

# ADR and Numbers: An Introduction

By James R. Coben and Nancy Welsh

// Innumerable are the lawyers who explain that they picked law over a technical field because they have a 'math block.' Seventh Circuit Federal Court of Appeals Judge Richard Allen Posner observed in a 2013 opinion.<sup>1</sup> This oft-repeated career-driving logic is ironic, given that numbers are at the very heart of the work that most lawyers do — and key to alternative dispute resolution. With this issue, the *Dispute Resolution Magazine* board seeks to bring numbers to the forefront, examining how

and why they get used and exploring their seductive power and peril.

Numbers provide a perspective and precision (or at least the illusion of both) that words cannot compete with. And numbers are seductive. Just by way of illustration, we asked ADR colleagues around the world to send us their "favorite ADR number" that tells us something about our field, based on their own research or that of someone else. Here's a sampling of responses:<sup>2</sup>

## More than 500,000,000

Estimated number of contracts with mandatory arbitration provisions that US consumers are parties to.<sup>3</sup>

## 47,640,905

2010 state court filings (excluding juvenile and traffic).<sup>4</sup>

## 60,000,000

The number of cases eBay's online dispute resolution system handles each year.<sup>5</sup>

## 359,594

2010 federal court filings (civil and criminal).<sup>6</sup>

## 8,400

Number of jobs held by arbitrators, mediators, and conciliators in the United States in 2012.<sup>7</sup>

## 714

The percentage increase in court-affiliated dispute resolution programs in Maryland from 1999 to 2013.<sup>8</sup>

## 150

The breaking point in attendance at a public meeting above which it becomes impossible to carry on orderly conversation while maintaining full interaction among all participants.<sup>9</sup>

## 134

Total arbitration claims filed at the American Arbitration Association by AT&T wireless customers between 2009 and 2014.<sup>10</sup>

## 57

Percentage of parties who reported that their lawyer talked more than they did in mediation.<sup>11</sup>

## 47

Percentage rate at which borrowers and lenders achieve agreement in foreclosure mediation.<sup>12</sup>

## 10

Decrease in predicted percentage probability of re-incarceration resulting from just one two-hour prisoner re-entry mediation session.<sup>13</sup>

## 3

Behavioral software predicts final settlement value within about 3% after only 3 negotiation moves.<sup>14</sup>

Your reaction to these numbers probably ranged from a nod of agreement to surprise and maybe even disbelief. But we have no doubt that you reacted. Indeed, it's impossible not to be influenced by numbers. And, in a cruel twist of fate, modern cognitive science strongly suggests we are especially irrational when working with numbers, subject to a wide variety of biases that make the myth of the economically rational decision-maker seem quite quaint. Moreover, in a legal system that often requires the monetization of harms, the most powerful numbers thrown around during dispute resolution procedures often include dollar signs. Wrong moves in managing those numbers can spell disaster.

What numbers mean, how we can use them effectively, and what they might tell us about the state of our democracy are all well worth exploration. To help us do so, Jennifer Robbennolt provides an overview of the inevitability of the presence of numbers in negotiation and mediation, describes the potential pitfalls in their use, and offers readers some practical recommendations for navigating their perils. Marjorie Corman Aaron and Wayne Brazil explore the power

of decision analysis — as well as the care that must be taken with its use — as parties assess the number, character, dynamics, and results of the many “risk pivots” in civil litigation. Robert Creo makes the case that numbers “are always there” and offers practical strategies, developed in his own considerable mediation experience, for neutrals to use numbers effectively in support of settlement efforts. In the final article, Matt Leighninger and Tina Nabatchi focus on democracy and numbers by documenting and analyzing the direct, innovative, and interactive forms of public participation emerging through new technology and their impact on the continued development of a vibrant democracy. Thanks to all six contributing authors for helping us increase our understanding of and comfort with numbers. ■

## Endnotes

1 Jackson v. Pollion, 733 F.3d 786, 788 (7th Cir. 2013) (citing DAVID L. FAIGMAN, ET AL., MODERN SCIENTIFIC EVIDENCE: STANDARDS, STATISTICS, AND RESEARCH METHODS v (2008 student ed.) for the proposition that “law students as a group, seem peculiarly averse to math and science.”)

2 Numbers listed here were contributed by Lorig Charkoudian, James Coben, Noam Ebner, Rafael Gely, Toby Guerin, Don Philbin, and Nancy Welsh.

3 Jean Sternlight, *Mandatory Binding Arbitration Clauses Prevent Consumers from Presenting Procedurally Difficult Claims*, 42 Sw. L. Rev. 87, 99.

4 Judith Resnik, *Diffusing Disputes: The Public In The Private Of Arbitration, The Private In Courts, And The Erasure Of Rights*, 124 YALE L.J. 2804, 2832 (2015).

5 Arthur Pearlstein et al., *ODR in North America*, in ONLINE DISPUTE RESOLUTION: THEORY AND PRACTICE 457 n. 22 (Mohamed S. Abdel Wahab et al. eds. 2011).

6 Resnik, *supra* note 4.

7 Bureau of Labor Statistics, U.S. Department of Labor, *Occupational Outlook Handbook, 2014-15 Edition*, Arbitrators, Mediators, and Conciliators.

8 Maryland Administrative Office of the Courts, *Alternative Dispute Resolution Landscape: An Overview of ADR in the Maryland Court System* 32-34 (April 2014).

9 Carrie Menkel-Meadow, *Scaling Up Deliberative Democracy as Dispute Resolution in Healthcare Reform: A Work in Progress*, 74 LAW & CONTEMP. PROBS. 1, 24 (Summer 2011).

10 Resnik, *supra* note 4, at 2812-13 (noting that during the same time period AT&T wireless customers increased from 85 million to 120 million).

11 Roselle L. Wissler, *Party Participation and Voice in Mediation*, 18 A.B.A. DISP. RESOL. MAG. 20, 20 (2011).

12 Heather S. Kulp & Jennifer Shack, *Foreclosure Dispute Resolution Program: Do They Work?* 27 A.B.A. PROB. & PROP. 22, 24 (2013).

13 Shawn M. Flower, *Community Mediation Maryland: Re-entry Mediation In-Depth Recidivism Analysis*, CHOICE RESEARCH ASSOCIATES i, iv (2014).

14 Don Philbin, *Checkmate: Early Moves Define Negotiation Outcomes*, NEWSLETTER OF THE LITIGATION SECTION OF THE STATE BAR OF TEXAS 8, 12 (2015).



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- Receptions
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- Luncheons
- Brown bags
- Proclamations by public officials
- Words Work programs in schools

See <http://ambar.org/mediationweek>  
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