UC DAVIS LAW REVIEW

VOL. 49, NO. 3 FEBRUARY 2016

How Litigants Evaluate the Characteristics of Legal Procedures: A Multi-Court Empirical Study

Donna Shestowsky[*]

[*] Copyright © 2016 Donna Shestowsky. Professor of Law and Martin Luther King, Jr. Scholar, University of California, Davis, School of Law. J.D., Stanford Law School; Ph.D. (Psychology), Stanford University; M.S. (Psychology), Yale University; B.A., Yale University. Correspondence should be addressed to Dr. Donna Shestowsky, University of California, Davis, School of Law, 400 Mrak Hall Drive, Davis, CA 95616, dshest@ucdavis.edu. This material is based upon work supported by the National Science Foundation under Grant Number 0920995. The American Bar Association's Section on Litigation and the Institute for Governmental Affairs at the University of California, Davis, also provided financial support during the first year of the study. The University of California, Davis, School of Law provided ongoing financial and human resources to ensure the success of this project. A full set of acknowledgements regarding the development of the dataset used in the present Article appears in Donna Shestowsky, *The Psychology of Procedural Preference: How Litigants Evaluate Legal Procedures Ex Ante*, 99 IOWA L. REV. 637 (2014). Research assistants Marvin Cho, Laura Flynn, David Jefferson, Alana Joyce, Linh Luong, Hovannes Nalbandyan, Steven Nguy, Sean Newland, and Brittany Parks ably assisted with this Article. Law librarians Elisabeth McKechnie and Susan Llano provided significant research support. Special thanks to Joseph Gonzales for conducting the statistical analyses, and to Laura Castro-Schilo and Keith Widaman for providing valuable early consultations. Gratitude is extended to Andrea Chandrasekher, Deborah Goldfarb, Victor Quintanilla, Nancy Welsh, and three anonymous peer reviewers for their thoughtful comments on early versions of this Article.

This Article presents findings from the first multi-court field study examining how civil litigants evaluate the characteristics of legal procedures shortly after their cases are filed in state court. Analyses revealed that litigants evaluated the characteristics in terms of control — i.e., whether the characteristics granted relative control to the litigants themselves or to third parties (e.g., mediators, judges). Although the litigants indicated a desire to be present for the resolution process, they preferred third-party control to litigant control. They also wanted third parties to control the process more than the outcome. Gender, age group, and case-type significantly predicted attraction to third-party control, whereas attraction to litigant control was predicted by whether litigants had a pre-existing relationship with each other, how much they valued a future relationship with the opposing party, party type, the type of opposing party, and court location. Implications for legal policy and lawyering are discussed.

TABLE OF CONTENTS

INTRODUCTION

The economic downturn's impact on the legal system has been profound. It greatly increased the waiting time for trial in jurisdictions across the country, while sharply decreasing the resources that many courts have for offering mediation, arbitration, or other alternatives to trial.[1] In light of these significant changes to the legal landscape, legal actors must strive harder to provide civil justice to those in need. A critical and foundational step for doing so involves gaining a better understanding of litigant preferences vis-à-vis different mechanisms for resolving disputes.

Over the past four decades,[2] researchers have used the procedural justice paradigm to elucidate how laypeople evaluate legal procedures.[3] Their studies, which explore how people evaluate the processes or procedures used to resolve disputes, stand in contrast to distributive justice studies, which examine how people evaluate the distribution of rights or resources as outcomes of procedures.[4]

[1] Donna Shestowsky, *The Psychology of Procedural Preference: How Litigants Evaluate Legal Procedures Ex Ante*, 99 IOWA L. REV. 637, 640 (2014) [hereinafter *Psychology of Procedural Preference*] (providing examples of courts and alternative dispute resolution ("ADR") programs that have been negatively impacted due to the economic downturn).

[2] For some of the earliest examples of this work, see generally JOHN THIBAUT & LAURENS WALKER, PROCEDURAL JUSTICE: A PSYCHOLOGICAL ANALYSIS (1975); John Thibaut et al., *Procedural Justice as Fairness*, 26 STAN. L. REV. 1271 (1974).

[3] *See, e.g.*, Stephen LaTour et al., *Procedure: Transnational Perspectives and Preferences*, 86 YALE L.J. 258, 265-68 (1976) (describing an example of the "procedural justice" model); E. Allan Lind et al., *Procedure and Outcome Effects on Reactions to Adjudicated Resolution of Conflicts of Interest*, 39 J. PERSONALITY & SOC. PSYCHOL. 643, 645-46 (1980) [hereinafter *Procedure and Outcome Effects*] (using the procedural justice paradigm to assess reactions to outcomes versus procedures for adversary and nonadversary adjudication).

[4] *See generally* Lind et al., *Procedure and Outcome Effects*, *supra* note 3, at 1

Procedural preference studies relying on the procedural justice paradigm have been surprisingly uniform in terms of methodology. First, most of the research consists of laboratory research wherein undergraduates evaluate procedural options for hypothetical conflicts.[5] Second, the field studies conducted on actual civil litigants have been remarkably homogeneous — with only a handful of exceptions,[6] they examine litigants' attitudes only *after* their dispute has been resolved (i.e., ex post), not before (i.e., ex ante). And yet, how litigants perceive options at the early stages of their case is critically important. Such evaluations presumably affect how litigants conceptualize procedures as they choose them, and how they feel about them when they begin the resolution process. Thus, early perceptions might explain their resistance or over-eagerness to use certain procedures, and how much good faith effort they expend on resolving their dispute while using these procedures. The goal of this Article is to provide some insight into this underexplored but important aspect of litigant psychology.

Acquiring meaningful insights into how litigants perceive their options ex ante is a two-fold research endeavor: we must learn how they view procedures at the macro level (i.e., whole procedures such as negotiation, mediation, jury trials) *and* how they evaluate options at the micro level (i.e., individual characteristics or attributes of procedures such as who will determine the outcome and how involved the parties will be in the process). Whereas our[7] past research investigated litigants' perceptions at the macro level,[8] the present Article reports a study that examined micro-level evaluations.

Empirical examinations of how litigants perceive the characteristics of procedures can be critically helpful to legal practitioners who want

(discussing the difference between the two types of studies).

[5] For a more thorough review, see Donna Shestowsky & Jeanne Brett, *Disputants' Perceptions of Dispute Resolution Procedures: An Ex Ante and Ex Post Longitudinal Empirical Study*, 41 CONN. L. REV. 63, 73-75 (2008).

[6] *See generally* Shestowsky, *Psychology of Procedural Preference*, *supra* note 1 (explaining the common methods used as part of a procedural preference study and how her study differs); Shestowsky & Brett, *supra* note 5, at 82-83 (describing their data collection process for exploring the ex ante perceptions of litigants involved in ongoing civil cases); Lamont E. Stallworth & Linda K. Stroh, *Who Is Seeking to Use ADR? Why Do They Choose to Do So?*, 51 DISP. RESOL. J. 30 (1996) (describing the scope and design of their study).

[7] In this Article, "our" and "we" refer to research team members at the University of California, Davis. The team was composed primarily of law students whom the Author selected, trained, and supervised. Any errors are therefore the sole responsibility of the Author.

[8] *See* Shestowsky, *Psychology of Procedural Preference*, *supra* note 1, at 656.

to understand what attracts and repels individuals embroiled in legal conflict. Findings from such research could help Alternative Dispute Resolution ("ADR") practitioners market and explain procedures more effectively by "breaking down" their descriptions of procedures in ways that resonate with their clients' mental framework.[9] It could also help lawyers dispel any preconceived notions or biases they might have about how clients think about various attributes of procedures, thereby helping them to counsel their clients more effectively. Moreover, it could also assist them to better predict the attitudes of opposing parties. Insofar as many courts require or encourage parties to use ADR procedures before gaining access to trial,[10] judges and court personnel could use such micro-level research to shape their programs in ways that promote litigant respect for the legal system, foster a greater desire to use ADR,[11] and possibly even encourage good faith participation in such procedures. The more educated that legal actors become about how litigants perceive the characteristics of procedures, the better equipped they will be to serve them. For example, if research were to suggest that litigants want to be included in the resolution process but do not desire free verbal exchanges between the parties, then ADR providers could structure procedures to meet these interests by, for example, offering litigants the opportunity to be "present" telephonically rather than face-to-face. Armed with such findings, legal actors could improve procedures from the litigant perspective.

---

[9] Such effective marketing of ADR procedures can help lawyers to build their practices. *See* Martin A. Frey, *Representing Clients Effectively in an ADR Environment*, 33 TULSA L.J. 443, 445 (1997) (observing that "[b]y developing a reputation for considering ADR as an alternative to litigation and for knowing how to select and operate within a broad array of ADR processes, additional clients will be attracted").

[10] *See* Deborah R. Hensler, *Our Courts, Ourselves: How the Alternative Dispute Resolution Movement Is Re-Shaping Our Legal System*, 108 PENN ST. L. REV. 165, 167 (2003) (noting that "many state courts require parties to attempt to resolve their cases through mediation before they can obtain a trial date"); Peter L. Murray, *Privatization of Civil Justice*, 15 WILLAMETTE J. INT'L L. & DISP. RESOL. 133, 137 (2007) (observing that "[i]n many U.S. states, civil litigants are required to participate in private alternative dispute resolution (ADR) proceedings — usually mediation — before the courts will consider their cases"); Holly A. Streeter-Schaefer, *A Look at Court Mandated Civil Mediation*, 49 DRAKE L. REV. 367, 373-77 (2001) (noting that many "states [have] jumped on the bandwagon" by mandating mediation for certain civil disputes).

[11] *See* Donna Shestowsky, *Disputants' Preferences for Court-Connected Dispute Resolution Procedures: Why We Should Care and Why We Know So Little*, 23 OHIO ST. J. ON DISP. RESOL. 549, 549-51 (2008) [hereinafter *Disputants' Preferences*] (noting that some courts make ADR procedures a mandatory prerequisite to trial, whereas others offer voluntary programs).

This Article reports on a significantly more in-depth empirical investigation into litigants' ex ante attitudes towards procedure characteristics than has been published to-date. To our knowledge, it is the first published ex ante field study to examine: (1) whether litigants prefer third-party versus litigant control, and (2) how litigants compare options regarding the process, outcome, and rules that distinguish different procedures. It should be noted that the former aspect of the investigation was hypothesis-driven, whereas the latter was propelled by hypothesis-testing as well as exploratory motivations.

Part I of this Article reviews the relevant empirical research on procedural preferences. It then introduces the hypothesis that litigants evaluate procedure characteristics in light of whether they grant relative control to third parties or to the litigants themselves. Part II describes the study's methodology and Part III discusses the results of a factor analysis that ultimately supported this hypothesis. After laying this foundation, the Article presents novel analyses suggesting that litigants prefer third-party control to litigant control. It then describes a Structural Equation Model that reveals the factors that predict the level of litigant attraction to each type of control. It also statistically elucidates how litigants compare different options regarding the process, outcome, and rules that could be used to resolve their dispute. The Article concludes by highlighting how the findings could be used to develop court policy and improve how legal actors advise litigants about their options.

I. LITERATURE REVIEW: THEORETICAL FRAMEWORK

A. Developments in the Procedural Justice Doctrine

The psychological exploration into litigants' procedural preferences dates back to the early 1970s, when empirical research by Thibaut and Walker — largely regarded as the originators of the procedural justice paradigm — and their colleagues revealed that laypeople care about their direct and indirect control over legal decisions that affect them.[12] They demonstrated that when laypeople evaluate procedures, they generally assess how the procedures distribute control between the parties themselves and third parties (e.g., mediators, arbitrators, judges). Their research also suggests that disputants prefer procedures

[12] For a review of the relevant literature, see generally Shestowsky & Brett, *supra* note 5, at 68-79.

that allow them (as opposed to third parties) to control the process.[13] Their early work highlights the important role that "voice" (i.e., the opportunity to share one's story or side of the dispute)[14] plays in how disputants construe dispute resolution options, which in turn illuminates the critical role that subjective perceptions play in the functioning of the legal system.[15] Subsequent research produced additional theories that explain why disputants care about process. One theory — the "instrumental" or "social exchange" theory — suggests that people desire process control because they believe it provides an indirect way to control their dispute's outcome.[16] Another framework — the "group value" model — suggests that people care about process because the quality of the process they experience helps them to assess their status and inclusion within their group or

[13] *See* Thibaut et al., *supra* note 2, at 1287-88 (describing the adversary system as one in which the process is chiefly controlled by the disputants, and finding that research participants judged the adversary system to be "the most preferable and the fairest mode of dispute resolution"); *see also* Donna Shestowsky, *Procedural Preferences in Alternative Dispute Resolution: A Closer, Modern Look at an Old Idea*, 10 PSYCHOL. PUB. POL'Y & L. 211, 211 (2004) [hereinafter *Procedural Preferences*] (reviewing how process control has been conceptualized in laboratory studies, and finding that it has nearly always been described to participants as an opportunity to control the presentation of evidence).

[14] In the subsequent literature, Thibaut and Walker's research has been variably labeled "process control" theory or the "voice" hypothesis. *See, e.g.*, Nancy Amoury Combs, *Legitimizing International Criminal Justice: The Importance of Process Control*, 33 MICH. J. INT'L L. 321, 372 (2012) ("Thibaut and Walker's findings were replicated in numerous subsequent studies that show not only the importance of process control for litigants but the reasons for that importance: litigants desire process control not so much because they believe it will enable them to achieve better outcomes, but rather for the opportunity it provides . . . to tell their side of the story.").

[15] *See* Tom R. Tyler et al., *Influence of Voice on Satisfaction with Leaders: Exploring the Meaning of Process Control*, 48 J. PERSONALITY & SOC. PSYCHOL. 72, 80 (1985) (reporting research suggesting that "voice increases satisfaction, irrespective of whether it is linked to decision control").

[16] *See* Donald E. Conlon, *Some Tests of the Self-Interest and Group-Value Models of Procedural Justice: Evidence from an Organizational Appeal Procedure*, 36 ACAD. MGMT. J. 1109, 1110 (1993) ("[T]he instrumental model suggests that people desire control over procedures because this control will increase the likelihood of favorable outcomes." (citation omitted)); Debra L. Shapiro & Jeanne M. Brett, *What Is the Role of Control in Organizational Justice?*, *in* HANDBOOK OF ORGANIZATIONAL JUSTICE 155, 157-61 (Jerald Greenberg & Jason A. Colquitt eds., 2005) (discussing why the voice effect influences perceived outcome control); Nancy A. Welsh, *Making Deals in Court-Connected Mediation: What's Justice Got to Do with It?*, 79 WASH. U. L.Q. 787, 826-27 (2001) ("According to the social exchange theory, disputants value the opportunity for voice because this provides them with the opportunity to influence the decision maker and indirectly influence the final outcome.").

community.[17] Other research emphasized how process has important implications for how people perceive social justice — when the fairness of an outcome is ambiguous, people often use their evaluations of the process they experienced as a mental shortcut for assessing the outcome.[18] Although different theories conceptualizing procedural justice have emerged since Thibaut and Walker's classic work, and some of these suggest that noncontrol factors explain how people make procedural justice determinations, control issues are considered central to procedural justice evaluations in the specific context of legal disputes.[19]

In practice, legal organizations and scholars often use the concept of control to classify legal procedures. Mediation and negotiation are commonly conceptualized as offering litigants greater process and outcome control as compared to adjudicatory options such as trial and arbitration.[20] The American Bar Association, for example, describes

[17] Later research demonstrated that the opportunity for voice heightens disputants' judgments of fair treatment, even when they are told that their voice will not and cannot influence the outcome. *See* E. Allan Lind et al., *Voice, Control, and Procedural Justice: Instrumental and Noninstrumental Concerns in Fairness Judgments*, 59 J. PERSONALITY & SOC. PSYCHOL. 952, 958 (1990); Nancy A. Welsh, *Perceptions of Fairness in Negotiation*, 87 MARQ. L. REV. 753, 765 (2004). That is, instead of perceiving procedures strictly in instrumental terms, individuals often define fair process in light of how respectfully they were treated by the involved third party because such treatment communicates their status and inclusion in groups. This interpretation provided support for the "group value" model. *See* E. ALLAN LIND & TOM R. TYLER, THE SOCIAL PSYCHOLOGY OF PROCEDURAL JUSTICE 230-40 (Melvin J. Lerner ed., 1988). Research on this theory "suggests that several noncontrol issues — the neutrality of the decision-making procedure, trust in the 3rd party, and the information the experience communicates about social standing — influence both procedural preferences and judgments of procedural justice." Tom R. Tyler, *The Psychology of Procedural Justice: A Test of the Group-Value Model*, 57 J. PERSONALITY & SOC. PSYCHOL. 830, 830 (1989) [hereinafter *Psychology of Procedural Justice*].

[18] The "fairness heuristic" hypothesis posits that when individuals lack a clear metric for assessing the fairness of a dispute's outcome (which is common in legal disputes), they use their assessment of the process as a mental shortcut for evaluating that outcome. *See* Kees van den Bos, *Fairness Heuristic Theory: Assessing the Information to Which People Are Reacting Has a Pivotal Role in Understanding Organizational Justice*, *in* THEORETICAL AND CULTURAL PERSPECTIVES ON ORGANIZATIONAL JUSTICE 63, 63-84 (Stephen Gilliland et al. eds., 2001).

[19] *See* Tyler, *Psychology of Procedural Justice*, *supra* note 17, at 830-32, 836-37.

[20] *See* Tom R. Tyler, E. Allan Lind & Yuen J. Huo, *Cultural Values and Authority Relations: The Psychology of Conflict Resolution Across Cultures*, 6 PSYCHOL. PUB. POL'Y & L. 1138, 1148 (2000) ("One important dimension along which these procedures vary is the degree to which they vest power in third-party authorities, as opposed to allowing the parties to the dispute to maintain control. Mediation gives authorities the power to suggest solutions. . . . Arbitration gives authorities the power to impose solutions."); Roselle L. Wissler, *The Effects of Mandatory Mediation: Empirical Research*

mediation and negotiation as offering parties greater participation in reaching a resolution, as well as control over the outcome.[21] Similarly, scholars often conceptualize legal procedures on a spectrum. On one end of the scale, negotiation offers participants control over both the process and outcome and does not involve a third-party neutral.[22] On the other end, arbitration and trial empower third-party neutrals to determine the outcome of a dispute and impose formality on the process. Mediation, existing in the middle of the spectrum, utilizes a third-party neutral, but allows parties to shape the process and control the outcome.[23]

Researchers who have synthesized past ex ante studies have arrived at different conclusions regarding where litigants prefer the locus of control to reside. Based on reviews of early work, some argue that

on the Experience of Small Claims and Common Pleas Courts, 33 WILLAMETTE L. REV. 565, 567 (1997) (suggesting that mediation provides the parties with control over the process and outcome).

[21] *See What You Need To Know About Dispute Resolution: The Guide to Dispute Resolution Processes*, AM. BAR ASS'N SEC. OF DISP. RESOL. (2006), http://www.americanbar.org/content/dam/aba/migrated/2011_build/dispute_resolution/draftbrochure.authcheckdam.pdf ("The only people who can resolve the dispute in mediation are the parties themselves.") Other national organizations also describe ADR procedures using the language of control. *See Learn About Mediation*, MEDIATION.ORG, https://www.mediation.org/mediation/faces/what_is_mediation (last visited Oct. 8, 2015) (hover over "Mediation") ("Mediation is a . . . process in which a mutually-selected, impartial mediator helps people involved in controversies to reach an outcome of their own making . . . . Mediation offers participants [a] . . . way to effectively address the substance of their controversy while maintaining their ability to control both process and outcome."); *id.* (hover over "Negotiation and Facilitation") ("Negotiation is the process in which contending parties engage in direct discussions to arrive at a mutually satisfactory agreement on the issues in contention.").

[22] Stephanie Smith & Janet Martinez, *An Analytical Framework for Dispute Systems Design*, 14 HARV. NEGOT. L. REV. 123, 127 (2009) ("[In] [n]egotiation . . . the parties retain control over both the process and outcome.").

[23] *Id.*; *see also* Marie A. Failinger, *Parallel Justice: Creating Causes of Action for Mandatory Mediation*, 47 U. MICH. J.L. REFORM 359, 391 (2014) (noting that litigants' acceptance of mandatory mediation could be due to the fact that it offers them control over the process and outcome); Taren R. Lord-Halvorson, *Why Wait Until We Die? Living Probate in a New Light*, 37 OKLA. CITY U. L. REV. 543, 555 (2012) ("[M]ediation allows for: (1) the parties to control the outcome of a dispute; (2) the parties to directly engage in the negotiation process . . . ."); Jacqueline Nolan-Haley, *Mediation: The "New Arbitration,"* 17 HARV. NEGOT. L. REV. 61, 68 (2012) (describing self-determination and party control over outcome as factors that distinguish mediation from arbitration); Nancy A. Welsh, *The Thinning Vision of Self-Determination in Court-Connected Mediation: The Inevitable Price of Institutionalization?*, 6 HARV. NEGOT. L. REV. 1, 16 (2001) ("[M]ediation offered citizens a means to wrest control over both the dispute resolution process and the dispute resolution outcome from judges and lawyers.").

disputants tend to prefer adjudicative procedures that allow them to retain some measure of process control but not control the outcome.[24] Others maintain that disputants desire both process and outcome control.[25] In yet another take on the literature, Shestowsky suggests that how disputants evaluate procedures might depend on when during the life course of the dispute their evaluations are assessed. Her analysis proposes that when litigants are surveyed ex ante, they tend to report a preference for adjudicative procedures (i.e., ones that allocate relatively greater control to third parties), but when they are surveyed ex post, they generally favor nonadjudicative options (i.e., ones that grant relatively greater control to litigants).[26] Importantly, these different perspectives on the literature were not informed by research on litigants' ex ante preferences for the two types of control in the context of actual civil cases, because no such studies have yet been published.[27] The field study presented herein aims to contribute to the literature by shedding new light on how litigants involved in ongoing litigation evaluate control ex ante.

[24] *See, e.g.*, Pauline Houlden et al., *Preference for Modes of Dispute Resolution as a Function of Process and Decision Control*, 14 J. EXPERIMENTAL SOC. PSYCHOL. 13, 28-29 (1978) (concluding that to maximize procedural preferences of both third parties and disputants, third parties should have decision control and disputants should control the process of presenting evidence); Stephen LaTour et al., *Some Determinants of Preference for Modes of Conflict Resolution*, 20 J. CONFLICT RESOL. 319, 351 (1976) [hereinafter *Some Determinants*] (similar conclusion). For fuller discussion, see Shestowsky, *Psychology of Procedural Preference*, *supra* note 1, at 648 n.42 and accompanying text.

[25] *See, e.g.*, Rebecca Hollander-Blumoff & Tom R. Tyler, *Procedural Justice in Negotiation: Procedural Fairness, Outcome Acceptance, and Integrative Potential*, 33 LAW & SOC. INQUIRY 473, 477 (2008) (reviewing the literature and concluding that participants prefer controlling both the outcome and process of their disputes); Shestowsky, *Procedural Preferences*, *supra* note 13, at 245 ("[P]articipants . . . valued shared control over decisions . . . [and] preferred a process that would grant them the opportunity to express their own views."). For fuller discussion, see Shestowsky, *Psychology of Procedural Preference*, *supra* note 1, at 648 n.43 and surrounding text.

[26] *See* Shestowsky & Brett, *supra* note 5, at 76-77 ("[I]t is pre-experience research (namely, laboratory studies) that has tended to find a preference for adjudicative procedures, whereas it is mainly post-experience research (primarily field studies) that has generally suggested an overall preference for nonadjudicative procedures.").

[27] These studies were laboratory studies that examined preferences for hypothetical disputes, or field studies that investigated ex post perceptions or variables other than process and outcome control.

B. Established Methodologies for Studying Procedural Preferences

Ex ante procedural preferences are typically explored in either of two ways. One method, the "macro" approach, directly assesses participants' reactions to whole procedures such as "mediation" and "binding arbitration." Another method, the "micro" approach, invites participants to assess different types of procedure characteristics rather than evaluate whole procedures that are labeled (e.g., "mediation," "judge trial") or described as having a set of characteristics.[28] For example, they might rate options pertaining to the outcome (e.g., who would determine the final outcome or how many people would determine the outcome). They might also evaluate different ways in which the process might evolve (e.g., how informal the process would be or whether litigants could express themselves conversationally or only in response to questions posed by others) or alternatives for the norms or rules that would be used to resolve the dispute (e.g., whether the law would be used to determine the outcome or the parties could decide to use more subjectively desirable standards).[29]

The present study utilizes the micro approach, which offers several advantages compared to the macro approach. One benefit is that it can help to reduce bias stemming from differential familiarity with legal procedures. The micro approach also helps to avoid evaluative implications of specific labels (e.g., "mediation") and therefore facilitates the determination of relative preferences without the potential confusion introduced by such labels. Another relative strength is that it minimizes the "labeling problem" which arises when researchers describe procedures but then mislabel them or use labels that are mismatched to contemporary versions of procedures.[30] The micro approach is also more psychological in that it can shed light on the "how" or "why" underlying attitudes towards procedures.

---

[28] Alternatively, one might view the "macro" approach as being a "direct" study of how procedures are evaluated, and the "micro" approach as being a relatively more "indirect" method. *See* Shestowsky, *Disputants' Preferences*, *supra* note 11, at 620-22 (explaining the advantages of the indirect approach over the direct approach).

[29] *See* Shestowsky, *Psychology of Procedural Preference*, *supra* note 1, at 652.

[30] *See* Deborah R. Hensler, *Suppose It's Not True: Challenging Mediation Ideology*, 2002 J. DISP. RESOL. 81, 86-87 (arguing, in a criticism of early work by Thibaut and Walker, that "what [was] termed 'mediation' most resembled non-binding arbitration of . . . the 1980s . . . the procedure looked neither like evaluative mediation, nor like facilitative mediation (and there was certainly nothing transformative about it). What [was] termed 'arbitration' was identical to . . . mediation, except . . . that the third party neutral rendered a binding decision"); *cf.* Shestowsky, *Psychology of Procedural Preference*, *supra* note 1, at 653-54 (discussing the difficulties in researching how litigants compare mediation to non-binding arbitration).

C. Past Research on Litigants' Evaluations of Procedure Characteristics

Research on ex ante preferences has almost exclusively consisted of laboratory studies rather than field studies of actual litigants. In fact, to our knowledge, only three published field studies have explored how actual civil disputants assess legal procedures ex ante. The first, by Lamont E. Stallworth and Linda K. Stroh, surveyed parties involved in Equal Employment Opportunity disputes pending before the Illinois Human Rights Commission, and compared fact-finding, mediation, and binding arbitration.[31] Using the macro approach, they found that disputants were more interested in using mediation than binding arbitration.[32] Although their study examined ex ante attitudes, many participants completed their surveys only after an initial case investigation was conducted, and these investigations often took several years.[33] Thus, while the researchers did assess early impressions of procedures, these impressions were already a few years in the making.[34]

The second field study, by Shestowsky and Brett,[35] differed from Stallworth and Stroh's work in three important ways. First, because it involved mailing surveys to civil litigants within two weeks of their case-filing date,[36] litigants' perceptions were examined much earlier in the dispute resolution trajectory. Second, its participants were involved in a broader range of cases.[37] Third, it used the micro approach to examine preferences. Specifically, it tested the hypothesis that civil litigants tend to evaluate their options based on how much control they offer to the parties themselves versus third parties (but they did *not* test for an overall preference between these two types of control).[38] Participants evaluated characteristics of procedures (i.e., outcome, process, and rules) and rated the attractiveness of each for

---

[31] *See* Stallworth & Stroh, *supra* note 6, at 31-36. Specifically, participants were asked "how interested they would be in using mediation if they knew their cases would be resolved within six to nine months, using a 'trained third party neutral.'" *Id.* at 35. And, "how interested they would be in using final and binding arbitration if they knew their cases could be resolved within six to nine months." *Id.*

[32] *Id.* at 36 tbl.2 (reporting the results of a statistical analysis that found interest in mediation to be significantly stronger than interest in arbitration).

[33] *Id.* at 33-34.

[34] *See id.* at 34.

[35] This field study is reported in Shestowsky & Brett, *supra* note 5, at 79-94.

[36] *Id.* at 82.

[37] *See id.* at 84.

[38] *See id.* at 79.

their particular case.[39] For example, they assessed sets of options pertaining to the outcome (e.g., who would make the final decision), how the process would evolve (e.g., whether disputants would express themselves conversationally or only in response to questions posed by others), and the substantive norms or rules that would be used to resolve the case (e.g., whether the law would automatically apply or the parties would use other standards).[40] Although variations of the micro approach are common in laboratory research, Shestowsky and Brett's published work appears to be the first to apply it to the study of litigants involved in ongoing litigation.[41]

Shestowsky and Brett's research produced some intriguing findings. They found that participants assessed procedure characteristics ex ante by categorizing them in terms of how much control they offer third parties as opposed to the litigants themselves.[42] This pattern aligned with findings from laboratory studies wherein research participants simulated being disputants.[43] They also found that older litigants were less attracted to Third-Party Control than their younger counterparts,[44] and those involved in contract cases liked disputant control more than did those involved in other kinds of cases.[45] Moreover, compared to those who opposed an individual, litigants who opposed a collective (e.g., a company or organization) were less interested in characteristics that offer control to disputants.[46]

The third ex ante field study, the *Litigant Procedure Perception Study*,[47] used the same dataset as the present research.[48] It relied on the macro approach to examine how litigants perceive whole procedures (i.e., Attorneys Negotiate without the Clients, Attorneys Negotiate with the Clients Present, Mediation Non-binding Arbitration, Binding Arbitration, Judge Decides without Trial, the Judge Trial, and the Jury Trial).[49] Because it surveyed litigants from three distinct state court systems, it was the first multi-jurisdictional

[39] *Id.* at 82.

[40] *Id.* at 82-83 nn.72–74.

[41] *See id.* at 78.

[42] *Id.* at 95.

[43] *See* Thibaut et al., *supra* note 2, at 1275-79.

[44] Shestowsky & Brett, *supra* note 5, at 95-96.

[45] *Id.* at 89.

[46] *Id.*

[47] *See generally* Shestowsky, *Psychology of Procedural Preference*, *supra* note 1.

[48] The *Litigant Procedure Perception Study* is described throughout *id.* at 654-73.

[49] See Appendix in *id.* at 670-72, 693-710 for the descriptions of these procedures that were provided to participants.

study of how litigants evaluate legal procedures ex ante. It examined preferences within a "laboratory-like" environment that held as constant as possible the court-connected options offered to litigants. Specifically, the courts were chosen because they offered both mediation and non-binding arbitration, as well as trial, for the *same* types of cases.[50] Compared to its predecessors, this study not only gathered data from significantly more litigants from a greater number of jurisdictions, but it inquired about a wider variety of procedures and explored a larger set of factors that might predict how litigants evaluate procedures.[51] Ultimately, they found that litigants liked the Judge Trial, Mediation, and Attorneys Negotiate with the Clients Present more than all other examined procedures.[52] Within this set of most preferred procedures, litigants did not like one procedure significantly more than any other.[53]

The present study, which uses the same dataset, complements its predecessor by using the micro approach to examine the perceptions of the same litigants. It tests hypotheses that were inspired by past psychological and legal research, expounding on those earlier ideas and presenting novel exploratory analyses.

D. Hypotheses

1. Hypothesis 1

In light of psychological research suggesting that litigants assess characteristics of legal procedures in terms of control, we hypothesized that litigants involved in civil cases would evaluate the characteristics in terms of whether they offer control to the litigants versus third parties.

2. Hypothesis 2

Motivated by legal scholarship suggesting that litigants tend to prefer adjudicative procedures to nonadjudicative ones ex ante,[54] we further hypothesized that, between the two forms of control, litigants would prefer third-party control to litigant control. To our knowledge,

[50] *Id.* at 654-55.

[51] *See id.* at 654-63.

[52] *See id.* at 664-65, 673-74.

[53] *Id.*

[54] *See supra* notes 29–34 and surrounding text.

this hypothesis has not yet been tested in field research on actual litigants.

II. METHODOLOGY

Participants and Cases: The dataset is composed of survey responses from 413 litigants.[55] These litigants had mailing addresses from 19 states; 7.02% had addresses from outside of the states in which the study courts were located. The majority of their cases involved only personal injury (28.6%) or contracts (24.5%) issues. A variety of other case-types were represented in the sample, including cases that involved only property (11.1%), civil rights (2.9%), employment (5.3%), or medical malpractice (1.7%) issues. In addition, 10.9% of litigants reported that their disputes were of some "other" singular case-type; 12.6% of litigants indicated that they were involved in two or more case-types (i.e., multiple causes of action).[56] For additional information about the participants, see Table 1.

[55] This number of participants reflects a 10% response rate. A 10% response rate is much higher than what was reported for other ex ante field studies on litigants' procedural preferences. Shestowsky, *Psychology of Procedural Preference*, *supra* note 1, at 688. This percentage is likely to be an extremely conservative estimate of the actual response rate, for several reasons. First, not all surveys that were completed and mailed back to the research team were included in the dataset (and thus not all returned surveys were included in the response rate calculation). In total, 474 surveys were returned. Several surveys (n = 18) were excluded from the dataset because the individuals completed more than one survey for the study (for different cases) or their spouse had also returned a survey for the same case (n = 1). Including these surveys would have introduced dependencies in the data. Additional surveys were excluded because the survey responses or other communications from the litigants revealed that the litigants or their cases did not meet the eligibility requirements (n = 42) (e.g., they completed the survey for a case other than the one for which we solicited them). After these surveys were removed, data from 413 unique litigants remained. Second, because the study courts generally did not collect litigant contact information, we attempted to locate litigant addresses on our own, typically using the internet and LexisNexis. This additional research step created challenges with respect to calculating the response rate. If a survey was not returned for "Mary Smith," for example, it was not possible to know whether Mary Smith declined to participate or whether we failed to locate the address of the correct Mary Smith. *See id.* at 656-57, 689. Thus, the reported response rate must be interpreted in light of this unique aspect of the methodology. The only alternative would have been to mail the surveys to the litigants' lawyers with the expectation that they would deliver them to their clients. This option could have created logistical and timing problems and might have raised a serious concern regarding data contamination.

[56] Missing data, n = 10 (2.4% of sample).

Table 1. Participant Information

	Frequency	**%**
Court Location		
California	59	14.3
Oregon	190	46.0
Utah	155	37.5
Missing Data	*9*	*2.2*
Role in Case		
Defendant Only	156	37.8
Plaintiff Only	235	56.9
Both Defendant and Plaintiff	12	2.9
Other	1	0.2
Missing Data	*9*	*2.2*
Party Type (Participant)		
Individual	287	69.5
Company	97	23.5
Group/Organization	27	6.5
Missing Data	*6*	*1.5*
Party Type (Opposing Party)		
Individual	202	48.9
Company	156	37.8
Missing Data	*30*	*7.3*
Previous Experience as a Litigant		
Yes, as a Defendant Only	52	12.6
Yes, as a Plaintiff Only	70	16.9
Yes, as both a Plaintiff and Defendant	69	16.7
No	176	42.6
Missing Data	*46*	*11.1*
Participant Age Group		
18–25	14	3.4
26–35	80	19.4
36–45	74	17.9
46–55	92	22.3
56–65	82	19.9
66–75	48	11.6
76–80	6	1.5

Over 80	5	1.2
Missing Data	*12*	*2.9*
Participant Ethnicity/Race		
American Indian or Alaska Native	6	1.5
Asian	17	4.1
Hispanic	12	2.9
Black or African American	20	4.8
Native Hawaiian or Other Pacific Islander	4	1.0
White Non-Hispanic	324	78.5
Other	16	3.9
Missing Data	*14*	*3.4*
Participant Gender		
Female	176	42.6
Male	225	54.5
Missing Data	*12*	*2.9*
Relationship with Opposing Party Before Filing		
No	218	52.8
Yes	180	43.6
Missing Data	*15*	*3.6*
Insurance Company has an Interest in the Outcome		
Yes, Plaintiff's insurance has an interest	26	6.3
Yes, Defendant's insurance has an interest	83	20.1
Yes, both Plaintiff's and Defendant's insurance have an interest	42	10.2
No, neither Plaintiff's nor Defendant's insurance have an interest	190	46.0
Don't Know	57	13.8
Missing Data	*15*	*3.6*

Note: N = 413. *Missing data* indicates litigants for whom a response to the question was not obtained. Party Type and Opposing Party Type calculations include participants (n = 4 and n = 7, respectively) who indicated that more than one type applied to their case.

Survey Instruments: Surveys were mailed to litigants within three weeks of the date on which their case was filed in court.[57] An introductory letter and consent form explained that those returning a completed survey would be compensated. The survey collected basic demographic information about participants as well as case information. For example, participants were asked: whether they were the plaintiff, defendant, or (in the case of counter-claims) both; whether they were involved in the case as an individual or as a representative of a company, organization, or other collective; their age group, gender, ethnicity, and previous experience as a litigant. They also indicated the cause of action or "case-type" (e.g., property, personal injury, medical malpractice) of their dispute.

Other questions assessed whether they knew or had a relationship with the opposing party before their case was filed (yes or no), the level of importance they placed on a future relationship with the opposing party (1 = not at all important; 5 = extremely important), and their "impression of the court" where the case was filed" (1 = extremely negative; 9 = extremely positive). They also provided a 0–100% rating of how confident they were of winning their case if it were to be tried in court ("How strong do you believe your case is? That is, if you go to trial for this case, what do you think your chances are of 'winning'?").[58]

Another set of questions assessed litigants' perceptions of procedure attributes. They evaluated fourteen unlabeled procedure characteristics similar to those used in Shestowsky and Brett's study.[59] Litigants were

[57] Detailed litigant recruitment information is described in Shestowsky, *Psychology of Procedural Preference*, *supra* note 1, at 656-58.

[58] Several steps were performed to keep the number of variables reasonable for subsequent analyses: (1) ethnicity/race data were collapsed to compare the effect of Whites and Non-Whites; (2) a new variable was created to indicate whether the participant had been a litigant in a prior case (rather than if he or she had been involved specifically as a plaintiff or defendant); (3) data were collapsed across all options regarding the interest that insurance companies had in the outcome of the case to compare the effect of either party's insurance having such an interest in the case and neither party's insurance having such an interest; and (4) the "other" category for the litigant's role in the case was excluded from analysis. All nominal variables (e.g., case-type) were dummy-coded and continuous variables (e.g., ratings of confidence in a trial win) were evaluated for assumptions of normality. For variables with non-normal distributional properties (i.e., skewness and kurtosis) data transformations (i.e., Box-Cox power transformations) were applied. *See supra* Table 1.

[59] *See* Shestowsky & Brett, *supra* note 5, at 80-88. These options were objectively stated attributes of procedures (e.g., "the outcome will be decided using the same rules or principles that apply in a court of law") and not the antecedents, consequences, or evaluations of them (e.g., "I want a procedure that makes me feel

asked to rate how attractive each option was for their particular case, using scales from 1 to 9 (1 = not at all attractive; 9 = extremely attractive). Five items pertained to the outcome. Six items related to how the process would evolve. Three items concerned the substantive norms or rules that would be used to resolve the case. See Appendix for the list of characteristics.

Theoretically, the litigants might have categorized or compared the characteristics along a variety of dimensions: relative formality; how adjudicative or nonadjudicative they were; how much they would allow the parties to interact directly with one another; how much involvement would be exercised by attorneys; whether they pertain to outcomes, process, or rules; whether they offer control to third parties versus the litigants themselves.[60] Our analyses allowed for the exploration of these possibilities.

III. RESULTS AND DISCUSSION

A. Hypothesis-Testing Analyses

1. How Litigants Evaluate Procedure Characteristics

To evaluate if litigant variability in ratings of the procedure characteristics shared common variance, we used factor analysis. Factor analysis is a multivariate data reduction technique that identifies groups or clusters of variables that share variability in ratings.[61] The goal of this analysis was to determine if attractiveness ratings for the 14 characteristics tended to cluster (i.e., indicate a common factor). After factors are identified, the variables indicating each factor are examined conceptually to determine how the variables under each factor are similar, as well as how they differ from the variables that fit better under a different factor. Researchers use this conceptual analysis to "name" each factor and develop expectations of factor relations with other measurements in subsequent analyses.

---

respected"; "I want a fair procedure"). Thus, this study was not intended to comparatively test different theories of procedural justice. Instead, it was intended to more practically assess litigants' subjective reactions to the concrete components of procedures.

[60] Questions intended for another Article were included in a separate section of the survey.

[61] This analytic approach is commonly used in psychological research when research participants are asked to rate a large number of items. For a highly accessible overview of factor analysis, see ANDY FIELD, DISCOVERING STATISTICS USING SPSS 619-80 (2d ed. 2005).

Three methods were used to assess the best number of factors to extract from the attractiveness ratings of the procedure characteristics: the Exploratory Factor Analysis of 1–6 factors (i.e., using Root Mean Square Error of Approximation ("RMSEA") as an indicator of fit),[62] the Cattell scree plot (i.e., the scree test),[63] and parallel analysis.[64] As shown in Table 2, the RMSEA index indicates that the extraction of six factors is warranted;[65] extracting one, two, three, four, and five factors resulted in an unsatisfactory model fit. Thus, using this coefficient by itself points to the extraction of six factors. Cattell's scree plot, shown in Figure 1, suggests that only the first two or three factors explain non-trivial variance. Finally, Figure 2 shows the results from a parallel analysis, with eigenvalues for randomly generated data and eigenvalues of the present data based on principal axes extraction. In this method, the number of factors to be extracted from the data is indicated by the number of empirical solutions that are both above and before the intersection of empirical and random solution trajectory lines.[66] The parallel analysis reveals that the extraction of six factors reflects the most appropriate solution. While not all the outlined methods converge on the same number of factors, six factors was the solution selected by the majority of the methods and was therefore used as a starting point.[67]

---

[62] *See* TIMOTHY A. BROWN, CONFIRMATORY FACTOR ANALYSIS FOR APPLIED RESEARCH 29-30, 38 (2006) (describing the usefulness of RMSEA for determining how well models fit to the data); Li-tze Hu & Peter M. Bentler, *Cutoff Criteria for Fit Indexes in Covariance Structure Analysis: Conventional Criteria Versus New Alternatives*, 6 STRUCTURAL EQUATION MODELING: A MULTIDISCIPLINARY J. 1, 27 (1999). Rotations were used in the EFA, specifically, Geomin using LINDA K. MUTHÉN & BENGT O. MUTHÉN, MPLUS: STATISTICAL ANALYSIS WITH LATENT VARIABLES: USER'S GUIDE 43-110, 587-774 (7th ed. 2012).

[63] *See* James C. Hayton et al., *Factor Retention Decisions in Exploratory Factor Analysis: A Tutorial on Parallel Analysis*, 7 ORGANIZATIONAL RES. METHODS 191, 193 (2004) (explaining that the scree plot is a "common" method for determining the number of factors, and describing its advantages and disadvantages). *See generally* Raymond B. Cattell, *The Scree Test for the Number of Factors*, 1 MULTIVARIATE BEHAV. RES. 245 (1966) (describing the scree test and its application).

[64] *See* Hayton, *supra* note 63, at 192 ("There is evidence . . . that parallel analysis . . . is one of the most accurate methods for determining the number of factors to retain.").

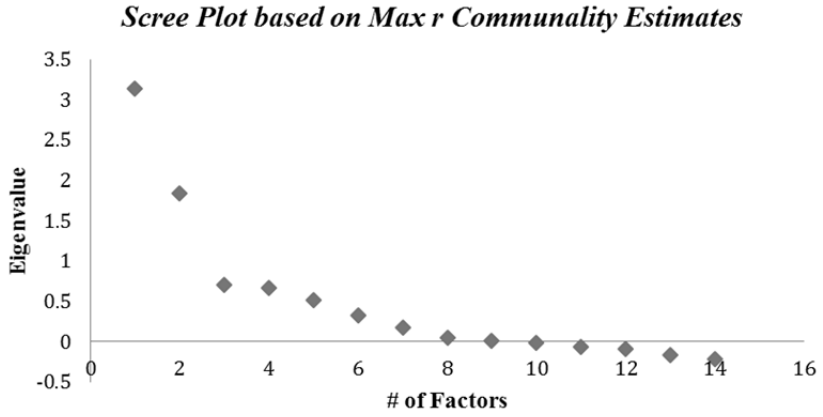
[65] A RMSEA less than .06 is recommended. *See generally* Hu & Bentler, *supra* note 62, at 27 (emphasizing the importance of using a RMSEA cutoff of .06).

[66] *See generally* Lloyd G. Humphreys & Richard G. Montanelli, Jr., *An Investigation of the Parallel Analysis Criterion for Determining the Number of Common Factors*, 10 MULTIVARIATE BEHAV. RES. 193 (1975) (describing the parallel analysis technique and its application).

[67] *See generally* Hayton et al., *supra* note 63, at 192 (explaining why the decision

Table 3 reports the factor loadings of the six-factor solution. As is apparent from Table 3, Factors 5 and 6 are not "common" factors (i.e., they consist of only one item with a loading higher than .40).[68] Moreover, the *Court Rules* item does not load on any one factor. As a result, the *Lawyers to Third Party No Parties*, *Third-Party Rules*, and *Court Rules* items were excluded from the data and the factor analysis was re-run with a four-factor extraction. The RMSEA suggested that four factors resulted in a good fit to the data (RMSEA = .047). The standardized factor loadings for this new factor analysis are presented in Table 4, along with the factor inter-correlations. These four factors were labeled *Parties Control Process and Rules*, *Parties Decide with Advice or Help*, *Process Managed by Others*, and *Third-Party Process Focus and Decision Control*, respectively, for Factors 1, 2, 3, and 4.

Figure 1. Cattell's Scree Plot Based on Maximum Correlation as Communality Estimates



regarding the number of factors to retain is important vis-à-vis accurate data interpretation).

[68] *See generally* NATASHA K. BOWEN & SHENYANG GUO, STRUCTURAL EQUATION MODELING ch. 1, at 7 (2011), *available at* http://hbanaszak.mjr.uw.edu.pl/TempTxt/Natasha%20K.%20Bowen%20and%20Shenyang%20Guo-Structural%20Equation%20Modeling-Oxford%20Scholarship%20Online%20%28January%202012%29.pdf ("It is also possible to have a latent variable with only two indicators, but it is best to have a minimum of three . . . .").

Figure 2. Eigenvalues for Random Generated Data vs. Eigenvalues of Real Data Based on Principal Axes Extraction with Squared Multiple Correlations on the Diagonal

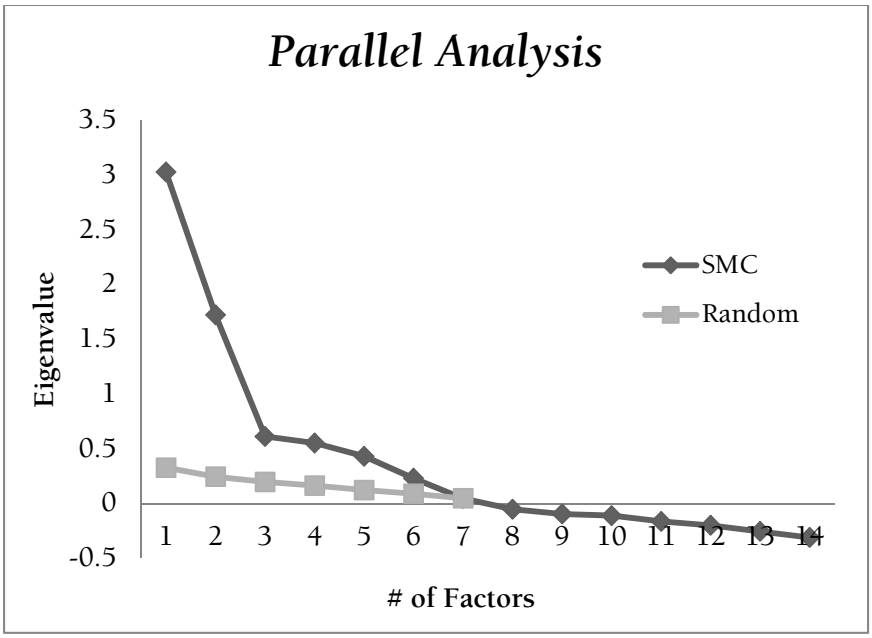


Table 2. RMSEA Coefficient for Maximum Likelihood Extraction of 1 to 6 Factors

No. of Factors Extracted	*RMSEA*
1	.158
2	.126
3	.109
4	.088
5	.069
6	.045

Table 3. Factor Loadings of Six-Factor Solution

Item	*Factor 1*	*Factor 2*	*Factor 3*	*Factor 4*	*Factor 5*	*Factor 6*
Third Party Decides	-0.02	-0.05	**0.74**	-0.10	0.10	0.13
Group Decides	0.01	0.10	**0.62**	0.02	-0.08	-0.13
Parties Veto Third-Party Suggestion	-0.02	**0.48**	0.26	0.03	-0.02	0.01
Parties Decide Using Third-Party Help But No Suggestion	-0.03	**0.83**	0.08	0.00	0.05	0.02
Parties Decide Lawyers Can Advise	0.18	**0.59**	-0.11	-0.05	0.04	-0.08
Parties Present to Third Party	0.12	0.06	0.36	0.22	-0.16	0.16
Lawyers to Third Party No Parties	0.04	0.05	-0.03	0.04	**0.95**	0.01
Lawyers to Third Party With Parties	0.05	0.03	-0.02	**0.86**	-0.10	-0.04
Parties Speak to Third Party When Directed	-0.08	-0.04	-0.03	**0.70**	0.18	0.05
Speak Freely to Each Other	**0.95**	-0.01	0.06	-0.01	0.06	-0.06
Speak Freely to Each Other and Third Party	**0.90**	0.01	0.06	-0.01	-0.01	-0.01
Court Rules	-0.03	-0.09	0.25	0.19	0.14	-0.32
Rules by Parties	**0.42**	0.24	-0.19	0.00	-0.01	0.20
Third-Party Rules	-0.01	-0.03	0.12	0.02	0.05	**0.78**

NOTE: Bolded loadings indicate the item loadings for their respective factors.

Table 4. Factor Loadings and Correlations of Four-Factor Solution

Item	*Factor 1*	*Factor 2*	*Factor 3*	*Factor 4*
Third Party Decides	-0.04	-0.05	-0.07	**0.74**
Group Decides	0.05	0.00	0.05	**0.54**
Parties Veto Third-Party Suggestion	-0.01	**0.46**	0.04	0.28
Parties Decide Using Third-Party Help But No Suggestion	-0.03	**0.83**	0.00	0.07
Parties Decide Lawyers Can Advise	0.19	**0.57**	-0.03	-0.15
Parties Present to Third Party	0.11	0.10	0.17	**0.44**
Lawyers to Third Party With Parties	0.06	-0.01	**1.02**	-0.05
Parties Speak to Third Party When Directed	-0.15	0.00	**0.54**	0.11
Speak Freely to Each Other	**0.91**	-0.01	-0.02	0.06
Speak Freely to Each Other and Third Party	**0.92**	0.01	-0.02	0.07
Rules by Parties	**0.41**	0.32	-0.03	-0.13
Factor 1 — *Parties Control Process and Rules*	1.00			
Factor 2 — *Parties Decide with Advice or Help*	0.51	1.00		
Factor 3 — *Process Managed by Others*	0.07	0.17	1.00	
Factor 4 — *Third-Party Process Focus and Decision Control*	0.13	0.14	0.34	1.00

NOTE: Bolded loadings indicate the item loadings for their respective factors. Below the items and their factor loadings is a diagonal correlation table indicating the correlations between factors.

Shestowsky and Brett used similar characteristics and found two factors to be the best solution: Attraction to Litigant Control and Attraction to Third-Party Control.[69] In the current investigation, the factor analysis revealed that attractiveness ratings for the characteristics were best explained by four factors. However, Factors 1 and 2 were highly positively correlated, as were Factors 3 and 4.[70] Moreover, the former two factors have indicators that represent attraction to litigant control, and the latter two have indicators that represent attraction to third-party control. Given these two observations, a Higher-Order Confirmatory Factor Analysis was used to test whether these pairs of factors that conceptually fit together did so statistically. We used parcels (i.e., averages) of Factors 1 and 2 items as indicators of a higher-order "Litigant Control" factor, and parcels of Factors 3 and 4 items as indicators of a higher-order "Third-Party Control" factor.[71] This model was identified by setting all factor variances to unity and setting equality constraints on the loadings of each of the higher-order factors. This model fit the data well, ($\chi^2(35) = 169.65$, $p < .01$[72]; CFI = .91; RMSEA = .09; 95% CI [.08, .10], SRMR = .08).[73] Table 5, which shows the resulting loadings from this model, suggests that the higher-order structure for these items is appropriate. These results support the idea that litigants assessed the characteristics in terms of these two types of control.

---

[69] *See* Shestowsky & Brett, *supra* note 5, at 88-89.

[70] *See supra* Table 4 (correlations reported).

[71] Although Chi-Square (χ^2) of model fit are reported, decisions of model fit relied more on CFI, RMSEA, and SRMR due to criticisms of the Chi-Square test. *See* BROWN, *supra* note 62, at 81-88.

[72] *See id.*

[73] Root Mean Square Error of Approximation ("RMSEA"), the Bentler Comparative Fit Index ("CFI"), and Standardized Room Mean Square Residual ("SRMR") are approximate fit indices that are used to assess the fit of an SEM model to a data set. *Id.* RMSEA is a badness-of-fit index with scores and confidence intervals closer to zero indicating a better model fit. *See id.* SRMR is a measure of the overall difference between the observed and predicted correlations. *Id.* It can take a range of values between 0 and 1, with 0.0 indicating a perfect fit. *Id.* CFI is an incremental fit model that measures improvement of model fit to a baseline model and is bound by the values of 0 to 1, with values closer to 1 indicating a better fit. Common suggestions for critical fit values are .06, .08, and .95 for RMSEA, SRMR, and CFI, respectively. *Id.*

Table 5. Standardized Factor Loadings from Higher-Order Confirmatory Factor Analysis

Factors	*B*	*S.E.*	*Z*	*P*
Factor 1 — Parties Control Process and Rules				
Speak Freely to Each Other	0.91	0.02	54.76	< .01
Speak Freely to Each Other and Third Party	0.95	0.02	59.37	< .01
Rules by Parties	0.53	0.04	13.75	< .01
Factor 2 — Parties Decide with Advice or Help				
Parties Veto Third-Party Suggestion	0.53	0.05	11.71	< .01
Parties Decide Using Third-Party Help But No Suggestion	0.82	0.04	19.64	< .01
Parties Decide Lawyers Can Advise	0.60	0.04	13.59	< .01
Factor 3 — Process Managed by Others				
Lawyers to Third Party With Parties	0.89	0.07	12.32	< .01
Parties Speak to Third Party When Directed	0.62	0.06	10.82	< .01
Factor 4 — Third-Party Process Focus and Decision Control				
Third Party Decides	0.65	0.05	12.82	< .01
Group Decides	0.58	0.05	10.96	< .01
Parties Present to Third Party	0.62	0.05	11.84	< .01
LITIGANT CONTROL (Higher Order)				
Factor 1 — *Parties Control Process and Rules*	0.73	0.04	20.65	< .01
Factor 2 — *Parties Decide with Advice or Help*	0.73	0.04	20.65	< .01

THIRD-PARTY CONTROL (Higher Order)				
Factor 3 — *Process Managed by Others*	0.68	0.05	12.98	< .01
Factor 4 — *Third-Party Process Focus and Decision Control*	0.68	0.05	12.98	< .01

2. Preference Between Litigant and Third-Party Control

In light of the factor analysis results, we evaluated litigants' preference between the two types of control. Taking into consideration past laboratory research suggesting that litigants prefer adjudicative procedures ex ante, we hypothesized that litigants would prefer Third-Party Control to Litigant Control.

To test this prediction, first-order factor items (i.e., *Parties Control Process and Rules*, *Parties Decide with Advice or Help*, *Process Managed by Others*, and *Third-Party Process Focus and Decision Control*) were aggregated together to create a mean Litigant Control higher-order factor score (*Parties Control Process and Rules* and *Parties Decide with Advice or Help*)[74] and a mean Third-Party Control higher-order factor score (*Process Managed by Others* and *Third-Party Process Focus and Decision Control*).[75] A paired *t*-test comparing Litigant Control and Third-Party Control revealed that litigants significantly favored Third-Party Control.[76]

3. Discussion of Hypothesis-Testing Analyses

The factor analysis results align with laboratory studies finding that disputants evaluate procedures based on whether control is allocated to third parties or to the parties themselves. In this regard, our results provide strong support for the external validity of the relevant laboratory research and affirm the conclusions of the smaller-scale field study by Shestowsky and Brett. Our findings also reinforce the conclusions of laboratory studies suggesting that litigants significantly prefer Third-Party Control to Litigant Control.[77]

[74] $M = 4.24$, $SD = 1.81$.

[75] $M = 5.62$, $SD = 1.64$.

[76] $t\,(298) = 12.45$, $p < .01$.

[77] *See supra* notes 42–51 and surrounding text.

Additionally, the results resonate with Shestowsky's recent theoretical work that attempts to reconcile conflicting assertions regarding litigant preferences. Whereas some studies conclude that litigants prefer adjudicative procedures granting relatively more control to third parties, others found that litigants favor nonadjudicative ones granting relatively more control to litigants. Shestowsky noticed these seemingly discrepant pronouncements and posited that they might be explained by when in the dispute resolution trajectory attitudes are assessed.[78] Specifically, she theorized that when disputants report their ex ante perceptions, they favor adjudicative options, but when they evaluate options ex post they prefer nonadjudicative ones.[79] Our results, which reflect significant litigant enthusiasm for third-party control, support the former tenet of this theoretical conceptualization.

It is interesting to contemplate how our results compare to those of the *Litigant Procedure Perception Study* which found that when the same litigants evaluated whole procedures (rather than the characteristics thereof) they liked Mediation, Attorneys Negotiate with Clients Present, and the Judge Trial best.[80] The preference for Third-Party Control that emerged in the present study clearly fits with their desire for a Judge Trial. However, it seems to be at odds with their attraction to Mediation and Attorneys Negotiate with Clients Present, which theoretically focus on party control.[81] One possible explanation is that litigants may have *perceived* these two procedures as offering some measure of third-party control. Interestingly, follow-up analyses

[78] *See* Shestowsky, *Disputants' Preferences*, *supra* note 11, at 552-53 ("[I]nitial research, conducted primarily in the 1970s, suggests that disputants favor adjudicative procedures (e.g., arbitration) to nonadjudicative procedures (e.g., mediation). The more recent literature tends to suggest the opposite . . . . The most promising explanation concerns when disputants are asked to evaluate procedures — whether it is at the beginning of the dispute resolution process (ex ante) or after they have experienced a given procedure (ex post)."). *But see* E. ALLAN LIND ET AL., THE RAND CORP., THE PERCEPTIONS OF JUSTICE: TORT LITIGANTS' VIEWS OF TRIAL, COURT-ANNEXED ARBITRATION, AND JUDICIAL SETTLEMENT CONFERENCES 78-80 (1989), *available at* http://www.rand.org/pubs/reports/R3708.html (suggesting that adjudicative procedures are regarded as fair and more satisfying ex post relative to nonadjudicative ones).

[79] *See* Shestowsky & Brett, *supra* note 5, at 76-78 ("[I]t is pre-experience [ex ante] research (namely, laboratory studies) that has tended to find a preference for adjudicative procedures, whereas it is mainly post-experience [ex post] research (primarily field studies) that has generally suggested an overall preference for nonadjudicative procedures.").

[80] *See* Shestowsky, *Psychology of Procedural Preference*, *supra* note 1, at 673-74.

[81] *See supra* notes 21–23 and surrounding text.

support this idea.[82] Thus, the participation of the opposing party and his or her attorney (in the case of Attorneys Negotiate with Clients Present and Mediation) or the involvement of a neutral third party (in the case of Mediation) appears to constitute third-party control in the minds of the litigants.

B. Exploratory Analyses

The results from our hypothesis-testing analyses prompted a series of exploratory analyses intended to further illuminate the psychology of litigants. These analyses explored (1) the demographic, case-type, relationship, and attitudinal factors that predict litigant attraction to Litigant and Third-Party Control; (2) how litigants compare the different control factors; and (3) how litigants compare different procedure characteristics.

1. Structural Equation Model of Attraction to Characteristics

To examine the factors that predict attraction to Litigant and Third-Party Control, a structural equation model was specified (see Figure 3 for a conceptual path diagram) using demographic, case-type, relationship, and attitudinal predictors of the higher-order factors (i.e., Litigant Control and Third-Party Control).[83] These predictors were

[82] Litigant ratings of attraction to Third-Party Control were significantly related to litigant attraction to Mediation ($r(404) = .268$, 95% CI [.175, .356], $p < .001$), Attorneys Negotiate with Clients Present ($r(408) = .256$, 95% CI [.163, .344], $p < .001$), and the Judge Trial ($r(407) = .343$, 95% CI [.254, .426], $p < .001$). While the magnitude of the association between attraction to Third-Party Control and the Judge Trial is slightly greater than for associations between attraction to Third-Party Control and attraction to both Mediation and Attorneys Negotiate with Clients Present, all estimates are within each other's 95% confidence intervals, thereby indicating that these associations do not significantly differ from each other. More importantly, the fact that the same degree of association is detected in connection with the Judge Trial (a procedure wherein third-party control is clearly present) as for both Mediation and Attorneys Negotiate with Clients Present suggests that litigants may perceive these two options as having the same degree of third-party control as is present in the Judge Trial.

[83] All regression analyses were conducted by applying the same model to both the transformed and original data for all outcome variables (i.e., ratings of each procedure's attractiveness). Results from these models were then compared against each other for: (1) concordance in omnibus model significance; and (2) significant differences between the standardized coefficients from the significant omnibus models applied to original versus transformed data. Omnibus model significance conformed very well between the original and transformed data. In addition, all standardized coefficients of model predictors generated from raw data were within the 68% CIs of those generated from transformed data, which suggests that the use of transformed data did not result in significantly different predictor effects. Because the

selected on the basis of suggestions derived from past empirical research.[84] To reduce model complexity, items indicating the first-order control factors were parceled and used as control score outcomes. Variables listed in the first column of Table 6 were tested as possible predictors of attraction to Litigant and Third-Party Control. This model resulted in a good fit to the data ($\chi^2(46) = 75.12$, $p < .01$; CFI = 0.90; RMSEA = 0.04 [0.02 – 0.06]; SRMR = 0.02).

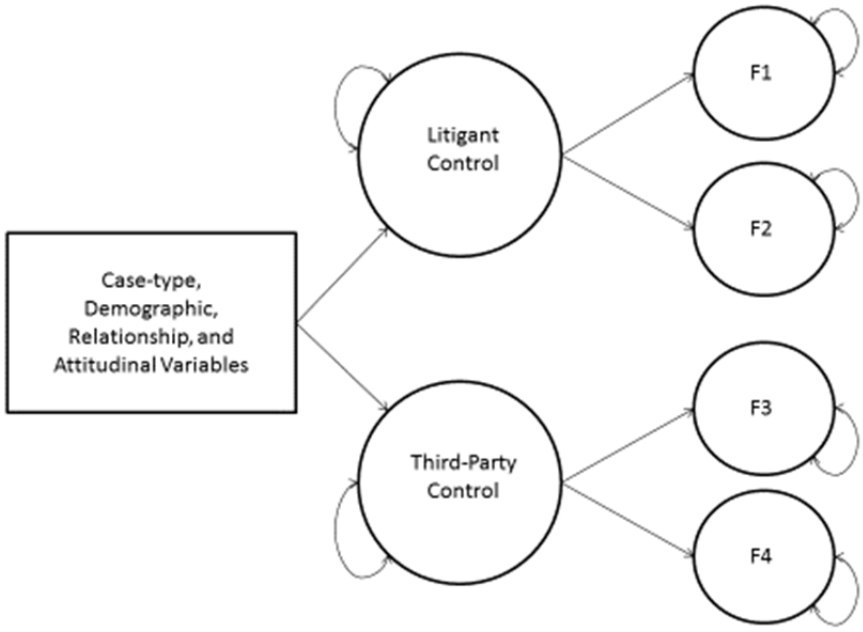
The next five columns, which report the results for Litigant Control, reveal that several (bolded) variables significantly predicted attraction to Litigant Control. Specifically, litigants liked Litigant Control more when the opposing party was a company, group, or organization (compared to an individual). Their appreciation for this type of control increased the more they valued a future relationship with the opposing party, or when their case was filed in Utah (compared to Oregon). They liked Litigant Control less when they had a relationship with the opposing party prior to the current dispute, or when they were a group or company (compared to an individual).

The five right-most columns of Table 6 report the results for the Third-Party Control Factor. Gender, age group, and case-type were found to be statistically significant predictors of attraction to Third-Party Control. Specifically, females were significantly less attracted to Third-Party Control (compared to males). Compared to their younger counterparts, older litigants were less attracted to Third-Party Control. Having an "other" case-type (compared to a case that concerned personal injury matters only) significantly predicted increased attraction to Third-Party Control.

unstandardized coefficients generated from the original data are easier to interpret with respect to the original data metrics, the reported results are those generated by applying the regression model to the original data.

[84] *See* Shestowsky, *Psychology of Procedural Preference*, *supra* note 1, at 653, 662.

Figure 3. Conceptual Path Diagram of Structural Equation Model



NOTE: Predictor variables consisted of case-type (i.e., personal injury, contract, employment, property, other, or two or more case-types), role in the case (i.e., defendant, plaintiff, or both), party type (i.e., individual, company, or group or organization), opposing party type (i.e., individual, company, or group or organization), defendant or plaintiff before (i.e., whether the litigant had been involved as a defendant or plaintiff in a previous case), relationship before (i.e., whether the litigant knew or had a relationship with the opposing party before the case was filed), gender, ethnicity (i.e., White or other), age (i.e., whether the litigant was 18–25, 26–35, 36–45, 46–55, 56–65, 66–75, 76–80, or over 80 treated as ordinal variable with values 1–8), insurance (i.e., whether an insurance company had any interest in the outcome of the case), future relationship (i.e., 1–5 rating of the importance of having a relationship with the opposing party in the future), percent win (i.e., 0–100% estimate of a trial win), court location (i.e., California, Oregon, or Utah), and court perceptions (1–9 rating of their impression, negative to positive, of the court where their case was filed).

Table 6. Structural Associations of Demographic and Case Variables with Higher-Order Factors

	Litigant Control					*Third-Party Control*				
Predictors	*B*	*S.E.*	*Z*	*p*	B	*B*	*S.E.*	*Z*	*p*	β
Female	*-0.39*	*0.21*	*-1.86*	*0.063*	*-0.12*	**-0.42**	**0.16**	**-2.58**	**0.010**	**-0.17**
NonWhite	*0.49*	*0.26*	*1.90*	*0.057*	*0.12*	0.24	0.20	1.19	0.234	0.08
Age Group	-0.09	0.07	-1.33	0.183	-0.08	**-0.18**	**0.05**	**-3.31**	**0.001**	**-0.22**
Party Type: Company	0.17	0.27	0.62	0.538	0.05	0.17	0.21	0.80	0.425	0.06
Party Type: Group/Org	**-0.78**	**0.40**	**-1.98**	**0.048**	**-0.12**	-0.01	0.31	-0.03	0.972	0.00
Opp. Party: Company	**0.48**	**0.22**	**2.17**	**0.030**	**0.15**	0.11	0.17	0.64	0.523	0.04
Opp. Party: Group/Org	**0.75**	**0.38**	**1.99**	**0.047**	**0.13**	0.16	0.29	0.54	0.589	0.04
Previous Relation: Yes	**-0.56**	**0.23**	**-2.49**	**0.013**	**-0.17**	-0.26	0.18	-1.43	0.153	-0.10
Future Relation Desire	**0.25**	**0.09**	**2.91**	**0.004**	**0.18**	-0.08	0.07	-1.12	0.262	-0.07
Case: Contract	-0.28	0.38	-0.76	0.449	-0.08	0.47	0.30	1.58	0.115	0.17
Case: Employ-ment	0.36	0.50	0.73	0.466	0.05	0.47	0.39	1.19	0.233	0.09
Case: Property	-0.32	0.37	-0.86	0.389	-0.06	0.28	0.29	0.97	0.331	0.07
Case: Other	-0.17	0.35	-0.48	0.633	-0.04	**0.77**	**0.28**	**2.74**	**0.006**	**0.23**
Case: Two or More	-0.07	0.34	-0.20	0.840	-0.01	0.43	0.26	1.63	0.104	0.12
Insurance Interest: Yes	-0.38	0.28	-1.38	0.168	-0.12	0.04	0.22	0.17	0.866	0.02
P or D Before: Yes	-0.01	0.21	-0.07	0.947	0.00	0.03	0.17	0.19	0.853	0.01
Confidence - Trial Win	0.00	0.00	-0.93	0.352	-0.07	*0.01*	*0.003*	*1.82*	*0.070*	*0.13*
State: CA	*0.56*	*0.30*	*1.88*	*0.061*	*0.12*	0.21	0.24	0.90	0.369	0.06

State: UT	**0.85**	**0.23**	**3.78**	**0.000**	**0.26**	-0.08	0.17	-0.45	0.653	-0.03
Role: Defendant	0.34	0.24	1.45	0.146	0.10	0.23	0.19	1.25	0.212	0.09
Role: Both	*1.05*	*0.58*	*1.80*	*0.072*	*0.11*	0.15	0.45	0.34	0.736	0.02
Perception of Court	-0.01	0.06	-0.15	0.880	-0.01	*0.09*	*0.05*	*1.84*	*0.065*	*0.13*

NOTE: $N = 413$. Bolded values indicate significant relations between predictors and types of control. Italicized and underlined values indicate marginal relations between predictors and types of control.

2. Litigants' Preferences for Control Subtypes

The factor analysis results spurred a follow-up question: do litigants value some control subtypes more than others? To answer this question, a Repeated Measures ANOVA ("RM ANOVA") was used to compare all first-order factor scores to each other. Results revealed a significant difference between first-order factor scores.[85] A pairwise comparison using the Bonferroni correction was then used to determine which first-order factor scores differed significantly from the others. Results revealed significant differences between all first-order factors. Specifically, *Process Managed by Others* attraction scores were significantly larger than the scores for all other first-order factors;[86] *Third-Party Process Focus and Decision Control* attraction scores were significantly larger than those of first-order factors comprising Litigant Control;[87] and *Parties Decide with Advice or Help* attraction scores were significantly larger than the scores for *Parties Control Process and Rules*.[88] Thus, these results reflect a clear ordering of preferences as follows (from most to least favored): (1) *Process Managed by Others*, (2) *Third-Party Process Focus and Decision Control*, (3) *Parties Decide with Advice or Help*, and (4) *Parties Control Process and Rules*. This ordering suggests that litigants were eager for third-

[85] Mauchly's Test of Sphericity was significant and the Greenhouse-Geisser correction was used; $F(3, 1194) = 95.79$, $p < .01$.

[86] *Process Managed by Others* ($M = 5.82$, $SD = 2.19$) had a significantly larger aggregate score than *Third-Party Process Focus and Decision Control* ($M = 5.42$, $SD = 1.81$; $p < .01$,), *Parties Decide with Advice or Help* ($M = 4.67$, $SD = 1.96$; $p < .01$), and *Parties Control Process and Rules* ($M = 3.82$, $SD = 2.22$; $p < .01$).

[87] *Third-Party Process Focus and Decision Control* ($M = 5.42$, $SD = 1.81$) had a significantly larger aggregate score than *Parties Decide with Advice or Help* ($M = 4.67$, $SD = 1.96$; $p < .01$) and *Parties Control Process and Rules* ($M = 3.82$, $SD = 2.22$; $p < .01$).

[88] *Parties Decide with Advice or Help* ($M = 4.67$, $SD = 1.96$) had a significantly larger aggregate score than *Parties Control Process and Rules* ($M = 3.82$, $SD = 2.22$; $p < .01$).

party involvement and prioritized this involvement over Litigant Control. It also suggests that, as regards to Third-Party Control, litigants were more enthusiastic about having a third-party control the process as opposed to the outcome. As regards to Litigant Control, litigants were more interested in controlling the outcome as opposed to the process or rules. It is important to note that all of the process control options ultimately included in the factors used for these analyses leave room for the litigants to be present, to directly participate, or both;[89] the options varied mainly in terms of who would manage or facilitate the procedure.

3. How Litigants Compared Procedure Characteristics

After determining that litigants had statistically significant preferences at the highest level of abstraction (i.e., overall Litigant versus Third-Party Control), as well as amongst the control subtypes (i.e., the factors derived from the factor analysis), the next step was to determine how their evaluations translated into preferences at the most granular level; namely, within the three sets of characteristics: (1) who would determine the outcome of their case (see Table 7); (2) what the process would be like (see Table 8); and (3) the rules that would be used to resolve their dispute (see Table 9). The RM ANOVA used to determine litigants' preferences within the three sets of characteristics revealed significant differences in ratings among options regarding who would determine the outcome,[90] the process that would be used,[91] and the rules that would apply.[92]

[89] None of the characteristics that excluded the parties from the process loaded significantly on any of the factors stemming from the factor analysis. *See supra* Tables 3–5.

[90] $F(4, 1624) = 33.91$, $p < .01$.

[91] $F(5, 2005) = 61.19$, $p < .01$.

[92] $F(2, 808) = 249.7$, $p < .01$.

Table 7. Options Regarding Who Would Determine the Outcome

Option	*M*	*SD*
Third Party Decides	5.31	2.39
Group Decides	5.47	2.39
Parties Veto Third-Party Suggestion	5.46	2.47
Parties Decide Using Third-Party Help But No Suggestion	4.37	2.47
Parties Decide Lawyers Can Advise	4.23	2.65

Table 8. Options Regarding the Process that Would Be Used

Option	*M*	*SD*
Parties Present to Third Party	5.48	2.45
Lawyers to Third No Parties	4.34	2.66
Lawyers to Third With Parties	6.08	2.42
Parties Speak to Third When Directed	5.53	2.53
Parties Speak Freely to Each Other	3.90	2.57
Parties Speak Freely to Each Other and Third	4.08	2.76

Table 9. Options Regarding the Rules that Would Be Used

Option	*M*	*SD*
Court Rules	6.96	1.99
Rules By Parties	3.56	2.42
Third-Party Rules	4.23	2.34

To determine which options significantly differed from each other within each set, pairwise comparisons using the Bonferroni correction were conducted. For options regarding who would determine the outcome, litigants preferred *Third Party Decides* to *Parties Decide Using*

Third-Party Help But No Suggestion[93] and *Parties Decide Lawyers Can Advise*.[94] The same pattern was revealed for *Group Decides*: they preferred *Group Decides* to *Parties Decide Using Third-Party Help But No Suggestion*,[95] and *Parties Decide Lawyers Can Advise*.[96] Finally, litigants preferred *Parties Veto Third-Party Suggestion* to *Parties Decide Using Third-Party Help But No Suggestion*[97] and *Parties Decide Lawyers Can Advise*.[98] There were no other significant differences in ratings between the decision-maker alternatives. Thus, maintaining veto power over a third-party suggestion was as much decision control that litigants desired and they were indifferent between having this type of power and delegating decision-making authority to a third party or group of third parties. The data are reported in Table 7.

Regarding the process to be used, litigants preferred *Lawyers to Third with Parties* compared to all other options.[99] They also preferred *Parties Present to Third Party* to *Lawyers to Third No Parties*,[100] *Parties Speak Freely to Each Other*,[101] and *Parties Speak Freely to Each Other and Third*.[102] They favored *Parties Speak to Third When Directed* to each of the latter three options as well.[103] No other significant differences in ratings emerged. Thus, litigants most strongly desired being personally present for the resolution process and wanted a lawyer who would speak on their behalf. As a second choice, they were content to speak on their own behalf to a third party, and liked this idea significantly more than any options that would entail the parties speaking freely to each other or the option in which the parties would be excluded from the resolution process. Table 8 reports these data.

For options regarding the rules that would be used to resolve their dispute, litigants liked *Court Rules* significantly more than *Rules by*

---

[93] $t(407) = 6.18$, $p < .01$.

[94] $t(409) = 6.20$, $p < .01$.

[95] $t(407) = 7.06$, $p < .01$.

[96] $t(409) = 7.18$, $p < .01$.

[97] $t(408) = 8.90$, $p < .01$.

[98] $t(410) = 8.08$, $p < .01$.

[99] *Parties Present to Third Party* ($t(402) = 4.25$, $p < .01$); *Lawyers to Third No Parties* ($t(402) = 9.68$, $p < .01$); *Parties Speak to Third When Directed* ($t(403) = 4.75$, $p < .01$); *Parties Speak Freely to Each Other and Third* ($t(403) = 13.13$, $p < .01$); *Parties Speak Freely to Third Party* ($t(403) = 11.66$, $p < .01$).

[100] $t(404) = 6.00$, $p < .01$.

[101] $t(405) = 10.19$, $p < .01$.

[102] $t(405) = 8.89$, $p < .01$.

[103] *Lawyers to Third No Parties* ($t(405) = 7.69$, $p < .01$); *Parties Speak Freely to Each Other* ($t(406) = 8.76$, $p < .01$); *Parties Speak Freely to Each Other and Third* ($t(406) = 7.39$, $p < .01$).

Parties[104] as well as *Third-Party Rules*.[105] They also favored *Third-Party Rules* to *Rules by Parties*.[106] These results reveal that litigants preferred the application of formal rules, and, as a second choice, they wanted a third party to suggest appropriate standards and norms rather than rely on rules of their own choosing. The data are catalogued in Table 9.

4. Discussion of Exploratory Analyses

a. Predictors of Attraction to Litigant and Third-Party Control

A noteworthy observation regarding how the demographic, case-type, relationship, and attitudinal variables predicted attraction to Litigant and Third-Party Control is that most procedure characteristics were not uniquely predictive of attraction to either control type. While speculative at this point, a number of possible explanations might explain this scenario. For example, it may be that singular characteristics like those studied here drive attraction less than the relationship (or "interaction effect") between multiple characteristics, which were not examined. Alternatively, it may be that some characteristics are simply not predictive of attraction to these types of control, or are not uniquely predictive when the factors are considered simultaneously as they were in our multivariate analyses. It is important to consider the power that multivariate analyses can have for explaining phenomena in the real world, where many characteristics are naturally at play. Some of the characteristics that were found to significantly predict attraction to control are especially interesting and are discussed more fully below.

(1) Relationship Between the Parties and Party Type Predicted Attraction to Litigant Control

The analysis revealed that the more value that litigants placed on a future relationship with the opposing party, the more they liked Litigant Control. This result makes intuitive sense — if parties desire a continuing relationship, they might care to directly influence its parameters. This result is also congruent with findings from the *Litigant Procedure Perception Study* which revealed that the more that litigants valued a future relationship with the opposing party, the

[104] $t(407) = 20.18$, $p < .01$.
[105] $t(404) = 16.60$, $p < .01$.
[106] $t(406) = 4.50$, $p < .01$.

more they liked the idea of settlement negotiations that would include the parties alongside their attorneys.[107]

When litigants reported an existing relationship with the opposing party, they were less attracted to Litigant Control.[108] It may be that litigants' (possibly biased) insight into the traits of the opposing party, or the dynamics that the litigants have when they interact, creates an assumption that litigant control over the resolution of the dispute will not be enjoyable or productive. The fact that the data failed to reveal a relation between attraction to Third-Party Control and the existence of a relationship between the parties suggests that litigants were more agnostic about the implications of Third-Party Control.

In comparison to the preferences of individuals, groups and organizations were significantly less attracted to Litigant Control (but not more attracted to Third-Party Control). There was a marginally significant similar effect for companies.[109] This pattern suggests that while collectives were relatively more agnostic about Third-Party Control, they disliked the idea of greater personal involvement in the resolution of their case. Individuals may have felt more personally invested in their conflict and therefore desired more direct involvement in its resolution. Individuals are also likely to be involved in fewer cases simultaneously compared to collectives and therefore have more time and energy for personal involvement.

Similarly, litigants were significantly more attracted to Litigant Control when they opposed a collective (i.e., a company, group, or organization) rather than an individual.[110] Those opposing a collective may feel less powerful, rendering a desire for personal control more salient and desirable.

(2) Gender, Age Group, and Case-Type Predicted Attraction to Third-Party Control

As litigant age increased, attraction to Third-Party Control decreased. This age group effect, which replicated earlier findings,[111] is interesting. One might expect older litigants to be more familiar with legal procedures because they may have had more indirect experiences with some of the procedures through family members, friends, or

[107] *See* Shestowsky, *Psychology of Procedural Preference*, *supra* note 1, at 671, 685.

[108] *See* Table 6.

[109] *Id.*

[110] *Id.*

[111] *See* Shestowsky & Brett, *supra* note 5, at 95-96. For a discussion of the procedures used to conduct the analysis, see *id.* at 90.

acquaintances. This life experience appears to be associated with some skepticism regarding what can be accomplished when control is delegated to third parties. It is also possible that younger litigants are more deferential to third-party authorities, and therefore like the idea of giving third parties control more than their older counterparts do.[112]

Analyses also revealed that women liked Third-Party Control less than men.[113] This result aligns with the *Litigant Procedure Perception Study* which found women to be significantly less attracted to Jury Trials and Binding Arbitration (which tend to grant process and outcome control to third parties) than men.[114] It should be noted, however, that no gender difference emerged with respect to the Judge Trial, which is also oriented to Third-Party Control.[115] This pattern suggests that women find an exception for the Judge Trial compared to these other two forms of adjudication.

b. Litigants' Evaluations of Control Subtypes and Procedure Characteristics

In terms of the procedure characteristics that litigants liked best, litigants had significant preferences within all three characteristic domains: (1) who would determine the outcome of the dispute; (2) process that would be used; and (3) the substantive rules that would be used. In general, litigants wanted assistance with respect to the outcome, process, and rules. As regards to the outcome, litigants were relatively uninterested in having ownership over the decision, even if they could solicit advice from their attorney or the help of a third party to make that decision. Maintaining veto power over the resolution of their case was as much direct control over the outcome that they desired (and how much they liked this veto option was "tied" with how much they valued having a neutral person or group determine the outcome). Thus, litigants preferred to vest at least some decision control in a third party rather than assume total responsibility for the resolution of their case.

As regards to process, litigants similarly did not want full control. They ideally wanted to be personally present for the procedure, but also be represented in that process.[116] As a "second choice," they preferred presenting their own case to a third party or speaking to a

[112] *See id.* at 95-96.

[113] *See* Table 6.

[114] Shestowsky, *Psychology of Procedural Preference*, *supra* note 1, at 683.

[115] *See id.* at 683-84.

[116] *See supra* note 5 and accompanying text.

third party when directed rather than having their lawyer present their case without them or engaging in a more informal conversation with the opposing party, even if a third party would be present for that dialogue.[117] This pattern reflects a desire to experience some process formality and to avoid unfacilitated discussions with the opposing party. It also suggests that litigants wanted to attend the procedure if the process was to involve presenting evidence to a third party. In fact, litigants preferred to present their own case rather than have their lawyer do so in their absence. Future research might explore whether this desire to be present reflects a distrust of agents, a distrust or dislike of the opposing party, a desire to maximize voice, or some combination of these or other possibilities.

Lastly, as for options regarding the substantive rules, litigants wanted to use court rules rather than rules determined by either the litigants themselves or a third party. However, when faced with the latter two options, they preferred to use rules determined by a third party to rules chosen by the litigants. Thus, this pattern signals another aspect of dispute resolution in which litigants did not want full control.

Overall, litigants tended to desire formality. This pattern resonates with our finding that litigants preferred Third-Party Control to Litigant Control.[118] Insofar as litigants valued characteristics reflective of adjudicative rather than nonadjudicative procedures, the results are consistent with those of multiple ex ante laboratory studies that point to a litigant preference for adjudication.[119]

It is interesting to consider how the preference for Third-Party Control resonates with findings from the *Litigant Procedure Perception Study*. That study revealed that litigants liked Attorneys Negotiate with Parties Present, Mediation, and the Judge Trial more than all other examined procedures, yet did not significantly prefer any one of these to any of the others.[120] The attraction to the Judge Trial fits with the overall preference we found for Third-Party Control. It also aligns with the fact that litigants liked the idea of having a neutral third

[117] *See supra* notes 98–101 and accompanying text.

[118] *See supra* note 42–51 and accompanying text.

[119] *See, e.g.*, LIND ET AL., *supra* note 78, at 78-80 (reporting on a field study finding that litigants regarded adjudicative procedures as more fair and satisfying compared to nonadjudicative ones, ex post); LaTour et al., *Some Determinants*, *supra* note 24, at 349 (reporting on experimental research finding that arbitration was generally the most preferred means of settlement); Thibaut et al., *supra* note 2, at 1283 (noting that laboratory research participants expressed preference for adversarial procedures).

[120] Shestowsky, *Psychology of Procedural Preference*, *supra* note 1, at 673-74.

person determine the outcome,[121] using a lawyer to present evidence to a third party in their presence,[122] and applying court rules[123] — all of which are classic features of the Judge Trial.

By contrast, the individual characteristics of procedures that litigants liked best do not appear to explain the *Litigant Procedure Perception Study*'s finding that Mediation and Attorneys Negotiate with Clients Present fall within litigants' top three favorite procedures. For example, we found that litigants preferred features that were relatively more formal, including the use of lawyers to present evidence to a third party (which is not reflective of negotiation), and reliance on court rules (which is not guaranteed in either negotiation or mediation as it would be at trial). Moreover, litigants' relative lack of enthusiasm for options such as *Parties Decide Lawyers Can Advise* and *Parties Decide Using Third-Party Help But No Suggestion* seems somewhat at odds with their attraction to Attorneys Negotiate with Clients Present and Mediation.

The fact that there seems to be a disconnect between macro and micro preferences suggests that litigants might have highly complex preferences. In fact, it is possible that they are attracted to certain procedures due to the interplay of characteristics. For example, while litigants generally want third parties to control the process, they might be more comfortable playing a bigger role in presenting their own case when they know that they can veto the third party's suggested outcome (as is the case with mediation). When the outcome is relatively more binding (as is the case with trial), litigants might prefer delegating more responsibility to others, which could include having a lawyer present the evidence and a judge determine the outcome.

A more compelling and troubling explanation for the apparent disconnect is that it might stem from an inaccurate understanding of which attributes actually characterize various procedures. Illustrative of this possibility is that if we try to deduce litigants' favorite procedures by examining the procedure characteristics that received the highest mean ratings, we would incorrectly infer that the Jury Trial, Binding Arbitration, and Non-binding Arbitration were the procedures they liked best. The first two of these typically rely on court rules, grant decision power to third parties, and allow lawyers to present evidence to third parties in the presence of the litigants. Non-binding Arbitration allows for the same type of process and reliance on

[121] *See* Table 7 and surrounding discussion.

[122] *See* Table 8 and surrounding discussion.

[123] *See* Table 9 and surrounding discussion.

court rules, and gives the litigants veto power over the outcome. And yet, not only were these three procedures not at the top of their list of favorites, but both forms of arbitration received the lowest mean attractiveness ratings out of all the procedures that they evaluated.[124] Therefore, while litigants may have certain preferences at the micro level, they might not be cognizant of how these specific characteristics translate into procedures at the macro level. Any misconceptions about procedures could be due to multiple factors, including the relative lack of coverage (or accurate coverage) of alternatives to trial in popular media or inadequate litigant education on procedures by lawyers or court personnel.[125]

In any case, attorneys should be vigilant about their clients' possible misconceptions about procedures. For instance, when clients indicate a desire to mediate, lawyers should inquire into which aspects of mediation motivate their enthusiasm. If clients suggest that their interest in mediation stems from a desire to vest a third party with decision control, have a formal presentation led by the attorneys, and rely on court rules, then the lawyers should explain how such attributes are more in tune with binding arbitration or trial. It might be helpful to walk clients through each procedure, detailing the nature

---

[124] Shestowsky, *Psychology of Procedural Preference*, *supra* note 1, at 665 (Figure 1 illustrating how litigants rated the attractiveness of legal procedures and showing that Binding and Non-binding Arbitration received the lowest mean ratings); *see supra* Tables 7–9. Similarly, when analyses investigated whether litigants were significantly more likely to give any of the procedures the lowest (1 = "not attractive at all") versus the highest (9 = "extremely attractive") possible rating, Binding Arbitration and Non-binding Arbitration were the only procedures to receive significantly more of the lowest possible rating than the highest possible rating, and the Jury Trial was not more likely to obtain the highest possible rating than the lowest possible rating. *See* Shestowsky, *Psychology of Procedural Preference*, *supra* note 1, at 666-67, 676.

[125] *See, e.g.*, Donna Ballman, *Fairly Legal Is Unfairly Inaccurate About Mediators*, WRITE REP. (Jan. 23, 2011, 4:10 PM), http://writereport.blogspot.com/2011/01/fairly-legal-is-unfairly-inaccurate.html (arguing that USA's 2011 television series, *Fairly Legal*, inaccurately portrayed the mediation process); Clare Fowler, *Fairly Legal: Positives and Negatives*, MEDIATE (Jan., 2011), http://www.mediate.com/mobile/article.cfm?id=7233 (discussing the differences between how the TV show *Fairly Legal* mediation and the actual practice of mediation); Nina Laurinkari & Ludovica Bello, *Alternative Dispute Resolution: Survey Analysis*, 13 EFFECTIUS NEWSL. 10 (2011), *available at* http://effectius.com/yahoo_site_admin/assets/docs/Effectius_ADRSurveyanalysis_NinaLaurinkari_LudovicaBello_newsletter13.150124032.pdf ("As to the difficulties encountered during the daily practice and execution of the ADR services offered, the biggest obstacle is the lack of awareness and/ or media coverage of the concept of ADR methods in general . . . ."); Diane J. Levin, *Mediation: Not Meditation, Not Medication, and Definitely Not Arbitration*, MEDIATION CHANNEL (July 3, 2009), http://mediationchannel.com/category/arbitration/ ("[T]he ADR field still has plenty of work to do in terms of public education and awareness.").

of the process, the rules that would be or could be used to resolve the dispute, and who is ultimately in charge of determining the outcome. To facilitate such conversations with their clients, lawyers could use the survey instrument employed in our research, and presented in the Appendix, as a resource for inquiring into their understanding of, and preference for, procedure characteristics. This type of discussion might help them sort out any misunderstandings that their clients have about certain procedures, and lead to productive conversations about which procedure would best meet their expectations for constitutive characteristics. Moreover, given that litigants tend to conceptualize procedures in terms of control, the language of control might be an especially effective tool for comparing the various options. Although it remains an empirical question, it is reasonable to expect that clients might be more satisfied with their lawyers (and even their experiences with the legal system) if they use a conceptual framework that seems natural to litigants.

Lawyers could also use our results to shape procedures to suit their clients' individualized preferences. For instance, given our finding that litigants most preferred a process in which they would be present along with their lawyer, lawyers should consider how their clients might be present (and represented) at the settlement table. If negotiations take place over the phone, for example, it may be prudent to suggest a teleconference that includes the client. As another example, in light of our finding that litigants tend to be averse to unfettered conversation with the opposing party, those who anticipate having to mediate their cases may be hoping for reassurances that their lawyer will protect them from undesirable interpersonal interactions. To meet these client interests, lawyers might suggest shuttle mediation or find a mediator who is especially skilled at productive facilitation, thereby making interactions more pleasant.

CONCLUSION

Our study represents a significant foray into an area that has been largely understudied. Specifically, our goal was to examine litigants' ex ante preferences, not for broadly defined procedures, but for the separate attributes that characterize them. Our findings offer insights into the psychology of litigants on a micro level, and illuminate what they like and dislike about different aspects of procedures. Importantly, our participants were asked to indicate their preferences for their own recently filed cases. Thus, it is possible that litigants would have different preferences at the end of their cases or for disputes that have not been filed in court.

The theoretical implications of the findings are many. First, insofar as our results suggest that litigants evaluate the attributes of procedures along the lines of Litigant versus Third-Party Control, they support the ecological validity of past laboratory research on ex ante perceptions. Second, our findings also reinforce the conclusions drawn from Shestowsky and Brett's smaller-scale field research.[126] Compared to the Shestowsky and Brett study, the present investigation analyzed the attitudes of a much larger sample of litigants, representing a wider variety of cases pending in three trial courts located in different states. These methodological attributes boost the generalizability of our findings and amount to a significant expansion on the inquiry into litigant psychology at the ex ante stage. Empirical reinforcement is immensely important because "[a]s is true for empirical research in general, it is only through additional research that we can obtain great confidence concerning the reliability and generalizability of [past] findings."[127] A strong and purposeful marriage between laboratory and field studies can lay a solid foundation for policy development. Third, our findings support the theory suggesting that procedural preferences may depend on when in the dispute resolution trajectory preferences are assessed.[128] This theory posits that when litigants evaluate procedures ex ante, they prefer ones that allocate control to third parties;[129] but when doing so ex post, they are relatively more attracted to procedures that allocate control to the parties.[130] The overall ex ante

126 *See* Shestowsky & Brett, *supra* note 5, at 84-85.

127 *Id.* at 105.

128 *See id.* at 80-94; Shestowsky, *Psychology of Procedural Preference*, *supra* note 1, at 654-70.

129 *See* Shestowsky, *Psychology of Procedural Preference*, *supra* note 1, at 652 (finding that disputants initially evaluated their options on the basis of the relative control they offered to disputants as opposed to third parties, and that initial attraction to Third-Party Control predicted ex post satisfaction with adjudicative procedures but not with nonadjudicative procedures). *But see* Shestowsky, *Procedural Preferences*, *supra* note 13, at 216-22 (outlining the differences between adjudicative and nonadjudicative procedures); Stallworth & Stroh, *supra* note 6, at 31, 36-37 (finding that disputants preferred mediation (a nonadjudicative procedure) ex ante, to more adjudicative options).

130 *See* Shestowsky & Brett, *supra* note 5, at 76-77, 93; Jean R. Sternlight, *Separate and Not Equal: Integrating Civil Procedure and ADR in Legal Academia*, 80 NOTRE DAME L. REV. 681, 719 (2005) (quoting Nancy A. Welsh, *Disputants' Decision Control in Court-Connected Mediation: A Hollow Promise Without Procedural Justice*, 2002 J. DISP. RESOL. 179, 187) (arguing that "Professor Welsh, after reviewing the same studies, disputes Hensler's conclusion that disputants view processes as more procedurally fair if they cede decisional control to a third party. Instead, argues Welsh, such studies show that 'the locus of decision control is less important to litigants' perceptions of procedural justice than process elements — voice, consideration, even-handedness

preference we found for Third-Party Control relative to Litigant Control supports the former part of this conceptualization.

Our findings also have practical significance. Before lawyers can help their clients choose a litigation strategy, they should explain what each possible resolution procedure entails and help them understand how flexible (or not) each is in terms of allowing them to shape the outcome, process, or substantive rules. To that end, our work can be used to educate lawyers on the aspects of procedures that litigants tend to like more than others, and the aspects of procedures that clients tend to want to control. Our results suggest that the level of control that litigants can obtain through various procedures is especially important when certain factors are salient in a particular case. Among these factors are whether the litigant has a previous relationship with the opposing party, the importance that a litigant places on a future relationship with that party, and whether the opposing party is an individual or a collective. Understanding the variables that predict litigant attraction to Litigant and Third-Party Control can help lawyers to counsel their clients more effectively and better anticipate the attitudes of opposing parties.

For similar reasons, our results have wider, systemic applicability for guiding judges and court personnel who design or reform ADR programs. Our study can help these legal actors to better understand the psychology of litigants and the role that control plays in their cognitive framework. If legal actors have a better understanding of litigant perceptions and offer them procedures that fit their preferences, they could nurture a sense of procedural justice within litigants,[131] increase appreciation for various ADR programs,[132] and boost voluntary compliance with case outcomes.[133] The more educated

and dignity").

[131] *See, e.g.*, John Lande, *Using Dispute System Design Methods to Promote Good-Faith Participation in Court-Connected Mediation Programs*, 50 UCLA L. REV. 69, 118-20 (2002) (discussing how mediation program designers can use empirical research on disputants' subjective perceptions to promote productive participation in mediation and remedy problems associated with apparent bad faith conduct).

[132] *See* Tom R. Tyler, *Trust and Law Abidingness: A Proactive Model of Social Regulation*, 81 B.U. L. REV. 361, 391 (2001); *see also* WAYNE D. BRAZIL, EARLY NEUTRAL EVALUATION 21-22 (2012) (explaining how litigants often feel alienated — i.e., "feel[ing] separated, fundamentally, from the adjudicatory process because (1) they do not understand it, (2) their participation in it is minimal or peripheral, and (3) they have no power to control it — or even affect its course significantly." By helping them to understand, participate in, and control parts of the process, litigants may be able to better appreciate the justice system).

[133] *See, e.g.*, Craig A. McEwen & Richard J. Maiman, *Mediation in Small Claims Court: Achieving Compliance Through Consent*, 18 LAW & SOC'Y REV. 11, 20-22 (1984)

actors within the justice system become about the views that litigants hold regarding the characteristics of procedures, the better equipped they will be to serve them.

Ideally, future research will address theoretical gaps in our understanding of litigant preferences while simultaneously providing pragmatic insights that will benefit the legal profession and the architects of court policy. Advancing procedural justice through the implementation of litigants' preferences will depend on collaborations between researchers and legal practitioners — be they judges, lawyers, or policy makers. Although researchers will continue to be responsible for the production of empirical research to advance our knowledge, the onus is on practitioners to catalyze this knowledge into court policy and better-informed client counseling protocols. Through this synthesis, the goals of democratic governance may best be realized, and the court system can more effectively operate to mete out civil justice.

(concluding that litigants in consensual procedures such as mediation are more likely to perceive the outcome as fair and just and, subsequently, are more likely to comply with the outcome than in adjudicated cases); Mark S. Umbreit et al., *Victim-Offender Mediation: Three Decades of Practice and Research*, 22 CONFLICT RESOL. Q. 279, 298-99 (2004) (concluding that offenders who participate in programs that offer them greater opportunity to shape the outcome are more likely to comply with the outcome and less likely to re-offend than those who use more adjudicative procedures that do not offer them such control).

APPENDIX: PROCEDURE CHARACTERISTICS EVALUATED BY PARTICIPANTS

Each question statement was evaluated using the following scale:

1	2	3	4	5	6	7	8	9
Not Attractive at All				Somewhat Attractive				Extremely Attractive

A. Who Should Decide My Case?

For every case, someone ultimately gets to decide the outcome. For example, this could be a judge or jury; or, it could be you or someone you empower to decide the outcome for you.

The next set of questions concerns who could be the decision-maker for your case.

How attractive do you find each option for who could decide the outcome for <u>your particular case</u>? Please circle the appropriate number for each option.

1. A neutral third ***person*** will decide the outcome of the case.[134]

2. A neutral ***group of people*** will decide the outcome of the case.[135]

3. A neutral third ***person*** will suggest how the case should be resolved, and the other party and I can either agree to accept that suggestion as the outcome, or either of us can reject it.[136]

4. A neutral third ***person*** will help me and the other party decide the outcome of the case ourselves, without making suggestions as to how the case should be resolved.[137]

5. The other party and I will decide what the outcome of the case will be ourselves, ***without*** the advice of a neutral third person, but, if we want to, we can get advice and suggestions from our own lawyer before we decide which outcome to ultimately choose.[138]

---

134 Characteristic 1: *Third Party Decides*.
135 Characteristic 2: *Group Decides*.
136 Characteristic 3: *Parties Veto Third-Party Suggestion*.
137 Characteristic 4: *Parties Decide Using Third-Party Help But No Suggestion*.
138 Characteristic 5: *Parties Decide Lawyers Can Advise*.

B. *What Kind of Process Should be Used to Resolve my Case?*

Legal procedures differ in terms of who can be present at the procedure, what kind of evidence can be presented, how the evidence can be presented, and who is allowed to present it.

This next set of questions concerns the process that could be used to resolve your case.

How attractive do you find each process alternative <u>for your particular case</u>? Please circle the appropriate number for each option.

6. Both the other party and I will attend the procedure and each of us will present evidence favorable to our own position to a neutral third person.[139]

7. The other party and I will each have our own lawyer. Our <u>lawyer</u> will present evidence favorable to our own position to a neutral third person. **Neither** the other party **nor** I will attend the procedure.[140]

8. The other party and I will each have our own lawyer. Our <u>lawyer</u> will present evidence favorable to our own position to a neutral third person. **Both** the other party **and** I ***will*** attend the procedure along with our lawyers.[141]

9. The other party and I will be able to speak during the procedure **only** when a neutral third person or our lawyers direct us to do so.[142]

10. Both the other party and I will be able to speak freely to each other during the procedure whenever we like, and as informally as we like.[143]

11. Both the other party and I will be able to speak freely to each other during the procedure whenever we like, and as informally as we like

[139] Characteristic 6: *Parties Present to Third Party*.
[140] Characteristic 7: *Lawyers to Third Party No Parties*.
[141] Characteristic 8: *Lawyers to Third Party With Parties*.
[142] Characteristic 9: *Parties Speak to Third Party When Directed*.
[143] Characteristic 10: *Speak Freely to Each Other*.

and speak to the neutral third person as freely and informally as we like as well.[144]

C. *What Rules Should be Used to Decide My Case?*

When a case is being resolved, certain substantive rules or principles (i.e., the rules governing the rights and obligations of the parties) generally are used to decide the outcome of the case. For example, some legal procedures require that the law be used to decide the outcome, whereas other procedures allow the parties or someone on their behalf to decide that other rules or principles should be used, such as special standards that apply to the parties' industry or group, the parties' own standards of fairness, or concerns about how a decision could affect a relationship or economic situation.

This next set of questions concerns substantive rules or principles that could be used to resolve your case.

How attractive do you find each alternative pertaining to substantive rules or principles to use to resolve your particular case? Please circle the appropriate number for each option.

12. The outcome will be decided using the same rules or principles that apply in a court of law.[145]

13. The other party and I will decide what rules or principles should be used to decide the outcome.[146]

14. A neutral third person will decide what rules or principles should be used to decide the outcome.[147]

[144] Characteristic 11: *Speak Freely to Each Other and Third Party*.
[145] Characteristic 12: *Court Rules*.
[146] Characteristic 13: *Rules by Parties*.
[147] Characteristic 14: *Third-Party Rules*.