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When Does Familiarity Breed Content? A Study of the Role of Different Forms of ADR Education and Experience in Attorneys' ADR Recommendations

Roselle L. Wissler*

I. INTRODUCTION

Alternative dispute resolution (ADR) programs that depend on voluntary participation often have low rates of utilization.¹ Because attorneys' recommendations and encouragement have a large impact on litigants' use of ADR,² proposals aimed at increasing voluntary ADR use often focus on ways to increase attorneys' familiarity with ADR.³ Only a few empirical studies have examined whether attorneys who either have taken ADR courses or who have previously used ADR are, in fact, more likely to recommend ADR to their clients.⁴ The present article reports the findings of a more comprehensive empirical study that explored the relative impact of different forms of ADR education and experience on whether attorneys advised clients to try ADR or to include ADR clauses in contracts.

This article first reviews proposed explanations for and solutions to the low rate of voluntary ADR use, as well as related empirical research. The article then reports a study that involved a survey of attorneys about their ADR education, their experience with ADR as counsel or as a third-party neutral, and their advice to clients about ADR. This study found that attorneys' direct experience with ADR, especially in their role as counsel but also as a neutral, was strongly related to whether they recommended ADR to clients. In contrast, ADR education had little or no relationship with attorneys' ADR recommendations, except for attorneys who had not used ADR as counsel. The implications of the findings for increasing voluntary ADR use are discussed.

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1. See *infra* notes 15-17 and accompanying text.
2. See *infra* notes 22-31 and accompanying text.
3. See *infra* notes 72-78 and accompanying text.
4. See *infra* notes 79-92 and accompanying text.

II. IMPLEMENTATION AND UTILIZATION OF ADR PROGRAMS

Alternative dispute resolution (ADR) programs have been increasingly adopted in federal and state courts.⁵ By the mid-1990s, many federal district courts had established a program involving one or more ADR processes:⁶ 54% of all federal district courts had a mediation program,⁷ 51% had a summary jury trial program,⁸ 23% had an arbitration program,⁹ and 15% had an early neutral evaluation program.¹⁰ Similarly, by that time, all states had one or more court-connected mediation programs, 66% had arbitration programs, and 30% had case evaluation programs.¹¹ Under the Alternative Dispute Reso-

5. See generally SARAH R. COLE ET AL., *MEDIATION: LAW, POLICY, PRACTICE*, apps. B & C (2000 Supp.).

6. ELIZABETH PLAPINGER & DONNA STEINSTRAS, *ADR & SETTLEMENT IN THE FEDERAL DISTRICT COURTS: A SOURCEBOOK FOR JUDGES & LAWYERS* 15-17 (1996).

7. In mediation, the mediator has no authority to make a decision or impose a resolution on the parties. Instead, the mediator facilitates the parties' discussion of their dispute and assists them in reaching a mutually agreed-upon resolution. See generally NANCY H. ROGERS & CRAIG A. McEWEN, *MEDIATION: LAW, POLICY, PRACTICE* § 3:02 (2d ed. 1994); JAY FOLBERG & ALLISON TAYLOR, *MEDIATION: A COMPREHENSIVE GUIDE TO RESOLVING CONFLICTS WITHOUT LITIGATION* 7-9 (1984); John W. Cooley, *Arbitration vs. Mediation: Explaining the Differences*, 69 JUDICATURE 263, 266-67 (1986); STEPHEN B. GOLDBERG ET AL., *DISPUTE RESOLUTION: NEGOTIATION, MEDIATION & OTHER PROCESSES* 123-31 (3d ed. 1999).

8. In a summary jury trial (SJT), an advisory six-person jury hears an abbreviated presentation of trial evidence and then renders a non-binding verdict that forms the basis for further settlement discussions. See generally M. DANIEL JACOUBOVITCH & CARL M. MOORE, *SUMMARY JURY TRIALS IN THE NORTHERN DISTRICT OF OHIO* 10 (1982); Thomas D. Lambros, *The Summary Jury Trial – An Alternative Method of Resolving Disputes*, 69 JUDICATURE 286, 288-90 (1986); Thomas D. Lambros, *The Summary Jury Trial and Other Alternative Methods of Dispute Resolution*, 103 FEDERAL RULES DECISIONS 461, 472 (1984).

9. In arbitration, one or more arbitrators make a decision following a private hearing in which the attorneys present arguments and evidence. In private or contractual arbitration, the decision typically is binding. In court-connected arbitration, the decision typically is non-binding, and the parties can request a trial de novo. See generally Cooley, *supra* note 7, at 264-65; JOHN W. COOLEY, *THE ARBITRATOR'S HANDBOOK* 2-5 (1998); GOLDBERG ET AL., *supra* note 7, at 233-37; Roger Hanson et al., *Court-Annexed Arbitration: Lessons from the Field*, 15 ST. CT. J. 4 (Fall 1991); THOMAS J. STIPANOWICH & PETER H. KASKELL (EDS.), *COMMERCIAL ARBITRATION AT ITS BEST: SUCCESSFUL STRATEGIES FOR BUSINESS USERS* (2001); John P. McIver & Susan Keillitz, *Court-Annexed Arbitration: An Introduction*, 14 JUST. SYS. J. 123 (1991).

10. In early neutral evaluation (ENE), after hearing a brief presentation of the case in the early stages of litigation, the evaluator assesses the strengths and weaknesses of each side's positions, helps to identify areas of agreement in order to narrow the scope of discovery and the issues for trial, and explores settlement possibilities. See generally Wayne D. Brazil et al., *Early Neutral Evaluation: An Experimental Effort to Expedite Dispute Resolution*, 69 JUDICATURE 279, 280-81 (1986); David I. Levine, *Early Neutral Evaluation: A Follow-up Report*, 70 JUDICATURE 236 (1987); Joshua D. Rosenberg & H. Jay Folberg, *Alternative Dispute Resolution: An Empirical Analysis*, 46 STAN. L. REV. 1487, 1490-91 (1994).

11. JUDITH FILNER ET AL., *CONFLICT RESOLUTION INSTITUTE FOR COURTS, 1995: COMPENDIUM*

lution Act of 1998, every federal district court was required to establish its own ADR program and to provide at least one ADR process for resolving civil cases.¹²

Some ADR programs have been adopted to increase the efficiency of dispute resolution relative to traditional litigation, some to enhance the effectiveness of dispute resolution, and some to achieve both goals. Proponents maintain that ADR processes increase the likelihood of earlier settlement (thereby reducing the cost to litigants and the time to resolve the case, as well as reducing court backlogs and demands on limited judicial resources) and provide a more satisfactory process for resolving disputes (thereby achieving outcomes that better suit the parties' interests, maintain the parties' relationship, reduce future litigation, and enhance compliance).¹³ Empirical research shows that litigants and attorneys who use ADR generally feel the process is fair and are satisfied with both the process and the outcome, but the evidence regarding time and cost savings is mixed.¹⁴

OF STATE COURT RESOURCE MATERIALS 8-10 (1995). See generally COLE ET AL., *supra* note 5, at apps. B & C.

12. 28 U.S.C. §651(b) (2001); 28 U.S.C. §652(a) (2001).

13. See, e.g., ROGERS & MCEWEN, *supra* note 7, at §§ 5:02, 5:03 (2d ed. 1994). JAMES S. KAKALIK ET AL., AN EVALUATION OF MEDIATION AND EARLY NEUTRAL EVALUATION UNDER THE CIVIL JUSTICE REFORM ACT xxx (1996); Jay Folberg et al., *Use of ADR in California Courts: Findings and Proposals*, 26 U.S.F.L. REV. 343, 348-51; Nancy Welsh & Barbara McAdoo, *The ABCs of ADR: Making ADR Work in Your Court System*, 37 JUDGES' J. 11 (Winter 1998); Leonard L. Riskin, *Mediation and Lawyers*, 43 OHIO ST. L. J. 29, 57 (1982); Carrie Menkel-Meadow, *For and Against Settlement: Uses and Abuses of the Mandatory Settlement Conference*, 33 UCLA L. REV. 485, 486-87 (1985).

14. See, e.g., Craig McEwen, *Note on Mediation Research*, in GOLDBERG ET AL., *supra* note 7 at 182-84; KAKALIK ET AL., *supra* note 13, at 34-39, 42-44; Joan B. Kelly, *A Decade of Divorce Mediation Research: Some Answers and Questions*, 34 FAM. & CONCILIATION CTS. REV. 373, 376-79 (1996); Roselle L. Wissler, *Mediation and Adjudication in Small Claims Court: The Effects of Process and Case Characteristics*, 29 LAW & SOC'Y REV. 323, 341 (1995) [hereinafter Wissler, *Small Claims Mediation*]; Roselle L. Wissler, *Court-Connected Mediation in General Civil Cases: What We Know from Empirical Research*, 17 OHIO ST. J. ON DISP. RESOL. __ (2002, FORTHCOMING), (at 39-63 of manuscript, on file with author) [hereinafter Wissler, *General Civil Mediation*]; Stevens H. Clarke & Elizabeth Ellen Gordon, *Public Sponsorship of Private Settling: Court-Ordered Civil Case Mediation*, 19 JUST. SYS. J. 311, 321-325 (1997); Rosenberg & Folberg, *supra* note 10, at 1487, 1497-1510; David I. Levine, *Early Neutral Evaluation: The Second Phase*, 1989 J. DISP. RESOL. 1; JACOBOWITZ & MOORE, *supra* note 8, at 10, 12; James Alfini, *Summary Jury Trials in State and Federal Courts: A Comparative Analysis of the Perceptions of Participating Lawyers*, 4 OHIO ST. J. ON DISP. RESOL. 213, 222-34 (1989); Keith O. Boyum, *Afterword: Does Court-Annexed Arbitration "Work"?*, 14 JUST. SYS. J. 244 (1991).

Despite the increasing number of court-connected ADR programs and participants' generally high levels of satisfaction with ADR, programs that depend on voluntary participation attract relatively few cases.¹⁵ For instance, 350 divorce cases were mediated in Maine during one year when child custody mediation was voluntary, compared to 4,918 cases mediated during one year after mediation became mandatory.¹⁶ Cases are less likely to enter ADR at the parties' request than as the result of a judicial referral, a pre-dispute contractual agreement between the parties (e.g., private binding arbitration), or a statute or court rule mandating ADR use in cases involving a certain subject matter or dollar amount in controversy (e.g., mandatory mediation for child custody cases or non-binding arbitration for cases with damages below a certain dollar amount).¹⁷

III. LOW VOLUNTARY ADR USE: PROPOSED EXPLANATIONS AND SOLUTIONS, AND RELATED EMPIRICAL RESEARCH

Various explanations have been offered for the low rate of voluntary utilization of ADR programs, and corresponding remedies have been proposed. These generally center on the three main sets of actors in the litigation process: the litigants, the attorneys, and the judges. Using these three groups to organize the discussion, this section reviews the asserted problems and proposed solutions to increase voluntary ADR use, as well as the empirical research findings that bear on them.¹⁸

15. E.g., GENERAL ACCOUNTING OFFICE, GAO/HRD-91-38, MEDICAL MALPRACTICE: FEW CLAIMS RESOLVED THROUGH MICHIGAN'S VOLUNTARY ARBITRATION PROGRAM 6-7 (December 1990) [hereinafter GAO report]; Jessica Pearson & Nancy Thoennes, *Divorce Mediation Research Results*, in *DIVORCE MEDIATION: THEORY AND PRACTICE* 429, 431 (Jay Folberg & Ann Milne eds., 1988); Susan Keilitz, *A Court Manager's Guide to the Alternative Dispute Resolution Database*, 14 ST. CT. J. 24, 28 (Fall 1990); Mike Thompson, *Crisis in Rural America: The Genesis of Farmer-Lender Mediation*, NAT'L INST. DISP. RESOL. F., Fall 1990, at 3; KAKALIK ET AL., *supra* note 13, at 52-53; ROGERS & McEWEN, *supra* note 7, at § 6:04; David E. Matz, *Why Disputes Don't Go to Mediation*, 17 MEDIATION Q. 3-5 (Fall 1987); Rosenberg & Folberg, *supra* note 10, at 1538; Jessica Pearson, *An Evaluation of Alternatives to Court Adjudication*, 7 JUST. SYS. J. 420, 426-27 (1982).

16. Craig A. McEwen et al., *Lawyers, Mediation, and the Management of Divorce Practice*, 28 LAW & SOC'Y REV. 149, 154 (1994).

17. Richard C. Reuben, *Public Justice: Toward a State Action Theory of Alternative Dispute Resolution*, 85 CAL. L. REV. 577, 594-95 (1997). See, e.g., 28 U.S.C. § 652(a); MO. SUP. CT. R. 17.03(a) (2001); MINN. GEN. R. PRAC. 114 .04(d) (2001); WISC. R. CIV. PROC. 802.12(2) (2001). See generally COLE ET AL., *supra* note 5, at Apps. B & C; ROGERS & McEWEN, *supra* note 7, at § 7.02.

18. The empirical studies discussed differ on a number of dimensions, any of which could produce the large differences that were sometimes observed among the studies. These dimensions include: from whom the information was obtained (e.g., the attorneys' substantive practice area,

A. *Litigants*

A major reason often given for the low rate of voluntary ADR use is that most potential litigants are unfamiliar with litigation and with alternative forms of dispute resolution and, therefore, they are unlikely to request and reluctant to use ADR.¹⁹ Other factors, including the interests and goals of the litigants, are thought to limit ADR use in some cases. Litigants are less likely to be interested in using an alternative to litigation if what is important to them is to uphold a principle, establish a legal precedent, prevent future suits, vindicate their position, or punish the other party.²⁰ Litigants' use of alternative processes also is likely to be limited by factors that are impediments to

the percentage of the sample who participated in the study), what was asked (e.g., the content and wording of the questions), where the study was conducted (e.g., the state or county and the corresponding statutes and local legal culture), when the information was obtained (e.g., the year in which the study was conducted, the timing in relation to changes in statutes or court rules), why the information was being gathered (e.g., to obtain general attitudes or to examine the impact of a recent court rule), and how the information was collected (e.g., by mailed questionnaire, phone survey, or in-person interview). General information on most of these dimensions is provided in the accompanying note when each study is first mentioned. Question wording also is noted if it varied across studies (e.g., if one study asked about mediation use and another asked about overall ADR use). It is beyond the scope of this article to present all of the above details and to provide a detailed analysis of what might explain the different findings across the studies.

19. Pearson & Thoennes, *supra* note 15, at 431; Susan Myers et al., *Divorce Mediation in the States: Institutionalization, Use and Assessment*, 12 ST. CT. J., 17, 23 (Fall 1988); Andreas Nelle, *Making Mediation Mandatory: A Proposed Framework*, 7 OHIO ST. J. ON DISP. RESOL. 287, 295-96 (1992); Maria R. Volpe & Charles Bahn, *Resistance to Mediation: Understanding and Handling It*, 3 NEGOTIATION J. 297, 298 (1987); Rosenberg & Folberg, *supra* note 10, at 1541; Karen A. Burch, Comment, *ADR in the Law Firm: A Practical Viewpoint*, 1987 MO. J. DISP. RESOL., 149, 161; Matz, *supra* note 15, at 3-4; Craig A. McEwen & Thomas W. Milburn, *Explaining a Paradox of Mediation*, 9 NEGOTIATION J. 23, 25-26 (1993); Pearson, *supra* note 15, at 428; John H. Wilkinson, *ADR: Valuable Tool Is Often Misunderstood*, NAT'L L. J., Nov. 2, 1987, at 19, 23; Folberg et al., *supra* note 13, at 358.

20. Roselle L. Wissler et al., *Resolving Libel Disputes Out of Court: The Libel Dispute Resolution Program*, in REFORMING LIBEL LAW 286, 306-08 (John Soloski & Randall P. Bezanson eds., 1992); Sally Engle Merry & Susan S. Silbey, *What do Plaintiffs Want? Reexamining the Concept of Dispute*, 9 JUST. SYS. J. 151, 153-154 (1984); Neil Vidmar, *Justice Motives and other Psychological Factors in the Development and Resolution of Disputes*, in THE JUSTICE MOTIVE IN SOCIAL BEHAVIOR 404-06 (Melvin J. Lerner & Sally C. Lerner eds., 1981); Frank E.A. Sander & Stephen B. Goldberg, *Fitting the Forum to the Fuss: A User-Friendly Guide to Selecting an ADR Procedure*, 10 NEGOTIATION J. 49, 51-59; McEwen & Milburn, *supra* note 19, at 25-28; Marguerite Millhauser, *The Unspoken Resistance to Alternative Dispute Resolution*, 3 NEGOTIATION J. 29, 30 (1987); Burch, *supra* note 19, at 159-61. *But see* Wissler, *Small Claims Mediation*, *supra* note 14, at 332.

settlement, such as a lack of interest in a speedy resolution, overestimating the value of the case, and underestimating the expense of litigation.²¹

Two recent studies confirm that ADR use often is not client-initiated.²² In each study, 68% of the attorneys reported their clients never or rarely requested that they investigate the use of an ADR process.²³ Consistent with the asserted relationship between litigants' ADR use and their familiarity with litigation and alternative processes, attorneys with commercial clients were almost twice as likely as attorneys with individual clients to report their clients requested that they investigate the use of an ADR process.²⁴

Lack of litigant initiation of ADR use, however, does not necessarily mean that litigants are reluctant to use ADR. A majority of attorneys said that their clients willingly used mediation (77%) or arbitration (64%).²⁵ Fewer than 12% of attorneys said the reason they had not used ADR was because their clients had refused.²⁶ In contrast, however, Prigoff reported that even

21. Folberg et al., *supra* note 13, at 358-59; Nelle, *supra* note 19, at 294-95; Wilkinson, *supra* note 19, at 23; Craig A. McEwen, *Managing Corporate Disputing: Overcoming Barriers to the Effective Use of Mediation for Reducing the Cost and Time of Litigation*, 14 OHIO ST. J. ON DISP. RESOL. 1, 11 (1998).

22. Bobbi McAdoo, *A Report to the Minnesota Supreme Court: The Impact of Rule 114 on Civil Litigation Practice in Minnesota* 26, app. C at 11 (forthcoming 25 HAMLINE L. REV. ____ 2002; December 1997 report on file with author). The findings are based on the 1996 survey responses of 748 Minnesota attorneys who had a civil case on the state court docket during the prior year (75% response rate). *Id.* at 8-11. Barbara McAdoo & Art Hinshaw, *The Challenge of Institutionalizing Alternative Dispute Resolution: Attorney Perspectives on the Effect of Rule 17 on Civil Litigation in Missouri*, 23-24 (forthcoming, 67 MO. L. REV. Summer 2002; July 16, 2001 manuscript on file with author). The findings are based on the 1999 survey responses of 232 Missouri attorneys who had a civil case on the state court docket during the prior year (58% response rate). *Id.* at 5-6.

23. McAdoo, *supra* note 22, app. C at 11; McAdoo & Hinshaw, *supra* note 22, at 23-24. Few attorneys in both Minnesota and Missouri reported that their clients usually or always asked them to look into ADR (7% and 2%, respectively), while 24% and 30%, respectively, reported that their clients sometimes asked them to investigate ADR. *Id.*

24. McAdoo, *supra* note 22, at 26-27. Attorneys with commercial clients reported that 40% of their clients, compared to 21% for attorneys with individual clients, at least sometimes asked them to investigate the use of ADR for their cases. *Id.* One cannot tell, however, whether the greater frequency of requests for ADR by commercial clients reflects their greater awareness of the costs involved in litigation and the benefits of ADR, the existence of contract provisions requiring ADR, or other differences and priorities that might exist between repeat-players and one-shot litigants. See also Marc Galanter, *Why the "Haves" Come Out Ahead: Speculations on the Limits of Legal Change*, 9 LAW & SOC'Y REV. 95, 97-104 (1975).

25. Richard C. Reuben, *The Lawyer Turns Peacemaker*, 82 A.B.A. J. 54, 57 (August 1996). The findings are based on the responses of 402 American Bar Association members to a telephone survey conducted in April 1996 (no response rate was provided). *Id.* at 60.

26. McAdoo, *supra* note 22, app. C at 7(6%); McAdoo & Hinshaw, *supra* note 22, app. E at 5 (11%).

when he explained ADR options, a majority of his clients chose conventional litigation.²⁷

The fact that litigants are unlikely to propose the use of alternative processes but often are willing to use them suggests that, in order to increase voluntary ADR use, the discussion of ADR needs to be initiated by the court or by the litigants' attorney. Judges feel they, personally, should not be the source of ADR information for litigants because doing so might interfere with the attorney-client relationship and because they typically see the litigants only late in the litigation process.²⁸ Given the central role of attorneys in the litigation process, attorneys may be the most appropriate persons to provide litigants with information about ADR processes and to help them understand and assess dispute resolution options in the context of their case.²⁹ Importantly, empirical research has shown that a key factor in litigants' willingness to use ADR is the recommendation and encouragement of their attorneys.³⁰ For example, a majority of parties in domestic relations cases (68% of the men and 72% of the women) who chose to use mediation said their attorneys had encouraged them to try it, whereas less than one-third (32% of the men and 18% of the women) of those who rejected mediation had been encouraged by their attorneys to use it.³¹

To educate litigants (and attorneys) about alternative methods of resolving disputes, some courts, at the time of filing, inform attorneys and unrepresented parties about available ADR programs.³² Some courts go further and explicitly encourage or require attorneys to discuss ADR options with their

27. Michael L. Prigoff, *Professional Responsibility: Should There Be a Duty to Advise on ADR Options? No: An Unreasonable Burden*, 76 A.B.A. J. at 51 (Nov. 1990).

28. Folberg et al., *supra* note 13, at 371, 415. The findings are based on the responses of 125 California state trial judges to a 1991 survey (no response rate was provided) and on interviews conducted with 38 judges and 11 court administrators in nine California counties. *Id.* at 346 n.1, 365 n.104, 355 n.54.

29. Folberg et al., *supra* note 13, at 382-83; Welsh & McAdoo, *supra* note 13, at 13.

30. GAO REPORT, *supra* note 15, at 8; Jessica Pearson et al., *The Decision to Mediate*, 6 J. DIVORCE 17, 29 (1982); Wissler et al., *supra* note 20, at 306.

31. Pearson et al. 1982, *supra* note 30, at 29.

32. See, e.g., ADR Rules for Civil Cases, Rule 1590.1, and Mediation Education Rule 1639, CAL. RULES OF COURT (2001); MINN. GEN. R. PRAC. 114.03(a) (2001); MO. SUP. CT. R. 17.02(a) (2001); Rosenberg & Folberg, *supra* note 10, at 1542. See also Center for Dispute Settlement and The Institute of Judicial Administration, *National Standards for Court-Connected Mediation Programs* (1992), reprinted in GOLDBERG ET AL., *supra* note 7, at 635.

clients.³³ Several commentators argue that, under existing codes of conduct and professional responsibility, attorneys have an implicit, if not explicit, obligation to discuss ADR processes with their clients, and others maintain that such a duty should be added where it does not now exist.³⁴

The effect on ADR use of requiring attorneys to inform their clients about ADR is unclear. After Missouri adopted a rule requiring attorneys to advise clients about the availability of ADR programs,³⁵ 62% of the attorneys said they did so within the first six months after the suit was filed.³⁶ Although 93% of Georgia attorneys felt they had an ethical obligation to counsel clients about ADR,³⁷ only 27% said they always advised clients about ADR and 37% said they did so frequently.³⁸ The percentage of attorneys who never or rarely discussed ADR with their clients, even when they were re-

33. See, e.g., MINN. GEN. R. PRAC. 114.03(b) (2001); Rules of the Supreme Judicial Court, Rule 1:18, Uniform Rules on Dispute Resolution, Rule 5, Massachusetts Rules of Court (2001); MO. SUP. CT. R. 17.02(b) (2001); ARK. CODE ANN. §16-7-204 (1999). All federal district courts require litigants in most categories of civil cases "to consider" the use of an ADR process. 28 U.S.C. § 652(a) (2001). See generally COLE ET AL., *supra* note 5, at § 4.03; Marshall J. Breger, *Should an Attorney Be Required to Advise a Client of ADR Options?*, 13 GEO. J. LEGAL ETHICS 427, Apps. I & II (2000).

34. Frank E.A. Sander, *Professional Responsibility: Should There Be a Duty to Advise on ADR Options? Yes: An Aid to Clients*, 76 A.B.A. J. 50 (Nov. 1990); Robert B. Moberly, *Ethical Standards for Court-Appointed Mediators and Florida's Mandatory Mediation Experiment*, 21 FLA. ST. U. L. REV. 701, 726 (1994); 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. TX. L. REV. 183, 187 (1999); Suzanne J. Schmitz, *Giving Meaning to the Second Generation of ADR Education: Attorneys' Duty to Learn about ADR and What they Must Learn*, 1999 J. DISP. RESOL. 29, 33-35; *A Lawyer's Creed, A Lawyer's Aspirational Ideals*, www.sconet.state.oh.us/cpl; COLO. RULES PROF'L CONDUCT, Rule 2.1 (2000); HAW. RULES PROF'L CONDUCT, Rule 2.1 (1993); Tex. Lawyer's Creed § II (11) (2001); Breger, *supra* note 33, at app. I. See also ethics opinions in several states cited in Arthur Garwin, *Show Me the Offer: When Opposing Counsel Suggests Mediation, Your Client Needs to Know*, 83 A.B.A. J. 84 (June 1997). But see Prigoff, *supra* note 27, at 51.

35. MO. SUP. CT. R. 17.02(b) (2001).

36. McAdoo & Hinshaw, *supra* note 22, at 22-23. Twenty-two percent said they discussed ADR more than six months after filing. *Id.*

37. At the time of the survey (see *infra* note 38), Ethical Consideration 7-5 read: "A lawyer as adviser has a duty to advise the client as to various forms of dispute resolution. When a matter is likely to involve litigation, a lawyer has a duty to inform the client of forms of dispute resolution which might constitute reasonable alternatives to litigation." RULES & REGULATIONS FOR THE ORGANIZATION AND GOVERNMENT OF THE STATE BAR OF GA, Rule 3-107 (1999).

38. Bonnie Powell, *The Georgia ADR Study 6* (Nov. 2000) (paper presented at the Conference on the Reflective/Best Practices in Evaluating Court-Connected ADR, on file with author). Thirty percent said they occasionally advised clients about ADR. *Id.* The findings are based on the responses of 525 Georgia State Bar Association members to a 1999 survey (35% response rate). *Id.* at 1, 3.

quired (16%)³⁹ or encouraged (6%)⁴⁰ to do so, appeared to be the same or somewhat higher than when no such obligation or suggestion existed (3%).⁴¹ Nonetheless, 51% of Missouri attorneys reported they used ADR more in their non-family civil cases after the mandatory advising rule went into effect.⁴² Some of this reported increase in ADR use, however, could be due to other changes authorized by Rule 17, namely the implementation of new ADR programs and the judicial referral of cases to non-binding ADR processes.⁴³

B. Attorneys

Several explanations have been offered for why attorneys do not regularly discuss ADR with their clients. Attorneys might not be sufficiently familiar with the various processes to feel able to advise their clients about potential alternative options for resolving their disputes.⁴⁴ Because their

39. McAdoo & Hinshaw, *supra* note 22, at 22-23.

40. Powell, *supra* note 38, at 6.

41. ROSELLE L. WISSLER, A SURVEY OF ARIZONA ATTORNEYS REGARDING THEIR USE OF AND ATTITUDES TOWARD ADR IN CIVIL CASES: PRELIMINARY DATA 15 (July 2001) (a report to the Arizona Supreme Court ADR Advisory Committee, with additional unpublished analyses, on file with author). The findings are based on the responses of 423 members of the Trial Practice Section of the Arizona State Bar Association to a 2001 survey. *Id.* Attorneys discussed the possible use of ADR with clients, on average, in 78% of their cases. *Id.*

42. McAdoo & Hinshaw, *supra* note 22, at 17. Four percent reported less ADR use, and 40% reported no change. *Id.*

43. MO. SUP. CT. R. 17.01(a), 17.03(a), (b). It could also be due to any other changes that might have occurred during that time period. Unfortunately, the study did not obtain baseline data before the rule went into effect and did not examine or control for these potential confounds. In addition, because the attorneys were surveyed about both their pre-and post-rule use *after* the rule went into effect, the survey findings are more subject to potential problems of recall and reactivity (i.e., attorneys altering their responses in reaction to the perceived purpose of the survey) than if the attorneys had been surveyed about their pre-rule ADR use *before* its implementation. See generally CLAIRE SELTZ ET AL., RESEARCH METHODS IN SOCIAL RELATIONS 125-27 (3d ed. 1976); FLOYD J. FOWLER, JR., SURVEY RESEARCH METHODS 92-93 (1988).

44. Edward A. Dauer, *Impediments to ADR*, 18 COLO. LAWYER 839 (1989). Three focus groups concerning impediments to the greater use of ADR were conducted with lawyers in private firms. *Id.* at 839-41. Burch, *supra* note 19, at 161; LEONARD RISKIN & JAMES WESTBROOK, DISPUTE RESOLUTION AND LAWYERS 53, 54 (1987); Wissler et al., *supra* note 20, at 306; Volpe & Bahn, *supra* note 19, at 302; Riskin, *supra* note 13, at 41, 49; KAKALIK ET AL., *supra* note 13, at 52; Folberg et al., *supra* note 13, at 370, 383; Rosenberg & Folberg, *supra* note 10, at 1541; Wilkinson, *supra* note 19, at 23; Deanne C. Siemer, *Perspectives of Advocates and Clients on Court-Sponsored ADR*, in EMERGING ADR ISSUES IN STATE AND FEDERAL COURTS, reprinted in

“philosophical map” emphasizes an adversarial rather than a problem-solving perspective, attorneys might question the appropriateness of ADR and might feel that proposing ADR, rather than all-out litigation, will be viewed by clients as a less-than-total commitment to their case and by opposing counsel as a “sign of weakness”.⁴⁵ Other factors can also keep attorneys from recommending ADR to their clients, such as overestimating the value of the case, underestimating the possibility of early settlement, and being concerned about making less money.⁴⁶

How familiar are attorneys with alternative dispute resolution processes? In one study, almost all attorneys (90% to 96%) said they could explain well or very well to a client the following processes: binding arbitration, non-binding arbitration, mediation, and judge pro tem settlement conference.⁴⁷ Markedly fewer attorneys (50% to 63%) felt they could explain well or very well the ADR processes of shorttrial,⁴⁸ summary jury trial, or early neutral evaluation.⁴⁹ In another study, 57% of attorneys rated their level of knowl-

GOLDBERG ET AL., *supra* note 7, at 317-20; ROGERS & McEWEN, *supra* note 7, at §4:07; Reuben, *supra* note 25, at 60; Nelle, *supra* note 19, at 294.

45. Riskin, *supra* note 13, at 44, 45; Millhauser, *supra* note 20, at 31-32; Siemer, *supra* note 44, at 317-20; Volpe & Bahn, *supra* note 19, at 298; Wilkinson, *supra* note 19, at 23; Dauer, *supra* note 44, at 840-41; Wissler et al., *supra* note 20, at 306, 309; Nelle, *supra* note 19, at 296; KAKALIK ET AL., *supra* note 13, at 52; Burch, *supra* note 29, at 161; Carrie Menkel-Meadow, *The Transformation of Disputes by Lawyers: What the Dispute Paradigm Does and Does Not Tell Us*, MO. J. DISP. RESOL. 31-34 (1986).

46. Folberg et al., *supra* note 13, at 358-59; Siemer, *supra* note 44, at 317-20; Nelle, *supra* note 19, at 294-95; Wilkinson, *supra* note 19, at 23; Riskin, *supra* note 13, at 43, 48-49; Nancy H. Rogers & Craig A. McEwen, *Employing the Law to Increase the Use of Mediation and to Encourage Direct and Early Negotiations*, 13 OHIO ST. J. ON DISP. RESOL. 831, 846 (1998). A study of the disputing practices of six large, national corporations was conducted from 1993 to 1995. *Id.* at 840. The findings are based on interviews with business principals and corporate counsel and a review of case files in business-to-business disputes. *Id.*

47. Wissler, *supra* note 41, at 20-22. Only 4% to 10% of the attorneys said they could not explain or could somewhat explain these processes. *Id.*

48. In a shorttrial, a four-person jury hears an abbreviated presentation of trial evidence and then renders a binding verdict. Christopher M. Skelly, *Want a “Shorttrial”? Here’s How*, 19 MARICOPA LAW. 16 (March 1999).

49. Wissler, *supra* note 41, at 20-22. A sizeable proportion of the attorneys, 36% to 51%, said they could not explain or could somewhat explain these processes. *Id.* See also Archie Zariski, *Lawyers and Dispute Resolution: What Do They Think And Know (And Think They Know)?*, 4 MURDOCH UNIV. ELECTRONIC J. OF LAW, app. A at 2 (June 1997). Almost all attorneys felt they could explain mediation (93%) and arbitration (90%) if a client asked, and a majority said they could explain conciliation (63%), but just over one-fourth felt they could explain either early neutral evaluation (28%) or mini-trial (26%). *Id.* The findings are based on the 1996 survey responses of 418 lawyers who were members of either the Law Society or the Australian Corporate Lawyers’ Association in the state of Western Australia (16% response rate). *Id.* at paragraph 24, 44.

edge of mediation as relatively high, 26% as moderate, and 17% as relatively low.⁵⁰

In several surveys, the percentage of attorneys who reported having taken a course in mediation, ADR, or negotiation skills ranged from 4% to 55%.⁵¹ Fifty-three percent of attorneys felt their "training and experience" as lawyers had prepared them for arbitration and 47% felt it prepared them for mediation.⁵² In several surveys, the percentage of attorneys who reported they had served as a third-party neutral in one or more ADR processes ranged from 4% to 47%.⁵³

Another way to assess attorneys' familiarity with alternative processes is to examine the extent of their ADR use in practice. In several surveys, the percentage of attorneys who had represented a client in an ADR process

50. Thomas D. Cavenagh, *A Quantitative Analysis of the Use and Avoidance of Mediation by the Cook County, Illinois, Legal Community*, 14 *MEDIATION Q.* 353, 356 (Summer 1997). The findings are based on the 1996 survey responses of 54 attorneys in Cook County, Illinois (Chicago) who were registered to practice law in the state and who worked in firms of 5 or more attorneys (18% response rate). *Id.* at 354-55.

51. Morris L. Medley & James A. Schellenberg, *Attitudes of Attorneys Toward Mediation*, 12 *MEDIATION Q.* 185, 189 (Winter 1994) (4% had mediation training in law school). The findings are based on the responses of 226 Indiana State Bar Association Members to a 1993 survey (45% response rate). *Id.* at 187-91. Cavenagh, *supra* note 50, at 356 (46% had a CLE or law school course on mediation). McAdoo & Hinshaw, *supra* note 22, at 12, app. E at 3 (48% had negotiation skills or ADR training, or both). Zariski, *supra* note 49, app. A at 10 (18% had training in negotiation or ADR before being admitted to practice law, and 37% had training after admission). John Lande, *Getting the Faith: Why Business Lawyers and Executives Believe in Mediation*, 5 *HARV. NEG. L. REV.* 137, 170 (2000) (law school was the source of ADR information for 5% to 10% and CLEs were the source for 43% to 47%). The findings are based on the responses of 70 outside counsel and 58 inside counsel in four states to a 1994 telephone survey (80% response rate). *Id.* at 163.

52. Reuben, *supra* note 25, at 60. Twenty-four percent said they were not prepared for arbitration and 29% felt unprepared for mediation. *Id.*

53. Powell, *supra* note 38, at 7 (4% had been an ADR neutral); Medley & Schellenberg, *supra* note 51, at 189 (4% were certified family mediators and 8% were certified civil mediators); McAdoo & Hinshaw, *supra* note 22, app. E at 4 (15% had been an ADR neutral); McAdoo, *supra* note 22, at app. C at 5 (30% had been an ADR neutral); Catherine M. Lee et al., *Attorneys' Opinions Regarding Child Custody Mediation and Assessment Services: The Influence of Gender, Years of Experience, and Mediation Practice*, 36 *FAM. CONCILIATION CTS. REV.* 216, 221 (Apr. 1998) (17% had been a mediator). The findings are based on the responses of 161 attorneys in the Ottawa, Canada region who were actively involved in the practice of family law and who dealt routinely with child custody matters (54% response rate). *Id.* at 219-20. Lande, *supra* note 51, at 169 (26% of inside counsel and 47% of outside counsel had been an ADR neutral).

ranged from 22% to 95%.⁵⁴ This large variation in ADR use across the studies could in part be due to differences in the extent of mandated ADR use, because many cases enter alternative processes as a result of statute, court rule, or judicial referral rather than party request.⁵⁵ Attorneys' experience with ADR was primarily with mediation or arbitration. Half or more of the attorneys who had used ADR had used mediation in at least one case.⁵⁶ The use of arbitration varied greatly across the studies – from a minority to a majority of attorneys who had used ADR had used arbitration.⁵⁷ A relatively small proportion of the attorneys who had used ADR had used early neutral evaluation (ENE), summary jury trial (SJT), mini-trial, or shorttrial.⁵⁸

54. Thomas G. Field, Jr. & Michael Rose, *Prospects for ADR in Patent Disputes: An Empirical Assessment of Attorneys' Attitudes*, 32 IDEA: THE J. OF LAW & TECHNOLOGY 309, 322 (1992) (22% had used mediation and 26% had used arbitration to settle patent, know-how, or licensing disputes). The findings discussed in the present article are based on the responses of 74 members of the Association of Corporate Patent Counsel to the survey conducted in 1991 (24% response rate). *Id.* at 311. Reuben, *supra* note 25, at 55 ("fewer than half" had used ADR in the preceding five years); Medley & Schellenberg, *supra* note 51, at 188-189 (50% had used mediation); Cavenagh, *supra* note 50, at 359 (64% had used mediation); Powell, *supra* note 38, at 7 (72% had used ADR); McAdoo & Hinshaw, *supra* note 22, app. E at 4 (77% had used ADR in the two years following the mandatory advising rule); McAdoo, *supra* note 22, app. C at 7 (80% had used ADR in the two years following the mandatory consideration rule); Elizabeth J. Koopman et al., *Professional Perspectives on Court-Connected Child Custody Mediation*, 29 FAM. & CONCILIATION CRTS. REV. 304, 311 (1991) (89% had used mediation). The findings reported in the present article are based on the survey responses of 204 attorneys drawn from five courts in three states (the response rate as well as the date and location of the survey were not provided). *Id.* at 310. Lande, *supra* note 51, at 169 (84% of inside counsel and 90% of outside counsel had used ADR). Wissler, *supra* note 41, app. C at 1 (95% had used voluntary ADR in the preceding two years). This latter figure might be higher than those of the other studies because the question included settlement conferences as a type of ADR. *Id.*

55. See *supra* notes 17-18 and accompanying text.

56. Medley & Schellenberg, *supra* note 51, at 188-89 (50%); Powell, *supra* note 38, at 6 (55%); Cavenagh, *supra* note 50, at 359 (64%); McAdoo, *supra* note 22, app. C at 9 (82%, prior to the mandatory consideration rule); Koopman et al., *supra* note 54, at 311 (89%); McAdoo & Hinshaw, *supra* note 22, at 37 (92%, prior to the mandatory advising rule); Wissler, *supra* note 41, at 17 (95%).

57. McAdoo & Hinshaw, *supra* note 22, at 62, app. E at 7 (prior to the mandatory advising rule, 19% of attorneys had used non-binding arbitration and 42% had used binding arbitration); Powell, *supra* note 38, at 6 (a "majority" had never or rarely used arbitration); Wissler, *supra* note 41, at 17 (58% had used private arbitration); McAdoo, *supra* note 22, app. C at 9 (prior to the mandatory consideration rule, 63% had used non-binding arbitration and 71% had used binding arbitration).

58. McAdoo, *supra* note 22, app. C at 9 (prior to the mandatory consideration rule, 16% had used ENE and 28% had used SJT); McAdoo & Hinshaw, *supra* note 22, app. E at 7 (prior to the mandatory advising rule, 18% had used ENE, 7% had used SJT, and 7% had used mini-trial); Wissler, *supra* note 41, at 18 (with regard to voluntary ADR use, 16% had used shorttrial, 12% had used ENE, and 11% had used SJT); Powell, *supra* note 38, at 6 (a "majority" had never or rarely used ENE or SJT).

A minority of attorneys made frequent use of any of the ADR processes and most seldom used them, even when examining only those attorneys who had used ADR. In several studies, from 0% to 17% of attorneys who had used ADR rated the frequency of their ADR use as high or said they used ADR often, usually, or always.⁵⁹ A much larger percentage of attorneys said they rarely used ADR processes, even mediation and arbitration.⁶⁰ Most attorneys who used ADR reported using it in one-fourth or fewer of their cases.⁶¹ An exception to this pattern of infrequent ADR use seems to be child custody mediation: twice as many domestic relations attorneys had used mediation in more than five cases than in five or fewer cases.⁶²

In several studies, attorneys tended to have favorable general attitudes⁶³ toward ADR processes, although support for ADR was not unanimous. Most attorneys said ADR can be a helpful tool,⁶⁴ a majority felt the benefits of using ADR outweigh the costs,⁶⁵ and few said they frequently were skeptical of

59. Cavenagh, *supra* note 50, at 356-60 (2% rated their use of mediation as high); McAdoo, *supra* note 22, app. C at 9 (prior to the mandatory consideration rule, from 10% to 17% said they used mediation or arbitration often, and fewer than 3% said they used ENE or SJT often); McAdoo & Hinshaw, *supra* note 22, app. E at 7 (prior to the mandatory advising rule, from 0% to 10% said they usually or always used the different ADR processes).

60. Cavenagh, *supra* note 50, at 356-60 (63% rated their mediation use as low); McAdoo & Hinshaw, *supra* note 22, App. E at 7 (prior to the mandatory advising rule, 37% said they rarely used mediation, and from 64% to 83% said they rarely used the other processes); McAdoo, *supra* note 22, app. C at 9 (prior to the mandatory consideration rule, from 36% to 50% said they rarely used mediation or arbitration, and 79% to 86% said they rarely used ENE or SJT).

61. Cavenagh, *supra* note 50, at 356-60 (97% of attorneys who had used mediation used it in one-fourth or fewer of their cases); McAdoo & Hinshaw, *supra* note 22, app. E at 6 (in the two years following the mandatory advising rule, 82% of attorneys who had used ADR used it in one-fourth or fewer of their cases). *But see* Wissler, *supra* note 41, App. C at 1 (38% of attorneys who had used ADR in the preceding two years had used it in one-fourth or fewer of their cases). The rate of ADR use in the latter study might be higher than in the other studies because it included settlement conferences as a type of ADR. *Id.*

62. Koopman et al., *supra* note 54, at 311.

63. To be distinguished from attitudes toward a specific ADR program. *See supra* note 14 for empirical studies that examined attorneys' attitudes regarding the fairness of ADR processes in which they had participated.

64. McAdoo, *supra* note 22, app. C at 11 (91%); McAdoo & Hinshaw, *supra* note 22, at 19 (90%); Powell, *supra* note 38, at 6 (a "majority"); Lande, *supra* note 51, at 172, 174 (73% of inside counsel and 81% of outside counsel felt that it was appropriate to use mediation in half or more lawsuits involving a business); Zariski, *supra* note 49, app. A at 7 (virtually all attorneys felt that at least some disputes should go through processes other than trial).

65. Wissler, *supra* note 41, at 30 (72%).

ADR's benefits.⁶⁶ Across several studies, there was considerable variation (from 29% to 69%) in the likelihood that attorneys encouraged,⁶⁷ supported,⁶⁸ or recommended the use of ADR⁶⁹ and in their preference for ADR over litigation.⁷⁰ Attorneys' support for mandatory ADR programs in several studies ranged from 25% to 51%.⁷¹

Some commentators maintain that increasing attorneys' recommendation and use of ADR depends on increasing their knowledge of ADR processes.⁷² Proposals aimed at educating attorneys about dispute resolution options include having courts distribute ADR information to attorneys⁷³ and making ADR courses part of law school and continuing legal education offerings.⁷⁴ Other commentators suggest actual participation in ADR processes, either in

66. Powell, *supra* note 38, at 6 (12%).

67. Medley & Schellenberg, *supra* note 51, at 190-91 (29% said most attorneys would encourage mediation in civil cases, and 34% said most attorneys would encourage mediation in divorce cases).

68. Powell, *supra* note 38, at 7 (52% said most attorneys that they know support ADR).

69. *Id.* (69% said that, as a general rule, they recommended private mediation).

70. Reuben, *supra* note 25, at 56 (51% said they preferred mediation over litigation for resolving disputes, and 31% preferred arbitration over litigation); Catherine M. Lee et al., *Lawyers' Opinions Regarding Child Custody Mediation and Assessment Services*, 29 PROF. PSYCH. RES. & PRAC. 115, 117 (1998) (on average, attorneys felt mediation was preferable to litigation in child custody cases). These findings are based on the same study as reported in Lee et al., *supra* note 53.

71. Wissler, *supra* note 41, at 29 (25% disagreed with the proposition that ADR should be used only when both sides want to use it); Medley & Schellenberg, *supra* note 51, at 190-91 (32% disagreed with the proposition that mediation should be used only when both sides want to use it); Lee et al., *supra* note 70, at 117 (on average, attorneys did not support mandatory mediation in child custody cases); Reuben, *supra* note 25, at 57 (51% said that mandatory ADR programs should be encouraged).

72. Riskin, *supra* note 13, at 41; Folberg et al., *supra* note 13, at 383; Welsh & McAdoo, *supra* note 13, at 11, 13. In jurisdictions where attorneys are required to discuss ADR options with their clients, attorneys are, at least implicitly, required to be informed about ADR. Schmitz, *supra* note 34, at 31, 34; COLE ET AL., *supra* note 5, at § 4.03. In addition, the ABA has identified being able to counsel a client about litigation and ADR options and to participate effectively in a range of dispute resolution processes as one set of the ten "fundamental lawyering skills" that every attorney should have. A.B.A., SECTION OF LEGAL EDUCATION & ADMISSIONS TO THE BAR, STATEMENT OF FUNDAMENTAL LAWYERING SKILLS & PROFESSIONAL VALUES 2, § 8 (1992).

73. See *supra* notes 32-33 and accompanying text.

74. E.g., Folberg, et al., *supra* note 13, at 370-71, 397-98; Riskin, *supra* note 13, at 51; Rosenberg and Folberg, *supra* note 10, at 1542; Schmitz, *supra* note 34, at 31. Kovach advocates law school courses that focus on the role of lawyer advocate in ADR in addition to courses providing an overview of ADR processes or mediation training. Kimberlee K. Kovach, *Good Faith in Mediation: Requested, Recommended, or Required? A New Ethic*, 38 S. TX. L. REV. 575, 580 (1997). See A.B.A., *supra* note 72, at § 8.4, for the recommended information every lawyer should know about ADR in order to effectively advise and represent clients.

the role of neutral⁷⁵ or counsel,⁷⁶ is a more effective way for attorneys to learn about ADR processes and will have a greater impact on their voluntary ADR use. One proposed way to increase attorneys' exposure to ADR in their role as counsel is to make ADR programs mandatory,⁷⁷ although concerns have been raised about possible negative repercussions from requiring the use of ADR.⁷⁸

The empirical research examining the relationship between attorneys' familiarity with ADR processes and whether they recommend ADR to clients or voluntarily use ADR presents a mixed picture, with findings varying in part with how "familiarity" was measured. General familiarity with or training in dispute resolution appears to have a limited effect on ADR use. One study reported no relationship between attorneys' ADR use and their ADR education,⁷⁹ and studies examining the relationship between years since law school and attitudes toward and use of ADR have produced mixed results.⁸⁰

75. Riskin, *supra* note 13, at 41-43.

76. Folberg et al., *supra* note 13, at 398.

77. "[I]mplementing mandatory ADR procedures now will result in not only the current participation and education of parties, but also in the kind of education of the bar that might help eliminate the need for mandatory ADR in the future." Folberg et al., *supra* note 13, at 398.

78. *Id.* at 415-16. Almost one-fourth of surveyed California judges were moderately or substantially concerned that parties or attorneys might react negatively to ADR referral. *See also* ROGERS & McEWEN, *supra* note 7, § 7:01. In fact, a sizeable proportion of surveyed attorneys did not support mandating ADR use. *See supra* note 71 and accompanying text. For a discussion of other concerns about mandatory mediation and empirical evidence regarding its effects on settlement and on participants' assessments, *see generally* Roselle L. Wissler, *The Effects of Mandatory Mediation: Empirical Research on the Experience of Small Claims and Common Pleas Courts*, 33 WILLAMETTE L. REV. 565 (1997). *See also*, Wissler, *General Civil Mediation*, *supra* note 14, at 69-70, 81-83.

79. Cavenagh, *supra* note 50, at 361.

80. Recent law school graduates, as a group, are generally presumed to have had more exposure to ADR in law school than are earlier graduates. One study found that more recent law school graduates had more favorable attitudes toward civil and divorce mediation. Medley & Schellenberg, *supra* note 51, at 193-94. Other studies, however, found no relationship between the number of years in practice and general attitudes toward mediation. Lande, *supra* note 51, at 198; Lee et al., *supra* note 53, at 222; Wissler, *supra* note 41, app. C at 2. One study found that more recent law school graduates were more likely to refer clients to mediation. Laura S. Smart & Connie J. Salts, *Attorney Attitudes Toward Divorce Mediation*, MEDIATION, Q. 65, 69 (December 1984). The findings are based on the 1983 survey responses of 150 divorce lawyers who were members of the Illinois State Bar Association (29% response rate). *Id.* at 68-69. A second study, however, found the opposite relationship: attorneys who had been in practice longer discussed ADR with clients and with opposing counsel in a significantly higher percentage of cases, although they were not significantly more likely to use voluntary ADR processes. Wissler, *supra*

In other studies, few attorneys said the reason they had not used ADR was because they did not understand the different processes.⁸¹ Several attorneys, however, commented that ADR processes such as early neutral evaluation and summary jury trial were seldom used because attorneys lacked sufficient information about them.⁸² Importantly, attorneys who felt they were better able to explain various ADR processes to clients were significantly more likely to use ADR and to discuss ADR options with their clients and with opposing counsel.⁸³

There is a more consistent relationship between having more direct ADR experience and referring clients to ADR processes. After using mandatory mediation in child custody cases, 85% of interviewed Maine divorce attorneys reported that, at least occasionally, they voluntarily sought mediation in cases in which it was not required.⁸⁴ Attorneys who had used ADR were more likely to recommend ADR to their clients⁸⁵ and were more likely to report they currently had a dispute they would consider resolving by ADR⁸⁶ than were attorneys who did not have ADR experience. Attorneys who had personal (i.e., not professional) experience with mediation or conciliation were more likely to refer clients to mediation than were attorneys who did not have personal experience.⁸⁷ Findings concerning the relationship between experience with ADR and attitudes toward ADR are mixed,⁸⁸ although there is a

note 41, app. C at 2.

81. McAdoo, *supra* note 22, app. C at 7 (8%); McAdoo & Hinshaw, *supra* note 22, at 15 (2%). These could be underestimates, however, as attorneys might be reluctant to acknowledge their lack of familiarity.

82. McAdoo, *supra* note 22, at 56 n.114.

83. Wissler, *supra* note 41, app. C at 2.

84. McEwen et al., *supra* note 16, at 155. These attorneys also described a change from "initial suspicion and resistance to eventual broad acceptance of mediation" after the introduction of mandatory child custody mediation. *Id.* at 177. The findings are based on interviews conducted in 1990 and 1991 with 163 Maine divorce attorneys (92% response rate). *Id.* at 151-52.

85. Rogers & McEwen, *supra* note 46, at 842, 845; Wissler et al., *supra* note 20, at 306. The findings are based on telephone interviews conducted from 1987 to 1990 with 222 attorneys who had considered an alternative process for resolving media libel disputes (86% response rate). *Id.* at 294.

86. Field, Jr. & Rose, *supra* note 54, at 320-21.

87. Smart & Salts, *supra* note 80, at 70.

88. One study found that attorneys who used voluntary ADR processes in a larger percentage of their cases had significantly more favorable attitudes toward ADR. Wissler, *supra* note 41, app. C at 2. Another study found that experience with mediation, primarily in civil cases, was related to more favorable attitudes toward civil mediation, but not toward divorce mediation. Medley & Schellenberg, *supra* note 51, at 194-95. A third study found that outside counsel who had used ADR in more cases had more favorable attitudes toward mediation, but, for inside counsel, there was no relationship between the extent of ADR use and mediation attitudes. Lande, *supra* note 51, at 199. Findings with regard to the relationship between serving as a mediator or a neu-

relationship between having more favorable attitudes and discussing ADR options with clients and with opposing counsel.⁸⁹

Having experience with and favorable attitudes toward alternative processes, however, does not necessarily guarantee more ADR referrals and greater ADR use. A study of court-connected early neutral evaluation found that attorneys who had a case go through ENE – who generally had favorable evaluations of the program and over 80% of whom said they would select ENE in other cases – nonetheless did not request to use ENE in cases that had not been assigned to the program.⁹⁰ A study of corporate disputing found corporate attitudes and actions favorable to mediation – including directives from business principals and from general counsel to use mediation and the corporation's signing of the Center for Public Resources Institute for Dispute Resolution Pledge to use ADR – did not ensure greater mediation use.⁹¹ Thus, while increasing attorneys' familiarity and experience with alternative processes might help to increase their recommendation and use of ADR, overcoming the inertia of following the usual litigation route might require more fundamental changes in the usual ways disputes and litigation are handled.⁹²

Some proposals seeking to increase the voluntary use of alternative processes, instead of focusing on education and experience, aim to remove barriers to attorneys' proposing the use of ADR to opposing counsel. Several states require attorneys, early in a case, to discuss with opposing counsel the potential use of ADR and the possibilities for early settlement, and to advise the court regarding their conclusions.⁹³ Making such discussions mandatory would eliminate concerns that a proposal to use ADR will be viewed as a sign of weakness and would integrate the consideration of alternatives into the routine litigation process.⁹⁴ Even though relatively few attorneys (17% and

tral in other ADR processes and attitudes toward mediation have been mixed. Lande, *supra* note 51, at 199; Lee et al., *supra* note 53, at 223.

89. Wissler, *supra* note 41, app. C at 2.

90. Rosenberg & Folberg, *supra* note 10, at 1487. Few attorneys who were assigned opted out, even though some expressed reservations or the desire not to participate. *Id.*

91. Rogers & McEwen, *supra* note 46, at 841-42.

92. *Id.* at 843, 845; McEwen, *supra* note 21, at 24-26.

93. *E.g.*, MINN. GEN. R. PRAC. 114.03-.04 (2001); CAL. ADR RULES FOR CIVIL CASES, Rule 1590.1 (2001); N.D. Cal. Amended Gen. Order 34 (July 1, 1992); ARIZ. REV. STAT., Rules of Civil Procedure, Rule 16(g)(2) (2002).

94. Folberg et al., *supra* note 13, at 386.

13%, respectively) said clients or other attorneys thought suggesting ADR was a sign of weakness, attorneys who expressed those views were significantly less likely to discuss ADR with clients and with opposing counsel and were significantly less likely to use ADR.⁹⁵ Importantly, fewer attorneys felt they should not be required to discuss ADR options early in a case (29%) than felt that parties should not be required to use ADR unless both sides wanted it (62%).⁹⁶

The effect on ADR use of requiring attorneys to discuss ADR with opposing counsel is unclear. Even when required to “meet and confer” about ADR within 60 days of filing, only 40% of attorneys said they usually or always did so.⁹⁷ Further, the proportion of attorneys who, under the above mandatory discussion rule, said they always or usually discussed ADR options with opposing counsel within the first six months after taking a case (52%)⁹⁸ did not appear to differ from the proportion of attorneys who did so without such a requirement (51%).⁹⁹

The mandatory discussion rule nonetheless appeared to increase ADR use: 81% of attorneys reported they used ADR more in their non-family civil cases after the rule went into effect.¹⁰⁰ Some of this reported increase in ADR use, however, was not the result of an increase in truly voluntary use. A majority of the attorneys reported the court selected an ADR process or ordered them to find one when they disagreed with opposing counsel about which ADR process was appropriate for a given case.¹⁰¹ Further, a sizeable number of attorneys who voluntarily chose to use mediation or arbitration said they did so *because* they anticipated the court would order ADR.¹⁰² Thus, a substantial portion of the reported increase in ADR use after the mandatory discussion rule went into effect likely was due to other aspects of the rule –

95. Wissler, *supra* note 41, at 25.

96. *Id.* at 26, 28-29.

97. McAdoo, *supra* note 22, at 25-26, app. C at 11. One-third of attorneys sometimes discussed ADR during that time period and 26% never or rarely did. *Id.* Compliance with the mandatory discussion rule was greater in a county where the court devoted significant resources to enforcement. *Id.* at 26.

98. *Id.*, app. C at 11. One-third of the attorneys sometimes discussed ADR with opposing counsel during the first six months, and 14% never or rarely did. *Id.*

99. McAdoo & Hinshaw, *supra* note 22, at 25-26. Thirty-five percent of the attorneys discussed ADR with opposing counsel at some later time, and 15% hardly ever discussed ADR. *Id.*

100. McAdoo, *supra* note 22, app. C at 8. Nineteen percent of the attorneys reported no change in their ADR use after the mandatory discussion rule was enacted, and fewer than 1% reported decreased ADR use. *Id.*

101. *Id.*, App. C at 12 (65%).

102. *Id.*, App. C at 14, 20. Forty percent of those who chose mediation, 42% of those who chose non-binding arbitration, and 15% of those who chose binding arbitration said they did so in anticipation of a court order to ADR. *Id.*

namely, the requirement that judges schedule a case management conference if the attorneys could not agree on an ADR process and the authorization for judges to order the use of a non-binding ADR process – rather than to the requirement that counsel discuss ADR.¹⁰³

C. Judges

The preceding findings demonstrate how judges' stance toward ADR can have a considerable impact on attorneys' use of ADR.¹⁰⁴ Knowing judges will refer cases to ADR can stimulate attorneys to use ADR,¹⁰⁵ and knowing judges do not support ADR can have the opposite effect. When judges did not play an active role in ADR referrals,¹⁰⁶ few attorneys who had used ADR said they did so because they anticipated a court order.¹⁰⁷ In contrast, 34% of the attorneys who had not used ADR gave as their reason the lack of encouragement by the court.¹⁰⁸

Judges might be reluctant to suggest or require ADR use if they themselves are not knowledgeable about or supportive of ADR.¹⁰⁹ In one study, about half of the judges said they were very familiar with arbitration, 31% with mediation, and fewer than 10% with mini-trial, neutral case evaluation,

103. MINN. GEN. R. PRAC. 114.04(b). See also *supra* note 43 and accompanying text.

104. See *supra* note 102 and accompanying text. See also John Haynes, *Mediators and the Legal Profession: An Overview*, MEDIATION Q. 5, 10 (Spring 1989); Welsh & McAdoo, *supra* note 13, at 13. Haynes also observed that more lawyers attended ADR training sessions in states that had mandatory mediation. *Id.* at 10.

105. See *supra* notes 101-102 and accompanying text.

106. In only 14% of the cases in which opposing counsel disagreed about which ADR process to use did the court select a process or order them to find one. McAdoo & Hinshaw, *supra* note 22, at 27. Cf. *supra* note 101 and accompanying text.

107. Only 7% of the attorneys who voluntarily chose to use mediation and none who chose to use non-binding arbitration said they did so *because* they anticipated the court would order ADR. McAdoo & Hinshaw, *supra* note 22, at 41, 63. Cf. *supra* note 102 and accompanying text.

108. McAdoo & Hinshaw, *supra* note 22, at 15. Cf. McAdoo, *supra* note 22, app. C, at 7. Where the court more actively referred cases to ADR, only 16% of attorneys who had *not* used ADR gave as their reason that the court did not actively encourage or order ADR. *Id.*

109. Welsh & McAdoo, *supra* note 13, at 13. An uninformed or non-supportive judge could not hold the kind of ADR discussion suggested by Brazil. See generally Wayne D. Brazil, *For Judges: Suggestions About What to Say About ADR at Case Management Conferences - and How to Respond to Concerns or Objections Raised by Counsel*, 16 OHIO ST. J. ON DISP. RESOL. 165 (2001).

or summary jury trial.¹¹⁰ Judges appeared to have more favorable attitudes toward ADR processes with which they were more familiar.¹¹¹ In another study, a majority of judges had favorable general attitudes toward mediation in both civil and divorce cases, including toward mandating its use when neither party requested it.¹¹² Neither study, however, examined the relationship between judges' familiarity with or positive attitudes toward ADR and whether they encouraged or ordered ADR use.

D. *The Present Study*

Given that litigants are unlikely to use ADR without their attorneys' recommendation and encouragement, proposals aimed at increasing voluntary ADR use often focus on attorneys and on ways to increase attorneys' familiarity with ADR, such as through ADR courses or the mandatory use of ADR. Which of the various forms of ADR education and experience would be most effective in increasing the likelihood that attorneys would recommend ADR to their clients? The findings of prior empirical studies suggest that increasing attorneys' direct experience with alternative processes will have a greater impact on their referring clients to ADR than will ADR education. The prior research, however, is limited in several respects. Each of the studies focused on only one aspect of ADR familiarity, and none of the studies examined whether there is crossover from the use of one type of ADR to the recommendation of other processes. Further, only one study examined directly the effect of ADR education, and none assessed the effect of serving as a third-party neutral, on attorneys' ADR recommendations. Finally, none of the studies looked at attorneys' advice regarding the use of ADR contract clauses.

The empirical study reported in the following section of the Article was conducted in order to provide more information about the relative impact of different forms of ADR education and experience on whether attorneys recommend ADR to their clients. The study, based on a survey of Ohio attorneys, examined the relative impact of attorneys' ADR education during and after law school as well as their experience with several ADR processes, as a neutral or as counsel, on whether attorneys advised their clients to try ADR processes or to include ADR clauses in contracts.

110. Folberg et al., *supra* note 13, at 415. In contrast, about 30% of these judges said they were not at all or only slightly familiar with arbitration, 43% with mediation, and 81% to 85% with the other processes. *Id.*

111. *Id.* at 364.

112. Morris L. Medley & James A. Schellenberg, *Attitudes of Indiana Judges Toward Mediation*, 11 *MEDIATION Q.* 329, 332-33 (1994). The findings are based on the responses of 187 Indiana state trial court judges to a 1992 survey (66% response rate). *Id.* at 330-33.

IV. AN EMPIRICAL ASSESSMENT OF THE RELATIONSHIP BETWEEN ADR EDUCATION AND EXPERIENCE AND WHETHER ATTORNEYS RECOMMEND ADR TO CLIENTS

A. *Survey Procedure, Characteristics of Respondents, and Patterns of ADR Use and Recommendations*

1. Methodology and Characteristics of Respondents

A questionnaire was sent in March 1995 to a random sample of attorneys registered with the Ohio Supreme Court Office of Attorney Registration.¹¹³ The questionnaire asked about the attorneys' ADR training, whether they had served as a third-party neutral in an ADR process, whether they had been counsel in a case that used various ADR processes, how frequently they advised clients to try ADR processes or to include ADR clauses in contracts, their attitudes toward the use of mediation and arbitration in various types of cases, and characteristics of their law practice.

A total of 2,330 attorneys returned a completed questionnaire, for a response rate of 44%.¹¹⁴ The attorneys who responded were representative of in-state members of the State Bar Association in terms of various characteristics of their law practice.¹¹⁵ Fifty-seven percent of the respondents described their practice primarily as civil litigation,¹¹⁶ 36% as non-litigation,¹¹⁷ and 6%

113. The survey was a collaborative effort between the Supreme Court of Ohio Committee on Dispute Resolution and the Ohio State University Socio-Legal Program on Dispute Resolution and was supported by the William and Flora Hewlett Foundation. C. Eileen Pruett, Nancy H. Rogers, Jeanne Clement, L. Camille Hébert, Craig A. McEwen, Charles E. Wilson, and the late Andrew I. Schwabel were involved in the design and distribution of the questionnaire. The present author was a research consultant and analyzed the survey data for the project.

114. Survey is on file with author.

115. The respondents were comparable to the overall bar membership in terms of their general area of practice, years in practice, type of practice, firm size, and geographic distribution. The information on bar members was obtained from the Ohio State Bar Association, OSBA Mailing Lists (June 30, 1995) (on file with author).

116. Over three-fourths of the attorneys who devoted more than 10% of their practice to domestic relations, personal injury, insurance defense, malpractice, workers' compensation, and collections, and a majority who worked in the commercial (57%) and administrative law (55%) areas, identified their practice as involving civil litigation.

117. Eighty-two percent of the attorneys who devoted more than 10% of their practice to the tax area, and a majority who worked in the areas of real estate (58%) and wills, trusts, and

as criminal litigation. Because attorneys who had a civil litigation practice would have more opportunity than attorneys in a non-litigation or criminal law practice to use ADR in their cases and to recommend ADR to their clients,¹¹⁸ the analyses reported in the present article are based on the 1299 attorneys who said they had a civil litigation practice.

2. ADR Training and Use

Half of the attorneys had one or more of the following forms of ADR education or training, and half had no ADR education. Thirty percent of the attorneys had taken a continuing legal education course in dispute resolution, 23% had taken a law school course in dispute resolution, and 34% had received mediation training.

Seventy-one percent of the attorneys had served as a third-party neutral in one or more ADR processes.¹¹⁹ Sixty-one percent of the attorneys had served as an arbitrator, 35% had served as a mediator,¹²⁰ and 14% had served as a neutral evaluator. Attorneys who had served as a third-party neutral in a given ADR process were also more likely to have served as a neutral in other processes.¹²¹

Eighty-one percent of the attorneys had used one or more ADR processes in their role as counsel in a case.¹²² A majority of the attorneys had

estate planning (54%), identified their practice as non-litigation.

118. Attorneys who had a civil litigation practice, compared to attorneys who had either a non-litigation or a criminal law practice, were more likely to say that mediation was relevant to their practice ($F(2,1837) = 41.78, p < .001$), were more likely to have used ADR ($F(2, 1822) = 181.82, p < .001$), and were more likely to have recommended ADR ($F(2, 2072) = 42.08, p < .001$). The F statistic (or the t statistic) is used to determine whether an observed difference between groups is a "true" difference (i.e., a statistically significant difference) or merely reflects chance variation. The conventional level of probability for determining the statistical significance of findings is the .05 level (i.e., $p < .05$). RICHARD P. RUNYON & AUDREY HABER, *FUNDAMENTALS OF BEHAVIORAL STATISTICS* 255-56, 297-300, 310-16 (5th ed. 1984).

119. Eight percent had served as an arbitrator, mediator, and neutral evaluator; 23% had served as a neutral in two of the three processes.

120. Of those attorneys who had served as a mediator, roughly equal proportions (about 25% each) had mediated ten or fewer cases, 11 to 15 cases, 16 to 30 cases, or more than 30 cases.

121. r 's ranged from .19 to .29, p 's $< .001$. To determine whether an observed relationship between two variables is a "true" relationship or merely reflects chance variation, tests of statistical significance must be conducted. The Pearson r statistic assesses whether the two variables are significantly associated with one another, not whether one factor causes the other. The value of r (the correlation coefficient) indicates the strength of the relationship and ranges from +1.00 to -1.00, with 0.00 representing no relationship between the variables. See, e.g., RUNYON & HABER, *supra* note 118, at 140-42, 230.

122. This reflects both voluntary and compulsory ADR use. At the time the survey was conducted, some of the state courts had mandatory mediation or non-binding arbitration pro-

been counsel in a case that went through non-binding arbitration (66%), mediation (64%), or binding arbitration (57%). Fewer attorneys had experience as counsel in a case that went through summary jury trial (19%) or early neutral evaluation (20%). Attorneys who had been counsel in a case that used a given process were also more likely to have been involved in a case that used other ADR processes.¹²³

3. Attitudes toward ADR Use in Civil Cases

A majority of attorneys (58% to 78%) favored using mediation in six types of civil cases, compared to only 10% to 22% who did not favor using mediation in those cases.¹²⁴ About half of the attorneys (44% to 50%) favored using non-binding arbitration in these types of civil cases, compared to 32% to 42% who did not. Attorneys who favored using mediation for a specific type of case also tended to favor using non-binding arbitration for that type of case, and vice versa.¹²⁵ For each specific case type, however, attorneys were more likely to favor using mediation than non-binding arbitration.¹²⁶

4. Recommending ADR Processes and ADR Contract Clauses to Clients

Sixteen percent of the attorneys said they often advised their clients to try arbitration, 61% said they sometimes did, and 23% said they never advised clients to try arbitration. Fourteen percent of the attorneys said they often advised their clients to try mediation, 59% said they sometimes did, and 27% said they never advised clients to try mediation. In contrast, only about

grams, and the federal courts had mandatory mediation, summary jury trial, and early neutral evaluation programs. Personal communication with C. Eileen Pruett, Coordinator, Dispute Resolution Programs, The Supreme Court of Ohio (August 30, 2001). *See also, e.g.*, OHIO CT. RULES, R. 15 (July 1, 2001), available at <www.sconet.state.oh.us/rules/superintendence/#rule15>.

123. r 's ranged from .19 to .44, p 's < .001.

124. The six civil case types asked about were: domestic relations, small claims, commercial, personal injury, legal malpractice, and medical malpractice. The ratings were made on a seven-point scale in which "1" was "would not favor at all" and "7" was "strongly favor." Attorneys who gave a rating of "5" to "7" were considered to favor mediation, and those who gave a rating of "1" to "3" were considered not to favor mediation.

125. r 's ranged from .34 to .48, p 's < .001.

126. Domestic relations: $t(1048) = 22.33$, $p < .001$; small claims: $t(1080) = 21.62$, $p < .001$; commercial: $t(1076) = 14.10$, $p < .001$; personal injury: $t(1164) = 6.62$, $p < .001$; legal malpractice: $t(1085) = 11.37$, $p < .001$; medical malpractice: $t(1097) = 10.00$, $p < .001$.

one-fourth of the attorneys said they advised their clients to try neutral evaluation (2% often did and 22% sometimes did), whereas 75% said they never advised their clients to try neutral evaluation. Thus, attorneys were significantly more likely to advise clients to try arbitration than mediation,¹²⁷ and were least likely to recommend neutral evaluation.¹²⁸ Attorneys who advised their clients to try a particular ADR process also tended to advise clients to try the other ADR processes.¹²⁹

Of the attorneys who prepared contracts in their practice, 21% said they often advised including an arbitration clause, 59% said they sometimes did, and 20% said they never advised including an arbitration clause. In contrast, only 9% said they often advised including a mediation clause, 39% said they sometimes did, and 52% said they never advised including a mediation clause. Thus, attorneys were more likely to recommend including an arbitration clause than a mediation clause in contracts.¹³⁰ Nonetheless, attorneys who advised clients to include an arbitration clause also tended to advise including a mediation clause, and vice versa.¹³¹

B. The Relationship between ADR Education and Experience Characteristics and Whether Attorneys Advised Clients to Try ADR

Attorneys' ADR recommendations play an important role in litigants' use of ADR.¹³² Accordingly, this section explores which forms of ADR education and experience are most strongly related to whether attorneys advise their clients to try ADR.¹³³ Specifically, we examined to what extent the following characteristics, both individually and as a group, could distinguish between attorneys who recommended ADR and those who did not:¹³⁴ whether

127. $t(1241) = 3.27, p < .01$.

128. Neutral evaluation vs. mediation ($t(1212) = 30.37, p < .001$); neutral evaluation vs. arbitration ($t(1213) = 31.30, p < .001$).

129. r 's ranged from .16 to .34, p 's < .001.

130. $t(800) = 16.59, p < .001$.

131. $r(799) = .33, p < .001$.

132. See *supra* notes 22-31 and accompanying text.

133. The principal question has been framed as trying to explain attorneys' ADR recommendations rather than trying to explain their ADR use because the attorneys have more control over the former than the latter. (I.e., ADR use may be required by contract or by statute and can be refused by the client or by the other party.) See *supra* notes 17, 25-27 and accompanying text.

134. Discriminant function analysis (DFA) is the statistical procedure used for most of the analyses in this and subsequent sections. DFA derives orthogonal, linear combinations of the predictor variables (i.e., attorneys' ADR education and experience) that maximally distinguish between the groups (i.e., between attorneys who recommended ADR to clients and attorneys who did not). DFA holds the error rate constant over all variables in the analysis and thereby avoids

the attorneys had (a) used ADR processes as counsel in a case; (b) served as a third-party neutral in ADR processes; (c) taken a law school course in dispute resolution; and (d) taken a continuing legal education (CLE) course in dispute resolution.

The first analysis examined whether these ADR education and experience characteristics could distinguish between attorneys who recommended ADR in general and attorneys who never recommended any of these processes.¹³⁵ For these analyses, general measures of overall ADR experience were used, namely whether or not the attorneys had used any of the ADR processes¹³⁶ and whether or not they had been a third-party neutral in any of the ADR processes.¹³⁷

The combined set of ADR education and overall ADR experience characteristics significantly distinguished between attorneys who advised their clients to try ADR and attorneys who did not recommend ADR.¹³⁸ The characteristic that made by far the largest contribution to distinguishing between attorneys who recommended ADR and those who did not was whether the attorneys had used an ADR process as counsel in a case (see Table 1).¹³⁹

the inflation that would arise from multiple, separate analyses. *See, e.g.*, BARBARA G. TABACHNICK & LINDA S. FIDELL, *USING MULTIVARIATE STATISTICS* 292-98 (1983).

135. The attorneys were asked whether they never, sometimes, or often advised clients to try mediation, arbitration, and neutral evaluation. These three measures were combined into a single measure of whether attorneys advised their clients to try ADR in general, which had a Chronbach's alpha of .52. Chronbach's alpha indicates the reliability and internal consistency of a scale. Its values range from a low of 0.00 to a high of 1.00. EDWARD G. CARMINES & RICHARD A. ZELLER, *RELIABILITY AND VALIDITY ASSESSMENT* 44-47 (1979).

136. The attorneys were asked whether they had ever used (including both voluntary and compulsory use) mediation, binding or non-binding arbitration, summary jury trial, or early neutral evaluation. These five measures were combined into a single measure of ADR use, which had a Chronbach's alpha of .60.

137. The attorneys were asked whether they had been a mediator, arbitrator, or neutral evaluator. These three measures were combined into a single measure of serving as an ADR neutral, which had a Chronbach's alpha of .46.

138. $\chi^2(4, N = 1020) = 187.74, p < .001, R^2 = .17$. The chi-square (χ^2) statistic indicates whether the predictor variables significantly distinguish between the groups. The R^2 (the canonical correlation squared) indicates the degree of relationship between group membership and the set of predictor variables. TABACHNICK & FIDELL, *supra* note 133, at 292-98. Here, 17% of the variance in whether attorneys did versus did not recommend ADR to clients is accounted for by ADR education and experience characteristics, which is a medium relationship. ROBERT ROSENTHAL & RALPH L. ROSNOW, *ESSENTIALS OF BEHAVIORAL RESEARCH* 207-11, 361 (1984).

139. The canonical loadings (e.g., .895 for whether attorneys had used ADR) indicate which variables make independent contributions to the overall discrimination. By convention, .30

Whether attorneys had served as a third-party neutral made the second largest contribution. Having taken a CLE in dispute resolution also made a statistically significant, but smaller, contribution. Having taken a law school course in dispute resolution, however, did not contribute significantly to distinguishing between attorneys who recommended ADR and those who did not. In sum, attorneys who recommended ADR were more likely, compared to attorneys who did not recommend ADR, to have used ADR as counsel (87% vs. 45%), to have served as a third-party neutral (75% vs. 46%), and to have taken a CLE in dispute resolution (32% vs. 16%).

Table 1. Characteristics that Distinguished Between Attorneys Who Advised Their Clients to Try ADR and Those Who Did Not

Attorney Characteristics	Canonical Loadings (<i>r</i>)
was counsel in case that used ADR	.895
served as third-party neutral	.534
had CLE in dispute resolution	.316
had law school course in dispute resolution	.150

Next, separate analyses were conducted for mediation, arbitration, and neutral evaluation in order to examine whether ADR education and experience in specific ADR processes, as counsel and as a neutral, could distinguish between attorneys who advised clients to try each of these three processes and attorneys who did not. The combined set of ADR education and ADR experience characteristics significantly distinguished between attorneys who advised their clients to try each ADR process and those who did not.¹⁴⁰ These analyses produced patterns that were generally similar across the different processes.

is the lowest cut-off for including variables to be used in interpreting the discriminant function. The canonical loadings also indicate the relative strength of the variables' contributions and are interpreted like correlation coefficients (i.e., ranging from +1.00 to -1.00, with 0.00 representing no relationship). TABACHNICK & FIDELL, *supra* note 134, at 320-21.

140. Mediation, $\chi^2(10, N = 964) = 278.38, p < .001, R^2 = .25$; arbitration, $\chi^2(10, N = 956) = 245.79, p < .001, R^2 = .23$; neutral evaluation, $\chi^2(10, N = 939) = 286.61, p < .001, R^2 = .27$. Thus, for each of these three processes, the set of ADR education and experience characteristics accounted for about 25% of the variance in whether attorneys did versus did not recommend ADR to clients, which is a large relationship. ROSENTHAL & ROSNOW, *supra* note 138, at 361.

The characteristic that made by far the largest contribution to distinguishing between attorneys who recommended each process and those who did not was whether the attorneys had used that particular process as counsel in a case (see Table 2).¹⁴¹ The characteristic that made the second largest contribution was whether the attorneys had been a third-party neutral in that particular process.¹⁴² In addition, having used other ADR processes contributed to distinguishing between attorneys who advised clients to try arbitration or neutral evaluation and those who did not.¹⁴³ Having taken a CLE in dispute resolution contributed to distinguishing between attorneys who recommended mediation and those who did not.¹⁴⁴ Having taken a law school course in dispute resolution, however, did not contribute significantly to distinguishing between attorneys who did versus did not recommend any of the processes.

141. Attorneys who recommended mediation, compared to attorneys who did not recommend mediation, were more likely to have used mediation (73% vs. 21%). Attorneys who recommended arbitration, compared to those who did not recommend arbitration, were more likely to have used non-binding arbitration (72% vs. 27%) and binding arbitration (63% vs. 20%). Attorneys who recommended neutral evaluation, compared to attorneys who did not recommend neutral evaluation, were more likely to have used neutral evaluation (48% vs. 7%).

142. Attorneys who recommended mediation were more likely to have been a mediator than were those who did not recommend mediation (42% vs. 17%). Attorneys who recommended arbitration were more likely to have been an arbitrator than were those who did not recommend arbitration (70% vs. 33%). Attorneys who recommended neutral evaluation were more likely to have been a neutral evaluator than were those who did not recommend neutral evaluation (29% vs. 8%).

143. Attorneys who recommended arbitration were more likely to have used mediation than were attorneys who did not recommend arbitration (38% vs. 25%). Attorneys who recommended neutral evaluation, compared to attorneys who did not recommend neutral evaluation, were more likely to have used summary jury trial (27% vs. 11%) and mediation (75% vs. 53%). Using other ADR processes, however, did not contribute to distinguishing between attorneys who recommended mediation and those who did not.

144. Attorneys who recommended mediation were more likely to have taken a CLE than were attorneys who did not recommend mediation (37% vs. 13%). Taking a CLE, however, did not contribute to distinguishing between attorneys who recommended arbitration or neutral evaluation and attorneys who did not recommend these processes.

Table 2. Characteristics that Distinguished Between Attorneys Who Advised Their Clients to Try Mediation, Arbitration, or Neutral Evaluation and Those Who Did Not¹⁴⁵

Attorney Characteristics	Canonical Loadings (<i>r</i>)		
	Mediation	Arbitration	Neutral Evaluation
was counsel in case that used mediation	.923	.403	.330
was counsel in case that used non-binding arbitration		.805	
was counsel in case that used binding arbitration		.720	
was counsel in case that used neutral evaluation			.864
was counsel in case that used summary jury trial			.355
served as mediator	.415		
served as arbitrator		.621	
served as neutral evaluator			.468
had CLE in dispute resolution	.411		
had law school course in dispute resolution			

In summary, gaining experience with ADR as counsel in a case had a stronger relationship with whether or not attorneys advised clients to try ADR than did gaining ADR experience by serving as a third-party neutral. Both of these forms of direct ADR experience had a stronger relationship with whether or not attorneys recommended ADR than did taking a CLE in dispute resolution. Although experience as counsel with a particular ADR process had the strongest relationship with whether or not attorneys recommended that specific ADR process, there nonetheless was some spillover from experience with one ADR process to recommending another process.¹⁴⁶

145. Characteristics that did not significantly distinguish between the groups (i.e., had a canonical loading of less than .30) were not included in this and subsequent tables to increase their readability.

146. A series of analyses were conducted to examine whether the relationship between using ADR and recommending ADR to clients might primarily reflect the underlying impact of a third factor, such as favorable attitudes toward ADR, on both ADR use and recommendations. This does not appear to be the case. Looking at mediation as an example, attorneys who had favorable attitudes toward the use of mediation in civil cases were, not surprisingly, more likely to use mediation ($r(955) = .16, p < .001$) and to recommend mediation ($r(972) = .30, p < .001$). The former relationship probably is smaller than the latter because some mediation use is com-

It is unclear why having taken a CLE in dispute resolution was related to whether or not attorneys recommended mediation, but having taken a law school course was not. CLEs might be more narrowly focused on the types of ADR available in the attorneys' substantive or geographic practice area or on representing clients in ADR, whereas law school courses could include more general courses on negotiation or an overview of ADR processes and might have a less practice-oriented focus.¹⁴⁷ Another possibility is that self-selection might play a larger role in the choice of CLEs than law school courses. Attorneys who develop an interest in ADR as a result of their practice would be more likely to sign up for an ADR CLE and also would be more likely to subsequently recommend ADR than would attorneys who do not become interested in ADR. The connection between interest in ADR, course selection, and subsequent opportunity to use ADR in practice would be more direct for CLEs than for law school courses. It is also unclear why having taken a CLE was related to recommending mediation but not to recommending arbitration or neutral evaluation; perhaps this reflects a difference in the relative emphasis given to these processes in the CLEs taken by the survey respondents.

Additional analyses showed that, within each ADR process, there was a cumulative effect of having used that process as counsel plus having been a third-party neutral in that same process. Attorneys who had used mediation and had been a mediator were more likely to recommend mediation to their clients (90%) than were attorneys who either had used mediation or had been a mediator (83%).¹⁴⁸ Similarly, attorneys who had used binding arbitration and non-binding arbitration and had been an arbitrator were more likely to recommend arbitration to their clients (94%) than were attorneys who had done any two of these things (86%), who in turn were more likely to recommend arbitration than were attorneys who had done only one of them

pulsory, in which situation mediation attitudes would be irrelevant to mediation use. When controlling for mediation attitudes, however, mediation use was still significantly related to recommending mediation (favorable attitudes, $r(590) = .45$, $p < .001$; unfavorable attitudes, $r(54) = .26$, $p < .05$). And the contribution of mediation attitudes, independent of the effect of mediation use, to whether attorneys recommended mediation was much smaller (R^2 change = .05) than was the contribution of mediation use, independent of the effect of mediation attitudes (R^2 change = .15). This series of analyses was conducted using a scale of attitudes toward mediation use in civil cases, which consisted of the attorneys' ratings for each of the six civil case types, *see supra* note 124, and had a Cronbach's alpha of .81.

147. *See also* Kovach, *supra* note 74, at 580.

148. $F(1, 852) = 9.66$, $p < .01$, $r = .11$.

(74%).¹⁴⁹ And attorneys who had used neutral evaluation and had been an evaluator were more likely to recommend neutral evaluation to their clients (78%) than were attorneys who either had used neutral evaluation or had been an evaluator (56%).¹⁵⁰

Even though having used ADR as counsel was strongly related to whether or not attorneys recommended ADR, some attorneys who had not used ADR nonetheless advised their clients to try it. For this subgroup of attorneys who had not used ADR, additional analyses examined to what extent ADR education and experience as a third-party neutral could distinguish between attorneys who recommended ADR to their clients and those who did not. For attorneys who had not used ADR as counsel, the set of ADR education and third-party experience characteristics significantly distinguished between attorneys who recommended mediation or arbitration and those who did not recommend these processes.¹⁵¹ These characteristics, however, did not significantly distinguish between attorneys who recommended neutral evaluation and those who did not.¹⁵² The pattern of which characteristics made what contribution to distinguishing between attorneys who recommended mediation or arbitration and attorneys who did not recommend these processes differed for mediation and arbitration.

For mediation, the two characteristics that made the largest contribution to distinguishing between attorneys who advised their clients to try mediation and those who did not were whether the attorneys had taken a CLE or a law school course in dispute resolution (see Table 3).¹⁵³ In addition, having been a mediator or a neutral evaluator contributed significantly.¹⁵⁴ For arbitration, having experience as an arbitrator or a neutral evaluator made the largest contribution to distinguishing between attorneys who advised their clients to try

149. $F(2, 896) = 24.67, p < .001, r = .23$. The post-hoc comparisons were significant at $p < .01$.

150. $F(1, 281) = 8.86, p < .01, r = .18$.

151. Mediation: $\chi^2(5, N = 171) = 14.68, p < .05, R^2 = .08$; arbitration: $\chi^2(5, N = 166) = 26.83, p < .001, R^2 = .15$. Thus, for these two processes, the set of ADR education and experience characteristics accounted for 8% and 15%, respectively, of the variance in whether attorneys who had not used ADR recommended mediation or arbitration to clients.

152. $\chi^2(5, N = 165) = 7.80, p = .17, R^2 = .05$. This suggests that other factors that were not part of the survey played a critical role in whether attorneys who had not used ADR advised clients to try neutral evaluation.

153. Of the subgroup of attorneys who had not used ADR, attorneys who recommended mediation, compared to those who did not recommend mediation, were more likely to have taken a CLE (29% vs. 13%) and a law school course (34% vs. 20%) in dispute resolution.

154. Of the subgroup of attorneys who had not used ADR, attorneys who recommended mediation, compared to those who did not recommend mediation, were more likely to have been a mediator (23% vs. 12%) and a neutral evaluator (5% vs. 1%).

arbitration and those who did not (see Table 3).¹⁵⁵ In addition, having been a mediator or having taken a CLE in dispute resolution contributed significantly.¹⁵⁶

Table 3. Attorneys Who Had Not Used ADR: Characteristics that Distinguished Between Attorneys Who Advised Their Clients to Try Mediation or Arbitration and Those Who Did Not

Attorney Characteristics	Canonical Loadings (<i>r</i>)	
	Mediation	Arbitration
had CLE in dispute resolution	.644	.377
had law school course in dispute resolution	.532	
served as mediator	.485	.415
served as neutral evaluator	.411	.581
served as arbitrator		.667

Thus, when the analyses focused on the subset of attorneys who had not used ADR as counsel, ADR education was more strongly related to whether or not attorneys recommended mediation or arbitration.¹⁵⁷ This pattern of findings is not surprising: the effect of ADR courses on attorneys' ADR recommendations likely would be eclipsed by the effect of using ADR as counsel. What is surprising, however, is the finding that, for attorneys who had not used ADR as counsel, ADR education was *more* strongly related to recommending mediation than was having served as a mediator. It is unclear what might explain this pattern, which is not observed for arbitration recommendations. The specific content of the CLEs might explain why CLEs had a stronger relationship with mediation than with arbitration recommendations,

155. Of the subgroup of attorneys who had not used ADR, attorneys who recommended arbitration, compared to those who did not recommend arbitration, were more likely to have been an arbitrator (42% vs. 17%) and a neutral evaluator (9% vs. 0%).

156. Of the subgroup of attorneys who had not used ADR, attorneys who recommended arbitration, compared to those who did not recommend arbitration, were more likely to have been a mediator (25% vs. 12%) and to have taken a CLE (28% vs. 15%).

157. Compare the canonical loadings for ADR courses in Table 3 and Table 2.

and why CLEs had a stronger relationship with mediation recommendations than did law school ADR courses.¹⁵⁸

C. The Relationship between ADR Education and Experience Characteristics and Whether Attorneys Advised Clients to Use ADR Contract Clauses

After a dispute has arisen, attorneys might be reluctant to propose ADR use out of a concern that it will be seen as a "sign of weakness."¹⁵⁹ Litigants also might be reluctant to use ADR at that time, when emotions as well as estimates of success are running high.¹⁶⁰ The inclusion of an ADR clause in contracts would overcome these barriers to ADR use. Accordingly, this section explores which of several forms of ADR education and experience are most strongly related to whether or not attorneys advise their clients to include arbitration or mediation clauses in contracts.

Specifically, for those attorneys who prepared contracts in their practice, we examined to what extent the following characteristics, both individually and as a group, could distinguish between attorneys who recommended ADR clauses and those who did not: whether the attorneys had (a) used ADR processes as counsel in a case, (b) served as a third-party neutral in ADR processes, (c) taken a law school course in dispute resolution, and (d) taken a CLE in dispute resolution. The pattern of which characteristics made a significant contribution, and the relative strength of their contributions to distinguishing between attorneys who recommended ADR clauses and those who did not, differed for arbitration clauses and mediation clauses.

Looking first at arbitration contract clauses, the combined set of ADR education and experience characteristics significantly distinguished between attorneys who advised their clients to include an arbitration clause and attorneys who did not recommend an arbitration clause.¹⁶¹ The two characteristics that made the largest contribution to distinguishing between attorneys who recommended an arbitration clause and those who did not were whether the attorneys had used binding arbitration or mediation as counsel (see Table 4).¹⁶² The pair of characteristics that made the next largest contribution was

158. See *supra* text accompanying note 147.

159. See *supra* text accompanying notes 45 and 95.

160. See *supra* notes 20-21 and accompanying text.

161. $\chi^2(10, N = 634) = 47.60, p < .001, R^2 = .07$. Thus, the set of ADR education and experience characteristics accounted for 7% of the variance in whether attorneys did versus did not recommend the inclusion of an arbitration clause, which is a small relationship. ROSENTHAL & ROSNOW, *supra* note 138, at 361.

162. Attorneys who recommended an arbitration clause, compared to those who did not

having been a mediator or an arbitrator.¹⁶³ Having used early neutral evaluation as counsel made a statistically significant but smaller contribution, as did having taken a CLE in dispute resolution.¹⁶⁴ It is puzzling that having used non-binding arbitration did not contribute significantly to distinguishing between attorneys who recommended an arbitration clause and those who did not, even though having used binding arbitration or other ADR processes did.¹⁶⁵

recommend an arbitration clause, were more likely to have used arbitration (57% vs. 33%) and mediation (60% vs. 38%).

163. Attorneys who recommended an arbitration clause, compared to those who did not recommend an arbitration clause, were more likely to have been a mediator (37% vs. 20%) and an arbitrator (61% vs. 44%).

164. Attorneys who recommended an arbitration clause, compared to those who did not recommend an arbitration clause, were more likely to have used neutral evaluation (19% vs. 7%) and to have taken a CLE (33% vs. 20%).

165. The explanation for this finding is not that attorneys who had used non-binding arbitration had a negative assessment of the process and thus were *less* likely to recommend an arbitration clause. The relationship between experience with non-binding arbitration and recommending an arbitration clause (canonical loading = .253), although not statistically significant, was in a positive rather than a negative direction.

Table 4. Characteristics that Distinguished Between Attorneys Who Advised Their Clients to Include an Arbitration Clause or Mediation Clause and Those Who Did Not

Attorney Characteristics	Canonical Loadings (<i>r</i>)	
	Arbitration Clause	Mediation Clause
was counsel in case that used mediation	.644	.645
was counsel in case that used non-binding arbitration		
was counsel in case that used binding arbitration	.685	
was counsel in case that used neutral evaluation	.437	.324
was counsel in case that used summary jury trial		.373
served as mediator	.510	.357
served as arbitrator	.474	
served as neutral evaluator		
had CLE in dispute resolution	.400	.450
had law school course in dispute resolution		

Looking next at mediation contract clauses, the combined set of ADR education and experience characteristics distinguished between attorneys who advised their clients to include a mediation clause and attorneys who did not recommend a mediation clause.¹⁶⁶ The characteristic that made by far the largest contribution to distinguishing between attorneys who recommended a mediation clause and those who did not was having used mediation as counsel (see Table 4).¹⁶⁷ Having taken a CLE in dispute resolution made the second largest contribution.¹⁶⁸ In addition, having used summary jury trial or neutral evaluation as counsel and having been a mediator significantly distinguished between attorneys who recommended a mediation clause and those who did not.¹⁶⁹

166. $\chi^2(10, N = 627) = 58.39, p < .001, R^2 = .09$. Thus, the set of ADR education and experience characteristics accounted for 9% of the variance in whether attorneys did versus did not recommend inclusion of a mediation clause.

167. Attorneys who recommended a mediation clause were more likely to have used mediation than were attorneys who did not recommend a mediation clause (66% vs. 47%).

168. Attorneys who recommended a mediation clause were more likely to have taken a CLE than were attorneys who did not recommend a mediation clause (37% vs. 24%).

169. Attorneys who recommended a mediation clause, compared to those who did not rec-

In summary, similar to the findings in the prior section,¹⁷⁰ gaining experience with ADR as counsel in a case had a stronger relationship with whether or not attorneys recommended an ADR clause than did gaining experience by serving as a third-party neutral. Although experience, as counsel or as a neutral, with a particular ADR process had the strongest relationship with whether or not attorneys recommended a clause with that specific ADR process, there was some spillover from experience with one ADR process to recommending a clause involving a different type of ADR. With regard to ADR education, having taken a CLE in dispute resolution was related to whether attorneys recommended ADR clauses, but having taken a law school course was not.¹⁷¹ For arbitration clauses, experience as a third-party neutral had a stronger relationship with recommending a clause than did taking a CLE; for mediation clauses, the reverse was true.¹⁷²

The same set of ADR education and experience characteristics accounted for a smaller proportion of the variance in attorneys' recommendations to include ADR clauses (approximately 8%) than in their recommendations to try ADR processes (approximately 25%). This would suggest that the ADR education and experience characteristics have a smaller influence, and other factors not included in the analyses have a larger influence, on recommendations to include ADR contract clauses than on recommendations to use ADR.¹⁷³

Although having used ADR as counsel was strongly related to whether or not attorneys recommended including an ADR contract clause, some attorneys who had not used ADR nonetheless recommended an ADR clause. For this subgroup of attorneys who had not used ADR, additional analyses examined to what extent ADR courses and experience as a third-party neutral could distinguish between attorneys who recommended an arbitration or a mediation clause and those who did not. For attorneys who had not used

ommend a mediation clause, were more likely to have used SJT (19% vs. 10%) and ENE (20% vs. 13%), and were more likely to have been a mediator (40% vs. 29%).

170. See *supra* notes 139-44 and accompanying text.

171. See *supra* note 147 and accompanying text for possible reasons for this pattern of findings.

172. Taking a CLE appeared to have a greater relative relationship with recommending mediation clauses than with recommending mediation. Compare Table 3 and Table 2.

173. Such factors might include the attorneys' substantive practice area or the subject matter of the dispute, which likely would be more strongly related to recommendations regarding ADR clauses than regarding ADR use if the range of disputes in which ADR clauses tend to be used is narrower than the range of disputes in which ADR processes tend to be used.

ADR as counsel, ADR education and third-party experience significantly distinguished between attorneys who recommended an arbitration clause and those who did not.¹⁷⁴ Having served as an arbitrator made the largest contribution to distinguishing between attorneys who recommended an arbitration clause and those who did not.¹⁷⁵ The only other characteristic that made a statistically significant but small contribution was *not* having served as a neutral evaluator.¹⁷⁶ The ADR education and experience characteristics did not significantly distinguish between attorneys who recommended a mediation clause and those who did not.¹⁷⁷ It is unclear why the findings based only on attorneys who had not used ADR differed considerably from those that also included attorneys who had used ADR.¹⁷⁸

D. The Relationship between ADR Education and Experience Characteristics and Whether Attorneys Used ADR as Counsel in a Case

As seen in the two preceding sections, attorneys who had experience with ADR as counsel in a case were significantly more likely to advise clients to try ADR and to include ADR contract clauses than were attorneys who had not used ADR.¹⁷⁹ Thus, factors that contribute to ADR use would also contribute indirectly to ADR referrals. Accordingly, this section explores to what extent ADR courses and experience as a third-party neutral can distinguish between attorneys who use ADR and attorneys who do not.

The first analysis examined whether ADR education and experience as a third-party neutral in any of the ADR processes¹⁸⁰ could distinguish between attorneys who used one or more ADR processes and attorneys who did not use any of these processes.¹⁸¹ These characteristics significantly distinguished

174. $\chi^2(5, N = 118) = 12.61, p < .05, R^2 = .10$.

175. Canonical loading = .834. Of the subgroup of attorneys who had not used ADR, attorneys who recommended an arbitration clause were more likely to have been an arbitrator than were attorneys who did not recommend an arbitration clause (31% vs. 6 %).

176. Canonical loading = -.302. Of the subgroup of attorneys who had not used ADR, attorneys who recommended an arbitration clause were *less* likely to have been a neutral evaluator than were attorneys who did not recommend an arbitration clause (4% vs. 9%).

177. $\chi^2(5, N = 117) = 6.26, p = .28, R^2 = .05$. This suggests that other factors that were not part of the survey played a critical role in whether attorneys who had not used ADR recommended a mediation clause.

178. See *supra* notes 161-69 and accompanying text.

179. See *supra* notes 139, 141, 162, 167 and accompanying text.

180. See *supra* note 137 and accompanying text.

181. See *supra* note 136 and accompanying text.

between attorneys who used ADR and those who did not.¹⁸² The only characteristic that contributed significantly to distinguishing between these two groups was whether the attorneys had served as a third-party neutral in an ADR process.¹⁸³ Having taken a CLE or a law school course in dispute resolution did not contribute significantly to distinguishing between attorneys who used ADR and those who did not.

Next, separate analyses were conducted for mediation, binding arbitration, non-binding arbitration, summary jury trial, and neutral evaluation in order to examine whether ADR education and experience as a neutral in a specific ADR process could distinguish between attorneys who used each of the five ADR processes and those who did not. This set of characteristics significantly distinguished between attorneys who used each of these ADR processes and those who did not.¹⁸⁴ The characteristic that made by far the largest contribution to distinguishing between attorneys who used each process and those who did not was whether the attorneys had been a third-party neutral in that particular process (see Table 5).¹⁸⁵ Although the strongest relationship with using a given ADR process was experience as a third-party neutral in that particular process, there was substantial spillover from having been a neutral in one process to using another process.¹⁸⁶ In addition, taking a

182. $\chi^2(6, N = 1020) = 114.429, p < .001, R^2 = .11$. Thus, the set of ADR education and third-party experience characteristics accounted for 11% of the variance in whether attorneys did versus did not use ADR, which is a medium relationship. ROSENTHAL & ROSNOW, *supra* note 138, at 361.

183. Canonical loading = .998. Attorneys who used ADR were more likely to have been a third-party neutral than were attorneys who did not use ADR (78% vs. 40%).

184. Mediation: $\chi^2(5, N = 1187) = 130.10, p < .001, R^2 = .10$; binding arbitration: $\chi^2(5, N = 1140) = 180.84, p < .001, R^2 = .15$; non-binding arbitration: $\chi^2(5, N = 1169) = 294.05, p < .001, R^2 = .22$; summary jury trial: $\chi^2(5, N = 1052) = 25.76, p < .001, R^2 = .02$; neutral evaluation: $\chi^2(5, N = 1033) = 57.40, p < .001, R^2 = .05$. Thus, the set of ADR education and third-party experience characteristics accounted for between 2% and 22% of the variance in determining whether attorneys did versus did not use ADR, depending on the specific ADR process.

185. Attorneys who had used mediation were more likely to have been a mediator than were attorneys who had not used mediation (46% vs. 17%). Attorneys who had used binding arbitration were more likely to have been an arbitrator than were those who had not used binding arbitration (75% vs. 41%). Attorneys who had used non-binding arbitration were more likely to have been an arbitrator than were those who had not used non-binding arbitration (78% vs. 30%). And attorneys who had used early neutral evaluation were more likely to have been a neutral evaluator than were attorneys who had not used ENE (29% vs. 10%).

186. Attorneys who had used mediation, compared to attorneys who had not used mediation, were more likely to have been an arbitrator (65% vs. 51%) and a neutral evaluator (19% vs. 6%). Attorneys who had used binding arbitration, compared to attorneys who had not used bind-

CLE in dispute resolution contributed to distinguishing between attorneys who had versus had not used mediation, neutral evaluation, and summary jury trial.¹⁸⁷ Having taken a CLE was not related, however, to using either binding or non-binding arbitration. And having taken a law school course in dispute resolution did not contribute significantly to distinguishing between attorneys who did versus did not use any of these ADR processes.

ing arbitration, were more likely to have been a mediator (43% vs. 25%) and a neutral evaluator (20% vs. 5%). Attorneys who had used non-binding arbitration were more likely to have been a neutral evaluator than were attorneys who had not used non-binding arbitration (19% vs. 7%). Attorneys who had used early neutral evaluation were more likely to have been a mediator than were attorneys who had not used ENE (43% vs. 33%). And attorneys who had used summary jury trial, compared to attorneys who had not used SJT, were more likely to have served as a mediator (43% vs. 34%), an arbitrator (72% vs. 58%), and a neutral evaluator (22% vs. 12%).

187. Attorneys who had used mediation were more likely to have taken a CLE than were attorneys who had not used mediation (36% vs. 21%). Attorneys who had used early neutral evaluation were more likely to have taken a CLE than were attorneys who had not used ENE (40% vs. 29%). And, attorneys who had used summary jury trial were more likely to have taken a CLE than were attorneys who had not used SJT (37% vs. 29%).

Table 5. Characteristics that Distinguished Between Attorneys Who Used ADR as Counsel in a Case and Those Who Did Not

Attorney Characteristics	Canonical Loadings (<i>r</i>)				
	Mediation	Binding Arbitration	Non-Binding Arbitration	Summary Jury Trial	Neutral Evaluation
served as mediator	.901	.475		.483	.355
served as arbitrator	.406	.873	.983	.761	
served as neutral evaluator	.524	.507	.301	.693	.940
had CLE in dispute resolution	.472			.407	.409
had law school course in dispute resolution					

In summary, gaining experience with a specific ADR process by serving as a third-party neutral in that process had a stronger relationship with whether or not attorneys used that type of ADR than did serving as a neutral in other ADR processes or taking a CLE in dispute resolution. The pattern of findings regarding the relationship of ADR education and experience with ADR use are consistent with those in prior sections regarding the relationship of these characteristics with ADR recommendations. Thus, having been a third-party neutral and having taken a CLE can influence attorneys' ADR recommendations not only directly but also indirectly through their relationship with ADR use.

V. CONCLUSION

The present study found that gaining experience with an ADR process as counsel in a case had by far the strongest relationship with whether attorneys advised their clients to try that process or to include a contract clause involving that process. Experience serving as a third-party neutral in a specific ADR process also was consistently related to whether attorneys recommended that process to clients. Having experience with one ADR process, as counsel or as a neutral, often was related to recommending other types of ADR. Having taken a continuing legal education course in dispute resolution had little relationship, and having taken a law school course had no relationship, with recommending ADR to clients, although ADR education had a greater impact for attorneys who had not used ADR as counsel.

Although the level of attorneys' ADR familiarity appears to be a key factor underlying the above findings, the context or role in which that knowledge or experience is gained also seems to be an important element. For example, even though attorneys who had served as a mediator were likely to be as or more familiar with the mediation process¹⁸⁸ than were attorneys who had used mediation as counsel, experience as counsel nonetheless had a stronger relationship with mediation recommendations than did experience as a mediator.¹⁸⁹ These findings would suggest that ADR familiarity that attorneys gained by using ADR as counsel in a case, compared to the same level of familiarity acquired by serving as a third-party neutral, is more relevant to the decisions they make in their role as counsel regarding whether to recommend ADR to clients. The relevance of the context in which ADR knowledge is obtained to decisions attorneys make about ADR as counsel in a case might also explain why CLEs in dispute resolution had some effect on ADR recommendations while law school courses did not.¹⁹⁰

Thus, the findings of the present study lend support to proposals to increase attorneys' familiarity with ADR as a way to increase the likelihood that they will recommend ADR to clients.¹⁹¹ More specifically, the findings suggest that efforts to increase attorneys' direct participation in ADR, especially in their role as counsel and to a lesser extent as a third-party neutral, will have a greater impact on their ADR recommendations and use than will more general education efforts. ADR education is likely to have more influence on ADR recommendations when attorneys have not used ADR as counsel, especially if it focuses on information relevant to attorneys' use of ADR in their practice.

Accordingly, policies that bring more cases, and therefore more attorneys, into ADR programs, such as by mandating ADR use in certain types of cases or by increasing the use of judicial referral, are likely to increase attorneys' ADR recommendations to clients.¹⁹² Short of mandating ADR use, policies that require attorneys to serve as a third-party neutral or to take a CLE

188. Most of the attorneys who had been mediators had received mediation training and had served as a mediator in more than ten cases.

189. See *supra* note 120 and accompanying text. Similar findings were observed for arbitration and neutral evaluation.

190. For other possible explanations of this finding, see *supra* text accompanying note 147.

191. See *supra* notes 72-76 and accompanying text.

192. Of course, a mandatory ADR program that overwhelmingly produced resolutions that attorneys viewed as less fair, less satisfactory, and less efficient would likely have a negative rather than a positive impact on attorneys' ADR recommendations. See e.g., Wissler et al., *supra* note 20, at 306. The present study had measures only of whether attorneys had used ADR, not of their assessments of their ADR experience, and thus could not address this issue.

in dispute resolution also would be expected to contribute to attorneys' increased ADR referrals and use.

Although attorneys' increased familiarity with ADR is likely to contribute to increased ADR referrals and use, factors other than ADR knowledge and experience also play a role in decisions regarding ADR recommendations and use. These factors include, among others, judges' active encouragement or ordering of ADR, the availability of programs in the attorneys' substantive practice area, and client policies regarding ADR use.¹⁹³ Thus, in addition to adopting procedures to increase attorneys' familiarity with ADR, developing mechanisms that remove other barriers to ADR use and that provide additional incentives also will be critical to expanding the voluntary use of ADR.

193. See e.g., *supra* notes 20-21, 104-108 and accompanying text.

