

WHAT THE PUBLIC'S LACK OF UNDERSTANDING OF ADR MEANS FOR PRACTICE AND ETHICS

**ACR-GNY & CUNY DISPUTE RESOLUTION CENTER AT JOHN JAY COLLEGE
ROUNDTABLE BREAKFAST**

OCTOBER 7, 2021



ABOUT US

- Kristen M. Blankley, Professor of Law, University of Nebraska College of Law
- Lisa M. PytlikZillig, Research Associate Professor, NU Public Policy Center; Interim Director, Social and Behavior Sciences Research Consortium, University of Nebraska
- Ashley M. Votruba, Assistant Professor of Psychology, University of Nebraska

AGENDA

- Relevant Prior Literature
- Empirical Study Methods and Results
- Ethical Implications of Results

LITERATURE REVIEW

WHAT DO POTENTIAL LEGAL CLIENTS “KNOW”?

THE “TRADITIONAL MODEL”

LEGAL PARTIES (GENERAL PUBLIC)

- Their values
- The “what” or “why”

LEGAL PROFESSIONALS (LAWYERS, NEUTRALS)

- Their processes
- The “how” or “methods”



BUT...IGNORING
PUBLIC
KNOWLEDGE
(OR LACK
THEREOF) MAY
NOT BE OPTIMAL

- **1. Public/client preferences:** People may ask for/prefer litigation because it is all they “know.”
- **2. Ethical considerations:** E.g., people cannot really *meaningfully* consent without “knowledge.”

“...it is reasonable to question whether clients are giving ‘meaningful informed consent’ if they agree to a process that they do not understand or for which they do not know the alternatives...”

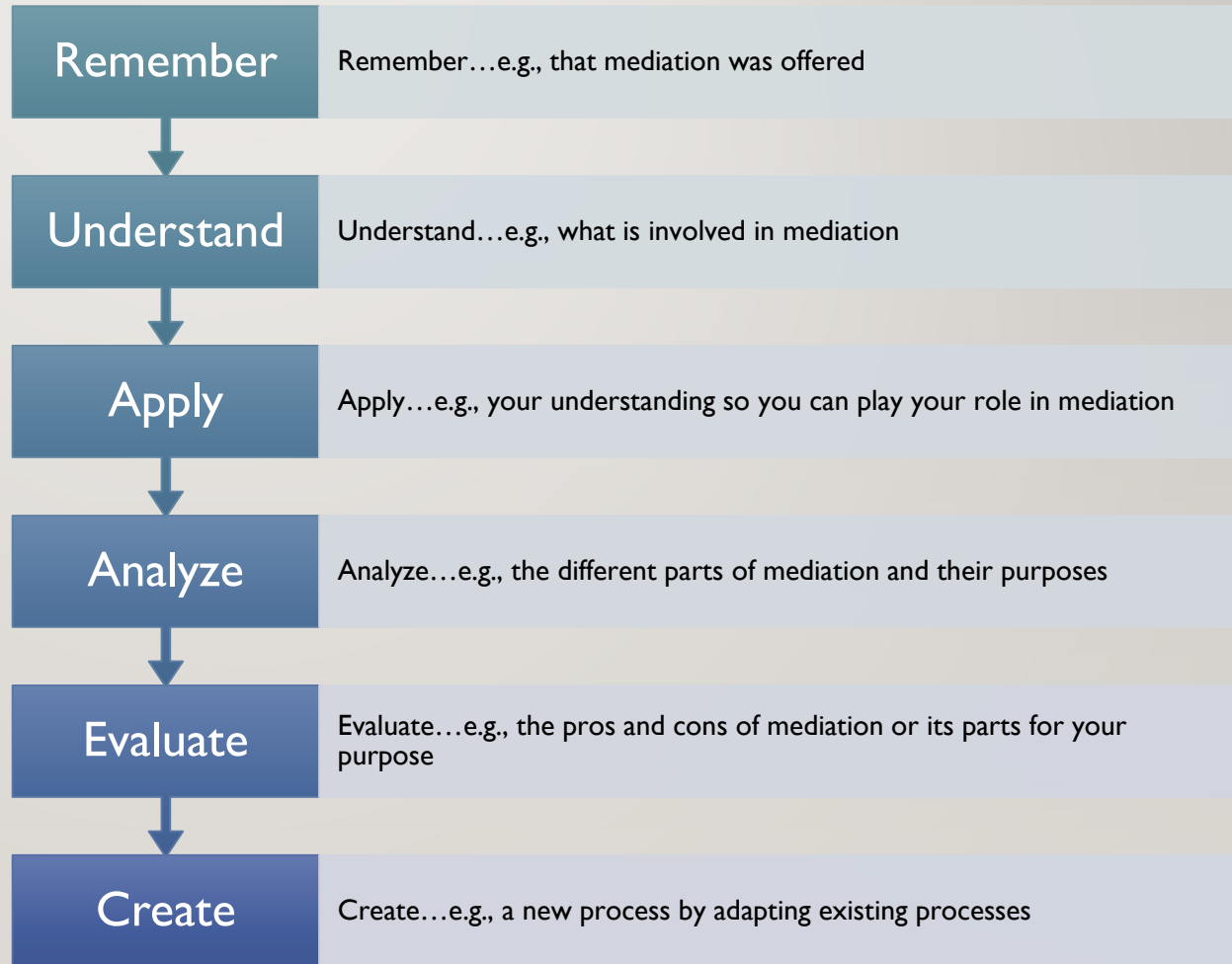
PROBLEMATIZING KNOWLEDGE: WHAT DOES IT MEAN TO 'KNOW' SOMETHING?

Knowledge...

- Comes in different types
- Is established in different ways
- Has different dimensions and purposes
- Requires different cognitive operations, skills, or capacities to express



BLOOM'S TAXONOMY



BLOOM'S TAXONOMY

- **[Notice...be aware of, perceive, attend to (pre-cursor of knowing)]**
- **Remember...that [some process] was offered** Awareness/memory
- **Understand...what is involved in [some process]** ← Our study
- **Apply...your understanding so you can play your role in [some process]**
- **Analyze...the different parts of [some process] and their purposes** More useful “knowing”
- **Evaluate...the pros and cons of [some process] or its parts for your purpose**
- **Create...a new process by adapting existing processes** ← Experts

PRIOR RESEARCH:

WHAT WE KNOW ABOUT WHAT THEY KNOW

- **Awareness/Memory** (Donna Shestowsky, 2017)
 - Surveyed litigants in three different state courts that offered litigation, mediation, and arbitration
 - **Low awareness:** ~25% recalled offering mediation, ~25% recalled offering arbitration and ~15% recalled both
 - **Little impact of representation:** No difference between represented and un-represented litigants

PRIOR RESEARCH: WHAT WE KNOW ABOUT WHAT THEY KNOW

- **Understanding** (from don't knows, Gross & Black, 2008)
 - Survey of perceptions of securities arbitrations
 - Ps: 1359 customers (laypersons) + 1588 more expert others (lawyers, corporate reps)
 - **Low understanding:** Customers much more likely to say “don't know” to many/most of the survey questions (including factual and opinion questions)



PRIOR RESEARCH: WHAT WE KNOW ABOUT WHAT THEY KNOW

- **Understanding** (from preferences, Shestowsky & Brett, 2008; Shestowsky, 2016)
 - Assume people have to perceive something and understand it at some level before they can prefer it...
 - Factor analysis of people's preferences revealed attention to “disputant control” and “third-party control” (2008)
 - But preferences did not predict procedures used
 - Mismatch of micro (feature) and macro (procedures) preferences (2016)



...a “more compelling and troubling explanation for the apparent disconnect is that it might stem from an inaccurate understanding of which attributes actually characterize various procedures.”

(Shetowsky, 2016, p. 833)



EMPIRICAL STUDY METHODS

INITIAL RESEARCH GOALS

1. Differentiate between dispute resolution processes
 - Identify specific key features
 - Create process "profiles" based on expert understanding
2. Compare experts' and community members' perceptions of dispute resolution processes
3. Use this information to better understand conflict resolution motivations and preferences
4. **But first, what do community members know about dispute resolution processes?**

IDENTIFYING KEY PROCESS FEATURES

- **Goal:** Identify a comprehensive list of process features used to describe dispute resolution processes.
- **Method:** Content analysis of academic & practitioner sources describing dispute resolution processes.
 - textbooks (e.g., Moffitt & Bordone, 2012)
 - treatises, ADR empirical articles, and law review articles (located using search terms like "alternative DR + processes/mechanisms/definitions" in Lexis, Westlaw, HeinOnline, and Google Scholar)
 - practitioner-oriented mechanism descriptions (located using similar search terms on Google; e.g., the ABA Section of DR overview of processes (2006)).

IDENTIFYING KEY PROCESS FEATURES

Mediation

Mediation is a private process where a neutral third person called a mediator helps the parties discuss and try to resolve the dispute. The parties have the opportunity to describe the issues, discuss their interests, understandings, and feelings; provide each other with information and explore ideas for the resolution of the dispute.

While courts can mandate that certain cases go to mediation, the process remains "voluntary" in that the parties are not required to come to agreement. The mediator does not have the power to make a decision for the parties, but can help the parties find a resolution that is mutually acceptable. The only people who can resolve the dispute in mediation are the parties themselves. There are a number of different ways that a mediation can proceed. Most mediations start with the parties together in a joint session. The mediator will describe how the process works, will explain the mediator's role and will help establish ground rules and an agenda for the session. Generally, parties then make opening statements. Some mediators conduct the entire process in a joint session. However, other mediators will move to separate sessions, shuttling back and forth between the parties. If the parties reach an agreement, the mediator may help reduce the agreement to a written contract, which may be enforceable in court.

KEY PROCESS FEATURES

- 1. Voluntariness:** “... Decide for themselves whether to participate.”
- 2. Self-determination:** “... The ones deciding how to resolve the dispute.”
- 3. Collaborative:** “... Work together to reach a solution.”
- 4. Binding:** “... Be legally held to their agreement.”
- 5. Attorney:** “... Consult an attorney.”
- 6. Appeal:** “... final agreement reviewed by a higher authority ...”
- 7. Third-Party Involvement:** “... include an outside third party.”
- 8. Confidential 1:** “... Be discussed with other people.”
- 9. Confidential 2:** “... Become a matter of public record.”
- 10. Confidential 3:** “... Be used in a future legal case.”
- 11. Formal:** “... Have firm, established rules and procedures.”
- 12. Speed:** “... Prioritize a quick resolution.”
- 13. Cost:** “... Prioritize keeping costs low.”
- 14. Direct Communication:** “... opportunity to talk directly to each other.”
- 15. Legal System:** “... Go through the legal system.”
- 16. Flexibility:** “... Allow flexibility.”
- 17. Compromise:** “... parties to compromise and reach a middle ground.”
- 18. Creativity:** “... Provide an opportunity for creative solutions.”




SURVEY STUDY: PERCEPTIONS OF DISPUTE RESOLUTION PROCESSES

PARTICIPANTS

Community Sample:

- 632 Mturk workers
- $M_{age} = 39.60$ ($SD = 12.51$)
- 55.1% Men; 43.7% Women
- 65.3% identified as White/European American

Expert Sample:

- 254 experts recruited via ADR listservs
 - $M_{age} = 55.76$ ($SD = 16.06$)
 - 42.5% Men; 44.5% Women
 - 53.5% identified as White/European American
- 

SURVEY PROCEDURE

- Community members: Self-reported "familiarity" with processes
- Assessment of process characteristics
 - Surveyed perceptions of 5 dispute resolution processes:
 - Litigation
 - Arbitration
 - Evaluative mediation
 - Facilitative mediation
 - Negotiation
 - For each of the dispute resolution process features.
- Participant information (demographics)
 - Self-reported "knowledge" of processes
 - Self-reported "experience with" process

SURVEY PROCEDURE: FAMILIARITY QUESTION

Before we examine your perceptions of each of the types of dispute resolution, we would like to better understand your familiarity with each of the mechanisms. How familiar are you with each of the following:

	I have never heard of this term until now	I have heard of this term but have no idea what it is	I have heard of it and have slight knowledge of it	I have heard of it and have some knowledge of it	I have heard of it and have quite a bit of knowledge about it
Litigation	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>
Arbitration	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>
Evaluative Mediation	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>
Facilitative Mediation	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>
Negotiation	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>

SURVEY PROCEDURE: EXAMPLE PROCESS RATING

In this dispute resolution mechanism how often do the people involved in the dispute resolution process...

Decide for themselves whether to participate.

Never 0 1 2 3 4 5 6 7 8 9 10 Always

Arbitration Don't Know

Evaluative Mediation Don't Know

Facilitative Mediation Don't Know

Negotiation Don't Know

Litigation Don't Know



RESULTS

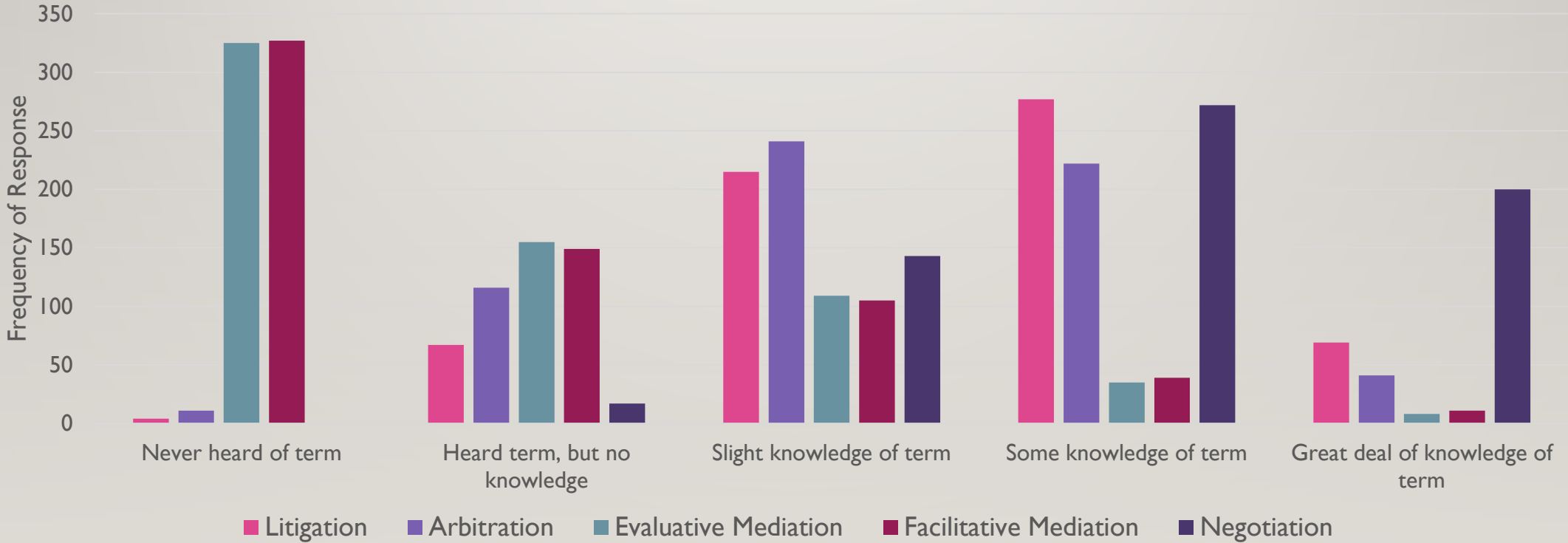


**COMMUNITY
SAMPLE
KNOWLEDGE OF
PROCESSES**



COMMUNITY SAMPLE: FAMILIARITY

*Frequency Distribution of **Familiarity** with Dispute Resolution Processes*

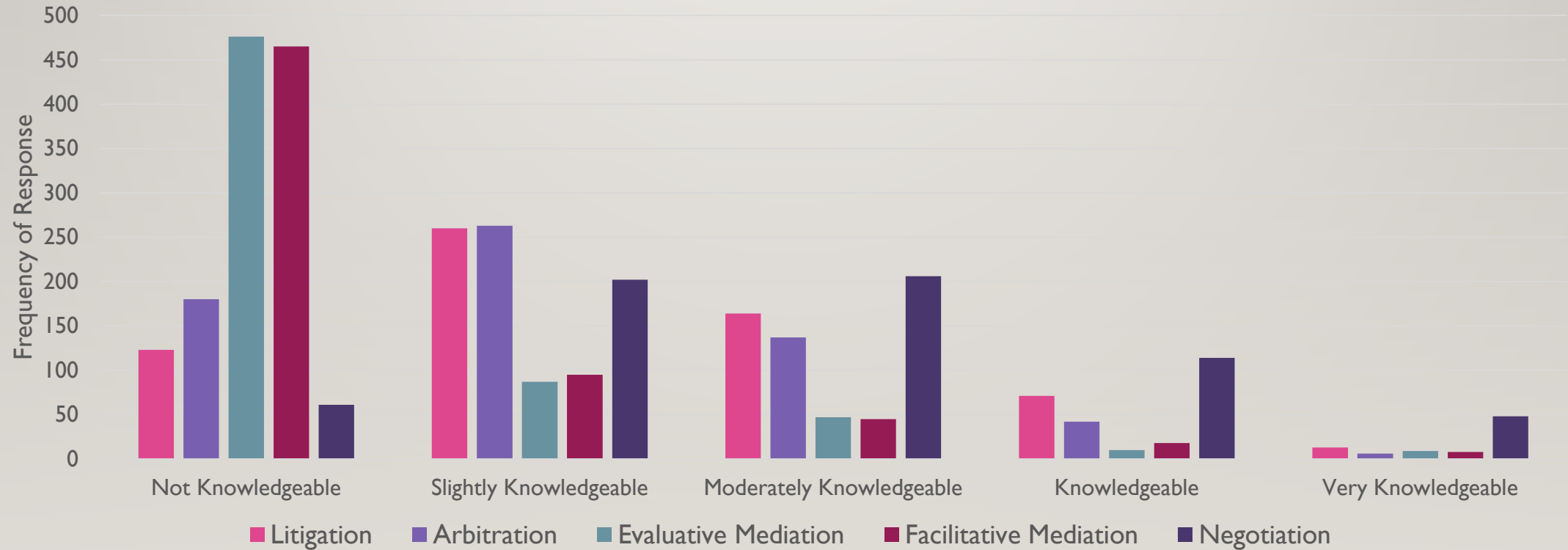


COMMUNITY SAMPLE: FAMILIARITY

Dispute Resolution Process	% who lack familiarity	% who have at least some familiarity
Litigation	11.2%	88.7%
Arbitration	20.1%	79.7%
Evaluative Mediation	75.9%	24.0%
Facilitative Mediation	75.4%	24.5%
Negotiation	2.7%	97.2%

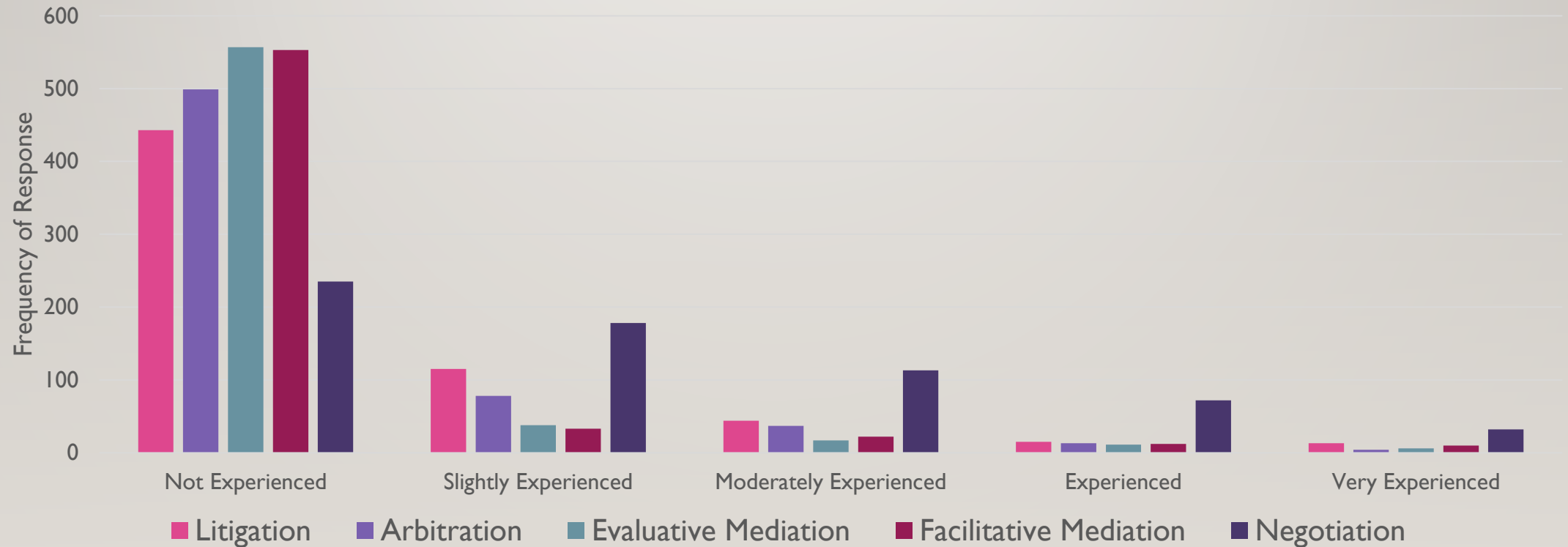
COMMUNITY SAMPLE: KNOWLEDGE

Frequency Distribution of **Knowledge** of Dispute Resolution Processes



COMMUNITY SAMPLE: EXPERIENCE

Frequency Distribution of Experience with Dispute Resolution Processes





COMPARING EXPERTS & COMMUNITY PERCEPTIONS



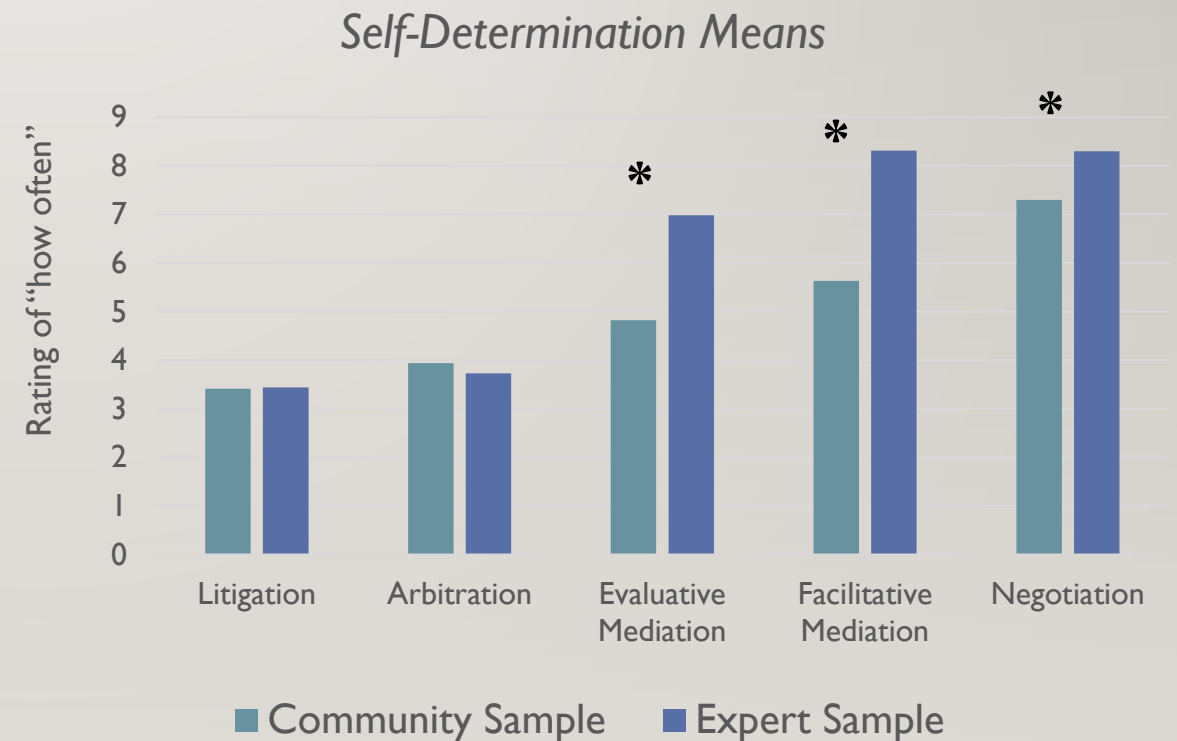
KEY PROCESS FEATURES

- 1. Voluntariness:** "... Decide for themselves whether to participate."
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COMPARING EXPERTS & COMMUNITY: SELF-DETERMINATION

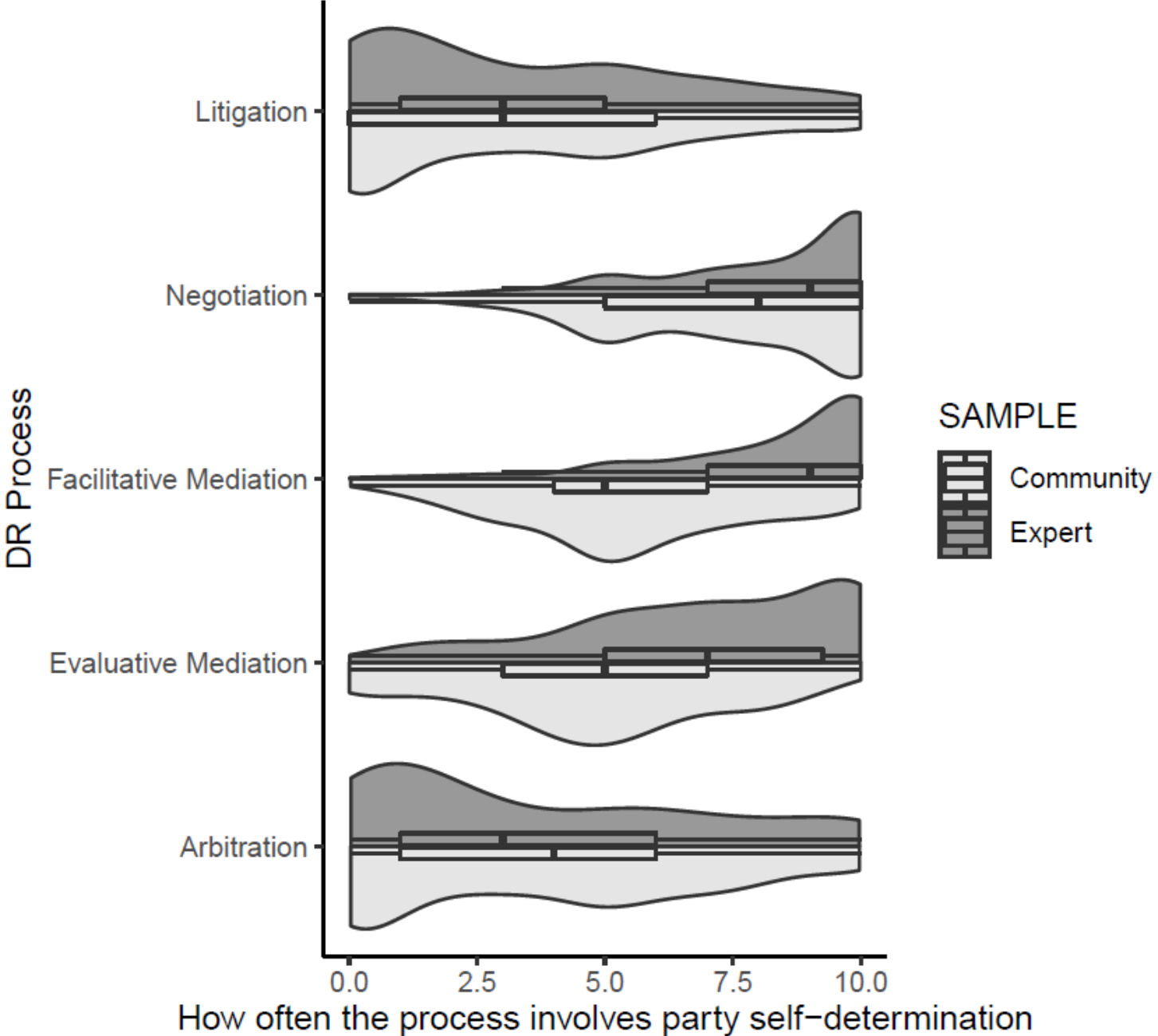
Self-determination: “... The ones deciding how to resolve the dispute.”

- Analysis: MANOVA (using a Greenhouse-Geisser correction)
 - Significant Interaction, $F(2.54, 593.32) = 25.75, p < .001$



COMPARING EXPERTS & COMMUNITY: SELF-DETERMINATION

Self-determination: “... The ones deciding how to resolve the dispute.”

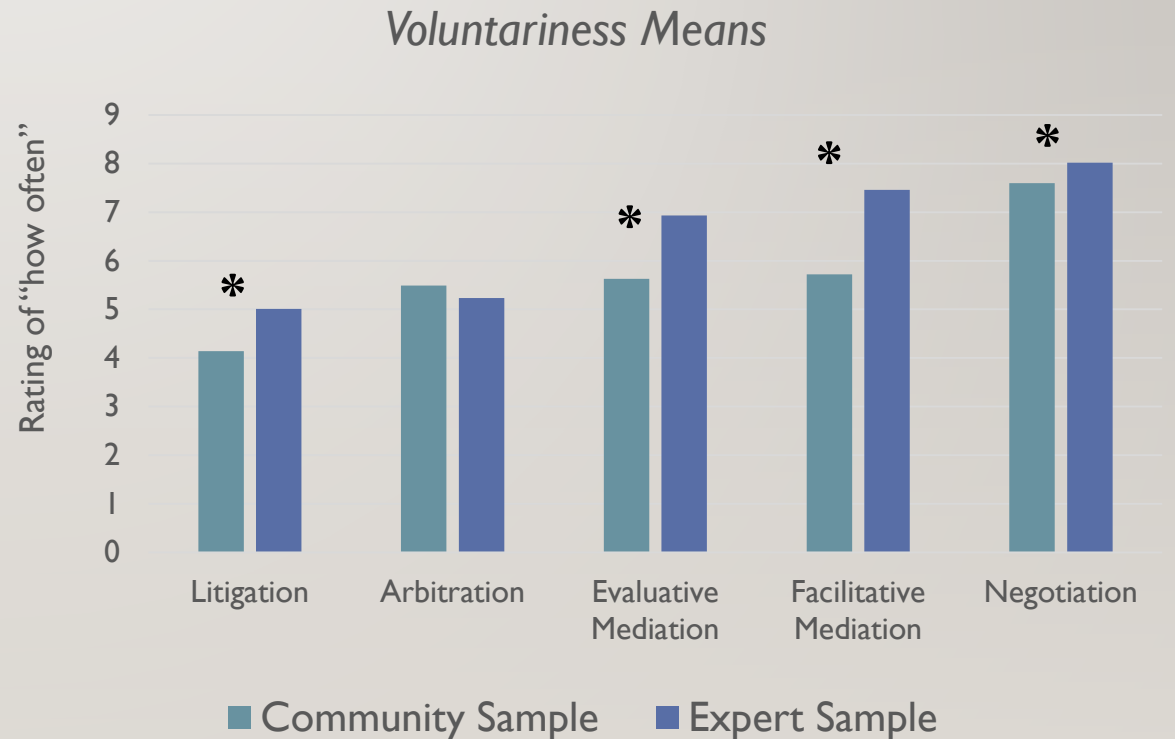


COMPARING EXPERTS & COMMUNITY: VOLUNTARINESS

Voluntariness: “... Decide for themselves whether to participate.”

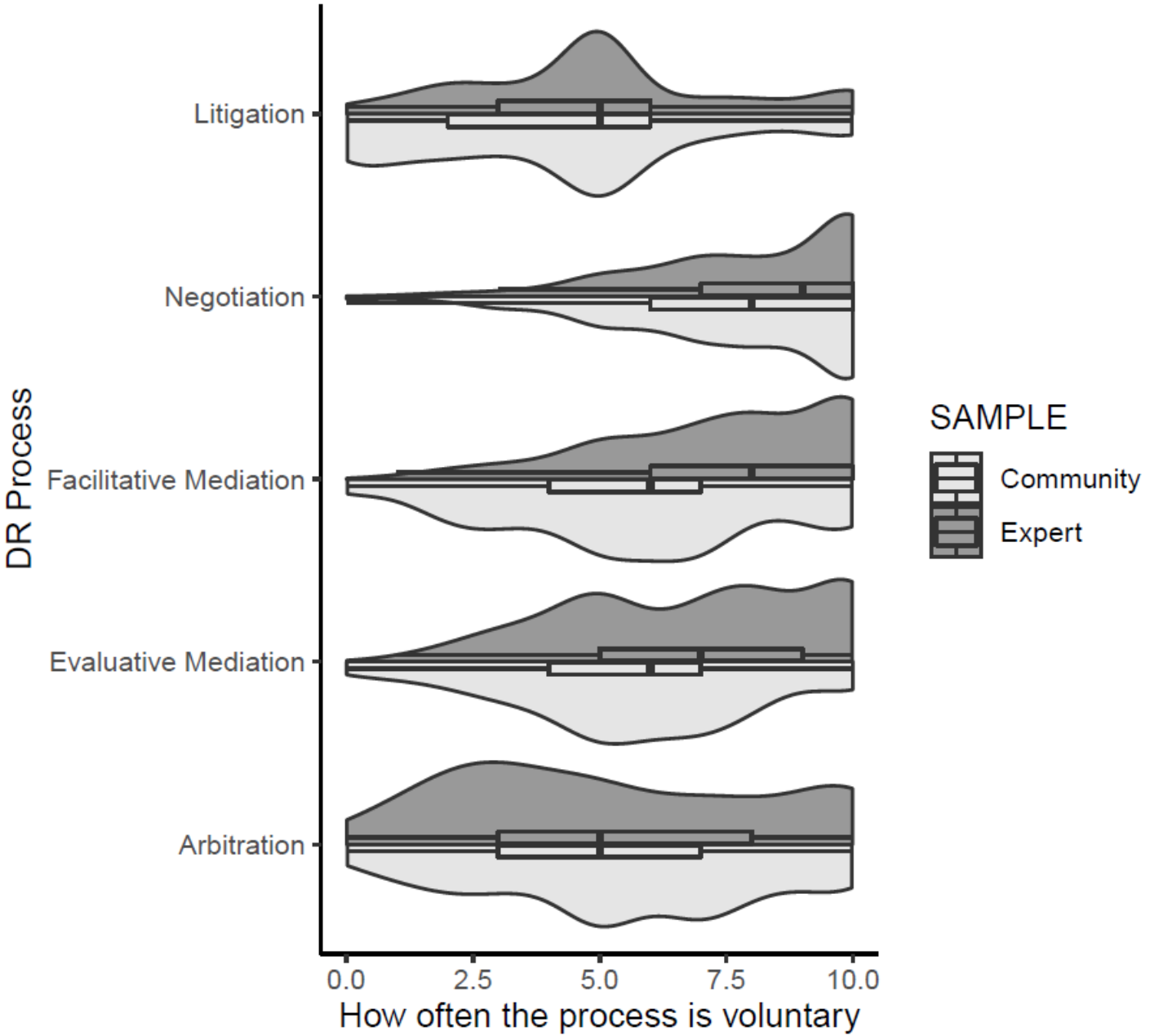
Analysis: MANOVA (using a Greenhouse-Geisser correction)

- Significant Interaction, $F(3.31, 946.69) = 7.16, p < .001$



COMPARING EXPERTS & COMMUNITY: VOLUNTARINESS

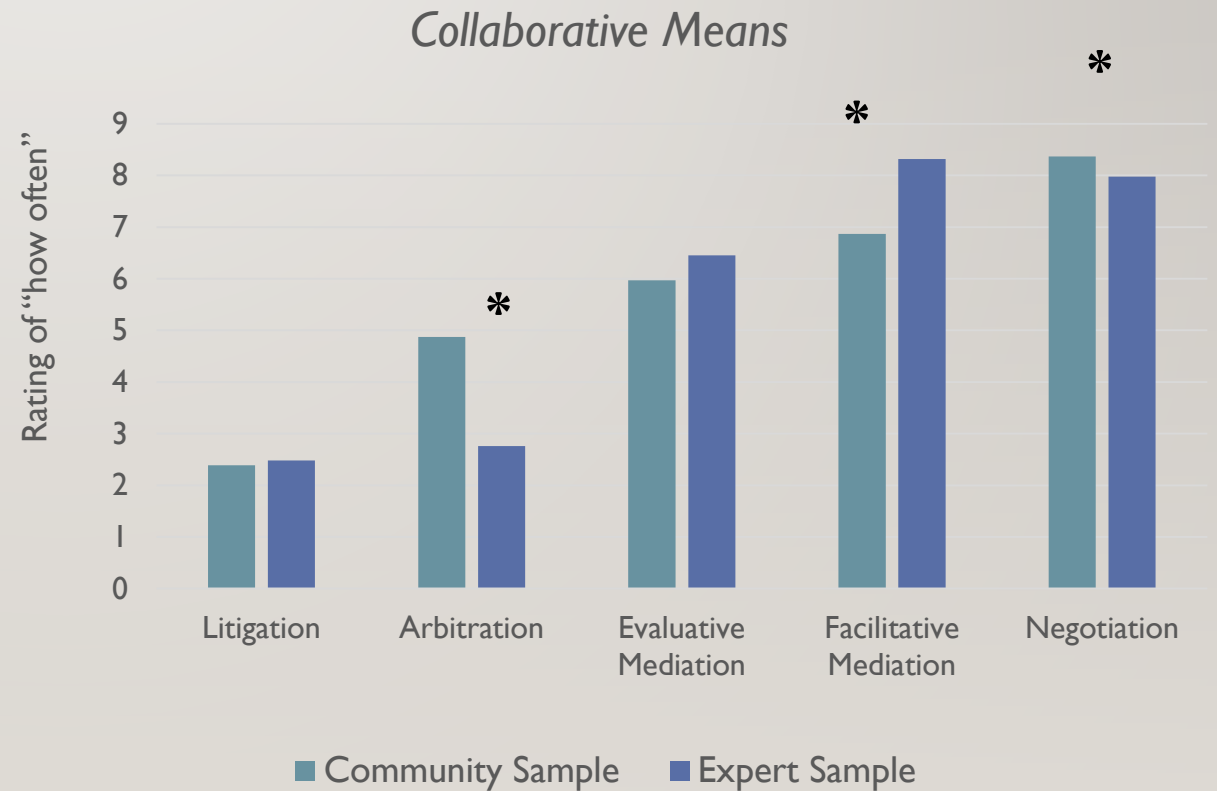
Voluntariness: "... Decide for themselves whether to participate."



COMPARING EXPERTS & COMMUNITY: COLLABORATIVE

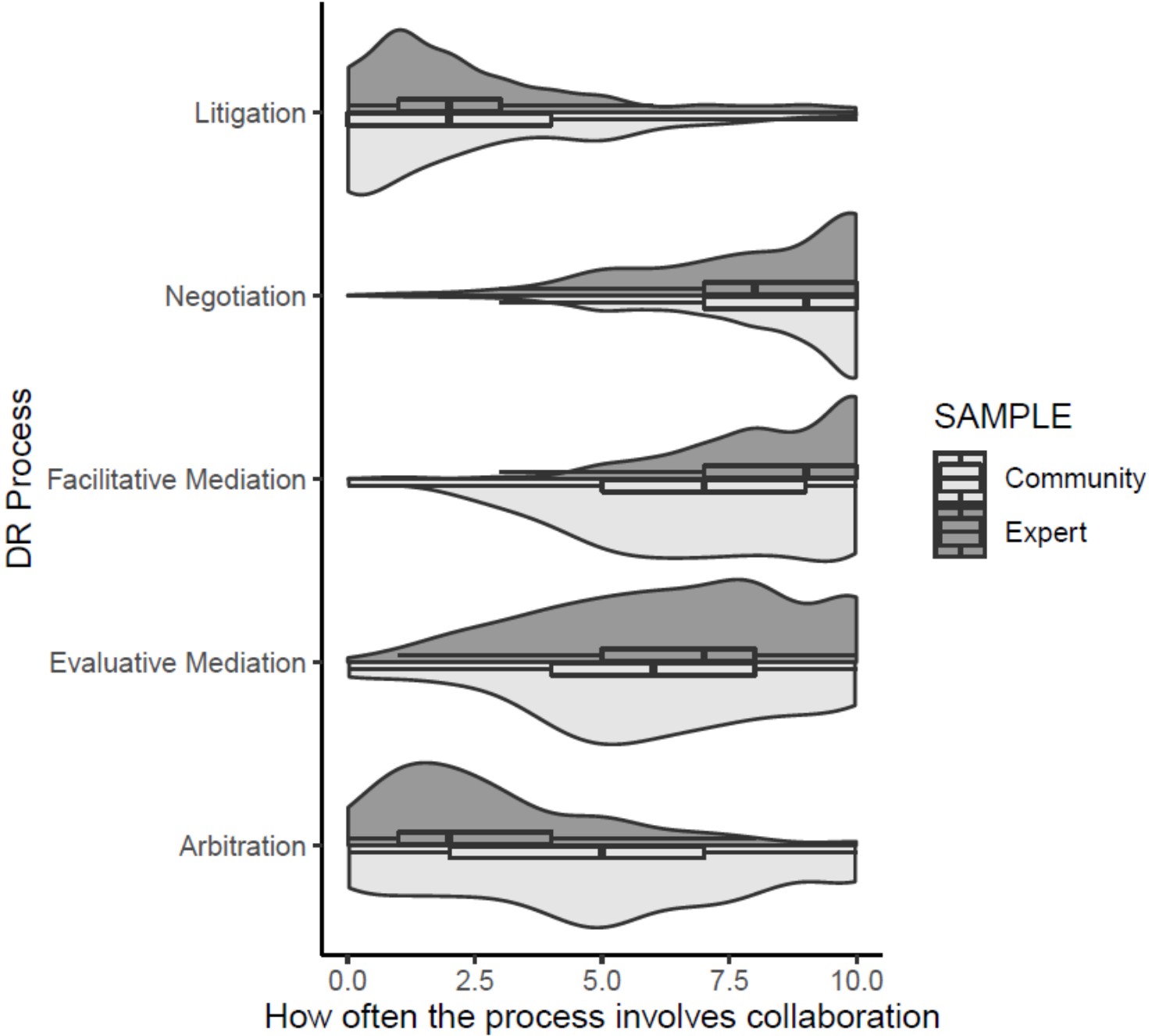
Collaborative: "...Work together to reach a solution."

- Analysis: MANOVA (using a Greenhouse-Geisser correction)
 - Significant Interaction, $F(2.90, 684.82) = 28.18, p < .001$



COMPARING EXPERTS & COMMUNITY: COLLABORATIVE

Collaborative: "...Work together to reach a solution."



SUMMARY OF FINDINGS

- Community Member Familiarity & Knowledge
 - Negotiation → Process most familiar to community member participants
 - Litigation & Arbitration → Second most familiar processes for community members
 - Evaluative & Facilitative Mediation → Processes least familiar to community members
- Community Member Experience
 - Negotiation → Community members had the most experience with this process.
 - All other Processes → Community members had very little experience with the other processes.

SUMMARY OF FINDINGS

- Comparing Experts & Community Members
 - Differences exist in expert and community perceptions.
 - Especially for facilitative mediation, evaluative mediation, & arbitration
 - Compared to experts, community member tend to show less agreement about process features.

ETHICAL IMPLICATIONS FOR NEUTRALS

HOW DO THESE FINDINGS RELATE TO INFORMED CONSENT AND SELF-DETERMINATION?

Model Standard of Conduct for Mediators I (A) Self-Determination

“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, and outcomes.”

WHAT IS “INFORMED CONSENT”?

- Professor Nolan-Haley’s (Fordham) research stresses the twin principles of disclosure and consent.
- Model Rules of Professional Conduct for Lawyers defines “informed consent” as “the agreement by a person to a proposed course of conduct after the lawyer has communicated adequate information and explanation about the material risks of and reasonably available alternatives to the proposed course of conduct.”
- These rules both involve an educational component on the part of the professional.



**INFORMED CONSENT IS
A PILLAR IN ALL ADR
PROCESSES – NOT JUST
MEDIATION!**

WHERE MIGHT MEDIATORS OBTAIN INFORMED CONSENT

- Case Intake
- Pre-Mediation Communications
- Mediator Opening Statement
- Anytime a Question Arises
- At the Point of a Decision Regarding Settlement

ADDITIONAL CONSIDERATIONS FOR PRO SE PARTIES

- Use Ordinary Terms
- Provide Details
- Provide Examples
- Encourage Questions
- Answer Questions to the Party's Satisfaction
- Meet Party Prior to the Session
- Learn Concerns About the Process and Address Them



**CAN NEUTRALS RELY
ON LAWYERS TO
EXPLAIN MEDIATION?**



**SHOULD ADR PROVIDER
ORGANIZATIONS DO MORE
PUBLIC-FACING EDUCATION?**



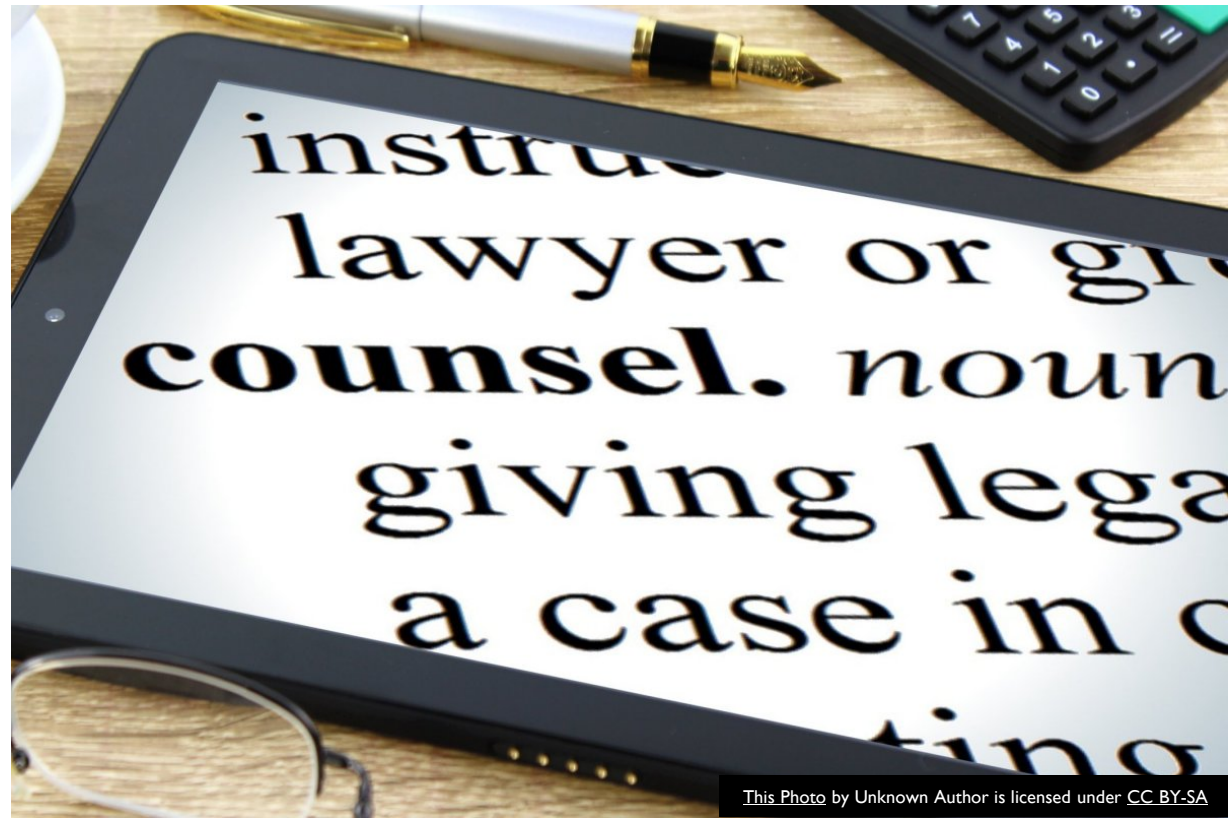
**ETHICAL
IMPLICATIONS FOR
LAWYERS**

APPLICABLE LAWYER ETHICAL RULES

- Decision-Making Rule (1.2)
- Communication Rule (1.4)
- Informed Consent (1.0)



**THE DEBATE –
SHOULD LAWYERS BE
ETHICALLY
REQUIRED TO
COUNSEL CLIENTS
ABOUT ADR
OPTIONS?**



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THANK YOU & QUESTIONS

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