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## ... Because "Yes" Actually Means "No": A Personalized Prescriptive to Reactualize Informed Consent in Dispute Resolution

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# **... BECAUSE “YES” ACTUALLY MEANS “NO”: A PERSONALIZED PRESCRIPTIVE TO REACTUALIZE INFORMED CONSENT IN DISPUTE RESOLUTION**

ELAYNE E. GREENBERG\*

*“[N]o man is good enough to govern another man . . . without that other’s consent.”*

*Abraham Lincoln*<sup>1</sup>

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1. President Abraham Lincoln, Speech on the Kansas–Nebraska Act (Oct. 16, 1854), in ABRAHAM LINCOLN, POLITICAL WRITINGS AND SPEECHES 22, 25 (Terence Ball ed., 2013).

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## I. INTRODUCTION

The discussion about the role informed consent plays in securing justice was catapulted front and center when media headlines drew attention to the dire consequences real people suffer when they have no understanding about the dispute resolution procedures in which they have agreed to participate.<sup>2</sup> One representative story brings the gravity of this discussion closer to home. When

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2. See Jessica Silver-Greenberg & Robert Gebeloff, *Arbitration Everywhere, Stacking the Deck of Justice*, N.Y. TIMES DEALBOOK (Oct. 31, 2015), [https://www.nytimes.com/2015/11/01/business/dealbook/arbitration-everywhere-stacking-the-deck-of-justice.html?\\_r=0](https://www.nytimes.com/2015/11/01/business/dealbook/arbitration-everywhere-stacking-the-deck-of-justice.html?_r=0) [<https://perma.cc/ZA4G-PVLJ>]; see also Jeff Sovern, Elayne E. Greenberg, Paul F. Kirgis & Yuxiang Liu, "Whimsy Little Contracts" with Unexpected Consequences: An Empirical Analysis of Consumer Understanding of Arbitration Agreements, 75 MD. L. REV. 1 (2015); Amy J. Schmitz, *Pizza-Box Contracts: True Tales of Consumer Contracting Culture*, 45 WAKE FOREST L. REV. 863 (2010).

Elizabeth Barrow was in her nineties and needed more intensive support to help navigate her day-to-day living, she became a resident of Brandon Woods, a nursing home in South Dartmouth, Massachusetts.<sup>3</sup> Time advanced and to the joy of family and friends, Elizabeth celebrated her one hundredth birthday in August 2009.<sup>4</sup> One month later, their joy turned into horror when Elizabeth was strangled and suffocated by her ninety-seven-year-old roommate.<sup>5</sup> Prior to the murder, the roommate was known to have a history of problems and noted to be “at risk to harm herself and others.”<sup>6</sup> However, when Scott Barrow, Mrs. Barrow’s surviving son, turned to the court to seek justice for the negligent care his beloved mother had received in the very nursing home that was supposed to provide supportive care for his mother, he was barred from seeking redress in court.<sup>7</sup>

Why was Scott Barrow denied access to justice in court? At the moment Scott was making the emotional decision to place his mother in a nursing home, the nursing home required Scott, as Elizabeth’s family member, to sign a contract with an arbitration clause that required all future claims be resolved in arbitration.<sup>8</sup> Scott didn’t fully understand the import of that arbitration clause.<sup>9</sup> Fortunately, the legislature was sparked into action by the reporting of similar injustices to residents of nursing homes and passed legislation that now bans

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3. Michael Corkery & Jessica Silver-Greenberg, *Pivotal Nursing Home Suit Raises A Simple Question: Who Signed the Contract?*, N.Y. TIMES DEALBOOK (Feb. 21, 2016), <https://www.nytimes.com/2016/02/22/business/dealbook/pivotal-nursing-home-suit-raises-a-simple-question-who-signed-the-contract.html> [<https://perma.cc/D2LG-5FVD>]. The lack of informed consent to dispute resolution procedures in pre-dispute arbitration clauses in consumer contracts affects individuals of all ages. See Jillian Berman, *These Controversial Student Contracts May Soon be Banned*, MARKETWATCH (June 8, 2016, 10:11 AM), <http://www.marketwatch.com/story/these-controversial-student-contracts-may-soon-be-banned-2016-06-02> [<https://perma.cc/7RZP-5BYW>]; see also Nicholas Rayfield, *National Student Loan Debt Reaches A Bonkers \$1.2 Trillion*, USATODAY (Apr. 8, 2015, 11:24 AM), <https://www.usatoday.com/story/college/2015/04/08/national-student-loan-debt-reaches-a-bonkers-12-trillion/37401867/> [<https://perma.cc/3FQ8-EFJ5>]. See generally Jeff Sovern, *Toward a New Model of Consumer Protection: The Problem of Inflated Transaction Costs*, 47 WM. & MARY L. REV. 1635 (2006). The media is replete with heart-wrenching stories about graduates of college and professionals shackled with onerous student loan agreements that paralyze their efforts to create a better life, who are barred from modifying these agreements in court. Again, we ask what about justice? The students signed student loan agreements that contained an arbitration clause without the students understanding the import of the arbitration clause.

4. Corkery & Silver-Greenberg, *supra* note 3.

5. *Id.*

6. *Id.*

7. *Id.*

8. *Id.*

9. *Id.*

arbitration clauses in nursing home contracts.<sup>10</sup> While this is a welcomed change to prevent such future deprivations of justice to residents in nursing homes, the problem of the lack of informed consent is not isolated to pre-dispute arbitration clauses in consumer contracts. This paper expands our focus to the broader problem of the lack of meaningful informed consent that often exists whenever an individual needs to make a choice about whether to participate in any dispute resolution procedure.<sup>11</sup>

Too often, litigants in civil disputes are dispute resolution illiterate.<sup>12</sup> Many litigants do not know that dispute resolution procedures other than litigation exist, many do not understand the fundamental workings of how various procedures operate to resolve disputes, and many do not appreciate the strategic application of these procedures to their case.<sup>13</sup> A troubling consequence of this dispute resolution illiteracy is that when litigants have the opportunity to use a dispute resolution procedure to resolve their dispute, they do not have the context to understand the import of their dispute resolution procedure choices as they apply to them and their case.<sup>14</sup> Thus, when litigants are asked by their lawyers to decide whether to resolve their dispute through litigation or an ADR approach, litigants often do not have adequate information and understanding about these two different approaches to give their meaningful informed consent to opt for one approach.<sup>15</sup> If civil litigants then agree to try to settle their dispute without litigation, again litigants often do not have adequate information and

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10. Jessica Silver-Greenberg & Michael Corkery, *U.S. Just Made It A Lot Less Difficult to Sue Nursing Homes*, N.Y. TIMES DEALBOOK (Sept. 28, 2016), <https://www.nytimes.com/2016/09/29/business/dealbook/arbitration-nursing-homes-elder-abuse-harassment-claims.html> [https://perma.cc/M4RN-WZD4].

11. See generally Donna Shestowsky, *When Ignorance is Not Bliss: An Empirical Study of Litigants' Awareness of Court-Sponsored Alternative Dispute Resolution Programs*, 22 HARV. NEGOT. L. REV. 189 (2017) [hereinafter Shestowsky, *When Ignorance is Not Bliss*]; Donna Shestowsky, *Disputants' Preferences for Court-Connected Resolution Procedures: Why We Should Care and Why We Know So Little*, 23 OHIO ST. J. ON DISP. RESOL. 549 (2008) [hereinafter Shestowsky, *Disputants' Preferences for Court-Connected Resolution Procedures*].

12. See generally Shestowsky, *When Ignorance is Not Bliss*, *supra* note 11; Donna Shestowsky & Jeanne Brett, *Disputants' Perceptions of Dispute Resolution Procedures: An Ex Ante and Ex Post Longitudinal Empirical Study*, 41 CONN. L. REV. 63 (2008); Roselle L. Wissler, *When Does Familiarity Breed Content? A Study of the Role of Different Forms of ADR Education and Experience in Attorneys' ADR Recommendations*, 2 PEPP. DISP. RESOL. L.J. 199 (2002).

13. Shestowsky & Brett, *supra* note 12, at 101; Wissler, *supra* note 12, at 203; Shestowsky, *Disputants' Preferences for Court-Connected Resolution Procedures*, *supra* note 11, at 620.

14. See Shestowsky, *When Ignorance is Not Bliss*, *supra* note 11, at 221.

15. *Id.* at 219.

understanding to choose one ADR procedure from a menu of ADR options.<sup>16</sup> Even if a litigant’s attorney selects the ADR procedure to be used to resolve the case, the litigant may still be unable to give their meaningful informed consent to participate.<sup>17</sup> Thus, litigants’ dispute resolution illiteracy thwarts their right to exercise their justice options.

Although lawyers, courts, ADR providers, and neutrals might provide litigants with information about dispute resolution procedures that these professionals assume litigants need to make an informed decision and give consent, litigants might find this information inadequate to support their personal decision-making process. The professional information provided is often a generic recitation about the structure and procedures used within a specific dispute resolution procedure.<sup>18</sup> Furthermore, it may be presented in a way that is incomprehensible to the litigant’s way of processing information and making decisions. For many litigants, such a generic presentation of information may have little meaning or relevance to addressing their particular needs and concerns. Conspicuously absent from this one-size-fits-all approach to informed consent is a more customized way to share information about the dispute resolution procedures that is tailored to the particular individual’s needs, values, and decision-making process.

Despite this inadequate information, many litigants still give a reflexive assent to the generic recitation of information explaining dispute resolution procedures, believing that they have no real choice. Some litigants may not even realize that they have the autonomy to choose as part of their right to make decisions about their case.<sup>19</sup> Still, other litigants may be hesitant to ask for additional information, not wanting to be viewed as “stupid.” Yet, others may not fathom what information they might want or need to know in order to make

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16. See Shestowsky, *Disputants’ Preferences for Court-Connected Resolution Procedures*, *supra* note 11, at 620.

17. See Shestowsky, *When Ignorance is Not Bliss*, *supra* note 11, at 236.

18. See *infra* Part II.

19. See, e.g., MODEL RULES OF PROF’L CONDUCT r. 1.2(a) (AM. BAR ASS’N 2017) (providing that “a lawyer shall abide by a client’s decisions concerning the objectives of representation and, as required by Rule 1.4, shall consult with the client as to the means by which they are pursued.”); MODEL RULES OF PROF’L CONDUCT r. 1.4(a) (AM. BAR ASS’N 2017) (“A lawyer shall . . . (2) reasonably consult with the client about the means by which the client’s objectives are to be accomplished; (3) keep the client reasonably informed about the status of the matter . . . .”); MODEL STANDARDS OF CONDUCT FOR MEDIATORS I.A. (AM. ARB. ASS’N 2005) (“A mediator shall conduct a mediation based on the principle of party self-determination. Self-determination is the act of coming to a voluntary, uncoerced decision in which each party makes free and informed choices as to process and outcome. Parties may exercise self-determination at any stage of a mediation, including mediator selection, process design, participation in or withdrawal from the process . . . .”).

an informed choice. Thus, when litigants agree to participate in a dispute resolution procedure, their “yes” may mean “no.”

When we shift our focus to the purpose and ideals of informed consent in dispute resolution, we observe how the absence of litigants’ meaningful informed consent is threatening the integrity of the dispute resolution profession and litigants’ right to choose their justice options. Informed consent is touted to be the fulcrum of the dispute resolution profession.<sup>20</sup> The dispute resolution profession professes to covet an individual’s right to self-determine their appropriate dispute resolution procedure.<sup>21</sup> As a foundational tenet of dispute resolution, the concept of informed consent has its genesis with the introduction of the multi-door courthouse paradigm, where courts offer a menu of dispute resolution processes from which parties may choose the process they deem most appropriate to help them resolve their disputes.<sup>22</sup> The right to informed consent is considered so sacrosanct that it is embedded in the ethical guidelines that shape the behavioral responsibilities that dispute resolution providers,<sup>23</sup> neutrals,<sup>24</sup> and advocates<sup>25</sup> are ethically obligated to follow to ensure that consumers make informed and consensual dispute resolution choices. However, the pervasive lack of meaningful informed consent calls into question the integrity of our practice and should compel practitioners to

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20. Jacqueline M. Nolan-Haley, *Informed Consent in Mediation: A Guiding Principle for Truly Educated Decisionmaking*, 74 NOTRE DAME L. REV. 775, 776 (1999).

21. For example, in the mediation community, informed consent is considered a sacred value. However, there is no consensus about how to achieve meaningful participant-informed consent. See, e.g., *id.* at 776–77; Michael T. Colatella Jr., *Informed Consent in Mediation: Promoting Pro Se Parties’ Informed Settlement Choice While Honoring the Mediator’s Ethical Duties*, 15 CARDOZO J. CONFLICT RESOL. 705, 705–06 (2014); Omer Shapira, *A Critical Assessment of the Model Standards of Conduct for Mediators (2005): Call for Reform*, 100 MARQ. L. REV. 81, 112 (2016).

22. Nolan-Haley, *supra* note 20, at 778; Thomas J. Stipanowich, *The Multi-Door Contract and Other Possibilities*, 13 OHIO ST. J. ON DISP. RESOL. 303, 325 (1998) (discussing the importance of offering informed consent to litigants in the multi-door model, and positing that magistrate judges can facilitate the most opportunity for efficient informed consent). See generally *Shaping the Future of Dispute Resolution & Improving Access to Justice*, GLOBAL POUND CONF., <http://globalpoundconference.org/> [<https://perma.cc/U3YC-SC2Q>] (last visited Aug. 27, 2016).

23. See, e.g., CPR-Geo. Commission on Ethics and Standards in ADR, *Principles for ADR Provider Organizations*, INT’L INST. FOR CONFLICT PREVENTION & RESOL., <http://www.cpradr.org/RulesCaseServices/CPRRules/PrinciplesforADRProviderOrganizations.aspx> [<https://perma.cc/P6DG-3QSP>] (May 1, 2002).

24. See, e.g., CODE OF ETHICS FOR ARBITRATORS IN COMMERCIAL DISPUTES (AM. ARB. ASS’N 2004) [https://www.americanbar.org/content/dam/aba/migrated/dispute/commercial\\_disputes.authcheckdam.pdf](https://www.americanbar.org/content/dam/aba/migrated/dispute/commercial_disputes.authcheckdam.pdf) [<https://perma.cc/4Q3X-3NUG>]; MODEL STANDARDS OF CONDUCT FOR MEDIATORS (AM. ARB. ASS’N 2005)

25. See, e.g., MODEL RULES OF PROF’L CONDUCT *rr.* 1.2, 1.4, 2.1 (AM. BAR ASS’N 2017).



rethink their current professional practices of obtaining client informed consent.<sup>26</sup>

This paper prescribes a three-phase proposal to help re-actualize meaningful informed consent by refocusing informed consent efforts back to what informed consent is about: the client. This discussion takes place in the following parts: Part II looks at the status quo of informed consent and explains why current practices do not achieve *meaningful* informed consent. Part III provides an overview of the research on dispute resolution illiteracy and offers insights on why the problem exists. In Part IV, we learn about the initiatives health care professionals are taking to achieve meaningful patient informed consent. Part V culls from the lessons of the health care industry and proposes how to implement a more personalized approach to achieve meaningful informed consent to dispute resolution procedures. This proposal focuses on how, as part of informed consent practices, lawyers, courts, ADR providers, and neutrals could provide individuals with tailored information about dispute resolution procedures that reflects the individual’s informational needs, personal values, and decision-making process. The paper then concludes by inviting colleagues to rethink their current informed consent practices and to implement the prescribed changes that will help clients achieve meaningful informed consent.

## II. THE STATUS QUO PROCESS OF PROVIDING GENERIC INFORMATION ABOUT DISPUTE RESOLUTION DOESN’T ACHIEVE MEANINGFUL INFORMED CONSENT

Dispute resolution ethical guidelines require that, before an individual selects or chooses to participate in a dispute resolution procedure, the individual is required to give his informed consent to participate.<sup>27</sup> To satisfy this requirement, lawyers routinely convey the information about the procedure that is provided by ADR providers and/or neutrals to the client.<sup>28</sup> The information may be presented in one or a combination of forms: oral, written, or on a website.<sup>29</sup> As part of good practice, the information may be provided multiple

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26. See generally MATT MILLER, *THE TYRANNY OF DEAD IDEAS: LETTING GO OF THE OLD WAYS OF THINKING TO UNLEASH A NEW PROSPERITY* (2009) (supporting the value of rethinking new approaches to problems by first having a willingness to forego the way things have been done in the past).

27. See MODEL STANDARDS OF CONDUCT FOR MEDIATORS I: (AM. ARB. ASS’N 2005).

28. MODEL RULES OF PROF’L CONDUCT *rr.* 1.2, 1.4, 2.1 (AM. BAR ASS’N 2017).

29. See, e.g., *Consent to Mediate and Mediator Selection*, B. ASS’N S.F., [https://www.sfbabar.org/forms/adr/ms\\_med\\_consent.pdf](https://www.sfbabar.org/forms/adr/ms_med_consent.pdf) (last visited Sept. 3, 2016); *Form of Consent to Participate in Mediation/Settlement Conference*, MONT. 21ST JUD. DISTRICT,



times before a decision is made and as a check-in once the decision is made.<sup>30</sup> If the individual is pro se, the ADR provider or the neutral may present the information about the procedure directly to the individual.<sup>31</sup>

Yet, even though the profession of dispute resolution has embraced these guidelines and prides itself on being about party choice, lawyers and ADR professionals commonly obtain a party's informed consent without giving the party relevant information to help exercise individual choice.<sup>32</sup> Instead, the scope of the information provided as part of informed consent focuses primarily on the structure and process of the procedure and includes the information lawyers, ADR providers, and neutrals assume the client wants.<sup>33</sup> Who is the neutral? What is the role of the neutral? What are the confidentiality parameters? What are the typical monetary costs? How long will it take? What are the benefits of participation? What are the possible remedies? However, this generic presentation of information about dispute resolution, be it orally, written, or accessible online, does not help achieve the meaningful informed consent that it purports to achieve<sup>34</sup> because it precludes additional information that may be relevant to support the individual's personal decision-making process.

There are five central barriers that interfere with achieving meaningful informed consent to choose and participate in a dispute resolution process. First, consumers of dispute resolution procedures are often dispute resolution

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<http://ravalli.us/DocumentCenter/View/826> [<https://perma.cc/PHP9-2MGR>] (last visited Sept. 3, 2016).

30. Am. Bar Ass'n, *ABA Model Code of Professional Responsibility EC 7-8*, in 1991 SELECTED STANDARDS ON PROFESSIONAL RESPONSIBILITY 170 (Thomas D. Morgan & Ronald D. Rotunda eds., 1991) ("A lawyer should exert his best efforts to insure that decisions of his client are made only after the client has been informed of relevant considerations. A lawyer ought to initiate this decision-making process if the client does not do so . . . A lawyer should advise his client of the possible effect of each legal alternative. A lawyer should bring to bear upon this decision-making process the fullness of his experience as well as his objective viewpoint.").

31. See, e.g., Nolan-Haley, *supra* note 20, at 801.

32. See, e.g., *Forms*, ADR SERVICES, <https://www.adrservices.com/services/forms/> [<https://perma.cc/5AYV-KEUL>] (last visited Sept. 27, 2018); *The JAMS Mediation Process*, JAMS MEDIATION, ARB., ADR SERVS., <https://www.jamsadr.com/adr-mediation/> [<https://perma.cc/6CZS-2Z7M>] (last visited Mar. 22, 2017); *Alternative Dispute Resolution (ADR)*, U.S. DISTRICT & BANKR. CT. S. DISTRICT TEX., <http://www.txs.uscourts.gov/adr> [<https://perma.cc/4BBG-DSUH>] (last visited Mar. 22, 2017).

33. See, e.g., *Forms*, *supra* note 32; *The JAMS Mediation Process*, *supra* note 32; *Alternative Dispute Resolution (ADR)*, *supra* note 32.

34. See, e.g., OMRI BEN-SHAHAR & CARL E. SCHNEIDER, *MORE THAN YOU WANTED TO KNOW: THE FAILURE OF MANDATED DISCLOSURE* (2014).

illiterate.<sup>35</sup> Second, consumers of dispute resolution are not all alike and may require personalized information, rather than generic information, to support their individualized decision-making process and satisfy their personal preferences.<sup>36</sup> Third, lawyers themselves may not be knowledgeable about or comfortable with dispute resolution.<sup>37</sup> Fourth, there is a misalignment between the generic information that lawyers, ADR providers, and neutrals assume litigants want about dispute resolution procedures to make an informed decision and the actual information individuals may want to support their individualized decision-making process and personal needs.<sup>38</sup> Finally, the presentation of informed consent information in its different forms may be discounted as boilerplate, akin to legalese that the individual has no power to change.<sup>39</sup> By understanding why the status quo approach doesn’t work,<sup>40</sup> this author hopes to help the reader appreciate that it is senseless to maintain the status quo when a different approach is needed.<sup>41</sup>

*A. Individuals may be dispute resolution illiterate.*

Given that our pop culture and media are primary sources of education about our legal system, it is no wonder individuals may be dispute resolution illiterate.<sup>42</sup> Our pop culture and media convey the message that adjudication, an adversarial procedure at its core, is the primary way to resolve disputes in our legal system.<sup>43</sup> Conspicuously absent from these mainstream social

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35. *Infra* Section II.A.

36. *Infra* Section II.B.

37. *Infra* Section II.C.

38. *Infra* Section II.D.

39. *Infra* Section II.E.

40. BEN-SHAHAR & SCHNEIDER, *supra* note 34, at 7.

41. *Id.* at 183.

42. See, e.g., Carrie Menkel-Meadow, *Can They Do That? Legal Ethics in Popular Culture: Of Character and Acts*, 48 UCLA L. REV. 1305, 1332–33, 1333 n.139 (2001) (discussing how the first depiction of arbitration on television occurred in the 1990s when the television show “LA Law” had Leland McKenzie serve as an arbitrator. According to the author, the first mediation scene was in Michael Creighton’s 1994 movie version of “Disclosure”); see also Michael Asimow, Discussion at the Association of American Law Schools’ 2017 Annual Meeting: Leveraging the Rise of the Law in Popular Culture (Jan. 6, 2017) (discussing how the repetitive messages in pop culture about lawyers in the legal system form cognitive heuristics that inform peoples’ perceptions of lawyers and the legal system).

43. Jed S. Rakoff, *Why Innocent People Plead Guilty*, N.Y. REV. BOOKS, Nov. 20, 2014, <https://www.nybooks.com/articles/2014/11/20/why-innocent-people-plead-guilty/> [<https://perma.cc/8K5X-RVEG>]; see also Michael Asimow, *Popular Culture and the Adversary System*, 40 LOY. L.A. L. REV. 653, 668 (2007); see also Hannah K. Gold, *8 Ways Crime Shows Like Law and Order Mess with Your Head*, ALTERNET (Nov. 12, 2014, 9:13 AM),

communications are lessons about the use of dispute resolution procedures and how dispute resolution procedures fit in to resolving disputes. This absence has two consequences in reinforcing dispute resolution illiteracy. First, it misses an opportunity to educate the public that dispute resolution is even an option and as an option, how dispute resolution procedures work. Second, such lack of representation in the pop culture and media signals that dispute resolution plays an insignificant role in resolving legal disputes.

Instead, in the often idealized portrayal of adjudication, the media perpetuates the falsehood that truth and justice always prevail.<sup>44</sup> According to cultivation theorists, such frequent and stark media images about this idealized process of justice are stored and processed in our brain under the category of information about the legal system.<sup>45</sup> Then, when individuals need to make decisions about whether or not to resolve a legal dispute using dispute resolution process, the information that is retrieved is the information about the adversarial system.<sup>46</sup>

Those few television shows or movie clips that are about dispute resolution either are parodies of the process<sup>47</sup> or a confusing intermix of the adjudication process into the dispute resolution process, thus reinforcing the message that adjudication prevails.<sup>48</sup> During those rare moments in which the press reports on disputes that are resolved using a dispute resolution procedure, the reporting is often inaccurate and mislabels procedures, adding to the lack of understanding about dispute resolution processes.<sup>49</sup>

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<https://alternet.org/media/8-ways-crime-shows-law-and-order-mess-your-head>  
[<https://perma.cc/GQ2W-SLHM>].

44. Asimow, *supra* note 43, at 676–77; Gold, *supra* note 43; see also Thane Rosenbaum, *The 6 Types of Lawyer Movies*, A.B.A. J., Aug. 2016, at 44, 45.

45. Asimow, *supra* note 43, at 670.

46. *Id.*

47. See, e.g., WEDDING CRASHERS (New Line Cinema 2005) (featuring within the plot of this comedy two womanizing divorce mediators).

48. See, e.g., *Fairly Legal* (USA Network 2011).

49. See Letter from Elayne Greenberg, Prof. St. John's Univ. Sch. of Law, to N.Y. Times on *Start-Ups Embrace Arbitration to Settle Workplace Disputes*, (May 15, 2016) (on file with author):

As a dispute resolution professional who has devoted her career to promoting the integrity of dispute resolution, I take issue with the way readers may have been misled when you conflated arbitration as part of a multi-step dispute that was offered by WeWork and arbitration as a stand alone process. Arbitration as part of a multi-step dispute resolution clause affords parties the opportunity to take control and try to resolve the dispute themselves before resorting to a third party determination . . . .

Arbitration, per se, is not evil. Rather, it may be one process of choice for suitable parties who opt to resolve their disputes out of court. However, context

One posited reason for the underrepresentation of dispute resolution procedures in the media is that conflict resolution is not sexy. Dispute resolution does not translate into the requisite viewer numbers and advertising dollars that are economic predicates for television and movies.<sup>50</sup> The rare exception, such as the arbitration hearing in the movie *Woman In Gold*,<sup>51</sup> was just that, an exception. Still, others may point to TV shows such as *Fairly Legal*,<sup>52</sup> which concerned a mediator who “tries” mediation cases and reports mediation communications to the judge, or movies such as *Wedding Crashers*,<sup>53</sup> a comedy about two womanizing mediators, as examples of how the topic of mediation is finally being introduced in mainstream media. However, both are hyperboles of mediation. Nobody watching these programs would be educated about how mediation might actually be a realistic dispute resolution option. They also misrepresent what the process looks like. Adding to the problem, even when there are realistic depictions of dispute resolution in the media, such as in the nightly news where skillful negotiations help resolve conflicts, the media misses the opportunity to explain the rationale for the effective strategies used in the negotiations and, again, deprives the public of dispute resolution education.<sup>54</sup>

The consequences of this pop culture void reverberate when litigants are confronted with choosing dispute resolution procedures to resolve their legal dispute. Too often when lawyers, ADR providers, or neutrals introduce litigants to different dispute resolution procedures, it may be the first time many litigants ever hear of these procedures.<sup>55</sup> Without any previous familiarity or context to understand dispute resolution procedures and how they fit into the overall justice scheme, litigants may understandably become overwhelmed and more challenged to give meaningful informed consent.<sup>56</sup> How many would

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is everything in deciding when it is appropriate to use arbitration. For example, the Consumer Financial Protection Bureau’s proposed rule proscribes arbitration in the context of consumer contracts, believing consumers were unable to make an informed decision at the moment they signed their contract . . . I hope the NYT continues to contribute to this important public discourse by accurately discerning when arbitration is and is not suitable.

50. See, e.g., Gary Harper, *Mediation in the Movies*, JOY OF CONFLICT RESOL. (Oct. 31, 2012), <https://joyofconflict.wordpress.com/2012/10/31/mediation-in-the-movies/> [https://perma.cc/6NNU-KP56].

51. WOMAN IN GOLD (BBC Films 2015).

52. *Fairly Legal* (USA Network 2011), *supra* note 48.

53. WEDDING CRASHERS, *supra* note 47.

54. Greenberg, *supra* note 49.

55. Wissler, *supra* note 12, at 203–04.

56. Nolan-Haley, *supra* note 20, at 819.

volunteer that they don't understand their choices? Some may acquiesce, believing they are powerless to act otherwise, and decide to defer to the judgment of their lawyers.<sup>57</sup> Still others may hold onto the fantasy promulgated by pop culture that justice is ubiquitous and would not uphold a harmful outcome that resulted from a flawed dispute resolution procedure.

*B. Individuals have different needs and different decision-making processes that warrant a more personalized approach to informed consent than the generic status quo approach to informed consent.*

Individual differences support the proposition that individuals require a personalized approach to informed consent rather than the generic approach that is the status quo.<sup>58</sup> Individual differences are noted by DNA variations,<sup>59</sup> personality differences,<sup>60</sup> and conflict styles<sup>61</sup> that may be activated based on the context. Moreover, individuals may have consciously and unconsciously developed personal decision-making values, preferences, and processes based on their culture.<sup>62</sup> Yes, no two individuals are alike, and each individual requires differentiated information as a predicate to giving their meaningful informed consent. Thus, to achieve meaningful informed consent, individuals require personalized information that honors, instead of disregards, these distinct differences.

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57. See generally Tamara Relis, *Consequences of Power*, 12 HARV. NEGOT. L. REV. 445 (2007).

58. Craig Haney & Philip G. Zimbardo, *Persistent Dispositionalism in Interactionist Clothing: Fundamental Attribution Error in Explaining Prison Abuse*, 35 PERSONALITY & SOC. PSYCHOL. BULL. 807, 807–08 (2009) (explaining context-driven socially problematic behavior in analyzing individual differences within the lens of “largely individualistic, trait-based terms.”).

59. See generally NAT’L HUM. GENOME RES. INST., <https://www.genome.gov> [https://perma.cc/W8WR-BUGY] (last visited Aug. 27, 2016).

60. Scott Barry Kaufman, *Can Personality Be Changed?*, THE ATLANTIC (July 26, 2016), <http://www.theatlantic.com/health/archive/2016/07/can-personality-be-changed/492956> [https://perma.cc/S776-5LFK].

61. See Ron Kraybill, *Style Matters: The Kraybill Conflict Style Inventory*, RIVERHOUSE EPress (2005), <http://www.ipcrc.net/LDI/pdfs/StyleMatters2013.pdf> [https://perma.cc/M7EZ-VJY6].

62. See, e.g., DANIEL KAHNEMAN, THINKING, FAST AND SLOW 56 (2011); Kara Alaimo, *How to Deal with A Foreign Colleague Who Can’t Say No*, N.Y. TIMES (July 30, 2016), <http://www.nytimes.com/2016/07/31/jobs/how-to-deal-with-a-foreign-colleague-who-cant-say-no.html> [https://perma.cc/XZ5B-5KNU].

*C. Lawyers, as gatekeepers of dispute resolution procedure information, may not themselves have an adequate working knowledge or comfort with these procedures to provide to their clients and help their clients give meaningful informed consent.*

Even though there has been a cultural shift in our legal system to include dispute *resolution* procedures, many lawyers have resisted this shift and still tenaciously hold on to the adversarial values and skills of adjudication.<sup>63</sup> Since the 1976 Pound Conference, when Professor Frank Sander introduced the concept of a multi-door courthouse that included a menu of dispute resolution procedures from which litigants could select the procedure most appropriate to resolve their dispute,<sup>64</sup> our legal system has slowly evolved to embrace this ideology.<sup>65</sup> Through mandatory court ADR programs,<sup>66</sup> CLE programs on ADR,<sup>67</sup> the formation of dispute resolution organizations,<sup>68</sup> and dispute resolution sections within national bar associations,<sup>69</sup> practicing lawyers have opportunities to become versed in the use of dispute resolution procedures. Law schools concomitantly reacted to this cultural evolution by giving dispute resolution a more prominent role in traditional legal education<sup>70</sup> while still relying on the Socratic method to educate from adjudicated cases and reinforce

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63. See Wissler, *supra* note 12, at 208.

64. See 1976 Pound Conference, GLOBAL POUND CONF., <http://globalpoundconference.org/about-the-series/1976-pound-conference#.WNq3pRlrJao> [https://perma.cc/B7WR-YWWT] (last visited Mar. 22, 2017).

65. See, e.g., Amos Tversky & Daniel Kahneman, *Judgment Under Uncertainty: Heuristics and Biases*, in JUDGMENT UNDER UNCERTAINTY: HEURISTICS AND BIASES 3 (Daniel Kahneman et al. eds., 1982); DAN ARIELY, PREDICTABLY IRRATIONAL: THE HIDDEN FORCES THAT SHAPE OUR DECISIONS 209 (2008); Dan Ariely, TED Talk at EG Conference 2008: Are We in Control of Our Own Decisions? (Dec. 11, 2008).

66. See, e.g., *Alternative Dispute Resolution (ADR) in the Central District: An Overview*, U.S. DISTRICT CT. CENT. DISTRICT CAL., <https://www.cacd.uscourts.gov/attorneys/adr> [https://perma.cc/N5WY-HFFW] (last visited Mar. 22, 2017).

67. See, e.g., *Events & CLE*, AM. ARB. ASS'N, [http://www.americanbar.org/groups/dispute\\_resolution/events\\_cle.html](http://www.americanbar.org/groups/dispute_resolution/events_cle.html) [https://perma.cc/RL6S-BEFZ] (last visited Mar. 22, 2017).

68. See, e.g., ASS'N FOR CONFLICT RESOL., <https://acrnet.org> [https://perma.cc/97G8-2XNE] (last visited Mar. 22, 2017).

69. See, e.g., *Section of Dispute Resolution*, AM. BAR ASS'N, [http://www.americanbar.org/groups/dispute\\_resolution.html](http://www.americanbar.org/groups/dispute_resolution.html) [https://perma.cc/G7UG-CMUT] (last visited Mar. 22, 2017).

70. See LEGAL EDUC., ADR, AND PRAC. PROBLEM SOLVING (LEAPS) PROJECT, <http://leaps.uoregon.edu/> [https://perma.cc/Y6CT-W3LG] (last visited Mar. 22, 2017); John Lande & Jean R. Sternlight, *The Potential Contribution of ADR to an Integrated Curriculum: Preparing Law Students for Real World Lawyering*, 25 OHIO ST. J. ON DISP. RESOL. 247, 275 (2010).

the primacy of adjudication. As a result, many law students may still complete their legal education without fully understanding how the different dispute resolution procedures work and how to integrate them into comprehensive legal education.

Therefore, lawyers' inconsistent familiarity and comfort level with dispute resolution procedures adversely affect their clients' ability to give their meaningful informed consent. As gatekeepers of dispute resolution information, lawyers cannot ensure their clients' meaningful informed consent to a dispute resolution procedure if lawyers themselves do not understand how these different procedures work. It affects whether lawyers even suggest dispute resolution procedures to their clients. Moreover, even if they opt or are court ordered to use a specific dispute resolution procedure, this lack of knowledge and comfort level will determine whether they appropriately synchronize their advocacy to the chosen dispute resolution procedure.<sup>71</sup>

*D. There is a misalignment between the generic information that lawyers, ADR providers, and neutrals assume litigants want about dispute resolution procedures to make an informed decision and the actual information litigants may want to support their individualized decision-making processes and personal needs.*

As has been said earlier, when lawyers, ADR providers, and neutrals attempt to secure individuals' informed consent to a dispute resolution procedure, that information focuses primarily on the structure and procedures of the process<sup>72</sup> and excludes more personalized information that individual litigants might value to support their individualized decision-making process. Even though websites containing the information are accessible by individual litigants, or the forms containing the information are often previewed with individuals before the actual signing, the information designed to provide informed consent is framed through the legal/ADR professional lens.<sup>73</sup> How does the given ADR procedure work, what will take place and generically, what are the advantages of each procedure? The information is often drafted by and for the legal/ADR audience.

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71. See Jacqueline Nolan-Haley, *Mediation: The "New Arbitration,"* 17 HARV. NEGOT. L. REV. 61, 61 (2012); see also Thomas J. Stipanowich, *Arbitration: The "New Litigation,"* 2010 U. ILL. L. REV. 1, 2.

72. See, e.g., *Forms*, supra note 32; *The JAMS Mediation Process*, supra note 32; *Alternative Dispute Resolution (ADR)*, supra note 32.

73. See, e.g., *Alternative Dispute Resolution (ADR)*, supra note 32.



Even when ADR providers take affirmative steps to ensure participant informed consent, the content of that informed consent information still focuses primarily on structure and process.<sup>74</sup> Moreover, the informed consent information is written from a lawyer’s or ADR professional’s perspective and does not tailor information to a participant’s personalized decision-making needs. As one example of the problem, the noteworthy ADR program implemented in the United States District Court in the Northern District of California ADR program,<sup>75</sup> which takes informed consent seriously, does not offer a personalized approach to informed consent. Because the program operates under a presumption that dispute resolution procedures will play some role in the life of each case,<sup>76</sup> there are ongoing procedural rules that are enforced to ensure that attorneys and litigants are informed about dispute resolution procedures.<sup>77</sup> For example, attorneys are expected to confer about which dispute resolution process they will use no later than twenty-one days before the Initial Case Management Conference.<sup>78</sup> In addition, “counsel and client must sign, serve and file an ADR Certification” and shall provide a copy to the “ADR Unit.”<sup>79</sup> In those instances where counsel cannot agree on a dispute resolution procedure or the requisite ADR Certification has not been filed, the lawyers may refer the case back to the ADR Department for a phone conference or may discuss the issue with the assigned judge.<sup>80</sup> To help inform the ADR discussions, the court website posts a handbook about ADR Dispute Resolution Procedures and includes answers to common questions about the options.<sup>81</sup>

Despite the program’s laudable efforts to provide the attorneys and clients with quality information about the available dispute resolution procedures, litigants’ meaningful informed consent is questionable. In my conversation

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74. *Id.*

75. See *Alternative Dispute Resolution (ADR)*, U.S. DISTRICT CT. N. DISTRICT CAL., <http://www.cand.uscourts.gov/adr> [<https://perma.cc/TR2K-BC2V>] (last visited Sept. 29, 2018).

76. See MODEL RULES OF PROF’L CONDUCT r. 3.2 (AM. BAR ASS’N 2017).

77. See *Alternative Dispute Resolution (ADR)*, *supra* note 75.

78. See MODEL RULES OF PROF’L CONDUCT r. 3.5(a) (AM. BAR ASS’N 2017).

79. See *id.* r. 3.5(b).

80. See *id.* r. 3.5(c).

81. The U.S. District Court of the Northern District of California also provides a workbook for litigants about ADR options in simple language for litigants to understand. *Alternative Dispute Resolution Procedures Handbook*, U.S. DISTRICT CT. N. DISTRICT CAL., [https://www.cand.uscourts.gov/filelibrary/3385/ADR-Handbook\\_May-1-2018.pdf](https://www.cand.uscourts.gov/filelibrary/3385/ADR-Handbook_May-1-2018.pdf) [<https://perma.cc/LYB7-9SSM>] (effective May 1, 2018). However, these materials provide generic information. They lack the personalized considerations that individuals might require before they could give their meaningful informed consent.

with Howard Herman, the ADR Director of the program, he acknowledged, “the lawyer is the principal conduit for the client to make informed choices.”<sup>82</sup> Thus, even though clients have access to ADR information on the court website, in many instances, the lawyers may be the client’s primary source of information. Moreover, many clients do not participate in the meetings between attorneys when they are conferring about choosing a process, calls with the ADR office, or pre-dispute resolution meetings.<sup>83</sup> As with other websites and forms designed to provide individuals with information to help get their informed consent, the information focuses on the structure and procedures of the available dispute resolution processes.<sup>84</sup>

As for suggestions about what might be done to ensure more meaningful informed consent, Mr. Herman opined that a lawyer’s obligation to advise clients about dispute resolution options would have even more force if the obligation was explicitly enshrined in the Lawyers’ Code of Ethical obligations. Furthermore, Mr. Herman acknowledged that the ADR Dispute Resolution Handbook should be shortened and simplified so that the language would be more accessible to the litigants themselves. This is a big concern especially given how many people are pro se these days.

However, if we look at meaningful informed consent from a client’s perspective, the client may prefer information that is titrated to their particular decision-making process and individualized needs. As explained in the previous section, all clients are different.<sup>85</sup> True, some clients may be content to defer to their lawyers and ADR professionals to decide whether or not to engage in a particular ADR procedure. However, others may welcome more differentiated information that recognizes their individual preference. For example, What are the real monetary costs of each procedure? Beyond the monetary costs, What are other possible costs, including emotional ones? What are the risks of choosing a procedure, and how might it foreclose other options? Where and how does this procedure fit into the traditional adjudication process? How might each of these procedures satisfy the client’s core concerns?<sup>86</sup> How do these procedures comport with the client’s cultural values? How might each procedure help achieve or preclude achieving the client’s personalized sense of justice?

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82. Telephone Conference with Howard Herman, ADR Director, N.D. Cal. (Jul. 28, 2016) (notes on file with author).

83. *Id.*

84. *See Alternative Dispute Resolution Procedures Handbook*, *supra* note 81.

85. *Supra* Section II.B.

86. *See generally* ROGER FISHER & DANIEL SHAPIRO, *BEYOND REASON: USING EMOTIONS AS YOU NEGOTIATE* (2005).

Therefore, there appears to be a misalignment between the information lawyers and ADR professionals actually provide the clients to achieve informed consent and the personalized information clients may want to achieve meaningful informed consent. The client may interpret this misalignment to mean that professionals consider their personal concerns to be inconsequential to the decision at hand. Furthermore, clients may interpret this misalignment to mean that the client doesn't really have autonomy, or the decision-making right, to choose a dispute resolution procedure. Thus, consent is neither informed nor autonomous.

*E. The presentation format of agreements to participate in specific dispute resolution procedures may be discounted as boilerplate.*

Agreements to participate in a dispute resolution procedure are unified forms that many would characterize as boilerplate.<sup>87</sup> Even though many dispute resolution neutrals and providers make it a practice to preview these agreements, to participate with attorneys and their clients prior to an in-person meeting, and to review these forms once more during the in-person meeting, these consumers of dispute resolution may still either ignore or not understand what they are agreeing to.<sup>88</sup> In a world where we are inundated with mandated disclosures distilled to boilerplate language, consumers of dispute resolution have habitually learned to ignore such information if they believe it doesn't comport with their own personal decision-making process.<sup>89</sup> Thus, individuals conduct cost-benefit rationalization to ignore the content of boilerplate if it is incomprehensible, unhelpful, or perceivably non-negotiable.<sup>90</sup> Moreover, individuals will ignore boilerplate if they hold onto their justice fantasy in which it would be impossible to enforce a contract that could harm them.<sup>91</sup> And, without reading, understanding, and considering the import of the words therein, we often reflexively give our consent just to move forward and get one more thing off our list.<sup>92</sup> Thus, there may be no meaningful informed consent.

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87. MARGARET JANE RADIN, *BOILERPLATE: THE FINE PRINT, VANISHING RIGHTS, AND THE RULE OF LAW*, at xvi (2013).

88. BEN-SHAHAR & SCHNEIDER, *supra* note 34, at 7.

89. *Id.* at 55.

90. *Id.* at 55–56.

91. RADIN, *supra* note 87, at 12.

92. *Id.* at 9.

### III. RESEARCH OFFERS INSIGHT ABOUT WHAT INFORMATION INDIVIDUALS MIGHT WANT TO KNOW BEFORE CONSENTING TO PARTICIPATE IN A DISPUTE RESOLUTION PROCEDURE

There is no research on point about what individuals choosing dispute resolution procedures would want to know *before* giving their meaningful consent to participate in a dispute resolution procedure. However, the existing research provides insights, with the benefit of hindsight, about what information individuals might value in their decision-making choice.<sup>93</sup> The research discussed in this section reinforces the magnitude of individuals' lack of understanding about how dispute resolution procedures work and the lack of meaningful informed consent. It also sheds light on misconceptions and fantasies about how our legal system operates. Finally, it encourages us to appreciate that while individuals might share common dispute resolution values, individuals also have differences that explain dispute resolution procedure preferences. Some might argue that deducing information about what individuals value as part of their informed consent might trigger a hindsight bias. This author acknowledges that risk and considers this as evidence for the need for on point research about informed consent.

Whatever dispute resolution procedures people may opt to use, individuals prefer to choose ADR procedures that they assess to be fair.<sup>94</sup> Researchers Rebecca Hollander-Blumoff and Tom R. Tyler explain that individuals assess the legitimacy of dispute resolution procedures based on their subjective assessment of the fairness of the decision-making process.<sup>95</sup> This personalized assessment of fairness consists of four determinants.<sup>96</sup> First, individuals want an opportunity to be heard and to tell their story.<sup>97</sup> Second, individuals want a decision-maker who is neutral, impartial, and conducts the procedure in a transparent way.<sup>98</sup> Third, individuals want a third party who they can trust.<sup>99</sup> Fourth, individuals want to be treated with dignity and respect.<sup>100</sup> An

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93. See, e.g., Donna Shestowsky, *How Litigants Evaluate the Characteristics of Legal Procedures: A Multi-Court Empirical Study*, 49 U.C. DAVIS L. REV. 793 (2016).

94. Rebecca Hollander-Blumoff & Tom R. Tyler, *Procedural Justice and the Rule of Law: Fostering Legitimacy in Alternative Dispute Resolution*, 2011 J. DISP. RESOL. 1, 3.

95. *Id.*

96. *Id.* at 5.

97. *Id.*

98. *Id.*

99. *Id.*

100. *Id.* at 6.

individual’s assessment of fairness was separate and distinct from the outcome of the procedure.<sup>101</sup>

Beginning with the research about how well consumers understand arbitration in pre-dispute clauses, the research confirms what many intuitively believed to be true. Consumers don’t care about or understand the meaning of arbitration.<sup>102</sup> In her research on consumers’ informed consent about arbitration, researcher Amy Schmitz opines that consumers might be more interested in arbitration clauses in consumer contracts if they were also informed about how these arbitration clauses might impact the consumer’s warranty and other remedy rights.<sup>103</sup> Schmitz conducted surveys and held focus groups to study consumers’ understanding of arbitration in pre-dispute arbitration clauses that were part of larger consumer contracts.<sup>104</sup> Again, the research showed that consumers “have little to no” understanding of arbitration.<sup>105</sup> Moreover, consumers perceived arbitration to be a biased process that favored the corporation.<sup>106</sup> As an important consideration in a consumer contract, most respondents surveyed valued price, warranties, fees and penalties, credit payment, returns, and cancelling services over the arbitration terms.<sup>107</sup> More jarring, approximately half of the respondents did not even notice pre-dispute arbitration clauses in their consumer contracts, even though the pre-dispute arbitration clauses were there.<sup>108</sup> When questioned if respondents would prefer to learn more information to better understand arbitration clauses, respondents expressed little interest.<sup>109</sup> Schmitz explains that since consumers are already interested in price, timing, and performance standards at the time they enter into a consumer contract, consumers might have greater interest in arbitration if it was linked to these other interests.<sup>110</sup>

Similar to Schmitz’s findings about consumers’ lack of informed consent to arbitration, this author, in collaboration with her colleagues Jeff Sovern, Paul Kirgis, and Yuxiang Liu, also found that consumers had a depth of misunderstanding about the pre-dispute arbitration clauses in consumer

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101. *Id.* at 17.

102. Amy J. Schmitz, *Legislating in the Light: Considering Empirical Data in Crafting Arbitration Reforms*, 15 HARV. NEGOT. L. REV. 115, 158–59 (2010).

103. *Id.* at 159.

104. *Id.* at 151, 154–55.

105. *Id.* at 152–53.

106. *Id.* at 153, 157.

107. *Id.* at 159.

108. *Id.* at 160.

109. *Id.* at 159.

110. *Id.*

contracts.<sup>111</sup> We surveyed 668 consumers, the sample corresponding with the demographics of the general American population with respect to age, income, education, and ethnicity.<sup>112</sup> Survey participants were then shown a sample consumer contract, asked to read it, and then answer questions about their understanding of what they had read.<sup>113</sup> The arbitration clause in the contract was in bold print and also referenced in three of the seven pages in the contract.<sup>114</sup>

However, when survey participants were asked to recall five items from the sample contract they had read, only 3% of the respondents mentioned arbitration or anything related to it.<sup>115</sup> Moreover, a majority of the respondents either didn't know they agreed to arbitrate or thought they didn't agree to arbitrate.<sup>116</sup> Finally, when survey participants were questioned about whether or not they had consented to arbitration in their own consumer contracts such as phone or credit cards, almost half were not even aware that these contracts had arbitration clauses, even though the contracts did have arbitration clauses.<sup>117</sup> The comments of survey participants reinforce their misconceived fantasy that justice is an inalienable right that can't be waived by signing a pre-dispute arbitration clause.<sup>118</sup>

Looking at another scholar whose research touches on informed consent, Professor Donna Shestowsky's award-winning research on civil litigants' preferences for dispute resolution procedures reinforces the idea that litigants may have misinformation about dispute resolution procedures.<sup>119</sup> Her research also contributes important information on civil litigants' preferences for dispute resolution procedures that is based on previous experience with litigation, age, and gender. In her research, she sampled 413 litigants from nineteen states<sup>120</sup> and asked them to rate their preferences for a series of legal procedures including negotiation, mediation, non-binding arbitration, binding arbitration,

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111. See Sovern, Greenberg, Kirgis & Liu, *supra* note 2, at 5.

112. *Id.* at 31.

113. *Id.* at 26.

114. *Id.* at 29.

115. *Id.* at 41.

116. *Id.* at 45.

117. *Id.* at 59–60.

118. *Id.* at 71.

119. See Donna Shestowsky, *The Psychology of Procedural Preference: How Litigants Evaluate Legal Procedures Ex Ante*, 99 IOWA L. REV. 637 (2014).

120. *Id.* at 658.

jury trials, and judge trials.<sup>121</sup> They indicated these preferences in light of their own recently-filed civil case.<sup>122</sup>

Overall, litigants expressed the most interest in attorney negotiation with clients present, mediation, and judge trials.<sup>123</sup> With the notable exception regarding how much they liked the idea of having a judge trial, the data suggested that litigants most preferred non-adjudicative procedures such as mediation and negotiation with attorneys to more adjudicative procedures, such as jury trials, and binding and non-binding arbitration.<sup>124</sup> One speculation for their high interest in a judge trial is that the litigants may be influenced by American media’s portrayal of judge trials.<sup>125</sup>

Reinforcing the need for personalized informed consent in dispute resolution, Shestowsky’s research also suggests that not all litigants are alike; litigant preferences, for example, differ as a function of litigant gender and past experience with litigation. For example, repeat litigants liked binding arbitration more than first-time litigants.<sup>126</sup> As for gender, although men and women were similarly enthused by the idea of a judge trial, men liked jury trials and binding arbitration more than women did.<sup>127</sup> The research speculates this difference may be because women tend to be more conflict averse than men.<sup>128</sup>

In a more granular analysis of the same set of litigants, Shestowsky examined how much litigants desired aspects of procedures that gave control to the parties themselves and how much they liked procedure characteristics that granted control to third parties.<sup>129</sup> Highlighting the point that a desire for either type of control can be a function of personal preference, Shestowsky found that age group and gender predicted how attracted litigants were to third-party control.<sup>130</sup> Specifically, those in older age groups liked third-party control less

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121. *Id.* at 665.

122. *Id.* at 656.

123. *Id.* at 674.

124. *Id.*

125. *Id.*

126. *Id.* at 680.

127. *Id.* at 683.

128. *Id.*

129. Shestowsky, *supra* note 93, at 819. Arbitration and litigation are examples of procedures that grant control of the outcome to third parties. Mediation, like negotiation is a procedure that gives parties the control of the outcome.

130. *Id.* at 830–31.



than those in younger age groups.<sup>131</sup> With respect to gender, women preferred third-party control significantly less than men did.<sup>132</sup>

She also found that how much litigants liked litigant control varied according to whether litigants had a pre-existing relationship with each other and how much they valued a future relationship with the opposing party.<sup>133</sup> In particular, the more litigants valued a future with the other party, the more they liked the idea of party control.<sup>134</sup> Distinguishably, those litigants who had an existing relationship with the other party were less interested in procedure characteristics that offered litigant control.<sup>135</sup> She also found that when the litigants' opposing party was a corporation, group, or organization, litigants were more attracted to procedure characteristics that offered litigant control.<sup>136</sup> However, litigants who were themselves a group organization were less attracted to litigant control, but at the same time, no more interested in a procedure with third-party control.<sup>137</sup>

Therefore, this research suggests that party differences such as age, gender, and relationship factors might influence what information parties will want to know about the procedures. Will the procedure offer the party process control? Will the procedure offer the party outcome control? Which is more important to each party: party process control or party outcome control? Given the different weights a party may assign to each choice, this reinforces the point the information parties need to make an informed decision is not one-size-fits-all.

Shestowsky hypothesizes, based on her own work and that of Tom Tyler and his colleagues, that litigants' procedural preferences might vary based on where they are in the litigation process.<sup>138</sup> At the beginning of the litigation process, litigants might favor procedures that offer third-party control.<sup>139</sup> However, towards the end of the litigation process, they might favor procedures that are not third-party controlled.<sup>140</sup> Therefore, the stage of the litigation

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131. *Id.* at 830.

132. *Id.* at 831.

133. *Id.* at 829.

134. *Id.*

135. *Id.* at 830.

136. *Id.*

137. *Id.*

138. *Id.* at 836; see also Tom R. Tyler, Yuen J. Huo & E. Allan Lind, *The Two Psychologies of Conflict Resolution: Differing Antecedents of Pre-Experience Choices and Post-Experience Evaluations*, 2 GROUP PROCESSES & INTERGROUP REL. 99 (1999).

139. Shestowsky, *supra* note 93, at 836.

140. *Id.*

process might impact the type of information parties might want to know before they can give their informed consent.

Contributing to our discussion about the need for meaningful informed consent, Shestowsky found that there was a misalignment between litigants’ macro preferences for procedures and micro preferences for procedure characteristics.<sup>141</sup> In other words, litigants identified specific dispute resolution procedures as their favorites, but when questioned further about their preference for individual features of a dispute resolution procedure, litigants’ favored features did not correspond to the majority of the dispute resolution procedures they liked best.<sup>142</sup> Shestowsky opines that the lack of correspondence might actually stem from litigants’ lack of understanding about how the presented menu of legal procedures actually work.<sup>143</sup> One possible implication of this pattern in her findings is that litigants are not well informed about what procedures entail, which raises the question of whether litigants participate in procedures without real informed consent of how legal procedures actually work.

Adding another wrinkle to the informed consent challenge, Shestowsky’s newer research shows that even though litigants may express a preference for specific dispute resolution procedures, many are unaware of the various procedures that are available to them.<sup>144</sup> When Shestowsky’s team surveyed over 300 state court litigants after their cases were closed, only 27% correctly identified their court as offering an arbitration program, and only 24% correctly identified their court as offering mediation.<sup>145</sup> This result was surprising /disturbing because each litigant in the study had a case that was eligible for both court-sponsored mediation and arbitration. Therefore, a first step in reforming our informed consent practice is learning what litigants understand about dispute resolution procedures and what types of processes they prefer. Another step would be helping litigants become aware of the menu of dispute resolution procedures available and making sure they understand what each entails.

Cumulatively, the research discussed in this section illuminates that disputants care about fair process. In the consumer context, pre-dispute consumers are more interested in pricing terms and less interested in

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141. *Id.* at 833.

142. *Id.*

143. *Id.*

144. Shestowsky, *When Ignorance is Not Bliss*, *supra* note 11, at 218.

145. *Id.* at 211.

understanding the ramifications of the arbitration clause.<sup>146</sup> In the court context, when litigants have an ongoing case, how attracted they are to given procedures varies as a function of individual attributes such as litigants' past litigation experience, age, and gender.<sup>147</sup>

#### IV. THE HEALTH CARE COMMUNITY OFFERS TRANSFERRABLE LESSONS ABOUT ACHIEVING MEANINGFUL INFORMED CONSENT

The health care community's struggles and innovation surrounding patient informed consent offer transferable lessons about how the dispute resolution profession might address its informed consent problem.<sup>148</sup> In health care, like in dispute resolution, party autonomy, also referred to as party self-determination, is a foundational principle.<sup>149</sup> Moreover, whether patients are making health care decisions, or litigants are making dispute resolution decisions, both are making decisions at a time of high stress, which is a context that may impair an individual's decision-making capacity.<sup>150</sup> Still another similarity between health care and dispute resolution, each focuses on the quality of information sharing based on the relationship between an individual and a professional.<sup>151</sup>

A recent poignant story authored by a man who underwent a double lung transplant highlights the need for a more personalized approach to informed consent in the health care community.<sup>152</sup> Prior to the surgery, the doctor informed the patient about the risk of death, the physical toll on his body, and the risk of death, the cost of prescriptions, and the risk of death.<sup>153</sup> However, as the patient was suffering from the aftermath of the transplants and was unprepared for much of what was to follow, he wished he had been better informed beyond being warned multiple times about the risk of death.<sup>154</sup> He

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146. *Supra* Part III.

147. *Supra* Part III.

148. See, e.g., Carmen L. Lewis & Michael P. Pignone, *Promoting Informed Decision-Making in a Primary Care Practice by Implementing Decision Aids*, 70 N.C. MED. J. 136 (2009), <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC3213756/> [<https://perma.cc/LJ8S-S86U>].

149. Jamie Staples King & Benjamin W. Moulton, *Rethinking Informed Consent: The Case for Shared Medical Decision-Making*, 32 AM. J.L. & MED. 429, 431 (2006).

150. *Id.* at 478.

151. *Id.* at 431.

152. Eirik Gumeny, *When Love Isn't as Simple as Standing by Your Man*, N.Y. TIMES (Sept. 9, 2016), <http://www.nytimes.com/2016/09/11/fashion/modern-love-lung-transplant-stress-marriage.html> [<https://perma.cc/9LX2-AKZ5>].

153. *Id.*

154. *Id.*

wished he had been informed about the psychological reactions to the scars, the emotional drain of anticipating death, the mood swings from the required medications, the reaction to the sound of a malfunctioning oxygen tank, and the irreparable strain on his marriage.<sup>155</sup>

This is but one example of how patients making health care decisions, similar to individuals choosing to participate in dispute resolution procedures, often make those decisions without giving their meaningful informed consent. This section will discuss the health care community’s struggles with achieving informed consent. Then, this section will showcase two innovative strategies the health care community is using to help achieve meaningful informed consent. The first health care innovation addresses how patients might get the qualitative and differentiated information patients need to be informed about their medical choices. The second innovation addresses the shared decision-making process that patients in collaboration with their doctor might actually use once they receive the information required to make a decision.

In the health care community, the disagreement about how to achieve meaningful informed consent centers on two main issues: what information should be provided to the patient; and to what extent the patient should realistically be involved in making health care choices.<sup>156</sup> In the health care context, informed consent refers to the “process of communication between a clinician and a patient that results in the patient’s authorization or agreement to undergo a specific medical intervention.”<sup>157</sup> As part of informed consent, “a patient must be apprised of the nature, risks, and alternatives of a medical procedure or treatment before the physician or other health care professional begins any such course. After receiving this information, the patient then either consents to or refuses such a procedure or treatment.”<sup>158</sup> However, the unanswered question in this definition is what constitutes adequate information.

Even though physicians have both a moral and legal obligation to provide patients with adequate information to give informed consent, there is no consensus about what constitutes adequate information to satisfy that legal requirement.<sup>159</sup> Rather, jurisdictions are split on what standard to use, with some relying on a “reasonable patient” standard and other relying on a

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155. *Id.*

156. King & Moulton, *supra* note 149, at 432.

157. The Joint Commission, *Informed Consent: More Than Getting a Signature*, QUICK SAFETY, Feb. 2016, at 1, [https://www.jointcommission.org/assets/1/23/Quick\\_Safety\\_Issue\\_Twenty-One\\_February\\_2016.pdf](https://www.jointcommission.org/assets/1/23/Quick_Safety_Issue_Twenty-One_February_2016.pdf) [<https://perma.cc/45V5-D6Q9>].

158. THE JOINT COMMISSION, 2016 COMPREHENSIVE ACCREDITATION MANUAL FOR HOSPITALS, at GL (2016).

159. King & Moulton, *supra* note 149, at 430.

“reasonably prudent practitioner” standard.<sup>160</sup> However, whether looking at informed consent from a practitioner’s perspective or a reasonable patient perspective, neither standard ensures that the patient receives the personalized information that the patient requires to achieve meaningful informed consent. This dilemma has been coined the “relevance problem.”<sup>161</sup> Some patients may be more versed in what information they need to know. Other patients may want to know little or nothing, deferring to their doctors’ judgment. Yet, others may need information outside the scope of the discrete information provided. Still other patients may not know what information they need to know or should know.

One groundbreaking idea from the health care industry that has sparked this paper’s proposal is a radically different informed consent paradigm that provides a patient with personalized disclosure based on what the patient wants and needs to know.<sup>162</sup> Referred to as “information-on-demand,” this patient-centered multi-modality model for informed consent offers the patient three tracks of information from which to choose.<sup>163</sup> The first track, a green aisle, provides basic information about the procedure, the rationale for choosing that procedure, and how the procedure will affect the patient’s life.<sup>164</sup> The second track, a blue aisle, offers the patient more information including information about the procedure risks and alternative treatments.<sup>165</sup> The third track, a red aisle, includes even more extensive information than the other two tracks, for those patients who want to know more information in helping their particular decision-making process.<sup>166</sup>

Patients can write down questions and change tracks.<sup>167</sup> Notably, patients do not sign an informed consent form until they meet in-person with the doctor.<sup>168</sup> Thus, the online component is an adjunct, not a replacement, to patient informed consent. Patients are not permitted to waive out of the

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160. *Id.* at 430, 493–501.

161. Gil Siegal, Richard J. Bonnie & Paul S. Appelbaum, *Personalized Disclosure by Information-on-Demand: Attending to Patients’ Needs in the Informed Consent Process*, 40 J. L., MED. & ETHICS 359, 359 (2012).

162. *Id.* at 361.

163. *Id.*

164. *Id.* at 361–62.

165. *Id.* at 362.

166. *Id.*

167. *Id.* at 363.

168. *Id.* at 364.

process.<sup>169</sup> However, patients are allowed to delegate their decision-making authority to a designated third person.<sup>170</sup>

In 2011, Gil Siegal, one of the authors of the paper about information-on-demand, formed a startup, Consent, M.D., which implemented this approach with actual patients.<sup>171</sup> To date there have been over 28,000 patient users on a platform he has created.<sup>172</sup> The patient-friendly platform has a tutorial that previews how the platform works and accommodates the variation in patients’ literacy, numeracy, and processing styles.<sup>173</sup> The information is provided through visuals, written language, and voice-overs, and the visuals and fonts may be adjusted to patient need and preference.<sup>174</sup> Moreover, patients may process the information at their own pace by pausing and taking breaks.<sup>175</sup> The program tests patient comprehension throughout the presentation and is designed so patients cannot run through the information without hearing the information.<sup>176</sup>

There are several benefits of this patient-centered model of providing information compared to the generic status quo approach. First, patients themselves control how much or how little information they receive, creating a more personalized process.<sup>177</sup> Second, there is a record of the information the patient has requested that should satisfy doctors’ legal obligations for informed consent.<sup>178</sup> Third, this dual modality of informed consent that involves both the presentation of online information and in-person discussion increases the likelihood that patients will receive the personalized information they need to give their meaningful informed consent.<sup>179</sup>

This approach, while an advancement of the status quo approach, can still make further refinements towards achieving meaningful informed consent. Even though the tutorial explains that the information provided has been approved for accuracy by doctors and patients, the site could contain more

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169. *Id.* at 363.

170. *Id.*

171. *Consent MD: Medical Procedure Information and Consent Platform*, STARTUP NATION CENT., <https://finder.startupnationcentral.org/c/consent-md> [<https://perma.cc/N95Y-55EF>] (last visited Mar. 22, 2017).

172. *Id.*; see MDCONSENT, <https://c-md.co.il/en> [<https://perma.cc/Q2FV-PF9L>] (last visited Mar. 23, 2017).

173. See MDCONSENT, *supra* note 172.

174. *Id.*

175. *Id.*

176. *Id.*

177. Siegal, Bonnie & Appelbaum, *supra* note 161, at 361.

178. *Id.* at 364.

179. *Id.*

personalized information that may be relevant to the patient's individualized decision-making process and needs. However, if it is absent from the informed consent information provided, patients might assume that this information will be considered irrelevant by the treating doctor, even though it is relevant to the patient's decision-making process, and not even bother asking the questions in the in-person meeting to sign the consent form. For example, *How might this procedure interfere with my sex life? How might my cultural prohibitions be honored in this treatment? I'm phobic about hospitals and procedures. What can be done to minimize my fears? I live alone, and have no friends or family who live nearby. What type of support will I need before and after the procedure? Will I be able to lift the twenty-five pound bags of cat litter that I use for my two cats? My partner and I have cocktails each night to relax and catch up with the day. Can I continue this while taking the prescribed medications? While the scar is healing, may I resume my twenty lap swims in the public pool?*

A second innovation in the health care community to help achieve meaningful patient informed consent is the shift to shared health care decision-making once patients have been provided with information about their health care options. Shared decision-making is a welcomed shift in the way the patient's health care decision from the paternalistic decision-making process in which the doctor makes the decision for the patient.<sup>180</sup> In a shared decision-making process, the patient and doctor participate together in the treatment decision-making process.<sup>181</sup> In addition, the patient and doctor may also include family and professional colleagues to participate in the decision-making process.<sup>182</sup> The benefit of this approach is that those patients who participate in shared decision-making have demonstrated great compliance with their decided treatment and better health outcomes.<sup>183</sup>

The Center for Informed Decision Making at Dartmouth–Hitchcock Hospital is one model for shared health care decision making. The Center provides patients and training health care professionals with the tools and information they need to share decision-making responsibilities about the

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180. Glyn Elwyn et al., *Shared Decision Making: A Model for Clinical Practice*, J. GEN. INTERNAL MED. 1361, 1361 (2012); Glyn Elwyn, Adrian Edwards & Paul Kinnersley, *Shared Decision-Making in Primary Care: The Neglected Second Half of the Consultation*, BRIT. J. GEN. PRAC. 477, 477 (1999).

181. Elwyn, Edwards & Kinnersley, *supra* note 180, at 478.

182. *Id.*

183. *Id.*



patient’s health care.<sup>184</sup> Patient information is accessible through web-based programs, counseling, and decision aids.<sup>185</sup> The purpose is to help patients make health care decisions based on the patient’s values and preferences.<sup>186</sup> The Center reports that 40% of patients who use shared decision-making have opted for less intrusive, less costly procedures, and have had better health outcomes.<sup>187</sup>

Learning from the health care community, the dispute resolution community should also be encouraged to rethink our profession’s informed consent practices. The health care industry’s advances in providing patients with titrating health care information shows how the value of titrating information responds to the different informational needs of patients. The shared decision-making model fosters a doctor–patient collaboration that encourages patient-centered health care decision making based on patient values and preferences. True, individuals making health care decisions have different concerns than individuals deciding which dispute resolution procedure to use. However, there are transferable lessons about titrating information and a patient-centered approach that, after some customized tweaking, can be incorporated into dispute resolution informed consent practice to help individuals achieve meaningful informed consent to dispute resolution procedures. The next section elaborates how this might be accomplished.

#### V. THE PROPOSAL: A THREE-PART APPROACH TO ACHIEVING MEANINGFUL INFORMED CONSENT

As we have been discussing, meaningful informed consent cannot be achieved with a “one-size-fits-all” approach. Individuals are not fungible, nor are they generic entities. This proposal rises to the challenge by proposing a three-tiered plan to help individuals access and process the range of information they need to know about a dispute resolution procedure before they decide to choose or refuse to participate in dispute resolution. This customized presentation of information will provide individuals with information they personally consider relevant as part of their decision-making process. This plan culls from the research lessons and health care strategies discussed in this paper

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184. See *Decision-Making Help*, DARTMOUTH-HITCHCOCK, [https://www.dartmouth-hitchcock.org/supportive-services/decision\\_making\\_help.html](https://www.dartmouth-hitchcock.org/supportive-services/decision_making_help.html) [https://perma.cc/697S-L97L] (last visited Mar. 22, 2017).

185. *Id.*

186. *Id.*

187. See *Decision-Making Resources*, DARTMOUTH-HITCHCOCK, <http://www.dartmouth-hitchcock.org/medical-information/decision-making-resources.html> [https://perma.cc/MW4Q-AWRX] (last visited Mar. 24, 2017).

and then adapts and applies these strategies to informed consent practice in dispute resolution.

The plan has three phases. In the first phase, a database containing information about the informational needs, personality preferences and values, and decision-making styles will be created to define the universe of information all individuals may personally want to know about before they can give their meaningful informed consent. In the second phase, individuals will develop their own user profile titrated from the larger database of information. The user profile will consist of the personalized informational needs, personal preferences and values, and decision-making style of the individual. Individuals will be able to access this titrated information in user-friendly ways such as podcasts, DVDs, written materials, and web casts. In the third phase, lawyers, ADR providers, and other relevant people will be educated about how to engage with clients using this more personalized approach.

*A. Phase One: Creating a database about the universe of information, preferences and value, and decision-making styles that may shape individual users' decision making about dispute resolution procedures*

This database is needed to ascertain the broad range of relevant information individuals may possibly want to know before they can give their meaningful informed consent. The database will contain the universe of informational needs, personality preferences and values, and decision-making styles that all individuals may possibly want to know about before they can give their meaningful informed consent. Even though the scope of the database should be broad and varied, the goal would *not* be to provide individuals with a greater quantity of information that will further overwhelm them and exacerbate the informed consent problem. The purpose of this broader database is to be sure to include all the relevant information all potential users of dispute resolution procedures might want to access.

For example, under the broad category of informational needs, there would be inter alia subcategories assessing dispute resolution literacy, reading literacy, personal preferences for quantity of information, accommodations needed for disabilities, and primary language used. Within the larger category of personality preferences and values would be subcategories evaluating conflict style, economic concerns, religious and moral values surrounding conflict and its resolution, and one's personal sense of justice. The broader decision-making category will analyze personal decision-making styles including time needed; who, if anyone, the individual may want to consult with; and the relevant information that helps the individual make a decision. These categories and the contents of the subparts are by no means exclusive and will be fleshed out further as this project evolves.

A first step in creating this database as part of a personalized informed consent design is to include all the stakeholders: clients, lawyers, ADR providers, and neutrals. The primary contributors of this client-focused database should be potential individual users. Lawyers, ADR providers, and neutrals could also help reconsider the additional information that should be included in this database. Information for the database will be collected through online surveys and in-person interviews of a representative cross-sample of individuals who might use dispute resolution procedures.

*B. Phase Two: Tailoring and Presenting Personalized Information: Creating a Personalized Client Profile*

In the second phase, individuals will create their own “personal preference profiles” from the broader database that is created in phase one. This personal preference profile is titrated information based on the individual’s preferences for information, psychological make-up and values, and decision-making styles. The goal is to provide individuals with greater quality of information that is relevant to support their personal decision-making process.

This personal profile is to be used as an adjunct, not a replacement, to in-person discussions about informed consent with individuals and their ADR professionals. This profile would help identify the type and amount of differentiated information an individual would find relevant before he can give meaningful informed consent. Information about the individual’s decision-making process, risk preferences, and values surrounding conflict would contribute to creating a profile that would help to tailor the presentation of information. For example, as part of the profile creation, individuals might be asked the following: describe the presenting conflict as you see it; what, according to your personal sense of justice, would you like to achieve to resolve the presenting conflict; what is your conflict style preference; what has your culture has taught you about conflict, conflict resolution, and decision making; what, if anything, is your risk preference; when making decisions, do you prefer to make them yourself or to rely on an expert; what particular concerns do you have about choosing any dispute resolution procedure; how much information do you need before you comfortably make life decisions? Based on this personal profile, individuals would then be able to access information that is tailored to their expressed preferences.

For example, learning about an individual’s legal literacy, including dispute resolution literacy, would shed light on the individual’s understanding about the interrelationship between dispute resolution and the legal system and the individual’s expectations about how the justice system works. Moreover, from the individual’s perspective, How do an individual’s culture, conflict styles, gender, age, personality, and preferences shape an individual’s personal sense

of justice and choice of dispute resolution procedures? How important is it to the individual to receive information about real costs (both emotional and economic), strategic advantages, risks, and disadvantages in the short term and long term to select one procedure over another? Continuing, How might the individual's cultural values, conflict styles, and emotional preferences influence an individual's dispute resolution procedure decision making? Furthermore, How does an individual's ideas about the role of law and their personal sense of justice affect what information might prompt her to choose one dispute resolution procedure over another? Culling from the research discussed in the first section of this paper, we also learn that information also needs to be adjusted for age and gender preferences and further titrated for information processing preferences.

Some may still be skeptical about this proposal. As stated earlier, lawyers, ADR professionals, and individual litigants themselves have raised concerns that individuals may not even realize what information they should know nor what questions they should ask. Addressing this concern, the individual would be presented with a menu that contains subject matter information tabs to help users consider the information they might need to give their personalized informed consent. The menu items would be categorized from the broader informational database and would serve as a trigger for the individual to help the individual ascertain what information they would prefer to know. Moreover, by presenting these subject information tabs as menu items from which individuals might choose, the individual has the option of selecting more information about possible topics that the individual might be interested in learning more about without imposing information on the individual that the individual might find irrelevant.

The personalized informed consent information should be available both online and in hard copy. This information should be available in the offices of lawyers, ADR providers, and neutrals. This will allow those who prefer to process information in hard copy and those who are not computer literate to still create their personal user profile.

For those readers who need additional support to envision how phases one and two might work, think of online shopping at the department store of your choice. When you visit the store's website, you, the shopper, are able to select from the large universe of items the store sells. However, if you are only interested in size M blue sweaters, you may refine the items you view by filtering the items you want to see: sweaters, colored blue, in size M. Thus, by filtering the items, you are presented with items that matter most to you.

*C. Phase Three: Lawyers, ADR Providers, and Neutrals Can Be Re-educated so that Professionals Engage Clients with Information That Matters to the Client*

In phase three, lawyers, ADR providers, and neutrals, as part of good informed consent practice, will expand the focus of their informed conversations with clients beyond the current narrow focus on structure and process of ADR procedures to a more client-centered conversation. This expanded conversation invites a more personalized conversation about dispute resolution procedures that engages the client with relevant information. Most importantly, it signals to the clients that their individual concerns really do matter. The items in the online personal profile preference will be used to help guide the discussion. The discussion may include an individual's generalized ideas and personalized notions about justice. Such conversations would help sort out preferred interests and realistic pursuits from fantasies and misconceptions about what different dispute resolution procedures offer. Moreover, it would help develop an understanding of how an individual's culture, personality, risk taking preferences, conflict style, and decision-making process might influence an individual's dispute resolution procedure choice. This client-centered conversation about informed consent also reinforced to professionals that the clients, not the professionals, have the right to autonomous and informed decision making.<sup>188</sup>

Web-based and printed material informational decision aids may be used as adjuncts to these in-person conversations. DVDs, webcasts, podcasts, and written materials may be developed that are tailored to accommodate different languages, disability needs, and cognitive abilities. Professionals will be instructed about how to include informational decision aids provided in podcasts, DVDs, written, and web-based forms to accommodate individual differences in informational needs and processing abilities. The purpose of offering this information in multi modalities is that it heightens the likelihood that all individuals will be able to make an informed choice.

Although this section is labeled phase three, lawyers, ADR providers, and neutrals could actually begin this phase immediately if they engage in the perspective taking suggested in phase one.

*D. Putting Phase One, Two, and Three Together to Achieve Meaningful Informed Consent*

In a succinct form, this is a three-tiered proposal to help a client give their meaningful informed consent both when choosing a dispute resolution

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188. See MODEL RULES OF PROF'L CONDUCT rr. 1.2, 1.4 (AM. BAR ASS'N 2017).

procedure and when considering to opt in or out of any given dispute resolution procedure. In phase one, there is the creation of a database that contains the universe of informational needs, personal values and preferences, and decision-making styles that individuals might use in deciding to use or refuse a dispute resolution procedure. From that broader database, individual users in phase two will create their own personal user profile. This personal user profile will customize the information they access about a dispute resolution procedure based on their information needs, personal values and preferences, and decision-making styles. In phase three, lawyers, ADR providers, and neutrals will use the client's personal preference user profile to tailor their in-person informed consent conversations about dispute resolution with the client. Web-based and printed informational aids will be used as adjuncts to the in-person meeting.

*E. Yes, but . . .*

Proposals are strengthened by objections from those who are more skeptical. Some may be skeptical of this proposal's pragmatism, believing that meaningful informed consent is an ideal rather than a realistic practice goal. A few remind that the human condition does not make informed consent a priority until an individual is actually embroiled in litigation. Others have raised how meaningful informed consent is a dynamic that changes as litigants proceed with different phases of the case. Still others question what is enough informed consent. All are valid concerns. However, even if meaningful informed consent is viewed as an ideal that shifts over the life of a case, these are recognized as challenges to overcome, rather than excuses not to achieve meaningful informed consent. The dispute resolution profession cannot remain complacent about our status approach to informed consent and optimistically believe the professional can make meaningful change.

VI. CONCLUSION

Even though informed consent is a fundamental value in dispute resolution and a prerequisite for an individual to exercise justice options, often individuals opting to participate in a dispute resolution procedure are neither informed nor able to give their meaningful consent. This discussion examines the current limitations of achieving a client's meaningful informed consent when a litigant is deciding whether or not to participate in a dispute resolution procedure. Then, this author recommends a more personalized approach to achieving meaningful informed consent. The proposal is a three-part plan that includes: creating the universe of information all consumers of dispute resolutions may actually want to know; developing an individual client profile that tailors that information to fit the individual client's informational, decision making, and

personal preferences; and educating lawyers and dispute resolution professionals about how to use the client's personal profile to have relevant professional-client conversations about meaningful informed consent.

As with any plan, some may be frustrated that this is not a quick fix and may prefer a more immediate remedy. Steps can be taken today. Lawyers, courts, ADR neutrals, and ADR providers each have a role in contributing to this change by re-examining how to provide more client tailored information about dispute resolution choices. Each one of us can use our perspective-taking skills and take steps to ensure that the clients we work with have the opportunity to give their meaningful informed consent when considering whether or not to use dispute resolution procedures. And with that added insight, we, as dispute resolution professionals, can begin working with our clients in a more client-centered focus to help them identify the relevant information they want included in their personal profile. Hopefully, if individuals are provided with better quality information before they choose or refuse a dispute resolution procedure, individuals will then be able to assess whether specific dispute resolution procedures comport with their personal values and preferences. Then and only then, will individuals be able to give their meaningful informed consent and exercise their right to justice options.

Going forward, it may also help to look back and appreciate how many of us were attracted to the dispute resolution profession because we believed that party self-determination and informed consent are fundamental individual rights. This paper reminds dispute resolution professionals to realign our dispute resolution practice regarding informed consent with our belief in party self-determination. As with other advances that cause us to rethink how we might more effectively practice dispute resolution, emerging information about individual decision making helps us realize that we should do more to ensure meaningful informed consent about dispute resolution procedures. After all, it is all about party self-determination to make informed justice choices.



