation, arbitration,

Family Law listserv, hosted by the Nebraska State Bar Association; 4) the NYC-DR listserv, hosted by the John Jay College of Criminal Justice; 5) the Dispute Resolution Ethics Committee listserv, hosted by the American Bar Association; and 6) the MEDIATE-AND-ARBITRATE listserv, hosted by Paul M. Lurie of Shiff Hardin LLP.

evaluative mediation, facilitative mediation, and negotiation.[86] In the study, we also collected data on the community participants' familiarity with, knowledge of, and experience with five dispute resolution processes that are commonly used to resolve legal conflict. The following paragraphs describe in detail the questions included in the survey instrument which we analyze in this Article.[87] The description is in the same order we report the results.

At the beginning of the study, the community participants were asked to rate their familiarity with each of the five processes.[88] These items were included at the beginning of the study to ensure that only the community participants who were at least somewhat familiar with the processes would provide their perceptions of those processes. The question stated, "Before we examine your perceptions of each of the types of dispute resolution, we would like to better understand your familiarity with each of the processes. How familiar are you with each of the following?" Participants were then asked to rate their familiarity with litigation, arbitration, evaluative mediation, facilitative mediation, and negotiation.[89]

Then, at the end of the study, participants in the community sample were asked several questions examining their knowledge of and experience with each of the five dispute resolution processes. Specifically, the community participants were asked to rate their overall knowledge ("How would you rate your overall knowledge of each of the following dispute resolution mechanisms?"[90]) and experience levels ("How would you rate your overall experience level with each of the following dispute resolution mechanisms?"[91]) for each dispute resolution process.[92] The community sample was also asked, "In which of the following dispute resolution mechanisms have you been a participant?" and directed to check all that applied for litigation, arbitration, evaluative mediation, facilitative mediation, and negotiation.

The bulk of the study for both the community and expert samples involved examining their perceptions of the five dispute resolution processes across twenty-three common features that distinguish be-

86. The results of that comparison are available in our other paper, Votruba et al., *supra* note 67.

87. *See infra* Part V.

88. *See infra* Figure A.

89. Ratings were provided on a scale of 1 = *I have never heard of this term until now*; 2 = *I have heard of it but have no idea what it is*; 3 = *I have heard of it and have slight knowledge of it*; 4 = *I have heard of it and have some knowledge of it*; and 5 = *I have heard of it and have quite a bit of knowledge about it*.

90. Ratings were provided on a scale of 1 = *Not knowledgeable* to 5 = *Very knowledgeable*.

91. Ratings were provided on a scale of 1 = *Not experienced* to 5 = *Very experienced*.

92. *See infra* Figure B (knowledge) and Figure C (experience).

tween the various dispute resolution processes.[93] Both the community and expert samples were asked to rate how common each feature was for the five dispute resolution processes.[94] Although we do not comprehensively report those results in this Article, we do report findings focusing on three of the key features. To inquire about each of the features, we began with the same prompt, "In this dispute resolution mechanism how often are the people involved in the dispute resolution process . . . ." The statement was completed for each of the three key features as follows: (1) self-determination: "the ones deciding how to resolve the dispute"; (2) voluntariness: "decid[ing] for themselves whether to participate"; and (3) collaborative solutions: "work[ing] together to reach a solution." Ratings were measured using sliders that could be moved between 0 and 10, with 0 = *never* and 10 = *always*.

V. RESULTS

A. Analysis of Community Participants' Familiarity with, Knowledge of, and Experience with Dispute Resolution Processes

We begin the analyses by examining community members' level of understanding of various dispute resolution processes. The familiarity and knowledge questions similarly reflect subjective knowledge (one's self-assessment of one's familiarity or knowledge) but were answered at different points of the study. The familiarity question, administered at the study outset, is likely to reflect one's initial gut reaction assessment, and we transformed that question to reflect the simpler construct of awareness. The knowledge question at the end of the study is likely to reflect a more deliberative assessment of one's subjective knowledge, due to the intervening survey questions that ask about specific aspects of each dispute resolution process. Given the important influence experience can have on knowledge generally, experience is another important indicator.[95] Examining all three indicators paints a more detailed and complete picture of the community members' knowledge about the dispute resolution processes of interest.

93. For a more in-depth discussion of the survey and these features, please see Votruba et al., *supra* note 67. We conducted a comprehensive review of alternative dispute resolution materials to collect descriptions of dispute resolution processes, and from those descriptions, we generated a comprehensive list of dispute resolution process features using thematic analysis.

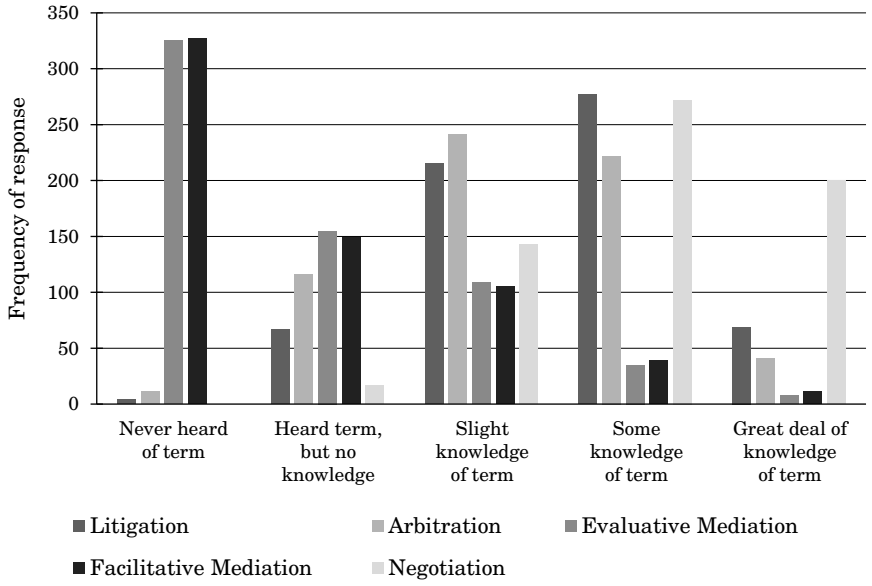
94. These dispute resolution processes were the most common processes encountered during the literature review for the thematic analysis. The decision to include facilitative and evaluative mediation, rather than mediation as a stand-alone term, was made because the two were presented as distinct from one another on many of the features identified during the thematic analysis.

95. *See supra* Part II.

1. Awareness of the Dispute Resolution Process

The community participant survey began by asking participants how familiar they were with the five dispute resolution processes of interest. The community participants' ratings associated with each of these terms is represented in the frequency distribution in Figure A.

Figure A - Frequency Distribution of Familiarity with Dispute Resolution Processes



To better reflect the construct of "awareness," as distinguishable from remembered knowledge, we generated two categories of community members by grouping responses: those who lacked any knowledge of the terms and those that had at least some knowledge of the term (see Table 2). Two of the five rating options indicated that the participant had no familiarity with the process, either because the participant had never heard the term or did not know what it meant. Adding these frequencies together provides information about the proportion of our participants who were unfamiliar with the dispute resolution processes. The results indicate that as it relates to each of the terms, 11.2% of the participants indicated no familiarity with litigation, 20.1% had no familiarity with arbitration, 75.9% had no familiarity with evaluative mediation, 75.4% had no familiarity with facilitative mediation, and 2.7% had no familiarity with negotiation. The second category included all of the participants who had at least slight knowledge of the term. Of our participants, 88.7% had at least slight famili-

arity with litigation, 79.7% with arbitration, 24.0% with evaluative mediation, 24.5% with facilitative mediation, and 97.2% with negotiation.

Table 2 - Community Participants Categorized by Familiarity

Dispute Resolution Process	% who lack familiarity	% who have at least some familiarity
Litigation	11.2%	88.7%
Arbitration	20.1%	79.7%
Evaluative Mediation	75.9%	24.0%
Facilitative Mediation	75.4%	24.5%
Negotiation	2.7%	97.2%

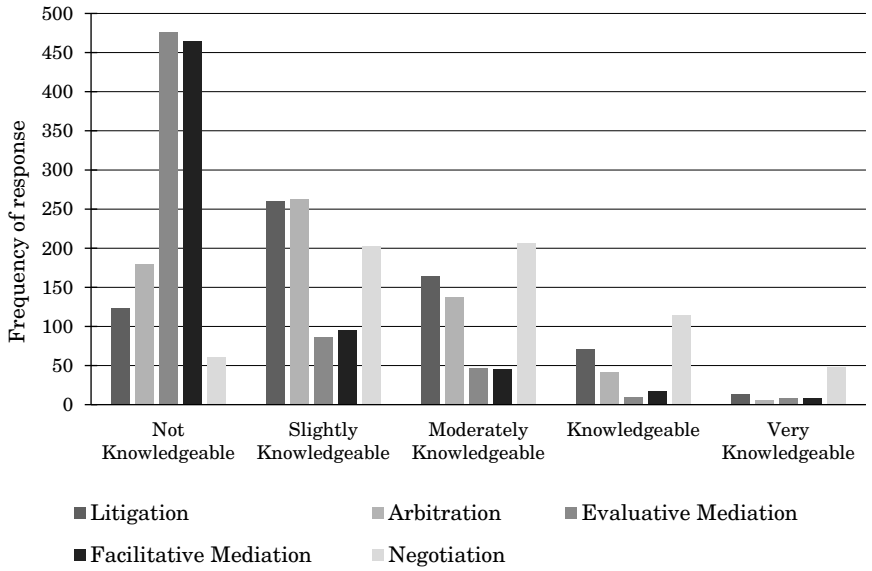
To examine differences in familiarity across the five processes, we also compared participants' ratings of familiarity for each process of interest using a statistical procedure called a repeated measures Analysis of Variance (ANOVA). The results indicated that there was a statistically significant difference between the processes in average rating of familiarity, $F(2.57, 1618.82) = 1164.03$, $p < .001$. To further understand these results, we compared the mean rating of familiarity for each process individually to the other processes by examining pairwise comparisons. The average ratings of familiarity for all of the processes were significantly different from each other (all $p < .001$) except for the average ratings of familiarity between evaluative and facilitative mediation, $p = .50$. On average, participants rated evaluative ($M = 1.81$; $SD = 1.00$) and facilitative mediation ($M = 1.83$; $SD = 1.03$) as least familiar; arbitration ($M = 3.27$; $SD = 0.89$) and litigation ($M = 3.54$; $SD = 0.85$) were in the middle; and negotiation was the most familiar ($M = 4.04$; $SD = 0.81$).

2. Subjective Knowledge of Dispute Resolution Processes

In addition to asking about familiarity at the beginning of the survey, the end of the survey asked community participants how knowledgeable they were with regards to the five dispute resolution processes of interest. Note that between the familiarity and knowledge questions, participants were asked questions that might trigger their self-assessments of specific knowledge (what they could remember) about the processes. This may have resulted in increases or decreases in self-assessed (subjective) knowledge based on how easily or with how much difficulty they felt they could answer the specific rating questions. The community participants' ratings of their knowledge

of each of the processes is represented in the frequency distribution in Figure B. An examination of the frequency distribution indicates that very few of our participants consider themselves knowledgeable or very knowledgeable about any of the dispute resolution processes.

Figure B - Frequency Distribution of Knowledge of Dispute Resolution Processes



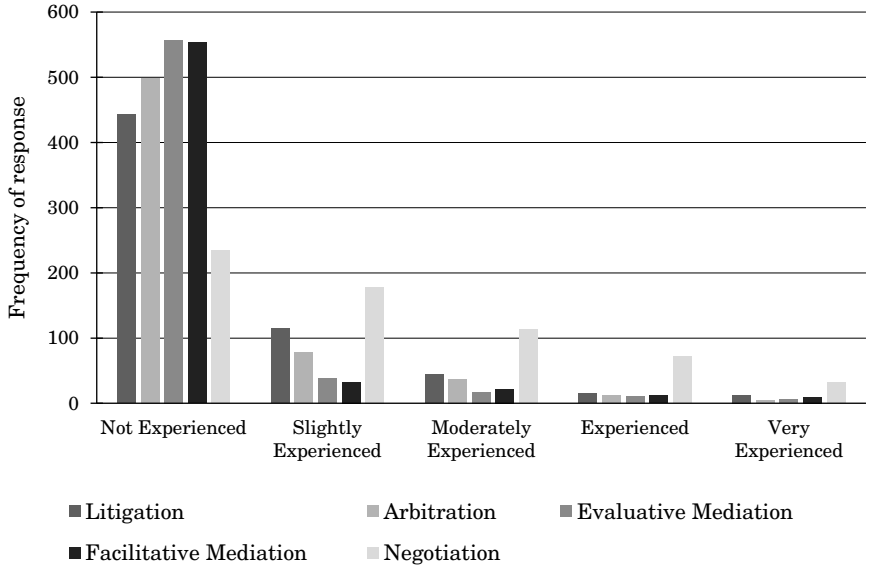
Again using ANOVA, we next compared community participants' ratings of knowledge across the five dispute resolution processes of interest to examine possible differences in knowledge ratings. The results indicated that there was a statistically significant difference between the processes in average rating of knowledge, $F(2.97, 1858.78) = 512.31$, $p < .001$. To further understand these results, we compared the mean rating of knowledge for each process individually to the other processes by examining pairwise comparisons. The average ratings of knowledge for all of the processes were significantly different from each other (all $p < .001$). In order of least to most knowledgeable, participants rated themselves as least knowledgeable of evaluative mediation ($M = 1.39$; $SD = 0.80$), then facilitative mediation ($M = 1.43$; $SD = 0.84$), and then arbitration ($M = 2.09$; $SD = 0.92$). The community participants reported being the most knowledgeable about litigation ($M = 2.35$; $SD = 0.98$) and negotiation ($M = 2.82$; $SD = 1.08$).

3. Experience with Dispute Resolution Processes

The survey asked the sample of community participants about their personal experiences with the five dispute resolution processes of interest. The initial question prompted participants to report if they had been a participant in any of the dispute resolution processes. Nearly half (47.2%) of the community participants reported having participated in a negotiation. Participants reported much lower levels of participation in litigation (17.6%), arbitration (10.9%), evaluative mediation (4.9%), and facilitative mediation (6.2%). For the community participants who had been involved in litigation, arbitration, evaluative mediation, or facilitative mediation, the vast majority had only been involved in the listed dispute resolution process only once.

In addition to reporting their actual experiences, community participants were also asked to rate their overall experience level with each of the dispute resolution processes. The community participants' ratings of their experience levels for each of the processes are represented in the frequency distribution in Figure C. Overall, the results indicate very low experience levels for litigation, arbitration, evaluative mediation, and facilitative mediation. However, the community participants reported greater amounts of experience with negotiation, similar to the self-reported participation findings reported in the previous paragraph.

Figure C - Frequency Distribution of Experience with Dispute Resolution Processes



Using a repeated measures ANOVA, we also compared community participants' ratings of experience level across the five dispute resolution processes of interest to examine differences in experience ratings. The results indicated that there was a statistically significant difference between the processes in average rating of experience, $F(2.49, 1553.88) = 252.51$, $p < .001$. To further understand these results, we compared the mean rating of experience for each process individually to the other processes by examining pairwise comparisons. The average ratings of experience for all of the processes were significantly different from each other (all $p < .001$) except for the average ratings of experience between evaluative and facilitative mediation, which was marginally significant, $p = .06$. On average, participants rated themselves as having the least experience with evaluative ($M = 1.21$; $SD = 0.66$) and facilitative mediation ($M = 1.24$; $SD = 0.74$). They rated having significantly more experience with arbitration ($M = 1.33$; $SD = 0.74$) and then litigation ($M = 1.48$; $SD = 0.89$). Finally, the community participants rated themselves as having the most experience with negotiation ($M = 2.19$; $SD = 1.20$).

B. Analyses Comparing Knowledgeable Community Members' and Experts' Perceptions of the Self-Determining, Voluntary, and Collaboration Potential of Various Processes

The following subsections detail three findings from this dataset that are reported more extensively in our other work.[96] These findings explore how community members and experts differ in their perceptions of the features of the five dispute resolution processes of interest. We focus on comparing community members' and experts' perceptions of self-determination, voluntary participation, and if the process is collaborative.

1. Knowledgeable Community Member and Expert Perceptions of Self-Determination

To compare community and expert participants' perceptions of self-determination—operationalized as how often the parties decide how to resolve the dispute—we ran a two-way multivariate analysis of variance (MANOVA). For this analysis, we only included community participants that reported at least some familiarity with the dispute resolution processes examined because those who were unfamiliar would be unable to provide meaningful responses that could be compared across processes. In total, only 86 out of the 632 community sample participants (13.6%) reported at least some familiarity with *all* five dispute resolution processes. We refer to this subsample of com-

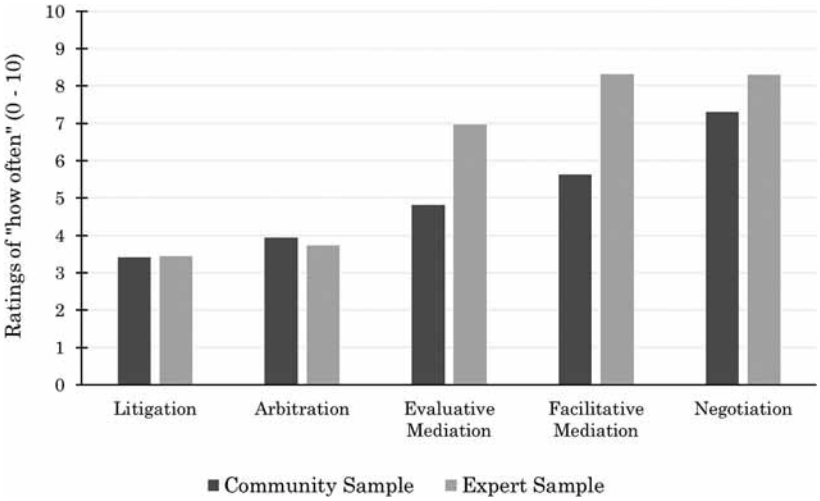
96. Votruba et al., *supra* note 67.

munity members in these analyses as "knowledgeable community members" to distinguish them from the larger sample.

There was a statistically significant interaction effect between the sample and the processes, $F(2.54, 593.32) = 25.75$, $p < .001$.[97] The significant interaction indicates that the relationship between the community and expert samples' perceptions depended upon the dispute resolution process. Thus, we followed up these analyses with pairwise comparisons (using one-way ANOVAs) directly comparing community and expert participants' perceptions for each of the dispute resolution processes. The results indicate there was not a significant difference between community and expert participants in perceptions of litigation and arbitration ($p = .91$ and $p = .47$, respectively). But, there were significant differences in perceptions of evaluative mediation ($F(1, 353) = 51.75$, $p < .001$), facilitative mediation ($F(1, 371) = 119.81$, $p < .001$), and negotiation ($F(1, 811) = 29.31$, $p < .001$). Examining the means, it is apparent that the community participants generally perceived evaluative mediation, facilitative mediation, and negotiation as involving less self-determination compared to the expert participants (see Figure D).

97. The sphericity assumptions of the MANOVA model were violated, so the results are reported using a Greenhouse-Geisser correction to the degrees of freedom as recommended. *See* Hervé Abdi, *The Greenhouse-Geisser Correction*, ENCYC. RES. DESIGN, 2010, at 1, 4–6. Statistical tests, including MANOVAs, must meet certain assumptions to ensure the appropriateness of the statistical test. Because MANOVAs involve repeatedly measuring variables with the same participant, they are particularly susceptible to violations of the assumption of sphericity. To correct for this assumption, an adjustment is made to the degrees of freedom known as a Greenhouse-Geisser correction.

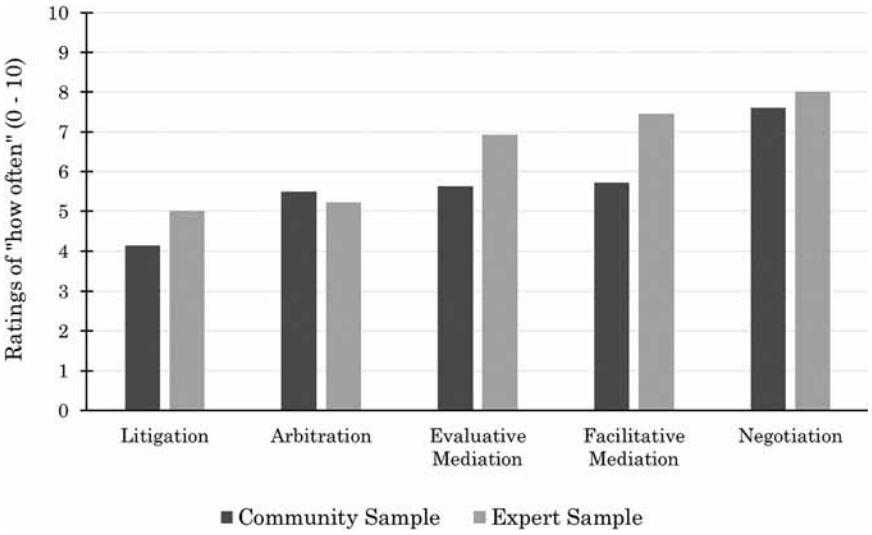
Figure D - Self-Determination Means Comparing the Community Member and Expert Participants



2. Knowledgeable Community Member and Expert Perceptions of Voluntariness

Using the same statistical procedures, we also compared the community and expert participants' perceptions of how voluntary participation is in the dispute resolution processes. Again, we conducted a MANOVA (using a Greenhouse-Geisser correction) including only the 86 community participants that reported at least some familiarity with all five of the dispute resolution processes. There was a statistically significant interaction effect between the sample and the processes, $F(3.31, 946.69) = 7.16$, $p < .001$. The significant interaction indicates that the relationship between the community and expert samples' perceptions depended upon the dispute resolution process. Thus, we followed up these analyses with pairwise comparisons directly comparing community and expert participants' perceptions for each of the dispute resolution processes. The results indicate there was not a significant difference between community and expert participants in perceptions regarding how voluntary participation in arbitration is ($p = .27$). But, there were significant differences in perceptions of voluntariness for litigation, ($F(1, 736) = 15.78$, $p < .001$), evaluative mediation ($F(1, 347) = 21.48$, $p < .001$), facilitative mediation ($F(1, 367) = 42.00$, $p < .001$), and negotiation ($F(1, 819) = 5.63$, $p = .02$). Examining the means, it is apparent that the community participants generally perceived participation in litigation, evaluative mediation, facilitative mediation, and negotiation as less voluntary compared to the expert participants (see Figure E).

Figure E - Voluntariness Means Comparing the Community Member and Expert Participants

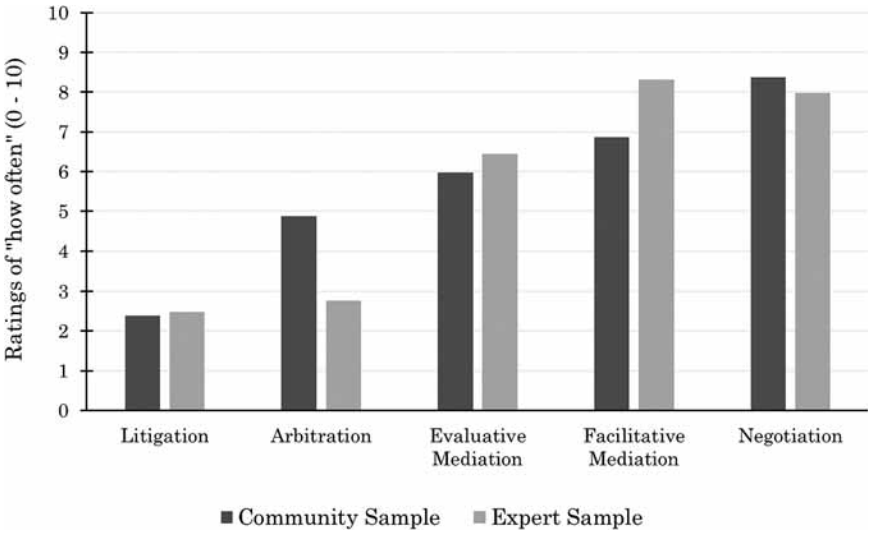


3. Knowledgeable Community Member and Expert Perceptions of Collaboration Potential

Finally, we also compared the community and expert participants' perceptions of how collaborative the dispute resolution processes are with regards to the parties working together to reach a solution. Again, we conducted a MANOVA (using a Greenhouse-Geisser correction) including only the 86 community participants that reported at least some familiarity with all five of the dispute resolution processes. There was a statistically significant interaction effect between the sample and the processes, $F(2.90, 684.82) = 28.18$, $p < .001$. The significant interaction indicates that the relationship between the community and expert samples' perceptions depended upon the dispute resolution process. Thus, we followed up these analyses with pairwise comparisons directly comparing community and expert participants' perceptions for each of the dispute resolution processes. The results indicate there was not a significant difference between community and expert participants in how collaborative they perceived litigation ($p = .66$) or evaluative mediation ($p = .09$). But, there were significant differences in perceptions of how collaborative the process is for arbitration ($F(1, 637) = 76.12$, $p < .001$), facilitative mediation ($F(1, 378) = 43.21$, $p < .001$), and negotiation ($F(1, 828) = 6.31$, $p = .01$). As shown by the means, the community participants perceived arbitration and negotiation as more collaborative processes compared to the experts.

But the community sample perceived facilitative mediation as *less* collaborative than the experts (see Figure F).

Figure F - Collaborative Means Comparing the Community Member and Expert Participants



C. Discussion of Results

While our primary objective at the start of this data collection effort was to confirm and clarify the understanding of what mediation, arbitration, and negotiation are, we also uncovered significant potential gaps in the public's understanding of ADR processes, as indicated by differences between public and expert ratings. These gaps should have significant impacts on how lawyers, neutrals, and court systems operate, both ethically and practically. In our examination of community participants' familiarity with, knowledge of, and experience with dispute resolution mechanisms, there were a number of noteworthy findings. First, pertaining to familiarity, nearly all of the community participants had at least some familiarity with negotiation. Self-reported knowledge of each of the processes also indicated that the community member participants perceived themselves as most knowledgeable about negotiation. This finding makes sense in light of the fact that most people engage in informal negotiations every day[98] and many have negotiated significant transactions such as purchasing

98. BLANKLEY & WESTON, *supra* note 6, at 29 ("Often, people are unaware that they are 'negotiating,' they negotiate out of instinct . . . .").

homes or cars, or negotiating a salary or raise.[99] Everyday person-to-person transactions have moved from the classifieds to forums such as Facebook Marketplace, Craigslist, and Poshmark, with no shortage of internet blogs teaching readers how to negotiate in these forums.[100] Books relating to negotiation are abundant to lay audiences,[101] including a book on negotiation written by a United States President.[102] For these reasons, the community participants' familiarity with and knowledge of negotiation is unsurprising.

The large majority of community member participants also indicated at least some familiarity with litigation and arbitration. With regards to self-assessed ratings of knowledge, the average ratings indicated litigation was the second most understood dispute resolution process and arbitration was the third most understood. Litigation is considered a default method of dispute resolution in the United States, and the "A" in ADR stands for "alternative" to litigation.[103] Litigation is commonly portrayed in popular media such as TV shows, movies, and novels. The participants' familiarity with litigation was expected given its prominence in popular culture in the United States. The participants' higher levels of familiarity with and knowledge of arbitration is somewhat surprising, but likely explainable. Arbitration agreements are now commonplace in contracts for cellular telephone and banking services.[104] Some members of the public may also be fa-

99. *See* Andrea Kumpfer Schneider et al., *The Definition of Negotiation: A Play in Three Acts*, 2017 J. DISP. RESOL. 15, 15–16 (2017) (describing major work requests, such as maternity leave and international travel, as "absolutely" a negotiation).

100. *See, e.g.*, Dave Ramsey, *How to Haggle for a Good Bargain*, RAMSEY, https://www.daveramsey.com/blog/how-to-negotiate-a-bargain [https://perma.unl.edu/TC46-H9RW] (last visited Aug. 24, 2020) (discussing tips for both in-person and online transactions).

101. *See generally* ROGER FISHER, WILLIAM URY & BRUCE PATTON, GETTING TO YES: NEGOTIATING AGREEMENT WITHOUT GIVING IN (3d ed. 2011) (providing five key ideas for negotiation).

102. DONALD J. TRUMP & TONY SCHWARTZ, TRUMP: THE ART OF THE DEAL (1987).

103. *See, e.g.*, Maurits Barendrecht & Berend R. de Vries, *Fitting the Forum to the Fuss with Sticky Defaults: Failure in the Market for Dispute Resolution Services?*, 7 CARDOZO J. CONFLICT RESOL. 83, 100 (2005) ("Faced with a proposal for an alternative dispute resolution method, the parties will compare the proposed method with the default method of litigation."); Thomas J. Stipanowich & J. Ryan Lamare, *Living with ADR: Evolving Perceptions and Use of Mediation, Arbitration, and Conflict Management in Fortune 100 Companies*, 19 HARV. NEGOT. L. REV. 1, 30 (2014) ("Many commentators now frequently use the adjective 'appropriate,' signaling a shift from a litigation default to an emphasis on what techniques are suitable to the circumstances.").

104. *See, e.g.*, Amy J. Schmitz, *Curing Consumer Warranty Woes Through Regulated Arbitration*, 23 OHIO ST. J. ON DISP. RESOL. 627, 627 (2008) ("Un-negotiated form arbitration provisions have become accepted reality in consumer contracts in the United States. Consumers can expect to find these form arbitration clauses in everything from McDonald's contest rules and medical services handbooks to

miliar with arbitration from nationwide press regarding some of the negative aspects of arbitration,[105] or even from sports media reporting on salary or grievance arbitration in the major sports leagues in the United States or within the Olympics.[106] Arbitration is also a common dispute resolution process in collective bargaining agreements,[107] and those employed in unionized workplaces or industries may be familiar with the process.

However, only about a quarter of the participants reported having at least some familiarity with evaluative mediation or facilitative mediation. Community participants' self-reported ratings also indicated low levels of knowledge for both of these processes. The low familiarity and knowledge may be attributable to at least two things. In the United States, mediation is the newest of these five types of dispute resolution, with many scholars dating the mediation revolution to the Pound Conference and community dispute resolution in the 1960s.[108] As it relates to the general population, mediation is most common in family law disputes, with mandatory and voluntary mediation programs in roughly half of the United States.[109] Mediation has had only limited exposure in the news and popular media. The other reason that may have led to low familiarity is the addition of the words "facilitative" and "evaluative" before the word "mediation." It is cer-

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computer purchase terms and pest control contracts. Most . . . credit card companies now require arbitration . . . .").

105. In 2015, the New York Times published a trilogy of articles on arbitration. *See* Michael Corkery & Jessica Silver-Greenberg, *In Religious Arbitration, Scripture Is the Rule of Law*, N.Y. TIMES (Nov. 2, 2015), http://www.nytimes.com/2015/11/03/business/dealbook/in-religious-arbitration-scripture-is-the-rule-of-law.html [https://perma.unl.edu/9JSY-QL8E]; Jessica Silver-Greenberg & Robert Gebeloff, *Arbitration Everywhere, Stacking the Deck of Justice*, N.Y. TIMES (Oct. 31, 2015), http://www.nytimes.com/2015/11/01/business/dealbook/arbitration-everywhere-stacking-the-deck-of-justice.html?_r=0 [https://perma.unl.edu/E7SV-VZKK]; Jessica Silver-Greenberg & Robert Gebeloff, *In Arbitration, a "Privatization of the Justice System,"* N.Y. TIMES (Nov. 1, 2015), http://www.nytimes.com/2015/11/02/business/dealbook/in-arbitration-a-privatization-of-the-justice-system.html [https://perma.unl.edu/4ND5-2SHR].

106. *See generally* Symposium, *Sports Law and Alternative Dispute Resolution*, 3 CARDOZO ONLINE J. CONFLICT RESOL. 3 (2001) (giving overview of arbitration in professional and Olympic sports); Maureen A. Weston, *Doping Control, Mandatory Arbitration, and Process Dangers for Accused Athletes in International Sports*, 10 PEPP. DISP. RESOL. L.J. 5, 5 (2009) ("As a condition of participating in international sporting competition, athletes generally waive rights to judicial recourse in their national courts and agree to mandatory arbitration of disputes regarding eligibility or discipline to the Court of Arbitration for Sport (CAS).").

107. *See, e.g.*, William B. Gould IV, *Judicial Review of Labor Arbitration Awards—Thirty Years of the* Steelworkers Trilogy: *The Aftermath of* AT&T *and* Misco, 64 NOTRE DAME L. REV. 464, 464–66 (1989) (discussing the legal history surrounding collective bargaining agreements and arbitration's place in that history).

108. *See* Traum & Farkas, *supra* note 1.

109. FAMILY JUSTICE INSTITUTE, WHAT STATE STATUTES TELL US ABOUT THE LANDSCAPE OF DOMESTIC RELATIONS 2–4 (2018) (on file with author).

tainly possible that the community sample was familiar with "mediation" as a general term but not when qualified by another term. When constructing the survey, we chose to differentiate between mediation models given that they differed on some of the features we were assessing, and we suspected not differentiating them would make it difficult for experts who knew of the subtypes to otherwise rate the features.

The study also inquired about the community participants' direct experience with the five dispute resolution processes. The frequency distribution in Figure C highlights that the vast majority of the community participants have no experience with litigation, arbitration, evaluative mediation, or facilitative mediation. The one dispute resolution process that a larger number of participants had experience with was negotiation. Again, this makes sense because most people engage in informal negotiations every day and have at least some experience engaging in significant negotiations involving larger purchases and salaries. Overall, the community participants were least experienced with evaluative mediation and facilitative mediation, followed by arbitration and litigation; they had the most experience with negotiation.

The final set of analyses directly compared the expert sample with the subset of our community sample that had indicated at least slight familiarity with all of the dispute resolution processes included in the analyses. These comparisons move beyond assessments of familiarity and subjective knowledge and begin to clarify the nature of public understanding of different processes, including how public understanding may differ from expert assessments of the processes. We compared the experts and these potentially more knowledgeable community members on their perceptions of how often the dispute resolution processes involved self-determination, are voluntary, and allow for collaborative solutions. Although our other paper focuses on a wide array of dispute resolution process features, we chose to include these select features in this Article because of their implications for ethics and practice. It is also notable that in our questions to the participants (as described in the methods section *supra*), we asked about each of these features without using the specific terms in order to avoid the question simply being a test of dispute resolution vocabulary. For example, the question about self-determination was framed as the parties deciding for themselves how to resolve the dispute.

The comparison of knowledgeable community members' and experts' perceptions of self-determination indicated that there were no differences in how they perceived self-determination in litigation and arbitration. However, there was a difference in expert and community perceptions of self-determination for evaluative mediation, facilitative mediation, and negotiation. In general, the community participants

perceived them as being lower in self-determination compared to experts. Similar results were observed for perceptions of how often participation in each of the dispute resolution processes is voluntary. Although there were no observed differences for perceptions of arbitration, the community participants generally perceived participation in litigation, evaluative mediation, facilitative mediation, and negotiation as less voluntary compared to the expert participants. The results on perceptions of how often each the processes involved collaborative solutions were somewhat different. This time, there were no differences in perceptions for litigation and evaluative mediation. However, the community participants perceived arbitration and negotiation as more often a collaborative process compared to the experts. But, the community sample perceived facilitative mediation as *less* collaborative than the experts.

As for our larger project, the results suggest that experts in the field of dispute resolution share a common understanding of the key features of different processes.[110] This is not the case for the community sample. Community members generally show less agreement (more variability) in their understanding of the prevalence of the key features for the processes we examined. Further, the community samples' responses often significantly differ from the experts'. These findings are particularly interesting when considering ethics, as this example shows that even when community participants indicated they had familiarity with dispute resolution processes, such as mediation, their assessments did not always correspond with expert assessments. Examining perceptions of self-determination, mediation appears to be the most commonly misunderstood process based on this question and others in our larger analysis.[111] In general, the comparison of experts' and community members' perceptions of the features of dispute resolution processes points to the fact that even the community members who indicate familiarity with all of the processes misunderstand important features of those processes.[112]

VI. IMPLICATIONS FOR LAWYERS – ETHICAL AND PROCESS-BASED

So far, this Article has considered the importance of studying the public's understanding of ADR processes by considering the literature on the psychology of knowledge, reviewing past research on what the general public knows about ADR processes, and detailing the results of the current study on community members' knowledge of ADR processes. Generally, the results suggest significant gaps in the pub-

110. Votruba et al., *supra* note 67.
111. *Id.*
112. *Id.*

lic's understanding of ADR processes. These gaps potentially impact how lawyers, neutrals, and court systems should operate, both ethically and practically. This Part considers the ethical and process-based implications of the reviewed literature and the current study findings for lawyers, neutrals, and court systems. We recognize that lawyers likely vary on how much they view their role as educational. Clients, too, will vary on their experience with various processes, sophistication level, and desire to know more about process options. Yet, we hope this discussion offers an opportunity to critically examine legal practitioners' assumptions regarding their clients' knowledge of ADR processes and the ethical and practical consequences of those assumptions.

This Part is divided in two sections. The first section considers how the results of this study impact legal ethics. The second section considers how these results could impact current philosophies relating to client counseling and informed consent.

A. Implications Relating to Legal Ethics

Although we did not create this study specifically with legal ethics in mind, the results implicate ethical practice. Because this study suggests that the general population has fairly limited knowledge and experience with dispute resolution processes, as well as misconceptions about the essential nature of dispute resolution processes, lawyers may need to reconsider their ethical duties to their clients to ensure their clients have the proper information to give informed consent regarding the course of the representation. In addition, this research might shape how lawyers view the traditional duty regarding the choices made in a representation—the "means/ends" divide. Finally, this section revives an important question: Should lawyers have an ethical duty to counsel their clients regarding ADR options?

1. Ethics and Communication with Clients

This study shows that a majority of the public lacks familiarity with, knowledge of, and experience with the processes of evaluative and facilitative mediation. Even those who claimed knowledge of these processes have differing perceptions of the fundamental features (e.g., self-determination) of the processes compared to the expert sample.[113] Further, although our participants indicated greater familiarity with, knowledge of, and experience with litigation and arbitration, the numbers are still rather low. Based on these findings, attorneys may need to dedicate additional attention to advising their clients on what they can expect regarding ADR processes.

113. *See supra* Part V.

Communication with clients is among the fundamental duties of a lawyer.[114] Clients expect robust communication from their advocates, and lack of communication is a common theme in malpractice actions.[115] The *Model Rules of Professional Conduct* deal with the lawyer's duty to keep a client informed in a number of places. Most notably, Model Rule 1.4, titled "Communications," states, in part:

> (a) A lawyer *shall*:
>
> (1) promptly inform the client of any decision or circumstance with respect to which the client's *informed consent*, as defined in Rule 1.0(e), is required by these Rules;
>
> (2) *reasonably consult with the client about the means by which the client's objectives are to be accomplished*;
>
> (3) keep the client *reasonably informed about the status* of the matter; [and]
>
> (4) promptly comply with reasonable *requests for information*[.]
>
> . . . .
>
> (b) A lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation.[116]

Nearly every state has adopted this rule, and the states that did not have their own communication rules.[117] The first comment to this Rule notes that "[r]easonable communication between the lawyer and client is *necessary* for the client effectively to participate in the representation."[118] Under Rule 1.4(a)(2), the communication rule requires consultation regarding the "means by which the client's objectives are

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114. *See In re* Michael A. Joseph, 56 V.I. 490, 505 (2012) ("As we have previously explained, the duties set forth in Model Rules 1.1, 1.3, and 1.4 are among the most important ethical duties owed by a lawyer."). Rule 1.1 deals with competency, Rule 1.3 deals with diligence, and Rule 1.4 concerns communication. As the *Joseph* court notes, these three rules are fundamental to law practice. *Id.*

115. Sarah Burkey, Note, *Model Rule 1.4: Why Telling Lawyers to "Communicate More" Is Not Enough*, 31 GEO. J. LEGAL ETHICS 545, 546 (2018) ("Indeed, lawyers are constantly sued by their own clients for their alleged failure to communicate.").

116. MODEL RULES PROF'L CONDUCT r. 1.4 (AM. BAR ASS'N 2002) (emphasis added). The Model Rules included the first ethical responsibility centered on communication. This rule does not have a counterpart in the old Model Code of Professional Responsibility. *See* Nancy J. Moore, *"Why Is There No Clear Doctrine of Informed Consent for Lawyers?,"* 47 U. TOL. L. REV. 133, 141 (2015) (noting that the 1983 Rules not only mandated, for the first time, "that lawyers must communicate with their clients" but "also provided for expansive duties both to communicate regularly and to explain matters sufficiently to permit clients to make 'informed decisions' concerning the course of the representation.").

117. Burkey, *supra* note 115, at 547–49 (describing the adoption of Rule 1.4 and the similar rules in states that did not adopt the Model Rules); *see also* Lucian T. Pera, *Grading ABA Leadership on Legal Ethics Leadership: State Adoption of the Revised ABA Model Rules of Professional Conduct*, 30 OKLA. CITY U. L. REV. 637, 672–73 (2005) (noting early adoptions of Rule 1.4, including many states that adopted Rule 1.4 verbatim).

118. MODEL RULES OF PROF'L CONDUCT r. 1.4 cmt. 1 (AM. BAR ASS'N 2002) (emphasis added).

to be accomplished,"[119] even though the means are usually considered to be in the realm of the lawyer's decision-making authority.[120]

The *Model Rules of Professional Conduct* do not specify the exact amount or quality of communication necessary, and "communication" is not a defined term in the Rules.[121] Comment 5 gives some guidance:

> The client should have sufficient information to participate intelligently in decisions concerning the objectives of the representation *and the means by which they are to be pursued*, to the extent the client is willing and able to do so. Adequacy of communication depends in part on the kind of advice or assistance that is involved.[122]

This comment, however, additionally notes that "a lawyer ordinarily will not be expected to describe . . . negotiation strategy."[123] Although a lawyer need not explain every detail of negotiation strategy, a lawyer may need to consult with their client about some process issues, particularly if the client's interests implicate process choice. For example, if a client in a probate dispute mentions a goal of reconciling with an estranged sibling, the lawyer may need to communicate with the client about processes that would achieve that goal (and those that would not).[124] In this probate example, the adversarial nature of litigation and arbitration could make the relationship between the siblings increasingly strained. In mediation and negotiation, however, the flexible nature of the process and ability to discuss non-legal topics and outcomes may be better suited to meet the need of the client for reconciliation.

The ABA adopted the addition of the words "informed consent" in Rule 1.4(a) in the 2000 version of the *Model Rules*;[125] however, by its text, lawyers need not obtain informed consent regarding every aspect that requires communication.[126] Where informed consent is required,

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119. MODEL RULES OF PROF'L CONDUCT r. 1.4(a)(2) (AM. BAR ASS'N 2002).
120. *See* MODEL RULES OF PROF'L CONDUCT r. 1.2 cmt. 2 (AM. BAR ASS'N 2002) ("Clients normally defer to the special knowledge and skill of their lawyer with respect to the means to be used to accomplish their objectives, particularly with respect to technical, legal and tactical matters.").
121. *See generally* MODEL RULES OF PROF'L CONDUCT r. 1.0 (AM. BAR ASS'N 2012); *see also* Luis Miguel Dickson, *Advice About Immunity: Ethical Conflict in* Garcetti *Advice-Giving*, 22 GEO. J. LEGAL ETHICS 795, 808 (2009) ("Model Rule 1.4 governs communication between the client and the lawyer. Model Rule 1.4(a)(2) and Model Rule 1.4(b), taken together, imply that a lawyer has an ethical duty to reasonably communicate with a client.").
122. MODEL RULES OF PROF'L CONDUCT r. 1.4 cmt. 5 (AM. BAR ASS'N 2002) (emphasis added).
123. *Id.*
124. *See infra* subsection VI.A.3 for additional discussion on a duty to advise a client regarding non-litigation options.
125. Moore, *supra* note 116, at 149–51 (discussing the adoption and changes to Rule 1.4 as part of the Ethics 2000 commission).
126. MODEL RULES OF PROF'L CONDUCT r. 1.4 (AM. BAR ASS'N 2002); Moore, *supra* note 116, at 151 ("An unintended consequence of the Commission's decision, however, is that lawyers looking for guidance in the context of decision making under Rule

the term is robust, defined as "the agreement by a person to a proposed course of conduct after the lawyer has communicated adequate information and explanation about the material risks of and reasonably available alternatives to the proposed course of conduct."[127] Lawyers, of course, may provide robust communication with their clients even when informed consent is not required, and the rules of professional conduct are minimum standards, neither aspirational nor best practices.[128]

In sum, the *Model Rules of Professional Conduct* indicate that lawyer-client communication must be sufficient enough that the client can "make informed decisions regarding representation"[129] and "participate intelligently in decisions concerning the objectives of the representation and the means by which they are to be pursued."[130] The public's general lack of knowledge of ADR processes indicates that lawyers may often need to address significant gaps in their clients' understanding of ADR processes to ensure their clients are adequately informed to make these decisions.

These gaps are likely significant for two reasons. First, the current study suggests an overwhelming dearth of knowledge regarding ADR processes, particularly for evaluative and facilitative mediation.[131] The majority of the community participants lacked familiarity with, knowledge of, and experience with these processes. This suggests that lawyers should not assume that a client, particularly a new client, has any familiarity with or knowledge about possible ADR processes. Nor should lawyers expect that their clients have enough knowledge to initiate a conversation about alternative dispute resolution. Further, our results suggest that clients may actually have some misunderstandings of ADR processes that their lawyer may need to correct. To best advise their clients, lawyers may need to initiate a conversation on the topic, assume their client has no knowledge of ADR processes, and be prepared to correct misinformation even if their client does report some knowledge.

Second, Bloom's taxonomy of knowledge suggests that being able to evaluate and choose between different dispute resolution processes

1.4(b) will not be referred to Rule 1.0(e), which provides an expansive definition of the term 'informed consent.'").

127. MODEL RULES OF PROF'L CONDUCT r. 1.0(e) (AM. BAR ASS'N 2002).

128. Clio, a popular law office practice software company, conducted a study in 2018 of lawyers, law firms, and clients to determine trends in provision of legal services. CLIO, LEGAL TRENDS REPORT 6 (2018), https://www.clio.com/resources/legal-trends/2018-report/ [https://perma.unl.edu/W2AU-X3WT]. Among other findings, the report notes that attorneys and clients have different expectations regarding modes and frequency of communication. *Id.* at 36–45.

129. MODEL RULES OF PROF'L CONDUCT r. 1.4(b) (AM. BAR ASS'N 2002).

130. MODEL RULES OF PROF'L CONDUCT r. 1.4 cmt. 5 (AM. BAR ASS'N 2002).

131. *See supra* section V.A.

will likely require multiple levels of knowledge including awareness of the process options, remembering those options, distinguishing between the options along the relevant dimensions, understanding and analyzing the implications of those options, and, finally, applying comparisons between the options to the specific situation.[132] All of this is to say that making informed, intelligent decisions requires a high level of knowledge and communication. To achieve this high level, attorneys will need to devote considerable time, energy, and thought to adequately and appropriately communicating with their clients. Admittedly, this is not easy to do. Lawyers—for legitimate reasons including time and cost efficiency, as well as overwhelming caseloads—often have limited time to communicate with their clients.[133] Further, as experts, it may be difficult for lawyers to appreciate the vast discrepancy between their and their clients' understanding of ADR processes.

For some lawyers, implementing these practices will require a change in how they counsel and educate clients, and the lawyers themselves may need additional training on how to provide the required information for clients to make informed decisions. Over the last few decades, law schools have provided increasing training for new lawyers in counseling, negotiation, ADR, and experiential learning, which should help provide initial training.[134] Now that we better understand the public's level of unfamiliarity with these processes, it can be argued that these courses could add additional training on counseling regarding ADR options. For current lawyers, educational programs regarding counseling clients as to their process options may equip lawyers with new tools for advising and counseling clients.

2. Ethics and Division of Responsibility Between Attorney and Client

This study also has implications under the *Model Rules of Professional Conduct* Rule 1.2, which governs the division of roles and responsibilities between the lawyer and client.[135] Given the lay population's misunderstanding of key features of dispute resolution processes, the division of authority between lawyers and clients may need reconsideration. As noted above,[136] increased communication

132. *See generally* Anderson & Krathwohl, *supra* note 33.

133. *See, e.g.*, Rodney J. Uphoff, *Relations Between Lawyer and Client in* Damages*: Model, Typical, or Dysfunctional?*, 2004 J. DISP. RESOL. 145, 163–64 (2004) (suggesting that high workloads for lawyers, among other factors, may limit the amount of time they may have available to counsel clients).

134. Lande, *supra* note 7, at 128–32 (describing the need for continuing a robust program of ADR within the legal academy).

135. *See* MODEL RULES OF PROF'L CONDUCT r. 1.2 (AM. BAR ASS'N 2002).

136. *See supra* subsection VI.A.1.

may alleviate many of the potential concerns regarding this knowledge gap.

Rule 1.2 divides the responsibility of the attorney–client relationship between the attorney and the client. Although not explicit, many lawyers read this rule as having a "means" and "ends" distinction, i.e., the client decides the objectives, or the ends, and the lawyer determines how the objectives are met, or the means.[137] Rule 1.2(a) requires that a lawyer "abide by a client's decisions concerning the objectives of representation and, as required by Rule 1.4, *shall consult with the client as to the means by which they are to be pursued*."[138] Read together, Rules 1.2 and 1.4 prioritize healthy communication between attorney and client regarding the "means," or the process and strategy choices, made by a lawyer during the course of a representation.[139] Additionally, Rule 1.2(a) places the decision of whether to settle specifically in the hands of the client.[140]

Comment 2 to Rule 1.2 elaborates on the means–ends distinction and notes the possibility that attorneys and clients may disagree on the proper "means" to be employed by the lawyer.[141] The comment notes that clients "normally defer" to lawyers' decisions regarding "technical, legal and tactical matters."[142] In the event of a disagreement, lawyers are encouraged to consult with their clients and "seek a mutually acceptable resolution" on the proper course of the representation.[143] The comment does not specifically state who makes the final decision in the event of disagreement.[144] Scholars note that while

137. *See* Moore, *supra* note 116, at 140 (noting that the Model Code implicitly maintained the "division of decisions into objectives and means").

138. MODEL RULES OF PROF'L CONDUCT r. 1.2(a) (AM. BAR ASS'N 2002) (emphasis added).

139. The comments to Rule 1.2 also cross-reference Rule 1.4, again noting the communication requirements. MODEL RULES OF PROF'L CONDUCT r. 1.2 cmt. 1 (AM. BAR ASS'N 2002) ("With respect to the means by which the client's objectives are to be pursued, the lawyer shall consult with the client as required by Rule 1.4(a)(2) and may take such action as is impliedly authorized to carry out the representation.").

140. MODEL RULES OF PROF'L CONDUCT r. 1.2(a) (AM. BAR ASS'N 2002).

141. MODEL RULES OF PROF'L CONDUCT r. 1.2 cmt. 2 (AM. BAR ASS'N 2002).

142. *Id.*

143. *Id.* The comment does not prescribe how such disagreements should be resolved, *id.*, and notes the possibility that the lawyer may need to withdraw from the representation if the disagreement cannot be resolved. *Id.* (citing Model Rule 1.16(b)(4), concerning withdrawal from representation). In addition, this comment in particular might not carry the threat of discipline if a serious disagreement arose regarding the course of the representation. *See* Moore, *supra* note 116, at 141 (noting that the comments to Rule 1.2 "could easily be taken as merely a suggestion of what lawyers ordinarily ought (morally) to do, not what they are required to do under penalty of discipline").

144. *See* Nina Varsava et al., *Allocating Authority Between Lawyers and Their Clients After* McCoy v. Louisiana, 23 NEW CRIM. L. REV. 170, 176 (2020) (stating that when it comes to disagreements over means decisions, the Model Rule "implicitly leaves ultimate authority over these decisions to the attorney").

Rule 1.2(a) may be fundamental to law practice, its parameters are difficult to define and specific guidance is lacking.[145]

In the criminal context, some authority exists to support the idea that defendants may be able to dictate certain procedural decisions, although the case law is hardly unanimous.[146] The United States Supreme Court recently held that the choice to maintain one's innocence, despite overwhelming evidence to the contrary, is "not [a] strategic choice[ ] about how best to *achieve* a client's objectives; they are choices about what the client's objectives in fact *are*."[147] The Supreme Court did not limit what a client's objectives may be, which raises an additional question: What if the client's objectives implicate elements of procedure?

The *Restatement (Third) of the Law Governing Lawyers* has a slightly broader view of the realm of choices within the client's control. The comments note that some decisions are "so vital" to clients that they would reasonably expect that their lawyers would abide by them.[148] The Restatement, however, neither defines those decisions nor provides examples.[149]

Given the results of this study, it is difficult to imagine many clients suggesting that they, or their lawyers, utilize processes alternative to litigation or negotiation. In an early study, Professor Wissler opined that the low utilization of voluntary ADR programs might be due, in part, to participants' unfamiliarity with these processes.[150] If clients are unfamiliar with ADR processes, as our study suggests, they will be less likely to request those processes in conversations with their attorneys or the court.[151]

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145. *See* Moore, *supra* note 116, at 141 (noting that parts of this rule may be more aspirational than the basis for discipline); Varsava et al., *supra* note 144, at 172 ("The Model Rules offer insufficient guidance in this area and fail to reflect the everyday reality of lawyering.").

146. *See* Varsava et al., *supra* note 144, at 177–78 (describing this area of law as a "confounding patchwork of rules that are difficult to justify under a consistent set of principles").

147. McCoy v. Louisiana, 138 S. Ct. 1500, 1508 (2018). Although the decision to assert guilt or innocence may appear to be one that would always be objective, not an end, this particular case involved overwhelming evidence of guilt. *Id.* Because of these circumstances, counsel considered the decision to admit guilt to be a strategic one that may lead to leniency in the sentencing phase of the case. *Id.* at 1508 ("Counsel may reasonably assess a concession of guilt as best suited to avoiding the death penalty, as English did in this case.").

148. RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 22 cmt. b (AM. LAW INST. 2000).

149. The Restatement further notes that one of the factors in determining whether a client makes a given decision is "how important the decision is for the client . . . ." RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 22 cmt. e.

150. Wissler, *supra* note 26, at 203.

151. *Id.* at 204 ("Two recent studies confirm that ADR use often is not client-initiated.").

Even without an express desire by a client to participate in a process, scholars considered whether certain strategies are "ends" in themselves. Professor Robert Burns suggests that negotiating strategy may be an "end" for a given client, particularly in integrative bargaining situations.[152] When lawyers consider client interests, as defined in *Getting to Yes*,[153] lawyers may find that more client "ends" implicate traditional lawyer "means." Professor Robert Cochran argued that the means chosen will "have a significant impact on the client's time and money, the client's relationship with the opposing party, the ultimate result of the representation, and the client's privacy and personal satisfaction,"[154] and Professor Shestowsky asserts that client "preferences should guide which procedures" lawyers employ in a given case.[155] These interests can be extraordinarily important to the client, making the "means–ends" analysis difficult. Overall, though, to the extent clients are even slightly engaged in choosing between procedures, it is essential that the clients are made aware of and understand the details of the various procedures well enough to evaluate those procedures and choose between them. Again, this suggests that lawyers may need to provide the necessary education and potentially correct misperceptions.

3. Ethical Duty to Counsel Clients Regarding ADR Options

The results of this study may give new vigor to those practitioners and scholars calling for an ethical obligation to counsel clients on process issues, particularly alternatives to litigation. The *Model Rules* themselves do not impose such an explicit duty, but Comment 5 to Rule 2.1 states that "when a matter is likely to involve litigation, it may be necessary under Rule 1.4 to inform the client of forms of dispute resolution that might constitute reasonable alternatives to litigation."[156] Although the text of Rule 2.1 does not mention alternative

152. Robert P. Burns, *Some Ethical Issues Surrounding Mediation*, 70 FORDHAM L. REV. 691, 699 (2001) (noting as an example that a client may have a strong desire that the negotiation follow certain norms, such as stringent ethical considerations, such that they are better classified as "ends" rather than "means."); *see also* Marshall J. Breger, *Should an Attorney Be Required to Advise a Client of ADR Options?*, 13 GEO. J. LEGAL ETHICS 427, 436–37 (2000) (considering whether the decision to choose among ADR options is an "ends" or a "means.").

153. FISHER ET AL., *supra* note 101 (describing interests as the underlying motivation for why a person asserts a given position).

154. Robert F. Cochran Jr., *Professional Rules and ADR: Control of Alternative Dispute Resolution Under the ABA Ethics 2000 Commission Proposal and Other Professional Responsibility Standards*, 28 FORDHAM URB. L.J. 895, 898 (2001).

155. Shestowsky, *Ignorance*, *supra* note 45, at 194.

156. MODEL RULES OF PROF'L CONDUCT r. 2.1 cmt. 5 (AM. BAR ASS'N 2018). The ABA added this comment as part of the Ethics 2000 Commission, ultimately adopted by the ABA in 2002. *Id.* For a redlined version of Rule 2.1 showing the changes from the Ethics 2000 Commission, see *Rule 2.1*, AM. B. ASS'N (Apr. 10, 2020),

forms of dispute resolution, it does allow a lawyer to counsel clients on a wide variety of non-legal factors, such as "moral, economic, social and political factors."[157] To the extent that a jurisdiction has adopted a duty to advise clients of ADR options, those rules are often limited to a specific jurisdiction, such as a federal district or a county.[158]

Many commentators have urged that regulatory authorities specifically require litigation attorneys to counsel clients on ADR options. In 2001, Professor Douglas Yarn argued:

> There are many reasons for such a duty, most of which are based on the general obligation of attorneys to inform clients of their legal options. An ethical duty to advise on ADR is arguably inherent in the fiduciary duty owed by an attorney to his principal. As ADR becomes increasingly prevalent and more integrated into the legal mainstream, it becomes less easy to avoid when representing a client. . . . Analogizing to informed consent or the duty to relay settlement offers, clients need to know the benefits and risks of choosing a particular dispute resolution process, whether litigation or mediation. At a slightly more esoteric level, there should be a duty to advise in order to promote the development of ADR as a public good. If ADR has public benefits of increasing access to justice, preserving judicial resources by reducing overcrowded court dockets, empowering communities, etc., then imposition of the norm promotes the public good.[159]

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https://www.americanbar.org/groups/professional_responsibility/policy/ethics_2000_commission/e2k_rule21/ [https://perma.unl.edu/SL2P-BZXZ]. Some scholars have questioned the placement of this idea in the comments of Rule 2.1 rather than the text, particularly given that Rule 1.4 does not specifically require such counseling and discussion. Gerald F. Phillips, *The Obligation of Attorneys to Inform Clients About ADR*, 31 W. ST. U. L. REV. 239, 242 (2004) (noting that Professor Robert Cochran found the cross references between Rules 1.4 and 2.1 create a circle leading nowhere).

157. MODEL RULES OF PROF'L CONDUCT r. 2.1 (AM. BAR ASS'N 2018).

158. Breger, *supra* note 152, at 463–65 (listing jurisdictions with a requirement that attorney counsel clients regarding ADR, but most of the requirements are local and not statewide); *see also* Kristen M. Blankley, *The Ethics and Practice of Drafting Pre-Dispute Resolution Clauses*, 49 CREIGHTON L. REV. 743, 748–49 (2016) (discussing the duty to advise); Shestowsky, *Ignorance*, *supra* note 45, at 200–02 (summarizing state and local laws). Colorado is among a small minority of states that advise lawyers to counsel clients about ADR options in litigated cases within the text of its rules. COLO. RULES OF PROF'L CONDUCT r. 2.1 (2020) ("In a matter involving or expected to involve litigation, a lawyer should advise the client of alternative forms of dispute resolution that might reasonably be pursued to attempt to resolve the legal dispute or to reach the legal objective sought."). Oregon, California, and Massachusetts have taken a different approach—requiring courts and clerks to provide ADR information to the litigants. *See* Becky L. Jacobs, *Mandatory ADR Notice Requirements: Gender Themes and Intentionality in Policy Discourse*, 22 HARV. NEGOT. L. REV. 1, 6–7 (2016) (discussing state requirements).

159. Douglas H. Yarn, *Lawyer Ethics in ADR and the Recommendations of Ethics 2000 to Revise the Model Rules of Professional Conduct: Considerations for Adoption and State Application*, 54 ARK. L. REV. 207, 246–47 (2001) (footnotes omitted); *see* Robert F. Cochran, Jr., *ADR, the ABA, and Client Control: A Proposal that the Model Rules Require Lawyers to Present ADR Options to Clients*, 41 S. TEX. L. REV. 183 (1999); Robert F. Cochran, Jr., *Legal Representation and the Next Steps*

Although not explicitly in the rules, some commentators find such a duty implied in Rules 2.1, 1.4, and their comments.[160] A new philosophy on this topic suggests that lawyers should advise clients about ADR options because legal training makes lawyers uniquely qualified to solve problems, "discern the issues in controversy, and build consensus around resolution."[161] Given the practical reality that few cases go to trial,[162] advising clients about how their cases will likely be resolved is an additional reason for lawyers to have a specific duty to counsel about these options.[163]

The duty to counsel clients regarding ADR options also has downsides. First, lawyers would need to become competent in these areas and proficient in explaining these options to clients.[164] In addition, if counseling clients regarding ADR options becomes a matter of professional ethics, liability may follow if a lawyer does not engage in this

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Toward Client Control: Attorney Malpractice for the Failure to Allow the Client to Control Negotiation and Pursue Alternatives to Litigation, 47 WASH. & LEE L. REV. 819 (1990); Frank E.A. Sander & Michael L. Prigoff, *Professional Responsibility: Should There Be a Duty to Advise of ADR Options?*, 76 ABA J. 50 (1990); Carol VanAuken-Haight & Pamela Chapman Enslen, *Attorney Duty to Inform Clients of ADR?*, 72 MICH. B.J. 1038 (1993); Monica L. Warmbrod, *Could an Attorney Face Disciplinary Actions or Even Legal Malpractice Liability for Failure to Inform Clients of Alternative Dispute Resolution?*, 27 CUMB. L. REV. 791 (1997); *see also* Christopher M. Fairman, *Protecting Consumers: Attorney Ethics and the Law Governing Lawyers*, 60 CONSUMER FIN. L.Q. REP. 529, 544 (2006) ("Because of the central importance of client choice, many scholars believe that there should be an express mandatory duty to advise clients of ADR options. Such a requirement, however, is largely absent from the ethical codes." (footnote omitted)).

160. Katerina P. Lewinbuk, *First, Do No Harm: The Consequences of Advising Clients About Litigation Alternatives in Medical Malpractice Cases*, 2 ST. MARY'S J. ON LEGAL MALPRACTICE & ETHICS 416, 429–30 (2012) (outlining the argument that a duty to advise about ADR options is implicit in the Model Rules).

161. Kristin L. Fortin, *Reviving the Lawyer's Role as Servant Leader: The Professional Paradigm and a Lawyer's Ethical Obligation to Inform Clients About Alternative Dispute Resolution*, 22 GEO. J. LEGAL ETHICS 589, 615 (2009).

162. Lewinbuk, *supra* note 160, at 425–26 (stating that less than 3% of cases go to trial).

163. Graham K. Bryant & Kristopher R. McClellan, *The Disappearing Civil Trial: Implications for the Future of Law Practice*, 30 REGENT U. L. REV. 287, 321 (2017) ("Lawyers, therefore, have an ethical duty to understand the options of ADR and litigation in order to competently advise clients about which course to pursue."); Kimberlee K. Kovach, *The Duty to Disclose Litigation Risks and Opportunities for Settlement: The Essence of Informed Decision-Making*, 33 U. LA VERNE L. REV. 71, 86 (2011) ("From contractual pre-dispute arbitration clauses to court mandated mediation, most cases, at least in several jurisdictions, are resolved through mediation or arbitration. As a consequence, lawyers are obligated to inform clients at the initial stages of representation that these options not only exist, but that it is quite likely that they will be participating in them." (footnotes omitted)).

164. Bryant & McClellan, *supra* note 163; Kovach, *supra* note 163; *see also* Wissler, *Barriers*, *supra* note 63, at 463–69 (discussing the idea that a lawyer's own knowledge of ADR is a barrier to widespread counseling regarding these processes).

counseling.[165] As noted above, whether process choices are "means" or "ends" is a difficult analysis,[166] and regulatory authorities may choose not to expose lawyers to potential liability for failing to explain choices that might be within the realm of lawyers to make.

Even without a specific ethical mandate to counsel clients about ADR options (outside of specific jurisdictions), some empirical evidence shows that many lawyers do incorporate discussions of ADR with their clients.[167] Professor Shestowsky's work suggests that clients who do participate in mediation, for example, do so at their lawyers' recommendations.[168] The studies to date, however, have focused on what lawyers do and say, not what clients hear or understand.[169] Our research considers the depth of knowledge of ADR processes by the general public, but we do not know where the survey takers received their knowledge—whether from lawyers, family members, television shows, or other sources.

To the extent that this study shows *lack of knowledge*, we would not expect clients to initiate a discussion of ADR options with their lawyers. Therefore, an explicit ethical requirement on lawyers to counsel their clients on ADR options could lead to more informed decision-making by clients regarding the processes that they want to utilize. If clients better understood their process options, they could theoretically make better decisions on how to resolve their dispute to best meet their needs.

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165. *See* Lewinbuk*, supra* note 160, at 434–35 (warning of a potential to expose lawyers to liability if a duty to counsel on ADR options is specifically incorporated into the Rules); Warmbrod, *supra* note 159, at 814–15 (discussing possibility of liability for failure to advise). ADR pioneer Frank Sander suggested that a duty to counsel clients regarding ADR could be satisfied by something as commonplace as handing a client a brochure outlining ADR options. Sander & Prigoff, *supra* note 159, at 50. Whether counseling through the provision of a brochure is an acceptable way to satisfy this theoretical duty is a topic outside the scope of this Article.

166. *See supra* subsection VI.A.2.

167. *See* Wissler, *Barriers*, *supra* note 63; Wissler, *supra* note 26.

168. *See* Donna Shestowsky, *Inside the Mind of the Client: An Analysis of Litigants' Decision Criteria for Choosing Procedure*, 36 CONFLICT RESOL. Q. 69, 82 (2018) ("The modal response to both ex post survey questions indicates that lawyers tend to drive procedural use. Moreover, among represented litigants, those who initially referenced an intent to rely on a lawyer's input were significantly more likely to mention relying on their lawyer in their ex post responses . . . .").

169. Shestowsky, *supra* note 45, at 205 ("It is possible that if these researchers had surveyed the *clients* . . . . they may have discovered that litigants had a different perspective regarding whether discussions about procedures took place. Moreover . . . they do not provide a picture of how well unrepresented litigants come to know about their options.").

B. Implications Relating to Client Counseling and Informed Consent

In addition to fundamental ethical issues, our research has additional implications for lawyers, dispute resolution professionals, and court systems. Although the previous section on ethical implications touched on issues related to client counseling, this section considers broader implications of those issues beyond the ethical requirements, which are often considered an ethical floor that lawyers should strive for conduct and performance well beyond.[170]

This section considers how our research impacts three practical considerations. First, this section considers how our research might impact client-centered counseling, a relatively new and popular theory guiding how lawyers and clients interact throughout the course of the relationship. Second, we consider how this research might affect dispute resolution professionals given the significant gaps in knowledge of key features of these processes. Finally, this section considers implications for court systems, particularly relating to working with unrepresented clients.

1. Client-Centered Counseling

The traditional model of the lawyer–client relationship is centered around the lawyer. Under the theory of lawyer-centered counseling, the lawyer, as the legal expert, makes most decisions in the relationship (other than those required under Rule 1.2).[171] Others describe the relationship as one in which the client delegates the decision-making authority to the lawyer, as agent.[172] Under this theory, the role of the client is "passive."[173] The lawyer-centered model is often associ-

170. *See* MODEL RULES OF PROF'L CONDUCT, pmbl. cmt. 7 (AM. BAR ASS'N 2018) ("A lawyer should strive to attain the highest level of skill, to improve the law and the legal profession and to exemplify the legal profession's ideals of public service."); *id.* cmt. 16 ("The Rules do not, however, exhaust the moral and ethical considerations that should inform a lawyer, for no worthwhile human activity can be completely defined by legal rules.").

171. Professor Katherine Kruse illustrates one of the downfalls of lawyer-based counseling by looking at the *Spaulding v. Zimmerman* case that is taught in nearly every legal ethics and professional responsibility class. *See* Katherine R. Kruse, *Beyond Cardboard Clients in Legal Ethics*, 23 GEO. J. LEGAL ETHICS 103 (2010) (discussing Spaulding v. Zimmerman, 116 N.W.2d 704 (Minn. 1962)). In the case, the defense attorney did not disclose a life-threatening medical condition of the plaintiff that was only discovered by a defense-side medical expert. *Id.* at 105–06. She notes that the lawyer likely "saw his job as simply to maximize his client's legal and financial interests" when the client might have preferred to disclose given the friendly relationship between the parties. *Id.*

172. Todd A. Berger, *The Constitutional Limits of Client-Centered Decision Making*, 50 U. RICH. L. REV. 1089, 1110 (2016) (describing the lawyer-centered approach).

173. *Id.* at 1110 ("[T]he client's role in the representation becomes largely passive.").

ated with the tactical decision to take advantage of every possible legal advantage in the name of zealous representation.[174]

Recently, a client-centered model of the attorney–client relationship emerged. Client-centered counseling, or client-centered lawyering, "focuses on the desires of the client" and considers client autonomy to be of "paramount importance."[175] This philosophy asks lawyers "to approach their clients as whole persons who are more than the sum of their legal interests."[176] Sometimes called a "participatory model" of lawyering, this theory provides more opportunity for "non-legal considerations" compared to the traditional, legally-focused model.[177] Some scholars describe this philosophy as "empowering" clients to make their own decisions, particularly for disadvantaged clients.[178]

This method of counseling employs active listening skills to ensure the lawyer understands the client's situation and that the client feels heard.[179] Through dialogue, the lawyer and client should both better understand the situation and the client's interests. Importantly, the lawyer provides options for the client regarding strategy, but the client ultimately decides the best course for the representation.[180] In this way, the lawyer in the client-centered strategy may remain "neutral" to the outcome while the client's needs and interests are satisfied.[181]

Client-centered counseling is one approach to the attorney–client relationship and not without some flaws. Professor Cochran argues that the client-centered approach may have the consequence of being self-centered, i.e., not concerned with the interests of others unless the

174. *Id.* at 1112–13 (discussing a client-centered approach).

175. Robert F. Cochran, Jr., *Which "Client-Centered Counselors?": A Reply to Professor Freedman*, 40 HOFSTRA L. REV. 355, 358 (2011).

176. Kruse, *supra* note 171, at 127; *see* Alex J. Hurder, *The Lawyer's Dilemma: To Be or Not to Be a Problem-Solving Negotiator*, 14 CLINICAL L. REV. 253, 273 (2007) ("The reference to a problem rather than a case suggests a broader view of the lawyer's role than the lawyer's traditional conception of a case implies.").

177. BLANKLEY & WESTON, *supra* note 6, at 11; *see also* Katherine R. Kruse, Bobbi McAdoo & Sharon Press, *Client Problem Solving: Where ADR and Lawyering Skills Meet*, 7 ELON L. REV. 225, 246–47 (2015) (describing the move away from the lawyer-centered model, which was described as "paternalistic," and the move toward better understanding of client needs and goals).

178. Robert A. Baruch Bush, *Mediation Skills and Client-Centered Lawyering: A New View of the Partnership,* 19 CLINICAL L. REV. 429, 447 (2013) (describing the goal as "*to strengthen the client's own capacity* for self-determination and agency").

179. Cochran, *supra* note 175, at 359 (describing reasons for use of active listening with clients); *see also* Kruse, *supra* note 171, at 128 ("Under the client-centered approach, hearing clients' stories and understanding their values, cares, and commitments is the first step and a continuing duty of legal representation.").

180. Cochran, *supra* note 175, at 359 ("The client then decides among the alternatives.").

181. *Id.* at 360.

client articulates the interests of others as the client's own interest.[182] In addition, although the lawyer may aim for meeting client needs or even empowerment, only the client can determine whether those goals have actually been met in a given situation.[183]

Because our research shows a low level of knowledge regarding ADR processes, as well as some potential misconceptions of those processes, lawyers who are already engaged in client-centered counseling may be particularly motivated to include more process-related education in their practices. These lawyers may also consider using active-listening tools to ensure that the client not only receives the information but also understands the information well enough to make informed choices.[184] For instance, if a client indicates a preference for a particular process, the lawyer could easily ask "why?" to determine if the client's interests actually align with the chosen process. If a client indicates a willingness to mediate as a method to not only resolve a legal dispute but also to reconcile with an estranged sibling, the lawyer could be more assured that the client understands how mediation can achieve both of those interests. Engaging in conversations about dispute resolution process options may have the added benefit of providing a different framework for discussing and exploring the client's interests. For example, explaining facilitative mediation as a collaborative and creative process that can result in mutually beneficial agreements might shift clients out of a "winner take all" mindset and elucidate an opportunity to consider interests they previously ignored given the limited framework of litigation.

2. Education by ADR Professionals to Participants

Given the general public's lack of self-reported knowledge and experience with alternative processes, ADR providers and provider organizations may need to provide additional information to participants to ensure informed consent and eliminate misconceptions. This study may give practitioners and programs insight into how much education may be necessary for their clients.

Dispute resolution processes, particularly consensual processes such as negotiation, mediation, and, to a lesser extent, processes such as mini-trials and early neutral evaluation, rely on the participants'

182. *Id.* ("[I]f the lawyer identifies some considerations that are important (consequences to the client) and fails to identify other considerations (consequences to other people), the client is likely to assume that consequences to other people are not important.").

183. Bush, *supra* note 178, at 448–49 ("Problem-solving skills, as they are conventionally taught, do not necessarily ensure either client empowerment or interactional improvement.").

184. *See supra* notes 36–44 (discussing Bloom's Taxonomy and its importance in decision-making).

informed consent to attend and participate in the process. As Professor Shestowsky stated: "The concept of party self-determination plays an important role in the history of ADR."[185] Professor Nolan-Haley describes: "Informed consent is a foundational principle that promotes human dignity, advances autonomy, and enhances party self-determination."[186] Most ADR processes directly involve the parties in the conversation, the process, the generation of ideas, and the ultimate decision on how to resolve the dispute.[187]

Codes of ethics for nearly all types of dispute resolution rely on voluntary participation and informed consent. For mediators, informed consent involves the parties' ability to make decisions about the resolution of the dispute and the process itself. The *Model Standards of Conduct for Mediators* provides:

> A mediator shall conduct a mediation based on the principle of party self-determination. Self-determination is the act of coming to a voluntary, uncoerced decision in which each party makes free and informed choices as to process and outcome. Parties may exercise self-determination at any stage of a mediation, including mediator selection, process design, participation in or withdrawal from the process, and outcomes.[188]

Professor Nolan-Haley describes informed consent as a "core value" of mediation[189] and as a concept based on the twin principles of "disclosure and consent."[190] Parties can only give "informed" consent if they understand what is happening.[191] Other consensual processes, such as Ombuds practice[192] and early neutral evaluation,[193] similarly value voluntary participation and informed consent.

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185. Shestowsky, *supra* note 45, at 194 ("[T]he animating impulse behind most of the 'ADR movement' has advocated for client choice in dispute resolution and 'self-determination' in mediation.").

186. Jacqueline Nolan-Haley, *Does ADR's "Access to Justice" Come at the Expense of Meaningful Consent?*, 33 OHIO ST. J. ON DISP. RESOL. 373, 391 (2018).

187. *See id.* at 194–95.

188. MODEL STANDARDS OF CONDUCT FOR MEDIATORS Standard I(A) (AM. BAR ASS'N, AM. ARBITRATION ASS'N & SOC'Y OF PROF'LS IN DISPUTE RESOLUTION 2005).

189. Nolan-Haley, *supra* note 186, at 376.

190. Jacqueline M. Nolan-Haley, *Informed Consent in Mediation: A Guiding Principle for Truly Educated Decisionmaking*, 74 NOTRE DAME L. REV. 775, 778 (1999) ("At a minimum, the principle of informed consent requires that parties be educated about the mediation process before they consent to participate in it, that their continued participation in mediation be voluntary, and that they understand and consent to the outcomes reached in mediation.").

191. The Model Rules of Professional Conduct for lawyers defines "informed consent" as "the agreement by a person to a proposed course of conduct after the lawyer has communicated adequate information and explanation about the material risks of and reasonably available alternatives to the proposed course of conduct." MODEL RULES OF PROF'L CONDUCT r. 1.0 (AM. BAR ASS'N 2018).

192. IOA STANDARDS OF PRACTICE Standard 4.4 (INT'L OMBUDSMAN ASS'N 2009), https://www.ombudsassociation.org/assets/docs/IOA_Standards_of_Practice_Oct09.pdf [https://perma.unl.edu/WE6Z-S3DU] ("Use of the Ombudsman Office is voluntary, and is not a required step in any grievance process or organizational policy.").

Arbitration is also a model built on consent, albeit manifested in a different way than in mediation. Parties agree to arbitration through contract, usually made prior to a dispute arising.[194] The arbitration process is flexible and customizable, which holds potential for informed consent and autonomy, but parties rarely know about or take advantage of such options.[195] Research to date suggests that consumers in particular do not notice or understand arbitration agreements in their contracts, thus casting doubt on whether the participants gave voluntary consent to participate,[196] even if they have entered into legally-binding contracts.

If the lay public either lacks understanding about a process they are about to enter or indicates misunderstanding, the neutral or service provider should educate the disputant to ensure informed consent. The findings in this Article should be shared with neutrals and provider organizations so they can adjust their practices and even their outreach to the general public. Perhaps mediators and arbitrators need to rethink how they intake cases and present opening remarks to the parties to ensure informed consent. Provider organizations may also be interested in additional education of the public through webinars, access-to-justice initiatives, and informational videos.

3. Education by Court Systems to Pro Se Litigants

Finally, this research has implications for the court system, particularly in the education that courts provide for pro se parties. Parties proceed pro se for a variety of reasons, but the primary reason cited by litigants is an inability to afford representation.[197] The number of

193. *See, e.g.*, S.C. ADR COURT RULES r. 3(a) (S.C. JUDICIAL BRANCH 2019) (providing that parties may voluntarily engage in early neutral evaluation in lieu of a court-required mediation); N.D. CAL. ADR RULES r. 5-2 (2018) (noting that cases may be referred to early neutral evaluation "following a stipulation by all parties").

194. *See* 9 U.S.C. § 2 (2018) (making arbitration agreements enforceable by the courts).

195. *See* Clark Freshman, *Tweaking the Market for Autonomy: A Problem-Solving Perspective to Informed Consent in Arbitration*, 56 U. MIAMI L. REV. 909, 929–30 (2002) (noting that parties likely do not know what options they have in arbitration so they do not ask for any).

196. Greenberg, *supra* note 16 at 215–16 (describing a study in which parties who read consumer agreements did not recall seeing an arbitration agreement); Schmitz, *supra* note 18, at 157–58 (discussing a consumer study regarding comprehension of arbitration agreements by consumers).

197. *See, e.g.*, INST. FOR THE ADVANCEMENT OF THE AM. LEGAL SYS., CASES WITHOUT COUNSEL 12 (2016), https://iaals.du.edu/sites/default/files/documents/publications/cases_without_counsel_research_report.pdf [https://perma.unl.edu/5CTM-SSDY] [hereinafter *Cases Without Counsel*] (noting that in the IAALS study of pro se family law participants, financial reasons appeared in upwards of 90% of cases); *see also* LEGAL SERVS. CORP., THE JUSTICE GAP 13–14 (2017), https://www.lsc.gov/sites/default/files/images/TheJusticeGap-FullReport.pdf [https://

parties proceeding pro se is rising rapidly, causing burdens on the court system.[198] Although pro se parties may possess a basic understanding of the court system and court processes from media exposure or even personal experience, court processes are complicated and intimidating.[199] Often, parties have questions about procedure, and court personnel—such as clerks and librarians—cannot always answer due to the prohibition on providing legal advice.[200] This increase in pro se parties, combined with the difficulties those parties experience while participating in the system, has caused concern for court systems, legal service providers, and access to justice commissions.[201]

Courts currently provide educational materials to parties, particularly through online resources, videos, forms, and brochures.[202] They also establish protocols on whether and how they answer questions posed by parties.[203] Many courts have mandatory dispute resolution

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perma.unl.edu/78NK-HB5C] [hereinafter *Justice Gap*] (describing the level of need of low-income households for legal services and the inability of legal aid organizations to provide support for a vast majority of those needs).

198. *See, e.g.*, COMM. ON CIVIL JUSTICE, SUPREME COURT OF GA. EQUAL JUSTICE COMM'N, CIVIL LEGAL NEEDS OF LOW AND MODERATE INCOME HOUSEHOLDS IN GEORGIA 2–3 (2009), https://www.americanbar.org/content/dam/aba/administrative/delivery_legal_services/downloads/georgia_legal_needs_study.pdf [https://perma.unl.edu/QV5K-EH3P] (describing the high numbers of low-income clients and the burdens these pro se parties put on the court system); 21ST CENTURY PRACTICE TASK FORCE, STATE BAR OF MICH., ENVISIONING A NEW FUTURE TODAY 3 (2016), https://www.michbar.org/file/future/21c_WorkProduct.pdf [https://perma.unl.edu/V8XY-UDX6] (noting that as many as 80% of legal needs of the poor remain unmet).

199. *Cases Without Counsel*, *supra* note 197, at 2 (describing self-represented litigants as "feeling lost or 'in the dark,' relating both to the individual steps and the big picture of the case"); *id.* at 30–33 (describing navigating the process and completing required forms and pleadings as stressful).

200. *Id.* at 27–28 (discussing frustration by pro se parties with court staff over the inability to answer questions the pro se parties view as simple and not necessarily a question of legal advice). In its 2017 report on *The Justice Gap*, Legal Services Corporation described a category of clients as "Unable to Serve Fully." *Justice Gap*, *supra* note 197, at 64. These clients often receive legal information or limited legal advice but not full representation due to insufficient funding. *Id.*

201. *See Justice Gap*, *supra* note 197, at 42–45 (discussing the number of cases that legal service corporations can serve and needs that go unmet).

202. *See, e.g.*, THE OFFICE OF DEPUTY CHIEF ADMIN. JUDGE FOR JUSTICE INITIATIVES, EXPANDING ACCESS TO JUSTICE IN NEW YORK STATE 22–23 (2009), https://www.americanbar.org/content/dam/aba/administrative/delivery_legal_services/downloads/expanding_access_to_justice_in_new_york_state.pdf [https://perma.unl.edu/NR85-733L] (describing form packets and online resources for pro se parties); SUPREME COURT OF OHIO, TASK FORCE ON ACCESS TO JUSTICE 25–27 (2015), http://www.supremecourt.ohio.gov/Publications/accessJustice/finalReport.pdf [https://perma.unl.edu/5WZ5-ZNKA] (discussing the need for forms and online resources).

203. THE OFFICE OF THE DEPUTY CHIEF ADMIN. JUDGE FOR JUSTICE INITIATIVES, SELF-REPRESENTED LITIGANTS 11 (2005), https://www.americanbar.org/content/dam/aba/administrative/delivery_legal_services/downloads/nyselfrepresentedliti-

programs, particularly mediation programs,[204] and those programs do not distinguish between represented parties and pro se parties. Courts, then, must educate unrepresented parties about those processes and what is expected of them. In some instances, state law dictates the contents of those educational disclosures.[205]

Our findings show that the lay population does not have a good understanding of dispute resolution processes. Courts may need or want to provide additional education to individual litigants regarding both voluntary and mandatory dispute resolution processes. In districts with voluntary dispute resolution options, litigants may need additional information to understand their options and choose accordingly. Districts with mandatory dispute resolution also need education for participants. Although the litigants do not choose whether to participate, the lack of knowledge found in this study shows that pro se litigants likely need additional information to understand the process in which they will be required to participate. Courts and clerks' offices can provide this education in a number of ways, such as short video explanations, brochures, articles, or other means.

VII. CONCLUSION

In some ways, the results examined here are basic, even unremarkable. More than anything, the research team discovered a gap in the public's knowledge base regarding what ADR processes actually entail. The researchers also uncovered that the public has a different perception of key features of mediation and arbitration than practicing mediators and arbitrators. Despite the simplicity of these results, the implications of this research are far reaching and, to date, unexplored.

Legal ethics and dispute resolution ethics are both built on the foundational concept of informed consent. This research shows that the lay public lacks its key underpinning—knowledge. Despite the

gants.pdf [https://perma.unl.edu/T5PK-6P5K] (discussing potential ways that clients can receive answers to legal questions, such as telephone hotlines and public meetings with lawyers who can answer basic client questions over forms).

204. NATIONAL COUNCIL OF JUVENILE AND FAMILY COURT JUDGES, FAMILY JUSTICE INITIATIVE 22 (2018) (on file with author) (noting that twenty-two states have mandatory mediation programs in domestic relations cases).

205. *See, e.g.*, NEB. REV. STAT. § 43-2925(2) (Reissue 2007) (requiring courts to provide information to all parties on the timeline of the litigation process, mediation services, and other resources in all family cases). In Nebraska, this law is satisfied when the clerk of courts provides all parties to a family law case a brochure created by the Office of Dispute Resolution. *See* NEB. STATE COURT ADM'R, NEBRASKA PARENTING ACT INFORMATION BROCHURE (2017), https://supremecourt.nebraska.gov/sites/default/files/Programs/mediation/Reports/Parenting_Act_Brochure_7-17.pdf.

many advances in the ADR field over the last fifty years, the message has clearly not been received by the general public.

This research suggests that because ADR is not a household term, additional outreach will be necessary to individual parties and to the general public. Lawyers may need to take additional care while counseling clients to ensure they know their options and can make informed choices. Individual neutrals may need to spend additional time with their clients to ensure the parties understand the process and their roles in it. Court systems and ADR providers could also provide additional public education to advance the knowledge of the public.

If these, and other efforts, are made to increase the understanding of ADR processes generally, researchers should re-survey the public to see if the efforts have been successful. The ADR movement depends on a wide variety of stakeholders, and public support would greatly increase its use and popularity.