



INTERNATIONAL CENTRE
FOR DISPUTE RESOLUTION®

Arbitration Mythbusters and Clause Drafting

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adr.org



American Arbitration Association®

The American Arbitration Association (AAA®), is a not-for-profit organization.

The AAA role in the dispute resolution process is to administer cases, from filing to closing. The AAA provides administrative services in the U.S., as well as abroad through its International Centre for Dispute Resolution® (ICDR®).

The AAA aims to move cases through arbitration or mediation in a fair and impartial manner until completion.

AAA services include the design and development of alternative dispute resolution (ADR) systems for corporations, unions, government agencies, law firms, and the courts.



01. Dispelling Myths

Myth #2 - Arbitration does not allow formal discovery

REALITY: In arbitration, the parties are free to decide for themselves how much discovery will be allowed.

- AAA Rules
- Federal Rules of Civil Procedure or state discovery rules vs. AAA Rules
- Counsel and the discovery process
- A La Carte Service: AAA eDiscovery Special Master



Myth #3 There's no appeal

REALITY: AAA has Optional Appellate Arbitration Rules

Parameters:

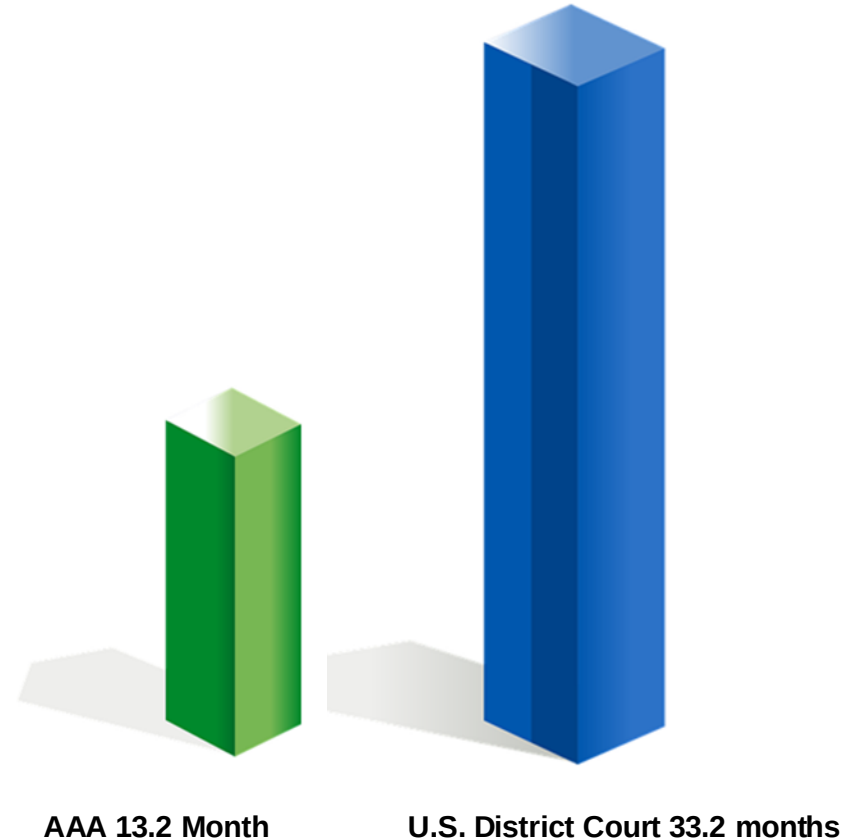
- Only available by agreement of the parties either by contract or stipulation.
- Parties are able to appeal on the grounds that the underlying award is based on errors of law that are material and prejudicial and/or on determinations of fact that are clearly erroneous
- Generally determined upon written documentation
- Goal is for completion in 3 months
- Specialized Appellate Panel



Myth #4 Arbitrations take forever

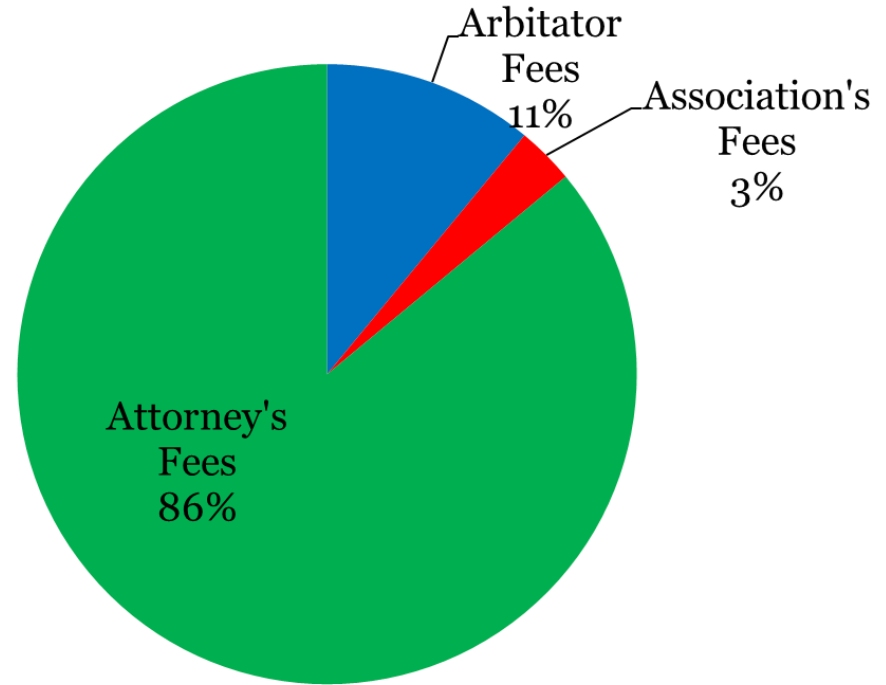
REALITY:

Median time from filing to trial –
civil cases 2022



Myth #5: Arbitrations cost a lot

REALITY: Cost of the arbitrator and administrator are a fraction of total costs.





Myth #5: Arbitrations cost a lot

REALITY: Arbitration is only more expensive when you treat it like litigation

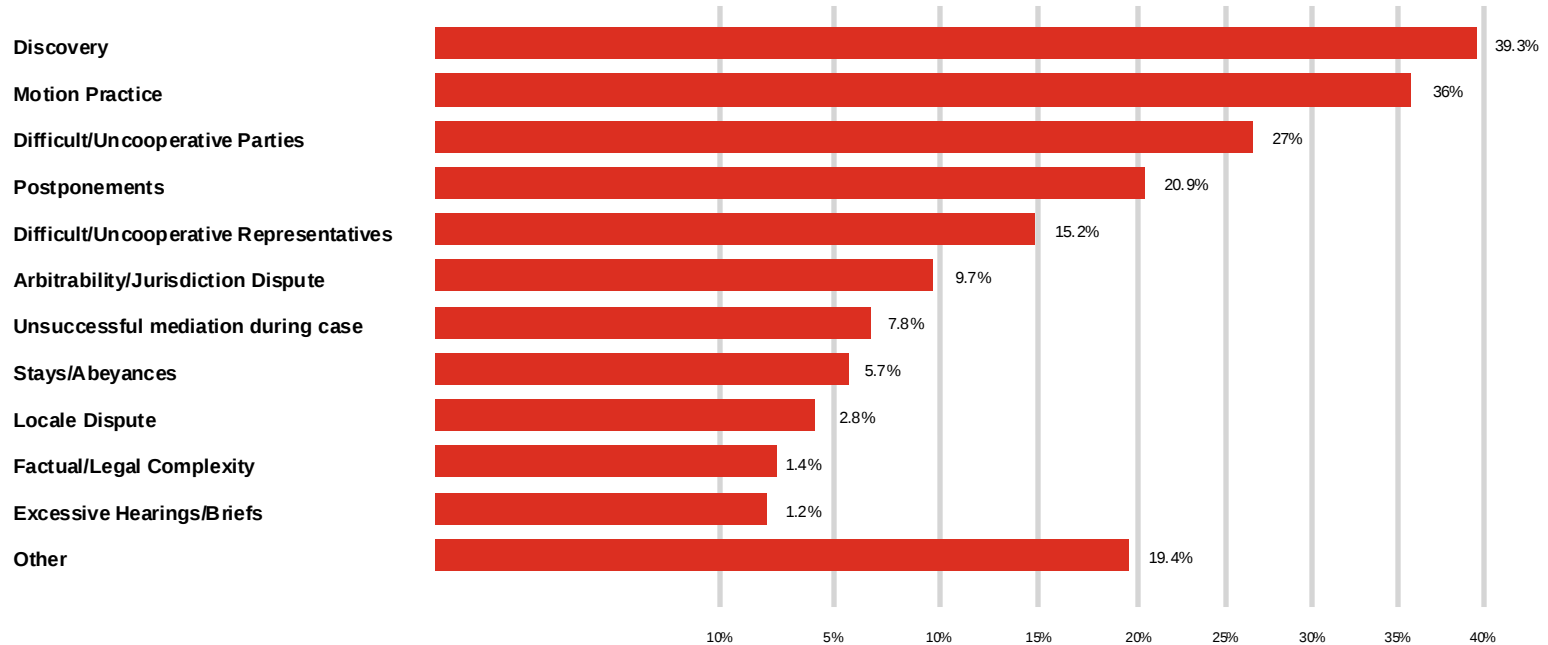
Arbitration is not meant to have:

- Slew of dispositive motions
- Numerous depositions & endless discovery
- Rigid adherence to rules of evidence and courtroom decorum
- Lengthy final awards from arbitrator(s)



Factors that Arbitrators Felt Escalated Costs or Delayed the Case

*400 awarded commercial cases with a claim or counterclaim of at least \$1 million dollars (2015 -2018)



Myth #5.5

Ad Hoc Arbitration is
Cheaper Than
Administered Arbitration

Administered arbitration is an insurance policy against the costs of :



Court involvement when parties cannot come to an agreement



Uncomfortable situations with the decision-maker relating to finances or disclosures



Decision-makers charging their hourly rates for administrative tasks

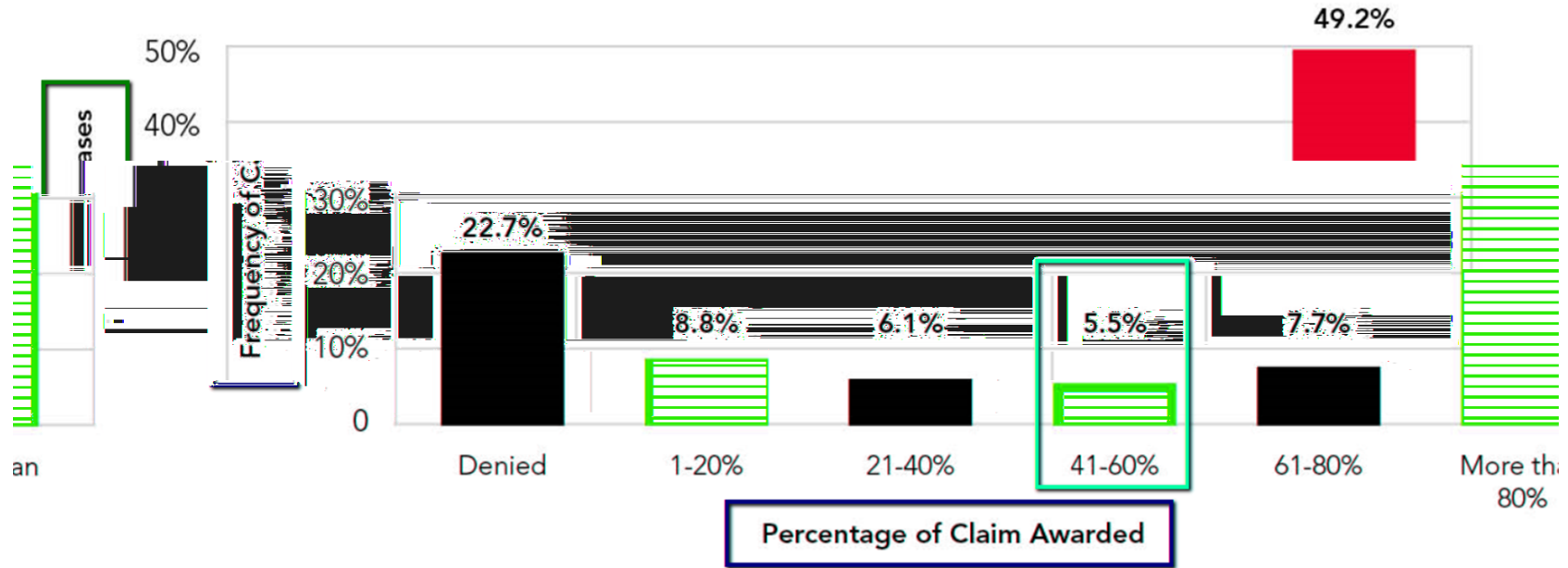


Delay tactics or the dispute “falling off the radar”



Myth #6 Arbitrators “Split the Baby”

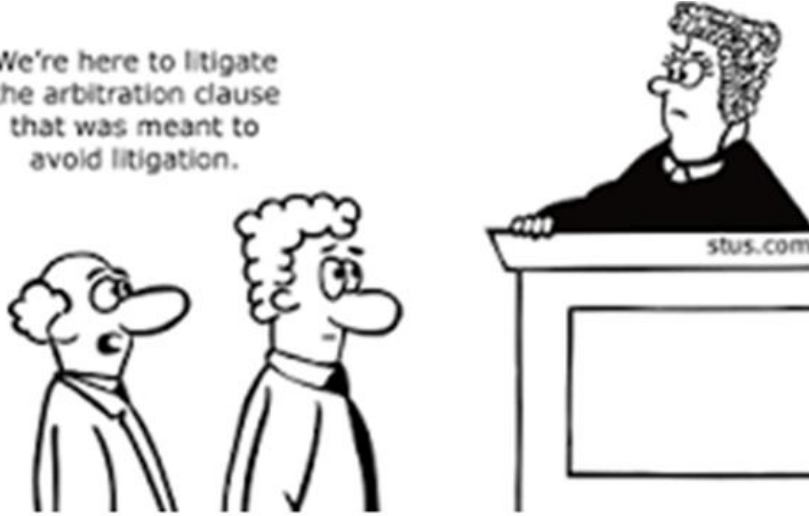
“Split” Awards account for less than 6% of decisions.



* based on 2018 study of 2,500 AAA administered business-to-business commercial arbitration cases with monetary claims awarded in 2017.

02. Clause Drafting

We're here to litigate
the arbitration clause
that was meant to
avoid litigation.



Drafting the Arbitration Clause

Where ADR Clauses Go Wrong

- Drafted early in the negotiation process or too late
- Too lengthy
- Ambiguous language
- Conflicting provisions
- Unrealistic Procedural Elements



Drafting the Arbitration Clause

Objectives for Well-Written Clause

Is self executing.

Sets parameters for the remedies available in arbitration.

Provides for a complete set of rules and procedures.

Addresses case dispute resolution needs.

Minimizes disputes over how the arbitration will be conducted.



Drafting the Arbitration Clause

The basic clause provides the following by simply incorporating the AAA's administration and rules:

- Arbitrability – R-7
- Self-enforcing – R-1, R-2
- Emergency Measures – R-39
- Procedural Time Limits - R-5 (Answer) and R-13 (Arb. Selection)
- AAA Administrative Assistance – R-2
- Rule for Direct Appointment by Parties – R-14
- Broad Authority of the Arbitrator(s) – R-7
- Issuance of Award - R-47, R-48 & R-49

Basic Arbitration Clause

Any controversy or claim arising out of or relating to this contract, or the breach thereof, shall be settled by arbitration administered by the American Arbitration Association in accordance with its Commercial Arbitration Rules, and judgment on the award rendered by the arbitrator(s) may be entered in any court having jurisdiction thereof.



Drafting the Arbitration Clause

Problems with not-so-standard arbitration clauses:

- Parties' intent unclear
- Vague conditions precedent
- Unrealistic or inappropriate procedures
- Problems with locale
- Problematic arbitrator selection provisions



Drafting the Arbitration Clause



Unclear Intentions

- “Any dispute shall be settled by binding arbitration unless any third party is materially necessary to resolution; then arbitration shall not be so mandatory unless the third party agrees unconditionally to participate.”
- “Every dispute of any kind or nature shall be submitted to arbitration unless it is a technical dispute which shall be resolved by a technical expert appointed by the parties.”





- **If carving out disputes, be clear regarding definitions.**
- **Generally speaking – the simpler, the better.**

Drafting the Arbitration Clause

Vague Conditions Precedent

“Prior to commencing arbitration the parties must first attempt to settle the matter by means of good faith negotiation with senior management. If unresolved in negotiation, the parties must submit the dispute to mediation. Failure to submit the dispute to either negotiation or mediation shall result in all claims being deemed void.”





- **Establish deadlines for the completion of each step of a multi-tiered dispute resolution process.**
- **Require that mediation be conducted pursuant to an established set of rules.**
- **Grant the arbitrator the authority to resolve disputes over conditions precedent.**
- **Define “good faith” or don’t mention it.**

Unrealistic or Inappropriate Procedures

in the City of New York. The decision of the arbitrator so chosen shall be given within ten (10) days after his selection or appointment.

Arbitration provision calling for
FRCP and hearing within 30 days

(the "AAA") in accordance with the then-current rules of the AAA. The arbitration shall be held in the New York City before a single arbitrator selected by mutual agreement of the parties, or if the parties cannot agree upon the choice of arbitrator within twenty (20) days of submission of such Claim, before a single arbitrator appointed by the AAA. Unless otherwise agreed to by the parties, the arbitration hearing shall commence within thirty (30) days after the time the Claim was submitted to arbitration and shall proceed in succession until the final arbitrator's award is given. The award of the arbitrator shall be final, non-appealable and binding upon the parties and their respective successors and permitted assigns and it shall be fully enforceable as an arbitration award by the state and federal courts of New York in accordance with the applicable laws of New York.

Unrealistic or Inappropriate Procedures

(a) Subject to the Expedited Procedures, each of the parties will: (i) select an arbitrator (each a “Designated Arbitrator”) who is unaffiliated with such party and, to the extent possible, experienced in arbitrating sports-related business and ticketing disputes; and (ii) notify the other party in writing of the identity of the arbitrator so selected. In the event that either of the parties fails to timely select its Designated Arbitrator, such arbitrator will be selected by the AAA’s office (or any successor thereto) located in the Borough of Manhattan in New York, New York (such selected arbitrator also a “Designated Arbitrator”). The Designated Arbitrators will, within five (5) business days following their selection, select a third arbitrator (the “Third Arbitrator” and collectively with the Designated Arbitrators, the “Arbitrators”). If the Designated Arbitrators are unable to agree on the Third Arbitrator within such five (5) business day-period, then the Third Arbitrator will be selected by the AAA’s office located in the Borough of Manhattan in New York, New York. The fees and expenses of the Arbitrators and the AAA will be borne equally by the parties.

(b) The arbitration hearing will be conducted in the Borough of Manhattan in New York, New York and conclude no later than thirty (30) days after the date on which the Third Arbitrator is selected. The Arbitrators will set the date(s) for the arbitration hearing; make determinations based solely on the documents and other evidence presented at the arbitration hearing; commit to the rendering of a decision regarding the dispute within ten (10) business days after the conclusion of the Submission Period (as hereinafter defined); and provide discovery according to the time limits specified herein, giving recognition to the understanding of the parties that they contemplate reasonable discovery, including document demands and depositions, but that such discovery be limited so that the time limits specified herein may be met without undue difficulty. In no event will the Arbitrators allow either of the parties to obtain more than a total of fifteen (15) hours of deposition testimony from all witnesses, including both fact and expert witnesses. In the event multiple hearing days are required, they will be scheduled consecutively to the greatest extent possible.



- **Be realistic in setting time frames.**
- **Consult with litigation teams.**
- **Anticipate the types and magnitude of disputes when specifying procedures.**

Drafting the Arbitration Clause

Lack of Clarity in Locale

- “The hearing shall be conducted at a location mutually agreed to by the parties.”
- Clause is silent as to locale.
- “All disputes and controversies related to this Agreement and the transactions contemplated by this Agreement ... will be determined by arbitration ... and will be conducted in Kansas or California or any other place mutually agreed by the parties.”





- **Specify a city and state;**
- **Specify several cities from which the filing party can choose; or**
- **Specify a locale that is not vague, e.g., the locale will be the city identified in the contract as the non-filing party's headquarters.**



Drafting the Arbitration Clause

Problematic Arbitrator Selection Provisions

- The sole arbitrator mutually selected by the parties must be knowledgeable in the subject matter of the dispute.”
- “The sole arbitrator shall be an investment banker or certified financial analyst with 10 years experience in the state of Alaska and a member of the Anchorage Bar Association.”
- “If the two (2) nominated arbitrators cannot agree on the nomination of the third arbitrator with fifteen (15) Business Days, then the Chairman of the American Arbitration Association shall appoint the third arbitrator who shall act as the Chairman of the tribunal.”





- The process for selecting an arbitrator should address all contingencies and be carefully worded to avoid costly and time-consuming surprises.
- Using the chosen ADR provider's selection process avoids ambiguity.
- It is better to not specify arbitrator qualifications than to have qualifications that:
 - Are ambiguous;
 - Would greatly reduce the pool of available experienced arbitrators; or
 - Prove challenging or impossible to satisfy.
- If three arbitrators are to be appointed, state whether two will be party-appointed and what happens if there are more than two parties.
- State whether party-appointed arbitrators will be neutral or non-neutral.
- Specify a time frame for completing each step of the selection process.
- Provide a fallback in case the designated selection process fails.

Form of Award

- “The arbitrator shall be required to provide a reasoned decision setting forth his findings and conclusions with respect to each Claim submitted to arbitration.”
- Does this require a reasoned award or detailed finding of facts and conclusions of law?



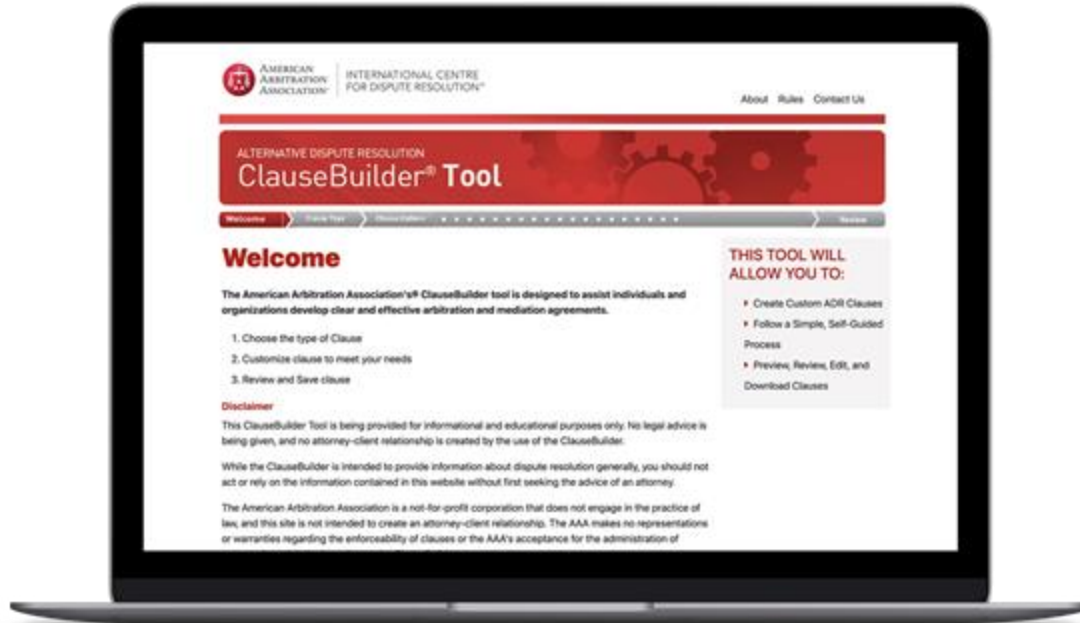
- Be clear about Award format
- Remember – more complex awards are more expensive and may require a transcript.

www.clausebuilder.org

AAA ClauseBuilder® Tool

Selections Include:

- Number of Arbitrators
- Method of Arbitration Selection
- Arbitrator Qualifications
- Locale Provisions
- Governing Law
- Discovery
- Documents Only Hearing
- Duration
- Remedies
- Attorneys' Fees
- And more.....



OUR MISSION

To support the prevention and resolution of conflicts by expanding access to alternative dispute resolution.

PRIORITIES



Prevent
and reduce
violence



Bridge
community
conflict



Support
diversity,
Equity &
Inclusion

PROGRAMS



Annual Grant Cycle



Rapid Response Grants



Diversity Scholarship Grants



Special Initiatives Grants

IMPACT

\$8.1M+

In grants funded
since 2015

\$229K+

Annual grant cycle
average grant 2023

146

Projects funded

FUNDING

\$13.5M+

To date, the Foundation
has received over
\$13.5M in donations.

Over \$9.7M
from the AAA-ICDR

Over \$3.8M
from AAA-ICDR
Arbitrators and Mediators



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