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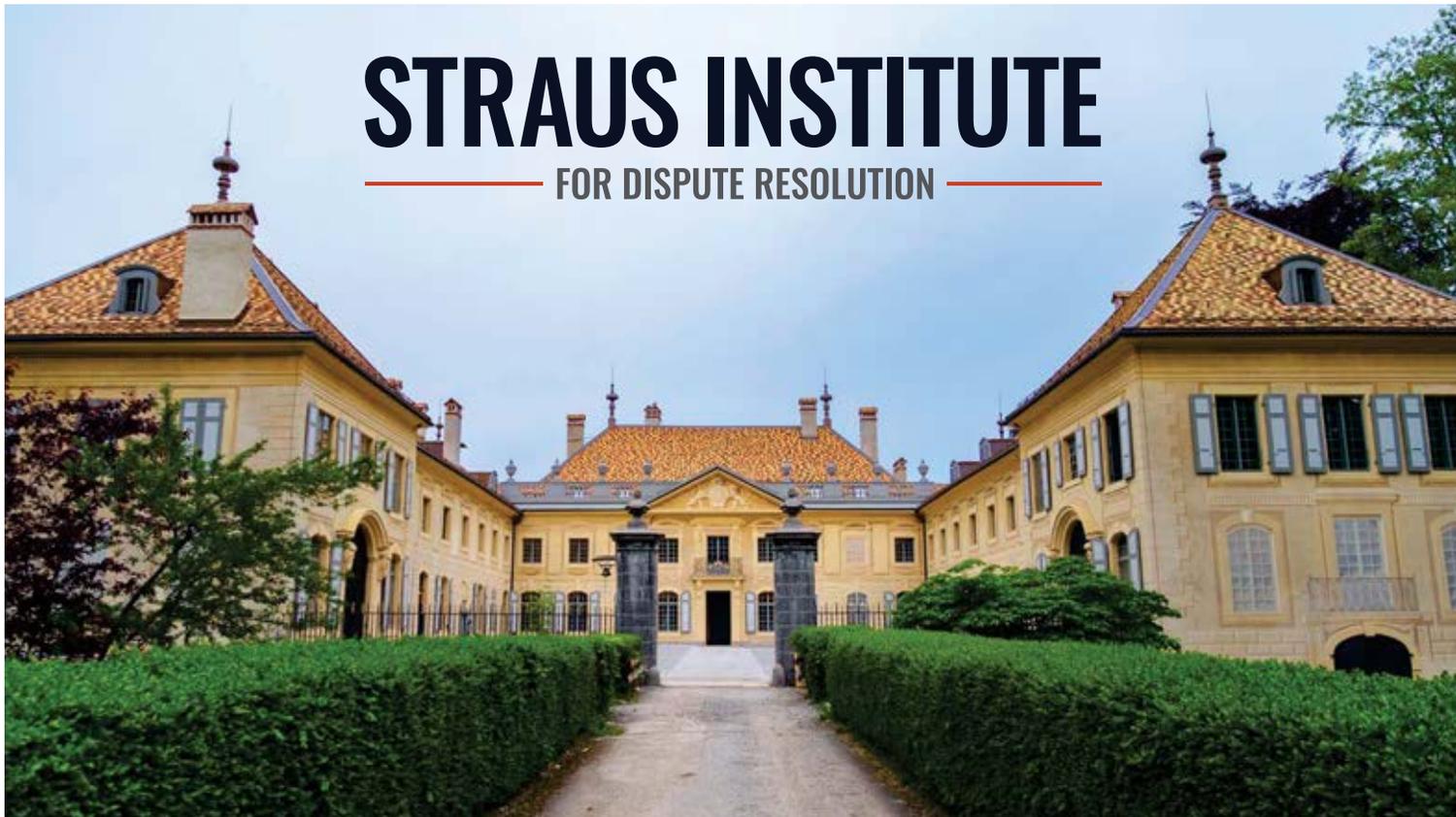


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Associate Editor

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Contacting the Magazine

Article ideas, letters, and other correspondence can be sent to: Dispute Resolution Magazine ABA Section of Dispute Resolution 1050 Connecticut, NW, Suite 400 Washington, DC 20036 Phone: 202-662-1680

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DISPUTE RESOLUTION MAGAZINE

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DISPUTE RESOLUTION SECTION

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ABA Section of Dispute Resolution Staff

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Jennifer Michel

jennifer.michel@americanbar.org

312-833-5006

Associate Director, Programming

Melissa Buckley

melissa.buckley@americanbar.org

202-442-3444

Committee and Meeting Specialist

Maria Bartolo

maria.bartolo@americanbar.org

312-988-5679

Membership and Marketing Specialist

Jessica Rawski

jessica.rawski@americanbar.org

312-988-5176

Administrative Assistant

Vernita Warren-Gary

vernita.warrengary@americanbar.org

312-988-5752

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Letter From Outgoing Chair *By Brian Pappas*



It was my honor to serve as Section chair. Looking back at my journey up the Section's leadership ladder, I learned and grew so much. My first ABA section event was at the 2008 Spring Conference in Seattle. I knew no one there, and I remember wondering whether I belonged at a meeting with such accomplished thinkers. I never imagined I would be Section chair fifteen years later. Whether you realize it or not, you may be chair someday, and so this column describing the lessons I learned is dedicated to you.

All roles and perspectives are valuable.

It's not about the Chair. As the chair, I tried to keep a healthy perspective regarding my ABA leadership obligations. In one year, it is not possible to leave a legacy or transform a section. The year begins quickly, and before you know it, you are at the mid-year meeting. Associations adapt and grow incrementally, just like their members, and my goal was always to be a responsible section steward. I learned from former chair Myra Selby that change for the sake of change is irresponsible. She taught me to be mindful and understand why you are taking the actions you are taking.

Our staff are incredibly valuable colleagues and partners. They are an essential part of our team and the true section VIPs. I learned from former chair Harrie Samaras that staff are mentors, valuable counsel, and lifelong friends. I am so honored to have worked for years with accomplished staff leaders like Linda Warren Seely, Gina Brown, Jennifer Michel, Melissa Buckley, Matthew Conger, and many others.

Leadership comes in all forms. You do not need to be an officer to make a difference. Indeed, I made an enormous impact as a committee cochair working with Mariana H.C. Gonstead. Along with our committee, and staff members Matthew Conger and Melissa Buckley, we worked as a team. We recruited new committee members and continuously brought varying perspectives into the committee. I am very proud that our section continues to make meaningful strides in supporting greater diversity in our section and in our field.

Never stop learning

Embrace the unknown. When we think we "know," there is less room for learning and growth. The more certain I am, the more I wonder what I am missing. I

learned this most clearly from Ava Abramowitz, who taught me to be curious, to be open to new ideas and opportunities, and to cultivate humility, grace, and patience.

Trust in the process and in those who came before you. The leadership ladder provides opportunities in stages to learn about different parts of "the elephant" that is the ABA. It takes time to see the full picture. So many committee chairs, institute leaders, and officers have preceded us. People like former chair Pam Enslin are generous and willing to provide a longer-term perspective. Their wisdom and experience are more valuable than you can imagine.

Mistakes are gifts. It is easier to learn from mistakes than successes. Embrace failure and forgive yourself and others. I have made more than my share of mistakes. For me it is an iterative process of learning and improving, and then making new mistakes and improving some more. We are all here to grow and to help others grow. I always try to understand what happened, to be accountable, and to do what I can to make it right. I learned a lot from our former staff guru Gina Brown, who always showed me patience, understanding, and forgiveness.

Engage positively

Take a risk now and then. Change is hard, and not everyone is ready to try something new. Often we do things a particular way simply because of history and tradition. I learned this from former chair Joan Stearns Johnsen. Joan had bold ideas, and she was not afraid to think big and challenge everyone to do the same. I learned that our principles are important, and they will guide us in the right direction.

Collaboration is the key. The African Proverb is true: "If you want to go fast, go alone, if you want to go far, go together." Whether with other sections, other committees, or other ADR organizations, it is better to "go far" than to go quickly. Keep in mind the core concepts that define our field, and take time to listen to all perspectives and include them meaningfully in deliberations. I try to seek others' opinions on everything as much as I can. If I am alone in my thinking, my thinking

Brian Pappas is Dean and Professor of Law at the University of North Dakota School of Law. He can be reached at brian.pappas@und.edu.

is likely wrong. I learned a lot about collaboration and kindness from former chair Jim Alfini.

Conflict can be a catalyst for better things. Conflict happens, even in a section of Dispute Resolution. While we are all in the conflict business, all of us have had moments we do not want to permanently define us. None of us really know what others are experiencing, and so forgiveness and grace are powerful tools for navigating conflict. I find it is better to take time to reflect before responding in a difficult situation. I learned so much watching former chair Nancy Welsh, who lives what she teaches.

Stay present and enjoy every moment

Service and engagement are fun. Whatever the issue, former chair Ben Davis was so good at making the work fun. Ben cares deeply about both justice and about sharing ideas, but always with a wonderful spirit of collegiality.

ABA leaders are passionate. I did not stay involved with the ABA so I could hold a title, but because

I like surrounding myself with great people who are passionate about working to improve our field. Former chair David Larson epitomizes this passion as he stepped in as chair-elect and had to learn a lot in a short period of time. He has done so much for our section and our field.

The future is bright. I have been so fortunate to learn from the chairs who came before me. But I am even more excited for the chairs rising up the ladder. Our next chair, Ana Sambold, is a lightning bolt of energy and expertise who creates community wherever she goes. With Jennifer Michel as our director and Ana as our chair, the future could not be brighter.

Final thoughts

All of the people I mentioned could provide a far better rundown of "leadership" advice than I can. Due to space limitations, I am not able to mention everyone, but you know who you are. I was simply fortunate enough to learn from all of them and from all of you. Thank you. ■

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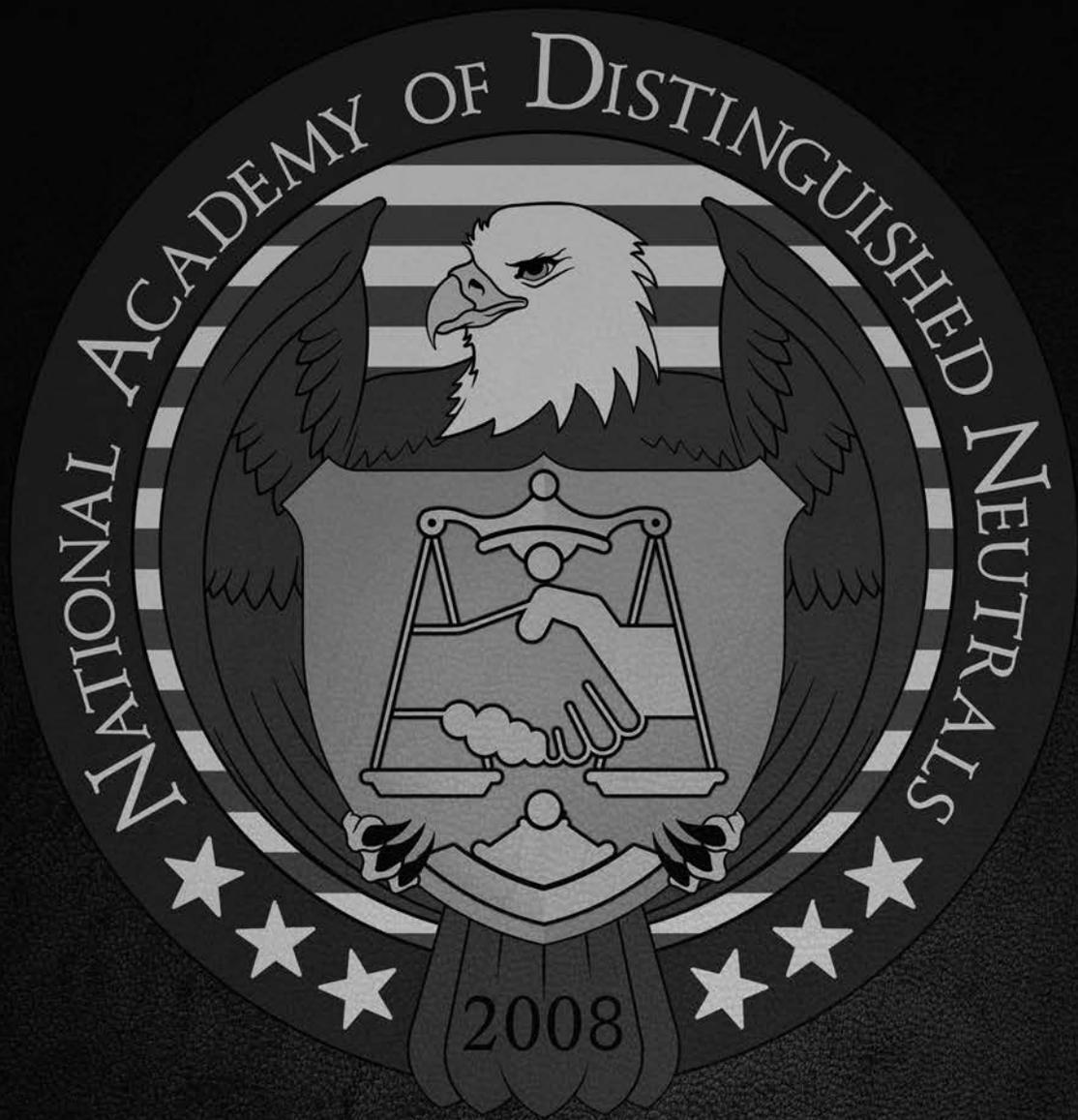
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Letter from the Board

Access to justice is a foundational concern of the legal profession and society as a whole. The scales of justice mean little if resolution of disputes is not accessible, even-handed, and timely.

Much is written today of a perceived two-tiered system of justice. While no one is above the law, equal justice under the law provides an important counter-measure—both principles go hand in hand. One without the other leaves the public questioning whether the ends of justice are being met. Similarly, because justice delayed is often justice denied, timely resolution of disputes is of paramount concern.

This issue addresses access to justice from multiple frameworks and highlights the importance of these overriding principles and attempts to meet these needs. While all aspects and applications of justice cannot be addressed in a single publication, these authors have examined access to justice from a variety of instructive viewpoints.

Addressing the issue from a rural perspective, Stacey Marz and Loren Hildebrandt walk us through an innovative program launched by the Alaska Court System to speedily identify, earmark, and resolve a wide range of family law disputes in a cost-effective manner with minimum disruption to the parties and maximum efficiency. The Early Resolution Program has streamlined Alaska's court docket through a combination of mediation, conciliation, or a settlement judge's oversight—all dependent on the nature of the underlying conflict. The program, launched in 2009, has been a national model for case management and is the recipient of the 2021 Irwin Cantor Innovative Program Award from the Association of Family and Conciliation Courts.

Building on issues faced by rural communities, Kristen M. Blankley and Kelly Riley guide us through the successful use of mediation in Nebraska. The latest efforts seek to implement an online dispute resolution mechanism to provide even greater access to dispute resolution resources. Myles Montgomery then takes a greater dive into how high-speed internet provides greater access to justice in rural communities. Myles discusses rural poverty, examining the digital divide, and legislative efforts currently underway to bridge that gap.

Turning to city and international settings, Tracey Frisch and Gregory Kochansky of the AAA/ICDR

discuss three of the Foundation's recent programs. Those programs aim to employ mediation for low emergent 911 calls in Dayton, Ohio to relieve demands on law enforcement while aiding police reform; improve police training in Chicago neighborhoods with high crime rates; and curb violence in the United States and Latin America by focusing on violence as a public health crisis.

Stepping away from community access matters, Brandon D. Miller and Robert A. Lusk analyze the Ending Forced Arbitration of Sexual Assault and Sexual Harassment Act of 2022. The Act renders arbitration of sexual harassment and sexual assault claims voidable at the option of the employee bringing a claim. Brandon and Robert discuss pros and cons of the Act.

And finally, we look at the 2023 Sander Award Winner: A congressional committee with a track record of bipartisan results. Grande Lum and Bruce Patton analyze the extraordinary results of the "Mod-Com" Committee and the structural methods employed by its chair and vice-chair to avoid gridlock and polarization. These methods, no doubt, can be employed in a range of scenarios to find common ground.

Access to justice is at the heart of our legal system. We hope this issue illustrates creative efforts undertaken by various communities in multiple contexts to further access and spark discussion on how dispute resolution principles can be adapted to meet local demands. ■

Advancing Access to Justice Through Alternative Dispute Resolution: AAA-ICDR Foundation Grantees in Focus¹

By Tracey Frisch and Gregory Kochansky

The American Arbitration Association and its international division, the International Centre for Dispute Resolution, announced the establishment of the AAA-ICDR Foundation in May 2015. The Foundation is a 501(c)(3) not-for-profit organization empowered to solicit donations and provide grants to fund a range of worthy causes that promote its wide-reaching mission: to support the prevention and resolution of conflicts by expanding access to alternative dispute resolution (ADR).

The Foundation has also established three priority areas:

- Prevent and reduce violence with a focus on vulnerable and underserved communities and police/social service partnerships.
- Bridge community conflict with a focus on civil discourse seeking to mend societal divisions.
- Support diversity, equity, and inclusion with a focus on access to justice.

Since inception in 2015, through the generous support of the AAA-ICDR and AAA-ICDR panel member donations, the Foundation has provided over \$8.1 million in grants to initiatives that further its mission and priority areas. Many of those grants have been awarded to programs focused, in particular, on advancing access to justice through ADR.

The Foundation has four grant types: its Annual Grant Cycle, Special Initiatives Grants, Rapid Response Grants, and Diversity Scholarships. The Foundation's Annual Grant Cycle has provided



more than \$6.5 million in funding to projects chosen through a competitive review process. Each year, typically in June, the AAA-ICDR Foundation issues a request for proposals that address Foundation priorities for the upcoming grant cycle. The two-step application process starts with an Initial Description of Grant Request—an open call for organizations to submit applications. After review, a number of applicants are invited to submit a full proposal.

The AAA-ICDR Foundation's Rapid Response Fund provides support when needs are more time-sensitive. The Foundation identifies prospective grantees

“ Since inception in 2015, through the generous support of the AAA-ICDR and AAA-ICDR panel member donations, the Foundation has provided over \$8.1 million in grants to initiatives that further its mission and priority areas. ”

and invites them to apply. This fund enables the Foundation to quickly award grants to not-for-profit 501(c)(3) organizations poised to address urgent needs arising from current events. For example, the focus for 2022 was on organizations using ADR to help displaced Ukrainian citizens.

In 2022, the Foundation also created a new category of grants, Special Initiative Grants, which allow the Foundation Board to proactively invite organizations to apply for funding separate from the Annual Grant Cycle. The 2022 Special Initiative Grants focused on the Foundation’s priorities of bridging community divides and preventing and reducing violence.

In addition to grants for organizations, the Foundation employs two strategies to encourage broader representation in leadership across the field of ADR. The Diversity Scholarship Program provides up to \$2,000 to individuals towards participation in a degree program, fellowship, or conference focused on ADR. In 2022, the Foundation also expanded its giving in this area by establishing scholarships for law students enrolled in dispute resolution programs at Howard University and North Carolina Central University, two Historically Black Colleges and Universities. The three-year commitment will provide, annually, \$50,000 to second- and third-year law students at each institution, for a total through 2024 of \$300,000.

This article highlights three of the Foundation’s 146 grants so far, with an emphasis on access to justice. Each was awarded in 2022 through either the Annual Grant Cycle or Special Initiative Grants:

- Dayton Mediation Center’s pilot of a Mediation Response Unit for low emergent 911 calls in Dayton, Ohio;

- Cure Violence Global’s training and public outreach efforts to address community violence as a public health crisis; and
- Metropolitan Family Services’ collaborative community police training through a joint initiative between the Metropolitan Peace Initiatives and the Chicago Police Department.

Dayton Mediation Center— Mediation Response Unit

The Dayton Mediation Center received a \$150,000 grant to pilot a Mediation Response Unit for low emergent 911 calls in Dayton, Ohio.

In 2020, the national conversation about use of force by law enforcement led the City of Dayton to convene working groups that included community members, professionals from various disciplines, and city officials. They met regularly, sought feedback from the community, and then made 142 recommendations for police reform that included—among other things—policy changes, additional training, and a focus on recruitment.

The working groups identified the local 911 system for emergency calls as one such opportunity, and the city enlisted the Dayton Mediation Center to spearhead efforts to establish an alternative Mediation Response Unit (MRU). Although serious emergencies require police intervention, many issues—disputes between neighbors, loitering complaints, issues with barking dogs—could be resolved by civilians instead. In addition to facilitating community conflict resolution, this approach frees up law enforcement for situations that may require forceful intervention.

The 2022 grant from the Foundation helped to establish a pilot program with a team of five experts in conflict resolution and crisis response to handle these “low emergent” calls. They apply a trauma-informed approach to transformative mediation, which provides a safe space for people to be heard and to move from self-absorption and weakness into recognition and empowerment. The process redirects appropriate 911 calls to the MRU for in-person follow-up, or even simply directs callers to other resources like mental health counseling.

Citizens can also contact the MRU hotline directly, walk-in services are available, and officers on the scene can ask the MRU to respond instead. MRU



“ Although serious emergencies require police intervention, many issues—disputes between neighbors, loitering complaints, issues with barking dogs—could be resolved by civilians instead.”

members wear uniforms and drive vehicles that clearly reflect their roles as “Mediators.” These services are available on weekdays, from 11:00 a.m. to 8:00 p.m., based on research showing that most calls the MRU would act on are made during those hours.

Over the past year, the MRU has responded to 1,500 calls for service in the Dayton community. The call type most responded to has been disputes between neighbors, followed by complaints about disorderly persons. The goals of the program are to publicize the MRU and expand its use—in Dayton and through similar programs in other communities,

especially to benefit marginalized populations including at-risk youth, group home residents, and students with disciplinary issues. In the future, the MRU also plans to work with researchers to gauge the impact of these efforts.

Cure Violence Global

Cure Violence Global received a \$542,000 two-year grant as part of the Foundation’s 2022 Special Initiative Grants to address community violence as a public health crisis through training and broader public outreach in both the United States and Latin America.

Violence is a major public health issue with physical, psychological, social, and economic dimensions. It reduces life expectancy, limits opportunity, and disproportionately impacts low-income communities of color—deepening inequities that already exist.

Cure Violence Global (CVG) wants to reduce violence by treating it as the contagious disease that it is: transmitted by exposure, causing psychological damage, and then spreading to others in the same way. That cycle can be broken. CVG trains individuals with strong credibility in their communities to set healthy social norms, manage conflict before

“ CVG trains individuals with strong credibility in their communities to set healthy social norms, manage conflict before it results in physical harm, and serve as an example to those at highest risk of becoming casualties of endemic violence. ”

it results in physical harm, and serve as an example to those at highest risk of becoming casualties of endemic violence.

With the federal government pledging to provide hundreds of millions of dollars per year for anti-violence efforts, new programs are expected to proliferate, and the workforce in those programs will need training based on the latest research and best practices. CVG’s “Alternative Dispute Resolution Training for Community Conflicts” program is designed to fill that need. This funding from the AAA-ICDR Foundation is helping CVG to work with an expert in educational design to update its trainings in the U.S. and Latin America for the benefit of violence interrupters and outreach workers on the front lines, as well as people involved in restorative justice, medical and trauma professionals, academics, community-based organizations new to the field, and law enforcement and criminal justice professionals.

The first step was to identify the sectors and organizations in the best position to apply these techniques and design strategies for achieving true engagement. CVG is now working with community organizations and governments in more than 23 cities in the U.S., targeting the highest-risk individuals in specific neighborhoods where violence is prevalent. In Latin America, it is doing similar work in four different countries.

Metropolitan Family Services

Metropolitan Family Services received a \$25,000 grant as part of the Foundation’s 2022 Annual Grant Cycle. The grant supported a collaboration between the Metropolitan Peace Initiatives (MPI) and the Chicago Police Department to further implement

community police training in Chicago neighborhoods with high crime rates.

Established in 2017, MPI is a division of Metropolitan Family Services charged with convening and supporting a collaborative of nine community-based organizations working to reduce violence and promote healing in 15 of Chicago’s most troubled communities. This collaborative is called Communities Partnering 4 Peace (CP4P). CP4P has expanded to include 15 community-based organizations serving 28 Chicago neighborhoods. Since 2017, MPI has offered the Metropolitan Peace Academy to train and professionalize CP4P-affiliated workers who perform street outreach.

The curriculum for this training is novel and informed, in part, by the lived experiences of its students. Prior to the implementation of this collaborative model, local street outreach workers did not share lessons learned with organizations working in adjacent or nearby neighborhoods. The communication and shared learning promoted at the Metropolitan Peace Academy has swiftly improved the practice of street outreach across the City of Chicago.

Late in 2021, MPI launched a new Community Police Training program. This joint effort between MPI and the Chicago Police Department is focused on strengthening community relations and bringing awareness to available resources. The training takes a hyperlocal approach: the subject matter, facilitators, and format are tailored to each neighborhood. To date, 100 police officers representing 10 of Chicago’s 22 police districts have participated. Each year, the program enrolls cohorts of new and transferring officers from 10 police districts, with the intention of training officers across all 22 districts.

The three-day training covers the history of each community in the participants’ district from the perspective of its citizens; introduces key faith, community, and business leaders; and details available resources, any gaps in service, and ongoing local challenges. The rigorous curriculum also addresses stereotyping and cultural literacy, and uses roleplaying exercises to move students from theory to practical application. As in all MPI training, instruction in trauma, restorative justice, and nonviolent practices plays a central role. Post-program surveys then gauge

“ The communication and shared learning promoted at the Metropolitan Peace Academy has swiftly improved the practice of street outreach across the City of Chicago. ”

the extent to which participants are successfully rebuilding communities' trust in law enforcement.

MPI's work targets individuals in low-income communities who are acutely at risk of being perpetrators and, in turn, victims of gun violence. These individuals mostly identify as African American (77 percent) or Latino (20 percent), and as male (81 percent), and are mostly between the ages of 16 and 44 (89 percent). Obstacles these at-risk individuals face include family isolation and lack of access to support structures; early academic failure; lack of effective reentry strategies and transitional support services; poor access to health and mental health care services; normalization of violence; and lack of economic investment, workforce development, and family economic success. Similarly, the outreach workers supporting them mostly identify as African American (88 percent) or Latino (12 percent), and as male (92 percent), and are mostly between the ages of 24 and 45 (80 percent).

This summer, the Community Police Training program will complete its second year. The curriculum, to date, is made available free of charge to organizations engaged in street outreach anywhere in the U.S.—not only in Chicago. In addition, Metropolitan Family Services (Chicago), the Urban Peace Institute (Los Angeles), and Man UP (New York City) all collaborate and share training best practices.



Tracey Frisch is Senior Counsel in the AAA-ICDR's Legal Department and Corporate Secretary, Grants Committee Chair, and Board Member of the AAA-ICDR Foundation. She can be reached

at FrischT@adr.org. **Gregory Kochansky** is Assistant Vice President for Publications and ADR Resources at the AAA-ICDR. He can be reached at KochanskyG@adr.org.

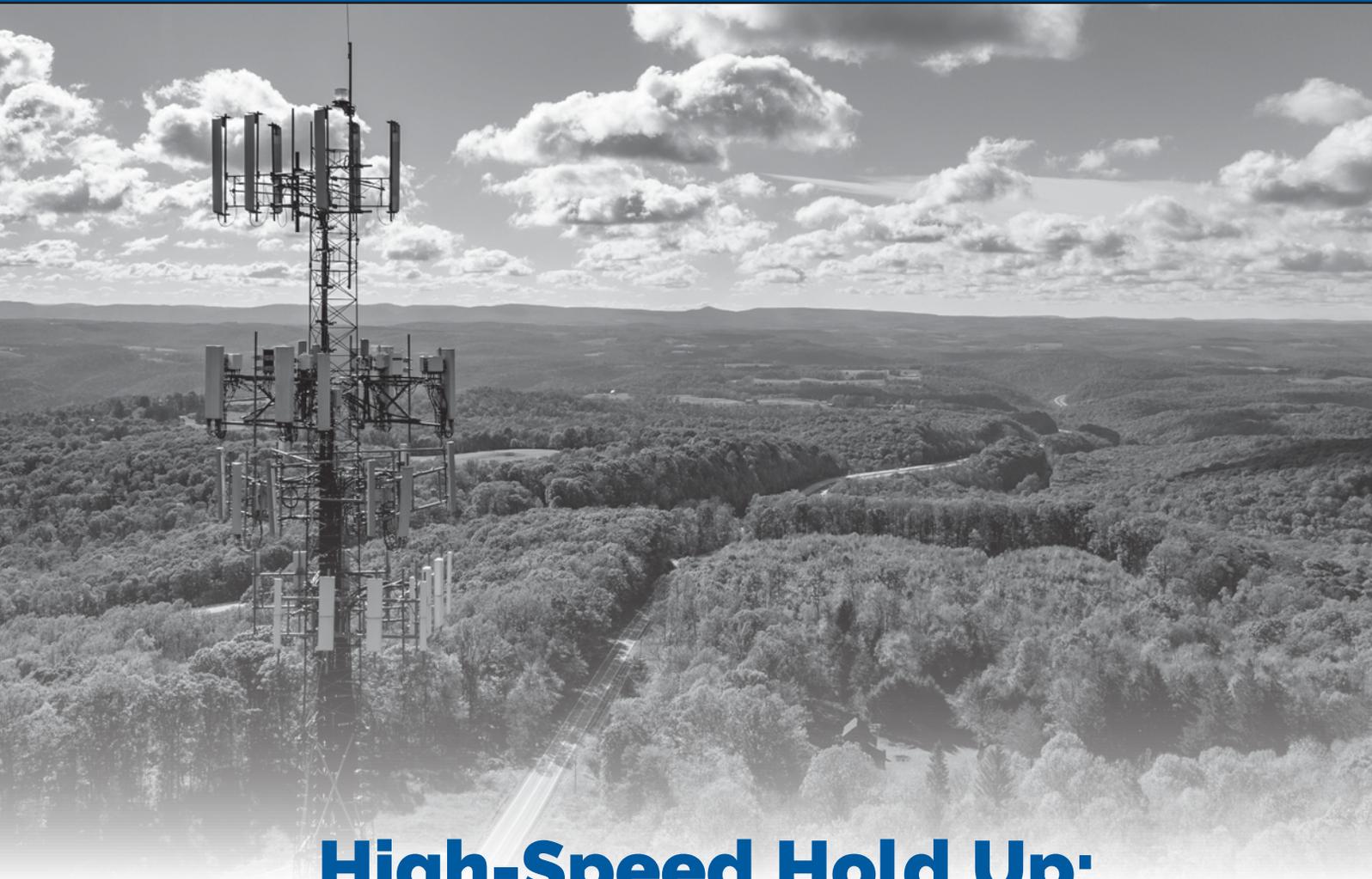
In addition to training officers to work more effectively with street outreach workers, MPI offers programming on reentry support for citizens returning to the community after incarceration and free legal assistance through the Legal Justice Corps, which connects attorneys with community-based organizations where program participants live.

Conclusion

Taken together, Dayton's Mediation Response Unit, Cure Violence Global, and Metropolitan Family Services show how innovative alternative dispute resolution techniques can improve access to justice. The AAA-ICDR Foundation is proud to support these programs and so many others that are leading the way to prevent and reduce violence; bridge community conflict; and support diversity, equity, and inclusion. To learn more about the AAA-ICDR Foundation and the programs it supports, visit aaaicdrfoundation.org. ■

Endnotes

1 Parts of this article were previously published in the AAA-ICDR Foundation's 2022 Annual Report. See https://www.aaaicdrfoundation.org/sites/default/files/2023-05/2022_AAA-ICDR_AnnualReport-Digital_0.pdf.



High-Speed Hold Up: How Lack of Broadband Internet Impacts Justice in Rural Areas

By Myles Montgomery

John Steinbeck's novels are largely set in rural California, especially the Salinas Valley in Monterey County. They reflect bucolic environments filled with agriculture and livestock. Often referred to as "The Salad Bowl" of the country, the Salinas Valley feeds much of the U.S. Yet, according to one study, only 42 percent of households in the area receive broadband services.¹ Much has been written about the digital divide and its impact on economic growth, education, and medical services, but few commentators describe how this phenomenon affects access to justice.

The digital divide significantly impacts the availability of alternative dispute resolution (ADR) in sparsely populated areas in the United States. High-speed internet gaps in rural states exacerbate existing inequities in the form of access to justice, especially for historically oppressed groups such as indigenous populations. Current federal and state legislation targets money for broadband development. But solving this issue will take more than just money. Effective implementation of broadband connectivity will require an understanding of the relationships between



infrastructure development, service providers, local resources, and digital literacy development.

The Persistence of Rural Poverty

Since 1958, when the U.S. began keeping statistics on poverty, rural communities—defined as open countryside areas with fewer than 500 persons per square mile and places with fewer than 2,500 persons²—have ranked higher than their urban counterparts in the indicia of poverty. In 1964, the War on Poverty recognized rural service gaps, and more recently, the Affordable Care Act addressed concerns about severe lapses in rural health care services. Despite these programs, poverty continues to disproportionately concentrate in outlying communities.

Further, the overall poverty rate of 11.6 percent disproportionately affects individuals in remote areas, especially nonwhite and tribal communities.³ In 2019, the U.S. Department of Agriculture determined that in rural settings the average poverty rate for whites (13.3 percent) was still lower than the averages for Black (30.7 percent), American Indian/Alaskan Native (29.6 percent), and Hispanic (21.7 percent) populations.⁴

The poverty rates for these same groups in urban areas were substantially lower.

ADR, Online Dispute Resolution, and Access to Justice

Legal resources are scarcer in country environments, and rural areas experience “legal deserts,” where attorneys are in short supply. Especially in the context of attorney shortages, ADR offers attractive solutions, including flexible approaches, faster outcomes, cost-effectiveness, and greater participant control.

Online dispute resolution (ODR) has proven highly effective in providing access to ADR services through a high-speed internet interface. For instance, one study on ODR effectiveness in Ottawa County, Michigan, found that custody, child support and parenting time disputes resolved faster when using an online platform.⁵ Another study, in Kane County, Illinois, found that 74 percent of online-mediated landlord-tenant disputes avoided eviction.⁶ Seventy-one percent of attorneys in this study reported they would highly recommend this process to a colleague.

An ODR pilot program in the Florida Court system also showed promise. In one jurisdiction, 89 percent

of small claims cases were processed and resolved at a cost of only five dollars for participants.⁷ Besides reduced costs, the program helped participants save time and travel costs.

Considering persistent levels of poverty in rural places, ADR and ODR represent potentially affordable avenues to justice. However, providing ADR training and ODR services requires adequate broadband resources, making the digital divide the greatest barrier.

The Digital Divide

The “digital divide” refers to the unequal access to technology among certain demographics and geographic regions. Besides referring to hardware and fiber optics, this term also refers to the relative level of digital literacy among a particular population. But lack of both infrastructure and service providers perpetuates the absence of connectivity in rural areas.

High-speed infrastructure has yet to reach many U.S. rural communities. A 2019 study by the Federal Communications Commission found that 18 million people are without adequate internet service. The authors of the report resulting from the study conclude that this figure “wildly underestimates” the actual number, which may be between 42 and 162 million.⁸ Importantly, the report also recognized that 26 percent of people in rural areas and 32 percent in tribal areas lack access to broadband.

Infrastructure is necessary, but not sufficient in and of itself to solve the digital divide. Service providers—public or private—are also required to link the internet and end-users. In rural areas, private providers can be harder to come by, as potential profits are slimmer than in metropolitan areas. Without private providers, public entities must be leveraged. The costs of these services must also be affordable to customers, which is difficult for those living in poverty.

“...lack of both infrastructure and service providers perpetuates the absence of connectivity in rural areas.”

Digital literacy, another aspect of the digital divide, must be promoted as well.

Legislation

Both federal and state legislation are poised to address some issues raised by the digital divide. For instance, the Infrastructure Investment Bill and American Jobs Act released \$65 billion for improving broadband infrastructure across the U.S. But commentators warn that “without accurate depictions and data on how residents in rural, urban, and tribal lands are adversely impacted by the lack of available and sufficient high-speed broadband, certain populations will be left without sufficient online connectivity and remain on the wrong side of digital opportunities, particularly those populations already impacted by a range of historic and systemic inequalities throughout America’s rural South and Black Belt regions.”⁹

State legislatures are also taking steps to develop and increase broadband services. Currently, 43 states, the District of Columbia, and Puerto Rico have passed or are considering legislation that would expand the necessary infrastructure.¹⁰ Enacted and pending bills focus primarily on funding, governance, and taxes for expanding broadband services. A smaller number of bills address digital literacy and education. While this trend is encouraging, the digital divide is a multifaceted issue that requires highly coordinated efforts. In states with more rural areas, this challenge is compounded by existing levels of high poverty.

Rural Areas: Barriers and Solutions

Snapshots of rural South Dakota, Mississippi, and Nebraska illustrate both the challenges posed by the digital divide and efforts towards change. For instance, in 2019, in half of South Dakota’s counties identified as rural, 25 percent of residents were without internet that meets high-speed standards.¹¹ Additionally, South Dakota encompasses nine indigenous tribes that are the poorest in the country, with a poverty rate of 49 percent.¹² The existing level of poverty creates a further issue: existence of broadband infrastructure and a provider does not mean residents can afford service.

Responding to these conditions, the South Dakota legislature approved \$5 million to fund the Connect SD program, a public-private collaboration with the

“ Beyond throwing federal money at developing infrastructure, concerted efforts are required at local levels, including developing service providers, and increasing digital literacy. ”

intent of expanding broadband service throughout the state.¹³ This program reportedly has extended high-speed internet to 26,000 homes, businesses, farms, and critical access facilities. Additionally, in 2023, the state launched a digital literacy program—featuring training in basic computer, internet, and email skills—and helps offset the costs of purchasing broadband service.¹⁴ Persons receiving any form of public assistance qualify for the program.

Mississippi experiences similar issues. In 2020, rural Mississippi communities experienced a 25 percent poverty rate.¹⁵ As in South Dakota, Mississippi’s indigenous communities bear an even greater poverty burden (33.49 percent).¹⁶ Regarding high-speed connectivity, as of December 2019, Mississippi’s percentage of residents without access to high-speed broadband (19.7 percent) leads the American South.¹⁷

To address this issue, the Office of Broadband Expansion and Accessibility of Mississippi (BEAM) was created. BEAM proposed a five-year plan “to empower Mississippians by arming them with the technological skills, services, and tools to succeed in a global, digital economy.”¹⁸ This plan includes three statewide goals: economic development for technology-focused start-ups, improvement in K-12 education, and the proliferation of broadband internet services.

Regarding the last goal, BEAM will distribute \$1.2 billion from the Infrastructure Investment and Jobs Act to expand broadband services to approximately 300,000 underserved residents.¹⁹ To map and account for new services, BEAM is using crowdsourcing. Still, this plan acknowledges the “impact of the economic environment in the State” as a significant factor in the plan’s success.²⁰ Examples of factors affecting the economic environment likely range from the limited grants available (compared to the

level of need) and the willingness of providers to enter rural areas.

With an overall poverty rate of 10.8 percent, largely rural Nebraska faces the same connectivity issues.²¹ In response, Governor Jim Pillen proposed creating a new office with the sole duty of expanding broadband services throughout the state.²² This new office hopes to replicate the success of Nebraskan counties that have independently initiated effective partnerships with internet providers to increase delivery of broadband services. As part of this effort, the state now offers broadband access programs, including subsidies for broadband services and equipment and deployment of targeted grants for underserved areas.²³

These examples suggest that closing the digital divide in rural areas requires changes at the state and local levels, with collaborations between public and private entities.

Looking Forward

What else is being done to bridge the digital divide? Some nonprofit organizations, such as Maine’s Island Institute, promote a community-driven model for addressing broadband service gaps in rural areas. This bottom-up model embraces community engagement as an engine and fosters collaboration among stakeholders who possess technical, political, and funding expertise. Work groups divide up tasks, such as cultivating relationships with service providers, choosing financial models for funding, developing local programs for digital literacy, and addressing ways to make broadband services affordable.²⁴ Similarly, the Center for Rural Affairs, which publishes the *South Dakota Broadband Resource Guide*,²⁵ works with rural communities to improve broadband access. Both agencies recognize the layers of issues associated with bridging the digital divide in rural areas.

Solving the high-speed hold-up requires structure, participation of multiple parties, and creativity. Beyond throwing federal money at developing infrastructure, concerted efforts are required at local levels, including developing service providers and increasing digital literacy. Without effective responses to each of these areas and corresponding improvement in access to internet services, equitable avenues to justice will continue to be delayed. ■

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Myles Montgomery is an attorney and social worker practicing in Sacramento, California. He is also a lecturer at Sacramento State University. He can be reached at montgomerylcsww@gmail.com



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One and Done: A Shortened and Personalized Approach to Family Law Case Processing

By Stacey Marz and Loren Hildebrandt

Individuals representing themselves in family law cases may not expect much from their first court hearing—certainly not to complete their case mere weeks after filing. The Alaska Court System’s innovative Early Resolution Program (ERP), however, helps 80 percent of cases that involve two self-represented litigants (SRLs) to resolve their disputes and finalize their cases at their initial hearing, with the help of a settlement judge, mediator, or unbundled volunteer attorneys.

The adversarial model used by default in many family law matters fails to recognize that most litigants want to finalize their court cases as soon as possible and that most issues require practical problem-solving, not complicated legal analysis. In over a decade of managing ERP, the authors have improved access to justice in contested divorce and custody cases with a user-friendly simplified process. While designed for SRLs, the model can benefit practitioners seeking to save their clients time, money, and the anxiety of protracted court involvement.

Why Create ERP?

In family law cases, the traditional adversarial process often increases hostility and fosters long-term distrust between parties by encouraging them to

dredge through the other side’s past misdeeds to assign blame or predict future behavior. Setting first appearances months out from filing pleadings can cause anxiety, stress, high emotions, and reactive behavior that necessitates substantial judicial involvement, including expedited hearings and motion practice.

Prolonging the parties’ interaction with each other and the court system is particularly problematic in family law cases involving SRLs. Reliving grievances compromises the ability to see beyond the present conflict and remain open and receptive to new possibilities. Even a perceived victory can come at a high emotional cost that can limit the parties’ motivation to follow through and land them back in court on enforcement motions. ERP professionals work to ensure a durable, fair, and impartial result, while helping parents and spouses shift focus from the past to their present and future responsibilities.

In the Alaska system, ERP began in 2009, when Anchorage Superior Court Judge Stephanie Joannides, inspired by her work presiding over problem-solving drug courts, adopted a process to streamline management of her family law cases with SRLs. Like many states, Alaska has a high rate of SRLs in family cases, ranging from 40 to 80 percent,

“ The adversarial model used by default in many family law matters fails to recognize that most litigants want to finalize their court cases as soon as possible and that most issues require practical problem-solving, not complicated legal analysis. ”

depending on court location. Judge Joannides partnered with author Stacey Marz, then Director of the Family Law Self-Help Center and current Administrative Director of the Alaska Court System, to create ERP to manage qualifying SRL divorce and custody cases.

Most issues in family law cases are practical in nature and can be resolved through a problem-solving approach; only the rare case calls for first impression legal analysis. The ERP system anticipated that early intervention in the case process and the help of legal professionals would encourage parties to settle their issues rather than endure a protracted court trial. The result would be faster resolutions in which the parties created their own solutions—after benefiting from legal advice, mediation, or a settlement conference—and a reduced workload for trial judges and staff. Thirteen years and nearly 3,000 cases later, ERP continues to serve as a national model for court case flow management, winning the 2021 Irwin Cantor Innovative Program Award from the Association of Family and Conciliation Courts.

How it Works

In the ERP system, six to nine divorce and custody cases are calendared for the same hearing block a few weeks after the pleadings are filed. ERP follows a simplified process: triage; assist; and hearing. The process minimizes time from case filing to disposition and the number of court staff needed to process the file. The ERP Coordinator, coauthor Loren Hildebrandt, receives domestic relations cases with two SRLs to screen about one to three days after an answer is filed. ERP follows a tailored approach to triaging cases with two-level screening. Level 1 screening assumes that all cases would benefit from participation and then looks for reasons to exclude a case. If the case is included, Level 2 screening determines the optimal legal resource to help the parties resolve the issues—volunteer unbundled attorneys, mediator, or settlement judge.

Level 1 screening starts after the court receives the answer to a complaint. This ensures that both parties intend to participate in the case, which is necessary to reach an agreement. The screener reviews the court file, which typically provides information about the marital property and debt in a divorce and about the

parties' positions on parenting plans for children, if any. The screener also reviews each party's individual court case histories as reflected in Alaska's electronic court case management system.

Most often, the coordinator declines cases not because of conflict between the parties, but due to a legal problem: a jurisdictional challenge; possible statutory presumption against custody for domestic violence perpetrators; need for dueling expert testimony (especially if the parties own a business); another relevant case that will impact the divorce/custody outcome (such as an open child in need of aid or criminal domestic violence case); or a non-parent requesting child custody. ERP accepts about 55 percent of all screened cases.

The parties' stated positions, even if opposing, rarely influence whether the program accepts a case. ERP routinely accepts and resolves challenging contested cases in which the parties do not agree on any issue, but a workable solution seems clear. For example, one recently settled custody case involved a five-year-old girl with parents who disagreed on decision-making and parenting time. The mother requested sole legal and primary physical custody, and the father requested joint legal and shared physical custody. The mother also wanted the father to complete drug and alcohol treatment before having unsupervised time with the child. The court history screen revealed that the father had convictions in the past five years for felony DUI and resisting arrest. The mother did not have a criminal record. The pleadings noted that the father currently had infrequent contact with the child at the mother's discretion.

The coordinator identified the case as suitable for ERP because it appeared straightforward to resolve with a reintroduction period; graduated increases in parenting time to the father, starting with supervised visits and progressing to overnights upon meeting sobriety benchmarks; and a safety plan to address alcohol and drug abuse. The coordinator assigned the case to a mediator with a background in counseling individuals with substance abuse issues. The coordinator kept the case on the ERP calendar even when the father was charged with a second felony DUI between scheduling and the hearing date, because the father was released on bail and the new charge would not change the basic framework of the potential solution.



The case settled in one hearing with a parenting plan that tracked the likely trial outcome the coordinator identified in screening, including joint legal custody and graduated increases in the father's parenting time. The parents and their daughter thereby avoided a delay of several months simmering in indeterminacy—with the mother limiting contact and the father insisting on visits that could be unsafe for the child.

Level 2 screening determines the appropriate legal resource for the individual case: two volunteer unbundled attorneys, a mediator, or a settlement judge. Assignment depends on several considerations, including the issues involved and whether the parties' positions fall within the realistic range of possible outcomes given the facts of the case and the legal framework. If the staff attorney finds that the parties could use legal advice because one or both parties' positions are extreme or unrealistic given the legal framework, there is known or alleged domestic violence, or a party seems particularly indecisive, the court assigns a free volunteer unbundled attorney provided through Alaska Legal Services to each litigant for the hearing. Cases involving parties with children are often assigned a mediator if the parties could benefit from talking through the details of a

parenting plan or need assistance communicating. Some cases are assigned directly to the settlement judge if there is nothing in dispute or if relatively few or only simple issues need to be decided.

After a case is selected for ERP and scheduled for the hearing, the rubber meets the road with the attorney coordinator's involvement with the parties. The coordinator first sends the parties a detailed scheduling notice explaining the purpose of the hearing and provides their direct phone number and email address for the parties to touch base with any questions. The coordinator follows up by calling every party (or emailing when parties do not answer the phone or do not provide their phone numbers) before the ERP hearing to explain how to prepare and what to expect. This prehearing contact adds significant value by guiding parties into the mindset to resolve disputes: calming fears; dispelling misconceptions; and demystifying the process.

The coordinator also discusses any issues identified in staging the case for the judge, volunteer attorneys, or mediator, such as insufficient documentation to calculate child support (the coordinator calculates support in advance based on the best available information), or vague information on property and debt to divide. The goal is to avoid surprises on hearing day. If the parties reach an agreement, the settlement judge makes sure it meets the legal requirements and the parties memorialize it on the record. During the hearing, the coordinator drafts the final orders based on the agreement the judge signs at the hearing's conclusion. The coordinator then distributes the final orders to the parties in the courtroom (if they are physically present) or mails them the next day if parties participated remotely.

Lessons learned

Advocating for yourself in a family law case can feel like trying to operate a roller coaster while riding it. The prospect of an expedited first hearing where the parties can settle with the help of legal professionals tends to reduce anxiety. But sometimes ERP simply replaces trial as an object of dread in the minds of wary participants. Thus, to engage each participant at their present level of mental and emotional preparedness, ERP uses a flexible approach honed through experience managing thousands of

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cases. Additionally, ERP is a party-propelled process. The court creates the conditions for settlement to occur, but does not pressure the parties about the timing or outcome. Allowing this much freedom has spurred unexpected learning opportunities over the program's life.

First, we note that we receive a variety of responses from people upon learning that the court scheduled them for ERP. ERP scheduling notices often surprise parties expecting a lengthy process. Parties sometimes call the same day they receive the notice with questions about how to prepare, what to bring, and what will happen if the other party does not appear. Some participants do not realize that they are missing key information needed to finalize an existing agreement or that they submitted an unenforceable parenting plan. The coordinator responds with neutral information about what judges expect in order to finalize a case at an ERP hearing and reassures parties that any final agreement will be the product of their joint and thoughtful consideration. The coordinator also encourages parties to plan ahead for issues such as division of retirement accounts or sale of a marital home and to bring only the materials they will need to reach a settlement. The coordinator informs parties that while participation is voluntary, failures to appear are rare.

In the two percent of cases in which parties fail to appear, the ERP judge gives the appearing party the option to try again at a later ERP hearing or schedule a trial-setting conference with the assigned judge. The availability of a neutral attorney coordinator to provide information and perspective tends to have a calming influence, and although the parties have the coordinator's direct number, they rarely call more than once between receiving the scheduling notice and the hearing day.

Second, over the program's life, we have identified a number of unanticipated issues that can serve as barriers to resolution at the parties' first scheduled ERP hearing. For instance, issues can arise when the

parties do not provide property and debt information with their complaint and answer, do not understand the discovery process, and are uncomfortable proceeding based solely on the other side's testimony about assets and debts. Normally, the ERP coordinator flags these concerns to discuss in prehearing calls or emails, but sometimes the parties do not respond to court contacts during the prehearing process. In such cases, the ERP judge explains discovery, provides a plain language form the parties can complete to comply with the discovery rule, and offers the option to schedule a second ERP hearing in 45 to 60 days. Volunteer attorneys often return to assist the parties at the second hearing, with the understanding they do not represent the parties in the meantime. Even parties who choose not to participate in a second ERP hearing can leave with interim orders and a better understanding of likely outcomes.

Third, in coordinating ERP, we have learned not to underestimate family law parties' ability to solve their own problems when given neutral legal information about the variables they must address to finalize their case. ERP never requires parties to communicate with each other, although it is suggested the parties talk about possible solutions before the hearing, unless there is domestic violence, or the relationship is so toxic that talking will be problematic. With surprising frequency, between the ERP coordinator's prehearing call and the hearing date, parties will collaborate well enough to resolve issues on their own.

In one recent example of a contested case, parties without minor children were divorcing after a twelve-year marriage. The parties had unequal retirement accounts that favored the husband and a home in the husband's name. They disagreed at first about who should retain the marital home because the wife could not afford to refinance it. The prehearing calls to the parties explained basic information available on the court's website about Alaska law on property division and emphasized that the judge would ask questions about whether any agreement was fair and equitable,

and knowing and voluntary. The coordinator offered the parties volunteer attorneys, but they declined.

The parties reached an agreement in which the wife remained in the marital home and retained the home's equity and the husband kept his retirement. They crafted a creative provision where the home would stay in the husband's name but the wife would make the mortgage payments and keep any equity upon sale. ERP welcomes such party-produced solutions because it exists to set the stage for early settlement and encourages problem-solving.

Lastly, sometimes factors beyond the court's control can help gain unintended efficiencies. ERP did not skip a beat during the pandemic, maintaining case volume within the range of its pre-pandemic levels by pivoting to remote delivery of services. Mediations moved to Zoom, and our mediators still prefer that method, although we now offer the option of in-person mediation when the parties and mediator all live in the same community.

Further, ERP's initial blueprint called for all mediations and volunteer attorney negotiations to occur in-person on the day of the hearing. Since everyone mediated on the day of ERP and finished around the same time, a three-hour ERP hearing block often incorporated long stretches of dead time followed by periods of intense activity at the end of the hearing block—with parties, coordinator, and judge staying late to memorialize agreements on record and prepare final paperwork for cases that finished at the buzzer. Remote delivery has helped us better structure ERP hearing blocks. Now about half of the parties mediate in the hours or days before the ERP hearing. This allows the coordinator to schedule the first several cases in half-hour increments, with parties receiving a guaranteed time within the hearing block. This more efficient arrangement helps SRLs complete their cases while missing less work and permits a more orderly and even distribution of ERP hearing time.

Benefits of a Problem-Solving Model

Family law attorneys stand to gain much from practicing ERP principles in evaluating their cases. The traditional trial model can cost too much and take too long. ERP professionals recognize that the parties' initial positions are not necessarily reliable indicators of what they really want or expect to happen when

the case is decided. Some ERP participants report that their positions represent what they think they should request, leaving room to bargain for a more reasonable result. But negotiation and puffery tactics tend to spawn hurt feelings and distrust; honesty and pragmatism lay the groundwork for cooperation and collaborative problem-solving.

ERP professionals see cases through an impartial perspective that helps parties to relax into the moment, consider creative solutions, and release the mutual desire for control that risks freezing them in conflict. The parties stop fixating on the reasons for the dispute and recognize the issues as practical problems to solve (what parenting schedule makes the most sense given the child(ren)'s activities, parents' jobs, and past history? what is the fairest way to divide the marital property and debt?). This open-mindedness inspires parties to find collaborative and legally appropriate solutions during their first and only court hearing. Notably, volunteer attorneys have shared that they work better together outside of ERP after working together to help their ERP clients resolve issues.

The traditional adversarial model takes months or years to resolve a family law case, often at great emotional and monetary expense. Given that approximately three-quarters of family law cases involve SRLs, access to justice may be improved by using a problem-solving approach in a simplified early-intervention process like Alaska's Early Resolution Program. Parties and their families reach finality quickly, with all legal issues addressed, and are able to move on with their lives, typically avoiding a court process that might enhance their dispute and elevate personal discord. ■



Stacey Marz is the Administrative Director of the Alaska Court System where she is responsible for statewide court operations. Stacey is also a Fellow to the National Center for State Courts Institute for Court Management. She can be reached at smarz@akcourts.gov. **Loren P. Hildebrandt** is a Staff Attorney and the Early Resolution Program Coordinator for the Alaska Court System. He also teaches hearing and trial preparation classes to self-represented litigants and serves as part of the legal team for the Court System's Department of Access to Justice Services. He can be reached at lhildebrandt@akcourts.gov.

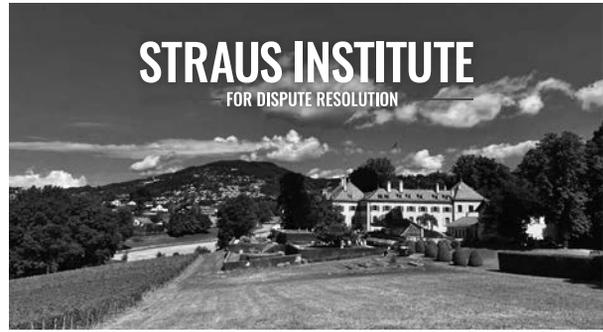


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Providing Access to Mediation for Rural Participants

Nebraska's Story

By Kristen M. Blankley & Kelly Riley

Tammy Bell is a nurse in Cozad, Nebraska, a town of roughly 4,000 people. She shares custody of her two children with John Singleton, who lives about two hours away in the smaller town of Blue Hill. John works on the family farm. John and Tammy met in Kearney, Nebraska, when they were both in college.

As the kids became teenagers, they preferred to stay in Cozad to compete in their sports activities and spend time with their friends. Going to John's house on the farm did not hold the allure that it did when they were younger. Although they still have cousins in Blue Hill, they have grown apart from their childhood

friends. John has become upset that Tammy "refuses" to allow him to have his court-ordered parenting time.

John hires a lawyer, who is located in Hastings, another small city, and he files a contempt action against Tammy. Tammy has a lawyer in Kearney who moves to modify the parenting plan to give Tammy more time, given the kids' preferences. Under Nebraska law, the parties must mediate this case before a trial on the merits can occur. The parties decide to use the mediation center in Kearney. The mediation center sets up a Zoom mediation with a mediator in a different part of the state. A video mediation accommodates all participants, who all live within a two- or more- hour radius,

and saves everyone significant time and expense related to travel.

Although this particular case is fictionalized, it is representative of many family law cases in the state. In addition, the phenomenon of distance between parties is not limited to family law cases, but could apply in any dispute.

The State of Nebraska recognizes that distance is among the rural community's biggest impediments to access to justice. It is also committed to mediation across the state. The pandemic expanded opportunities for remote participation in mediation and has suggested lessons for other court-access issues moving forward.

Nebraska's Commitment to Mediation Across the State

With the passage of the Dispute Resolution Act in 1991,¹ the State of Nebraska created a system in which mediation is available to citizens in all 93 counties and four Tribal Nations, regardless of the parties' ability to pay for services. The Act created a Supreme Court Dispute Resolution Advisory Council, created the Office of Dispute Resolution within the Administrative Office of the Courts and Probation (AOCP), and funded mediation service providers. The service providers are six independent nonprofit community mediation centers that undergo an annual review to maintain their approval status through the Office of Dispute Resolution. The centers operate in defined service areas without geographic overlap, though there are times when a center will provide services in another center's area. When this situation arises, the centers communicate and come to an agreement about which center will provide the service.

Most of Nebraska is rural, with two urban centers, Omaha and Lincoln, sitting in the eastern part of the state. Nebraska's population density is between 25.22² and 26.06³ people per square mile, which ranks eighth in the United States for states with the lowest population density. In the early days of the Dispute Resolution Act, the four most rural mediation centers struggled, partly due to the size of their service area and the difficulties of providing in-person mediation. The centers have largely decided that they will do what they can to bring mediation to a location convenient to the parties when providing in-person services,

rather than making parties travel to a mediation center's office.

When the legislature passed the Dispute Resolution Act in 1991, the six community mediation centers received grant funding of roughly \$30,000 per year from the Office of Dispute Resolution in the form of infrastructure grants. The centers could use that money on expenditures such as staffing, rent, insurance, mediator pay, or mileage, among other things. Today, the centers receive infrastructure grants in the amount of \$60,000 per center per year, but this grant only begins to cover the routine costs of each center. For the mediation centers to stay in business, they also rely on mediator fees from private clients, as well as other grant funding.

Over the last thirty years, demand for mediation has grown, particularly in court-connected cases. Early on, the centers partnered with Nebraska's Department of Health and Human Services (and later the AOCP) to provide facilitated conferencing in child welfare cases, and those relationships have led to increased cases over time. In 2007, Nebraska amended its Parenting Act⁴ to require mediation in all cases that are not settled prior to court. The 2007 legislation instituted a filing fee that is distributed to the mediation centers so they can work on parenting plan cases for those who could otherwise not afford mediation.

Nebraska law mandates access to mediation for everyone in the state, regardless of their ability to pay. The fees for most mediation clients are determined on a sliding fee scale for those willing to provide proof of income. An annual sliding fee scale is distributed by the Office of Dispute Resolution every year and is based on Federal Income Guidelines. Nearly all of the clients of Nebraska's community mediation centers are eligible for reduced fee services due to their income.

Distance as an Impediment to Access to Justice

In rural Nebraska, and likely most rural parts of the United States, distance is one of the largest barriers to access to justice. Distance affects nearly every aspect of a dispute—e.g., distance between parties, distance from lawyers, and distance to a courthouse.

“ In rural Nebraska, and likely most rural parts of the United States, distance is one of the largest barriers to access to justice. ”

While the great majority of Nebraskans live in Omaha and Lincoln, the remaining population lives in small towns and villages, often at significant distances from one another. Like many large midwestern and western states, Nebraska suffers from the phenomenon known as a “legal desert” with limited access to attorneys in rural areas.⁵ Of Nebraska’s 93 counties, twelve counties have no lawyers.⁶ Many additional counties have fewer than five lawyers.

Although Nebraska has a system in place to provide mediation access to all counties, the rural mediation centers all have vast geographic coverage areas, some as large as 35 counties. Before the pandemic, rural centers primarily sought to bridge the divide by recruiting mediators across their geographic areas and by relying on access to mediation through telephone services and videoconferencing, when available.

In most cases, providing mediation services aided by technology was better than not providing mediation services at all. Although telephone conferencing could bring parties together, the lack of visual cues makes the mediation more difficult. In a telephone mediation, parties do not necessarily know when to start talking without an oral cue, such as “*Tammy, please tell us more about your kids’ activities in Cozad.*” Similarly, a party may not be able to gauge whether the mediator and other parties understand the story or the point being made, thus they may repeat a point multiple times. Telephone mediation requires the mediator to be more conscious of providing oral cues to keep the process moving.

A decade ago, videoconferencing for mediations involved software such as Skype and early versions of Zoom. These programs often ran slowly, and they only had computer interfaces. In rural areas, parties with unreliable internet or no internet at all would need to schedule use of a publicly available service at a local library, university, or community center.

Questions also arose about whether using public computers met the requirements of confidentiality and security.⁷

The Nebraska mediation centers that have mediators available across their geographic areas can arrange space at local libraries, churches, and community centers to provide in-person mediation in a way that is convenient and cost-effective. Rural centers thus rely on creativity and connections with local resources throughout the service area to meet the needs of the community.

Two factors have greatly increased access to justice through technology in rural Nebraska. First, Nebraska committed to providing infrastructure for high-speed internet and phone services. And second, the pandemic forced people to use more remote services across many areas of life.

Nebraska Builds Technology Infrastructure

Over the last decade, Nebraska has made great progress towards providing greater access to telecommunications across the state. The availability of broadband, in particular, has been a priority for the state, leading to the creation of the Nebraska Broadband Office in 2023.⁸ Nebraska’s broadband initiatives have focused on rural access.

Additionally, telephone companies have been working to increase their coverage. Nearly all of Nebraska now has 4G and 4G LTE coverage through at least one cellular provider. In addition, 5G coverage is beginning to expand to cities outside of Omaha and Lincoln. These innovations helped set the stage for access to mediation services in rural Nebraska.

The Pandemic Creates Opportunities for Increasing Access to Mediation

When the pandemic caused facilities to close, nearly every public-facing industry looked for ways to continue serving its customers, clients, and constituents. Schools, stores, doctors’ offices, and courthouses, to name a few, all needed to embrace technology to continue providing access to goods and services. At the individual level, those who had rarely relied on technology were forced to learn new skills to stay in touch and to conduct daily tasks.



Within the legal and ADR communities, Zoom became the platform of choice for meeting with clients. Mediators gravitated to Zoom because of its ease of use and helpful features. The breakout room feature, suggested by mediator Colin Rule,⁹ provided mediators with the ability to caucus and create flexible spaces for different configurations of people and stakeholders.

Mediation centers across the country, and in Nebraska, all began to train mediators and staff on how to best use online platforms. When necessary, center staff walked parties through the technology so they knew what to expect at the mediation.

Advances in technology have made video-conferencing particularly attractive. Phone-based applications, as opposed to web-based software, allow parties to connect via either a data plan or a Wi-Fi connection. Accessing Wi-Fi on a phone in a café parking lot, library, or workplace is significantly easier than finding a place for a party to use a laptop or desktop computer. And people of all ages were

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already learning how to use Zoom to connect with friends and family during lockdowns.

Although online mediation may have started as a necessity, many of the rural mediation centers in Nebraska continue to use online tools to help parties who live at a distance and to bring more cases to the table. Online mediation brings flexibility and cost-efficiency. Nebraska mediation centers have seen an increase in the number of attorneys who can

participate in mediation online, since the attorneys would no longer need to travel long distances.

Further, mediation centers can recruit mediators from across the state to act as online facilitators. The physical presence of the mediator is not required, which allows the centers to recruit across the state or even, in narrow circumstances, outside of the state. Additionally, the six community mediation centers can share mediators to ensure that statewide caseloads are managed. In particular, the rural centers can leverage excess capacity of mediators in Omaha and Lincoln if those mediators are willing to provide some services online.

Thus, the pandemic opened additional opportunities for rural mediation centers through advances in technology. While the rural centers have always needed to be creative to manage distance and other barriers, online mediation opens new opportunities that will long outlast the lockdowns of 2020 and 2021.

Barriers for Online Mediation

While virtual mediation has been a blessing for the Nebraska mediation centers, there are barriers to remote participation. First, the parties may prefer in-person meetings. With self-determination a fundamental aspect of mediation, the preferences of the parties should drive how the mediation occurs.

Second, cases involving a large number of participants, such as child welfare conferencing, may benefit from in-person sessions. Specifically, while most professionals have access to a computer for virtual meetings, many other participants may join via phone; but phone interface cannot accommodate as many participants on one screen and can impact engagement. According to the Pew Research Center, 27 percent of Americans earning less than \$30,000 per year use only a smartphone and do not have broadband access at home.¹⁰ The number of people relying on smartphones has increased from 12 percent

“ ... access issues must be balanced against the challenges associated with virtual technology. ”

in 2013 to 27 percent in 2021. This segment of the population accounts for a large portion of mediation center clients, and their needs and resources should be taken into consideration when determining the meeting format.

Third, Stanford University researchers have identified causes of “Zoom fatigue”¹¹ that mediators should understand. For instance, virtual sessions, which involve close-up, highly intense eye contact and a constant view of yourself, impose a higher cognitive load. Mediation has always been recognized as draining for participants under the best of circumstances, so limiting online session time may be particularly valuable. Thus, access issues must be balanced against the challenges associated with virtual technology. While professionals who use virtual technology regularly have learned how to overcome “Zoom fatigue,” the challenges identified can be a factor for participants who are not regular virtual users.

New Frontiers

The AOCP continues its commitment to financially assist the Nebraska mediation centers in serving state residents. The Office of Dispute Resolution also has regular discussions with the centers to determine how to increase the number of mediators and facilitators and how to increase diversity. At the outset of the pandemic, when mediations switched to mostly virtual sessions, some mediators decided it was time to retire, thereby reducing the number of mediators available to the centers. Because the centers are struggling to find new mediators, many existing mediators are expanding the number of centers they work with and may be limited to virtual availability only.

Within the next few years, the Nebraska judicial branch plans to implement online dispute resolution (ODR), starting with small claims cases. The goal is to increase access to justice, especially in the rural areas where court may only be in session on certain days and during daytime hours, making it difficult for litigants to attend. Additionally, depending on the courthouse’s location within the county, parties may have to drive an hour just to get to the court.

The vision for ODR in Nebraska includes a level of seamless integration among the litigants, the courts, and the mediation centers. Similar to ODR offered through other states, the ODR process would allow

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litigants across the state to first try negotiating a settlement themselves asynchronously. If they are unable to reach an agreement, the mediation center serving the county where the case is filed would be notified, and a mediator would be assigned to assist. This step would also happen asynchronously to allow the litigants flexibility to access the process at a time that best works with their schedules. If an agreement is reached, either with or without the assistance of a mediator, the signed agreement would be uploaded to the court for review by the assigned judge, and the litigants would not need to physically attend court. Depending on the success of ODR in the realm of small claims court, ODR may expand and be offered in simple divorce cases that do not involve children.

Conclusion

Nebraska’s statewide system envisions and works towards proving access to mediation services to everyone within the state. This ideal, however, still poses significant challenges to the state’s rural populations. Technology has been one way to help bridge the gap. With recent advances in technological infrastructure and increased attention to online mediation, Nebraska’s rural communities have experienced increased access to justice. ■



Kristen M. Blankley is the Henry M. Grether, Jr. Professor of Law at the University of Nebraska College of Law. She is also a practicing mediator, facilitator, and arbitrator. She can be reached at kristen.

blankley@unl.edu. **Kelly Riley** is the director of the Nebraska Supreme Court’s Office of Dispute Resolution (ODR). She has served on the Board of Directors for the National Association of Community Mediation and the Association for Conflict Resolution. She can be reached at kelly.riley@nebraska.gov.

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Arbitration in Review: Ending the Forced Arbitration of Sexual Assault and Sexual Harassment

By Brandon D. Miller and Robert A. Lusk

Introduction

Arbitration has been a hot topic in recent years. Employers routinely use arbitration to address issues for all employees—hourly workers to executives—and the legal profession has promoted arbitration for its efficiency, cost savings, and clear benefits for employers.¹ In fact, the Supreme Court handed down five significant opinions on the subject last year alone.² Separately, President Biden signed the Ending Forced Arbitration of Sexual Assault and Sexual Harassment Act of 2021 (the Act) into law on March 3, 2022.

The Act amends the Federal Arbitration Act (FAA),³ rendering predispute arbitration agreements voidable to the extent they cover sexual harassment or sexual assault disputes. The Act applies regardless of whether such claims arise under state, federal, or tribal law, and regardless of whether they are filed in state, federal, or tribal courts.

From any objective perspective, the Act can be construed to have both pros and cons, with varying degrees of agreement and disagreement about its ability to address the core issues motivating the passage of the Act, and any spillover effects it may have.

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... not everyone agrees about how to move forward in light of these legislative changes or even what consequences the Act will have, either beneficial or adverse.

”

Accordingly, not everyone agrees about how to move forward in light of these legislative changes or even what consequences the Act will have, either beneficial or adverse.

Substance of the Act

As noted, the Act renders predispute arbitration agreements voidable at the option of an employee alleging a sexual harassment or assault claim. The Act defines sexual harassment disputes broadly, as those “relating to conduct that is alleged to constitute sexual harassment under applicable Federal, Tribal, or State law.”⁴

Sexual assault disputes are more narrowly defined as those involving nonconsensual sexual acts or sexual contact, as such terms are defined in U.S. criminal law or similar state or tribal law.

Additional details are fleshed out in Section 402(a) of the Act, which states in sum that the employee alleging sexual harassment or sexual assault conduct, or any representative of any class or collective action involving the same conduct, may invalidate any predispute arbitration agreement or predispute joint-action waiver. Essentially, any plaintiff subject to a predispute agreement may decide its enforceability in their subsequent action against a defendant.

More detail appears in Section 402(b), which provides that the court shall determine the validity and enforceability of any agreement instead of an arbitrator, irrespective of whether the party objecting to the arbitration challenges the agreement itself or other terms in the agreement, and notwithstanding any applicable delegation clause in the agreement.

These sections articulate two critical provisions of the Act. First, only the individual or class representative alleging sexual misconduct may initiate arbitration proceedings. Second, only the court, not an arbitrator, may decide the arbitrability issue. Neither the employer nor the arbitrator has a say so.

The Act is not limited to employment cases, but it will have the greatest impact in this area. So, for

example, if a plaintiff who is a party to a predispute arbitration agreement with their employer files a sexual harassment lawsuit in federal court, the employer would not be able to stay the lawsuit pending arbitration, at least not over the plaintiff’s objection. The same would hold true for a class representative in a class or other collective action.

Notably, the Act’s effective date is March 22, 2022, meaning that perhaps millions of existing employee arbitration agreements now contain voidable provisions purportedly mandating arbitration for sexual harassment and assault cases. Of course, prior disputes settled in arbitration may not be relitigated in light of the Act.

Policy and Statutory Benefits Promoted by Proponents

Arbitration is a critical tool for resolving disputes between employees and employers. An often-cited data point is that sixty million employees, more than 50 percent of all nonunion private sector employees, are subject to arbitration agreements in their employment.⁵ Practitioners and academics have cautioned about the ubiquity of the agreements in the employment context, especially considering mass employment in the gig and modern economy.

Stakeholders may anticipate that, due to the public nature of the court system, the Act will encourage both “better behavior” from employers responding to sexual harassment and assault complaints and better workplace prevention efforts. But any change to employer behavior will likely take years to fully appreciate and understand.⁶

For these reasons, there is an ongoing discussion of whether arbitration has gone “too far,” deviating from and failing in its intended purpose to achieve efficient outcomes for all involved parties.⁷ For instance in California, employers often require mandatory arbitration of all claims and bar employees from filing class actions, Private Attorneys General Act claims, and collective and representative actions also bar employees from seeking relief through state

agencies. Employers may rightfully seek to protect themselves against lawsuits, but they do so by conditioning employment on the employer’s preferred resolution—private arbitration.

While good faith discussions continue about the appropriate use of arbitration, the changing political landscape (including a newfound willingness to address and redress longstanding societal and political issues), the #MeToo movement, and the resolution of high-profile sexual harassment and assault cases via arbitration have all led to rare bipartisan recognition of a salient issue with a reasonable solution.⁸ These interests, the social context, and the attendant equitable goals underlie two distinct goals and benefits in the Act.⁹

First, proponents view the Act as an important step towards addressing a glaring power imbalance between employers and employees inherent in many workplace sexual harassment and assault situations.¹⁰ Instead of allowing employers to control the process at the start of employment, during employment, and after termination, employees now retain control generally over how a dispute is resolved.

Second, the substantive goal of the statute is achieved. Employees alleging sexual harassment and assault now have an affirmative choice. Do they want to bring a claim via a lawsuit or attempt resolution through arbitration? In fact, this law may result in no changes to the dispute process for employees and employers. Employees may still choose arbitration to save time, to retain more confidentiality than

“ By limiting the power of employers, the prohibition against forced arbitration seeks to put employees who have experienced sexual harassment and assault on more equal footing with their employers by giving them an affirmative choice in how they resolve the dispute. ”

they would have in court, or simply to better suit their needs. But if employees now wish to bring their claims in court for reasons of accountability, to promote public interest litigation, or because they want to exercise their legal rights, they can now choose to do so.¹¹ And this new autonomy granted to employees achieves the underlying policy objective of rebalancing the important relationship between employers and employees.

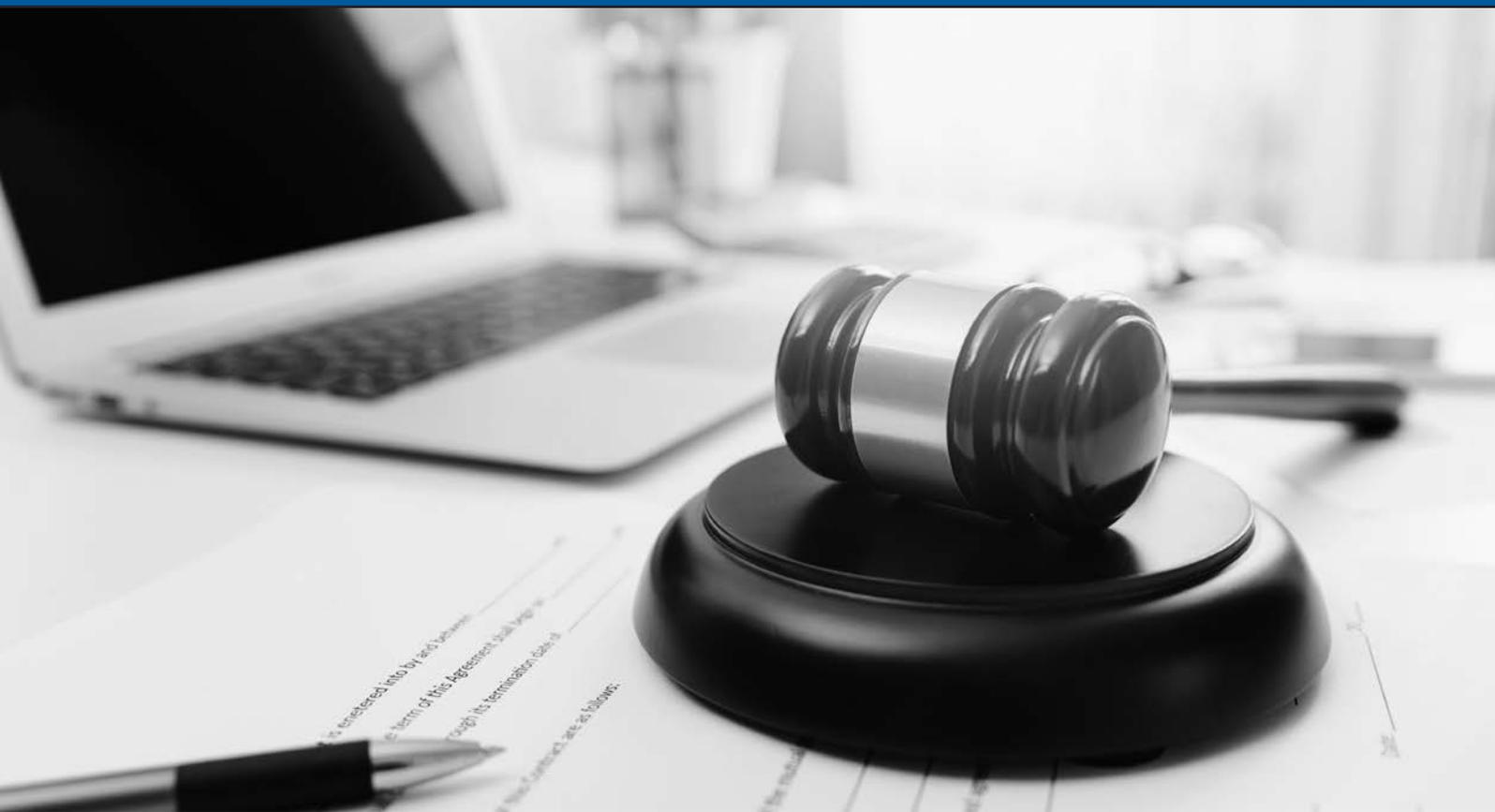
Critics of the Act argue that invalidating agreements to arbitrate sexual assault and harassment claims, especially when agreed on as a condition of employment, may result in a flood of exclusions and carveouts for arbitration. But states like California have passed similar legislation that prohibits noncompete agreements within the state. As with this Act, these prohibitions were enacted to remedy what was viewed as a gross power imbalance—employers exerting unreasonable control over an employee’s future movement and ability to work.

The result of this legislation was not a deluge of employees wreaking havoc by engaging in unfair competition or stealing employer clients without reprove. Instead, employees in California can now express their right to at-will employment in the state without undue influence from any employer who may have leveraged power against them at the time of hiring. In fact, the Federal Trade Commission has indicated that it will develop rulemaking in 2024 to ban noncompete clauses nationwide due to issues of wage suppression, reduction in innovation, and unfairly blocking the start of new businesses.¹²

The Act thus joins other legislation designed to achieve a social goal rooted in a perceived power imbalance. By limiting the power of employers, the prohibition against forced arbitration seeks to put employees who have experienced sexual harassment and assault on more equal footing with their employers by giving them an affirmative choice in how they resolve the dispute.

Opponents’ Views

Of course, the Act has critics among practitioners, academics, and stakeholders, who worry about the effects of the arbitration prohibition and whether it will achieve its stated purpose.



First, from a skeptic's point of view, why should cases involving sex be treated differently than cases involving, for example, race? Given America's history of racial hostility and discrimination, it seems it should perhaps be the other way around. But proponents may view the Act as the thin end of the wedge. Arguably, the Act is a step towards eliminating employment arbitration one cause of action at a time—first sex, then religion, then race, and so on. Alternatively, the Act's proponents may find it reasonable and appropriate to shame sexual harassers and assaulters in public through the litigation process. But they should first consider if there is empirical evidence suggesting the rate of sexual harassment and assault has increased since 1991, when the U.S. Supreme Court first permitted the arbitration of civil rights claims in the employment context, including sex harassment claims¹³

Though there is often a disconnect between the legislative intent and legislative results, other critics advocate for the perennial idea of leveling the playing field between the big guy (the employer) and the little guy (the employee), an idea that has supported every legislative intervention into the labor market since the 1930s. Since then, in the name of justice and fairness, so much labor and employment legislation has

been enacted that the ABA's Labor and Employment Section boasts more than 16,000 members. But it is not clear that the playing field is now level, critics might argue. Thus, we should continue to recognize that individuals who put their assets, credit, and talent at risk to create a business should have more say about the terms and conditions of employment than the individuals seeking employment.

Further, advocating for justice and fairness in the workplace has not always worked well in practice. Consider Detroit, the cradle of the automobile industry and the UAW, or Pittsburgh, the cradle of America's steel industry. Today, cars and steel are manufactured in many places. But not so much in Detroit or Pittsburgh. Many reasons account for this, but chief among them was organized labor's pursuit of what it refers to as industrial fairness, justice, and peace.¹⁴ Arguably, many of the "little guys" in and around Detroit and Pittsburgh would prefer "unfair" car or steel manufacturing jobs to the jobs they now hold.

Today's gig economy may also support retention of simpler forms of dispute resolution like arbitration given the expansive nature of gig workers and the inherent flexibility of the work. Arguably, employees benefit from and may prefer flexible, part-time work arrangements, which provide more work and lifestyle

choices and less stress. In turn, employers find that flexibility improves recruitment and retention, which are the bedrock to any successful business model. Gig work also avoids the many costs and potential liabilities stemming from the myriad state and federal legislative interventions that apply to full-time employment.

Additionally, from a legal perspective, the U.S. Supreme Court rejected the argument that employment arbitration is less fair than litigation more than 30 years ago in *Gilmer*. The Court considered the same legal and practical arguments advanced in favor of the sexual harassment/sexual assault Act and determined that there is no reason to assume arbitration panels will be biased; that discovery is no more important in employment cases than other complex cases subject to arbitration; that the same relief is available in arbitration and in court; and that unequal bargaining power in the employment context is no greater than unequal bargaining power in areas where arbitration is clearly beneficial, like the securities industry.¹⁵ And since 1991, employment law practitioners have become accustomed to arbitration, and they widely agree that arbitration is generally faster, less expensive, and more predictable than litigation.

Further, there is no real evidence that employees fare worse in arbitration than in litigation. One article referenced in the House Committee Report published with the Act included no proof supporting the proposition that employees fared better in court than in arbitration. Instead, the article merely referred the reader to another article by the same author and a collaborator.¹⁶ This second article revealed that, between 2003 and 2007, if one relied entirely on cases that were actually tried, plaintiffs did fare better in court than in arbitration.¹⁷ But this hardly proves the point, given the very small percentage of cases actually tried to verdict.

Also, the vast number of employment cases, perhaps on the order of 95 percent or more, are not tried. They are dismissed or settled. It is impossible to draw reliable conclusions based on a data set that excludes as much as 95 percent of the relevant data. Other data provides little support for the idea that employees fare better in litigation than in arbitration. For instance, according to one source, only one percent of plaintiffs prevail in federal employment discrimination, harassment, and retaliation cases at trial. Further, of the

72,000 cases analyzed, 75 percent were settled, and employers prevailed on summary judgment in 13 percent. Thus, existing data appear not to support the contention that the Act will produce “better” outcomes for employees who have experienced sexual harassment or assault in the workplace.¹⁸

What’s Next For Employees and Employers under the Act?

Both more and more persuasive information about outcomes for arbitration and litigation in these cases must be gathered. In addition to considering how employees fare in the two settings, research should focus on a host of relevant questions. What is the total cost of resolving disputes through arbitration as opposed to litigation? Are employees choosing to litigate these claims instead of using arbitration? Will employers be able to successfully challenge any aspects of the Act? Does arbitration resolve disputes more quickly than litigation, as justice delayed is justice denied? Is arbitration more predictable?

It will likely take years to see behavioral changes from aggrieved employees. Employees must become aware of their new rights under the FAA, case law must be developed as employers challenge the carveout, and employees must decide if litigation or arbitration is best suited for resolving their sexual harassment and assault claims. Until then, academics, policy makers, and stakeholders will need to closely monitor the Act’s direct and indirect effects. The success of the carveout will likely influence both future changes to the FAA and the use of arbitration in general.

A bipartisan group of lawmakers has already begun discussing legislation to prohibit arbitration of age discrimination claims through the same mechanisms employed in the sexual harassment/sexual assault Act.¹⁹ Notably, despite opposition from similar stakeholders who opposed the sexual harassment/sexual assault Act, the proposed age discrimination legislation is supported by Republicans and Democrats alike, and it will likely be introduced and passed soon. Thus, the fears concerning the Act and its effects appear not to be deterring action on additional arbitration prohibitions.

Moreover, as proponents seek to add similar bans on mandatory arbitration in other areas, such as for wage theft, racial discrimination, and unfair labor practices, critics will have to wait and see if the

anticipated effects of the Act materialize. Certainly, discussions about arbitration carveouts and prohibitions have only just begun. ■

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Brandon D. Miller is a California labor and employment attorney and a candidate for an LLM in Alternative Dispute Resolution at the University of Southern California. He serves as a fellow on the Dispute Resolution

Section's Employment Law Committee. He can be reached at bdm.miller@yahoo.com. **Robert A. Lusk** is an attorney, arbitrator, and mediator. He serves as a neutral on the American Arbitration Association's Employment and Consumer Panels. He can be reached at rlusk@educatorslegalservices.com.

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A Tribute to the House Select Committee on the Modernization of Congress, the 2023 Sander Award Winner

By Grande Lum and Bruce Patton

Editor's note: Named for long-time Harvard Law School professor Frank Sander, the Frank E.A. Sander Innovation in ADR Award was established to recognize innovative methods and extraordinary achievements in the field of Alternative Dispute Resolution.

This May, the House Select Committee on the Modernization of Congress was recognized by the ABA Dispute Resolution Section for innovative dispute resolution methods and extraordinary achievement in its work as a committee. It is entirely fitting that the American Bar Association's award named for dispute resolution pioneer Frank Sander should honor the House Select Committee on the Modernization of Congress and its leaders: Chair Derek Kilmer (a Democrat from Washington) and Vice Chairs Tom Graves (a Republican former representative from Georgia) and William Timmons (a Republican from South Carolina).

Dubbed "the most important committee you've never heard of" by the *Washington Post*,¹ the Select

Committee (known as "ModCom") was authorized in 2019 by an overwhelming House vote of 418 to 12 for a term of one year. In a tradition of similar committees constituted roughly every 20 years since 1946, it was tasked with investigating, studying, holding hearings, and making findings and recommendations to make Congress more efficient and effective. A vast array of civil society organizations recognized the need for such a committee and championed its creation and operation. In 2018, our organization, the Rebuild Congress Initiative, facilitated a bipartisan series of conversations among mostly rank-and-file House members that resulted in a "Dear Colleague" letter proposing the creation of such a committee. The letter was signed by some of the House's most conservative to most progressive members.

Due to its initial successes, the Select Committee was extended with overwhelming support to a full two-year term, and then again for a second two-year session of Congress. Its work continues today through the newly created Subcommittee on Modernization of the House Committee on Administration, under the leadership of Chair Stephanie Bice (R-OK).

“ ModCom has effectively advanced policies to improve staff expertise, retention, and diversity, and it introduced a framework to ensure transparency and accountability for congressionally directed investments in local communities. ”



Chair Kilmer and Vice Chair Graves²

Impact of the Committee

In its four years of service, the Select Committee made 202 recommendations, most of them adopted unanimously. To help ensure implementation, one of ModCom's first process innovations was to issue rolling recommendations, roughly quarterly. As a result, more than 130 of its recommendations are already fully or partially implemented.

By way of example, ModCom has effectively advanced policies to improve staff expertise, retention, and diversity, and it introduced a framework to ensure transparency and accountability for congressionally directed investments in local communities. As a result of the Committee's recommendation, a human resource one-stop shop hub was created for members, committees, and leadership staff. Upon the Committee's recommendation, the member allowance for hiring congressional staff was increased, enabling more competitive salaries for staff with institutional knowledge and expertise to continue their service longer, and staff are now regularly surveyed re compensation, benefits, and conditions.

In addition to addressing civility, partisanship, and staff human resources issues, recommendations have been made and implemented in: (1) broadening internship and fellowship professionalization; (2) improving accessibility for those with disabilities; (3) adopting evidence-based policymaking; (4) strengthening Congressional oversight capacity; (5) modernizing district office operations, House office buildings, and the legislative process; (6) fostering

Congressional continuity; (7) improving constituent engagement and services; and (8) bolstering House technology.³

Much remains to be done, of course. The Committee's report after just two years identified a host of further issues to address, including the role of money in politics (specifically campaign finance) and the budget and appropriations process. "The American people deserve a Congress that can get things done for them," said Committee Chair Derek Kilmer. "The Modernization Committee is focused on improving Congress' ability to solve problems, increasing civility and collaboration across ideology, and increasing constituent access to the legislative process. But our goal was not just to make recommendations. It was to make change. That's why we've focused on seeing these recommendations get implemented."⁴

Methods to Sidestep Gridlock and Diminish Polarization

The U.S. Constitution gives Congress a critical and powerful role to pass laws, enact the nation's budget, declare war, confirm presidential appointments, oversee the executive and judicial branches, and investigate matters of national importance. In the last sixty years, Congress has passed landmark legislation that profoundly shaped the nation, including the passage of the 1964 Civil Rights Act, the Voting Rights Act, Medicare and Medicaid, and the Americans with Disabilities Act. However, this



Modernization Committee members and witnesses in the roundtable setup⁶

century has seen sustained gridlock and increasing polarization in society as a whole and in Congress in particular. Congress had its lowest approval rate of nine percent in 2013, and it currently stands at just eighteen percent. A multitude of factors are at play, including increasing polarization and conflict in our culture and politics, incentivized demonization of the other side, and an age of disinformation that leaves us more vulnerable to manipulation. Elected officials are now more vulnerable to losing to candidates from the extreme wings of their party than to candidates from the political middle.

This context is what makes the work of the Select Committee so extraordinary. Chair Kilmer insisted that the Committee consist of an equal number of Democrats and Republicans with a two-thirds vote required to pass any single recommendation. The norm in other committees is for the majority party to have more seats, thus requiring a bare majority for passing votes. In every aspect of their work, ModCom took a different approach, credited by many to Chair Kilmer's leadership.

The Committee understood that to get "things to work differently in Congress you had to do things differently in Congress." Typically, committees split the budget (with the party in control getting two-thirds),



Bruce Patton facilitates ModCom's initial bipartisan retreat.⁷

and Republicans and Democrats each hire own-party staff. Chair Kilmer and Vice Chair Graves decided upfront to have only one *shared* staff. They would all wear "jerseys that say 'let's fix Congress'," according to Kilmer.⁵

In hearings, Committee members sat next to members from a different party, as opposed to the traditional approach of Republicans and Democrats on opposite sides of the room. Chair Kilmer noted that when you hear a good idea you want to turn to the person next to you to talk about it, and the seating arrangement ensured that Committee members would talk to each other. Through this arrangement, they achieved better dialogue and conversation.

“ The Committee understood that to get “things to work differently in Congress you had to do things differently in Congress.” ”

Likewise, after a few hearings at the traditional dais, looking down at witnesses, the Committee decided instead to sit with witnesses at a round table to facilitate eye contact. The traditional five-minute statements with five minutes of questions from each member was abandoned in favor of an open discussion moderated by the chairs. Members could still use their five minutes at the end if needed, but it was rarely used. As a result, discussions went deeper and involved everyone interested.

The Committee began its work a bipartisan planning retreat. Chair Kilmer said the Committee defined success together and then made a plan to get there.⁸ The Committee also broke bread together as one group and brought in experts on civility and collaboration from multiple fields to address how to fix a broken culture, including political scientists, organizational psychologists, and sports coaches.

Changing the culture of any organization is difficult, and in an institution made up of 535 different offices, especially so. One idea the Committee recommended was to have new House members go through joint orientation activities, rather than spending most of their time in red and blue camps. Such an innovation alters communication and relationship dynamics from day one. As a result of this recommendation, over twenty bipartisan events and activities were held during new member orientation for the latest Congress, including a session on decorum and bipartisanship.

Feedback from Committee Members

Tom Graves, a Republican from Georgia and the Committee’s original vice chair, observed, “One of the things I value most about this committee is how different our backgrounds are, but that as Members we’ve united with a common goal to improve the way our legislative branch works. Committee Members hail from opposite sides of the country, with different professional backgrounds and life experiences. We’ve identified opportunities for bipartisan learning, found ways to better connect with our constituents, encouraged bipartisan Member retreats, and showed

the American people that regardless of our political differences, a commitment to those we serve should come first.”⁹

Vice Chair William Timmons, a Republican from South Carolina who took over after Graves retired from Congress, noted how important it was “to engage in evidence-based policy making in a collaborative manner from a position of mutual respect. We don’t do that [in Congress]. I’ve been in Congress for four years and five months. And outside of [this] committee, I have not done that.” He noted that in his experience, laws in the House were generally made available to members only at the very end of the process, when there is little time to read the legislation, and everyone just wants to get back to their districts. Timmons emphasized that it is not supposed to work that way. He identified the biggest challenge to working differently as trust, which requires relationship building. He attributed the Committee’s success to the time committed to building relationships and doing the work, the openness to ideas, and the willingness to challenge each other.¹⁰

Rep. Kilmer expressed appreciation to the American Bar Association Dispute Resolution Section for the recognition provided by the Frank Sander Award. “This recognition from the American Bar Association is a testament to the dedication exhibited by the Democrats and Republicans on our committee as we collaborated to build a Congress that works better for the American people.”¹¹ Vice Chair Timmons struck a similar note, saying, “The work of this Committee has begun to fix Congress, and I could not be prouder of what we have accomplished on behalf of the American people.”¹²

Take-Aways & Conclusion

In their introductory letter for the 2020 Final Committee Report, Representatives Kilmer and Graves noted, “We started by emphasizing bipartisanship at every level of our committee—we worked together not as Republicans or Democrats, but as colleagues. We shared our resources and staff, and continually

“ The House Select Committee on Modernization of Congress is an exemplar for what is possible through working together differently—through improved communication, better understanding, and innovative dispute resolution. ”

sought out compromises that an overwhelming majority of our committee members could support. We engaged in tough discussions and didn’t allow our differences to block a path forward.”¹³

The House Select Committee on Modernization of Congress is an exemplar for what is possible through working together differently—through improved communication, better understanding, and innovative dispute resolution. Their guiding principle was to make Congress work better for the American people. Our country is in a time of division while facing many tough issues, and the Committee showed us a path forward and what is possible if we work together. ■

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Grande Lum is director of the Gould Negotiation and Mediation Program and the Gould Alternative Dispute Resolution Research Initiative at Stanford Law School.

He is senior advisor to the Rebuild Congress Initiative, author of *The Negotiation Fieldbook*, and coauthor of *America’s Peacemakers: The Community Relations Service and Civil Rights*. He can be reached at ghlum@stanford.edu. **Bruce Patton** is cofounder of the Rebuild Congress Initiative, an independent and nonpartisan initiative of the Harvard Negotiation Project and *Issue One*. He is also cofounder and Distinguished Fellow of the Harvard Negotiation Project, and a coauthor of *Getting to YES* and *Difficult Conversations*. He can be reached at bpatton@law.harvard.edu.



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New Rules in Minnesota

After years of work, the Minnesota Supreme Court adopted new court rules for Minnesota's ADR program that went into effect on January 1, 2023. Since many jurisdictions have rules, and some may even have updated those rules to meet the reality of remote ADR processes, why spend time looking at the Minnesota revisions? First, I live in Minnesota and thus have a personal interest in them. But more importantly, the Minnesota rule revisions may be worth exploring nationally. I had some limited involvement in drafting these rules, but for the most part, they were adopted despite some major concerns I raised.

Minnesota first adopted court rules for ADR effective July 1, 1994. So it was not among the first states to adopt ADR rules, but was ahead of many. Minnesota has a fairly sophisticated system of state statutes, court rules, and ethical standards, and has a grievance body. But it primarily relies on volunteers for managing the system. Unlike Florida, which has a well-staffed Dispute Resolution Center to assist the various Florida Supreme Court ADR committees and boards, Minnesota has an ADR Ethics Board charged with reviewing grievances filed against ADR neutrals. The Ethics Board is also responsible for developing proposed rule revisions with minimal staff assistance.

By way of context, one major feature of the Minnesota court ADR rules is that both the procedural rules and the ethical standards cover the full continuum of ADR processes. Specifically named and defined are "adjudicative processes" (arbitration, consensual special magistrate, and summary jury trial); "evaluative processes" (early neutral evaluation (ENE), non-binding advisory opinion, and neutral fact finding); "facilitative processes" (mediation); and "hybrid processes" (mini-trial, mediation-arbitration (med-arb), arbitration-mediation (arb-med)); and "other." In the definition portion of the rule, "other" includes the following sentence: "Parties may create other ADR processes by means of a written agreement that defines the role of the neutral." This means that unlike other jurisdictions that focus on mediation (and sometimes

arbitration), Minnesota offers a wide variety of ADR processes—although mediation is used most often.

The amendments can best be understood in this context. Most of the proposed revisions arose from issues the ADR Ethics Board had grappled with since the last revisions. Although mediation is the process most often used, the vast majority of grievances filed by participants that come to the attention of the ADR Ethics Board relate to "family" issues and, more specifically, the hybrid processes—not mediation. Since the ADR Ethics Board had recommended these changes, the amendments focused on addressing these concerns.

This requirement for a "written agreement" is one of the interesting revisions. Prior to these revisions, the Civil Mediation Act (Minnesota Statute § 572.31–40) required participants in civil cases to sign an agreement to mediate if they intended their mediated agreement to be binding. Such an agreement was not required for any of the other ADR processes described above. From the ADR Ethics Board perspective, requiring a signed agreement to participate in an ADR process would go a long way to address concerns most often raised in grievances. A signed agreement would also ensure that participants understood what process they would engage in. As you might imagine, if someone thought they were engaged in a facilitative process and the neutral started making decisions or offering opinions, they would be disconcerted.

Thus, the "new" ethical standards contain a provision entitled "Requirement of Written Agreement for ADR Services" (Rule 114.13 subd. 7(b)). Under this Rule

In any civil or family court matter in which ADR is used, the Neutral shall enter into a signed written agreement for services with the parties either before or promptly after the commencement of the ADR process. The written agreement shall be consistent with any court order appointing the Neutral... The written agreement shall include, at a minimum, the following:

1. A description of the role of the Neutral.
2. If the Neutral's role includes decision making, whether the Neutral's decision is binding or non-binding.
3. An explanation of confidentiality and admissibility of evidence.
4. If the Neutral is to be paid, the amount of compensation, how the compensation will be paid, and include a notice that the Neutral could seek remedies from the court for non-payment...
5. If adjudicative, the rules of the process.
6. That the Neutral must follow the Code of Ethics for Court-Annexed ADR Neutrals and is subject to the jurisdiction of the ADR Ethics Board.
7. Neutrals for facilitative and evaluative processes shall include the following language in the agreement signed at the commencement of the process:
 - A. the Neutral has no duty to protect the interests of the parties or provide them with the information about their legal rights;
 - B. no agreement reached in this process is binding unless it is put in writing, states that it is binding, and is signed by the parties (and their legal counsel, if they are represented) or put on the record and acknowledged under oath by the parties;
 - C. signing a settlement agreement may adversely affect the parties' legal rights;
 - D. the parties should consult an attorney before signing a settlement agreement if they are uncertain of their rights, and
 - E. in a family court matter, the agreement is subject to the approval of the court.

In essence, the Rule takes the statutory requirement related to civil mediation, expands it to cover all ADR processes, and elevates it to an ethical standard.

Pros and Cons

From my perspective, providing clear information to participants before they engage in ADR processes is clearly a positive. Even those of us who are active in the ADR field may have difficulty defining all the different ADR processes or reaching a consensus on the "correct" definition of each. As practitioners continue to offer a range of services that run the gamut from adjudicative to evaluative to facilitative or some combination thereof, it makes sense to require clear communication, in writing, to potential participants in these processes.

Second, this new rule requires "neutrals" to disclose up front that they are subject to a set of ethical standards and to identify the enforcement body, an important contribution. Practitioners responsible for grievance processes have long speculated that so few grievances are filed against mediators primarily because most participants are unaware that a code of conduct governs mediators, never mind what it contains or where they would file a complaint. Left to their own devices, most neutrals do not provide this information orally or in writing.

A few words about section seven of the new Rules. Minnesota is one of the few jurisdictions that has the so-called statutory "magic language"—language required in a mediated agreement to make the agreement binding. Absent such a requirement, mediation agreements are generally treated like any other contract that involves the meeting of the minds and therefore could be enforced. In Minnesota, the same statute requiring an "agreement to mediate" in civil cases also contains a provision stating that

A mediated settlement agreement is not binding unless:

1. it contains a provision stating that it is binding and a provision stating substantially that the parties were advised in writing that a) the mediator has no duty to protect their interests or provide them with information about their legal rights; b) signing a mediated a settlement agreement may adversely affect their legal rights; and c) they should consult an attorney before signing a mediated settlement agreement if they are uncertain of their rights.

Providing this information to the participants before a process begins, as required by section 7 of the new ethical rules, could mean they have helpful information they should know upfront. On the other hand, changing this provision from a limited application in the Civil Mediation Act to an ethical standard that applies to “all mediated settlement agreements” results in a problematic net effect. On its face, this is a very legalistic provision, and one that would likely cause unrepresented individuals to question their participation in mediation, especially when the mediator would be unable to help them understand what the provision means.

Wearing my hat as copresident of Community Mediation Minnesota, I am very concerned that this provision will have a chilling effect on community dispute resolution programs. Often, the participants in community disputes want to reach resolutions with their neighbors, family members, or coworkers—not the types of resolutions that a court would enforce (e.g., participants agree to treat each other with respect going forward). Including the language in the agreement to mediate

and in the mediated agreement could be both confusing and not appropriate. But because this is an ethical rule, the community programs will be required to make it a regular part of their process.

These changes are a good reminder that those responsible for developing revisions should use an inclusive process when drafting rule amendments. Revisions should be considered from many different perspectives to limit the unintended consequences of provisions that may be helpful in one context, but detrimental in another. ■

Sharon Press is a Professor of Law and Director of the Dispute Resolution Institute at Mitchell Hamline School of Law. She is also a member of the Dispute Resolution Magazine editorial board and served as a member of the Model Standards for Mediators (2005) Drafting Committee. Prior to joining the faculty at Mitchell Hamline School of Law, she served as director of the Florida Dispute Resolution Center, where she was responsible for the ADR programs for the Florida state court system. She can be reached at sharon.press@mitchellhamline.edu.

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