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40 Decision-Making in Alternative Dispute Resolution

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Introduction

Civil litigation is the method of last resort for the resolution of legal disputes. In many circumstances, it might also be an attractive one. Those who are able to secure a valid judgment in court have the ability to marshal governmental power to assist with collection or enforcement (Holmes, 1997/1897). Even so, as a method for conflict resolution, litigation is rare, and litigation to a final judgment even more so. People who find themselves in conflicts have numerous alternative methods for attempting to manage or resolve their disputes (Shapiro & Rosen, 1994). In a classic early survey of consumers who had experienced problems with products or services that they purchased, Best and Andreasen (1977) found that the majority avoided confrontation by either doing nothing (60%) or simply stopping doing business with the seller (6%). For those who did voice their concern, they overwhelmingly did so themselves (31%) by contacting the seller directly to complain, request returns or repairs, or withhold payment, rather than contacting third parties such as the Better Business Bureau or a lawyer (1–2%). Ross (1980) similarly found that approximately 96% of insurance claims for car crashes were settled before trial, many without even initiating legal action. Finally, even when litigation is used, Eisenberg and Lanvers' (2009) comprehensive review of research on civil-case outcomes indicated that about 70% are resolved by agreement or abandonment of legal claims through voluntary dismissal or default. Estimates of higher settlement rates in litigation, sometimes in excess of 95%, are generally based on a mistaken assumption that all cases resolved without a jury trial are settled. Consistent with Eisenber and Lanvers' (2009) findings, all of the most credible empirical studies report that approximately two-thirds of filed civil cases are resolved through settlement (Moffitt 2019).

This chapter provides an overview of psychological research on decision-making regarding whether to use processes other than civil litigation to manage private disputes. We begin with an overview of the three major alternative dispute resolution (ADR) processes: negotiation, mediation, and arbitration. We then turn to research on how disputants make decisions regarding processes and outcomes, considering

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conflict styles, cost–benefit analysis, situational constraints, and biased perceptions. We conclude the chapter with strategies for improving decision-making in alternative contexts and an identification of key areas for future research.

Dispute Resolution Processes

Litigation provides a highly structured process for parties to set forth the legal and factual bases for their dispute, culminating in a final judgment that can be enforced against the losing party by way of state power. Litigation is quite formal, mostly public, and fairly limited in terms of subject matter and remedies. Additionally, litigation usually requires the involvement of lawyers and can be expensive and time consuming.

Alternative Dispute Resolution (ADR) describes the range of approaches for conflict resolution outside of traditional civil litigation (Reynolds, 2012), including, when civil cases are filed, voluntary resolution of the cases through processes other than judgment by a judge or a trial. Generally speaking, ADR methods are informal and customizable, making possible private and creative agreements between disputants on matters that might not be cognizable in the traditional civil system (Menkel-Meadow, 2002). And, unlike litigation, many ADR processes can be used for crafting deals, not just resolving disputes (Goldberg, 2004).

The three major modern ADR approaches are *arbitration*, *mediation*, *and negotiation*. *Arbitration* is similar to litigation in that it features a relatively structured process and a third-party decision-maker (an arbitrator or arbitration panel) empowered to impose a decision upon the disputants. Efficiency and expertise are central concerns. Accordingly, the arbitration process is often less complex than conventional litigation and the arbitrator is often someone with subject-matter-significant experience in the dispute context (Conklin, 2016). Unless the parties have agreed otherwise, an arbitrator's decision is binding and largely unappealable (Cole, 2001).

Mediation involves a third-party neutral who serves as a process guide for the parties but does not have the power to impose a decision. Mediation is sometimes referred to as "facilitated negotiation" because the mediator helps the disputants come to a consensual agreement grounded in each party's self-determination and autonomy (Berman, 1995). Relationships, emotions, and interpersonal discord are often central concerns of mediation (Bush & Folger, 1994), as are as the underlying "interests" that inform the parties' positions in the dispute (Fisher et al., 2011). Mediators can specialize in different styles, from purely facilitative, process-oriented approaches to more directive ones in which they opine on merits and possible outcomes. Mediators might also specialize in different substantive areas, such as commercial, construction, or family disputes (Moffitt, 2005). Parties who reach consensual agreement in mediation often memorialize the terms of the agreement in a contract.

Negotiation is bargaining between two or more parties around the potential terms of an agreement. No third-party neutral is present. Parties in a negotiation can draw

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on laws, social norms, or any other of a wide set of considerations when deciding whether to resolve their disputes (Fiss, 1984; Reynolds, 2012). Negotiation has thus been referred to as the "wild west" of dispute resolution because it has so few constraints around process and substance (Hollander-Blumoff, 2010). That said, negotiations are often described in terms of dichotomies such as hard/soft, competitive/cooperative, people-focused/problem-focused, distributive/integrative, or positional/interest-based (Fisher et al., 2011). The dichotomies help categorize and explain expectations, strategies, and behaviors in private bargaining. As in mediation, negotiators can choose to make their agreements legally binding through contract.

The three general approaches differ in terms of process control and outcome control (Thibaut & Walker, 1975). In arbitration, parties can agree to particular procedural rules (American Arbitration Association, 2021) but otherwise have little control because the arbitrator is the final decision-maker. Mediation, by contrast, affords disputants more process control and outcome control, given that mediation is customizable and mediators cannot impose a binding decision. That said, as expert third-party "process guides," mediators can wield considerable influence over process and outcome, so participants in mediation cannot be said to have full control over either (Welsh, 2004). Negotiations have no third-party neutrals involved and no outside process to follow. In negotiation, disputants maintain complete control over process and outcome.

Although negotiation, mediation, and arbitration are used far more often than litigation, they are not separate from it. The "shadow of the law," defined as an awareness of the legal entitlements that would be present in litigation, often affects which ADR processes are used and whether and how the parties ultimately come to agreement (Mnookin & Kornhauser, 1979). Even when disputants turn to the courts, they frequently end up in court-connected ADR processes such as mediation or settlement conferences, either by choice or as a mandatory prerequisite to litigation (Nussbaum, 2016), and civil cases are frequently resolved through negotiated settlement.

Decisions About Processes

How do disputants decide which process or processes to use to resolve their conflicts? Consistent with the traditional distinctions in the field of psychology (Snyker & Ickes, 1985), we organize our discussion of answers to this question in terms of individual differences in how people tend to approach conflict and the influence of situational factors, including cultural, structural, and legal considerations or, as is often the case, requirements.

Conflict Styles

Psychological consideration of conflict decisions dates back to the origin of the field itself (Deutsch, 1995). In the last half of the twentieth century, personality theories converged on two-dimensional models of individual differences in approaches to

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conflict (Tehrani & Yamini, 2020). In these models, people tend to handle conflict systematically in ways that reflect (a) low or high concerns for themselves or their own interests and (b) low or high concern for others or the others' interests (Rahim, 1983; Thomas & Kilmann, 1978). All of the possible combinations of levels of concern for self and concern for others are often simplified into four quadrants representing distinct conflict styles or modes: *Avoiding/withdrawing* (low concern for self, low for others); *dominating/competing* (high concern for self, low for others); *obliging/accommodating* (low concern for self, high for others); and *collaborating/problem-solving* (high concern for self, high for others). A fifth conflict style, *compromising* (moderate concern for self and moderate for others), is often added in the center of the quadrants, at the midpoint between low and high concern for self and others.

Psychologists and others have examined the influence of these conflict styles on people's approaches to conflict in a wide range of domains and roles, including commercial transactions (Beverland et al., 2009), workplaces and business organizations (Rahim, 2017), hospitals and nursing facilities (Nicotera, 2021), primary and secondary schools (Johnson & Johnson, 1996), marriages (Islami, 2016), mediation services (Cominelli & Lucchiari, 2017), and in legal contexts (Goldfien & Robbennolt, 2007). In addition, a fairly sizable body of research examines the antecedents of conflict styles in terms of stable underlying personality traits, cultural backgrounds, and roles of the people involved. With respect to personality traits, in their meta-analysis, Tehrani and Yamini (2020) found that the strongest positive associations were between the traits of openness to experience, conscientiousness, extraversion, and agreeableness and a collaborating conflict style; between agreeableness and a compromising style; and between neuroticism and an avoiding style. Cross-culturally, in their meta-analysis, Holt and DeVore (2005) found that the largest differences in conflict styles were in the tendencies of those from collectivist cultures (e.g., Japan, Mexico) to favor avoiding and compromising approaches, relatively speaking, whereas members of individualistic cultures (e.g., United States, Germany) tend to favor dominating approaches. Similarly, avoiding and compromising approaches tend to be used more between peers, whereas dominating approaches tend to be used more with subordinates. And, in conflicts with superiors, people tend to favor accommodating and avoiding approaches to conflict (Holt & DeVore, 2005).

How do conflict styles impact disputants' decisions regarding what processes to use? Social psychological theory suggests that individual differences tend to have the largest influence on perception, judgment, decisions, and behavior where people have the most discretion (Snyder & Ickes, 1985). For aggrieved people, this is in the decision about whether to address the conflict directly at all, or, instead, to "lump it" by taking one's losses (Poppe, 2019). For many disputes, particularly those with relatively low stakes, involving important social or business relationships, or when necessary emotional or financial resources are low, avoidance is likely the most common approach (Hamilton, 2009; Leung, 1988; Tjosvold & Sun, 2002).

Some people, however, are more likely to directly confront those with whom they have disputes. Research on the southern culture of honor, for example,

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indicates that White males from the south-eastern United States are more likely to respond to even small perceived offenses aggressively, often including violence or other forms of "self-help" (Cohen et al., 1996; Saucier et al., 2018). The confrontational tendency has been linked to subcultural norms of masculinity and reputation common to rural societies, in which reliance on authorities or formal processes of law enforcement and conflict resolution is impractical or impossible (Cohen et al., 1996).

Perceived Costs and Benefits

Along with individual differences in conflict styles, disputants' decisions about which process to use in a particular case are affected by perceived costs and benefits in terms of time and money, perceived fairness, and advice of counsel.

First, disputants' decisions about a dispute resolution process are at least partially a function of a rational, cost–benefit analysis in which each disputant weighs the risks and opportunities of each process in light of their own self-interest (Robbennolt, 2014). If a disputant believes she has a strong legal case, for example, that disputant might strategically select the traditional adjudicative process. A disputant who is concerned that they might be more exposed to bullying or threats in a less formal process might similarly favor litigation. But if the case involved an ongoing relationship or sensitive reputational concerns, the disputant might opt for a more private resolution processes, such as mediation. Generally speaking, when disputants recognize that their material interests are partially aligned or that the conflict implicates other interests, such as reputation or future dealings, disputants might select processes designed to uncover mutually beneficial outcomes or with the flexibility to protect their other interests, such as negotiation or mediation (Cheung, 1999; Tjosvold & Sun, 2002).

A second factor influencing disputants' process choices stems from their conceptions of procedural justice. Empirical research indicates that disputants care about the process by which their disputes are resolved, not just about the final results. In particular, disputants want to have their voices heard, to be treated with respect, to trust the decision-maker(s), and to understand the decision-making process (Shestowsky, 2016; Tyler & Lind, 2001; Welsh, 2001). For disputants choosing between dispute resolution processes, considerations of procedural justice might figure as prominently as "rational" and often financially focused cost–benefit calculations.

Third, disputants' decisions about dispute resolution approaches are often significantly shaped by the advice of their lawyers or other advisors. Indeed, they are often unaware of the existence of ADR options, unless they are advised by their lawyers (Shestowsky, 2017). The advice and initial impressions, however, might not accurately reflect their own preferences, as assessments of ADR processes by disputants who have used them are frequently unrelated to their prior expectations (Shestowsky, 2014).

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Situational Constraints

Disputants sometimes have no meaningful choice regarding ADR processes, thus eliminating the effects of individual differences and cost–benefit considerations on decision-making. Over the last three decades, so-called "mandatory" arbitration clauses have become common almost to the point of ubiquity in consumer contracts, employment contracts, and health care agreements (Szalai, 2013). Although such clauses were once considered unenforceable, a line of Supreme Court cases interpreting the Federal Arbitration Act has created a legal landscape in which disputants are bound to resolve disputes through arbitration rather than through litigation (Sternlight, 2005). In theory, such parties exercised choice – namely, by agreeing to the arbitration clause before any dispute even arose. The reality of boilerplate terms and adhesion contracts, however, means that most people do so with no meaningful understanding of the clauses to which they "agreed" (Sovern et al., 2015).

Outside of contracts, legal process rules themselves also regularly mandate ADR processes. For example, parties in small claims proceedings and parents seeking a divorce are often required to enter into mediation (Wissler, 1997). Similarly, state and federal procedural rules generally require parties to negotiate in an effort to reach agreement before requesting judicial relief about issues that arise during a case (Riedy & Greenwald, 2015). Less commonly, legal rules might prohibit mandatory ADR with respect to certain types of claims. For example, the United States Congress recently passed the Ending Forced Arbitration of Sexual Assault and Sexual Harassment Act of 2021 (2022), making it possible for survivors of sexual assault and harassment to avoid arbitration and bring their cases in open court if they choose.

Decisions About Outcomes

In litigation and arbitration, third parties have the authority to impose outcomes. In negotiation and mediation, outcomes are determined by consent of the disputants. What affects these decisions? As with decisions about process, discussed earlier, conflict styles likely play a role. Most of the research on whether disputants ultimately agree, however, focuses on circumstances of the particular dispute, including considerations regarding costs and benefits and the psychological processes that result in deviation from basic rational-actor models.

Rational Actors

The dominant conceptualization of disputants in the literature is based on a simplistic rational-actor model in which disputants compare potential terms in a negotiation to their most favorable prospect if no agreement is reached, known as their *best alternative to a negotiated agreement* (BATNA; Fisher et al., 2011). In a dispute in which interests are diametrically opposed and the only question is who gets how

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much, disputants, in theory, compare their settlement *reservation values* – namely, the point of indifference between settlement and nonsettlement. If disputants seeking payment have reservation values that are less than that of the disputants from whom payment is sought, then there is a *zone of possible agreement* (ZOPA; Arrow et al., 1995) and consensual resolution should occur.

Substantive and procedural laws, the facts of the case, and related litigation circumstances and strategy all affect decisions about agreement because they affect the disputants' perceptions of each of their BATNAs, which changes their reservation values. Disputants in negotiation and mediation thus bargain in the shadow of the law by assessing the case's value in reference to their understanding of their legal entitlements and liabilities (Mnookin & Kornhauser, 1979). And decisions during litigation and negotiation are connected in that they can affect perceptions not only of the litigation value of a case, but also its potential settlement value (Moffitt, 2019).

Psychological Barriers

Most real-world contexts are not as clean as this simplistic model (Robbennolt, 2014). Disputants often have agents (e.g., lawyers, and constituents, e.g., partners, colleagues, or the public) whose interests are not perfectly aligned and who might have the ability to affect the terms of any agreement (Arrow et al., 1995). In addition, although disputing parties frequently have some common interests, conflicts often are, or are perceived to be, dominated by opposition. This can lead to situations in which a ZOPA exists but the disputants act in ways that obscure it, such as by withholding information, or are otherwise impacted by psychological processes that undermine consensual resolution (Mnookin, 1993). In their comprehensive literature review, for example, Friend and Malhotra (2019) identified 48 conceptually distinct psychological barriers to conflict resolution, which they traced to 26 unique cognitive, affective, or motivational processes (see also Brett & Thompson, 2016; Thompson et al., 2010).

Within the larger phenomenon of motivated reasoning, defined as the tendency for people to justify their decisions based on prior beliefs, attitudes, or positions instead of evidence, we focus on three related barriers: Biased search for and assimilation of information, reactive devaluation, and the hostile media effect. Experience suggests that these barriers, in particular, are a common feature of disputes and, when present, make voluntary resolution of the dispute difficult. Moreover, as discussed in the next section, they are the sorts of barriers that mediation and other similar conflict management processes are designed to help people in conflict to overcome.

Biased Perception of Facts

One motivated process, akin to confirmation bias (Nickerson, 1998), is for disputants to selectively search for, attend to, and thus recall information that supports their perspective or position (see Chapter 20 of this volume for more on this topic). The result is illustrated in Hastorf and Cantril's (1954) classic study of Princeton and Dartmouth football fans observing a particularly rough game. The fans of each team

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tended to understand the conflict over how the game was played in a way that put themselves and their team in a positive light (e.g., that the other team started it and their team's players were just protecting themselves), but also perceived and recalled facts (e.g., the number of fouls committed by each team) in ways that supported their biased understandings. Similarly, in an experimental study, Kahan and colleagues (2012) showed ideological partisans identical video footage of a protest that the researchers told participants was either in opposition (a) to abortion or (b) to exclusion of openly gay people from military service. The extent to which participants recalled seeing events (e.g., protestors obstructing pedestrians) depended on their ideological position on the issue ostensibly being protested. As a result, participants who had the same ideological perspective but who thought the protest was about a different topic disagreed sharply on their perceptions and recollections of what occurred (see also Lord et al., 1984). Moving to ADR processes, in a set of negotiation experiments, Thompson (1995) found that negotiators and partisan observers tended to misperceive what the other side wanted in a negotiation significantly more often than did unaffiliated observers. Finally, being party to a conflict can bias the perception of and judgment about facts even of those who have financial incentives to be accurate or who are professional representatives, such as lawyers (Melnikoff & Strohminger, 2020).

Biased Perceptions of Offers

A second motivated process common to people involved in serious disputes is the tendency to prefer what the opposing side does not. As a result, disputants can reject settlement offers that, in material terms, fall within the ZOPA simply because the opposition was willing to offer it. In psychological terms, such *reactive devaluation* is the process of revising the perceived value of terms in a potential agreement based upon who proposed them. In their seminal set of studies on the phenomenon, Maoz et al. (2002) asked Jewish- and Arab–Israeli participants to rate the favorability of the proposed terms offered by the Israeli and Palestinian delegations during peace talks but experimentally altered identification of which party purportedly proposed them. Their results showed that purported authorship affected favorability ratings enough that, when Jewish Israeli participants thought the authorship was reversed, they rated the terms of the actual Israeli delegation's proposal more negatively than the terms of the actual Palestinian delegation's proposal (see also Ross, 1995).

Like many biases, reactive devaluation tends to be most influential when the terms being offered are somewhat vague and might require interpretation as to the exact implementation, as frequently occurs in the initial stages of a negotiation (Kahneman, 1992; Moaz et al., 2002). As such, reactive devaluation can be thought of as part of the more general tendency that people in conflict have to assume that all of their interests are diametrically opposed to those of the other side and thus, often falsely, that there are no areas of agreement (de Dreu et al., 2000). Finally, consistent with motivated processes more broadly, recent research on reactive devaluation in commercial construction disputes suggests that reactive devaluation is rooted in

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disputants' overconfidence in their own positions, selective attention to information that supports their own respective perspectives, and distrust (Cheung et al., 2020).

Biased Perceptions of Third Parties

A third motivated psychological process is the tendency for disputants to view neutral third parties who disagree with them as biased. Known as the *hostile media effect*, much of the research on this process has focused on perceptions of news coverage (Gunther & Schmitt, 2004; Hansen & Kim, 2011). In their classic study, Vallone et al. (1985) surveyed Republicans and Democrats who believed the news media was biased and learned that 89% viewed it as biased against their preferred candidate. Similarly, when the researchers showed pro-Israeli and pro-Arab participants identical news coverage of the Beirut massacre, members of each group viewed it as unfairly unfavorable to their side. In the ADR context, Arad and Carnevale (1994) experimentally altered the source of information in mediation and found that partisans rated a proposal from a neutral mediator as more unbiased, and the mediator as more trustworthy, when the proposed terms favored their side than when the proposed terms were neutral. By comparison, neutral observers' ratings had the opposite pattern, viewing the third-party mediator as more trustworthy and the proposed terms as fairer when the terms were neutral. Similarly, Harth and Shnabel (2015) found in two experimental studies that conciliatory messages and reminders of a party's own past transgressions were less effective at promoting conflict resolution when conveyed by a neutral third party.

Improving Decision-Making in ADR

As explained earlier, disputants in negotiation and mediation are susceptible to psychological processes that can undermine the efficient resolution of disputes. Accordingly, strategies for improving decision-making in ADR are necessary to encourage outcomes that are sensible, durable, timely, cost effective, responsive to disputants' interests and values, and consistent with justice. Research and experience suggest that four primary strategies are useful in this regard.

First, disputants attempting to negotiate a resolution can be more effective simply by becoming more astute about conflict itself. Pruitt and Kim (2004) famously described negotiation as "mild overt conflict," which means that to negotiate a dispute is to address conflict with more conflict. Disputants who negotiate without a basic understanding of conflict dynamics thus often find themselves unconsciously making suboptimal decisions while being caught up in emotion, misled by biases, pulled into escalation and other pernicious disputing tendencies, and incapable of managing the substantive demands of the situation. Learning more about the conditions that cause and escalate conflict – including different perceptions, strong emotions, and entrenched commitments – can help these disputants navigate conflict dynamics more successfully while seeking workable resolutions (Stone et al., 2010). Basic empathetic behaviors, such as "considering the opposite" and thinking about

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the other side's perspective in a dispute, for example, can reduce bias and promote settlement (Frenkel & Stark, 2015). Similarly, making (or receiving) apologies has been shown to affect settlement value, rates, and satisfaction (Robbennolt, 2008). Of course, empathy and apologies alone do not necessarily lead to superior or even defensible outcomes in alternative processes, but these kinds of behaviors can expand and complicate a disputant's perception of the situation, which in turn can help curtail harmful behaviors that could make the dispute impossible to resolve privately (Cobb, 2013).

Second, disputants might benefit from becoming smarter not just about conflict generally but about negotiation specifically. Guthrie has argued that lawyers are less vulnerable to cognitive biases in decision-making because, at least in part, they are trained to recognize and compensate for these biases (Guthrie, 2003). A similar logic could apply to nonlawyer negotiators who study negotiation. There is no shortage of courses and texts devoted to the theory and practice of negotiation, from both academic and popular sources. Even high-level and somewhat simplistic treatments of negotiation can help disputants develop a rudimentary understanding of the substantive elements of negotiation, such as issues, interests, ZOPA, criteria, and BATNA. Moreover, most popular and academic books on negotiation provide some insight into disputing contexts, including the emotional, psychological, and interpersonal dimensions of the dispute (Fisher et al., 2011; Mnookin et al., 2000; Voss, 2016).

Third, disputants could improve decision-making in ADR by enlisting experts, such as lawyers. As Guthrie (2003) pointed out, legal training can make lawyers less susceptible to biases and decision errors. In a similar vein, Gilson (1984) theorized that business lawyers play an important corrective role in client decision-making, because these lawyers identify and help ameliorate the impact of distortions such as transaction costs, differing time horizons, and asymmetric information. In other words, business lawyers create value in negotiation by designing transactions that allow clients to behave as if their idealized (and usually wrong) assumptions about reality were true. This observation about the value of legal training in transactional decision-making might apply to lawyers working on disputes as well. Compiling studies across legal fields, Ashenfelter et al. (2013) pointed out that retaining counsel generally had a positive impact on outcomes for disputants, particularly in cases when the lawyers were facing off against unrepresented parties.

In that same article, however, the researchers concluded that when lawyers were pitted against other lawyers, the results were not demonstrably better than what the clients could have achieved without any representation at all. This conclusion suggests that legal training might sometimes destroy value in ADR contexts, which makes sense given that legal training is often predicated on an adversary system bounded by rules and overseen by a neutral decision-maker. ADR contexts, by contrast, require participants to govern themselves and take responsibility for fashioning mutually agreeable deals in a proportionate way. For this reason, many ADR scholars have called for reimagining and expanding lawyers' professional identities to include creativity, problem-solving, therapeutic justice, and nonpartisanship (Menkel-Meadow, 2001; Mnookin & Gilson, 1994; Schneider, 1999).

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Initiatives in collaborative law and cooperative law (Lande, 2009; Mosten, 2008), as well as interest-based negotiation training in law schools (Moffitt, 2010), are evidence of a professional class attempting to prepare itself to be more effective in alternative contexts.

The fourth strategy for improving decision-making in ADR is for disputants to seek third-party assistance by way of mediation. Mediators help guide the disputants through a decision-making process that is less prone to the errors that can arise from strong emotions, imperfect information, unconscious conflict reactions, and simply not knowing how to negotiate constructively. For example, mediators create the conditions for meaningful participation and resolution by giving everyone an opportunity to speak and by modeling constructive communication habits by reframing, mirroring, asking open-ended questions, validating emotions, and encouraging dialogue (Golann, 2013). Moreover, in situations where emotions or relationships are central concerns, mediators can improve decision-making by addressing relational problems separately from substantive issues (Bush & Folger, 2004). Mediators can help the parties to frame or reframe issues in ways that dampen potential decision biases. And, under some circumstances, mediators might provide suggestions as means of counteracting reactive devaluation effects, by serving as the visible "source" of possible settlement terms (Arrow et al., 1995; Moffitt, 1997). Although mediators are not immune from bias or decision errors – in fact, they might have incentives to press the parties to settle – their presence can afford the parties a sense of procedural justice and fairness, so long as they do not inordinately pressure the parties and take steps to avoid being perceived as biased (Welsh, 2017).

Areas for Further Research

There is an extensive research literature examining factors that influence people's preferences, strategies, and outcome decisions within particular approaches to conflict resolution (e.g., negotiation, mediation), including the extent to which the decisions are aligned with those people's interests. By comparison, very few empirical studies examine factors that systematically influence people's decisions about which formal approaches to select to resolve their conflicts. Our review suggests that conflict styles, relationships and power dynamics, size of the stakes, legal agreements and requirements, and advice of counsel all likely play a role in whether people decide to use mediation, arbitration, negotiation, litigation, or to just walk away from conflict. Significant additional work in which the decision between different formal approaches (e.g., mediation or arbitration) is a dependent variable is needed, however, to assess the conditions under which these factors and others are most influential, and to better understand whether and when people's interests would have been better served with another approach. In this way, it might be possible to improve policies regarding which ADR processes to recommend or require and to provide better guidance for disputants regarding which to select.

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Conclusion

In most ADR contexts, neither the state nor outside third parties impose solutions upon disputants. Rather, the disputants themselves decide which processes to use, what to include in proposals, and whether to bind themselves to agreements. Empowering disputants to resolve their own conflicts on their own terms is what makes ADR valuable, from the perspectives of the disputants and of society. Generally speaking, everyone benefits when disputants are able to avoid burdening the public court system and craft sensible, durable, creative agreements that address all aspects of the conflict at hand. But it is also true that when disputants are responsible for decision-making around processes and outcomes, they can struggle with conflict-related psychological and structural barriers, making poor decisions that lead to suboptimal or even unjust results. For this reason, researchers, parties, and practitioners must continue to evaluate private adjudication and ADR carefully to identify needs, develop processes, and promulgate strategies that support and empower individual disputants while equipping process experts and institutional designers to work toward more effective and just alternative approaches to dispute resolution.

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