

What Empirical Research Tells Us About the Effect of Lawyers on ADR Processes and Outcomes

Introduction

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_____ In a majority of cases in family and limited jurisdiction courts, such as small claims and housing courts, one or both litigants are unrepresented. In general civil jurisdiction cases, a smaller but not insignificant number of litigants also are unrepresented. Questions have been raised whether unrepresented litigants can obtain a fair result in "traditional" litigation given their relative lack of information, compared to lawyers, about court forms, processes, personnel, and procedures; lack of knowledge about substantive law and rules of evidence and procedure; and lack of case presentation and negotiation skills.

Several responses to the growing numbers of unrepresented litigants in civil courts have been proposed. One centers on the courts doing more to improve unrepresented litigants' ability to handle their cases themselves, such as by providing simplified forms and instructions as well as increased assistance by court personnel. Another focuses on increasing the availability of legal representation, such as through increased pro bono representation, unbundling of legal services, or limited purpose representation. A third proposal suggests that courts provide alternative dispute resolution (ADR) programs, particularly mediation, as a way to enhance unrepresented litigants' access to justice.

Existing court-connected ADR programs, however, do not necessarily welcome unrepresented litigants. Some programs routinely exclude cases with unrepresented litigants from mandatory referral to ADR, as in many federal civil court civil mediation programs and all federal appellate mediation programs. Other programs, such as in federal bankruptcy courts, refer only certain types of matters to mediation when one or both parties are unrepresented. By contrast, the mandatory referral of cases to arbitration in state general jurisdiction civil courts takes place without regard to litigants' representational status. Similarly, in family and small claims courts, cases are routinely referred to mediation even though many involve unrepresented parties on one or both sides of the case. Obviously, different ADR programs have reached different conclusions about the benefits associated with representation and the risks associated with being unrepresented.

The concerns about whether unrepresented parties can achieve a fair result in ADR processes include many of the concerns raised about unrepresented parties in litigation, as well as additional concerns specific to the ADR setting. Unrepresented parties may not understand the potential advantages or disadvantages of ADR processes well enough to make an informed decision about whether to use ADR when its use is voluntary. In addition, unrepresented parties may not understand how the ADR process operates or how it fits into the overall litigation process; that being required to mediate does not mean they are required to settle; that a mediator

or neutral evaluator cannot give them advice on settlement proposals nor decide their case; or what the implications of proposed settlements or the arbitrator's decision are and what their outcomes might be if they proceed with litigation.

The effect of lawyers on mediation has long been debated. Some commentators maintain that lawyers have a negative impact on the mediation process and outcome by narrowing its focus to legal norms and solutions, diminishing its problem-solving orientation and non-adversarial nature, limiting the parties' participation during the session, and increasing cost and delay. Others maintain that lawyers contribute to the fairness of the mediation process and outcome by preparing their clients for the mediation process, ensuring they can fully communicate their concerns, providing them with needed information so they can evaluate settlement proposals and non-settlement options, and counteracting settlement pressure from the mediator or the other side.

This paper will review the empirical literature on the impact that representation, or lack of representation, has on litigants' perceptions and outcomes in ADR. The paper will examine whether research supports the assumed benefits and costs of being represented by counsel in ADR, as well as the asserted risks of being unrepresented. The paper will also review the empirical literature on the impact of representation on outcomes in litigation in an effort to extrapolate from those findings to ADR processes. The paper will conclude with a discussion of whether, under what circumstances, and in what ways, representation may be beneficial or detrimental in ADR.