Alternatives
TO THE HIGH COST OF LITIGATION
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Mediation Techniques

A Commercial Dispute, Transformed

BY DAN SIMON

In a commercial dispute, a mediator might assume that the quality of the interaction between opposing sides is beside the point. We might think that the relationship is fundamentally adversarial, that it will not change, and that the best outcome of mediation will be a settlement that both sides are unhappy with.

Even problem-solving or facilitative mediators generally don't expect the parties to feel better about the situation other than the relief that might come from ending litigation. Even though a win-win solution may benefit both sides, we may predict that the mutual sense of having been wronged is unlikely to shift.

I've found that, on the contrary, the nature of the interaction is nearly always at the core of the conflict, that incremental changes in it can be very important to parties, and that such changes can be the key to finding resolution.

There's also another aspect of the interaction that we might assume is beyond our influence—the interaction between a party and their lawyer. The lawyers are rarely on the same page as their clients (and if the lawyers do indeed add value, it must be because they have a different perspective to add).

The transformative approach to mediation often causes the interactional dynamics, both between sides, and between parties and their own lawyers, to improve. Here's the story of one such mediation I conducted.

The author practices and teaches transformative mediation in St. Paul, Minn., Southern California, and online. More information about him is available at http://transformativemediation.com. The book he wrote with Tara West (who practices and teaches in Asheville, N.C., and online), "Self-Determination in Mediation: The Art and Science of Mirrors and Lights" (Rowman 2022), from which this article is adapted, is available at https://amzn.to/4fMIgT4.

Sam, a lumber supplier, represented by Sarah, filed suit against Beau, represented by Bradley, who owned a chain of lumber retail stores, for an unpaid $32,000 bill. Beau counterclaimed for $450,000 in damages he said one of his stores suffered when he received and then distributed bad wood from Sam.

In two additional separate actions, Beau had also filed suit against Sam for damages due to the bad wood that two of his other stores bought from Sam. A judge dismissed Beau's counterclaim due to Bradley's failure to meet a filing deadline. The two other suits were still pending when the mediation was scheduled.

Separate Conversations

As soon as I was hired to mediate this case, I suggested to attorneys Bradley and Sarah that I start by having separate telephone conversations with each side, which would include the lawyer and their client. (When lawyers are not involved, I almost always speak with each client at least once before the joint session—first to ensure they are comfortable working with me and then to help them prepare for the joint session if they like.) Both lawyers told me that their clients were not available for these calls, but they would be present at the mediation.

In a perfect world I would talk to the parties

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CPR

CPR News

Verizon and its GC, Vandana Venkatesh, Are the 2025 CPR CLA Recipients

Just after Memorial Day, the International Institute for Conflict Prevention and Resolution presented its 2025 Corporate Leadership Award to Verizon and its general counsel, Vandana Venkatesh.

The May 29 dinner awards were presented at Guastavino's in New York City.

The evening hosts were CPR board member and co-chair of the 2025 CPR Dinner Committee, Bruce Byrd, who is Executive Vice President and General Counsel of Santa Clara, Calif.-based cybersecurity company Palo Alto Networks, and who acted as master of ceremonies, and CPR President and Chief Executive Officer Serena Lee.

In introducing the award, they said Verizon and Venkatesh are emblematic of a determined corporate commitment to improving conflict resolution and moving to fair, efficient, and cost-effective case management, from situations of deep party division and wasteful litigation.

In turn, Verizon officials including Venkatesh reported they had been guided by CPR's creativity and guidance in establishing conflict resolution processes and dispute prevention methods. The Verizon work was one of the first highly sophisticated internal corporate dispute resolution programs that was publicly revealed.

"Our approach to dispute resolution mirrors the ethos that CPR has, which is thoughtful, creative, and ultimately solution-oriented," Venkatesh told the awards dinner audience. She said Verizon's customer service philosophies align with CPR's motto, "Less Conflict, More Purpose."

Vandana Venkatesh

The full list of evening sponsors, as well as the CPR 2025 Dinner Committee members, is available at www.cpradr.org/events/cpr-2025-corporate-leadership-award-dinner.

In his opening remarks, Bruce Byrd said, "We honor innovation in the area of conflict resolution," noting that the Verizon team personifies that work. "Has there ever been a time in our collective working lives where innovation and creativity and openness in this area is more important?" he asked.

Byrd—whose CPR 2025 Dinner Committee co-chair was Stephen Younger, senior counsel in the New York office of Withers—thanked attendees for supporting CPR's think-tank work. He praised Verizon attorneys' problem-solving skills, noting he had worked closely with them earlier in his career. "It's a proud moment for us to celebrate their leadership," he said, which "is in line with CPR's mission to promote effective and responsible dispute resolution across industries."

CPR CEO Serena Lee discussed the New York nonprofit's mission and initiatives [which includes publishing this newsletter], as well as

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Alternatives

CPR

Editor:
Russ Bleemer

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Theory Meets Practice

When AI Comes to the Table: How Tech Tools Will Change ADR

BY JOHN LANDE

Dispute resolution is entering a new era shaped by artificial intelligence. AI tools have already shown up in court systems, law offices, and training programs. They are likely to expand fast and reshape how we work.

Practitioners will soon face a growing array of AI tools designed to support negotiation, mediation, arbitration, and other processes. These tools will vary in function, purpose, audience, and values. They will:

- Serve various populations of parties, practitioners, administrators, and educators.
- Operate in courts, communities, companies, and cross-border settings.
- Reflect differing practice philosophies.

These tools will shape how people prepare, communicate, and decide. They will reflect the values of their designers and users.

As described below, at least seven types of AI tools are emerging to help resolve disputes, build systems, and train the next generation of practitioners.

Practitioners who use AI effectively will thrive. Those who ignore it may fall behind. Indeed, attorneys may soon be ethically required to use it. ABA Formal Opinion 512 states:

> As GAI [general artificial intelligence] tools continue to develop and become more widely available, *it is conceivable that lawyers will eventually have to use them to competently complete certain tasks for clients.* But even in the absence of an expectation for lawyers to use GAI tools as a matter of course, lawyers should become aware of the GAI tools relevant to their work so that they can make an informed decision, as a matter of professional judgment, whether to avail themselves of these tools or to conduct their work by other means. (Footnotes omitted; emphasis added.)

The Future Is Here

AI is no longer just science fiction. Attorneys already use it to manage cases, draft documents, and predict case outcomes.

Online dispute resolution platforms now use AI to assist with small claims, consumer disputes, and other high-volume cases. They use structured forms, document management, and guided interviews to help parties resolve their disputes. See, e.g., Kaylee Vampola, "The Evolving Role of AI in Arbitration: How Institutions Are Shaping Policy," 43 *Alternatives* 88 (June 2025) (available on Westlaw).

Legal analytics tools crunch large datasets to estimate outcomes based on case type, judge, and jurisdiction. Most of these tools support litigation strategy, but similar tools are emerging for negotiation, mediation, and arbitration.

As the technology advances, expect a new wave of AI tools. Current tools generally are designed for dispute resolution practitioners. In the future, tools will be designed specifically to help disputants. They may help users identify interests, assess risks, plan strategies, evaluate proposals, and craft arguments. Some will guide self-represented parties or students learning dispute resolution.

Seven Types of Tools

Developers are likely to create at least seven categories of AI tools for dispute resolution.

They will likely span the full range of dispute resolution, from prevention through resolution. Some tools already exist. Others will emerge as needs and technologies evolve. We should help users choose and use tools that fit their goals.

Dispute Prevention Tools. Some tools may try to prevent conflict from escalating into formal disputes by monitoring communication and spotting early signs of disagreement. For example, they may be built into HR, compliance, or contracting platforms to manage workplace and business relationships.

Preparation Tools for Practitioners. These tools help mediators, arbitrators, attorneys, and other professionals prepare for litigation or other dispute resolution processes. They may include checklists, prompts, or case-specific frameworks that support careful preparation without dictating choices. See, e.g., 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); John Lande, "Part 1: The Real Practice Systems Project: A Menu of Mediation Checklists," 42 *Alternatives* 53 (April 2024), and John Lande, "Part 2: Practitioners: Why Real Practice System Checklists Are So Useful," 42 *Alternatives* 80 (May 2024) [both *Alternatives* articles are available on *Westlaw*].

Dispute Resolution Tools. Some tools may function as mediators or arbitrators to help resolve cases. They might help parties reach agreements or issue binding decisions. They raise important questions about fairness, trust, and human oversight in AI-guided outcomes.

Client-Facing Tools. Some tools are designed for parties, especially those who are self-represented. They may help with analysis, planning, and strategy development, while offering clear guidance without oversimplification.

Case Management and Analytics Platforms. Comprehensive platforms combine scheduling, messaging, document exchange, and analytics. These systems appeal to dispute

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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. The author thanks, "with the usual disclaimers," Noam Ebner for comments on an earlier draft.

Theory Meets Practice

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resolution practitioners and organizations managing large caseloads.

Education and Training Tools. Simulation tools teach negotiation, risk assessment, and process design. They help students and trainees explore strategies in various dispute resolution processes. Their value depends on how well they reflect the messiness of real-world practice.

Platform-Integrated Tools. Some AI systems are built into court portals, insurance platforms, or corporate claim systems. These may offer real-time recommendations or resolutions.

Bias Is Inevitable

No AI tool is neutral. Dispute resolution tools reflect different assumptions about the nature of disputes, what people need, and what counts as success.

The word "bias" usually carries a negative connotation. In dispute resolution, the term is especially sensitive because neutrals are required to avoid favoritism.

Biases can also reflect values, preferences, or habits, which are not necessarily bad. They help us simplify decisions, act efficiently, and stay true to our values. Without them, we couldn't negotiate or even decide where to eat lunch.

Some biases are admirable, including preferences for fairness, generosity, and empathy. Various dispute resolution experts are biased in favor of party self-determination, constructive problem-solving, efficient resolution of disputes, and many other values.

Bias is inevitable both in humans and in bots. Some biases help. Others hurt. Many are neutral. Some assumptions are easy to spot. Others hide in the code or defaults.

Shaping Outcomes

AI tools inevitably embed assumptions about what constitutes a good process or outcome. For example, various tools may:

- Guide users toward particular ways of framing issues.
- Emphasize mutual gains and/or partisan advantage.
- Focus on court outcomes and/or parties' intangible goals.
- Set early resolution as the default.
- Assume lengthy adversarial battles.
- Reinforce existing inequalities.

Well-designed tools should enhance not replace human judgment. They should disclose their frameworks, explain their functions, and invite users to think critically. Poorly designed tools hide their biases and may present their outputs as neutral or authoritative.

AI's Rapid ADR Spread

Expect a Surge: Get ready for an expanding array of artificial intelligence tools to support negotiation, mediation, arbitration, and other dispute resolution processes.

Learn What's Built In: Understanding these tools' values and assumptions is essential for ethical and effective use.

Shape the Future: Dispute resolution professionals can help develop AI tools grounded in practical wisdom and shared values.

The impact of AI tools depends not just on how they're built, but also on how they're used. To avoid harm, users must learn to deploy these tools with care.

Reflect Best Values

Developers will face both market and ethical pressures to disclose the assumptions, values, and priorities embedded in their tools. As developers compete for users, clear disclosures will be important because users will want to know what they're getting.

Disclosure also is a core ethical principle. Users can't see how these tools "think," and they need clear information about the assumptions and values built into their designs.

Dispute resolution professionals can help shape tools to reflect values about what constitutes a good process or outcome. Scholars, practitioners, and technologists can collaborate on tools grounded in sound theory and real-world practice. Alyson Carrel, "Legal Intelligence Through Artificial Intelligence Requires Emotional Intelligence: A New Competency Model for the 21st Century Legal Professional," 35 *Ga. St. U. L. Rev.* 1153 (2019) (available at https://bit.ly/3YW0w6v).

The marketplace will reflect different dispute resolution theories and procedures. For example, some tools may promote the use of joint opening sessions, prioritize direct communication, or suggest impasse-breaking techniques in high-stakes cases. Still others might emphasize storytelling, trauma-informed approaches, or settlement templates in routine cases. Some may prioritize various attributes such as speed, predictive accuracy, and resolution.

Some tools may grow out of publications and practice materials from individual authors. Others may come from institutions, professional groups, or tech companies. Some may be open source. Others will be commercial products.

Gary Doernhoefer, founder of software company ADR Notable, proposed a general-purpose tool based on contributions from various theorists and practitioners. John Lande, "A Proposal for the Joint Development of Generative AI for the Dispute Resolution Profession," *Indisputably.org* (April 13, 2023) (available at https://bit.ly/4mpfXxZ) (posting Doernhoefer proposal).

There is likely to be a market for technical experts who can turn professional content into workable tools. Many experts have produced valuable materials but need technical assistance to translate those ideas into user-friendly AI systems that comply with technical, legal, and ethical requirements.

A Transparent Tool

The Real Practice Systems Negotiation and Mediation Coach—RPS Coach—is an example of a tool based on explicit values to help a wide range of users make process choices. These include mediators, attorneys, parties, program managers, educators, and students. John Lande, "A Practical Guide for Using the RPS Negotiation and Mediation Coach" (March 31, 2025) University of Missouri School of Law Legal Studies Research Paper No. 2025-15 (available at https://bit.ly/3H4tRFE).

I developed RPS Coach to help parties and practitioners navigate disputes more effectively. It draws on my publications and reflects my

values. It illustrates one way to integrate theory, practice, and disclosure into an AI tool. John Lande, "RPS Coach is Biased – And Proud of It" (April 11, 2025) University of Missouri School of Law Legal Studies Research Paper No. 2025-17 (available at https://bit.ly/3GZ6SvU).

RPS Coach doesn't promote any one method, theory, or strategy. Instead, it helps users make informed choices that reflect their own values, goals, and constraints. That includes analyzing interests, estimating the value of alternatives, and exploring strategy options.

Some parties prefer positional negotiation. Others want interest-and-options discussions. Some seek mediator analysis. Others don't. RPS Coach doesn't push users in any particular direction.

RPS Coach is grounded in practice systems thinking. It treats negotiation and mediation as part of broader patterns of values, routines, and habits. Rather than offering piecemeal tips, it helps practitioners build systems emphasizing strategy over tactics and judgment over scripts.

RPS Coach has two parts: a curated knowledge base and a set of operational instructions. Together, they reflect the theory, practice, and values that shape its tone, content, and priorities. Its knowledge base includes:

- Checklists for mediators and attorneys.
- Guides for litigation interest and risk assessment.
- Articles on good decision-making by parties and attorneys.
- Resources on negotiation, mediation, preparation, and early dispute resolution.
- Tools for court-connected ADR.
- Publications about legal education.
- An annotated bibliography.
- Critiques of common theories and terminology, with suggested alternatives.

RPS Coach has specific instructions (which it usually follows), including to:

- Explain what it can and can't do.
- Reflect relevant ethical standards.
- Use language that is clear to both laypeople and practitioners.
- Tailor advice to different types of users.
- Encourage careful process design.
- Support perspective-taking.
- Help users explore both tangible and intangible interests.
- Promote realistic, value-based decision-making.
- Encourage reflection about handling disputes.

The RPS Coach can be found at https://bit.ly/4dseClZ. RPS Coach works with both free and paid ChatGPT subscriptions.

* * *

The next wave of dispute resolution AI will be shaped by theorists, designers, practitioners, and user communities. Oversight and accountability will be essential as AI becomes more integrated into courts, legal education, and public systems. Independent evaluations should assess what these tools do, whom they serve, and whom they leave out.

Ideally, developers will use dispute system design principles and make explicit decisions about the values their tools promote. These tools should support good decision-making, generate results consistent with user goals, streamline dispute processes, and be easy to use.

Designers should carefully examine default assumptions. Tools should expand access, especially for self-represented parties, individuals with limited digital skills, and underserved communities.

This is not only a call for better technology. It's a call for ethical imagination. For AI to help improve dispute resolution, we must build tools grounded in wisdom, not just intelligence.

Dispute resolution is, at heart, a human craft. AI can help if we are intentional and clear about the values we build into our tools.

Back to School on Dispute Management

Using 'Modern' Standing Neutrals Keeps Parties' Interests Aligned

BY KATE VITASEK

In last month's column, I introduced the concept of a Standing Neutral and shared how a *Traditional Standing Neutral* works, profiling the success of how standing neutrals were used in the 2016 Rio Olympics. Kate Vitasek, "Traditional Standing Neutrals: How Contracting Parties Can Avoid Conflicts with Early Help and Involvement," 43 *Alternatives* 87 (June 2025) (available on Westlaw).

Traditional standing neutrals are typically used in the construction industry in the form of dispute review boards. They also are typically used to help contracting parties work through problems and conflicts before they become a dispute.

But over the years, the concept of using neutrals has evolved and today there is more interest than ever in using a standing neutral in more proactive and preventive ways. This month's column builds on the concept of using a standing neutral and goes into detail on *Modern Standing Neutrals.*

Modern standing neutrals provide a wide range of support services that help keep contracting party's interests aligned well before problems or misalignments occur.

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Columnist 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 at https://haslam.utk.edu/people/profile/kate-vitasek/. 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).

Dispute Management

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Independence and neutrality are key reasons why organizations turn to third-party neutrals for resolving disputes. But these same reasons are exactly why more business relationships are choosing to engage an independent third party to help them in various facets of their relationship to stay aligned post-contract signing.

To be effective, contracting parties assign the neutral at the beginning of their relationship, and the neutral is embedded into the party's continuing governance structure. Contracting parties determine the roles and nature of how they will use the neutral and split the cost between the parties.

How It Works

The basic Standing Neutral concept works the same whether using a Traditional or Modern version. When designing a Standing Neutral process, it is important to understand three critical success factors.

Early Mutual Selection—The parties jointly select the Standing Neutral early in the relationship. This allows the Standing Neutral to be embedded in the continuing governance mechanisms. The parties mutually agree and designate a single neutral or a board of three neutrals.

Standing Neutral Refresher

What is it? A Standing Neutral uses a respected expert—preselected, therefore 'standing,'—who helps parties resolve issues throughout the life of a relationship.

How does it work? By engaging the neutral early on, and embedding the neutral into the contracting parties' governance structure, the parties set up a facilitation for dialogues that aim to provide continuous cooperation.

The result: A remarkable tool for preventing disputes.

The parties jointly select their Standing Neutral, where each has high confidence in the neutral's integrity and expertise. A Standing Neutral is typically an expert in the parties' industry (e.g., construction, facilities management, IT services).

Continuous Involvement—Following the Standing Neutrals selection, the parties brief the Standing Neutral on the relationship and provide the necessary documents. The Standing Neutral is then formally embedded into the parties' continuing governance (e.g., attending monthly operation reviews and/or more strategic quarterly business reviews). In some cases, and where the contracting parties may want to minimize the costs of deploying a Standing Neutral, they may choose to limit the role to only being involved on an ad-hoc basis. In this case, the Standing Neutral acts more like a "Standby" Neutral.

Prompt Action—A key objective of a Standing Neutral process is to preserve cooperative relationships between the contracting parties. While the role of Modern and Traditional Standing Neutrals varies, both aim to "keep the peace."

A good Standing Neutral process emphasizes "real-time" involvement, especially if there is a potential problem or conflict brewing. When a Standby Neutral is not integrated into the parties' governance as part of regular review meetings, they are expected to be available on relatively short notice to consult with

Figure 1: Standing Neutrals—Modern v. Traditional

Design Principles	Modern Standing Neutral	Traditional Standing Neutral
Timing of Involvement	Involvement can be pre- or post- contract signing. When pre-contract signing, serves as Deal Facilitator.	Almost always involved after contract is signed.
Number of Neutrals	Typically one.	Typically a "Board" of three.
Depth of Engagement	Typically mid and highest level of governance.	Typically only the highest levels of governance.
Role/ Authority	Typically a coach or an expert evaluator.	Typically an expert evaluator with the goal to make a recommendation on a dispute. Recommendations may become binding if not rejected.
Fact-Finding Latitude	Typically may receive information and personally investigate. May be able to hire outside experts.	Typically only receive information.
Types of Support	**Pre-Contract Support:** • Deal Architect **Post Contract Support:** • Transition support • Risk Management • Key performance indicator/Performance management alignment • Project management support • Onboarding support /training • Strategic reviews • Relationship health monitoring **Dispute Management:** • Issue Resolution (rarely mediates or arbitrates disputes)	**Dispute Management:** Focus is on early real-time dispute resolution. May be given the authority for binding arbitration. May also be engaged to help prevent disputes.

the parties and discuss issues while misalignment and problems are still new and where the parties' positions have likely not hardened.

Modern Prevention

A Modern Standing Neutral differs from a Traditional Standing Neutral in that the role is typically more expansive and preventive in nature.

With a Modern Standing Neutral, the involvement can occur both before and after a contract is signed. If the Modern Standing Neutral is brought on in a pre-contract signing, the neutral serves as a Deal Facilitator. A Modern Standing Neutral typically involves one person, instead of a "Board" of three with a traditional standing neutral.

A Modern Standing Neutral's role or authority are also different—the neutral often serves as a coach or expert evaluator, instead of having the goal of making a recommendation (like a "Classic" Standing Neutral). Their fact-finding latitude is far greater—they can receive information, personally investigate, and even hire outside experts.

The table opposite (Figure 1) highlights the key differences between a Modern Standing Neutral and a Traditional Standing Neutral as found with a construction industry DRB.

While there are several differences between Modern Standing Neutrals and Traditional Standing Neutrals, the biggest difference is Modern Standing Neutrals play a more comprehensive role of providing post-contract signing support.

The highlighted box is this month's focus on the Back to School on Dispute Management Continuum

Case Study

When Ernst & Young, now known as EY, set out to rethink its strategy for outsourcing workplace services (e.g., food service, cleaning services,

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Figure 2: Standing Neutral Responsibilities, with EY's Use Highlighted

Factors to Consider	Typical Post-Contract Standing Neutral Options			
Number of Neutrals	One		Three	
Timing of Involvement	Pre-contract signing (e.g., Deal Facilitator)		Post-contract signing	
Skills Required	Deep SME/Industry Experience	Facilitation/Soft Skills	Project Management	Legal/Lawyer
Depth of Engagement	All levels of governance	Mid-levels of governance	Only the highest levels of governance	
Level of Involvement	Continuous involvement (embedded as part of continuing governance)		Ad hoc (only when called upon)	
Authority	Advice only	Makes formal recommendation (non-binding)	Non-binding decision	Binding decisions
Fact-Finding Latitude	May only receive information and evidence provided	May investigate personally	Ability to hire outside experts	
Common Types of Support	The team used the types of support noted in ***bold italics*** ***Pre-Contract Support:*** • ***Deal Facilitator*** ***Post-Contract Support:*** • Transition Support • Risk Management • ***Performance Metrics/Performance Management Alignment*** • Project Management Support • Onboarding Support/Training • ***Strategic Reviews*** • ***Relationship Health Monitoring*** ***Dispute Resolution:*** • ***Issue Resolution*** • Mediation • Arbitration			
Reference in Contract	Formal: Referenced in contract (may be an appendix or schedule)		Informal: Not referenced in contract	

Dispute Management

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and maintenance of its facilities), it incorporated a Modern Standing Neutral from the outset.

EY and its service provider at the time, Integrated Service Solutions (ISS), first incorporated a Standing Neutral to support the parties in developing a formal relational contract. The parties selected one Standing Neutral to support the parties–Erik Linnarsson–a lawyer formerly with Stockholm's Cirio Law Firm, as a Deal Facilitator. Linnarsson was trained as a Certified Deal Architect to craft complex outsourcing agreements.

At first, some EYers didn't understand why they should use a neutral coach. For EY's Becky Burningham, the accounting and consulting firm's Procurement Lead, having a neutral coach "felt odd." But after being on the team the value of the coach became apparent.

"It is very easy to fall back on the traditional 'buyer-vs.-supplier' mindset," said Burningham, adding, "The Certified Deal Architect coach plays a critical role in helping challenge traditional power-based approaches and getting both parties to a true win-win agreement."

Jens Holmberg–ISS's Legal Director for Sweden–was a fan of incorporating a Standing Neutral. "Including a neutral Certified Deal Architect coach to facilitate us in working through the Vested methodology was quite smart because it really helped us all learn what a good Vested agreement looked like," said Holmberg, adding, "While we could not have used a coach, having one proved to be very valuable in terms of both improving the efficiency and quality of the decisions we made as we all learned the paradigm shift of following the Vested Five Rules." [For information on Vested processes, developed by the author, see www.vestedway.com.]

Post contract-signing, the parties continued to use a Standing Neutral. The parties designed the Standing Neutral role to embed the Standing Neutral as part of the parties' continuing governance, with Linnarsson supporting both mid- and higher-level governance forums. Linnarsson would act as both an expert coach and evaluator for issue resolution providing advice, as problems arose. If needed, however, Linnarsson had the authority to make formal, non-binding recommendations.

The parties also tapped into their Standing Neutral for additional post-support services that were preventive in nature. This included continuing performance management alignment, facilitating strategic reviews, and performance relationship health monitoring.

For example, one role of the Standing Neutral was conducting an annual health check using a Compatibility and Trust (CaT) Assessment. Isabella Liljeström, the ISS contract owner, found great value in doing the yearly CaT assessment: "Each year, Erik administers the CaT assessment, which concludes with a formal workshop of team members learning how healthy their relationship is. The workshop helps guide us on what is important and helps us think through how to close gaps in compatibility and trust."

The Standing Neutral also supports strategic reviews, including reviewing their contract for any misalignments. An excellent example was the metrics around sustainability. When the parties initially created the agreement it had a sustainability metric. Since signing the agreement, however, regulatory requirements around sustainability have become stricter.

In addition, EY wanted to be a global leader in sustainability. As part of the review and with the help of the Standing Neutral, the parties worked together to revamp their sustainability metrics.

Jens Holmberg also liked incorporating a Standing Neutral post contract signing. "A Standing Neutral is a very proactive dispute prevention mechanism," concluded Holmberg, adding, "Simply having a trusting and credible Standing Neutral post-contract signing gives team members a sounding board that helps people make better decisions. Using a Standing Neutral is truly a powerful tool to keep contracting parties' interests aligned."

* * *

Standing neutrals are an excellent way to shift the focus on dispute resolution, moving up the dispute management continuum as depicted at the top of page 111, where a neutral is used in a more preventive approach.

* * *

In September's Alternatives*, Back to School on Dispute Management columnist Kate Vitasek will explore how Contract Clauses can provide guidance on how parties should respond to unanticipated events and manage problems with the goal of preventing disputes..*

Mediation Techniques

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themselves in these preliminary calls and help them get clear about how they want to approach the mediation. In the real world, I accept that the initial conversations are sometimes only between me and the lawyer. I could insist that I talk to the parties first, and if I did so, the lawyers and parties would likely comply, but compliance is not what I aim for when my goal is to support the self-determination of all participants.

I met with Bradley first, and he explained that in addition to the case for the unpaid bill I had been hired to mediate, there were the two other cases pending between the same two parties as described above. I asked whether it might make sense to address those as well during the mediation. He said, "Absolutely not. There are different judges hearing those cases and this is the case that has been ordered to mediation."

I didn't follow his reasoning, but I dropped the subject. I also asked Bradley whether Beau and Sam might want to do business together again in the future, and Bradley said he thought that was highly unlikely given the bad blood between them now.

I told Bradley that Beau was welcome to reach out to me before the mediation if he wanted to chat at all. Bradley said he would pass that message on to Beau, but I did not hear from Beau before meeting him on the day of the mediation.

My initial conversation with Sarah was brief. She told me she believed that the claim of bad wood was completely bogus and added that it had been dismissed. Her client simply wanted to be paid for the wood he had delivered, for which the price was $32,000. When I asked Sarah if these guys might want to do business with each other again, she said, "No way."

We wound down the conversation, and I told Sarah that her client was welcome to give me a call and have a chat before the mediation if he wanted to, and Sarah said, "Thanks, I'll tell him."

Sam called me the next day and we talked for about an hour. He filled me in on his career as a builder, which led to him having a thorough understanding of lumber and the business of it. He had purchased the current company three years earlier, and it had been very successful. He explained that he sold lumber to most of the major retailers and directly to the largest builders. He also explained that he only dealt in high-quality wood so there was no possibility that Beau had somehow received bad wood from him.

Sam also said that until Beau stopped paying and claimed bad wood, he had been a great customer. He had always paid for his lumber immediately on delivery, unlike most customers, who waited 30 days. I told him that the mediation would provide him, Beau, and the lawyers with an opportunity to have whatever conversation they wanted to have.

I am always aware that the information I receive before a mediation is likely only the tip of the iceberg, so I'm not tempted to think strategically about how to use the information to structure the conversation. Yet when I hear that there are other lawsuits pending between the same parties, I know it's likely that those matters will come up in the conversation. I am also aware that businesses who have worked together in the past might do so in the future regardless of what their lawyers say.

When the five of us gathered in the large conference room of my office, I asked if everyone knew each other and learned that Sam and Beau had never met. They greeted each other politely. Sarah started by briefly saying that Beau owed Sam $32,000, and that was what needed to be addressed.

Bradley responded with an opening statement similar to one he might deliver in court. He emphasized that the purpose of today's mediation was only to address one of the three pending lawsuits as all three cases were being heard by different judges, and this was the case ordered to mediation. He also said that though Beau's counterclaim of $450,000 had been dismissed, Bradley intended to appeal that decision.

Sarah spoke up and said, "But it has been dismissed!"

Next came several minutes of back and forth between Bradley and Sarah, which I summarized by saying, "So you have different perspectives on that counterclaim. Sarah, you're saying it's dismissed, and you doubt it can be rejuvenated, and Bradley, you're saying that first of all, you yourself said it had been dismissed but you believe there's a good chance that you can appeal that decision successfully."

This debate between Sarah and Bradley, on one level, seemed beside the point, perhaps an example of lawyers' personalities getting in the way of a negotiation. To me, though, the interaction between the lawyers is always part of the story. And just like the parties, if their agency can be supported, they often find their way to a place where they are interacting more constructively—where they are able both to advocate for their client and to deal more responsively with each other and the parties.

Changing Times

The type of practice: Transformative mediation.

The misconception: An adversarial setting is presumed. That may be natural. But it doesn't mean that the nature of the interaction can't shift.

The process benefits: Such moves may be incremental—and may be needed between the party and its lawyer at the same time. Results even beyond the bottom line may result.

On the topic of whether the other pending lawsuits could be addressed as well, both lawyers agreed that we were here to discuss just one of them. Sam spoke up and said that he would like to resolve all of them if possible. Both lawyers responded that no, this mediation was just for one of them. Bradley said, "I think the mediator will agree with this. The judge ordered us to mediate this case, so this is the one we need to address."

I said, "Just so we're clear about where I'm coming from, it's up to you all what you talk about. I don't work for the judge. And I'm hearing, Bradley and Sarah, you're saying you need to focus on this one case, and Sam, you said you'd like to discuss all of them."

What's the Motivation?

I did not know what was motivating the lawyers. Maybe they believed it was to each of their clients' benefit to take the position that they were only willing to talk about one case—this way, they could make it seem like they were making a concession to the other side if they agreed to talk about the other cases. Or maybe the lawyers wanted to have more work to do if this case settled.

At the moment that Sam said he wanted to address all three cases, I was conscious of wanting to support him but also support the lawyers as they said otherwise. I was aware that addressing all the cases made a lot of sense to me, but I tried not to let that interfere with supporting the conversation the participants were having.

On the issue of whether there had been bad wood, Beau and Sam seemed to come to an understanding despite their lawyers. Sam said, "We did not sell any bad wood. We get all our product from Johnson or Westbrook. They do not sell bad wood."

Bradley said, "You are the successor in interest to a company that did sell bad wood. You are responsible for their liabilities."

Sarah said, "Well, that's debatable."

Beau said, "You did sell bad wood though, man. This was right *after* you bought the company! I was dealing with the Jones brothers. You know what happened with them! They were shady."

Sam said, "They're no longer with the company."

Beau said, "I know, but they were selling the good wood somewhere else and pocketing the money. They sold me shitty wood."

Sam looked as if he realized this might be true. His former employees may have sold Beau bad wood. "Didn't you pick up this wood at our yard?"

Beau said, "No, they delivered this shit to me."

Sam said, "Huh."

Sarah seemed not to like that her client was conceding that he may have been responsible for bad wood. She spoke up and said, "Okay, guys. Hold on a minute."

Beau went on, "Those guys were doing all kinds of fraudulent stuff. I don't know where they got the crap they sold me, but it wasn't from Johnson or Westbrook."

Sarah said to me, "Dan, can I meet with my client privately?"

Bradley said, "Hold on a minute, Dan."

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Mediation Techniques

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Sarah said, "Dan, can you get us back on track?"

The Right Track

I, of course, did not see them as being off track. The parties had just had an exchange that may have entirely cleared up their disconnect about bad wood. But I responded to Sarah by saying, "You'd like something different to be going on here?"

Sarah said, "Yes, I'd like to meet with my client alone. Bradley and Beau need to figure out what they're going to offer us, anyway."

I said, "That's okay with me, how does everyone else feel about that?"

Bradley said, "Yes, that's fine." Beau gave me a thumbs up and Sam nodded.

I led Sarah and Sam to a room down the hall and said I would check on them in a few minutes. I asked Bradley and Beau if they preferred to be alone, or if they would like me to join them. Bradley said, "Actually, Dan, I'd like to talk privately to Beau."

I said, "No problem, I'll check back with you in a few minutes."

A few minutes later, I knocked on the office door where Sarah and Sam were meeting and Sarah said, "Come in." As I sat down with them, Sarah said to Sam, "Man, I do not trust that Beau."

Sam: "I actually believe him, and I'd like to do business with him again."

Sarah: "He seems like a snake to me.

Sam: "He was a great customer—he paid in full on every delivery."

Sarah: "Not that 32 grand, he didn't."

Sam: "Well, he may have had a good reason."

Sarah: "Well, I'm not sure he wants to do business with you."

Sam: "Maybe not."

Whenever I hear a lawyer suggest to their client they should be more distrustful of the opposing party, I cringe inside. Sometimes it appears to serve the lawyer's interest in perpetuating the conflict.

I noticed my reaction and returned to my intention to support the conversation. I reflected and summarized their conversation just as I would a conversation between opposing parties. After about 10 minutes, I asked Sarah and Sam if they would be ready to meet with the full group again once the others were ready, and they said, "Sure."

I checked in with Bradley and Beau and learned that they had the following offer in mind: Beau would pay $15,000 to settle all the claims and counterclaims in all three suits. Also, he would start buying his wood from Sam again, which Beau guessed would amount to about $150,000 per month profit for Sam.

But before he did that, he wanted to have dinner with Sam. Beau said he liked to know the people he did business with—he wanted to look them in the eye and let them know who he is as a person.

When we all got back together, Bradley shared that offer with Sam and Sarah. Sam asked if Beau would continue to pay at the time of delivery.

Beau said, "Yes, I don't like to owe anybody anything. Except I don't like to pay for shitty wood." Sam said, "I can understand that. Okay, that sounds like a deal. And yes, let's have dinner together—I'm buying."

Sam said it was a shame that the two of them hadn't met earlier, before all the litigation got out of control.

* * *

Sam and Beau were able to overcome their lawyers' idea that they should only talk about one of the lawsuits and Sarah's efforts to prevent them from talking about the bad wood. They were also able to make plans to do business together despite the assumption of both lawyers that this would be out of the question. I believe that supporting both the parties and the lawyers allowed for the best ideas to come to the surface.

Worldly Perspectives

Can Mediation's Strong Institutional Base Translate to Strong ADR Use in Germany?

BY GIUSEPPE DE PALO & MARY B. TREVOR

In Germany, the roots of civil and commercial mediation can be traced to the 1980s, when German family lawyers who had attended mediation training in the United States invited the trainers to conduct training in Germany.

Mediation use did not remain restricted to family mediation, as people recognized that its principles could be adapted for use in the business arena. Over time, mediation use spread as well to the public sector and has entered a variety of specialty areas including sports mediation, elder mediation, heritage mediation, and various subspecialties within the business field.

Mediation's development in the early decades was supported by mediation associations, which were and remain important players on the mediation scene. The so-called "Big Three," which have played the most significant role, are the Federal Association for

De Palo is a mediator in JAMS Inc.'s New York office, and the president of the Dialogue Through Conflict Foundation. Trevor is an emerita professor at Mitchell Hamline School of Law in St. Paul, Minn., and a scientific adviser to DTC. **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 the Access to Justice goal (16) of the United Nation's Sustainable Development Goals (see https://sdgs.un.org/goals/goal16). In these *Worldly Perspectives* columns, the authors are presenting a summary of a forthcoming country report that has resulted from the Rebooting Mediation Project study of individual nations' ADR efforts.**

Mediation in Business and the World of Work (BMWA) (Bundesverband in Wirtschaft und Arbeitswelt, www.bmwa-deutschland.de), the Federal Association of Mediation (BM) (Bundesverband Mediation, www.bmev.de.), and the Federal Working Group for Family Mediation (BAFM) (Bundesarbeitsgemeinschaft für Familienmediation, www.bafm-mediation.de).

The German Society for Mediation (DGM) and the German Forum for Mediation (DFfM) have played supporting roles—respectively, Deutsche Gesellschaft für Mediation, https://www.dgmediation.de, and Deutsches Forum für Mediation, https://www.deutscher-mediationsrat.de/startseite.html.

Professional organizations such as the Judges' Association, the Bar Association, the Lawyers' Association, and others have also played supporting roles. In fact, these mediation and professional organizations were invited by the Legislature to participate in the development of the German Mediation Act (referred to below as the "Mediation Act"): Deutsche Gesellschaft für Mediation and Deutsches Forum für Mediation (available at https://www.deutscher-mediationsrat.de/startseite.html). The Mediation Act was enacted in 2012.

Acknowledgment

This month's column was prepared in collaboration with Prof. Dr. Cristina Lenz, who holds the research professorship for "Social Acceptance of Land Use" and teaches construction and planning law, as well as business administration in the construction industry, with a focus on negotiation and cooperative processes like mediation, at the Weihenstephan-Triesdorf University of Applied Sciences in Freising, Germany. After almost eight years as Dean of the Faculty of Landscape Architecture, she resigned from her position to take over the leadership of the Center for Continuing Education and the Department of Social Competence at the university; she is now Vice Dean and responsible for the faculty's budget. Before accepting her appointment at the HSWT, Lenz was a lawyer and partner at the Munich-based law firm of Köhne, Kulle und Kollegen Rechtsanwalts GmbH. She is former academic director of the master's program "Mediation, Negotiation, Communication and Conflict Management," which she founded, at the Karl-Franzens University of Graz in Graz, Austria. She is a certified BMWA business mediator and BMWA training trainer, and has been a member of the German mediation association's board for more than 25 years as well as heading the BMWA certification office. She is chair of EMNI, European Mediation Network Initiative

Solid Support

This month's Worldly Perspectives jurisdiction: Germany

The state of practice: There is a statutory foundation, and mediation associations are influential, but the growth is modest.

The state of the prospects: The nation will keep trying. More education, and more clauses. But mandatory processes aren't on the horizon.

Civil Mediation Framework

Overview: The Mediation Act came into force on July 21, 2012. It served mainly to implement the EU Mediation Directive of 2008 (referred to below as the "EU Directive") (Directive 2008/52/EC of the European Parliament and of the Council of 21 May 2008 on certain aspects of mediation in civil and commercial cases, OJ L 136, 24.5.2008, p. 3 (available at https://bit.ly/42WCXf6)). Its preliminary sections define "mediator" and "mediation" (Section 1) and describe the mediation procedure and the role of the mediator (Sections 2-3). Other relevant provisions are discussed below.

Certain provisions of the Code of Civil Procedure ("ZPO") (Zivilprozessordnung, available at https://bit.ly/3HmucDV), also discussed below, address mediation as well.

Confidentiality and Privilege: Consistent with the EU Directive, Mediation Act Section 1 defines mediation as a confidential procedure. Section 4 requires the mediator and other people working in the mediator's practice to maintain confidentiality as to everything that has become known to them during their work unless otherwise provided by law.

Disclosure is authorized if necessary to implement or enforce a settlement agreement or if it concerns commonly known or insignificant facts. Disclosure is required for overriding reasons of public order ("ordre public"), such as reporting a threat to a child's well-being or a threat to harm a person. The mediator must inform the parties about the extent of the confidentiality duty.

Enforceability: While the EU Directive did require that mediation agreements be made enforceable upon certain conditions, the Mediation Act does not address this issue and mediation agreements are not immediately enforceable. But the Directive's requirements are met through ZPO provisions, which allow for a variety of enforcement options when applicable conditions are met: Sections 794(1)(1) and 796b(1), concerning settlements achieved in a litigated matter; Section 794(1)(1), concerning settlements achieved before a recognized conciliation body; Section 796a(1), concerning settlements achieved between the parties' lawyers; Section 796c, concerning enforcement by a notary; and Section 794(1)(4a), concerning awards in arbitration proceedings.

Statute of Limitations: Section 278a(2) of the ZPO provides that the court "shall" suspend proceedings "if the parties decide to conduct mediation or another out-of-court conflict resolution procedure." Under the German Civil Code (BGB), Section 203, mediation is treated as a negotiation that suspends the running of the statute of limitations. Bürgerliches Gesetzbuch, https://www.gesetze-im-internet.de/englisch_bgb/.

Duration: Absent a private mediation agreement setting a time limit, there are no limits on the duration of a mediation. In the commercial sector, both in Germany and

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internationally, the commonly accepted duration estimate is 30-90 days, with the largest proportion of the Rebooting study respondents selecting between 31 and 60 days. [For more on the Dialogue Through Conflict Foundation Rebooting Mediation study, see the authors' credit on page 114.]

Costs: There are no statutory financial incentives or fees to participate in mediation. If mediation is used related to court proceedings—whether proposed by the court, the parties, or their lawyers—the costs are usually shared. Section 7 of the Mediation Act, however, did empower courts to authorize financial support to parties needing it, subject to continuing research studying the impact of such support. Overall, the costs vary depending on the area, and may be assessed on an hourly, flat rate, or daily basis.

The Rebooting study answers to the cost question accordingly varied widely, from "€501 to €1,000" to more than €5,000. As one example from a mediation association, the BMWA has proposed a standard hourly rate of between €180 and €450, depending on the complexity of the case.

Under the BWMA's fee schedule for the administration of business mediations, costs start at €150 for subject matter valued at up to €10,000 and are €950 for subject matter valued at over €500,000. Large-scale proceedings valued at more than €2 million are capped at €5,000.

Routes to Mediation

Statutory measures: No German statute requires disputing parties in the civil or commercial context to mediate, nor are parties required to attend mediation information sessions or attorneys required to inform clients about mediation as an alternative to court proceedings.

A proposed Mediation Act provision that would have required mediation participation as a prerequisite to filing a claim in court was not enacted. ZPO Section 253(3)(1), however, provides that a litigation statement of claim "should" indicate whether the filing of the claim was preceded by an attempt at mediation or another process for out-of-court dispute resolution, and it should also address whether there are any reasons to prevent such a process.

Judicial referral: Under Section 278a(1), the court can directly propose mediation or other out-of-court conflict resolution procedures to the parties, but it is not obligated to do so. Judicial attitudes toward mediation are mixed, so the likelihood of a referral may vary, in part, according to who the presiding judge is.

Contractual agreement: Parties to a contractual agreement may choose to integrate a mediation clause into the contract. As a rule, so-called cascading clauses, establishing a sequence of events, are used.

> Disputes about which mediator to use often arise. In such cases, the disputants may contact a mediation association to seek suggestions.

In the event of a dispute, bilateral negotiations will first take place, often subject to time limits for their start and end. If these negotiations are unsuccessful, mediation or another conflict management format will come next. If the chosen route yields no agreement, resorting to arbitration or state court is the next option. Absent such a clause, the way to the state courts is always open.

In the hope of avoiding damage to a business relationship, large companies and corporations may enter into framework agreements with each other that include a provision that mediation should be attempted before a court action. Nevertheless, disputes about which mediator to use often arise. In such cases, the disputants may contact a mediation association to seek suggestions. Sometimes, in large commercial cases, a proper tender approach may be used to select a mediator.

Ad hoc agreement: For disputes lacking a mediation agreement or not involving a contractual relationship (for example, neighborhood disputes), an ad hoc mediation agreement may be reached. This is one of the most difficult approaches to mediation, because there are two obstacles to overcome. First, the parties, or at least one party, must have faith in the possibilities of mediation, and second, the parties must agree on a mediator.

Ensuring Quality

Training and Certification: Section 5 of the Mediation Act addresses the training and further education of mediators. Certification is not required to act as a mediator, but Section 6 authorized the issuance of regulations for mediator certification.

In response, in 2016, the Certified Mediator Training Ordinance ("ZMediatAusbV") (*Federal Law Gazette Year 2016*, Part I No. 42 (Bonn Aug. 31, 2016)) was issued, requiring 120 hours of training, broken down into various areas of coverage, plus further training of at least 40 hours every four years.

It also addressed requirements for training institutes and the recognition of equivalent training abroad. The Ordinance was amended in 2024 to require 10 additional hours to cover digital competence and to allow for some virtual training.

Despite the Ordinance name, however, there is no governmental formal accreditation or monitoring of mediators claiming to be certified. An action under the Unfair Competition Act, which prohibits unfair commercial practices, may be possible in a case of misrepresentation. The act is available at https://bit.ly/443m3wQ.

Since mediation associations were first founded in the 1990s, they generally have developed and updated their own training and certification criteria. Certain of the mediation associations eventually collaborated to develop the "QVM standard" (available at www.qv-mediation.de; shareholders of the QVM are the BAFM, the BMWA, the DGM and the DFfM), released in 2019, which requires more than 200 hours of training and other experiences as well as an exam, requirements far higher than those of the Mediation Act's regulations.

Mediation Statistics

Number of mediators: There are an estimated 10,000 mediators in Germany. Many are members of a mediation association and are certified; others are just members. Some are

members of several associations. Lawyers who are also mediators are in the Mediation Specialist Group of the German Bar Association (DeutscherAnwaltsVerein) (available at https://anwaltverein.de/de/).

Market size: There are no reliable statistics for the number of mediations conducted annually in Germany, as no governmental authority collects this data. Mediation associations record their own number of requests for mediations, and association members may be asked to report how many mediations they have conducted.

The number of mediators trained is not a reliable indicator since people who do mediation training may do so for reasons other than to practice as a mediator. Overall, due to differences among the mediation associations and training motivation variations, no reliable totaling can be done.

Other factors make determining the number of mediations conducted per year difficult, including the wide variation in mediation areas, mediation length, and mediation's role in any given dispute resolution process; the degree to which mediation is a full-time or supplementary aspect of a practitioner's work, and the different venues (in-house, B2B, individual, community, etc.) in which mediations take place.

In many companies and organizations, for example, mediation is now used extensively for internal and external conflict management and in employment contracts. Such needs often call for expertise, and more and more experts are being trained as mediators.

Likely for the above reasons, as well as for jurisdiction-specific variations, Rebooting study responses to the question of how many mediations are carried out each year vary widely, from a total of approximately 70% of respondents offering opinions as low as "Less than 1,000" all the way up to about 5% of respondents offering an opinion as high as "More than 100,000."

In one area, however, respondents were in nearly total agreement: When asked whether they agreed that the relationship between mediation and court proceedings is a balanced one, a total of 90% expressed a level of disagreement. In response to a related question, nearly 80% said that mediator supply is greater than demand for their services.

Mode of mediation: In addition to the classic face-to-face mediation, there are two forms of hybrid mediation. In one, those participants who cannot meet with the others in person are connected virtually. In the other, some meetings are held in face-to-face mode and others are held virtually. Finally, there is fully virtual mediation. Caucus discussions are also possible in these variants.

There is no legal regulation as to which mode is used. Under Section 3 of the Mediation Act, it is effectively the mediator's job to choose the appropriate procedural design.

Settlement rates: There has been no reliable survey of the success rate of mediation, in part because success is defined differently. Is the improvement of the relationship between the parties a success, or is only the resolution of individual or all points of conflict? Estimates of 60-70% or 70%-80% have no demonstrated consistent basis.

Strengths and Challenges

While mediation has a firm place in the dispute resolution landscape in Germany and is fully supported by the active involvement of the mediation associations, its potential has not yet been fully realized.

This shortcoming was recognized by the government a few years ago. In 2012, Mediation Act Section 8 had required the federal government, after five years, to evaluate the law's effect on mediation development, as well as the training and education of mediators, and submit a report to the German Bundestag. The resulting 2017 report was the first comprehensive empirical study on German mediation use, and the federal government will use it as a basis for addressing how to better promote mediation. The report of the evaluation and comments in German are available at https://bit.ly/3ZHWlLT.

The report acknowledged that mediation numbers had not increased significantly since 2012, that mediation activity was mainly concentrated among a few mediators, and that mediating only had a low earning potential, with many mediators involved in training, not practice. The report rejected, as unneeded for increasing mediation, enacting special regulations to provide mediation cost support, making mediation results immediately enforceable, or developing a uniform public certification system.

When Rebooting study respondents were asked to rate different ways of increasing mediation use through governmental action, the top-rated option, in contrast with the 2017 report, involved financial incentives for parties choosing to mediate, such as refunds of court fees or tax benefits.

Other top-rated options included making some aspects of the mediation experience mandatory, such as requiring parties to attend mediation information sessions before starting litigation proceedings or authorizing judges to order parties to mediate. Respondents also responded favorably to possible actions at the EU level, such as creating an EU-wide mediation pledge for certain industries or creating an EU agency dedicated to promoting mediation.

> No German statute requires disputing parties in the civil or commercial context to mediate.

Highly rated non-governmental actions included establishing a mediation advocacy education program for law schools, business schools, and other higher educational facilities, and implementing pilot projects to encourage the use of civil and commercial mediation.

* * *

In Germany, the mediators themselves organized early on into mediation associations, set the development of mediation in motion and continue to play significant roles in the conduct and oversight of mediation.

Following upon the 2012 Mediation Act enactment, regulations have further developed the governmental role in overseeing mediation. But despite diversification and wide mediator availability, the number of mediations falls short of achieving a balanced relationship between court proceedings and mediation.

Of the many possible options for improving this balance, education can play a significant role, whether through requiring litigating parties to attend a mediation information session before deciding whether to proceed in court, or educating professionals in the legal, governmental, and business fields about mediation's benefits.

Neutrals' Techniques

A Kenyan Mediator's Perspective on Practice, And Commitment to Impartiality and Empathy

For more than 30 years, Grace Wanjiru Mburu has been working on peaceful conflict resolution as a children's officer, private and court-accredited mediator. Based in Kenya—see https://gmmediators.com/#—she also has dealt with specialized cases such as orphans of justice, juvenile delinquency or large organizational and traditional conflicts. She is a member of Suluhu Mediation Center and the Court Annexed Mediation in Kenya. Her broad perspective in this interview—from justice for children to organizational dynamics to commercial matters—provides an interesting perspective for mediators everywhere. Mburu reveals what she believes makes mediation effective where a justice system is powerless, and she provides observations and advice on conflict resolution from the community to the court case.

The interview was conducted on Zoom on July 26, 2024, by Karoline Caesar, a certified mediator in Bonn, Germany [see www.karoline-caesar.de.] She was joined by co-interviewers Kenneth Indeche and Angela Waichinga, who are certified mediators in Kenya, and members of MTI Mediation Training Institute of East Africa. The Mburu interview is part of a series of interviews conducted by Caesar to portray mediators who are bridging Western and African methodology to show the strengths of combined methods, and to give more visibility to mediators. Caesar writes, "I think more people should embrace the attitude of a mediator to make this world more peaceful, so we need to get to know mediators—their thoughts, beliefs, [and] experiences mediating."

* * *

Question: How did you come to deal with the topics of mediation and conflict management in the first place?

Grace Mburu: I became interested in mediation and conflict management early in my career.

As a volunteer children's officer, I witnessed firsthand the transformative power of mediation. When handling children matters, parents need to most of all understand their role, and mediation helps them to do that. My experience enabled me to understand that children need to grow up, no matter if they have been fighting or have had problems, if they had been living in the streets—there should not be any issue hindering them from growing up.

In 2001, the Children Act had been adopted by the Kenyan parliament. (The law is available at https://bit.ly/3BCL0nJ.) Prior to that, children matters were handled by chiefs. When I started volunteering, I began to understand child rights including protection needs, the responsibilities of guardians, parents, and the government. I helped the community understand what a child right is.

This was part of my work as a volunteer … for 10 years. When a Japanese professor came to Kenya, he noticed my passion for children. He invited me to attend a training in Japan at the United Nations Asia and Far East Institute for the Prevention of Crime and the Treatment of Offenders (UNAFEI). The topic of the training was the juvenile delinquent treatment system–and yes, I agreed to come to Japan for the training! My motivation had to do with the fact that many organizations worked for children in Kenya, but none of them wanted to do anything for children in the criminal justice system–thus children in contact with the law. A child may have been neglected, maybe abused, and when this becomes revealed, [the child] can get in contact with the law. Other children are in conflict with the law, in bad company, in the streets.

There are also the so-called "orphans of justice" accompanying their mothers in prison. Up to the age of four, a child in Kenya can stay in prison with [his or her] mother. Usually, mothers try to find a guardian, but their children do not wish to leave them. What type of adults will these children be, what effect will the criminal justice system have on them?

In Japan, another professor was interested in my research on these orphans of justice. This time, I received an invitation to go to Stockholm to further deepen my specialized knowledge. I majored in "the practical approach to child rights." How do you apply child rights to children in the criminal justice system?

It was an eye-opening course. We were only three Africans in a class of 30. Our common denominator was mediation–how can we bring in parents, caregivers and government officers who are supposed to take care of these children? Can we negotiate? Can she go back to school? She has been sexually abused, [and] gone through trauma. Can we negotiate the terms of how she can go back to school and how she and her parents can live with the neighbor who abused her?

No stranger abuses children, it is usually someone who knows the child. Your brother abused your neighbor's daughter–how do you handle this as a neighborhood? How do you manage? Send him to prison? Punishment in there is heavy. But the hatred will go on for generations to come. Volunteering was the best [thing] I have ever done in my life.

* * *

I looked for private institutions offering mediation courses, and in 2020, I had the opportunity to train. … The price was 40,000 Kenyan Shilling [about US$311]. But I did not regret it–the training was such an eye-opener. I learned so many things I had not known before: How do you negotiate? What is the difference between arbitration, mediation and negotiation? I found myself, my passion, in this 90-hour, five-days training.

I subsequently became a member of the probation case committee. I began to handle matters that the judiciary is unable to handle–involving

the community, individuals, or organizations. I applied for accreditation to the judiciary–and I quickly got it as I had the expertise.

I remember that during an internship at the Tokyo Family Court, I observed a couple that had filed a divorce. In African tradition a divorce is hatred, it is abusive, everything that is unimaginable. Here I am in a Japanese court: "Sorry honey, we cannot work this out." I said: "Seriously? Not in this world."

I became even more motivated to prevent divorce in Kenya. How can you call yourself honey, sweetheart, and then divorce? How will we visit our children? When I got accreditation, the sweetest thing was that my very first matter, a file referred to me by the judiciary, was a divorce. It was a crazy case. In the end it was smooth sailing. … [B]oth are still friends.

What are your strengths as a mediator?

I am impartial, which builds trust, and I have very strong communication skills. I am keen on active listening, which enables me to understand the underlying issues. I am patient. I have empathy which helps me to create a safe space, and everyone feels valued and heard. I sometimes work quickly and I use caucuses–this means that I have individual conversations with each of them. Then I bring them together.

Problem-solving capacity is a useful quality for any mediator, as well. I am also a qualified counseling psychologist. I am able to understand the marriage stage they are in–honeymoon stage, irritation stage, older couples often are in the emptiness stage.

What is very important is to be sure of yourself–strengths and weaknesses. Right now I am in the emptiness stage. Self-awareness of mediators is key–when you are in the honeymoon stage and are mediating a couple which finds itself in irritation stage, you need to be very careful because you will need to understand another type of stage than the one you are in.

What has been your greatest success so far?

I facilitated a complex negotiation between two large church organizations.

They were at the brink of litigation, it was a tough case. During a series of mediations, the parties were able to reach a consensual agreement. They are different congregations. It was crucial to me to preserve the gospel they believe in.

Also, I wanted to preserve their professional relationship. As human beings we have conflicts, but some are beyond imagination. If the conflict had gone through litigation, it would have been a big shame for the churches. They were all pastors with name tags. How do I handle these big-name tags such as "bishops"?

The thing that they all had in common was that none of them doubted their God, and to me that was very key. In conflict if it is bad, you start to even doubt what you believe in. But here, in spite of it all, they continued believing in God.

Bridging Methodologies

The subject: A Kenyan mediator with a wide purview discusses her work.

The experience: It's clear that the practice, entered with characteristic small steps, has launched a philosophy of work, life, service, and success.

The advice: Impartiality, sensitivity, and empathy—bedrock mediation skills even for commercial cases, and elusive without concerted attention to development.

It was very, very tough mediation. I am happy about the success. On another note, last year, the court referred 24 matters to me, and I was able to achieve full consensual agreements for 20. To me, that was a success.

What are the differences and similarities between using mediation in different cultures?

Mediation practices vary significantly across cultures–despite the common core principles of impartiality, confidentiality, voluntary participation and lack of coercion.

In some cultures, face-to-face meetings are favored. In courts, you also use face-to-face meetings. In communities you do private mediation, you can meet at a private office, but there is always an emphasis on community leaders and elders in the process. The elders

> 'Is there a way out to assist people to handle commercial matters in an amicable way so they do not lose everything they invested?'

are the opinion leaders in their community. They understand the cultural practices within their community, which is crucial to effectively bridge differences.

But apart from these cultural differences, the universal goal of mediation is to find a peaceful resolution to conflicts. As Africans, there are cultural taboos—for instance, that a certain category of people cannot speak for themselves, but the goal for mediation remains the same.

I worked for a county court far from Nairobi [Kenya's capital and largest city]. It was a mediation for people who do not understand the court system, and I was invited by the chief to talk to the people. The dispute concerned two different families, and it was about dowry and all that.

You do not get to meet the bride or bridegroom themselves, but the elders negotiate—the uncle to either side. I focused on the question: Are these people able to pass on information correctly to the parties concerned? It is so vital for achieving an agreeable solution that there is no coercion.

But they did understand. Why is the dowry issue a conflict? Why is the spirit of a deceased person bringing conflict? Elders and neighbors are used to come in between [parties,] and are excellent in taking on an intermediary role during mediation.

In Germany (2012, 2017) and in Kenya (2020), the Mediation Act [available at https://bit.ly/4fBqZeV] and the Legal Ordinance [available at https://bit.ly/4iPhnA5] have been passed, so that the mediator is a protected professional title. There are study courses, and since 2011, four United Nations resolutions have been passed to strengthen

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Neutrals' Techniques

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the role of mediation at international level. On the other hand, conflicts still are seen as a taboo in many societies, and many people prefer to go to court. Is mediation becoming stronger or weaker? What makes it stronger, what weakens it?

Mediation is becoming increasingly recognized, globally and in Kenya. What makes it stronger is legal support.

Most advocates are already mediators in Kenya. This brings public awareness. I once acted as guest speaker and noticed that when the community comes to understand that you rule out a court procedure and what exactly it is you are ruling out, they become so interested. I use my mother tongue to explain in detail what mediation is, what negotiation is, and what I am doing.

> 'Just prevent conflicts so we do not get hard—you fall down, you stand up, brush yourself, life continues.'

Success stories of mediation also contribute to its promotion and growth. After quite so many cases I have seen people coming back to me: "Thank you so much, thank you so much."

However, it can be weakened by a lack of understanding and mistrust in the process. If you fail to do pre-mediation the right way, you will automatically fail. This first conversation is key to creating trust and to making parties understand the process. If they do not understand it, you run a high risk of failure.

In some communities, there are cultural taboos against discussing conflict openly. For instance, in the northeastern part of Kenya, this is considered a taboo. There is also a lack of adequate training of mediators. Continuous education and advocacy will be very important to strengthen [mediation].

How open do you think the mediation sector is in Kenya? So, how many mediators with diverse backgrounds are working in Kenya (men-women, age, countryside-city, international, religious affiliation, etc.)?

The mediation sector in Kenya is progressively opening up–more mediators from diverse backgrounds are entering the field.

When I recently attended a forum, people from all backgrounds were mediators. In fact, the Kenyan Constitution in article 159 paragraph 2c [available at https://bit.ly/41LwK6v}, emphasizes the need to make sure Kenyans access justice through mediation, arbitration and other alternative justice systems.

There is still more room for increasing awareness and acceptance across different regions. But more courts already work with mediation in Kenya.

Regarding the number of accredited mediators that can be found on the Kenyan judiciary's website [which at press time lists 1,981 accredited mediators, up from 1,541 at the time of this interview] (see Public MAC Mediator Registry), most mediators were aged—my age-mates—but [since] 2020, I see more young people which is very encouraging. I am an African of 56 who believes age is just a number. I have been married for 29 years, I have three kids, [and] am the mother of two young adults who are already married.

If everything were possible, which aspects of conflict management from other contexts (i.e., international) would you like to try out in Kenya?

Crime prevention–I was trained in Japan on the issue of crime prevention in regard to children. In Kenya I would love to do anything imaginable in this regard, such as pre-emptive crisis management.

Very few people are willing to admit conflict, so I would be willing to do preemptive crisis management in organizations, churches, communities, [and] families. I mentor young couples, tell them I wish you could prevent conflict before you become so hard. Just prevent conflicts so we do not get hard—you fall down, you stand up, brush yourself, life continues.

I am also interested in commercial and corporate mediation: Is there a way out to assist people to handle commercial matters in an amicable way so they do not lose everything they invested?

Litigation is much more costly than mediation and if money matters, lawyers are too expensive. People who [went] bankrupt due to the pandemic of Covid-19 were developing high blood pressure, diabetes, [and] mental problems because they tried to use litigation to resolve their problems related to their bankruptcy.

In your opinion, how can racism be combated better? Does mediation have a role to play in this area or should other mechanisms come into force?

Mediation is crucial in combating racism as it is a platform for open dialogue and mutual understanding. It allows individuals to express experiences and perspectives in a controlled environment. Through empathy, we create awareness on racism. We also need a broader strategy including education on racism.

> 'I focused on the question: Are these people able to pass on information correctly to the parties concerned?'

In Kenya for instance, we know there is discrimination of albinos. It needs policy changes and at the same time, community initiatives. Sensitization on human rights needs to be done. Racism means that there is a lack of understanding that these people are human beings like me and you. We also need policies that ensure protection.

Any advice for Kenyan (and maybe international) mediators?

I advise to invest in continuous learning and in cultural sensitivity. It is also wise to stay updated with the latest mediation technologies and techniques such as virtual mediation. You need to have up-to-date knowledge on legal frameworks.

It is wise to be open-minded and have respect for diverse cultural contexts—I really would like to emphasize this. Also, if this was ever possible, a network of fellow mediators should be built to provide valuable support to each other and to share our resources. But most importantly: We need to maintain our commitment as mediators on impartiality and on empathy–the cornerstones of effective mediation.

To me, mediation works!

CPR News

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thanking 2025 CPR Dinner Committee volunteers, and the donors and supporters of the CLA dinner and CPR's mission. (See the link above.) Lee asked the audience members to participate in CPR's research and development initiatives and collaborate on continued steps to improve conflict prevention and dispute resolution practices.

CPR participation and alternative dispute resolution initiatives aren't new for Verizon. The New York-based wireless giant has prioritized its ADR leadership at and with the CPR Institute for decades, and from its very beginnings: When Verizon was formed in June 2000—a merger of Bell Atlantic Corp. and GTE Corp. that, at the time, was one of the largest mergers in U.S. business history—the new company emphasized its goal of a "horizon" view in leading wireless technology development.

That same month, a senior official in the new company's legal department joined a CPR Annual Meeting panel featuring three other national commercial conflict resolution experts for a frank, sometimes blunt, discussion in dealing with streams of cases, and the ADR potential for addressing a voluminous litigation caseload.

The new Verizon had inherited its employment disputes. The now-retired attorney-panelist told the CPR meeting audience about the challenges faced in integrating the companies and inheriting employment discrimination cases. Acknowledging the disparate and multiple claims of employees and managers, as well as the view of the company by its customer markets, the Verizon panelist discussed the company's reliance on what he called "individualized mediation" to address the claims. The goal was to direct the new company to sophisticated product development and provide market assurance, rather than costly court fights and potential class-action matters.

At the time of that June 2000 Annual Meeting in New York City, CPR, which opened its doors in 1977, was developing its first comprehensive multistep employment ADR program to reflect the growing conflict resolution systems sophistication that the organization had seen in its first two decades. The Verizon panelist told the CPR Annual Meeting gathering that face-to-face meetings with complainants would "let the catharsis of mediation do its work."

He concluded simply, "And it did."

The retired Verizon officer described the company's conflict resolution work in detail, an unusual move at the time in revealing internal corporate dispute resolution programs. He explained that benchmarks evolved from the individual mediations, as settlements were achieved. "And after you set the first benchmarks in place," he said, "then the rest just kind of rolls along pretty quickly."

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CPR News

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Similarly, and much more recently, Verizon has used its ADR development experience to continue to innovate, developing its mass arbitration programs and processes as courts have backed the use of mandatory arbitration for employee and customer disputes.

Verizon has continued to pioneer in the area, notably instituting processes for consumer disputes. The company has devised its own consumer contract clauses for handling voluminous, repetitive requests for arbitration under its contracts into a mass protocol using outside arbitration provider rules.

In her remarks after receiving the CPR Corporate Leadership Award, Vandana Venkatesh discussed Verizon's continued reliance on conflict resolution processes including consumer arbitration. She highlighted the company's support, advocacy, and use of improved ADR practices in support of its 2025 CLA honor.

In a Verizon film prepared for the CLA dinner, Hans Vestberg, Verizon's chief executive officer, noted that General Counsel Venkatesh has championed alternative dispute resolution and dispute prevention as a way "to keep the company's customers and all the stakeholders out of the courts and moving forward together on the issues that are most important."

The film's narration featuring Verizon executives also noted that Venkatesh "has approached ADR using a model that CPR has long championed and supported: being thoughtful, creative, and solution oriented," which Venkatesh repeated and re-emphasized in her remarks. The film noted that the company has a "conversation" with disputing customers—a pre-arbitration step that often produces a resolution.

"[W]e have made arbitration as straightforward and accessible as possible," the presentation noted. It also explained an additional fairness protection is added: where customers recover more in arbitration than Verizon's pre-process offer, then the company will pay more than the awarded amount, ensuring a minimum $5,000 recovery.

Vandana Venkatesh followed the film, concluding the evening's program. She thanked CPR and accepted the award on behalf of the Verizon legal staff as well as herself. "The CPR Institute has been instrumental in creating what I think is best-in-class tools and resources supporting dispute resolution and management," citing the CPR Corporate Policy Statement on Alternatives to Litigation, best known as the CPR Pledge, and other thought leadership work.

She emphasized continuing development and improvement, noting, "at Verizon, we embody this and uphold our pledge to our commitment to arbitration for consumer disputes. … This approach has helped us actively listen, to work with our customers and earn their trust and identify solutions."