



Center for Dispute Resolution ADR Quarterly - Fall 2020

As the USC Gould Center for Dispute Resolution embarks on a new remote fall semester, we are proud to once again welcome an incredible class of students dedicated to redefining their careers through ADR education.

With recognized leading digital education approaches, including breakout discussions meant to not only engage the class, but also to mimic real-life ADR practice, the Center is fostering conversation at the forefront of online dispute resolution. We hope to see you in person soon as we continue to develop essential learning environments that will be relevant to the future of ADR education.

Expanding the Dialogue

Special Education Dispute Resolution in the Era of COVID-19

Richard Erhard, USC Gould Lecturer in Law

Since last spring, many public schools across our nation have either been shuttered, partially open, preparing to open, or in a state of open today, closed tomorrow limbo. Parents, students, teachers, administrators and communities are faced with myriad untenable issues surrounding the implementation of compulsory education laws on one hand, while concurrently struggling with the implementation of service delivery models, duty-bound to ensure one of the most fundamental precepts of public education: the provision of a safe learning environment for students and staff.



Despite the effect of the COVID-19 pandemic on public education, the Individuals with Disabilities Education Act, mirrored by state statutes, provides no respite to the requirement for school districts to provide a free, appropriate public education (FAPE) to students with disabilities. Under the best of circumstances, the provision of FAPE is the source of most special education legal disputes. Due to mandated school closures, this issue is further exacerbated, creating additional rationale for due process complaints, taxing an institutionalized special education dispute resolution system already carrying a huge administrative burden.

The institutionalization of the special education dispute resolution system rests on the word "free" in the FAPE acronym. Unlike contemporary commercial mediation, where parties typically share in the cost of the mediation, under the FAPE requirement, all services, including the right to mediation, must be free.

Professor Nancy Welsh's 2004 article "Stepping Back Through the Looking Glass: Real Conversations with Real Disputants About Institutionalized Mediation and Its Value," in the *Ohio State Journal on Dispute Resolution*, provides vivid insight to the institutionalization of mediation in special education disputes. Welsh notes the behaviors characterizing

mediation are developed in response to the “expectations of the professionals who dominate these environments,” i.e., judges and attorneys. “The irony, of course, is that mediation was conceived originally as a process that responded to the needs and expectations of the disputants, as distinct from the institutions or professionals serving those disputants,” she writes.

Responding to the needs and expectations of special education disputants through alternative service delivery models (ASDM) is one unanticipated consequence of the COVID-19 pandemic. Institutions of higher education, including USC Gould School of Law, support online dispute resolution (ODR) through digital course offerings. Furthermore, select local education agencies now implement digital Individualized Education Program (IEP) facilitation, by third-party neutrals. These initiatives are unblocking the halls of traditional institutionalized dispute resolution models.



Mastering the Litigation "Carve Out"

Nathan O'Malley, USC Gould Lecturer in Law

In the ADR world the term “carve-out” refers to an exception within an alternative. Arbitration is a popular alternative to court litigation, but contracting parties may not wish to commit all potential disputes to that forum.

Frequently, negotiations over the choice for litigation or arbitration will lead contractual parties to draft a court litigation exception, or “carve-out”, within an arbitration clause. Advocates for such clauses argue that they provide for greater flexibility and customization of the dispute resolution process, however, as a number of recent court decisions show, the application of a “carve-out” can be prone to problems in practice.

This piece considers some of those problems and potential solutions. [Read more here.](#)

USC Gould/JAMS Arbitration Institute Inaugural Webinar Series: The Future of Dispute Resolution

The University of Southern California Gould School of Law and JAMS launched the inaugural USC Gould/JAMS Arbitration Institute Webinar Series titled *The Future of Dispute Resolution* in the Summer of 2020. This three-part webinar series brought together some of the world’s leading practitioners and commentators on international law to address the dispute resolution industry’s most pressing issues, such as the dynamic and evolving state of Sino-American commercial arbitration, the challenging effects of the COVID-19 pandemic and other environmental threats to the practice of law, and a final program on the latest trends and challenges in the global construction dispute industry.



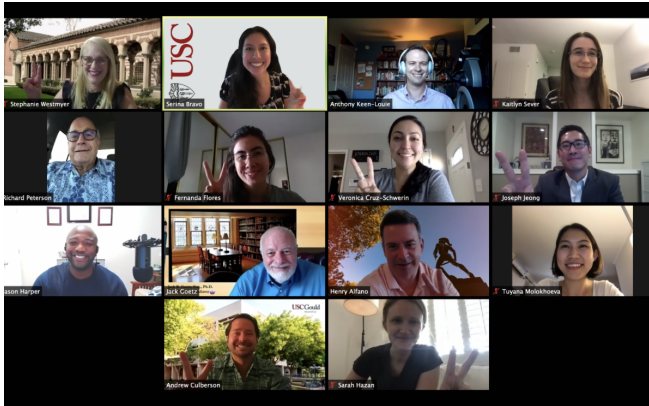
This series attracted over 1,200 registrants from more than 70 nations and a wide range of constituent groups, including in house counsel, legal practitioners, legal services organizations, and businesspeople.

Please email Sherman Humphrey at shumphrey@jamsadr.com to join our mailing list for advance notice of our **Fifth Annual International Arbitration Symposium** (to resume March 17, 2021), **2021 Webinar Series** (to begin in April 2021) and **Entertainment ADR Symposium** (rescheduled for May 26, 2021).



We thank the following organizations for supporting our inaugural Webinar Series:

[American Bar Association – Dispute Resolution Section \(ABA\)](#)
[American Bar Association – International Law Section \(ABA\)](#)
[Arbitral Women](#)
[Australian Centre for International Commercial Arbitration \(ACICA\)](#)
[Beijing Arbitration Commission/Beijing International Arbitration Center \(BAC/BIAC\)](#)
[Boston International Arbitration Council \(BIAC\)](#)
[California International Arbitration Council \(CIAC\)](#)
[Chartered Institute of Arbitrators \(CIArb\)](#)
[Hong Kong International Arbitration Centre \(HKIAC\)](#)
[Miami International Arbitration Society \(MIAS\)](#)
[New York International Arbitration Center \(NYIAC\)](#)
[Singapore International Arbitration Centre \(SIAC\)](#)
[Y Construction](#)



ADR Networking Social

Hosted by the Center's career team, our virtual ADR social brought together current students, professors and alumni.

Using breakout rooms to connect in smaller groups, alumni and professors were able to brainstorm job hunting tactics and learn some interesting facts about one another in a laid-back atmosphere. We look forward to the next event!

Furthering Career Development

Fall ADR Speaker Series

Continuing to engage our ADR students and foster connections and experiential learning with our broader alumni and Trojan Family, the Center has developed an ongoing speaker series for our students this fall.

October 7 | Mediation & Philanthropy

Sally Patchen (Mediator, Youth Peer Mediation Expert, Non-profit Administrator)

October 8 | Arbitration & Mediation

Maureen Weston (Pepperdine Professor, Arbitrator, Mediator)

October 15 | Employment Mediation

Cherry Destura (EEOC Mediation Program)

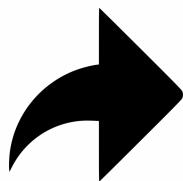
November 9 | Mediation Practice

Steve Cerveris (Cerveris Mediation)



Up Next: Experiential Learning Opportunities for the Center

Fall Speaker Series | Additional specialized speakers to be announced, including events with thought leaders working in court



mediation, Ombuds careers and mediation in the federal government

October 16-17 | USC Gould ADR student, Diana Lam, will participate in the University of Houston National Mediator Competition. She is currently enrolled in International Negotiation and Mediation at the Center, taught by Professor John Garman and Sean Galliher, a USC Gould LLM in ADR alumnus.

November 7 | SCMA Annual Conference

November 11 at 7pm PST | Zoom Live Lecture: Dealing with Strong Negative Emotions in Conflict by Professor Richard Peterson. [Register here.](#)

Student & Alumni Spotlight

Student Spotlight: Apul Bhalani (MDR Class of 2021)

Meet Apul Bhalani (MDR '21). In the Q&A below, he shares what drove him to pursue a legal education in dispute resolution and how his studies have shaped his work with Kids Manage Conflict.



What made you pursue your degree in particular, and why at USC Gould?

I was interested in mediation and ADR from some articles I had read about other countries starting to push mediation through online systems as a way to relieve the excessive cases the courts were experiencing. That really seemed like something I wanted to learn more about with how technology could apply to handle mediation more effectively in courts here. I decided on USC for the flexibility of class offerings for my schedule as well as Professor Richard Peterson, the director of the program, personally calling me to answer my questions about the program and opportunities I was interested in.

[Read the full Q&A here.](#)



Alumni Spotlight: Joseph Jeong (LLM in ADR '18)

Meet Joseph Jeong (LLM in ADR '18). In the Q&A below, he shares what drove his passion for dispute resolution and his advice for using USC's resources to advance your career.

What initially sparked your interest in learning about law?

My interest in studying law started when I started working in the financial industry. After managing various types of client, credit and risk portfolios, I wanted to improve my skills in understanding core issues, negotiating

opportunities, and achieving solutions and ultimately become a subject matter expert in my field.

[Read the full Q&A here.](#)

ADR Faculty: News & Notes

**Lecturers Jack R. Goetz & Jason Harper |
National MC3 Conference Discussion**



Dr. Jack R. Goetz (LAW 680-Mediation Theory and Practice) and Jason Harper (LAW 829-Cross-Cultural Dispute Resolution) participated in two September conferences with national audiences discussing the theoretical underpinnings and continued growth of MC3's neutrally grounded voluntary mediator certification.



A Family Mediation Conference Training, led by Woody Mosten on September 16, and the Virginia Mediation Network's annual conference on September 25 provided mediators from states across the country an opportunity to participate in dialogue that will help mediation grow from a field to a profession. MC3 is a non-profit organization that ensures user and public confidence in the process of mediation by setting standards for mediator training, education, and ethical practice and by developing, implementing and maintaining those standards for mediators.

From the Director

Recognizing and Avoiding Cognitive Traps in Decision-Making

Richard Peterson, Director of the USC Gould School of Law Center for Dispute Resolution

Conflict in life is as certain as death and taxes. The events of this year certainly confirm this reality. In the midst of a pandemic, and with social and political unrest erupting across the country, we face local, state and national elections with an opportunity to exercise one of the most important responsibilities associated with citizenship: voting.

As elections draw near, we are bombarded with arguments by candidates and partisans who passionately attempt to convince us why they are right and the other side wrong. This process involves saturation of advertisements with carefully crafted messages that purport to communicate facts and information that we are encouraged to accept without question. News outlets and social media flood our ears, minds and hearts with conflicting information coupled with emotional pleas which suggest that to doubt their ideas constitutes ignorance, or even complicity in dark conspiracies. Indeed, navigating the waters of political conflict as we attempt to sort truth from fiction presents us with a significant challenge: to recognize tools of persuasion used to influence us, and to recognize cognitive biases that can obstruct our ability to rationally separate fact from fiction.



Dispute resolution education empowers students to understand the psychology of persuasion and to recognize cognitive traps that interfere with objective evaluation of information and rational decision making. Even so, those who have been taught about cognitive traps often fail to avoid them because avoiding such errors requires significant effort to slow down our thinking enough to overcome the seductive lure of intuitive and heuristic decision-making.

In his Nobel Prize winning book *Thinking, Fast and Slow*, Daniel Kahneman describes this as "System 1" and "System 2" thinking. System 1 thinking generates quick, intuitive information necessary to reserve energy for the more difficult analysis required by System 2 thinking. Examples of System 1 thinking include recognizing the color of a building as yellow, $2+2=?$, reading the name on a sign, identifying water on a floor, etc. However, System 1 thinking alone leaves us susceptible to apply intuitive heuristics in situations

where critical decision-making really calls for System 2 thinking. As Kahneman points out, research has established that “both self-control and cognitive effort are forms of mental work.” He then says: “Many people are overconfident, prone to place too much faith in their intuition. They apparently find cognitive effort at least mildly unpleasant and avoid it as much as possible.”

In addition, the textbooks regularly used in my ADR classes almost always include information about cognitive biases, particularly how such biases distort our evaluation of information and obstruct appropriate decision-making. In their highly respected book, *The Practice of Mediation*, Douglas Frenkel and James Stark point out that the first cause of overconfidence in intuitive decision-making is confirmation bias. They describe confirmation bias as “human beings’ tendency to seek out and process new information in ways that are (unconsciously) aimed at confirming their preexisting views and hypotheses.” Confirmation bias impacts people even if they have no strong feelings about an issue, nor a stake in an outcome. But the authors point out that this bias “comes in stronger, motivated forms as well, as when people are motivated to defend their beliefs, have allegiances to a ‘side,’ or an interest in achieving a particular result.”

Confirmation bias has been tested empirically and is seen in the following example of behaviors: “avoiding information that challenges one’s hypotheses or beliefs and persisting in one’s beliefs despite contradictory evidence. The more complex and ambiguous the data that is subject to interpretation, the stronger the likely effects of confirmation bias. The more a person generates and reiterates arguments in support of a given belief or hypothesis, the more convinced he or she is likely to become of its correctness.”

Another significant obstacle to objective evaluation of information is egocentric bias. This involves the tendency of people to view themselves as more fair, intelligent and competent than the average, and better able to control outside forces than others. In another excellent ADR textbook, *Resolving Disputes: Theory, Practice, and Law*, Jay Folberg, Dwight Golann, Thomas Stipanowich, and Lisa Kloppenberg describe egocentric bias as a tendency to “rate our abilities, chance of being right, and good luck more highly than is warranted ... We are also overconfident about our ability to assess uncertain data and tend to give more weight to what we know than what we don’t know.”

In *Resolving Disputes*, the authors identify additional psychological traps implicated in rational decision-making. For example, we are susceptible to forming opinions about issues and ideas depending upon how they are framed. “Our thinking about an issue and our answer to a question are affected by how the question is presented,” the authors write. Thus, framing presents a potential cognitive trap.

Selective perception arises when we automatically filter out information or data that does not support our views or beliefs. “Whenever we encounter a new situation, we must interpret a universe of unfamiliar, often conflicting data that is more than we can process. We respond by instinctively forming a hypothesis about the situation, then organizing what we see and hear with the help of that premise. Our hypothesis also operates as a filter, by automatically screening out anything that does not support it – which in turn reinforces the belief that our initial view was correct.”

Attribution error is another cognitive bias. Simply stated, attribution error arises when we tend to conclude that the actions of another are good or bad depending upon whether or not we have positive or negative feelings about the person. We are also more lenient in our own shortcomings, justifying our actions while condemning similar behavior in others. Reactive devaluation occurs whenever we conclude that “whatever proposal comes from the other side cannot be good for us. Anything done or suggested by them is suspect.”

Recognizing cognitive biases is a necessary step in avoiding mistakes associated with intuitive decision-making. However, it will take more than recognition of these biases to overcome them. As the authors of *Resolving Disputes* write, “We are easily fooled by our own ingrained biases and distortions. By definition, what we believe is our reality.” Nevertheless, during this important time of election decision-making, the quality of our decisions may be improved if we consider and recognize how cognitive biases may be

influencing our evaluation of information, and how they may be impacting the important decisions we make in supporting our democracy.

Why Dispute Resolution at USC?

Renowned influencers in dispute resolution on faculty

Recognized Course Provider in the U.S. for CIArb

Curriculum based in real-life application

Scholarships that drive diversity & dedication

CURIOUS? LEARN MORE: [ADR AT USC](#)

QUESTIONS? CONTACT US AT ADR@LAW.USC.EDU



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