Alternatives
TO THE HIGH COST OF LITIGATION
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Back to School on Dispute Management

The Business Case For Dispute Prevention

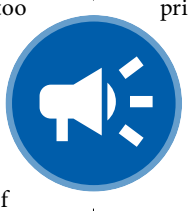
BY KATE VITASEK

Louis M. Brown–the father of preventive law, stated "It usually costs less to avoid getting into trouble than to pay for getting out of trouble." Louis M. Brown, Manual of Preventive Law (Prentice-Hall, 1st ed. 1950).

There is good news and bad news when it comes to disputes. The good news is that it's rare for disputes to actually go to trial. Iva Bozovic and Gillian Hadfield's research shows contracting professionals report "it is common knowledge that litigation is almost always an empty threat; outside of bet-the-company type settings, it costs too much in legal fees and reputational damage, it takes too long and/or it is too unpredictable." Iva Bozovic, Gillian Hadfield, "Scaffolding: Using Formal Contracts to Build Informal Relations in Support of Innovation" (Feb. 27, 2015). USC CLASS Research Paper No. C12-3; USC Law Legal Studies Paper No. 12-6 (available at https://bit.ly/3zPVy1F).

Now for the bad news. Even though you might never end up in court, managing disputes is costly and time-consuming. Our experience working with companies has taught us that individuals and organizations often get sucked into a negative tit-for-tat cycle of conflict escalation that takes a toll on all involved. Costs include lost profits and other damages, third-party costs for lawyers, accountants and claims consultants, and losses in stock price or other valuations.

In addition to the direct costs are the indirect costs relating to damage to relationships, the diversion of company resources, and potential damage to reputation. Not surprisingly, disputes also take a toll on the individuals involved, as well, in the form of added stress, reduced morale, and diminished trust.



A Hard Look At the Hard Costs

But just how big a problem are disputes? Are we making a mountain out of a molehill?

Let's consider some statistics and research on the cost of disputes to put the need for dispute prevention into perspective.

The 2024 Norton Rose Fulbright litigation trends survey reports that, on average, organizations spend $2.3 million on litigation for every $1 billion in revenue, with larger companies spending six times more than smaller companies. 2024 Annual Litigation Trends Survey, Norton Rose Fulbright 1-40 (2024) (available at https://bit.ly/3Y5Hj21) (Litigation Spending at p. 28).

A 2022 Association of Corporate Counsel study adds further insight, stating, "by a long distance, the most common types of litigation are those related to employment and labor (70%) and breach of contract (58%). "The State of Corporate Litigation Today Survey Report," Association of

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CPR

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CPR News

Calendar Alert: 2024 CPR Awards Submission Deadline Is Nov. 15

The International Institute for Conflict Prevention and Resolution's 2024 CPR Annual Awards program is accepting submissions for consideration until the middle of this month.

The awards, which honor advances in conflict resolution thought leadership in books and professional and student articles, this year covers the publication period of November 2024 to October 2024.

The CPR Institute's Annual Awards criteria focus on scholarship that addresses the resolution, prevention, or creative management of major disputes involving public or business institutions between corporations, between government and corporations, or among multiple parties. The review committee comprises judges and lawyers from leading corporations, top law firms and academic institutions across the U.S.

This year's expected categories—to be presented at CPR's Annual Meeting 2025 in Miami, which runs from Feb. 5-7 (information available at www.cpradr.org/events/2025-annual-meeting)—are:

- Book Award—A book published by academics and other professionals during the publication period that advances understanding in the ADR field. Books must be submitted in pdf or similar format. CPR regrets that it cannot accept hard-copy submissions.
- James F. Henry Award—Beginning in 2002, the James F. Henry Award honors outstanding achievement by individuals for distinguished, sustained contributions to ADR. Candidates for the James F. Henry Award—named for CPR's late founder—will be evaluated for leadership, innovation and sustaining commitment to the field.
- Joseph T. McLaughlin Original Student Article or Paper—The Joseph T. McLaughlin Original Student Article or Paper award focuses on events or issues in ADR. Outstanding papers prepared for courses requiring papers as a substantial part of a course grade must be recommended for submission by a professor. The award is named for a former CPR board member. See "CPR Board Member Joseph T. Mclaughlin, Remembered," CPR News, 30 *Alternatives* 31 (February 2012).
- Professional Article & Short Article—The awards for Professional Article & Short Article published by academics and other professionals advance understanding in ADR.

Alternatives articles aren't eligible for CPR Awards consideration.

Send electronic file nominations, in PDF or MS Word format, to CPR Institute Senior Vice President Helena Tavares Erickson at herickson@cpradr.org by Friday, Nov. 15. Submissions should be led by a cover letter with name, address, telephone, and email address. Submissions on behalf of others should supply the author's contact information as well.

For full details, including past award winners and a list of awards judges, see www.cpradr.org/annual-awards. Highlights from the 2023 award winners can be found in last month's CPR News at 42 *Alternatives* 142 (October 2024).

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Theory Meets Practice

A Snapshot of How Mediators Are Using Technology

BY JOHN LANDE

All professional mediators inevitably use technology these days. Indeed, they use it more than they realize. And, with the accelerating rate of technological developments, they generally will use it a lot more in the future.

But it's not easy to incorporate technological developments into daily practice and keep up with the rapid pace of change.

Part of the challenge is that mediators have their own unique complex practice systems that they aren't fully conscious of. And technology is integrated throughout their systems.

This article discusses these issues, incorporating practitioners' input from a virtual program, "How Mediators and Related Neutrals Can Optimize Tech Resources in Their Real Practice Systems," on June 12, 2024, organized by the Technology and Mediation Committees of the American Bar Association Section of Dispute Resolution.

The RPS Presentation

The idea for this presentation grew out of the development of the Real Practice System (RPS) Project (blog post on *Indisputably* (Dec. 20, 2022) (available at https://bit.ly/3V2LudS)), and particularly the RPS Menu of Mediation Checklists (see John Lande, "Real Practice Systems Project Menu of Mediation Checklists" (Dec. 1, 2023). University of Missouri School of Law Legal Studies Research Paper No. 2023-17 (available at https://bit.ly/4eR9qIV)), which is a concrete manifestation of RPS theory.

John Lande, a longtime *Alternatives* contributor, with this article launches a regular column, "Theory Meets Practice." He is Isidor Loeb Professor Emeritus at the University of Missouri School of Law's Center for the Study of Dispute Resolution in Columbia, Mo. This year, he received the American Bar Association Section on Dispute Resolution's Award for Outstanding Scholarly Work. See https://bit.ly/3Tq5YuK. His biography page can be found at https://lande.missouri.edu.

(See also John Lande, "The Real Practice Systems Project: A Menu of Mediation Checklists," 42 *Alternatives* 53 (April 2024), and John Lande, Practitioners: Why Real Practice System Checklists Are So Useful," 42 *Alternatives* 80 (May 2024), in addition to the two additional articles in the author's four-part series which appeared in the June 2024 and July/August 2024 issues, at www.cpradr.org/alternatives-newsletter.)

RPS theory argues that mediators have unique practice systems based on their personal histories, values, goals, motivations, knowledge, and skills as well as the parties and the cases in their mediations. They develop categories of cases, parties, and behavior patterns that lead them to design routine procedures and strategies for dealing with recurring challenges before, during, and after mediation sessions. Their systems include unconscious routines and conscious strategies for dealing with challenging problems.

As I reviewed the RPS checklists, I noticed that they were populated with numerous references to technology. This led me to write a blog post, "Technology in Real Practice Systems" (on *Indisputably* (Jan. 21, 2024) (available at https://bit.ly/4eR9Wql)), which lists these references.

My presentation reviewed RPS theory, the menu of checklists generally, and the use of technologies in the checklists.

Mediators can decide what makes sense for them by reading the RPS checklists cited above and learning about other practitioners' use of technology in order to assess their own optimal use.

Here's the PowerPoint from the presentation: https://bit.ly/3zCMWv2.

A Snapshot of Technology Use

To get a snapshot of how mediators are using technology currently, I collected data from the program participants. Since technology is changing so rapidly–and people's *use of technology* also is changing–the data provides only a snapshot at this moment in time.

The Program Participants: The program was conducted over Zoom, with more than 60 participants. I conducted a survey at the beginning of the program about the participants' backgrounds, and 45 people responded.

After I gave my presentation, I asked participants to respond in the chat to open-ended questions, and 22 to 37 people responded to those questions. After the program ended, participants were given a survey and 28 people responded.

The participants were members of the ABA committees co-sponsoring the program, especially the Mediation Committee. Forty-one people responded to this question. Here are the five committees most represented in the Zoom call: Mediation (80%), ADR Practice Management & Skills Building (29%), Court ADR (27%), Early Dispute Resolution (24%), and Technology (22%). Some people were members of more than one committee and they could indicate all the committees they belonged to.

I asked the year that people graduated from law school. One-third of the 33 people who responded said that they graduated before 1990. Twenty-seven percent graduated between 1990 and 1999. Twelve percent graduated since 2000. Twenty-seven percent did not graduate from law school.

I asked what services participants regularly provide in their practice, and I told them to indicate all the services they provide. Of the 33 people who responded, here are the percentages of their responses: mediation (88%), arbitration (33%), representation (30%), other (24%), and "do not practice" (12%).

I asked about the types of cases that currently comprise more than 25% of their practice. Here is the breakdown of the 33 people

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who responded: commercial (48%), tort (21%), employment and labor (12%), family (9%), other (36%), do not practice (12%).

Then I asked what technologies they regularly use in their practice, and I told them to indicate all the technologies they use. The percentages for the 31 people who responded can be found in the table appearing on the next page.

Obviously, the responses reflect the experiences of members of the ABA Section of Dispute Resolution who attended the program. They may be more or less generalizable to other populations.

Most Important Technologies in Participants' Practices: After my presentation, I asked participants to identify the most important technologies that they use in their practice. Thirty-five people responded in the chat, often mentioning several technologies. Here are the general categories of their responses and the number of people giving those responses:

Technology	Number
Video platform	35
Calendar	7
Artificial intelligence	5
Electronic signatures	4
Decision tree	3
Payment	3

Clearly, video platforms are essential for practitioners these days. It became the "new normal" during the Covid pandemic. After restrictions on in-person interactions ended, practitioners continued to use video–a lot–and now it continues to be the new normal for many practitioners.

Not only that, but Zoom clearly is the video platform of choice for these practitioners. Of the 35 people who responded to this question, 34 identified Zoom.

Some practitioners are "multi-lingual" (or "multi-video"). Three people said that they also use the Teams platform and one uses WebEx when Zoom does not work.

This illustrates the importance of social norms in using technology. If one wants to have a video conversation these days, it's important to be fluent in Zoom. It's good to be proficient in using other platforms, but one shouldn't expect that others know how to use them.

Of the seven people who said that a calendering technology is particularly important, five specifically mentioned Calendly. See https://calendly.com. The other two referred to calendaring generally. Although this is a small number of responses, it suggests that there may be a norm for using Calendly.

By contrast, there does not seem to be a convergence yet in preference for artificial intelligence apps. Three people mentioned ChatGPT, three mentioned Gemini, two mentioned Copilot, two mentioned Claude, one mentioned Perplexity, and two mentioned AI generally.

The responses to this question suggest that people generally think of technology only as cutting-edge electronic innovations and those that have become the new normal only recently.

This assumption of recent development is reflected by the small number of responses about older technologies that practitioners probably find even more important than the ones listed above. For example, some people said that their most important technologies included word processing, email, and phones, which probably are absolutely essential for all mediators but they may not even think of them as technologies—they take them for granted.

The Tech Challenge

The data: Columnist John Lande surveyed how mediators use technology right now.

The premise: Capturing the patterns in the rapid evolution, with a chunk of focus on 'the new normal,' video mediation.

The fear: Just keeping up may be just keeping a little behind. But this is a challenge because artificial intelligence—indeed, much of this—is in the early stages of development and adoption.

Use of Artificial Intelligence: I asked if participants had integrated artificial intelligence in their practice and, if so, how they did so. Of the 38 people responding, half (19) said that they use AI, 7 said that they do so a little, and 12 said that they don't use it.

In other words, more than two-thirds said that they use it at least to some extent.

Some people use AI frequently, enthusiastically, and in many different ways.

One said that she uses AI Tools in all aspects of her practice. One person said that she teaches it and has created chat bots for clients. Another called it "my best friend!"

Here are some of the ways people use it:

- marketing
- doing background research
- checking fact questions
- preparing for mediation
- realistic anchoring
- anonymously brainstorming
- creating decision trees
- developing mediator proposals
- dealing with impasse
- testing out a failed mediation
- ideating, writing first drafts, and summarizing articles
- drafting and research
- fine-tuning writing for emails, scheduling orders, summaries, and ideas

Some people are hesitant, using AI "only occasionally and carefully" in the words of one person. Another said she is taking only "baby steps." Another said she uses it on a "very limited basis given confidentiality and other ethical considerations."

People expressed different reasons for not using AI in their practices. Some people were almost apologetic, saying "sorry," or "I should but haven't." One person said she uses it for personal matters but hasn't used it for her practice yet. Another simply said, "not yet," suggesting that she expects to do so in the future. Another said that it is "not ready for prime time," also suggesting that he would use it when it is more reliable.

People need to learn how to use AI effectively. For example, one person attended AI presentations by attorney/mediator/trainers Susan Guthrie and Meredith McBride and found them to be very valuable.

Concerns about Technology: I asked participants about their frustrations with technology.

What Technologies Do You Regularly Use in Your Practice?

Technology	Percentage
Website describing your practice	77%
Video conversations before and/or during mediation sessions	71%
Online calendar scheduling app	48%
Getting signatures on agreements and/or other documents	42%
Billing	39%
Cloud app to store and exchange documents	39%
Drafting agreements or memos of understanding	35%
App to keep track of participants in a case	26%
Artificial intelligence	26%
Electronic note-taking during mediation sessions	23%
Decision trees	16%
App to check conflicts of interest	13%
App for executing engagement letter / agreement to mediate	13%
Summarizing text	6%
Litigation analytics	6%
App to keep track of offers and counter-offers	3%

The most common response, by 12 participants, was about technical problems.

One person mentioned hallucinations and "stupid answers," presumably about AI. Similarly, one person complained about "fantasy answers." Another person identified "bandwidth problems" on Zoom, making it hard to hear or interpret others' reactions.

Another criticized programs that "lag and glitch." One complained about "when technology burps and doesn't work right! User error!"

Seven people expressed frustration that technology changes so fast that they don't have the bandwidth to keep up with it. Part of the problem is that there are so many options to consider and use. So there's a steep "learning curve." One person complained about "learning something only to have it change or update and have to learn it again." Another said, "I'm certified with GPT, Anthropic, and NVIDIA. The tech changes so fast I have to set aside time weekly to learn the updates."

Related to these concerns, six people mentioned their lack of self-confidence or the incompetence of themselves or parties. People described "not being smart enough to take advantage of everything that is out there!" and their "own technological ineptitudes!" One person missed having IT experts to help him. "Being a solo neutral, [I have] to figure [it] out for myself. I miss my former firm's IT department!" (Notice all the exclamation marks!)

Two people mentioned others' lack of competence or even aversion to using technology, while four people identified the cost or cost-benefit ratio of using technology. Three mentioned concerns about privacy and confidentiality.

Adoption and Barriers

I asked why people don't use technologies that would benefit them. Thirteen people said that technologies are overwhelming and they don't have time to keep up.

One person said that there are "too many options to determine efficient use given all the other competing considerations such as case law developments, etc."

A self-described technology "junkie" said that she needs time to "curate" the technological developments.

Eight people mentioned the cost of adopting new technologies. Four referred to confidentiality concerns. One person wrote, "As an ombuds office within a public university, any records that are created by tech systems are possibly subject to public records disclosure."

Two people talked about client concerns. One said that she needs clients who are willing and comfortable in using technology. Another asked rhetorically, "Has anyone experienced having to argue with 'technology as an expert' as in a client saying they put this into an AI program and it spit out an answer. And then you, as a neutral, have to … explain why it is not a viable option?"

After the program, 28 people responded to a survey question asking if they are planning to change their use of technology in their practice based on what they learned in this program. Thirty-six percent said "yes," 18% said "no," and 46% said "maybe."

Of those who would change their use of technology, 12 people said that they would try using AI.

One would "dip my toe into ChatGPT." Another would use AI more often, but "still protecting client confidentiality." One person is considering implementing more AI for marketing and personal mediation training. Another would "explore AI options for our office, perhaps embedding a chatbot on our website to assist visitors with acute concerns."

Five people mentioned particular apps they would try. These include decision trees, conflict checking software, and ADR Notable, a mediation case management platform available at www.adrnotable.com.

* * *

New technology is exciting! Scary! Efficient! Expensive! Productive! Time-consuming! Unpredictable! Overwhelming! Maddening! And: a source of great wonder about life in the future! All of the above!!! (Notice the exclamation points!)

The availability of Zoom has revolutionized mediation. Before the pandemic, many mediators wouldn't have considered mediating by video. But it provides so many benefits that many mediators won't go back to mediating in person.

The pandemic forced professionals to learn how to use it and rely on it in their daily lives. The responses in this program indicate that Zoom is easy to use and has beaten its competitors, at least for mediations. After an initial learning period, it has become readily acceptable, much as using websites, email, and texting.

Widespread use of video also has changed the mediation process in some cases. When mediating in person was the norm, there was great pressure to complete mediations in a single day. People often had to travel to get to the mediation site and it was inconvenient to reconvene in person if the parties didn't settle

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that day.

Now, it is more common to have multi-session mediations over a period of time. Mediation is seen more as a process than an event. John Lande, "The Evolution To Planned Early Multi-Stage Mediation," *Kluwer Mediation Blog* (Aug. 28, 2020) (available at https://bit.ly/3VQX2zS). This is especially true considering the increased use of conversations before mediation sessions. It also enables everyone to schedule particular times to engage in the process.

In addition, key decision-makers can participate without having to commit to traveling to attend an entire mediation.

We are in the early stages of development and adoption of artificial intelligence, which is much more complicated than merely communicating by video. The responses in this program reflect a wide range of reactions at this moment. Some people are extremely excited about AI and use it in multiple ways in their practice. Others are wary, not using it at all or only cautiously "dipping in their toes."

> Mediators can take control of technology in their practices and make conscious decisions about using it by recognizing the key elements of their practice systems.

This caution makes sense at this point. As one person noted, AI apps are changing so fast and "leapfrogging" each other, so it's prudent for some people to hold off committing time and money into particular AI apps until the field stabilizes. There also are valid concerns about relying on systems that sometimes "hallucinate" and produce "stupid answers." Concerns about privacy and confidentiality are especially appropriate for dispute resolution practitioners.

Although video and AI get much of the attention as the latest technologies that mediators use, they also rely on a lot of others including word processing, email, websites, calendaring apps, conflict checking programs, apps to collect signatures at a distance, billing programs, the cloud, decision trees, and many others.

Indeed, our professional lives have become so infused with technology that we barely notice–much like the air we breathe. Mediators and other dispute resolution practitioners can take more control and make conscious decisions about using technology by recognizing the key elements of their practice systems. The Real Practice System Menu of Checklists linked above can really help.

ADR Technology

AI and Deepfakes in International Arbitration: Is Seeing Really No Longer Believing?

BY MOHANNAD A. EL-MURTADI SULEIMAN

Much has been written on the possible benefits of generative artificial intelligence to arbitration.

While generative AI can bring significant benefits to arbitration, it can also pose risks that threaten the integrity of the arbitration process. Chief among those is the threat of "deepfakes," which are images or recordings that have been created or edited by AI to appear genuine to the naked eye.

Indeed, a recent survey regarding the risk of AI in international arbitration showed that most participants viewed deepfakes as the biggest risk generative AI poses to arbitration. Annual Arbitration Survey 2023, "AI in IA—The Rise in Machine Learning," Bryan Cave Leighton Paisner (Nov. 9, 2023) (available at https://bit.ly/4ewtIH0). While several possible risks can emanate from deepfakes, this article focuses on the impact deepfakes could have on video evidence in international arbitration and suggests ways to address deepfakes in international arbitration.

Video's Weight

A study of the human perception of video evidence has shown that people tend to ascribe greater weight to video recordings over other forms of evidence due to the following factors:

(i) humans process video evidence more quickly than other forms of evidence;
(ii) the perception that videos are less impacted by partisan factors; and
(iii) videos are more engaging than other forms of evidence and, consequently, attract more attention and can be more easily remembered.

As a result, decision makers, including arbitral tribunals, have historically relied on video evidence in evaluating the parties' competing claims. For example, in an arbitration under a bilateral investment treaty between Ecuador and the United States, and conducted in accordance with United Nations Commission on International Trade Law rules in The Hague, *Chevron v. Ecuador* (2018), the tribunal

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considered video recordings as part of the evidence for accepting Chevron's denial-of-justice claim against Ecuador.

In *Tokios Tokelés v. Ukraine* (2007), an International Centre for Settlement of Investment Disputes arbitration, the tribunal considered video recordings in evaluating the claimant's assertions of a breach of the treaty's standard of protection and treatment. And in *Tatneft v. Ukraine* (2014), an Uncitral arbitration under a BIT between Russia and the Ukraine, the tribunal ruled that video recordings of a raid of the claimant's refinery were "credible evidence."

The common perception that recordings are unbiased representations of the facts has also led to prioritizing videos over contradictory evidence, a phenomenon that could improperly lead to ignoring or not giving sufficient weight to such contradictory evidence—for example, see *McDowell v. Sheerer*, 374 F. App'x 288 (3d Cir. 2010), where a U.S. district court judge prioritized video evidence over witness testimony, even though the video did not provide conclusive evidence regarding the matter at issue.

Deepfakes, however, have challenged the perception that seeing is believing—which is understandable, given that the naked eye cannot detect most deepfakes. Nils C. Köbis, Barbora Doležalová & Ivan Soraperra, "Fooled twice: People cannot detect deepfakes but think they can," 24(11) *iScience* 103364 (available at https://bit.ly/4dBww4c).

As a result, video evidence may now pose the following issues of proof that were not present before deepfakes: First, does the evidence proponent bear the burden of proving its authenticity? Second, how can one prove that a video is authentic? Finally, how should arbitral tribunals deal with frivolous assertions that authentic video evidence is a deepfake (the so-called deepfake defense)?

Who Bears The Burden?

In international arbitration, it is commonplace for tribunals to issue a procedural order regarding the proceeding's conduct, providing that the parties' evidence is deemed authentic unless a party challenges the evidence's authenticity.

This formulation leaves open the question of which party bears the burden of proving the evidence's authenticity in case of a challenge. Nevertheless, it is generally accepted that a claimant bears the burden of proving its claim, a principle encapsulated in the maxim *actori incumbit probatio*.

Thus, if the authenticity of video evidence has been challenged, one can argue that the evidence proponent bears the burden of proving its authenticity as part of its burden of proving its claim. Doing so would be consistent with national rules regarding court proceedings, which provide that the evidence proponent bears the burden of proving its authenticity.

For example, U.S. Federal Rules of Evidence Rule 901(a) (available at https://bit.ly/4gUXQgY) requires the evidence-proponent to "produce evidence sufficient to support a finding that the item is what the proponent claims it is" and provides a non-exhaustive list of corroborating mechanisms, including witness and expert evidence.

But irrespective of who bears the burden of proving the video's authenticity, the question of burden of proof will remain academic in the absence of ways to establish that a video recording is authentic (proving the positive) or that such a recording is not deepfake (proving the negative).

Practical Application

The hottest ADR issue: Same as the rest of the world, work and otherwise, it's the question of the effect of artificial intelligence.

The AI ability in question: Deepfakes in international arbitration.

The challenge: This may be easier than in other walks of life. Provider rules often deal with arbitration evidence specifically related to pictures and video documentation. This article will put you up to date on the current state of the technology, and the current specific ADR-related rules.

Proof Methodology

How can one prove that a video is authentic?

Most arbitration rules empower tribunals to decide which facts have been established. For example, Article 25(1) of the International Chamber of Commerce Rules of Arbitration provides that a "tribunal shall proceed within as short a time as possible to establish the facts of the case by all appropriate means." Article 22.1 of the LCIA Arbitration Rules provides that a tribunal "shall have the power … to decide whether or not to apply any strict rules of evidence (or any other rules) as to the admissibility, relevance or weight of any material tendered by a party on any issue of fact or expert opinion."

In addition, Article 36 of the ICSID Arbitration Rules provides that an arbitral tribunal "shall determine the admissibility and probative value of the evidence adduced." Similarly, the International Bar Association Rules on the Taking of Evidence in International Arbitration and the UNCITRAL Model Law on International Commercial Arbitration provide that a tribunal can "determine the admissibility, relevance, materiality and weight" of any evidence.

Nevertheless, arbitration rules do not provide guidance regarding the tools the evidence proponent can use to establish the evidence's authenticity. And given how authentic they can appear, deepfakes present a special challenge when it comes to proving the authenticity of video evidence.

While traditional methods of establishing the authenticity of evidence, such as witness and expert evidence, may be useful, the technological advancement that deepfakes present calls for quicker and easier tools for authenticating video evidence. For example, the metadata relating to the time and location of the evidence's creation and author could assist in identifying deepfakes (see Matt Reynolds, "Courts and lawyers struggle with growing prevalence of deepfakes," *ABA Journal* (June 9, 2020) (available at https://bit.ly/3NeMczD) (discussing a case in which metadata helped uncover a doctored video).

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Other forms of digital identification can also help authenticate video evidence. For example, the parties may rely on the data's hash value, a numerical value that identifies data and verifies its integrity. See "Ensuring Data Integrity with Hash Codes," *AI Skills Challenge* (Microsoft blog) (Jan. 3, 2023) (available at https://bit.ly/3ZSHDm9). The parties could also rely on software such as Intel's FakeCatcher to detect fake videos. As machine-learning technologies continue to evolve, detecting deepfakes by identifying inconsistencies in data should become easier in the future.

On the other hand, tools that courts have historically considered relevant for authenticating recordings, such as the chain of custody (see *United States v. McKeever*, 169 F. Supp. 426 (S.D.N.Y. 1958) (available at https://bit.ly/3ZSHXBn), may have little relevance in today's world, where recordings are easily disseminated and shared within milliseconds.

The Deepfake Defense

The difficulties associated with authenticating video evidence could also lead to the evidence opponent making a frivolous assertion that a video has been adulterated. While there may not be any basis for such an assertion, it could cause a tribunal to ignore important evidence regarding the parties' claims.

To preserve the proceeding's integrity, it may be important to establish that no party may present evidence that it knows to be false or otherwise make frivolous assertions regarding the authenticity of the opposing party's evidence.

Recent initiatives regarding AI use in international arbitration have called for the parties not to use AI to falsify evidence. In April 2024, the Silicon Valley Arbitration and Mediation Center (at https://svamc.org) issued guidelines on using artificial intelligence in arbitration, which provide as follows under Article 5:

> Parties, party representatives, and experts shall not use any forms of AI in ways that affect the integrity of the arbitration or otherwise disrupt the conduct of the proceedings.
>
> Parties, party representatives and experts shall not use any form of AI to falsify evidence, compromise the authenticity of evidence, or otherwise mislead the arbitral tribunal and/or opposing party(ies).

Other older initiatives regarding the conduct of arbitration in general have also called for the parties' representatives not to knowingly submit false facts to the tribunal. The IBA Guidelines on Party Representation in International Arbitration, for example, provide that a "Party Representative should not make any knowingly false submission of fact to the Arbitral Tribunal."

Nevertheless, while Article 9.8 of the IBA Rules on the Taking of Evidence in International Arbitration provides that a tribunal may consider the party's conduct regarding evidence in its assignment of costs, there does not seem to be any guideline that specifically calls for the evidence opponent not to make frivolous assertions regarding the authenticity of the video evidence. Such a concept could be included in the guidelines that are being developed by the arbitral community on the use of AI in international arbitration.

* * *

While AI can provide innumerable benefits to arbitration, it can upend long-established norms and assumptions regarding the authenticity of evidence.

The concern is significantly heightened regarding video evidence, which decision makers are naturally more susceptible to accepting and assigning a greater weight in evaluating the parties' claims. While it is generally accepted that arbitral tribunals are the deciders of facts, arbitration rules lack sufficient guidance on how a tribunal can consider video evidence authentic or deal with frivolous assertions regarding the authenticity of videos. And the recent initiatives regarding AI in arbitration have fallen short of covering these grounds by stopping at a mere prohibition on using AI to falsify evidence.

Artificial intelligence can provide innumerable benefits to arbitration. It also can upend long-established norms and assumptions regarding the authenticity of evidence.

As AI continues to impact arbitration, the need for clear tools for evidence authentication that deal with the technological advancements brought about by AI is higher than ever before. Arbitral institutions can incorporate such tools in their rules or provide a non-exhaustive list of mechanisms for authenticating video evidence. Such mechanisms can help not only in deciding which evidence is to be considered but also in deciding how to deal with the deepfake defense discussed above.

Dispute Management

(continued from front page)

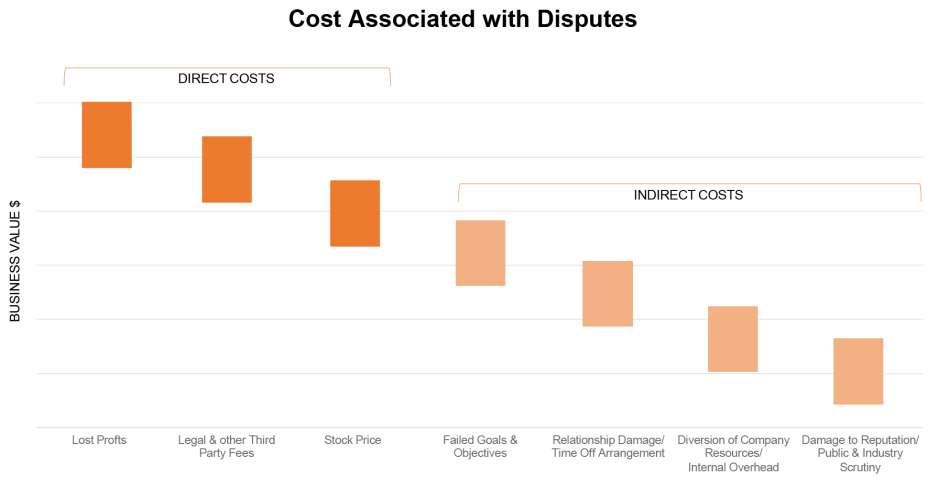
Corporate Counsel (Oct. 10, 2022) (available at https://bit.ly/4eIxM6H).

Many people associate dispute costs with paying third-party fees—lawyers, paralegals, accountants, claims consultants, and other experts. While Hadfield's research cites the high hourly rates of lawyers as one factor that makes the legal system costly, her work shows that there are many other costs that contribute to the high cost of managing disputes.

For example, consider the time and cost to work through legal processes and costs associated with the "discovery" process, which is most commonly used in the United States. Hadfield points to a Microsoft example which reports that for every page of evidence used in a discovery process, Microsoft had to produce 1,000 pages, manually review 4,500 pages, collect and process 90,000 pages, and preserve 340,000 pages. Gillian K. Hadfield, Rules for a Flat World (Oxford University Press, 1st ed. 2016).

A Hard Look At the Soft Costs

When looking at the cost of disputes, people often don't count the softer costs. Research by a CPR task force outlined seven cost



categories for managing disputes. CPR's Dispute Prevention Pledge for Business Relationships, CPR Institute PowerPoint, 14 (2023) (available at https://bit.ly/3TUx8uK) (seven cost categories related to managing disputes). See chart above.

CPR classified costs as both direct and indirect. Indirect costs include failed goals and objectives, relationship damage, diversion of company resources and damage to reputation and public scrutiny.

But often the costs go well beyond the companies having the dispute. Let's reflect on the indirect costs of two recent labor disputes—the United Auto Workers strike last year and the more-recent east coast port strike.

The six-week 2023 United Auto Workers strike was estimated to result in more than $10 billion in losses for automakers, workers and suppliers, according to the Anderson Economic Group. And it led to drawdowns in production and, according to the Federal Reserve, declines in sales and inventory. Gisela Rua and Maria D. Tito, "Tapping the Brakes: The Effect of the 2023 United Auto Workers Strike on Economic Activity," FEDS Notes (April 16, 2024) (available at https://bit.ly/3TRXaPf).

A strike by the U.S. East Coast and Gulf Coast dockworkers that began Oct. 1, meanwhile, halted shipping at dozens of ports from Maine to Texas, impacting shipping on items ranging from bananas to cars. That strike—which stoked inflation fears—was estimated to cost the American economy about $5 billion a day. Doyinsola Oladipo and David Shepardson, "U.S. dockworkers strike, halting half the nation's ocean shipping," Reuters (Oct. 1) (available at https://bit.ly/3ZIsfJ6).

The Hidden Cost of Lost Trust

One of the hidden costs not illustrated in the CPR report is the cost of lost trust.

Prevention's Investment

The costs: Disputing has both direct bottom line and indirect effects that hit in a multitude of ways.

The assessment: Businesses need to look at the hidden 'taxes' that come from seemingly vague issues like the loss of trust between the parties.

The reality: Hard government data shows that the numbers of civil disputes are increasing. Prevention is dispute management.

Stephen M.R. Covey's book *Speed of Trust* outlines seven "organizational taxes" that are directly related to low trust. Stephen M.R. Covey, The Speed of Trust (New York: Free Press, 2006). Each of Covey's "taxes" exemplify increased transaction costs due to low trust.

1. **Redundancy** is unnecessary duplication. Redundancy stems from the mindset that people cannot be trusted unless they are closely watched.

2. **Bureaucracy** is when too many rules and regulations are in place, such as when too many people must "sign off" on something.

3. **Politics** is when people use strategy to gain power. Sadly, too much time is wasted interpreting other people's motives and trying to read hidden agendas.

4. **Disengagement** is when people are still getting paid even though they "clocked out." Simply put, team members put in the minimal effort required to get their paycheck.

5. **Turnover** results when the best performers in an organization leave to pursue a job where they are seen as trusted and value-added contributors..

6. **Churn** is the effort and costs associated with constantly finding new customers, suppliers, distributors and investors because of a lack of loyalty.

7. **Fraud** is flat-out dishonesty. Fraud is a circular tax; when companies tighten the reigns to prevent fraud, they reduce their fraud-related losses, but they inevitably see an increase in the other six areas.

Covey's catchy book title is just one example of people studying trust. While most people don't doubt there is a cost associated with lost trust, they struggle to understand the hard costs associated with lost trust.

More Than Just Costs

While managing the cost of disputes is one thing, it is important to consider the fact that disputes also cause other disruptions such as consuming time.

The ACC study linked above notes that 46% of in-house counsel report the length of litigation is increasing, versus only 8% citing that it is declining. The study also provides insight into the time it takes to resolve a dispute. Seventy-two percent of employment and labor disputes last longer than one year and 71% of breach of contract disputes last longer than one year, with 22% taking more than two years. See the ACC report above.

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Dispute Management

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Simply put, the more time people spend in working on disputes, the more they are not spending in value-added activities that can positively impact the organization.

Disputes Are Increasing

Sadly—despite the emphasis on ADR—litigation is on the rise. Between March 2023 to March 2024, there were 31,803 private contract cases in the Federal District and Circuit courts. Table C—U.S. District Courts–Civil Cases Commenced, by Basis of Jurisdiction and Nature of Suit (March 31, 2024) United States Courts (available at https://bit.ly/4evN0fw). Data from the National Center for State Courts notes that contract case filings were up 19% from 2021-2022, with 39 states reporting 3.6 million incoming cases. Morgan Moffett, Sarah Gibson and Diane Robinson, 2022 Caseload Highlights, CSP 1-5 (Jan. 16, 2024) (available at https://bit.ly/3TPRZ2o) (contract case filing statistics).

International investment disputes are also on the rise. The International Centre for Settlement of Investment Disputes, best known as ICSID, which is the world's leading institution devoted to international investment dispute settlement, reports dispute data every six months since 1972. In the past 10 years, the number of ICSID cases has risen to 329 from 209, with a steady increase every year except 2020 where there was a slight decrease of only three cases. The ICSID Caseload—Statistics, ICSID 1-27 (2024) (available at https://bit.ly/3ZSOigp) (ICSID case statistics).

> While managing the cost of disputes is one thing, it is important to consider the fact that disputes also cause other disruptions.

But is there hope? Unfortunately, the Norton Rose Fulbright survey predicts litigation will continue to increase. In fact, 42% of in-house counsel report they expected the litigation tide to continue to rise over the next 12 months (with only 14% expecting volume to go down).

* * *

The bottom line? It is your bottom line.

Making the shift to dispute prevention does not just make intuitive sense; there is a bottom-line business case for adopting upstream dispute prevention mechanisms. Simply put, it brings more value to all parties involved.

I hope the compelling data shared in this article gives you the justification you need to invest in dispute prevention. In my next article I will share a continuum of dispute prevention mechanisms that real companies are using to not only reduce–but to also prevent–disputes.

ADR Briefs

The Evolving Role of Technology in Resolving Disputes and Encouraging Civility

BY KENNETH R. FEINBERG

The international crisis caused by the Covid-19 pandemic has been well documented, disrupting interaction among nations around the world, and posing individual challenges caused by isolation. But the resilience of local communities in combatting the crisis, and the ability of individuals to discover new creative ways to maintain communication, should not go unnoticed. Modern technology has forged new, exciting ways to deal with the fallout from Covid-19.

The author, founder and managing partner of the Feinberg Law Offices, in Washington, D.C., is best known for serving as the Special Master of the Federal Sept. 11th Victim Compensation Fund of 2001. He is an attorney, mediator, and author of "What Is Life Worth?" (Public Affairs Press 2005), and "Who Gets What" (Public Affairs Press in 2012).

In the world of alternative dispute resolution–helping nations and individuals resolve complex disputes without the benefit of face-to-face meetings–technology has, at least in large part, come to the rescue.

In my own professional world of mediation, the use of virtual technology has resulted in mediation success, as the participants voluntarily agree to participate by Zoom, MS Teams, and other forms of visual aid, in an effort to resolve complex disputes without the necessity, expense and inefficiency of face-to-face meetings, often in faraway locations.

It is a simple task to place the mediation participants in separate virtual rooms, with the mediator accessing each side in confidence in an effort to move the process forward. After confidential discussions with one of the disputing parties—receiving an offer or demand to deliver to the other side—the mediator can then attempt to bridge differences. Modern technology replaces in-person meetings behind closed doors.

It is also worth emphasizing how modern technology and the Internet promote mediation civility and undercut the personal emotion that frequently acts as a barrier to dispute resolution. When parties engaged in disagreement do not confront each other in person, and, instead, act through the device of virtual mediation, it is often easier to focus on the dispute's merits without the anger and frustration that often act as barrier to resolution.

Civility and reasonableness replace such anger when the mediation participants act through the mediator without engaging the other side either in a conference room or in a hallway.

Nor is mediation the only beneficiary of such technology. In the past few decades, I have used the Internet in encouraging claimants seeking compensation after the settlement of a dispute to simply file their claim online using a standard claim form, attaching the necessary documentation proving their claim without the necessity of any mailing or in person meeting.

The entire compensation process can be accomplished using cutting-edge technology. Such technology was used successfully

ADR Briefs

following the Deepwater Horizon oil rig explosion in the Gulf of Mexico in 2010, when the Gulf Coast Claims Facility received well over one million claims. In numerous claims programs thereafter, including, for example, the processing of sexual abuse claims directed at the clergy in various dioceses throughout the nation, online processing of claims has proved successful.

Once again, technology can be used to minimize anger and frustration in the processing of compensation claims. This is accomplished by inviting disgruntled or dissatisfied claimants with the opportunity to be heard by means of visual communication with the claims administrator, without the necessity of a face-to-face meeting.

In confidence, the claimant is invited to express opinions and frustration directly to the claims administrator, and engage in a conversation without the requirement of attendance in person. These virtual confidential sessions are effective in convincing the claimant that he or she is being heard and that the comments are not being disregarded or ignored. Again, civility becomes a priority in the course of the hearing.

Serving as Senior Mediation Adviser to the Dialogue Through Conflict Foundation (at www.dialoguethroughconflict.org), a charitable organization devoted to foster more constructive interactions among people and organizations, in the past year or two, I have come to recognize additional value in using high tech as a vehicle to deal not only with prevailing disputes, but to provide additional tools to prevent and manage everyday conflicts in the workplace before they ripen into formal litigation.

One good example of this is Your Portable Personal Ombuds (YPPO, available at www.personalombuds.com), a web app created by DTC that provides staff and management with a self-help and educational guide to consult in an effort to nip workplace disagreements in the bud before they mushroom into costly and uncertain litigation.

YPPO provides a menu of options, with their respective pros and cons, for those seeking guidance as to the best way to resolve specific workplace disputes in organizations of all kinds. The YPPO Conflict Guide (available at www.personalombuds.com/conflict-guide) spells out frequent missteps while offering standards for encouraging resolution.

YPPO is just the first digital solution developed by DTC to bring innovative conflict prevention technology to civil society at large.

> Feinberg on ADR technology: It's 'still in its early stages. But there are already clear signs of success.'

The use of modern technology in resolving disputes and encouraging peaceful resolution is still in its early stages. But there are already clear signs of success. Technology will continue to evolve in numerous creative ways as it continues to become an important method of avoiding litigation and undercutting the emotion which all too often fuels disagreement.

How South Africa Fights Discrimination with Employment/Labor Dispute Resolution Structures

BY HILARY MOFSOWITZ

South African labor/employment legislation is primarily regulated by the Labor Relations Act 66 of 1995 (available at www.gov.za/documents/labour-relations-act). This legislation was substantially amended after apartheid was abolished in 1990-1994, and the country experienced its first democracy.

The LRA aims to "advance economic development, social justice, labour peace and the democratisation of the workplace."

The author worked in dispute resolution for 27 years at the Commission for Conciliation, Mediation and Arbitration and in bargaining councils in South Africa, and is now based in New York and is an arbitrator, mediator, workplace investigator, factfinder, and a hearing officer.

One of the LRA's primary objectives is to give effect to the Constitution of the Republic of South Africa, 1996, which includes the right to fair labor practice, the promotion of orderly collective bargaining, the rights of freedom of association, the right to join a union, the right to strike and not to be unfairly discriminated against. Everyone is equal before the law and has the right to equal protection and benefit of the law.

This means that *all* employees (regardless of a contract of employment, union membership, and collective bargaining agreement) have the right in law, not to be discharged without just cause. This also means that to promote the achievement of equality, legislative and other measures designed to protect or advance persons, disadvantaged by unfair discrimination, may be taken.

ILO Membership

The LRA reinforces the country's obligations incurred as a member state of the International Labour Organization, or ILO. See www.ilo.org. South Africa has ratified 28 ILO conventions, including the eight core conventions. South Africa ratified Convention 190 in 2021. This is the first international treaty to recognize the right of everyone to a world of work, free from violence and harassment, including gender-based violence and harassment.

The South Africa Employment Equity Act 55 of 1998 says, "No person may unfairly discriminate, directly or indirectly, against an employee, in any employment policy or practice, on one or more grounds, including race, gender, sex, pregnancy, marital status, family responsibility, ethnic or social origin, colour, sexual orientation, age, disability, religion, HIV status, conscience, belief, political opinion, culture, language and birth." (Available at www.gov.za/documents/employment-equity-act.)

Every designated employer—that is, those who employ 50 employees or more—municipalities, employers who generate a specific financial turnover, an organ of state, or are bound by a collective agreement *must*, in order to achieve employment equity, implement

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affirmative action measures for people from designated groups.

Affirmative action measures are designed to ensure that suitably qualified people from designated groups have equal employment opportunities and are equally represented in all occupational levels in the workforce.

Neutrals' Diversity

In terms of the LRA (section 117(2)(d)), all regulating bodies *must* (among other factors), have due regard to the need to constitute neutrals panels that are independent, competent, and representative in respect of race and gender. This applies to all panels, both in the public and private sectors. The neutrals—specifically, mediators and arbitrators—are addressing employment and labor workplace dispute resolution.

All disputes are referred in terms of the LRA or collective bargaining agreements. All labor and employment disputes are filed with a private or public sector panel for mediation and arbitration. The Commission for Conciliation, Mediation and Arbitration (see www.ccma.org.za) is a statutory body established via the LRA provisions. All industry-specific panels—bargaining councils—are accredited through the CCMA. Parties do not pay for these dispute resolution services.

New neutrals are offered extensive training—about one year of training—and mentoring, with no fee attached to the training and mentoring.

New neutrals observe their mentors' conducting hearings. Thereafter, new neutrals conduct hearings while their mentors observe them. Both the new neutral and the mentor are paid a daily fee. The mentor provides feedback to the new neutral daily.

The relationship between the new neutral and the mentor is governed by a "mentorship contract." In terms of this contract, the mentor is obligated to screen all the awards written by the mentee and to guide the new neutral appropriately. A period of mentorship can be extended on the recommendation of the mentor.

Neutrals are not selected by the parties to a particular case, other than private arbitration. Neutrals are appointed to a case—they can only be appointed to a panel through consensus by labor and management. The appointment process to a case, in contrast to selection by the parties, means that new neutrals gain exposure, and development, grow in competency and confidence, and become well-known to the parties. This enables panels to comply with the requirement to provide a team of neutrals that are fully diversified and representative in terms of race and gender.

New neutrals are drawn from a wide range of South Africa society, including the legal community, unions, and management backgrounds. Because new neutrals are allocated work, they tend to represent a younger population, that does not have independent financial resources.

New neutrals have to demonstrate "neutrality" during the training and mentorship processes. They do not need to show a background of neutrality before being appointed. Trainers and mentors will discover a lack of neutrality.

All neutrals are governed by a Code of Conduct and can be removed from a panel if found to be in breach of the code. The codes vary according to the industry-specific panel.

All panels *must* report on the composition of their panels, as well as the use of neutrals, in order to demonstrate compliance with the legislation governing the requirement for diversified panels. State funding for panels will be removed from panels that do not comply with the legislated diversity requirements.

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Aaron's Practice Focus at CPR

Late last year, the *University of Cincinnati Law Review* contacted *Alternatives* requesting participation in a tribute to retiring University of Cincinnati College of Law Prof. Marjorie Corman Aaron, a longtime contributor to CPR Institute initiatives and events, and this newsletter.

Below is the first publication of the full CPR tribute, as the original contribution was limited due to space considerations after submission. The law review can be found at 92(4) *University of Cincinnati Law Review* (2024) (available at https://scholarship.law.uc.edu/uclr). The issue at the link includes the full eight-article tribute. The tribute's *Alternatives* article by editor Russ Bleemer is available directly at https://bit.ly/3TWjDLk.

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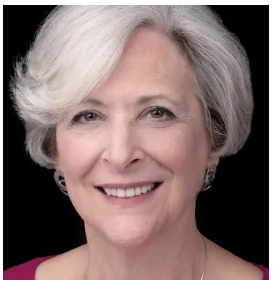
The CPR Institute's long and productive relationship with our friend Marjorie Corman Aaron literally has spanned every facet of the nearly 50-year-old New York-based nonprofit's work.



Marjorie Corman Aaron

CPR's mission is to prevent and resolve business and employment-related disputes. A membership organization, CPR is the preeminent advocate for best practices to achieve better results from conflict resolution, and leadership in prevention.

Marjorie has been one of the organization's key trainers in alternative dispute resolution skills for decades. She has been a presenter

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on countless panels at CPR meetings nationwide. She has contributed to developing key practices standards, including participating on the drafting committee of the CPR-Georgetown Commission on Ethics and Standards of Practice in ADR Principles for ADR Provider Organizations, which was released on May 1, 2002. She has served as a judge in CPR's prestigious annual awards program, and been a recipient of a CPR Award when she was not judging. And she has authored numerous articles published by CPR along with her substantial scholarly work.

The best way to demonstrate Marjorie's groundbreaking contributions to the field via her CPR Institute efforts are in her own words. Below are excerpted highlights and summaries from some of Marjorie's writings and accounts of her teachings in the pages of *Alternatives to the High Cost of Litigation*, the CPR Institute's long-running newsletter, which includes reports of CPR Institute events in which Marjorie participated.

First, note the significance of Marjorie's work to the profession as well as to the CPR Institute. Marjorie's CPR Institute conference appearances have been groundbreaking for the ADR field because the applications examined at CPR Institute meetings she and others offered were firsts and debuts for commercial conflict resolution. The meetings highlighted, identified, and distilled emerging best practices that were emanating from the efforts of lawyers to achieve more positive resolutions for their clients.

Marjorie shared scholarship and practices she had been developing with colleagues in her post as executive director of the Harvard Law School Program on Negotiation, and in her work in the nascent stages of ADR provider Endispute, which would merge and evolve into today's JAMS Inc., preceding her move to academia.

She helped break ground in other ways with the CPR Institute, which kicked off ADR online via live web roundtable discussions in 1999, a precursor of much more to come over the years at www.cpradr.org. In a session that fine-tuned the skills of online lurkers as well as the notable panel (and others who clicked in later or picked up on subsequent articles detailing the discussion), Aaron discussed mediation briefing and prioritized all of her work:

> As a strategic matter, I don't think it's a wise idea to reveal a "bottom line" to the mediator, but I don't think it would hurt for you to indicate a "range" or "ballpark" in which you would find the numbers comfortable. Most important in a pre-mediation submission to the mediator is to provide a sense of your clients' business interests, and their priority.

"Special Supplement: ADR 2000, CPR's Online Seminar/The Art Of Mediation Advocacy: An Insider's Guide May 1999," 17 *Alternatives* 107 (June 1999).

* * *

Articles: Marjorie's written contributions have been far too numerous to present in detail here. But all provided significant ADR development points.

Shortly after Marjorie participated in her first CPR Meeting event—details below—she wrote her first *Alternatives* article, "ADR Toolbox: The Highwire Art of Evaluation," 14 *Alternatives* 5 (May 1996), tackling a white-hot issue, the use of evaluation by mediators. She wrote that evaluation is a necessary mediation tool, but also a last step, not to be substituted for other essential techniques—and not to be avoided if it is needed to settle a case.

The subject was touchy among many in the field—even today, many neutrals may only facilitate the parties, and some court programs restrict evaluation. In the article, Marjorie offered a series of practice points so that evaluation could be deployed effectively yet avoid putting the mediator in a position of risking his or her neutrality—a series of 13 steps.

The steps she urged mediators to take included having the parties meet in private sessions; establishing empathy and trust; identifying

> Marjorie Aaron is CPR's preeminent presenter on the dispute resolution technique of decision trees.

the settlement "problem"; building an information base; neutralizing enemy perspectives; asking permission to evaluate; discussing the evaluation purpose; looking for ways to piggyback the evaluation onto the parties' views; creating and maintaining distance from the evaluation so it can be accepted without the parties sacrificing their own perspective; invoking the power of neutrality to diminish the parties' potential and even likely inclination to take an adversarial stance against the evaluation; acknowledging the limits; structuring the presentation, and stepping back from the evaluation ("After the mediator has presented the evaluation to one side, it makes sense to give that side some 'breathing space'—an opportunity to reflect on the evaluation.").

Marjorie accompanied her first *Alternatives* article with a sonnet-like piece on evaluation, complete with apologies to William Shakespeare, and titled "A Mediator's Soliloquy." The poem concluded, "Mediator evaluation can be a weapon of great might/But it should be used last and it must be done right."

* * *

Just two months later, Marjorie returned to *Alternatives*' pages with a topic that became a brand for her at the CPR Institute: She has been the organization's preeminent presenter of the dispute resolution technique of decision trees, a sophisticated analysis of options on the path to a settlement.

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The technique wasn't new, but it was redeveloped by Marjorie for a different audience than was customary. "Decision trees allow the parties and their lawyers to see more clearly how the strengths and weaknesses of their positions on specific issues will affect the overall value of a case," she wrote with her co-author, adding, "Long popular in the business community, decision analysis has evolved as a tool for lawyers to help make decisions in complex litigation." Marjorie Corman Aaron & David P. Hoffer, "Using Decision Trees As Tools for Settlement," 14 *Alternatives* 71 (June 1996).

Boosted with graphics that showed a basic decision-tree application in litigation that evolved to depiction of the multiple paths in a complex case, Marjorie explained

> Depending on the level of precision required, one may design a rough-cut model, limiting the range of possibilities and making bold assumptions about damages. Or, one may develop a more refined tree, taking into account numerous possibilities (even if some have low probabilities) and assigning probabilities to different levels of damage awards.

But the article closed with a section previewing decades of scholarship to come, urging the application of decision trees by mediators.

> Objective analysis takes the sting out of tough settlement choices.

Working through "the tree structure with the parties" to assign probabilities or values "makes the parties less resistant to the mediator's reasoning on each issue, and more willing to listen." She added that "[f]or an evaluative mediator, decision analysis also can help influence the parties' settlement decisions."

Marjorie concluded that the objective analysis takes the sting out of tough settlement choices. "By transforming settlement into an individual or business decision," she wrote, "decision analysis helps parties escape the feeling that they are making personal or corporate concessions. The exercise of creating the tree and mounting it on a large paper easel, blackboard or large computer screen, removes the analysis from the arena of ego and emotion."

But well ahead of the times, Prof. Aaron and co-author Hoffer noted in a sidebar that computer software was a better option for complex cases, and even recommended a program, Treeage, which moved to the web at www.treeage.com and became a professional go-to. (Hoffer, an attorney, headed Treeage at the time.)

The *Alternatives* article was an adaptation of a longer article that Hoffer wrote as a Harvard student that would win a CPR Award for 1995, "Decision Analysis as a Mediator's Tool," 1 *Harv. Negot. L. Rev.* 113 (1996) ,as well as Marjorie Corman Aaron, "The Value of Decision Analysis in Mediation Practice" 11:2 *Negotiation Journal* I23 (April 1995), which also won a CPR Award.

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In a two-part *Alternatives* article in October 2002 and November/December 2022, Prof. Aaron looked at the commencement of mediation. "First moves matter," she began, noting, "A mediator's strategic choices during the initial contact can encourage the next steps that will produce a success or render mediation less likely or less productive."

Marjorie presented a list of 11 questions that were meticulously designed to elicit positions from parties to cut to the heart of the dispute. Her point was that a productive set-up produces better, quicker and more efficient settlements. The article concluded with a checklist and worksheet that streamlined the points—The Neutral's Initial Contact: Checklist of Mediation Issues and Questions—for making intake a more significant and productive part of the development a mediation-based resolution process. Marjorie Aaron, "At first glance: Maximizing the mediator's initial contact," 20 *Alternatives* 167 (October 2002), and Marjorie Aaron, "Getting a head start: More intake questions and tips for mediators," 20 *Alternatives* 184 (November/December 2002).

* * *

As part of an effort linked to the American Bar Association's Section of Dispute Resolution formation of a Women in Dispute Resolution Committee, *Alternatives* produced a special issue discussing, among other things, issues relating to gender and settlement.

In Marjorie's special-issue feature, "Strategy at the Negotiation Table: From Stereotypes To Subtleties" (30 *Alternatives* 83 (April 2012)), she discussed some tough perceptions about male versus female bargaining positions, and even tougher data. "Research indicates that 'in the aggregate and on the average' men and women fall into socially gendered communication patterns that are read as reflecting different levels of power and authority," she wrote.

The advice, similarly, was blunt. First, Marjorie noted, "Women tend to nod their heads and smile more often than men do when speaking or listening. Head nodding and smiling are understood as communicating warmth and friendliness." Id. After discussion, her advice: "Women who wish to project a forceful and confident presence might be mindful and literally keep a steady head when speaking. Accompany your words with slower and well-controlled motions; smile less often and only deliberately." Id.

The article ended with a deep dive into current negotiation scholarship and a guide to research, mostly involving gender issues, which yielded advice for all mediators. Marjorie highlighted research that concluded that there "are no significant differences in male and female attorneys' effectiveness in competitive negotiations on behalf of

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their clients." Id. She also noted that research indicates that "opposing negotiators may begin with a more aggressive opening proposal and be less flexible in the negotiations when they believe they are negotiating against a woman." Id.

Marjorie concluded, "The good news, then, is that objective measures confirm that women advocates and neutrals are at least as competent as their male counterparts in often difficult negotiations that occur within the mediation process—and 'in the aggregate and on the average' we might have an edge in aspects of social and emotional intelligence."

* * *

A year later, Marjorie adapted the first of multiple excerpts from her then-current book, "Client Science: Advice for Lawyers on Counseling Clients Through Bad News and Other Legal Realities" (Oxford University Press 2012), with a warning: "Stepping back from words and phrases, lawyers must recognize that, outside of the legal practice, people lack shared knowledge about its workings. Thus, the 'lawyer-translator' must supply basic, missing knowledge of legal process, practice, and culture for her words to make sense. Without some of that knowledge, the lawyer's words lack meaning." Marjorie Corman Aaron, "'Translating the Terrain' over Cultural Myths and Mistaken Assumptions," 31 *Alternatives* 115 (September 2013).

The article provided "an entirely incomplete list of things lawyers know about litigation that most clients do not," identifying explicitly areas of client communication that need attention. Id.

The article concluded with wise words for practice:

> Grounded in experience and evidence, most lawyers become astonished or frustrated when their clients turn deaf ears to concerns about practical financial interests. As a mediator, I often witness a lawyer's incredulity and concern at her client's "irrational" rejection of a significant settlement in favor of waiting for trial and risking a low or zero-dollar verdict. That lawyer may have learned that the client deeply desires to resurrect his good name and ruin the other's.
>
> All too often, however, the lawyer fails to recognize the strength of the client's underlying belief that his legal action has the power to do so. Unless that belief is addressed and discussed, the client will cling to negotiating positions that cause his lawyer to shake her head in disbelief.

* * *

In this decade, Prof. Aaron, motivated by the contentious political atmosphere surrounding U.S. presidential politics, wrote two unflinching late-2020 articles that put conciliatory ADR processes and the work of neutrals squarely in the scope of society's most difficult conflicts. The articles framed their advice with the tough national conflicts the nation faced on the verge of the presidential election.

In the two commentaries—"Reflections on Untethered Philosophy, Settlements, and Nondisclosure Agreements," 38 *Alternatives* 117 (September 2020), and "Confessions and Redemption—and Politics—For an Un-Neutral Person Who Mediates," 38 *Alternatives* (October 2020)—Marjorie reflected on mediation state of the art while providing concrete operating procedures for neutrals caught in profoundly polarized public and private disputes.

In the wake of public reveals of nondisclosure agreements that worked in favor of high-profile politicians and business leaders, in the first article Marjorie, confronted her profession:

> Mediators and lawyers had to explain to family and friends that, yes, private settlements are normal. And settlement agreements that restrict public disclosure of their terms are a routine part of practice and process.
>
> It felt shady, irresponsible, callous, immoral.

She argued that the disconnect "doesn't occur just in cases about sexual harassment or assault or politicians' sexual infidelities. Some may feel it when negotiating settlements of apparently legitimate and possibly endemic race, disability, gender, and religious discrimination, of product liability claims, of environmental hazards."

She offered seven proposals—longshots, she conceded—for preventing or mitigating potential harm from settlements and NDAs. The article concludes with, and takes some comfort in, a survey of state legislative moves to restrict NDAs; she concluded that the issue was a systemic legal problem, not the fault of ADR.

In the second article looking at the delivery of justice, Marjorie noted,

> The real truth is that it's naive to believe that court judgments—judicial rulings and jury verdicts—deliver pure justice under the law, that their judgments are somehow true or right.
>
> …
>
> In our rotting institutional landscape, there's a search for grace in ADR's houses.

She concluded the piece, "Within ADR's house, and now in our arbitration and mediation rooms, we mediators, court ADR administrators, process designers, and arbitrators can construct and conduct processes that reflect moral values our lawmakers seem to have abandoned."

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Presentations: Marjorie Aaron has been a constant presence at CPR Meetings throughout the organization's existence, bringing innovative research to senior law firm partners, general counsel, and top neutrals who attend the semi-annual events.

In "The Power Of Framing," a seminar at the June 1998 CPR Spring Meeting in Sea Island, Ga., Marjorie said she believed that "mediation occurs in language—it's an act of communication." She explained that framing is "a way for a mediator and the parties to manage meaning in a way that helps people settle."

The presentation covered ways mediators could recast issues that change the emphasis of disputes and lead to resolution. As stated in *Alternatives*,

> "[Pleople use the word framing all the time in conversation," she said, "and they use it in a lot of different ways. They use it to say, 'Well, let's frame this as a business problem,' which means 'Let's look at it as a business problem.' Sometimes people use 'reframe' to mean 'rephrase'… [such as] 'This dirty, rotten scoundrel set out to ruin me,' and the mediator says, 'Well, sounds like he's saying that the events caused him real harm here.'" The frame, Aaron said, provides the meaning and context to the events in the eyes of the speaker, which leads to choices "about what should happen next."

"Spring Meeting Supplement—June 1998," 16 *Alternatives* 95 (July/August 1998)

Aaron concluded that the bottom line is that "to frame is really to manage the meeting." Id. "For example, she said, 'You could imagine that someone would frame a dispute as a tale of David and Goliath and that evokes certain meanings.' She said a mediator could reframe by saying that 'Really, this is about a penny-ante player trying to get into the big leagues.' That evokes a different set of meanings and a different set of prescriptions."

* * *

In June 2002, Marjorie hosted a CPR Spring Meeting panel in which she posed hypotheticals about mediator practice, and provided guidance along with two legendary mediators on neutrals' conduct.

The focus was on ethical choices and, in particular, confidentiality, in the wake of the then-recent adoption by the National Conference of Commissioners on Uniform Laws of the Uniform Mediation Act.

Joining Marjorie were New York mediator/trainer/author Margaret L. Shaw and Washington attorney William L. Webster, who headed the U.S. Federal Bureau of Investigation, the Central Intelligence Agency, and is a former federal judge (and later became chairman of the CPR Institute). Shaw passed away in 2017.

Through a series of short roleplay scenarios designed by Marjorie that were enacted by the panelists, best practices for the audience's neutrals emerged. The first roleplay focused on the extent that the mediator can talk to one party about information gathered from the other side, and how to influence the potential outcome.

A second roleplay on authority in the mediation session provoked a big audience discussion, with Marjorie summarizing that "said that more ethical problems in the conduct of the mediation—'or at least trust issues'—arise once one of the parties has divulged its bottom line."

The program is the subject of a report at "Special Supplement: CPR Spring Meeting June 2002," 20 *Alternatives* 146 (September 2002).

* * *

At the June 1999 CPR Spring Meeting, Marjorie participated in a blue ribbon panel assessing two decades of the CPR Institute's history, and projecting the future. Moderated by the late Harvard Law School Prof. Frank E.A. Sander, Marjorie was joined again by William Webster, as well Philadelphia neutral Judith P. Meyer, and legal consultant Peter Zeughauser of Newport Beach, Calif.

Marjorie emphasized that the incentive for ADR must come from the client. She also said that she saw a significant role for courts in providing a similar incentive to encourage mediation for settling cases.

Highlighting an area always ripe for increased conflict resolution processes, Marjorie said she would like to see more "transactional ADR." She said that going into a merger, the parties could hire a neutral "to facilitate the negotiations, enhancing the likelihood" that the transaction will be completed. Bringing in a neutral, she said, could encourage a deal structure that will be less likely to generate future conflicts.

She asked the audience to think about its ADR role. "[T]he question is whether we're positioning ourselves so that people will only think of the folks in this room when they have or are already in litigation and will turn to a different source in a different mindset," she said, issuing a challenge: "Could we become involved in, I think, a more creative end, which is when someone is putting your deal together? ... I'm hoping that's a future innovation."

Frank Sander asked the panel to conclude with an ADR wish list. Aaron replied that any disputes that "could possibly be a candidate for settlement" should be required to consult with a mediator before starting discovery "so that the mediator could facilitate a discovery plan aimed toward settlement."

She also said that she would "stop the clock" when litigation was filed, and make everyone assess their negotiation performance and skills so that they can understand when their tactics can undercut their long-term goals. "Experts Say Institutionalization Means Major Practice Changes," 17 *Alternatives* 145 (September 1999).

* * *

The January 1996 CPR Institute Winter Meeting, when Marjorie was Executive Director of the Program on Negotiation at Harvard Law

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School, marked her first appearance as a lead presenter at a CPR Institute annual event.

The subject was that touchy process issue which has continued to provide controversy in the conflict resolution world, the use of evaluation by a neutral in mediation. The case risk at the time was that the neutral would be perceived as saying the same lines about case weaknesses to each side to extract concessions, Marjorie suggested.

In reality, she told the CPR audience, a mediator "has an obligation to present a consistent evaluation to both sides." Aaron suggested that neutrals reinforce their neutrality, and offered sample wording:

> I'm delivering an evaluation to you and to the other side in private. And we'll be talking about issues that matter to you perhaps more than to the other side, so I'm not going to tell you that every word I say in here is exactly the same word that I will say on the other side. But on the numbers, the issues that I'm telling you are weak, the issues that I'm suggesting are strong, and on my assessment of damages and liability, the numbers I'm giving you are the same that I will give to the other side. You can compare notes at the end—you can bring the flip chart into the other room.

Marjorie co-hosted the session with Suffolk University School of Law Prof. Dwight Golann, with similar CPR training sessions repeated by Marjorie with Dwight or other trainers in 2004 and 2006.

* * *

And again, as this tribute was being written, Marjorie and Dwight Golann were preparing a two-day, 10-hour training session, "Challenges & Frustrations in Negotiation: Techniques for Lawyers to Master," to be held in conjunction with the CPR Institute Annual Meeting on March 5-6, 2024, in Philadelphia. [The session ultimately was canceled.]

So it is and so it continues with Marjorie and the CPR Institute … precisely where it began. Marjorie's contributions to developing and improving the profession by imparting her knowledge and now vast experience to a generation of new practitioners continues as strong as ever in her retirement, along with her magnificent

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contributions to the CPR Institute's mission and work. Marjorie's work is a continuing, still-growing part of the bedrock of commercial dispute resolution.

The CPR Institute and *Alternatives* thank her for her contributions to the profession and our work, and offer congratulations on retiring and the *University of Cincinnati Law Review* tribute.

In Video Focus: CPR DRS Neutrals, And Diversity

A 2024 @CPRInstituteOnline *YouTube* series is highlighting the practices, procedures, and conflict resolution views of members of CPR Dispute Resolution Service LLC's Panel of Distinguished Neutrals.

CPR Institute Vice President of Advocacy and Educational Outreach Ellen Waldman is hosting the interview videos, which debut periodically on CPR's website.

The purpose of the videos is to improve the selection rates of diverse mediators and arbitrators. The CPR Institute views increased selection as essential to enhance the accessibility and acceptance of alternative dispute resolution, and to ensure that all available talent is deployed in support of dispute management. For CPR's Diversity, Equity & Inclusion initiatives, including the Diversity Commitment, which demonstrates businesses' commitment to improving the selection of diverse neutrals, go to www.cpradr.org/diversity-equity-and-inclusion.

The website/*YouTube* interviews promote the abilities of CPR DRS panel members, and at the same time air areas of practice focus as well as concern to neutrals and advocates.

The most recent video posted as of the publication of this November issue is with Pasadena, Calif.-based attorney Reginald A. Holmes, who discusses, among other things, how his litigation experience, including in-house work, helped him establish his baseline for operating as a full-time neutral.

CPR DRS is owned by the International Institute for Conflict Prevention and Resolution, which publishes this newsletter. CPR DRS has its own website at https://drs.cpradr.org; CPR is at www.cpradr.org. The video website posts can be followed on CPR's Podcast and Videos page at www.cpradr.org/news/podcast-and-video, which includes a listing of the six videos posted so far. The Waldman-Holmes discussion can be found directly at https://bit.ly/3XU5Rdm.