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## Lawyerless Dispute Resolution: Rethinking a Paradigm

Jean R. Sternlight

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# LAWYERLESS DISPUTE RESOLUTION: RETHINKING A PARADIGM

*Jean R. Sternlight\**

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### INTRODUCTION

Do participants in mediation and arbitration have attorneys? Do they need them? Although the phenomenon of pro se litigation has received substantial attention in recent years,<sup>1</sup> most commentators and policymakers have failed to focus on whether participants in mediation, arbitration, or other forms of alternative dispute resolution (“ADR”)<sup>2</sup> need legal assistance.<sup>3</sup> Likely, the failure to focus on the possible need for representation

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1. See, e.g., Russell Engler, *Connecting Self-Representation to Civil Gideon: What Existing Data Reveal About When Counsel is Most Needed*, 37 FORDHAM URB. L.J. 37, 38 (2010) (urging that programs to assist self-representation and programs to provide counsel all be considered part of a larger endeavor to enhance access to justice); Andrew Scherer, *Securing a Civil Right to Counsel: The Importance of Collaborating*, 30 N.Y.U. REV. L. & SOC. CHANGE 675 (2006) (encouraging collaborative efforts to secure a civil right to counsel); Carroll Seron, *The Impact of Legal Counsel on Outcomes for Poor Tenants in New York City’s Housing Court: Results of a Randomized Experiment*, 35 LAW & SOC’Y REV. 419 (2001) (finding that the provision of legal counsel produces large differences in outcomes for low income tenants in housing court).

2. In a prior article I urged that the phrase ADR is not useful, because the processes grouped together are more dissimilar than alike. Jean R. Sternlight, *Is Binding Arbitration a Form of ADR?: An Argument That the Term “ADR” Has Begun to Outlive its Usefulness*, 2000 J. DISP. RESOL. 98 (2000). I still believe that. Nonetheless, I once again find it helpful to use the phrase to describe dispute resolution processes that are not litigation because others so frequently group these processes together.

3. To the extent commentators have focused on the issue of legal representation or its absence in ADR, the discussions have typically focused either on how mediators or arbitrators can help pro se parties. See, e.g., Russell Engler, *And Justice for All—Including the Unrepresented Poor: Revisiting the Roles of the Judges, Mediators, and Clerks*, 67 FORDHAM L. REV. 1987 (1999); Cynthia E. Nance, *Unrepresented Parties in Mediation*, 15 NO. 3 PRAC. LITIG. 47 (2004). For a discussion of how lawyers ought to behave when participating in mediations and arbitrations, see HAROLD I. ABRAMSON, *MEDIATION REPRESENTATION: ADVOCATING IN A PROBLEM-SOLVING PROCESS* (2004); JOHN COOLEY, *ARBITRATION ADVOCACY* (2003); DWIGHT GOLANN, *MEDIATING LEGAL DISPUTES: EFFECTIVE STRATEGIES FOR LAWYERS AND MEDIATORS* (1996); Jean R. Sternlight, *Lawyers’ Representation of*

in proceedings is based on an often unstated premise that because ADR is non-adversarial, or at least less adversarial than litigation, the need for representation in ADR is necessarily, or at least typically, less than the need for representation in litigation.<sup>4</sup> Since we have not yet come close to providing all litigants with attorneys, some may say we should not waste our time or energy thinking about the possible unmet need for attorneys in ADR processes. Perhaps the failure to focus on the possible need for representation in ADR is also based on a misimpression that most mediations and arbitrations are informal affairs in which attorneys could do little good and might even disrupt the process.<sup>5</sup>

This Article suggests that our failure to focus on the possible need for representation in mediation and arbitration is fundamentally misguided. Although legal representation is no doubt more important in some contexts than others, it is wrong to make the binary assumption that legal representation is always more important in litigation than in ADR processes. Whereas some may assume that ADR processes are uniformly informal and supportive, it turns out that arbitration, and even mediation, can often be quite formal and adversarial. In arbitration, witnesses are often called, expert testimony presented, and legal arguments made. As for mediation, it too can often involve legal arguments, documents, and presentations by lawyers, clients, and experts. Indeed, as compared to litigation, mediation may give attorneys more opportunity to intimidate their opponent with visual evidence and arguments that the rules of evidence might not permit.<sup>6</sup>

If lawyerless ADR is problematic, it is a pervasive issue. Mediation and arbitration have become increasingly prevalent as part of our justice system.<sup>7</sup> Many jurisdictions are now not only offering mediation and arbitration as options, but also taking the further step of mandating that parties proceed to ADR prior to, or sometimes in lieu of, resolving their claims in court.<sup>8</sup> In addition, many contracts also require that disputes be resolved privately through mediation or arbitration, rather than through litigation.<sup>9</sup>

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*Clients in Mediation: Using Economics and Psychology to Structure Advocacy in a Nonadversarial Setting*, 14 OHIO ST. J. ON DISP. RESOL. 269 (1999).

4. *See infra* Part II.A.3.

5. *See infra* Part II.A.3.

6. *See* Lawrence M. Watson, *Effective Legal Representation in Mediation*, 2 ALTERNATIVE DISPUTE RESOLUTION IN FLORIDA ch. 2, 16-20 (1995) (providing examples of how attorneys can use charts, photos and other techniques to convince an opposing client to settle a dispute).

7. Some praise this trend and others bemoan it, but that is a discussion for another day. ADR has clearly arrived, for better or for worse.

8. *See infra* Part II.

9. Some also suggest that ADR may be a way to improve access to the justice system. *See, e.g.*, DEBORAH RHODE, ACCESS TO JUSTICE 86 (2004) (urging that ADR can be part of a

Thus, ADR may be the only form of dispute resolution many disputants get. As for representation, some jurisdictions proscribe the participation of attorneys in court-connected ADR processes.<sup>10</sup> Other jurisdictions or ADR providers may permit or even encourage participants to bring attorneys,<sup>11</sup> but the reality is that participants often do not or cannot retain counsel.<sup>12</sup>

Part I will discuss the empirical side of these issues. How often or under what circumstances do participants in mediation and arbitration have attorneys? What appears to be the significance of whether parties are represented in ADR processes? Specifically, is such representation helpful to the party? Does it change the nature of the ADR process itself? If representation is important, need the representative be an attorney? Unfortunately, as this entire area has been under-studied, we will not find clear answers to all of these questions. But, we will learn that attorneys do seem to help in ADR, at least sometimes, and that while attorneys or sometimes non-lawyer representatives do participate in ADR, many parties in ADR are also unrepresented.

Part II will examine why lawyers might be important in ADR, drawing on the literature and case law discussing the significance of lawyers in other contexts. This analysis will cause us to rethink our assumptions regarding whether and when attorneys might be helpful. Case law and policy discussions have stated (with little explanation) that it is much more important to have legal representation in adversarial than non-adversarial settings. Such statements seem to be based on another unchallenged assumption—that the primary value added by lawyers is their knowledge and skill with respect to such matters as fact gathering, legal analysis, procedural rules, and presentation of evidence. This assumption has led people to conclude that lawyers are most needed in complex cases, adversarial fora, and where the disputants are not particularly well-educated or articulate. However, as Part II.B will discuss, recent social science research suggests that lawyers

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cluster of ways to improve access to justice); Rob Rubinson, *A Theory on Access to Justice*, 29 J. LEGAL PROF. 89, 142-52 (2004) (asserting that mediation, if properly structured, can improve unrepresented clients' access to justice).

10. See *infra* notes 42-47 and accompanying text. Some private programs, such as employer-imposed arbitration programs, may also proscribe employees from bringing counsel with them to the ADR procedure. E.g., Mei L. Bickner et al., *Developments in Employment Arbitration: Analysis of a New Survey of Employment Arbitration Programs*, DISP. RESOL. J., Jan. 1997, at 80.

11. See, e.g., UNIFORM ARBITRATION ACT § 16 (2000), available at <http://www.law.upenn.edu/bll/archives/ulc/uarba/arbitrat1213.htm> (providing that disputants must be permitted to bring counsel to an arbitration).

12. On the other hand, it is also true that some jurisdictions refuse to mandate mediation if one or all parties are unrepresented. See Roselle L. Wissler, *The Effectiveness of Court-Connected Dispute Resolution in Civil Cases*, 22 CONFLICT RESOL. Q. 55, 71 (2004).

may also play other roles, such as balancing power inequalities or providing emotional support. Thus, the need for lawyers may be even greater in simpler kinds of cases than it is in more complex matters. Based on lawyers' contributions in terms of knowledge and skills as well as power balancing and emotional support, Part II.C concludes that legal representation may often be critically important in ADR processes. Part II.D rejects the idea that neutral arbitration and mediation can entirely take the place of attorney advocates. While some may argue that the presence of attorneys may at times undercut the value of mediation or arbitration, Part II.E concludes that this idea is often overstated. Finally, Part II.F considers whether non-lawyer representatives ("NLRs") are as effective as attorneys in serving clients' interests in ADR. While recognizing that this is at times true, this Article asserts that NLRs are no more inherently appropriate in ADR proceedings than they are in litigation. Thus, while we ought to reconsider the extent to which prohibitions on non-attorney representation may impinge on disputants' access to justice; it is a mistake to assume that non-attorney representation is more appropriate in ADR than in litigation.

Finally, Part III will consider the practical implications of the conclusion that disputants in ADR often need legal representation. Because many disputes will be finally resolved in ADR and because legal representation can be equally or even more important in ADR than in litigation, we need to focus simultaneously on improving representation in both ADR and litigation. Part III suggests that these insights need to be considered by courts regulating ADR processes and examining right-to-counsel arguments in those processes, by policymakers examining how access to counsel can be improved, and by attorneys and legal service organizations determining how to allocate their scarce resources.

### I. AN EMPIRICAL EXAMINATION OF LEGAL REPRESENTATION IN ADR

As Professor Wissler emphasizes in her valuable article for this symposium, very little empirical work has been done examining attorneys' role and impact in mediation.<sup>13</sup> We similarly know very little about the extent to which participants in arbitration are represented by attorneys, nor the degree to which legal representation in arbitration is significant. While multiple books and articles now provide guidance to attorneys regarding *how* to participate in mediation<sup>14</sup> or arbitration,<sup>15</sup> most of these works do not ex-

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13. Roselle L. Wissler, *Representation in Mediation: What We Know from Empirical Research*, 37 *FORDHAM URB. L.J.* 419, 426 (2010) (noting that only a small number of studies have been conducted in only a few mediation contexts).

14. See, e.g., ABRAMSON, *supra* note 3; JOHN COOLEY, *MEDIATION ADVOCACY* 15-18 (2002); Sternlight, *supra* note 3.

amine the question of whether attorney representation is rare or common. Still, it is worth summarizing the little bit that we think we know.

### A. The Extent of Legal Representation in ADR

In considering the question of how frequently ADR participants are represented by attorneys, it is critically important to remember that ADR processes vary tremendously. To this author, at least, it seems obvious that the likelihood of representation in ADR will fluctuate according to factors such as which ADR process is being used,<sup>16</sup> the nature of the matter in dispute,<sup>17</sup> the wealth and character of the disputants,<sup>18</sup> and the amount of money or other relief at stake in the dispute.<sup>19</sup>

Is the phenomenon of pro se disputants less present in ADR than in litigation? Is there any reason to believe that it is easier for disputants to obtain representation to handle a given dispute in ADR than in litigation? Theoretically, this could be true. If ADR processes were cheaper and quicker than litigation, and if plaintiffs could recover as much through ADR as they could through taking that same dispute to litigation, then plaintiffs' lawyers would be more eager to handle a particular dispute on contingency in the ADR process than in litigation. On the other hand, if

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15. See, e.g., COOLEY, *supra* note 3; Tina Drake Zimmerman, *Representation in ADR and Access to Justice for Legal Services Clients*, 10 GEO. J. ON POVERTY L. & POL'Y 181 (2003).

16. Holding other factors constant, I would expect that representation would be more common in arbitration than in mediation. Arbitration is fairly similar to litigation in that evidence is presented and adversarial arguments are made. Mediation, in contrast, is a facilitated settlement discussion. While evidence can be discussed and legal arguments made, it is also possible to hold a mediation that focuses primarily on non-legal interests and concerns. Thus, disputants may well see a greater need for representation in arbitration than in mediation.

17. If the parties are disputing the meaning of a statute or a contractual term, legal representation will likely be seen as more critical by the disputants than if the core of the dispute involves relations between neighbors or family members.

18. As Rob Rubinson has ably explained in the litigation context, today, representation tends to be limited to disputants who are businesses, wealthy individuals, or able to attract the assistance of "cause" organizations. Rubinson, *supra* note 9, at 100-02; see also RHODE, *supra* note 9, at 24-46. Many "normal" people simply can't afford an attorney, whether as plaintiffs, if too little is at stake to warrant contingent fee representation, or as defendants. Rubinson, *supra* note 9, at 102; see also Engler, *supra* note 1, at 4 (citing studies discussing unmet legal needs of the poor, who cannot afford legal representation). At the same time, Herbert Kritzer has also pointed out that the lack of counsel in many cases is attributable to disputants' choices as to when counsel is and is not important. Herbert M. Kritzer, *To Lawyer or Not to Lawyer, Is that the Question?*, J. EMPIRICAL LEGAL STUD. (forthcoming) (manuscript at 33-34, on file with author), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1004773](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1004773).

19. See RHODE, *supra* note 9, at 24-26; Rubinson, *supra* note 9, at 100-02.

the payoff were smaller in ADR, or if ADR were no quicker or cheaper than litigation, then contingent-fee attorneys would be even more reluctant to handle disputes in ADR than in litigation. Neither studies nor anecdotal evidence show that attorneys who are unwilling to litigate a particular matter on a contingent fee basis are willing to arbitrate or mediate the dispute on a contingent fee basis. With respect to those parties who pay by the hour, it similarly may not be any easier to hire an attorney to handle a matter in ADR than in litigation. Assuming that disputes are typically resolved more quickly in ADR than in litigation, the attorney might well seek a higher hourly rate in ADR to make up for the fact that he cannot charge for as many hours. In short, intuitively and theoretically it seems likely that most disputants who have a hard time finding attorneys to litigate their disputes will have at least as hard a time finding attorneys to mediate or arbitrate those disputes.

The small number of studies examining attorney representation in ADR processes seem consistent with these premises, as does anecdotal information. As Roselle Wissler reports, the few mediation studies conducted to date show great variability in the likelihood and nature of representation between, for example, family disputes,<sup>20</sup> Equal Employment Opportunity Commission claims, and general civil matters.<sup>21</sup> Certainly, well-known persons hire attorneys to represent them when their divorces are mediated. In the EEO context, those few employees who are union members may often be represented in mediation by a union representative, rather than an attorney.<sup>22</sup>

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20. There is an impression, if not actual empirical information, that many disputants in family cases appear unrepresented at mediation. See Craig A. McEwen et al., *Bring in the Lawyers: Challenging the Dominant Approaches to Ensuring Fairness in Divorce Mediation*, 79 MINN. L. REV. 1317, 1351 (1995) (“Critics and proponents of mediation alike see the absence of lawyers as a defining aspect of divorce mediation.”). This phenomenon reflects not only the inability of many divorcing persons to retain counsel, but also the decision of many counsel to allow their clients to attend mediation without representation. As McEwen et al. discuss, non-attendance of family mediations is common in many jurisdictions. *Id.* at 1331.

21. Wissler, *supra* note 13, at 428-30 (showing that among these three categories, attorney representation was most likely in general civil cases and least likely in Equal Employment Opportunity (“EEO”) cases, but recognizing that data may be affected with respect to court-connected mediation by the fact that some courts exclude cases involving unrepresented parties, from mandatory referral to mediation).

22. Lisa B. Bingham et al., *Exploring the Role of Representation in Employment Mediation at the USPS*, 17 OHIO ST. J. ON DISP. RESOL. 341, 359, 363-64 (2001) (using data from United States Postal Service’s employment mediation program, specifically 7651 data tracking reports prepared by mediators and exit surveys prepared by participants, roughly two-thirds of complainants are represented, although only 3% of complainants had attorney representatives).



As surmised, arbitration seems to involve attorneys somewhat more often than other ADR processes.<sup>23</sup> Elizabeth Hill and Alexander Colvin have found that a substantial number of complainants arbitrating employment disputes were represented by attorneys.<sup>24</sup> International business disputes that are handled through arbitration involve the use of lawyers.<sup>25</sup> When bicyclist Floyd Landis arbitrated the charges that he had used drugs to cheat in the Tour de France, both he and the regulatory agency were represented.<sup>26</sup> Similarly, large personal injury matters or class actions that are taken to mediation or arbitration typically involve attorneys.<sup>27</sup>

### B. The Impact of Legal Representation in ADR

As one thinks about undertaking an empirical examination of the impact of legal representation in ADR, many challenges of such a study are immediately evident. First, how does one measure success in ADR processes? In litigation and even arbitration it is fairly well accepted that one should look at who is awarded or required to pay a judgment as well as the size of that judgment. In mediation, however, settlements may be far more complex and multi-faceted, involving apologies, future business deals, and non-monetary relief. Even more fundamentally, does success depend only on

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23. Historically, arbitration was more informal and less prone to lawyers than it is today. For a general discussion of the evolution of arbitration, see Edward Brunet, *Replacing Folklore Arbitration with a Contract Model of Arbitration*, 74 TUL. L. REV. 39 (1999) (discussing the change in nature of arbitration, from informal/guild to more like litigation) and Thomas J. Stipanowich, *Arbitration: The "New Litigation,"* 2010 U. ILL. L. REV. 1, available at [http://home.law.uiuc.edu/lrev/publications/2000s/2010/2010\\_1/Stipanowich.pdf](http://home.law.uiuc.edu/lrev/publications/2000s/2010/2010_1/Stipanowich.pdf).

24. Alexander J.S. Colvin, *Empirical Research on Employment Arbitration: Clarity Amidst the Sound and Fury?*, 11 EMP. RTS. & EMP. POL'Y J. 405, 407-08, 432 (2007) (finding, in a study of 2763 employment arbitration cases administered by the American Arbitration Association from 2003 to 2006, that employees were represented in 74.9% of the cases); Elizabeth Hill, *Due Process at Low Cost: An Empirical Study of Employment Arbitration Under the Auspices of the American Arbitration Association*, 18 OHIO ST. J. ON DISP. RESOL. 777, 792, 820 (2003) (examining 200 awards randomly selected from AAA Employment Arbitration Dispute awards initiated during 1999 and 2000 and finding that two-thirds of complainants arbitrating pursuant to promulgated cases were represented by attorneys). Of course, it may also be that many other persons were deterred from arbitrating employment disputes by the fact that they could not obtain attorney representation.

25. For a good discussion of international commercial arbitration, see YVES DEZALAY & BRYANT G. GARTH, *DEALING IN VIRTUE: INTERNATIONAL COMMERCIAL ARBITRATION AND THE CONSTRUCTION OF A TRANSNATIONAL LEGAL ORDER* (1996).

26. U.S. Anti-Doping Agency v. Landis, No. 30 190 00847 06 (Sept. 20, 2007) (Brunet, Arb., McLaren, Arb., & Campbell, Arb.), available at [http://www.usantidoping.org/files/active/arbitration\\_rulings/Landis%20Final%20\(20-09-07\)%20\(3\).pdf](http://www.usantidoping.org/files/active/arbitration_rulings/Landis%20Final%20(20-09-07)%20(3).pdf) (reflecting that both sides were well represented by attorneys during the American arbitration hearing).

27. Readers may recall that the class action legal dispute over toxic chemicals, portrayed in the movie *Erin Brockovich* (Universal Studios, 2000), was ultimately taken to binding arbitration upon the agreement of counsel on both sides.

the results of arbitration or mediation, or should we also look at other things, such as disputants' perceptions as to whether they were treated fairly and justly? Should we consider broader societal definitions of justice, as well as disputants' own views?<sup>28</sup> For purposes of this Article, I will focus primarily on the narrow question of what relief was obtained or paid by disputants, while recognizing the limits of this analysis.

Second, as we look at degrees of success in mediation and arbitration for persons who do and do not have attorneys, how can we accurately compare them? There is a significant apples and oranges problem. If one learned, for example, that represented plaintiffs in a certain set of arbitrations won more frequently or won greater sums of money than unrepresented plaintiffs in arbitration, what would it mean? Would it mean that the attorney's skills enabled the plaintiff to do substantially better? Or, would it mean that plaintiffs are more successful in obtaining attorneys in cases that have a greater likelihood of substantial success?<sup>29</sup> That is, perhaps attorneys are good at screening cases but do not actually add value at all.<sup>30</sup> How can these two explanations be distinguished?<sup>31</sup>

Other problems exist as well. For example, the impact of representation likely varies substantially depending on whether both parties are represented, or only one party is represented by an attorney. Finally, as noted earlier, ADR processes vary substantially from one another. Mediation and arbitration are very different from one another, and also vary tremendously themselves. Thus, a conclusion that attorneys do or do not matter in one particular context may well not be generalizable to other contexts.

With all these significant caveats in mind, let us at least summarize the research that does exist. First, very few studies focus on objective meas-

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28. I explore these philosophical sorts of issues in several prior works, including Jean R. Sternlight, *Creeping Mandatory Arbitration: Is it Just?*, 57 STAN. L. REV. 1631 (2005), and Jean R. Sternlight, *ADR is Here: Preliminary Reflections on Where it Fits in a System of Justice*, 3 NEV. L.J. 289 (2003). See also Engler, *supra* note 1, at 52 (stating that "[c]ase outcomes are not the sole, valid evaluative measure for assessment," and that other measures may include "achieving customer satisfaction, easing strains on the court, and increasing litigants' understanding of court processes").

29. See Colvin, *supra* note 24, at 433 (observing that because employees appear to do better in litigation than in arbitration, "[t]his disparity in the anticipated outcomes between the systems is likely to reduce substantially the willingness and ability of plaintiff's counsel to represent employees in arbitration under contingency fee arrangements compared to litigation").

30. *Id.* (suggesting that differences in success of represented versus unrepresented employees in arbitration may be attributable in part to attorneys' superior screening skills).

31. Theoretically the solution to this quandary is to assign or not assign attorneys to disputes on a random basis, but accomplishing this end in the real world is difficult.

ures of the results of attorney representation, rather than on disputants' *perceptions* of the differences attorneys may or may not make.<sup>32</sup> While such perception studies are interesting, they are mixed as to the importance of attorney representation.<sup>33</sup> And, of course, unrepresented disputants are not in a good position to know what difference an attorney might have made.

Second, those few studies looking at whether attorney representation affects the likelihood of settlement or the amount of settlement in mediation tentatively seem to show<sup>34</sup> that attorneys encourage claimants to settle less often<sup>35</sup> but recover more when they do settle. Specifically, one study showed that represented claimants obtained higher dollar settlements in mediation.<sup>36</sup> As Roselle Wissler notes, however, this is but a single study and such differences may reflect selection factors, such as attorneys' preference for monetary as opposed to non-monetary awards, and disputants' greater ability to obtain contingent-fee representation in higher dollar disputes.<sup>37</sup>

In arbitration, very few relevant studies have been done. Those few conducted, however, tentatively show higher win rates and recoveries for persons who are represented. For example, Alexander Colvin, looking at employment arbitration, found statistically significant differences in both win rates and recovery amounts depending on whether employees were represented.<sup>38</sup> Along the same lines, empirical studies in the United King-

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32. See Wissler, *supra* note 13, at 435-41 (summarizing studies on the difference attorney representation makes in mediation and concluding that most studies "found no differences between represented and unrepresented parties in their assessments of the fairness of the mediation process").

33. See *id.* at 468; see also Peter J. Kuriloff, *Is Mediation a Fair Way to Resolve Special Education Disputes? First Empirical Findings*, 2 HARV. NEGOT. L. REV. 35, 46, 54-57 (1997) (finding that parents with an advocate, including both attorney and non-attorney, did not find mediation more or less satisfying than parents without, but, among parents who reached settlements, those with attorney advocates found the process fairer than those with non-attorney advocates or no representation, and also found the implementation of the agreement to be more satisfactory).

34. Wissler, *supra* note 13, at 458.

35. See *id.* at 459 (finding that across studies, full settlement was most likely when lawyers were not present in mediation, but that in some studies partial settlement was highest when lawyers were present).

36. See E. Patrick McDermott & Ruth Obar, "What's Going On" in Mediation: An Empirical Analysis of the Influence of a Mediator's Style on Party Satisfaction and Monetary Benefit, 9 HARV. NEGOT. L. REV. 75, 102-03, 107 (finding that represented claimants received higher monetary awards in EEO mediation, but failing to distinguish between lawyer and non-lawyer representatives).

37. Wissler, *supra* note 13, at 466-68.

38. Colvin, *supra* note 24, at 433 (finding that represented employees won 22.6% of the time as compared to 13.7% for unrepresented employees, and that the mean damage award for represented employees was \$28,009 as compared to \$13,222 for self-represented em-

dom generally suggest that represented tribunal applicants are more likely to achieve favorable outcomes than unrepresented applicants.<sup>39</sup>

### C. Distinguishing Legal and Non-Legal Representation

Given that few studies attempt to examine the impact of attorneys on objective success in mediation and arbitration, it is not surprising that we also have little information comparing the relative success of attorneys and non-attorneys. One study suggests that disputants may sometimes be more satisfied with representation by non-lawyers (e.g. union representatives) than lawyers, and that lawyers may not settle as many cases completely as may non-lawyers.<sup>40</sup> Of course, it is likely also true that the specialized expertise of the representative can be extremely important for both attorney and non-attorney representatives.<sup>41</sup>

## II. WHY MIGHT ATTORNEYS BE NEEDED IN ADR?

Some might suggest that one of the goals of ADR is to avoid the need for attorneys. One of the virtues of a purportedly simpler, less adversarial dispute resolution process would seem to be that disputants would be fully capable of representing themselves, and not have to rely on expensive attorneys.

In addition, some may have a sense that the typically adversarial mindset of attorneys does not fit with less adversarial ADR processes. The point is worth considering. Studies have shown that the kinds of people who typically enter and graduate from law school are often psychologically ill-

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ployees); *see also* Richard N. Block & Jack Stieber, *The Impact of Attorneys and Arbitrators on Arbitration Awards*, 40 *INDUS. & LAB. REL. REV.* 543, 552-54 (1987) (finding that parties in labor arbitration received more favorable outcomes when they had counsel and their opponent did not, but when both parties lacked counsel, outcomes resembled those in which both parties were represented). *But cf.* Elizabeth Hill, *Due Process at Low Cost: An Empirical Study of Employment Arbitration Under the Auspices of the American Arbitration Association*, 18 *OHIO ST. J. ON DISP. RESOL.* 777, 792, 820 (2003) (looking at 200 awards randomly selected from AAA Employment Arbitration Dispute awards initiated during 1999 and 2000 and finding win/loss ratios indistinguishable between persons who arbitrated with attorney representation and persons who arbitrated pro se).

39. Hazel Genn, *Tribunals and Informal Justice*, 56 *MOD. L. REV.* 396, 398 (1993).

40. Bingham et al., *supra* note 22, at 364-71.

41. HERBERT M. KRITZER, *LEGAL ADVOCACY: LAWYERS AND NONLAWYERS AT WORK* 77, 111-49 (1998) (finding, in study of social security disability appeals, that claimants represented by nonattorneys did much better than unrepresented claimants, but not as well as claimants represented by attorneys, and that "formal training (in the law) is less crucial than is day-to-day experience in the unemployment compensation setting"); *see also* Engler, *supra* note 1, at 3, 47-48 (noting importance of not just any advocate, but an advocate with specialized expertise).

sued to consider non-legal interests and non-adversarial solutions.<sup>42</sup> The fear is, lawyers will not prove helpful in ADR and may just mess it up.<sup>43</sup> Specifically, attorneys in mediation may focus unduly on narrow monetary interests, may be overly argumentative, or may discourage their clients from addressing opposing disputants directly.<sup>44</sup> Similarly, attorneys have been criticized for turning arbitration, which often used to be a quick, simple process, into just another type of litigation.<sup>45</sup> Some jurisdictions have gone so far as to prohibit attorneys from participating in certain categories of court-connected mediation.<sup>46</sup> A few commentators have urged that traditional adversarial lawyers should not play a role in mediation.<sup>47</sup>

Yet, particularly as ADR has become mandatory in many contexts in many jurisdictions, the question of whether individuals can effectively represent themselves has become more pressing. When ADR is voluntary, some may assume that a disputant would not choose to go to ADR unrepresented if she did not think that it served her best interest.<sup>48</sup> When people are being forced into ADR we can no longer assume that it is a process they have chosen or want. Also, it is quite possible, particularly in mandatory ADR, that one side may be represented while the other is not. Even those

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42. See generally Leonard L. Riskin & Nancy A. Welsh, *Is That All There Is?: "The Problem" in Court-Oriented Mediation*, 15 GEO. MASON L. REV. 863, 903-04 (2008) ("[L]awyers—even those who have been trained in and appreciate interest-based negotiation—tend to employ their habitual lens," thereby viewing problems more narrowly and legalistically than many clients or mediators); Leonard L. Riskin, *Mediation and Lawyers*, 43 OHIO ST. L.J. 29 (1982); see also Chris Guthrie, *The Lawyer's Philosophical Map and the Disputant's Perceptual Map: Impediments to Facilitative Mediation and Lawyering*, 6 HARV. NEGOT. L. REV. 145 (2001).

43. See, e.g., Kuriloff, *supra* note 33, at 54 ("[I]t is arguable that their training as 'zealous advocates' in an adversarial system may hamper communication and cooperation in a mediation." (citing CHRISTOPHER W. MOORE, *THE MEDIATION PROCESS* 146 (2d ed. 1996))).

44. I discuss some of these problems in Sternlight, *supra* note 3.

45. For discussions of the evolution of arbitration, see Brunet, *supra* note 23, and Stipanowich, *supra* note 23.

46. Roselle Wissler and Stephan Landsman each note several of these jurisdictions. Stephan Landsman, *Nothing for Something? Denying Access to Legal Assistance to Those Compelled to Participate in ADR Proceedings*, 37 FORDHAM URB. L.J. 273, 290 (2010); Wissler, *supra* note 13, at 428.

47. E.g., Mark C. Rutherford, *Lawyers and Divorce Mediation: Designing the Role of "Outside Counsel"*, *MEDIATION Q.*, June 1986, at 17 (urging a new role for lawyers in divorce mediation, such that a single attorney would neutrally advise all disputants).

48. Of course, this assumption is not necessarily valid, in that taking a dispute to ADR without representation, even when voluntary, may simply be the lesser of evils rather than something that the disputant actually wants. For example, a disputant who cannot obtain an attorney may prefer to be unrepresented in mediation, rather than in litigation. Yet, that does not mean that the disputant's choice of unrepresented mediation is something the disputant actually sees in a positive light.

who might prefer lawyerless dispute resolution may be concerned about a process in which only one side receives representation.

Moreover, upon reflection most people would probably agree that lawyers, at least potentially, can be extremely helpful in ADR proceedings. We all know that lawyers are trained to make legal arguments. While some may believe that such arguments have no place or no proper place in ADR proceedings, it turns out that, in fact, legal arguments often do play a role in both mediation and arbitration. In addition, lawyers can also help their clients in many ways other than making legal arguments.

The discussion which follows first examines the Supreme Court's expressed perspective on why clients may need attorneys, next looks at some social science research adding an additional perspective on how lawyers can be helpful, thirdly focuses on how attorneys may specifically help clients in ADR, next considers whether adding attorneys to ADR processes is likely to harm those processes, and finally asks whether non-attorney representatives are likely to prove as helpful as attorneys in ADR.

#### **A. The Supreme Court's Perspective on Clients' Need for Lawyers**

The Supreme Court has been asked, in numerous contexts, to determine clients' need for legal representation.<sup>49</sup> For the purpose of this analysis, the bottom-line results of these cases are less important than the reasoning the Court has employed to reach its decisions. This Article is not arguing for a constitutional right to counsel in ADR processes, but rather examining the assumptions underlying the Court's right to counsel decisions. As for the results of the Courts' decisions, suffice it to say that these decisions have been nuanced. The Court has sometimes mandated appointment of counsel,<sup>50</sup> sometimes left appointment of counsel to the discretion of the trial court,<sup>51</sup> and sometimes found appointment of counsel to be unnecessary.<sup>52</sup>

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49. Often the Court has addressed whether various clauses of the Constitution require that legal counsel be appointed for persons who cannot afford to hire their own attorney. Sometimes the Court has addressed whether statutory prohibitions or limitations on right to counsel are justifiable.

50. *See, e.g., Gideon v. Wainwright*, 372 U.S. 335, 345 (1962) (holding that indigent criminal defendants accused of felonies are entitled under the Sixth and Fourteenth Amendments to have counsel appointed for them, and rejecting prior case-by-case analysis of *Betts v. Brady*, 316 U.S. 455 (1942)).

51. *See, e.g., Lassiter v. Dep't of Soc. Servs.*, 452 U.S. 18 (1981) (holding that under the Due Process Clause of the Fourteenth Amendment, an indigent parent threatened with termination of parental rights may or may not be entitled to appointment of counsel, depending upon the complexity of the issues and the relative competence of the parent to present those issues); *Gagnon v. Scarpelli*, 411 U.S. 778, 790 (1973) (holding that a probationer threatened with revocation of his probation may or may not be constitutionally entitled to counsel, depending upon the specific factual circumstances).

Although the Court's decisions on the right to counsel tend to be very fact specific, they also depend on a theory, never explained in depth, as to when it is most important for clients to have legal representation. The Court has typically found that the need for attorney representation is greatest when: (1) the client has something very important at stake;<sup>53</sup> (2) the client's participation in legal proceedings is involuntary;<sup>54</sup> (3) the hearing is formal and adversarial in nature; and (4) the client has shown that he or she may lack sufficient expertise or competence to adequately represent her own interests. These factors, particularly the third and fourth factors, are implicitly founded on a "knowledge and skills" model of lawyering. In particular, the Court apparently believes that lawyers' greatest contribution to their clients are such knowledge and skills as ability to research and present the law, ability to gather and present facts, and ability to cross-examine opposing witnesses. Given the Court's emphasis on these skills it is understandable why the Court believes attorneys are needed more in formal and adversarial settings as compared to less formal and less adversarial fora. After the following section examines the Court's assumption that lawyers are most needed for their knowledge and skills, and the related assertion that lawyers are more needed in adversarial than non-adversarial proceedings, Part II.B will then raise some questions as to whether lawyers' knowledge and skills are in fact their greatest contribution to clients.

*I. Lawyers Are Most Needed for Their Skills and Expertise*

Both explicitly and implicitly, the Supreme Court has frequently identified the sorts of tasks it believes most require the assistance of counsel, such as gathering and presenting facts, conducting legal analyses, and using procedural skills such as cross-examination.<sup>55</sup> For example, in *Gideon v.*

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52. *Scott v. Illinois*, 440 U.S. 367, 373-74 (1979) (holding that the state was not required to appoint counsel for a person accused of theft and ultimately fined but not imprisoned).

53. *See, e.g., Argersinger v. Hamlin*, 407 U.S. 25, 37 (1972) (holding that absent a knowing and intelligent waiver, no person may be imprisoned for any offense, no matter how classified, unless he was represented by counsel at trial); *Gideon*, 372 U.S. at 339 (appointment of counsel for indigent is mandatory where indigent is accused of committing a felony).

54. *Compare Gideon*, 372 U.S. at 335 (indigent criminal defendant accused of felony must be afforded counsel) and *Lassiter*, 452 U.S. at 18 (1981) (indigent threatened with termination of parental rights may be entitled to counsel, depending on factual circumstances) with *Walters v. Nat'l Ass'n of Radiation Survivors*, 473 U.S. 305 (1985) (veterans seeking service-connected benefits are not denied constitutional rights by statute which prevents them from paying attorney more than ten dollars as a maximum fee).

55. Occasionally, the Court mentions other important functions of counsel. *See, e.g., Argersinger*, 407 U.S. at 34 (noting that attorneys can be important in criminal cases to aid

*Wainwright*,<sup>56</sup> discussing the right to counsel in criminal cases, the Court famously quoted Justice Sutherland's words in *Powell v. Alabama*:<sup>57</sup>

The right to be heard would be, in many cases, of little avail if it did not comprehend the right to be heard by counsel. Even the intelligent and educated layman has small and sometimes no skill in the science of law. If charged with crime, he is incapable, generally, of determining for himself whether the indictment is good or bad. He is unfamiliar with the rules of evidence. Left without the aid of counsel he may be put on trial, without a proper charge, and convicted upon incompetent evidence, or evidence irrelevant to the issue or otherwise inadmissible. He lacks both the skill and knowledge adequately to prepare his defense, even though he have a perfect one [sic].<sup>58</sup>

On the civil side, *Goldberg v. Kelly* explained that “[c]ounsel can help delineate the issues, present the factual contentions in an orderly manner, conduct cross-examination, and generally safeguard the interests of the recipient.”<sup>59</sup>

## 2. *Need for Attorney is Greatest When Clients Lack Legal Skills and Knowledge*

The Court has consistently stated that clients who are more skilled in the law, better able to investigate and present facts, and generally more articulate need attorneys less than those clients who lack these same traits. For

defendants in negotiating plea agreements, so that defendants know what they are doing, are aware of their alternatives, and are treated fairly by the prosecution).

56. 372 U.S. 335 (1963).

57. 287 U.S. 45 (1932).

58. *Gideon*, 372 U.S. at 344-45 (quoting *Powell*, 287 U.S. at 68-69). Similarly, discussing the possible need for an attorney in the context of a parole revocation the Court explained that:

[T]he effectiveness of [certain Due Process] rights . . . may in some circumstances depend on the use of skills which the probationer or parolee is unlikely to possess. Despite the informal nature of the proceedings and the absence of technical rules of procedure or evidence, the unskilled or uneducated probationer or parolee may well have difficulty in presenting his version of a disputed set of facts where the presentation requires the examining or cross-examining of witnesses or the offering or dissecting of complex documentary evidence.

*Gagnon v. Scarpelli*, 411 U.S. 778, 786-87 (1973) (holding that attorneys must sometimes, but not always, be provided to persons facing revocation of parole).

59. *Goldberg v. Kelly*, 397 U.S. 254, 270-71 (1970) (holding that welfare recipient is entitled to retain counsel to contest termination of benefits). In re *Gault* similarly states: “The juvenile needs the assistance of counsel to cope with problems of law, to make skilled inquiry into the facts, to insist upon regularity of the proceedings, and to ascertain whether he has a defense and to prepare and submit it.” 387 U.S. 1, 36 (1967) (holding that a juvenile threatened with commitment as a juvenile delinquent has a right to retain counsel or, if he cannot afford counsel, to have an attorney appointed for him).



example, in *Gagnon v. Scarpelli*,<sup>60</sup> the Court noted that “the unskilled or uneducated probationer or parolee may well have difficulty in presenting his version of a disputed set of facts where the presentation requires the examining or cross-examining of witnesses or the offering or dissecting of complex documentary evidence.”<sup>61</sup> Illiteracy is one marker of those clients who may most need assistance from an attorney.<sup>62</sup>

3. *Need for Attorney is Greatest When the Proceeding is Formal and Adversarial*

At the same time, even those clients who lack skills will not always be held to require the assistance of an attorney, because the Court looks not only at the clients’ skills (or lack thereof) but also at the nature of the proceeding itself.<sup>63</sup> In particular, numerous Supreme Court decisions have stated that persons have a greater need for representation when proceedings are formal and adversarial in nature than when proceedings are informal. The Court has expressed this philosophy in the most detail in *Walters v. National Association of Radiation Survivors*,<sup>64</sup> a decision refusing to find unconstitutional a statutory provision preventing veterans from paying their attorneys more than ten dollars in suits seeking veterans’ disability bene-

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60. 411 U.S. 778 (1973) (holding that some but not all probationers are entitled to appointment of counsel in revocation hearings).

61. *Id.* at 787.

62. *Wolff v. McDonnell*, 418 U.S. 539, 570 (1974) (suggesting that illiterate inmates need more help in contesting disciplinary proceedings than those who can read, and therefore found they could be entitled to help from a fellow inmate or other helper, if not an attorney). In the converse situation, *Betts v. Brady*, a pre-*Gideon* case, held that criminal defendants were only entitled to counsel on a case-by-case basis, and found the Due Process Clause was not violated by denying Mr. Betts counsel where he was a forty-three year old man “of ordinary intelligence, and ability to take care of his own interests on the trial of that narrow issue.” 316 U.S. 455, 472 (1942). Mr. Betts “had once before been in a criminal court, pleaded guilty to larceny and served a sentence and was not wholly unfamiliar with criminal procedure.” *Id.*

63. In *Lassiter v. Dept. of Social Services*, the majority held that an indigent mother was not entitled to counsel in a hearing to terminate her parental rights, even though the Department of Social Services did have counsel, in part because “no expert witnesses testified, and the case presented no specially troublesome points of law . . . .” 452 U.S. 18, 32 (1981). The Court further found that Ms. Lassiter’s arguments were so weak that “the presence of counsel for Ms. Lassiter could not have made a determinative difference.” *Id.* at 32-33. In contrast, the dissenters would have afforded counsel to Ms. Lassiter. *Id.* at 35, 59-60. They stated: “a parent acting pro se is . . . likely to be unaware of controlling legal standards and practices, and unskilled in garnering relevant facts . . . .” *Id.* at 51. Alluding to additional factors, going beyond mere knowledge and skills, the dissenters also asserted: “When the parent is indigent, lacking in education, and easily intimidated by figures of authority, the imbalance [of power] may well become insuperable.” *Id.* at 46.

64. 473 U.S. 305 (1985).

fits.<sup>65</sup> Rejecting constitutional arguments asserting a right to pay more than ten dollars for representation, the Court stated: “Simple factual questions are capable of resolution in a nonadversarial context, and it is less than crystal clear why *lawyers* must be available to identify possible errors in *medical* judgment.”<sup>66</sup> Distinguishing prior precedent that provided a right to counsel in adversarial criminal proceedings, the Court stated:

[T]he process here is not designed to operate adversarially.<sup>67</sup> While counsel may well be needed to respond to opposing counsel or other forms of adversary in a trial-type proceeding, where as here no such adversary appears, and in addition a claimant or recipient is provided with substitute safeguards such as a competent representative, a decisionmaker whose duty it is to aid the claimant, and significant concessions with respect to the claimant’s burden of proof, the need for counsel is considerably diminished. We have expressed similar concerns in other cases holding that counsel is not required in various proceedings that do not approximate trials, but instead are more informal and nonadversary.<sup>68</sup>

As noted in *Walters*, the Court had previously held that not all important decisions need be made in an adversarial context or with the assistance of an attorney.<sup>69</sup>

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65. *Id.* at 332.

66. *Id.* at 330. In *Walters*, the Court considered evidence regarding the types of cases presented to the Veterans’ Administration and regarding success rates in cases depending upon the representation, if any, secured by the veteran. The Court noted that veterans represented by attorneys were only slightly more successful than veterans represented by a non-attorney or even veterans who were entirely unrepresented. *Id.* at 327 (finding that veterans with attorneys prevailed 18.3% of the time in appeals to the Board of Veterans Appeals and that persons who were unrepresented prevailed 15.2% of the time).

67. *Id.* at 333. The Court asserted that although the Veterans’ Administration may have been opposing a veteran’s claim in a particular matter, the governmental body was not an adversary inherently opposed to the interests of the claimant. *Id.* at 310.

68. *Id.* at 333-34 (citing *Parham v. J.R.*, 442 U.S. 584, 608-09 (1979)); see *Goss v. Lopez*, 419 U.S. 565, 583 (1975); *Wolff v. McDonnell*, 418 U.S. 539, 570 (1974). The *Walters* Court further explained that precedents requiring lawyers in adversarial criminal matters or stating that counsel can help identify legal questions and present arguments are of tangential relevance in non-adversarial procedures. 473 U.S. at 332.

69. See *Parham*, 442 U.S. at 606-13 (holding that the decision to admit a minor to a mental institution, with the permission of his or her parents, must be made following an inquiry by an independent neutral, but that the neutral need not be law-trained and that the inquiry need not be adversarial); *Goss*, 419 U.S. at 740-41 (finding that while students threatened with short suspensions are entitled to certain procedural protections, they do not have the right to secure counsel, to confront or cross-examine witnesses, or to call their own witnesses, observing that so formalizing the process would be undesirable); *Wolff*, 418 U.S. at 569-70 (finding that prisoners challenging loss of their good-time credits were not entitled to either retained or appointed counsel, in part because the prison disciplinary hearing was not particularly adversarial); *Gagnon v. Scarpelli*, 411 U.S. 778, 790-91 (1973) (finding that persons at risk for revocation of their probation were not necessarily entitled to appointed

At the same time, the Court has occasionally recognized that even in certain purportedly informal proceedings, such as parole revocations, lawyers' skills may be critically important if the hearing has an adversarial nature.

Despite the informal nature of the proceedings and the absence of technical rules of procedure or evidence, the unskilled or uneducated probationer or parolee may well have difficulty in presenting his version of a disputed set of facts where the presentation requires the examining or cross-examining of witnesses or the offering or dissecting of complex documentary evidence.<sup>70</sup>

#### 4. *Fear that Injecting Counsel into Non-adversarial Process will Undermine That Process*

In discussing the need for appointing counsel or allowing counsel in non-adversarial or less-adversarial proceedings, the Court has repeatedly expressed concern that allowing participation of counsel may somehow impede the value of such process. In *Walters*, refusing to find unconstitutional a statute prohibiting veterans from paying attorneys more than ten dollars to help them pursue benefit claims, the Court explained that:

A necessary concomitant of Congress' desire that a veteran not need a representative to assist him in making his claim was that the system should be as informal and nonadversarial as possible. This is not to say that complicated factual inquiries may be rendered simple by the expe-

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counsel, given that probation revocation hearings are less formal and less adversarial than criminal trials). The *Gagnon* Court stated:

In a criminal trial, the State is represented by a prosecutor; formal rules of evidence are in force; a defendant enjoys a number of procedural rights which may be lost if not timely raised; and, in a jury trial, a defendant must make a presentation understandable to untrained jurors. In short, a criminal trial under our system is an adversary proceeding with its own unique characteristics. In a revocation hearing, on the other hand, the State is represented, not by a prosecutor, but by a parole officer with the orientation described above [trying to help the probationer]; formal procedures and rules of evidence are not employed; and the members of the hearing body are familiar with the problems and practice of probation or parole.

*Id.* at 789. Instead, the Court found counsel should be provided on a case-by-case basis, depending on the arguments being made by the probationer and the degree to which the probationer seems "capable of speaking effectively for himself." *Id.* at 791. *See also* Vitek v. Jones, 445 U.S. 480, 500 (1980) (Powell, J., concurring) (finding that a prisoner threatened with transfer to a mental health facility may need assistance, but in the context of this more informal setting the assistance need not be provided by an attorney rather than a mental health professional); *Argersinger v. Hamlin*, 407 U.S. 25, 44-46 (1972) (Brennan, J., concurring) (suggesting that whereas indigent criminal defendants have a right to counsel in a jury trial if they may be deprived of liberty, in contrast, counsel may not be needed "in a nonjury trial before a judge experienced in piecing together unassembled facts").

70. *Gagnon*, 411 U.S. at 786-87.

dient of informality, but surely Congress desired that the proceedings be as informal and nonadversarial as possible. The regular introduction of lawyers into the proceedings would be quite unlikely to further this goal.<sup>71</sup>

Quoting extensively from Henry Friendly's famous article, *Some Kind of Hearing*,<sup>72</sup> the Court urged that allowing the participation of compensated attorneys would make the Veterans' Administration ("VA") hearings more adversarial and more complex, and thereby necessitate the retention of attorneys for claims currently simple enough to be pursued by veterans without the assistance of counsel.<sup>73</sup>

Similarly in *Gagnon v. Scarpelli*, holding that criminals defending against parole revocation should be allowed appointed counsel on a case-by-case basis, the Court announced that:

The introduction of counsel into a revocation proceeding will alter significantly the nature of the proceeding. If counsel is provided for the probationer or parolee, the State in turn will normally provide its own counsel; lawyers, by training and disposition, are advocates and bound by professional duty to present all available evidence and arguments in support of their clients' positions and to contest with vigor all adverse evidence and views. The role of the hearing body itself, aptly described in *Morrissey* as being 'predictive and discretionary' as well as factfinding, may become more akin to that of a judge at a trial, and less attuned to the rehabilitative needs of the individual probationer or parolee. . . . Certainly, the decisionmaking process will be prolonged, and the financial cost to the State—for appointed counsel, counsel for the State, a longer record, and the possibility of judicial review—will not be insubstantial.<sup>74</sup>

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71. *Walters*, 473 U.S. at 323-24.

72. *Id.* at 325-26 (quoting Henry J. Friendly, *Some Kind of Hearing*, 123 U. PA. L. REV. 1267 (1975)); see also Genn, *supra* note 39, at 399 (noting that British policymakers have expressed reluctance to encourage legal representation in informal tribunals for fear that lawyers might undermine speed and informality of those processes).

73. *Walters*, 473 U.S. at 326. Cf. *Goss*, 419 U.S. at 583 ("[F]urther formalizing the suspension process and escalating its formality and adversary nature may not only make it too costly as a regular disciplinary tool but also destroy its effectiveness as part of the teaching process.").

74. 411 U.S. at 787-88. The Court also opined that providing counsel may actually harm the defendant because "[i]n the greater self-consciousness of its quasi-judicial role, the hearing body may be less tolerant of marginal deviant behavior and feel more pressure to reincarcerate than to continue nonpunitive rehabilitation." *Id.* at 788. The Court expressed some similar concerns in *Wolff*, a case holding that prisoners have no right to retained or appointed counsel to represent them in disciplinary hearings. 418 U.S. at 570. The Court explained:

[t]he insertion of counsel into the disciplinary process would inevitably give the proceedings a more adversary cast and tend to reduce their utility as a means to further correctional goals. There would also be delay and very practical problems

5. *Others Share the Supreme Court's Views on When Clients Most Need Attorneys*

The Supreme Court is not alone in its assumptions that lawyers are most needed for their skill and expertise and that the need for lawyers is greater in adversarial than in non-adversarial proceedings. The European Court of Human Rights has stated that

[t]he question whether the provision of legal aid is necessary for a fair hearing must be determined on the basis of the particular facts and circumstances of each case and will depend, *inter alia*, upon the importance of what is at stake for the applicant in the proceedings, the complexity of the relevant law and procedure and the applicant's capacity to represent him or herself effectively.<sup>75</sup>

Commentator Hazel Genn has noted that when the British set up informal tribunals to take the place of courts "there was an assumption that the informality of proceedings would make it possible for applicants to represent themselves at hearings."<sup>76</sup>

The approach taken by the American Bar Association ("ABA") to the right to counsel is perhaps a bit more nuanced. In a 2006 Resolution, the ABA called on state governments and the federal government to provide right to counsel "in those categories of *adversarial* proceedings where basic human needs are at stake, such as those involving shelter, sustenance, safety, health or child custody."<sup>77</sup> This statement, and the accompanying report, specifically distinguish adversarial from non-adversarial matters,

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in providing counsel in sufficient numbers at the time and place where hearings are to be held.

*Id.* at 570.

75. *Steel v. United Kingdom*, 41 Eur. Ct. H.R. at 22.61 (2005) (holding that two Green Peace advocates should have been afforded counsel to defend themselves in a defamation action). The European Court of Human Rights found that the two activists, a "part-time bar worker" and "an unwaged single parent," *id.* at 50, albeit "articulate and resourceful," *id.* at 68, were not sufficiently capable to handle a case involving about 40,000 pages of documentary evidence and 130 oral witnesses, as well as a 313 day trial and 23 day appeal, *id.* at 49, 72. See also *Airey v. Ireland*, 2 Eur. Ct. H.R. 305 (1979) (holding that an indigent woman of "humble family background" was entitled to legal assistance in her action to secure a legal separation from her husband because litigation of this kind involves complicated law and facts, may well require expert evidence, and also may "entail an emotional involvement that is scarcely compatible with the degree of objectivity required by advocacy in court").

76. Genn, *supra* note 39, at 395.

77. ABA Resolution 112A (Aug. 7, 2006), at 1 (emphasis added) (delineating tasks), available at <http://www.abanet.org/legalservices/sclaid/downloads/06A112A.pdf>. This Resolution was supported by a report entitled ABA Task Force on Access to Civil Justice et al., Report to the House of Delegates. But note that another ABA Resolution, 112B (Aug. 7, 2006), passed the same day, stated that a full range of legal aid services should include "representation in negotiation and alternative dispute resolution." *Id.* at 2.

urging that attorneys are needed more in the adversarial than non-adversarial context.<sup>78</sup> Yet, in a separate report, discussing principles for delivering civil legal aid, the ABA recommended that an attempt be made to afford “representation in negotiation and alternative dispute resolution.”<sup>79</sup> It seems that the ABA has not focused much attention on the question of whether attorneys might be important in arbitration or mediation.

### B. Lawyers’ Contributions Beyond Knowledge and Skills

The Supreme Court and others’ perspective that lawyers’ primary contribution is their knowledge and skills, no doubt seem intuitively obvious to many. Upon reflection, however, it is not obvious, at least to this author, that the Court has correctly identified all of the ways lawyers are helpful to their clients.

Sociologist Rebecca Sandefur has conducted a major study yielding intriguing results regarding the importance of legal representation.<sup>80</sup> Her meta-analysis examining 74,000 cases reported in seventeen studies finds that the importance of legal representation, relative to both self-representation and representation by non-lawyers, appears to vary tremendously. Depending on the study and on the statistical assumptions employed, lawyers’ impact ranged from non-existent to making it thirty-eight times more likely that plaintiffs would prevail.<sup>81</sup>

Sandefur’s most fascinating result, at least for this author, is that lawyers’ impact relative to self-representation appears to be greatest not in the

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78. The report states that:

[t]he right defined in this resolution focuses on representation in adversarial proceedings; it does not propose a generalized right to legal advice or to legal assistance unrelated to litigation in such forums. “Adversarial proceedings” as defined in the resolution are intended to include both judicial and some quasi-judicial tribunals, because many of the disputes involving the basic human needs described below are, in one jurisdiction or another, allocated to administrative agencies or tribunals.

*Id.* at 13.

79. ABA Task Force on Access to Civil Justice et al., *Principles of a State System for the Delivery of Civil Legal Aid* (Aug. 7, 2006), at 1. Interestingly, this second report supported a resolution adopted by the ABA House of Delegates on the same day as the first report, noted *supra* note 77. Apparently, the ABA has not focused much attention on the possible need for legal representation in ADR proceedings.

80. Rebecca L. Sandefur, *Elements of Expertise: Lawyers’ Impact on Civil Trial and Hearing Outcomes* (Mar. 26, 2008) (on file with author). After starting with “every known published quantitative analysis of the relationship between attorney representation and civil trial or hearing outcomes,” which amounted to fewer than forty studies over the course of four decades, Sandefur then used a variety of criteria to limit her focus to seventeen studies. *Id.* at 9-10.

81. *Id.* at 25.

most complex disputes, but rather in those cases that are simpler either procedurally<sup>82</sup> or substantively.<sup>83</sup> That is, whereas researchers, in addition to the Supreme Court, have tended to assume that lawyers' knowledge of substantive law and procedure is their most important contribution to their clients, Sandefur's study showed that, in fact, such expertise was actually *inversely* correlated to lawyers' superior performance relative to self-representation. Lawyers were 2.3 times more successful than unrepresented parties in cases that were above average in substantive complexity but 9 times more successful than unrepresented parties in cases that were below average in substantive complexity.<sup>84</sup> Similarly, attorneys were 6.16 times more successful than unrepresented parties in cases of average procedural complexity but 9.23 times as successful in cases of below average substantive complexity.<sup>85</sup>

The comparison of lawyers to non-lawyer advocates ("NLAs"), rather than to unrepresented clients, yielded a quite different set of results. Sandefur found that lawyers outperformed NLAs more (though not always significantly) in those cases that were procedurally or substantively complex, as compared to cases that were simple.<sup>86</sup>

What might explain Sandefur's results? Why would it be more important to be represented in a simpler case than a more complex case? And,

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82. Sandefur defines procedural complexity by looking to surveys of lawyer-practitioners in the various fields of law. *Id.* at 12-13 (citing 1995 Chicago Lawyers Survey).

83. Sandefur defines substantive complexity by looking to "a group of experts—professors of law at Northwestern University Law School and American Bar Foundation research specialists on the legal profession." *Id.* at 11-12. Of course, these experts' characterizations may themselves be flawed. They may, for example, be based on a false conception that matters of lesser value are necessarily simpler. See Genn, *supra* note 39, at 400. Also, the apparent simplicity of certain matters may cause unrepresented disputants to omit legal arguments that were in fact necessary. *Id.* at 403.

84. Sandefur, *supra* note 80, at 25-27. These numbers assume exogeneity, meaning that the lawyers' presence is unrelated to the case's likelihood of success. *Id.* The figures provided show differences across the seventeen studies, i.e. weighting for the differences in numbers of cases counted in each study. *Id.* The differences between simpler and more complex cases were even greater comparing differences across cases, rather than across studies. *Id.*

85. *Id.* at 27. These numbers again assume exogeneity and show differences across the seventeen studies. The differences were even greater comparing differences across cases, rather than across studies.

86. Under all statistical assumptions, lawyers mattered more than NLAs in cases that were more procedurally complex. *Id.* at 27-28. Depending on statistical assumptions, lawyers outperformed NLAs either for the most complex cases, or for the cases of average complexity. Note that Sandefur also attempts to discern whether lawyers' impact is greater in more formal trials than in more simplified tribunals and small claims courts. Her results, however, are ambiguous, depending on exogeneity assumptions. *Id.* at 28-29.

why might lawyers outperform NLAs in more complex cases as compared to simpler cases? To resolve this puzzle it may help to consider what kinds of cases are said to be relatively simple. Sandefur states that “[t]he studies in which we observe the largest differences in the outcomes of lawyer-represented and self-represented cases include landlord-tenant cases, asylum cases, and social security disability reconsideration hearings.”<sup>87</sup> Sandefur observes that “[i]n these disputes, the focal party frequently labors under the double stigmas of a disesteemed social position—poor person, immigrant—and a disesteemed legal position—cast as a delinquent tenant, illegal migrant, or malinger.”<sup>88</sup> Sandefur goes on to opine that in these sorts of settings lawyers may benefit their clients by providing a sort of endorsement that leads judges and court staff to treat them better and evaluate their cases as more likely meritorious.<sup>89</sup> She further notes that in these settings, cases are often “treated perfunctorily or in an ad hoc fashion by judges, hearing officers and clerks.”<sup>90</sup> She cites studies finding that judges in such settings may often “short cut the law.”<sup>91</sup> Based on these theories, Sandefur opines that “lawyers’ impact appears greatest when lower status people appear in hearings where summary processing is standard operating procedure, or the court’s adherence to the law is ad hoc. In these settings, lawyers appear to assist their clients, in part, by simply assisting the court in following its own rules.”<sup>92</sup> Given that this function is non-technical, Sandefur finds it understandable that NLAs could similarly provide substantial assistance to clients in such settings.

Perhaps an even simpler explanation suffices. The sorts of people who are often unrepresented in “simple” cases need help that is not based exclusively on procedural and substantive expertise. Erica Fox, in an article discussing unrepresented tenants’ ability to negotiate on their own behalf in Boston Housing Court, describes a concept she calls “self-agency.”<sup>93</sup> “If negotiators authorize themselves to identify and to prioritize their interests, as well as to pursue and to satisfy them, [they are said to have] a high degree of ‘self-agency.’”<sup>94</sup> In contrast, when unrepresented persons can be knowledgeable and articulate in the hallway, and seem to have a strong le-

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87. *Id.* at 30.

88. *Id.*

89. *Id.*

90. *Id.* at 31.

91. *Id.*

92. *Id.* at 32-33.

93. Erica L. Fox, *Alone in the Hallway: Challenges to Effective Self-Representation in Negotiation*, 1 HARV. NEGOT. L. REV. 85, 86-87 (1996).

94. *Id.* at 87.



gal position, but nonetheless reach a settlement that is lopsided in favor of the opposing party, Fox would say they lack “self-agency.”<sup>95</sup>

Drawing on several months of observations and interviews at the Boston Housing Court, Fox found that tenants who were very verbal and able to talk on their own behalf in the hallway almost magically became silent when the time came to negotiate directly or in a mediation with the landlord’s attorney. One tenant explained the phenomenon: “People here are afraid to talk. You know, you get that inner fear, and you’re too afraid to say anything.”<sup>96</sup> Alternatively, some clients engaged in what Fox calls “constructive silence,” whereby they spoke words that were audible but not significant.<sup>97</sup> In short, the tenants typically felt and acted disempowered, and thereby could not and did not negotiate effectively on their own behalf.<sup>98</sup>

Putting together Fox’s individual study and Sandefur’s statistical work it is possible to begin to think about roles played by attorneys that do not depend only on procedural and substantive expertise. In ADR, as in litigation, attorneys can help empower clients to stand up for themselves, and to express their own perspectives. Even in relatively simple disputes, where the procedural rules have been geared to allow access by pro se disputants, it seems obvious that many individuals will not feel entirely comfortable trying to represent their own interests. Whether one calls this attorney role “boosting self-agency,” “providing emotional support,” or “balancing power,” it seems clear that attorneys potentially play important roles that go beyond providing legal expertise.<sup>99</sup> Thus, in considering the need for representation in mediation and arbitration we should ask not only whether these processes are so complex or adversarial as to require representation, but also whether the participants in the ADR process would benefit from the sort of emotional or other support that representatives may provide.

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95. *Id.*

96. *Id.* at 98 (quoting a tenant named Arnold Moses).

97. Fox cites author Bell Hooks, who describes such constructive silence as “black women’s silence.” Speaking of herself, Hooks writes, “I was never taught absolute silence, I was taught that it was important to speak but to talk a talk that was in itself a silence.” *Id.* at 99 (quoting BELL HOOKS, TALKING BACK: THINKING FEMINIST, THINKING BLACK 6 (1989)).

98. On those relatively few occasions when tenants did try to assert themselves, they were sometimes punished for exercising such self-agency. *Id.* at 105-06.

99. Many other commentators have, of course, focused on how lawyers can help make up for disputants’ lack of power or perceived power. *See, e.g.*, CENTER FOR AUTO SAFETY, LITTLE INJUSTICES: SMALL CLAIMS COURTS AND THE AMERICAN CONSUMER (1972); Engler, *supra* note 1.

### C. How Lawyers Can Help in ADR

Drawing upon both the traditional knowledge and skills typically emphasized by the Supreme Court, and the supportive emotional and other factors illustrated by the work of Sandefur and Fox, this Part will now explore when and how attorneys can be useful in mediation and arbitration. Of course, throughout this exercise it is essential to remember that arbitration and mediation are very different from one another, and that these processes themselves also vary tremendously, depending on the context. Nonetheless, we will see that there are many stages at which attorney participation can be very useful in both arbitration and mediation. In particular, lawyers add value through imparting their procedural and strategic knowledge regarding the various processes, gathering and presenting legal and factual information, assisting specifically in negotiation, and empowering their clients. Thus, even to the extent arbitration and mediation are relatively simple and non-adversarial, which is often not the case, lawyers can provide a great deal of assistance with regard to these processes.

#### 1. Knowledge and Strategy re: Processes

Lawyers can be very useful in helping disputants decide whether arbitration or mediation is desirable. Although some lawyers will be more knowledgeable than others about the pros and cons of such processes, certainly they will generally know more than their clients. Even when the processes are theoretically mandatory, lawyers may be able to help clients avoid processes that they believe would not be desirable. Also, lawyers are better positioned than clients to decide whether to opt into ADR processes voluntarily.<sup>100</sup>

If an ADR process is to be used, lawyers can help select the neutral. In purely voluntary processes, lawyers rely on their networks to find names of mediators and arbitrators who they think would or would not be appropriate. Even when mediation or arbitration is court-ordered, lawyers can often help disputants make choices among lists of possible neutrals. Beyond familiarity with the names and qualifications of particular neutrals, attorneys will typically be more knowledgeable than clients regarding the varying approaches neutrals might use, and better able to assess their usefulness in a particular dispute.<sup>101</sup>

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100. See, e.g., David Plimpton, *Mediation of Disputes: The Role of the Lawyer and How Best to Serve the Client's Interest*, 8 ME. B.J. 38, 41-44 (1993) (discussing the role a lawyer can play in helping a client decide among dispute resolution processes).

101. For example, attorneys can help guide their clients on the choice between more facilitative and more evaluative mediators. See generally Leonard L. Riskin, *Understanding*

Once the neutral is selected, the lawyer can be very helpful in coaching the client in such matters as what to expect in mediation or arbitration,<sup>102</sup> who to bring as participants or witnesses,<sup>103</sup> or what strategic moves might be desirable in either process.<sup>104</sup> In arbitration, whether binding or non-binding, attorneys can make the same kinds of decisions they make in litigation, such as which witnesses to use and whether and how to present documentary evidence.

The strategy in mediation is a form of negotiation strategy, and great thought should be given to how and whether to present information, solicit information, ask questions, make apologies, or make offers/demands. Although aspects of mediation may sometimes be confidential, depending upon relevant statutes, rules and contracts, information exchanged in mediation may nonetheless be very important to litigation that later transpires if the dispute is not resolved.<sup>105</sup> Attorneys can help with these tasks.

One additional way attorneys can help clients succeed in mediation is to help them better understand their own situation and goals. Although some may demonize attorneys, suggesting that they are only interested in heightening adversarial tensions or pursuing monetary relief, and although such may be an apt description of some attorneys, many other attorneys are very good at helping their clients to more fully understand their situation and to appreciate other parties' concerns. Psychologically, we all have a tendency to view the world through our own schema, predispositions, and stereotypes.<sup>106</sup> We also tend to be affected by "naïve realism" (an assumption that others see the world the way we do),<sup>107</sup> and positive biases (that cause us to be overoptimistic<sup>108</sup> and to overemphasize our own contributions to

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*Mediators' Orientations, Strategies and Techniques: A Grid for the Perplexed*, 1 HARV. NEGOT. L. REV. 7 (1996).

102. See, e.g., Penelope Bryan, *Reclaiming Professionalism: The Lawyer's Role in Divorce Mediation*, 28 FAM. L.Q. 177, 210 (1994) (discussing ways lawyers can educate their clients with respect to the mediation process).

103. See, e.g., Kent B. Scott & Cody W. Wilson, *Questions Clients Have About Whether (and How) to Mediate and How Counsel Should Answer Them*, 63 DISP. RESOL. J., May-July 2008, at 26, 33-34.

104. See generally ABRAMSON, *supra* note 3, at 95-124 (discussing lawyer's role in mediation); COOLEY, *supra* note 14, at 127-200; COOLEY, *supra* note 3, at 164-82 (discussing how lawyers can be effective in arbitration).

105. See, e.g., *Rojas v. Superior Court*, 93 P.3d 260, 265 (Cal. 2004) (holding that evidence prepared for a mediation, including photographs, raw test data, and witness statements was not discoverable in a subsequent action).

106. See, e.g., Jean R. Sternlight & Jennifer Robbenolt, *Good Lawyers Should Be Good Psychologists: Insights for Interviewing and Counseling Clients*, 23 OHIO ST. J. ON DISP. RESOL. 437, 449-61 (2008).

107. *Id.* at 463-65.

108. *Id.* at 468-72.

group endeavors).<sup>109</sup> Lawyers, while not entirely immune to such biases, are apparently less subject to some biases than are their clients.<sup>110</sup> Further, when working with clients they can help clients to broaden their views and get beyond their biases.<sup>111</sup>

## 2. *Gathering and Presenting Factual Information*

Gathering and presenting legal and factual information is often a key aspect of both mediation and arbitration. No matter how informal the process, disputants typically need to explain such matters as what happened, what relief they are seeking or seeking to avoid providing, and why they believe they are in the right and someone else is in the wrong.

While some might believe that all such facts will already be in the disputants' possession, often that is not the case. For example, one kind of dispute that is frequently mediated is marital dissolution. Although the two spouses may be quite familiar with aspects of their family, neither of them may have complete knowledge with respect to their mortgage, the value of their property, their investments, or their pensions. Lawyers are accustomed to ferreting out information and working with accountants, and may be very useful in helping parties prepare for a mediation or arbitration. Similarly, while the disputants presumably know their children and each other quite well, lawyers may again be able to seek out other factual information that could be relevant. They may help obtain school, medical, or psychological records or seek out the assistance of a private investigator. In personal injury matters the attorney will likely be better at obtaining police reports, witness statements, and governmental agencies' investigative reports with respect to the instant accident and other similar accidents. Even in seemingly simple disputes between neighbors, a lawyer can help obtain information, for example, regarding property lines or local noise or zoning ordinances. While one obviously does not need to have a law degree to make these sorts of factual inquiries, lawyers' training and experience makes them better suited than many lay persons to engage in such factual investigations.

Having gathered the facts, the lawyer can help make strategic arguments regarding which facts to disclose, as well as when and how such facts

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109. *Id.* at 469-72.

110. Russell Korobkin & Chris Guthrie, *Psychology, Economics, and Settlement: A New Look at the Role of the Lawyer*, 76 TEX. L. REV. 77, 95-121 (1997).

111. *See id.*; *see also* Scott & Wilson, *supra* note 103 (discussing how attorneys can help their clients better understand the weaknesses as well as the strengths of their positions); COOLEY, *supra* note 14 (discussing that lawyers can use mediation to facilitate communication between clients). Of course not all lawyers possess these skills, but some do.

should be disclosed. In mediation, careful thought must be given to whether and how to convey information. If the dispute is not resolved in mediation it may well be litigated, and it may or may not be wise to disclose all of one's best litigation arguments in mediation. In non-binding arbitration, similarly, the lawyer may decide not to present the entire case that might be presented in court. And, assuming facts will be presented, lawyers can typically prepare both verbal and written versions of the facts that are much clearer, better organized, and more persuasive than the client might be able to manage on her own.

### 3. *Researching and Presenting Legal Arguments*

Although some may assume that legal arguments have no place, or less of a place, in ADR proceedings than in court, they would be wrong. Mediations often occur in the shadow of litigation, with disputants quite cognizant that the case may proceed to litigation if it does not settle in mediation.<sup>112</sup> Thus, the strength and weakness of legal arguments is highly relevant to determine whether a disputant ought to settle on particular terms. For this reason, disputants, mediators, and of course the lawyers often focus explicitly on the strength and weakness of legal arguments during the mediation. Arbitrations, of course, typically turn on legal arguments, merely substituting the arbitrator's legal determinations for those of a judge. Thus, in both forms of ADR lawyers can help a great deal in researching and presenting legal arguments.<sup>113</sup>

### 4. *Empowering Clients*

In addition to the tasks outlined above, lawyers are poised to help their clients in the ways suggested by the Sandefur and Fox studies—specifically, by providing emotional support and empowering their clients. Even in simpler ADR matters that do not involve complex facts or law, it may be very important for clients to be accompanied and supported by a person who can help them emotionally to tell their own story. A large literature discusses this need as applied to minorities,<sup>114</sup> women,<sup>115</sup> and vic-

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112. See Robert H. Mnookin & Lewis Kornhauser, *Bargaining in the Shadow of the Law: The Case of Divorce*, 88 YALE L.J. 950, 973-77 (1979).

113. See Trina Grillo, *The Mediation Alternative: Process Dangers for Women*, 100 YALE L.J. 1545, 1597-98 (1991) (explaining that counsel can assist client in avoiding revelation of "privileged or irrelevant material," which could hurt client later if mediation is unsuccessful); Riskin, *supra* note 42, at 36-41 (discussing clients' need for legal advice during and after mediation).

114. See, e.g., Richard Delgado et al., *Fairness and Formality: Minimizing the Risk of Prejudice in Alternative Dispute Resolution*, 1985 WIS. L. REV. 1359 (1985).

tims of domestic violence.<sup>116</sup> But it seems that the empowerment issue is likely much bigger than that: many disputants can benefit substantially from the assistance of an attorney to help them tell their own story, even in matters that may seem relatively simple in terms of facts and law.

Some may imagine that mediations or arbitrations are so informal and comfortable that participants do not need any emotional support, except perhaps, from the neutral. It is possible that some arbitrations and mediations have this nature. Yet, as has been discussed, it is certain that many arbitrations and mediations have a much less warm and friendly atmosphere.<sup>117</sup>

### 5. *Drafting Agreements*

If an agreement is reached in mediation, the attorney can also help the client by drafting the actual mediation agreement. As with any contract, lawyers can add a great deal, ensuring that the terms of the contract are clear, fair, and enforceable.<sup>118</sup>

#### **D. Neutrals Can't Adequately Make Up for the Absence of Representation**

Some may believe that the neutral arbitrator or mediator can help the unrepresented disputant sufficiently, such that representation is not needed.<sup>119</sup> Stephan Landsman, in contrast, believes that arbitrators and mediators have less authority and ability to help unrepresented disputants than do courts.<sup>120</sup> I believe the truth lies somewhere in between. Mediators often have responsibilities that are in tension with one another, both to remain impartial and also to ensure that parties are sufficiently well-informed that they can exercise self-determination.<sup>121</sup> If mediators try too hard to help an unpre-

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115. See, e.g., Grillo, *supra* note 113, at 1572-81.

116. Penelope E. Bryan, *Killing Us Softly: Divorce Mediation and the Politics of Power*, 40 BUFF. L. REV. 441 (1992).

117. See Watson, *supra* note 6, at 15-21.

118. E.g., Plimpton, *supra* note 100, at 46.

119. See Rubinson, *supra* note 9, at 142-52 (asserting mediation can help solve access to justice problem).

120. Landsman, *supra* note 46.

121. The Model Standards of Conduct for Mediators, endorsed by the American Bar Association, the Association for Conflict Resolution, and the American Arbitration Association, state that mediators shall support party self-determination and remain impartial. MODEL STANDARDS OF CONDUCT FOR MEDIATORS §§ I, II (2005), available at <http://www.abanet.org/dispute/news/ModelStandardsofConductforMediatorsfinal05.pdf>. The Standards also state that “[i]f a party appears to have difficulty comprehending the process, issues, or settlement options, or difficulty participating in a mediation, the mediator should explore the

sented power they will put their impartiality at risk. Arbitrators, on the other hand, feel essentially the same pressures as judges. While they are permitted to help unrepresented disputants present their position, the arbitrator cannot become an advocate for the unrepresented disputant without losing her neutral stance in the adversarial process. Thus, while both arbitrators and mediators may be able to help the unrepresented, neither, consistent with their role, can help substantially in conducting legal or factual research, organizing factual information, presenting legal arguments, or providing emotional support.

### E. Will Adding Lawyers Undercut the Value of Mediation and Arbitration?

Having laid out the potential benefits of having more lawyers represent clients in arbitration and mediation, it is also important to consider the possible counterargument, that adding lawyers to ADR processes will undermine the very value of those processes. Some fear that adding lawyers will make ADR processes too legalistic, formal, costly, and slow. Certainly there is some validity to this expressed fear—lawyers do not always know how to maximize the value of ADR processes. In mediation, they may well focus too narrowly on purely legal issues or monetary relief.<sup>122</sup> Or, they may run up the bill or encourage the client to settle or not settle for reasons that benefit the lawyer but not the client.<sup>123</sup> In arbitration, similarly, lawyers may overly complicate a process intended to be simple, by engaging in extensive discovery or filing lots of motions.

Yet, while the concerns are valid, keeping lawyers out of ADR altogether is not the right solution. Lawyers can be trained to do a better job in ADR, whether in law school or in subsequent CLEs. While the training may not succeed in all cases, surely it is wrong to conclude that the training prospects are so bleak that we should assume lawyers hurt more than they help. Many professional mediators have recognized that attorneys can be extremely helpful to the process of mediation,<sup>124</sup> and no doubt most arbitrators would prefer to handle hearings in which disputants are represented, rather than pro se. Thus, we need to do what we can to train lawyers to be

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circumstances and potential accommodations, modifications or adjustments that would make possible the party's capacity to comprehend, participate and exercise self-determination." *Id.* at § VI(10).

122. See, e.g., Tamara Relis, "It's Not About the Money!": A Theory on Misconceptions of Plaintiffs' Litigation Aims, 68 U. PITT. L. REV. 701 (2007) (presenting empirical research showing that plaintiffs' aims in litigation are often different from those assumed by their attorneys); Riskin & Welsh, *supra* note 42, at 903-04; Sternlight, *supra* note 3, at 324-25.

123. See Sternlight, *supra* note 3, at 320-21, 327-28.

124. E.g., McEwen et al., *supra* note 20.

helpful in ADR processes, and ensure that attorneys are provided to those disputants who need them most, whether in ADR or in litigation.

#### F. Non-Lawyer Representatives

Assuming participants in mediation and arbitration could often benefit from representation, must that representation be supplied by an attorney? If non-lawyers could represent disputants' interests in ADR as effectively, or even almost as effectively as attorneys, could not both disputants and society as a whole save on the costs of legal representation?

Certainly the point is worth considering. Studies of litigation have shown that non-lawyer representatives can be as effective or sometimes more effective than attorneys, depending on their expertise and familiarity with the particular type of dispute.<sup>125</sup> In mediation, similarly, the preliminary results seem to show that non-lawyer representatives can be helpful.<sup>126</sup>

I believe that we should be rethinking the rules regarding unauthorized practice of law. The rules restricting non-lawyers from providing legal assistance, though perhaps often well-intended as a means to protect the public from bad legal advice, at times may deprive persons of the only help they can afford.<sup>127</sup>

Nonetheless, I believe it would be a mistake to accept the idea that non-legal representation necessarily makes more sense in ADR processes than it does in litigation. There is no reason to believe that mediation or arbitration require fewer legal skills and knowledge than litigation. As has been discussed, the gathering and presentation of facts, and the research and presentation of legal arguments, can be just as important in ADR as in litigation. Similarly, the need for providing emotional support, self-agency, and an endorsement or reputational boost of the sort discussed by Sandefur may be just as great or even greater in mediation or arbitration than in litigation. The need for such support depends not only on the nature of the process, but rather on disparities in power and confidence between disputants. Nor is it clear that non-lawyers are necessarily as good as lawyers in providing emotional support, confidence, or certainly reputational-

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125. KRITZER, *supra* note 41.

126. See Bingham et al., *supra* note 22, at 364-71 (finding that United States Postal Service employees are more satisfied with representation by union representatives than by lawyers, and that the lawyers, who appeared in only 3% of cases, did not settle as many cases completely as did the non-lawyers).

127. For a discussion of the Bar's prohibition on "unauthorized practice of law" and the purported problems therewith, see RHODE, *supra* note 9, at 81-91.



bolstering to clients.<sup>128</sup> While non-lawyers may well have superior emotional skills to lawyers, disputants may feel more confident knowing that they are supported by an attorney, as opposed to a non-attorney. Thus, rather than assume that the substitution of non-attorney-representatives for attorneys makes more sense in ADR than in litigation, we should rethink the rules on unauthorized practice of law with respect to all forms of dispute resolution.

### III. SO WHAT IS TO BE DONE?<sup>129</sup>

Assuming readers are convinced that it can be very important to have legal representation in ADR, what can we do to achieve this goal? We do not have enough legal representation in litigation, and do not seem to be near the achievement of a civil *Gideon*. Is it therefore a waste of time to focus on the need to provide counsel in ADR?

While it is no doubt true that there are not enough lawyers to go around, drawing the line between litigation and ADR does not make sense. Thus, it is unwise to base public policy on an assumption that we should not worry about legal representation in ADR until the need for legal representation in litigation is met. But, given the substantial pro se phenomenon in litigation, how can we also hope to obtain legal representation in ADR? Below, I offer suggestions to courts, policymakers, and legal providers.

#### A. Courts Considering the Need for Counsel Should Rethink Their Focus on Adversarial Settings

I heartily endorse the idea that attorneys may sometimes be constitutionally required in civil as well as criminal settings.<sup>130</sup> As courts consider the extent to which attorneys may be needed in civil settings, I urge them to reconsider the instinct that the need for representation correlates with the extent to which the process is adversarial. As we have seen, the assumption of this correlation, while never expressly justified, permeates the body of Supreme Court decisions dealing with the right to counsel. Yet, as has been discussed, perhaps the need for representation is greater in certain informal settings than it is in more formal adversarial contexts. Thus, as courts think about the extent to which non-legal representation can be suf-

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128. See Sandefur, *supra* note 80, at 25-26 (finding that attorneys were relatively more effective than non-attorney advocates in cases that were more complex).

129. With apologies to Lenin. See VLADIMIR ILICH LENIN, WHAT IS TO BE DONE?: BURNING QUESTIONS OF OUR MOVEMENT (1943).

130. See, e.g., Engler, *supra* note 1, at 78 (summarizing an argument for civil right to counsel).

ficient, in lieu of legal representation, they should recognize that while non-legal representation can potentially be useful and appropriate, it is not necessarily any more appropriate in ADR than it is in litigation.

Courts should also consider the potential need for counsel in ADR processes in other contexts. For example, courts deciding whether to make a particular ADR process mandatory should recognize that mandating an unrepresented person to appear in mediation or arbitration can sometimes be more problematic than allowing that person to continue unrepresented in litigation. When courts, acting as regulators, set standards for the qualification and training of ADR neutrals, they should similarly keep in mind the problems of unrepresented disputants. Finally, courts creating rules that require persons to participate in mediation or arbitration “in good faith” or that establish confidentiality in ADR processes should, again, recognize that unrepresented persons may be affected by the rule.

#### **B. Policymakers Should Focus on the Need for Representation in ADR, and Not Only in Litigation**

If we are able to convince policymakers to increase the availability of attorneys, we should also convince them to focus on ADR as well as litigation. I agree with Russell Engler that a blend of solutions is probably appropriate to enhance access to justice.<sup>131</sup> We can focus simultaneously on providing more attorneys and NLRs, and on helping those persons who proceed pro se. But, as we engage in both endeavors we should remember that attorneys can be just as important in ADR as they can be in litigation.

Commentator Rob Rubinson has proposed a different solution to the pro se phenomenon.<sup>132</sup> Seemingly in conflict with the spirit of this Article, he suggests that mediation can be so conducive to pro se disputants that it can actually help solve the problem of pro se clients’ lack of access to justice.<sup>133</sup> Yet, upon close reading, Rubinson’s argument is largely consistent with the ideas presented here. Rubinson is very careful to contrast the “good” mediation that he proposes with the “bad” mediation that often exists.<sup>134</sup> In essence, Rubinson proposes a model of mediation whereby mediators are well-trained, dedicated, and well-compensated; mediators are trained to help disputants find their own solutions rather than to impose solutions; mediation caseloads are carefully controlled; sufficient time and

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131. *Id.* at 81.

132. Rubinson, *supra* note 9.

133. *Id.* at 147-52.

134. *Id.* at 145, 152 (recognizing that mediation often will not be structured as he proposes).

space is afforded for mediation; staff is available to assist disputants in deciding whether mediation is desirable; attorneys are welcome in the process but only if all parties are represented; a corps of attorneys are employed by the mediation program to advise disputants on available legal remedies and to review final agreements; the connection between courts and mediation programs is severed to avoid court-imposed settlement pressures; and all mediation services is provided for little or no cost to disputants.<sup>135</sup> If such a program could exist, asserts Rubinson, disputants could be empowered to truly represent their own interests.<sup>136</sup>

The pro se mediation program proposed by Rubinson is, in many ways, a beautiful dream. Yet, I fear it will inevitably be corrupted and cheapened so that the mediation afforded to weaker poorer parties will not adequately represent their own interests. Rubinson himself is very cognizant of this concern: “The crux, as always, is there is currently no mediation program that looks remotely like my proposal. A process called mediation can be used for good or ill, and therein lurks the anger of proposals like mine.”<sup>137</sup> If mediation does not look as Rubinson proposes, I think he and I would agree that representation can be quite important to protect disputants’ interests.

Policymakers should consider disputants’ potential need for attorneys in ADR processes not only as they examine the direct question of whether or when attorneys should be appointed in mediation or arbitration, but also as they consider other kinds of questions relating to such dispute resolution. Thus, as noted above with respect to courts, policymakers should recognize that disputants may be suffering from lack of representation when the policymakers consider such issues as whether to mandate ADR, what training and qualification standards ought to be set for neutrals, and what confidentiality rules ought to be applied.

### **C. Legal Services Organizations Should Rethink How Lawyers Are Used**

Skeptics may suggest that the reform measures discussed thus far are long term aspirations, if not pipedreams. It may take some time before courts are willing to recognize a constitutional right to representation in civil ADR proceedings. We do not seem poised to dramatically increase the availability of attorneys through either pro bono or government-funded efforts.

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135. *Id.* at 147-51.

136. *Id.* at 142-43.

137. *Id.* at 152.

Does the analysis presented here have any use in our current world of very scarce resources? In pondering this question it may be helpful to consider how one legal services organization decided to allocate its attorneys between litigation and ADR. While this is just one article, describing one particular legal services organization,<sup>138</sup> the experience may provide an insight as to how the provision of legal services can be reconceptualized.

According to an article published in May 2006,<sup>139</sup> Neighborhood Legal Services (“NLS”) in Massachusetts has taken a very innovative approach to how to allocate its scarce resources to tenants at risk of eviction. The article explains:

In a typical year the Housing Court Department, only one of two parts of the court system with jurisdiction over evictions, presides over more than 20,000 evictions. Many of the defendants are eligible for legal services because of their low incomes. All are facing the imminent loss of their homes.<sup>140</sup>

Faced with this great need, a legal services entity with limited staffing could choose to: (1) fully represent a very small number of clients (thereby helping a few but having an inconsequential impact on the bigger problem); (2) fully represent only clients in public or subsidized housing, rather than private housing, figuring that in those cases a subsidy as well as the tenancy is at risk (still an inconsequential impact on the larger problem); or (3) offer self-help and legal education to the persons, such as private tenants, whom it cannot represent (on the hope that such programs can more efficiently provide help to a larger number of tenants).<sup>141</sup>

For a time, NLS, like many other entities, took the approach of offering pro se clinics to teach tenants to write their own pleadings, and counseling on how to appear in court to present their side of the story.<sup>142</sup> Perhaps more unusually, however, NLS also performed an extensive review of the success of its own program. The review showed that the pro se clinics were not particularly useful:

They found that these clients gained virtually nothing as a result of the advice, with no appreciable difference between the results achieved by low income tenants who had never seen the program and those that had.

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138. Russell Engler cites other studies, some of which found that efforts to aid unrepresented clients through workshops and other approaches could in fact be fairly effective. Engler, *supra* note 1, at 66-72.

139. Ross Dolloff & Patricio Rossi, *Mediation Project Gets Results for North Shore Tenants*, 16 LEGAL SERVS. REP., May 2006, at 1.

140. *Id.*

141. *Id.* at 1, 12.

142. *Id.* at 12.

No matter how the program was tinkered with, the result was always the same. It seemed that once immersed in the court process, these tenants, no matter how well trained and coached, succumbed to pressure to settle their case on unfavorable terms or were simply afraid to appear and contest the matter at all.<sup>143</sup>

Working together with two other legal services entities, NLS staff therefore spent a year brainstorming how they might restructure their representation model to provide maximum assistance with minimum attorney hours. This rethinking took account of the facts that more than 90% of the eviction cases were settling in the court's mandatory mediation program, that the mediations typically took place just minutes before a case was called for hearing and thus were highly charged and quite emotional, and that the courts were pressing hard to resolve disputes through settlement rather than at trial.<sup>144</sup> The legal services staff noted:

These forces conspire to work dramatically to the detriment of our client population, who often lack the education and sense of self, as well as an awareness of the rules of the system and of their rights in the landlord-tenant relationship, to effectively overcome this pressure to capitulate and settle on any terms. The fancy legal pleadings crafted skillfully by the lawyer in the traditional advocacy model are, then, never even looked at in the vast majority of cases.<sup>145</sup>

Thus, the legal services program rethought their model of representation to try to "use the available attorney resources only for those tasks and events that are critical to the client's success and either skip or have others perform the remaining tasks."<sup>146</sup> In this new model, representation in mediation becomes the attorneys' key task. The model uses non-lawyer advocates to interview clients, provides limited assistance in a group setting to help clients draft their own pleadings and identify what documents to bring to court, and has attorneys review available information in advance but not actually meet with clients in advance.<sup>147</sup> Then, the model uses the valuable attorney time to represent clients in every mediation.<sup>148</sup> The attorneys use the mediation process "to facilitate achieving a fair agreement for the client, consistent with their needs, desires and their legal position in the case."<sup>149</sup>

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143. *Id.*

144. *Id.* at 12.

145. *Id.*

146. *Id.* at 13.

147. *Id.*

148. *Id.*

149. *Id.*

If the case is not resolved in mediation, the attorney may or may not continue to represent the client at trial. The lawyer will continue representation at trial “only when the client was not offered a fair settlement based on the reality of the case. . . .”<sup>150</sup> That is, clients who reject a fair settlement will have to represent themselves at trial. The designers of the program believe it ensures “that every person who enters the housing court facing an eviction has a reasonable opportunity to get justice—not just access to the system, but substantive justice.”<sup>151</sup>

Following the establishment of the program, known as the Mediation Project, the legal services group conducted an empirical study on its results by looking at 200 of the 400 tenants who had been served in an eight month period.<sup>152</sup> The study found that the clients represented in mediation were far more successful than unrepresented clients.<sup>153</sup> It also found that clients were extremely satisfied with the program.<sup>154</sup>

Drawing on the inspiration of this Mediation Project, perhaps more attorneys, more courts, and more legal service entities can start to rethink which attorney services are most important. Although we have traditionally emphasized lawyers’ substantive and procedural knowledge in adversarial processes, we can now see that lawyers play other extremely important roles as well.

### CONCLUSIONS

It is natural to be attracted to the idea of a dispute resolution process in which persons can represent themselves. The thought of needing to depend on someone else for representation is unappealing to many, both because individualism is such a strong value in our society<sup>155</sup> and because we often believe that no person can understand our beliefs, needs, and desires as

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150. *Id.*

151. *Id.*

152. *Id.* at 14 (opining that use of a more traditional means of representation could have served only about one-third of these clients).

153. For example, “[i]n 29 percent of cases the eviction was denied unconditionally or temporarily denied subject to a probationary period. In contrast, less than five percent of unrepresented clients are able to achieve these results.” *Id.* Of the clients who were evicted, those with representation were permitted to stay in their homes for an average of nearly two months, whereas unrepresented defendants typically were allowed to remain less than three weeks. *Id.*

154. On a three-point scale measuring the degree to which project services were “helpful” in achieving their positive results, clients, on average, rated the program 2.93. *Id.*

155. Ayn Rand, author of *The Fountainhead* and many other works, is seen by many as one of the primary advocates of individualist philosophy.

well as we understand them ourselves.<sup>156</sup> Certainly we can try to work towards that ideal by creating dispute resolution processes that are conducive to self-representation. If we are going to attempt to make mediation or even arbitration maximally conducive to self-representation we will need to think carefully about such issues as how the neutrals should be selected and trained, whether rules should be adopted to prevent intimidation of unrepresented persons, and whether all kinds of disputes would be appropriate for such a process.

In the short term, however, we should recognize that the nature of existing arbitration and mediation are often such that disputants may need attorney representation. While of course this Article does not suggest that attorney representation is *always* needed, it can nonetheless be said that attorneys can be very helpful both for their substantive and procedural knowledge and skills, and for the emotional and reputational support they can provide. Certainly, it is wrong to assume that attorneys do not participate in ADR or that they cannot be helpful in ADR. Non-lawyer representatives can be effective too, but there is no reason to think they are more appropriate in ADR than in litigation.

The problem of needing representation in ADR is more pressing than ever given the growth of court-connected mandatory programs and given the high percentage of cases resolved through settlement. Thus, rather than ignore this issue or wish it away, we must continue to do empirical work examining the need for attorney representation in ADR processes. For now, we should assume that attorney representation in ADR may often be essential to allow disputants to achieve a just result.

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156. Some of us may have more faith in our own ability to know and understand ourselves, as illustrated by the high demand for therapists and psychologists.