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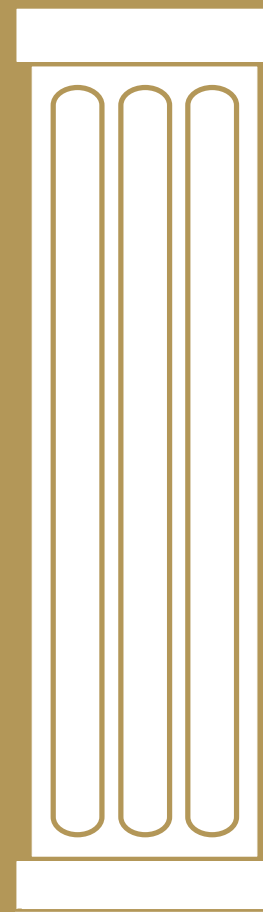
2023

*A Publication Dedicated to the Profession
of Alternative Dispute Resolution*

VOLUME 16

2023

American Journal of Mediation



AJM

American College of Civil Trial Mediators

MISSION STATEMENT

The *American College of Civil Trial Mediators* is a non-profit organization of dispute resolution professionals who are distinguished by their skill and professional commitment to civil trial mediation.

Membership is limited to active mediators, program administrators, and academics who have achieved substantial experience in their field as well as professional recognition for their accomplishments.

The Fellows of the College are dedicated to improving ethical and professional standards of mediation practice while fostering the growth of alternative dispute resolution systems throughout the country.

In fulfilling its mission, the College conducts advanced ADR education programs, supports ADR research, and encourages the growth of ADR systems. In addition, it is a principal objective of the College to publicly recognize those persons making major contributions to the ADR movement nationwide.

October 1995

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AMERICAN JOURNAL OF MEDIATION

Editorial Board Introduction

Welcome to Volume 16 of the American Journal of Mediation for 2023. The Journal again sponsored its American Journal of Mediation National Dispute Resolution Writing Competition for law students across the country.

It is always interesting to me as a thirty plus year civil trial mediator that each newest generation of lawyers find ways to incorporate our profession into an incredibly broad range of issues within society in general. Twenty-six entries were received from nine law schools relating mediation and ADR to such areas as Infrastructure Construction, Rabbinical Arbitration, Reproductive Justice, the Legal System of the Late Roman Republic, Mass Arbitration, Family Mediation, Organizational Ombuds and Mediator Misconduct. Several of the student's articles are included in this year's Journal.

But first is an in depth look at the concept of "Procedural Fairness" in mediation by College Fellow Lambert J. "Joe" Hassinger, Jr. His professionally written piece sets forth specific ways that we, as mediators, can enhance the negotiation experience of both the parties and their counsel by (this is my favorite concept in his article) the use of "humble curiosity." Thank you to Joe for sharing your wisdom with all of us.

This year's winning contest article is entitled *Tables Turning: How Companies Should Respond to the "Mass Arbitration" Phenomenon and Abernathy v. DoorDash, Inc.* by Isaac Keller from the University of Missouri School of Law. Isaac discusses the impact of the strategy of "mass arbitration" on mandatory pre-suit arbitration provisions with class waivers in consumer and employment contracts.

The second-place article is *Mending Mediations in New York: Child-Inclusive Mediation as a Means of Finding the Child's Voice in the Absence of the Child* by Halle Jaffe from the Cardozo School

of Law. Halle takes an in-depth look at one of the most difficult situations faced too often in family mediation.

In addition to the contest winners, we present several top articles for your intellectual enjoyment in this issue of the Journal ranging from the “Search for Peace in South Sudan” to “Airline Passenger Disputes” to “NIL in the NCAA” and one that was most intriguing to me discussing “Facilitative Mediation in First-Year Law School Pedagogy”.

Thanks as always to **Julie Walbroel, Richard Lord, Charles Crumpton, Jay Sandak, Lawrence M. Watson, Jr., Joe Hassinger, Christina Magee and Joaquin “Jay” Fraxedas**, my fellow judges from the American College of Civil Trial Mediators, who gave of their time and effort to read and rank all of the student’s entries. To the contest committee members **Lawrence M. Watson, Jr., Lela P. Love and Josh Stulberg**, my special gratitude for their hard work in bringing this year’s Journal to fruition.

My personal appreciation goes out to my fellow Editorial Board members, **Lawrence M. Watson, Jr., Joaquin “Jay” Fraxedas, Allen Schreiber, Don Philbin, Richard Lord, Stephen Sawicki**, and new Board member, **Christina Magee** and especially to **Sarah Evans**, our Journal Administrator who has the most difficult job, that of keeping me on track towards publication.

In prior years I have concluded with the words below from Volume 1 of this Journal and again see no reason not to continue that tradition.

“Our editorial philosophy will reflect the goal of professional service. Each issue of the American Journal of Mediation will feature carefully selected articles researched and written by members of the nation’s ADR academic community – scholarly articles dealing with important concepts of ADR one generally expects to see in publications of this nature. In each issue, however, we will also be publishing pragmatic and practical contributions from leading ADR practitioners – features having an immediate application to a dispute resolution professional practice. As opportunities arise, we will highlight and discuss the

latest developments in ADR theory and practice; we will weigh in on where our profession is going and the challenges it meets along the way.”

We welcome your submissions that further this philosophy.

John W. Salmon
Editor in Chief

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**Procedural Fairness: Cornerstone of Remarkable Mediation
and Principal Tool of the Skilled Mediator**

By: Lambert J. “Joe” Hassinger, Jr.

Introduction

In the early weeks of this course, the asynchronous material referenced “procedural justice” and “procedural fairness.” I did not recall ever hearing those terms, so I thought I would use this paper to delve into the underlying concepts and connect them to techniques the mediator can use to ensure that the parties’ (and counsel’s) need for procedural fairness is met. My intended audience is commercial mediators.

What is procedural fairness?

In the context of mediation, the terms “procedural justice” and “procedural fairness” are used largely interchangeably. Thus, for the purposes of this paper, I will primarily refer to “procedural fairness,” but may use either term interchangeably. So what is procedural fairness? It “refers to the fairness of a process by which a decision is reached.”¹ More specifically, it refers subjective fairness as perceived by the parties and their advocates.²

But this begs the question: What do concepts like fairness or justice have to do with mediation? They seem better suited for the world of litigation or other proceedings in a court of law. Indeed, parties go to court so that, on an even playing field, an impartial judge or jury can weigh evidence dispassionately based on the law (fairness). Parties go to trial so that a jury can declare that they have been wronged, or wrongly accused (justice). Indeed, some counsel clearly advise their clients that, in the context of employment claims, mediation is “not a forum for justice. The mediator will not decide who is right and who is wrong. Instead,

¹ Hollander-Blumoff, R. and Tyler, T., Procedural Justice and the Rule of Law: Fostering Legitimacy in Alternative Dispute Resolution, 2011 Univ. Missouri Disp. Resol. L.J. 1, 3 (2011).

² Douglas, K. and Hurley, J., The Potential of Procedural Justice in Mediation: A Study into Mediators Understanding, 29 Bond Law Review 69, 75 (2017).

the mediator focuses on a financial solution...”³ When we delve a bit deeper, however, we see that procedural fairness is the cornerstone upon which the entire mediation process is built. The mediator’s process either successfully recognizes, respects and incorporates procedural fairness, and thereby guides litigants to a settlement they can accept, or it does not, in which case the mediator’s process is fruitless. In other words, the financial outcome is not a substitute for procedural fairness that only a court of law can deliver; instead, procedural fairness is the underpinning that both empowers parties to embrace a settlement and enables the skilled mediator to lead the parties to an outcome they can embrace.

The literature is clear that “disputants’ perceptions of procedural fairness influence their perceptions of outcome fairness.”⁴ Stated otherwise, “perceptions of procedural justice influence disputants’ perceptions of substantive justice...and their perceptions of the legitimacy of the institution that provided or sponsored the dispute resolution process.”⁵ Simply put, procedural justice “drives the satisfaction that people have with their outcomes...”⁶ It drives their assessment about satisfaction with the outcome.

I will take that one step further. Since in mediation one must voluntarily accept the outcome for there to be a negotiated resolution, one’s satisfaction with the process - their assessment of procedural fairness - in large part drives whether they will accept the outcome, that is, whether they will settle the case. In other words, when parties perceive the process to be legitimate, they are more likely to view the outcome as worthy of acceptance.⁷

This is not to say, however, that the objective value of the case is irrelevant to one’s decision to accept or reject. A sense of procedural fairness does not result in capitulation to settle at any price. Parties to a negotiation do not seek any deal to be had; they

³ What Discrimination Plaintiffs Can Expect at Mediation, www.gaemploymentlawyers.com (2019).

⁴ Welsh, N., Disputants’ Decision Control in Court-Connected Mediation: A Hollow Promise Without Procedural Justice, Texas A&M University School of Law at 180 (2002).

⁵ Id. at 184-185.

⁶ Hollander-Blumoff, *supra*, at 3.

⁷ Douglas, *supra*, at 74.

want a good deal or, more likely, a great deal. The point here is that whether parties perceive the deal as one that should be accepted is colored by the process that led them there. As one researcher explains, “procedural justice has a separate and independent effect on how people feel about their results, apart from how fair or good the outcome is.”⁸

Satisfaction of Core Needs, Not Trickery or Manipulation

Leading thinkers on this subject have identified “four particular process elements that result in a heightened perception of procedural justice: the opportunity for disputants to express their voice, assurance that a third party considered what they said, and treatment that is both even-handed and dignified.”⁹ First is voice, which refers to the opportunity to present one’s own story. “People want control over the process that leads to decisions that affect them, and this can partly be achieved through the opportunity to voice their case. Direct participation in the process is linked to the individual’s self-determination and empowerment.”¹⁰ The concept of voice in mediation “requires that each disputant’s story be heard and validated. This requires the opportunity to speak without interruption and an authority figure who listens with genuine interest.”¹¹

Next, people want neutrality in the process, a level playing field. A sense of neutrality “can be fostered by an authority figure who is impartial, transparent, consistent in applying rules and even-handed in considering the views of both parties.”¹² As Hollander-Blumoff explains, a party’s assessment of whether the decision-maker is neutral “involves such issues as impartiality (lack of bias), the ability to gather and assess the information needed, openness about the procedure (transparency), and consistency in the application of rules over people and across time.”¹³ I note that while the mediator is, by definition, not a

⁸ Hollander-Blumoff, *supra* at 5.

⁹ Welsh, *supra*, at 185.

¹⁰ Douglas, *supra*, at 75.

¹¹ *Id.* at 76.

¹² *Id.*

¹³ Hollander-Blumoff, *supra*, at 5.

decision-maker, he or she is the authority figure in the room and his/her process is the level playing field. It is the mediator who provides, establishes and applies the rules of the process, that is, the platform of neutrality.

Third, parties want to experience trust. In the context of mediation, this means that the mediator “acts in good faith and listens to and validates the views of the parties.”¹⁴ Trust, it turns out, is critical but implicit. As such, it is worth thinking about how trust develops, that is, how it is perceived and earned:

Trust is the least overt aspect of fairness because it involves inferences on the part of the parties that the [mediator] was sincerely trying to do what was right and was motivated to do what was good for the people involved. Because trust is an inference, it is shaped by how the [mediator] acts. When the [mediator] provides evidence that they have listened to and considered the views of the parties and tried to take them into account in thinking about how to respond to the issues, they are viewed as more trustworthy.”¹⁵

Douglas comments that trust is closely related to neutrality but difficult to define because it overlaps with voice, validation and respect:

Trust in mediation involves participants’ trust in the mediator, trust between disputants and trust in the process. From the parties’ perspective, trust stems from the mediator’s expertise in the process and how they explain it, the interactions with the parties being positive and having chemistry, and lack of bias. Building trust involves an even-handed mediator who has the interpersonal skills to engage with, show concern for, listen to and validate the parties.”¹⁶

As such, with respect to procedural fairness, the question has been raised, for example, whether the EEOC’s mediation program

¹⁴ Douglas, *supra*, at 75.

¹⁵ Hollander-Blumoff, *supra*, at 5.

¹⁶ Douglas, *supra*, at 78.

can be effective, for while “the EEOC guarantees impartiality, employers may still be weary of mediating with the EEOC because the regulatory agency is designed to eliminate discrimination, usually by litigating charges against the perpetrating employer.”¹⁷ That question stems from trust, or a lack of it.

Fourth, parties care about how they are treated. “They want to be treated by an authority figure (the mediator) with courtesy and respect, in a process that values their dignity.”¹⁸ As with trust, the mediator’s ability to make visible her respect for the parties or, alternatively, her decision to minimize courtesy or respect, can reinforce – or destroy – her ability to lead.

This notion of procedural fairness expressed by those writers cited above aligns with what others capture in the concept of subjective value. Leading thinkers in negotiation and mediation tell us that subjective valuation is not only important, for example, in one’s assessment of the outcome in retrospect, but in fact is critical to a successful negotiation, that is, a negotiation that results in resolution. For instance, in *The Objective Value of Subjective Value: A Multi-Round Negotiation Study*, the researchers explain that subjective value encompasses four factors:

- i Instrumental Subjective Value (SV) which involves subjective perception that the economic outcome is beneficial, balanced and consistent with principles of legitimacy and precedent.
- i Self SV which involves losing face versus feeling competent and satisfied that one has behaved appropriately.
- i Process SV which involves the perception that one has been heard and treated justly, and that the process was efficient; and
- i Relationship SV which involves positive impressions, trust and a solid foundation for working together in the future.¹⁹

¹⁷ Lim, M., A Business Alternative: Changing Employers’ Perception of the EEOC Mediation Program, 16 Pepp. Disp. Resol. L.J. 341 (2016).

¹⁸ Douglas, *supra*, at 75.

¹⁹ The Objective Value of Subjective Value: A Multi-Round Negotiation Study, Journal of Applied Social Psychology 2010, Curhan, Elfenbein and Eisenkraft.

Their research indicates that while “behavioral science researchers have traditionally portrayed negotiation as an economically motivated, one-shot interaction best practiced by rational, unemotional actors,” high subjective value influences the parties’ ability to complete the negotiation successfully.²⁰ For purposes of the instant paper, such research demonstrates that the value being negotiated in a mediation is not just the objective value, for example, the dollar amount of the settlement. While the objective value is the result that represents resolution, the process that leads the parties to that outcome – the mediator’s process – necessarily involves the exploration, communication and satisfaction of subjective value.

Stated otherwise, in my view it is the subjective value of the mediator’s process that guides the parties to a resolution that they can ultimately see and grasp. It is the process, implemented by the expert mediator, which enables the parties (and the negotiators) to believe that resolution is possible. It is the mediator’s process that empowers the parties to see past the horizon to what is possible and then embrace what is possible.

Other thinkers capture the notion of procedural fairness in terms of core concerns. For instance, in *Beyond Reason*, Roger Fisher delineates five core concerns:

- ï Appreciation: The desire to feel understood and honestly valued.
- ï Affiliation: The sense of connectedness with another group or person.
- ï Autonomy: The freedom to make decisions without imposition.
- ï Status: Our standing in relation to others.
- ï Role: Respect for the lawyer’s role as counselor and advocate; and for the party’s role as problem-solver and decision-maker.²¹

These core concerns are human wants and needs that are important to every participant in every negotiation, including the parties and the negotiators. As mediators, we must ensure that

²⁰ Id.

²¹ Fisher, Roger and Shapiro, R., *Beyond Reason: Using Emotions as You Negotiate*, Penguin Books 2005.

these core concerns are identified, respected and satisfied. A mediator who accomplishes that goal lays a solid foundation for, and a reliable pathway to resolution. The mediator who fails to take these core concerns into account, or worse who tramples on them, creates self-imposed barriers to settlement. The mediator respects and satisfies the parties' and counsel's sense of subjective value, their core concerns, by how they communicate with them. As Alain Lempereur explains, "the best mediators are, before anything else, communication acrobats."²² In *Rapport, The Four Ways to Read People*, Emily Alison and Laurence Alison speak to the value of rapport building in meaningful communication.²³ They tell us that, "[o]ften communication skills are thought of as mastering the art of saying the right thing at the right time and in the right way. However, the real key to communication lies in what you do before you even open your mouth. Careful listening, not smooth talking, is actually the key to building solid rapport with others."²⁴

They offer the acronym H.E.A.R. and the following framework for the core foundations of rapport:

- Honesty:** being objective and direct when communicating your intentions or feelings.
- Empathy:** understanding someone by recognizing their core beliefs and values.
- Autonomy:** emphasizing other's free will and their right to choose to cooperate
- Reflection:** identifying and repeating back those elements that are significant, meaningful and tactical to help guide the conversation towards the goal.²⁵

With respect to rapport building, honesty involves delivering the right amount of honesty balanced by the right

²² Lempereur, Alain, et al., *Mediation: Negotiation by Other Moves*, John Wiley & Sons 2021, at 203.

²³ Alison, E. and Alison, L., *Rapport: The Four Ways to Read People*, Vermillion 2020.

²⁴ *Id.* at 55.

²⁵ *Id.*

amount of sensitivity.²⁶ Empathy, they tell us, is an often used but frequently misunderstood concept. Empathy involves “trying to genuinely understand what a person is thinking and feeling.”²⁷ It does not require softness but does require that one shows an analytical interest in uncovering the other person’s core beliefs and values.²⁸ I refer to this as a humble curiosity. Not an attempt to manipulate or present a false chumminess, but an interest in knowing more about how they see themselves and the conflict.²⁹

Autonomy is the power of choice. The Alison’s explain that autonomy is “an incredibly powerful feature of how we interact with other people.”³⁰ Freedom to choose is inherent in human nature, so perceptions of freedom – or a sense that the other is trying to control us – strongly influences our behavior.³¹ How do we respect and satisfy one’s need for autonomy? We offer choices. And why does offering choices work so well? “The answer is at once very simple and complexly frustrating – we don’t like to be told what to do.”³²

“Reflection,” the Alison’s tell us, “is the aikido of conversation management.”³³ In it, we take what the other has given us in the conversation and use it to build the momentum of the conversation.³⁴ In fact, the Alison’s declare reflection to be the single most important skill discussed in their book, for it is the key to unlocking all others.³⁵ Reflection gives the other person the space to be vulnerable and reveal their core concerns to us, and

²⁶ Id. at 64.

²⁷ Id. at 78.

²⁸ Id. at 79.

²⁹ As an aside, coincidentally just this week I was invited to attend a Men’s Night at a friend’s church, and the topic was Christian manhood and St. Paul’s First Letter to the Corinthians. Pastor Steve Robinson of Church of the King, a remarkable speaker and leader, contrasted the lives of men and boys, and commented that “men are empathetic, boys are apathetic.”

³⁰ Alison, *supra*, at 90.

³¹ Id.

³² Id. at 94.

³³ Id. at 106.

³⁴ Id.

³⁵ Id. at 107.

enables us to connect with them on a level of commitment, non-judgment and trust.

Techniques of the skilled mediator

The discussion above reveals how researchers and thought leaders embrace procedural fairness as a cornerstone of outstanding mediation. As I suggest above, however, procedural fairness does not simply exist in the backdrop of effective mediation; it is not just the canvas, let's say, upon which the mediation process and outcome magically appear. A sense of procedural fairness does not come about automatically, nor does it happen accidentally. It is not something the mediator simply declares at the outset of the mediation (e.g., "This process will be fair, respectful and allow everyone to have their say."). It is part of and results from the deliberate design of the skilled mediator – the design of a process that encourages and allows for resolution of the dispute. And it is alive and active. It is integral to everything the mediator says and does, from the preparation stage through signatures on the settlement agreement.

So how does the skilled mediator do this exactly? How does the skilled mediator communicate with parties and negotiators to create, instill and nurture a sense of procedural justice to help parties vigorously embrace the outcome? Below we will look at the wisdom of a few thought leaders on the matter. As we do, keep in mind the four process elements that result in a heightened perception of procedural fairness: the opportunity for disputants to express their voice, assurance that a third party considered what they said, and treatment that is both even-handed and dignified.³⁶

First, to reiterate a point alluded to above, the needs that we are talking about here are invisible – voice, to be listened to, neutrality, trust, respect, autonomy, appreciation, status, et cetera – are all invisible. They fill the room but cannot be seen unless made visible. And they are made visible deliberately, consciously. The effective mediator, therefore, is never simply a messenger, mindlessly conveying demands and offers back and forth. Nor is he/she on the sidelines, simply an observer of the negotiation. As

³⁶ Welsh, *supra*, at 185.

one of my mentors, mediator and leader Bob Jenks, so often says, “everything we do and everything we say leads us further to or further from our goal.” Thus, for the mediator, everything he says and does is deliberate, not accidental; and the purpose of everything she does and says is to make visible to the parties and counsel that a process that allows for effective communication and meets their core needs.

To accomplish that, the skilled mediator must maintain a mindset of service and is self-reflective, asking himself/herself:

- What does this party/counsel need from me - right now? Stated otherwise, what can I give counsel right now that she/he needs from me?
- Am I not just hearing the facts but listening for the story? Or, am I caught up in the words or in the heat of the moment?
- Do I need to make anything explicit to the party (or counsel) right now? For example: You can trust me. You are safe with me. I am interested in what you were saying about X. I will not judge you or your case. You are a highly skilled litigator.
- Is my body language sending the right messages, or do I need to adjust?
- Do I need to press a bit harder, or is now the time for a soft approach?
- How do I best raise this topic while making sure I do not violate the listener’s sense of autonomy?
- Am I managing my own emotions or am I becoming impatient, personally involved in the emotional dynamic or personally invested in the outcome of the mediation?³⁷

Such a constant self-reflective mindset, focused on service to the parties/negotiators, enables us to identify what we need to say and do in that moment to enable our process to guide the parties forward. As Lempereur tells us, “The mediator becomes like the

³⁷ The Impact of Emotional Intelligence on Effective Mediation, www.medium.com (2021).

conductor of the orchestra, knowing how to activate the right instrument when the time comes, because they know the score.”³⁸

Next, I love brainstorming. And so do parties and their negotiators. By brainstorming with a party and negotiator, in the right way, the mediator makes visible every one of the core needs discussed above. The opportunity to brainstorm can come about in several ways. For example, I have met with the plaintiff and now relay plaintiff’s move to the defendant. As soon as I do, I can sense frustration, anger and the building reactive devaluation. Before the defendant takes a drastic position in retaliation, I might say something like, “I know you are probably annoyed by that move. Let’s see how best to respond. Can we brainstorm for a minute?”

What does that do? It acknowledges their frustration (they are heard and seen), tells them I am going to help them (I am engaged and working for you), and guides them away from a harmful kneejerk response (you can trust me). It also gives them room – room to breathe, room to settle down, and room to collaborate with me.³⁹ I suggest options, I listen, and I am curious, but I do not judge or dictate. I help them identify options that they can consider, approve and embrace.

As another example, I will use brainstorming when counsel gives me his/her next move, and I know the move will be detrimental or there are better options to consider. I may say something like, “I understand that move and I see your reasoning. Before you choose to do that, can we brainstorm for a minute?” People like options. Having options gives them power and they appreciate receiving options they had not considered. The skilled attorney will welcome my invitation because she knows that as the only person who is in both rooms (i.e., the only person with the vision to see where settlement is possible), I may be able to identify some more productive options. The rather unskilled attorney may push back, in which case I may try to softly nudge them into brainstorming; or, if they refuse, then I will respect their autonomy and defer to them - it is the mediator’s process, but it is their negotiation.

³⁸ Lempereur, *supra*, at 216.

³⁹ See, e.g., Frisbie, T., *Raising Emotional Intelligence at the Mediation Table, Dispute Resolution, ABA Section of Dispute Resolution* (Winter 2018).

Integral to brainstorming, and indeed to the mediator's communication with parties/counsel throughout the mediation process, is asking for permission. No one likes to be told what to do – especially parties in conflict and attorneys. Most people, however, even those with the highest emotion or ego, will grant permission when requested. Thus, I ask permission to brainstorm. I ask permission to offer another option. I ask permission to talk about a particular topic for a minute. Asking permission makes visible my appreciation for their participation and my respect for their autonomy, status, and role.

It is also incumbent on the mediator to meet the parties and counsel where they are. In the vast majority of cases, our problem at mediation is not a math problem. It is a people problem. As one commentator explains, “if a truly objective, wholly rational assessment of the facts and law were all that's required to reach a resolution, then presumably, the parties would have already done that. Yet, the dispute remains. Why? Because the decision makers on each side are human beings with varying degrees of reasonableness, perspective, risk aversion, anxiety, motivation, bias, upbringing, worldview, anger, ego, pride, resentment, hubris, agreeableness and, yes, emotional intelligence.”⁴⁰

This is true no matter the nature of the underlying dispute. Employment disputes illustrate this point. Such disputes may involve horrific violations of one's body, for example, and frequently involve violations of conflicting values that go to the parties' identities. Mediation of such claims involves high emotion and a demand for things like accountability, responsibility, retribution, justice, acknowledgement, or apology. Consequently, it is critical that the mediator constantly read the room and understand where participants are and what they need. Are they frustrated, tired, annoyed, or angry? Are they fed up with talking about “what it's worth,” instead of talking with them and what happened to them? Do they need a jolt of hope or a moment of trust? Do we need to take a break, mentally or physically? Can I show them appreciation, or do something to better to welcome them into the discussion?

⁴⁰ Furlong, D., *The Role of Emotional Intelligence in Mediation*, www.msba.org (2023).

One technique I have used in several types of cases, to much success, is this: If counsel and I are discussing judgment value or “what it’s worth,” sometimes that type of discussion can be overwhelming for a party (either plaintiff or defendant). It can feel like we have lost sight of what the case is about – their story, their experience, their innocence, the wrong committed against them, or how their life has changed.

To demonstrate honesty and empathy, either in the first caucus with a party or whenever I sense the party is very emotional, I will stop for a minute and ask (for permission) to share something with them. I tell them that I know our discussion about what an injury “is worth” can be very upsetting and feels like we are missing their story. The legal system, however, requires us to talk about the case this way, and this is the way the jury will address the matter when they deliberate. But we never lose sight of the fact that this is about a real person with a real story; a person who feels harmed, unjustly accused, hurt, defamed, et cetera, perhaps in a life changing way, and it is important to me and their attorney that they know this. Every time I have done that, it has been appreciated and had a huge impact on the listener.

Finally, let me discuss the technique of playing devil’s advocate. I doubt there is ever a mediation where the mediator does not play devil’s advocate at some point. The keys to effectively using this technique are two-fold. The first is to make explicit the fact that you are playing devil’s advocate. I will say, “Let me (or may I) play devil’s advocate with you for a minute.” Or perhaps, “playing devil’s advocate, does the case law support...” The mediator can run into a problem when she plays devil’s advocate without making it explicit, because the listener can mistakenly feel as if the mediator is attacking or challenging them, or that the mediator is trying to impose a position or outcome – and no one likes that. Attorneys and parties are already in conflict with the other side; they do not want to fight with the mediator too.

The second key to effectively playing devil’s advocate is to primarily use questions. Questions solicit information; statements elicit argument.⁴¹ Therefore, mediators ask questions. With questions, we can lead the listener where they need to go. And our

⁴¹ More sage advice from Bob Jenks.

questions are soft; they are not leading questions. The mediator never embodies Perry Mason.⁴²

Conclusion

One of my colleagues teaches that the mediator is not the captain of the vessel; the mediator is the stream. Another likes to say that the mediator is like the lighthouse, because he/she is the only one who can see the dangers and reveal the safe path. Our participants can only embrace the way forward if we deliberately design and implement a process that empowers them to do so. Thus, the skilled mediator leads, coaches and guides, using a process built on voice, trust, neutrality and respect.

⁴² Perry Mason is a fictional character from a television series that ran from 1957-1966. His courtroom skills were legendary, and his cross examinations frequently resulted in admissions, capitulation and utter destruction of the witness.

**Tables Turning: How Companies Should Respond to the
“Mass Arbitration” Phenomenon and Abernathy v. DoorDash,
Inc.**

By: Isaac Keller

ABSTRACT

Over the last four decades, mandatory pre-dispute arbitration has become an increasingly common method for resolving disputes between corporations and consumers or employees. Despite its harm to smaller and disadvantaged parties, the Supreme Court’s pro-arbitration stance and legislative inaction have allowed this trend to continue. Following the Supreme Court’s 2011 decision in *Concepcion*, this practice has expanded to include class action waivers. However, a new strategy known as “mass arbitration” is empowering plaintiffs and forcing companies to settle disputes more quickly. This article aims to advise businesses on how to respond to this development, ultimately recommending that businesses reject the conventional wisdom that arbitration provisions with class waivers are advantageous and eliminate mandatory pre-dispute arbitration provisions with class action waivers in consumer and employment contracts.

I. INTRODUCTION

On July 27, 2021, Donna Bell filed a complaint against Arise Virtual Solutions, Inc. (Arise), a customer service call center company, alleging that the company violated the Fair Labor Standard Act (FLSA) by misclassifying its “Customer Support Professionals” (CSPs) as independent contractors.¹ Bell argued that CSPs should, under federal law, be classified as employees to receive benefits derived from the FLSA.² CSPs, like Mrs. Bell, were tasked with providing Arise’s clients with remote customer service.³

Mrs. Bell alleged that Arise classified CSPs as independent contractors to unlawfully deny its customer service workforce minimum wage, overtime pay, and paid sick leave.⁴ Mrs. Bell’s complaint was accompanied by a motion for class certification that requested the CSPs try the case together.⁵ In response to the complaint, Arise moved to compel arbitration, pointing to various work-related contracts, signed by the Plaintiff, containing mandatory pre-dispute arbitration provisions and class waivers.⁶

Plaintiff’s primary defense against the enforcement of the arbitration provision was that the agreement was unconscionable because it was “adhesive” and “buried” in the agreement.⁷ However, in an effort to prove that the fees associated with arbitrating the claim individually would be “prohibitively expensive,” Mrs. Bell also pointed to the filing fee of \$925 and even revealed her monthly income and expenses to the court.⁸

Moreover, Mrs. Bell submitted an affidavit that provided evidence as to the costs counsel’s firm had incurred arbitrating claims like this before.⁹ Yet, the Court determined that Plaintiff

¹ Bell v. Arise Virtual Sols., Inc., No. 4:21-CV-00538-RK, 2022 WL 567841, at *1 (W.D. Mo. Feb. 24, 2022).

² Id. at *11.

³ Id. at *1.

⁴ Id.

⁵ Id.

⁶ Bell, No. 4:21-CV-00538-RK, 2022 WL 567841 at 4.

⁷ Id. at *8.

⁸ Id. at *10–11.

⁹ Id. at *11.

“ha[d] not adequately demonstrated... [that] arbitration is ‘prohibitively expensive’... by showing ‘that it is likely, as opposed to merely speculative, that the prohibitive costs will actually be incurred....’”¹⁰ Instead, the Court granted Arise’s motion to compel arbitration and denied the Plaintiff’s request to certify the class.¹¹

There have been several lawsuits and investigations against Arise over the past decade regarding the misclassification of workers, including a U.S. Department of Labor investigation, and a National Labor Relations Board charge.¹² However, because Arise includes mandatory pre-dispute arbitration provisions with class waivers in every employment contract, scholars argue that it has been shielded from the law, particularly regarding class litigation.¹³

Indeed, Arise’s roughly 70,000 employees are likely not even aware that Arise may be violating the law.¹⁴ Unsurprisingly, Arise is not an outlier. For example, from 2011 to 2019, the number of companies that imposed arbitration provisions with class action waivers in consumer contracts tripled.¹⁵ Hundreds of cases like *Bell v. Arise Virtual Solutions, Inc.* are filed every year.¹⁶ Indeed,

¹⁰ *Id.*

¹¹ *Bell*, No. 4:21-CV-00538-RK, 2022 WL 567841 at *13.

¹² Ken Armstrong, et al., All a Gig-Economy Pioneer had to do was “Politely Disagree” It was Violating Federal Law and the Labor Department Walked Away, *PROPUBLICA* (Jan. 22, 2021), <https://www.propublica.org/article/arise-department-of-labor-2010> (reporting by a Labor Department investigator estimated that Arise owed its customer service workers \$14.2 million).

¹³ *Id.*

¹⁴ *Id.*

¹⁵ Ryan Miller, Next-Gen Arbitration: An Empirical Study of how Arbitration Agreements in Consumer Form Contracts Have Changed After *Concepcion* and *American Express*, 32 *GEO. J. LEGAL ETHICS* 793, 795, 806, 824-25 (2019).

¹⁶ Imre Stephen Szalai, The Prevalence of Consumer Arbitration Agreements by America’s Top Companies, *UC DAVIS L. REV. ONLINE* (Feb. 1, 2019) (stating 81 of the Fortune 100 companies, representing more than two-thirds of the U.S. GDP, use arbitration clauses in consumer and employment contracts and in 2018).

more than half of all employers use mandatory pre-dispute arbitration provisions with class action waivers in employment contracts—and that number increases significantly when the company has more than 1,000 employees.¹⁷

Interestingly, however, the plaintiff attorney in Bell may have identified a new strategy to discourage companies from using arbitration provisions in this way.¹⁸ Shannon Liss-Riordan, the attorney for the plaintiff in Bell, filed a motion for notice, pursuant to the FLSA, requesting the court mandate that Arise provides her with the names and contact information of every CSP at the company.¹⁹

Rather than pursue a traditional class action, Liss-Riordan planned to use the information to “unleash a wave of arbitration filings against Arise in what could become a war of attrition.”²⁰ Arise would be forced to pay for hundreds, if not thousands, of individual arbitrations with associated costs of processing fees, arbitrator fees, and lawyer fees.²¹ This, of course, doesn’t include

(“[T]here were at least 826,537,000 consumer arbitration agreements in force.”). *Id.*

¹⁷ Alexander J.S. Colvin, *The Growing Use of Mandatory Arbitration*, EPI (Apr. 6, 2018), <https://www.epi.org/publication/the-growing-use-of-mandatory-arbitration-access-to-the-courts-is-now-barred-for-more-than-60-million-american-workers> (discussing that arbitration prevents 24.7 million American workers from bringing a class action claim if their employment rights are ever violated).

¹⁸ Ken Armstrong & Ariana Tobin, *A New Suit Seeks to Turn Arbitrations, a Tool of Big Corporations, Against a Top Customer Service Provider*, PROPUBLICA (Aug. 3, 2021), <https://www.propublica.org/article/a-new-suit-seeks-to-turn-arbitrations-a-tool-of-big-corporations-against-a-top-customer-service-provider>.

¹⁹ Plaintiff’s Motion for Notice to Be Issued Pursuant to 29 U.S.C. § 216(b), & Suggestions in Support at 1, *Bell v. Arise Virtual Sols., Inc.*, No. 21-cv-00538, 2022 WL 567841 (W.D. Mo. Feb. 24, 2022), ECF No. 2.

²⁰ Armstrong & Tobin, *supra* note 18.

²¹ *Id.*

whatever the defendant may owe in the event the arbitrator awards in favor of the plaintiff.²²

This new strategy, known as “mass arbitration,” has potentially flipped one of the biggest legal advantages that companies possessed into a new advantage for workers and consumers.²³ Companies that have faced mass arbitration have taken drastic measures.²⁴ Some companies have even eliminated class waivers and arbitration provisions from employment and consumer contracts.²⁵ No doubt, this new strategy for plaintiffs may alter the very way companies resolve disputes with employees and consumers moving forward.²⁶ Importantly, however, there is not a cohesive response to mass arbitration among companies.²⁷ While some companies have disregarded arbitration, others have only recently registered forced arbitration clauses.²⁸

²² *Id.*

²³ Michael Corkery & Jessica Silver-Greenberg, ‘Scared to Death’ by Arbitration: Companies Drowning in Their Own System, *N.Y. TIMES* (Apr. 6, 2020), <https://www.nytimes.com/2020/04/06/business/arbitration-overload.html>.

²⁴ Cory Doctorow, *NYT: Binding Arbitration for Thee, but not for Me*, *MEDIUM* (Jan. 7, 2023), <https://doctorow.medium.com/nyt-binding-arbitration-for-thee-but-not-for-me-654cdcd6646c> (detailing how companies who have drafted contracts with arbitration provisions have nonetheless begun arguing that some arbitration agreements with consumers should not be binding or enforceable).

²⁵ Cecilia Y. Oh & Perie Reiko Koyama, *Retail Industry 2021 Year in Review: Retail Giant Drops Arbitration Clause—Is This the Right Move for Your Agreement?*, *NAT’L L. REV.* (Feb. 4, 2022), <https://www.natlawreview.com/article/retail-industry-2021-year-review-retail-giant-drops-arbitration-clause-right-move>.

²⁶ *Id.*

²⁷ *Id.*

²⁸ *The Ass’n for Trial Lawyers, Forced Arbitration in a Pandemic: Corporations Double Down*, *AAJ* (Oct. 27, 2021), <https://www.justice.org/resources/research/forced-arbitration-in-a-pandemic> (documenting that reports administered from the American Arbitration Association (AAA) and the Judicial

This paper seeks to (1) analyze the growth of arbitration in the business context; (2) analyze the development of mass arbitration and why plaintiff attorneys are using this strategy; and (3) explore solutions for businesses moving forward.

II. BACKGROUND

a. Arbitration in Corporate America

The story of binding arbitration began with Congress's implementation of the Federal Arbitration Act (FAA) in 1925.²⁹ After decades of prior judicial animosity toward arbitration,³⁰ the legislature sought to ensure that future agreements to arbitrate would be "valid, irrevocable, and enforceable..."³¹ By doing so, the legislature created an Act that made pre-dispute arbitration agreements enforceable in the United States.³²

Importantly, however, at the time of enactment the legislature had assumed the scope was limited to commercial disputes, rather than employment or consumer disputes.³³ The FAA was to make arbitration agreements between equally situated parties enforceable.³⁴ The original drafters were clear that the legislative

Arbitration and Mediation Services, Inc. (JAMS), finding that close case filing rates showed a 17% jump in new cases closed in 2020 over 201 and that roughly 240 corporations registered forced arbitration clauses with AAA since the beginning of the pandemic, including Twitter, Square, Stubhub, Marshalls, TJ Maxx, and more than 70 auto dealerships).

²⁹ Federal Arb. Act of 1925, 9 U.S.C. § 2.

³⁰ *Haskell v. McClintic-Marshall Co.*, 289 F. 405, 409 (9th Cir. 1923) ("[I]t was a settled rule of the common law that a general agreement to submit to arbitration did not oust the courts of jurisdiction").

³¹ 9 U.S.C. § 2.

³² 9 U.S.C. §§ 1-16.

³³ Katherine V.W. Stone & Alexander J.S. Colvin, *The Arbitration Epidemic: Mandatory Arbitration Deprives Workers and Consumers of Their Rights*, EPI (Dec. 7, 2015), <https://www.epi.org/publication/the-arbitration-epidemic>.

³⁴ *Id.*

intent behind the FAA was only to create a remedy to enforce agreements in commercial and admiralty contracts.³⁵ At first, courts had a consistent understanding, and between 1925 and the 1980s, “courts interpreted the FAA as applying to a narrow set of cases—commercial cases involving federal law that were brought in federal courts on an independent federal ground.”³⁶

The very meaning of the FAA has since changed. In the landmark 1983 case of *Moses Cone*, the U.S. Supreme Court adopted a nationwide presumption in favor of arbitration.³⁷ Although the FAA had existed unaltered for roughly 60 years, the Court emphasized a new pro-arbitration judicial attitude.³⁸ From then on, courts around the country were expected to resolve any doubts about the “arbitrability” of disputes with an order to compel the parties to arbitrate.³⁹ Of course, this has become the case not just for commercial disputes, but consumer and employment disputes as well.⁴⁰

³⁵ 65 Cong. Rec. 1931 (1924) (“It creates no new legislation, grants no new rights, except a remedy to enforce an agreement in commercial contracts and in admiralty contracts.”); Julius Henry Cohen & Kenneth Dayton, *The New Federal Arbitration Law*, 12 VA. L. REV. 265, 281 (1926); *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333 (2011) (Breyer, J., dissenting) (“When Congress enacted the act . . . it . . . thought that arbitration would be used primarily where merchants sought to resolve disputes of fact, not law, under the customs of their industries, where the parties possessed roughly equivalent bargaining power.”).

³⁶ Stone & Colvin, *supra* note 33.

³⁷ *Moses H. Cone Mem’l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24 (1983).

³⁸ *Id.* at 24–25 (“[Q]uestions of arbitrability must be addressed with a healthy regard for the federal policy favoring arbitration” and that “any doubts as to the scope of arbitrable issues should be resolved in favor of arbitration.”).

³⁹ *Id.*

⁴⁰ *Id.* (“The effect of [section 2 of the Federal Arbitration Act] is to “create a body of federal substantive law of arbitrability, applicable to any arbitration agreement within the coverage of the Act.”).

Section 2 of the FAA also includes what has now become well-known as the “savings clause.”⁴¹ Legislatures, advocates, and judges understood that agreements to arbitrate were meant to be “creatures of contract.”⁴² Thus, agreements to arbitrate were “valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.”⁴³

If there were no “grounds... for the revocation” of an arbitration provision, then the parties were expected to fulfill their agreement to arbitrate and an award would consequently be enforced.⁴⁴ But if there were legitimate grounds for revocation, an agreement to arbitrate could be invalidated and the parties could pursue the claim via litigation.⁴⁵ Put plainly, the savings clause was intended to protect consumers and companies alike from an order to compel arbitration when there was no true assent between the parties.⁴⁶

However, while the Court has emphasized a presumption in favor of arbitration, it has also imposed explicit limitations on the FAA’s savings clause. This has primarily occurred in three ways. First, following prior precedent that the FAA preempts state law,⁴⁷ the Court has declared that an arbitration agreement may not be revoked merely because it conflicts with state law.⁴⁸ In the event that state law conflicts with the FAA or creates an “obstacle” to the Act, the state law will not invalidate an agreement to arbitrate and will be preempted by the FAA.⁴⁹

Consider, for example, the case of *Concepcion*, where state law provided that some collective action waivers within consumer

⁴¹ 9 U.S.C. § 2 (1947).

⁴² Hiro Aragaki, *Arbitration: Creature of Contract, Pillar of Procedure*, 8 Y.B. ARB. & MEDIATION 2, 3 (2016).

⁴³ 9 U.S.C. § 2 (1947).

⁴⁴ See generally Aragaki, *supra* note 42.

⁴⁵ *Id.*

⁴⁶ *Id.*

⁴⁷ *Southland Corp. v. Keating*, 465 U.S. 1, 11 (1984).

⁴⁸ *Perry v. Thomas*, 482 U.S. 483, 491 (1987).

⁴⁹ *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333 (2011).

contracts were unconscionable and unenforceable.⁵⁰ There, the Supreme Court held that requiring class-wide arbitration “interferes with the fundamental attributes of arbitration and thus creates a scheme inconsistent with the FAA” in regards to the individualized nature of arbitration.⁵¹ In this way, the Court has narrowed the ability of parties to invalidate an agreement to arbitrate based on the agreement being “illegal” under the savings clause.⁵² The only way illegality would be a basis to invalidate an agreement to arbitrate is if the conflicting law was federal, rather than state, law. Yet, even then, it is not certain that the illegality defense would prevail.⁵³

Second, the Court has created a “separability” doctrine that makes it more difficult to invalidate an arbitration provision within an otherwise unenforceable contract.⁵⁴ For example, in *Prima Paint*, a party to a commercial lease alleged that the contract was induced by fraud and was therefore unenforceable.⁵⁵ The Supreme Court held that even if the contract was invalid, and induced by fraud, the agreement to arbitrate was separate from the rest of the contract.⁵⁶ As a result, a party asserting that a contract was the product of fraud today must either pursue the claim in arbitration or provide evidence that the specific arbitration provision was the product of fraud.⁵⁷ In 2006, the Supreme Court extended this doctrine beyond fraud to include illegal contracts as well.⁵⁸

⁵⁰ *Id.* at 338 (the Ninth Circuit’s basis for finding the class waiver unconscionable was due to an adopted California law called the Discover Bank Rule).

⁵¹ *Id.* at 344; see also *Am. Express Co v. Italian Colors Rest.*, 570 U.S. 228, 228 (2013).

⁵² *Concepcion*, 563 U.S. at 339.

⁵³ *Epic Sys. Corp. v. Lewis*, 138 S. Ct. 1612, 1616 (2018) (finding that the FAA requires arbitration agreements be enforced even if it conflicts with the National Labor Relations Act, a federal law).

⁵⁴ *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395, 421 (1967).

⁵⁵ *Id.* at 402.

⁵⁶ *Id.*

⁵⁷ *Id.*

⁵⁸ *Buckeye Check Cashing, Inc. v. Cardegna*, 546 U.S. 440, 441–442 (2006).

Third, building off the implications of the separability doctrine, the Court has developed an “equal footing” principle—essentially forcing courts to treat agreements to arbitrate the same as any other contract.⁵⁹ Practically, this means that a court may only invalidate an arbitration agreement based on general contract defenses and not legal rules that would apply only to arbitration.⁶⁰ This ruling effectively guts state efforts to “single out” arbitration and regulate it in any meaningful way.⁶¹ No doubt, even if state law puts arbitration agreements on equal footing to other contracts, a state law may nonetheless be subject to preemption by the FAA if it “interferes with fundamental attributes of arbitration.”⁶²

As the power of the savings clause has diluted and the scope of the FAA has expanded, more companies have begun using arbitration to resolve consumer and employment disputes.⁶³ Companies have quickly realized the financial benefit that arbitration provides—taking advantage of the Court’s lax ruling on the FAA’s savings clause, often at the expense of the smaller disadvantaged party.⁶⁴

b. Regulatory Background

There have been some regulatory initiatives against arbitration in the past decade—namely in the financial services industry. Indeed, there is a similar history of the growing use of mandatory arbitration provisions by financial service providers.⁶⁵ For example, in 1999 the 10 major banks that issue credit cards

⁵⁹ *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 339 (2011); *E.E.O.C. v. Waffle House, Inc.*, 534 U.S. 279, 294 (2002).

⁶⁰ *Kindred Nursing Ctr’s Ltd. P’ship v. Clark*, 137 S. Ct. 1421, 1426 (2017).

⁶¹ *Concepcion*, 563 U.S. at 341 (“When state law prohibits outright the arbitration of a particular type of claim, the analysis is straightforward...the rule is displaced by the FAA.”).

⁶² *Chamber of Commerce of the United States v. Becerra*, 438 F. Supp. 3d 1078, 1096 (E.D. Cal. 2020) (quoting *Lamps Plus, Inc. v. Varela*, 139 S. Ct. 1407, 1418 (2019)).

⁶³ *Stone & Colvin*, *supra* note 33.

⁶⁴ *Id.*

⁶⁵ *Id.*

(including American Express, CitiBank, First USA, Capital One, Chase, and Discover) all formed a cohesive group called “the Arbitration Coalition” with the sole purpose of promoting the growth of arbitration clauses in consumer contracts.⁶⁶ Of course, these clauses not only mandated arbitration, but they also included class waiver provisions that barred consumers from pursuing class-wide claims.⁶⁷

The Supreme Court’s interpretation of the FAA and the saving clause is similar in financial service cases.⁶⁸ However, there is some important legislative and administrative history surrounding mandatory consumer arbitration provisions in financial services. In 2010, Congress enacted the Dodd-Frank Wall Street Reform and Consumer Protection Act (“Dodd-Frank”).⁶⁹ In response to the enormous growth of consumer arbitration provisions, section 1028(a) of Dodd-Frank instructed the Consumer Financial Protection Bureau (“CFPB”) to conduct a comprehensive study on the use of arbitration agreements in connection with consumer financial products or services.⁷⁰ Dodd-Frank also granted the CFPB the power to regulate financial service consumer contracts based on the results of the study.⁷¹

In March 2015, the CFPB issued a 150-page report that highlighted the widespread use of consumer arbitration clauses in the financial service industry.⁷² The report found that pre-dispute, forced arbitration clauses are included in a significant amount of

⁶⁶ *Id.*

⁶⁷ *Id.*

⁶⁸ *Green Tree Fin. Corp.-Ala. v. Randolph*, 531 U.S. 79, 85 (2000) (finding that an individual that claimed a lender violated the Truth in Lending Act was still required to arbitrate pursuant to an arbitration clause, even if the projected costs of arbitration likely precluded the claimant from bringing the claim).

⁶⁹ Dodd-Frank Wall St. Reform and Consumer Prot. Act, Pub. L. No. 111-203, § 1028(a), 124 Stat. 1376, 1376 (2010).

⁷⁰ Dodd-Frank Wall St. Reform and Consumer Prot. Act § 1028(a).

⁷¹ Dodd-Frank Wall St. Reform and Consumer Prot. Act § 1028(b).

⁷² See CFPB, ARBITRATION STUDY REPORT TO CONGRESS, PURSUANT TO DODD-FRANK WALL STREET REFORM AND CONSUMER PROTECTION ACT § 1028(A), (2015).

contracts regarding credit cards, bank accounts, cell phones, payday loans, insurance, student loans, leases, and other forms of consumer financial service transactions.⁷³

Additionally, the word count of these arbitration clauses always averaged more than 1,000 words⁷⁴ and almost every arbitration clause precluded class action claims.⁷⁵ Despite the prevalence of these provisions, the report also revealed that consumers were seldom aware of the existence of the provision or its consequence.⁷⁶ Similarly, the report did not support the common argument in favor of consumer arbitration that the imposition of these clauses resulted in lower prices for consumers.⁷⁷

Pursuant to § 1028(b) of Dodd-Frank, the CFPB used the report findings to issue a final rule in July 2017 titled “Arbitration Agreements Rule”⁷⁸ which would establish 12 CFR 1040.⁷⁹ The

⁷³Id. §§ 3.4.3, 2.3, (2015) (finding that 53% of the credit card market, 81% of prepaid card contracts, 86% of the largest private student loan lenders, and more than 90% of the payday loans market included mandatory arbitration clauses).

⁷⁴Id. § 2.4 (finding that arbitration clauses in credit card contracts averaged 1,109.8 words, in GPR prepaid card contracts averaged 1,082.8 words, and in payday loan contracts averaged 1,421.3 words).

⁷⁵Id. § 2.5.5 (“Almost all of the arbitration clauses studied contained terms limiting the availability of class proceedings in arbitration”).

⁷⁶Id. § 3.2 (“[L]ess than 20% of respondents recognized that the contract could impact their right to a jury trial; and approximately 13% understood that the contract they had just been shown prohibited them from participating in a class action lawsuit . . . [and] 87% of respondents who said that they had never entered a consumer contract with an arbitration clause had indeed entered into at least one consumer contract that included a pre-dispute arbitration clause.”).

⁷⁷Myriam E. Giles, EXAMINING MANDATORY ARBITRATION IN FINANCIAL SERVICE PRODUCTS 5 (3-8-2022), <https://larc.cardozo.yu.edu/faculty-testimony/9>.

⁷⁸CFPB Rule on Arb. Agreements, 82 Fed. Reg. 33210 (July 19, 2017) (to be codified at 12 C.F.R. pt. 1040).

rule, among other things, restricted financial institutions’ ability to impose arbitration provisions with class action waivers in financial service contracts.⁸⁰ Essentially, the CFPB rule prohibited certain financial service companies from using an agreement that provided an arbitration clause that barred the consumer from participating in a class action concerning the service.⁸¹

By November 2017, a few months after the CFPB issued the final rule, Congress had passed, and President Trump had signed a joint resolution voicing disapproval.⁸² In other words, “[u]nder the joint resolution and by operation of the Congressional Review Act,⁸³ the arbitration agreements rule...” no longer had “...force or effect.”⁸⁴ Congress, with the help of President Trump, rolled back the CFPB’s final rule in just a few months.⁸⁵

There has since been no significant limitation on the use of consumer arbitration clauses with class action waivers in the financial service industry—or on the use of arbitration generally for that matter.⁸⁶ And the financial services industry is just one example of a lack of regulatory and legislative response to the growth of mandatory arbitration provisions in consumer contracts.

III. WHY DO BUSINESSES ARBITRATE?

⁷⁹ Id.

⁸⁰ Id.

⁸¹ Id.

⁸² Joint Resolution for Congressional Disapproval, Pub. L. No. 115-74 (Nov. 1, 2017).

⁸³ Id.

⁸⁴ CFPB Rule on Arb. Agreements, 82 Fed. Reg. 55500 (Nov. 22, 2017) (to be codified at 12 C.F.R. pt. 1040).

⁸⁵ Id.

⁸⁶ J. Maria Glover, *Mass Arbitration*, 74 STAN. L. REV. 1283, 1293 (2022), <https://review.law.stanford.edu/wp-content/uploads/sites/3/2022/09/Glover-74-Stan.-L.-Rev.-1283.pdf>.

The benefits that arbitration provides for businesses help explain why they sometimes prefer arbitration to litigation.⁸⁷ Arbitration offers an informal, confidential, and speedy alternative to litigation.⁸⁸ Although, importantly, much of the concern regarding these benefits in the consumer arbitration context is that the benefits to businesses are often at the expense of consumers.⁸⁹ Aside from many of the benefits already previewed above—like class action waivers—this portion of the article will briefly examine some of the current advantages and disadvantages of arbitration in company contracts, from both the consumer and employee perspective and the business perspective.

a. Efficiency and Cost

Perhaps the most common argument for arbitration is that it is more efficient than litigation.⁹⁰ Arbitration excludes some of the timelier procedural requirements of litigation like motions to dismiss, motions for summary judgment, interrogatories, depositions, and even appeals.⁹¹ Additionally, because arbitration is a “creature of contract,”⁹² and parties are the “architects”⁹³ of their arbitration, an arbitration process can be tailored in a way to avoid certain costs and time-consuming processes as well.⁹⁴

Generally, both parties benefit from an efficient legal process.⁹⁵ However, most research focuses on business arbitration and there

⁸⁷ Roy Weinstein et al., *Efficiency and Economic Benefits of Dispute Resolution through Arbitration Compared with U.S. District Court Proceedings*, MICRONOMICS (Mar. 2017).

⁸⁸ Garret Meisman, *Opt-In Arbitration: A Functional Alternative to the FAIR Act*, 46 *BYU L. REV.* 1647, 1656, 1658 (2021).

⁸⁹ Stone & Colvin, *supra* note 33.

⁹⁰ John S. Kiernan, *Reducing the Cost and Increasing the Efficiency of Resolving Commercial Disputes*, 40 *CARDOZO L. REV.* 187, 210–11 (2018).

⁹¹ Meisman, *supra* note 88.

⁹² Aragaki, *supra* note 42.

⁹³ *Commonwealth Coatings v. Continental Cas.*, 393 U.S. 145, 150 (1968) (White, J., concurring).

⁹⁴ *Id.* at 151.

⁹⁵ Kiernan, *supra* note 90.

has been little research about the benefit to consumers regarding efficiency.⁹⁶ Naturally, an argument in favor of arbitration often stemming from the efficiency argument is that arbitration is less costly than litigation.⁹⁷

As such, this argument really has two prongs. First, because arbitration is more efficient and quicker,⁹⁸ it naturally costs less than litigation because there is less of a need to spend money.⁹⁹ Second, arbitration has “fewer ‘process costs’ such as ‘forum fees, litigation expenses, out-of-pocket attorneys’ fees, time, and energy devoted by the parties.’”¹⁰⁰ The two together create a persuasive argument that arbitration is cheaper than litigation—especially for businesses frequently facing lawsuits. However, it’s worth noting that the filing fees and administrative costs are typically higher for arbitration compared to bringing a lawsuit in court.¹⁰¹

⁹⁶ 153 CONG. REC. S4616 (daily ed. Apr. 17, 2007 (statement of Sen. Sessions); S. REP. NO. 68-536 at 3 (1924) (finding that arbitration permits parties to “avoid...delay and expense”); Mark Fotohabadi, How Much Does Arbitration Cost?, ALT. DISP. RESOL. TIMES (June 10, 2022), <https://www.adrtimes.com/how-much-does-arbitration-cost> (studies demonstrate arbitration is efficient, saves money, and that “[t]he federal government estimated arbitration saved 90 attorney hours, worth tens of thousands of dollars, each time it used arbitration.”).

⁹⁷ Meisman, *supra* note 88, at 1657.

⁹⁸ Arbitration vs. Litigation: The Difference, THOMAS REUTERS (Oct. 4, 2022), <https://legal.thomsonreuters.com/blog/arbitration-vs-litigation-the-differences> (detailing American Bar Association research suggests that average arbitration cases take about seven months, while average litigation can take from 23-30 months depending on the court schedule).

⁹⁹ Seth E. Lipner, Is Arbitration Really Cheaper?, FORBES (July 14, 2009), <https://www.forbes.com/2009/07/14/lipner-arbitration-litigation-intelligent-investing-cost>.

¹⁰⁰ Meisman, *supra* note 88, at 1657 (citing David S. Schwartz, Mandatory Arbitration and Fairness, 84 NOTRE DAME L. REV. 1247, 1267 (2009)).

¹⁰¹ Jeremy T. Walker, Know the Law: Arbitration vs. Litigation, MCCLANE MIDDLETON (Sep. 17, 2022),

b. Repeat Players and Potential for Bias

A well-known disadvantage to arbitration is that it likely presents a higher risk of bias among third-party neutrals when compared to litigation.¹⁰² Businesses that often use arbitration to resolve disputes with consumers are considered “repeat players” in the arbitration process.¹⁰³ These businesses possess a strong advantage over consumers by becoming more familiar with the forum, process, and even the arbitrator themselves.¹⁰⁴

There are a few reasons repeat players have an advantage over one-timers (consumers who are participating in arbitration for the first time) in arbitration proceedings. First, there is an “information advantage.”¹⁰⁵ Companies that frequently participate in arbitration proceedings hold an advantage over consumers because they can carefully track the results of each proceeding over time.¹⁰⁶ These companies keep “strike lists” of arbitrators who are considered

<https://www.mclane.com/insights/know-the-law-arbitration-vs-litigation>.

¹⁰² Forced Arbitration in a Pandemic: Corporations Double Down, *AAJ* (Oct. 27, 2021), <https://www.justice.org/resources/research/forced-arbitration-in-a-pandemic> (“What hasn’t changed is the likelihood of success. In years past, consumers were more likely to be struck by lightning than win a monetary award in forced arbitration. In 2020, that win rate dropped even further. Just 577 Americans won a monetary award in forced arbitration in 2020, a win rate of 4.1%- below the five-year average win rather of 5.3%. More people climb Mount Everest in a year (and they have a better success rate) than win their consumer arbitration case”).

¹⁰³ David Horton & Andrea Cann Chandrasekher, *After the Revolution: An Empirical Study of Consumer Arbitration*, 104 *GEORGETOWN L. J.* 57, 57 (2015).

¹⁰⁴ *Id.* at 120.

¹⁰⁵ Amit Seru, *Tipping the Scales: Balancing Consumer Arbitration Cases*, *SIEPR* (Feb. 2023), <https://siepr.stanford.edu/publications/tipping-scales-balancing-consumer-arbitration-cases>.

¹⁰⁶ *Id.*

more “consumer friendly” and use those lists during future selection processes.¹⁰⁷ Thus, companies quickly become more informed than consumers about what arbitrators are more likely to support their side.¹⁰⁸

Second, there is a “selection advantage.” Arbitrators are only compensated if they are selected by companies and/or consumers to arbitrate disputes.¹⁰⁹ However, because companies are often repeat players, arbitrators “know they have a better chance of being selected and paid if they exhibit a more pro-industry stance.”¹¹⁰ Thus, there is a large incentive for competing arbitrators to demonstrate that they are more “industry-friendly” than “consumer-friendly.”¹¹¹

Arbitrators can display enough bias in consumer arbitration to make a difference for businesses and consumers. For example, one study found that a “[r]andom selection of arbitrators would increase consumer awards by about \$60,000 on average.”¹¹² That same study suggested that industry-friendly arbitrators are 50% more likely to be chosen than consumer-friendly counterparts.¹¹³

Additionally, one report even found that only 5.3% of consumers between 2016-2020 “won” in a forced pre-dispute arbitration.¹¹⁴ Some scholars argue that this bias was intensified by the *Concepcion* decision, as it led to the decline of consumer class actions—allowing companies to pursue “scores of individual disputes...inadvertently transform[ing] some large corporations into extreme repeat players.”¹¹⁵

Regardless, it can be advantageous for businesses to arbitrate rather than litigate. This is particularly true when there is a dispute

¹⁰⁷ *Id.*

¹⁰⁸ *Id.*

¹⁰⁹ *Id.*

¹¹⁰ *Id.*

¹¹¹ Seru, *supra* note 105.

¹¹² *Id.*

¹¹³ *Id.*

¹¹⁴ Forced Arbitration in a Pandemic: Corporations Double Down, AAJ (Oct. 27, 2021), <https://www.justice.org/resources/research/forced-arbitration-in-a-pandemic>.

¹¹⁵ Horton & Chandrasekher, *supra* note 103.

between only one consumer or employee and a company. The benefits listed above make this abundantly clear.

IV. THE “MASS ARBITRATION” SURPRISE AND CORPORATE RISKS

Since the 2010s, the benefits of individualized arbitration have led businesses to prioritize the use of class action waivers tied to arbitration provisions in consumer and employment contracts.¹¹⁶ This became possible by the Supreme Court’s repeated holding that companies can require employees and consumers to take all related disputes to arbitration on an individual basis.¹¹⁷ Moreover, the lack of legislative or regulatory response allowed companies to continue using mandatory pre-dispute arbitration provisions with class waivers despite some of the disadvantages to workers and consumers. However, recent efforts from plaintiff attorneys represent some potential risks to businesses if they continue using class waivers in arbitration provisions.¹¹⁸

a. Mass Arbitration

Mass arbitration has become a “litigation phenomenon” and will likely continue to be a strategy for plaintiff attorneys moving forward.¹¹⁹ As companies continue to include arbitration provisions mandating individual arbitration, they risk plaintiff attorneys taking advantage by “filing hundreds or even thousands of individual arbitration demands...requiring the company to pay... millions of dollars in... fees charged by the two widely used arbitration administrators.”¹²⁰

¹¹⁶ Stone & Colvin, *supra* note 33.

¹¹⁷ *Epic Systems Corp. v. Lewis*, 138 S. Ct. 1612, 1632 (2018); *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 351–52 (2011).

¹¹⁸ Glover, *supra* note 86, at 1333.

¹¹⁹ Alan S. Kaplinsky et al., *Arbitration Year in Review: Back to Basics (But with Some New Twists)*, 76 *THE BUS. LAW.* 675, 679 (Spring 2021).

¹²⁰ *Id.*

For example, in 2019, a law firm, Keller Lenkner,¹²¹ served roughly 75,000 arbitration demands on Amazon, alleging that Amazon’s Alexa device was recording customers without their consent.¹²² As a result, in July 2021, Amazon announced that the company was removing mandatory arbitration and class action waiver provisions from its consumer terms and conditions.¹²³

Mass arbitration has impacted a variety of other companies as well.¹²⁴ In *Adams v. Postmates, Inc.*, over 5,000 delivery drivers for Postmates all filed a motion to compel arbitration to allow them to independently arbitrate their misclassification claims.¹²⁵ The AAA granted some of the individuals fee waivers, and the remaining claimants paid a total of \$99,600 for their portion of the fees.¹²⁶ This paled in comparison to the roughly \$10 million that Postmates was estimated to owe.¹²⁷ The Court in that case granted the motion, forcing the parties to proceed in arbitration as contracted.¹²⁸

In the past 5 years, similar mass arbitration cases have been brought against Uber,¹²⁹ Lyft,¹³⁰ Chipotle,¹³¹ Buffalo Wild

¹²¹ Bruce Love, High-Profile Plaintiffs Firm Keller Lenker Becomes Keller Postman as Co-Founder Leaves, *THE AM. LAW.* (Apr. 25, 2022), <https://www.law.com/americanlawyer/2022/04/25/high-profile-plaintiffs-firm-keller-lenkner-becomes-keller-postman-as-co-founder-leaves> (Keller Lenker is now known as Keller Postman).

¹²² Oh & Koyama, *supra* note 25.

¹²³ *Id.*

¹²⁴ Kaplinsky et al., *supra* note 119.

¹²⁵ *Adams v. Postmates, Inc.*, No. 19-3042 SBA, 2020 U.S. Dist. LEXIS 38729, at *73 (N.D. Cal. Mar. 5, 2020).

¹²⁶ *Adams v. Postmates, Inc.*, 414 F. Supp. 3d 1246, 1250 (N.D. Cal. Oct. 22, 2019).

¹²⁷ *Id.*

¹²⁸ *Id.*

¹²⁹ See Petition for Order Compelling Arbitration at para 23, *Abadilla v. Uber Techs., Inc.*, No. 4:18-cv-07343-KAW (N.D. Cal. Dec. 5, 2018) (case involved 12,501 individual JAMS arbitrations).

¹³⁰ See Petition for Order Compelling Arbitration at para 15, *Abarca v. Lyft Inc.*, No. 3:18-cv-07502-EDL (N.D. Cal. filed Dec. 13, 2018) (case involved 3,420 individual AAA arbitrations).

Wings,¹³² and more.¹³³ Although a lengthy and expensive process for plaintiff attorneys, the mass arbitration strategy can force companies to pay a “host of arbitration and attorney fees in a long succession of cases.”¹³⁴ Some attorneys have even begun automating mass arbitration claims, making it much easier for plaintiff attorneys to bring a wave of arbitration claims without expending ordinary time and effort.¹³⁵ The legal strategy of mass arbitration is still new—but there is no doubt it will change how businesses use arbitration provisions in consumer and employment contracts.

b. *Abernathy v. DoorDash, Inc.*

Abernathy involved a group of 5,879 delivery drivers for DoorDash, all of whom allegedly clicked through a contract online that contained a pre-dispute mandatory arbitration provision.¹³⁶ The provision provided that the parties mutually agree to arbitrate any and all disputes arising out of or relating to the agreement and that the parties both waive their right to a class, collective, or representative action.¹³⁷ Additionally, under AAA’s Commercial Arbitration Rules, all individuals were required to pay a \$300

¹³¹ See Andrew Wallender, *Corporate Arbitration Tactic Backfires as Claims Flood In*, BLOOMBERG L. (Feb. 11, 2019), <https://news.bloomberglaw.com/daily-labor-report/corporate-arbitration-tactic-backfires-as-claims-flood-in>.

¹³² *Id.*

¹³³ Oh & Koyama, *supra* note 25 (finding that at least a dozen major mass arbitration cases have been initiated in the United States from 2020-2022, including some against Intuit and Chegg).

¹³⁴ Armstrong & Tobin, *supra* note 18.

¹³⁵ Corkery & Jessica Silver-Greenberg, *supra* note 23 (“FairShake...uses an automated system to get the arbitration process started. If the claim results in a payout, the start-up takes a cut...FairShake is expanding its focus to other industries, like consumer finance and home security”).

¹³⁶ *Abernathy v. DoorDash, Inc.*, 438 F. Supp. 3d 1062, 1064 (N.D. Cal. 2020).

¹³⁷ *Id.*

filing fee and the responding company was required to pay a \$1,900 filing fee in the event the parties arbitrate a dispute.¹³⁸

The controversy in the case revolved around whether the labor classification of the delivery drivers was correct.¹³⁹ Petitioner delivery drivers claimed that they had been improperly classified as independent contractors rather than employees.¹⁴⁰ This classification, according to Petitioners, denied them employment benefits under relevant labor statutes such as minimum wage, overtime pay, and reimbursement for business expenses.¹⁴¹

Accordingly, in August 2019, petitioners’ counsel began filing individual demands for arbitration.¹⁴² Petitioners filed 2,250 demands for arbitration with the AAA in August and another 4,000 demands in September.¹⁴³ Each demand alleged that DoorDash violated statutes such as the Fair Labor Standards Act and the California Labor Code.¹⁴⁴ After petitioners all-together paid \$1.2 million in filing fees, DoorDash disputed their obligation to tender the nearly \$12 million in administrative and filing fees.¹⁴⁵

In November 2019, AAA emailed the parties informing them that Respondent failed to submit the required fees for the 6,250 individual demands and that they would be closing the file.¹⁴⁶ Soon after, Petitioners brought this case to the United States District Court for the Northern District of California and sought a motion to compel DoorDash to arbitration each individual demand.¹⁴⁷ The Court granted that the motion to compel arbitration as to 5,010 petitioners and thus order DoorDash to “immediately commence AAA arbitration with these petitioners.”¹⁴⁸ Importantly, the judge emphasized that:

¹³⁸ Id.

¹³⁹ Id.

¹⁴⁰ Id.

¹⁴¹ Abernathy, 438 F. Supp. 3d at 1064.

¹⁴² Id.

¹⁴³ Id.

¹⁴⁴ Id.

¹⁴⁵ Id.

¹⁴⁶ Abernathy, 438 F. Supp. 3d at 1064.

¹⁴⁷ Id.

¹⁴⁸ Id. at 1066.

For decades, the employer-side bar and their employer clients have forced arbitration clauses upon workers, thus taking away their right to go to court, and forced class-action waivers upon them too, thus taking away their ability to join collectively to vindicate common rights. The employer-side bar has succeeded in the United States Supreme Court to sustain such provisions. The irony, in this case, is that the workers wish to enforce the very provisions forced on them by seeking, even if by the thousands, individual arbitrations, the remnant of procedural rights left to them. The employer here, DoorDash, faced with having to actually honor its side of the bargain, now blanches at the cost of the filing fees it agreed to pay in the arbitration clause. No doubt, DoorDash never expected that so many would actually seek arbitration. Instead, in irony upon irony, DoorDash now wishes to resort to a class-wide lawsuit, the very device it denied to the workers, to avoid its duty to arbitrate. This hypocrisy will not be blessed, at least by this order. *Abernathy v. DoorDash, Inc.*, 438 F. Supp. 3d 1062, 1067—68 (N.D. Cal. 2020).

Abernathy focuses on mass arbitration in the employment context.¹⁴⁹ Importantly, in response to this case, the AAA has since modified its employment rules regarding fees to now account for “group filings” like the one in *Abernathy*.¹⁵⁰ However, there has

¹⁴⁹ *Id.* at 1067-68.

¹⁵⁰ Employment Arbitration Under AAA Administration, AM. ARB. ASS’N, https://adr.org/sites/default/files/Employment_Fee_Schedule1Nov19_0.pdf (“AAA has discretion to determine an alternative payment process for “group filing” when (a) 25 or more similar claims for arbitration or mediation are filed; (b) claims are against or on behalf of the same party or parties; and (c) counsel for the parties is consistent or coordinated across all cases.”).

been no change made to AAA’s Consumer Arbitration Rules and JAMS has likewise not modified any of its rules.¹⁵¹

DoorDash now works with a new arbitration provider, the Conflict Prevention and Resolution (CPR), which allows a maximum of only 10 arbitration claims at once when more than 30 are filed.¹⁵² Moreover, CPR mandates a 90-day mediation session prior to arbitrating, effectively delaying claims for years.¹⁵³ Regardless, Abernathy presents just one example of the rather high risks that businesses face if they continue to require class action waivers within arbitration provisions in consumer and employment contracts.¹⁵⁴

V. SOLUTIONS

The mass arbitration movement has enormous implications for corporate defendants. First, the development of this strategy diminishes the impact of the Supreme Court’s holding in *Concepcion*.¹⁵⁵ *Concepcion* held that arbitration provisions with class waivers were not only permissible but were implied because they reflected the “fundamental attributes” of arbitration.¹⁵⁶

The result was the explosion of class waivers in consumer and employment contracts¹⁵⁷—often constraining the ability of small, disadvantaged parties to bring a claim.¹⁵⁸ Indeed, some scholars suggest that *Concepcion* and the Supreme Court’s favoritism toward arbitration led to a 90% decline in the number of claims being brought by consumers and employees.¹⁵⁹

¹⁵¹ Kaplinsky et al., *supra* note 119, at 680.

¹⁵² Forced Arbitration in a Pandemic: Corporations Double Down, AM. ASS’N FOR JUST. (Oct. 27, 2021), <https://www.justice.org/resources/research/forced-arbitration-in-a-pandemic>.

¹⁵³ *Id.*

¹⁵⁴ Kaplinsky et al., *supra* note 119, at 679-680.

¹⁵⁵ Glover, *supra* note 86, at 1367.

¹⁵⁶ *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 344 (2011).

¹⁵⁷ Miller, *supra* note 15, at 795.

¹⁵⁸ Stone & Colvin, *supra* note 33, at 12-13.

¹⁵⁹ Glover, *supra* note 86, at 1305.

Mass arbitration potentially uproots the Concepcion legal landscape.¹⁶⁰ The mechanism makes it to where “[c]laims that were rendered unmarketable by class-action waivers...[are now] capable of generating settlement pressure greater than that produced by class certification.”¹⁶¹ Indeed, the cost for defendants just to begin the arbitration process may outweigh any potential cost of class-wide litigation.¹⁶² Businesses will need to make this determination.¹⁶³ A tough decision, but one that Amazon, for example, made swiftly.¹⁶⁴

Second, the development of mass arbitration puts businesses hoping to keep arbitration provisions in a tricky spot. Courts have almost universally found that consumer and employment contracts that unreasonably shift arbitration fees to the consumer and employee are unconscionable.¹⁶⁵ Businesses that want to maintain arbitration provisions in their consumer and employment contracts, but do not want to be subject to the potential financial consequences of mass arbitration, will face a unique challenge.¹⁶⁶ That is, creating the perfect contract that is neither unconscionable nor makes the company solely responsible for the fees associated with arbitrating.¹⁶⁷

Finally, remember, this plaintiff strategy is relatively new. The automation of starting the arbitration process, combined with the possibility that other plaintiff firms may begin initiating arbitration claims, makes mass arbitration a scary concept for businesses. If mass arbitration claims have only just begun, these businesses will need to consider whether arbitration is as efficient and effective as it once was. Additionally, if businesses do discontinue the use of arbitration provisions, there may be some more intense legal implications. For example, consider how Arise would have

¹⁶⁰ Id.

¹⁶¹ Id. at 1341.

¹⁶² See generally, Glover, *supra* note 86.

¹⁶³ Id.

¹⁶⁴ Oh & Koyama, *supra* note 25.

¹⁶⁵ Glover, *supra* note 86, at 1366.

¹⁶⁶ See generally, Glover, *supra* note 86.

¹⁶⁷ Id. at 1366.

changed its employment structure had a court, rather than an arbitrator, found that it was violating the FLSA.¹⁶⁸

The solution to the mass arbitration plaintiff strategy is simple. Companies should eliminate arbitration provisions with class waivers in consumer and employment contracts. This approach has a variety of benefits.

First, companies that remove mandatory pre-dispute arbitration provisions from their consumer and employment contracts will be immune from mass arbitrations. Instead, disputes arising out of or relating to consumer or employment contracts would be resolved with aggregate class action claims—likely cheaper for both the plaintiffs and the defendant company.¹⁶⁹ Additionally, if businesses do not want to settle a case, they will be better positioned with the absence of mass arbitration claims as the upfront costs will be significantly less.¹⁷⁰

Second, there is a public relations and political advantage that businesses can harbor if they remove mandatory pre-dispute arbitration provisions from consumer and employment contracts.¹⁷¹ Allowing small, more disadvantaged parties to “see their day in court” looks good to both consumers and legislators.¹⁷² Companies that decide to remove these provisions thus not only receive the benefit of avoiding the implications listed above, but also get the PR benefit of looking like a company that respects the rights of their employees and consumers. Additionally, companies removing arbitration provisions could have higher employee satisfaction and lower turnover as their employees will have more faith and trust in the dispute resolution process.

¹⁶⁸ *Id.* at 1334 (citing Plaintiff’s Motion for Notice to Be Issued Pursuant to 29 U.S.C. § 216(b); *Bell v. Arise Virtual Sols., Inc.*, No. 21-cv-00538, 2022 WL 567841, at 1 (W.D. Mo. Feb. 24, 2022), ECF No. 2.).

¹⁶⁹ Dave Rochelson, *Is This the End of Mandatory Arbitration?*, AM. BAR ASS’N (June 7, 2022), https://www.americanbar.org/groups/gpsolo/publications/gp_solo/2022/may-june/is-the-end-mandatory-arbitration.

¹⁷⁰ Glover, *supra* note 86, at 1356.

¹⁷¹ Rochelson, *supra* note 169.

¹⁷² *Id.*

Finally, companies could also maintain arbitration provisions but eliminate class waivers. However, this approach risks the possibility that plaintiff attorneys continue initiating mass arbitrations rather than consolidating plaintiffs into a class-wide arbitration. This approach has only minimal PR benefits and still leaves companies vulnerable to the financial consequences of mass arbitration.

VI. CONCLUSION

Businesses have increasingly relied on arbitration since *Moses Cone* and, more recently, *Concepcion*. Over the past 40 years, arbitration has provided businesses with an efficient and cost-effective alternative to litigation often at the expense of the individual. However, mass arbitration may have turned the tables on businesses, providing consumers and employees with an effective strategy to force companies to settle cases quickly.

This Article advises businesses to reevaluate their arbitration provisions and ultimately eliminate mandatory pre-dispute arbitration provisions with class waivers in consumer and employment contracts. This route will not only benefit consumers and employees but will provide businesses with immunity from the emerging mass arbitration plaintiff strategy.

Mending Mediations in New York: Child-Inclusive Mediation as a Means of Finding the Child's Voice in the Absence of the Child

By: Halle Jaffe

I. INTRODUCTION

Imagine being fourteen years old and sitting in a stiff mahogany chair in a grand, intimidating courtroom. The space is well-lit, and the judge sits patiently beside you on his bench while you testify in favor of one parent and against the other. Unfortunately, the fourteen-year-old child in *Casarotti v. Casarotti* was put into this disturbing situation.¹ If having to state your custody preferences in front of both parents in the courtroom isn't traumatizing enough, the child in this case wanted to live with her kind and supportive father; however, her mother threatened her with ominous consequences – such as being cut off from financial aid and denied access to her half-brother – should she testify in his favor.²

The attorney for the child and the father both requested that the Family Court hold a Lincoln hearing – an in-camera hearing where the child expresses his or her feelings about the case with only the child, attorney, and judge in the room – rather than require the child to testify in open court.³ However, this request was denied; after the mother refused to consent to the child testifying outside of the parties' presence, the child had to testify under oath in front of both parents.⁴ It was counter to the child's best interest for the court to put her in this uncomfortable position, notwithstanding that her wishes were already known to her parents and that the mother attempted to influence her child's testimony.⁵ To make this situation worse – this child is not alone. In fact, she is one of the thousands of children who have been put in this disturbing

¹ *Casarotti v. Casarotti*, 107 A.D.3d 1336 (2013).

² *Id.*

³ *Id.*

⁴ *Id.*

⁵ *Id.*

position, as over one-hundred thousand children appear in court under similar circumstances each year.⁶

Describing her custody preferences to an attorney, a mediator, and a child consultant in private would have limited the child's risk of harm and "would have been far more informative and worthwhile than...an examination of the child under oath in open court."⁷ Likewise, "A child should not be placed in the position of having his or her relationship with either parent further jeopardized by having to publicly relate his or her difficulties with them" while explaining reasons for his or her preference.⁸ Rather than putting a child through the traumatic experience of testifying about his or her parents in court, a more child-friendly alternative that incorporates the best interests of the child from their point of view should become the primary means of resolving divorce disputes. This alternative method is known as child-inclusive divorce mediation.

A. Roadmap

This paper will explore the use of child-inclusive divorce mediation as a means of reducing the negative impacts of divorce litigation and parental mediation on children, as these decisions are often left to the discretion of the parents and the judge.⁹ Rather than there being no weight attached to children's beliefs and preferences, this paper will focus on examining, critiquing, and creating a child-inclusive process where the child's voice truly matters.¹⁰ This paper will begin by discussing children's virtually non-existent role in the divorce process and then dive more specifically into adverse effects of divorce on children, standard divorce mediation practices in New York, and the "best interest of the child" standard. After evaluating these factors, the paper will

⁶ The Child Witness in the Courtroom, 139 PEDIATRICS 3 (2017), <https://publications.aap.org/pediatrics/article/139/3/e20164008/53469/The-Child-Witness-in-the-Courtroom?autologincheck=redirected>.

⁷ Id.

⁸ Supra note 1.

⁹ Mark Henaghan and Bill Atkin, Family Law Policy in New Zealand (19th ed. 2019).

¹⁰ Id.

state the problem with current divorce practices and explore the emergence of child-inclusive mediation, what the process entails, and who practices it. The discussion on child-inclusive mediation will lead into the role of child consultants in Australia, Australia's Child Responsive Program, and empirical support for child-inclusive mediation. Criticisms will follow, in addition to an examination of childhood developmental stages, such as child testimony age requirements and its child witness screening process. Taking all of these factors into account, this paper will end with an enlightening proposal and unique recommendation for when and how children should participate in the child-inclusive mediation process.

II. BACKGROUND

Forty-five percent of all first marriages in the United States end in divorce.¹¹ Thus, a significant number of children who grew up surrounded by the loving union of their two parents experience notable disruptions in their relationships with their parents during childhood due to divorce.¹² While the majority of such disputes are settled outside the courtroom, high divorce rates make custody battles one of the most frequent sources of litigation in the United States.¹³ However, given that ninety-five percent of parenting dispute cases settle without court action, the majority of children do not have an opportunity to be heard in matters that affect them.¹⁴

¹¹ Lamb et al., *The Effects of Divorce and Custody Arrangements on Children's Behavior, Development, and Adjustment*, University of Nebraska-Lincoln Faculty Publications, Department of Psychology (1997), <https://digitalcommons.unl.edu/cgi/viewcontent.cgi?article=1333&context=psychfacpub>.

¹² *Id.*

¹³ Robert Emery, *Renegotiating Family Relationships: Divorce, Child Custody, and Mediation* (2nd ed. 2018). (According to the national center for state courts, family law cases, including custody disputes, accounted for 42% of all civil cases filed in state courts in 2018).

¹⁴ *Supra* note 9. (Although custody arrangements typically govern the schedules of children until they turn eighteen, children's preferences are rarely taken into account when creating these

Overall findings indicate that adversarial litigation in family law cases has a reputation for its uncivil character, abuse of discovery practices, high costs, and pressure to compete rather than cooperate.¹⁵ The costs, stress, and time-consuming nature of divorce litigation lead to a deep discomfort inherent in the traditional adversarial model experienced by many lawyers and clients, especially children.¹⁶ Accordingly, the adversarial process does not serve the best interests of the child.¹⁷ This is due to the

separation agreements. This is usually the case due to the fact that legislation does not require judges to consider or attach weight to children's beliefs and preferences. In divorce litigation, judges use their own discretion to decide what weight they should attach to a child's views. Likewise, in typical mediation settings, the child is unable to express their views, leaving all decisions up to the discretion of the parents).

¹⁵ Julie Macfarlane, *Experiences of Collaborative Law: Preliminary Results from the Collaborative Lawyering Research Project*, 2004 J. DISP. RESOL. (2004).

¹⁶ Larry Gaughan, *In the Belly of the Beast: An Insider's Critique of the Adversarial System of Divorce* (2016), <https://apfmnet.org/belly-beast-insiders-critique-adversarial-system-divorce/>.

¹⁷ Graham Saayman & Vanessa Saayman, *The Adversarial Legal Process and Divorce: Negative Effects Upon the Psychological Adjustment of Children*, JOURNAL OF DIVORCE, 12(2-3), 329–348. (“Our legal system relies upon the notion that two or more professional adversaries representing the parties to the dispute will draw forth all relevant information to the contest in the process of putting forward their clients’ best positions, thereby allowing the decision-maker to determine the “truth” and to make the best decision. This process assumes that only the real interest of the parties is to “win.” The adversary system is not humane.” This is due to the fact that it is neither friendly to the parents nor the children, who are placed in the middle of this warfare. Rather than focusing on the child’s welfare, the adversarial system typically focuses on parents’ rights, “camouflage[ing] issues of concern to the child by directing the discussion at the rights of the parents. Commentators and practitioners in the custody dispute arena have expressed the sentiment that child custody matters are really not

fact that adversarial divorces turn parents brutally against each other to the point where they communicate via their lawyers.¹⁸ Forming a defensive posture and assuming the worst from their ex-spouse, the parents' hostile attitude often gets transferred to the children who learn unwanted and unnecessary details about their parents' separation.¹⁹ These discourteous statements, facial expressions, and behaviors can negatively affect the child's developing mind, resulting in alienation, unhappiness, and scorn.²⁰

Historically, children in divorce cases were not included in the decision-making processes of their parents; however, recent research demonstrates that not listening to children may cause more harm than good.²¹ Children have not been included in the divorce process due to the beliefs that they (1) were in need of protection, and (2) lacked the physical and mental capacity to play a significant role in family law matters.²² In addition, parents were often hesitant to speak about their separation plans with their kids, anxious not to hurt their children's feelings, and attempting to avoid angry reactions.²³ Nevertheless, children five-years-old and

about the best interests of the child, but instead are about the interests of the two parents").

¹⁸ Ray Levy, *A Common Pitfall of the Traditional Adversarial Divorce Can Inadvertently Push Your Children Away*, Collaborative Divorce Texas, <https://collaborativedivorcetexas.com/a-common-pitfall-of-the-traditional-adversarial-divorce-can-inadvertently-push-your-children-away/>.

¹⁹ *Id.*

²⁰ *Id.*

²¹ *Supra* note 15.

²² Rachel Birnbaum, *The Voice of the Child in Separation/Divorce Mediation and Other Alternative Dispute Resolution Processes: A Literature Review*, Department of Justice Canada (2009), <https://www.justice.gc.ca/eng/rp-pr/fl-lf/divorce/vcsdm-pvem/pdf/vcsdm-pvem.pdf>.

²³ Carolus van Nijnatten & Esli Jongen, *Professional Conversations with Children in Divorce-Related Child Welfare Inquiries*, 18 *Norwegian University of Science and Technology* 4 (2011), https://journals.sagepub.com/doi/full/10.1177/0907568211398157?casa_token=uVJWjDDRdl8AAAAA%3A1545CL8NZsZ0IjouQ75

older want to be informed about decisions with regard to their parents' separation and have a say in the outcome, and their participation typically provides clarity, makes them feel heard, and reduces negative feelings towards the separation.²⁴ As children often suffer due to custody disputes in divorces, there is now an appetite for a different way to practice law, perhaps returning family practice to its more traditional forms of counseling, support, and child-inclusion.²⁵

A. Adverse Effects of Divorce on Children

When assessing the adverse effects of divorce on children, experts consider the following factors: (1) psychological status of the two parents, (2) the extent of the conflict, and (3) the financial circumstances of the family.²⁶ Most children of divorce experience dramatic declines in their economic circumstances, abandonment by parents, diminished capacity of parents to attend meaningfully and constructively to their needs, and diminished contact with many familiar or potential sources of psychosocial support.²⁷ As a result, the experience of divorce is a psychosocial stressor and a significant life transition for most children with long-term repercussions.²⁸ Some children from divorced homes show long-term behavioral problems, depression, poor school performance,

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e6O_P4KreFXu04Mwg9lXV_yIVuVNhKjG6dnWafiKBv1YOH-
vvHJPcg.

²⁴ Bren Neale & Jennifer Flowerdew, *New Structures, New Agency: The Dynamics of Child-Parent Relationships After Divorce*, 15 *INT'L J. CHILDREN'S RIGHTS* 25 (2007). (Children five and up want to be informed about their parents' separation due to (1) a sense of control, as children may feel a lack of control when their parents separate; (2), a desire to be heard, (3) fear of the unknown, and (4), they want to make sure that they maintain a relationship with their parents after the separation).

²⁵ *Supra* note 9.

²⁶ *Id.*

²⁷ Paul Amato, *Life-Span Adjustment of Children to Their Parents' Divorce*, 4 *CHILDREN AND DIVORCE* 143 (1994),

<https://www.jstor.org/stable/1602482>.

²⁸ *Supra* note 9.

acting out, low self-esteem, and difficulties with intimate relationships.²⁹

While divorce itself often results in negative consequences on the children involved, these adverse effects are exacerbated by children having no input in current divorce processes. As legislation does not require judges to consider or attach weight to children's beliefs and preferences, judges use their own discretion to decide how important a child's views are.³⁰ The consequences of adversarial litigation on children are not too far off from those resulting from typical mediation settings as well, where the divorcing couple is focused on resolving their own dispute, once again leaving the child unable to express his or her feelings and preferences.³¹ Thus, all decisions in mediation are up to the discretion of the parents, leaving the child's voice unheard and resulting in negative consequences on their mental health.

B. Standard Divorce Mediation Practices in New York

In New York, there is no mandatory referral to mediation in divorce cases. Mediation is typically voluntary, and parents in a custody dispute may ask for their case to be sent to mediation.³² Since divorce mediation is confidential, the mediator may not reveal anything that you or your spouse said in mediation or any documents or other written material that you provided as part of the process. The mediator can be a marriage counselor, social worker, psychologist, or lawyer trained in family and divorce mediation.³³ The mediator is a neutral party whose job is to help the couple discover common ground and reach fair settlement to

²⁹ Id.

³⁰ Id.

³¹ Id.

³² New York Unified Court System, Custody/Visitation Mediation Program, NYCOURTS.GOV, <https://ww2.nycourts.gov/COURTS/nyc/family/mediation.shtml>.

³³ Training, NY State Council on Divorce Mediation, <https://www.nysmediate.org/training>; Everything About Divorce Mediation Process, Divorce Statistics, <https://www.divorcestatistics.info/everything-about-divorce-mediation-process.html>.

avoid the bitter consequences of a contested divorce.³⁴ The mediator provides the couple with a full explanation of the confidentiality rules before the mediation begins.³⁵ As stated in New York's confidentiality rules, "A mediator shall maintain the confidentiality of all information obtained by the mediator during a mediation, including information obtained from the parties, non-party participants or documents shown to the mediator, with the exception of any allegation of child abuse."³⁶ The New York mediation process generally follows the same basic stages as in other states, including orientation, gathering information about the case (finances, property, children), identifying what each spouse needs and wants, exploring settlement options, and negotiating a settlement.³⁷ If the spouses agree about one or more issues, the mediator will typically prepare a document that reflects those agreements. The mediator may also assist the parties in drafting the entire custody and settlement agreement, if both parties consent.

When children are involved in the divorce dispute, whether parents are fighting over custody or finances, parents typically will work with the mediator to discuss these issues and help the parties reach an arrangement that is suitable for everyone involved.³⁸ Under the family law guidelines in New York, however, the courts must be able to ascertain that the agreement is in the best interests of the child.³⁹ If a separation agreement provides for an arrangement of custody or parenting time that the courts don't believe is right for the child, then the agreement may not be

³⁴ Id.

³⁵ Standards of Conduct for New York State Community Dispute Resolution Center Mediators, New York State Unified Court System Division of Professional and Court Services, https://ww2.nycourts.gov/sites/default/files/document/files/2018-07/Standards_of_Conduct.pdf.

³⁶ Id.

³⁷ Id.

³⁸ Darren Shapiro, When Will Courts Uphold NY Divorce Mediation Child Custody Agreements? Law and Mediation Office of Darren M. Shapiro, P.C., <https://www.darrenshapiro.com/when-will-courts-uphold-ny-divorce-mediation-child-custody-agree.html>.

³⁹ Id.

enforced.⁴⁰ The agreement may also be invalid if it is substantially unconscionable or is the result of fraud or duress.⁴¹ If unenforceable, the parties may need to renegotiate the terms of the agreement or seek a court order to modify it.⁴² Depending on the circumstances, the parties may need to re-enter mediation to resolve the dispute in a mutually beneficial manner.⁴³ However, if the agreement is unenforceable due to a legal defect or violation of public policy, the court may declare the entire agreement as invalid and unenforceable. In this case, the parties would need to re-start mediation to create a new agreement.⁴⁴

While mediation is typically voluntary, presumptive mediation – an initiative which commenced in 2019 – is now beginning to emerge as a mandatory addition to New York child custody and divorce cases in specific areas, such as Nassau County.⁴⁵ Under the presumptive mediation initiative, many matrimonial cases in certain districts will be referred to mediation early in the legal process, unlike current practices where there is no mandatory referral to mediation.⁴⁶ The presumptive mediation program has prompted a number of significant changes in the way that divorce and child custody cases are addressed in Nassau County, Suffolk County, and other regions in New York.⁴⁷ When custody cases in these specific regions in New York are filed, whether it is for a modification of an existing custody arrangement or a new custody

⁴⁰ Id.

⁴¹ Marital Settlement Agreement, Cornell Law School Legal Information Institute, https://www.law.cornell.edu/wex/marital_settlement_agreement.

⁴² Id.

⁴³ Id.

⁴⁴ Id.

⁴⁵ Darren Shapiro, The Basics of Court Ordered Mediation in New York Family Court, Law and Mediation Office of Darren M. Shapiro, P.C., <https://www.darrenshapiro.com/the-basics-of-court-ordered-mediation-in-new-york-family-court.html>.

⁴⁶ E.A. Gjeltén, Guide to Divorce Mediation in New York, DivorceNet, <https://www.divorcenet.com/resources/divorce-mediation-in-new-york.html>.

⁴⁷ Id.

case, the first court appearance will be scheduled for mediation.⁴⁸ A neutral mediator will be assigned to the case, and the case will be scheduled. The parties will be entitled to have their lawyers in the mediation if they choose, and if the court has appointed an attorney to represent the child, they will be able to attend the mediation as well. If a case is eligible for presumptive mediation, the spouses may request an exemption.⁴⁹

C. Best Interest of the Child

Although children's voices themselves are not heard in standard custody proceedings, the main concern for the court in awarding custody decisions is the "best interest of the child."⁵⁰ By utilizing the "best interest of the child" standard, the court is required to balance the ability of each parent to meet the needs of the child or children.⁵¹ The court then determines child custody based on the "best interest of the child" test by evaluating a number of factors, such as stability, child care arrangements, primary caretaker, drugs and alcohol, mental health of the parents, physical health of the parent, spousal abuse, abandonment and interference with visitation rights, child's preference, finances of each parent, conditions in the home environment, educational opportunities, where the child's siblings live, and the court's observations of the parents.⁵² The court may also consider any other factor that might affect the child's best interests.⁵³

When figuring out what the best interest of the child is, it is important to look to section 402 of the Uniform Marriage and

⁴⁸ Darren Shapiro, Court Ordered Mediation for Child Custody in New York Family Court, Law and Mediation Office of Darren M. Shapiro, P.C., <https://www.longislandfamilylawandmediation.com/court-ordered-mediation-for-child-custody-in-new-york-family-court/>.

⁴⁹ Id.

⁵⁰ Best Interest of the Child, NYCOURTS.GOV, <https://nycourts.gov/courthelp/family/bestInterest.shtml>.

⁵¹ New York City Bar Legal Referral Service, Best Interests of the Child, <https://www.nycbar.org/get-legal-help/article/family-law/child-custody-and-parenting-plans/best-interests-of-the-child/>

⁵² Id.

⁵³ Id.

Divorce Act (UMDA). The UMDA is a 1970 model statute that defines marriage and divorce.⁵⁴ More specifically, UMDA §402D, the Best Interest of the Child Standard, lays out all relevant factors that the court should consider in making its custody decisions, including:⁵⁵

1. The wishes of the child's parents as to his custody;
2. The wishes of the child as to his custodian
3. The interaction and interrelationship of the child with his parents, his siblings, and any other person who may significantly affect the child's best interest;
4. The child's adjustment to his home, school, and community;
5. The mental and physical health of all individuals involved.

By utilizing these factors in making custody decisions, the court makes an informed decision based on what it believes is in the best interest of the child. However, can a court truly make a decision based on the "best interest of the child" without physically hearing these interests from the child herself?

D. The Problem

New York's current adversarial practices for resolving custody disputes result in an abundance of time, money, and adverse effects for the children of the divorcing parents. While mediation may be a better alternative and is becoming more widespread due to the presumptive mediation program, typical mediation practices do not include the child's perspective, often resulting in agreements that don't incorporate the child's preferences. Even though the child's "best interest" is supposed to be thoroughly considered during mediation, how can a child's "best interest" be taken to heart when the parents are inferring what this best interest is rather than asking the child first-hand?

There is a need for a new primary means of resolving custody disputes that eliminates the negative and boosts the positive – more specifically, a system of child-inclusive mediation which includes the child without acting as a psychological stressor. This way, the

⁵⁴ Uniform Marriage and Divorce Act Law and Legal Definition, US LEGAL, <https://definitions.uslegal.com/u/uniform-marriage-and-divorce-act/>.

⁵⁵ Uniform Marriage and Divorce Act §402 (1979).

“best interest of the child” will be considered from their point of view and eliminate adverse effects associated with the child having no input in his or her parents’ settlement agreement.

E. Child-Inclusive Mediation

1. The Emergence of Child-Inclusive Mediation

As a unique solution to the discontent with adversarial divorce litigation and current mediation practices, research reveals that child-inclusive divorce mediation is an effective alternative that helps minimize the negative impacts of divorce on children.⁵⁶ Child-inclusive divorce mediation originally evolved as a “strategic enactment of United Nations principles around enabling children to present their wishes in family law proceedings about them.”⁵⁷ Rather than a typical negotiation model focused on neutrality, the child-inclusive model actively seeks to facilitate the often-unspoken developmental agendas – the needs, desires, and goals of children that contribute to their growth and development – of the children affected by the dispute.⁵⁸

As a relatively new concept that emerged in the field of family mediation in the 1990s, child-inclusive mediation is based on the idea that children’s voices and needs should play an important role in the mediation and decision-making process.⁵⁹ Child-inclusive mediation (“CIM”) was first developed by one of the world’s leading child psychologists, family therapists, and developmental researchers, Dr. Jennifer McIntosh, who recognized the importance

⁵⁶ Brianna L. Nelson, *Divorce Mediation and its Impact on Children*, St. Catherine University (2013), https://sophia.stkate.edu/cgi/viewcontent.cgi?article=1242&context=msw_papers.

⁵⁷ Jennifer McIntosh, Yvoonne Wells, Bruce Smyth, & Caroline Long, *Child-Focused and Child-Inclusive Divorce Mediation: Comparative Outcomes from a Prospective Study of Postseparation Adjustment*, 46 *FAMILY COURT REVIEW* 105 (2007), <https://onlinelibrary.wiley.com/doi/10.1111/j.1744-1617.2007.00186.x>.

⁵⁸ *Id.*

⁵⁹ *Id.*

of including children in the mediation process.⁶⁰ She found that by giving children a voice and involving them in the decision-making process, parents increasingly understood their children's needs and concerns and were more likely to reach agreements in the best interests of the whole family.⁶¹ Since then, CIM has been adopted and developed by family mediators and researchers in other countries, including the United Kingdom, Canada, and the United States. It has become increasingly recognized as an important approach to family mediation and is now widely used by family mediators across the world.

2. The Child-Inclusive Mediation Process

Child-inclusive mediation is an ADR process in which parents undergo a formal negotiation under the guidance of a trained mediator, while their children meet with a child consultant who provides parents and the mediator with feedback on the child's experiences, thoughts, and feelings on the divorce and their specific needs.⁶² In child-inclusive mediation, the child does not attend mediation with the parents; rather, he or she meets with the child consultant or representative outside of the mediation setting in a supportive, developmentally appropriate manner.⁶³ This way, the child is given a direct opportunity to participate in the process without the trauma of speaking up in front of his or her parents.⁶⁴ The child instructs the mediator to share his or her custody

⁶⁰ Lindsay Bruckner, Child Inclusive Mediation, Visionary Mental Health Services, LLC, <https://visionarymentalhealth.com/child-inclusive-mediation/>.

⁶¹ *Id.*

⁶² Deborah Hope Wayne, Child Inclusive Mediation, Collaborative Law and Mediation Offices, <https://www.deborahwaynelaw.com/child-inclusive-mediation.html>.

⁶³ *Id.*

⁶⁴ Veerashnie Srikson, Mandatory Child-Inclusive Mediation – A Possibility in South Africa? University of Pretoria (2019), https://repository.up.ac.za/bitstream/handle/2263/73253/Srikson_Mandatory_2019.pdf?sequence=3&isAllowed=y.

preferences or any other belief in regard to their parents' separation.⁶⁵

The child-inclusive model embraces the essential need of divorcing parents to focus on and plan for the needs of the children post-separation.⁶⁶ It is a process that seeks to focus on the best interests of the children through an enhanced level of thinking and planning for the children.⁶⁷ Including children in mediation, a non-adversarial option, is a cost-effective, less traumatic alternative to divorce litigation could benefit them in the long run, severely limiting childhood trauma, mental health issues, and strained family relationships.⁶⁸ The professional that the child is speaking to will listen and understand the child's perspective and concerns, making sure the child knows that the interview is conducted confidentially and only information that the child gives permission to share is divulged to the parents.⁶⁹ The children in this process are "empowered with the knowledge that their views are being considered and engage whole heartedly to give a full account of the affects that his or her parents['] decision will have on their life."⁷⁰

After listening intently, the mediator brings the child's concerns to the attention of their parents, who have the ultimate decision-making power to consider whether to abide by or ignore their child's concerns.⁷¹ Once final decisions are made by the parents, the child is involved in an interview one last time to hear what the agreement entails.⁷² If the child disagrees, the mediator continues to listen to the child's views to seek clarity on their concerns and convey that message to the parents, who have the option to negotiate a more child-inclusive settlement.⁷³

3. Who Practices Child-Inclusive Mediation?

⁶⁵ Id.

⁶⁶ Supra note 64.

⁶⁷ Id.

⁶⁸ Id.

⁶⁹ Id.

⁷⁰ Id.

⁷¹ Id.

⁷² Id.

⁷³ Id.

Those who practice child-inclusive mediation are typically specialists in the field who identify persistent distress in children and parents, thinking deeply about their needs and best interests.⁷⁴ Special experience may be especially required in working with children who display depression and trauma, in addition to young children who utilize non-verbal communications⁷⁵ Therapeutic skills and well-founded developmental knowledge are crucial skills required for digging into the family's history, especially navigating the loss they experience due to the divorce.⁷⁶

4. Child Consultants in Australia

In Australia, their version of the child-inclusive mediation process begins with a psychological consultation carried out by tertiary qualified mental health professionals.⁷⁷ There are four stages that take place over multiple sessions: hearing the family presenting its problems, taking the family and developmental histories from the parents, assessing of the child, and receiving feedback with the parents.⁷⁸ The parents meet with a mediator while the child meets with a child consultant, who then relays their preferences back to the parents. Since the number of adequately qualified child and family mental health specialists in the family law field is lacking, Australia has shifted towards re-training generic family counselling and welfare professionals to adapt to the role of child consultant in dispute resolution processes.⁷⁹

Australia also advocates for child consultants to be equipped with a sufficient background in social sciences.⁸⁰ Significant training in developmental, attachment, trauma, and family systems theories and experience in the clinical application of these theories

⁷⁴ Jennifer McIntosh, *Child Inclusion as a Principle and as Evidence-Based Practice: Applications to Family Law Services and Related Sectors*, Australian Family Relation Clearinghouse Issues (2007), https://aifs.gov.au/sites/default/files/publication-documents/issues1_0.pdf.

⁷⁵ *Id.*

⁷⁶ *Id.*

⁷⁷ *Id.*

⁷⁸ *Id.*

⁷⁹ *Id.*

⁸⁰ *Id.*

is required.⁸¹ A postgraduate qualification in counselling, psychology or psychotherapy is recommended as a minimum benchmark for formal qualifications, as well as two years of experience working with children and families in a mental or community health setting.⁸² If qualified mediators intend to work as a child consultant, they must undergo additional training to adapt and apply their skills in a child-inclusive frame.⁸³ The same applies for lawyers, as legal training alone does not suffice for the role of child consultant.

5. Australia's Child Responsive Program

The Family Court of Australia introduced the Child Responsive Program ("CRP") to promote the participation of children in family law proceedings and mandate proper guidelines for doing so. More specifically, the CRP is an approach to policy and program development that prioritizes the needs of children and aims to ensure that they are considered in the design, implementation, and evaluation of decisions that affect their lives.⁸⁴ This program aims to ensure that children's voices are heard and attended to amidst their parents' separation, similar to child-inclusive mediation.

While there are no particular guidelines for deciding when children undergoing child-inclusive mediation in New York are competent to meaningfully participate in the process, Article 12 of Australia's Children's Convention dictates when children can be included:

State parties shall assure to the child who is capable of forming his or her own views the right to express those views freely in all matters affecting the child, the views of the child being given due weight in accordance with the age and maturity of the child. For this purpose, the child shall in particular be provided the opportunity to be heard in any judicial and administrative proceedings affecting the child, either directly or

⁸¹ Id.

⁸² Id.

⁸³ Id.

⁸⁴ Id.

through a representative or an appropriate body in a manner consistent with the procedural rules of national law.⁸⁵

Thus, as long as a child can form and express their own opinions, their voice can be heard and taken seriously.

In addition to there being no formal method of dictating when children should be included in the mediation process in New York, there is also no general set of rules and regulations in place for child-inclusive mediation practices. However, Australia's Child Responsive Program has outlined six key stages:⁸⁶

1. Information sessions that provide parents with general information about the mediation process.
2. Intake and assessment meeting conducted with each parent individually, delving into the history of the parent's relationship, conflict, mental health issues, safety problems, potential substance abuse issues, the child's needs, and future care options.
3. Children's interview. In this interview, which is conducted more like a "play-therapy-style" rather than an interview, explores the children's core needs and beliefs. The child consultant provides the parents with a summary of the children's feelings, concerns, and needs in relation to their dispute.
4. Preliminary report. The family consultant prepares this initial report based on the parents' assessment and children's interview. It details the parents' responses to the feedback from their child's session and is used as a summary for the final feedback meeting with parents and lawyers.
5. Feedback meeting. A formal feedback meeting is conducted with the parents, their attorneys, and a court registrar, relaying the core themes from the child's session

⁸⁵ Convention on the Rights of the Child, 1557 U.N.T.S. 3, 12 (Nov. 20, 1989).

⁸⁶ Jennifer McIntosh, *Child Inclusion as a Principle and as Evidence-Based Practice: Applications to Family Law Services and Related Sectors*, Australian Family Relation Clearinghouse Issues (2007), https://aifs.gov.au/sites/default/files/publication-documents/issues1_0.pdf.

and the issues around the dispute resolution from the preliminary report.

6. Less adversarial trial. If the Child Responsive Program is unable to resolve the matter, a less adversarial trial (LAT) approach may be used. This approach takes the family to trial, however, the trial is child-related and focuses on the needs and interests of the child. The family consultant will support the parents through the LAT process, participating in courtroom matters, displaying the preliminary report, and creating a family report if requested by the judge. After the LAT, the family consultant conducts any necessary follow-up procedures.⁸⁷

While this program is still new, findings are encouraging. The program shows an increased willingness of parents to cooperate. In fifty-five percent of matters explored in this study, the CRP process was able to settle the dispute without the matter proceeding to trial.⁸⁸ There has been a positive impact of the children's interview, as the majority of parents reported positive experiences for their children and themselves from the early involvement of the children in the process.⁸⁹ Forty-four percent of parents even said that the feedback from their children was the most influential aspect of their court process.⁹⁰

III. DISCUSSION

A. Empirical Support for Child-Inclusive Mediation

A study comparing outcomes over one year for two groups of separated parents who attended child-inclusive mediation found significant reductions in severity of conflict for both treatment groups.⁹¹ Most parents reported improved resolution of the initial discourse that led them to mediation, and children of varying ages

⁸⁷ Id.

⁸⁸ Id.

⁸⁹ Id.

⁹⁰ Id.

⁹¹ *Supra* note 68 (Australia).

perceived less frequent and intense conflict between their parents, with a significant lowering of their own distress.⁹²

The findings of this study point to significant mechanisms that created beneficial and lasting outcomes. To begin, “the immediacy and intimacy of material created by the child consultation process meant that parents were frequently ‘moved’ in a lasting way by the feedback they heard from and about their own children.”⁹³ The wakeup call to alter their behaviors around their children and attitudes about their previous partner that these parents encountered was direct, compelling, and positively impacted their actions towards their kids.⁹⁴ In addition, by increasing focus on their children’s emotional and age-specific needs in the child-inclusive treatment, parents’ agreements favored stability of living arrangements and improved attachment relationships.⁹⁵ The findings of the study suggest that child-inclusive intervention led parents to create “developmentally appropriate” agreements tailored to the core experiences of their children.⁹⁶

B. Criticisms of Child-Inclusive Mediation

Critics of child-inclusive mediation argue that although children have rights, these rights are relational since the parents are the ones who ultimately possess the legal rights of the minors.⁹⁷ Likewise, children may be manipulated by one of their parents to take their side in a custody battle, resulting in anxiety and conflicts of loyalties.⁹⁸ As a result of this “conflict of loyalties” and unresolved parental conflicts, the child often ends up suffering from emotional turmoil.⁹⁹ In addition to the conflict of loyalties, children may be overloaded with an unsuitable level of

⁹² Id.

⁹³ Id.

⁹⁴ Id.

⁹⁵ Id.

⁹⁶ Id.

⁹⁷ Carles Rodriguez-Dominguez & Martina Roustan, *The Inclusion of/Focus on Children in Family Mediation: A Review of Studies and Future Proposals*, Papeles del Psicologo (2015).

⁹⁸ Id.

⁹⁹ Id.

responsibility when entrusted with a sense of decision-making power.¹⁰⁰

Critics also argue that children in child-inclusive mediation may feel unable to express their feelings if they think about potential repercussions from their parents that may result as a result of sharing certain custody preferences, stating an opinion against one parent.¹⁰¹ As a result of these criticisms, some assert that “not all children necessarily want or need to be heard, so unless there is a request from the child or the parents to be interviewed, there is no reason to do so.”¹⁰²

Lastly, critics cite to barriers in implementing child-inclusive mediation programs. For instance, in Australia, “one of the challenges for [a] service embarking on child-inclusive work is to plan for staffing and support structures that enable the upgrading of the skills and expertise that this intervention requires. An important precursor to this is an honest and credible evaluation of existing skills, expertise, and culture within an organization.”¹⁰³ Critics also assert that challenges to implement a child-inclusive program of this nature include not having enough time and resources to see larger numbers of children, ensuring there is sufficient funding to develop expertise working with children directly, and ensuring that children’s voices are taken seriously.¹⁰⁴

C. Developmental Stages

In response to the critics, examining the developmental stages of children is a crucial aspect that one must consider in determining when to include a child in the mediation process. In order to make a reputable recommendation regarding a respectable age and stage of life that children should have their voices heard in their parents’ divorce mediation process, it is important to look at how divorce affects children of different ages and child testimony age requirements in various states.

¹⁰⁰ Id.

¹⁰¹ Id.

¹⁰² Id.

¹⁰³ *Supra* note 84.

¹⁰⁴ Jennifer Hannah, Child Protection in Family Relationship Centres: Innovations in Western Australia, 51 *FAMILY COURT REV.* 268 (2013).

1. How Divorce Affects Children of Different Ages

Before commencing the discussion on child testimony age requirements, it is important to closely examine how a child's age contributes to different levels of difficulty when adjusting to and understanding the divorce.¹⁰⁵ Detailed child and parent interviews conducted by Wallerstein and Kelly reveal these differences in relation to age.¹⁰⁶ Observations of children during the year after their parents' separation showed that preschool aged children "lack the cognitive sophistication to understanding the meaning of divorce...they react to the departure of one parent with a great deal of confusion...many become fearful."¹⁰⁷ Children of elementary school age have greater cognitive maturity and are better equipped to understanding the meaning of divorce.¹⁰⁸ However, this understanding may lead them to grieve for the loss of their traditional family structure, and they may end up feeling a great deal of anger towards one or both parents.¹⁰⁹ As adolescents are more peer oriented and less dependent on their families, they typically suffer less of an impact from the divorce; however, their parents' divorce may lead them to question their own ability to maintain serious relationships.¹¹⁰

While Wallerstein and Kelly's observations suggest that children at all ages are affected by divorce, the severity of their reactions differ.¹¹¹ Because divorce affects children of various ages in drastically different ways, it is important to examine the ages that children are psychologically able to be heard and understood in the justice system in order to make a recommendation regarding when to include them in a child-inclusive mediation process.

2. Child Testimony Age Requirements Generally

¹⁰⁵ Paul Amato, *The Future of Children*, 4 CHILDREN AND DIVORCE 143 (1994), <https://www.jstor.org/stable/1602482?seq=6>.

¹⁰⁶ Id.

¹⁰⁷ Id.

¹⁰⁸ Id.

¹⁰⁹ Id.

¹¹⁰ Id.

¹¹¹ Id.

Exploring child testimony age requirements can provide guidance on when children are developmentally able to express their own opinions and preferences in a meaningful way. While determining witness competency in state courts typically rests with the discretion of the judge, some states presume that children younger than a certain age are incompetent.¹¹² However, regardless of age, most judges conduct a voir dire examination, commonly known as a competency test, to assess the child's ability to distinguish between telling the truth or a lie and whether they understand their obligation to tell the truth.¹¹³ By focusing on basic memory and communication abilities, the voir dire examination ensures that the child is able to understand and respond to questions, ultimately translating to them serving as a reliable witness.¹¹⁴

Even if a child is unable to meet these requirements, several jurisdictions allow unsworn testimony when the child exhibits "sufficient intelligence and capacity for telling the truth."¹¹⁵ In New York State, however, there is no law regarding admissibility of testimony of a child witness.¹¹⁶ Instead, civil cases have adopted the standard created in criminal cases.¹¹⁷ The rule originates in NY CLS CPL section 60.20 which creates a presumption that witnesses under nine-years-old are incompetent to testify.¹¹⁸

3. Child Testimony Age Requirements in Custody Cases

¹¹² Sherry Rozell, *Are Children Competent Witnesses? A Psychological Perspective*, 63 *Washington University Law Quarterly* 816 (1985); Aviva A. Orenstein, *Children As Witnesses: A Symposium on Child Competence and the Accused's Right to Confront Child Witnesses*, 82 *IND. L.J.* 909 (2007).

¹¹³ *Id.*

¹¹⁴ Nicholas Bala, *Children Witnesses in the Criminal Courts: Recognizing Competence and Assessing Credibility*, *LAWNOW* (Jan. 5, 2018).

¹¹⁵ *Id.*

¹¹⁶ Andrea Alonso & Kevin Faley, *Capacity of Infants to Testify*, *NEW YORK LAW JOURNAL* (2017), https://mdafny.com/index.aspx?TypeContent=CUSTOMPAGEARTICLE&custom_pages_articlesID=20217.

¹¹⁷ *Id.*

¹¹⁸ *Id.*

When it comes to custody cases in particular, dozens of states allow children to testify in family court once they reach a certain age. In Maryland, for instance, if a child is old enough and mature enough to make rational choices, the court must consider the child's preferences.¹¹⁹ In California, while the law permits children fourteen and under to express their opinion, there is no specific age dictating when a judge will listen to a child's opinion.¹²⁰ California statutes also allow children younger than fourteen to testify about custody preferences, unless the court decides that this testimony will go against the child's best interest.¹²¹ In Arkansas, there is no specified age for when a child can dictate which parent he or she desires to live with.¹²² The court has the ultimate decision-making power until the child turns eighteen.¹²³ Thus, situational circumstances – such as the specific judge or state the proceeding is taking place – play a significant role in child testimony situations.

IV. PROPOSAL

Since children are directly affected by their parents' divorces and the terms of the separation agreements, the New York court system should issue reforms to typical mediation programs. These reforms should aim to include children in the decision-making process more often, specifically when they are developmentally able to understand the divorce process and make competent decisions on issues such as living arrangements. The family court system in New York needs detailed practices and procedures which make it imperative that the child's voice is heard and that lay out the qualifications and considerations for child consultants who guide the process.

¹¹⁹ Patricia Fersch, *When Can Children Testify in a Contested Child Custody Case?*, FORBES (2022), <https://www.forbes.com/sites/patriciafersch/2022/11/03/when-can-children-testify-in-a-contested-child-custody-case/?sh=13869b637e52>.

¹²⁰ *Id.*

¹²¹ *Id.*

¹²² *Id.*

¹²³ *Id.*

As mentioned earlier, children five-years-old and older display a desire to have a say in their parents' divorce settlement.¹²⁴ However, scholars believe that children should not be adjudicated until at least the age of twelve, so their development will not be negatively affected.¹²⁵ In addition, a New York Statute dictates that witnesses under nine-years-old are incompetent to testify.¹²⁶ Considering all of these factors – including the benefits of child-inclusive mediation stated throughout this paper – the best way to decide when a child should have the choice to share their voice amongst their parents' divorce should be to undergo a voir dire competency screening with a trained child consultant. This screening process should mirror child witness screening, where a child is given an elicit narrative of a harmless event and tested on their ability to perceive, remember, and communicate.¹²⁷ Showing that they can communicate answers truthfully and understand what is asked of them translates into children thoroughly communicating their living situation and other aspects of their home lives to a child consultant.

However, unlike certain courts who set age parameters on whether children are competent and can testify in court in addition to voir dire examinations, New York should follow Australia's approach in allowing a "child who is capable of forming his or her own views the right to express those views freely in all matters affecting the child, the views of the child being given due weight in accordance with the age and maturity of the child." By combining Australia's child-representation guidelines with voir

¹²⁴ Bren Neale & Jennifer Flowerdew, *New Structures, New Agency: The Dynamics of Child-Parent Relationships After Divorce*, 15 INT'L J. CHILDREN'S RIGHTS 25 (2007).

¹²⁵ Minimum Age of Prosecution of 12: What Does it Mean and Why Does it Matter?, National Commission on Correctional Health Care, <https://www.ncchc.org/minimum-age-of-prosecution-of-12-what-does-it-mean-and-why-does-it-matter/>.

¹²⁶ Andrea Alonso & Kevin Faley, *Capacity of Infants to Testify*, NEW YORK LAW JOURNAL (2017), https://mdafny.com/index.aspx?TypeContent=CUSTOMPAGEARTICLE&custom_pages_articlesID=20217.

¹²⁷ Thomas Lyon, *Assessing the Competency of Child Witnesses: Best Practice Informed By Psychology and Law*, University of Southern California (2011).

dire examinations and having children capable of forming their own views undergo a brief competency screening, regardless of their age, children's voices will more effectively, efficiently, and importantly be heard.

In addition, careful guidelines must navigate the training and selection of these child consultants, and the United States should mirror Australia's qualification standards for these specialists. Child consultants should have an adequate social science background, as well as experience working with children who have undergone depression and trauma, as well as younger non-verbal children.¹²⁸ They must have well-founded developmental knowledge and therapeutic skills in order recognize chronic presentations of distress in children and think critically about their fragile states.¹²⁹ They must have formal training in "developmental, attachment, trauma, and family systems theories and experience in the clinical application of these theories in requisite."¹³⁰ Lastly, they must have a college degree, a postgraduate qualification in counseling, psychology, or psychotherapy, and at least two years of experience working with children and their families in a mental health or community health setting.¹³¹ If there is a lack of trained individuals who fall into this category, the United States may continue to follow Australia's system by moving generic counselors and welfare professionals from their typical roles in family guidance and re-train them for the role of child consultant in a dispute resolution process.¹³²

V. CONCLUSION

Including competent children in the divorce mediation process is not a panacea to ending childhood trauma resulting from divorce; however, it may shine a glimpse of hope for children seeking to have their voices heard in the settlement amidst all of the turmoil. The benefits of child-inclusive mediation make it the ideal environment to incorporate the voice of the child. Rather than putting a child on the stand in an intimidating courtroom in front of

¹²⁸ *Supra* note 86.

¹²⁹ *Id.*

¹³⁰ *Id.*

¹³¹ *Id.*

¹³² *Id.*

both parents or a child having no voice at all, creating standard processes for when, how, and by who a child's voice can be heard in a gentle, comforting, setting can provide a practical solution to the problem of children having no say in their parents' divorce decisions and experiencing mental health issues and trauma. Child-inclusive mediation should become more prevalent, thoroughly researched, and hopefully even the forefront of custody dispute resolution in New York and beyond.

Brothers at Arms: Salva Kiir, Riek Machar & the Search for a Lasting Peace in South Sudan

By: Patrick Babajanian

INTRODUCTION

Sometimes, the most destructive conflicts we can experience as human beings occur with those we consider our closest friends, family, and confidants. For instance, in his article, *Building Circles of Trust*, Prof. Sukhsimranjit Singh recalls the story of Raj and Shiri, two friends who moved from India to the United States in the 1980s to pursue the “American Dream.”¹ Over the course of nearly a decade, Raj and Shiri managed to accumulate enough wealth to purchase homes and marry, and proceeded to do business with one another for the next fifteen years.² As their community grew, Raj and Shiri identified a need to establish a place of worship, in this case an Indian temple.³ Raj took the initiative to achieve this goal, leveraging his financial resources and connections to do so, and in turn sought to cement ownership of the temple in his own name.⁴ This created a direct conflict between himself and Shiri, who desired collective ownership of the temple by the community.⁵ Ultimately, the temple congregation divided into camps loyal to either Raj or Shiri on the issue of temple management, culminating in threatened litigation and two failed attempts at community-based mediation before Prof. Singh’s intervention finally helped the parties reach a long-term, mutually satisfactory agreement.⁶

The story of Raj and Shiri closely mirrors another political rivalry between two men who at one time would have considered themselves, if not friends, then at least allies in pursuit of a

¹ See generally Sukhsimranjit Singh, *Building Circles of Trust*, in *STORIES MEDIATORS TELL: WORLD EDITION 229* (Lela P. Love & Glen Parker eds., 2017). Further references to this source appear on a 1–9-page scale reflecting a PDF version of the article used in a cross-cultural conflict resolution course the author took in 2022.

² *Id.* at 1.

³ *Id.*

⁴ *Id.* at 1–2.

⁵ *Id.* at 2.

⁶ *Id.* at 2–3, 8.

common endeavor: Salva Kiir and Riek Machar, President and Vice President, respectively, of the Republic of South Sudan (“South Sudan”), who assumed leadership of the country following the attainment of independence from the Republic of Sudan (“Sudan”) on July 9, 2011.⁷ Independence brought with it high hopes for the young country’s future, even as the new government inherited several major problems it would have to overcome.⁸ Unfortunately, the initial jubilation was not long to last: in December 2013, the political rivalry between Kiir and Machar escalated into full-fledged civil war as forces loyal to the ethnic Dinka president clashed with those of the ethnic Nuer vice president, resulting in the deaths of tens of thousands of people and the displacement of millions more.⁹ Despite the signing of a peace

⁷ South Sudan’s Decade of Independence: A Timeline, AL JAZEERA (July 9, 2021), <https://www.aljazeera.com/news/2021/7/9/south-sudans-bloody-first-10-years>.

⁸ See Peter Martell, *After Independence, What Next for South Sudan?*, AFR. RENEWAL (Aug. 2011), <https://www.un.org/africarenewal/magazine/august-2011/after-independence-what-next-south-sudan> (acknowledging post-independence optimism among South Sudanese while also recognizing continuing problems such as poverty, underdeveloped infrastructure, “lowest routine immunization coverage in the world,” high child and maternal mortality rates, ethnic rivalries, lack of satisfactory jobs, and ongoing tension and violence with Sudan); see also *A CONCISE HISTORY OF SOUTH SUDAN: NEW AND REVISED EDITION* 344–47 (Anders Breidlid, Avelino Androga Said, Astrid Kristine Breidlid, Anne Farren & Yosa Wawa eds., 2d ed. 2014) (reviewing challenges the South Sudanese government faced at independence, including conflicts with Sudan over territory and oil-revenue distribution, difficulties transitioning from the SPLM’s military-style governance to grassroots democracy, inability to pay civil servants’ salaries, high food prices, official corruption, underutilization of the country’s arable land for agriculture, low primary/secondary school enrollment, and high infant mortality rate) (internal citations omitted).

⁹ See *The World Factbook: South Sudan*, CENT. INTEL. AGENCY, <https://www.cia.gov/the-world-factbook/countries/south-sudan/> (last updated Nov. 14, 2022).

agreement in August 2015, fighting resumed in July 2016 and continued until the signing of a “revitalized” peace agreement in September 2018, according to which “[t]he government and most armed opposition groups agreed that they would form a unified national army, create a transitional government by May 2019, and prepare for elections in December 2022.”¹⁰ Elections were subsequently pushed back to “late 2023,” and “the transitional government was formed in February 2020, when M[achar] returned to Juba as first vice president.”¹¹ As of now, “implementation of the peace agreement has stalled as the parties wrangle over power-sharing arrangements, contributing to an uptick in communal violence and the country’s worst food security crisis since independence, with 7 of 11 million South Sudanese citizens in need of humanitarian assistance.”¹²

Because South Sudan has already experienced two rounds of civil war since gaining independence, and because the underlying tensions that led to that violence continue to pervade the young country’s politics, one could imagine a third round of fighting breaking out between Kiir and Machar’s competing factions absent a true and lasting reconciliation between the two leaders. With that in mind, this article proposes and evaluates several key elements of a potential future mediation between Kiir and Machar based on the model Prof. Singh applied to resolve the conflict between Raj and Shiri. Part I analyzes the personal backgrounds of Kiir and Machar to identify relevant interests, motives, and desires a mediator should be cognizant of to most effectively engage each party during mediation. Next, Part II explores the critical role language can play in intercultural mediations in general and in a Kiir–Machar mediation in particular, including the need to ensure any interpretive services used are competent for the task at hand. Finally, Part III touches on the double-edged sword of geography, which can serve as both the cause of intercultural conflict and a vehicle for resolving it (if leveraged properly). Though not an exhaustive blueprint in and of themselves, the elements discussed in this article are critical components a mediator should consider in designing and implementing a potential future mediation between Kiir and

¹⁰ Id.

¹¹ Id.

¹² Id.

Machar. Hopefully, doing so will maximize the probability that the next mediation will be the last one required to achieve a true and lasting peace in South Sudan.

I. KIIR AND MACHAR: PROTAGONISTS, ANTAGONISTS, OR SOMETHING IN BETWEEN?

Near the beginning of Prof. Singh's mediation of the Raj–Shiri conflict, it “became very important for [him] to understand the dynamics at play and whose temple it was.”¹³ In the Kiir–Machar conflict, the equivalent of the “temple” would be the country of South Sudan. Prof. Singh went on to explain he “had to become a student of this culture,” requiring him to “get[] to know the personalities of the individual congregants, including Raj and Shiri.”¹⁴ To that end, the following subsections begin the discussion of a potential future mediation between Kiir and Machar by reviewing their respective personal backgrounds, not only as representatives of certain ethnic and political groups, but as human beings on an individual level. As discussed below, exploring the respective life journeys of these two men at the forefront of the conflict in South Sudan yields fascinating insight into their interests, motives, and desires, and informs best practices for designing a potential future mediation between them.

A. KIIR

Kiir, of the Dinka tribe—South Sudan's largest ethnic group at 35% of the population—served as an officer and second-in-command of the Sudan People's Liberation Movement/Army (SPLM/A), the “main rebel movement and army in South Sudan.”¹⁵ Kiir was “popular within the military wings of the movement” and “held a strong vision of an independent South Sudan,” though this latter trait “was in stark contrast to the late John Garang de Mabior, the charismatic SPLM leader who

¹³ Singh, *supra* note 1, at 3.

¹⁴ *Id.*

¹⁵ Carlo Koos, Kiir and Machar: Insights into South Sudan's Strongmen, *THE CONVERSATION* (May 10, 2022, 9:55 AM EDT), <https://theconversation.com/kiir-and-machar-insights-into-south-sudans-strongmen-182522>.

envisioned a united Sudan where South Sudanese had equal political and economic rights along North Sudanese.”¹⁶ After Garang perished in a helicopter crash in 2005, Kiir succeeded him as leader of the SPLM and Vice President of Sudan, and ultimately became President of South Sudan.¹⁷ Observers note Kiir’s general reputation for “calm, mild[-]tempered, and rather emotionless public appearances,” but also his “thirst for formal authority and power[,] which he has expanded with stamina within the SPLM and South Sudanese state institutions over the past decades.”¹⁸

It is interesting to note here a peculiar character trait Kiir shares with Raj from Prof. Singh’s mediation, turning on each man’s use of clothing to signify status: Prof. Singh notes that, in contrast to Shiri, who “looked like any other congregant,” Raj “was always dressed [in] a suit and tie” and “liked being different”;¹⁹ Kiir, in a similar vein, is “[a]lways seen in public with his trademark cowboy hat.”²⁰ That hat was “possibly a gift from [U.S. President George W. Bush], who presented the South Sudanese liberation leader with a large cowboy hat in a 2006 visit to the White House.”²¹ Kiir’s persistence in wearing the hat in

¹⁶ Id.; see also Profile: President Salva Kiir, AL JAZEERA (Dec. 29, 2013), <https://www.aljazeera.com/news/2013/12/29/profile-president-salva-kiir> (“An independent South Sudan was Kiir’s long[-]cherished dream—far more so than Garang, who favo[r]red greater rights for southerners in a united Sudan.”).

¹⁷ Koos, *supra* note 15.

¹⁸ Id.

¹⁹ Singh, *supra* note 1, at 3.

²⁰ Salva Kiir: South Sudan’s President in a Cowboy Hat, BBC NEWS (June 21, 2018), <https://www.bbc.com/news/world-africa-12107760>.

²¹ Colum Lynch, Where Did Kiir Get His Ten-Gallon Hat?, FOREIGN POL’Y (Sept. 26, 2011, 10:27 PM), <https://foreignpolicy.com/2011/09/26/where-did-kiir-get-his-ten-gallon-hat/>; see also Noah Pitcher, Salva Kiir Mayardit: The Cowboy Hat-Wearing President and Military Leader of South Sudan, TODAY NEWS AFR. (Apr. 3, 2022), <https://todaynewsafrika.com/salva-kiir-mayardit-the-cowboy-hat-wearing-president-and-military-leader-of-south-sudan/> (“Salva Kiir is widely recognized by a large cowboy hat on his head. He first received a [S]tetson hat as a gift from U.S. President George W.

public “may reflect his gratitude for Bush’s commitment to South Sudan’s independence and his administration’s role in brokering the landmark 2005 Comprehensive Peace Agreement, which set the stage for the country’s independence referendum in January [2011].”²² On the other hand, because Kiir “lacked the charisma of his predecessor [Garang]” as leader of the SPLM, it is also possible the hat is “part of his attempt to give himself a clear image.”²³ Just as Raj initially displayed reluctance to participate in Prof. Singh’s mediation process because he “[did not] wish to risk losing his well-established control over the temple . . .,”²⁴ Kiir may hesitate to fully participate in a potential future mediation with Machar if he feels the process may result in his removal from power. With that in mind, a precursor to mediation would be to assure Kiir his position as President of South Sudan is secure for as long as constitutionally appropriate.²⁵ Doing so would alleviate a

Bush when he visited the White House in 2006. The piece of attire has since grown to become his signature look.”); Reid J. Epstein, Sudan Leader’s Hat Tip to Bush, POLITICO, <https://www.politico.com/story/2011/07/sudan-leaders-hat-tip-to-bush-058697> (last updated July 11, 2011, 2:13 PM EDT) (“Bush gave Kiir the black Stetson in 2006, according to the blog of the Middle East Institute. The hat instantly became Kiir’s trademark, and the institute said he has not been photographed without it since.”). See Dunn, *infra* note 23, for a citation to the Middle East Institute blog post referenced in the Epstein source listed in this footnote.

²² Lynch, *supra* note 21.

²³ Michael Collins Dunn, Salva Kiir’s Black Stetson, MIDDLE EAST INST.: ED.’S BLOG (Jan. 20, 2011, 12:26 PM), <http://mideasti.blogspot.com/2011/01/salva-kiirs-black-stetson.html>.

²⁴ Singh, *supra* note 1, at 4.

²⁵ See Fred Oluoch, South Sudan Talks Endorse a Two-Term Presidency, THE EAST AFRICAN (Nov. 14, 2020), <https://www.theeastafrican.co.ke/tea/news/east-africa/south-sudan-talks-endorse-a-two-term-presidency-3021080> (discussing 2011 interim South Sudanese constitution’s lack of presidential term limits; 2020 National Dialogue conference’s unanimous decision to adopt limit of two five-year terms; and Kiir’s eligibility to run

considerable amount of tension that has characterized the political rivalry between Kiir and Machar, opening more mental and emotional bandwidth to discuss issues of substance relevant to the future governance of the country.

Additionally, a mediator may find success in engaging Kiir on a spiritual level. The President has been described as “[a] committed Christian, . . . regularly speak[ing] at the Roman Catholic cathedral in Juba, the capital [of South Sudan].”²⁶ Moreover, the South Sudanese government once posted on its website that “[m]any political analysts and opinion leaders worldwide describe [Kiir] as the Biblical Joshua who took the mantle of leadership from Moses just as the Israelites were on the verge of entering Canaan and capably established the then[-]fugitives in the Promised Land.”²⁷ Given Kiir’s strong connection to his religious faith, he may be particularly open to mediation with Machar if the discussion is framed in terms that resonate with this aspect of his identity. As Prof. Singh writes, referencing the former nun Karen Armstrong, “[e]ach faith . . . has its own version of the Golden Rule: ‘Always treat others as you would wish to be treated yourself.’”²⁸ Although “[t]here is no calculated quid pro quo in the admonition” and “[i]n the Bible, the Golden Rule is meant to be heeded in human intercourse for spiritual, rather than

for office because conference’s decision marks “new beginning,” in words of delegate Chol Diel).

²⁶ Salva Kiir: South Sudan’s President in a Cowboy Hat, *supra* note 20.

²⁷ *Id.*; see also CHRISTOPHER TOUNSEL, CHOSEN PEOPLES: CHRISTIANITY AND POLITICAL IMAGINATION IN SOUTH SUDAN 119 (2021) (noting how “[i]nterestingly—and perhaps not coincidentally—Kiir chose Israel as one of the sites for his first presidential visits” and “in addition to sharing that South Sudan and Israel ‘shared values’ and conquered ‘similar struggles,’ . . . made sure to note his enthusiasm to—representing all South Sudanese—‘set foot in the Promised Land.’”) (internal citations omitted).

²⁸ Sukhsimranjit Singh, Best Practices for Mediating Religious Conflicts, AM. BAR ASS’N, https://www.americanbar.org/groups/dispute_resolution/publications/dispute_resolution_magazine/2018/fall2018/best-practices-for-mediating-religious-conflicts/ (last accessed Nov. 26, 2022).

monetary, wealth,” a “link between spiritual and material advantage makes doing the generous deed prudent on multiple levels.”²⁹ Appealing to this fundamental guideline could serve to initiate discussions between Kiir and Machar on a positive note, emphasizing the parties’ mutual interest in being treated fairly. This would also allow the parties to discuss non-spiritual matters after the proverbial ice has been broken with an introduction grounded in spirituality. In fact, religion-based mediation between Kiir and Machar—who also identifies as a Christian—is not unprecedented, having been conducted in 2019 in Vatican City under the auspices of His Holiness Pope Francis.³⁰ Similarly to how the factions in the Raj–Shiri conflict came together to share a meal that ultimately led to a mediated solution,³¹ the parties in the Vatican mediation “live[d] there and [ate] together during the retreat.”³² While the effect of the Vatican mediation on moving the South Sudanese conflict forward is unclear, it was at least successful in bringing Kiir and Machar to the same location and affording them an opportunity to discuss their issues face to face, a result that a potential future mediation could recreate by employing similar mechanisms.

B. MACHAR

Machar, of the Nuer tribe—South Sudan’s second largest ethnic group at 16% of the population—served as a “regional commander under Garang’s leadership in the SPLM during the 1980s.”³³ Similarly to Kiir, Machar preferred South Sudan to be

²⁹ Lela P. Love & Sukhsimranjit Singh, *Following the Golden Rule and Finding Gold: Generosity and Success in Negotiation*, Faculty Research Paper No. 378, at 7 (Jan. 2013).

³⁰ See Philip Pullella, *Vatican Tries “Retreat Diplomacy” as South Sudan Peace Deal Falts*, REUTERS: WORLD NEWS, <https://www.reuters.com/article/us-pope-southsudan/vatican-tries-retreat-diplomacy-as-south-sudan-peace-deal-falters-idUSKCN1RM1XU> (last updated Apr. 10, 2019, 7:37 AM).

³¹ See Singh, *supra* note 1, at 7–8.

³² See Pullella, *supra* note 30.

³³ Koos, *supra* note 15.

wholly independent rather than an autonomous region of Sudan.³⁴ This basic commonality of opinion concerning the identity of the country could serve as the lynchpin of a potential future mediation by appealing to both leaders' shared interest and the experiences that characterized their pursuit thereof. Moreover, it is worth noting how Machar "complained about Garang's authoritarian leadership"³⁵ because after Kiir terminated Machar from the position of Vice President in July 2013, Machar would go on to accuse the President of "dictatorial" behavior in turn,³⁶ reflecting the same kind of grievance Machar felt toward Garang's leadership. Ultimately, although Machar did become Vice President of South Sudan following Garang's death,³⁷ he revealed his presidential ambitions when "[a]t the time of his sacking[,] Machar said he would challenge Kiir for the leadership of the ruling party so that he could run for president in the 2015 election."³⁸

³⁴ Id.; see also Profile: South Sudan Rebel Leader Riek Machar, AL JAZEERA (Jan. 5, 2014), <https://www.aljazeera.com/news/2014/1/5/profile-south-sudan-rebel-leader-riek-machar> [hereinafter Profile: Riek Machar] ("In contrast [to Garang], Machar was always calling for self-determination for the south. After falling out with Garang in 1991, he split from the SPLM/A and formed his own splinter group, SPLA-Nasir.").

³⁵ Koos, *supra* note 15.

³⁶ See South Sudan's Decade of Independence, *supra* note 7; see also A CONCISE HISTORY OF SOUTH SUDAN, *supra* note 8, at 348 ("In July 2013[,] President Salva Kiir . . . dismissed his Vice[]President Riek Machar and all the ministers. This incident did not appease the dissident members of the party who claimed that there was an increasing concentration of powers in the hands of the President. Riek Machar said that the dismissals were a step towards dictatorship and that he would challenge Salva Kiir for the Presidency.").

³⁷ Koos, *supra* note 15.

³⁸ Profile: Riek Machar, *supra* note 34; see also A CONCISE HISTORY OF SOUTH SUDAN, *supra* note 8, at 348 (Machar saying his dismissal, among others, were a "step towards dictatorship" and that he would "challenge Salva Kiir for the Presidency").

Hailing from a minority ethnic group and being terminated from his position as Kiir's deputy, Machar likely felt threatened, a sense of inferiority to Kiir and the President's majority ethnic group, and a consequent need to save face by asserting his political strength in a way that ultimately spiraled into countrywide violence.³⁹ An application of Hofstede's dimension score of "Power Distance Index," which "refers to the extent to which less powerful members of a culture expect and accept that power is distributed unequally in a culture" and "is defined from the viewpoint of the less powerful members of a culture,"⁴⁰ supports this hypothesis. Barkai notes that "[s]tatus is an important issue in a high[-]Power Distance culture."⁴¹ Accordingly, South Sudan may be characterized as a high-Power Distance culture, given the central role that leadership of the country has played in the political rivalry between Kiir and Machar. The Power Distance score assigned to East Africa—the closest categorization to South Sudan available—supports this hypothesis.⁴² This being the case, a potential future mediation between Kiir and Machar should be conducted in a way that ensures each leader perceives he is respected in his position of authority, and particular attention should be paid to Machar in this regard given his secondary position in the executive leadership and membership within a minority ethnic group.

The risk of Machar feeling alienated in the mediation process could spell disaster for peace efforts in South Sudan. In 1991, dissatisfied with Garang's leadership of the SPLM, Machar created a splinter group called the SPLM-Nasir faction, which

³⁹ See CLÉMENCE PINAUD, *WAR AND GENOCIDE IN SOUTH SUDAN* 145 (2021) ("Not standing up for the Nuer being massacred in Juba and other locations [in December 2013] would cause him to lose face and would mean his political death. It was not so much that he had something to gain from a rebellion; it was more that he thought he had nothing to lose and that he had little choice.").

⁴⁰ John Barkai, *What's a Cross-Cultural Mediator to Do? A Low-Context Solution for a High-Context Problem*, 10 *CARDOZO J. CONFLICT RESOL.* 43, 63 (2008) (internal citations omitted).

⁴¹ *Id.*

⁴² *Id.* at 64, 78 (East Africa having a Power Distance Index score of 64, greater than both the World Average of 43 and World Mean of 39).

went on to massacre “thousands of civilians belonging to the ethnic Dinka, Kiir’s tribe,” in the town of Bor.⁴³ The massacre resulted in “reprisal attacks.”⁴⁴ Notably, “the legacy of this ethnic violence remains largely unresolved and unaddressed” and “continues to be a source of latent distrust and suspicion that [is] exploited by political rhetoric and manipulation.”⁴⁵ In 2012, Machar publicly apologized for the role he played in the Bor massacre,⁴⁶ emphasizing the effective role apology can play in achieving national reconciliation for future generations.⁴⁷ Deborah L. Levi writes that “[b]y apologizing, the offender acknowledges her diminutive moral stature and asks for restorative forgiveness,” and that “[s]he also acknowledges the existence and importance (to both parties) of the moral register itself.”⁴⁸ Moreover, “[w]hen the apologizee gestures to acknowledge that meaning, he closes the circle of performance, thus establishing a new moral equilibrium.”⁴⁹ Of course, “[l]ike other important rituals, an apology is worthless unless the required gestures are filled with meaning.”⁵⁰ Here, assuming Machar genuinely meant the apology he offered for his role in the Bor massacre, that action could serve as the beginning of reconciliation efforts by offering Kiir the moral high ground to accept or decline on his terms as a representative of the Dinka community.

Even as Kiir and Machar differ on certain points, they do share much in common.⁵¹ For example, “both [have] always seen South Sudan’s future as that of an independent nation,” with the

⁴³ Koos, *supra* note 15.

⁴⁴ *Id.*

⁴⁵ *Id.*

⁴⁶ Profile: Riek Machar, *supra* note 34.

⁴⁷ South Sudan VP Confirms Apology for Bor Massacre, SUDAN TRIB. (Apr. 3, 2012), <https://sudantribune.com/article41540/> (“‘Giving an apology is the best way of bringing in peace. We don’t want to pass these painful things to our children. We want them to be living in a peaceful and democratic state in South Sudan,’ said Machar.”).

⁴⁸ Deborah L. Levi, *The Role of Apology in Mediation*, 72 N.Y.U. L. REV. 1165, 1178 (1997) (internal citations omitted).

⁴⁹ *Id.* (internal citations omitted).

⁵⁰ *Id.* at 1177–78 (internal citations omitted).

⁵¹ See Koos, *supra* note 15.

main challenge being “agreeing on how to organi[z]e, distribute[,] and cooperate within a nation that consists of dozens of ethnic groups and sub-tribes, different livelihoods, and cultural links across neighbo[.]ring countries.”⁵² Kiir and Machar clearly “see themselves and their ethnic communities as the main heirs of the nation,” and view themselves as “each hold[ing] a legitimate claim to leadership,” with these claims “nurtured through the relative population share of both groups and their role in the war with Sudan, largely due to their settlement areas along the South Sudan–Sudan border.”⁵³ As such, a potential future mediation should note these points of commonality from the outset and emphasize the integral role Kiir, Machar, and their respective communities can play in jointly leading their country into its second decade of independence and beyond.

II. JUBA ARABIC AS THE PROPOSED LINGUA FRANCA OF A KIIIR–MACHAR MEDIATION

Carter and Watts write that all components of a mediation, whether ethical or procedural, rely on “clear communication between parties and mediators.”⁵⁴ Moreover, they acknowledge that “language plays a central role in mediation and when participants speak different languages, it becomes more difficult to uphold a quality process.”⁵⁵ Consequently, “[w]hen language presents a barrier in mediation, the mediator’s role becomes even more important toward ensuring an ethical and effective process.”⁵⁶ In his mediation of the Raj–Shiri conflict, Prof. Singh “found [himself] simultaneously switching between English, Punjabi, and Hindi,” using English to “gain the trust of the young professionals in the room and to gain control of a session,” Punjabi to engage the “older generation that hailed from Punjab,” and Hindi to engage “the rest.”⁵⁷ Ultimately, he spoke “*their* preferred

⁵² Id.

⁵³ Id.

⁵⁴ Alexandra Carter & Shawn Watts, *The Role of Language Interpretation in Providing a Quality Mediation Process*, 9(2) CONTEMP. ASIA ARB. J. 301, 303 (2016).

⁵⁵ Id. at 303–04.

⁵⁶ Id. at 304.

⁵⁷ Singh, *supra* note 1, at 6.

language to connect with different age groups and with differing expectations.”⁵⁸ Language would certainly play a substantial role in a Kiir–Machar mediation as well, both as a potential obstacle to overcome and a bridge that can bring each faction together on a level playing field.

Approximately sixty languages are spoken in South Sudan, by “dozens of ethnic groups in a population of around 13 million.”⁵⁹ Notably, the majority of South Sudan’s population also speaks “Juba Arabic,” a “dialect far removed from standardized Arabic and named for the South Sudanese capital.”⁶⁰ However, because the Arabic language evokes a negative association with oppressive policies imposed by the northern government in Khartoum on what is now South Sudan, the latter “embedded in its new constitution a declaration that English, not Arabic, would henceforth be the country’s official language, while ‘all indigenous languages of South Sudan are national languages and shall be respected, developed[,] and promoted.’”⁶¹ The subsequent replacement of Arabic as a language of instruction in the South Sudanese education system had a markedly negative impact on students’ learning abilities.⁶² Moreover, language in general became a vehicle for fueling intercultural tension in South Sudan during the period of civil war.⁶³ Given the pitfalls Carter and

⁵⁸ *Id.* (emphasis in original).

⁵⁹ Laura Kasinof, For South Sudan, It’s Not So Easy to Declare Independence from Arabic, FOREIGN POL’Y (Nov. 14, 2018, 8:49 AM), <https://foreignpolicy.com/2018/11/14/for-south-sudan-declaring-independence-from-arabic-is-not-so-easy-language-politics-juba-khartoum-english/>.

⁶⁰ *Id.*

⁶¹ *Id.*

⁶² *Id.* (“University of Juba professors have found that students who had gone to Arabic-speaking schools that switched to English following independence, particularly those just entering high school at the time, are now struggling to keep up at university because they essentially lost their high school education due to poor English comprehension and instruction.”).

⁶³ *Id.* (“Periods of political tension tend to cement an us-versus-them mentality, and South Sudan is no exception. In such fraught times, language and the way one speaks it becomes a loaded act, signifying a specific identity. In recent years, the emphasis on Nuer

Watts forewarn about when parties to a mediation do not share the same language,⁶⁴ a potential future mediation between Kiir and Machar should be conducted in a common language decided on before the mediation occurs, and that language should be Juba Arabic.

Beyond being “the language spoken by more South Sudanese than any other,” Juba Arabic is “a tongue that had grown up alongside the country, the witness and stenographer to its difficult history,” with “much the same origin as the country—a messy, plucky thing pulled up from the wreckage of conquest and colonialism.”⁶⁵ As such, independent of one’s tribal affiliation, it serves as a potential common ground on which mediative communication can grow. Kiir is “[m]ore comfortable speaking Juba Arabic than English,”⁶⁶ and indeed upon returning from peace talks in Khartoum in August 2018, he “addressed the crowd who had gathered to meet him at the Juba Airport not in English, but in Juba Arabic.”⁶⁷ On the other hand, Machar “was awarded a PhD in philosophy and Strategic Planning from the British University of Bradford in 1984,”⁶⁸ suggesting he may have more comfort with English as a medium of communication than Kiir—who lacks a similar education—does. Carter and Watts note that “[l]anguage affects not only the parties’ ability to understand one another, but their power to advocate for themselves and make decisions, which

language has coincided with the prevalence of Dinka on Juba’s streets as the civil war has ground on. Both groups are retreating into linguistic cocoons, with little to unite them under the umbrella of common national identity.”).

⁶⁴ See Carter & Watts, *supra* note 54, at 309–10 (highlighting importance of mutual comprehension among mediation participants to ensure maintenance of parties’ self-determination, mediator’s impartiality, and confidentiality).

⁶⁵ Ryan Lenora Brown, *Voice of a Nation: How Juba Arabic Helps Bridge a Factious South Sudan*, *CHRISTIAN SCI. MONITOR* (Nov. 6, 2018),

<https://www.csmonitor.com/World/Africa/2018/1106/Voice-of-a-nation-How-Juba-Arabic-helps-bridge-a-factious-South-Sudan>.

⁶⁶ See Salva Kiir: South Sudan’s President in a Cowboy Hat, *supra* note 20.

⁶⁷ Brown, *supra* note 65.

⁶⁸ See Profile: Riek Machar, *supra* note 34.

takes on added importance when the mediation involves one or more parties from a traditionally underrepresented or disadvantaged group.”⁶⁹ Interestingly, though Kiir hails from South Sudan’s majority ethnic group, *he* would find himself at a disadvantage—linguistic, in this case—vis-à-vis Machar if English were selected as the language of a potential future mediation. Because of (1) this power imbalance; (2) the desire to avoid any potential miscommunications that might result from using different languages in mediation, even with the aid of translators—who are not infallible⁷⁰; and (3) the unifying power of Juba Arabic as a medium of communication for South Sudan as a country,⁷¹ a potential future mediation between Kiir and Machar should be conducted in Juba Arabic.

Moreover, that mediation could serve as a symbolic moment that prompts the country overall to adopt Juba Arabic as an official lingua franca, bolstering national identity in addition to one’s more specific tribal identity. Attempts to establish *linguae francae* as national languages in other countries have proven successful on several notable occasions.⁷² However, not all efforts

⁶⁹ Carter & Watts, *supra* note 54, at 310.

⁷⁰ See *id.* at 311 (“It is often assumed in the judicial system that any bilingual person can serve as an interpreter; however, an interpreter has to perform several cognitive tasks simultaneously in order to accurately interpret the words of a party. It is imperative that the interpreter is qualified in these skills, as well as knowledgeable about the process of mediation, to accurately convey the thoughts and feelings of a party.”) (internal citations omitted).

⁷¹ See Brown, *supra* note 65 (“‘It’s the language that connects us whether we are Dinka, Nuer, Bari, whatever,’ [Joseph Abuk, one of South Sudan’s leading actors and playwrights,] says.”)

⁷² See, e.g., Kasinof, *supra* note 59 (reviewing various examples, including: (1) Indonesia, which successfully adopted Bahasa Indonesia, a lingua franca used among traders in coastal Southeast Asia; (2) Tanzania, whose first post-independence president, Julius Nyerere, “pushed his countrymen to learn and speak [the pre-European-colonialism regional trade language] Swahili while downplaying tribal affiliations, a move that is credited with unifying the nation and helping pacify the sorts of tribal tensions that continue to exist in neighboring East African nations”; and (3)

to do so have gone as smoothly as governing authorities may have desired.⁷³ Of particular interest, Juba Arabic's roots as a trade language⁷⁴ may tip the scales in favor of successful adoption as an official lingua franca the way other trade languages have been successfully adopted in the past.⁷⁵ Indonesia, for example, implemented its lingua franca via an "aggressive education campaign by the government and advantageous timing, because the initial adoption of the language was during a period when post-colonial nationalism was running high."⁷⁶ Tanzania similarly "invested in linguistic education" and "[t]oday, Tanzanians' mastery of the so-called purest form of Swahili . . . is endowed with a sense of national pride."⁷⁷ Accordingly, an initiative to implement Juba Arabic as an official lingua franca in South Sudan should be accompanied with a well-equipped education campaign to ensure all citizens have equal access to the language, and the government can leverage the initiative as a means to reinforce

Turkey, whose first president, Mustafa Kemal Atatürk, "shifted modern Turkish from Arabic to Latin script in its written form and purged the language of many words that were of Persian or Arabic origin and replaced them with Turkish equivalents.").

⁷³ See, e.g., *id.* (noting: (1) opposition the Indian government faced from Dravidian-language-speaking groups after Hindi was adopted as the country's official language; (2) forcing of Native Americans to "enroll in English-language schools in the United States"; (3) post-revolutionary France "[seeking] to stamp out minority languages like Breton and Occitan through standardized schooling in French"; and (4) Chinese authorities "slowly erod[ing] minority languages within their borders such as Tibetan and Uighur—and . . . [trying] to do so with Cantonese—by promoting Mandarin through education and the media, ostensibly for the sake of national unity, though also as part of an effort to curtail the political power of ethnic groups that are viewed as a threat to the state.").

⁷⁴ See Brown, *supra* note 65 ("To South Sudanese, Juba Arabic was a language for deciding the price of vegetables and haggling for a taxi.").

⁷⁵ See Kasinof, *supra* note 59 (noting Indonesia's and Tanzania's successes in adopting trade language as lingua franca).

⁷⁶ *Id.*

⁷⁷ *Id.*

South Sudan's identity as an independent country. Overall, if South Sudan were to successfully adopt Juba Arabic as a lingua franca—ideally on a voluntary basis, not via coercion—it would find itself not as an outlier, but as a member of a community of international peers with similar experiences.

If, however, the parties disagree on using Juba Arabic as a lingua franca, and that disagreement would be a non-starter to mediation, the service of interpreters should be incorporated with certain precautions, namely: ensuring the interpreters (1) are “qualified in [the cognitive tasks that must be simultaneously performed to accurately interpret a party's words], as well as knowledgeable about the process of mediation, to accurately convey the thoughts and feelings of a party”⁷⁸; (2) have an “appropriate level of distance from the conflict” to mediate without bias;⁷⁹ (3) have “familiarity with the dialect and formal and informal versions of the party's language”⁸⁰; and (4) “commit to investing the additional time for the sake of a quality process.”⁸¹ Whether the parties to the mediation choose to communicate in one or multiple languages, the mediator should regularly monitor the process to ensure all parties' intentions are being clearly understood.⁸² Of course, the mediator should ensure adequate funding is provided for interpretive services,⁸³ perhaps from government financial resources given the parties to the mediation would be government actors and the national interest in achieving a lasting peace. The aforementioned safeguards in the provision of mediative interpretive services should minimize avoidable barriers to interparty communication that might otherwise derail the conversation's focus on substantive matters.

⁷⁸ Carter & Watts, *supra* note 54, at 311 (internal citations omitted).

⁷⁹ *Id.* at 311–12.

⁸⁰ *Id.* at 312 (internal citations omitted).

⁸¹ *Id.*

⁸² *Id.* at 312–13 (including tactics such as having interpreters on standby to deploy as needed, using knowledge of second language to check interpreters' competency, checking in regularly with parties regarding quality of interpretation, and rephrasing questions to elicit information from parties) (internal citations omitted).

⁸³ See *id.* at 313.

III. RAMCIEL: A NEW CAPITAL FOR A NEW SOUTH SUDAN

In the final stage of the Raj–Shiri mediation, Prof. Singh initially planned to convene the parties in his office; however, the morning of the meeting, he learned the parties wanted to meet at the temple instead.⁸⁴ Flexibly, he obliged the parties’ wish, “observed as everyone prayed,” and witnessed the priest “provide[] the participants his blessings for a successful mediation.”⁸⁵ The temple, at the center of Raj and Shiri’s dispute, provided a fixed place in space that both parties had obviously imbued with significant value, a value that arguably helped encourage them to attempt mediation as a worthwhile endeavor. A Kiir–Machar mediation should similarly account for the important role physical space—in this case, geography—can play in exacerbating or resolving an intercultural conflict, and tailor the proceedings accordingly to maximize symbolic value for the long-term benefit of all parties.⁸⁶

Geographically, South Sudan comprises three “greater” provinces, namely “the Upper Nile in the northeast, Bahr el Ghazal to the northwest, and Equatoria in the south.”⁸⁷ Juba “sits firmly in the center of Equatoria.”⁸⁸ This has resulted in calls to move the capital to a more central location to alleviate regional tensions, a

⁸⁴ See Singh, *supra* note 1, at 7.

⁸⁵ *Id.*

⁸⁶ See Phyllis E. Bernard, *Finding Common Ground in the Soil of Culture*, in *RETHINKING NEGOTIATION TEACHING: INNOVATIONS FOR CONTEXT AND CULTURE* 34 (Christopher Honeyman & James Coben eds., 2009) (“[N]egotiators may wish to reconsider the symbolic message of their venue. Does the location favor the interests of one side or another? Does the chosen building site evoke a sense of responsibility without undue pressure? Do easy chairs arranged in club[-]room style suggest the gravitas of chairs around a table?”) (emphasis in original).

⁸⁷ Robert O’Connor, *The World’s Youngest Country Wants to Build a New Capital in a Former Rhino Sanctuary*, *VICE: WORLD NEWS* (July 9, 2021, 9:07 AM), <https://www.vice.com/en/article/3aq539/south-sudan-the-worlds-youngest-country-wants-to-build-a-new-capital-in-a-former-rhino-sanctuary>.

⁸⁸ *Id.*

goal that John Garang himself promoted before South Sudan formally gained independence.⁸⁹ The new capital is to be named Ramciel, a site has reportedly been chosen in a more central location in the country for the city, and work has started in order to turn it into an operative center of government.⁹⁰

A country's decision to move its capital city is not unprecedented, having occurred on at least eight occasions across four continents.⁹¹ Capitals may be constructed in central positions in their respective countries because they "need to be seen as representative and accessible."⁹² This was the case with Abuja, Nigeria's capital since 1991, which was built as "a brand[-]new, geographically central city to signify the unity of a nation divided along religious and geographic lines."⁹³ It is also partly why Indonesia recently decided to move its capital from Jakarta, on the island of Java, to a new location on the more centrally located

⁸⁹ See *id.* (Koang Pal Chang, director of news at Eye Radio, which broadcasts out of Juba, saying: "The intention has been to finally unite the South Sudanese. Communities have been fighting along tribal lines for centuries. John Garang, our revolutionary leader, reali[z]ed the only way to start to fix it was to bring the capital city into the middle of the three regions. That way nobody could claim the ownership. It would belong to all people.").

⁹⁰ See *id.* ("The site picked out for the new capital sits in this central location, at the crossroads of South Sudan's three provinces. It has been provisionally named Ramciel, and as of 2017 the project had reportedly secured funding to begin work from the government of Morocco, following Juba's successful courtship of the head of state, King Mohamed, during a visit earlier that year. A further deal is in place with engineers from South Korea to begin infrastructural planning. That task in itself promises to be gargantuan; despite its sensible location, Ramciel currently has no roads or provisions for electricity.").

⁹¹ See *Eight Countries That Moved Their Capitals*, BBC NEWS (Mar. 14, 2015), <https://www.bbc.com/news/world-31877909> (Nigeria, Myanmar, Russia, Pakistan, Brazil, Kazakhstan, Tanzania, and Ivory Coast (Côte d'Ivoire)).

⁹² *Capital Cities: How Are They Chosen and What Do They Represent?*, BBC NEWS (Dec. 6, 2017), <https://www.bbc.com/news/world-42258989>.

⁹³ *Id.*

island of Borneo.⁹⁴ Capitals may also be the product of compromise, as was the case with the United States' capital at Washington, DC.⁹⁵ Finally, capitals may be established to symbolize the beginning of a new era in a country's history following a period of turmoil, as South Africa considered doing following the end of apartheid in the 1990s.⁹⁶

Ramciel, as a new capital for South Sudan, would play a similar role as the aforementioned examples in helping to bridge the divides among the various sectors of the country's society. The new capital would be equally accessible to the three major regions via its location in the geographic center of the country; it would symbolize the country's unity by serving as a tangible central reference point that the rest of the country emanates from; and its

⁹⁴ See Kate Lyons, *Why Is Indonesia Moving Its Capital City? Everything You Need to Know*, *The Guardian* (Aug. 27, 2019, 00.39 EDT),

<https://www.theguardian.com/world/2019/aug/27/why-is-indonesia-moving-its-capital-city-everything-you-need-to-know> (“The location is very strategic—it’s in the cent[er] of Indonesia and close to urban areas,” [Indonesian President Joko Widodo] said in a televised speech. “The burden Jakarta is holding right now is too heavy as the cent[er] of governance, business, finance, trade[,] and services.”).

⁹⁵ *Capital Cities*, supra note 92 (“Unlike the deeply divided Washington of today, the founding of the [U.S.] capital in Washington[,] DC[,] in 1790 was grounded in political compromise. Alexander Hamilton and the northern states wanted the federal government to take on states’ debts and struck a deal with Thomas Jefferson and James Madison, who wanted the capital in the South. George Washington chose the exact spot on the Potomac River and the rest is history.”).

⁹⁶ *Id.* (“The branches of [South Africa’s] government are split between Cape Town (legislative), Pretoria (administrative)[,] and Bloemfontein (judiciary), though the Constitutional Court is in Johannesburg. This dates back to the creation of the Union of South Africa in 1910 after four British colonies were unified and agreement could not be reached on where the capital would be located. In 1994, after apartheid ended, there was a movement for a new capital to be created à la Canberra or Brasilia—to allow a fresh start, but this never happened.”).

establishment would mark the beginning of a new era in South Sudan's history, having occurred during the era of independence. Though currently inoperative as a full-fledged center of government, the site of Ramciel would nevertheless serve as a prime location to host a potential future mediation between Kiir and Machar, convening these representatives of South Sudan's two largest ethnic groups in the same symbolic location to agree on the best path forward for their country together.

CONCLUSION

Ultimately, Prof. Singh was able to successfully guide Raj and Shiri to an agreement regarding the conflict over temple management, whereby Raj agreed to ultimately step down as president and appoint a successor from Shiri's party.⁹⁷ Arguably, this result would not have been achieved if Prof. Singh had not dedicated the time, energy, and resources necessary to meaningfully understand the parties to the mediation and tailor the process accordingly to reach them on a human level.

Similarly, a potential future mediation between Salva Kiir and Riek Machar on the future of South Sudan should approach these individuals the same way Prof. Singh approached Raj and Shiri. In particular, crucial elements for a successful mediation would include evaluating Kiir and Machar's personal backgrounds to understand their respective interests, motives, and desires. Additionally, a mediator should recommend the use of Juba Arabic as the lingua franca of mediation, reflecting the language's common use in South Sudan; if the parties cannot agree to do this, then the mediator should at least ensure interpretive services are provided competently and with adequate safeguards to ensure the substance of communications is not literally lost in translation. Finally, the mediator should consider hosting the mediation on the site of Ramciel, the proposed new capital for South Sudan, in order to maximize the symbolic value of the mediation as a new beginning in the young country's history.

Hopefully, with all these elements in place, the next mediation between Kiir and Machar will be the last one needed to secure a final, comprehensive, and lasting peace for South Sudan,

⁹⁷ See Singh, *supra* note 1, at 8.

and the parties will be able to move together into a future that is brighter than the past they leave behind.

**Destination ADR:
Charting a New Course for Airline Passenger Disputes**

By: Cheng-chi (Kirin) Chang

Abstract

Airline passenger rights in the United States lag behind protections in the European Union (EU), leaving consumers vulnerable. Since the 1978 Airline Deregulation Act, limited federal oversight and reliance on airline contracts have weakened recourse for passengers facing issues like disruptions, mishandled baggage, and unfair practices. The complex regulatory landscape and high costs of litigation pose barriers to dispute resolution, exemplified by failed attempts at a Passenger Bill of Rights. In contrast, the EU has expanded protections through legislation and dedicated alternative dispute resolution (ADR) systems. This article analyzes the EU framework, using Spain as a case study, where recent regulations strengthened ADR by granting binding authority to resolutions. The analysis extends to include pertinent observations from the German legal landscape. Insights from the EU model highlight the potential for specialized aviation ADR bodies and mandatory airline participation to level the playing field for passengers. However, imposing similar reforms in the US may conflict with the hands-off approach rooted in deregulation policies. More modest yet impactful changes emphasizing incentives over mandates could promote voluntary airline adoption of binding arbitration procedures approved by the Department of Transportation. Targeted legislative adjustments maintaining deregulation principles while expanding accessible dispute resolution would align with the EU emphasis on passenger rights. Though substantial gaps remain, enhancing ADR access can gradually improve protections consistent with the US regulatory philosophy. This incremental approach represents an attainable progression toward more equitable aviation dispute resolution.

INTRODUCTION

Since the 1978 Airline Deregulation Act, the airline industry has undergone massive changes which eliminated federal control over routes, fares, and market entry. While deregulation succeeded in promoting competition and reducing airfares, it also triggered a decline in airline service quality and passenger protections. Today's passengers face increasingly inhospitable conditions, including cramped seating, burdensome fees, and uncertain recourse for delays, cancellations, and other service disruptions. Against this backdrop, the contrast between European Union (EU) and United States policies on airline passenger rights has become more pronounced. The EU actively fortifies passenger protections through comprehensive legislation and specialized alternative dispute resolution (ADR) systems. The United States, conversely, provides only limited safeguards, leaving passengers in a vulnerable position with few cost-effective remedies.

This article compares the EU and US approaches to airline passenger rights, focusing on dispute resolution mechanisms. Part II examines the challenges passengers face under the current US framework, which centers on airline contracts and lacks robust oversight. Part III provides background on ADR and details the EU's framework, using Spain as a case study. Part IV identifies key characteristics of the EU model, including mandatory airline participation in ADR and the establishment of aviation-focused ADR bodies. It also explores controversies related to the scope of ADR in compelling airline compliance. Finally, Part V draws lessons from the EU experience and proposes reforms to strengthen US passenger rights through increased access to binding ADR procedures.

While the US adheres to a hands-off approach rooted in the free market policies of deregulation, targeted legislative changes providing incentives and safeguards for ADR could incrementally empower consumers. The EU offers a roadmap of how non-litigation dispute resolution can effectively supplement traditional enforcement mechanisms. By facilitating access to expert mediation and arbitration forums, the US can adapt key aspects of the EU model to its unique regulatory landscape. Though political hurdles exist, enhancing alternative resolution procedures remains a viable path forward for buttressing passenger protections.

I. CHALLENGES IN U.S. AVIATION PASSENGER DISPUTE
RESOLUTION MECHANISMS

A. Overview of Aviation Passenger Disputes

1. Parties Involved in Aviation Passenger Disputes

Aviation passenger disputes, spanning ticket purchase, airport wait times, and in-flight transportation, involve legal conflicts between passengers and various entities, primarily airlines and airport authorities.¹ These disputes may stem from personal or property damage resulting from an operator's tortious actions or contractual disagreements related to passenger transportation and baggage agreements.²

Key participants in these disputes encompass carriers, airport management entities, airline sales agents, and operators of airline sales platforms. Carriers, defined as enterprises utilizing civil aircraft for passenger and baggage transport, frequently find themselves at the center of complaints.³ Grievances may include lost luggage, flight delays, cancellations, subpar service, or passenger refusal to board.⁴ The onus falls on airlines to address and resolve passenger claims, safeguarding their legal rights. Compensation, free accommodations, rebooking, refunds, or other remedies may be offered.⁵

¹ Matthew Schoonover, *Oversold, Delayed, Rescheduled: Airline Passenger Rights and Protections*, 35 WASHINGTON UNIVERSITY JOURNAL OF LAW & POLICY 519, 521 (2011).

² Tory Weigand, "No Waif in the Wilderness": Contractual Doctrine and the "Self" Versus "State" Imposed Obligation, 86 JOURNAL OF AIR LAW AND COMMERCE 67, 97 (2021).

³ 14 C.F.R. § 1.1; William Mann, *All the (Air) Rage: Legal Implications Surrounding Airline and Government Bans on Unruly Passengers in the Sky*, 65 JOURNAL OF AIR LAW AND COMMERCE 857, 886 (2000).

⁴ Audrey Johnson, *Consumers and Congress Lobby for Airline Customer Service Improvements: Voluntary Action or Legislation?*, 13 LOYOLA CONSUMER LAW REVIEW 402, 415 (2001).

⁵ Greg Iacurci, *Canceled, Delayed Flights Are Likely over July 4 Holiday Weekend. What to Know about Your Rights*, CNBC (2023), <https://www.cnbc.com/2023/06/30/delayed-and-canceled->

Airport management authorities serve as intermediaries, maintaining order and providing essential services.⁶ Disputes with airports may arise from inadequate services, boarding procedures, security matters, or passenger complaints.⁷ Moreover, airports bear the responsibility of ensuring passenger safety and responding to emergencies.⁸

In aviation passenger disputes, airline sales agents and online platform operators play crucial roles.⁹ Passengers often book and modify flights through these intermediaries, avoiding direct airline contact.¹⁰ Consequently, they typically address initial complaints about overbooking, delays, or cancellations to the booking platform.¹¹ This pattern underscores the complexity of such disputes and the variety of involved entities.¹²

2. Types and Characteristics of Aviation Passenger Disputes

The following five types of disputes are the most common: 1) disruptions to air travel experience; 2) mishandled baggage; 3) refunds and fares; 4) disability accommodations; and 5) consumer

flights-what-to-know-about-your-rights.html (last visited Oct 25, 2023).

⁶ Nigel Halpern & Deodat Mwesumo, Airport Service Quality and Passenger Satisfaction: The Impact of Service Failure on the Likelihood of Promoting an Airport Online, 41 RESEARCH IN TRANSPORTATION BUSINESS & MANAGEMENT 100667 (2021).

⁷ Id.

⁸ Jeffrey C. Price & Jeffrey S. Forrest, Airport Emergency Planning, Part II, PRACTICAL AIRPORT OPERATIONS, SAFETY, AND EMERGENCY MANAGEMENT 427 (2016).

⁹ US Department of Transportation, Buying a Ticket, <https://www.transportation.gov/individuals/aviation-consumer-protection/buying-ticket>.

¹⁰ Christopher Elliott, Advice | The Great Booking Debate: Is Direct Better than a Third-Party Site?, WASHINGTON POST, Jan. 11, 2023, <https://www.washingtonpost.com/travel/tips/booking-direct-travel-websites-flights-hotels/>; US Department of Transportation, *supra* note 10.

¹¹ Elliott, *supra* note 11.

¹² Id.

protection violations.¹³ Aviation passenger disputes encompass various categories, each triggering distinct legal rights and responsibilities as defined by airline consumer protection regulations. Analyzing consumer complaint data unveils prevalent areas of conflict between passengers and air carriers.

Disruptions to the air travel experience, constituting the primary source of disputes, contributed to 52.5% of December 2022 complaints and 31.7% overall in 2022.¹⁴ Passengers face missed connections, additional expenses, and inconvenience, often stemming from inconsistent airline policies.¹⁵ Mishandled baggage, accounting for 13.8% of December 2022 complaints and 15.5% overall in 2022, leads to disputes when airlines fail to compensate for lost, damaged, or delayed luggage, despite baggage liability rules.¹⁶

Refund and fare-related disputes, involving unjust denials and improper fare practices, encompass contract law and specific regulations on refunds and price transparency.¹⁷ Passengers rightly expect adherence to advertised fares and service contracts. Despite forming a smaller percentage, disability accommodation disputes saw a 50% increase in 2022.¹⁸ These conflicts arise when airlines inadequately accommodate individuals with disabilities, violating anti-discrimination regulations. Consumer protection violations involve breaches of airline consumer protection regulations, such as overbooking/bumping and truth in advertising. Passengers seek accountability when transparent information and fair dealings are not met.

¹³ U.S. Department of Transportation, *Air Travel Consumer Report: December 2022, Full Year 2022 Airline Complaint Data*, (2023), <https://www.transportation.gov/briefing-room/air-travel-consumer-report-december-2022-full-year-2022-airline-complaint-data>.

¹⁴ *Id.*

¹⁵ *Id.*

¹⁶ *Id.*

¹⁷ Rachel Y. Tang, *Airline Passenger Rights: The Federal Role in Aviation Consumer Protection* (2016), <https://trid.trb.org/view/1417471>.

¹⁸ U.S. Department of Transportation, *supra* note 14.

- B. U.S. Aviation Passenger Rights: Legal Framework and Oversight
 1. Multiple Levels of Airline Passenger Protection

The legal framework and oversight of U.S. aviation passenger rights involve multiple levels of protection, stemming from federal laws, regulations, and airline policies.¹⁹ Congress, authorized under the Commerce Clause, governs these rights, limiting state and local involvement in air carrier pricing and services.²⁰ Congress shapes airline passenger rights, authorizing federal agencies to enforce them.²¹ Oversight falls under the House Committee on Transportation and Infrastructure and the Senate Committee on Commerce, Science, and Transportation.²² Congressional scrutiny extends to issues such as tarmac delays, flight schedules, and airline mergers, exemplified by the 2013 American Airlines and US Airways merger.²³

The U.S. Department of Transportation (DOT) plays a crucial role in enforcing airline passenger rights, operating under 49 U.S.C. Section 41712.²⁴ The DOT issues regulations, with the Office of the Secretary administering this authority independently of the Federal Aviation Administration (FAA).²⁵ The Office of the Assistant General Counsel for Aviation Enforcement and Proceedings (OAEP) monitors airline compliance, investigating violations and imposing fines based on various factors. Large carriers may face penalties up to \$27,500 per violation, while small entities face a maximum \$1,100 penalty, with exceptions for discrimination and deceptive practices.²⁶ The DOT's enforcement includes investigations initiated from various sources, such as complaint letters to airlines, potentially resulting in warning letters or enforcement hearings.²⁷

¹⁹ Tang, *supra* note 18 at 1–4.

²⁰ *Id.* at 1–2.

²¹ *Id.*

²² *Id.*

²³ *Id.*

²⁴ *Id.* at 2.

²⁵ *Id.* at 2–4.

²⁶ *Id.*

²⁷ *Id.*

Airline passenger rights are outlined in airline contracts of carriage (CCs), the legal agreements between airlines and passengers.²⁸ CCs are no longer federally regulated due to the 1978 Airline Deregulation Act.²⁹ However, CCs conflicting with federal laws or regulations are unenforceable.³⁰ Deregulation introduced price competition, replacing service competition. Airlines charge separate fees for previously included services, leading to complaints.³¹ Airlines no longer maintain excess capacity, complicating responses to flight delays and cancellations, a common source of passenger complaints.³²

The airline-passenger relationship is governed by a mix of federal regulations and state law.³³ The DOT has the power to regulate airline contracts and prevent unfair practices. State law also plays a role, especially in common contract claims against airlines.³⁴ There's an ongoing legal debate about the extent of federal and state authority in airline contracts.³⁵ The Supreme Court has set some limits, allowing states to enforce contract terms but not impose extra obligations.³⁶ The DOT can investigate complaints but can't compensate passengers for contract breaches.³⁷ Passengers must rely on state law for lawsuits, which can be costly compared to minor financial losses due to airline breaches, like not providing cash refunds or overbooking.³⁸

²⁸ *Id.* at 4.

²⁹ *Id.*

³⁰ *Id.*

³¹ *Id.*

³² *Id.*

³³ Timothy Ravich, *Re-Regulation and Airline Passengers' Rights*, 67 *JOURNAL OF AIR LAW AND COMMERCE* 935 (2002).

³⁴ Weigand, *supra* note 3.

³⁵ *Id.*; Charles Rhyne, *Federal, State and Local Jurisdiction Over Civil Aviation*, 11 *LAW AND CONTEMPORARY PROBLEMS* 459 (1946).

³⁶ Grant Glazebrook, *Friendly Skies, Unfriendly Terms: Class Action Waivers and Force Majeure Clauses in Airline Contracts of Carriage*, 43 *NORTHWESTERN JOURNAL OF INTERNATIONAL LAW & BUSINESS* 185 (2023).

³⁷ US Department of Transportation, *Air Travel Complaints*, <https://www.transportation.gov/airconsumer/complaint-process>.

³⁸ Grant Glazebrook, *supra* note 37 at 190.

2. Passenger Bill of Rights

The Passenger Bill of Rights (PBOR) refers to proposed legislation aimed at enhancing and protecting the rights of airline passengers.³⁹ These rights include measures such as ensuring reasonable seat sizes, addressing extra charges for parents sitting with children, providing refunds and alternative transportation for delays, and safeguarding passengers from unfair practices in the airline industry.⁴⁰

Despite repeated attempts since 1989 to establish a PBOR, no bill has made it to a congressional vote. The lack of progress on PBOR legislation in Congress can be attributed to various factors. One significant factor is the successful lobbying efforts of the airline industry. Since 1998, airlines have collectively spent \$1.7 billion on lobbying, ranking as the fourteenth-highest spending industry.⁴¹ In 1999, when opposing the PBOR legislation, airlines invested over \$3 million in lobbying, arguing that it would lead to re-regulation of commercial air transportation.⁴² These efforts have played a role in impeding the advancement of PBOR bills.

Other factors, however, suggest that Congress may prioritize the interests of airline passengers. Professor Timothy Ravitch, an aviation litigation expert, speculates that members of Congress, frequent flyers themselves, have a personal stake in enhanced passenger protections.⁴³ Representatives who have experienced poor airline service firsthand can empathize with passengers' stories and concerns, implying that lobbying alone cannot fully explain the lack of progress on PBOR bills.⁴⁴ Timing and the complexities of the legislative process have also posed challenges. For instance, the 2001 PBOR bill coincided with the

³⁹ Schoonover, *supra* note 2 at 534.

⁴⁰ US Department of Transportation, *Fly Rights*, <https://www.transportation.gov/airconsumer/fly-rights>; Vanessa Romo, *An Airline Passengers' Bill of Rights Seeks to Make Flying Feel More Humane*, NPR, Feb. 7, 2023, <https://www.npr.org/2023/02/07/1154974524/an-airline-passengers-bill-of-rights-seeks-to-make-flying-feel-more-humane>.

⁴¹ Grant Glazebrook, *supra* note 37 at 207.

⁴² *Id.*

⁴³ Ravich, *supra* note 34 at 940, 953.

⁴⁴ *Id.*

September 11 attacks, shifting Congress's focus to foreign policy and national security.⁴⁵ Bills introduced between 2007 and 2010 overlapped with the Great Recession, further diverting attention and resources. The most recent PBOR bill, introduced by Senators Markey and Blumenthal, faces the arduous legislative process, with only a small percentage of bills becoming law.⁴⁶

Although standalone PBOR bills have struggled, the DOT has incorporated some PBOR concepts into its passenger protection regulations. Recent versions of PBOR included measures like prohibiting class action waivers and enabling private actions to enforce DOT regulations and statutory rights.⁴⁷ Thus, while standalone PBOR bills face hurdles, the DOT has taken steps to enhance passenger rights through regulatory means.

C. Issues with the United States Aviation Passenger Dispute Resolution Mechanism

In the U.S., airline passengers face substantial challenges in protecting their rights due to high legal costs and inadequate dispute resolution methods.⁴⁸ The main issue is not just the lack of robust safeguards for ADR but also ineffective enforcement. The DOT has limited capacity to effectively redress breaches of airline contracts, primarily focusing on regulatory infractions through enforcement actions and civil sanctions.⁴⁹ These measures, however, offer limited remedies for passenger grievances.⁵⁰

⁴⁵ Grant Glazebrook, *supra* note 37 at 208.

⁴⁶ Edward J. Markey, Senators Markey, Blumenthal Lead Democratic Senators in Introducing Legislation To Bolster Airline Passenger Protections, U.S. SENATOR ED MARKEY OF MASSACHUSETTS (2023), <https://www.markey.senate.gov/news/press-releases/senators-markey-blumenthal-lead-in-introducing-legislation-to-bolster-airline-passenger-protections>.

⁴⁷ Romo, *supra* note 41; Markey, *supra* note 47.

⁴⁸ Sarah Firshein, In Fine Print, Airlines Make It Harder to Fight for Passenger Rights, THE NEW YORK TIMES, Jun. 12, 2020, <https://www.nytimes.com/2020/06/12/travel/virus-airlines-private-arbitration.html>.

⁴⁹ Grant Glazebrook, *supra* note 37 at 189.

⁵⁰ *Id.*

Moreover, the lack of specific passenger rights legislation and the complex interplay between federal regulations and state common law further complicate the situation. The Airline Deregulation Act (ADA) allows for common law contract claims against airlines but creates legal ambiguity, often leading to lengthy litigation and leaving passengers with few options for redress.⁵¹ The minor financial harm to individuals from airline contract breaches does not justify the high costs of legal action.⁵²

Assessing dispute resolution in U.S. aviation reveals weaknesses in enforcement mechanisms and a significant disadvantage for passengers due to expenses and lack of legislative oversight. There is a clear need for alternative mechanisms, such as those in Europe, to resolve disputes more effectively and equitably. Adopting ADR practices could address these deficiencies, benefiting passengers and the industry alike.

II. ADR IN AVIATION DISPUTES: AN OVERVIEW WITH A FOCUS ON THE EU SYSTEM

A. ADR: Definition and Evolution

ADR first gaining traction in the 1970s in the United States, provides an efficient way to resolve legal disputes outside courtrooms.⁵³ It emerged due to the high costs, delays, and contentiousness of traditional litigation. ADR methods include negotiation, mediation, arbitration, and their combinations.⁵⁴

The post-World War II surge in U.S. civil disputes, particularly during the economic boom, necessitated ADR's

⁵¹ Aubrey Colvard, *Trying to Squeeze into the Middle Seat: Application of the Airline Deregulation Act's Preemption Provision to Internet Travel Agencies*, 75 *JOURNAL OF AIR LAW AND COMMERCE* 705, 36 (2010).

⁵² Grant Glazebrook, *supra* note 37 at 190.

⁵³ THE U.S. OFFICE OF PERSONNEL MANAGEMENT, *Alternate Dispute Resolution Handbook*, 1 1, <https://www.opm.gov/policy-data-oversight/employee-relations/employee-rights-appeals/alternative-dispute-resolution/handbook.pdf>.

⁵⁴ alternative dispute resolution, LII / LEGAL INFORMATION INSTITUTE, https://www.law.cornell.edu/wex/alternative_dispute_resolution.

evolution.⁵⁵ The government, acknowledging its efficiency, integrated ADR into the legal framework with laws like the National Labor Relations Act of 1935 and the Alternative Dispute Resolution Act of 1998.⁵⁶ These laws mandated ADR programs in federal district courts. ADR's global importance is also evident in the EU's adoption of international arbitration laws.

Today, ADR is integral in employment, family, and commercial law.⁵⁷ Its modern form dates back to the 1960s and 70s, marked by significant developments like the first community mediation center in 1967, Chief Justice Warren Burger's endorsement in 1976, and Professor Frank Sander's "multi-door courthouse" concept.⁵⁸ ADR addresses litigation's major flaws—high costs, slowness, complexity, adversarial nature, unpredictability, and limited remedies. It has evolved from an alternative to a primary method for resolving disputes, offering faster, simpler, and more collaborative resolution processes.⁵⁹

B. Framework of the European Union Aviation Passenger Dispute ADR System

1. EU Regulation on the Protection of Passenger Rights: Regulation No. 261/2004

The EU Air Passenger Rights System, a comprehensive framework conferring enforceable rights within national courts,

⁵⁵ Louis Kriesberg, *The Evolution of Conflict Resolution* 1, 8 (2009), <https://www.maxwell.syr.edu/docs/default-source/ektron-files/the-evolution-of-conflict-resolution-louis-kriesberg.pdf>.

⁵⁶ JEROME T. BARRETT & JOSEPH BARRETT, *A HISTORY OF ALTERNATIVE DISPUTE RESOLUTION: THE STORY OF A POLITICAL, SOCIAL, AND CULTURAL MOVEMENT* 112 (1st edition ed. 2004); THE U.S. OFFICE OF PERSONNEL MANAGEMENT, *supra* note 54 at 1.

⁵⁷ Jacqueline Nolan-Haley et al., *ADR and the Professional Responsibility of Lawyers*, 28 *FORDHAM URB. L.J.* 887, 899, 918 (2001).

⁵⁸ Richard Reuben, *Constitutional Gravity: A Unitary Theory of Alternative Dispute Resolution and Public Civil Justice*, 47 *UCLA L. REV.* 949, 978 (2000); Thomas Main, *ADR: The New Equity*, 74 *U. CIN. L. REV.* 329, 335 (2005).

⁵⁹ Jacqueline Nolan-Haley, *Discussions in Dispute Resolution: The Foundational Articles*, 38 *FACULTY SCHOLARSHIP* 137, 153 (2022).

has evolved in response to the dynamic growth of the EU aviation market since its liberalization in 1992.⁶⁰ This period witnessed a surge in new airlines, business models, routes, and passengers, accompanied by a proportional increase in disputes.⁶¹ To initially address these issues, the EU enacted Regulation 295/91 in 1991, establishing a compensation system for denied boarding.⁶² However, challenges persisted, prompting the introduction of Regulation 261/2004.⁶³ This regulation, a testament to the EU's commitment to consumer protection, granted air passengers rights to assistance and compensation.⁶⁴ Unlike its predecessor, Regulation 261/2004 expanded its coverage beyond denied boarding incidents to encompass flight cancellations and delays.⁶⁵ Serving as a legal foundation for passenger protection, it applies to departures from EU Treaty member state airports and even extends to flights from third countries to EU member state airports.⁶⁶ Despite its noble intentions, Regulation 261/2004 faced challenges from the outset, marked by non-compliance, uncooperative airlines, under-resourced enforcement agencies, and intricate court proceedings.⁶⁷

Since its inception in 2004, EU 261 has significantly augmented the rights of passengers on European airlines and within EU countries.⁶⁸ Heralded as providing "the highest standard

⁶⁰ EUROPEAN UNION, CASE ANALYSIS: THE TRANSPOSITION AND IMPLEMENTATION OF REGULATION 261/2004 ON AIR PASSENGER RIGHTS 2 (2018).

⁶¹ *Id.*

⁶² *Id.*

⁶³ *Id.*

⁶⁴ Jeffrey Brownson & Dylan Pearl, What Is EU 261 And How Does It Work?, FORBES, <https://www.forbes.com/advisor/credit-cards/travel-rewards/eu-261/>.

⁶⁵ *Id.*

⁶⁶ European Commission, Air Passenger Rights: Frequently Asked Questions, https://ireland.representation.ec.europa.eu/live-work-study-eu/air-passenger-rights-frequently-asked-questions_en.

⁶⁷ Sara Drake, Delays, Cancellations and Compensation: Why Are Air Passengers Still Finding It Difficult to Enforce Their EU Rights under Regulation 261/2004?, 27 MAASTRICHT JOURNAL OF EUROPEAN AND COMPARATIVE LAW 230, 233–238 (2020).

⁶⁸ Drake, *supra* note 68.

of consumer protection in the world," this regulation has created a robust statutory framework offering various protections, such as assistance in case of disruptions, compensation, and rebooking for canceled flights.⁶⁹ Moreover, EU 261 establishes a private right of action, allowing plaintiffs to bring claims in the national courts of any EU member state. However, critiques from scholars and consumer rights advocates have underscored the regulation's "weak, decentralized enforcement regime."⁷⁰ Its reliance on national regulatory bodies often proves ineffective in sanctioning airlines for violations, thereby diminishing its overall efficacy.⁷¹

2. EU's First Consumer ADR Directive: Directive No. 2013/11/EU

On November 29, 2011, the European Commission proposed the Consumer ADR Directive as part of the European 2020 strategy.⁷² This directive replaced previous non-binding recommendations on consumer dispute ADR mechanisms in the EU and aimed to promote high-quality consumer ADR mechanisms.⁷³ It established an accreditation process and required regular monitoring by member states.⁷⁴ Key objectives included saving consumers approximately 22.5 billion euros annually and addressing concerns about independence and fairness in dispute resolution.⁷⁵

⁶⁹ *Id.*

⁷⁰ *Id.*

⁷¹ Sara Drake, *Delays, Cancellations and Compensation: Why Are Air Passengers Still Finding It Difficult to Enforce Their EU Rights under Regulation 261/2004?*, 27 *MAASTRICHT JOURNAL OF EUROPEAN AND COMPARATIVE LAW* 230, 234 (2020).

⁷² Rafal Morek, *ADR and ODR for EU Consumers: Proposals for New Directive and Regulation*, *KLUWER MEDIATION BLOG* (2011), <https://mediationblog.kluwerarbitration.com/2011/12/09/adr-and-odr-for-eu-consumers-proposals-for-new-directive-and-regulation/>.

⁷³ A. Biard, *Impact of Directive 2013/11/EU on Consumer ADR Quality: Evidence from France and the UK*, 42 *J CONSUM POLICY (DORDR)* 109 (2019).

⁷⁴ *Id.*

⁷⁵ Naomi Creutzfeldt, *Implementation of the Consumer ADR Directive*, 5 *JOURNAL OF EUROPEAN CONSUMER AND MARKET LAW* 169, 169 (2016).

Member states are granted flexibility in creating their own accreditation and supervision procedures under this directive.⁷⁶ This flexibility has led to significant differences across the EU in how ADR schemes are implemented.⁷⁷ Competent authorities in each member state ensure that ADR entities meet legal requirements and safeguard consumer rights.⁷⁸

Crucially, the Directive applies to both binding and non-binding ADR processes.⁷⁹ This broad scope ensures comprehensive coverage of various types of dispute resolution mechanisms, from consensual methods to more formal arbitration processes.⁸⁰ Additionally, member states have the discretion to determine the extent of the authority vested in these ADR schemes.⁸¹ They can decide whether the ADR schemes established on their territories have the power to impose a decision, thereby distinguishing between consensual ADR schemes and arbitration schemes that can enforce decisions.⁸² This distinction is crucial as it directly impacts the nature and outcome of the dispute resolution process.

The directive imposes fundamental requirements on ADR entities, such as privacy, fairness, independence, professionalism, accessibility, and transparency.⁸³ ADR procedures should be free or carry only nominal charges for consumers, and results should be provided within 90 calendar days.⁸⁴

In summary, Directive 2013/11/EU provides a comprehensive framework for consumer dispute resolution in the EU. It allows for adaptation to national circumstances, including

⁷⁶ Pablo Cortés, Directive 2013/11/EU on Alternative Dispute Resolution for Consumers and Regulation (EC) 524/2013 on Online Dispute Resolution, in EU REGULATION OF E-COMMERCE 222 (2022), <https://www.elgaronline.com/edcollchap/book/9781800372092/book-part-9781800372092-14.xml>.

⁷⁷ *Id.*

⁷⁸ *Id.*

⁷⁹ *Id.* at 235.

⁸⁰ *Id.*

⁸¹ *Id.*

⁸² *Id.*

⁸³ Biard, *supra* note 74.

⁸⁴ Cortés, *supra* note 77.

decisions on empowering ADR schemes with the ability to enforce decisions, significantly affecting the consumer dispute resolution landscape across the EU.

3. Current ADR Avenues for Resolving Aviation Passenger Disputes

Passengers whose rights are violated have several recourse options under the "Commission Notice Interpretative Guidelines on Regulation (EC) No 261/2004."⁸⁵ Initially, they should file a complaint with the airline. If dissatisfied or ignored, they can complain to the national economic department, sue in civil court, seek an ADR organization, or engage a claims management company.

The ADR process in aviation disputes offers a speedy, cost-effective conflict resolution between airlines and passengers. Central to this is the European Online Dispute Resolution (ODR) framework, established in 2016.⁸⁶ It primarily offers an online platform, as required by EU Regulation No. 524/2013, to facilitate the resolution of online trade disputes. However, the ODR framework does not make decisions; it merely connects parties with suitable mechanisms for resolving their disputes.⁸⁷ This platform significantly improves the process of connecting with ADR entities, marking a notable change in how the EU approaches dispute resolution.⁸⁸ Online traders must link to the EU's ODR website on their platforms and provide a direct email for

⁸⁵ Interpretative Guidelines on Regulation (EC) No 261/2004 of the European Parliament and of the Council establishing common rules on compensation and assistance to passengers in the event of denied boarding and of cancellation or long delay of flights and on Council Regulation (EC) No 2027/97 on air carrier liability in the event of accidents as amended by Regulation (EC) No 889/2002 of the European Parliament and of the Council, 2016 O.J. (C 214).

⁸⁶ Michael Bogdan, *The New EU Regulation on Online Resolution for Consumer Disputes*, 9 MASARYK UNIVERSITY JOURNAL OF LAW AND TECHNOLOGY 155 (2015).

⁸⁷ *Id.* at 158–159.

⁸⁸ *Id.*

consumers, simplifying and economizing contractual dispute resolution without courts.⁸⁹

In the aviation sector, the ODR platform streamlines starting online ADR processes.⁹⁰ As a consumer lodges a complaint, the platform not only facilitates but also plays a crucial role by suggesting a suitable dispute resolution body from over 350 registered entities.⁹¹ When a consumer files a complaint on the ODR platform, the online trader receives a notification and must respond within 10 days, initiating an efficient timeline. Both parties have 30 days to select a dispute resolution body, with the platform offering recommendations but allowing flexibility in their final choice.⁹² Upon selection, the chosen body reviews the complaint, confirms its jurisdiction within three weeks, and then follows its standard procedures to propose a solution within 90 days.⁹³ The final decision's legal binding status varies according to the rules of the respective dispute resolution body.⁹⁴

The ODR platform's architecture allows for the ADR process to proceed without solely relying on it, even after selecting an appropriate entity. It permits traditional methods, compliant with various national laws and regulations. Its main role is to facilitate the selection and connection for ADR processes, whether binding, non-binding, or involving mediation.⁹⁵ This complies with the EU's First Consumer ADR Directive, Directive No. 2013/11/EU.⁹⁶ Additionally, the Regulation indicates that physical presence is optional unless the dispute resolution body's rules require it, and the parties agree.⁹⁷ This feature underscores the platform's capacity to support diverse dispute resolution methods,

⁸⁹ Id.

⁹⁰ Id.

⁹¹ EUROPEAN COMMISSION, Report From the Commission to the European Parliament, the Council and the European Economic and Social Committee, (2019), EUROPEAN COMMISSION.

⁹² European Commission, Online Dispute Resolution, <https://ec.europa.eu/consumers/odr/main/?event=main.complaints.screeningphase>.

⁹³ Bogdan, *supra* note 87.

⁹⁴ Id.

⁹⁵ Id. at 158–159.

⁹⁶ Id. at 158.

⁹⁷ Id. at 158–159.

ensuring a systematic and user-friendly ODR framework throughout the EU.

C. Spain's ADR System for Aviation Passenger Disputes

1. Overview of Spain's New Regulations TMA/201/2022

Law No. 7/2017, enacted on November 2, 2017, incorporated Directive 2013/11/EU into Spanish law.⁹⁸ This directive established the ADR system for consumer disputes and made it applicable to disputes covered by the EU Air Passenger Rights Protection Regulation.⁹⁹ To be recognized as a suitable ADR entity for aviation passenger disputes, the State Aviation Safety Agency of Spain (AESA) must comply with the requirements of this law.¹⁰⁰ The ADR process is mandatory and binding for airlines, as stated in a ministerial decree.¹⁰¹

Law No. 3/2020, issued on September 18, 2020, addresses issues related to the COVID-19 pandemic in the field of justice.¹⁰² It includes passenger disputes within the scope of the EU-recognized ADR system.¹⁰³ Decisions made by AESA as an ADR entity are considered enforceable judgments, and passengers can seek enforcement through a competent commercial court.¹⁰⁴ This regulation allows passengers to file complaints with AESA, ensures airline compliance with ADR decisions, and upholds the

⁹⁸ AESA, Legislation | AESA-Agencia Estatal de Seguridad Aérea - Ministerio de Fomento, <https://www.seguridadaaerea.gob.es/en/ambitos/derechos-de-los-pasajeros/normativa>.

⁹⁹ Law 7/2017, Second Additional Provision (Spain)., <https://www.boe.es/buscar/pdf/2017/BOE-A-2017-12659-consolidado.pdf>.

¹⁰⁰ Id.

¹⁰¹ Id.

¹⁰² Royal Decree-Law 3/2020 (Spain)., <https://www.boe.es/eli/es/rdl/2020/02/04/3/con>.

¹⁰³ Id.; Augusta Abogados-Jaime Fernández Cortés, The New ADR Proceeding for Passenger Claims Some Comments on the Legality of the New Regulation, LEXOLOGY (2022), <https://www.lexology.com/library/detail.aspx?g=a3427ff9-8b7e-407c-96f3-6e9b6ce533be>.

¹⁰⁴ Royal Decree-Law 3/2020 (Spain)., *supra* note 103.

principles of independence, fairness, transparency, and efficiency in resolving aviation passenger disputes through ADR.¹⁰⁵

On March 17, 2022, Order TMA/201/2022 was published in the Official State Gazette of Spain (BOE).¹⁰⁶ This order establishes the rights to compensation and assistance for air transport users in cases of denied boarding, flight cancellations, or prolonged delays, as well as ADR procedures related to the rights of persons with disabilities or reduced mobility.¹⁰⁷

Order TMA/201/2022 regulates ADR procedures for the protection of air passenger rights under Regulation (EC) No. 261/2004, which covers compensation and assistance in cases of denied boarding, flight cancellations, or long delays; Regulation (EC) No. 1107/2006, which outlines the rights of persons with disabilities and reduced mobility when traveling by air; and Regulation (EU) No. 524/2013, which governs online dispute resolution.¹⁰⁸ It establishes these procedures as the most effective means to protect the rights of air transport passengers, ensuring compliance with the regulations while considering principles such as proportionality, legal certainty, efficiency, and transparency. Hearings involving consumer associations, airline organizations, and airport management personnel should be conducted to ensure effective participation and application of these provisions.

2. Aviation Passenger Dispute ADR System Under the Spain's New Regulations

Spain's Spanish State Aviation Safety Agency (AESA) has implemented an efficient Alternative Dispute Resolution (ADR) for passenger claims under EC Regulation 261/2004, streamlining resolution compared to traditional legal methods.¹⁰⁹ This ADR covers issues like cancellations, significant delays, denied boarding, and the rights of disabled persons under EC Regulation 1107/2006.¹¹⁰ However, it excludes claims like personal injury or

¹⁰⁵ Id.; Cortés, *supra* note 104.

¹⁰⁶ Cortés, *supra* note 104.

¹⁰⁷ Id.

¹⁰⁸ AESA, *supra* note 99.

¹⁰⁹ Id.

¹¹⁰ Jaime Fernández Cortés, Latest Updates on Spain's New ADR Procedure for Air Passenger Disputes, *LEXOLOGY* (2023),

baggage damage under the 1999 Montreal Convention, and those outside EU 261/2004's purview, such as mental anguish and loss of profits.¹¹¹

To start ADR, passengers should lodge a complaint with the airline, then proceed to file with AESA if unsatisfied, giving the airline a month to respond.¹¹² In case of a rejection, passengers can choose ADR via AESA within a year.¹¹³ AESA targets resolving claims in 90 days, with a possible extension for complex cases.¹¹⁴ Airlines must adhere to AESA's rulings within 30 days, regardless of any court appeals, and face fines between €4,500 and €70,000 for non-compliance.¹¹⁵

The ADR system presents a distinct method for resolving airline-passenger disputes. Passengers voluntarily engage in ADR or pursue court action, while airlines must participate if a claim is made through AESA.¹¹⁶ However, airlines can still appeal AESA's decisions in court but must comply with any AESA-ordered compensation during the appeal process.¹¹⁷

Passengers initiate ADR by filing a complaint with the airline, followed by contacting AESA within a year if dissatisfied. Airlines have a month to respond to complaints.¹¹⁸ The process, executed entirely online via AESA's platform, promotes accessibility and efficiency.¹¹⁹ After collecting necessary information and verifying all documents, AESA conducts an arbitration process and makes a decision on the claim.¹²⁰ This structured yet flexible system ensures that passenger rights are protected while also obliging airlines to engage in a fair and efficient dispute resolution process.

<https://www.lexology.com/commentary/aviation/spain/augusta-abogados/latest-updates-on-spains-new-adr-procedure-for-air-passenger-disputes>.

¹¹¹ Id.

¹¹² Id.

¹¹³ Id.

¹¹⁴ Id.

¹¹⁵ Cortés, *supra* note 104.

¹¹⁶ Cortés, *supra* note 111.

¹¹⁷ Id.

¹¹⁸ Id.

¹¹⁹ Id.

¹²⁰ Id.

In summary, Spain's aviation passenger ADR system represents a significant advancement in facilitating streamlined dispute resolution and timely compensation during air travel disruptions. By vesting binding authority in AESA, the system not only enhances access to justice for passengers but also ensures rigorous adherence to EU passenger rights regulations by the aviation industry.

D. Germany 's ADR System for Aviation Passenger Disputes

In resolving aviation passenger disputes, Germany uses a distinct Alternative Dispute Resolution (ADR) system tailored for airline-passenger conflicts. The Federal Aviation Office in Germany strictly enforces regulations without adjudicating individual passenger claims. Germany has developed a comprehensive ADR framework, including both public and private ADR entities.¹²¹ At the forefront of Germany's private ADR initiatives is the Schlichtungsstelle für den öffentlichen Personenverkehr (“söp”), the first ADR body certified by the government to address airline-passenger disputes.¹²²

To facilitate this process, the German government mandates the involvement of airlines and passengers in dispute resolution procedures for claims under €5,000.¹²³ Significantly, airlines have the autonomy to select their preferred ADR body, with many opting to join the söp. Membership entails a fee for carriers, while consumers can access the service free of charge.¹²⁴ The SÖP intervenes only if an airline fails to respond to a direct complaint or provides an unsatisfactory answer.¹²⁵ When a passenger submits an online claim to the SÖP, the organization meticulously assesses the merits of the case before deciding whether to accept it.¹²⁶ If a passenger's claim is denied, they can

¹²¹ Grant Glazebrook, *supra* note 37 at 211–213.

¹²² The primary functions of söp, SÖP, <https://soep-online.de/en/the-primary-functions-of-sop/>.

¹²³ Grant Glazebrook, *supra* note 37 at 212.

¹²⁴ The conciliation procedure, SÖP, <https://soep-online.de/en/the-conciliation-procedure/>.

¹²⁵ *Id.*

¹²⁶ *Id.*

still sue.¹²⁷ In cases where both parties choose a third-party neutral, this person acts as a non-binding arbitrator, tasked with gathering data and assessing each side's position.¹²⁸ The arbitrator's non-binding decision serves as a suggested resolution.¹²⁹ Crucially, this decision isn't legally enforceable, allowing either party to dismiss it.¹³⁰ Should this occur, the claimant may still take legal action.¹³¹ Therefore, non-binding arbitration offers a pathway to an amicable settlement, while preserving the option of legal recourse if no agreement is reached.¹³²

E. Evaluating the German and Spain Model

In analyzing the German and Spanish models for resolving aviation disputes, a key observation is that both countries prioritize arbitration over mediation within their ADR frameworks. This alignment underscores a fundamental commitment to structured passenger rights resolution. However, a notable divergence emerges in the binding nature of their ADR outcomes. Spain's approach is characterized by binding ADR, ensuring that the decisions of its designated institutions are final and enforceable.¹³³ In contrast, Germany employs a non-binding ADR system, where the decisions serve more as recommendations rather than conclusive judgments.¹³⁴

Germany's system requires passengers to approach the airline before an arbitration body intervenes. This body can suggest solutions but cannot decide cases.¹³⁵ Such private mediation, common in some U.S. industries, poses fewer constitutional issues. However, adapting this system to the U.S. could be problematic.¹³⁶

¹²⁷ Id.

¹²⁸ SÖP, Rules of Procedure 2023, (2023), https://soep-online.de/wp-content/uploads/2023/01/soep-Rules-of-Procedure_2023.pdf.

¹²⁹ Id.

¹³⁰ The conciliation procedure, *supra* note 125.

¹³¹ Id.

¹³² Id.

¹³³ Cortés, *supra* note 111.

¹³⁴ The conciliation procedure, *supra* note 125.

¹³⁵ Id.

¹³⁶ Grant Glazebrook, *supra* note 37 at 211–213.

In the U.S., the arbitration body's non-binding recommendations have limited impact, as court rulings are more influential.¹³⁷ In contrast, Germany's "loser pays" court system encourages consumers to pursue legal action if airlines dismiss a third-party neutral's advice.¹³⁸ This differs from the U.S., where consumers bear all legal costs regardless of the outcome, making legal action financially risky.¹³⁹

Turning to Spain, the basic passenger rights system aligns with the German model, yet two critical distinctions emerge. Firstly, the Spanish State Aviation Safety Agency (AESA) is not merely an enforcement agency but has attained accreditation as an ADR entity in air transport. This accreditation grants the AESA authority in resolving ADR procedures for claims based on EU regulations. Secondly, unlike the German system, ADR decisions in Spain possess a binding effect on airlines. While consumers retain the option to reject ADR rulings and resort to court proceedings, airlines are obligated to accept the third-party neutral's decision.

In essence, the Spanish model introduces a more assertive stance by making ADR decisions binding on airlines. This stands in contrast to the German approach, where recommendations lack binding force. The comparison of these two European systems offers valuable insights into the varying strategies employed within the EU for aviation dispute resolution.

III. ADR PROPOSALS FOR US AVIATION PASSENGER RIGHTS

The EU's aviation dispute resolution models provide valuable insights that can guide efforts to improve passenger rights protections in the United States. While establishing a comprehensive Passenger Bill of Rights (PBOR) faces challenges, targeted reforms focused on ADR may offer a more feasible path forward.

¹³⁷ Id.

¹³⁸ Id.

¹³⁹ Id.

A. Specialized ADR Bodies for Aviation Passenger Disputes

The EU has developed effective ADR bodies for aviation passenger disputes, exemplified by Spain's model led by the AESA. Spain's shift from general consumer arbitration to specialized aviation ADR agencies, as required by EU Directive 2013/11/EU, mirrors a similar transition in Germany. These dedicated agencies offer more expertise and efficiency in managing aviation-related conflicts.

Spain's TMA/201/2022 regulation marks a significant advancement, enabling passenger participation in the ADR process and providing an option to contest AESA's decisions in court. This regulation addresses the power imbalance between passengers and airlines, ensuring airline compliance with compensation directives during appeals.

The United States could benefit from Germany's approach, which mandates airline participation in ADR and allows consumers to move to court litigation at any stage. EU's strict certification standards for ADR organizations ensure fairness and adherence to international norms. Adopting a similar certification process in the U.S., focusing on privacy, fairness, professionalism, and accessibility, could enhance aviation passenger dispute resolution.

In summary, the EU's specialized ADR bodies, especially in aviation disputes, offer a valuable model for the U.S. to develop a more efficient and passenger-focused ADR system.

B. Promoting private ADR systems through legislative and regulatory changes

Inspired by successful European models, the United States Congress has the option to pass legislation authorizing the Department of Transportation (DOT) to certify private ADR bodies for aviation disputes. Germany and Spain's approach in granting binding authority to certified ADR bodies can serve as a guiding principle.

The EU prioritizes the protection of passenger rights and is committed to strengthening these rights through legislative efforts. One way it aims to achieve this is by promoting the use of ADR systems, including Online Dispute Resolution (ODR) platforms, to

provide passengers with a more convenient and accessible means of resolving disputes.

To enhance the effectiveness of ADR systems, it is essential to consider the nature of ADR institutions. Within the EU, ongoing debate surrounds whether ADR institutions should prioritize mediation over arbitration. Some argue that ADR resolutions should simply reflect the mutual agreement of the parties involved, without carrying legal binding force. However, it is crucial to acknowledge that without legal binding, gaining the attention and trust of airlines can be challenging in the long run.

In Spain, recent regulations have effectively addressed this issue by granting enforceability to ADR institution resolutions. This approach bridges the gap between ADR proceedings and judicial processes, as the resolutions undergo judicial review, confirmation, and enforcement by the courts. By utilizing the judicial system, Spain ensures the effectiveness and legality of ADR resolutions, providing additional reassurance to all parties involved.

The United States, in considering the establishment of a private ADR system for aviation disputes, should draw lessons from the European experience, particularly Spain's approach. Advocates of ADR in the U.S. should argue for the legal binding of ADR resolutions. This ensures that the resolutions carry the necessary weight to compel airlines to comply, fostering a sense of accountability and trust in the ADR process.

While the issue of mandatory airline participation in the ADR system is still under discussion in the EU, countries like Germany and Spain are taking steps to address this matter, primarily to protect the interests of passengers who may be at a disadvantage.¹⁴⁰ The main objective is to facilitate dispute resolution, as relying solely on private remedies may not always ensure fair treatment of passenger grievances. National involvement can help level the playing field, enabling passengers to effectively resolve disputes through ADR mechanisms.

Specialized ADR bodies with aviation expertise can offer passengers a meaningful alternative to court proceedings. To

¹⁴⁰ Niall Kearney, *Air Passenger Rights in the European Union – Developing a Customer Friendly Model for Airline Carriers within the Context of Judicial, Extra-judicial and Trader Redress*, 1, 19–39 (2014).

address the shortcomings of deregulation, the DOT could consider relaxing current rules that prohibit arbitration clauses, aligning with market-based solutions under the Airline Deregulation Act.

In contrast, the United States has not placed the same level of legislative focus on airline passenger rights. Currently, there is no dedicated section for passenger rights within civil aviation regulations, and the resolution of airline passenger disputes typically falls under general consumer dispute resolution mechanisms. However, airline passenger disputes have unique characteristics that require specific measures to empower passengers, reduce the cost of pursuing their rights, and establish a convenient, cost-effective, and efficient dispute resolution mechanism. Only through such initiatives can passenger engagement be encouraged and the protection of passenger rights be enhanced.

The deregulation of airline contracts of carriage (COCs) has weakened passenger protections. However, ADR systems can provide a balanced approach to addressing these shortcomings without imposing excessive regulations. By allowing carriers to require binding ADR and avoiding class actions, the United States can promote market-based solutions consistent with the principles of deregulation.

C. Developing ODR systems

The European Union's (EU) endorsement of online dispute resolution (ODR) has spurred a U.S. Department of Transportation (DOT) initiative to develop an ODR platform for aviation disputes with tech companies. This platform will offer a cost-effective and accessible solution for consumers worldwide.

ODR proves valuable for aviation disputes. It serves as a low-cost legal alternative for complex cases, although direct communication is preferable for simpler complaints. It's vital for establishing initial contact between consumers and traders. In today's social media-driven world, where reputation is critical, ODR enables traders to quickly resolve complaints, thus protecting their reputation.¹⁴¹ Understanding ODR's mechanism is key. It starts with a consumer's online complaint, leading to voluntary

¹⁴¹ The impact of reputation, AIRLINES (2014), <https://airlines.iata.org/2014/05/22/impact-reputation>.

trader participation. ODR acts as a structured environment for dialogue and negotiation, despite its non-binding outcomes. The platform thrives by fostering conversation and targeting mutually beneficial outcomes. It promotes the exchange of information and evidence, resulting in well-informed decisions.

In summary, focusing on alternative dispute resolution (ADR) reforms can bolster passenger rights while aligning with market-driven deregulation. Providing access to quality ADR offers effective consumer solutions without the need for strict regulations.

CONCLUSION

This article has analyzed the aviation passenger rights landscape, contrasting the proactive EU approach with the relatively limited protections in the US. While comprehensive reform in the US faces hurdles, targeted changes to facilitate ADR offer a promising path forward. Establishing specialized ADR bodies and granting them binding authority, as seen in the EU, would meaningfully empower consumers. However, given the US's adherence to airline deregulation, a balanced approach involving incentives and measured legislative changes to promote ADR may prove more feasible. Though substantial gaps remain, modest steps to enhance access to expert ADR forums can gradually strengthen passenger rights in a manner consistent with the US regulatory philosophy.

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NIL in the NCAA: Using A Special Master to Resolve Class Actions

By: Daniella Infantino

Arch Manning, a college football player at the University of Texas who is unlikely to get much playing time this coming year but who is the nephew of two NFL football players, has joined an Name Image and Likeness (“NIL”) deal that will allow him to make \$2,900,000.00.¹ Meanwhile, professional NFL players such as Joe Burrow, the Cincinnati Bengals quarterback who has played four seasons in the NFL, is anticipated to make a base salary of just over \$1,000,000.00 this season.² This can be attributed to the 2021 Supreme Court decision which reshaped the landscape for college athletes all over the world, preventing the NCAA from restricting “compensation and benefits related to education.”³ In other words, college athletes now have the ability to receive financial compensation for their NIL.

For decades, the National Collegiate Athletic Association (NCAA) has been the governing body overseeing collegiate sports in the United States, championing the principles of amateurism and fair competition.⁴ In simple terms, amateurism is the idea that athletes should not receive financial compensation for their athletic abilities or fame beyond scholarships and the cost of attendance at the athlete’s respective institutions.⁵ Moreover, under these

¹ Charlie Wilson, Joe Burrow's Contract Woes Laid Bare by Incredible Arch Manning Statistic, MIRROR (Aug. 27, 2023), www.mirror.co.uk/sport/other-sports/american-sports/cincinnati-bengals-arch-manning-burrow-30797882 (last visited Dec. 5, 2023).

² Id.

³ NCAA v. Alston, 141 S. Ct. 2141, 2151 (2021).

⁴ National Collegiate Athletic Association, History of the NCAA, NCAA, www.ncaa.org/sports/2021/5/4/history.aspx (last visited Dec. 5, 2023).

⁵ What is Amateurism and Why Does the NCAA Care About It?, BREAKOUT SPORTS (Jan. 29, 2019), <https://breakoutsports.net/2019/01/29/what-is-amateurism-and-why-does-the-ncaa-care-about-it/> (last visited Dec. 5, 2023).

principles, student-athletes have historically been barred from capitalizing on their own NIL.⁶ This means that college athletes have not been able to earn compensation from endorsements, sponsorships, or the use of their NIL even as their performances generated significant revenue for their respective universities and the NCAA itself.

However, the status quo began to change in recent years, spurred by various factors.⁷ Legal challenges, public opinion shifts, and a recognition of the changing landscape of sports marketing prompted a reevaluation of the NCAA's longstanding rules.⁸ The NCAA's suspension of its previous NIL policies prohibiting college athletes from financially compensating off of their NIL has sparked significant controversy, with many saying that college athletes should not have the ability to profit off of their NIL for numerous reasons.⁹ It is crucial that an Alternative Dispute

⁶ Anthony Gonzales & Emanuel Cleaver, Student Athletes Deserve the Right to Capitalize on their Name, Image, and Likeness, *THE HILL* (Apr. 26, 2021), <https://thehill.com/blogs/congress-blog/lawmaker-news/550337-student-athletes-deserve-the-right-to-capitalize-on-their/> (last visited Dec. 5, 2023).

⁷ *NCAA v. Alston and O'Bannon v. NCAA* dramatically altered the NIL landscape, with the NCAA reconsidering its stance on NIL issues and subsequently passing a uniform interim policy in 2021 kicking back its NIL restrictions. See Alston, *supra* note 3; see also *O'Bannon v. NCAA*, 802 F.3d 1049, 1049 (9th Cir. 2015).

⁸ *Id.*

⁹ Charlie Baker, NCAA President, has stated that differing state NIL laws create an uneven playing field for colleges which do not afford as many NIL rights as other universities. See Josh Moody, The Current State of NIL, *Inside Higher Ed* (June 7, 2023), www.insidehighered.com/news/students/athletics/2023/06/07/two-years-nil-fueling-chaos-college-athletics (last visited Dec. 6, 2023); see also Michael H. LeRoy, Do College Athletes Get NIL? Unreasonable Restraints on Player Access to Sports Branding Markets, 2023 *U. ILL. L. REV.* 53, 60 (2023) (stating that sports teams enforce anticompetitive rules which deprive student-athletes of a free labor market to equalize each team's chance to compete for a championship); see also Vinayak Shrivastav, Op-Ed: From NIL to AI: Navigating the New Playbook of College Football, *SPORTS VIDEO GROUP* (Dec. 7, 2023),

Resolution (ADR) system is developed to resolve current controversies such as the Class Action which is currently confronting the NCAA, and to avoid future NIL controversies that may arise in the near future.

This paper aims to provide a comprehensive analysis of the issues surrounding NIL rights and the NCAA, to deal with present class action litigation against the NCAA that was filed by a group of present and former NCAA athletes in 2021. This paper will then focus on Special Master Kenneth Feinberg's mediation in the September 11th Victim Compensation Fund to construct an ADR method for this dispute. Part I of this paper provides a general overview of NIL, and Part II discusses the landmark Supreme Court decision which shaped the NIL landscape. Part III will elaborate on a class action lawsuit that has been initiated against the NCAA. In Part IV, the paper considers an ADR mechanism aimed at addressing the ongoing NCAA lawsuit, inspired by the negotiation tactics employed by Special Master Kenneth Feinberg. Part V further examines the initial aspect of the ADR approach, focusing on the functions of Special Masters in settlement processes, and transitions into a review of Kenneth Feinberg's effective strategies post-September 11th. Part VI advocates for the establishment of a federal NIL statute as a preventive measure against prospective legal challenges. Lastly, Part VII offers a brief conclusion highlighting the importance of implementing a process to ensure dispute prevention and avoid future litigation in this area.

www.sportsvideo.org/2023/12/07/op-ed-from-nil-to-ai-navigating-the-new-playbook-of-college-football/#:~:text=The%20argument%20against%20any%20form,first%2C%20and%20then%20%E2%80%9Cathletes%E2%80%9D%20second (stating that the common argument against student-athletes profiting off their NIL is that they are “students first” and “athletes second”) (last visited Dec. 8, 2023); see also Nicole Sadek, *College Athletes Lured by NIL Deals, Exploited by Fine Print* (July 18, 2023), <https://news.bloomberglaw.com/antitrust/college-athletes-lured-by-nil-deals-exploited-by-fine-print> (emphasizing that this new era of sports allowing college athletes to profit off their NIL leaves students ripe for abusive deals due to inadequate information) (last visited Dec. 8, 2023).

I. Name, Image, Likeness Overview

In the ever-evolving landscape of college athletics, the intersection of amateurism and the rights of student-athletes has emerged as a contentious and pivotal battleground.¹⁰ Central to this debate is the concept of NIL rights, which have ignited discussions, legal challenges, and transformative changes within the NCAA and collegiate sports as a whole. NIL policies create opportunities for student-athletes to financially benefit from their NIL through various endorsement deals and sponsorships.¹¹ This encompasses a wide range of promotional activities, including autograph signings, product endorsements, and social media promotions.¹² In essence, NIL rules allow student-athletes to use

¹⁰ The NCAA has long held that allowing student athletes to receive compensation would blur the lines between amateur and professional sports, potentially undermining the educational mission of universities. The NCAA thus advocates for a commitment to amateurism which refers to the idea that student-athletes participate in sports activities without receiving financial compensation off their NIL. The NCAA's primary argument utilizing the notion of amateurism is that student-athletes should be motivated primarily by education and the physical, mental, and social benefits to be derived from same. See Romano, Robert J. Esq. *The Concept of Amateurism: How the Term Became Part of the College Sport Vernacular*, 1 U.N.H. Sports L. Rev. 29, 33, 39 (2022).

¹¹ Taylor Henderson, *It's about Time: An Analysis of Name, Image, and Likeness Legislation in the United States*, 30 JEFFREY S. MOORAD SPORTS L. J. 61, 61-62 (2023)

¹² Henderson, *supra* note 11; see also Michael Poyfair, *NCAA v. Alston: The Supreme Court Paves the Way for Name, Image, and Likeness Opportunities among Collegiate Student-Athletes as the NCAA Is Forced to Create an Interim Name, Image, and Likeness Policy to Comply with Antitrust Legislation*, 55 CREIGHTON L. REV. 269, 276 (2022) (stating that the NCAA argues that to preserve its services, which is a fair and established

their NIL to enter into partnerships with brands and secure deals akin to those entered into by professional athletes with major companies like Adidas, Nike, or Puma.¹³ It is essential to understand that while these policies enable athletes to profit from their NIL, direct payment for their on-field performance (also known as “pay-for-play”) and direct payment to induce athletes to join a particular school (also known as “recruiting inducement”) is prohibited, as the NCAA maintains its commitment to preserving the amateur sports status of its athletes.¹⁴

Commercialism has always been intertwined with college athletics, and there has been a continuing tension between the commercial aspect of the industry alongside the amateurism promoted within the industry.¹⁵ For that reason, the NCAA was created in 1906 to preserve the notion of amateurism.¹⁶ The NCAA operates primarily as a trade association with an emphasis on enhancing its own profits in relation to college athletics.¹⁷ Under amateurism, student-athletes are prohibited from (1) having written or verbal agreements with agents and (2) receiving financial

association of amateur collegiate institutions, supplemental student-athlete income must remain impermissible).

¹³ Henderson, *supra* note 11.

¹⁴ Everything You Need to Know About NIL, ICON SOURCE, <https://iconsource.com/everything-about-nil/> (last visited Dec. 1, 2023).

¹⁵ Chris Murphy, How Everyone is Getting Rich Off College Sports — Except the Players, MADNESS INC. (March 27, 2019), www.murphy.senate.gov/download/madness-inc (last visited Oct. 8, 2023).

¹⁶ Dylan Akers, Federal Legislation Needed to Settle Student-Athlete Name, Image, Likeness Issue, 26 SUFFOLK J. TRIAL & APP. ADVOC. 203, 205 (2020), available at go-gale.com.lp.hscl.ufl.edu/ps/i.do?p=AONE&u=gain40375&id=GALE|A722130698&v=2.1&it=r&sid=bookmark-AONE&asid=73b4f7a3.

¹⁷ Gerald Gurney et al., Unwinding Madness: What Went Wrong with College Sports and How To Fix It, BROOKINGS INSTITUTION PRESS (2017) (discussing the NCAA model and arguing that the NCAA has placed commercial success above its responsibilities to protect the academic health and well-being of college athletes).

compensation for their athletic performance.¹⁸ Amateurism only permits student-athletes to receive scholarships and grants that are approved by the NCAA.¹⁹ The NCAA has been historically adamant about preserving amateurism among college athletics because of its notion that amateurism would help promote fair competition and preserve an academic environment in which obtaining an education is the top priority.²⁰ However, as states have passed legislation granting student-athletes opportunities to profit off their NIL, the NCAA has been forced to re-evaluate its past policies to avoid extensive litigation.²¹

II. The Tumultuous Road to NIL Rights for Student-Athletes

The journey towards securing NIL rights for student-athletes has been extensive and fraught with challenges. Grasping the current landscape of NIL rights requires a retrospective examination of the pivotal legal battles and legislative developments that have shaped the current framework.

¹⁸ What is Amateurism and Why Does the NCAA Care About It?, supra note 5.

¹⁹ What is Amateurism and Why Does the NCAA Care About It?, supra note 5.

²⁰ Supra note 9; see also Julia Chaffers, *The Hypocrisy of the NCAA's Amateurism Model*, PRINCETON UNIVERSITY (Mar. 4, 2020), <https://aas.princeton.edu/news/opinion-hypocrisy-ncaas-amateurism-model#:~:text=The%20NCAA%20argues%20that%20%E2%80%9Cmaintaining,%2C%20not%20their%20learning%2C%20first> (last visited Dec. 6, 2023).

²¹ See Tim Tucker, *NIL Timeline: How We Got Here and What's Next*, THE ATLANTA JOURNAL CONSTITUTION (March 18, 2022), <https://www.ajc.com/sports/georgia-bulldogs/nil-timeline-how-we-got-here-and-whats-next/EOL7R3CSSNHK5DKMAF6STQ6KZ4/> (last visited Dec. 10, 2023) (stating that Florida passed an NIL law giving college athletes additional rights in June 2020 and Georgia passed an NIL law in May 2021 giving college athletes the right to make money off of endorsements).

The initiation of NIL rights for collegiate athletes was propelled by the landmark case *O'Bannon v. NCAA*.²² In *O'Bannon*, the Ninth Circuit Court of Appeals considered allegations that the NCAA had breached the Sherman Antitrust Act.²³ UCLA basketball player Ed O'Bannon sued the NCAA, on behalf of himself and other former Division I athletes, claiming that the NCAA violated United States antitrust laws by prohibiting athletes from obtaining a share of the revenues generated from the use of their image in broadcasts and videogames.²⁴ O'Bannon argued that (1) that he was entitled to financial compensation for the use of his NIL upon graduation, and (2) that the NCAA should not be allowed to restrict student athletes from receiving additional scholarship opportunities to potentially cover the cost of university attendance if the NCAA did not allow student-athletes to profit off of their NIL.²⁵

In *O'Bannon*, the NCAA contended that education was the primary reason for preventing students from profiting off their NIL.²⁶ According to the NCAA, student-athletes' participation in athletics is not the primary purpose for attending college, and comes secondary to any educational responsibilities.²⁷ As such, the NCAA argued that the pursuit of NIL deals would distract student-athletes from their educational endeavors.²⁸ Moreover, the NCAA

²² *O'Bannon*, 802 F.3d at 1049.

²³ Kenneth Ferguson, Symposium Commentary: Name, Image, and Likeness in Amateur Sports: Keynote Address, 32 ALB. L.J. SCI. & TECH. 143, 147 (2022), available at <https://heinonline.org/HOL/P?h=hein.journals/albnyst32&i=163>; see also *O'Bannon*, 802 F.3d at 1052.

²⁴ Scooby Axson, NCAA Ordered to Pay \$46 Million in Ed O'Bannon Lawyers Fees, SI WIRE (Jul. 14, 2015), <https://www.si.com/college/2015/07/14/ncaa-46-million-judgment-antitrust-lawsuit> (last visited Nov. 23, 2023).

²⁵ Poyfair, *supra* note 12, at 281.

²⁶ Akers, *supra* note 16, at 209.

²⁷ David Meggyesy, Athletes In Big-Time College Sport, 37 SOCIETY 3, 24-28 (2000); see also Anthony Miller, NCAA Division I Athletics: Amateurism and Exploitation, THE SPORT JOURNAL, <https://thesportjournal.org/article/ncaa-division-i-athletics-amateurism-and-exploitation/> (last visited Nov. 30, 2023).

²⁸ Meggyesy, *supra* note 27; see also Miller, *supra* note 27.

alleged that its policies were not subject to antitrust law because the policies were “mere eligibility rules, which do not regulate commercial activity.”²⁹

The Ninth Circuit rejected the NCAA’s argument, holding that the Commerce Clause is broad enough to cover a transaction involving a student-athlete and NIL rights because both parties in the exchange anticipate economic gain.³⁰ The Court held that the NCAA rules were within the ambit of the Sherman Antitrust Act and that raising the maximum possible scholarship aid to the full cost of attendance did not interfere with the NCAA’s efforts to preserve amateurism and academic integrity.³¹ However, because the protection of amateurism is at the heart of the NCAA’s policies, the Court avoided ruling on the NIL issue specifically without substantial evidence demonstrating how NIL payments to student-athletes would affect amateur status under the NCAA jurisdiction.³² Nonetheless, *O’Bannon* was still a step in the right direction for the attainment of additional NIL rights for athletes. The NCAA was ordered to pay \$44.4 million in attorneys’ fees and an additional \$1.5 million in costs to lawyers for the Plaintiffs, and the NCAA was now under close surveillance to ensure compliance with the Sherman Antitrust Act.³³

In response to the outcome of *O’Bannon*, many states began affording student athletes additional NIL rights. For example, in 2019, California enacted its Fair Pay to Play Act allowing college athletes to profit off of their NIL, which led other states to follow suit in order to ensure that prospective athletes did not flock to California where they could be compensated.³⁴ States like Florida

²⁹ Ferguson, *supra* note 23.

³⁰ *Id.*

³¹ Poyfair, *supra* note 12, at 281; see also *O’Bannon*, 802 F.3d at 1075.

³² Poyfair, *supra* note 12, at 285.

³³ Everything You Need to Know About NIL, *supra* note 14.

³⁴ Tucker, *supra* note 21. California’s Fair Pay to Play Act is an example of a state law giving athletes additional opportunities to be compensated for their NIL. See CAL. S.B. 206 (2021) [hereinafter CAL. S.B. 206]; The California Fair Pay to Play Act will effectively create an unrestricted market for student-athletes and other parties to use and profit from the use of student-athlete NILs. As of April 2020, 34 states have introduced bills recognizing

followed suit, passing a law granting NIL rights to student-athletes as early as June 2020.³⁵ These laws began to challenge the restrictive NIL policies that the NCAA has long had in place, justified by the NCAA's assertions that student-athletes' amateur status prevent them from participating in the free market.³⁶ The NCAA has long contended that "its actions should be given deference in its attempt to maintain a tradition of amateurism, fair competition, and successful integration of college athletics and academics."³⁷

As states progressively continued taking steps to give athletes additional opportunities to be compensated for their NIL, the NCAA was eventually forced to reevaluate its stance on NIL.³⁸ The NIL issue which the Court refused to address in *O'Bannon* was again thrust into the spotlight in *NCAA v. Alston*, where the Supreme Court took the opportunity to alter the landscape of NIL within the NCAA.³⁹ In *Alston*, the Plaintiffs challenged the NCAA's rules limiting education-related benefits as violating antitrust law.⁴⁰ The Plaintiffs alleged that the NCAA's restriction on education-related benefits violated the Sherman Antitrust Act, which outlaws monopolistic business practices.⁴¹

student-athletes' right to receive compensation for the commercial use of their NILs. See *Grant House et al. v. NCAA et al.*, No. 4:20-cv-03919 (N.D. Cal. June 15, 2020).

³⁵ FLA. STAT. § 1006.74 (2023); see also Tucker, *supra* note 34.

³⁶ Akers, *supra* note 16, at 204.

³⁷ Poyfair, *supra* note 12, at 270.

³⁸ Tucker, *supra* note 34.

³⁹ *Alston*, 141 S. Ct. at 2151.

⁴⁰ *Id.*; see also Judith Araujo & J. Nicci Warr, *A Dollar and a Dream: Student-Athlete Compensation in the Aftermath of U.S. Supreme Court's Alston Decision*, JDSUPRA (Oct. 7, 2021) (stating that education-related benefits include things such as allowing schools to offer scholarships for graduate degrees or allowing schools to pay for things such as computers and tutoring), available at www.jdsupra.com/legalnews/a-dollar-and-a-dream-student-athlete-2056263/.

⁴¹ Henderson, *supra* note 11; see also Terence Fennessy, *International Trade - Sherman Antitrust Act*, 18 SUFFOLK TRANSNAT'L L. REV. 847, 847 (1995) (defining

The Court began by establishing that this case justified heightened scrutiny because of the significant restraint on the college athletics market.⁴² Thereafter, the Court stated that the defenses of amateurism and fair competition through financial restriction and market restraint are not adequately justified actions that shield the NCAA from antitrust principles under the heightened scrutiny standard which has been established.⁴³ The Court reasoned that the NCAA's restriction on student-athlete compensation does not have a sufficient connection to fair competition and academic success.⁴⁴ Thus, the Court concluded that, even though the NCAA has substantial latitude in its maintenance of fair competition, its actions are not protected from federal antitrust scrutiny.⁴⁵ It is therefore considered a violation of federal antitrust law for the NCAA to prevent schools from providing education-related benefits.⁴⁶ The Court grounded its decision in existing and pending state laws giving student-athletes the ability to receive financial compensation off their NIL.⁴⁷

Although the provision of NIL rights are not specifically considered "education-related benefits" for the sake of the outcome of *Alston*, the concurrence in *Alston* written by Kavanaugh suggests that any NCAA restrictions on compensation provisions related to sports participation may trigger antitrust concerns.⁴⁸ As such, the NCAA has backed down from its stance of altogether restricting student-athlete academic compensation in efforts to retain the students' amateur status.⁴⁹ While *Alston* did not specifically rule on the permissibility of NIL opportunities, it established a tightened legal framework to further protect student-

the Sherman Anti-Trust Act); see also Sherman Antitrust Act, 15 U.S.C. §§ 1-2 (1990).

⁴² Poyfair, *supra* note 12, at 275.

⁴³ Poyfair, *supra* note 12, at 271; see also *Alston*, 141 S. Ct. at 2166.

⁴⁴ *Alston*, 141 S. Ct. at 2151.

⁴⁵ Poyfair, *supra* note 12, at 271; see also *Alston*, 141 S. Ct. at 2163.

⁴⁶ *Id.*

⁴⁷ CAL. S.B. 206, *supra* note 34; see also Tucker, *supra* note 34.

⁴⁸ *Alston*, 141 S. Ct. at 2166 (Kavanaugh J., concurring); Araujo & Warr, *supra* note 35.

⁴⁹ Araujo & Warr, *supra* note 40.

athletes and declare certain NIL restrictions unlawful if such a case were to go to court.⁵⁰

In efforts to avoid potential future litigation, the NCAA reversed course and adopted a uniform interim policy on June 30, 2021 suspending its previous NIL prohibitions for all incoming and current student-athletes.⁵¹ The interim policy establishes that athletes can engage in NIL activities that are consistent with the law of the state where the school is located.⁵² However, the payments cannot come from the schools themselves, and the NCAA's restrictions against pay-for-play⁵³ and recruiting inducements still stand.⁵⁴ If the state where the school is located

⁵⁰ Poyfair, *supra* note 12, at 270.

⁵¹ See Michelle Brutlag Hosick, *NCAA Adopts Interim Name, Image, and Likeness Policy*, NCAA Rules Committee, NCAA (June 30, 2021), <https://www.ncaa.org/news/2021/6/30/ncaa-adopts-interim-name-image-and-likeness-policy.aspx> (last visited Dec. 10, 2023).

⁵² Tucker, *supra* note 34; see also Victoria J. Haneman & David P. Weber, *The Abandonment of International College Athletes by NIL Policy*, 101 N.C. L. REV. 1599, 1605 (2023).

⁵³ Pay-for-play is used to describe the situation where athletes receive benefits in exchange for their decision to play a sport at a particular university. See Haneman & Weber, *supra* note 52. Current laws permit boosters to contact agents of athletes to inform the agents what types of NIL opportunities are available to the student-athlete should they choose to commit to their respective school. See Leonard Armato, *Pay for Play is Alive in College Sports and Free Agency Has Arrived*, FORBES (Dec. 16, 2022), www.forbes.com/sites/leonardarmato/2022/12/16/pay-for-play-is-alive-in-college-sports-and-its-time-to-realize-that-free-agency-has-arrived/?sh=5b3a4189638e (last visited Dec. 9, 2023).

⁵⁴ Boosters cannot recruit or communicate with prospective athletes with the intention of inducing the athlete to commit to their specific university. See NCAA, *Name, Image, and Likeness Interim Policy, Question and Answer 2* (Feb. 2023), available at https://ncaaorg.s3.amazonaws.com/ncaa/NIL/July2022NIL_DIInterimPolicy.pdf; Student-athletes are prohibited from entering NIL contracts that are contingent on the athlete's commitment or enrollment at a particular university. See Haneman & Weber, *supra* note 52, at 1607.

does not contain a specific NIL provision, athletes must abide by the NIL rules as permitted by the NCAA.⁵⁵ Moreover, the interim policy suggests that schools in other states should set their own guidelines with minimal restrictions. The NCAA stated that the interim policy shall remain in effect under a federal NIL law or new NCAA rules are adopted to replace it.⁵⁶

III. Class Action Lawsuit Against NCAA

Despite the NCAA's efforts to avoid litigation, the NCAA is now being faced with a class-action lawsuit, known as *In Re College Athlete NIL Litigation*. *In Re College Athlete NIL Litigation* is a class action lawsuit facing the NCAA accusing it of violating antitrust law by restricting NIL activities and preventing conferences from compensating players for the utilization of their NIL in broadcasting.⁵⁷ The lawsuit is being brought by Arizona State swimmer Grant House, TCU basketball player Sedona Prince, and Illinois football player Tymir Oliver, on behalf of themselves and all other athletes similarly situated, which includes football and men's and women's basketball players who play, or have played, at a Power Five (Division I) conference school from June 15, 2016 through 2021.⁵⁸

⁵⁵ Haneman & Weber, *supra* note 52, at 1606.

⁵⁶ Hosick, *supra* note 51.

⁵⁷ Michael Mccann, Athletes in NCAA NIL Case Gain Class Certification for Part of Lawsuit, SPORTICO (Sept. 22, 2023), <https://www.sportico.com/law/analysis/2023/judge-certifies-ncaa-nil-broadcast-class-action-1234739488/> (last visited Sept. 14, 2023).

⁵⁸ Mccann, *supra* note 57; see also Netti et al., Federal Court Hears Oral Arguments in College Athlete NIL Case, NIXON PEABODY (Sept. 27, 2023), <https://www.nixonpeabody.com/insights/alerts/2023/09/27/federal-court-hears-oral-arguments-in-college-athlete-nil-case> (last visited Oct. 28, 2023); see also Athletes Granted Class-Action Status in House v. NCAA Antitrust Case, Sports Business Journal (Nov. 11, 2023), www.sportsbusinessjournal.com/Articles/2023/11/06/house-v-ncaa-lawsuit-antitrust-college-athlete-payments.aspx#:~:text=of%20USA%20TODAY.-

According to recent developments in the class action, this lawsuit could include nearly 6,300 football and men's basketball players, 850 women's basketball players, and 7,400 athletes engaged in other Division I sports at Power Five conference schools.⁵⁹ In addition, a class of individuals comprised of Division I Power Five men's football, men's basketball, and women's basketball players are also seeking damages for currently being denied a share of broadcasting revenue (BNIL).⁶⁰

The student-athletes in this litigation seek injunctive relief, among other remedies, to permanently repeal every NCAA regulation of NIL activities still in existence.⁶¹ In addition, the student-athletes also seek to hold the NCAA financially accountable for refusing to allow student-athletes to profit from their NIL in the past.⁶² As mentioned previously, the NCAA continues to impose restrictions on pay-for-play and recruiting inducements. This lawsuit would effectively remove both of these restrictions by abolishing the NCAA's rules prohibiting NIL compensation from being "contingent on athletic participation, performance, or enrollment at a particular school."⁶³ In addition, the class action lawsuit highlights the fact that, while the NCAA has suspended its NIL rules for the time being, none of the NIL rules have actually been repealed. The lawsuit seeks to fully repeal the policies which the NCAA has suspended.⁶⁴

Moreover, the Plaintiffs in the current class action lawsuit are seeking retroactive compensation for the NCAA's failure to compensate eligible Division I athletes from 2016-2021. The Plaintiffs in *In Re College Athlete NIL Litigation* recently gained

,House%20v.,NIL%20compensation%20had%20not%20existed (last visited Dec. 9, 2023).

⁵⁹ Athletes Granted Class-Action Status, *supra* note 58.

⁶⁰ Netti et al., *supra* note 58.

⁶¹ Cohen et al., Co-Conspirators Beware: Where the College Athlete NIL Litigation Stands and What Might Happen Next, NELSON MULLINS (May 31, 2023), https://www.nelsonmullins.com/idea_exchange/insights/co-conspirators-beware-where-the-college-athlete-nil-litigation-stands-and-what-might-happen-next (last visited Dec. 3, 2023).

⁶² *Id.*

⁶³ *Id.*

⁶⁴ Cohen et al., *supra* note 61.

class certification for the lawsuit, allowing them to represent a larger class of individuals⁶⁵, and are prepared to bring their case against the NCAA that could reach upward of \$1.4 billion.⁶⁶ To make matters worse for the NCAA, since this is an antitrust action, the damages could be trebled, meaning that the damages could reach upward of \$4 billion.⁶⁷ Nonetheless, the NCAA has emphasized that it plans to stay firm in its stance that NIL payments to college athletes should not be used as recruitment leverage or pay-for-play.⁶⁸

IV. ADR Resolution for Handling NIL Class Action

Choosing to employ an ADR process for managing the NCAA class action lawsuit is a sensible decision, as it offers a range of benefits when contrasted with the conventional litigation path. While ADR may not entirely resolve all facets of the ongoing lawsuit, it can significantly mitigate some of the downsides associated with litigation.

One of the major drawbacks of litigation in the context of the NCAA class action lawsuit is its protracted nature.⁶⁹ Lawsuits can drag on for years, consuming substantial time and resources, both

⁶⁵ Charlie Baker, If NIL Lawsuit is Deemed Class Action, It Could Cost NCAA More than \$1 Billion, *FORBES* (May 5, 2023), www.forbes.com/sites/thomasbaker/2023/05/05/if-nil-lawsuit-is-deemed-class-action-it-could-cost-ncaa-more-than-1-billion/?sh=444b4dfe44b2 (last visited Dec. 9, 2023).

⁶⁶ *Id.*

⁶⁷ Athletes Granted Class Action Status, *supra* note 58.

⁶⁸ Cohen et al., *supra* note 61.

⁶⁹ Ibapynhun Shisha Mukhim, ADR a Justice Saviour of Courts, 3 *JUS CORPUS L.J.* 987, 988 (2022) (stating that litigation is a protracted, pricey, and frustrating process) [hereinafter *The Pros and Cons of Mediation and Litigation*]; see also *The Pros and Cons of Mediation and Litigation for Your Case*, SBEMP ATTORNEYS (2023), <https://sbemp.com/the-pros-and-cons-of-mediation-and-litigation-for-your-case/#:~:text=The%20Cons%20of%20Litigation&text=First%20and%20foremost%2C%20the%20legal,the%20outcome%20of%20the%20case> (last visited Dec. 9, 2023).

for the plaintiffs and the defendants.⁷⁰ In contrast, ADR mechanisms often result in quicker resolutions, thereby reducing the burden on all parties involved.⁷¹ This expeditious process can also minimize the emotional toll and stress that protracted litigation can exert on participants. Moreover, ADR processes generally allow for more flexibility and customization.⁷² Parties can tailor the resolution mechanism to their specific needs and concerns, fostering a sense of ownership and control over the outcome. This level of control is often lacking in litigation, where decisions are made by judges and juries.

Litigation is also notoriously expensive. Legal fees, court costs, and related expenses can be financially crippling for both plaintiffs and defendants.⁷³ ADR processes, although not entirely cost-free, are typically more cost-effective and efficient, making justice more accessible.⁷⁴ Furthermore, ADR can foster collaborative solutions that aim for a win-win scenario. In contrast, litigation tends to be adversarial, where parties compete to prove their case.⁷⁵ The collaborative approach of ADR can promote better long-term relationships and reduce the risk of future class action lawsuits.

This paper outlines an ADR approach designed to adeptly manage the complexities presented by the NCAA Class Action litigation. It advocates specifically for the introduction of a Special Master—an expert brought in to ensure judicious oversight.⁷⁶ Furthermore, this paper recommends a comprehensive and enduring resolution by endorsing the creation of national NIL law, aimed at preventing similar conflicts in the years to come. By addressing both the immediate and underlying issues, the strategy looks to resolve the current legal challenges while setting a precedent that could reduce the occurrence of such litigation down

⁷⁰ *Id.*

⁷¹ *Id.*

⁷² *Id.*

⁷³ Mukhim *supra* note 69, at 987; see also *The Pros and Cons of Mediation and Litigation*, *supra* note 69.

⁷⁴ Richard A. Enslin, ADR: Another Acronym, or a Viable Alternative to the High Cost of Litigation and Crowded Court Dockets - The Debate Commences, 18 N.M. L. REV. 1, 10 (1988).

⁷⁵ *The Pros and Cons of Mediation and Litigation*, *supra* note 69.

⁷⁶ David R. Cohen, *The Judge, the Special Master, and You*, 32 GPSOLO 72, 73 (2015).

the line. To fully appreciate the significance and potential impact of such a strategy, one must first be acquainted with the role and responsibilities of a Special Master within the legal context, particularly in relation to the ongoing class action lawsuit against the NCAA.

V. Implementation of a Special Master

This paper first proposes the implementation of a Special Master to aid in the resolution of the NCAA Class Action lawsuit. A Special Master is a judicially appointed expert who aids the court in resolving a complex matter, with or without the consent of the parties involved.⁷⁷ A Special Master functions similarly to an administrative agency, carrying out the tasks designated to them by a court with the flexibility, expertise, investigative authority, and time, which the court may otherwise lack.⁷⁸ There are numerous legal sources that give federal judges the authority to appoint a Special Master to assist in complex matters.⁷⁹ The role of a Special Master is explicitly recognized in Rule 53 of the Federal Rules of Civil Procedure.⁸⁰ Specifically, Rule 53 provides a broad framework for federal judges to appoint Special Masters in situations where particular matters cannot be effectively handled by a judge or by an available magistrate judge due to time constraints, a lack of judicial resources, a lack of expertise, or some combination thereof.⁸¹ A magistrate judge works within the federal court system alongside other judicial officers or on their own to prepare cases for trial or increase the likelihood of settlement.⁸²

Before making an appointment of a Special Master, Rule 53 requires that all parties are provided with notice and an opportunity to be heard, as well as an opportunity to suggest potential qualified

⁷⁷ *Id.*

⁷⁸ Margaret G. Farrell, *The Function and Legitimacy of Special Masters*, 2 *WIDENER L. Symp. J.* 235, 237 (1997).

⁷⁹ *Id.* at 246.

⁸⁰ Cohen, *supra* note 76; see also *FED. R. CIV. P.* 53.

⁸¹ Cohen, *supra* note 76.

⁸² Nancy A. Welsh, *Magistrate Judges, Settlement, and Procedural Justice*, 16 *NEV. L.J.* 983, 986 (2016).

candidates to serve as the Special Master.⁸³ Other sources of legal authority that give judges the power to appoint Special Masters includes the consent of the parties⁸⁴ and the court's inherent powers.⁸⁵

Special Masters are particularly useful to courts because they provide innovative solutions to complex issues by tailoring their proposal based on the unique factors of individual cases, rather than implementing a “one-size-fits-all” solution.⁸⁶ Since many judges do not have the requisite knowledge needed to resolve or confront complex issues, the appointment of a Special Master can serve as a tool to increase both the efficiency and effectiveness of the process. Importantly, the court reserves ultimate decision-making authority, having the ability to review any order or recommendation issued by the appointed Special Master.⁸⁷ As such, the role as a Special Master can be seen as an effective ADR

⁸³ Hon Scheindlin, Special Masters are Another Category of ADR, *REUTERS* (Sept. 15, 2021), <https://www.reuters.com/legal/legalindustry/special-masters-are-another-category-adr-2021-09-15/> (last visited Sept. 23, 2023).

⁸⁴ Peter G. McCabe, The Federal Magistrate Act of 1979, 16 *HARV. J. ON LEGIS.* 343, 374-75 (1979) (stating that appointments of Special Masters made with the parties' consent should not be subject to the same requirements which apply to appointments made without such consent).

⁸⁵ Courts have the inherent authority to equip themselves with the necessary tools to fulfill their judicial functions. This includes the authority to designate individuals who are not a part of the court, including Special Masters and auditors. The designation of these individuals can be done with or without the consent of parties involved to streamline complex issues. *Ex Parte Peterson*, 253 U.S. 300, 312-13 (1920); see also *Reilly v. United States*, 863 F.2d 149, 154 n.4 (1st Cir. 1988). However, the court's inherent authority to appoint individuals who are not connected to the court are limited by Article III. *Stauble v. Warrob*, 977 F.2d 690, 695 (1st Cir. 1992); *In re Bituminous Coal Operators Ass'n*, 949 F.2d 1165, 1168 (D.C. Cir. 1991); see also *In re United States*, 816 F.2d 1083, 1092 (6th Cir. 1987).

⁸⁶ Farrell, *supra* note 78.

⁸⁷ Cohen, *supra* note 76; *FED. R. CIV. P.* 53; see also Scheindlin, *supra* note 67.

solution that supplements, but does not supplant, judicial authority.⁸⁸

Numerous state courts have adopted their own versions of Rule 53, with some closely mirroring the federal rule.⁸⁹ Since state courts do not enjoy the benefit of Magistrate Judges like the federal courts do, these state rules can prove particularly useful by giving state courts the ability to fill this gap with Special Masters.⁹⁰ Moreover, in 2019, the American Bar Association adopted Guidelines for the Appointment and Use of Special Masters in Federal and State Civil Litigation.⁹¹ These guidelines detail the functions which Special Masters may perform, while also advising courts as to effective approaches which they should take in appointing Special Masters for complex cases.⁹² These newly implemented guidelines have altered the landscape for Special Masters within the judicial field, now being seen as a retroactive tool to prevent complex issues from worsening, rather than a proactive remedy when situations have already deteriorated.⁹³

Having examined the role of a Special Master and the specific functions they tend to perform within the legal context, it is helpful to analyze a noteworthy exemplar in this area. Kenneth Feinberg stands out as a paradigm of success in the role of a Special Master, particularly for his administration of the Victim Compensation Fund after the September 11th attack. Feinberg's achievements in this capacity demonstrate how a Special Master's expertise and approach can significantly influence the outcome of complex cases, providing crucial insights that are particularly relevant when considering the potential impact of a Special Master in the NCAA Class Action lawsuit.

a. Exceptional Special Master Kenneth Feinberg –
Victim Compensation Fund

⁸⁸ Merril Hirsh, *A Revolution That Doesn't Offend Anyone: The ABA Guidelines for the Appointment and Use of Special Masters in Civil Litigation*, 58 *JUDGES J.* 30, 31 (2019).

⁸⁹ Scheindlin, *supra* note 83.

⁹⁰ Scheindlin, *supra* note 83.

⁹¹ Hirsh, *supra* note 88, at 30.

⁹² Scheindlin, *supra* note 83.

⁹³ Hirsh, *supra* note 88, at 32.

Kenneth Feinberg is a prominent attorney and mediator who has gained recognition for his role as a Special Master in developing the regulations governing the administration of the Victim Compensation Fund in the aftermath of the September 11th attacks on the Twin Towers.⁹⁴ Kenneth Feinberg played a significant role in mediating the compensation fund for victims of the September 11th terrorist attacks in the United States.⁹⁵ In the aftermath of the September 11th attacks, the U.S. Congress established the September 11th Victim Compensation Fund to provide financial assistance to individuals and families who suffered losses because of the attacks.⁹⁶ Feinberg had been teaching a law school class on mediation class-action lawsuits on the morning of September 11th and was thereafter tasked by Congress with the immense responsibility of assigning a monetary value to the thousands of lives lost in the attack.⁹⁷ Feinberg was subsequently appointed as the Special Master of the Victim Compensation Fund, a role in which he served pro bono.⁹⁸ Feinberg largely contributed to the successful administration of the fund which effectively compensated 97% of the families of the deceased victims who might have otherwise pursued lawsuits for years to come.⁹⁹

This paper will next explore the factors that led to the effectiveness of Feinberg's Victim Compensation Fund, shedding

⁹⁴ Sybil Shainwald, Special Master, Sept 11th Victim Compensation Fund, THE FEINBERG GROUP, LLP (Apr. 22, 2004), https://sybilshainwald.com/2004-04-22_SSPIL_Kenneth-R-Feinberg.htm (last visited Dec. 4, 2023)

⁹⁵ Id.

⁹⁶ Id.

⁹⁷ Michael Rosenwald, After 9/11, Kenneth Feinberg was Asked to do the Unthinkable: Assign a Value to Each Life Lost That Day, THE WASHINGTON POST (Sept. 11, 2023), <https://www.washingtonpost.com/history/2021/09/03/worth-kenneth-feinberg-9-11/> (last visited Sept. 12, 2023).

⁹⁸ Shainwald, *supra* note 94.

⁹⁹ Kenneth Feinberg, Final Report of the Special Master for the September 11th Victim Compensation Fund of 2001, WASHINGTON, D.C: DEPT. OF JUSTICE 1 (2004), available at <https://securitypolicylaw.syr.edu/wp-content/uploads/2012/09/Special-Masters-Final-Report.pdf>.

light on elements that may also contribute to a successful outcome for the Special Master in the NCAA Class Action lawsuit. These factors encompass the following: fairness and equity, transparency, urgency, Best Alternative to a Negotiated Agreement (BATNA), and flexibility.

To begin, Feinberg is known for his commitment to ensuring fairness and equity in the distribution of compensation funds.¹⁰⁰ He seeks to treat all victims or claimants consistently, regardless of their background and considers the unique circumstances of each case.¹⁰¹ As a matter of fairness, Feinberg developed a compensation formula wherein most of the funds were not paid to the highest-income earners, including wealthy brokerage firms.¹⁰² However, Feinberg also ensured that he did not strictly stick to a strict formula, as the circumstances required empathy and consideration based on the circumstances as well.¹⁰³ Furthermore, when reflecting on Feinberg's management of the Victim Compensation Fund, he stressed the importance of "offering due process, giving claimants the opportunity to be heard, making himself available, and reaching out to people."¹⁰⁴ The fund offered in-person informal meetings and hearings so that claimants could explain the magnitude of their loss and their perspective regarding how the Fund should treat the situation.¹⁰⁵

In addition, Feinberg placed a strong emphasis on transparency throughout the compensation process.¹⁰⁶ He believes in clear and open communication with victims and their families, explaining the criteria and procedures involved in the fund, even when this clear formula upset the families involved.¹⁰⁷ The Fund

¹⁰⁰ Feinberg, *supra* note 99, at 6.

¹⁰¹ Rosenwald, *supra* note 97.

¹⁰² *Id.*

¹⁰³ *Id.*

¹⁰⁴ Chloe Gordils, *Victim Compensation Fundamentals: Kenneth Feinberg and Guidelines for Future Compensation Fund Czars 1*, 39 *REV. LITIG.* 2, 163-190 (2019), available at <https://www.proquest.com/docview/2448459718/fulltextPDF/1AF5B8B36874ADEPQ/1?accountid=10920&sourcetype=Scholarly%20Journals>.

¹⁰⁵ Feinberg, *supra* note 99.

¹⁰⁶ Rosenwald, *supra* note 97; *Id.* at 64.

¹⁰⁷ Rosenwald, *supra* note 97.

took significant steps to ensure that families could obtain detailed information about their likely recovery from the Victim Compensation Fund.¹⁰⁸

Feinberg also understood the urgency of providing financial relief to victims, especially in cases of natural disasters, mass shootings, or other tragedies.¹⁰⁹ His thought process includes streamlining the application and disbursement processes to ensure timely assistance.¹¹⁰ In fact, Feinberg ensured that the Victim Compensation Fund was fully administered within a 33-month period which is an extremely speedy turnaround time under Feinberg's circumstances.¹¹¹ The speediness with which Feinberg was able to administer the Fund helped provide the victims' families with a sense of closure that would not have necessarily been available due to the uncertainty and delay of litigation.¹¹²

Importantly, Feinberg utilized the concept of BATNA effectively in his role as the Special Master of the September 11th Victim Compensation Fund.¹¹³ He established a fair compensation framework that essentially served as the BATNA in the compensation process.¹¹⁴ It was a foundation for negotiations, offering claimants a predictable and fair alternative to litigation.¹¹⁵ Recognizing that victims and their families had the option to pursue litigation, Feinberg structured the compensation process to provide a more attractive alternative.¹¹⁶ The Victim Compensation

¹⁰⁸ Feinberg, *supra* note 99.

¹⁰⁹ Rosenwald, *supra* note 97.

¹¹⁰ Feinberg, *supra* note 99, at 67; see also Gillian K. Hadfield, Framing the Choice Between Cash and the Courthouse: Experiences with the 9/11 Victim Compensation Fund, 42 L. & SOC'Y REV. 645, 649 (2008) (discussing the factors involved in deciding whether to accept payment from the Victim Compensation Fund or pursue litigation), available at <https://www.degruyter.com/document/doi/10.18574/nyu/9780814789339.003.0030/html>.

¹¹¹ Feinberg, *supra* note 99, at 1, 67.

¹¹² *Id.*

¹¹³ Feinberg, *supra* note 99, at 1, 3.

¹¹³ *Id.*

¹¹⁴ *Id.* at 3-4.

¹¹⁵ *Id.*

¹¹⁶ *Id.*

Fund offered expedient outcomes, avoiding the uncertainties and potential delays associated with legal battles.¹¹⁷ Through transparent communication, Feinberg made sure claimants understood the methodology and fairness of the compensation framework, enhancing its attractiveness.¹¹⁸

Moreover, Feinberg remained flexible, recognizing that each compensation fund is unique, and his thought process is adaptable to the specific circumstances of each case.¹¹⁹ Feinberg adjusted the fund's criteria and procedures to best serve the needs of the victims and their families.¹²⁰ As mentioned previously, Feinberg developed a formula for distributing funds to various families, but he also ensured that he took consideration of the specific circumstances with which he was dealing.¹²¹ Feinberg met with different families to hear their stories day after day and developed a willingness to adjust the compensation beyond the formula which had initially been created.¹²² This approach drastically improved the appeal of the Victim Compensation Fund as an alternative to litigation.

By offering a streamlined process and quick disbursement of funds, Feinberg facilitated swift resolutions, making the Victim Compensation Fund a preferred BATNA for many victims and families looking to avoid the legal complexities, costs, and extended timelines associated with lawsuits.¹²³ Feinberg's strategic use of BATNA played a pivotal role in providing efficient and fair compensation to the September 11th victims and their families. Lastly, in cases where there may be limited funds available, Feinberg balanced the interests of all claimants and stakeholders to ensure an equitable distribution of compensation.¹²⁴ While there

¹¹⁷ Hadfield, *supra* note 110.

¹¹⁸ *Id.*

¹¹⁹ Rosenwald, *supra* note 97.

¹²⁰ *Id.*

¹²¹ *Id.*

¹²² *Id.*

¹²³ Feinberg, *supra* note 99, at 3-4.

¹²⁴ The Special Master, 8 Disp. Resol. MAG. 8, 9 (2002) (stating that Kenneth Feinberg considered the families to be the most important stakeholders with the most beneficial input since they were the primary consumers of the Victim Compensation Fund), available at <https://heinonline->

were no caps on the available compensation under the Victim Compensation Fund, unlimited funding is not typical.¹²⁵ Feinberg emphasized the importance of making critical yet tough decisions as to who is eligible and how to effectively distribute available resources in scenarios where there is limited funding.¹²⁶

b. Application of Special Masters to NCAA Class Action Lawsuit

Appointing a Special Master for the resolution of the NCAA Class Action Lawsuit offers a promising and expedient alternative to protracted court proceedings, potentially yielding an innovative resolution to the issues presented. It is essential to draw from the experiences of effective Special Masters, such as Kenneth Feinberg, to guide the appointment and actions of a Special Master in this matter to ensure a successful outcome.

To target the issue of retroactive compensation which the present class action seeks, a Special Master could potentially create a de facto compensation trust fund to compensate the individuals involved in the class action lawsuit in a fair and equitable way.¹²⁷ A de facto trust compensation trust fund is essentially an informal trust arrangement created to manage and distribute compensation

org.lp.hscl.ufl.edu/HOL/Page?public=true&handle=hein.journals/disput8&div=32&start_page=8&collection=journals&set_as_cursor=0&men_tab=srchresults#.

¹²⁵ Scott Szymendera, *The September 11th Victim Compensation Fund*, CONGRESSIONAL RESEARCH SERVICE (Oct. 17, 2019) (stating that while there was no cap on the Victim Compensation Fund award amount, there were still limits on the amounts of individual awards for losses suffered).

¹²⁶ Kenneth Feinberg, “Who Gets What” – Setting Compensation After Tragedy, SPONSORED BY TRAVELERS INSTITUTE ET AL., WEBINAR, (Feb. 23, 2022), https://www.travelers.com/travelers-institute/webinar-series/symposia-series/ken_feinberg (last visited Oct. 29, 2023) [hereinafter Feinberg, *Who Gets What*].

¹²⁷ “De facto” is defined as a practice which exists in reality, regardless of whether they are officially recognized by laws or other formal norms. See Curtis Knittle, *Cablelabs Specifications Move from De Facto to De Jure*, INFORMED BLOG (Oct. 6, 2020).

to a group of individuals.¹²⁸ Unlike a formal trust, which is governed through strict legal procedures and is subject to comprehensive regulation and oversight, a de facto trust would function without the rigid formalities and legal constructs typically associated with such trusts.¹²⁹ This informal trust arrangement would serve the practical role of managing and disbursing funds, similar to a formal trust, yet it would do so outside the bounds of formal trust law requirements.

In establishing a de facto compensation trust fund, numerous factors would need to be considered to ensure its actualization. To begin, a Special Master would likely have to determine where the compensation for the fund will come from in the first place. The NCAA would need to secure funding for the trust fund, either by allocating existing funds or sourcing additional funds, potentially through revenue sharing from broadcast rights, sponsorships, or other income streams. The Special Master would assist in ensuring that the trust fund would serve as a BATNA, providing a preferable option to litigation with a predictable and equitable compensation framework.¹³⁰

In addition, to facilitate eligible individuals joining the class action and accessing the compensation provided through the fund, a multi-step process should be implemented. All potentially eligible individuals could be notified through a comprehensive outreach campaign utilizing direct communication and widespread public announcements through the NCAA's platforms. In doing so, it will be imperative to establish clear guidelines as to which athletes are eligible for compensation through the trust fund. It will also be crucial for a Special Master to determine the method of distribution of the money within the trust fund. A Special Master could ensure that an accessible registration system is established for claim submissions, establishing a robust verification process wherein athletes can confirm their eligibility based on participation in NCAA Division I sports during the 2016 through 2021-time frame.¹³¹ A panel or the designated Special Master would then review the verified claims to determine the compensation

¹²⁸ Id.

¹²⁹ Walter G. Hart, *What Is a Trust?*, 15 L. Q. REV. 294, 300 (1899).

¹³⁰ Hadfield, *supra* note 110.

¹³¹ Netti et al., *supra* note 58.

distribution. An appeals mechanism would be in place for any disputes over eligibility or the compensation awarded. Following approval, a structured and efficient disbursement system would ensure timely fund allocation to the rightful claimants.

Flexibility in the administration of the fund would be paramount, adapting to the unique nuances of each claim.¹³² As advised by Special Master Feinberg, it is crucial to make critical yet difficult decisions regarding who is eligible for the fund and how to effectively distribute the limited resources available within the fund.¹³³ Unlike Feinberg, who did not have a cap on the funding available within the Victim Compensation Fund, the NCAA's funding will likely be limited to the amount of revenue that it can acquire, either through its existing funds or through the sourcing of additional external funds.¹³⁴ This trust fund, built on these principles, would aim to deliver not only financial compensation but also a sense of closure and justice to the athletes involved.

To effectively create what would function as a compensation trust fund, it is essential to form a governing entity tasked with supervising the allocation of funds and enforcing adherence to the established procedures. It would be necessary for a Special Master to implement a framework that ensures the entire process is transparent, equitable, and in strict conformity with the criteria for eligibility and distribution. This would be in line with the methodology employed by Kenneth Feinberg when administering the Victim Compensation Fund post-September 11th.¹³⁵ In addition, by emphasizing transparency, the Special Master would ensure that the NCAA provides clear communication about the fund's operations and compensation mechanisms, thus providing athletes with comprehensive understanding and setting clear expectations.¹³⁶

¹³² Rosenwald, *supra* note 97.

¹³³ Feinberg, *Who Gets What*, *supra* note 126.

¹³⁴ *Id.*

¹³⁵ Kenneth Feinberg fully administered the entire Victim Compensation Fund within a 33-month period. See Feinberg, *supra* note 99.

¹³⁶ Rosenwald, *supra* note 97.

VI. Proposed Systemic Change – The Implementation of a Federal NIL Law

To mitigate the potential for future legal challenges similar to those currently faced by the NCAA, this paper suggests the adoption of a uniform NIL legislation. Currently, the absence of a centralized NIL policy allows states to enact their own laws, granting varying degrees of NIL rights to student-athletes.¹³⁷ This decentralization has resulted in disparities where certain universities, bolstered by more generous NIL laws, can offer better terms to student-athletes, thereby luring the athletes to their programs.¹³⁸ Such discrepancies create an unbalanced and disadvantageous competitive landscape where some universities might find themselves at a significant disadvantage.¹³⁹ This inequity compels states to reassess their stance on NIL to remain competitive in attracting top-tier athletic talent.¹⁴⁰

To address the current imbalance in the playing field that has emerged because of inconsistent NIL rights being afforded to student-athletes among states, a standardized federal NIL law is recommended. By establishing uniform NIL rights, student-athletes across different states would have access to the same opportunities, removing the current disparities that can place some universities at a competitive disadvantage.¹⁴¹ The establishment of a federal NIL law would provide a fair and balanced framework for all parties involved, thereby reducing the likelihood of litigation rooted in varying NIL rights and fostering a more equitable environment for student-athletes to leverage their NIL rights.¹⁴²

¹³⁷ Laura C. Murray, *The New Frontier of NIL Legislation*, 60 HOUS. L. REV. 757, 757 (2023) (stating that the differing NIL laws passed by states has created an uneven playing field in college athletics).

¹³⁸ *Id.*

¹³⁹ *Id.*

¹⁴⁰ Irwin Kishner et al., *Why NIL Needs Federal Legislation: NCAA*, SPORTICO (2023), www.sportico.com/leagues/college-sports/2023/why-nil-needs-federal-legislation-ncaa-1234735926/ (last visited Nov. 29, 2023).

¹⁴¹ Murray, *supra* note 137.

¹⁴² Murray, *supra* note 137.

VII. Conclusion

In conclusion, the journey toward securing NIL rights for student-athletes has been challenging, and the end is not yet in sight. As the NIL rights landscape keeps evolving, the future remains uncertain. However, there are actionable steps that can be implemented to potentially settle the ongoing class action lawsuit against the NCAA and also to avert future legal disputes. The exemplary precedent set by Kenneth Feinberg, especially in his management of the Victim Compensation Fund post-September 11th, indicates that there are achievable routes to success in such complex issues. Feinberg's approach, emphasizing fairness and equity, flexibility, transparency, efficiency, BATNA, and interest-balancing, offers a framework for the effective use of Special Masters in resolving complex cases like the current NCAA class action lawsuit. Implementing these principles and recommending systemic reforms on the federal level could not only resolve the immediate legal hurdles the NCAA faces but also help to prevent potential future litigation as well.

**Professor as Mediator: Using Facilitative Mediation to
Improve First-Year Law School Pedagogy**

By: Amy Mildebrath

I. Introduction

“[A]sk questions. If you're uncomfortable about asking questions, say you are uncomfortable about asking questions and then ask anyway.” – Chimamanda Ngozi Adichie, *Americanah*

Law school pedagogy, especially the pedagogy of first year, required, doctrinal courses, is the subject of robust debate among legal and education scholars alike.¹ A frequent critique of first-year law school pedagogy is that it fails to create effective lawyers.² Students do not leave law school with a nuanced understanding of how to craft legal arguments, nor can they understand and exploit the rhetoric of legal opinions in ways that help them serve their clients.³

Another, increasingly urgent critique is that while Law’s role in continued violence against communities of color, LGBTQIA+ communities, and women has grown more central in public consciousness, lawyers have not been trained to use the law to meaningfully respond to and tackle these challenges.⁴

¹ See e.g., Jamie R. Abrams, *Reframing the Socratic Method*, 64 J. LEGAL EDUC. 562, 563 & 566 (2015) (questioning the pedagogical effectiveness of the Socratic method, a foundational approach to law school teaching appearing most often in first year courses).

² *Id.* at 571 (pointing to deficiencies in law students’ research abilities when entering the profession); *id.* at 574 (“The case-based Socratic method focuses on a very narrow and distorted range of legal skills.”).

³ Sherri L. Keene & Susan A. McHahon, *The Contextual Case Method: Moving Beyond Opinions to Spark Students’ Legal Imaginations*, 108 VA. L. REV. ONLINE 72, 79 (2022).

⁴ See Amna A. Akbar, *Law’s Exposure: The Movement and the Legal Academy*, 65 J. LEGAL EDUC. 352, 355 (2015) (“The movement exposes to the mainstream what black communities have argued . . . for centuries: Law is not fair, does not treat people equally, and its violence is lethal and routine.”); Keene &

More narrowly, within the walls of law schools, students suffer at alarming rates from mental health problems, food insecurity, substance abuse, and housing insecurity.⁵ The disparities created by Law in the world at large are equally poignant within law school classes, in which students of color, women, gender nonconforming students, and students in lower socioeconomic brackets frequently struggle to a higher degree with financial and emotional stress, experience lower degrees of psychological safety within the classroom, and perform less well academically than their white, male, cisgendered, middle-class peers.⁶

Much scholarship exists in the way of unifying these two concerns: many law professors argue that requiring students from the beginning of law school to engage more meaningfully with how Law constructs, maintains, and interacts with race, gender, and class has the general tendency to create more effective lawyers.⁷ This essay seeks to explain how to meaningfully engage students at all, and especially with these difficult topics. It posits

McHahon, *supra* note 3, at 78 (“A student who does not understand the role of bias, policy preference, or other non-legal factors play in decisions will not be as effective an advocate for their client.”).

⁵ Jordana A. Confino, *Where are We on the Path to Law Student Well Being? Report on the ABA CoLAP Law Student Assistance Committee Law School Wellness Survey*, 68 J. LEGAL EDUC. 650, 650 (2019); IND. UNIV. CTR. FOR POSTSECONDARY RSCH., THE COVID CRISIS IN LEGAL EDUCATION: 2021 ANNUAL SURVEY RESULTS 11 (2021), <https://lssse.indiana.edu/wp-content/uploads/2015/12/COVID-Crisis-in-Legal-Education-Final-10.28.21.pdf>.

⁶ See e.g., Erin C. Lain, *Racialized Interactions in the Law School Classroom*, 67 J. LEGAL EDUC. 780, 786–87 (2018) (explaining that students of color may become disengaged because they lack a sense of psychological safety in the classroom); Abrams, *supra* note 1, at 566 n.24.

⁷ See Akbar, *supra* note 4, at 365 (“Law is transformed from its common image in the liberal imagination—as the cure-all for the ills of inequality—into just one tool among many for challenging a social order in which race, gender, sex, and class determine power relations and the material conditions in which people live.”).

that such engagement is central to law student well-being, professor well-being, and the well-being of the profession for years to come.

The essay relies on four central premises: (1) In order to engage first year students, law professors can conceptualize themselves as facilitative mediators; (2) mediated discussions led by a facilitative mediator are a form of Socratic dialogue; (3) Socratic dialogue is necessary to develop students with strong, nuanced understandings of the law's relationship to race, gender, and class; and (4) having a strong and nuanced understanding of the law's relationship to race, gender, and class is necessary to being an effective lawyer.

This article is intended to fall in line with many of the long-established practices of the law school classroom as much as it is intended to be radical. It is simultaneously a reevaluation of law school pedagogy from the ground up, and a confirmation that some of the oldest practices in legal education provide an opportunity for enormous growth and improvement in the legal profession.

The essay builds upon each of these premises. The next section explains the important dynamic shift achieved from a professor conceptualizing themselves as a facilitative mediator. Next, it introduces a kind of facilitative mediation, the BADGER framework, and explains how the framework is invaluable when structuring a first-year doctrinal law course. Finally, it explains how the BADGER framework creates a form of Socratic dialogue, why that dialogue is so essential to student engagement and well-being, and how that dialogue differs from more conventional implementations of the Socratic method.

II. Professor as Mediator: An Important Dynamic Shift

In education scholarship, tension exists between theorists who believe in the efficacy of teacher-centered instruction, and those who believe in student-centered instruction.⁸ Those who advocate for teacher-centered instruction (where professors are

⁸ Gert Biesta, *The Rediscovery of Teaching: On Robot Vacuum Cleaners, Non-egological Education and the Limits of the Hermeneutical World View*, 48 EDUC. PHIL. & THEORY 374, 387 (2016) (describing the debate between teacher-centered instruction and student-centered instruction as “all too common.”).

considered “the sage on the stage”) bemoan the unstructured and undisciplined nature of student-centered classrooms.⁹ They raise concerns about the damage that can be caused when teachers devalue their roles and offer students neither guidance nor support.¹⁰ They argue that teacher-centered classrooms provide students with the sense that they are learning from someone wiser than themselves, who is capable of expanding their understanding and appreciating their growth.¹¹ They point to the ways in which student-teacher relationships are integral to students’ academic success.¹²

On the other hand, advocates for student-centered instruction (where professors are considered “the guide on the side”) argue that teacher-centered instruction nearly always integrates lecture as the central instructional method.¹³ They point to the volumes of studies tending to prove that lecture is the least effective method of instruction in terms of student learning gains.¹⁴ They note that student-centered classrooms orient learning as the primary goal of instruction.¹⁵

Law professors are not immune from these debates. They struggle with questions about how much power to give the students, and how much power to take for themselves. Especially in times where conversation may necessarily involve emotionally charged topics, professors tend to attempt to exert higher levels of

⁹ *Id.*

¹⁰ *Id.* (explaining that student-centered approaches to learning have led to “a demise of . . . the teacher”).

¹¹ *See generally id.* (emphasizing the human need to be *taught* rather than simply to learn).

¹² Marina Micari & Pilar Pazos, *Connecting to the Professor: Impact of Student-Faculty Relationship in a Highly Challenging Course*, 60 COLL. TEACHING 41, 42 (2012) (“[S]tudents’ academic self-concept [is] strongly correlated to their relationships with faculty, including their sense of professors’ . . . respect for students.”).

¹³ Deborah L. Borman & Catherine Haras, *Something Borrowed: Interdisciplinary Strategies for Legal Education*, 68 J. LEGAL EDUC. 357, 366 (2019).

¹⁴ *Id.* (citing the “raft of studies” which demonstrate that lecturing must be supplemented with opportunities to practice).

¹⁵ *See* Biesta, *supra* note 8, at 374.

control over the conversation.¹⁶ They are sensitive to the potential consequences of removing themselves from discussions about race, gender, and class and how those constructs interact with every aspect of the law.¹⁷ They are also aware that they possess a higher degree of knowledge than their students about certain topics, and they want to be able to communicate that knowledge.

Balancing power-sharing and control within the classroom can be especially tricky to achieve for law professors who are not required to have—and often are not provided—any formal teacher training.¹⁸ Different pedagogical strategies abound, and this litany of choices can often serve to overwhelm rather than inform.¹⁹

This is where the work of a facilitative mediator can become enormously helpful for law professors.²⁰ Facilitative mediators are at once essential to and separate from the

¹⁶ Lain, *supra* note 6, at 791–92.

¹⁷ *See id.* at 791 (describing professors who seek to control the direction of racialized interactions as “largely acting out of fear.”).

¹⁸ Borman & Haras, *supra* note 13, at 357.

¹⁹ Abrams, *supra* note 1, at 562 (“[E]xciting innovations in legal education are frenetically swirling around us.”). For professors who are unsure about the fundamentals of pedagogically sound instruction, even the best ideas will have trouble finding application. The process laid out in this paper relies on fundamental understandings of human learning that will result in positive learning outcomes in numerous contexts.

²⁰ This paper adopts Leonard Riskin’s conceptualization of a facilitative-broad mediator. A facilitative-broad mediator “seeks to help the parties define, understand, and resolve the problems [the parties] wish to address. She encourages [the parties] to consider underlying interests. . . .” Leonard L. Riskin, *Mediator Orientations, Strategies and Techniques*, in *THE NATURE OF MEDIATION* 229, 232 (1995). Like a facilitative-broad mediator, a professor helps students seek and define the legal and factual problems within cases and operate as active agents to work through and resolve some of those problems. The facilitative mediator does not herself provide “assessments, predictions, or proposals” but instead “helps the participants better understand their legal situation.” *Id.* While worthwhile critique regarding the framing of “facilitative-broad” mediators has been raised by Riskin himself, these debates are outside the scope of this article. *Id.* at 235.

conversation taking place.²¹ Their conceptualization of themselves as a “neutral party” affords them the opportunity to ask questions that the parties themselves may not think or wish to ask, making their presence essential.²² At the same time, their “neutrality” centers the mediation parties, requiring complete party engagement as a necessary condition for a successful mediation.²³ Mediators share power with the parties, while also being in control of the structure and process of the mediation.²⁴

This balance of control between mediator and parties gives facilitative mediators the opportunity to encourage parties to engage in lateral thinking about their dispute—thinking that restructures concept patterns and generates new ones.²⁵ Through techniques like analogizing, generating alternatives, challenging assumptions, suspending judgment, fractionating the problem, and encouraging brainstorming, facilitative mediators get parties to think, feel, and speak differently about their conflict.²⁶ Without the

²¹ *Id.* at 230 (explaining that mediators frame their role as enhancing and clarifying communication between parties, without providing their own opinion on the dispute).

²² See MONICA HANAWAY, *PSYCHOLOGICALLY INFORMED MEDIATION* 13 (2020) (explaining that facilitative mediation involves a process in which “the parties’ deeper interests are explored, with the aim in assisting the parties in reaching their own voluntary and mutually agreeable resolution.”).

²³ See Riskin, *supra* note 20, at 230 (“[T]he parties . . . develop better solutions than any that the mediator might create.”).

²⁴ Carol Izumi, *Implicit Bias and the Illusion of Mediator Neutrality*, 34 *J. L. & POL’Y* 102, 123 (2010).

²⁵ JOHN W. COOLEY, *THE MEDIATOR’S HANDBOOK* 254 (NITA, eds., 2d ed. 2006).

²⁶ *Id.* at 256 (analogizing: “One can use analogies to provide movement. The problem under consideration is related to the analogy and the analogy is developed along its own lines. At each stage, the developed analogy transferred back to the original problem to see if any aspects are useful to a solution. Ask ‘what’s similar?’”; *id.* at 255 (generating alternatives: “The most fundamental principle of lateral thinking is that any particular way of looking at things is only one from among many other possible ways. Using the generation of alternatives technique, one does not search for the best approach, but rather looks for as many different

mediator, the parties would not experience a change, but without party engagement, the mediator would be unable to generate workable solutions. For a professor, being a facilitative mediator makes their role clear: they are there to engage their students in lateral thinking. Specifically, the role of the professor is to engage students in lateral thinking to help them understand the law from many angles, including those angles which view the law as a mechanism of power and oppression.

This process of change—getting parties to recognize that their dispute can be considered through many lenses, that truth is in the eye of the beholder, and that disputes can be rhetorically framed in infinite ways—is at the center of the Socratic method.²⁷ The facilitative mediator recognizes that unless a speaker's interests (which inform their positions) are revealed and questioned, they cannot be altered.²⁸ Notice, however, that the facilitative mediator is not out to prove a party wrong.²⁹ The mediator is only there to understand parties' interests in the

approaches as possible. In the lateral search, the alternatives generated do not have to be reasonable in themselves. Even if they are not reasonable, they may spark or precipitate reasonable solutions.”); *id.* at 256 (challenging assumptions: “When using this technique, one challenges (1) the necessity of boundaries and limits in problem solving; and (2) the validity of concepts. Ask ‘why?’”); *id.* (suspending judgment: “Judgement is suspended during the generative state of thinking and applied during the selective stage.”); *id.* (fractionating the problem: “Using this technique, one breaks down a situation into fractions and then restructures the situation by putting the fractions together in a new way. Ask ‘what if?’”); *id.* (encouraging brainstorming: “Brainstorming has three features: a formal (or special) setting; suspended judgement; and cross-stimulation.”).

²⁷ Compare Borman & Haras, *supra* note 13, at 381–82 (“[In a Socratic] dialogue, the aim is for *disequilibrium*, creating opportunities for a renewed understanding that comes from difference”) with JOSEPH B. STULBERG & LELA LOVE, *THE MIDDLE VOICE: MEDIATING CONFLICT SUCCESSFULLY* 11 (3d ed. 2019) (“[H]ow can the mediator reorient the way disputants see their conflict and each other so that they view a developed solution?”).

²⁸ See Riskin, *supra* note 20, at 230.

²⁹ See *id.*

dispute, and how to use those interests to frame and reconstruct a party's positions.³⁰

Consequently, facilitative mediators do not view disagreement or conflict as stances to be corrected, but as opportunities to expand upon parties' conceptions of each other's interests and positions.³¹ This positive orientation towards conflict helps mediators because they anticipate and accept disagreement.³² This constitutes a strong dynamic shift from a professor, who may wish to minimize or control conflict by refraining from asking students questions.³³ Through ground rules, a facilitative mediator creates a culture of respect and dialogue, but she does not invalidate any individual party concerns or behaviors.³⁴ A similar orientation in a law professor may help the professor experience intellectual excitement regarding conflict in the classroom, rather than fear or discomfort.

Thinking of themselves as facilitative mediators allows law professors to develop a strong and specific orientation towards power-sharing and control in their classroom. Through thinking of themselves as a mediator, a professor reaffirms their own efficacy

³⁰ *See id.*

³¹ *See* Caroline Harmon-Darrow et al., *Defining Inclusive Mediation: Theory, Practice, and Research*, 37 CONFLICT RESOL. QUARTERLY 305, 306 (2020) (explaining how alternative dispute resolution is founded on conflict theory, or the idea that conflict is an inherently neutral force which may be used for positive or negative ends).

³² *See* Elizabeth E. Bader, *The Psychology and Neurobiology of Mediation*, 17 CARDOZO J. CONFLICT RESOL. 363, 363 (2016) ("Mediation was, I found, in large measure the process of helping parties, and often their attorneys, work through their initially exaggerated sense of themselves and the possibilities for settlement in order to arrive at a realistic resolution of the dispute.").

³³ *See* Lain, *supra* note 6, at 791–92.

³⁴ Izumi, *supra* note 24, at 123 (explaining that mediators are "deliberate in planning and conducting each mediation to 'place and keep the power of self-determination with the parties, while protecting all parties' abilities to present issues and concerns equally in the mediation session.'").

and the essential nature of their presence within the classroom.³⁵ It simultaneously centers students and encourages professors to help students move through disagreement by identifying the interests which inform the law and their own positions. Disagreement is therefore essential in the classroom because it is in contrasts that students can see their own beliefs. Like culture, which is often invisible to those who live in it, if all students in a classroom appear to adopt a similar position, they will find it challenging to articulate the interests which inform that position.

This conflict in interests and positions reflects mediations, and the adversarial legal system as a whole. To be a lawyer at all, law students must be able to anticipate, identify, and address the adverse party's positions. To be an effective lawyer, law students must be able to speak to the adverse party's interests, and why those interests are less compelling than their client's. In this way, the conceptualization of themselves as a facilitative mediator not only provides a professor a framework in which to operate pedagogically, it also tends to produce more effective lawyers.

III. The Socratic Method, Student Well-Being, and the BADGER Framework of Facilitative Mediation

The work of facilitative mediators provides a lens through which professors may view themselves, but it is of little practical use to professors as they go about constructing their classes. However, the BADGER method of facilitative mediation, developed by Joseph Stulberg and Lela Love and described in detail below, can serve as a blueprint for professors who are aiming to engage students as parties in a mediated discussion about the law.³⁶ This framework is particularly useful for a few different reasons.

³⁵ Facilitative mediation involves a process in which “the parties’ deeper interests are explored, with the aim in assisting the parties in reaching their own voluntary and mutually agreeable resolution.” MONICA HANAWAY, *PSYCHOLOGICALLY INFORMED MEDIATION* 13 (2020). Facilitative mediation therefore maintains a spotlight on the parties (students) while leaving essential the role of the mediator (professor).

³⁶ See generally STULBERG & LOVE, *supra* note 27. BADGER mediation has practitioners “Begin” mediations after moving

First, it engages professors as facilitative mediators for every part of their classroom instruction, from planning and writing a syllabus to teaching a specific class. Second, it encapsulates the kinds of considerations that professors need to make if they want to engage in Socratic dialogue that includes discussion of how the law constructs and interacts with race, class, and gender.³⁷ Finally, it provides a structure to orient instruction towards the well-being, psychological safety, and learning of students in the classroom.

As an additional note, the framework embodies an ethos that law professors may find useful, especially in moments of frustration or tension within their classroom. “BADGER” mediation is named in the hope that mediators using the framework will adopt the qualities of an actual badger—a persistent, optimistic animal that works tirelessly towards achieving its goals.³⁸ Badgers are not easily unsettled, they are fiercely protective of what is important to them, they are consistent and tenacious.³⁹ In my experience as a law student, I find this image encapsulates the attitudes of my professors nicely.

A. Elements of the BADGER Framework: PRIOR TO, COMMIT, and BADGER

The BADGER framework contains three discrete series of steps and considerations. The first series, PRIOR TO, describes a set of considerations to be made prior to serving as a mediator in any dispute.⁴⁰ Professors can use these same considerations to structure their course and write their syllabus.

through a specific set of considerations, outlined *infra* Section III.A, “Accumulate information” from mediation parties, “Develop a discussion strategy” once they have adequate understanding of party interests and goals, “Generate movement” in the conversation between parties, “Elect separate sessions” where necessary, and finally “Reach closure.” *Id.*

³⁷ While the bare framework will not always naturally result in these kinds of considerations being made, this article seeks to employ it in that manner.

³⁸ STULBERG & LOVE, *supra* note 27, at 50.

³⁹ *Id.*

⁴⁰ *Id.* at 38.

PRIOR TO stands for parties, resources, issues, options for process, rules of behavior, timeframe, and outcomes.⁴¹ Professors, when writing their syllabus, consider the parties (students) in their classroom, and account for the ways in which different student groups will result in inherently different class discussion. They also consider the resources they provide to their students, whether that is a casebook, additional course readings, videos, articles, recorded lectures, or office hours.⁴² They additionally identify the issues they want to cover in class.⁴³ No professor has the time to fully evaluate every aspect of their subject area, so being conscientious about what to discuss and what to leave out and how those decisions relate to the desired outcomes of the course is essential to constructing meaningful lessons.⁴⁴ Professors consider options for process when they think about the ways in which students may engage with ideas, whether through individual work, small group discussion, or whole-class discussion. Rules of behavior gives professors a means of establishing control over their classroom environment and how students interact. It provides them opportunities to create a more equitable classroom by encouraging different modes of classroom behavior.⁴⁵ Professors

⁴¹ *Id.*

⁴² Nancy J. Soonpaa, *The Ins and Outcomes of Writing an Effective Syllabus*, 67 J. LEGAL EDUC. 833, 841 (2018); see Keene & McHahon, *supra* note 3, at 72 (describing how different resources create different classroom dynamics).

⁴³ See Soonpaa, *supra* note 42, at 839 (explaining how choices about outcomes in a course dictate choices about content selection).

⁴⁴ See *id.*

⁴⁵ See *A Conversation with Hassan Batts*, in RE-CENTERING: CULTURE AND KNOWLEDGE IN CONFLICT RESOLUTION AND PRACTICE 215, 219 (Mary Adams Trujillo et al. eds., 2008) (explaining that ground rules can function inequitably in mediation environments); see also Sharon Press & Ellen E. Deason, *Mediation: Embedded Assumptions of Whiteness?*, 22 CARDOZO J. CONFLICT RESOL. 453, 459–61 (2022) (raising concerns regarding how to make ground rules more equitable). When considering rules for engagement in the classroom, professors can be likewise conscientious about how those rules impact students with different cultural expectations.

consider timeframe when they divide up work for the semester. They strive to avoid covering substantially more or substantially less content than their timeframe provides. Finally, professors begin their semester with an eye towards outcomes—what it is they want their students to learn specifically, and how their classroom instruction will move students towards those goals on a daily basis.⁴⁶

The next set of considerations, COMMIT, describes the ideas mediators need to consider before committing to a specific mediation.⁴⁷ In the classroom, the factors are translated as follows:

- Commitment of students to the learning process, generated internally within each student but also within the classroom culture of a particular course.
- Organizational resources are available to enhance student learning.
- Method of instruction chosen for class is appropriate as a means of achieving deep student learning for the topic that day.
- Matters open to student conversation are ripe for discussion, in that students have the requisite background knowledge to meaningfully engage with the topics.
- Incentives exist for students to participate in discussion, in that the discussion is relevant to student learning and will inform students about topics they will be required to understand.
- Talents of the professor are brought to the forefront in the lesson that day so that students have a strong belief in the professor's credibility and ability to help them.⁴⁸

This portion of the framework is the least tangible. Rather than connecting directly to some specific set of choices by the professor, COMMIT helps professors frame their mindset moving into individual lessons. It reminds them of the power they have

⁴⁶ Soonpaa, *supra* note 42, at 837–40.

⁴⁷ STULBERG & LOVE, *supra* note 27, at 46.

⁴⁸ See Micari & Pazos, *supra* note 12, at 42 (“[S]tudents’ academic self-concept [is] strongly correlated to their relationships with faculty, including their sense of professors’ . . . respect for students.”).

over student commitment⁴⁹ and asks them to assure themselves that the resources they have chosen for instruction are connected to their desired outcomes. It asks them to check that they are choosing effective means of discussion and are discussing topics that students are ready and able to learn about. It asks them to evaluate the intrinsic and extrinsic incentives that exist to do well in their class and to participate in conversation and reminds them to approach class with confidence in their efficacy and value as an instructor.⁵⁰

The final series, BADGER itself, describes the process that mediators move through during a mediation. BADGER—standing for begin, accumulate information, develop a discussion strategy, generate movement, elect separate sessions, and reach closure—is a framework the professor uses when designing a lesson.⁵¹ The framework is based fundamentally around asking the right questions to build discussion towards a shared outcome.⁵² In other words, BADGER provides professors with a consistent means of structuring Socratic dialogue in individual daily lessons.

The holistic nature of the framework means that professors can build their entire course around central themes: the importance of student engagement, making decisions with an eye towards outcomes, and expertly navigating conversations in which conflict arises. Although the Socratic dialogue itself will only appear when applying the BADGER framework in a daily lesson, the evaluations that the professor makes during PRIOR TO and COMMIT are what ensure that Socratic dialogue is inclusive and valuable to all students, rather than alienating and dehumanizing.

PRIOR TO asks professors to carefully consider the specific students they have in their room, and structure the class around the needs of those students. COMMIT acts as a kind of safety valve for the decisions made in PRIOR TO, ensuring that

⁴⁹ Michael F. Shaughnessy, *An Interview with Anita Woolfolk: The Educational Psychology of Teacher Efficacy*, 16 EDUC. PSYCH. REV. 153, 154 (2004) (correlating positive student outcomes with a teachers' sense that their capabilities foster student learning and engagement).

⁵⁰ *Id.*

⁵¹ STULBERG & LOVE, *supra* note 27, at 50.

⁵² *See generally id.* at 66–75 (describing methods of questioning that generate productive conversation).

professors have fully considered how their pedagogical choices will impact student engagement and learning. This helps ensure that when professors begin a BADGER conversation, they are doing so with appropriate reasoning and context.

B. Using BADGER Mediation to Reimagine the Socratic Method

The Socratic method, as recommended in this article, and as informed by the BADGER framework, is different in key respects from the Socratic method which has been criticized as a central mechanism of oppression and disenfranchisement in law school.⁵³

At the outset, it is important to note that the Socratic method, although discussed extensively in legal scholarship, has no accepted definition.⁵⁴ Historically, the method is derived from three, “radically incompatible” accounts of Socrates’s life and teachings.⁵⁵ It disappeared for many centuries, reemerging in the United States and cropping up in American law schools in the late nineteenth century.⁵⁶ It was developed in tandem with the case method of instruction, and resulted in a process in which individual students were questioned extensively as to the facts and legal elements of (largely) appellate cases.⁵⁷

The Socratic method in law schools contained little reference to the classic texts from which it sprung.⁵⁸ Rather, the particulars of the method were shaped by educators seeking to address present concerns, rather by an adherence to a well-defined ancient practice.⁵⁹ It became associated with “an aggressive approach to questioning, in which instructors ‘unremittingly’

⁵³ Borman & Haras, *supra* note 13, at 380.

⁵⁴ Jack Schneider, *Remembrance of Things Past: A History of the Socratic Method in the United States*, 43 CURRICULUM INQUIRY 613, 613 (2013).

⁵⁵ *Id.* at 615.

⁵⁶ *Id.* at 625.

⁵⁷ *Id.* at 626.

⁵⁸ *Id.*

⁵⁹ *Id.* at 634.

pushed students to think through cases and their particulars.”⁶⁰ At its most extreme, this form of Socratic questioning was described as a hazing ritual in which professors aimed to “destroy” their students.⁶¹ Even in today’s more evenhanded approaches to the Socratic method, students describe feeling anxious, quizzed, and humiliated when they answer “incorrectly.”⁶² Students also have difficulty understanding how intensively questioning their classmate about an obscure court case is intended to illuminate the many ways they can personally regard a specific legal problem.

Given the murky history of the Socratic method, and that no clear definition of the method has crystallized in more recent years, this article adopts only its most generalized, accepted definition: teaching through asking questions.⁶³ This is in close parallel with the essential structure of BADGER mediation. The BADGER framework engages mediators in a distinct process of leveled questioning that tends to result in discussion and can often result in agreement.⁶⁴ Through this questioning, mediators build a conversation that reveals to parties the contours of the dispute, as well as a path forward.⁶⁵

Professors taking on the role of a facilitative mediator during instruction have the capacity to transform law school pedagogy in two important ways. First, thinking like a facilitative mediator (and thinking of students like mediation parties) emphasizes the importance of context. Parties could not answer

⁶⁰ *Id.* at 627.

⁶¹ *Id.*

⁶² Anna Huggins & Alex Steel, *The Relationship Between Class Participation and Law Students’ Learning, Engagement, and Stress: Do Demographics Matter?*, 46 UNIV. NEW SOUTH WALES L. RSCH. SERIES 1, 1 (2016).

⁶³ Schneider, *supra* note 54, at 624; Borman & Haras, *supra* note 13, at 380 (“The Socratic method uniquely leverages prior knowledge, engages students in real-time practice and feedback, and incorporates testing as a social learning experience that is personally meaningful for students.”).

⁶⁴ As discussed *infra*, Section V, the BADGER mediation framework includes startup questions, open-ended but focused questions, and justification questions, followed by a process of deeper questioning as parties move towards closure.

⁶⁵ STULBERG & LOVE, *supra* note 27, at 91–102.

questions regarding—and thus could not mediate—a dispute they knew very little about. Likewise, students cannot deeply discuss a case when their only exposure to its contours is one, trimmed legal opinion.⁶⁶ Consideration of resources, made explicitly in the PRIOR TO and COMMIT sections, reminds professors that the assigned readings limit the possible ways students may think about, feel about, and discuss the implications of a case.⁶⁷ A greater diversity of resources creates the possibility of better developed interests and perspectives.⁶⁸

This becomes especially important when applying the framework to help students see and understand the law's relationship with race, gender, sex, and class.⁶⁹ By providing students certain resources over others, the professor limits the extent to which students can engage with “the dialectic between social structures, ideologies, and political commitments that

⁶⁶ Keene & McHahon, *supra* note 3, at 78 (“Without training beyond opinions, students would not understand the importance of framing, how it is necessary (but might not be sufficient) to win a case in the face of influences pushing a decision maker to rule against her client.”).

⁶⁷ Akbar, *supra* note 4, at 368 (“In classrooms and court opinions, what goes named and unnamed generates a view of how the world is and how it should be—even how it *could* be.”).

⁶⁸ See Keen & McMahan, *supra* note 3, at 85 (“[I]n reading the briefs and recognizing what when unsaid [in the opinion], a student may realize that they need to look beyond the opinion to determine the complex motivations and interests that really drove a court's decision.”).

⁶⁹ This does not imply that facilitative mediation, or facilitative mediation frameworks are particularly adept at helping mediators or mediation parties address larger power dynamics in mediations as they relate to race, gender, and class. See, e.g., Izumi, *supra* note 24, at 103. As with most processes, frameworks can be employed in racist and anti-racist ways, are vulnerable to the implicit biases of the humans involved in the process, and exist within a larger, capitalistic structure that often discourages social progress. Izumi, *supra* note 24, at 103. However, this essay aims to use the framework in a way that helps students expose, understand, and discuss inequalities in the law.

motivate and constitute the law.”⁷⁰ A contextual method of case instruction which pairs case opinions with other resources such as legal briefs, news articles, or academic papers, provides students with ample opportunity to “think like lawyers” about the many layers of argument that go into forming a finalized legal opinion.⁷¹ The use of structured Socratic questioning as means of eliciting student response helps the professor generate multi-faceted classroom discussion examining those layers. On a societal level, this training of students to understand the law’s constructions of race, gender, and class means that the legal profession can keep pace with greater lay understanding about what justice might look like.⁷² On an individual level, lawyers with a deep understanding of the assumptions and motivations of the law are better lawyers, and they are better able to serve their clients and address injustice.⁷³

Second, thinking like a facilitative mediator whose goal is to “badger” the parties into a purposeful discussion changes the way professors seek to engage with students. The BADGER framework creates a much more humane application of the Socratic method because it encourages professors to use questioning as a means of understanding positions and interests, rather than as a means to test individual students about their understanding of a topic. This version of the method presupposes that students have valuable insight to bring to conversations about the law, even if they lack in-depth legal knowledge.⁷⁴ It builds on

⁷⁰ Akbar, *supra* note 4, at 367.

⁷¹ Keen & McMahon, *supra* note 3, at 82; *see also* Abrams, *supra* note 1, at 568 (explaining how a client-centered method of case instruction softens the teacher-student hierarchy, invites diverse participation, and is more transferable to other law courses and experiences).

⁷² Akbar, *supra* note 4, at 355.

⁷³ *See* Keen & McMahon, *supra* note 3, at 77 (“The traditional case method thus both blinds future lawyers to possible injustices baked into the system and leaves them unequipped to counter those injustices when they occur.”).

⁷⁴ Riskin, *supra* note 20, at 230 (“The facilitative mediator assumes that parties are intelligent, able to work with their counterparts, and capable of understanding their situations better than . . . the mediator.”);

knowledge students already have to construct new modes of understanding.⁷⁵ It also makes every student in the room essential to the discussion. Focusing on the thoughts of one student limits the perspectives others are exposed to and can evaluate. Spreading questions out to a greater number of students increases class engagement, as well as the richness of ideas students can experience.⁷⁶ This process of engagement not only allows for true and lasting learning, it also has prosocial benefits that will serve all students in law school.⁷⁷

C. Using BADGER Mediation to Enhance Student Engagement and Well-Being

Law student well-being is a longstanding concern of the American Bar Association, as well as the legal academy.⁷⁸ Law students experience anxiety and depression at extremely high rates and suffer from steep financial burdens imposed by school.⁷⁹ Substance abuse is rampant in law school and the legal profession.⁸⁰ Although efforts have been made to improve law student well-being, these efforts have fallen short of their goals.⁸¹

Many different approaches are needed to tackle law student well-being, but one avenue of improvement is through a focus on student engagement within the classroom. When people experience complete engagement—cognitive, emotional, and behavioral engagement—they additionally experience a sense of happiness and well-being.⁸² This sense of well-being is generated by the

⁷⁵ Borman & Haras, *supra* note 13, at 367 (“[A]ctivating prior knowledge acts as a hook to learning.”).

⁷⁶ Borman & Haras, *supra* note 13, at 386.

⁷⁷ Borman & Haras, *supra* note 13, at 386.

⁷⁸ Confino, *supra* note 5, at 650.

⁷⁹ *Id.*

⁸⁰ *Id.*

⁸¹ *Id.* at 703.

⁸² Kristy S. Cooper et al., *Reflectiveness, Adaptivity, and Support: How Teacher Agency Promotes Student Engagement*, 123 AM. J. EDUC. 109, 111 (2016). Cognitive engagement refers to being mentally absorbed in a subject. Behavioral engagement is the outward appearance of engagement, such as a student raising their hand or talking in class. Emotional engagement comes from a

feeling of learning and the feeling of being valuable within one's environment.⁸³ When students do not feel that their contributions in class are meaningful or necessary, or worse if they feel their contributions are actually discouraged, they experience corresponding decline in their belief in their ability to be a good law student and ultimately a good lawyer.⁸⁴ Every law student is vulnerable to this decline in self-confidence, but students who embody identities that are typically devalued in the law are at a far greater risk.⁸⁵ If the legal profession is committed to increasing its diversity, then supporting diverse students is imperative.

Viewing classroom discussion as a form of mediated dialogue prioritizes student engagement because it makes student contributions essential to the lesson. Through an unwavering focus on student engagement through mediated dialogue, professors ensure that for some amount of time each week, their students have the opportunity to meaningfully contribute to their environment. This can be key for students who feel isolated, left out, or forgotten about.

While focusing on various viewpoints of the law has the effect of building stronger lawyers who can do more for society, focusing on the individual student expressing those viewpoints has the effect of building a stronger individual, who feels more capable of influencing the world around them. In short, conceptualizing themselves as mediators helps professors address the issues of the "forest" and increase the health of individual "trees."

IV. Applying the BADGER Mediation Framework

The following section applies the BADGER framework to the law school classroom to illuminate the way that the specific elements of the framework coalesce to create an interactive classroom environment. Each heading and subheading mirrors those used in Lela Love and Joseph Stulberg's book and explores each step of the process fully.

unity between cognitive and behavioral engagement. It is a sense of happiness *and* well-being springing from a meaningful focus on the topic.

⁸³ Lain, *supra* note 6, at 787.

⁸⁴ *Id.*

⁸⁵ *Id.*

A. Begin Discussions

1. Set the Procedural Framework

Law professors often do not control the set ups of their rooms, and the lecture style forum classroom is particularly poor for encouraging robust classroom discussion. To the extent that professors can control the layout of their classroom, they can choose setups which encourage discussion such as circles and semi-circles. Even dividing the class in half and having each half face each other may encourage participation across the aisle. This could be particularly effective if students sat on one side or the other based upon an opening question relevant to that day's topic. Unfortunately, most doctrinal courses have been and will continue to be taught in lecture halls,⁸⁶ so often professors must make do.

Other procedural concerns—like that of the mediator—concern food or other external wellness of the participants.⁸⁷ Although professors cannot be expected to bring snacks to class, nearly half of all law students have expressed at least some concern about food security,⁸⁸ so working to keep course costs low and staying updated about what those costs may be is a way to help ensure that well-fed students show up to class.

2. Get Started

For mediators, getting started involves setting the tone of the mediation.⁸⁹ The mediator must decide whether to set a formal or informal tone, is wise to avoid jargon or being overly cumbersome, and must avoid being prejudicial.⁹⁰ For professors, getting started also means setting the tone of a class or of the semester, whether formal or informal. The professor may equally wish to avoid “jargon,” at least until they are assured that students take meaning from important vocabulary. The beginning of class can be quick, clear and establish an initial roadmap for the

⁸⁶ Abrams, *supra* note 1, at 563.

⁸⁷ STULBERG & LOVE, *supra* note 27, at 53.

⁸⁸ IND. UNIV. CTR. FOR POSTSECONDARY RSCH., *supra* note 5, at 9.

⁸⁹ STULBERG & LOVE, *supra* note 27, at 59.

⁹⁰ *Id.* at 61.

period.⁹¹ It can orient students to the topic that day and can provide them a mental schema upon which to attach new information.

Getting started can be used as a way of demonstrating an openness to students and student ideas, and the tone and organization of the beginning of the lesson can instill student confidence in the competency of the professor.⁹²

B. Accumulate Information

1. Ask Helpful Questions

As class moves into instruction, questioning begins. Therefore, so does Socratic dialogue.⁹³ As in mediation,⁹⁴ questions get discussion flowing and help the professor understand the students' existing mental schemas. Questions at the beginning of a class that are overly broad or too specific will not establish

⁹¹ Michael Linsin, *How to Use the Preview Strategy to Improve Behavior*, SMART CLASSROOM MGMT., <https://smartclassroommanagement.com/2012/06/23/how-to-use-the-preview-strategy-to-improve-behavior/> (last visited Dec. 8, 2022).

⁹² Micari & Pazos, *supra* note 12, at 42 (citing studies which find “students’ academic self-concept to be strongly related to their relationships with faculty, including their sense of professors’ approachability, accessibility, and respect for students”).

⁹³ This section borrows heavily from Assistant Professor of Law Jamie R. Abrams’ *Reframing the Socratic Method*. Her ‘adaptations’ to the Socratic method focus largely on changing the *kinds* of questions asked, more so than *how* and *to whom* the questions are posed. Abrams, *supra* note 1, at 564-65. Thus, this paper will focus on an appropriate process for questioning, but the substantive questions provided as examples come from Professor Abrams’ framework. *Id.* Her framework (1) consistently positions the client at the center of the Socratic dialogue; (2) asks students to consider the legal research and weight of authority as a precursor to client guidance and case outcomes; and (3) consistently and frequently sensitizes students to skills within the Socratic dialogue. *Id.*

⁹⁴ STULBERG & LOVE, *supra* note 27, at 66.

student background knowledge.⁹⁵ Questions that are directed exclusively to one student can alienate the rest of the class and so do little to foster broad engagement. Professors can instead choose to engage with many students early and often. This can be accomplished by asking helpful questions, and gradually increasing the complexity of the questioning as class progresses. The intuition that easy questions must be asked before people are willing or able to answer difficult ones is excellently captured by The Middle Voice's questioning framework.

a. Startup Questions

Mediators find questions that begin with what, who, when, and where are "particularly effective start-up questions."⁹⁶ These questions should be easy for the party to answer because the party knows the information to share.⁹⁷ Facts of a case can normally be gleaned within the first few paragraphs of the case text and are easily located online. Therefore, students are likely to feel comfortable engaging in these early questions.

Consider the following example from a Torts class. Review the accompanying footnotes to understand the pedagogical decisions behind the interaction.⁹⁸

Professor: Alright, John, who⁹⁹ was the plaintiff in this case?

John: Uh, Palsgraf I think.

Professor: Yes, Palsgraf.¹⁰⁰ Anna, did you catch Palsgraf's first name?¹⁰¹

⁹⁵ Douglas K. Newell, *Ten Survival Suggestions for Rookie Law Teachers*, 33(4) J. OF LEGAL EDUC. 693, 699 (1983).

⁹⁶ STULBERG & LOVE, *supra* note 27, at 66.

⁹⁷ *Id.*

⁹⁸ This interaction is using the client-centered framework presented by Professor Abrams in *Reframing the Socratic Method*, *supra* note 1.

⁹⁹ Notice the inclusion of "who" and "what" questions in the following exchange.

¹⁰⁰ Notice the way in which the professor confirms some element of every student answer, even when, as with Myranda's answer *infra*, the response is technically wrong, or, as with John's answer, the response is incomplete. The professor acknowledges how the

Anna: Helen.

Professor: Perfect, Helen Palsgraf is our plaintiff, so she's our client for today. Alright, Andrew, what happened to our client?

Andrew: Ms. Palsgraf was on a train platform when a man dropped a box of dynamite when he was getting onto a train, and she got hurt in the explosion.

Professor: Yes, a man did drop a box of dynamite, and she did get hurt. Stacy, can you clarify a little more?¹⁰² How did Helen get hurt?

Stacy: Well, the explosion didn't hurt her exactly. But the explosion knocked over a scale and that fell on her, and she was hurt pretty badly. There were some lasting effects.¹⁰³

Professor: Perfect, so we know Helen Palsgraf was on a train platform when a box of dynamite was dropped by another passenger getting on a train. We also know that she got hurt because the explosion caused scales to fall on her. Okay, why was the package of dynamite dropped in the first place? Kevin?

Kevin: I'm not sure.

Professor: No problem, we'll come back to you Kevin.¹⁰⁴ Ryan?

answer may have been arrived at, but then continues toward building a class understanding of the case.

¹⁰¹ Notice the careful phrasing of this response. It provides Anna an opportunity to help her classmate, but it does not belittle John for not knowing. "Did you catch" implies that it is a fact easily missed, but the continued questioning regarding Ms. Palsgraf's full name centers the importance of her as a client.

¹⁰² Notice that the professor asks for student clarification, rather than clarifying themselves.

¹⁰³ Notice how the professor reframes this answer to center the important parts. At this point in the discussion, the professor does not see the need to center the exact nature and extent of the plaintiff's injuries, and so leaves that detail out when reframing.

¹⁰⁴ The professor at this stage of the process prioritizes conversational momentum over encouraging students to think

Ryan: The railroad employees were trying to help the passenger get on the train before it left, and they pushed him, so he dropped the package on the tracks.

Professor: Exactly. So a man was getting on the train, he was pushed by railroad employees who were trying to help him board. This caused him to drop the package of dynamite he was carrying, and when it exploded it caused a scale to fall on our client. So our client wants compensation for her injuries. Who does she want to sue? Myranda?

Myranda: I guess she probably would sue the guy who was holding the package.¹⁰⁵

Professor: That's true, he would have been a good party to bring a claim against. But our client can't find him, and she doesn't know who he is. But she wants compensation and there is another party she could sue instead. Leon what do you think? Who else could she bring a claim against?

These questions serve a variety of functions. They establish a class understanding of the case; they serve as a formative assessment for students who answer the questions; they provide an opportunity for numerous students to feel a sense of success early on in the course; they create a classroom culture of participation; they provide the professor with information about existing mental schemas students have. The feeling of success and community that can be built during startup questions is essential to the underlying goal of promoting student engagement and well-being. It is an opportunity to situate students as equal, independently valuable, and valued. This lays the foundation for more difficult conversations that are likely to take place.

more deeply when they give answers like this one. This would look somewhat different later in the process.

¹⁰⁵ In this two or three-minute interaction, the professor engages with over 10% of a sixty-student class and alternates calling on male and female students. Also notice the way in which the discussion is teeing up the more difficult legal concept at issue in this case—proximate cause.

b. Open-Ended but Focused Questions

Just like in mediations, open-ended but focused questions in the law school classroom “invite persons to answer in their own words but they target the subject matter.” Consider the following example of this style of questioning from a Constitutional law class. Review the accompanying footnotes to understand the pedagogical decisions behind the interaction.

Professor: Okay, so we’ve established that our client sells lottery tickets, and that the federal government just passed a regulation to prevent our client from doing that. We also know that our client wants to challenge the federal government’s ability to pass that regulation as being an over extension of the commerce power. So, our client has found a lawyer. What precedent would the lawyer have found had she researched the issue after the lawyer was retained?¹⁰⁶

Hillary: (Raised hand)¹⁰⁷ Well, the lawyer would have found *Gibbons v. Ogden*, which doesn’t look so good for our client.

Professor: Why’s that?¹⁰⁸

Hillary: If I remember correctly, that case says that the commerce power is super expansive—that the

¹⁰⁶ This interaction is using the client-centered framework presented by Professor Abrams in *Reframing the Socratic Method*, *supra* note 1. This question was provided by that framework.

¹⁰⁷ As questions get more complicated, professors may stop cold-calling and rely on the classroom culture of participation that they build throughout the semester. They may ask for multiple student perspectives on the same question or may ask students to fill in any gaps their peers may not have mentioned or considered. The Mediator-Professor is willing to accept even short or unsure answers and encourage students to build upon each other. All of this is done with the aim of elevating student voices and ensuring that a variety of student perspectives are shared and validated.

¹⁰⁸ Notice how the professor encourages the student to explain more about their answer to understand where the answer is coming from—whether it is an understanding of the case or some other information the student is aware of.

federal government can regulate what they want basically.

Professor: That's true! But let's be more specific about the language. Can anyone flip back and find exactly what Gibbons says about the commerce power?¹⁰⁹

Jeff: Yeah, I found it. It says that the commerce power "is complete in itself, may be exercised to its utmost extent, and acknowledges no limitations other than are prescribed in the Constitution."¹¹⁰

Professor: Yes. Acknowledges no limitations other than are prescribed in the Constitution. Okay so what is a place in the Constitution that might limit the power of the federal government over the states?

Open-ended but focused questions are not necessarily the core of class discussion going forward, but they continue to build a foundation of trust and community within the classroom.

c. Justification Questions

Succinctly, justification questions are why questions.¹¹¹ For a law school classroom, these questions might look like "why did the court side with or against the plaintiff?"¹¹² or "why did the court decline to decide the question?" Just like in mediation, these questions elicit substantive and perceptual answers which each serve important functions in the classroom. A substantive response "displays a [student's] rational justification" for believing an answer to be true.¹¹³ A perceptual response forces a student to

¹⁰⁹ Now that the professor understands the source of the student answer, notice how the professor shifts the conversation back to the concrete legal text and away from the student's less specific description.

¹¹⁰ Notice the way that encouraging students to quote the text connects student's own reasoning with the language of the legal document, much like they will be encouraged to do in legal practice.

¹¹¹ STULBERG & LOVE, *supra* note 27, at 67.

¹¹² Abrams, *supra* note 1, at 569.

¹¹³ See STULBERG & LOVE, *supra* note 27, at 68.

reveal whether their justification for an answer has more to do with their background knowledge or values than with the legal issues at stake in the case.¹¹⁴

Consider the following example of this style of questioning from a Criminal Law class. Review the accompanying footnotes to understand the pedagogical decisions behind the interaction.

Professor: Okay, so we know a lot about our client now, thanks to your peers. We know our client is a Black man convicted of armed robbery and the murder of a white policeman. We know that he was sentenced to death by a Georgia trial court, and that sentence was upheld by the appellate court and the Georgia Supreme Court. We also know that he has petitioned the United States Supreme Court to hear his case, and that's when we got added as lawyers. Why did he petition the Supreme Court to hear his case? Isn't he guilty?

Carmen: Yeah he was found guilty of murder. But he doesn't want the death penalty. He is saying that the way the death penalty is administered in Georgia violates the eighth and fourteenth amendments.

Professor: Perfect. Someone add to that. Why does he think the administration of the death penalty in Georgia is unconstitutional?

Stuart: He thinks that the state killing people is wrong, even if they committed murder.¹¹⁵

Professor: So, that's good. That might be what our client is ultimately trying to argue. But he is introducing evidence to support the argument that the state shouldn't kill him. What does he argue? What evidence does he want to introduce? Haley?

Haley:¹¹⁶ (Raised hand) He uses this study. . . I forget the name of it. But he uses a study to show

¹¹⁴ *Id.*

¹¹⁵ Notice how this answer, although technically incorrect, provides an opportunity for discussion about the criminal legal topic at issue—what kinds of evidence can be used to support the *interest* in eliminating the death penalty. See how the professor transitions the discussion back to this topic in the next line.

that whether someone is sentenced to death in Georgia has to do with the race of the victim, and also the race of the perpetrator. He's using the study to show that the death penalty in Georgia is racially discriminatory.

Professor: Exactly. The Baldus study. It's a statistical analysis that he wants to use to show the court that the equal protection clause has been violated.

Startup questions, open-ended but focused questions, and justification questions are designed to get the ball rolling and to get as many students involved as possible. Using this method helps ensure that twenty minutes into a lesson, a substantial number of students have engaged with the material. Without this initial engagement, more difficult conversations that must take place later in the lesson will stall out. Giving students this early opportunity to experience a sense of success and mastery will not only inspire a feeling of mental well-being, it is also critical for student learning.

2. Support Conversation

Mediators, like professors, support conversation through their nonverbal communication and through verbal reinforcement and clarification¹¹⁷ to “encourage disclosure and further

¹¹⁶ Notice that the professor continues to distribute these questions throughout the classroom, engaging as many students as possible. Remember that justification questions are introductory to the substantive conversation which will ultimately dominate class.

¹¹⁷ Verbal reinforcement and clarification often takes the form of reframing and summarizing. DWIGHT GOLANN & JAY FOLBERG, *MEDIATION: THE ROLES OF ADVOCATE AND NEUTRAL* 163 (Vicki Been et al. eds., 2d ed. 2011) (“Helping disputants to reach agreement often requires finding a way to modify their perspective, or frames, on a controversy”); James R. Beattie, Jr., *Socratic Ignorance: Once More into the Cave*, 105 W. VA. L. REV. 471, 476 (“If teaching is viewed as a process of eliciting information from students, information that will eventually lead to the answers we are looking for, then plainly we must pay close attention to what our student is saying.”).

communication.”¹¹⁸ Part of this process involves getting parties to care about what the other side is saying.¹¹⁹ To get law students to care about what other law students are saying, the professors can “seek[] to ensure [they] understand the [students’] communications” without criticizing or disparaging them.¹²⁰ In summarizing and reframing each student’s response before moving on to the next student, professors help answers flow together, making each response a meaningful part of the conversation.¹²¹ The professor also demonstrates care and attention for the student, which directly contributes to student well-being.¹²²

3. Mine the Conversation for Gold

Just like the mediator, professors can identify and emphasize “what elements of the conversation will turn two

¹¹⁸ STULBERG & LOVE, *supra* note 27, at 70.

¹¹⁹ LYNN DURYEE & MATT WHITE, *MASTERING MEDIATION* 232 (Jo A. Darden ed., 2012) (“The secret to maintaining passion and enthusiasm is to cultivate curiosity.”). This is true in the mediation context as well as the classroom, and is equally true for mediator, professor, and student. The degree to which any party is curious about the interaction is directly correlated to their engagement with it. Cultivating curiosity means making the interactions between professor and student relevant to the class as a whole through reframing and connecting.

¹²⁰ See Micari & Pazos, *supra* note 12, at 45 (“[T]here is often a tendency for faculty to assume that talent and hard work alone will get students through the course, when in reality many other factors—including their own behavior towards students—can play important roles.”).

¹²¹ KEN BRYANT & DANA L. CURTIS, *REFRAMING* (2004), *reprinted in* *MEDIATION: THE ROLES OF ADVOCATE AND NEUTRAL* 163, 163 (Vicki Been et al. eds., 2011) (“Your goal is to accurately reflect the message sent by the speaker, while simultaneously molding the statement into an *aid for easier communication*”) (emphasis added).

¹²² Micari & Pazos, *supra* note 12, at 41 (“The relationship between college students and their teachers has been shown repeatedly to have an impact on the quality of the students’ experiences and learning.”).

monologues into a dialogue.”¹²³ This process can be especially valuable for professors who are concerned that allowing student ideas dominate the classroom may result in a poor understanding of the law. By mining student responses for “gold” and plucking those gold nuggets from the conversation to emphasize for the class, the professor has control over where the conversation goes but does not dominate the conversation.¹²⁴

C. Develop the Discussion Strategy

1. Identify and frame the “Issues”

As professors listen to students talk, they next “distill a series of negotiating issues.”¹²⁵ In the classroom, “negotiating issues” are those legal topics which most require analysis and understanding. These issues have been distilled from the opening conversation. Consider again how the conversation from the Torts class above can move from teeing up the facts of the case into a lengthier debate about proximate cause—the important legal idea that is the reason for studying the case in the first place. The discussion of the case from the client’s perspective provides a framework upon which students can attach their understanding of proximate cause.

Framing of the “issues” for discussion can be an important moment for anti-racist work in both mediations and the classroom.¹²⁶ In mediations, which issues are considered relevant enough to be discussed can be influenced by the implicit biases of the mediator.¹²⁷ Like the mediator, the professor is cognizant of how emphasizing certain aspects of a case or concept over others

¹²³ STULBERG & LOVE, *supra* note 27, at 72.

¹²⁴ See generally Julie A. Oseid, *Talk Less, Smile More*, 68(1) J. OF LEGAL EDUC. 176, 177–78 (2018). After losing her voice during an illness, Professor Oseid was forced to confront the fact she spoke in class almost twice as much as she thought she did. When she stopped lecturing at all, her class “generated one of the richest conversations of the semester.”

¹²⁵ STULBERG & LOVE, *supra* note 27, at 78.

¹²⁶ Press & Deason, *supra* note 45, at 466.

¹²⁷ *Id.* at 467.

may contribute to upholding or dismantling the structure of racism, sexism, or classism in America.¹²⁸

2. Develop an Agenda

Breaking down the “issues” that will be discussed in class explicitly provides a roadmap for students to use as they continue to attach new information to their mental schemas.¹²⁹ It also gives students a strong sense of efficacy over their own education to see that the issues they raised at the beginning of class are now being used to deepen their understanding of the topic.

D. Generate Movement

Just as the mediator must “manage the process and chair the discussions” but must not “do so in a lockstep manner, constricted by self-imposed blinders”¹³⁰ a law professor embodying the work of a facilitative mediator is flexible and adaptable during class discussion.

Two situations are the bane of the educator’s existence: silence stemming from students not understanding, and silence stemming from student discomfort with the subject matter. In both of these scenarios, it is extremely tempting to charge ahead through a lecture format, or to ask students questions only to immediately correct them. But neither of these solutions generates movement.¹³¹ It shifts the spotlight back onto the professor and away from student learning.

Sometimes, students just do not feel they can answer the question being posed. When this happens, professors turn to their toolkit to find creative ways to generate movement, rather than plowing through the lesson, leaving students behind in the process.

1. Information

Stulberg and Love point out, “People often change their mind with new information. A mediator is interested in two things:

¹²⁸ See generally *id.*

¹²⁹ Linsin, *supra* note 91.

¹³⁰ STULBERG & LOVE, *supra* note 27, at 32.

¹³¹ Beattie, *supra* note 117, at 479.

what people know and what they don't."¹³² The mediator "uses both dimensions to move parties toward an agreement."¹³³ Professors likewise use the things students do and do not know to move students towards understanding. Thus, if students get stuck, professors tap back into the goldmine that they cracked open at the beginning of class. Starting with what students understood about the case, the professor can reemphasize key elements that might guide students to an answer.¹³⁴

Providing a variety of information that students can use to gain understanding of a topic increases student engagement and can increase a professor's sense of efficacy and satisfaction with the course. A properly invigorated class discussion steers the professor and students away from the classroom equivalent of an impasse.

2. Perspective

Another way to generate movement in mediation is by focusing on party perspectives.¹³⁵ Whereas a focus on perspective is valuable to mediation parties who have reached an impasse due to disagreement, focusing on student perspective in the law school classroom is valuable to generate conversation when discussion has stalled out because of boredom, unpreparedness, or confusion, as well as during a moment of outright disagreement.

For example, allowing for choice in instruction may be as helpful in moving students towards discussion as it is in mediation.¹³⁶ This might look like questions such as, "would we like to keep discussing this topic or would we like to move on?" or "would you like a moment to read the paragraph on page 254 explaining the court's reasoning, or can someone provide a summary now?" Questions like this may cause students to express the reason they are not participating. A student, in response to the first question may offer "I would like to move on. I think I understand this topic." Without this response, the professor may be

¹³² STULBERG & LOVE, *supra* note 27, at 93.

¹³³ *Id.*

¹³⁴ See discussion *supra* note 26, for a list of specific strategies.

¹³⁵ STULBERG & LOVE, *supra* note 27, at 95.

¹³⁶ *Id.*

forced to inaccurately speculate about why students are not participating, at the expense of student engagement.

Additionally, citing examples with which people can identify not only helps move the conversation forward, it also provides an opportunity for professors to involve students who may otherwise feel left out of the conversation.¹³⁷ Vivid examples, whether provided by the professor or (even better) solicited from students, help place the law in a more concrete framework and more easily allows the new information to attach to existing mental schemas.¹³⁸ Letting silence ring is also a classic strategy in teaching pedagogy as well as mediation.¹³⁹ Simply giving students a chance to think before moving on to the next question may generate responses that would otherwise be missed.

Focusing on perspectives may also be especially valuable in helping integrate anti-racist practices into instruction. On one hand, being mindful of (and directly addressing) perspectives that are informed by implicit bias or a misunderstanding of the way systems of oppression operate is essential to create a feeling of psychological safety within the classroom for all students.¹⁴⁰ A feeling of psychological safety is critical for student engagement, since feeling unsafe hinders many of the higher-order thinking processes necessary for class discussion and generally discourages students from participating.¹⁴¹ On the other hand, finding opportunity to place emphasis on perspectives which are traditionally underrepresented, or which are underrepresented in the classroom, helps all students feel involved in and necessary to the success of the conversation.¹⁴²

E. Elect “Separate Sessions”

In *The Middle Voice*, electing separate sessions refers to the choice as to whether to caucus with parties individually.¹⁴³ In a

¹³⁷ Beattie, *supra* note 117, at 485.

¹³⁸ Newell, *supra* note 95, at 697.

¹³⁹ See Oseid, *supra* note 124, at 183 (explaining how professorial silence encouraged student participation).

¹⁴⁰ Lain, *supra* note 6, at 783.

¹⁴¹ *Id.* at 784.

¹⁴² *Id.* at 796.

¹⁴³ STULBERG & LOVE, *supra* note 27, at 103.

first-year doctrinal course, electing “separate sessions” refers to spontaneously or premeditatedly asking students to work with one another in small groups rather than with the professor in a large setting. Stulberg and Loves’ framework encourages mediators to use caucus only when it is necessary,¹⁴⁴ while some mediation frameworks include caucus as a necessary procedural step. Professors can be similarly flexible in their approaches as to when students should work together.¹⁴⁵

1. When and Why

Stulberg and Love advocate for the use of caucus because “people have a psychological need for a safety zone during discussions. They need time to consider ideas, evaluate what others have said, and brainstorm solutions without feeling pressured into making an immediate response.”¹⁴⁶ The same is true in the law school classroom. Many times, students are hesitant to share in front of the whole class because they are not confident that they have integrated new information correctly into their existing mental schemas (more colloquially—they do not want to “look stupid.”)¹⁴⁷ Some time to brainstorm with their peers and double check their thinking provides a psychological safety zone.

Group work also provides opportunity for the professor to meet with smaller groups of students at a time and ask more probing questions in a smaller setting. Spotlighting one student in a group of three is much less problematic than in group of sixty. Placing students in small groups therefore affords the opportunity for professors to get to know their students and address student learning on a more individual level.

¹⁴⁴ *Id.*

¹⁴⁵ If professors encourage the practice only once or twice a semester, it is unlikely to have as many positive effects as if it is employed more regularly. Procedures which are completely unexpected and out of the norm are likely to be approached with much more hesitancy, caution, and suspicion than procedures which are customary.

¹⁴⁶ STULBERG & LOVE, *supra* note 27, at 104.

¹⁴⁷ Newell, *supra* note 95, at 168.

Group work may also be a mechanism for community building.¹⁴⁸ Professors may choose to allow students to group randomly and encourage students to change groups throughout the semester. This increases student exposure to diverse ideas and helps students cultivate skills necessary for working in team environments in their careers.¹⁴⁹ It is also likely to encourage participation in whole class discussion, since students are more likely to feel comfortable talking in front of a group of people they know well.¹⁵⁰ Alternatively, professors may assign groups which remain permanent throughout the semester. This encourages students to rely on each other and work with one another in a sustained fashion, also developing skills important in their careers.¹⁵¹

Regardless of the choices surrounding the role of group work in the class overall, students working with each other fosters a sense of community which speaks directly to student well-being.¹⁵² Especially for first year law students, who are in courses with the same set of peers for the entire year, allowing students to get to know each other in both social and professional ways is highly beneficial.¹⁵³

F. Reach Closure

The final step of the BADGER process requires that parties “reach closure” in some way, even if not through explicit agreement.

1. Outcomes

The Middle Voice explains that at the end of a mediated discussion, parties should “have a clearer understanding of their situation.”¹⁵⁴ In a mediation, whether parties have a clearer

¹⁴⁸ Jodi S. Balsam, *Teaming Up to Learn in the Doctrinal Classroom*, 68 J. OF L. EDUC. 261, 269 (2019).

¹⁴⁹ *Id.*

¹⁵⁰ Newell, *supra* note 95, at 168.

¹⁵¹ Balsam, *supra* note 148.

¹⁵² *Id.*

¹⁵³ *Id.*

¹⁵⁴ STULBERG & LOVE, *supra* note 27, at 119.

understanding will be evident from interacting with them and asking personalized questions. But in a class of sixty students, it will be less clear whether students have gained a clearer understanding of materials without assessing them in any way.

Assessment is necessary to measure whether student learning is taking place.¹⁵⁵ Assessment can be in the form of in-class questions that take place every day, short multiple-choice quizzes that can be taken in class or online, or in class polls which may serve as a basis for discussion.¹⁵⁶ These assessments should be employed routinely, not only to conform with ABA requirements,¹⁵⁷ but also to help engage students in metacognitive processes in which they assess their own learning.¹⁵⁸

Assessments should not normally be burdensome to professors. While practice essays may have a marked effect on student learning,¹⁵⁹ they do consume a lot of time. Providing practice essays with sample answers is a good way to avoid time-consuming feedback processes. There are additionally many assessment options which do not absorb much time or resources, and which provide myriad educational benefits to students.

Together, this process of leveled questioning, followed by class discussion—whether it be in whole-class or small-group format—is used as a means of fostering student engagement and student learning. Professors, like mediators, can watch their students understand a topic differently, and can provide guidance to students as their understanding deepens and grows.

V. Conclusion

¹⁵⁵ See Soonpaa, *supra* note 42, at 842.

¹⁵⁶ *Id.*

¹⁵⁷ AM. BAR ASS'N, STANDARDS AND RULES OF PROCEDURE FOR APPROVAL OF LAW SCHOOLS 2022-2023 1 (2022).

¹⁵⁸ Jennifer A. Gundlach & Jessica R. Santangelo, *Teaching and Assessing Metacognition in Law School*, 69 J. OF LEGAL EDUC. 156, 157 (2019) (“In learning, as in professional practice, ‘content and procedural knowledge alone are insufficient for persistent and self-directed growth’ of expertise; ‘knowledge of *how* one learns content or practices a procedure’ is critical.”).

¹⁵⁹ *Id.* at 158.

The BADGER framework allows professors to customize the process for individual classes with varying dynamics, while also providing a grounding framework for professors to rely on when creating instruction over the course or a semester or over the course of years. The framework taps into intuitive understandings of how human beings engage and learn, and how they can go about discussing difficult topics. These intuitions are extremely valuable to the work of a law professor, who is tasked with encouraging students of widely variant backgrounds and experiences to think more deeply and meaningfully about the law. Through the use of BADGER mediation techniques, professors center student engagement with complex ideas while also cementing the need for the professor in the room. Professors guide and structure in-depth conversations by providing valuable resources and asking valuable questions. The resulting classroom dynamic is one of shared power and shared understanding, tolerance for the ideas of others, and student confidence in their ability to succeed as lawyers. This is the classroom dynamic that will keep law students healthy and will keep legal profession relevant for years to come.

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