Alternatives
TO THE HIGH COST OF LITIGATION
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Worldly Perspectives

Is Mediation Becoming a Core Component of Justice in England and Wales?

BY GIUSEPPE DE PALO AND MARY B. TREVOR

Mediation in England and Wales has come a long way from its peripheral status to a position where its role in the justice system is undergoing a significant transformation.

Legislative reforms, judicial interventions, and an evolving regulatory landscape are positioning mediation, traditionally seen as an alternative to litigation, as a mainstream

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Giuseppe De Palo is a mediator in JAMS Inc.'s New York office, and the president of the Dialogue Through Conflict Foundation. Mary B. Trevor is an emerita professor at Mitchell Hamline School of Law in St. Paul, Minn., and a scientific adviser to DTC.

This month's column was prepared in collaboration with Bryan Clark, who is a Professor at Newcastle University Law School, U.K. He is a leading academic in the mediation field and in its interaction with lawyers and civil justice. An experienced teacher and trainer, he is Co-Director of Newcastle's LLM in Mediation and International Commercial Dispute Resolution. He was named ADR Academic Researcher of the Year at the 2024 National Mediation Awards.

Clark is also a member of the central editorial team for the forthcoming publication *Rebooting Mediation*, in which country reports from around the world will explore the status of civil and commercial mediation. Clark conducted the England and Wales study from which the accompanying article is derived.

The *Rebooting Mediation* project, a large-scale study directed by De Palo for DTC, aims to provide policymakers with scientific, data-driven evidence to guide policy recommendations for achieving Access to Justice goal (16) of the United Nation's Sustainable Development Goals. In this column about England and Wales and in future columns, the authors will present a summary of a forthcoming country report that has resulted from the *Rebooting Mediation* project study.

The Return

The *Worldly Perspectives* column by Giuseppe De Palo and Mary Trevor returns to *Alternatives* with this article. The mission is the same as the original version, which appeared in these pages from October 2009 through January 2013: to advance understanding of how conflict resolution is practiced in countries around the globe. (The original columns are available on Lexis and Westlaw.) The authors—credits appear above—seek to advance the mission of the nonprofit Dialogue Through Conflict Foundation, which seeks broader global use of ADR techniques to address conflict, under United Nations Sustainable Goal 16 on peace, justice, and strong institutions. The column previously focused on Europe and included some nations in the Middle East and Africa; now, the authors plan to cover the world more widely. As part of the foundation's Sustainable Conflict Resolution Initiative, this material will serve as a resource for policymakers and scholars, providing empirical evidence on policies that effectively increase mediation use. By fostering global dialogue and integrating diverse perspectives, the efforts seek to strengthen institutional frameworks and promote long-term conflict prevention, aligning with international sustainability goals. The column is expected to appear monthly.

CPR News

CPR's Founder's Award Presented, Posthumously, to Michael Leathes

Last month, the International Institute for Conflict Prevention and Resolution presented its James F. Henry Award in recognition of Michael S. Leathes, an influential former board member who passed away last year.

The award is given for outstanding achievement by individuals for distinguished, sustained contributions to the conflict resolution field. Candidates for the James F. Henry Award are honored for their leadership, innovation and sustaining commitment to the profession.

Henry, who founded CPR as well as this newsletter, passed away in 2022. See "CPR News: Reflections on an ADR Life: CPR Founder James Henry's Memorial," 41 *Alternatives* 38 (March 2023).

Leathes was honored at CPR's annual awards dinner at the CPR Annual Meeting in Miami on Feb. 6.

Leathes, an expert in intellectual property law and practice, was one of the first proponents of what is now most frequently called mixed-mode ADR—combined mediation-arbitration procedures. He believed that parties should experiment with the various forms of dispute resolution.

He was a CPR board member for two years, 2004-2006, and was long active in and supportive of the New York nonprofit in his role as head of Batmark, a British American Tobacco subsidiary that managed the company's worldwide intellectual property rights.

Leathes played an essential role in growing business mediation worldwide. At CPR, he often organized and led panels at CPR's events. Leathes was instrumental in many of CPR's education and advocacy efforts.

Michael S. Leathes

For example, Leathes led CPR efforts to produce an influential video, "Resolution Through Mediation: Solving a Complex International Business Problem," which CPR co-produced with the International Trademark Association. The video, featuring Leathes and his evangelical approach to convincing businesses to use mediation, is still widely used today. It is available on *YouTube* at https://bit.ly/4hsPb5g.

Leathes was a founder and co-chair of CPR's European Advisory Board, organizing conferences and events, including CPR's European Business Mediation Congresses.

He was CPR's first International Fellow. Leathes took early retirement in 2006, but that year began one of his most profound professional initiatives for increasing settlement over litigation. He founded the International Mediation Institute in the Hague, Netherlands, to improve the confidence of mediation consumers, from individuals to international corporations, by providing resources and information about the process. The key focus was to create standards for mediators

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Alternatives

CPR

Editor:
Russ Bleemer

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Commentary

A Century of ADR: Reflecting on the Federal Arbitration Act and Charting a Path for Reform

BY RICHARD A. BALES & JILL I. GROSS

The Federal Arbitration Act (FAA), enacted by Congress in 1925, has stood for nearly a century as a cornerstone of American dispute resolution. Designed to ensure enforceability of arbitration agreements between commercial entities, it has evolved far beyond its intended original scope.

Over the past 40 years, judicial interpretations have expanded the law's application to employment, consumer, and statutory claims. While this evolution has brought notable successes, it has also revealed significant shortcomings. The 100-year mark is an opportune time to take a step back and think creatively about ways to improve a statute that has polarized disputants, especially between those of unequal bargaining power.

To commemorate the FAA's centenary, the authors organized and co-edited "The Federal Arbitration Act: Successes, Failures, and a Roadmap for Reform," published in December 2024 by Cambridge University Press. This volume of 32 chapters from 30 different contributors brings together concrete proposals from leading law professors and ADR practitioners, each offering unique insights into the statute's impact and proposing targeted reforms.

The book is organized thematically, with eight different parts, and with each chapter addressing specific aspects of the FAA in need of modernization. By curating contributions from experts with varying backgrounds and viewpoints, the book aims to chart a practical path forward for arbitration reform.

Bales is Professor of Law, Ohio Northern University, in Ada, Ohio (visiting at St. Louis University Law School, St. Louis, Mo., spring 2025). Gross is Vice Dean for Academic Affairs and Professor of Law, Elisabeth Haub School of Law, Pace University, White Plains, N.Y. Their new book, "The Federal Arbitration Act: Successes, Failures, and a Roadmap for Reform" (available at https://bit.ly/4gfCw3U), which is discussed in this article, was published in December 2024.

This article describes many of the recommendations made by the chapter authors, showcasing the collaborative and diverse perspectives that define the project. After briefly setting the stage for the passage of the FAA, the article first highlights those reform proposals that focus on the FAA's substantive section, and then summarizes those reform proposals that focus on the procedural mechanisms embedded in the statute.

A Brief History

When Congress enacted the FAA, Congress's intent was to promote arbitration as a faster, more cost-effective alternative to litigation for parties of relatively equal bargaining power. Its most substantive provision, section 2, mandates courts to enforce, as "valid, irrevocable, and enforceable," written agreements to arbitrate current or future disputes "that arise out of any maritime transaction or a contract evidencing a transaction involving commerce, … save upon such grounds as exist at law or in equity for the revocation of any contract."

The remaining FAA sections provide procedural mechanisms to facilitate the enforcement of the right created by section 2.

For decades, the statute primarily governed disputes between commercial entities of relatively equal bargaining power. Starting in the 1980s, however, the U.S. Supreme Court began expanding the FAA's reach to encompass mandatory arbitration clauses in employment and consumer contracts, often involving parties with vastly unequal bargaining power.

Consequently, companies and employers began drafting adhesive arbitration clauses that, among other conditions, required consumers and employees to waive their rights to, among other things, bring their claims as a class action, utilize the full range of discovery devices available in a civil case in court, and appeal an adverse ruling on grounds related to the merits.

While arbitration has since become a ubiquitous mechanism for resolving disputes, these waivers of judicial rights and remedies have raised significant concerns about fairness, access to justice, and transparency.

Reform Recommendations

As several of the book's chapters explain, the legislative history and political winds that led to the FAA's passage illustrate how unintended consequences and shifting alliances fueled the Act's expansion beyond its original purpose. The sheer number of suggested reforms in the book highlight how desperately this 100-year-old statute needs attention.

It needs attention both to refine the substantive right it created (to enforce agreements to arbitrate certain disputes), and to clarify the procedural mechanisms the FAA itself designed to enforce that right.

As detailed in the book, below are some of the key proposals to reform the substantive section of the FAA (mandating the enforcement of arbitration agreements) while safeguarding its original purpose to provide for streamlined dispute resolution:

- *Restricting Adhesion Arbitration Clauses.* The FAA should be amended to exclude arbitration clauses in adhesion contracts, such as those used in employment and consumer agreements. This would empower states to regulate these clauses, allowing for local experimentation and greater procedural fairness. Excluding adhesion contracts would restore balance by limiting arbitration to contexts where both parties have meaningful bargaining power. This amendment would also bring the U.S. into line with the overwhelming majority of other

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countries that ban adhesive arbitration clauses.

- *Enhancing Procedural Safeguards.* Alternatively, and borrowing from the Older Workers Benefit Protection Act, the FAA should include procedural requirements for arbitration agreements in consumer and employment contexts. Such requirements could mandate plain-language agreements, written advice to consult legal counsel, and a minimum period for consideration before acceptance.
- *Restoring the Federal-State Balance.* The Supreme Court's broad interpretation of FAA preemption of conflicting state laws has restricted states' ability to regulate arbitration. Congress should clarify that the FAA does not preempt state laws aimed at curbing unfair arbitration agreements. This change would allow states to act as laboratories for reform. Indeed, a more far-reaching solution proposed by one author would be to repeal the FAA in its entirety, returning enforcement of arbitration agreements to the states.
- *Prohibiting Class Action Waivers.* Class action waivers in arbitration agreements undermine both collective redress for small-value claims and public trust in arbitration generally. The FAA should be amended to prohibit such waivers, ensuring that arbitration does not foreclose access to justice for widespread but low-value harms.
- *Reconciling the FAA with Securities Law.* The FAA's provisions should be reconciled with federal securities laws. For example, Congress could clarify the relationship between the FAA and the U.S. Securities and Exchange Commission's authority to regulate arbitration agreements in customer-broker contracts. This would ensure that investors are not disadvantaged by mandatory arbitration clauses that conflict with the SEC's investor protection mandate.
- *Banning "Ghost" Delegation Clauses.* Current Supreme Court jurisprudence provides that courts must enforce arbitration clauses that delegate the arbitrability question to arbitrators simply if the clause incorporates by reference forum rules (some of which empower arbitrators to decide arbitrability). The FAA should be amended to ban these "ghost" delegation clauses that require arbitrators to decide threshold questions of arbitrability because the parties could not have envisioned such an outcome.
- *Eliminating the "arising out of" phrase.* Arguing for a more expansive FAA, one author argues that Congress should revise the FAA to permit enforcement of agreements to arbitrate disputes that do not arise out of the contract containing the arbitration agreement. This would require eliminating the words "arising out of" from FAA section 2, which makes predispute arbitration agreements enforceable only as to controversies "arising out of [the] contract" containing the arbitration agreement.
- *Tweaking EFASASHA.* In 2022, Congress passed the Ending Forced Arbitration of Sexual Assault and Sexual Harassment Act—the EFASASHA—which invalidated certain arbitration agreements and class or collective action waivers in the face of sexual harassment or sexual assault claims. While a welcome change to the FAA, EFASASHA also suffers from some drafting ambiguities, and should be further tweaked to eliminate those ambiguities.

100-Year Review

The anniversary exam: The Federal Arbitration Act, born in 1925, should be considered for procedural reform.

The principal concerns: Fairness, access to justice, and transparency.

The path: The authors summarize ideas from their new book, which collects FAA improvement suggestions into a roadmap for better U.S. ADR.

In addition to critiques targeting the Supreme Court's expansive interpretation of FAA section 2, most FAA provisions relate to procedural rules applicable in federal courts when a party to an arbitration invokes the FAA. Those procedural provisions, which allow parties to petition courts to compel parties to arbitrate, provide for an arbitrator selection method if the agreement is silent, empower arbitrators to issue subpoenas, and many more, also need updating to deal with arbitration in the modern world.

Thus, many reform proposals in the book aim to clarify the procedural mechanisms provided by the FAA to enforce the substantive right of section 2. These proposals, if adopted, will reduce litigation about arbitration, returning arbitration agreements to their original purpose of replacing expensive and time-consuming litigation when parties agree to do so. Below is a summary of many of these procedurally focused proposals.

- **Defining Arbitration to Eliminate Structural Bias.** Currently, the word "arbitration" is not defined in the FAA. The law should be amended to make clear that arbitration is a decision-making process involving binding adjudication by a third party and that the process provides due process to all parties, including but not limited to an impartial arbitrator. As a consequence, arbitration providers must have mechanisms in place to assure sufficient due process and impartiality, and to protect against structural bias.
- **Clarifying Federal Court Jurisdiction.** The FAA provides no independent ground for federal court jurisdiction to enforce substantive protections provided by the statute. Courts have created a variety of inconsistent jurisdictional tests. Congress should add a single test that would establish federal court jurisdiction if the subject matter of the arbitration would support federal court jurisdiction.
- **Eliminating the Jury Trial on Petitions to Compel.** The FAA currently provides for a jury trial to decide a petition to compel arbitration. Though rarely used in practice, Congress should remove that reference in the FAA to provide for a more streamlined mechanism to decide these petitions.
- **Promoting Arbitrator Diversity.** Arbitration's legitimacy hinges on the perceived

fairness of its processes. Increasing the diversity of arbitrator rosters—and encouraging parties to select diverse arbitrators—would enhance the credibility of arbitration. The FAA should incorporate mechanisms to promote diversity, such as encouraging providers to recruit diverse rosters and publishing demographic data on arbitrator selections.

- **Improving Arbitrator Disclosure and Ethics Standards.** The FAA's provisions on arbitrator impartiality should be updated to address modern realities, including social media connections. Clearer disclosure requirements and enhanced ethical standards would mitigate perceived and actual conflicts of interest, strengthening public trust in arbitration.
- **Expanding Grounds for Judicial Review.** Limited grounds for vacating arbitration awards undermine confidence in the process. The FAA should permit broader judicial review when the parties have agreed to it, allowing courts to overturn awards for clear errors of law or manifest disregard of evidence. This reform would ensure accountability without undermining arbitration's efficiency.
- **Mandating Reasoned Written Awards.** Arbitration awards should include written opinions explaining the reasoning behind decisions. Requiring this transparency would enhance accountability, improve the quality of arbitral decisions, and provide valuable guidance for future cases.
- **Adapting to Technological Advances.** The FAA should be updated to reflect the realities of online arbitration. Modernizing procedural rules to accommodate virtual hearings and electronic evidence will ensure the FAA remains relevant in the digital age.
- **Modernizing Statutory Language.** Statutes drafted one hundred years ago show their age. At the very least, the current text should be updated to be gender-neutral, to eliminate legalese, and to conform to current practices to be easily understandable.

* * *

The FAA has played a pivotal role in embedding arbitration as a favored means of dispute resolution within the U.S. legal framework. The passage of time and the growth of adhesive arbitration clauses, however, has exposed significant vulnerabilities, particularly in areas where parties to these agreements lack equal bargaining power.

As we commemorate the FAA's centenary, these proposed reforms—drawn from the collective expertise of the contributors to "The Federal Arbitration Act: Successes, Failures and a Roadmap for Reform"—offer a path for preserving arbitration's benefits while addressing its shortcomings. By modernizing the FAA, we can ensure that arbitration continues to serve as a fair, efficient, and accessible alternative to litigation for the next century.

Theory Meets Practice

What's the Matter with BATNA? It's Misleading and Doesn't Help Advance Parties' Important Interests

BY JOHN LANDE

BATNA–the best alternative to a negotiated agreement–is the most favorable possible outcome if the parties don't settle, right?

Wrong.

This is a common misconception about a commonly used term. See John Lande, "Confusing Dispute Resolution Jargon," *Indisputably.org* (Jan. 4, 2018) (available at https://bit.ly/4hc9q6o).

Roger Fisher and William Ury coined the term "BATNA" in their book, *Getting to Yes*, which is required reading in many law and business school courses and is a popular book for general audiences. There are more than 14 million hits for BATNA on Google.

This month's *Theory Meets Practice* column describes how people frequently misunderstand and misuse this concept, and it offers suggestions for better understanding and techniques. It focuses on attorneys' perspectives in mediation of substantial cases in U.S. pretrial litigation, though the same logic generally applies in unmediated negotiation.

The author, a longtime *Alternatives* contributor, presents this 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. Last 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.

BATNA in Theory

Course of Action, Not Outcome. BATNA is a course of action, not an outcome. The distinction becomes clearer when considering various possible courses of action.

We typically assume that trial is "the" alternative process. In fact, there are multiple alternative courses of action such as enlisting others to persuade or pressure the other side, using public relations, employing self-help remedies, and even dropping a lawsuit. Probably the most common alternative is settlement after the current mediation session but before trial. Parties may combine several of these alternatives.

But we generally treat the BATNA as the *result* of the alternative process, saying things like "know your BATNA." Considering that there may be multiple alternative processes, one can't reasonably decide which course of action is the "best" alternative

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without assessing potential results of all plausible actions.

Inherent Uncertainty. Part of the problem with "knowing" one's BATNA as a result is that it implies that the result is an obvious definite and fixed decision at trial. In practice, sophisticated attorneys, mediators, and parties know that this is not so. But attorneys often act with unwarranted confidence about the trial decision.

In fact, the value of an alternative course of action is anything but obvious because of the uncertainties in litigation. Research shows that attorneys often have overconfidence bias about court outcomes. See, e.g., Randall L. Kiser, Martin A. Asher & Blakeley B. McShane, "Let's Not Make a Deal: An Empirical Study of Decision Making in Unsuccessful Settlement Negotiations," 5 *Journal of Empirical Legal Studies* 551 (2008) (available at https://bit.ly/4jh1HWy).

So the notion of accurately "knowing" the value of one's BATNA is highly misleading.

Decision analysis can help attorneys estimate court outcomes, taking into account the uncertainty of the estimates. The analysis combines estimated probabilities of various contingencies–such as rulings on motions, argument effectiveness, and judgment collectability–with estimates of their consequences.

By definition, these estimates are inherently uncertain. Combining multiple estimates compounds the uncertainty. Thus, the best possible estimate is a *range of possible outcomes* rather than a single value. The wider the range, the greater the confidence overall but the less the confidence in any particular value.

Decision analysis provides systematic estimates incorporating assumptions about a limited number of contingencies. There are many factors that can affect court outcomes, many of which can't practically be incorporated in a decision analysis. See box "Factors that May Affect Court Outcomes," on the opposite page at left.

In fact, it is impossible to "know" what would happen in court *even after litigation ends*. If a case would be litigated multiple times, there would be a range of results–not the same result every time. The results generally would cluster around an average, but sometimes the results would be substantially different than the average because of the contingencies described above. So no one should be very confident about the outcome except perhaps in the simplest of cases.

Ignoring Intangible Costs of Litigation. A more fundamental problem is that the BATNA's expected value misleads parties about what to consider when deciding whether to accept a particular offer. According to *Getting to Yes*, the BATNA value is supposed to be the "tripwire" for deciding whether to accept or reject an offer. But people often consider only the expected court outcome, ignoring a wide range of factors reflecting parties' actual interests.

Of course, parties are interested in the monetary outcomes of disputes. Plaintiffs generally want to receive as much as possible and defendants want to pay as little as possible. Parties want to minimize their legal fees and other litigation expenses. By definition, monetary outcomes are quantifiable.

Parties, however, also have many intangible interests, which are not readily quantifiable but may be at least as important to them as the monetary outcomes. Intangible interests have real value, though the amount depends on parties' subjective valuations. They can assign values by considering how much less they would be willing to receive or how much more they would be willing to pay if the interests were satisfied.

Attorneys and mediators often ignore or discount parties' intangible values because courts generally provide only monetary awards and/or intangible interests are hard to quantify.

BATNA value calculations usually focus only on a single lump-sum outcome. In practice, parties are often interested in various other options such as making payments over time, developing future business arrangements, and including non-disclosure agreements. See box "Settlement Options in Addition to Lump-Sum Payments," on the opposite page at right.

Consider the following hypothetical case. Assume, for the sake of discussion, that XYZ Corp. is absolutely certain that it would recover a $100 million judgment after trial. Should it consider settlement offers less than $100 million?

Of course. For one thing, XYZ would incur additional legal expenses by continuing to litigate. Continued litigation also would impose substantial intangible costs. Its employees would have to invest uncompensated time dealing with the litigation. XYZ might incur opportunity costs because it would not pursue potentially profitable activities.

The continued litigation also might damage its relationships and reputation. Continued litigation could erode investor confidence, depress stock prices, and hinder the ability to secure financing. For instance, in an intellectual property dispute, continuing litigation could harm a company's reputation, delay product launches, and strain business relationships. These factors may outweigh the amount of a trial judgment.

These are just a few examples of the significant intangible costs that continued litigation can impose on parties. See box "Parties' Intangible Interests that Litigation May Affect" on page 42; CPR's Early Case Assessment Toolkit, www.cpradr.org/early-case-assessment; Kate Vitasek, "The Business Case for Dispute Prevention," 42 *Alternatives* 157 (Nov. 2024); John Lande, "Real Practice Systems Project Menu of Checklists for Attorneys in Mediation" (Sept. 24, 2024) University of Missouri School of Law Legal Studies Research Paper No. 2024-30 (available at https://bit.ly/3Cc00Jq).

Parties and attorneys recognize these costs as well as the risks of getting unfavorable results at trial, so plaintiffs regularly accept less than their expectations of the court outcome,

Carefully Analyze Litigation

Avoid common misunderstanding: BATNA isn't the expected court result—it's a course of action, not the value resulting from the course of action.

Don't make overconfident predictions: Attorneys often make unrealistic predictions of court outcomes.

Consider parties' intangible interests: Parties have many intangible interests that aren't included in estimates of BATNA values.

and defendants regularly pay more.

Thus, the BATNA value defined as the expected court outcome isn't really the tripwire for decisions about whether to proceed in litigation. It is only part of the bottom line that parties use in making these decisions. See John Lande, "What's a Bottom Line?" *Indisputably.org* (Aug. 26, 2020) (available at https://bit.ly/4g8pqpq). Attorneys should ask their clients about *all the elements* of the bottom line and incorporate them in their strategies.

BATNA in Practice

While practitioners frequently use the BATNA concept in practice, they rarely use the term explicitly.

Cockamamie Stories. Although *Getting to Yes* recommends using BATNAs defensively as tripwires to avoid making bad agreements, attorneys probably use it more often *offensively* in ritualized positional negotiation.

Factors that May Affect Court Outcomes

- Parties' motivations and resources
- Effectiveness of legal representation
- Parties' characteristics such as demeanor and likeability
- Case complexity
- Choice of law
- Substantive, procedural, and evidentiary legal rules
- Burden of proof
- Rulings on pretrial motions
- Discovery
- Rulings on motions during trial
- Quality, quantity, and persuasiveness of evidence
- Credibility of fact and expert witnesses
- Rulings on objections
- Public attitudes in the trial venue
- Pre-trial publicity
- Jury instructions
- Jurors' ability to understand factual and legal issues
- Judge or jury bias
- Ease of enforcing judgments
- Appellate decisions on trial judgments

Each side seeks to maximize its outcome by starting with extreme positions based on allegedly confident predictions of victory in court, assuming that every contingency is resolved in its favor.

Each side concocts a series of cockamamie stories about why its case is so great and why the other side would lose horribly if it goes to trial. The parties make a series of counteroffers trying to end up with the most favorable possible agreement. As they make a series of concessions, attorneys tell new stories that maintain the same basic fiction while creating new rationalizations in the counteroffer dance.

Everyone knows that these stories are fibs. If you gave truth serum to the attorneys, they would admit that they don't really believe their own predictions of court outcomes.

Attorneys perform this charade even when they know that there is a good chance that the case would not go to trial, recognizing that only a tiny proportion of cases actually are tried.

Attorneys "play this game" for many reasons. They believe, with some justification, that "everybody does it." It's expected. It's just "puffing." They would feel like suckers if they didn't do it. They would see themselves as bad attorneys, failing to protect their clients. They would fear losing financial rewards and professional opportunities if they don't get good results for their clients. See John Lande, "BATNAs and the Emotional Pains from 'Positional Negotiation,'" *Indisputably.org* (July 8, 2020) (available at https://bit.ly/3BZLFjl).

Overlooking a Common BATNA. Attorneys typically talk as if going to trial is the most likely alternative to reaching an agreement. In many cases, if parties don't settle at one point before trial, they will settle at a later time before trial. Thus, a more realistic analysis would consider at what point it would be most advantageous to settle.

In other words, they would analyze whether they would be better off to settle now or later, taking into account additional risks and costs of continuing to litigate.

Endgame. In many cases, after the first few rounds of counteroffers, attorneys don't even bother making up stories supposedly related to BATNA values. Instead, the parties exchange numbers devoid of any rationale other than as a tactic to maximize their partisan interests.

Settlement Options in Addition to Lump-Sum Payments

- Apology or acknowledgment of responsibility
- Installment payments, possibly with interest
- Provisions allocating recoveries or contributions between parties
- Future business transactions or relationship
- Discounts or premiums in future transactions
- In-kind goods or services
- Assistance from third parties
- Charitable contributions
- Non-disclosure agreements
- Provisions contingent on future events
- Provisions reducing tax liability
- Provisions for warranties and representations
- Provisions for limitation of liability and indemnity
- Recommendation for employment in employment cases
- Parenting plan and other agreements in family cases
- Licensing agreement in intellectual property cases
- Injunction or agreement about future behavior

Source: John Lande, "Real Practice Systems Project Menu of Checklists for Attorneys in Mediation" (Sept. 24, 2024) University of Missouri School of Law Legal Studies Research Paper No. 2024-30 (available at https://bit.ly/3Cc00Jq).

Attorneys and mediators often ignore or discount parties' intangible values because courts generally don't provide remedies for them and/or the interests are hard to quantify. However, to "close the gap" when the parties' positions are far apart and they are reluctant to make further concessions, mediators sometimes highlight the risks and intangible costs of continuing to litigate. They do so to lower parties' expectations about the net result, emphasizing how much

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they could lose, including their intangible interests, by continuing to litigate.

Changing the Game

Ideally, attorneys would candidly discuss with their counterparts the likely court results as well as both parties' risks and costs of continuing to litigate. They would reach agreement based on realistic estimates of the likely court outcome and both parties' intangible interests. They would create value for both parties by considering differences in the parties' interests.

Alas, this rarely happens in the real world.

Parties are likely to reach good agreements if they realistically discuss with their attorneys all the elements of each side's bottom line, not merely fictitious and strangely confident claims about what would happen in a trial that probably wouldn't occur.

Attorneys can improve the process by having these conversations with their clients at the earliest appropriate time in their cases and especially when preparing for mediation. The conversations would realistically identify uncertainties about plausible court outcomes and help clients value the intangible costs of continuing to litigate. See Michaela Keet, Heather Heavin, & John Lande, Litigation Interest and Risk Assessment: Help Your Clients Make Good Litigation Decisions (American Bar Association 2020).

Sometimes attorneys are reluctant to be forthright, worrying that clients would lose confidence that their attorneys would be willing and able to be strong advocates. But some clients prefer to have candid conversations early in a case so that they can have realistic expectations. This can reduce their frustrations when they end up making a series of concessions in mediation.

One of the major benefits of mediation is that attorneys can have relatively honest conversations with mediators in private sessions. Even in these conversations, however, attorneys often are reluctant to be too candid with mediators. Attorneys may fear that the mediators would use this information to persuade their clients to reduce their expectations or to subtly signal to the other side that the clients are willing to make substantial concessions.

Mediators can help parties and attorneys by focusing realistically on all of the elements of parties' bottom lines—expected court outcomes, future litigation expenses, and intangible costs—early in a case, ideally during conversations with attorneys before the first mediation session. See John Lande, "The Real Practice System Project: A Menu of Mediation Checklists," 42 *Alternatives* 53 (April 2024); John Lande, "How Can You Turn Adversarial Attorneys into Quasi-Mediators?" 43 *Alternatives* 3 (January 2025).

Attorneys can change the game of merely exchanging disingenuous offers by also focusing on the *other side's* risks and intangible costs. Through private conversations with the mediator, they can communicate those risks and costs to the other side to induce them to make concessions. By focusing on all the elements of both parties' bottom lines—not only the expected court outcomes—attorneys and mediators can help parties advance their highest priority interests.

Parties' Intangible Interests that Litigation May Affect

Individual Parties' Intangible Interests:

- Effects on party, especially if parties will have a continuing relationship
- Effects of settlement and possible court outcome on financial situation
- Stress and anxiety
- Control over process and/or outcome
- Effects on self-esteem
- Effects on physical or mental health
- Effects on children, family, and other personal relationships
- Effects on relationships at work
- Effects on reputation
- Effects of future litigation, discovery, and disclosure of information
- Interest in gaining information from other parties
- Interest in privacy
- Interest in gaining acknowledgment or apology
- Interest in public vindication of actions or principles
- Negative reactions, such as alcohol or drug abuse, violence, or intimidation
- Fear of unfavorable outcome
- Opportunity costs, e.g., diversion of time, resources, and activities
- Desire for closure--ending dispute and moving on
- How party might feel in, say, a year under various scenarios
- Possible decision regret if court outcome is worse than offer in mediation
- Possible benefit from continued disputing

Organizational Parties' Intangible Interests—in addition to applicable individuals' interests:

- Diversion of time of directors, executives, and other employees
- Potential for internal conflict
- Effects on organizational decision-making
- Effects on organizational morale
- Portrayal in mainstream and social media
- Disclosure requirements
- Effects on reputation and relationship with stakeholders such as investors, customers, suppliers, contractors, insurers, or lenders
- Effects on organizational brand
- Costs of rehabilitating negative image
- Effects on valuation of business
- Effects on ability to get financing
- Effects on potential growth, innovation, mergers, acquisitions, or joint ventures
- Effects on intellectual property rights and development
- Creation of favorable or unfavorable precedent for future disputes
- Encouragement or discouragement of future claims
- Effects on potential civil or criminal liability in other matters
- Additional overhead expenses

Source: John Lande, "Real Practice Systems Project Menu of Checklists for Attorneys in Mediation" (Sept. 24, 2024) University of Missouri School of Law Legal Studies Research Paper No. 2024-30 (available at https://bit.ly/3Cc00Jq).

Back to School on Dispute Management

Eighteen Ways to Prevent Disputes Before They Happen

BY KATE VITASEK

Contracts can be similar to buying a new pair of shoes–they are often great at first, but over time they either become as comfortable to walk in as a slipper … or cause friction that can turn into a blister.

Left unchecked, friction or misaligned interests can turn into a full-blown dispute or, worse, end up in court. While most conflicts avoid litigation, the time and cost associated with traditional lawyer-led negotiation, mediation, and arbitration can be protracted and expensive. Kate Vitasek, "The Business Case for Dispute Prevention," 42 *Alternatives* 157 (November 2024).

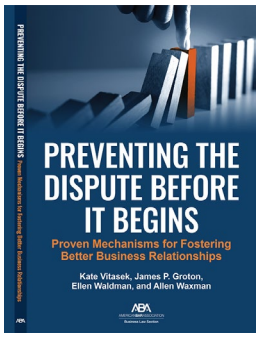
Even if the issue does not go to a formal dispute, the friction can cause lost opportunity, value leakage, and transaction costs, which is what Nobel laureate Oliver Williamson called Transaction Cost Economics.

In today's world of contracting, you should always expect contracting parties to see some friction and misalignment in their relationship. Why? In the words of Williamson: "All complex contracts will be incomplete. There will be errors, omissions, and the like." Oliver E. Williamson, "Outsourcing: Transaction Cost Economics and Supply Chain Management," 44(2) *J. of Supply Chain Mgt.* 5 (2008) (available at https://bit.ly/40mxM6N). The very nature of complex contracts means it is impossible to predict every "what if" scenario given today's global and dynamic business environment.

Kate Vitasek is the author of this monthly *Alternatives* column, *Back to School on Dispute Management*. She is a Distinguished Fellow in the Global Supply Chain Institute at the Haslam College of Business at the University of Tennessee in Knoxville, Tenn. Her university webpage can be found here. She is co-author of Preventing the Dispute Before It Happens: Proven Mechanisms for Fostering Better Business Relationships, published in December by the American Bar Association (available at https://bit.ly/42cThcS).

The good news is that companies can adopt various proven dispute prevention mechanisms to help them prevent disputes before they occur.

The even better news is that this author has teamed up with CPR Vice President for Advocacy & Educational Outreach Ellen Waldman, and dispute prevention advocates James P. Groton (a retired Eversheds Sutherland partner in Atlanta) and Allen Waxman (counsel to DLA Piper in New York, and former CPR president and chief executive officer) [CPR publishes this newsletter] on a new book published by the American Bar Association aptly titled "Preventing the Dispute Before It Happens: Proven Mechanisms for Fostering Better Business Relationships" (available at https://bit.ly/42cThcS).



In the book, we introduce a Dispute Management Continuum that includes 18 proven dispute prevention mechanisms. We then explain why, what and how each mechanism can prevent disputes. I am excited to introduce the continuum in this article.

Classifying the Mechanisms

The idea of a Dispute Management Continuum is not new. In 1991, CPR introduced the concept in the publication "Preventing and Resolving Construction Disputes." James Groton, editor, "Preventing and Resolving Construction Disputes," CPR Legal Program Construction Disputes Committee (1991).

The idea was to provide a simple way to classify a diversity of mechanisms ranging from dispute prevention to dispute resolution. Over the years the continuum has evolved. James P. Groton & Helena Haapio, "From Reaction to Proactive Action: Dispute Prevention Processes in Business Agreements," 9 IACCM EMEA Academic Symposium (2007) (available at https://bit.ly/40EYzg9); Kate Vitasek, James P. Groton & Daniel Bumblauskas, "Unpacking the Standing Neutral: A Cost Effective and Common-Sense Approach for Preventing Conflict," *UNI Scholarworks* 1 (2019) (available at https://bit.ly/4akCgiM).

In collaboration with Ellen, Jim and Allen, we set out to update the previous versions of the Dispute Management Continuum by expanding it to include new mechanisms. We also set out to create a one-stop-shop guidebook that shares the why, what and how of 18 proven dispute prevention mechanisms that can help organizations prevent disputes before they happen.

The continuum spans five categories, from the most preventive options to the most adversarial options. See Figure 1 below.

A key goal of the book is to show how shifting the Dispute Management Continuum can help organizations prevent disputes before they happen.

As shown in Figure 1, the first three categories of the Dispute Management Continuum relate to the evolving stages of the business relationship: from the pre-contract relationship development stage (entering the business relationship) to the negotiations stage (formalizing the business relationship) to managing the business relationship. It is during these three stages that the parties can most effectively deploy dispute prevention mechanisms.

The last two categories of the Dispute Management Continuum cover the two kinds of dispute resolution mechanisms: non-binding dispute resolution (which includes

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Dispute Management

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mechanisms such as assisted resolution and mediation where an outcome is not dictated to the parties) and binding dispute resolution (which includes mechanisms such as arbitration and litigation where a third party mandates the result).

Using the graphic is an easy way to visualize the prevention mechanisms used in the pre-contract, contract development and contract management stages. In contrast, the more conventional ADR and adjudication mechanisms fall into the post-contract stage.

Figure 2 opposite provides a more detailed view of the Dispute Management Continuum, which includes 33 mechanisms across the five categories. Eighteen are dispute prevention mechanisms (rather than dispute resolution mechanisms) and are the focus in the book.

The Figure 2 mechanisms discussed in the book are not a finite list. Rather, the book focuses on the 18 dispute prevention mechanisms due to their popularity and success in practice.

Moving Upstream

Let's dig into a high-level overview of each category in the Dispute Management Continuum.

Category 1: Entering the Business Relationship—Every day, companies enter into new business relationships. For some, the process starts with business leaders having strategic discussions about new opportunities.

For others, it begins when a company's procurement team sends a tender seeking competitive bids for a specific scope of work. In either case, the expected result will be the establishment of a viable business relationship that adds value to each participant.

How viable and enriching that relationship will be depends primarily on how aligned the participants are in their goals and values, cultural compatibility, and ability to function in a collaborative, flexible, and innovative fashion.

In the book, we profile three categories of dispute prevention mechanisms for use when entering a business relationship: partner assessment, business relationship model, and using a neutral deal facilitator.

Figure 1. Dispute Management Continuum

While some form of these mechanisms will find their way into a contract, others may not. Nevertheless, each of these dispute prevention mechanisms can offer significant benefits in preventing or mitigating disputes. See the corresponding list in Figure 2.

A Prevention Guidebook

The goals: Information and inspiration for preparing for inevitable conflict.

Another goal: To make conflict productive.

The ultimate goal: Moving business toward improved efficiency.

Category 2: Forming the Business Relationship—Once contracting parties have agreed to formally enter a business relationship, there are several proven dispute prevention mechanisms they can embed into their contractual relationship.

Embedding preventive mechanisms in a parties' formal contract can help the parties manage their expectations and feelings of entitlement and reduce the risk of misunderstandings. Henry Allen Blair, "Anticipating Procedural Innovation: How and When Parties Calibrate Procedure through Contract," 72 *Okla. L. Rev.* 797 (2020) (preventive mechanisms in formal contracts).

In the book, we profile how contract architecture can prevent disputes by making contracts easier to understand with good contract design and easier to execute with smart contracts. We also explore how formal relational contracts create a flexible contract framework and embed relational contract constructs to help parties stay in continual alignment when internal or external changes in the business environment require modification. We then consider how companies use risk/reward alignment to create fair and balanced contracts that motivate good performance.

Finally, we explore contractual clauses organizations can use to guide the management and escalation of problems to prevent disputes.

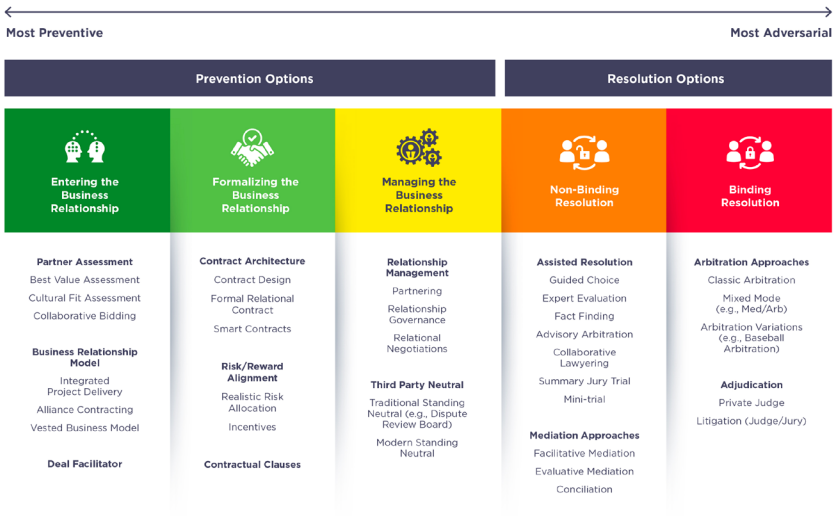
Category 3: Managing the Business Relationship—Business is dynamic, and it is easy for contracting parties to fall into misalignment. The reason is simple. Business conditions often change, financial pressures arise, and personnel come and go. These circumstances can easily create friction even among the most well-intentioned parties.

Problems—either caused by the fault of one party or simply by changing business conditions—can easily cause friction in a business relationship. Typically, problems start small and only become disputes if they are not properly addressed. That is why it is critical to consider implementing mechanisms for managing the relationship after signing a contract.

In the book, we profile five mechanisms that fall into two categories: relationship management and using third-party neutrals to help the parties solve problems before they become disputes.

Category 4: Non-Binding Resolution—Organizations unable to prevent conflicts from escalating into disputes will likely find themselves seeking more formal ways to manage their misalignment. While my fellow authors and I are fans of dispute prevention, we are also pragmatists and realize contracting parties may still need to fall back on tried-and-true

Figure 2. Detailed Dispute Management Continuum



dispute resolution mechanisms for resolving a dispute.

As authors, we advocate organizations turn first to non-binding dispute resolution mechanisms, which enable parties to have control over resolving the dispute. This typically yields a faster and more cost-effective resolution than binding resolution options.

The most common non-binding dispute resolution mechanisms fall into two categories: assisted resolution and mediation approaches.

Category 5: Binding Resolution—The last category in the Dispute Management Continuum is Binding Resolution. Binding dispute resolution uses an adjudication process. Adjudication–defined by CPR–is the resolution of the dispute by a neutral third party vested (by law or agreement) with authority to bind the disputants to the terms of an award. Common adjudicative processes are arbitration and litigation.

Because the book's focus is on dispute prevention rather than dispute resolution, as authors, we have purposely chosen not to go into detail about dispute resolution mechanisms.

Informative and Inspirational

One of the goals was to create a book that was not only informative, but also inspirational and could be used as a guidebook. We intentionally share inspirational examples of how real organizations are having real results by adopting dispute prevention mechanisms. For each mechanism, we share a case study that we hope will pique the readers' interests in piloting dispute prevention mechanisms in their own organizations.

A second goal for the book was for it to be a guidebook. For example, if you are already familiar with and using a particular dispute prevention mechanism, you can easily skip ahead and explore the mechanisms you want to learn more about.

The Bottom Line

The bottom line? It is your bottom line. Organizations that adopt dispute prevention practices can reduce the cost and time associated with disputes. But it starts with the right mindset and the adoption of dispute prevention mechanisms.

From a mindset perspective, dispute prevention means acknowledging that no relationship is perfect, and no contract can cover every eventuality. A dispute prevention mindset embraces this reality and provides mechanisms to help the parties maintain alignment as their relationship evolves.

This is especially important when working in more strategic and longer-term business relationships, such as strategic outsourcing agreements, large construction projects, franchise agreements, and critical supply contracts.

From an adoption perspective, this means being willing to learn about and try out dispute prevention mechanisms you may not be currently using.

Worldly Perspectives

(continued from front cover)
dispute resolution tool.

Mediation's evolution in England and Wales provides insight into its trajectory from a voluntary mechanism to one increasingly marked by structured mandates and institutional acceptance. See, e.g., Giuseppe De Palo & Mary Trevor, "Worldly Perspectives: Is Mediation Moving Out of the Shadows and Into the U.K. Practice Mainstream?" 30 *Alternatives* 173 (October 2012).

Early Foundations And Resistance

The journey of mediation in England and Wales began in earnest during the late 20th century, spearheaded by the Civil Procedure Rules (CPR) of 1998. Introduced after Lord Woolf's seminal review of the civil justice system, the CPR aimed to address issues of cost, complexity, and delay in litigation.

These reforms emphasized the court's duty to promote settlement, making alternative dispute resolution a key component of civil justice. Mediation was encouraged as an efficient way to resolve disputes without engaging in protracted litigation.

Despite these reforms, resistance to mediation persisted, rooted in legal traditions that favored adversarial litigation. Judges, while empowered to encourage mediation and impose cost sanctions for unreasonable refusals, avoided making mediation mandatory. This reticence was exemplified in cases like *Halsey v. Milton Keynes*, [2004] 1 WLR 3002 (available at https://bit.ly/3jy8FZw), which upheld party autonomy as a cornerstone of the legal process. The judiciary's cautious approach mirrored the

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Worldly Perspectives

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broader skepticism within the legal profession, where mediation was seen as ancillary rather than essential.

The Shift Toward Mandates

The reluctance to embrace mandatory mediation began to wane in the 2010s, as economic pressures and caseload burdens on courts underscored the need for alternative mechanisms.

The tide turned decisively with the introduction of automatic referral schemes for small claims and the landmark case of *Churchill v. Merthyr Tydfil Borough Council*, [2023] EWCA Civ 1416 (2023) (available at https://bit.ly/3A5Tmmt). In *Churchill*, the Court of Appeal recognized the judiciary's power to compel parties to mediate under certain conditions, breaking new ground for the role of mandates in civil justice.

This shift reflects an acknowledgment of mediation's value in achieving timely and cost-effective resolutions. Small claims, a significant area of litigation, have been at the forefront of these developments.

As of April 2024, parties in small claims cases are automatically referred to mediation through a free telephone service. While participation remains technically voluntary, the procedural integration of mediation marks a significant departure from earlier frameworks.

Confidentiality and Enforcement: Persistent Challenges

One of mediation's defining features is confidentiality, yet its application in England and Wales remains nuanced and sometimes contentious.

Some jurisdictions have a codified mediation privilege, whereby confidentiality is explicitly established in legislation, providing strong legal safeguards. In jurisdictions without such codification, like England and Wales, confidentiality relies on contract law and the common law principle of "without prejudice," encouraging open discussions without fear of later repercussions.

This framework, while effective in many cases, has limitations. Courts have carved out exceptions where mediation behavior is deemed unreasonable or where public policy considerations demand disclosure, as seen in cases like *Farm Assist Ltd. v. Secretary of State for Environment, Food and Rural Affairs (No. 2)*, [2009] EWHC 1102 (TCC) (available at https://bit.ly/4gvwlcn).

The enforceability of mediated settlements has evolved over time. Agreements reached through mediation can be formalized as legally binding contracts or integrated into *Tomlin Orders*, which grant them the same enforceability as court orders. The 2008 European Union Mediation Directive, which provided a framework for the recognition and enforcement of mediated agreements in cross-border disputes, is no longer applicable to the United Kingdom because of Brexit.

Because of this regulatory difference, it is now more difficult to implement mediation agreements between parties from the U.K. and the EU. To guarantee the efficacy and enforcement of the results of cross-border mediation, the U.K. must now create more robust domestic procedures.

Market-Led Regulation and The Mediators' Role

Mediation in England and Wales remains largely self-regulated. Bodies such as the Civil Mediation Council (CMC) have established accreditation standards and codes of conduct, but membership is not mandatory, unlike other some other jurisdictions.

Italy's mandatory mediation model, for example, contrasts sharply with the self-regulated approach in England and Wales. Italy introduced compulsory mediation for specific civil and commercial disputes in 2011, requiring parties to attempt mediation before proceeding to court. This system is state regulated.

Data collected for the England and Wales *Rebooting Mediation* study by Bryan Clark underscore mixed perceptions about current mediation standards. Among respondents, 40% found existing standards sufficient, while 32% believed them to be insufficient or nonexistent. This divide likely reflects the different professional backgrounds of respondents. Those in sophisticated, high-value disputes may find the current regulatory environment adequate, while others dealing with more complex or lower-value cases may feel different.

A significant portion of the data collected for the study examined judicial promotion of mediation. While 54.9% of respondents indicated courts had discretionary powers to refer cases to mediation, only 21.57% believed courts were proactive in doing so.

Similarly, 48% of respondents stated there was no mandatory mediation, while 40% acknowledged its application in limited cases. These results suggest an uneven awareness and implementation of mediation mandates across different dispute areas.

The study's data also highlighted gaps in mediation understanding among professionals. For instance, 33.33% of respondents mistakenly believed that mediation confidentiality was guaranteed without exception, contradicting established case law referenced above that permits exceptions under specific circumstances.

Furthermore, 25.49% erroneously assumed confidentiality adhered strictly to the 2008 EU Mediation Directive, despite the directive's post-Brexit abolition. These findings underscore the need for improved education and awareness about mediation's legal framework.

Turning Tide

This month's *Worldly Perspectives* jurisdictions: England and Wales.

The acceptance: Mandatory mediation is spreading, with automatic referrals in small civil cases as of a year ago.

The resistance: It's waning, and ADR is on a path toward wider U.K. use. But post-Brexit, enforcement of international mediation agreements no longer has an EU directive to rely upon for enforceability.

Judicial and Legislative Developments

Judicial prompting remains a critical driver of mediation in England and Wales. Cases such as *Dunnett v. Railtrack*, [2002] EWCA Civ. 303 (available at https://bit.ly/4hM1gSP) and *Halsey* (noted above) established cost penalties for unreasonable refusals to mediate. The 2023 *Churchill* case, however, has also marked a turning point here, granting courts the power to mandate mediation in appropriate cases.

Respondents in Bryan Clark's study reflected mixed awareness of these developments, with some reporting inconsistent application of judicial encouragement.

Recent legislative reforms also point to a broader integration of mediation into civil justice. Automatic referral schemes for small claims have been implemented, with plans to expand similar mechanisms to other areas. But the study revealed that economic incentives for mediation remain limited. While 64% of respondents reported no financial incentives, 28% noted modest measures, such as reduced court fees, that encourage mediation. Expanding these incentives could play a pivotal role in fostering mediation's adoption.

Expanding Mediation's Reach

One of the striking findings from Clark's study is the relatively low level of awareness among practitioners about the broader benefits and applicability of mediation.

While the commercial sector has embraced mediation to a significant extent, other areas, such as community and family disputes, remain underrepresented in mediation practices. This disparity is also reflected in the annual estimates of mediated cases. The study indicates that while some respondents believe the annual market size to be between 10,001 and 50,000 cases, others estimate much lower figures, pointing to inconsistencies in perception and data collection.

Another issue highlighted is the lack of uniformity in mediator training and accreditation. Although the CMC has established guidelines, there is no overarching regulatory body to enforce uniform standards across the board.

The study revealed that only 20% of respondents considered current training and accreditation standards to be strong, with a significant portion advocating for more stringent requirements. This lack of standardization not only affects the quality of mediation services but also undermines public confidence in the process.

The role of technology in mediation is another area that deserves attention. The Covid-19 pandemic accelerated the adoption of online mediation, yet regulation in this area remains largely absent. Respondents noted that while online mediation offers convenience and accessibility, it also poses challenges related to confidentiality, variations in participant technological proficiency, and the dynamics of virtual communication. Addressing these challenges will be crucial as online mediation continues to gain traction.

Employment and Public Sector Disputes

Employment disputes and public sector conflicts represent significant areas where mediation could be used more effectively. The *Rebooting Mediation* study found that while mechanisms like the early conciliation offered by the Advisory, Conciliation and Arbitration Service, or Acas (available at acas.org.uk), have been successful in resolving employment disputes, mediation awareness and use remain limited in other public sector contexts.

For example, disputes involving local authorities, healthcare providers, and educational institutions often escalate to litigation due to a lack of mediation infrastructure.

Expanding mediation's reach in these areas will require targeted initiatives, including training programs for mediators specializing in public sector disputes and awareness campaigns to educate stakeholders about the benefits of mediation. Additionally, integrating mediation clauses into public sector contracts could serve as a preventive measure, ensuring that disputes are addressed before they escalate.

Economic and Social Impacts

The economic benefits of U.K. mediation are well-documented.

According to the study data, mediation can resolve disputes in a fraction of the time and cost required for litigation. For example, a dispute worth €200,000 resolved through mediation takes an average of 87 days and costs about €9,000, compared to 333 days and €51,000 for litigation. These figures underscore the potential for significant cost savings, not only for the parties involved but also for the judicial system.

Beyond economic considerations, mediation also offers social benefits. By fostering collaborative problem-solving, mediation can help preserve relationships and promote a culture of dialogue. This is particularly important in community and family disputes, where the preservation of interpersonal relationships is often a priority. The study highlights several case examples where mediation has successfully de-escalated conflicts, leading to mutually beneficial outcomes.

The Path Forward

Mediation's journey in England and Wales is emblematic of broader shifts in dispute resolution. From its roots in voluntary practice to its emerging status as a quasi-mandatory process, mediation is reshaping how justice is delivered.

The move toward structured mandates, exemplified by the small claims scheme and judicial referrals, signals a growing recognition of mediation's potential to reduce litigation costs and court backlogs.

The study shows, however, that challenges remain. Ensuring confidentiality, standardizing mediator qualifications, and increasing public awareness are critical to mediation's sustained integration. Better education among legal professionals and litigants is needed to dispel misconceptions about mediation's processes and benefits. Expanding regulatory frameworks and economic incentives could further enhance mediation's role within the justice system.

As mediation evolves, it holds the promise of transforming dispute resolution in England and Wales. The question is no longer whether mediation will play a central role but how it can most effectively adapt to the demands of a modern justice system while preserving its core principles of flexibility and neutrality.

ADR Theory

Collaborating Instead of Canceling: Seven 'Mind Shifts' for Dispute Resolvers

BY DAN BERSTEIN

We live in a society where admitting a mistake can be very scary, for anyone, due to cancel culture.

People are often literally afraid they could lose their jobs, their reputations, and even their family relationships because of the time they misspoke or just simply made an error. Or perhaps they are espousing a viewpoint or following a practice that someone they trusted taught them yesterday but now is known to be harmful today.

Of course, big changes are inevitable. Even a document as robust as the U.S. Constitution had to be amended to provide for something as self-evident as equal rights based on sex or race. Through hindsight, we take for granted how lost people were not to realize it was wrong to ever maintain these prejudiced disparities. Yet day-to-day, when faced with similar errors, it can be hard to see past the constraints of the present landscape, acknowledge the errors of the past history, and take steps in the right direction for the future.

Professionals across every discipline are rightfully scared of cancel culture coming for them, so what does that mean about collaborating through problems today?

This author's Mental Health Safe Project (www.mhsafe.org) has spent the past few years working with leading dispute resolution organizations to convince them to update, disclaim, remove, or supplement their guidance material that inadvertently discriminates against people with mental illnesses by advocating that folks be screened out, asked inappropriate questions, or otherwise treated disparately due to their known or suspected mental impairments. Because MH Safe was founded by a mediator, the goal has always been to emphasize collaboration, but sometimes that has not been possible due to negative or avoidant reactions that seem potentially related to fears of cancel culture consequences.

This article focuses on shifting away from these fraught dynamics. It is the third installment in a series published in *Alternatives*, helping dispute resolution professionals vet guidance and work collaboratively to address problems that have already been published. See Dan Berstein, "Mistakes? Tools for Publishers and CLE Providers To Prevent Discriminatory Dispute Resolution Guidance," 42 *Alternatives* 59 (April 2024), and "Five Strategies Dispute Resolvers Can Use to Vet Professional Guidance and Stop Misconduct," at 40 *Alternatives* 177 (December 2022).

This piece explores ways to orient our conversations toward more collaboration by making sure they are framed as long-term, public, community-wide, simple, celebratory, inclusive, and principled. These seven "mind shifts" can help reduce "identity quakes" as discussed in Douglas Stone, Bruce Patton, & Sheila Heen, Difficult Conversations: How to Discuss What Matters Most (Penguin Books; Revised edition Aug. 22, 2023), and Leonard L. Riskin, Managing Conflict Mindfully: Don't Believe Everything You Think (West Academic Publishing April 10, 2023).

For a separate review of a personal journey through navigating these identity quakes, the author has examined how to use an internal family systems approach to balance the avoidance, collaboration, and advocacy parts in conflicts: Dan Berstein, "The Advocacy, Avoidance & Collaboration Parts in Conflict: Applying Riskin's Mindfulness Tactics to Mental Health Advocacy Conflicts," *Mediate.com* (April 5, 2024) (available at https://bit.ly/4fIqxMp).

By contrast, this article focuses on professional journeys. We can make working together more palatable—without people feeling scared of having conversations about stopping discrimination. Below is a discussion of each of the seven mindshifts to do just that. These shifts are also summarized in a checklist worksheet, accessible at https://bit.ly/MindshiftsChecklist.

Shift 1: From Short-Term to Long-Term

Disseminators of illegal or inappropriate guidance may believe that they can delay or avoid addressing this issue because they are looking at a short-term time horizon. Moving the conversation to a long-term outlook can potentially help the disseminator think about making changes that are more likely to occur as time goes on because more complaints may emerge as social consciousness evolves.

Four tips for thinking long-term:

- Link your message to antecedent events that show this outreach is part of a longer history on this issue.
- Orient the listener to understand that this outreach is part of a future-oriented, continuing effort that will persist beyond this one item.
- Ground the conversation in awareness of social trends that show a continuing process that will not be stopping (and may be growing).
- Create a structure that maps some next steps and deadlines so the person understands the long-term nature of their specific item.

The author, based in the New York City area, is a mediator and trainer who helps organizations address challenging behaviors and accessibility concerns without accidentally becoming discriminatory toward people with mental illness. He leads MH Mediate's Mental Health Safe Project at www.mhsafe.org.

Shift 2: From Private to Public

People who are defensive to changes may remain more defensive or avoidant of those changes when they are having private discussions about these problems. The sooner the outlook shifts to contemplating a public awareness of the problem, the better chance of their perceiving it is important and necessary to address the issue.

Four tips for thinking public:

- Share some recognition of past publicized events that are related (such as how MH Safe shares publications of changes to other types of guidance).
- Ground the work you are doing with a potential public audience, such as sharing that you are working on writing an article or case study about this.
- Invite them to consider what public narrative they would like to see, such as by offering to take their feedback in the presentation in the public narrative.
- Reach out to related third parties for help so that the conversation feels like it is rippling to others and not siloed in the confines of this one interaction.

Shift 3: From Individual to Community

When one person makes a complaint, they are likely representative of a larger problem affecting many more people. Making a complaint takes some level of bravery, time, and energy, as well as a willingness to make oneself vulnerable and potentially persist through obstacles. It is easy for someone receiving a complaint to perceive it as an individual issue rather than appreciate that it affects a larger community of people. Raising that community focus can help with the complaint being taken more seriously.

Four Tips for Thinking Community:

- Research different stakeholders from the community that may be affected by this problem.
- Quantify or demonstrate the impact on the community.
- Run an education campaign to the affected community.
- Create an empowerment group or support group to include voices from the community.

Shift 4: From Difficult to Simple

Organizations are often not prepared to adjust, especially for problems they have not considered. They may hesitate to engage because they see the entire endeavor as something difficult, so shifting their perspective to see the next steps as simple may make them more likely to collaborate.

Moving the Needle

The subject: Working together.

The novel advice: Seven principles to shift mindsets to collaboration, each with four practical commonsense ways to change behaviors—your behavior.

The goal: The author, a mental health professional, says that working together can be made 'more palatable—without people feeling scared of having conversations about stopping discrimination.'

Four tips for thinking simple:

- Show empathy for the reality that your first message is likely the first they have learned about an issue and there may be a learning curve for them.
- Identify the barriers to the person making changes (time, money, institutional barriers, etc.).
- Create resources to help them overcome or transcend those barriers (such as addendum campaigns if they cannot stop disseminating the harmful content).
- Share success stories from other organizations as benchmarks or role models to make the change seem attainable.

Shift 5: From Shameful to Celebratory

Making changes to publications or policies is something people and organizations are often avoidant of doing because they think of it as taboo or shameful to make mistakes and to publicly correct them. But the reality is that adjusting is a positive act that should happen more regularly, and so it is important to find ways to shift from treating it as a shameful event and reframe it as something praiseworthy that all publishers and policymakers should aspire toward.

Four tips for thinking celebratory:

- Share past stories of successful collaborations and celebrations so they appreciate that this is your goal.
- Explain ways you would like to celebrate them as an anti-stigma leader.
- Provide choices so they feel empowered about how they are portrayed.
- Reflect on ways you are genuinely grateful for their time, energy, and consideration even if it is not 100% of what you wanted.

Shift 6: From Exclusive to Inclusive

One way people often resist making changes is by framing the complainant as aberrant. It is unusual, after all, that someone will complain about a problem because it takes time, energy, and an ability to endure the awkward or even contentious reactions that emerge from conflicts. Rather than appreciate the substance behind a complaint, an organization may write off complainants as "litigious," "difficult," or "abnormal." They may even use mental illness stereotypes and slurs to denigrate them.

Rather than exclude complainants, who may not be at their best in the first place because they have often endured traumas, it can be helpful for organizations to shift toward an inclusive mindset that is accessible to people who manifest as hurt, upset, or just different.

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ADR Theory

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One way complainants might encourage this shift is by disclosing their communication differences and explicitly asking for inclusion, such as by making an accessibility request.

Four tips for thinking inclusively:

- Find ways to share one's needs, differences, and vulnerabilities instead of trying to mask them. One way is making an Americans with Disabilities Act request for a disability-related reasonable accommodation or a more general accessibility request.
- Provide references to practices such as trauma-informed, bias-resistant, and accessible practices in order to remind organizations why it is important to include unusual-seeming people.
- Explain any wariness of being shunned due to past experiences where people used tactics suggesting less communication with aberrant-seeming marginalized groups—sharing why you are nervous could prime the organization to respond differently.
- Acknowledge ways that one's communication differences may be unusual, uncomfortable, or burdensome for the recipient and thank them for working with you.

Shift 7: From Political to Principled

Achieving change is not a straightforward or linear matter of right and wrong. There are people that have influence, sway, and control over what happens. Change occurs when the relationships align, and when the powerful privileged people get beyond those relational politics to try something new, outside their usual status quo. Shifting the conversation from a focus on those political barriers and onto people following their principles can make a big difference.

Four tips for thinking principled:

- Notice when decisions are being made due to personal relationships, deference to professional reputations, or institutional norms.
- Show empathy and support to people who feel stuck having to yield to these kinds of political or authority relationships.
- Find a way to suggest the change that matches the preferences or priorities of influential people (similar to waging your own political campaign).
- Create resources or talking points that emphasize the core principles and do not mention any of the relationships involved.

* * *

To support collaboration, it can be helpful for dispute resolvers to frame a conversation as a long-term, public, community-wide, simple, celebratory, inclusive, and principled endeavor. These tips may make it easier to collaborate, but it is still possible that people will interpret any outreach as an attempt to cancel them.

In *Getting Past No*, William Ury writes about distinguishing between a threat and a warning as a way to prevent power displays from impeding collaborative dispute resolution processes.

Understanding the great fears people have of being canceled, it is important to shift the tone away from threats and even from warnings—and try as hard as possible to present any pitch as an offer to help them make improvements and help them prevent problems that are inadvertently hurting people every day.

Recently, MH Safe received feedback from one organization that the fact that there was a one-week deadline to respond seemed hostile, aggressive, and threatening. This led to a conversation where MH Safe explained it was not giving a time pressure deadline from the standpoint of embarrassing or rushing the organization, but rather MH Safe acts quickly because, every day, many people living privately with mental health problems are being impacted by the inadvertently discriminatory guidance.

The timeline was not about causing the organization pain—that was a misunderstanding. Really, it was about helping people with mental health problems as soon as possible. This clarifying conversation led to MH Safe updating its outreach messages and website to include this language. That is an example of the importance of how we frame things to shift people's mindsets and encourage them to think more collaboratively instead of interpreting any outreach about problems as hostile threats.

The quest for collaboration remains a work in progress. The Mental Health Safe Project continues improving its outreach so the recipient feels less threatened by the urgent need to make a change and feels more open to receiving an offer of help.

As dispute resolution professionals, we can all work together, across any dispute, to shift ourselves away from feeling threatened, defensive, and protective and toward becoming more open to working together so we can extend offers to make changes together. The more we focus on these seven shifts, the better chance we have to collaborate through all kinds of conflicts, be they divorces, political disputes, or discrimination allegations.

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and include detailed background information on neutrals' experience for potential ADR consumers.

IMI has held conferences and contributed thought leadership to ADR-focused institutions, and the legal profession, worldwide. Its website and current activities can be found at https://imimediation.org.

CPR Senior Vice President Helena Tavares Erickson, who coordinates the CPR Annual Awards, presented the award. She told the awards dinner audience that Leathes is best known for founding IMI and helping to organize the Global Pound Conference, a series of IMI-sponsored ADR conferences held in 28 cities world-wide in 2016-2017 (see https://imimediation.org/research/gpc/).

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Erickson, who had worked with Leathes on various CPR projects, introduced a video from his three children in which they accepted the award and thanked CPR for honoring their father and his work.

Leathes' son, Greg, said on the video, "Dad believed at his very core, and from some incredibly formative experiences, that righting wrongs by talking and working together was fundamental. That Dad would channel himself so enthusiastically, so energetically and so inspirationally in the field of dispute resolution is to us a coming together of all the parts of the human being that he was—it was, for want of a better word, natural."

Daughter Femke cited an online campaign, conducted in part on the IMI website, that culminated in the posthumous James F. Henry Award. "It means so much to us not only because of what it represents," she said, "but also because it highlights the lasting impact that Dad had on the field and on the lives of so many people around the world.

For more on the award campaign and a link to a petition backing Leathes, see https://bit.ly/4jMb54U.

Leathes died at 76 last August. A memorial service will be held on March 14 at the Divinity School's BodleIan Library in Oxford, England. A memorial website, which includes information on attending, is available at https://michaelleathesmemorial.co.uk.

A March Launch for CPR's Seattle Chapter

There is still time for a last-minute registration for the launch event of CPR's new Seattle chapter.

The March 4 meeting will focus on early dispute prevention and the role of outside counsel in assisting their clients in heading off conflicts.

The Seattle conflict resolution community is invited to join in the opening of the first CPR Institute chapter to serve the Pacific Northwest. Registration is still open at www.cpradr.org/events/general-counsel-early-dispute-resolution.

The group will convene in-house and outside counsel, and others interested in preventing and resolving business and employment disputes efficiently and effectively, to share best practices and new ADR and early dispute resolution practices, techniques, and developments, particularly those unique to the region's businesses.

The kickoff program will feature a substantive fireside chat on general counsels' view of early dispute prevention and resolution mechanisms, as well as the roles outside counsel can and/or should play in the current environment.

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The scheduled speakers include CPR Institute Board Chair Laura Robertson, who is Vice President and Deputy General Counsel at ConocoPhillips Co.; Nancy Dowling, General Secretary, Danone North America and a CPR board member; Cynthia Randall, Vice President and Deputy General Counsel—Litigation, Microsoft Inc., and co-chair of CPR's Council, and Michael Paisner, who is a Partner in Perkins Coie.

CPR's sponsors for the event include HKA and host K&L Gates.

Your New First Friday Event: Corporate Counsel Connection

CPR's new Corporate Counsel Connection meets again this month, after kicking off at the February CPR Annual Meeting in Miami.

The Corporate Counsel Connection is a regularly recurring gathering online exclusively for in-house counsel at CPR Institute member companies, as well as individual corporate counsel members. The meeting connects members with other in-house counsel for idea exchange and networking.

The idea is to discuss problems and challenges unique to the in-house counsel role and learn from peers who have navigated similar situations. The monthly virtual meetings will follow Chatham House Rules and only in-house counsel members will be admitted.

The second Corporate Counsel Connection meeting—after the Feb. 5 in-person Miami kickoff—will be on Friday, March 7, with the expectation of continuing the events on the first Friday of each month. The meetings will be held at noon, Eastern, via Zoom.

Advance registration is required. To register for the March event, go here: www.cpradr.org/events/corporate-counsel-connection-march-2024. Check CPR's events webpage for future events here: www.cpradr.org/events, or register for CPR's Datebook email here: https://www.cpradr.org/subscription-center. The next Corporate Counsel Connection meeting will be Friday, April 4 (more information at https://bit.ly/3XeAGtN).

CPR corporate members are encouraged to send topics in advance. The meetings will be led by in-house counsel member facilitators.

To submit topics or any questions about the Corporate Counsel Connection, email CPR Director of Membership Elizabeth (Lizzi) Merrill at emerrill@cpradr.org. To receive consideration for a one-year term as a facilitator, email Merrill.