

University of Missouri School of Law

## University of Missouri School of Law Scholarship Repository

---

Faculty Blogs

Faculty Scholarship

---

9-4-2018

### What Do Litigants Really Want?

John M. Lande

Follow this and additional works at: [https://scholarship.law.missouri.edu/fac\\_blogs](https://scholarship.law.missouri.edu/fac_blogs)



Part of the [Dispute Resolution and Arbitration Commons](#)

---

---

## WHAT DO LITIGANTS REALLY WANT?

SEPTEMBER 4, 2018 | JOHN LANDE | 4 COMMENTS

[Donna Shestowsky](#) (California–Davis) recently wrote the latest in a series of her studies asking actual litigants about their procedural preferences. The article is *Inside the Mind of the Client: An Analysis of Litigants' Decision Criteria for Choosing Procedures*, 36 Conflict Resolution Quarterly 69 (2018). Here's the abstract:

This article presents findings from the first longitudinal study to ask civil litigants prospectively what criteria they plan to consider when selecting legal procedures and then retroactively assess the criteria used to make those decisions. The most commonly referenced ex ante criteria are lawyer's advice, cost, and time. The retrospective reasons also include these factors, but the list is narrower and more practical. Litigants who initially listed a desire to reduce costs or follow their lawyers' advice were later significantly more likely to report using procedures for these reasons, suggesting the stability of these criteria. However, the same stability did not manifest for other criteria. Implications for improving protocols for counseling litigants about procedure are discussed.

There are several things that are especially noteworthy about the methodology of this study. Like Donna's earlier studies, it asks subjects about their views before they proceed far in litigation thus reducing hindsight bias and errors due to faulty memory. It also asks their views after the cases are over so that she can correlate their responses from both points in time. It has always been (too?) easy for litigants and professionals to say that they will choose procedures that will save time and money. This study provides more confidence, at least on the litigant side, that this generally is so.

Her study found that litigants who initially intended to choose procedures that would save time, were not more likely (than those who didn't) to indicate at the end of their case that they used procedures that they thought would save them time. In this way, we see that initial goals didn't always seem to pan out. And, it also reminds us that we should pay attention to the methods of research studies – studies about what litigants value and expect at the start of their can't be assumed to tell us about their post-litigation experiences and values.

This study developed a list of criteria that laypeople really think about. Instead of providing a fixed set of response options for multiple choice questions, it asked open-ended questions that enabled subjects to express their thoughts in their own words. The responses were then coded into a set of criteria. Again, this provides more confidence in the validity of the concepts and the findings. The lists of factors and the frequencies that litigants cited them are interesting findings in themselves.

Donna's research is particularly important because we know that litigants often have systematically different perspectives than their lawyers. It's much harder to study litigants than lawyers and it is easy to assume, incorrectly, that lawyers' responses in studies accurately reflect their clients' perspectives. This is one reason why I'm thrilled that the ABA Section of Dispute Resolution is focusing on users' perspectives at the upcoming annual conference. (Of course, lawyers are "users" of ADR, so some conference programs may address lawyers' perspectives, which is important – just not the same as their clients' in some ways.)

The study found that the decision-making factor that subjects most often cited – both prospectively and retrospectively – was their lawyers' advice. So, although lawyers' perspectives often differ from their clients', the lawyers are very influential. Donna appropriately argues, "Given the extent to which litigants are predisposed to following their lawyers' advice about which procedures to use, lawyers should attempt to understand their clients' interests, values, and objectives *before* sharing their personal evaluations of procedures to avoid imposing their own views."

This [article is available online](#) though you have to pay for the article unless your institution has a subscription to the journal.

◀ DID YOU HEAR ABOUT?   ◀ DISPUTE RESOLUTION PRACTICE   ◀ EMPIRICAL RESEARCH   ◀ RECENT SCHOLARSHIP  
◀ SEEING THE WORLD THROUGH OTHERS' EYES

#### 4 THOUGHTS ON "WHAT DO LITIGANTS REALLY WANT?"

★ John Lande

SEPTEMBER 13, 2018 AT 6:38 PM

Thanks for your comment, John. Unfortunately, I think that your finding is all too accurate in too many cases.

When you have something to share from your dissertation, I would love to post it or link to it. So please let me know if and when we can do that.

---

**John Woodward**

SEPTEMBER 12, 2018 AT 5:11 PM

Client/litigant/disputant engagement with the process is a big part of the access to justice conversation and I thank the author for presenting this research report. My own PhD research, just about to be submitted, found that a significant issue for lawyers engaged with mediation is that they do not sufficiently involve their clients in the process with the result that disputants sometimes leave the dispute with a feeling that they have been more an observer than a participant.

---

**Donna Shestowsky**

SEPTEMBER 24, 2018 AT 10:46 AM

Thank you for sharing your observations, and for doing work in this important area. Please let the group know once your dissertation becomes publicly available?

---

**Heather Kulp**

SEPTEMBER 5, 2018 AT 8:43 AM

Greatly appreciating this research. Thank you to Donna (and John for highlighting her work). You've added much to the field and given a lot for court-connected folks to consider. I wonder what litigants who do not have attorneys shaping their expectations really want? Anyone have insight about what litigants who do not have attorneys say they want, and how that shapes process choices? An attorney is a pretty big thumb on the scale, yet most people coming to court do not have an attorney to provide such guidance. How can courts address the real expectations of litigants, absent attorneys' counseling?

This site uses Akismet to reduce spam. [Learn how your comment data is processed.](#)

