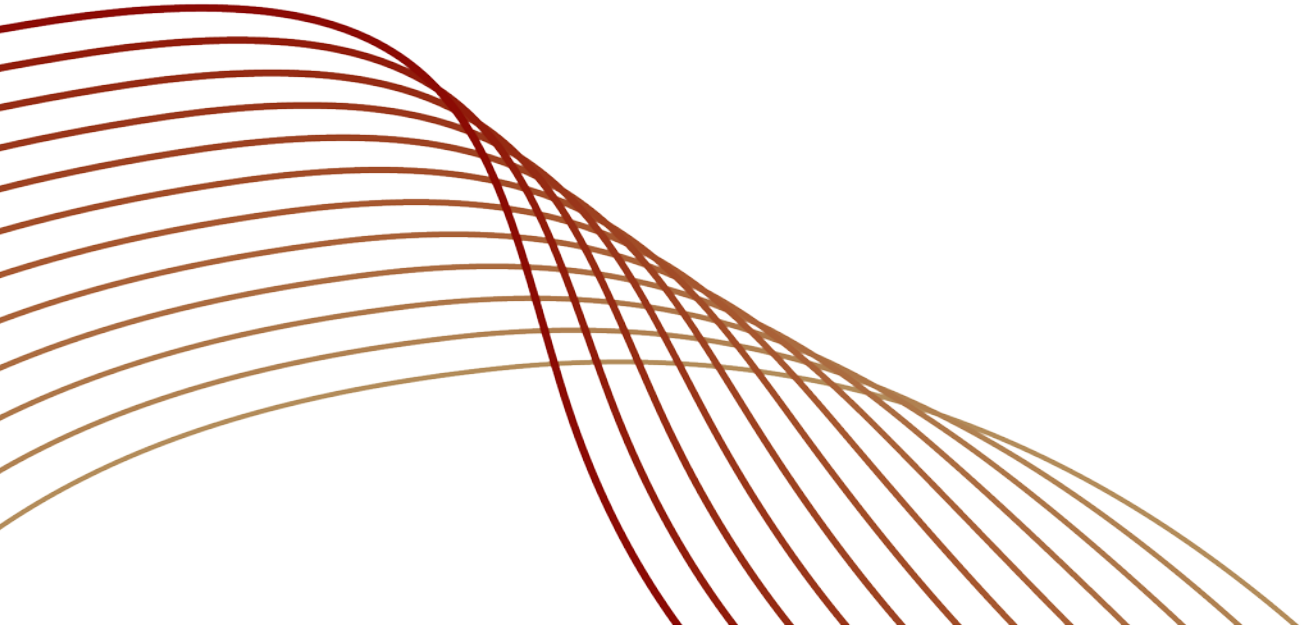
EARLY CASE ASSESSMENT

An Integral Part of any Early Dispute Resolution Program

Kurt W. Hansson, Esq.



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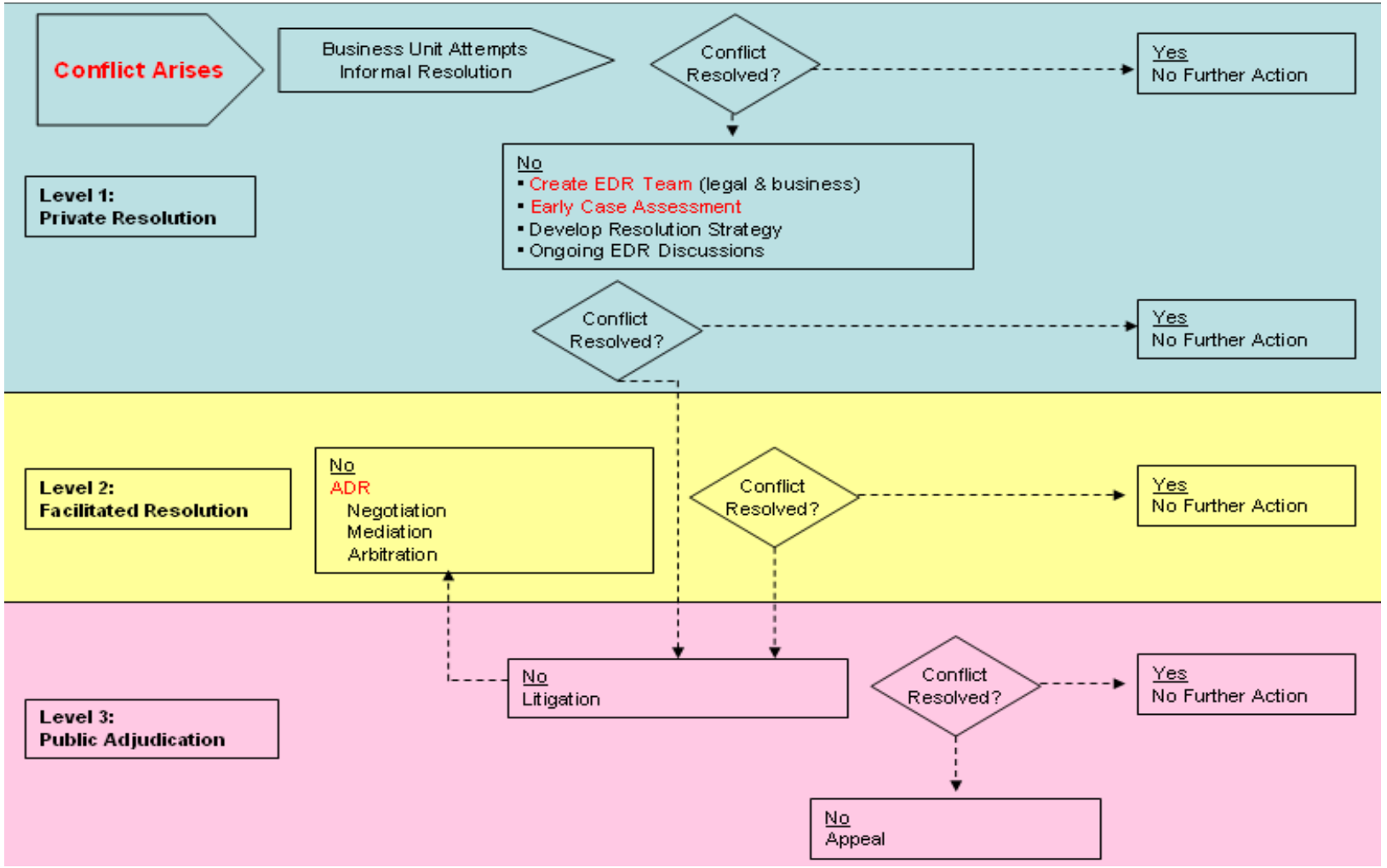
PAUL HASTINGS EXPERIENCE WITH EDR/ECA

- Assisted GE in developing award winning ECA program that has been in existence over 10 years
- Assisted in developing similar programs for JPMorgan Chase, Schering Plough, LexisNexis, Samsung and other corporations
- Trained in-house legal departments to conduct ECAs
- Programs vary, but all reduce money spent on outside counsel leading to quicker and better results for clients

EARLY DISPUTE RESOLUTION ("EDR") PROCESS



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WHAT IS EDR?

- Disciplined process designed to facilitate best strategic approach to resolving conflicts based on sound understanding of key business and legal issues and risks/benefits to the Company

- **Not** a substitute for litigation counseling

- Executional excellence, not process for process' sake

- Thoughtful resolution, not capitulation

CONFLICT ARISES

- EDR Indications – Conflict Arises
  - The conflict is a threat to existing business relationships
  - The conflict poses a regulatory or financial risk to the business
  - The conflict is a threat to corporate reputation
  - The conflict is part of an emerging pattern
  - Unable to resolve conflict informally, or
  - Conflict may result in litigation

CREATE EDR TEAM

- Business or legal colleague notification to litigation group
  - Counsel performs **preliminary case assessment** (approximately 10 days)
    - Nature of dispute
    - Apparent amount at risk
    - Business and/or regulatory issues
    - Identification of stakeholders and marketplace perception
    - Document retention issues
    - Risk Management notification, if necessary
  - Counsel assembles team, as necessary
    - Business contact
    - Subject matter expertise within business
    - Outside counsel

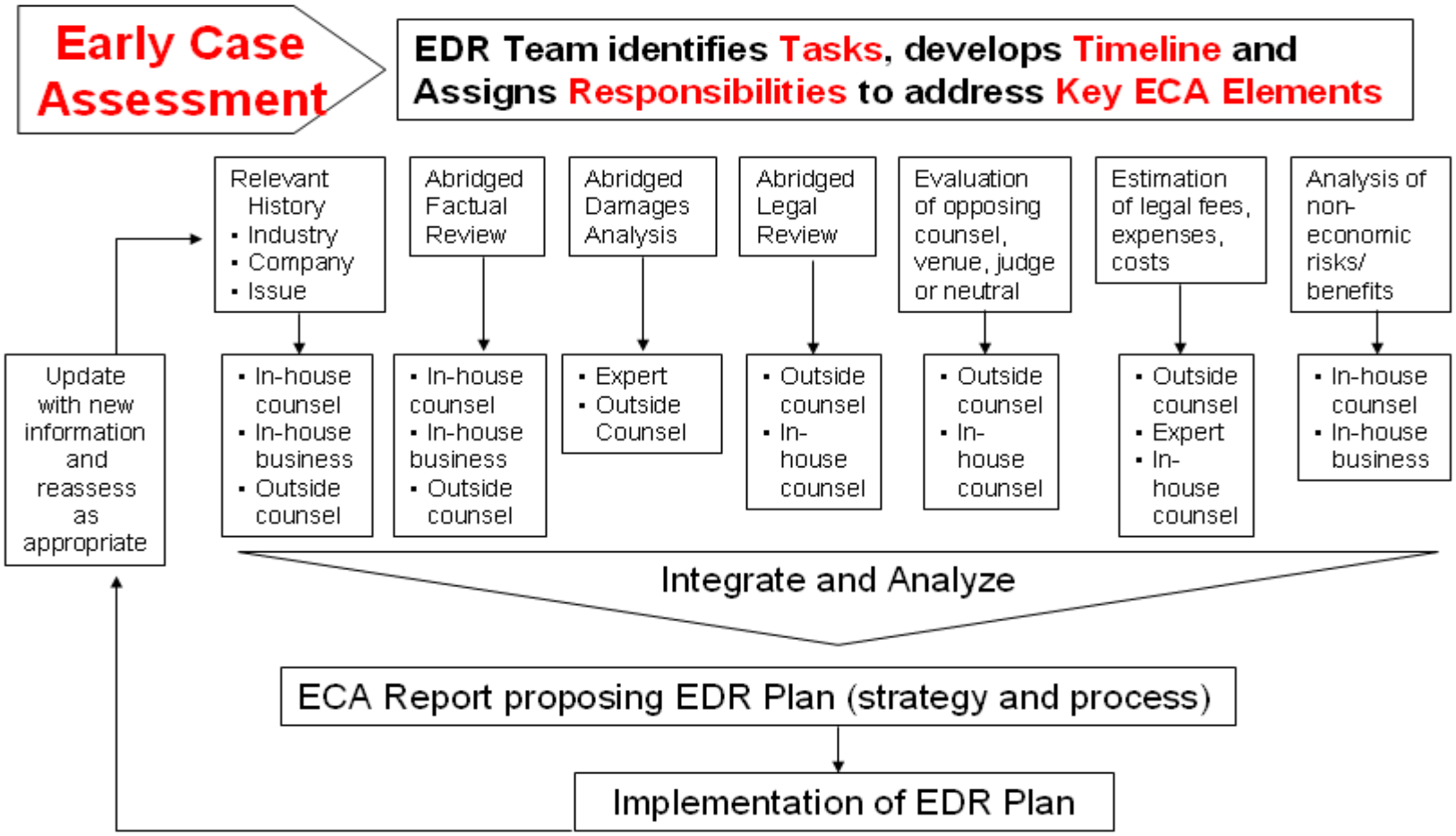
CREATE EDR TEAM (CONTINUED)

- **Perform Early Case Assessment if:**
  - Financial Risk Over $1 Million
  - Major Corporate Reputation Issues
  - Major Precedent Issues
  - Potential Pattern – e.g., Consumer Class Action or Mass Torts
  - Corporate Reserve or Discretion of Litigator

WHAT IS ECA?

- Defined strictly as early case assessment
- Not exactly correct, as really should be early dispute assessment
  - For example, ECAs can be used to review compliance issues or make decisions about whether to file litigation
- ECA should be in writing but report can take many different forms; no one right solution for any company, bank or firm
- Bottom line: brief but thorough analysis at beginning of dispute (within 90 – 120 days) that helps party to assess litigation risk, explore settlement options that are both economic and non-economic, and ultimately develop a targeted litigation strategy if necessary

ECA PROCESS



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KEY ELEMENTS OF ECA

- Preliminary Review and Assessment of Available Facts and Law
  - Interview witnesses and review key documents (do not forget emails, though should not consume process); balancing act depending on size of matter
  - Review underlying history
  - Legal research as necessary
  - Preserve Information
  - Limitation – Do not have other sides documents/emails and have not interviewed their witnesses to determine credibility, etc.
- Damage Assessment (Include Legal Fees and Costs)
  - Surprisingly, most overlooked part of many ECAs
  - Do not be afraid to consult experts to assist in review
  - Look for indemnification/insurance coverage
  - Limitation - Litigation budgets can be difficult to predict at beginning of case

KEY ELEMENTS OF ECA (CONTINUED)

- Forum Issues
  - Assess judge, venue, and opposing counsel
  - If jury, research verdicts in jurisdiction and likely jury charges
  - Local counsel knowledge can be invaluable here
- Non-Economic Factors and Historical Information Regarding Opposing Party
  - Second most overlooked part of most ECAs
  - Other relationships with present adversary (important to explore possible business solutions not necessarily related to dispute)
  - Company reputation and precedent issues
  - Impact on other potential litigation
  - Industry trends

KEY ELEMENTS OF ECA (CONTINUED)

- Assessment of Each Party's Objectives
  - Should not just be "simply win"
  - Prioritize factors such as litigation cost v. precedent v. "copycat" exposure v. regulatory issues v. insurance coverage v. marketplace reputation
- Settlement Range / Non-Monetary Solutions
  - Analysis needs to be focused
  - Don't be afraid to push outside counsel to give specific settlement ranges with rationales (understand though it is an early case assessment)
  - Analyze non-monetary solutions as do not need to wait until mediation to think creatively
- Develop a Preliminary Dispute/Remediation Plan
  - Develop plan before significant expenses incurred
  - Remember mediation and other EDR options
  - Preliminary litigation strategy if no realistic settlement plan

MOST COMMON OBJECTIONS

- No Need to Formalize Process That Already Exists – More Paperwork
  - Many in-house and outside lawyers conduct some form of ECA already but rigor of having to do thorough analysis and make recommendations in writing leads to more critical, focused thinking
  - Informal ECA often ignores damages or non-economic factors; analysis tends to be more superficial
- Just Another Litigation Expense – Not Worth It
  - General Electric has proven that ECA actually leads to costs savings on outside counsel and litigation judgments (i.e., in first few years GE litigation expenses reduced from $120 million to $69 million)
  - Often leads to earlier resolution with less costs
  - Alternative is generally later settlements with greater litigation costs; at minimum more targeted litigation strategy

MOST COMMON OBJECTIONS (CONTINUED)

- Analysis Is Too Preliminary To Be Useful
  - Not true if company follows steps outlined in presentation
  - Spend extra time to really understand damages and non-economic factors which will often drive settlement/litigation strategy
  - Emails are critical but keywords are often necessary
- Not Helpful In Highly Complicated Cases Given Volume of Information
  - Usually most helpful in highly complicated cases
  - Developing litigation strategy even more important when cases are complex

MOST COMMON PROBLEMS WHEN CONDUCTING ECAS

- Damage analysis is superficial or non-existent
- ECA is either too long or lacks executive summary for busy executives – know your audience
- Nothing committed to writing so lose much of the discipline of the process
- Afraid to take position in writing regarding liability, damages or both
- Failure to take into account no review of other's side witnesses or documents; it is an early case assessment
- Fail to update or view ECA as last word on settlement/litigation strategy – consistently use ECA as tool to drive settlement and litigation strategy with appropriate updates
- Failure to work as a team between in-house and outside lawyers

REASONS MORE COMPANIES ARE CONDUCTING ECAS

- Some form of formal program tends to work best
  - Better settlements
  - More opportunity to early on review potential business solutions
  - Refined litigation strategy if necessary
- Reduce fees and expenses for legal departments facing costs pressures from business clients
- Good tool for communicating with internal business clients; helps avoid surprises
  - Can assist in reports to management / reserve analysis
- Part of larger EDR process where early analysis and critical thinking are key

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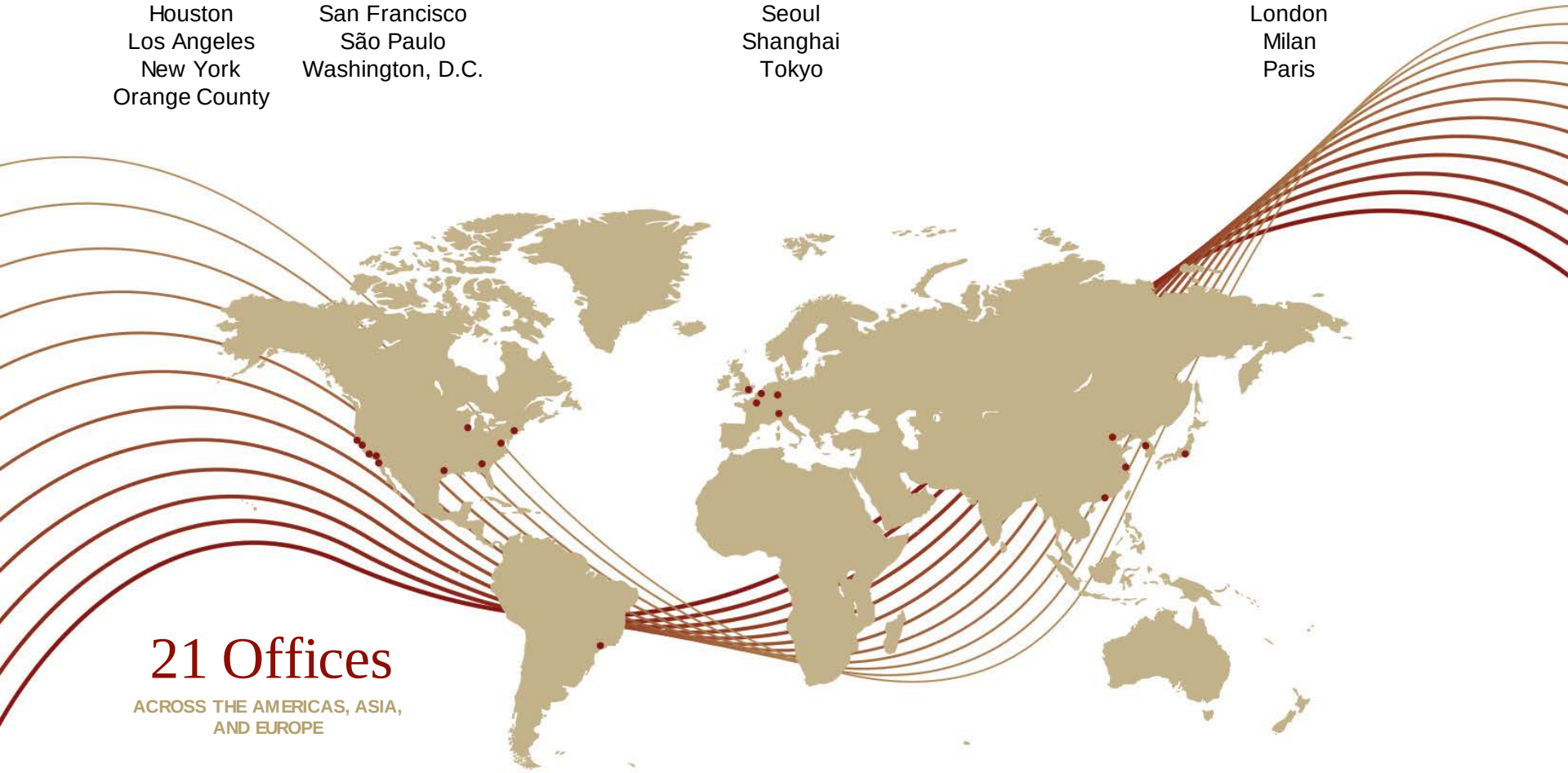

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TO INTEGRATE WITH THE STRATEGIC GOALS OF YOUR BUSINESS

PAUL HASTINGS

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PAUL HASTINGS

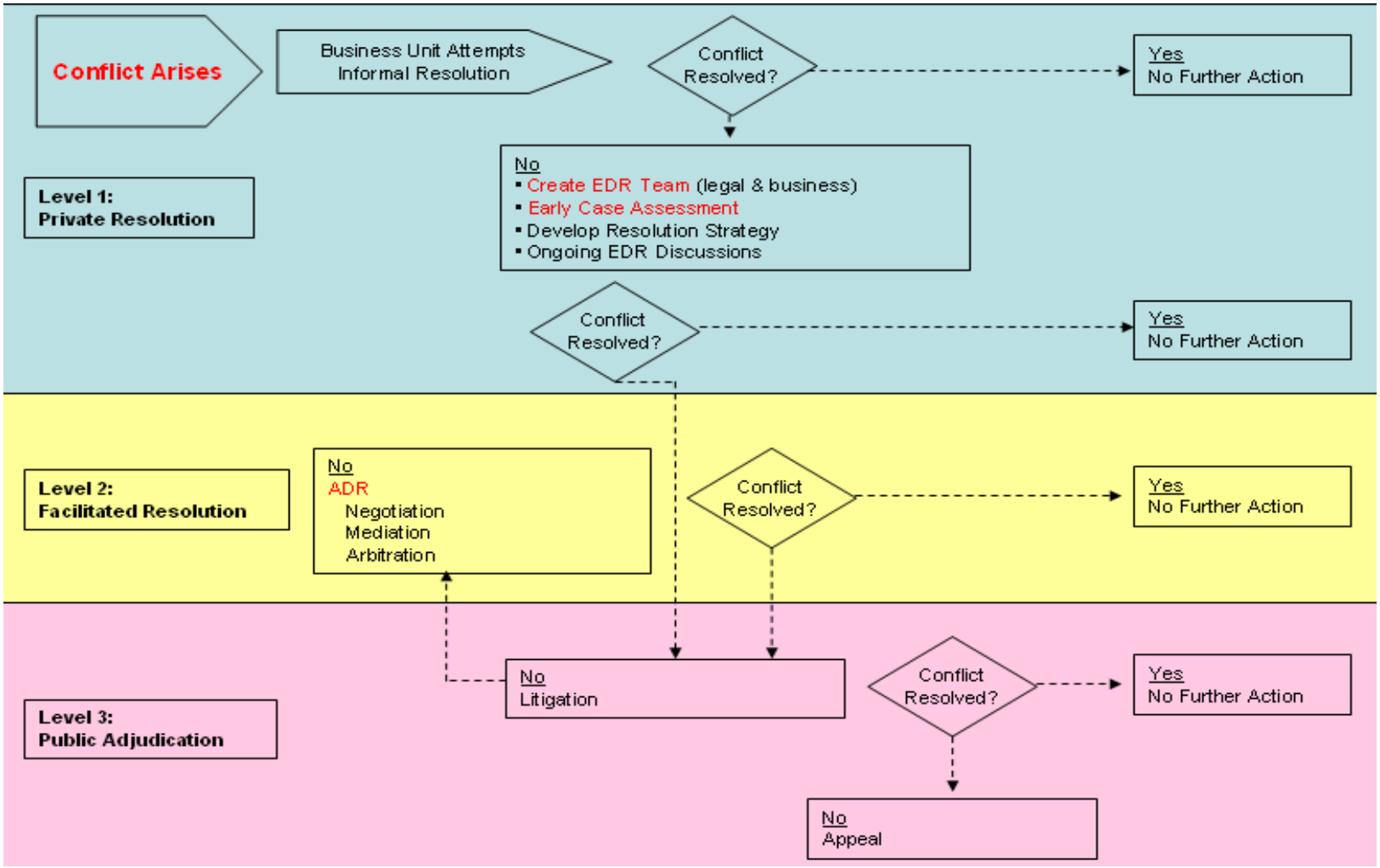
- What is ECA
  - Defined strictly as "early case assessment," but that is a misnomer; really, it is "early dispute assessment."
  - It is a brief but thorough analysis at the beginning of a dispute (within 90-120 days) that helps a party assess litigation risk, explore settlement options that are both economic and non-economic, and develop a target litigation strategy from the outset.
    - This includes a preliminary review and assessment of available facts and law;
    - Damages assessment, including legal fees and costs;
    - Forum and venue issues;
    - Non-economic factors and historical information regarding the opposing party (including our relationships with the adversary and impact on other potential litigation);
    - Assessment of each party's objectives;
    - Settlement range and non-monetary solutions; and
    - Development of a plan and strategy, which may include mediation and/or arbitration.
  - ECA is not a substitute for litigation counseling, but will provide a disciplined process to facilitate the best strategic approach to resolve the conflict based on an understanding of the key business and legal issues and the risks/benefits to the Company.

- Paul Hastings Use of ECA/EDR
  - At Paul Hastings we have formally incorporated ECA/EDR into the litigation department so that every litigation we handle goes through the ECA/ EDR process. Although many lawyers conduct an informal ECA/EDR on their own, we have found that it works better to formalize the process, as the analysis tends to be more thorough, forward thinking, and ultimately, much more helpful to our clients and resolving the dispute favorably. This is especially true for the more complex disputes, as it gives us a head start on digesting complicated issues and understanding the strengths and weaknesses of the case.
  - Our ECA/EDR program has become a selling point for the department, and we are constantly talking to and working with clients such as GE, GSK, JP Morgan, and Samsung, on developing and evolving our ECA/EDR program.

- Flow Charts/Decision Making Process
  - Attached are two flow charts that explain the early dispute resolution and early case assessment process that we have implemented at Paul Hastings.

- Example of Success/Metrics
  - An example of how clients have saved millions from ECA is found in the attached article, where GE was awarded the 2007 Corporate Counsel's "Best Legal Department Award" in large part for its effective and efficient use of ECA, which decreased its litigation costs from $120.5M to $69.3M in three years.

EARLY DISPUTE RESOLUTION ("EDR") PROCESS



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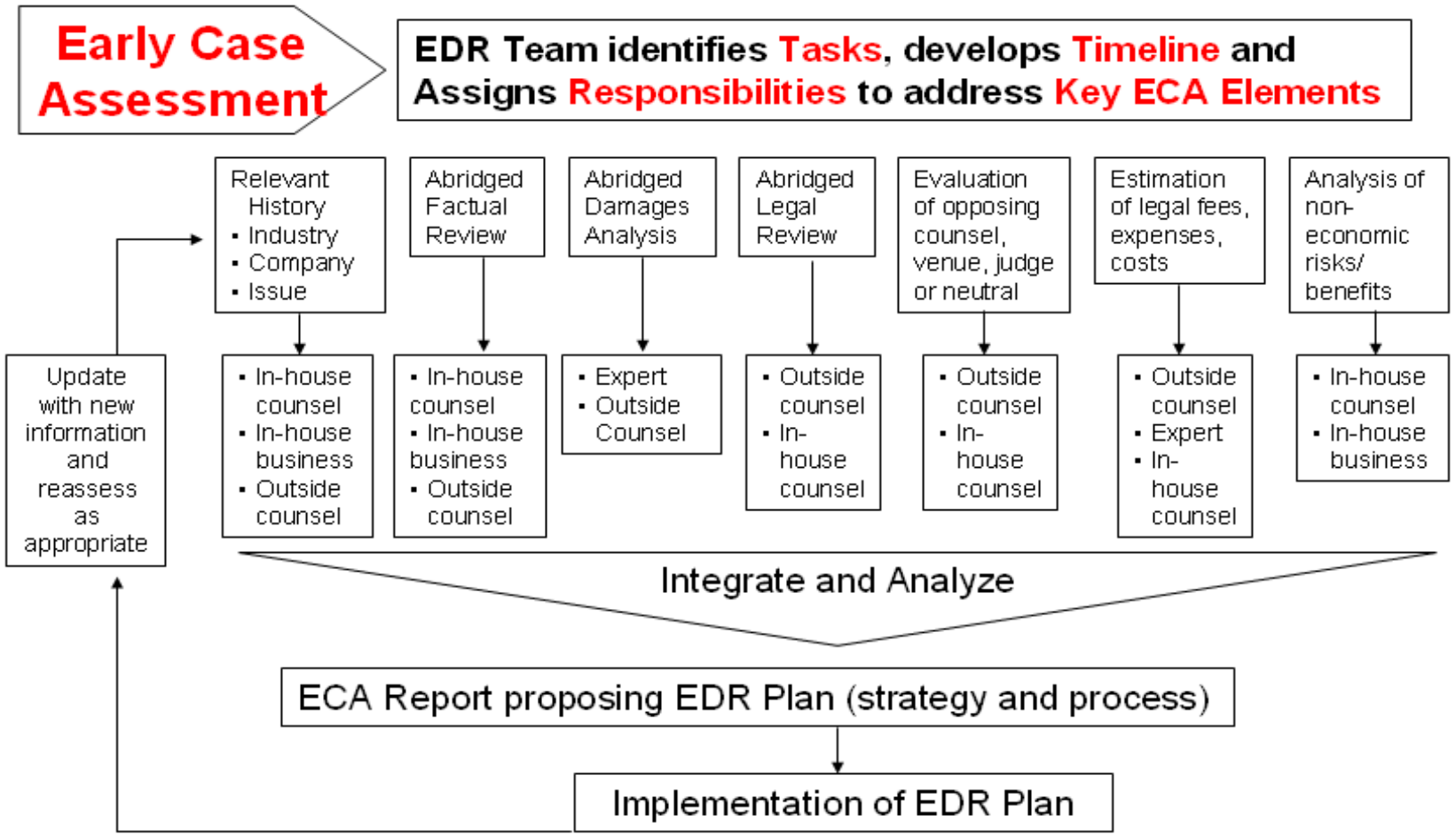
ECA PROCESS



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International Franchise Association
49th Annual Legal Symposium
May 15-17, 2016
JW Marriott
Washington, DC

FASTER, CHEAPER, BETTER:
THE NEW STANDARD FOR DISPUTE RESOLUTION

Peter R. Silverman
Shumaker, Loop & Kendrick, LLP
Toledo, Ohio

Anne S. Jordan
Jordan Associates
Chicago, Illinois

Les Wharton
Coverall North America, Inc.
Deerfield Beach, Florida

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***General Counsel:** The more I consider your idea, the more workable I realize it is…*

** ** **

We three authors are members of the Early Dispute Resolution ("EDR") Task Force of the ABA Section of Dispute Resolution, and we're EDR evangelists. EDR refers to a series of process improvements and tools -- mediation is simply one of those tools -- that can be selectively combined to resolve disputes in their earliest stages, quickly, inexpensively, and fairly. If EDR becomes as widely used as mediation, it will radically alter the way businesses and their counsel approach disputes, and what they spend to resolve them.

To show EDR's promise and prospects, we've decided to test it at the edge. We use the hypothetical situation of a CEO's demanding that her general counsel implement a policy that all business disputes will be resolved in 30 days, a policy many would consider not only unattainable, but counterproductive. Even among the authors there is disagreement about whether and to what extent this could be realistically implemented, but we can't resist a challenge and hope that this will inspire readers to set big goals.

Our paper is in three parts. The first section, written in the format of a series of memoranda between a CEO demanding a 30-day dispute resolution policy and a resistant general counsel, explores whether it is workable and even wise to radically ramp-up expectations for the speed and cost of dispute resolution. The second section describes the processes to consider incorporating into a 30-day resolution policy, and the third makes recommendations as to what an actual policy could be.

I. A 30-DAY DISPUTE RESOLUTION POLICY: WORKABLE AND WISE?

For purposes of our paper's hypothetical, assume we're dealing with a large franchisor with company-owned stores as well as franchisees, where disputes can arise with franchisees, suppliers, employees, customers, builders, and so on. The CEO and her general counsel have the following exchange.

M E M O R A N D U M

From: Susan Jones, CEO
To: Charles Smith, General Counsel
Re: Early Dispute Resolution- *time for disruptive change*

Charlie,

I held your job for a number of years before being promoted to President. One of the biggest things I've had to adjust to in my new role is the dizzying speed of change. We and our competitors are constantly at each other's throats to see who can take market share away from the others by doing faster, cheaper, and better.

Over the last several decades, corporate America has refined its use of commercial arbitration as a cost-effective means of resolving disputes, and has also fully embraced mediation. Nonetheless, resolving disputes still takes too long, costs too much, and is too disruptive to our business. I know firsthand how resistant most litigators are to early settlement. They first want to engage in motion practice and discovery to try to increase their client's leverage. When they finally feel the time is right to talk settlement, months or even years have passed and the money that's been spent could have gone toward settlement instead. Since settlement is all but inevitable -- statistically less than 5% of cases ever go to trial -- it's time to acknowledge that major change is needed.

Here's my challenge to you: I want to try to resolve every dispute in 30 days from when we first learn about it. I'm open to using every tool we have at our disposal to get this done, so tell me the benefits that we'll see and how we can minimize any downside.

I also want to know if any of our disputes stem from business practices that, if changed (and by change I mean doing something differently without increasing our costs or putting us at a competitive disadvantage), would reduce disagreements or potential liabilities before they escalate into litigation. I'll consider an early dispute resolution process even more successful if it involves ways to avoid disputes before they arise.

M E M O R A N D U M

From: Charles Smith, General Counsel
To: Susan Jones, CEO
Re: Early Dispute Resolution- *practicalities – change needs to be sensible*

Susan,

I'm with you: I'd like to improve speed of our dispute resolution and find cost savings across the legal department. But it's unproductive to set an unattainable goal of resolving disputes in 30 days (really 22 business days). Here's why it just won't work:

First, we have only one staff lawyer who manages litigation. To compress the process into 30 days, rather than spread it out over the case's life cycle, will mean that we'll need to increase staffing levels.

Second, our employees will need to search for and provide us with information as soon as we learn of a dispute. Based on our experience, there's no way they'll prioritize our requests just to meet a legal department-mandated deadline. It'll be even more challenging if we need information from our suppliers or service providers.

Third, our outside litigation counsel is from a top firm and handles many complex cases at a time. If we need a TRO or preliminary injunction, they drop everything to handle it, but that's the exception, not the rule. The best outside litigation counsel are simply not set up for an expedited 30-day dispute resolution process.

Fourth, a lot of disputes are complex and take time to resolve. You can't straightjacket them into a 30-day dispute resolution procedure.

Fifth, we have no control over the opposing parties or their counsel. They could exploit a 30-day policy to gain leverage, or just be suspicious of it and refuse to participate.

For all these reasons, it just won't work. But I'm more than happy to get you recommendations on how to tweak our policies and set metrics to resolve disputes quicker and cheaper.

M E M O R A N D U M

From: Susan Jones, CEO
To: Charles Smith, General Counsel
Re: Early Dispute Resolution- *directive for disruptive change*

Charlie,

I'll be blunt: If you can't make it work, I'll find someone who can.

First, the total hours the law department spends on litigation should drop significantly once the backlog of pending cases is cleared. My guess is that we could free up over half the time of your current staff attorney and cut our litigation costs by half in the process.

Second, you're not asking our employees to do anything more than they would otherwise have to do, so at most, it's just that the time frame is compressed. Given the benefits I'm expecting, that's a reasonable concession for them to make. And since they'll generally have had some culpability in causing the dispute, they have to help the law department resolve it, not just make it your problem.

Third, if our current counsel can't handle an expedited process, there's a long line of excellent attorneys who would love to represent us.

Fourth and fifth, while you're right that we can't control the type of disputes that arise, or who the opposing parties or their counsel are, we're not powerless in trying to drive our direction and goals. I need you to tell me how to make our approach most effective over the full range of disputes and regardless of who may be the opposing parties or the counsel representing them.

I realize that to make this work, our franchisees will need to buy into the approach. I have to believe that I can persuade the franchisees to embrace our procedures to resolve disputes quickly and economically, so long as they view the process as fair. They have a long history of supporting changes that reduce their costs and this should be no different. It should also help improve our relationships with franchisees after the dispute is resolved.

I want our litigation team to be as skilled at EDR as we now are in standard litigation. So lay out for me the EDR processes and the best practices in using them as a party and an advocate.

One last point. I intend to sell the whole franchising industry on this approach. So write your report like a formal paper and I'll slap my name on it and publish it and present it at an IFA conference. You should also find speaking and other opportunities to promote the approach. Just make sure I always get credit for the vision.

M E M O R A N D U M

From: Charles Smith, General Counsel
To: Susan Jones, CEO
Re: Early Dispute Resolution- *a proposal for disruptive change*

Susan,

The more I considered your idea, the more excited I became about making it a reality. To implement our initiative, we should formally adopt the 30-day dispute resolution process as a policy; clearly communicate it internally and externally, and include an alternative dispute resolution ("ADR") clause in our franchise agreements and other contracts. We'll also have to identify the best EDR processes to use in the 30 days, and find neutrals and counsel skilled in those EDR techniques.

Section II below reviews different approaches to early dispute resolution. Section III presents the recommended policy.

II. APPROACHES TO EARLY DISPUTE RESOLUTION

Early dispute resolution (EDR) encompasses a number of different processes and tools that, when used in combination, can be more effective than traditional mediation. These are intended to result in the resolution of disputes before parties have spent significant time and money on discovery, motions, and trial. The formal presentation with citations below is ready for you to take public.

A. Early dispute resolution generally

The rationale for EDR is that only a small fraction of cases ever go to trial, making settlement not only desirable but inevitable. Given that reality, parties should approach disputes not with a litigation mindset, but by identifying and using clearly-defined steps at the earliest possible stages of the dispute that will lead to resolution. There's no one-size-fits-all approach, but as a threshold matter, most disputes should be able to be resolved quickly and economically when both parties:

(1) are reasonable;

(2) have skilled, ethical counsel; and

(3) have enough information to:

  (a) understand the merits of each side's position and leverage, and

  (b) make an informed judgment as to the value of each side's case.

I call these the "Driving Principles." Steps one and two of the Driving Principles are entirely dependent on the parties and the counsel they choose. I call step three of

the Driving Principles "Sufficient Knowledge." EDR works by applying the processes both sides need to gain Sufficient Knowledge.

There is no generally-accepted procedure for EDR as there is for mediation. The principles have been written about in a number of different contexts and under a number of different names. The ABA's Dispute Resolution Section has published a brochure on one approach called Planned Early Dispute Resolution,[1] and the Section has an EDR Task Force that continues to focus on the area. Others have written on more specific approaches under the names Planned Early Negotiation,[2] Guided Choice,[3] Early Active Intervention,[4] Collaborative Law,[5] Settlement Counsel,[6] and Med-Arb.[7] I

[1] John Lande, Kurt L. Dettman & Catherine E. Shanks, *Planned Early Dispute Resolution*, A.B.A. Sec. Disp. Resol., http://www.americanbar.org/groups/dispute_resolution/resources/planned_early_dispute_resolution_pedr.html (2015). *See also* John Lande and Peter W. Benner, *Why and How Businesses Use Planned early Dispute Resolution,* 13 Univ. of St. Thomas Law Journal (2017), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2722664.

[2] *See* John Lande, Lawyering *with Planned Early Negotiation: How You Can Get Good Results for Clients and Make Money* (ABA 2nd ed. 2015); *see also* John Lande, "A Framework for Advancing Negotiation Theory: Implications from a Study of How Lawyers Reach Agreement in Pretrial Litigation," 16 Cardozo Journal of Conflict Resolution.1 (2014).

[3] For a comprehensive description of and bibliography on Guided Choice, see www.gcdisputeresolution.com

[4] *See e.g.,* Peter Silverman, *Mediation 2.0.,* 15:4 Franchise Lawyer (2012); Steven Fedder, John Lande, & Peter Silverman, *Can We Resolve Franchise Disputes Faster, Cheaper, Better*, Franchising Business and Law Alert 16:10 LJN (2010);

[5] *See, e.g.,* David A. Hoffman, *Collaborative Law in the World of Business*, 6:3 Collaborative Review (2003); Diana Fitzpatrick, Using Collaborative Law to Resolve Commercial Business Disputes, http://www.nolo.com/legal-encyclopedia/collaborative-law-business-commercial-disputes-30152.html; *Civil and Commercial Application of Collaborative Practice* (International Academy of Collaborative Professionals), https://www.collaborativepractice.com/public/about/about-collaborative-practice/civil-commercial-application-of-collaborative-practice.aspx; R. Paul Faxon & Michael Zeytoonian, *Prescription for Sanity in Resolving Business Disputes: Civil Collaborative Practice in a Business Restructuring Case*, 5:2 Collaborative Law Journal (2007); Michael Zeytoonian, *Three Misconceptions About Using Collaborative Law in Employment Disputes;* http://www.mediate.com/articles/ZeytoonianMbl20140228.cfm

[6] *See, e.g.,* Kathy Brian, *Why Should Businesses Hire Settlement Counsel?,* 2008 J. Disp. Resol. 195; Dan Chray, Frank M. Bedell, Eric O. English & J. Patrick O'Malley, *Case Studies in Settlement Counsel: Best Practices for Litigation Exit Strategies,* 33 No. 8 ADD Docket 50 (Oc.t 2015); James E. McGuire, *Settlement Counsel: Answer to the* FAQs, 3:2 NYSBA Disp. Resol. Law (Fall, 2010); William F. Coyne, Jr. *The Case for Settlement Counsel*, 14 Ohio St. J. on Disp. Resol. 367 (1999); Roger Fisher, *What About Negotiation as a Specialty*, 69 A.B.A. J. 1221, 1221-1224 (1983); James E. McGuire, *Why Litigators Should Use Settlement Counsel,* 18 Alternatives to High Cost Litig. 107, 120-23 (2000)

[7] The literature on med-arb is vast, and often critical. *See*, e.g., Brian A. Pappas, *Med-Arb and the Legalization of Alternative Dispute Resolution*, 2015 Harv. Negot. L. Rev. 157 (2015)(critical); Thomas J. Brewer and Lawrence R. Mills, *Combining Mediation & Arbitration*, 54 Nov. Disp. Resol. J. 32 (1999) (pros and cons); Barry Bartel, *Med-Arb as a Distinct Method of Dispute Resolution: History, Analysis, and Potential*, 27 Willamette L. Rev. 661 (991) (early article identifying, defining, and analyzing process).

review each of these below, and then in Section III, discuss the principles that I think we should be using.

1. Specific approaches

Three of the EDR approaches use similar tools, each with a slightly different twist. These are Planned Early Negotiation, Guided Choice, and Early Active Intervention. I'll describe those, and then discuss Collaborative Law, Settlement Counsel, and Med-Arb, each of which require more explanation

a. Planned Early Negotiation

Planned Early Negotiation (sometimes referred to as Planned Early Dispute Resolution or PEDR) anticipates that at the beginning of the dispute, the parties will meet to negotiate an exchange of information and take any other steps needed to resolve the dispute quickly and economically. It then counsels the use of interest-based-bargaining and similar negotiation principles to look for business opportunities to ultimately reach settlement.

b. Guided Choice

Guided Choice starts with the selection of a mediator who "guides" the settlement negotiations both substantively and procedurally. If the parties reach impasse, the mediator helps find a way to get past it. This could include, for example, using an independent expert or a streamlined arbitration process to resolve a key factual or legal issue that can't be reconciled consensually. The mediator also ensures that the parties have gone through the steps necessary to gain Sufficient Knowledge.

c. Early Active Intervention

Early Active Intervention also prescribes bringing in a neutral early, but is tightly structured. It sets steps with tight deadlines for negotiation, information exchange, and mediation, all of which can be set out in an ADR clause.

2. Alternatives Already In Use Generally

a. Collaborative and cooperative law

The fourth approach, collaborative law, takes more explaining. Collaborative law, while widely practiced, is used primary in family law. Its applicability to business disputes has been limited for the reasons I describe below, but it is similar to the use of settlement counsel, attorneys who work exclusively to settle a case and won't be involved if there is litigation. Before I get to that, though, let's start with an explanation of what collaborative law is.[8]

[8] This section is expanded from an earlier version written by Peter Silverman in Peter Klarfeld, Michael Lewis & Peter Silverman, *Mediating Franchise Disputes,* ABA Franchising Forum (Oct. 2009) at 35-38.

The starting point is that parties hire lawyers who subscribe to the collaborative law process and are trained in cooperative negotiating.[9] For example, the parties' counsel helps them "communicate with each other, identify issues, collect and help interpret data, locate experts, ask questions, make observations, suggest options, help… express [their] needs, goals, interests, and feelings, check the workability of proposed solutions, and prepare and file all required documents for the court." [10] Attorneys aren't supposed to take advantage of points the other attorney missed or amounts miscalculated. If experts are needed, they're hired jointly. The parties are supposed to make full and honest disclosure.[11]

The parties and the lawyers agree in writing in advance that if the parties don't resolve their dispute and either party then wants to proceed to litigation, the lawyers must resign and the parties retain new counsel.

A variation on this is cooperative law. The difference is that while the parties initially pursue settlement using the same cooperative negotiation principles, the lawyers don't need to resign if the parties later choose to litigate.[12] For our purposes, cooperative law in the business context has evolved into planned early negotiation and includes the notion of hiring settlement counsel (discussed in more detail below).[13]

Because these approaches significantly depart from the attorney's traditional role in dispute resolution, they raise a host of issues. One is ethical.[14] Does counsel's agreement to resolve the dispute without resort to litigation contradict his/her professional obligation to zealously advocate for the client's interests? As a general matter, the American Bar Association and state bar associations and legislatures have

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[9] *See generally* Uniform Collaborative Law Rules and Uniform Collaborative Law Act at 1 (as Amended 2010), which also states that there are roughly 22,000 lawyers trained worldwide in collaborative law. *See also generally,* John Lande, *Possibilities for Collaborative Law: Ethics and Practice of Lawyer Disqualification and Process Control in a New Model of Lawyering*, 64 Ohio St. L.J. 1315 (2003) *("Possibilities").*

[10] Collaborative Law Institute of Illinois Principles and Guidelines, §4, http://collablawil.org/about-collaborative-law-institute-of-illinois/collaborative-law-principles-and-guidelines/

[11] *Id.*, § 6.

[12] *Id.*; *See, e.g.,* John Lande, *The Movement Toward Early Case Handling in Courts and Private Dispute Resolution,* 24 Ohio St. J. Disp. Resol. 81, 121-126 (2008).

[13] There are advocates for using collaborative law to resolve commercial disputes. *See, e.g.,* R. Paul Faxon & Michael Zeytoonian, *Prescription for Sanity in Resolving Business Disputes: Civil Collaborative Practice in a Business Restructuring Case,* 5 Collab. L. J. (Fall 2007); Sherri R. Abney, *Avoiding Litigation: A Guide to Civil Collaborative Law* (2005). *See also* the website for the Global Collaborative Law Council, whose mission is "advancing the use of collaborative process for resolving civil disputes around the world." http://www.collaborativelaw.us/about.html

[14] *See generally Possibilities*, *supra* note 71, at 1330-1372.

taken the position that practicing collaborative law in the family law area with a client's informed consent doesn't violate the rules or obligations of professional responsibility.[15] There is no reason that that analysis would change when applied to commercial disputes. If anything, businesses are more sophisticated than are spouses going through a divorce, and are more capable of giving informed consent.

Other issues are practical. The processes that have worked in family law disputes likely won't work in in business disputes unless modified.

- With both parties fully and honestly disclosing their assets, family law is fairly well settled as to division of property and monetary settlement. In business disputes, the facts and law are usually contested.

- Divorcing parents have a common goal in seeking the best interests of their children. Businesses also have relationship concerns when they're in disputes with parties with whom they will ongoing dealings (like franchisees), but both sides also have a strong self-interest that their positions are intended to protect.

- The collaborative law's disqualification requirement if a case proceeds to arbitration or litigation may disrupt the way businesses traditionally use their litigation counsel.[16] For example, in disputes between franchisors and franchisees, each side often uses counsel who knows their business, values, and approach to disputes. So each side may resist using a process where its long-time counsel couldn't continue to represent them if the dispute proceeded to litigation.

- In family law, there is a nationally-recognized set of principles and associated training with certified collaborative law practitioners. In the commercial context, there is none of this, though many lawyers may be aware of the principles.[17]

While the pure approach doesn't translate well, parties can still cooperate on a stepped process of voluntary information and document exchange (with safeguards) and

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[15] See generally discussion in Scott R. Peppet, *The (New) Ethics of Collaborative Law*, 14 Disp. Resol. Mag. 23 (Winter 2008). The ABA Standing Committee on Ethics and Professional Responsibility in Formal Opinion 447 found that the practice doesn't violate any ethical requirements. A number of states have enacted statutes that recognize and authorize collaborative law. *See. e.g.,* Cal. Fam. Code § 2013; N.C. Gen. Stat. §§ 50-79; and Tex. Fam. Code Ann. § 6.603.

[16] *See* John Lande, *Evading Evasion: How Protocols Can Improve Civil Case Results*, 21 Alternatives to High Cost Lit. 149, 163-65 (2003); Robert W. Rack, Jr., S*ettle or Withdraw: Collaborative Lawyering Provides Incentive to Avoid Costly Litigation,* Disp. Res'n. Mag., Summer 1998, at 8.

[17] *See generally* David A. Hoffman, *Collaborative Law in the World of Business*, *Collaborative Rev.*, Vol. 6, No. 3, Winter 2003, at 1, http://www.*motsayandlay.com/articles/CL_in_the_World_of_Business.pdf.*

good faith negotiation or mediation (albeit with each side looking to rationally reach the best result for itself based on Sufficient Knowledge).

Last, if business parties are unable to resolve a dispute early, they can apply the general notion of cooperation beyond the dispute resolution process to the conduct of litigation itself. Organizations like the Sedona Conference, for example, have developed principles of cooperation in discovery generally,[18] with a significant amount of judicial acceptance. Clients looking for speed and efficiency in resolving disputes will likely demand that their counsel be skilled in applying these new approaches to trial and arbitration if EDR efforts aren't successful.

b. Settlement counsel

A variant on cooperative procedure is the use of settlement counsel who would be used only for early resolution phase of a dispute. If unsuccessful, he or she would hand the matter off to litigation counsel.

If we decide to use settlement counsel in our EDR process, we will need to find an attorney who is interested in this limited representation and is good at it – being able to both cooperate procedurally while vigorously seeking our best interest based on Sufficient Knowledge. I think that's very achievable and over time settlement counsel would deeply learn our business, values and approaches to dispute resolution.

Ideally, both sides would use settlement counsel, but it's not necessary. Franchisees that don't have disputes with the regularity that we do might be less inclined to hire separate settlement counsel, but our settlement counsel should be skilled enough to work with traditional litigation counsel that is willing to engage in the process in good faith.

Another potential concern is that settlement counsel may be biased toward settlement and not assert our position as strongly as it should be. It's at best a minor concern (and is simply the reverse of litigators being biased toward litigation because it is more lucrative) in light of the benefits that can be realized from early resolution of a dispute. I'm confident we could hire ethical, highly skilled lawyers who would handle the process objectively, and be able to advocate our position strongly while still seeking settlement at fair terms based on Sufficient Knowledge.

c. Med-Arb

Med-Arb is, as suggested by the name, the joining of mediation and arbitration in a sequential dispute resolution process. At its most general level, if mediation fails, then arbitration follows with the mediator becoming the arbitrator.

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[18] The Sedona Conference Cooperation Proclamation (July, 2008), http://www.thesedonaconference.org/content/ tsc_cooperation_proclamation/proclamation.pdf.

The advantage to the process is that the neutral has the full set of tools needed to bring the matter to conclusion, whether by consensual settlement or an arbitration award. The neutral has flexibility, and builds familiarity with the parties and the facts of the dispute throughout the process. For example, he or she could arbitrate one vexing issue, then turn back to mediation or fashion a settlement on a number of issues, but leave one issue for arbitration. Finally, if mediation fails, the parties don't need to incur the time and expense and finding a new neutral.

The process has two downsides that have led most parties to avoid it. One, if parties know the neutral will become the arbitrator, the parties may be reluctant to share openly with the mediator out of a concern that information could later be used against them if the matter is contested. Two, if the neutral has the ultimate power to rule on the matter as an arbitrator, that gives the neutral coercive control.

The most useful insight for our purposes from Med-Arb is that the mediator, regardless of whether he or she serves as the arbitrator, can help develop an economical, streamlined arbitration to resolve outstanding issues if we're unable to resolve a dispute cooperatively. This can include any number of options, ranging from structured litigation or arbitration to variants on standard arbitration such as baseball,[19] night baseball,[20] and high-low.[21]

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That ends the overview. None of the EDR processes or existing approaches, applied alone, will get us to a 30-day dispute resolution policy, but they each offer ideas and tools that I borrow in describing my recommended policy.

[19] In baseball arbitration, each party chooses and discloses to the arbitrator a damages number. The arbitrator's sole decision is which of the two numbers to choose for the award.

[20] Like baseball arbitration, each party chooses a damages number but doesn't reveal it to the arbitrator. The arbitrator then rules on how she values damages. The actual award will be the number closest to the arbitrator's damages finding.

[21] In high-low arbitration, the parties bracket damages between an agreed high and low number. If the award is lower than the low number, the respondent pays the agreed-upon low figure. If the award is higher than the high number, the claimant accepts the high number. If the award is in between, the parties are bound by the arbitrator's figure. The parties choose whether to disclose the high and low numbers to the arbitrator before the arbitration.

III. MY RECOMMENDATIONS FOR OUR 30 DAY EARLY DISPUTE RESOLUTION POLICY

A. Executive Summary

I'm recommending a five-step process to resolve disputes in no more than 22 business days (30 calendar days). As I'll discuss in more detail below, we'll use a truncated process for smaller or less significant disputes. Also, if experts are required, more time would likely be needed.

The five steps and the business days allowed to accomplish them are:

1. In no more than three days, we internally gather all necessary information on the case and what we need to know from the other side for Sufficient Knowledge.

2. In no more than the following three days, and if called for, outside counsel assesses the case and presents us with an initial analysis.

3. In no more than the following seven days, the parties exchange documents and information in a process with safeguards.

4. In no more than the following three days, the parties value the case based on Sufficient Knowledge.

5. In no more than the following six days, the parties negotiate or mediate the dispute to resolution.

Here's a chart setting out the steps and the number of days:

Process	Number of days
Internal early case assessment (the EDR Package)	3
Outside counsel early case assessment (the Initial Assessment)	3
Document and information exchange – no experts	7
Case valuation	3
Negotiation or mediation	6

The use of experts could be integrated into the five steps or may require additional time.

B. A cautionary note on 30 days.

As Boswell so eloquently put it, *"Depend upon it, Sir, when a man knows he is to be hanged in a fortnight, it concentrates his mind wonderfully."* [22] Your 30-day deadline does concentrate the mind, and I've laid out what I think could be a workable 30-day dispute resolution policy. But we shouldn't be surprised when we can't meet the 30-day deadline.

If some disputes take 60 or 90 days or even longer to resolve, that doesn't mean that our goal hasn't been realized. It will depend on the circumstances. As a result, to keep our focus on what we really want to accomplish, I'd tweak our policy to be one of *trying* to resolve disputes within 30 days. It shouldn't change our aim to resolve disputes in 30 days, but will avoid the policy's being deemed a failure simply because we set an aggressive deadline that may prove hard to achieve in every case.

Likewise, if after reviewing my report, you conclude that 30 days is too compressed to be effective, we can easily change the process to 60 or 90 days by adjusting the time allowed for each step of the process. Whatever time frame you set, I expect that we'll continue to work to make the process more streamlined. We simply need some experience with EDR to have a better sense of what we should strive for.

C. The Implementation plan

1. Not All Disputes Are Created Equally

While our 30-day goal should apply to all disputes, a dispute should meet a threshold before we take all steps in the process. Routine disagreements can and should be resolved through a phone call or meeting on the business side or dialogue between counsel. We may also want to have a more streamlined process for certain types of disputes rather than use the negotiation-centric process I've discussed so far. For example, we might look to an ombudsman program for franchisee concerns. Or accounting disputes may be better resolved through referral to an accountant who can make a binding determination of what amounts are at issue or how something should be calculated.

Even with disputes that will be subject to the five-step process, we don't need to follow the policy mechanically. We need to use the right tools at the right time and in the right way. These tools could, but don't need to, include investigation, early case assessment, document exchange, information exchange, negotiation, mediation, use of experts, early neutral evaluation, selective issue arbitration and others. Like wanting to play with every toy in the toy box, there can be a temptation to want to use every tool in the EDR toolbox. The law department will need to analyze each dispute so that the selection and use of tools is guided solely by economy, speed, and advantage. We should become sophisticated pretty quickly as to which tools will be the most workable for us,

[22] Boswell, *Life of Johnson,* quoting Dr. Samuel Johnson, on September 19, 1777, explaining how an uneducated convict might have come to quickly write an eloquent plea for mercy (which was actually written by Johnson).

when to use them, and how to keep their cost proportional and economical to the size of the dispute

2. Announcing the policy

To ensure success, we need to clearly explain the rationale for EDR and set expectations internally and externally.

a. Internal communication

Internally, we have to educate management on the nature of, and rationale for, the process. If they understand how this can significantly lower costs and reduce the demands on them and their staff in the longer term, I'm optimistic they'll embrace the proposed changes. (Of course, your mandating compliance with the process and the associated time frames will also help.)

Management also needs to understand that the process can't be tainted by emotional factors like a desire to avoid embarrassment, prove that we're right, or even the score. That boomerangs quickly in a compressed process like this and needs to be avoided from the outset.

b. External communication

Outside parties, especially our franchisees, need to understand what the process is and why we're committed to it as a matter of policy. That helps eliminate suspicion that it's some veiled way to gain an advantage. At the same time, we need to communicate the policy in way that makes clear that we're not simply going to roll over and settle quickly at any cost or that we're risk-averse. This is primarily an economic decision that works to both parties' benefit. I also think it's a good sales tool as it shows we have high integrity in the way we deal with disputes.

Here's what I propose our announced policy to be:

> *As a company, we're committed to resolving all disputes quickly, economically, and fairly. Our ideal is to resolve even the most serious disputes in their earliest stages, and we will try to do so in 30 days using early dispute resolution principles (EDR). More information on EDR principles is available on our website: www. settlefastercheaper.com*
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> .
>
> *We recognize that even with both sides using EDR principles in good faith, we may not settle every dispute. Our further commitment is that if we don't resolve the dispute in 30 days (or a longer time we've agreed on), we'll try to structure a dispute resolution procedure through court or arbitration that allows the process to proceed as quickly and economically as possible to a final resolution.*

c. Using a neutral

Once a matter reaches a certain threshold, a neutral skilled in EDR principles should be involved. Our EDR clause in contracts should require this (I'll discuss the specifics of this later). And in cases not governed by an EDR clause, we should seek the other side's agreement to retain a neutral.

In a simple dispute, we might need the neutral only for a short phone call to initially structure the process. We could then use the neutral beyond that if we need helping getting through any of the steps below. Cost-effectiveness, speed and the extent of the other side's cooperation will drive the decision. In significant cases, I would expect that the neutral would be involved in each step of the process. To avoid delays, I will immediately start identifying neutrals who understand the overall EDR process and are skilled at implementing it.

D. EDR Policy: The five basic steps for each dispute

The EDR approach that I'm recommending draws from the processes I described in Section II that will allow us to expedite resolution of our disputes, but adds a rigor that's needed to compress the process into thirty days. The five basic steps are internal early case assessment; outside counsel assessment; document and information exchange; case valuation; and negotiation or meditation to either settlement or further structured dispute resolution. Experts, if needed would be an additional step that would likely extend the time.

As a threshold matter, as soon as the law department becomes aware of a dispute, we'll determine what level of effort we believe it warrants and tentatively develop the steps and timing needed to resolve the dispute in 30 days. We'll also reach out to the other party and their counsel in an effort to come to agreement on the steps that need to be taken and the timing involved. If it appears that a party won't be cooperative or constructive, we'll consider our options and may need to change course. At a minimum, I'd expect that we'd bring in a neutral to see if we can make the process work.

1. Early case assessment - The EDR Package

The first step is prompt, cost-effective internal review -- what is commonly called early case assessment (ECA). In practical terms, it means that when the law department learns of a dispute, we begin the investigatory process immediately.

We'll start by determining the key internal players (e.g., finance for a royalty issue, the sales group for a misrepresentation issue, or the finance and the supply team if the complaint is about rebates).

We'll then direct the team to gather key documents. This doesn't mean an exhaustive search of files and email, but a tailored collection and review of the information need to obtain Sufficient Knowledge. If, for example, the claim is that our sales representative made a financial performance representation, we should look at all

e-mails between the sales representative and the franchisee, and we should pull the disclosure file to determine whether we have properly executed disclaimers.

The goal is to understand the case fully, which means that we'll be looking for harmful as well as helpful documents. Knowing the weaknesses of our position will enable us to more accurately value our case.

One final caveat on document collection. Under the Federal Rules of Civil Procedure and many state rules, we need to preserve documents once we're on notice of a dispute or litigation is reasonably foreseeable. While that requires identifying potentially relevant documents to preserve, that's a different process from what I've just outlined, though the steps overlap. We'll have to work through that in the department so that both tasks are done consistent with the EDR timelines, and so that we won't have to replicate document collection efforts if we don't settle.

We'll also interview the key players, again, to get out the harmful facts as well as the helpful ones. As a cultural matter, we need everyone to understand that bad news ultimately comes out. We want to learn it right at the beginning.

Another part of the ECA process is to develop an understanding of the respective leverage we and the other side have. Our goal is to reach the most advantageous resolution for the company through a fair process, and exercising leverage is fully consistent with this. We should also assess business objectives and risks. Our objectives and risks should provide the framework within which everything else is considered.

The assessment should give us a good idea of what we *know*. The final step is to come up with a list of what we don't know and what, if anything, we *need to know* to properly assess the facts, law and our or the other side's leverage. It will be hard to avoid the usual approach, which favors a need to know everything about what the other side has done and to see every relevant document. That's nonsense. Given the accepted wisdom that most cases turn on no more than a dozen documents, our goal will be to ask the other side only for information that we need for Sufficient Knowledge.

We'll then put into a memorandum with attachments all the documents, interview summaries, analysis, and information that we need but don't have, which I'll call the *EDR Package*. We're ready to move to the next step and, if appropriate, retain counsel.

For the 30-day process to work, what I've just described should take no more than three business days. That deadline needs to be communicated and followed.

2. Use of outside counsel – legal research and case assessment

The next step is for us to determine whether we need legal analysis. Some disputes will be factual, but others will raise issues of contract law or otherwise require looking into specific case law, such as on encroachment or the effect of a disclaimer.

We could turn to our regular outside counsel for this, but I'd like to begin experimenting with settlement counsel who specializes in franchise litigation. We'd structure fees to keep settlement counsel within budget and to incentivize early settlement.

The next step is to have counsel prepare a case assessment (the "Initial Assessment") based on the EDR Package and any legal research we've requested. I'd like to give counsel three business days to get that to us. To keep the focus on timeliness and cost-effectiveness, I plan to negotiate for a fixed fee for preparation of the Initial Assessment. Depending on the complexity of the matter, I think that the fee should be between $2500 and $10,000. To work within the thirty-day policy, we need to spend the money at this stage to get the Initial Assessment.

The Initial Assessment should be neutral and evaluative; we don't want advocacy. The purpose of the Initial Assessment is to allow us to structure our resolution strategy. The Assessment should be structured as follows:

a. Short factual summary;

b. Short discussion of legal issues and governing law;

c. Leverage – ours and theirs;

d. Desired business outcome – ours and theirs;

e. Range of outcomes (including similar verdicts if we have cases of the type where verdicts are tracked); and

f. What if any additional information and documents we *need* internally and from the other side for Sufficient Knowledge, and why

3. Document and information exchange

There are different ways to obtain information, and our process doesn't require that one particular method always be used. I've identified four methods: (1) simply ask the other side, and counsel would respond, (2) ask for a response in affidavit from either by a corporate representative who has inquired as to the answers, or from one or more people who have personal knowledge, (3) interview the corporate representative or person(s) with knowledge, and (4) take a limited deposition.

At this point in the process – the seventh business day - we should know what information and documents we need to develop Sufficient Knowledge. By proposing a

narrowly-focused, highly-relevant request, we'll show good faith and hopefully encourage the other side to make the same tailored type of request.

If either side thinks the other is requesting information or documents that go beyond what's needed for Sufficient Knowledge, we'll need to negotiate scope. We may need a neutral's help for that. Both sides need to be reasonable and responsive to keep the process within our 30-day deadline.

If we've found a bad document that could hurt our position and the other side doesn't know about it, we may want to try to resolve the dispute before there is any document exchange. If that's not possible or has other downside associated with it, we have to be prepared to turn over things that might be harmful.

We also need to expect that the other side will act ethically and exchange both helpful and harmful documents. Having said that, though, we should generally encourage full disclosure by incorporating sanctions for non-compliance in to our EDR process. That might include asking for verification from counsel for the other side that they've made a reasonably diligent, good-faith search, and produced the reasonably responsive documents (a "Compliant Response"). We could also condition any settlement on a representation that each party made a Compliant Response. That would allow a fraudulent inducement challenge to any settlement if we later learned the other side withheld material information or documents.

Strategically, this will be a revealing stage in the EDR process. A broad, bad-faith request by a party sends the message that it hasn't bought into the process. If that happens, I'd respond directly, saying that the broad request doesn't fit into a good-faith, cost-effective, 30-day resolution process, and I'd ask the party to reconsider what they need for Sufficient Knowledge. As mentioned, we may need a neutral to help work through this. If the other party won't narrow its request, we'd need to decide whether to pivot to an alternative, which I'll discuss later, or try to comply.

Likewise, if the other side stalls in producing documents or information that we need for Sufficient Knowledge, or is only appearing to cooperate without actually engaging in the process in good faith, we may have struck a nerve and learned of a leverage point. If faced with this, we can use the neutral to try to get things back on track.

4. Case Valuation – The Five Questions

At this point, both sides should have Sufficient Knowledge to assess their cases. They should now undertake an analysis to establish a value for the dispute based on defined variables that each party should use, and that should set the basis for meaningful negotiation or mediation. We should allot two business days for this, which takes us through the end of the 15th business day if we're tracking to our 30 day process.

Specifically, each side should now have what it needs to be able to answer these questions, which I'll refer to below as the Five Questions:

- How much do we and the other side expect to spend in attorneys' fees to take the case through arbitration or trial?
- What is our worst outcome after trial or arbitration?
- What is our best outcome after trial or arbitration?
- Recognizing that the worst and best outcomes simply set outer limits, what's the reasonably likely range of damages we stand to win or lose?
- What's the chance of our winning/losing at numbers within that range?

Critics of early settlement efforts often cite the difficulty of valuing their case before they've had a thorough review of their client's and the other side's documents, received responses to written interrogatories, and taken depositions. The reality is that with Sufficient Knowledge, parties should be able to answer the Five Questions without engaging in a process that "leaves no stone unturned."

As the parties go through this process, their differences on the dispute and its value will generally become clear. If we're misguided on the likely cost of the matter, which party is likely to prevail, or the likely damages recoverable, I want to understand that at the earliest stages of the dispute, not after we've gone through months or years of discovery and motions. It should also give the neutral a range of damages to work with in mediation as opposed to basic arm-wrestling as to the number one side will take and the other will pay.

One last point. While the process may seem involved, if we don't do it now, we'll end up doing it in bits and pieces over many months, and when we finally get to settlement negotiations or mediation, our ultimate cost to settle will have increased by the fees and costs we incurred.

5. Negotiating or mediating for resolution

Assuming there have been no delays and no need for experts, we have seven business days remaining in the 22-business day period.

In negotiating, either directly with the other side or using a neutral, we should plan to use all the negotiation strategies we'd use in any business negotiation. Our tactics can be adversarial, or when it's in our interest, we can use interest-based negotiation (IBN) to develop a solution that works for both sides.[23] This involves a discussion of each side's interests as well as creative problem-solving, or put another way, looking for positive-sum solutions where both parties satisfy important interests.

I assume that the negotiations would usually involve the neutral and would occur in a setting very much like traditional mediation. The key, though, will be having a

[23] The literature on interest-based negotiation is vast. The classic statement of the principles is from Bruce Patton, Roger Fisher, and William Ury, Getting to Yes (1981).

skilled and effective neutral willing to be assertive in working through impasses and toward resolution.

If an impasse relates to one or a few major issues, the parties could agree to streamlined binding or advisory arbitration on just those issues. We could use the neutral for making that determination, but I don't recommend doing so (see my discussion of the problems with med-arb above). Instead, we should be able to find a separate neutral reasonably quickly for that.

To make sure the policy serves our goal of faster, cheaper, and better dispute resolution and doesn't become just another step along the way to litigation or arbitration as usual, and to avoid having others try to leverage our policy against us, we should consider some downside for not resolving a dispute within 30 days. That could, for example, include a fee-shifting provision if a party doesn't end up recovering at least what was offered at the point where negotiations or the mediation ended. It would apply to both parties equally.

6. A variable: experts

In some cases, experts may be needed for one or both sides to attain Sufficient Knowledge. Experts could be brought in and integrated into the five steps. To the extent we identify the need for an expert early, we could work with the expert during the first 13 days of the process. If the expert needs the documents and information from the information exchange, then that process can't begin until day 14.

In some cases, we may want to be able to question the other side's expert or even to have the experts discuss the issues together in front of both sides. And in some cases, the parties may want to jointly retain one independent expert.

Our use of experts should be consistent with the goal of limiting information to just what's needed to gain Sufficient Knowledge. This means that we'd likely ask the expert to prepare more of an executive summary than a full report.

Even with the request for only an executive summary, however, using an expert would likely require that the 30-day deadline be extended so that the quality of what underpins our (or the other side's) Sufficient Knowledge is maintained. The parties may need longer than a few days to retain an expert on short notice, or the expert may have scheduling issues. Also, if the expert's opinion involves any complexity, testing or surveys, even more time will be needed. If the quality or accuracy of an expert's opinion would be materially affected, we shouldn't sacrifice that simply to meet our self-imposed deadline. To do otherwise could lessen the chances of settlement and undermine the larger goal of lowering our dispute resolution costs and the time it takes to get resolution.

E. When the process doesn't lead to resolution

There will be times when we may not be able to resolve the dispute consistent with our policy. When that happens, consistent with our larger goal of expedited, cost-effective resolution, we should try to negotiate a streamlined process for any ensuing litigation or arbitration. That might include time and scope limits on discovery, motions, and the hearing on the merits. A skilled EDR neutral will be able to provide strong guidance on this.

F. Contracting For EDR

As part of our policy, we should expand the standard arbitration clause in our contracts to require participation in our EDR process. During contract negotiations, I'll have our transactional attorneys work with our litigation counsel to make sure that these clauses are well thought out and carefully drafted. Otherwise, the clauses often fail to accomplish their intended purpose for lower cost, faster dispute resolution.

Part of the problem in drafting a clause is that the principles of EDR are not widely understood. Further, the principles encompass a series of tools, which are not widely understood. The term lacks the precision and common understanding that *mediation* has. Thus our clause will need to talk in terms of steps, and we'll need to educate the other side on how the process works. We may want to put up something in that regard on our web site along with the statement of our policy. (I describe that in § III(C)(2)(b) above.)

Another problem is that the first two of the Driving Principles require that both parties and their counsel should be ethical and proceed in good faith. We can't mandate that by contract. With high-integrity, good faith parties and counsel on the other side, all we'd really need is a commitment to try to resolve the dispute through EDR. Without high-integrity, good faith parties and counsel on the other side, our clause could be as long as a book and it just wouldn't work. So the clause should assume good faith. If it's not there, we'll still give it our best shot for 30 days but will likely not get far.

Finally, I mentioned before that we should have a threshold that some disputes are for a low-enough amount or are clear enough that they should be resolved simply by direct discussion without going through the EDR process. To achieve this, I'd suggest a mandatory meeting requirement before triggering EDR.

Here's my suggested clause:

1. In any dispute between the parties, before commencing arbitration pursuant to § [ ], representatives of each party with the authority to resolve the dispute shall meet in good faith to try to resolve the matter as early as possible, but no later than 14 days after one party gives the other notice of the dispute.

2. If the parties do not resolve the dispute within the 14 days, then before commencing arbitration, the parties shall engage in good faith in a 30-day early dispute resolution process, as follows:

   a. Within three business days of the end of the 14-day period (the "Trigger Date"), with the consent of both parties, the parties shall select a neutral skilled in the EDR process. The parties shall share equally the costs of the neutral.

   b. Within six business days of the Trigger Date, the parties shall each determine in good faith the documents and information, if any, that is in the other's possession and that each party deems essential to evaluating the case. Both parties shall in good faith limit the request for information and documents as much as possible. By the end of the sixth business day, each party shall serve its request, if any, on the other side.

   c. Within the following seven business days, each side shall provide the other the requested documents and information. If either side believes the other side's request seeks more than essential information or documents, the parties shall in good faith discuss limiting the request, and shall involve the neutral if they cannot resolve the issue themselves. Neither party may be compelled to produce information or documents; the process is a good-faith exchange to expedite the settlement process and to try to get out early the information each side needs to make an informed judgment as to settlement.

   d. Within the following three business days, the parties shall each prepare an EDR case analysis to exchange with the other side and, if appropriate, the neutral. Each EDR case analysis shall discuss the party's position on the key issues and damages and equitable relief, and shall estimate the party's' expected attorneys' fees.

   e. Within the following six business days, the parties shall meet in good faith in a mutually-convenient location to negotiate or mediate to try to resolve the dispute.

   f. Every claim of each party is tolled from the date of initial notice of the dispute until seven business days following the termination of the EDR process.

g. Nothing in this section prevents during the 30-day period, (i) either party from seeking preliminary or emergency injunctive relief in court or [with the arbitration administrator], or (ii) on three-business-days' notice, a party from filing for arbitration if the other party does not cooperate in the EDR process.

G. Measuring EDR

We don't have historical data on the average length of our disputes or the costs of litigation and arbitration except in the aggregate. To be able to champion our use of EDR, management will need some sense of whether the process delivers the promised cost-savings. To that end, I plan to track the time to resolution of all disputes handled by the law department and also the costs versus settlement offers made at various points. We'll benchmark ourselves against the value that we or outside counsel, when they're involved, put on the dispute. Like you, I know this will save us money. I'm anxious to learn how big a payback we'll reap.

H. Corresponding change in business processes

As your memo notes, we should also consider changing our business processes to reduce the likelihood of certain disputes even arising. An example might be changing the training or incentives for our franchise sales group to minimize overselling, even adding a disincentive for risk-creating conduct. I'll return to this in a later memo, but first want to focus on implementing our EDR policy.

IV. CONCLUSION

Thanks for pushing me on this. Despite my initial reluctance, I'm excited about the potential that EDR has to save us significant time and legal costs. When you first gave me the challenge, I thought you had read one business book too many and had lost touch with reality. I was wrong. We can do this. I have to believe that within five years this will be the general process most businesses will follow as a matter of course for resolving disputes and we'll be able to say we were there at the start.

Eversource Energy Legal Department
2016 Guidelines and Billing Requirements for Outside Counsel

The Eversource Energy Legal Department ("Eversource Legal") desires to engage experienced outside counsel in a collaborative, partnering relationship to ensure the provision of high quality, cost effective legal advice and representation to the Eversource Energy companies ("Eversource"). Eversource Legal has selected your firm ("Outside Counsel", "you", and "your firm") to serve as one of Eversource's Outside Counsel as we believe your firm has the requisite skills, experience, and approach to the practice of law and commitment to serve the best interests of Eversource.

The following Guidelines and Billing Requirements for Outside Counsel ("Guidelines & Requirements") represent Eversource Legal's expectations with respect to the practices and procedures to be followed by your firm when working with Eversource Legal and billing Eversource for legal services. Compliance with these Guidelines & Requirements will help ensure that our work together on behalf of Eversource proceeds smoothly, transparently, and your firm's invoices for reasonable and necessary legal services will be processed, reviewed and paid promptly. Fees, costs or disbursements not submitted in compliance with the Guidelines & Requirements will not be considered for payment.

Eversource Legal uses the Serengeti Tracker ("Serengeti") electronic billing system to receive, review and process for payment all Outside Counsel invoices and budgets for individual matters, and the Guidelines & Requirements discussed below should be followed by all of our law firms when submitting invoices and budgets through Serengeti.

Eversource Legal is willing to discuss reasonable alternatives to the specific requirements contained in the Guidelines & Requirements provided such alternatives are cost-efficient and ensure quality legal representation. Eversource Legal will be flexible in its approach to supervising legal matters and recognizes the potential for instances where it may serve our mutual interests to deviate from these Guidelines & Requirements. In these instances, we expect you to discuss with Eversource Legal any potential issues presented by the Guidelines & Requirements, and any exceptions thereto must be authorized in writing by Eversource Legal management.

These Guidelines & Requirements will remain in effect until notified otherwise. The Guidelines & Requirements are not intended to be all-inclusive and may be modified, revised, or supplemented as needed. By accepting new legal matters on behalf of Eversource, your firm acknowledges its intent and agreement to comply with the Guidelines & Requirements. Please ensure that all personnel within your firm working on Eversource matters receive and become familiar with the contents of these Guidelines & Requirements.

Nothing contained in these Guidelines & Requirements should be interpreted to restrict counsel's exercise of independent and professional judgment in rendering quality legal services to Eversource. All counsel working on Eversource matters are expected to adhere to all ethics rules governing professional conduct and responsibility. If you have any questions about Eversource's Guidelines and Requirements, please immediately notify the Eversource Attorney with whom you are working.

I. GUIDELINES

A. Roles and Responsibilities

For each matter, the responsible Eversource Legal attorney will define the scope of the assignment and the anticipated objectives to be attained. Outside Counsel should not perform any significant work until the scope and objectives of the representation established by Eversource Legal are fully understood and mutually agreed to.

B. Communication

We typically share active involvement on a matter with Outside Counsel throughout the entire course of an engagement and seek to achieve an effective partnership with Outside Counsel to ensure the best results with maximum efficiency. Outside Counsel must regularly communicate with their Eversource Legal attorney contact to keep him/her up to date on the matter and to avoid any surprises. We prefer frequent telephone discussions and emails because such regular communication fosters the level of partnership that the proper handling of our assigned matters require. Outside Counsel must provide adequate advance notice of any significant events (such as trials, conferences, filing deadlines and anticipated meetings).

As a means of improving overall efficiency and cost-effectiveness, we will not generally pay for the preparation of any formal written correspondence, status reports or memorandums of law, unless they were specifically requested by the lead Eversource Legal attorney on the matter.

C. Matter Management Plans and Budgets

Within 30 days of being assigned a new matter, Outside Counsel must submit a budget in Serengeti following consultation with their Eversource Legal attorney contact on the matter. The proposed budget must be approved by Eversource Legal. We expect that Outside Counsel will track fees and costs against the budget as the matter progresses and promptly communicate with the lead Eversource Legal attorney for the matter if you expect fees or costs to exceed the estimated budget. Budget preparation and management time may not be billed.

In addition to budgets on all matters or engagements, Outside Counsel may also be required to provide a Matter Management Plan for certain matters or particular engagements. Unless advised otherwise by the Eversource Legal contact attorney, a Matter Management Plan will generally be required for all (court, agency, or administrative or regulatory body) litigation matters involving claims or matters that: (i) are in excess of $250,000; (ii) may significantly affect the Company's real, personal or intellectual property rights or interests; or (iii) may implicate important regulatory, political, or public relations issues or objectives.

D. Alternative Fee Arrangements

One of our goals is to significantly enhance our use of alternative fee mechanisms. We strongly encourage you to develop and propose to us mutually beneficial fee arrangements that vary from the traditional practice of billing at regular hourly rates. We welcome your suggestions for such arrangements, either for new matters or matters currently assigned to your firm. Additionally,

Eversource Legal may request you to develop proposed arrangements in connection with your role in certain matters or litigation.

E. Staffing

Eversource Legal expects Outside Counsel to staff each matter in a competent and efficient manner. Because we retain counsel experienced in the substantive legal issues involved, we do not pay for time spent learning the substantive law, local rules or background information relating to the court or form of action. To ensure staffing levels are within expectations, Outside Counsel should discuss staffing plans for specific matters with the lead Eversource Legal attorney on the matter. Any changes to approved staffing must be approved in advance by the lead Eversource Legal attorney.

F. Direct Communications with Eversource Business People

Eversource Legal attorneys are the gatekeepers for *all* legal services performed by Outside Counsel for Eversource. If any of our business personnel, including officers, directors or managers of one of the Eversource companies, requests your legal assistance, it is *your* responsibility to discuss the scope of the matter with the lead Eversource Legal attorney and obtain Eversource Legal authorization to proceed *before* you expend *any* time on the matter. Failure to timely consult with Eversource Legal may result in some or all of the time billed to Eversource on that matter being rejected.

G. Alternative Dispute Resolution

Eversource Legal recognizes that for many disputes there is a less expensive, more effective method of resolution than the traditional lawsuit and is a long-time signatory to the International Institute for Conflict Prevention & Resolution ("CPR") Corporate Policy Statement on Alternatives to Litigation©. Alternative dispute resolution ("ADR") procedures involve collaborative techniques which can often spare businesses the high costs of litigation. In recognition of the foregoing, in the event of a business dispute between Eversource and another company that has made or will then make a similar statement, we are prepared to explore with that other party resolution of the dispute through negotiation or ADR techniques before pursuing full-scale litigation. If either party believes that the dispute is not suitable for ADR techniques, or if such techniques do not produce results satisfactory to the disputants, either party may proceed with litigation. In addition, Eversource is a founding signatory to the CPR 21st Century Corporate ADR Pledge to commit its resources to manage and resolve disputes through negotiation, mediation and other ADR processes when appropriate, with a view to establishing and practicing global, sustainable dispute management and resolution processes.

We similarly expect our law firms, like the more than 1,500 that have already signed the CPR Law Firm Policy Statement on Alternatives to Litigation©, to sign the pledge and recognize that for many disputes there may be methods more effective for resolution than traditional litigation and to ensure appropriate lawyers in your firm will be knowledgeable about ADR, and, where appropriate, the responsible firm attorney will discuss with the lead Eversource Legal attorney the availability of ADR procedures so Eversource can make an informed choice concerning resolution of the dispute.

H. Conflicts

It is Outside Counsel's responsibility to ensure that there are no conflicts of interest prior to taking on any matter for Eversource or any other client in a matter potentially involving or affecting Eversource or its legal or business interests. Any request for Eversource to waive conflicts of interest must be submitted in writing to the lead Eversource Legal attorney. In addition to a standard conflicts check, please inform the lead Eversource Legal attorney if your firm is performing legal work for any of our direct competitors. We may choose to discontinue work with your firm should you represent a competitor, depending on the nature of such representation. You should also advise Eversource Legal of any positions your firm has taken in the recent past or is presently taking on issues that to your knowledge may be contradictory, adverse or otherwise prejudicial to the interests of Eversource in the particular matter in which you are engaged or any other matter that may have the same issues or considerations.

I. Business Conduct

We have adopted a Code of Business Conduct that requires employees and representatives, including Outside Counsel, to conduct their activities on Eversource's behalf with honesty and integrity, and in accordance with high moral and ethical standards. Please review our Code of Business Conduct located on Eversource's website at https://www.eversource.com/Content/docs/default-source/Investors/code_of_business_conduct.pdf?sfvrsn=2

J. Confidentiality

In addition to the privileges and confidentiality accorded to attorney client communications and written legal work prepared by or at the request of counsel, a number of state and federal laws require the security and protection, management, control and disclosure of certain types of Confidential Information. Outside Counsel must comply with all applicable federal and state laws applicable to such Confidential Information, including, without limitation, state personal information laws and laws and regulations applicable to persons or entities that store or maintain personal information in the states in which the Eversource companies' customers are located (Connecticut, Massachusetts and New Hampshire). Eversource defines "Confidential Information" as data or information in any form that: is subject to the attorney client privilege or legal work product privilege protections; contains proprietary information; contains critical infrastructure information (including without limitation Critical Energy Infrastructure Information ("CEII"), as defined by Federal Energy Regulatory Commission, and Critical Infrastructure Protection ("CIP") information, as defined by North American Electric Reliability Corporation); contains personal and/or personnel information of employees or customers, particularly personal information capable of being associated with a particular person through one or more identifiers; and is otherwise designated by Eversource as confidential.

You and your firm may periodically come into possession of Confidential Information during the course of your representation of Eversource. We expect that you will keep all Confidential Information confidential and will take, and ensure that your agents, employees, and representatives will take, appropriate measures to protect such Confidential Information. Such steps should include at a minimum those steps that you take to protect your firm's own

confidential information that is of similar value or importance to the Confidential Information disclosed in the course of your representation of Eversource. Outside Counsel should not distribute, copy, or otherwise communicate any of the Confidential Information to any other person or entity except as is necessary to perform the scope of legal services on behalf of Eversource for which you were engaged. Outside Counsel must maintain records of who has access to such Confidential Information, and must inform all such persons of their obligations respecting such Confidential Information, including the proper treatment of such information in accordance with this Agreement. Your firm must exercise such precautions or measures as may be commercially reasonable in the circumstances to prevent the improper or unauthorized use or disclosure of, or access to, Eversource Confidential Information.

Outside Counsel must secure all Eversource Confidential Information during the course of their representation of Eversource, and may not use the Confidential Information in any manner whatsoever outside of the scope of that representation. Outside Counsel is required to retain and store all Confidential Information furnished to you in a secure and confidential manner, return such Confidential Information upon request, and not erase, destroy or otherwise dispose of such information without advance written approval by Eversource Legal. If Outside Counsel is requested or authorized in writing by Eversource Legal to dispose of any Confidential Information, you must take appropriate measures to make sure that such Confidential Information is shredded, destroyed or rendered unreadable prior to disposal in compliance with the standards of the National Association for Information Destruction for the media on which the Confidential Information is stored, and you must provide Eversource Legal with written certification of the return and/or disposal of such Confidential Information promptly following its return or disposal.

Outside Counsel must comply with all applicable laws in the performance of its services and in the protection of Eversource Confidential Information. In the event that disclosure of Eversource Confidential Information is mandated by law or judicial action, to the extent permitted by law, your firm will promptly notify the lead Eversource Legal attorney and provide reasonable assistance, at Eversource Legal's request and expense, in contesting such disclosure within the timeframe allotted by the governing rules. To the extent applicable to your firm's services, you will have established policies and procedures to identify indications of possible identity theft risks to Eversource employees or customers that may arise in your representation of Eversource; and when you identify any possible identity theft risks to Eversource's employees or customers, you will take appropriate steps to prevent and mitigate identity theft.

Outside Counsel must review and comply with Eversource's Corporate Information Security Requirements, included as Attachment A.

K. Ownership of Work Product

All memoranda, correspondence, and other attorney work product created for or on behalf of Eversource remains the property of Eversource to use as it deems appropriate. Further, unless otherwise agreed to by your Eversource Legal contact, you should provide an electronic copy (in native format if possible) of any such memoranda and work product prepared by your firm on behalf of Eversource to your Eversource Legal contact *before* billing Eversource for the preparation and/or development thereof. Eversource may not approve for payment any charges for the preparation of any such memoranda and work product not provided to Eversource.

L. Sarbanes-Oxley Obligations

A strong Corporate Governance program is essential to earning and retaining the trust of our customers, employees, investors, and regulators. Ethics and integrity are the very heart of our business, and Eversource Legal is proud of the way our Corporate Compliance and Corporate Governance programs enhance the Company's day-to-day activities and strengthen its performance. Our reputation and credibility depend on it. An important part of the programs is the Attorney Conduct Rule established under Section 307 of the Sarbanes Oxley Act. The Rule requires all attorneys to report evidence of any material violation of federal or state securities, fiduciary or similar laws "up the ladder" to their supervisor, or in the case of Outside Counsel, to Eversource's General Counsel.

M. Diversity

Eversource Legal recognizes that developing a culture of diversity and inclusion is vital to Eversource's success in achieving its business goals and objectives. Toward that end, Eversource Legal seeks to continuously demonstrate a commitment to diversity, and value and respect individual differences. In selecting your firm to provide legal services to Eversource, we expect your firm to demonstrate its commitment to the principals of diversity and inclusion through:

- Firm demographics, including firm management demographics
- Maintaining a diversity plan or other evidence of the firm's commitment to diversity
- Maintaining membership in and active support of organizations committed to increasing the recruitment, retention and promotion of diverse lawyers in your geographic area
- Making measurable progress in furthering diversity within the firm consistent with the firm's diversity plan, specifically with respect to Eversource related work
- Engaging diverse attorneys and paraprofessionals on Eversource related work
- Engaging diverse suppliers, specifically with respect to Eversource related work

II. BILLING REQUIREMENTS

A. Prompt Billing and Payment

It is important that bills be rendered promptly *every thirty (30) days*, unless otherwise requested and agreed to by Eversource Legal. Invoices submitted with charges reflecting time/work performed more than 90 days prior to the date the invoice is presented may be subject to non-payment for failure to comply with the prompt billing requirements. We may not accept or pay any additional charges, interest or penalties for delayed payment of invoices that are questioned by Eversource Legal or are submitted without compliance to these billing requirements. We will make every effort to render payment within 60 days of receipt of an invoice that complies with these requirements.

Because our budgeting is on a calendar year basis, please do not submit bills for periods that overlap the end of the year and beginning of the year.

Consistent with Eversource Legal's continuing efforts to promptly review, approve and pay invoices for legal services, we are offering a prompt pay discount option for our Outside Counsel, which is based on industry best practices. Your firm has the option to implement a prompt pay discount of 2% on your Fee Offer in Serengeti, which will be applied to your invoice if payment of the invoice is approved for payment in the Serengeti system within ten (10) days of invoice receipt in the Serengeti system. You should contact the Legal Department Administrator or the lead Eversource Legal attorney on your matter to implement this feature or to discuss this option further.

B. Form and Content of Invoices

It is important that invoices from Outside Counsel contain information sufficient to permit Eversource Legal to determine the nature and extent of services for which invoices are rendered and to permit us to review the cost effectiveness of those services. Invoices should be prepared on a monthly basis using Serengeti and must include the following items:

- Date of invoice
- Unique invoice number
- Serengeti Tracker File # (Matter #)
- Eversource Matter Name
- Charge date (fees and disbursements)
- Timekeeper name or ID
- Timekeeper category or level
- Detailed description of task performed (no narrative or "block" billing)
- Time entries in tenths of an hour
- Timekeeper hourly rate
- Total for each charge
- Detailed description and itemization of each disbursement

C. Billing Rates

Eversource expects to be charged the lowest hourly billing rate provided by Outside Counsel to its most valued clients. Consistent with our expectation of efficient staffing, we will not pay an hourly rate higher than that of the attorney to whom the matter is originally assigned, without prior approval. With respect to a specific matter, we will only pay the hourly rate(s) we agree upon at the time of the initial engagement.

- Initial Fees Schedule: Upon the initial engagement of your firm, you must provide Eversource Legal with a schedule of billing rates for all timekeepers expected to provide services in the matter over the balance of the calendar year. These rates will be submitted via a Timekeeper Rate Sheet in the Serengeti system. Eversource Legal will only consider reasonable and customary billing rates for similar services provided by other counsel in the geographic location in which your firm is located. Eversource Legal must approve the rates submitted for each timekeeper before such

timekeeper performs any services on an Eversource matter. The approved rates will apply to all matters unless an alternative fee arrangement is approved for a specific matter. In that case, a separate Timekeeper Rate Sheet will be submitted for approval for that matter.

- Rate Increases: Eversource Legal typically will entertain rate increases on an annual basis for an effective date of January 1. Any request for an increase to a timekeeper's rate must be submitted in writing, e-mail is acceptable, on or before December 1to the Eversource Legal Administrator, Pamela Tyrol at Pamela.tyrol@eversource.com for review and approval by Eversource Legal , in order to be effective January 1 of the following year. Once Eversource Legal has reviewed proposed rate increases, we will advise outside counsel if the increases are approved.

- Timekeeper Rate Sheets: Are required to be submitted prior to January 1 of each year to include current rates for all timekeepers at your firm. New rate sheets are to be submitted annually even if no increases are proposed. If your firm has proposed any increases, your firm should wait until approval is received from Eversource Legal so all rates can be submitted in the Timekeeper Rate Sheet.

D. Acceptable Timekeeping Practices and Guidelines

- Actual Time: Eversource will pay only for the ***actual***, reasonable and necessary time spent completing a task, or series of related tasks.

- Block Billing: Eversource will not pay for time that is "block billed," e.g., a line item with a single time and charge covering multiple activities. Each individual task must contain an individual and separate billing entry.

- Telephone Calls: Billing for telephone conversations must specifically describe the parties and purpose of the call.

- Minimum Billing: Eversource will not accept "minimum billings" that do not accurately reflect the actual time spent to complete a specific task or activity, e.g., billing a 1 hour minimum charge for any court appearance regardless of the actual time spent in court, or billing minimum quarter hours for any task. Eversource will not accept "task minimum billings" that do not accurately reflect the time spent to complete the specific task or activity, e.g., billing a 2 hour minimum charge for any motion preparation. Eversource will not accept minimum billings for forms (i.e. standard interrogatories or motion to compel responses to discovery) other than time actually spent in the drafting of changes to the form.

- Duplicate Time: Eversource will not pay for work which is duplicative in nature. Absent prior approval from Eversource Legal, no more than one lawyer should attend meetings, witness interviews, telephone conferences, depositions, hearings or other proceedings. Similarly, Eversource will generally not pay for multiple reviews of documents, and will not pay for work already performed by another member of the firm. File reviews occasioned by a transfer of responsibility will not be reimbursed

absent an explanation for the transfer or review which is approved in advance by Eversource Legal.

- Billing for Travel Time: Eversource should not be billed and will not pay for time expended travelling to an Eversource business destination within a 50 mile radius from any office of your law firm (excluding any time spent on Eversource business while travelling, such as participation on a cell phone call (hands-free mode) which would be billed at the timekeeper's approved hourly rate). For any travel time to an Eversource business destination greater than a 50 mile radius from any office of your law firm, Eversource should be billed and will pay for time spent traveling beyond the 50 mile radius (or greater than one hour travel time whichever is greater) on Eversource business during which you are not engaged in work for any clients (such time spent on other client matters must be deducted from the travel time billed to Eversource) at a travel rate equal to 50% of the timekeeper's approved hourly rate, unless a different rate has been approved in advance by the lead Eversource Legal Attorney.

- Intra-Firm Conferences: Eversource expects your firm to limit intra-office conferencing among attorneys to specific value-added benefit to the particular matter. Eversource will generally only pay for charges by one timekeeper for internal conferences involving substantive legal or procedural issues, absent compelling reasons for such conferences. We do not expect to be charged for conferences that involve work distribution, instruction, education or status updates. Although intra-office conferences between attorneys are typically not compensable, where timekeepers consult to discuss substantive or strategic procedural aspects of the matter that result in more effective representation, such intra-office conferences are billable so long as there is a sufficient description of the nature of the communication and its relevance and value to the matter discussed. Intra-office conferences that appear excessive, unreasonable, unnecessary or contrary to these Billing Requirements will not be reimbursed.

- Legal Research: No individual research project in excess of two (2) hours should be undertaken without Eversource Legal's prior approval. All legal research in excess of two (2) hours must be coordinated with and approved by the Eversource Attorney, keeping in mind that your firm was selected because of its expertise, Eversource will not pay for research on matters such as local rules of practice, basic issues of law, or core legal principles within your firm's specialty (or legal research aimed at educating junior lawyers in the substantive law applicable to a matter). Any approved research that is reduced to written or printed form should be promptly forwarded to Eversource Legal but should not be in memorandum form unless expressly requested by the lead Eversource Legal attorney. Copies of any requested and approved legal memoranda should be provided to Eversource Legal in the same form in which they were prepared for your firm's internal use. To the extent legal research on an Eversource matter is applicable to other clients of your firm, Eversource should be billed only its proportionate share of the related fees.

- Paralegal Work: Eversource will pay for the following tasks at the Default Paralegal Rate, which your firm will provide, when performed by an associate or partner, unless otherwise agreed to in advance, due to the non-routine nature of the matter:

    - Responding to form interrogatories
    - Digesting depositions
    - Requesting records or reports
    - Preparing deposition notices
    - Preparing subpoenas
    - Performing title searches or preparing title abstracts

E. Costs and Expenses

Eversource Legal has significant resources that can be made available to defray the overall costs of services, such as copying, collating, word processing. Depending on the particular project, it may be preferable and more cost effective for some of these services to be performed in-house. Please consult the lead Eversource Attorney on your matter on this issue.

1. Reimbursable Costs and Expenses: Only standard expense items should be billed as expenses or disbursements, at actual cost and without markup, and identified by an actual itemization of expenses. For example:

    - Long distance telephone calls to third parties (long distance calls to Eversource will generally not be reimbursed)
    - Large scale, non-routine internal photocopying projects done at Eversource Legal's request with prior consent (not to exceed $0.10 per page for standard copies and $0.25 per page for color copies)
    - Actual invoice cost for outside photocopies or printing at Eversource Legal's request with prior consent.
    - Certified, registered and express mail (only when necessary)
    - Courier and overnight delivery services (only when necessary)
    - Court costs and sheriff's fees
    - Actual and reasonable travel expenses
    - Costs of court reporters and similar costs.

2. Prohibited Costs and Expenses: Eversource presumes that hourly billable rates are calculated to include all overhead and internal charges associated with the firm's practice. Unless prior written consent is obtained, Eversource will not pay for overhead or other firm costs such as:

    - Mark-up or profit on any otherwise approved expense items. Allocable case-related fees or expenses including, but not limited to, filing fees, witness and service fees, and court reporting services, will be reimbursed at actual cost only
    - Internal routine photocopying
    - Imaging or scanning service costs
    - Office supplies

- Document/ File storage and retrieval costs
- Meals (unless related to approved travel)
- Local telephone charges
- Cellular telephone charges
- Internet connectivity
- Accounting or bookkeeping fees
- Rental or purchase of office equipment
- Computer software or hardware
- Subscriptions, publications or periodicals
- Receiving, reviewing or forwarding mail
- Invoice preparation
- Budget preparation or review
- Staff supervision or instructions regarding work assignments
- Negotiation or discussion of billing arrangements, in general, or for a particular matter
- Internal messengers or couriers
- Interacting with vendors and vendor invoice processing
- Attendance at seminars, continued legal education, or conferences unless specifically requested and approved in advance by Eversource Legal
- Costs associated with general "for your information" memos, if sent to multiple clients
- Electronic legal research (e.g. Westlaw, Lexis or other cost-based providers)
- Rent or depreciation
- Utilities
- Regular first class postage charges
- Billing-related time (i.e. time spent preparing, revising, or negotiating invoices or time related to firm accounting or bookkeeping)
- Clerical or administrative tasks including, but not limited to:

    - Photocopying
    - Calendaring
    - Assigning work to administrative staff
    - File organization
    - Bates stamping
    - Word processing
    - Scheduling travel
    - Filing
    - Proofreading
    - Document indexing
    - Interacting with third-party vendors
    - Cite Checking
    - Abstracting of deposition and/or hearing transcripts
    - Eversource Legal will not pay for services performed by secretaries; librarians; billing, filing or document clerks; law clerks (interns or law students); data processors; or summer associates or overtime for these

services unless advanced approval is given by the lead Eversource Legal attorney

The lists above are not intended to be all-inclusive and should another expense be charged, Eversource Legal reserves the right to determine whether it is a covered reimbursable expense or not.

3. Large Disbursements/Third-Party Vendors/Expert Witness/Consultant Costs:
   Any large purchases from any third-party vendors, consultants or experts, and/or any single disbursement in excess of $500, including volume copying, must be approved in advance by Eversource Legal. These disbursements shall be paid by your firm and submitted on your invoice to Eversource Legal unless otherwise agreed to by Eversource Legal.

   Expert witnesses and/or consultants should only be hired after consulting with and attaining approval from the lead Eversource Legal attorney. Eversource Legal should be provided with the reason that an expert and/or consultant are necessary, their qualifications and areas of expertise, and his/her rate information. Eversource Legal should be provided with a proposal of the work to be performed by the expert/consultant, and an estimated budget for their services.

4. Reimbursable Travel Expenses - Local:

   Travel within a 50 mile radius of the firm's office is considered local travel. Eversource will not reimburse for local travel or parking expenses incurred during the normal course of business, including late nights or weekends. Eversource will reimburse the cost of local meals if the meal takes place during a meeting with third parties or Eversource Legal representatives while working on an Eversource matter. After business hours or weekend expenses for meals, taxis or car service for Outside Counsel or its staff will not be reimbursed.

5. Reimbursable Travel Expenses – Out of Town:

   All out-of-town travel must be approved, in advance, by Eversource Legal. Eversource Legal expects that the firm, in all events, will seek the lowest fares available, moderately priced hotels, and reasonably priced ground transportation. Further, travel expenses will be reimbursed only as follows:

   - Business travel expenses must be supported by detailed receipts which sufficiently identify date and place of the expense, nature of the expense and the name of the individual incurring the expense. Copies of receipts must be provided upon request

   - Except in unusual cases, travel should be undertaken by only one representative of the firm

   - Airline, railroad or other fairs will be reimbursed in an amount not to exceed the coach fair

- All modes of ground transportation will be by the most economical means available. For example, your firm must seek to use taxis and/or public transportation where such are reasonable alternatives to vehicle rental. For automobile rental we will reimburse up to the mid-size level. If a personal automobile is used for non-local travel, we will reimburse your mileage at the current IRS rate

- We expect you to stay at reasonably priced hotels and eat reasonably priced meals. We do not authorize and will not reimburse for, luxury hotel accommodations, lavish meals, or alcohol or tobacco purchases. Accommodations that exceed $250.00 per night will be closely scrutinized. Travel meals should not exceed $100.00 per day unless authorized by the lead Eversource Legal Attorney

These Outside Counsel Guidelines and Billing Requirements contain proprietary information. These guidelines and requirements are provided to our counsel to clarify Eversource Legal billing processes and procedures only, and may not be distributed or published in any way without written permission from Eversource Legal.

Attachment A

CORPORATE INFORMATION SECURITY REQUIREMENTS

1. The following security requirements and terms and conditions ("Requirements") apply to any third party, vendor or contractor ("Contractor") that electronically transmits, receives, hosts, stores, maintains, processes, or otherwise has access to confidential information belonging to Eversource Energy and subsidiaries and their affiliates (collectively "Utility") in mission critical company applications, including the following:

    a. Critical Infrastructure Information (CII), which includes without limitation, Critical Energy Infrastructure Information (CEII), as defined by the Federal Energy Regulatory Commission, and information subject to Critical Infrastructure Protection (CIP), as defined by the North American Energy Reliability Corporation;
    b. Personal Identifiable Information (PII) shall mean first name and last name or first initial and last name of an individual in combination with any one or more of the following data elements that relate to such individual: (a) Social Security number; (b) driver's license number or state-issued identification card number; (c) financial account number, or credit or debit card number, with or without any required security code, access code, personal identification number or password, that would permit access to a resident's financial account;
    c. Protected Health Information (PHI) shall mean any information relating to the past, present and future physical or mental condition of an individual, including any information about their participation or coverage in our health plan; or
    d. Any information deemed by Utility to be confidential and proprietary such as confidential or proprietary business or technical information including, but not limited to, technical, financial, commercial, marketing, customer or other business information that the Company desires to protect against unrestricted disclosure or competitive use.

    The foregoing information shall be collectively referred to as ("Confidential Information").

2. Contractor shall make commercially best efforts consistent with industry standards as stipulated in ISO/IEC 17799 Code of Practice for Information Security Management or its equivalent to ensure the confidentiality, integrity and availability of the Confidential Information within its control.

3. Contractor shall provide Utility with documentation to certify that it satisfies the following **minimum security requirements** which must be included with any purchase order issued or any agreement with any Contractor prior to execution by Utility:

    a. Contractor has a written Confidential Information management program and a published set of comprehensive security policies that stipulate user responsibilities, meet all business, legal and regulatory requirements for protecting the Contractor's cyber assets and Utility's Confidential Information accessed or stored by Contractor that ensures the confidentiality, integrity and availability of the Confidential Information accessed or stored by Contractor;

    b. Contractor has established written policies and procedures for data security that prohibit activities that jeopardize security such as sharing user passwords, running hacking tools, performing unauthorized system changes. Such policies and procedures should have identifiable associated consequences. Contractor shall have communicated these policies

and procedures to all users of the Contractor's computer resources with user acknowledgement retained on file;

c. the Contractor's cyber asset level of protection has been defined using a risk assessment process factoring in business impact and the probability of occurrence;

d. each user shall be uniquely identified to ensure accountability and Contractor has processes in place to ensure only authorized and appropriate level of access is granted to computer resources;

e. user activity is logged and Contractor has a process in place for reporting suspected unauthorized activity to facilitate investigations;

f. attempted unauthorized activity is monitored by Contractor 7x24 for identified critical cyber assets (i.e., the Internet gateway, dial-in, or a high risk application) and Contractor has associated incident handling procedures in place to ensure timely and appropriate response in compliance with all applicable laws;

g. Contractor has change control processes and associated security in place to ensure that only authorized hardware and software is installed on the company's network;

h. Contractor has security services such as anti-virus, anti-spyware, firewalls, patch update processes, intrusion detection, third party vulnerability assessments, and vulnerability scanning of critical cyber assets, in place and up to date with the latest versions and technology, and Contractor shall keep such security services current and up to date with the latest versions, patches, new virus definitions, etc., and periodically test these services to ensure effective on-going operation;

i. where wireless technology is used, Contractor has sufficient controls (e.g., encryption, device identification, vulnerability assessment) in place to ensure only authorized use and data privacy;

j. all laptops used by Contractor to access or store CEII, PHI or PII shall be encrypted.

k. all records and files containing PII, PHI, CEII or CIP information that will travel across public networks or will be transmitted wirelessly, shall be encrypted.

l. Contractor has business continuity plans in place that address common events including heavy absenteeism for an extended duration (i.e., a pandemic) and disaster recovery plans and Contractor periodically tests these plans to ensure their effectiveness.

m. Utility has the right to audit Contractor’s computer systems to ensure all such systems and Utility information stored on such systems are managed by Contractor in accordance with the requirements set forth in these Requirements.

4. The following provisions related to information security are hereby added to the General Terms and Conditions or agreement to which these Requirements are attached:

a. Contractor shall comply with “best industry practices” relating to electronic information security for the Information within Contractor’s control and shall be liable for any Utility Confidential Information that is lost, stolen or disclosed without authorization while in Contractor’s control;

b. Contractor shall comply with all federal and state laws and regulations applicable to the type of Confidential Information that Contractor electronically transmits, receives, hosts, stores, maintains, processes, or otherwise has access to. In the event that several laws or regulations apply to any of the Confidential Information being managed by Contractor, the more stringent law and requirement shall apply to all such Confidential Information (e.g. if a Contractor manages PII information applicable to any Utility customer or employee, the more stringent standards of any applicable state or federal laws regarding such PII information shall apply to all customer or employee information being managed by Contractor);

c. Contractor shall obtain written authorization from Utility prior to sending, communicating, delivering or transmitting Confidential information to a subcontractor or an affiliate;

d. Insurance: Contractor warrants that it will maintain sufficient insurance coverage to enable it to meet its obligations created by this Agreement and by law. Without limiting the foregoing, and in addition to any other insurance requirements set forth in the Agreement with Contractor, Contractor will maintain (and shall cause each of its agents, independent contractors and subcontractors performing any services hereunder to maintain) at its sole cost and expense at least the following insurance covering its obligations under this Agreement:

i. Professional Liability Insurance with a combined single limit of not less than Five Million Dollars ($5,000,000) per occurrence. Such insurance shall cover any and all errors, omissions or negligent acts in the delivery of products and services under this Agreement. Such errors and omissions insurance shall include coverage for claims and losses with respect to network risks (such as data breaches, unauthorized access/use, ID theft, invasion of privacy, damage/loss/theft of data, degradation, downtime, etc.) and intellectual property infringement, such as copyrights, trademarks, service marks and trade dress.

ii. The Professional Liability Insurance retroactive coverage date shall be no later than the Effective Date. Contractor shall maintain an extended reporting period providing that claims first made and reported to the insurance company within two (2) years after termination of the Agreement will be deemed to have been made during the policy period.

iii. Contractor shall ensure that (i) the insurance policy listed above contain a waiver of subrogation against Utility and its affiliates, (ii) the Professional Liability policy names Utility and its affiliates and assignees as additional insureds, and (iii) all policies contain a provision requiring at least thirty (30) days' prior written notice to Utility of any cancellation, modification or non-renewal. Within thirty (30) days following the Effective Date, and upon the renewal date of each policy, Contractor will furnish to Utility certificates of insurance and such other documentation relating to such policies as Utility may reasonably request. In the event that Utility reasonably determines the coverage obtained by Contractor to be less than that required to meet Contractor's obligations created by this Agreement, then Contractor agrees that it shall promptly acquire such coverage and notify Utility in writing that such coverage has been acquired. All insurance must be issued by one or more insurance carriers Best rated A- or better. Contractor's insurance will be deemed primary with respect to all obligations assumed by Contractor under the Agreement.

e. To the extent applicable, Contractor shall comply with Utility's Customer Service and/or Human Resources privacy policies and Corporate Information Security procedures as specified in a separate exhibit attached hereto if applicable;

5. Security Incident Management:

a. Utility's Corporate Information Security (CIS) assists in responding to and investigating incidents related to misuse or abuse of Utility or customer information technology resources. This includes computer and network security breaches and unauthorized disclosure or modification of electronic utility or personal information. In the event of a security incident concerning a computer hosting sensitive Utility or personal data, Contractor must take immediate action to report the incident to CIS *as soon as the incident is suspected.*

b. Contractor should **IMMEDIATELY CALL**, regardless of the day or time the Corporate Information Security at (860) 665 - 4357 (24x7); Please **ALSO** email **sharcis@eversource.com** and Utility's Chief Compliance Officer, Duncan MacKay, duncan.mackay@eversource.com with details of the suspected exposure. Please **DO NOT** simply leave voicemail or send email - please ensure you reach an employee, because it is **CRITICAL** that Utility begins response procedures immediately.

c. **DO NOT** take any other action until advised by the CIS provided however Contractor shall not be restricted from taking commercially reasonable efforts to avoid or limit the damage to Utility information or systems caused by an incident if CIS is advised of such efforts at the time of or before they are undertaken.

d. **DO NOT** talk about the incident with any other parties until you are authorized as part of the process outlined in this document.

e. When CIS is notified, it will advise and assist in containing and limiting the exposure, in investigating the breach or attack, in obtaining the appropriate approvals, and in handling notification to the affected individuals and agencies. The incident still is the responsibility of the Contractor experiencing the exposure; CIS' mission is to provide assistance and guidance to the Contractor to appropriately and timely resolve any incident.

EVERSOURCE ENERGY

Matter Management Plan and Budget

The purpose of this matter management plan and budget is to provide a framework within which a litigation matter will be managed and strategies and goals for the case developed. While this framework is not intended to limit the ability of counsel to properly represent the interests of Eversource Energy, it is intended to serve as a reference guideline for how this matter will proceed and for how decisions relating to strategy and settlement will be made. This matter plan and budget is not intended to be an inflexible document; rather, it should be updated as the matter progresses, as the facts and issues develop, and as experience and reason dictate.

I. <u>CASE OVERVIEW</u>- *Within 45-60 days of the filing of the complaint, other charging document or pleading, or, if the matter is already pending, receipt of this Matter Management Plan and Budget, provide an initial assessment of the matter, a description of the various options for proceeding with the matter, and a fee proposal and budget for each option, including in the assessment the following information/analyses:*

A. Provide a brief description of the nature of the claims and the relief sought.
B. Describe the principal legal issues.
C. Describe the principal factual issues, including potential witnesses.
D. Provide a preliminary evaluation and theory of the case.
E. Set forth the legal and business goals of the representation.
F. If in federal court, in state court on the complex litigation docket, or in arbitration, please describe the reputation of the assigned judge/arbitrator and the demographics of the jury panel; if in state court, please assess whether this case should be removed to federal court or placed on the complex litigation docket.
G. Describe the capabilities and resources of opposing counsel and the opposing party.
H. Describe the proposed staffing for the representation, including a distribution of responsibilities if this is a multi-firm representation and also as between in-house and external resources.
I. Provide an assessment of liability (including the percentage probability of success on key issues, claims, defenses, counterclaims, cross-claims, and third-party claims).
J. Provide an assessment of exposure (including damages, other relief sought, attorneys' fees recoverable, set-offs, indemnities, and contribution).
K. Evaluate the potential for early disposition through negotiation, ADR, or motion. ***The rebuttable presumption is that the case should proceed promptly (within 90-120 days of filing) to formal mediation.***
L. Anticipated inside legal costs and employee time.
M. Miscellaneous issues presented by the case (i.e., publicity, business relationships, business disruption, etc.).
N. Settlement analysis.

O. Overall preliminary recommendations, proposed plan, and recommended reserve for the Company's Corporate Accounting Department and the business unit's accounting function (*must confirm with the business unit accounting function that it has undertaken a reserve analysis and what if any reserve has been established*).

P. Potential insurance coverage/notification of carrier through copy of complaint to the Company's Claims & Insurance Department *(must confirm with Claims & Insurance that it has undertaken a coverage analysis and what if any coverage exists).*

Q. Potential developmental/partnering opportunities for in-house counsel/paralegal.

II. <u>PRELIMINARY PROCEEDINGS</u>- *Please describe the nature and scope of the initial proceedings in this matter and estimate the time and cost attributable to each.*

A. Initial client meeting(s).
B. Preliminary factual investigation and interviews with relevant witnesses.
C. Initial legal research and research memoranda (describe purpose of research for each issue identified).
D. Case analysis.
E. Develop litigation plan, including work allocation between internal and external resources, and budget.
F. Consideration of alternative dispute resolution (for example, arbitration, mediation, or reference for fact finding), along with the projected budget.

III. <u>PLEADINGS (I.E., COMPLAINT, ANSWER, COUNTERCLAIMS, ETC.)</u>- *Please describe the nature and scope of the pleadings likely to be filed in this matter and estimate the time and cost attributable to each task related thereto.*

A. Describe the pleadings.
B. Legal research
C. Drafting

IV. <u>DISCOVERY</u>- *Please describe the nature and scope of the discovery likely to be required in this matter and estimate the time and cost attributable to each task related thereto.*

A. Preparation of document discovery.
    1. Interrogatories, document requests, and requests for admissions.
    2. Review adversary's response to discovery requests.
    3. Follow-up requesting more specific information to discovery requests; analysis of responses.
    4. Preparation, research, and argument of anticipated discovery motions.

B. Responding to adversary's document discovery.
    1. Review of potentially relevant client files and production of documents.

2. Preparation of objections to adversary's document requests.
3. Follow-up to respond to adversary's request for further information.
4. Preparation, research and argument of anticipated discovery motions.

C. Depositions

1. Preparation for and taking depositions, including non-party depositions. (List deponents to be taken and include a brief statement as to why such deposition is necessary.)
   a. _____
   b. _____
   c. _____
   d. _____
   e. _____
2. Preparation for and defending depositions likely to be requested by adversary. (List deponents, state whether such depositions are relevant and, if not, whether motion practice should be pursued.)
   a. _____
   b. _____
   c. _____
   d. _____
   e. _____
3. Review and analysis of depositions.

V. <u>EXPERT WITNESSES</u>- *Please describe the nature and scope of expert witnesses in this matter and estimate the time and cost attributable to each related item.*

A. Identification and retention of experts (state purpose of each expert to be retained.)
B. Conferences and interaction with experts.
C. Produce and obtain expert reports.
D. Prepare for and attend all expert depositions.

VI. <u>MOTION PRACTICE (INCLUDE SUBJECT MATTER OF, AND REASONS FOR, ANTICIPATED MOTIONS)</u>- *Please describe the nature and scope of the motions likely to be filed or encountered in this matter and estimate the time and cost attributable to each task related thereto.*

A. Addressed to pleadings
B. Summary judgment
C. Motions in limine

VII. <u>PRETRIAL COURT APPEARANCES</u>- *Please describe the nature and scope of the pretrial court appearances likely to occur in this matter and estimate the time and cost attributable to each task related thereto.*

A. Status and case management conferences
B. Settlement and pretrial conferences

VIII. **FINAL TRIAL PREPARATION**- *Please describe the nature and scope of the pretrial preparation likely to be required in this matter and estimate the time and cost attributable to each task related thereto.*

A. Preparation of trial documents required by the court (e.g., pretrial order, witness and document lists, and portions of depositions to be offered in evidence).
B. Preparation of trial presentation.

IX. **TRIAL**- *Please describe the nature and scope of the trial of this matter and estimate the time and cost attributable to each task related thereto.*

A. Voir dire
B. Opening argument
C. Pretrial brief
D. Jury instructions (including special verdict questions)
E. Direct examination preparation
F. Cross-examination preparation
G. Exhibits and evidentiary issues
H. Closing argument
I. Post-trial brief

X. **STAFFING**- *Please identify the individuals you anticipate staffing this matter, through the completion of trial, including their role and applicable hourly billable rate (reflecting any discounts).*

A. Lead Counsel
B. Associate Counsel
C. Legal Assistant/Paralegal

XI. **POST-TRIAL MOTIONS**- *Please describe the nature and scope of any post-trial motions you anticipate filing or encountering in this matter and estimate the time and cost attributable to each task related thereto.*

XII. **APPEALS**- *Please identify the likelihood that an appeal will be taken from any judgment or verdict in this matter and the nature of the issues related thereto.*

XIII. **MISCELLANEOUS**- *Please describe the nature and scope of any miscellaneous tasks, not described above, likely to be involved in this matter and estimate the time and cost attributable to each task related thereto.*

A. Research and prepare memoranda of law on emerging issues as they arise.

B. Correspondence, memoranda, conferences, telephone calls, miscellaneous research, analysis development of strategy, etc.
C. Other (Describe)

XIV. <u>OUT OF POCKET COSTS</u>- *Expenses and disbursements other than those described below shall be born by counsel unless otherwise agreed to and set forth and budgeted below.*

A. Deposition transcripts.
B. Travel, lodging, and meals.
C. Expert witnesses.
E. Other agreed to expenses in accordance with the Company's Billing Conventions and Guidelines.

Total estimated out of pocket costs:_____

PEPPERDINE UNIVERSITY
School of Law

Living with ADR: Evolving Perceptions and Use of Mediation, Arbitration and Conflict Management in Fortune 1,000 Corporations

Thomas J. Stipanowich and J. Ryan Lamare

Pepperdine University School of Law

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Living with ADR: Evolving Perceptions and Use of Mediation, Arbitration and Conflict Management in Fortune 1,000 Corporations

Thomas J. Stipanowich[*] and J. Ryan Lamare[**]

INTRODUCTION

For the second time in fifteen years, leading counsel at many of the world's largest corporations participated in a landmark survey of perceptions and experiences with "alternative dispute resolution (ADR)"—mediation, arbitration and other third party intervention strategies intended to produce more satisfactory paths to managing and resolving conflict, including approaches that may be more economical, less formal and more private than court litigation, with more satisfactory and more durable results.[1] Comparing their responses to those of the mid-1990s, significant evolutionary trends are observable. As a group, corporate attorneys have moderated their expectations for ADR.[2] At the same time, more corporations have embraced mediation and foresee its continuing use for a wide spectrum of disputes.[3] Many companies are also employing other informal approaches to early resolution of conflict[4] and integrated systems for addressing workplace conflict.[5] Binding arbitration, significantly, reached its tipping point: while some longstanding concerns about arbitration processes have lessened, fewer major companies are relying on arbitration to resolve many kinds of disputes (important exceptions being consumer and products liability disputes) and are evenly divided regarding its future use.[6]

During the "Quiet Revolution" that transformed American conflict resolution in the final decades of the Twentieth Century,[7] legal counsel for major corporations played a significant role.[8] Corporate attorneys, along with courts,[9] community programs[10] and government agencies[11]

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[*] William H. Webster Chair in Dispute Resolution and Professor of Law, Pepperdine University School of Law; Academic Director, Straus Institute for Dispute Resolution. The authors extend special thanks to Professor Rob Anderson for his valued assistance in the analysis of survey data, as well as the many who offered valuable comments or criticisms, including David Lipsky, Ahmed Taha, Phil Armstrong and David Cruikshank. They also thank Research Services Librarian Tiffani Willis; Meredith Parker and Sara Rosenblit, Pepperdine University School of Law Class of 2012; and Hsuan (Valerie) Li and Jessica Tyndall, Pepperdine University School of Law Class of 2014; for their background research for this article.

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[1] *See* Thomas J. Stipanowich, *ADR and "The Vanishing Trial": The Growth and Impact of "Alternative Dispute Resolution",* 1 J. EMPIRICAL LEGAL STUD. 843, 845 (2004) [hereinafter Stipanowich, *Vanishing Trial*], *available at* http://ssrn.com/abstract=1380922. *See also* Steven Shavell, *Alternative Dispute Resolution: An Economic Analysis,* 24 J. LEGAL STUD. 1, 1 (1995). However, the term has been subject to criticism for several reasons. *See infra* text accompanying notes 166–76.

[2] *See infra* text accompanying notes 199–204.

[3] *See infra* Part IV.A.

[4] *See infra* text accompanying notes 210–20.

[5] *See infra* text Part VI.

[6] *See infra* Part IV.A.

[7] *See infra* Part I.A.2.

[8] *See* Harry N. Mazadoorian, *At a Crossroad: Will the Corporate ADR Movement be a Revolution, or Just Rhetoric?*, 4 DISP. RESOL. MAG. 4 (Summer, 2000). *See also* Stipanowich, *Vanishing Trial, supra* note 1, at 875–

provided key leadership in promoting the use of mediation and other intervention strategies for more effective resolution of disputes.[12] As the nation's—and world's—most visible clients, corporate counsel were uniquely placed to help bring about a sea change in the culture of conflict.

In 1997 a survey of Fortune 1,000 corporate counsel provided the first broad-based picture of conflict resolution processes within large companies after the advent of the Quiet Revolution.[13] The more than six hundred responses offered a tantalizing glimpse of how and why businesses employed mediation, arbitration and other approaches collectively known by the term "ADR." Coupled with follow-on investigations at representative companies, [14] the Fortune 1,000 survey presented a highly variegated picture of corporate perceptions and experiences. It identified perceived potential benefits of mediation or of arbitration, usage patterns within different industries and corporate sectors, and concerns that acted as barriers to the use of ADR.[15] It also demonstrated that, despite being widely exposed to ADR and tending to appreciate the potential benefits of purposeful choice in managing conflict, companies' approaches to conflict were very mixed, with many companies still relying on litigation as their preferred approach of first resort.[16]

Since that time, corporate dispute resolution policies and practices have received considerable attention in public tribunals, among practicing attorneys and scholars, and the media.[17] In addition to encouraging or directing companies to mediate cases in litigation, courts are regularly being called upon to interpret and enforce varied, often complex contractual dispute resolution schemes.[18] The U.S. Supreme Court and other courts have tended to accord broad enforcement to binding arbitration agreements, giving rise to controversy between some companies and consumer and employee advocates over questions of procedural fairness.[19]

910, *available at* http://ssrn.com/abstract=1380922 (describing evolution of ADR and conflict management in business realm).

[9] *See* David I. Tevelin, *The Future of Alternative Dispute Resolution*, FORUM, Winter 1992, at 15 (according to the National Center for State Courts, nearly 1,100 programs were being operated by state courts or assisting state tribunals in handling disputes in 1990).

[10] *Id.*

[11] *See generally* JEFFREY M. SENGER, FEDERAL DISPUTE RESOLUTION: USING ADR WITH THE UNITED STATES GOVERNMENT (Jossey-Bass 2004) (discussing how government agencies helped transform conflict resolution). *See also*, *e.g.*, Stipanowich, *Vanishing Trial, supra* note 1, at 866 (discussing developments in the U.S. Justice Department).

[12] *See supra* note 8, at 4-5.

[13] *See infra* Part I.B.

[14] *See infra* text accompanying notes 136–42.

[15] *See supra* note 13.

[16] *See infra* text accompanying notes 80–1.

[17] *See* U.S. DEP'T OF LABOR, EMPLOYMENT LITIGATION AND DISPUTE RESOLUTION, http://www.dol.gov/_sec/media/reports/dunlop/section4.htm (discussing the need of dispute resolution programs in companies to prevent dissatisfaction with litigation).

[18] *See generally* Thomas J. Stipanowich, *The Arbitration Penumbra: Arbitration Law in the Changing Landscape of Dispute Resolution,* 8 NEV. L. REV. 101 (2007) [hereinafter Stipanowich, *Arbitration Penumbra*], *available at* http://ssrn.com/abstract=1007490 (describing variety of dispute resolution approaches, including stepped and "hybrid" processes).

[19] *See, e.g.,* Thomas J. Stipanowich, *The Third Arbitration Trilogy*, *Stolt-Nielsen, Rent-A-Center, Concepcion and the Future of American Arbitration,* 22 AMER. REV. INT'L ARB. 324 (2011) [hereinafter Stipanowich, *Trilogy*], *available at* http//ssrn.com/abstract=1919936 (summarizing recent key Supreme Court cases dealing with enforcement of arbitration agreements and Congressional and regulatory responses).

Although framed quite differently, there is also lively debate over the effectiveness of arbitration as a substitute for litigation of business-to-business disputes.[20] There are, moreover, indications that although companies' policies regarding arbitration and other conflict management approaches vary considerably, a good number are employing approaches aimed at early or "real-time" resolution of conflict.[21] All of these indicators have stoked interest in empirical research on corporate policies and practices.[22]

In 2011, a second landmark survey of corporate counsel in Fortune 1,000 companies was co-sponsored by Cornell University's Scheinman Institute on Conflict Resolution, the Straus Institute for Dispute Resolution at Pepperdine University School of Law, and the International Institute for Conflict Prevention & Resolution (CPR).[23] It was administered by the Cornell University Survey Research Institute. The new survey, which is the focus of this article, offers important new insights regarding changes in the way large companies handle conflict. It evidences key trends, including a general shift in corporate orientation away from litigation and toward ADR.[24] It enhances our understanding of significant variations in ADR usage patterns in three major transactional settings: corporate/commercial, consumer, and employment.[25] Most importantly, it presents dramatically contrasting pictures of the evolution of the two primary ADR choices, mediation and arbitration. While mediation appears to be even more widely used than in 1997 and is today virtually ubiquitous among major companies, the survey indicates a dramatic *fall-off* in the use of arbitration in most types of dispute: commercial, employment, environmental, IP, real estate and construction, among other categories, with notable exceptions such as consumer disputes and products liability cases.[26] At the same time, the survey offers tangible evidence of corporations' growing sophistication and increasing emphasis on control of the process of managing conflict, including reliance on early neutral evaluation and early case assessment, approaches aimed at deliberate management of conflict in the early stages,[27] as well as control over the selection of third-party neutrals and increasing sophistication in the use of ADR.[28] This enhanced sophistication and attention is also reflected in the growing use of integrated approaches to managing conflict, particularly in the employment sphere.[29] Finally, the new data afford an understanding of the expectations and the concerns that drive these choices, raising questions about the origins and viability of corporate attorneys' perceptions—notably those regarding arbitration—and suggesting potential ways of addressing underlying concerns.

Part I of this article provides a retrospective on the modern evolution of ADR among corporations and summarizes the developments leading up to the original (1997) Fortune 1,000 survey of corporate counsel, and the central findings of that landmark study. Part II describes the

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[20] *See generally* Thomas J. Stipanowich, *Arbitration: The "New Litigation,"* 2010 U. ILL. L. REV. 1 (2010) [hereinafter Stipanowich, *New Litigation*], *available at* http://ssrn.com/abstract=1297526 (discussing evolution of arbitration along lines of litigation).

[21] *See* Thomas J. Stipanowich, *Real-Time Strategies for Relational Conflict,* IBA LEG. PRACT. DIV. MED. NWSLTR., 6 (2007), *available at* http://ssrn.com/abstract=1980792.

[22] *See*, *e.g.*, *infra* text accompanying notes 123–32, 136–45.

[23] CPR is a 501(c)(3) organization focused primarily on professional educational initiatives. *See infra* text accompanying notes 54–5.

[24] *See infra* Part III.A.

[25] *See infra* text accompanying notes 188–91, 222–46.

[26] *See infra* Part III.A–B.

[27] *See infra* text accompanying notes 215–20, Part V.

[28] *See infra* Part VI.

[29] *See infra* Part VII.

further evolutionary events giving rise to the current Fortune 1,000 survey as well as our working hypotheses and methodology. Parts III-VI summarize and analyze different aspects of the current survey data and offer comparisons to the 1997 results and other studies. Part III examines conflict resolution policies among corporations, the circumstances that "trigger" the use of ADR, the reasons companies choose to use ADR, and the relative usage of different forms of ADR in the three years prior to the survey. Part IV focuses on the two most important process options, mediation and arbitration, examining their relative usage for different kinds of disputes (with special emphasis on corporate/commercial, employment and consumer disputes) and expectations regarding their future use. Part V scrutinizes what is, for most users, the single most important element in mediation and arbitration: the individuals employed to facilitate or adjudicate the dispute; it explores current methods of "neutral" selection as well as current perceptions of quality. Part VI briefly examines the growth of integrated conflict resolution systems addressing issues and conflicts in employment relationships. Part VII offers final reflections on the future of mediation, arbitration and conflict management practice and research, positing opportunities for corporations to take full advantage of the choices inherent in ADR and for researchers to build on the foundation of broad-based surveys.

I. THE FIRST FORTUNE 1,000 CORPORATE COUNSEL SURVEY (1997)

A. Backdrop for the 1997 Survey

1. The "Business Arbitration Era"

For much of the latter half of the Twentieth Century, out-of-court dispute resolution centered on binding arbitration[30] as an alternative to litigation of commercial disputes.[31] Empirical studies from the fifties through the mid-eighties portrayed a wide array of procedural options available to arbitrating parties,[32] indicating how arbitration processes might be tailored to many different kinds of commercial disputes. Results reflected perceptions among most users that arbitration promoted faster resolution[33] and cost-savings,[34] especially in cases involving

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[30] Thomas J. Stipanowich, *Contract and Conflict Management*, 3 WIS. L. REV. 831, 839 (2001) [hereinafter Stipanowich, *Contract and Conflict Management*], *available at* http://ssrn.com/abstract=1377917 (binding arbitration is defined as "the submission of a dispute to one or more impartial persons for a final and binding decision.").

[31] *See generally* Thomas J. Stipanowich, *Rethinking American Arbitration*, 63 IND. L. REV. 425 (1987) [hereinafter Stipanowich, *Rethinking American Arbitration*], *available at* http://ssrn.com/abstract=2061822 (analyzing results of national survey by the ABA Forum on the Construction Industry regarding arbitration of construction disputes, and summarizing and comparing prior empirical studies of commercial arbitration). A notable exception to this orientation was the labor arena, in which mediation was also an important element. *See* WILLIAM E. SIMKIN & NICHOLAS A. FIDANDIS, MEDIATION AND THE DYNAMICS OF COLLECTIVE BARGAINING (2d ed. 1986); Jacqueline Nolan-Haley, *Mediation: The "New Arbitration,"* 17 HARV. NEGOT. L. REV. 61, 65 (2012).

[32] Some forms of arbitration were pure business tribunals, with no advocacy or adjudicative role for legal counsel. *See generally*, Mentschikoff, *Commercial Arbitration*, 61 COLUM. L. REV. 846, 859 (1961) (discussing problem of attorney participation in arbitration process which causes inadequacy and delay). *See, e.g.*, Stipanowich, *Rethinking American Arbitration*, *supra* note 31, at 434 (stating that some trade associations forbid attorney involvement in arbitration process).

[33] *See* Stipanowich, *Rethinking American Arbitration*, *supra* note 31, at 460–61 (ABA Forum survey), 473 (University of Chicago survey of AAA cases); 474 (Harvard Business School survey); 475 (Kritzer-Anderson study); 475–77 (AAA user rating survey, survey of closed cases).

[34] *See* Stipanowich, *Rethinking American Arbitration*, *supra* note 31, at 461–62.

smaller amounts at issue.[35] Most respondents positively assessed the abilities and effectiveness of arbitrators, comparing them favorably to judges and juries.[36] But while generally favorable, these studies also revealed undercurrents of concern regarding arbitration processes. Respondents often expressed negative views about the quality of arbitrators[37] and the sufficiency of information provided by administering institutions to aid in arbitrator selection.[38] Some also had concerns about the fairness of arbitral decisions (awards)[39] and the standards by which those decisions were made, including conformity to applicable law.[40] Unease about arbitrators often underpinned broader concerns about arbitration, including the relative lack of judicial oversight of arbitration awards.[41] Business people and counsel might harbor very different views on these subjects, but often shared concerns about the impact of attorneys on the arbitration process—particularly in contributing to delays.[42] At the same time, lawyers expressed views that arbitration might be improved by introducing elements analogous to litigation.[43] As reflected in the ABA Forum on the Construction Industry's intensive study of lawyer perspectives on arbitration, however, such opinions were sometimes qualified by concerns about arbitration becoming a mere carbon copy of litigation.[44] All of these expectations and concerns would figure in the forward evolution of arbitration and other process choices.[45]

2. The "Quiet Revolution"[46]

By the time of that ABA Forum study, dramatic change was afoot; the world of conflict resolution was experiencing unprecedented changes.[47] Spurred by the need to develop alternatives to the high costs and risk of litigation, businesses began exploring new alternatives for managing and resolving disputes, including mediation and other approaches aimed at settling disputes short of trial.[48] Businesses were motivated not only by risk of excessive judgments or

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[35] *See id.* at 460–62.
[36] *See id.* at 454–58.
[37] *See id.* at 454–56.
[38] *See id.* at 456.
[39] *See id.* at 457–58.
[40] *See id.* at 458–59
[41] *See id.*
[42] *See id.* at 477.
[43] Such elements include express arbitral authority to direct exchange of pertinent documents in advance of hearings and the ability to award attorney fees as a sanction for failure to comply with applicable arbitration procedures; these views evinced a general desire to see arbitrators exert greater control over the arbitration process and promote party cooperation in moving the case forward. *Id*. at 467.
[44] *See, e.g., id*. at 465 (majority of responding construction attorneys favored keeping discovery in arbitration more limited in scope than discovery in litigation).
[45] *See infra* text accompanying note 120.
[46] Portions of this section were adapted from Stipanowich, *Vanishing Trial, supra* note 1, at 875–79.
[47] *See id.* at 849–50 (discussing Congressional passage of the Civil Justice Reform Act and the evolution of federal and state court ADR programs), 875–909 (discussing evolution of ADR and conflict management in business, employment and consumer arenas). *See also* Thomas J. Stipanowich, *The Quiet Revolution Comes to Kentucky: A Case Study in Community Mediation,* 81 KY. L.J**.** 855, 856–61 (1993) [hereinafter Stipanowich, *The Quiet Revolution*], *available at* http://ssrn.com/abstract=2101212 (describing "quiet revolution" in dispute resolution in 1980s and early 1990s).
[48] *See generally* Thomas J. Stipanowich, *Beyond Arbitration: Innovation and Evolution in the United States Construction Industry,* 31 WAKE FOREST L. REV. 65 (1996) [hereinafter Stipanowich, *Beyond Arbitration*], *available at* http://ssrn.com/abstract=2060438 (summarizing and analyzing results of major national survey of construction ADR).

settlements, but also significant transaction costs, including the expense of legal counsel, supporting experts, preparation time and discovery—costs that were often a multiple of the amount of settlement.[49] Businesses experienced dramatic increases in the hourly billing rates at most law firms, the failure to manage discovery and related costs, the waning of professionalism and an increase in "Rambo"-style tactics, and perceptions that jury verdicts were becoming more unpredictable.[50] A 1998 study found one company "reported a nine-fold increase in legal costs over the ten years prior to the study, while another reported a ten-fold increase."[51] In addition to the costs of outside counsel, litigation often entailed an unacceptable drain on internal human resources[52] and consequent lost opportunities.

Exemplary of this emphasis on more actively managing conflict was the collaboration of leading corporate counsel in the creation in 1979 of the non-profit Center for Public Resources, later renamed the CPR Institute for Dispute Resolution, and, eventually, the International Institute for Conflict Prevention & Resolution (CPR).[53] The organization developed a variety of tools to promote and inform lawyers about constructive alternatives to court trial. In order to encourage a new problem-solving culture among lawyers, CPR sponsored conferences and developed an extensive array of publications, procedures and protocols for dispute resolution including, notably, the CPR Commitment or "Pledge" to attempt to resolve disputes without litigation.[54]

By the mid-1990s, corporate counsel and other advisors to businesses found themselves challenged for the first time to choose from (or be steered into) a diverse array of dispute resolution options including mediation,[55] mini-trial,[56] fact-finding,[57] court-annexed non-binding

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[49] David B. Lipsky & Ronald L. Seeber, *In Search of Control: The Corporate Embrace of ADR*, 1 U. PA. J. LAB. & EMP. L. 133, 142 (1998); Craig A. McEwen, *Managing Corporate Disputing: Overcoming Barriers to the Effective Use of Mediation for Reducing the Cost and Time of Litigation*, 14 OHIO ST. J. ON DISP. RESOL., 1 (1998); John Lande, *Failing Faith in Litigation? A Survey of Business Lawyers' and Executives' Opinions*, 3 HARV. NEGOT. L. REV. 51 (1998).

[50] McEwen, *supra* note 49, at 2–3.

[51] *Id*. at 7.

[52] *Id.* at 8–9.

[53] In between academic appointments, Professor Stipanowich served as the second President and CEO of CPR, from 2001 to 2006.

[54] The CPR Commitment, or "Pledge," was signed by corporate general counsel and managing partners on behalf of major corporations and law firms. Representatives of a total of more than 4,000 corporations, including subsidiaries, and hundreds of law firms have signed some version of the CPR Commitment, including industry-specific commitments. *See* Mazadoorian, *supra* note 8, at 4. Some of CPR's initiatives were aimed at concerns about the quality of arbitrators and administration of arbitration; CPR fielded a list of "distinguished neutrals" including former cabinet officers and retired federal appellate judges to "credential" arbitration and out-of-court dispute resolution, and established a new set of "nonadministered" rules for arbitration of complex commercial cases. *See* Stipanowich, *Beyond Arbitration*, *supra* note 48, at 79. CPR also helped develop guidance for court-connected ADR. ELIZABETH PLAPINGER & DONNA STEINSTRA, ADR AND SETTLEMENT IN THE FEDERAL DISTRICT COURTS: A SOURCEBOOK FOR JUDGES & LAWYERS, 61–2 (1996) (extensively describing various ADR programs in the federal district courts).

[55] Mediation came into wide use as a species of private, informal processes in which disputing parties were assisted by third parties who "advise and consult impartially with the parties [in their efforts] to bring about a mutually acceptable resolution of disputes." *See* Stipanowich, *Beyond Arbitration*, *supra* note 48, at 84–6. Mediation became the mainstay of court-connected and community programs throughout the U.S. *See id.* at 85. It came to be viewed as a particularly flexible tool for efficiently and effectively settling disputes. *See* Lisa Brennan, *What Lawyers Like: Mediation*, NAT'L L.J., A1 (1999) (reporting that four out of five outside lawyers and in-house counsel responding to survey used mediation because it saves time and money; approximately half reported that mediation preserves

arbitration[58] and early neutral evaluation (ENE).[59] In the construction and employment arenas, there was even more ambitious experimentation with approaches aimed at proactive management of conflict.

In 1994, linked nationwide surveys of construction and public contracts attorneys, business persons and industry professionals[60] depicted an industry rapidly moving beyond reliance on binding arbitration and actively exploring a range of new approaches to construction conflict;[61] mediation, dispute review boards and other tailored intervention strategies came to the

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relationships).

[56] Mini-trial (Minitrial) is a process in which counsel for the opposing parties present their "best cases" in condensed form before representatives of each side who are authorized to settle the dispute. Usually, a neutral third-party advisor presides over the process. After the presentation, the parties' representatives meet to discuss settlement prospects. The advisor may offer certain non-binding conclusions regarding the probably adjudicated outcome of the case and may assist in negotiations. Thomas J. Stipanowich & Leslie King O'Neal, *Charting the Course: The 1994 Construction Industry Survey On Dispute Avoidance and Resolution—Part I*, 15-Nov CONSTR. LAW. 5, 9 n. 14 (1995) (quoting Thomas J. Stipanowich & Douglas A. Henderson, *Settling Disputes by Mediation, Minitrial and Other Processes-The ABA Forum Survey*, 12 CONSTR. LAW. 6 (April 1992). Limited discovery may precede each presentation in order to allow each side to put on its best evidence and present a concise version of its case. Albert H. Dib, *EPA Alternative Dispute Resolution Guidance*, 4 FORMS AND AGREEMENTS FOR ARCHITECTS, ENGINEERS AND CONTRACTORS § 38:29 (2012). *See also* Robert M. Smith, *Alternative Dispute Resolution for Banks and Other Financial Institutions*, 46 AM. JUR. TRIALS 231, § 34 Minitrial (2012). The mini-trial format may be tailored in various ways, including authorizing the third party neutral to making a legally binding decision. H. Warren Knight, CALIFORNIA PRACTICE GUIDE: ALTERNATIVE DISPUTE RESOLUTION, Ch. 3-F (Rutter Group 2004) (2001).

[57] Fact-finding processes engage neutral parties—lay or expert—in determining elements of "truth" in a factual dispute. Smith, *supra* note 56, at § 3 Private ADR Processes (1993), updated 2012. Fact-finding has seen use as a free-standing settlement technique, or in support of mediation or other approaches. *See* Brian Panka, *Use of Neutral Fact-Finding to Preserve Exclusive Rights and Uphold the Disclosure Purpose of the Patent System*, 2003 J. DISP. RESOL. 531, 541 (2003); Robert B. Fitzpatrick, *Shouldn't We Make Full Disclosure to Our Clients of ADR Options?*, SC 59 ALI-ABA 755, 770 (1998). *See also* Charles P. Lickson, *The Use of Alternative Dispute Resolution in Intellectual Property, Technology-Related, or Innovation-Based Disputes*, 55 AM. JUR. TRIALS 483, § 47 (1995), updated 2012; Smith, *supra* note 56, at § 33 Neutral Fact Finding (2012) ("Fact-finding is often treated as an element of the services provided by a mediator in the mediation process. In fact, fact-finding is a component of almost all ADR procedures."). The parties present or submit one or more factual aspects of a dispute to a neutral third party who decides the facts of the case and issues a report based on those facts. Fitzpatrick, *supra*, at 770. Fact-finding can be undertaken voluntarily by the parties in an attempt to promote settlement discussions, or ordered by a court as part of the narrowing of the issues for either settlement or litigation. Lickson, *supra*. Fact-finders may render advisory opinions or reports, or legally binding conclusions. Tim K. Klintsworth, *The Enforceability of An Agreement to Submit to a Non-Arbitral Form of Dispute Resolution: The Rise of Mediation and Neutral Fact-Finding*, 1995 J. DISP. RESOL. 181, 186 (1995).

[58] Court-annexed non-binding arbitration is an adjudicatory process involving an expedited adversarial hearing before one or more lawyer arbitrators culminating in a non-binding judgment on the merits on disputed legal issues. Either party might reject the arbitral judgment and seek trial de novo. *See, e.g.,* PLAPINGER & STEINSTRA, *supra* note 54, at 61–2 (1996).

[59] Early neutral evaluation (ENE) is a non-binding ADR process usually conducted early in litigation, before much discovery has taken place. The neutral evaluator conducts a confidential session with the parties and counsel to hear both sides of the case and offer a non-binding assessment of the case. The evaluator may also help with case planning by helping to clarify arguments and issues, and may even mediate settlement discussions. *Id.* at 63–5.

[60] *See generally* Stipanowich, *Beyond Arbitration*, *supra* note 48 (detailing results of 2 surveys on mediation and other ADR processes).

[61] *See id.* Despite the evolution of other alternatives, arbitration continues to be widely embraced as for the resolution of international disputes. *See* ALAN REDFERN, LAW AND PRACTICE OF INTERNATIONAL COMMERCIAL ARBITRATION 62–6 (4th ed. 2004) (discussing the importance of arbitration for international commerce disputes).

fore as strategies for early, informal resolution of disputes.[62] An even more ambitious movement toward "upstream," integrated management of conflict was "partnering"—facilitated meetings among project team members to discuss and anticipate organizational and individual goals, concerns and hot-button issues during the course of construction.[63] But mediation was by far the most widely used of the new approaches,[64] and construction lawyers tended to view mediation as more effective than arbitration in producing positive results[65]: resolving individual disputes, improving communications, preserving relationships, and reducing the cost and delay associated with dispute resolution.[66] Portending future trends toward "lawyer-driven" or "legal" mediation,[67] reports of 459 individual mediations showed that more than eighty-five percent of mediators were attorneys or retired judges,[68] that more than seven in ten mediators "expresse[ed] to the parties . . . their views of the factual and legal issues in dispute,"[69] and that there were significantly more full or partial settlements in cases where such evaluations were offered.[70]

Meanwhile, there were signs of a dramatic transformation in the handling of workplace conflict. This development reflected societal tensions between collectivism and individualism, as well as the perception of many organizations that rather than merely react to conflict, there was a need to become increasingly strategic in their management of employment disputes, a normal and inevitable reality of the workplace.[71] In 1995, the General Accounting Office issued a report on U.S. businesses which indicated that almost all employers used some form of ADR, with negotiations, fact-finding, mediation, and peer review being the most common.[72] Some companies, however, were going further and developing integrated systems for the management of conflict in the non-union workplace. Such programs typically embraced a comprehensive and proactive approach to conflict management, a broad scope for handling complaints, and variety of access points for entrance into the system, including an office charged with managing the firm's ADR system.[73] The Brown & Root Dispute Resolution Program, effective in 1993,

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[62] Thomas J. Stipanowich, *The Multi-Door Contract and Other Possibilities*, 13 OHIO ST. J. DISP. RESOL. 303, 336–78 (1998) [hereinafter Stipanowich, *Multi-Door Contract*], *available at* http://ssrn.com/abstract=2015805.

[63] *Id.* at 378–85.

[64] Stipanowich, *Beyond Arbitration*, *supra* note 48, at 179.

[65] *Id.* at 172.

[66] DAVID B. LIPSKY & RONALD L. SEEBER, THE APPROPRIATE RESOLUTION OF CORPORATE DISPUTES: A REPORT ON THE GROWING USE OF ADR BY U.S. CORPORATIONS, CORNELL/PERC INST. ON CONFLICT RESOL.172, TABLE LL-1.ATTORNEYS (1998) [hereinafter LIPSKY & SEEBER, REPORT ON THE GROWING USE OF ADR].

[67] *See infra* text accompanying notes 109-11.

[68] LIPSKY & SEEBER, REPORT ON THE GROWING USE OF ADR, *supra* note 66, at 116, Table O "Occupation of Mediator."

[69] *Id*. at 118, Table Q "Features of Mediation."

[70] *Id*. at 123. Significantly, although tending to view mediation as most effective in achieving key process goals, early neutral evaluation usually received their second highest collective assessment, and in some cases was rated even higher than mediation. *See id*. at 145-52. *See also* Stipanowich, *Multi-Door Contract*, *supra* note 62, at 366-72 (discussing implications of survey data and similar anecdotal evidence).

[71] For a summary of these tensions, and a full analysis of the extent to which the Fortune 1,000 survey assesses these, please see David B. Lipsky et al., *Conflict Resolution in the United States*, OXFORD HANDBOOK ON CONFLICT MANAGEMENT (forthcoming, 2013).

[72] John T. Dunlop & Arnold M. Zack, *Mediation and Arbitration of Employment Disputes,* 75 (1997). Roughly 10% of employers used arbitration, making it one of the least common approaches. *Id.*

[73] *See* DAVID B. LIPSKY ET AL., EMERGING SYSTEMS FOR MANAGING WORKPLACE CONFLICT: LESSONS FROM AMERICAN CORPORATIONS FOR MANAGER AND DISPUTE RESOLUTION PROFESSIONALS 3-22 (Cornell University Press 2003) [hereinafter LIPSKY ET AL., EMERGING SYSTEMS FOR MANAGING WORKPLACE CONFLICT]. *See also* ANN

included an open door policy and provided the employee with options of internal mediation, mediation by a third party, and independently administered arbitration.[74] Generally, employer-designed systems were introduced to employees with the assurance that the purpose of the system was to reduce costs and delays of litigation while protecting the rights of the employees.[75]

B. The 1997 Fortune 1,000 Survey

All of these developments created the impetus for the first broad-based study of dispute resolution in major companies—the 1997 survey of Fortune 1,000 corporate counsel by Cornell University.[76] Based on responses from more than six hundred companies, the study concluded "that ADR processes are well established in corporate America, widespread in all industries and for nearly all types of disputes,"[77] and that "ADR practice is not haphazard or incidental but rather seems to be integral to a systematic, long-term change in the way corporations resolve disputes."[78] Although reflecting widespread usage of ADR processes by businesses, however, these conclusions greatly overstated the degree of systematization in corporate conflict management reflected in the data.[79] While more than one in ten companies purported to "always try to use ADR," companies with policies emphasizing litigation, or an ad hoc approach to dispute resolution, still outnumbered those asserting pro-ADR policies.[80]

A full eighty-seven percent of respondents reported some use of mediation by their companies in the prior three years, and eighty percent reported using arbitration during the same period.[81] However, around four-fifths of the respondents said their companies engaged in mediation or arbitration only "occasionally," "rarely," or "not at all."[82] In-house grievance

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GOSLINE ET AL., DESIGNING INTEGRATED CONFLICT MANAGEMENT SYSTEMS: GUIDELINES FOR PRACTITIONERS AND DECISION MAKERS IN ORGANIZATIONS (Cornell University Press 2001).

[74] *Id.* at 72.

[75] *Id.* at 76.

[76] *See generally* LIPSKY & SEEBER, REPORT ON THE GROWING USE OF ADR, *supra* note 66.

[77] *Id.* at 8. The survey was directed to general counsel or heads of litigation at the Fortune 1,000 companies. For the purposes of the survey, ADR was defined as "the use of any form of mediation or arbitration as a substitute for the public judicial or administrative process available to resolve a dispute." *Id.* at 7. Actually, the survey included queries regarding other forms of ADR as well.

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[79] As much is acknowledged by the authors in a follow-up study taking a closer look at corporate ADR and conflict management practices. *See infra* text accompanying notes 135–44.

[80] LIPSKY & SEEBER, REPORT ON THE GROWING USE OF ADR, *supra* note 66, at 9, Chart 2; 11, Table 5.

[81] *Id.* at 9, Chart 2. A difficulty with the term "arbitration" is that it comprehends the very different systems of binding arbitration pursuant to agreement and court-ordered arbitration, which is rarely binding unless the parties subsequently so agree. The responses appear to have contemplated one or the other or both kinds of "arbitration" – and perhaps private non-binding processes as well. These are all very different species with varied functions: non-binding arbitration is typically a spur to settlement, while binding arbitration is a wholesale substitute for court trial.

[82] *Id.* at 10, Tables 3, 4 (reflecting data for "rights arbitration." The authors of the study, reflecting their background in the labor field, chose to divide disputes into those involving "rights" – as they defined it, involving "a conflict that arises out of the administration of an already existing agreement", and "interests" – involving dispute arising "between parties trying to forge a relationship" (as arbitration of collective bargaining issues). These terms are not utilized outside the arena of organized labor/collective bargaining and therefore were not employed in the 2011 corporate survey.

procedures,[83] mini-trial,[84] fact-finding,[85] and ombuds,[86] were also used by respondents' companies, although much less widely than mediation or arbitration.

The data also reflected the purported use of "mediation-arbitration" by almost forty percent of responding companies. Although the term was not defined in the survey instrument, it might have been interpreted by some respondents to refer to a procedure in which a single individual or team of neutrals acts as a mediator and, if necessary, shifts to an arbitral role.[87] However, substantial anecdotal evidence indicates that U.S. lawyers tend to be very cautious about employing neutrals in multiple roles, a practice which entails legal, practical and/or ethical concerns.[88] It is therefore highly unlikely that four out of ten companies had experience with such practices. It is probable that respondents generally interpreted "mediation-arbitration" to include any procedure in which a mediated negotiation process was followed by arbitration.[89] Interpreted in this light, the data appear to reflect the emergence of multi-phase or stepped dispute resolution approaches in which binding arbitration is positioned as the adjudicative backstop where mediation fails to resolve disputes.[90] This is consistent with developments in the construction industry[91] and other commercial arenas.[92]

Although ADR usage patterns varied by type of dispute, and by industry,[93] mediation was far and away the preferred ADR process among survey respondents.[94] There were numerous reasons for this preference, most notably perceptions that mediation offered potential cost and time savings, enabled parties to retain control over issue resolution, and was generally more satisfying both in term of process and outcomes. Companies came to mediation in a variety of ways; frequent users tended to rely on contractual provisions or company policies, while other companies usually arrived in mediation as the result of ad hoc decisions or court directives.[95]

Respondents most often went to arbitration pursuant to a contractual provision, whereas mediation was usually judicially mandated. However, about four in ten respondents claimed corporate experience with court-mandated arbitration. This might reflect companies'

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[83] "In-house grievance procedures" would generally have been understood to refer to mechanisms established for the resolution of disputes involving individual unionized employees under the terms of a collective bargaining agreement. *See* Michael K. Northrop, *Distinguishing Arbitration and Private Settlement in NLRB Deferral Policy*, 44 U. MIAMI L. REV. 341, 343–44 (1989) (explaining that collective bargaining agreements normally have mandatory in house grievance procedures and systems in place for resolving disputes). Such arrangements were a precursor to mechanisms for managing conflict involving individual non-unionized employees in the workplace.

[84] *See supra* text accompanying note 56.

[85] *See supra* text accompanying note 57.

[86] *See* John E. Sands & Sam Margulies, *ADR in Employment Law: The Concept of Zero Litigation*, 155-Sep N.J. LAW. 23, 24–5 (1993) (discussing integrated ADR systems within an organization and the role of ombudsmen in such systems).

[87] In the report of the Fortune 1,000 survey, the authors also used the term "med-arb" as a substitute for mediation-arbitration. *See* LIPSKY ET AL., EMERGING SYSTEMS FOR MANAGING WORKPLACE CONFLICT, *supra* note 73, at 9. For a fuller discussion of this issue in connection with the 2011 survey data *see infra* text accompanying note 135.

[88] *See* Judith Resnik, *Managerial Judges*, 96 HARV. L. REV. 376 (1982).

[89] *See infra* text accompanying notes 204–08.

[90] *See* Stipanowich, *Contract and Conflict Management*, *supra* note 30, at 853–54 (discussing stepped procedures for company implemented dispute resolution programs).

[91] *See* Stipanowich, *Multi-Door Contract*, *supra* note 62, at 320–24.

[92] *See* Stipanowich, *Contract and Conflict Management*, *supra* note 30, at 853–54.

[93] *See* LIPSKY & SEEBER, REPORT ON THE GROWING USE OF ADR, *supra* note 66, at 11, Table 6; *id*. at 12, Table 7.

[94] *See id.* at 12.

[95] *Id.* at 18.

participation in a court-connected non-binding arbitration program (such programs were relatively common at the time),[96] judicial enforcement of private agreements for binding arbitration, or even judicial pressure to move litigated cases into a binding arbitration despite the absence of prior agreements.

"Because the contract said so"—not any perceived benefit of the process—was by far the most common reason given for going to arbitration.[97] However, almost seventy percent indicated they chose arbitration because it saved time (68.5%) or saved money (68.6%). A majority—roughly six in ten respondents—said they chose arbitration because it afforded a more satisfactory process than litigation and limited the extent of discovery. A minority cited the preservation of confidentiality or of good relationships, the avoidance of legal precedents and achievement of more satisfactory settlements or "more durable resolution." However, a significantly higher percentage of counsel tended to associate nearly all of these potential benefits with mediation than with arbitration.[98] In this respect, the results are generally consistent with those obtained in the 1994 study of dispute resolution practices in the construction industry.[99]

Respondents also identified perceived barriers to the use of mediation and arbitration.[100] Three-quarters of responding counsel thought mediation usage was impeded by the unwillingness of other parties—perhaps reflecting the fact that some business lawyers and clients still lacked experience with mediation. Only about one in four, however, saw their company's lack of experience with mediation as a factor; a slightly higher number cited lack of desire from senior management. About forty percent of respondents viewed the potential lack of finality ("non-binding") and "compromised outcomes" as obstacles. Significantly, no other concern was shared by more than thirty percent of respondents.

By nearly every measure, moreover, the collective response reflected greater levels of concern regarding arbitration.[101] A majority of respondents viewed the difficulty of appeal as a barrier to arbitration use, and nearly as many expressed concerns about lack of adherence to legal rules, compromised outcomes, and lack of confidence in neutrals. All of these outstanding concerns were resonant of data from earlier studies of commercial arbitration.[102] Relatively few expressed concerns about the costliness or complexity of arbitration, although, tellingly, such concerns were more often expressed about arbitration than about mediation.

Finally, the survey sought to assess the extent to which companies were moving toward more systematic management of workplace conflict.[103] Respondents were asked several questions regarding the extent to which companies offered what might be considered component pieces of workplace conflict management systems, including corporate use of an ombudsman or of peer review panels, for instance. Reflecting a generally ad hoc and reactive, rather than

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[96] *See* ELIZABETH PLAPINGER & DONNA STEINSTRA, *supra* note 54 (discussing court-connected arbitration); Stipanowich, *Multi-Door Contract*, *supra* note 62, at 310.
[97] *See* LIPSKY & SEEBER, REPORT ON THE GROWING USE OF ADR, *supra* note 66, at 17, Table 15.
[98] An exception was the presence of an international dispute; respondents were significantly more likely to choose arbitration in such circumstances. *See* REDFERN, *supra* text accompanying note 61.
[99] LIPSKY & SEEBER, REPORT ON THE GROWING USE OF ADR, *supra* note 66, at 26, Table 22. *See supra* text accompanying notes 60–1.
[100] *See id.*
[101] *See id.*
[102] *See supra* text accompanying notes 37–42, 93–4.
[103] *See supra* text accompanying notes 5, 70–3 (discussing relevant developments).

strategic, approach to workplace conflict management, only one in ten surveyed companies reported the use of an ombudsman.[104] An identical percentage of companies also said they offered peer review.[105]

II. THE 2011 FORTUNE 1,000 CORPORATE COUNSEL SURVEY

A. Backdrop: The Quiet Revolution Continues

By the advent of the new millennium, ADR was more or less firmly ensconced in public and private dispute resolution. But as attorneys garnered more experience and familiarity with mediation and arbitration, new stresses and strains were observable. Longstanding concerns by some lawyers about the adequacy of arbitration as a substitute for litigation (including the lack of judicial appeal, the perception that arbitrators seek compromise, and the standards for arbitral decision making[106]) were reinforced by broader use of arbitration across the spectrum of civil disputes. There was also, paradoxically, more discussion and debate about the role of lawyers and the importation of a reflexive "litigation mentality" into mediation and arbitration. And while some corporations adopted more sophisticated approaches to proactive conflict management, many adhered to reactive, ad hoc approaches to resolving disputes.

1. Mediation

By the late 1990s provisions for mediation were being integrated in commercial contract dispute resolution clauses as a preliminary step or precondition for arbitration or litigation, reflecting widespread acknowledgment of the value of mediation and its acceptance as a primary intervention strategy in managing conflict.[107] In the ensuing years, meanwhile, the use of mediation to resolve disputes was cited as an important factor in the dramatic drop-off in the incidence of court trial.[108]

As lawyers firmly embraced mediation, their impact on the process was significant. As portended by responses to the 1994 construction survey,[109] mainstream "legal" mediation typically featured lawyer mediators who at some point in the process employed evaluation techniques—in other words, sharing views on the issues in dispute and their likely disposition in future proceedings.[110] Commentators expressed concern about the pervasiveness of this model to the exclusion of others, as well as other prevalent practices promoted by attorneys, including excessive adversarialism, the manipulation or "spinning" of mediators and of the mediation

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[104] *See generally* LIPSKY & SEEBER, REPORT ON THE GROWING USE OF ADR, *supra* note 66.
[105] *See id.*
[106] *See supra* text accompanying notes 37–44.
[107] *See* Stipanowich, *Multi-Door Contract, supra* note 62, at 373–78 (discussing incorporation of mediation provision in American Institute of Architects contracts and related developments, and their implications).
[108] *See generally* Stipanowich, *Vanishing Trial*, *supra* note 1, at 848–50 (reviewing many empirical studies and discussing impact of mediation and other forms of ADR in court system and on incidence of trial).
[109] *See supra* text accompanying note 56.
[110] *See* Nolan-Haley, *supra* note 31, at 83–5. *Cf.* Debra Berman & James Alfini, *Lawyer Colonization of Family Mediation: Consequences and Implications*, 95 MARQ. L. REV. 887 (2012) (discussing impact of lawyers on divorce and child custody mediation).

process, and an overemphasis on monetary settlements to the exclusion of more integrative and "relational" solutions.[111]

2. Arbitration

During the latter years of the Twentieth Century and the opening of the Twenty-first, binding arbitration was also evolving, in part because Supreme Court decisions promoted broad use of arbitration for all kinds of civil disputes under the aegis of the Federal Arbitration Act.[112] For businesses, these developments brought to the fore concerns about the utility of arbitration as a substitute for litigation as well as its ability to serve more traditional process goals such as speed, economy and efficiency.[113] In 2001, a national commission sponsored by CPR published extensive guidelines for business users of arbitration; the group's recommendations were premised on the notion that the needs and goals parties bring to arbitration "vary by company, by arbitration, and by dispute"—realities underlined by the 1997 Fortune 1,000 survey.[114] Thus, the key to effective use of arbitration was making informed process choices;[115] accordingly, the recommendations addressed methods for promoting varied goals such as confidentiality, economy and efficiency while addressing concerns about the quality of arbitrators and guarding against irrational awards. The study also emphasized the importance of utilizing arbitration in the context of an integrated approach to conflict management, including preliminary efforts to resolve conflict informally through negotiation or mediation.[116]

Despite such efforts, concerns about arbitration persisted. Spurred in part by fairness concerns associated with the use of arbitration in adhesion contracts, increased attention was directed to the lack of appeal from arbitration and other procedural limitations.[117] These views resonated with longstanding worries in some quarters about the lack of judicial scrutiny of arbitration awards and the standards for decision making.[118] But even as questions continued to be raised about arbitration's sufficiency as a substitute for litigation, there were also voices of concern about the importation of trial elements into arbitration and the potential impact on process costs and cycle time.[119] Enhanced focus on cost-effectiveness and efficiency drove a number of initiatives such as the *College of Commercial Arbitrators Protocols for Cost-Effective, Expeditious Commercial Arbitration.*[120] As to how much businesses were actually

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[111] *See generally id. See also* Nancy A. Welsh, *The Thinning Vision of Self-Determination in Court-Connected Mediation: The Inevitable Price of Institutionalization?,* 6 HARV. NEGOT. L. REV. 1, 23, 25–7, 57–8 (2001).
[112] *See* Stipanowich, *New Litigation, supra* note 20, at 8–11.
[113] *Id.* at 24–5.
[114] *See* COMMERCIAL ARBITRATION AT ITS BEST: SUCCESSFUL STRATEGIES FOR BUSINESS USERS xxiii–xxv (Thomas J. Stipanowich & Peter H. Kaskell, eds. 2001) [hereinafter COMMERCIAL ARBITRATION AT ITS BEST].
[115] *Id.* at xxiv–xxv.
[116] *See id.* at 10–4.
[117] *See, e.g.*, Bryant G. Garth, *Tilting the Justice System: From ADR as Idealistic Movement to a Segmented Market in Dispute Resolution*, 18 GA. ST. U. L. REV. 927 (2002) (lack of appeal of arbitration awards may hinder rights enforcement; arbitrators have long been thought to involve compromise); Christopher R. Drahozal, *"Unfair" Arbitration Clauses*, 2001 U. ILL. L. REV. 695 (2001) (critically analyzing academic literature on "unfair" arbitration clauses. *See infra* text accompanying notes 123–29.
[118] *See* Garth, *supra* note 117, at 933–36.
[119] *See generally* Stipanowich, *New Litigation*, supra note 20, at 22–4.
[120] *See generally* The COLLEGE OF COMMERCIAL ARBITRATORS PROTOCOLS ON EXPEDITIOUS, COST-EFFECTIVE COMMERCIAL ARBITRATION: KEY ACTION STEPS FOR BUSINESS USERS, COUNSEL, ARBITRATORS AND ARBITRATION PROVIDER INSTITUTIONS (Thomas J. Stipanowich, Editor-in-Chief et al., eds. 2010) [hereinafter PROTOCOLS],

using arbitration, the evidence was mixed.[121] There were, however, indications that increasing reliance on mediation and the incorporation of mediation as a step prior to arbitration in contractual dispute resolution clauses were affecting arbitration use.[122]

All of these realities were reflected in a RAND survey of assorted U.S. corporate counsel on perceptions of business-to-business arbitration.[123] Most respondents believed arbitration to be "better, faster and cheaper than litigation"[124]—responses reminiscent of earlier surveys.[125] Strong majorities also identified four factors favoring a choice of arbitration: the avoidance of "excessive or emotionally driven jury awards," the ability to choose arbitrators with particular qualifications, the relative confidentiality of arbitration, and the relative ability of arbitrators to cope with complex contractual issues.[126] On the other hand, long-expressed concerns about arbitrator compromise[127] and loss of the right of judicial appeal were still cited as factors discouraging the use of arbitration.[128] There was also a strong undercurrent of concern among interviewees about arbitration "becoming increasingly like litigation, entailing greater discovery and pre-hearing motion work,"[129] with negative implications for cycle time and costs. This may be significant, for in 1997 lower costs and cycle time were among the leading reasons Fortune 1,000 corporate counsel opted for arbitration.[130] For many in the RAND study, these concerns were outweighed by pro-arbitration factors. There was, however, a significant split in respondents' attitudes about whether their experience with arbitration encouraged (44%) or discouraged (36%) the use of pre-dispute arbitration clauses in commercial contracts.[131]

Of course, changing perspectives on business-to-business arbitration were only part of the story. A far more visible—and controversial—evolution was occurring as provisions for binding arbitration appeared with increasing frequency in individual employment and consumer contracts. In the context of standardized adhesion contracts, such terms provoked considerable litigation, a variety of legislative initiatives and ongoing scholarly debate over issues of assent and procedural fairness. Despite a long string of U.S. Supreme Court decisions smashing many of the barriers to enforceability of arbitration agreements, however, major companies were far

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available at http://ssrn.com/abstract=1982169 (discussing and addressing concerns about excessive delay and cost in arbitration; providing practice guidelines for business users, advocates, arbitrators and arbitration institutions).

[121] DOUGLAS SHONTZ ET AL., BUSINESS-TO-BUSINESS ARBITRATION IN THE UNITED STATES: PERCEPTIONS OF CORPORATE COUNSEL (Rand Institute for Civil Justice Report 2011) [hereinafter RAND REPORT]. The Rand Report was based on a relatively small response rate (13%).

[122] *See* Stipanowich, *New Litigation*, *supra* note 20, at 25–9.

[123] *See* RAND REPORT, *supra* note 121.

[124] *See id.* at ix, 7–9.

[125] *See supra* text accompanying note 33.

[126] *See* RAND REPORT, *supra* note 121, at 15–20.

[127] *Id*. at 11–3.

[128] *Id.* at 20–1.

[129] *Id.* at x.

[130] *See supra* text accompanying note 98.

[131] *Id.* at 10–1. A number of other empirical studies have focused on arbitration terms in different kinds of contracts, resulting in a variety of conclusions about the prevalence of arbitration and agendas of drafters. *See generally* Christopher R. Drahozal & Stephen J. Ware, *Why Do Businesses Use (or Not Use) Arbitration Clauses?* 25 OHIO ST. J. ON DISP. RESOL. 433 (listing recent studies and critiquing some studies).

from unitary in their approach to arbitration, and arbitration was often only one among several elements in a corporate program.[132]

3. Systematic approaches; workplace conflict management programs

Besides employing mediation, arbitration and other third party intervention strategies, some companies experimented with a variety of other tools comprising integrated or systematic approaches to the management of conflict such as early case assessment (ECA).[133] ECA comprises a range of approaches aimed at effectively managing the resolution of business conflict by actively and systematically analyzing all aspects of a case and developing appropriate strategies in accordance with business goals.[134]

The most intensive focus of such efforts, however, continued to be on workplace conflict. In 2003, a follow-up study looked more closely into the practices of twenty of the companies in the 1997 Fortune 1,000 survey.[135] They found that a relatively small percentage of big companies had a policy of contending most claims and controversies, rigorously employing litigation (or the threat of litigation). Decision makers tend to view dispute resolution as a zero-sum game, and view ADR as undermining their reputation for fighting non-meritorious claims.[136] Another, larger minority of companies employed policies aimed at preventing or resolving some or all kinds of business-related disputes. Some of these companies adopted systemic approaches for workplace conflict management.[137] The latter tended to take proactive approaches to conflict, and developed and implemented these approaches throughout the organization.[138] However, the great majority of companies apparently still relied on ad hoc approaches to the resolution of conflict.[139] Expecting to find a general trend toward systematic and proactive approaches to

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[132] *See, e.g.*, Stipanowich, *Vanishing Trial*, *supra* note 1, at 901–03 (summarizing ADR program elements, including arbitration, in twenty companies in CPR INSTITUTE FOR DISPUTE RESOLUTION, HOW COMPANIES MANAGE EMPLOYMENT DISPUTES: A COMPENDIUM OF LEADING CORPORATE EMPLOYMENT PROGRAMS) (Peter Phillips, ed. 2002).

[133] *See* Stephen M. Prignano, *Early Case Assessment, Rein in Costs and Identify Risks*, IN-HOUSE DEFENSE QUARTERLY 4, 4–5 (2008), *available at* http://www.edwardswildman.com/files/News/6d97c728-395e-49f1-8ed9-174ad537b84d/Presentation/NewsAttachment/ac573809-8ea1-4b12-af4c-17a6bfa172de/Rein%20in%20Costs%20and%20Identify%20Risks_Prignano.pdf; Lisa C. Wood, *Early Case Evaluation (Litigation Efficiency Is Not An Oxymoron)*, 29-SPG ANTITRUST 90 (2009); Eric L. Barnum, *An Introduction to Early Case Assessment*, 17 No. 6 PRAC. LITIGATOR 21 (2006).

[134] *See supra* note 133.

[135] *See generally* LIPSKY ET AL., EMERGING SYSTEMS FOR MANAGING WORKPLACE CONFLICT, *supra* note 73; DAVID B. LIPSKY ET AL., AN UNCERTAIN DESTINATION: ON THE DEVELOPMENT OF CONFLICT MANAGEMENT SYSTEMS IN U.S. CORPORATIONS, IN ALTERNATIVE DISPUTE RESOLUTION IN THE EMPLOYMENT ARENA, PROCEEDINGS OF NEW YORK UNIVERSITY 53RD ANNUAL CONFERENCE ON LABOR 109 (Samuel Estreicher & David Sherwyn, ed.) (2004). [hereinafter LIPSKY ET AL., AN UNCERTAIN DESTINATION].

[136] *See* LIPSKY ET AL., EMERGING SYSTEMS FOR MANAGING WORKPLACE CONFLICT, *supra* note 73, at 119–22.

[137] *Id.* at 128–32.

[138] *Id*. at 130. An outstanding illustration of such practices is revealed in Thomas L. Sager, *Changing Rules, Changing Roles*, 2 LITIG. MGMT. 18 (2004). *Cf.* AM. ARB. ASS'N, DISPUTE WISE MANAGEMENT: IMPROVING ECONOMIC AND NON-ECONOMIC OUTCOMES IN MANAGING BUSINESS CONFLICTS (2003) (market research firm study on corporate approaches to conflict).

[139] Rather than systematically laying the groundwork for avoiding or managing conflict, their approach was reactive. That is, they thought in terms of how to respond when a matter ripens into a dispute. Put another way, their use of ADR was tactical rather than strategic; incremental rather than integrated. Mediation or arbitration was employed experimentally (either post-dispute or in pre-dispute contractual provisions) in the context of specific categories of disputes. *See id.* at 122–26. *See also* Mazadoorian, *supra* note 8, at 6.

conflict, the authors instead concluded that the corporate sector's use of ADR tended to be far from "institutional." While a confluence of factors (such as a company's perceived exposure to great risks in litigation, the background and attitude of corporate business leaders and general counsel, and the presence of committed "champions")[140] sometimes produced an institutional commitment to actively managing conflict, the authors "were surprised at the lack of 'integration' in approach to conflict" among companies they studied.[141] These conclusions were reinforced by a concurrent study of conflict management practices in Maryland businesses.[142] While some companies had embraced some or all of the various elements often associated with more systematic, integrated approaches to conflict management, including corporate ADR policy statements or commitments, early case analysis (ECA), ADR training and education for staff, and other approaches, the great majority had not.[143] Generally, concluded the survey, "[e]ven businesses that have made commitments to use ADR still appear to use it reactively rather than designing a system to prevent conflicts from escalating."[144]

B. A New Fortune 1,000 Survey: Purpose, Research Questions

The continuing evolution of ADR prompted representatives of the Scheinman Institute on Conflict Resolution at Cornell University, the Straus Institute for Dispute Resolution at Pepperdine University School of Law and the International Institute for Conflict Prevention & Resolution (CPR) to confer and plan a full-scale follow-up survey of Fortune 1,000 corporate counsel.[145] A primary purpose of the survey was to obtain current information regarding the use of mediation, arbitration, and other ADR approaches by major U.S. corporations. By comparing the results of the new survey with the results obtained in a 1997 Fortune 1,000 survey, moreover, it might be possible to identify key trends in corporate dispute resolution practice. In light of recent developments, however, the new survey instrument would need to touch on subjects not addressed in 1997.

Based on prior studies as well as mounting anecdotal evidence, members of the research team identified key questions:

Q: Has the emphasis on ADR increased or decreased since 1997? How will corporate conflict resolution policies have changed, if at all?

In light of the growing emphasis on ADR in legal education and by bar associations, greater use of contractual ADR provisions, continuing referral by courts and administrative agencies of cases to ADR and the growth of a large cadre of professional mediators and arbitrators, it was reasonable to expect that more companies would have embraced ADR, and

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[140] LIPSKY ET AL., EMERGING SYSTEMS FOR MANAGING WORKPLACE CONFLICT, *supra* note 73, at 142–44.
[141] *Id*. at 147.
[142] THE USE OF ALTERNATIVE DISPUTE RESOLUTION (ADR) IN MARYLAND BUSINESS: A BENCHMARKING STUDY (Maryland Mediation and Conflict Resolution Office, 2004) [hereinafter ADR IN MARYLAND BUSINESS].
[143] Unfortunately, the report does not present data by size of organization, so no conclusions can be drawn regarding differences between large, medium-sized and small companies.
[144] *See* ADR IN MARYLAND BUSINESS, *supra* note 142, at 31.
[145] The primary organizational representatives participating in the process of planning the survey were Professor David Lipsky on behalf of the Scheinman Institute, Professor Thomas Stipanowich on behalf of the Straus Institute, and CPR Institute President and CEO Kathleen Bryan. The Cornell Survey Research Institute finalized and implemented the survey.

reliance on litigation would be further diminished. However, it was deemed likely that most companies still embrace a variety of approaches employing litigation and ADR.[146]

Q: Why do companies resort to ADR? Are the reasons the same or different than in 1997?

Although the rationale for employing different approaches varies (as evidenced by data from the 1997 survey[147]), we expected companies to cite the same basic drivers for ADR use: savings of time and money, self-determination, a more satisfying and durable process, limited discovery, relative confidentiality, expertise, and preservation of relationships. We wondered, however, how lawyers' increasing familiarity with and participation in ADR processes[148] might alter perceptions.

Q: What forms of ADR are in use today, and how have usage patterns changed?

In addition to mediation and arbitration, we expected to see continued usage of an array of ADR approaches, including some that were not addressed in the 1997 survey (including early neutral evaluation, early case assessment and elements of workplace conflict management systems). We anticipated some drop-off in the use of mini-trial because of its relative cost.[149]

Q: Has mediation usage increased or decreased since 1997?

We expected that more companies would report recent experiences with mediation in different kinds of disputes. This result would be consistent with anecdotal evidence regarding use of contractual provisions for mediation by businesses and continuing emphasis on mediation by courts and administrative agencies.[150]

Q: Has arbitration usage increased or decreased since 1997?

Our expectations regarding arbitration were mixed. On the one hand, we anticipated that arbitration use would continue to be widely used in different kinds of disputes, especially given the encouragement of favorable Supreme Court rulings.[151] However, controversies concerning the use of arbitration in consumer and employment contracts,[152] ongoing debates over the role of arbitration in business-to-business disputes,[153] and the growing reliance on contractual mediation provisions[154] might have had a dampening effect on arbitration usage.

Q: How do mediation and arbitration usage vary by type of dispute?

Consistent with the 1997 data, we expected to see variations in the use of mediation and arbitration among different types of disputes. Because of the sharply contrasting policy and practice implications associated with out-of-court resolution (especially binding arbitration) of

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[146] *See infra* text accompanying notes 79–80, 139–44. The complete final survey instrument is available upon request from the authors.
[147] *See supra* text accompanying notes 1, 13–6.
[148] *See supra* text accompanying notes 108–10.
[149] Mini-trials are "generally not as fast, as informal, or as cheap as mediation" and for that reason are less amenable to wide employment. Douglas Hurt Yarn, *Consideration of the Mini-Trial Option*, 1 ALTERNATIVE DISP. RESOL. PRAC. GUIDE § 38.20 (2012).
[150] *See supra* text accompanying note 107.
[151] *See* Stipanowich, *Trilogy*, *supra* note 19, at 385–87.
[152] *Id.* at 398–99.
[153] *See* Stipanowich, *New Litigation*, supra note 20, at 22–4.
[154] *See supra* text accompanying notes 18, 95.

commercial/corporate, employment and consumer disputes,[155] we elected to focus additional attention on comparisons of these categories.

Q: What is the likelihood of companies' future use of mediation and arbitration?

For reasons noted above, we expected the great majority of respondents to forecast continuing reliance on mediation by their company. Predictions of future corporate use of arbitration would be more mixed.[156]

Q: What are the perceived barriers to the use of arbitration? Have perceptions changed since 1997?

Despite continuing efforts to address user concerns about commercial arbitration,[157] recent evidence led us to believe the new data would reflect continuing anxiety regarding arbitrator compromise and loss of the right of judicial appeal.[158] We also expected to see growing concerns over arbitration-related costs and delays.[159]

Q: How are ADR neutrals selected and how qualified are they perceived to be? Have patterns and perceptions changed since 1997?

We expected to see that to the extent disputing parties had greater control over neutral selection (as, for example, where parties and not courts select mediators) there might be a concomitant increase in the perceived qualifications of neutrals.[160]

Q: What percentage of companies employ workplace conflict management systems? Will the percentage have increased or decreased since 1997.

Although we expected that a greater number of companies would report practices associated with systematic management of workplace conflict, we anticipated that such companies would still be very much in the minority.[161]

C. Implementation of the Survey

The survey was put in final form and administered by Cornell's Survey Research Institute in 2011. The objective of the planners was to survey, through a questionnaire completed online or in a phone interview, the general counsel of each corporation in the Fortune 1,000. If the general counsel was unavailable to complete the survey, the plan was to have it completed by one of the general counsel's senior deputies.

Respondents included counsel in 368 corporations, as compared to 606 corporations in the 1997 survey. In the current survey, forty-six percent of the respondents were general counsel and fifty-four percent were other counsel. Eighty-five counsel responded by mail, 212 responded online, and 63 completed the survey by phone interview. The decline in responses

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[155] *See generally* Stipanowich, *Contract and Conflict Management*, supra note 30, at 879–87.
[156] *See supra* text accompanying notes 6, 101–02.
[157] *See supra* text accompanying notes 102, 113–21.
[158] *See* RAND REPORT, *supra* note 121, at 20–1.
[159] *Id.* at x.
[160] *See* Stipanowich, *Beyond Arbitration*, *supra* note 48, at 123 (showing significant direct relationship between party selection of mediators and settlement).
[161] *See supra* text accompanying notes 135–44.

between 1997 and 2011 can be attributed primarily to "survey fatigue" amongst companies.[162] However, both surveys constitute a robust cross-section of Fortune 1,000 firms encompassing a wide spectrum of industries.[163] In comparing the Fortune 1,000 in 1997 against the Fortune 1,000 in 2011, concerns might be raised as to compositional comparability, since the makeup of the sample in 2011 differs somewhat from that found in 1997. For instance, it is likely that the 2011 Fortune 1,000 list includes a higher number of information technology firms and a smaller number of industrial and manufacturing firms than the 1997 group. However, it is unlikely that any issues in this regard present a significant problem for our analysis of ADR practices. In other empirical analyses of the Fortune 1,000 that use the same data,[164] controls were included for structural factors that might differ between 1997 and 2011 respondents, such as firm size, industry, and regulation status within industries. Importantly, none of these controls was found to significantly affect the firm's responses with regards to its ADR practices and broad dispute resolution behaviors and strategies. Thus, although the nature of the two groups may be slightly different in terms of industry and other compositional factors, this appears to have little or no bearing on responses regarding ADR behaviors within the firms.

Another concern in studies of this type is potential survey bias. It may be the case that the firms that chose to respond to the 1997 and 2011 surveys did so because they had strong ADR programs, or were proponents of such systems. This would have the effect of overestimating the usage of ADR in the target groups, Fortune 1,000 corporations. Since we did not perform randomized experiments and rely on observational data, this is a limitation we must consider. That said, both the 1997 and the 2011 samples are broadly representative of the Fortune 1,000 universe. We also have no reason to suspect that survey bias would be more prevalent in 2011 than in 1997. Although the response rate declined between the two waves of study, there is nothing to suggest that this decline yields higher odds of respondent firms being pro-ADR. Indeed, as the results that follow will show, we find a very mixed picture with regards to differences between 1997 and 2011 in firms' perspectives on ADR, choices of practice, and decisions to not use certain ADR options. Were the 2011 sample more heavily biased in favor of ADR than the 1997 sample, we would expect to find upward trends in a vast array of pro-ADR responses to the questions posed of companies in the more recent study. This is assuredly not the case.

D. Cautionary Notes

A brief word of caution is in order for those reading and relying upon the following data. First of all, the survey instrument employed in the present study closely adhered in many respects to the 1997 survey. Many of the questions were identical or very similar to those in the earlier instrument in order to facilitate a side-by-side comparison of present perspectives and experiences with 1997 findings. While this was an important objective for the survey planners, it also meant that a few ambiguous or vague terms or phrases were carried forward into the present survey.

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[162] *See* David B. Lipsky et al., (2013), *The Antecedents of Workplace Conflict Management Systems in U.S. Corporations: Evidence from a New Survey of Fortune 1000 Companies* 21 (working paper, 2012).
[163] *Id.*
[164] *See id.* at 20–1. *See also* Ariel C. Avgar et al., *Unions and ADR: The Relationship between Labor Unions and Workplace Dispute Resolution in U.S. Corporations*, 28 OHIO ST. J. ON DISP. RESOL. 63 (2013).

Particular attention should be drawn to issues associated with reliance on the familiar term "alternative dispute resolution, (ADR)," which was employed in this study just as it was in its 1997 precursor. First, pervasive reliance on mediation and other out-of-court intervention processes and commensurate decrease in the rate of trial is a strong argument for abandoning "alternative" as a qualifying adjective. As a California task force observed some years ago, "not only is 'alternative' unhelpful—alternative to what?—but 'appropriate' better conveys the concept of "method best suited to resolving the dispute[…]"[165] Many commentators now frequently use the adjective "appropriate,"[166] signaling a shift from a "litigation default" to an emphasis on what techniques are suitable to the circumstances.[167] (This shift will be reflected in the current survey results.[168])

Second, some commentators have argued that the lumping of widely disparate strategies under the umbrella of "ADR" is potentially confusing,[169] impeding effective understanding of individual dispute resolution approaches.[170] In particular, there is debate over whether binding arbitration should be categorized as a method of ADR, since it is much more closely akin to court adjudication.[171] In the international commercial context, ADR is generally distinguished from binding arbitration.[172] As we will see, respondents in the present study tend to perceive and treat arbitration very differently from mediation, and have widely disparate views on the future use of these processes.[173]

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[165] REPORT OF THE COMMISSION ON THE FUTURE OF THE CALIFORNIA COURTS, JUSTICE IN THE BALANCE—2020 40 (1993), cited in REPORT OF THE TASK FORCE ON THE QUALITY OF JUSTICE SUBCOMMITTEE ON ALTERNATIVE DISPUTE RESOLUTION AND THE JUDICIAL SYSTEM, ALTERNATIVE DISPUTE RESOLUTION IN CIVIL CASES 3 (1999) [hereinafter CALIFORNIA REPORT ON ADR IN CIVIL CASES].

[166] Jeffrey Scott Wolfe, *Across the Ripple of Time: The Future of Alternative (Or is it "Appropriate?") Dispute Resolution*, 36 TULSA L. J. 785, 795 (2001). *See* Kenneth L. Jacobs, *Alternative Dispute Resolution: How to Implement an "Appropriate Dispute Resolution" Program in Your Litigation Department*, 76 MICH. B. J. 156 (1997) (noting that although the ADR movement originated in an effort to promote "alternatives" to court-based dispute resolution, more recently ADR practitioners have emphasized that the process really is about tailoring an "appropriate" means of resolution for a particular case. Hence, court litigation is appropriate dispute resolution for a constitutional question. Mediation is appropriate dispute resolution for many commercial contract conflicts. Arbitration is appropriate dispute resolution for many labor disputes).

[167] *Id.* at 795.

[168] *See infra* text accompanying note 179.

[169] *See* Jean R. Sternlight, *Is Binding Arbitration a form of ADR?:An Argument That the Term "ADR" Has Begun to Outlive Its Usefulness*, 2000 J. DIS. RES. 97, 103 (2000).

[170] As Professor Sternlight argues,

> It makes no more sense to group all these techniques together than it would to group together contracts, torts, property, UCC, etc. in a single three credit course called "private law." While this can be done (and perhaps is in some countries) the decision to group diverse subjects inevitably results in less attention being paid to individual components of the group.

Id. at 106.

[171] *See id.* at 106–07.

[172] Outside the U.S., ADR is generally deemed to comprise all settlement-oriented intervention strategies *other than* litigation and arbitration. Loukas A. Mistelis, *ADR in England and Wales*, 12 AM. REV. INT'L ARB. 167, 169 (2001) (ADR in its "European context . . . does not include arbitration."). Virginia A. Greiman, *The Public/Private Conundrum in International Investment Disputes: Advancing Investor Community Partnerships*, 32 WHITTIER L. REV. 395, 402 n. 31 (2011). S*ee generally* Andrea Kupfer Schneider, *Public and Private International Dispute Resolution in* THE HANDBOOK OF DISPUTE RESOLUTION, 438, 446–47 (Michael L. Moffitt & Robert C. Bordone, eds., Jossey-Bass 2005). This is in part because arbitration is so widely accepted as a method for resolving cross-border business conflicts. Greiman, *supra*, at 402 n. 31.

[173] *See infra* text accompanying notes 224–25, Table L-K, Chart D.

In addition, the term "alternative dispute resolution" is arguably not expansive enough to comprehend strategies and approaches aimed at managing issues between parties before they become full-fledged disputes, including open door policies and programs that form early tiers of conflict management schemes for employees and partnering on construction projects.[174] Nevertheless, as the survey data reveal, there is growing emphasis on addressing conflict at its roots, and these broader strategies are a critical and growing part of the landscape.[175]

In consideration of the time and attention of busy corporate counsel, moreover, it was deemed necessary to place severe limitations on the length of the survey instrument. This in turn resulted in the omission or revision in the final version of a few questions that were raised in the 1997 survey. We will draw attention to specific circumstances in which such limitations may raise questions regarding interpretation of the data and we have been careful to limit our conclusions accordingly.[176]

III. CONFLICT RESOLUTION POLICIES, PERSPECTIVES ON AND EXPERIENCE WITH ADR

A. Conflict Resolution Policies of Companies

As in 1997, corporate counsel were asked, "How would you describe your company's policy toward dispute resolution?" and given a list of possible options. As before, the results provide a broad impressionistic view of major companies' general orientations toward litigation and ADR.

When compared to the collective response of the 1997 survey group, the 2011 response reflects an important shift toward ADR.[177] As shown in Table A, less than one percent of respondents' companies espouse an "always litigate" posture—as compared to roughly ten times that percentage in 1997. There is also a dramatic drop in the percentage of companies that purport to "litigate first" before moving to ADR. This probably means that companies are much less likely to follow the "hardball" practice of filing a lawsuit without prior negotiation,[178] or at least without prior resort to mediation or other third-party intervention.

The data also show a corresponding increase in companies that purport to "litigate only in cases that seem appropriate, us[ing] ADR for all others." It is reasonable to conclude that counsel indicating their company adheres to such a policy are reflecting an appreciation of the primacy of ADR tools and techniques in the "dispute filtering" process, with litigation (or, at

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[174] Stipanowich, *Vanishing Trial*, *supra* note 1, at 845–46. See also Stipanowich, *Multi-Door Contract*, *supra* note 62, at 378–403 (discussing project partnering and other approaches involving facilitative intervention from the beginning of ongoing relationships to address the roots of conflict).

[175] *See infra* text accompanying notes 214–19.

[176] Through apparent inadvertence or an effort to shorten the survey instrument, a few regrettable departures were made from the 1997 template in the final draft of the survey. For example, some questions which originally treated mediation and arbitration discretely were modified to focus on the aggregate term "ADR," limiting our ability to interpret and compare data. In these circumstances we were careful to make comparisons and draw conclusions only where we believed we were on firm ground. *See infra* text accompanying notes 185-86.

[177] Each of the responses in the 2011 survey has been compared against the others using samples t-tests to measure whether the differences in responses are statistically significant. Regarding corporate policy, all answers are statistically different from each other.

[178] JAY FOLBERG & DWIGHT GOLANN, LAWYER NEGOTIATION: THEORY, PRACTICE & LAW 98 (2d ed. 2011).

least, trial) being a backstop or last resort.[179] Of course, the notion of what cases are "appropriate" for litigation may vary considerably among companies and senior counsel, as may the kinds of dispute resolution approaches employed in the "filtering" process.[180] In commercial contracts, for example, more elaborate arrangements may include a stepped approach including negotiation at one or more levels followed if necessary by mediation and, eventually, arbitration or litigation.[181] As discussed below, there are also integrated systems for managing workplace disputes.[182]

The percentage of respondents who said their corporate policy is "try to move to ADR always" was virtually the same as in 1997. The lack of upward movement in this category may reflect general recognition that there are limits inherent in all of the approaches that collectively comprise ADR, and that in some cases litigation may be necessary and unavoidable.[183]

A full quarter of respondents indicated that their company had *no policy* respecting resolution of conflict—a slight increase from the corresponding data in the 1997 survey. Although on first blush the apparent lack of a policy respecting conflict management might appear to be a failure of strategic vision at the corporate level, it could also mirror the reality that in some large companies dealing with many different kinds of disputes, decisions about how to manage conflict are not made in the office of general counsel, but at a lower level. Put another way, in such companies conflict management is not treated as a global matter, but is instead addressed in the context of specific departments, functions and relational or transactional settings.[184]

Table A: Conflict Resolution Policies of Fortune 1,000 Respondents (1997, 2011) (in percent)

Corporate Policy	**1997**		**2011**
	Defending Party	Initiating Party	
Always litigate	5.0%	6.1%	0.6%
Litigate first, then move to ADR for those cases where appropriate	24.7%	21.4%	18.8%
Litigate only in cases that seem appropriate, use ADR for all others	25.2%	27.0%	38.2%
Tries to move to ADR always	11.7%	11.3%	11.1%
No company policy	20.8%	22.1%	25.2%
Other	12.6%	12.1%	6.1%

Source. DAVID B. LIPSKY & RONALD L. SEEBER, THE APPROPRIATE RESOLUTION OF CORPORATE DISPUTES: A REPORT ON THE GROWING USE OF ADR BY U.S. CORPORATIONS, CORNELL/PERC INST. ON CONFLICT RESOL.11, TABLE 5 (1998)**.**

[179] Stipanowich, *Multi-Door Contract*, *supra* note 62, at 376–77.
[180] *See supra* text accompanying notes 114-16.
[181] Stipanowich, *Arbitration Penumbra*, *supra* note 18, at 427–28.
[182] *See infra* Part VI.
[183] *See* Drahozal & Ware, *supra* note 131, at 450 (discussing circumstances in which companies may prefer litigation over arbitration).
[184] LIPSKY ET AL., EMERGING SYSTEMS FOR MANAGING WORKPLACE CONFLICT, *supra* note 73, at 67–9.

B. "Triggers" for ADR

In light of perceptible differences in underlying policies and practices, the 2011 survey sought discrete information regarding the handling of corporate/commercial, employment and consumer disputes. As we expected, the data (Table B) confirm significant distinctions among these arenas, beginning with the "triggers" for the use of ADR.

As in 1997, respondents were asked to identify which one of several mechanisms "most often triggered the use of ADR." Unlike in 1997, however, the current survey instrument did not seek to differentiate between triggers for mediation and those for arbitration. This is unfortunate because, as the earlier data show, there are important differences in the way mediation and arbitration are triggered.[185] Data from the current survey thus incorporate a "blended" approach in which counsel may reflect on their company's experience with mediation, with arbitration, or both.[186] Moreover, respondents were required to limit their choice to a single most-frequently-used "trigger" even though multiple triggers might be identified. Nevertheless, some worthwhile conclusions can be drawn from the data.

Table B: Triggers for Use of ADR in Companies (1997, 2011)

	1997*		2011		
	For use of mediation	For use of arbitration	Corporate/ Commercial Disputes	Employment Disputes	Consumer Disputes
Part of contract	10%	67%	54.2%	19.4%	41.2%
Ad hoc/voluntary	40%	10%	26.6%	43.1%	36.1%
Company policy	9%	5%	3.9%	12.7%	2.1%
Court mandate	29%	7%	13.5%	19.8%	20.6%
Other	17%	9%	1.8%	4.9%	0.0%

*Numbers for 1997 are approximate, based on bar charts in original published study. *See* Table A source, 15, Chart 4.

More than half of the companies surveyed indicated that the predominant trigger for the use of ADR in corporate/commercial disputes was a contractual provision. Because this figure blends experiences with mediation and arbitration, it is not possible to do a meaningful comparison with the 1997 data. However, contractually-triggered ADR appears to play a much more significant role in the corporate/commercial arena than in either the consumer or the employment context. On the other hand, ad hoc or voluntary approaches are most common in workplace conflict, as is ADR pursuant to a corporate policy.[187] This latter result is surprising. It seems to run counter to the notion that employers are using contracts to force individual employees into ADR processes (notably binding arbitration).[188] Assuming the data do not simply reflect hyper-technical distinctions based on the difference between the terms of individual

[185] *See infra* Table B.
[186] It is conceivable but not likely that the term "ADR" would provoke responses that do not reflect experience with either mediation or arbitration. Those processes tend to be by far the most visible and widely used approaches traditionally associated with the term ADR. *See supra* Part II.A.
[187] *See supra* Table B.
[188] Miriam A. Cherry, *A Negotiation Analysis of Mandatory Arbitration Contracts*, 4 HARV. NEGOT. L. REV. 279, 277–78 (1999).

employment contracts and employee handbooks, the result may reflect a tendency toward voluntary choice in workplace process options among the Fortune 1,000.[189] Fortunately, the survey provided some more specific data on the use of binding arbitration in employment contracts.[190]

C. Reasons for Using "ADR"'

The 2011 survey sought to determine why companies resorted to ADR.[191] The results are summarized in Table C along with corresponding results from 1997. The list of reasons included external causes ("required by contract"; "court mandated"; "desired by senior management") as well as perceived intrinsic benefits or attributes of ADR. Perceived intrinsic benefits may be grouped for discussion purposes into the following categories:

1. *general efficiency and process control* (comprised of the elements "saves time", "saves money", "allows parties to resolve disputes themselves", "provides a more satisfactory process" and "has limited discovery");
2. *privacy and confidentiality* (including the elements "has limited discovery", "preserves confidentiality");
3. *control over results* ("avoids establishing legal precedents", "gives more satisfactory settlements", "provides a more durable resolution (compared to litigation)");
4. *preserving relationships* ("preserves good relationships between disputing parties") and
5. *neutral expertise* ("uses expertise of third party neutral").

Table C: Reasons Companies Used ADR Instead of Litigation (1997, 2011) (in percent)

Reason	**1997**		**2011**
	…to use mediation	**…to use arbitration**	**…to use ADR**
Is required by contract	43.4%	91.6%	75.3%
Is court mandated	63.1%	41.9%	55.1%
Is desired by senior management	---	---	26.0%
Saves time	80.1%	68.5%	70.9%
Saves money	89.2%	68.6%	68.7%
Allows parties to resolve disputes themselves	82.9%	---	52.4%
Provides a more satisfactory process	81.1%	60.5%	38.2%
Has limited discovery	---	59.3%	51.5%
Preserves confidentiality	44.9%	43.2%	46.8%
Avoids establishing legal precedents	44.4%	36.9%	31.9%
Gives more satisfactory settlements	67.1%	34.8%	26.0%

[189] *Cf.* Phillips, *supra* note 132, *summarized in* Stipanowich, *Vanishing Trial*, *supra* note 1, at 901–03 (reflecting variety of corporate employment dispute resolution programs).

[190] *See infra* Table I. The question read, "When your company has decided to use ADR instead of litigation, which of the following reasons generally help to explain that decision?" A list of possible reasons followed.

[191] In the 1997 survey, respondents were asked to identify reasons their company used mediation, and, separately, the reasons for using arbitration. For some reason which remains unclear to the authors of this article, the 2011 survey substituted a single series of queries focusing on the use of "ADR" in lieu of two series of questions focusing on mediation and arbitration, respectively.

Provides more durable resolution (compared to litigation)	31.7%	28.3%	18.6%
Preserves good relationships between disputing parties	58.7%	41.3%	43.5%
Uses expertise of third party neutral	53.2%	49.9%	42.9%

Source for 1997 figures: Table A source, 17, Table 15.

The data suggest that companies use ADR instead of litigation, first and foremost, to save time and money and to exert control over the dispute resolution process.[192] As we have seen, concerns about cost and time loom large in discussions and debates over dispute resolution choices.[193]

More than half the respondents said their companies were motivated to use ADR as a way of limiting discovery, because discovery is typically the most significant source of expense and delay in litigation,[194] and the scope of discovery is closely linked to concerns about process time and cost, noted above.[195] Limitations on discovery may also be responses to concerns about confidentiality, another frequent stimulus for ADR.[196] The push for confidentiality is most intense with regard to contractual disputes involving intellectual property and other proprietary information.[197]

More than four in ten respondents also emphasized concerns about the preservation of relationships as a motive for ADR use. Roughly the same number identified their motivation as a desire for expertise in third party intervention.

At the same time, significantly, it appears many corporate counsel have moderated their appraisal of some of the benefits traditionally associated with ADR. A handful of key insights may be drawn from a comparison of the current data with the 1997 figures. These comparisons generally indicate companies' expectations for ADR have tangibly diminished when compared to the 1997 data for *both* mediation and arbitration. In 2011, as highlighted in Chart D, considerably fewer respondents (around thirty-eight percent) believed their company used ADR because it "provides a more satisfactory process." Similarly, there was a significant drop-off in the percentage of counsel indicating their company favored ADR because it "gives more satisfactory settlements" or because it "provides a more durable resolution."

Moreover, fewer saw "avoid[ing] establishing legal precedents" or even the "expertise of a third party neutral" as a basis for embracing ADR. Finally, the percent choosing ADR because it "preserves good relationships between dispute parties" was significantly lower than the 1997 figure associated with mediation, and approximates the 1997 figure for arbitration.

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[192] This correlates to 1997 data on the reasons why companies used mediation and arbitration. *See infra* Table C. *Cf.* Mazadoorian, *supra* note 8, at 4 ("[C]orporate managers found that ADR, particularly mediative processes, protected one of the most sacrosanct of all corporate objectives—retaining control of the decision-making process.").

[193] *See supra* text accompanying notes 48–52, 129–30. *See infra* text accompanying notes 244-45, 283-92.

[194] PROTOCOLS, *supra* note 120, at 6.

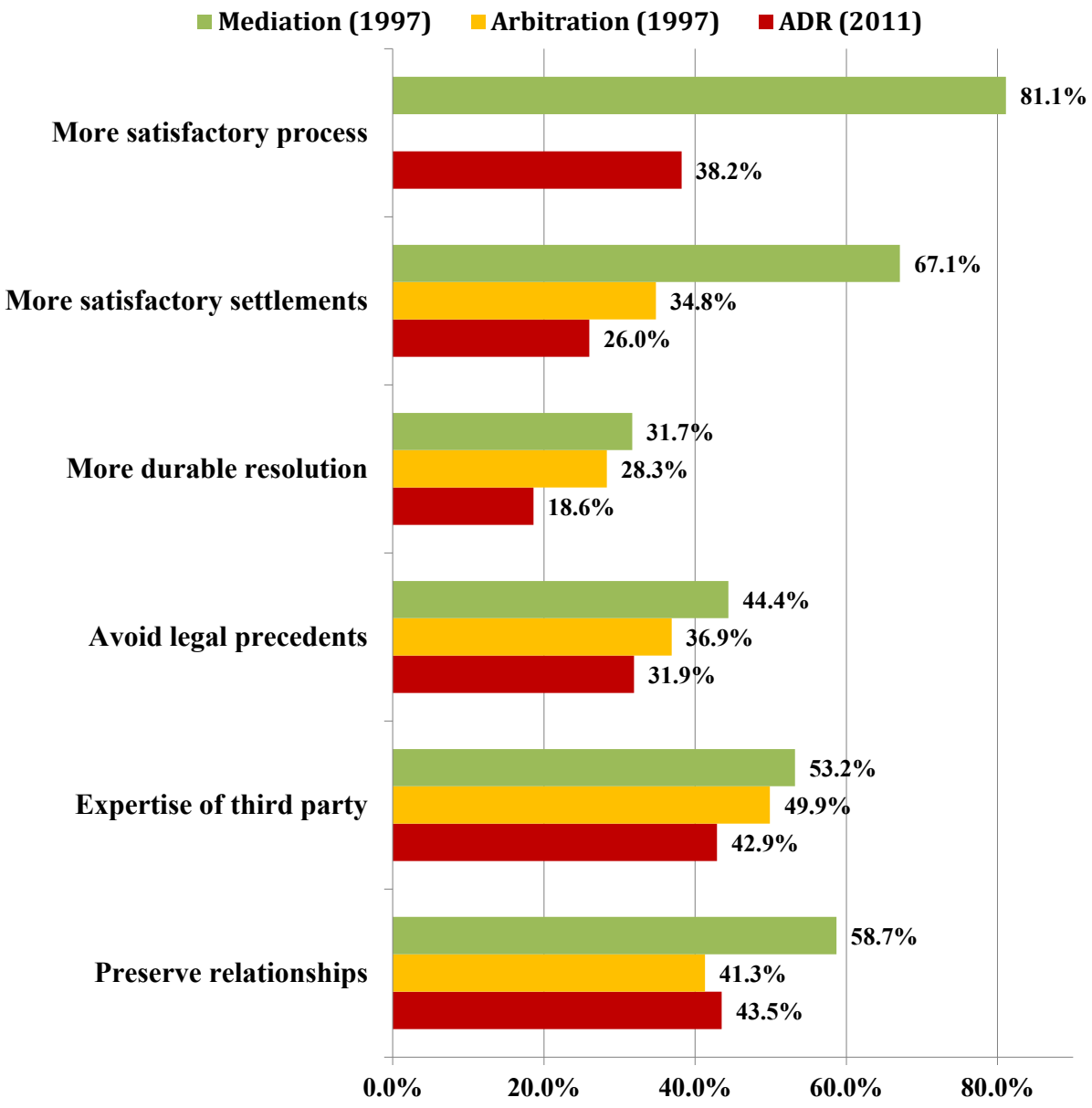
[195] COMMERCIAL ARBITRATION AT ITS BEST, *supra* note 114, at 48.

[196] *Id.* at 254, 260.

[197] *Id.* at 258.

There was, on the other hand, a slight increase in the percentage of counsel who believed the preservation of confidentiality stimulated use of ADR; and as noted above, expectations of time- and money-savings still motivated a large majority of companies.

Chart D: Reasons Companies Use ADR (or Specific ADR Processes) Instead of Litigation

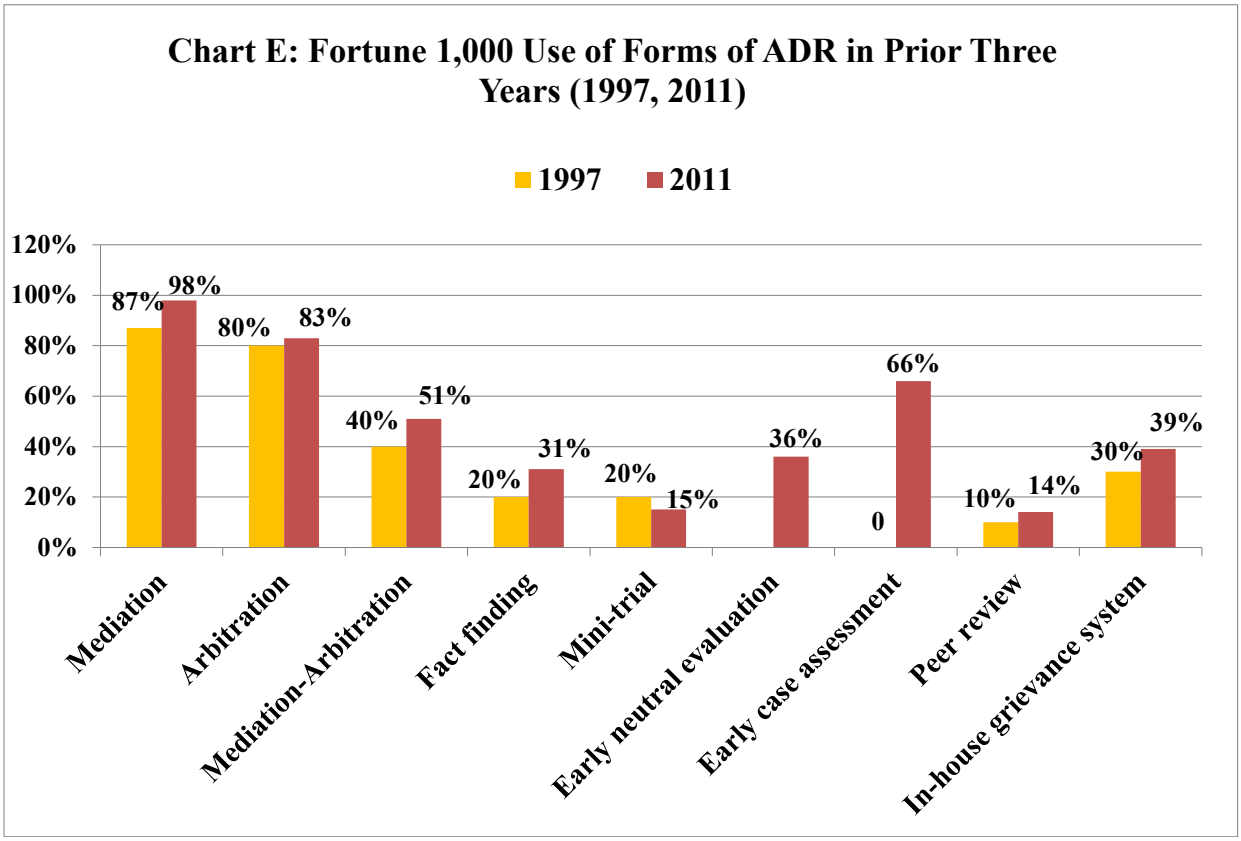


Why are fewer corporate counsel signaling corporate optimism about the ability of ADR to achieve satisfactory processes and effective, durable settlements, or to provide other touted benefits? One possible explanation is that champions of mediation and other forms of ADR initially promoted these alternatives as many-faceted improvements on court process—in some

eyes, a panacea.[198] In living and working with these processes, however, companies have found that each and every one presents its own limitations, problems and pitfalls.[199] Today's less heady perspectives, in other words, are simply the realism borne of long experience. Another explanation, more intriguing, is that during the course of repeatedly using and participating in ADR processes, attorneys have actually changed those processes.[200] In some cases, it is argued, the transformation has made alternatives to litigation more like the very thing they were designed to replace—more formal, more adversarial, lengthier and more expensive.[201] In the context of mediation, manipulation is sometimes aimed at frustration of a primary goal of mediation—a timely settlement.[202]

D. Use of Different Approaches for Resolving Conflict

Corporate respondents were asked to indicate whether or not their company had used each of several different dispute resolution approaches during the three years prior to the survey. Chart E summarizes data regarding the relative use of different processes in 1997 and 2011.



Source for 1997 figures. Table A source, 9, Chart 2.

[198] *See, e.g.*, Antony M.D. Willis, *Mediation in a Cold Climate*, 19 ALTERNATIVES TO HIGH COST LITIG. 21, 21 (2001).
[199] *See supra* text accompanying notes 107–32.
[200] *See supra* text accompanying notes 106, 109–11, 119–20, 129–30.
[201] *See supra* text accompanying notes 119–20, 129–30.
[202] *See supra* text accompanying note 111.

Mediation. The 2011 responses suggest that today corporate experience with mediation is virtually universal. Ninety-eight percent of respondents indicated their company had used mediation at least once in the prior three years, a ten percent jump from the 1997 figure. This number resonates with other data showing increases in the number of companies using mediation in many different kinds of disputes, discussed below.

Arbitration. More counsel also represented that their company had had at least one experience with arbitration in the prior three years. However, the jump was very slight, from eighty percent to eighty-three percent. More significantly, as we will see, arbitration usage has actually dropped—in some cases precipitously—for most categories of disputes in the corporate experience. This phenomenon is addressed in Part IV below.

"Mediation-arbitration." As in 1997, "mediation-arbitration" was presented as a discrete approach to conflict resolution in the 2011 Survey, and fifty-one percent of respondents claimed corporate experience with the approach. Respondents might have interpreted the term at least three different ways.[203] First of all, "mediation-arbitration" might be understood to refer to the circumstance in which a single dispute resolution professional first attempts to mediate a conflict and, if unsuccessful, switches hats and assumes the role of arbitrator of the dispute.[204] This approach, often referred to as "med-arb,"[205] is a controversial practice among American lawyers.[206] While frequently discussed, it is highly doubtful that almost half of U.S. corporations, which are not disposed to experiment with innovative approaches to conflict, have employed a "same neutral/multiple role" procedure.[207] Another, much more likely interpretation of "mediation-arbitration" is the more conventional (and increasingly popular) approach where mediation is utilized alongside (that is, prior to or during) the arbitration process, with separate neutrals acting as mediator and arbitrator(s).[208] A third, related possibility is that those who indicated that their company used "mediation-arbitration" meant that they included a "stepped" dispute resolution provision in their contract which called for mediation and, failing resolution through mediation, arbitration, but did not necessarily employ either or both processes. However, since the question asks about processes actually "used . . . in the past three years," the second interpretation is by far the most logical one.

Fact finding (fact-finding). Twenty percent of respondents reported recent use of fact-finding by their company in 1997; that number rose to thirty-one percent in 2011. This jump in reported usage of a third party evaluation technique is consistent with the apparent emphasis on evaluative techniques by mediators in facilitating negotiation of litigated cases.[209] It also resonates with data on the use of early neutral evaluation and early case assessment, discussed below.

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[203] *Cf. supra* text accompanying notes 87–92.
[204] Barry C. Bartel, *Med-Arb as a Distinct Method of Dispute Resolution: History, Analysis, and Potential*, 27 WILLAMETTE L. REV. 661, 664–65 (1991).
[205] *Id.*
[206] *Id.* at 678–79; *see also* Richard Fullerton, *Med-Arb and Its Variants: Ethical Issues For Parties and Neutrals*, 65-OCT DISP. RESOL. J. 52, 59 (2010) [hereinafter Fullerton, *Med-Arb and Its Variants*]; Lela P. Love, Symposium: *The Top Ten Reasons Why Mediators Should Not Evaluate*, 24 FLA. ST. U. L. REV. 937, 938 (1997).
[207] Fullerton, *Med-Arb and Its Variants*, *supra* note 207, at 59–60.
[208] *See supra* text accompanying notes 89-90, 182.
[209] *See supra* text accompanying notes 55, 59, 71–2. *See also* note 57 (discussing fact-finding approaches).

Mini-trial. Reported corporate use of "mini-trial" dropped from twenty percent in 1997 to fifteen percent in 2011. This is consistent with the apparent de-emphasis on mini-trial since the 1980s, when it was heavily touted as an important alternative to litigation.[210] In addition, mini-trials have been criticized as "encouraging the disputants to increase adversarialism and to further entrench their positions by developing a 'best case' presentation."[211] Another barrier to the use of mini-trials is that they usually require the investment of significantly greater resources than negotiation or mediation; moreover, mini-trial agreements are often tough to negotiate.[212] The mini-trial format makes the most sense after unstructured negotiations have clearly broken down or reached an impasse, mediation has been tried or rejected, and the parties already have a considerable investment in pending litigation.[213]

Early neutral evaluation (ENE). Although no reference was made to early neutral evaluation (ENE) in the 1997 survey, thirty-six percent of respondents in the 2011 survey indicated that their company had recent experience with such an approach. Today ENE remains an important element of various court ADR programs,[214] and may be used to facilitate early case management as well as settlement.[215] The current data may also indicate the use of ENE in private, out-of-court contexts.[216] However framed, the emphasis on ENE appears to reflect corporate efforts to invest additional resources further upstream in the dispute resolution process, using third party expertise as the lynchpin of selective fact-finding and case preparation. This kind of intervention may help settle the case or set the stage for its further development.

Early case assessment (ECA). Of similar import are new data regarding corporate reliance on early case assessment (ECA). More than six in ten respondents (66%) affirmed recent experience with ECA, which has currency as a catch-phrase for forms of proactive case management in which disputes are systematically analyzed in order to formulate a strategy for their handling in a manner consistent with business goals.[217] Respondents' "ECA" experiences might refer to a broad formal corporate protocol that is regularly used for assessing and managing cases, like that at DuPont,[218] or a solitary effort. Like ENE, ECA exemplifies recognition of the need to approach conflict early and affirmatively rather than reflexively and

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[210] *See supra* notes 56, 58–9. Other, less widely used approaches include mini-trial, summary jury trial and non-binding evaluation or assessment. *See also* Stipanowich, *The Quiet Revolution*, *supra* note 47, at 865–68 (describing approaches, their uses and attributes).

[211] *See* Yarn, *supra* note 149.

[212] *Id.*

[213] *Id.*

[214] *See* Wayne D. Brazil, *Early Neutral Evaluation or Mediation? When Might ENE Deliver More Value?*, 14 NO. 1 DISP. RESOL. MAG. 10, 10–12 (2007); Elizabeth S. Stong, *Some Reflections from the Bench on Alternative Dispute Resolution in Business Bankruptcy Cases*, 17 AM. BANKR. INST. L. REV. 387, 387–99 (2009).

[215] John Lande, *The Movement Toward Early Case Handling in Courts and Private Dispute Resolution*, 24 OHIO ST. J. ON DISP. RESOL. 81, 99–101, 126 (2008).

[216] *See* Allan van Gestal, *The ADR Case Evaluator's Role in Contemplated and Pending Litigation*, 14 NO. 4 DISP. RESOL. MAG. 40, 40–2 (2008); Robert L. Ebe, *A Different Approach to Conducting Med-Arb in Complex Commercial Litigation Matters*, 29 ALTERNATIVES TO HIGH COST LITIG. 65, 65–71 (2011). *See also* Dwight Golann, *The Changing Role of Evaluation in Commercial ADR,* 14 NO. 1 DISP. RESOL. MAG. 16, 16–36 (2007).

[217] *See supra* text accompanying notes 133–34.

[218] Thomas L. Sagar & Richard L. Horwitz, *Early Case Assessment—DuPont's Experience*, 4 SUCCESSFUL PARTNERING BETWEEN INSIDE AND OUTSIDE COUNSEL § 75:19 (2012).

reactively, and in a manner consistent with specific circumstances, as well as broader business goals such as economy and efficiency.[219]

Peer review and in-house grievance systems. In 1997, firms were asked about two aspects of ADR traditionally confined to workplace disputes: to what extent they had used peer-review panels in the past three years, and whether they offered their non-union employees an in-house grievance system? One in ten firms (10%) had used peer review in the recent past, and thirty percent indicated the usage of an in-house grievance system. The same questions were asked in 2011, with respondents indicating an increase in the usage of both mechanisms for handling workplace conflict. Peer review usage rose to fourteen percent in 2011, while the employment of in-house grievance systems increased to thirty-nine percent of companies. We will return to these subjects in our discussion of workplace conflict management systems in Part VI.

IV. CORPORATE EXPERIENCE WITH AND PERSPECTIVES ON MEDIATION AND ARBITRATION

A. Present and Future Use of Mediation and Arbitration

In comparing the 1997 and 2011 survey responses, the most salient data relate to recent experiences with mediation and arbitration. In both surveys, counsel were asked, "In the past three years, has your company used mediation and/or arbitration for any of the following [listed] types of disputes?" As illustrated by Chart F, significantly more companies reported using mediation for nearly all kinds of disputes;[220] however, significantly *fewer* companies reported arbitrating in key categories (Chart G).

More companies appeared to be resorting to mediation in the following arenas of conflict: commercial/contract, individual employment, consumer, corporate finance, environmental, intellectual property, personal injury, products liability and real estate. There was a sole exception to the pattern of increasing mediation use: the number of companies mediating construction disputes was virtually unchanged. However, given anecdotal evidence that mediation continues to be widely used in construction disputes,[221] the data probably reflect the severe and sustained impact of recent economic downturns on all forms of construction in recent years.[222] In other words, fewer construction projects means fewer construction disputes, and fewer opportunities to use mediation.

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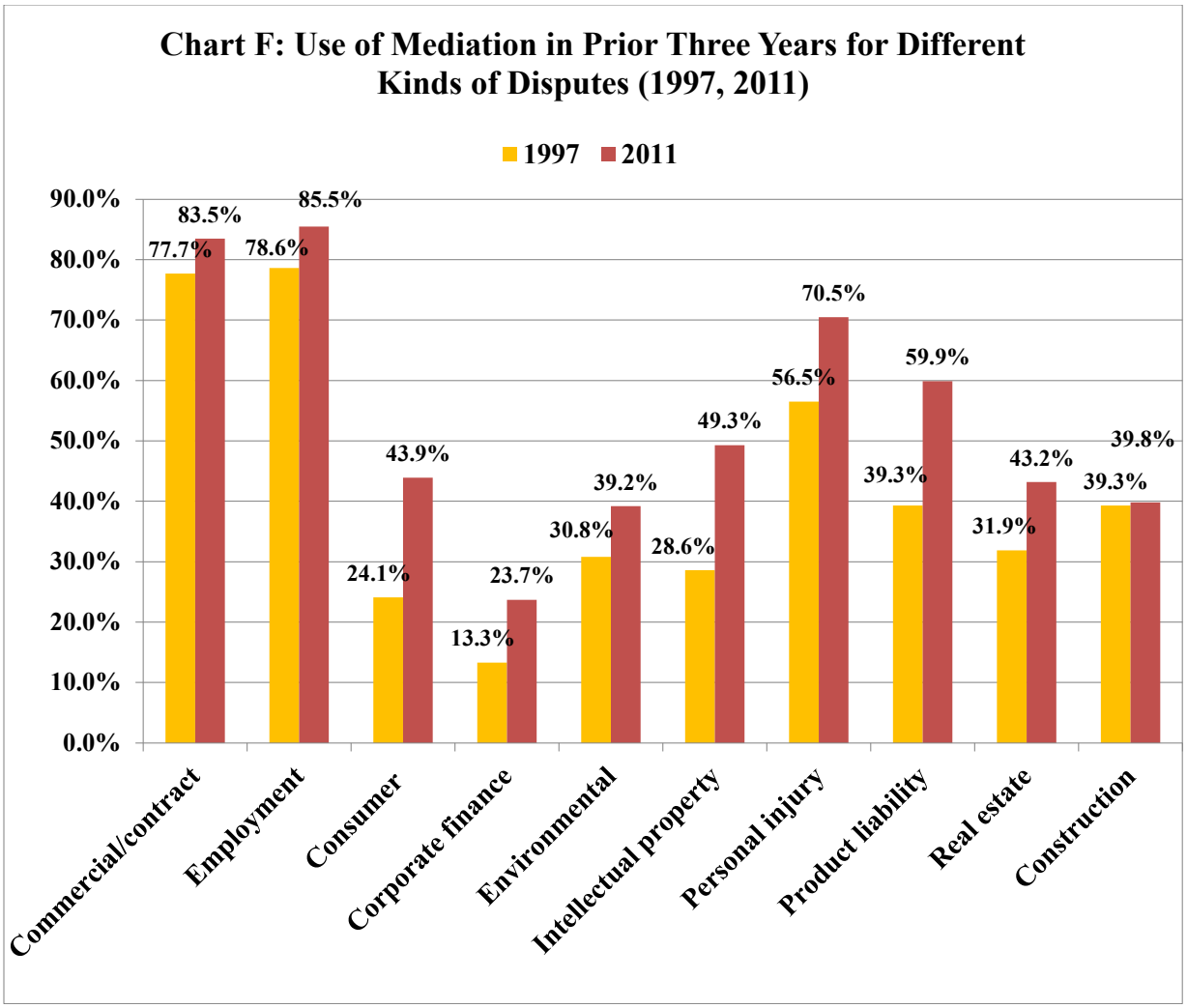
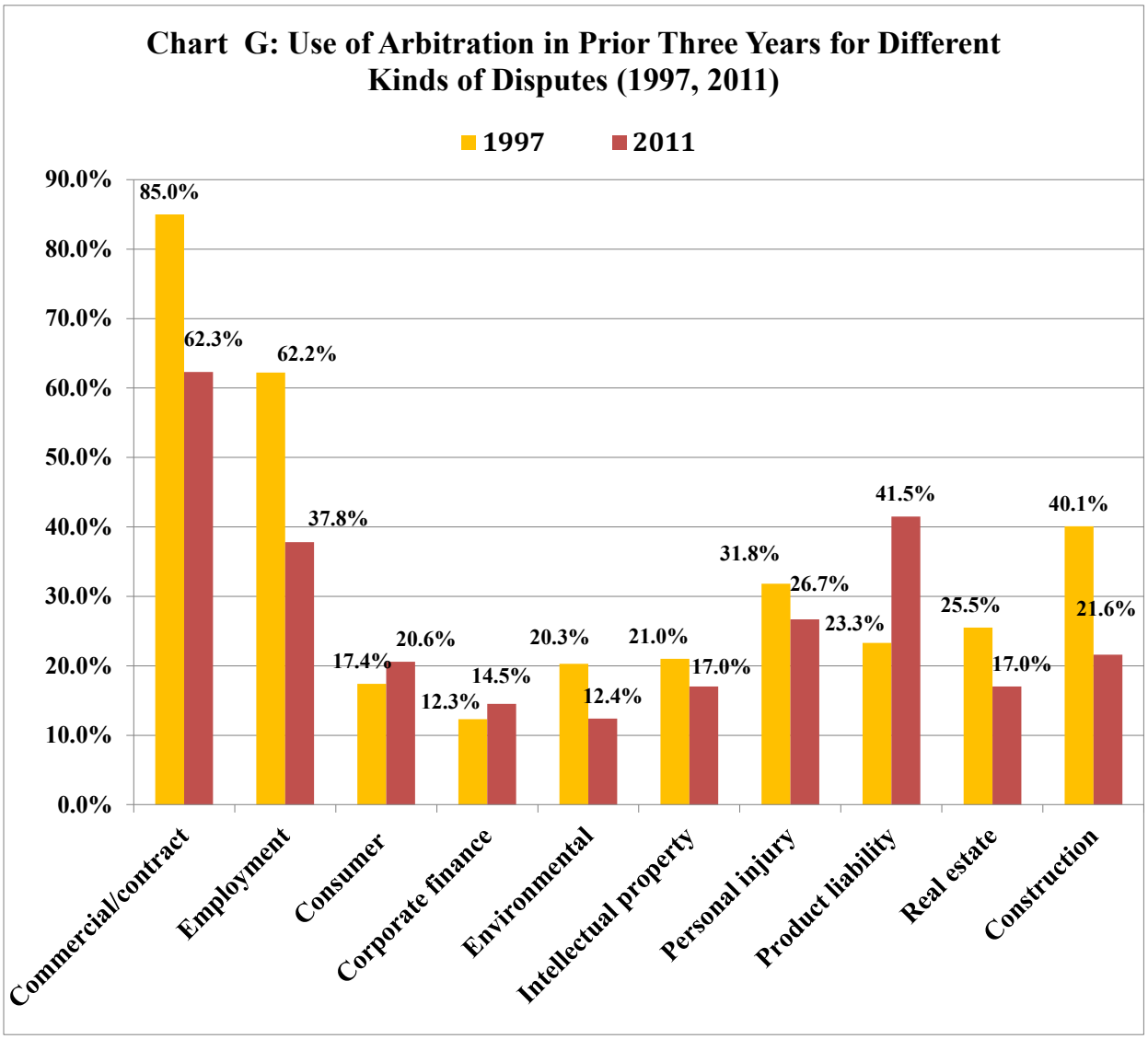
[219] Lande, *supra* note 216, at 109–11.
[220] *Cf. supra* text accompanying notes 107–08.
[221] Dean B. Thomson, *Construction Attorneys' Mediation Preferences Surveyed—Is There a Gap Between Supply and Demand?*, *in* AAA HANDBOOK ON CONSTRUCTION ARBITRATION AND ADR 247 (2d ed. 2010).
[222] *See* Matt McKinnon, *Record Drop in Construction Spending*, SCHNEIDER DOWNS (Oct. 25, 2012), *available at* http://www.schneiderdowns.com/record-drop-in-construction-spending.



Source for 1997 figures: Table A source, 11, Table 6.

The comparative data on arbitration present a dramatically contrasting picture (Chart G). Significant drops were reported in the number of companies reporting arbitration usage in commercial/contract disputes (from eight-five percent (85.0%) in 1997 to about sixty-two percent (62.3%) in 2011) and other categories of disputes: employment (62.2% to 37.8%), environmental disputes (20.3% to 12.4%), intellectual property disputes (21.0% to 17.0%), real estate disputes (25.5% to 17.0%) and construction disputes (40.1% to 21.6%). Notable exceptions were consumer disputes, which recorded a slight increase (17.4% to 20.6%) and products liability disputes, for which the usage of arbitration jumped from 23.3% to 41.5% of respondents).



Source for 1997 figures: Table A source, 11, Table 6.

Taken as a whole, the statistics meaningfully signal very different trends in mediation and arbitration. Mediation usage is expanding and arbitration usage contracting in most conflict settings. Key exceptions to the downward trend for arbitration are consumer disputes and products liability cases, which probably reflect expanded use of binding arbitration agreements in standardized contracts for consumer goods and services.[223]

[223] *See* Stipanowich, *New Litigation, supra* note 20, at 35-9. *See generally* Thomas Stipanowich et at., *National Roundtable on Consumer and Employment Dispute Resolution: Consumer Arbitration Roundtable Summary Report,* Pepperdine University Legal Studies Research Paper No. 2012/22, Indiana University School of Public & Environmental Affairs Research Paper No. 2012-04-01; Penn State Law Research Paper No. 18-2012 (April 17, 2012) [hereinafter Stipanowich et al., *National Roundtable Summary*], *available at* http://ssrn.com/abstract=2061763 (summarizing intensive facilitated discussion on consumer arbitration and dispute resolution). *See supra* text accompanying note 132.

The overall data resonate with other figures on the frequency of use of mediation and arbitration by companies. For example, when asked how frequently they currently use mediation voluntarily—that is, in the absence of court mandate—in corporate/commercial disputes (Table H), nearly half of those responding said they employed mediation "frequently" or "always." Only about fifteen percent purported to use mediation "rarely" or never." The responses regarding use of arbitration were the virtual mirror image of the mediation results. Fewer than fifteen percent of respondents claimed their company used arbitration "frequently" or "always" in corporate/commercial disputes, while almost half said arbitration was used "rarely" or "never." This result must be a combination of several factors, including (1) companies not employing contractual provisions for binding arbitration; (2) disputes being resolved through negotiation or mediation, prior to the commencement of arbitration; and (3) claims being dropped prior to adjudication.

Table H: Frequency of Use, in Corporate/Commercial Disputes, of Mediation and Arbitration Procedures Other Than Court-Mandated Procedures (2011)

	Always	Frequently	Occasionally	Rarely	Never
Voluntary mediation	1.8%	45.8%	37.5%	9.2%	5.7%
Non-binding arbitration	0.3%	4.4%	18.7%	28.0%	48.6%
Binding arbitration	1.8%	12.9%	37.2%	28.5%	19.5%

The contrasts between frequency of use of mediation and of arbitration are even more striking in data relating to employment disputes (Table I). The reported infrequency of arbitration in employment disputes is generally consistent with various reported corporate experiences with multi-step or integrated programs to address workplace complaints. Indications are that the great majority of disputes are resolved informally in the early stages, and rarely in arbitration or litigation.[224] Furthermore, many employers may be eschewing arbitration altogether.[225] Another factor may be claims that are dropped prior to being arbitrated, perhaps because of cost or other barriers.[226]

Table I: Frequency of Use, in Employment Disputes, of Mediation and Arbitration Procedures Other Than Court-Mandated Procedures (2011)

	Always	Frequently	Occasionally	Rarely	Never
Voluntary mediation	6.6%	44.0%	35.2%	11.0%	3.3%
Non-binding	0.4%	3.2%	11.9%	26.1%	58.5%

[224] *See* Stipanowich, *Vanishing Trial*, *supra* note 1, at 903 (citing reports).
[225] *See infra* Table O, showing almost thirty percent of respondents indicated "no desire from senior management" as a reason for not using arbitration to resolve employment disputes.
[226] *See Developments in the Law—Access to Courts: III. Mandatory Arbitration Clauses: Proposals for Reform of Consumer-Defendant Arbitration*, 122 HARV. L. REV. 1170, 1172 (2009) (arguing that as a result of class action waiver provisions, "consumer-plaintiff arbitrations . . . essentially never occur).

arbitration					
Binding arbitration	4.4%	12.2%	14.4%	24.0%	45.0%

Although, as noted above, more companies appear to be resorting to arbitration for consumer cases (Table G), very few companies arbitrate consumer cases more than occasionally (Table J). As was the case with employment disputes, this is due in part to corporate decisions not to use arbitration provisions, and may also reflect resolutions through negotiated settlement. Again, however, another possibility is that consumers are dissuaded from pursuing claims through arbitration because of cost or other barriers.[227]

Table J: Frequency of Use, in Consumer Disputes, of Mediation and Arbitration Procedures Other Than Court-Mandated Procedures (2011)

	Always	Frequently	Occasionally	Rarely	Never
Voluntary mediation	3.1%	38.9%	42.1%	13.7%	2.1%
Non-binding arbitration	0.0%	4.4%	13.3%	30.0%	52.2%
Binding arbitration	4.3%	12.0%	25.0%	28.9%	30.4%

A final, emphatic statement of the starkly divergent trends in mediation and arbitration usage is reflected in respondents' predictions of their future use. Almost eighty-six percent of respondents said their company was "likely" or "very likely" to use mediation instead of litigation for future corporate/commercial disputes (Table K). On the other hand, respondents were almost evenly split as to whether their companies were likely or unlikely to use arbitration instead of litigation in future corporate/commercial disputes (Table L).[228]

Once again, the contrast between predicted future mediation use and arbitration use was even greater with respect to employment disputes and consumer disputes. This suggests that, despite the Supreme Court's continuing support for broad enforceability of arbitration agreements in employment and consumer contracts,[229] many companies remain unwilling to incorporate such provisions. This could be the result of a variety of factors specific to a company (which in the employment arena have caused large companies to generate a variety of approaches to conflict management[230]), as well as concerns about the impact of potential legislation or regulation of employment and consumer arbitration agreements.[231] That said, it should be recalled that the number of companies reporting use of arbitration in consumer and product liability disputes increased between 1997 and 2011, as reflected in Table G. Moreover, it is possible that the data in Table L actually indicate that additional companies plan to use arbitration in consumer cases in the future.

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[227] *Id.*

[228] The divided expectations regarding arbitration use are similar to the results of the recent RAND study. *See* RAND REPORT, *supra* text accompanying note 121, at 10. However, the Fortune 1,000 respondents are more evenly divided.

[229] *See generally* Stipanowich, *Trilogy*, *supra* note 19.

[230] *See supra* text accompanying notes 135–38.

[231] *See* Stipanowich, *Trilogy*, *supra* note 19, at 396–404.

Table K: Likelihood, Compared to Litigation, of Respondent's Company to Use Mediation for Disputes in the Future (2011)

	Very likely	Likely	Unlikely	Very unlikely
Corporate/commercial disputes	41.0%	44.6%	12.2%	2.1%
Employment disputes	36.3%	51.1%	9.3%	3.3%
Consumer disputes	24.7%	55.3%	13.8%	6.4%

Table L: Likelihood, Compared to Litigation, of Respondent's Company to Use Arbitration for Disputes in the Future (2011)

	Very likely	Likely	Unlikely	Very unlikely
Corporate/commercial disputes	12.4%	37.8%	31.3%	18.6%
Employment disputes	14.2%	24.7%	26.6%	34.5%
Consumer disputes	19.8%	24.1%	31.9%	24.2%

The divergent trends involving future use of mediation and arbitration are underlined when one compares 2011 predictions to those of the 1997 group (Tables M, N). In 2011, as in 1997, eighty percent or more of responding corporate counsel viewed future mediation use by their company as "likely" or "very likely" for all categories of disputes (Table M). But whereas seventy-one percent of 1997 respondents saw their company as "likely" or "very likely" to use arbitration, only about fifty percent of the 2011 group see arbitration of corporate disputes as "likely" or "very likely" (Table N). Once again, the numbers are even lower with respect to arbitration of employment and consumer disputes.

Table M: Comparative Likelihood of Respondent's Company to Use Mediation for Disputes in the Future (1997, 2011)

		Very likely	Likely	Unlikely	Very unlikely
1997	Likelihood of future mediation use	38%	46%	11%	5%
2011	Corporate/commercial disputes	41.0%	44.6%	12.2%	2.1%
	Employment disputes	36.3%	51.1%	9.3%	3.3%
	Consumer disputes	24.7%	55.3%	13.8%	6.4%

Source for 1997 figures: Table A source, 30, Chart 11.

Table N: Comparative Likelihood of Respondent's Company to Use Arbitration for Disputes in the Future (1997, 2011)

		Very likely	Likely	Unlikely	Very unlikely
1997	Likelihood of future arbitration use	24%	47%	18%	11%
2011	Corporate/commercial disputes	12.4%	37.8%	31.3%	18.6%
	Employment disputes	14.2%	24.7%	26.6%	34.5%
	Consumer disputes	19.8%	24.1%	31.9%	24.2%

Source for 1997 figures: Table A source, 30, Chart 11.

B. Why More Companies Use Mediation, and Fewer Use Arbitration: A Tipping Point

The 2011 Fortune 1,000 survey may be remembered as a tipping point in the modern history of mediation and arbitration, because it marks the point at which reliance on mediation contributed to a drop-off in arbitration—a direct parallel to mediation's role in the reduced incidence of court trial.[232]

During America's Quiet Revolution in dispute resolution, mediation took, and for some time has held, center stage. Because it affords parties and counsel several potential advantages—privacy, informality, flexibility and, above all, control—mediation has become a normal adjunct of litigation, and usually settles or helps settle cases on the way to court.[233] Mediation is a natural response to the cost, length, perceived risks and loss of control associated with litigation.

Logically, experience with mediation in litigated cases led to the development of private analogues. In the 1990s, as discussed above, mediation provisions began popping up in commercial contracts, often as a step prior to binding arbitration.[234] Anyone who arbitrates frequently knows that as business-to-business arbitration has tended to take on more of the characteristics of court trial,[235] parties are using mediation in the same way they use it on the way to court. Mediated resolutions may obviate the need for an arbitration demand, or settle a case along the way to arbitration hearings. This phenomenon alone may account for the observed drop-off in the use of arbitration.

That doesn't fully explain, however, why more businesses appear to be prepared to go a step further and plan to litigate, not arbitrate, if mediation fails to resolve the dispute. (Such would be the practical result of the removal of provisions for binding arbitration from dispute resolution clauses, as recently happened in the case of standard construction contracts.[236]) Given the strong imperatives to use arbitration in cross-border business disputes (including broad international enforceability of awards and avoidance of foreign courts), it is hard to imagine that

[232] *See supra* text accompanying note 108.
[233] *See* Stipanowich, *New Litigation*, *supra* note 20, at 26–9.
[234] *See supra* note 180, at 181.
[235] *See supra* text accompanying notes 129–30.
[236] *See* Stipanowich, *New Litigation*, supra note 20, at 29–30.

the data reflect international trends.[237] Arbitration in the U.S. domestic market, however, is another matter.

These same themes and concerns are reflected in the reasons given by Fortune 1,000 survey respondents in 1997 and in 2011 when asked, "When your company has not used arbitration in disputes, which of the following [listed] reasons help to explain that decision?" In 2011, separate queries were aimed at corporate/commercial disputes, employment disputes, and consumer disputes. As reflected in Table O, leading concerns included: the difficulty of appeal, the concern that arbitrators may not follow the law, the perception that arbitrators tend to compromise, lack of confidence in neutrals, and, increasingly, high costs.[238] In a nutshell, it seems that business lawyers are worried, one way or the other, about not having enough control in arbitration. For some, apparently, this means turning to litigation.

Table O: Reasons Why Companies Have Not Used Arbitration (in percent): 1997, 2011

Barrier	**1997**	**2011**		
		Corporate/ Commercial	**Consumer**	**Employment**
No desire from senior management	35.0%	24.6%	15.2%	29.7%
Too costly	14.8%	22.9%	28.3%	18.1%
Too complicated	9.9%	9.0%	15.2%	9.6%
Difficult to appeal	54.3%	51.6%	41.4%	41.3%
Not confined to legal rules	48.6%	44.1%	33.3%	36.2%
Lack of corporate experience	25.9%	11.9%	8.1%	7.2%
Unwillingness of opposing party	62.8%	44.9%	52.5%	43.0%
Results in compromised outcomes	49.7%	47.0%	42.4%	43.0%
Lack of confidence in third party neutrals	48.3%	34.2%	29.3%	24.2%
Lack of qualified third party neutrals	28.4%	11.0%	16.2%	8.2%
Risk of exposing strategy	---	6.4%	5.1%	6.5%
Too time consuming	[Not asked]	11.0%	13.1%	9.9%

Source for 1997 figures: Table A source, 26, Table 22.

At the same time, the 2011 data reflect a number of lowered perceptual barriers to the use of arbitration. The opposition to (or lack of support for) arbitration among senior management appears to be significantly diminished. Similarly, the use of arbitration is today much less likely to be hampered by lack of corporate experience than was the case in 1997.

Concerns about arbitrators, too, appear to be much less of a factor. And while difficulty of appeal, concern about arbitrators not following legal rules, and the unwillingness of opposing parties to arbitrate remain important considerations for corporate counsel, these barriers, too, affect a smaller percentage of companies than was the case in 1997.

[237] *See supra* text accompanying note 61.
[238] Compare similar results from the recent RAND study. *See* RAND REPORT, *supra* text accompanying note 121.

The only significant exception to these trends is perceptions regarding the cost of arbitration. Across the board, more companies (although still a relatively small minority) viewed cost as a barrier to the use of arbitration.[239] This result resonates with recent broadly expressed concerns about the growing costs and inefficiencies in commercial arbitration.[240]

A final word should be added regarding the data on barriers to the use of arbitration in consumer disputes (which in contrast to the general trend, appears to be on the increase, as discussed above, and which for a variety of reasons should be distinguished from arbitration of commercial disputes[241]). First of all, there appears to be relatively little resistance to the use of arbitration in consumer cases among Fortune 1,000 senior management. Moreover, concerns about the difficulty of appeal of arbitration awards are significantly less likely to be perceived as a reason not to use arbitration. On the other hand, more than half of those responding (52.5%) perceived the "unwillingness of [the] opposing party"—in this case a consumer or consumer advocate—as a reason not to use arbitration in a consumer contract. In addition, almost three in ten respondents believed the high cost of consumer arbitration might prohibit its use.

V. SOURCES OF AND PERCEPTIONS OF QUALITY OF THIRD PARTY NEUTRALS

A. Sources of Nominees for Neutral Roles

Another important basis of comparison between the 1997 and 2011 surveys involves mediators, arbitrators and other third party "neutrals"—those who act as mediators and arbitrators as well as in other formats for third-party intervention in conflict. In this respect, the 2011 survey offers both more and less than its predecessor: it sought data with respect to the three most important categories of disputes (corporate/commercial, employment, and consumer), but, unlike the 1997 survey, it did not distinguish between mediators and arbitrators (despite the significant differences in these roles and modes of selection).[242] However, some useful insights may be gleaned from the current and comparative data.

In 2011, as indicated in Table P, the collective response of corporate counsel made clear that regardless of the nature of the dispute (corporate/commercial, employment or consumer), major companies rely overwhelmingly on two major sources for nominees for neutral roles: private ADR provider organizations and their own previous experience, or reliance on word-of-mouth. Despite the fact that court-connected mediation and mediation of disputes involving federal or state agencies remain an important component of the landscape for companies,[243] relatively few neutrals appear to be appointed by a court or an agency.

When placed side-by-side with the 1997 responses (Table Q), these data reflect a clear drop-off in the role of courts in picking neutrals—notably mediators. Moreover, the activity of agencies in this regard is even more negligible, with the exception of the employment arena (where data probably reflect the impact of mediation programs such as that of the Equal

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[239] *See supra* text accompanying notes 129–30 (discussing Rand Report and earlier Fortune 1,000 survey).
[240] *See supra* text accompanying notes 119–20, 129–30.
[241] *See supra* text accompanying note 132. *See also* Stipanowich et al., *National Roundtable Summary*, *supra* note 226 .
[242] *See* LIPSKY & SEEBER, REPORT ON THE GROWING USE OF ADR, *supra* note 66, at 28–9.
[243] Robert A. Baruch Bush, *Staying in Orbit, or Breaking Free: The Relationship of Mediation to the Courts Over Four Decades*, 84 N.D. L. REV. 705, 705 (2008).

Employment Opportunity Commission (EEOC)[244]). There is also significantly greater emphasis on personal experience or word-of-mouth in selecting neutrals for corporate/commercial and employment cases—a development that probably reflects the experience garnered by many companies in the period since the 1997 survey as well as the corporate desire for control which is a prime motivator for the use of ADR.[245]

Yet, however great may be the desire for control of process, it is notable that hardly any companies have sought mediators or arbitrators internally—within their own ranks. This is not surprising given concerns about perceptions of bias that tend to accompany such options.[246]

***Table P: Sources of Nominees for Third Party Neutral Roles* (2011)**

	Corporate/Commercial Disputes	Employment Disputes	Consumer Disputes
The court	5.2%	6.3%	5.6%
A state or federal agency	0.9%	9.7%	1.1%
A private ADR provider	46.0%	31.2%	56.2%
Within the corporation	1.2%	0.7%	0.0%
Previous experience (word-of-mouth)	39.3%	39.1%	30.3%
Other	7.3%	4.9%	6.7%

Table Q: Comparison of Sources of Nominees for Third Party Neutral Roles (1997, 2011)

	1997*		2011		
	Mediators	Arbitrators	Neutrals in Corporate/ Commercial Disputes	Neutrals in Employment Disputes	Neutrals in Consumer Disputes
The court	20%	11%	5.2%	6.3%	5.6%
A state or federal agency	5%	9%	0.9%	9.7%	1.1%
A private ADR provider	30%	48%	46.0%	31.2%	56.2%
Within the corporation	3%	3%	1.2%	0.7%	0.0%
Previous experience (word-of-mouth)	30%	30%	39.3%	39.1%	30.3%
Other	20%	10%	7.3%	4.9%	6.7%

*Numbers for 1997 are approximate, based on bar charts in original published study. Source for 1997 figures: Table A source, 28, Chart 10.

[244] Seth D. Harris, *Disabilities Accommodations, Transaction Costs, and Mediation: Evidence From the EEOC's Mediation Program*, 13 HARV. NEGOT. L. REV. 1, 31–4 (2008).
[245] *See supra* text accompanying note 192.
[246] *See* LIPSKY ET AL., EMERGING SYSTEMS FOR MANAGING WORKPLACE CONFLICT, *supra* note 73, at 335.

B. Perceptions of Quality of Neutrals

Because the 2011 survey did not ask corporate counsel to offer separate perceptions on the quality of mediators and arbitrators, it is not possible to make a clear comparison between the 1997 data and the present responses. From the 2011 data (Table R), however, we glean that counsel tended to reserve their highest ratings for neutrals in corporate/commercial disputes (with almost thirty-eight percent of respondents perceiving neutrals as "very qualified"). It may be no accident that nearly four in ten corporate counsel controlled the selection of these neutrals, basing their selection on experience, investigation or word-of-mouth. While the same may be said of employment neutrals, a much larger percentage of the latter were selected by courts or agencies; companies were able to place reliance on private ADR providers (and private selection mechanisms in which they typically had some voice) for a larger percentage of neutrals in corporate/commercial cases.[247] This result is generally consistent with our expectations.

Table R: Perceptions of Quality of Third-Party Neutrals (2011)

	Very qualified	Somewhat qualified	Somewhat unqualified	Not qualified at all
Corporate/commercial disputes	37.7%	58.5%	3.5%	0.3%
Employment disputes	29.8%	61.2%	8.1%	0.8%
Consumer disputes	16.7%	72.2%	6.7%	4.4%

Table S: Comparison of Perceptions of Quality of Third-Party Neutrals (1997, 2011)

		Very qualified	Somewhat qualified	Somewhat unqualified	Not qualified at all
1997	Mediators	43.1%	55.8%	Not asked	1.0%
	Arbitrators	28.3%	69.9%	Not asked	1.8%
2011	Neutrals in corporate/commercial disputes	37.7%	58.5%	3.5%	0.3%
	Neutrals in employment disputes	29.8%	61.2%	8.1%	0.8%
	Neutrals in consumer disputes	16.7%	72.2%	6.7%	4.4%

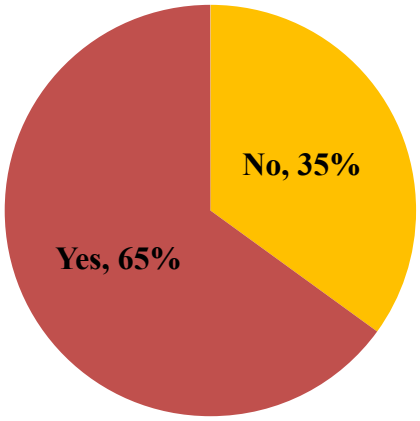
Source for 1997 figures: Table A source, 29, Table 25.

[247] It is worth comparing these results to data from the 1994 study of construction disputes which showed a significant direct relationship between party control over mediator selection and the settlement of disputes. *See* Stipanowich, *Beyond Arbitration*, *supra* note 48, at 123.

VI. USE OF INTEGRATED CONFLICT MANAGEMENT IN THE WORKPLACE

The survey explored the usage of integrated conflict management systems in several ways. First, we directly asked respondents whether they believed their company had a "conflict management system." As indicated in Table S, two-thirds (67%) of respondents indicated that they believed their company did in fact offer such a system. However, this result may be misleading in that the question does not clearly define the characteristics of a system. Indeed, this response is clearly unreliable, given that only fifty-two percent of those surveyed indicate that their employees were covered by ADR at all.

Table S: Do you believe your company has a "conflict management system"?



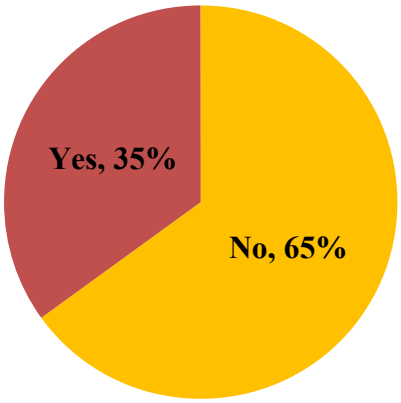
We delved more deeply into our assessment of integrated conflict management systems (which can be seen as one proxy for organizational strategy regarding the handling of workplace disputes) by asking a series of follow-up questions to the respondents. First, we considered the extent to which companies indicated that they employed an ombudsman. Fourteen percent of Fortune 1,000 firms indicated that an ombudsman was employed within their organization. This percentage is considerably higher than that found during the 1997 survey, where only one in ten respondents answered the question in the affirmative. As such, we find a moderate jump in ombudsman presence between 1997 and 2011, even if the absolute number of firms offering this service remains relatively low.

The establishment of an office dedicated to managing a dispute resolution program may serve as a direct proxy for the presence of an integrated conflict management system, since such an office is among key criteria for an integrated workplace ADR system.[248] In the current survey, thirty-five percent of respondents affirmed that their companies have an office or

[248] *See supra* text accompanying note 73.

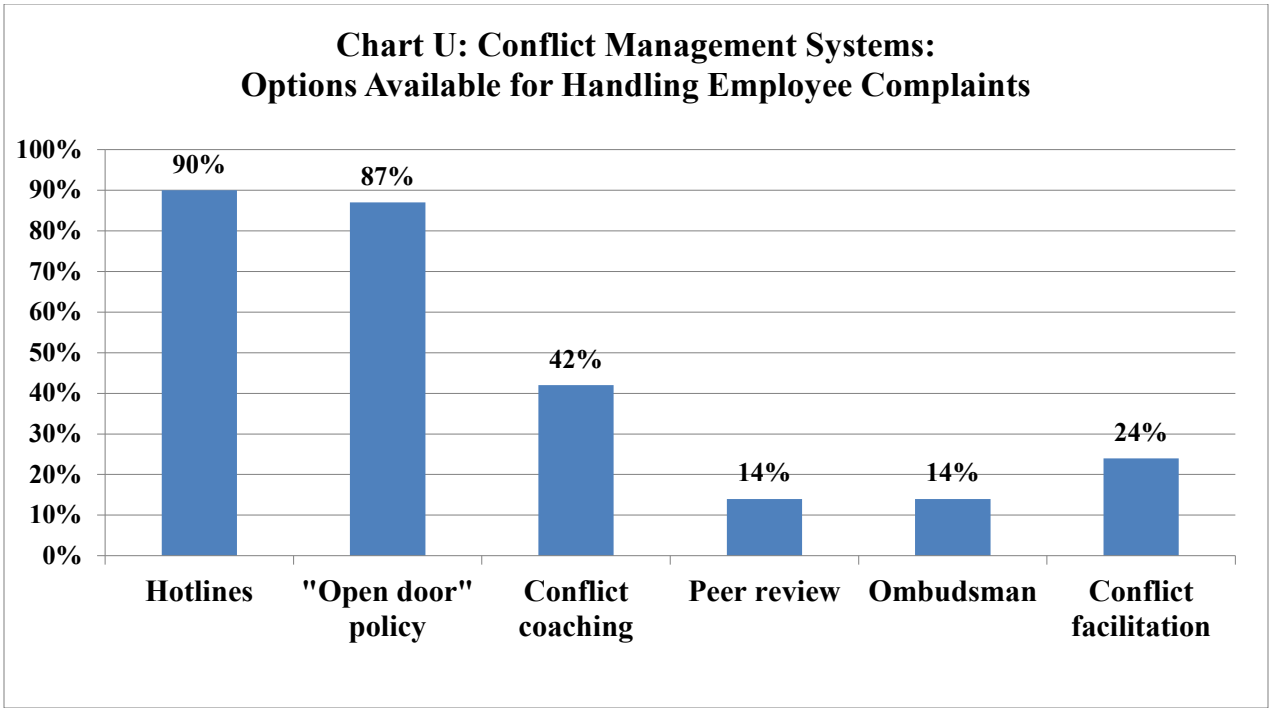
"function" for managing their ADR program (Table T). This number mirrors the response found when firms were asked if they used an in-house grievance system for non-union employees (see the discussion of Chart E)[249] and falls more closely in line with our expectations regarding the percentage of companies that offer integrated ADR systems. The results appear to confirm the assertion that no more than about one-third of respondent firms in the Fortune 1,000 actually have integrated conflict management systems for their workforce. This nevertheless represents a significant advance.

Table T: Does your company have an office or "function" dedicated to managing your dispute resolution program?



Moreover, many of the respondent corporations revealed a variety of individual practices that might be considered crucial to a conflict management system (Chart U). For instance, nine of every ten firms indicated the presence of hotlines for resolving disputes, and eighty-seven percent had an "open door" policy. However, only forty-two percent of companies offered conflict coaching, twenty-four percent provided conflict facilitation mechanisms, and just fourteen percent offered peer review (though, as noted earlier in the paper, this represents an increase over the ten percent of respondents indicating that they used peer review in 1997). On the whole, the results suggest that many companies employ various foundational elements of what might be required to build fully integrated conflict management systems, though considerably fewer have actually established these systems for their workers.

[249] *See supra* Part III.D.



VII. LOOKING AHEAD: IMPLICATIONS OF THE SURVEY FOR FUTURE CORPORATE CONFLICT MANAGEMENT, MEDIATION AND ARBITRATION PRACTICE AND RESEARCH

A. Considerations for Counselors and Advocates

1. Early assessment, intervention, conflict management

Our survey reinforces the conclusion that the most common reason for companies to use ADR instead of litigation is to save time and money.[250] Other reasons include party control of the dispute resolution process and result,[251] the maintenance of privacy or confidentiality,[252] the preservation of relationships,[253] and the desire for expertise in third party intervention.[254] An organization's priorities may vary greatly depending on the circumstances.[255]

In furtherance of these ends, many companies today appear to be employing strategies aimed at deliberate, proactive and systematic assessment of conflicts in the early stages—perhaps even the first sixty days—in order to lay the groundwork for business decisions about their forward management.[256] Many others are utilizing targeted expert evaluations to promote

[250] *See supra* Table C. *See also* Stipanowich, *Beyond Arbitration*, *supra* note 48, at 176–78.
[251] *See supra* Table C. *See also* Stipanowich, *New Litigation*, *supra* note 20, at 26.
[252] *See supra* Table C. *See also* Stipanowich, *New Litigation*, *supra* note 20, at 26–8.
[253] *See supra* Table C. *See also* Stipanowich, *New Litigation*, *supra* note 20, at 28.
[254] *See supra* Table C. *See also supra* text accompanying note 126.
[255] *See supra* text accompanying notes 114–15.
[256] *See supra* text accompanying notes 133, 217–19.

early settlement or more efficient case management.[257] Such efforts may be furthered by a new initiative unveiled by the International Institute for Conflict Prevention & Resolution aimed at "moving away from case-by-case resolution towards a sustainable system-based process for greater efficiency and improved quality."[258] The mechanism for this effort is a latter-day counterpart of the old CPR Pledge.[259]

In the workplace, there has been significant growth in the number of companies employing a variety of tools to manage employee relations and address disputes. A substantial number—perhaps approaching one-third—appear to have developed integrated systems, including offices of dispute resolution for conflict management; a range of options for handling complaints; and a variety of access points for entrance into the system.[260]

2. Mediation

At some stage in the dispute resolution process, corporations often employ mediation. Increasingly this occurs pursuant to a provision in a contract[261]; in any event, the disputing parties are today more likely to have a say in the selection of mediators.[262] Mediation affords parties—and their attorneys—a high degree of control over process and result, and this control is exerted to guide mediation along relatively narrow channels. Recent evidence suggests that in lawyered cases one "mode" of mediation—in which, sooner or later, there is some kind of evaluation by a mediator with background as a legal advocate or judge—predominates.[263] Mediation along these lines is firmly ensconced as the form *du jour* of third party intervention aimed at settlement, and will continue to remain so in the immediate future. In the longer term, one wonders how mediation practice will be affected by its own "success," and the changes that may eventually be wrought by a generation of counsel armed with ever-greater experience in "legal" mediation as an element of the litigation process.[264] A very different kind of challenge is presented by the slashing of court budgets, which (along with raising other issues of access to justice) is resulting in the shutting down of some longstanding court-connected mediation programs that were a primary force in the Quiet Revolution in dispute resolution.[265]

3. Arbitration

a. commercial arbitration

The triumph of mediation has been instrumental in bringing binding arbitration to a tipping point—a tangible ebbing of the tide that swept in during the latter half of the Nineteenth Century.[266] Just as mediation was a key factor in the so-called "vanishing trial,"[267] it now factors in the reduced incidence of arbitration.

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[257] *See supra* text accompanying notes 214–16.
[258] *CPR Launches 21st Century Corporate ADR Pledge at Annual Meeting* (Jan. 22, 2013), http://www.cpradr.org/Resources/ALLCPRArticles/tabid/265/ID/775/CPR-Launches-21st-Century-Corporate-ADR-Pledge-at-Annual-CPR-Meeting-in-San-Diego-Press.aspx.
[259] *See supra* text accompanying note 54.
[260] *See supra* text accompanying notes 21, 73.
[261] *See supra* text accompanying notes 95, 107.
[262] *See supra* text accompanying notes 248-50, Table Q.
[263] *See supra* text accompanying notes 109–11.
[264] *See id.*
[265] *See* Nancy A. Welsh, *The Current Transitional State of Court-Connected ADR*, 95 MARQ. L. REV. 873, 874 (2012).
[266] *See supra* text accompanying notes 30-45.

Make no mistake: binding arbitration is and always will be a critical and essential feature of the landscape of commercial dispute resolution, and not just for international disputes. In an era when there is broad recognition that the prevailing one-size-fits-all template for litigation is too top-heavy and burdensome,[268] and the challenges of obtaining civil justice are threatened by the closing of courthouses and reductions in court staff,[269] arbitration as a *choice-based* adjudicative alternative seems a made-to-order option.[270] (The future of employment and consumer arbitration, in which party choice is often a more problematic notion, is complicated by special concerns.[271] These topics are reserved for separate discussion below.)

Why, then, do fully half of our survey respondents think it unlikely that their company will use arbitration in the future? Several factors seem to be at play, undoubtedly greatly affected by personal and corporate experience. Ultimately, however, it often comes down to perceptions of *control.* When informed of the reduced usage of arbitration reflected in the Fortune 1,000 survey, one corporate general counsel expressed no surprise, explaining that he never uses arbitration because, as he put it, *"I want to control my [company's] destiny."* This point of view appears to equate control with the perceived features of litigation that augur in favor of a "right" result, including a decision maker charged with adhering to legal standards and a right of appeal. Hence, leading concerns about binding arbitration revolve around the lack of judicial review on the merits, the qualifications of arbitrators, the belief that arbitrators tend to compromise, and to ignore legal norms.[272] Given the fact that so many corporate counsel harbor these concerns, it is not surprising that even if a company is desirous of employing arbitration, the other party may object to its use.

But there is another set of perspectives that view choice-based arbitration as offering greater control and assurance of a "right" result. These include several factors identified in one recent study as supporting the use of arbitration, including the avoidance of "excessive or emotionally driven jury awards," the ability to choose arbitrators with particular qualifications, and the relative capability of arbitrators to cope with complex contractual issues.[273]

There are, moreover, choices that parties are afforded to deal with each of the leading concerns about arbitration. For example, concerns about arbitrators' conformance to legal norms may be addressed by selecting experienced lawyers or former judges as arbitrators (now the prevailing norm in commercial arbitration); through competent legal advocacy, including oral argument and briefing; and contractual standards for award-making in accordance with

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[267] *See id.*

[268] PROTOCOLS, *supra* note 120, at 2.

[269] *See, e.g.*, Imran Ghori, *San Bernardino County: Supervisors Discuss Court Closures*, PRESS ENTERPRISE, (Jan. 31, 2013, 6:18 PM), http://www.pe.com/local-news/politics/imran-ghori-headlines/20130131-san-bernardino-county-supervisors-discuss-court-closures.ece.

[270] *See generally* Thomas Stipanowich, *Arbitration and Choice: Taking Charge of the "New Litigation," (Symposium Keynote Presentation),"* 7 DEPAUL BUS. & COMM. L.J. 383 (2009) [hereinafter Stipanowich, *Arbitration and Choice*], *available at* http://ssrn.com/abstract=1372291. Potential benefits of arbitration include efficient, user friendly case administration, choice of expert decision-makers, finality of the decision; flexibility of the adjudicative process, accessibility of the decision-makers, fair and sensible results, lower cost, cycle time. *See generally* Hon. Curtis E. von Kann, *A Report Card On the Quality of Commercial Arbitration: Assessing and Improving Delivery of the Benefits Customers Seek*, 7 DEPAUL BUS. & COMM. L.J. 499 (2009) (discussing benefits of arbitration).

[271] Stipanowich, *Trilogy*, *supra* note 19, at 396–404.

[272] *See supra* notes 37–42, 117–19, 127–28. *See also* Drahozal & Ware, *supra* note 131, at 436.

[273] *See* RAND REPORT, *supra* note 121, at 15–20.

applicable law. Despite statutory limitations on judicial scrutiny of the merits of arbitration awards, some national/international organizations publish appellate arbitration rules offering different models for review of arbitration awards.[274] Concerns about arbitrator compromise may be allayed by better information about award-making,[275] more specific guidance for arbitrators regarding award-making, and relying on single arbitrators in lieu of multi-member panels that might be tempted, for example, to rely on compromise to fix damages.[276]

The ability to make process choices in arbitration offers other potential benefits. These include, notably, the opportunity to cloak proceedings with a degree of privacy and to protect the confidentiality of proprietary information.[277]

Then there is the matter of time and cost. The longstanding perception of arbitration was of processes entailing lower cost and shorter cycle time than litigation.[278] In the 1997 Fortune 1,000 survey, savings of time and cost were the leading reasons (other than "the contract required arbitration") why companies chose arbitration.[279] By the time of the RAND study, however, while most responding counsel still associated cost savings and speed with arbitration, these goals were apparently not high on the list of reasons to use arbitration; rather, costs and delays were mentioned as a growing concern.[280] Moreover, although the present survey did not permit isolation of reasons why companies elected arbitration, data on present perceptions of barriers to arbitration use are telling: comparing the current survey data to the 1997 results, while in nearly every case a smaller percentage of respondents viewed specific concerns (such as lack of appeal, arbitrator compromise, etc.) as barriers to the use of arbitration, a *higher* percentage of 2011 respondents viewed the relative costs of arbitration as a barrier to its use.[281]

Again, choice comes into play. By the time parties are at the adjudication stage, judging by the recent data, their focus may be very different than at earlier stages. For some, economy and cycle time may be less important than confidence in the process and the result.[282] However, there is evidence that such concerns remain important concerns for many companies, and corporate counsel often closely monitor the "burn rate" on expenditures for adjudication.[283] In a recent article, two corporate counsel explained that companies tend to seek, above all, "fairness, efficiency (including speed and cost) and certainty in the enforcement of contractual rights and protections."[284] They bemoaned the loss of speed and cost in the quest for more perfect

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[274] There is also the possibility of broadened appeal under the arbitration laws of some states. However, such alternatives entail potential dramatic increases in process, cost and cycle time and should be approached with caution. Stipanowich, *Arbitration and Choice, supra* note 263, at 443–48; Thomas J. Stipanowich, *Expanded Review of Awards:* Hall Street *and* Cable Connection, *in* 2010 ANNUAL REPORT OF THE SECTION OF PUBLIC UTILITY, COMMUNICATIONS, AND TRANSPORTATION LAW (2010).

[275] *See* Reginald Alleyne, *Statutory Discrimination Claims: Rights "Waived" and Lost in the Arbitration Forum*, 13 HOFSTRA LAB. L.J. 381, 412 (1996).

[276] *Cf.* Randall G. Holcombe, *An Empirical Test of the Median Voter Model*, 18 ECON. INQUIRY 260–75 (1980) (discussing how the middle or median voter may control in a majoritarian system).

[277] COMMERCIAL ARBITRATION AT ITS BEST, *supra* note 114, at 249–63.

[278] Stipanowich, *New Litigation*, *supra* note 20, at 4–5.

[279] *See supra* text accompanying notes 122, 229, 245–48, Table C.

[280] *See* RAND REPORT, *supra* text accompanying note 121.

[281] *See supra* text accompanying notes 129–30 (discussing Rand Report and earlier Fortune 1,000 survey).

[282] Stipanowich, *Arbitration and Choice*, *supra* note 275, at 387.

[283] The authors thank David Cruikshank for these observations.

[284] Michael McIlwrath & Roland Schroeder, *The View From an International Arbitration Customer: In Dire Need of Early Resolution*, 74 ARB. 3, 4 (2008).

procedural "due process."[285] Moreover, recent reductions in U.S. court budgets may dramatically extend the time to public trial and enhance the relative attractiveness of a much more expeditious arbitration proceeding. To the extent expeditious, cost-effective procedures are (or will again become) a priority for companies, there are now appropriate process choices; significant strides have been made in recent years to enhance and promote key options, presenting opportunities before and during the arbitration process.[286]

There are a number of practical barriers to making deliberate choices about arbitration and dispute resolution, but they are not insurmountable.[287] Only by acting reflectively and proactively can corporate counsel and their clients reap the full benefits of binding arbitration and other approaches.

b. employment and consumer arbitration

Although the issues surrounding the use of binding arbitration in employment and consumer contracts are too varied and complex to treat in this paper, a brief final reflection on our data is appropriate in light of the considerable attention now directed toward these topics. First of all, it is clear that large companies are far from unified in their attitudes and practices. It appears that a majority are unlikely to use arbitration for employment or for consumer disputes in the future, and most rarely arbitrate such cases today.[288] In the employment arena, there is more likely to be resistance to its use from senior management,[289] and multi-faceted conflict management systems may increasingly obviate the need for adjudication of any kind.[290] In the consumer arena, many companies appear to be particularly concerned about consumer opposition to arbitration.[291]

It must be remembered, however, that consumer and products liability cases appear to be exceptions to the general fall-off in the use of arbitration.[292] Furthermore, a significant minority of respondents indicated that their companies would be likely to arbitrate consumer or employment disputes in the future.[293] In light of recent Supreme Court decisions, some companies may be encouraged to believe that arbitration provisions will now offer corporations significant leverage as a barrier to class actions.[294] Much hinges on future legislative initiatives or regulatory action on the part of the Consumer Financial Protection Bureau or other agencies.[295]

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[285] *Id.*
[286] *See*, *e.g.*, PROTOCOLS, *supra* note 120, at 44–45. *See also*, *e.g.*, Christine L. Newhall, *The AAA's War on Time and Cost: The Campaign to Restore Arbitration's Benefits,* DISP. RES. J. 20 (Aug./Oct. 2012).
[287] Stipanowich, *Arbitration and Choice*, *supra* note 275, at 388–93.
[288] *See supra* Tables I, J, L.
[289] *See supra* Table O.
[290] *See supra* text accompanying note 227.
[291] *See supra* Table O.
[292] *See supra* Chart F.
[293] *See supra* Table N.
[294] *See* Stipanowich, *Trilogy*, *supra* note 19, at 380-96.
[295] *See id.* at 396-406.

B. Considerations for Researchers

The present survey raises an assortment of considerations for future research, including subjects to be developed and studied.

As a preliminary matter, it is time to acknowledge the shortcomings of the term "ADR," a catch-all concept comprising the entire range of diverse alternatives to court trial. While it may be useful as a term of convenience in discussions of conflict management, its utility in research into the dynamics of public and private dispute resolution is inversely related to the very breadth and variety of the approaches it embraces. Wherever possible, queries about attitudes toward "ADR" should give way to more specifically tailored questions.

Broad-based surveys like the present one and its 1997 precursor are useful in helping to identify broad trends and alert us to key "tipping points" such as the recent reduced emphasis on arbitration. They are, however, not designed to provide meaningful insights into the dynamics of individual dispute resolution processes or of conflict management systems; instead, they offer a springboard for research on these issues. The latter include (1) the priorities and expectations of business clients and other parties regarding dispute resolution and conflict management; (2) the performance and effectiveness of multi-step dispute resolution approaches, or of conflict management systems; (3) the dynamics of mediation processes, including mediator styles and strategies and the interplay between mediators and advocates; (4) arbitrator styles and strategies in pre-hearing and hearing management, deliberating and rendering awards; and (5) the impact of neutral experience, education and professional background.

CONCLUSION

The Fortune 1,000 survey portrays important evolution in corporate sector practices three decades into the Quiet Revolution in dispute resolution. A dwindling few major corporations continue to embrace hardball litigation as a broad policy, while many more are increasing their emphasis on alternatives. Nearly all companies have recent experience with mediation, which is now employed more extensively across the broad swath of civil conflict and the great majority of companies foresee its use in the future. Mediation's success has contributed to the marked fall-off in the use of binding arbitration, which calls to mind mediation's earlier role in the reduced incidence of trial. Today, there are also many companies using approaches focused on more strategic management of conflict, in a manner more reflective of business priorities. These include targeted early neutral evaluations that promote settlement or more effective case management, early case assessment, and integrated systems for managing workplace conflict. Such approaches represent a significant step beyond reactive and reflexive advocacy.

On the other hand, there is reason to believe that many companies continue to employ ad hoc approaches in some or all kinds of conflict, and devote little time to deliberating on the choices they make—often by default—with regard to dispute resolution, both at the time of contracting and after disputes arise. Moreover, much evidence suggests that business mediation is dominated by a single "legal" model with a relatively narrow, litigation-oriented focus. There are also indications that many corporate counsel worry that arbitration is not enough like litigation to be a suitable substitute, while at the same time there are growing concerns that it has become too much like litigation. The evenly divided opinions of corporate counsel regarding the future use of arbitration appear to reflect an underlying divide in perceptions about how to get

what they want out of adjudication. Diverging perspectives are also evident in the realms of employment and consumer disputes, portending varied practices in these critical areas in the coming years.

The present survey, like its predecessor, presents a useful backdrop for more focused inquiries aimed at discrete conflict settings. Insights from research may underpin the further evolution of effective approaches to the management of conflict.