



# New York Dispute Resolution Lawyer

A publication of the Dispute Resolution Section of the New York State Bar Association



**What's Going On? Diversity, Equity, Inclusion**  
**Enforcement of Partial Final Arbitration Awards**  
**Enforcing Mediated Settlement Agreements**



## **Award For Attorney Professionalism**

To honor a member of the NYSBA for outstanding professionalism, which is defined as dedication to service to clients and a commitment to promoting respect for the legal system in pursuit of justice and the public good, characterized by exemplary ethical conduct, competence, good judgment, integrity and civility.

**Presented by:** Committee on Attorney Professionalism

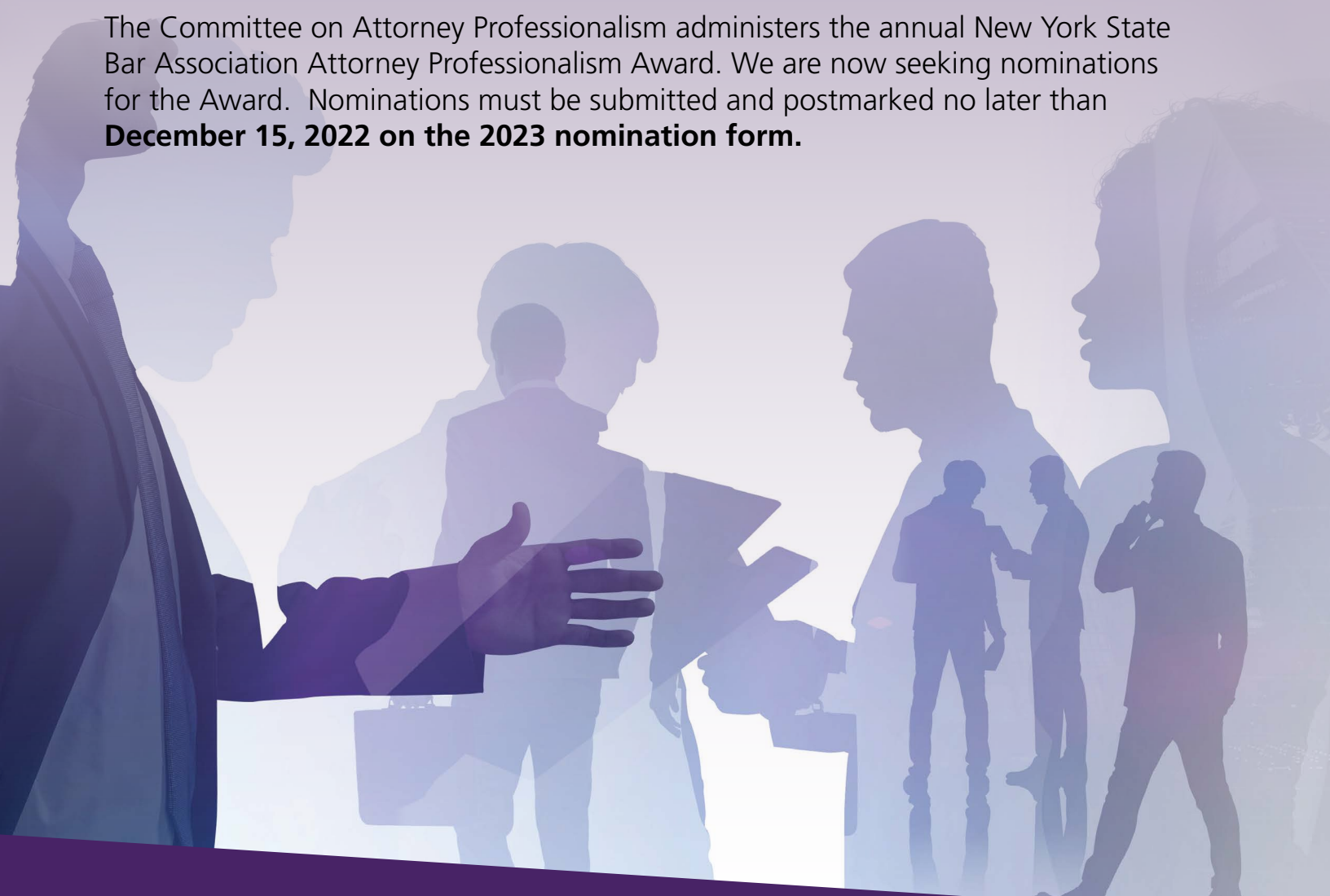
**Contact:** Melissa O'Clair

**Nomination Deadline:** December 15, 2022

**Date Presented:** To be given on Law Day

**Prize Awarded:** Tiffany & Co. Clock

The Committee on Attorney Professionalism administers the annual New York State Bar Association Attorney Professionalism Award. We are now seeking nominations for the Award. Nominations must be submitted and postmarked no later than **December 15, 2022 on the 2023 nomination form.**



**Nomination Deadline: December 15, 2022**

**Nomination Forms: [NYSBA.ORG/ATTORNEYPROFESSIONALISM](https://www.nysba.org/attorneyprofessionalism)**

# Contents

## Special Section: Tribute to Chuck Newman

- 12** Summoning Chuck Newman: Brilliant Mind, Great and Warm Heart, Generous Engagement With Community  
*Simeon H. Baum*

## Diversity

- 15** What's Going On? An Overview of Diversity, Equity and Inclusion Dispute Resolution Initiatives in New York  
*Robyn Weinstein and Michelle Lavrichenko*

## Arbitration

- 20** Why First-of-a-Kind Technology Disputes in Energy and Construction Projects Are Challenging To Decide  
*Patricia D. Galloway*
- 23** Enforcement of Partial Final Arbitration Awards  
*Edward Lozowicki*
- 26** Lessons From the Field: Technology Solutions To Enhance Your Arbitration Advocacy Practice  
*Artem N. Barsukov*

## Mediation

- 29** Enforcing Mediated Settlement Agreements, or, When Is a Deal Really a Deal: An Analysis of *Murphy v. Institute of International Education*  
*Steven M. Bierman*
- 33** A Beneficial Symbiotic Relationship: Rule 2.1 of the ABA Model Rules of Professional Responsibility and Appellate Mediation  
*Kathleen M. Scanlon*

## Case Notes

- 38** What a Development This Is:  
*Morgan v. Sundance, Inc.*  
*Laura Kaster*
- 40** Case Summaries  
*Alfred Feliu*



## New York Dispute Resolution Lawyer

2022 | Vol. 15 | No. 2

- 3** Message From the Chair  
*Noah Hanft*
- 7** Message From the Co-Editors-in-Chief  
*Edna Sussman, Laura A. Kaster and Sherman Kahn*
- 9** Ethical Compass: Zooming in on Neutrals' Implicit 'isms  
*Professor Elayne E. Greenberg*
- 36** Book Review  
*Commercial Litigation in New York State Courts, 5th Edition* —Still the Leading Resource for Commercial Litigation Advocates and ADR Practitioners  
*Reviewed by Ross J. Kartez*
- 44** Section Committee Chairs

# New York Dispute Resolution Lawyer

## Co-Editors-in-Chief

**Edna Sussman**  
SussmanADR  
esussman@sussmanadr.com

**Sherman W. Kahn**  
Mauriel Kapouytian  
Woods LLP  
skahn@mkwllp.com

**Laura A. Kaster**  
Appropriate Dispute |  
Resolutions  
laura.kaster@kasteradr.com

## Board of Editors

**Steven M. Bierman**  
Bierman ADR LLC  
sbierman@biermanadr.com

**Theo Cheng**  
ADR Office of Theo Cheng  
LLC  
theo@theocheng.com

**Al Feliu**  
Feliu Neutral Services  
afeliu@feliuadr.com

**Leah Haber Kuck**  
Skadden, Arps, Slate  
Meagher & Flom LLP  
lea.kuck@skadden.com

**Julie Hopkins**  
Julie.Hopkins@jghopkins.  
com

**Lela Love**  
Cardozo School of Law  
love@yu.edu

**Jacqueline Nolan-Haley**  
Fordham University School  
of Law  
jnolanhaley@fordham.edu

**Kathleen Paisley**  
Ambos Nbgo Law  
kathleen.paisley@amboslaw.  
be

**Rekha Rangachari**  
New York International  
Arbitration Center  
rrangachari@nyiac.org

**Steven Skulnik**  
Practical Law/Thomson  
Reuters  
sskulnik@stevenskulnik.com

## Dispute Resolution Section Officers

**Chair**  
**Noah J. Hanft**  
AcumenADR LLC  
New York, NY  
nhanft@acumenadr.com

**Chair-Elect**  
**Jeffrey K. Anderson**  
Anderson, Moschetti & Taffany PLLC  
Latham, NY  
anderson@amtinjurylaw.com

**Vice-Chair**  
**Jill Pilgrim**  
Pilgrim & Associates Arbitration, Law & Mediation LLC  
New York, NY  
jjesq@pilgrim-associateslaw.com

**Secretary**  
**Evan J. Spelfogel**  
Phillips Nizer LLP  
New York, NY  
espelfogel@phillipsnizer.com

**Treasurer**  
**Deborah Reperowitz**  
Stradley Ronon  
New York, NY  
dreperowitz@stradley.com

**Immediate Past Chair**  
**Ross J. Kartez**  
Ruskin Moscou Fattischek P.C.  
Uniondale, NY  
rkartez@rmfpc.com

The *New York Dispute Resolution Lawyer* is distributed to members of the New York State Bar Association's Dispute Resolution Section without charge. The views expressed in articles in this publication represent only the author's viewpoint and not necessarily the views of the Association, the Section or its Officers.

### Accommodations for Persons with Disabilities:

NYSBA welcomes participation by individuals with disabilities. NYSBA is committed to complying with all applicable laws that prohibit discrimination against individuals on the basis of disability in the full and equal enjoyment of its goods, services, programs, activities, facilities, privileges, advantages, or accommodations. To request auxiliary aids or services or if you have any questions regarding accessibility, please contact the Bar Center at 518-463-3200.

Publication Date: September 2022

© 2022 by the New York State Bar Association

ISSN 1945-6522 (print) ISSN 1945-6530 (online)

*This edition is only available online and by pdf.*

**NYSBA.ORG/DISPUTE**

# Message From the Chair

Could there be a point in time more revealing of the importance of dispute resolution? With the horrific, unjustifiable war on civilians raging in Ukraine, and our country so polarized over virtually every aspect of life, the work of those that believe in dispute resolution is cut out for us. Of course, we cannot put an end to war, tribalism, and ignorance, but we in the ADR community can certainly do our part. And the Dispute Resolution Section, under the leadership of Ross Kartez, has worked mightily to do so over the last year, with great success.

Despite the challenges of the pandemic and the responsibilities of a new child, Ross Kartez has been an extraordinary leader. As I prepare to follow Ross as the chair of the Dispute Resolution Section, I anticipate this task will be both easy and difficult. Easy, because he has done so much excellent work and created such strong momentum that I can simply let the great programs and the work of our committees carry on. Difficult, in that by devoting boundless energy, creativity, and passion to the Section, he has set the bar so high. And Ross has carried on the tradition of the outstanding leaders the Section has had over the years who I have worked with and observed with admiration.

It is truly an honor for me to serve as the chair of the Dispute Resolution Section of NYSBA. Eight years ago, I was still general counsel of MasterCard, wrapping up a 30-year career there. After experiencing the massive benefits and rewards of mediation firsthand, I had decided to embark on a second career in ADR. One of the first things I did was join the Dispute Resolution Section and the Mediation Committee. I soon realized the breadth and importance of the work our Section does. And, equally important, I was taken in by the dedication and intellect of the folks in our community. I went on to serve as president and CEO of the CPR Institute, and in that role my respect and affection for the ADR community only grew.

I am particularly excited to take on the role of chair of this Section because there are so many wonderful people with a can-do attitude who commit their time and energy to the work of our Section. And there is probably no better example than our dear friend, Chuck Newman. Sadly, we lost Chuck just a few months ago. Chuck was one of the first people I met in our Section. As was the case with so many



**Noah Hanft**

of us, Chuck quickly became more than just a colleague, but a good friend. His dedication to the profession, intellect, and compassion inspired all of us. Chuck demonstrated how one could be passionate and have strong opinions without being the slightest bit argumentative. And one of the first initiatives the Section will take on is honoring Chuck's memory by instituting a special "Chuck Newman Award" for an individual who best exemplifies the wonderful and extraordinary attributes that Chuck demonstrated.

Before I discuss a few events on the horizon and acknowledge the many wonderful programs the Section has put on over the past year, I want to make a pitch. If you want to be part of a community that welcomes new ideas, new initiatives, new committees, and new people, you are missing out if you're not a member of the Dispute Resolution Section. If you join, you will enter a world where new ideas, creative thinking, and intellectual curiosity are highly valued. And I feel a moral obligation to ensure that anyone who is not a member knows what they're missing. So please feel free to reach out to me ([nhanft@acumenadr.com](mailto:nhanft@acumenadr.com)) and allow me to share with you why, whether you are a law student, litigator, transactional lawyer, aspiring or experienced neutral, the Dispute Resolution Section is the place to be.

Please mark your calendar for the Fall Meeting scheduled for October 20. This year we hope to return to a one-day LIVE session, with a virtual option. Chair-Elect Jeff Anderson, Mohamed Sweify, Loretta Gastwirth, Deborah Reperowitz and Rachel Gupta will be chairing what promises to be an exceptional program. The meeting will begin with a keynote address by Kenneth Feinberg and will conclude with remarks by Colin Bruce, Special Envoy, Humanitarian and Development Affairs, International Committee of the Red Cross.

In addition, the Section's three-day, highly regarded Commercial Arbitration Training for Arbitrators and Counsel, led by Simeon Baum, was held on July 11-13 and, once again, received rave reviews.

Now I'd like to acknowledge the hard work and accomplishments of so many in our Section over the past year. There are far too many people to individually recognize for their outstanding contributions, and far too many exceptional programs to mention, so I apologize in advance for not mentioning all the great people and programs that took place this year. I do want to collectively thank the scores of people in the Section who have contributed their time and efforts so generously.

The Section's Annual Meeting has become a showcase for talent and has continued to garner rave reviews. This year's program chairs, Jess Bunshaft, Shashi Dholandas, Krista Gottlieb, and Dani Schwartz put together a program that exceeded all expectations with great topics, including an engaging and comprehensible discussion of blockchain and cryptocurrency disputes and a phenomenal presentation from Court of Appeals Judge Cannataro on presumptive ADR.

Speaking of the presumptive ADR efforts, I would be remiss not to recognize the work of the Mediation Committee and the ADR and the Courts Committee (co-chaired by Laura Kaster and Dan Kolb) in driving the presumptive ADR effort and the new rules under consideration. In particular, we all owe a debt of gratitude to Dan Kolb for his leadership and guidance in helping to shape the Section's thoughtful support and recommendations. There were many involved in this effort, but the contributions of Ross, Loretta Gastwirth, and Laura Kaster stand out.

Many thanks to Edna Sussman, Laura Kaster, and Sherman Kahn for the incredible effort they undertake year after year to publish what is far and away the leading industry journal, the *New York Dispute Resolution Lawyer*. These dedicated co-editors deserve all of our thanks as we look forward to this publication's continued success.

I want also to extend a special thank you to Jeff Zaino, who, over the course of many years, has worked tirelessly to promote all of the Section's events and makes AAA offices available to us whenever feasible.

The Mediation Committee, under the leadership of Bart Eagle, Gary Shaffer, and Rachel Gupta, truly hit the ball out of the park this past year with a ton of extraordinary programs, including the highly informative and well attended "Mediation Roundtable Series," as well as the development of a new mentorship program for new mediators. Rachel Gupta has stepped down from her role as committee chair, and Emily Altman will be joining Bart and Gary. I have no doubt that they and the Mediation Committee's exceptionally talented members will continue to put on invaluable and exciting programs.

Simeon Baum and Steve Hochman carried on their well-established and highly attended Commercial Mediation training, offered twice a year, and available both in basic and advanced formats. Participants continue to find this training invaluable.

Speaking of stellar Mediation Committee members, there is probably no one who has put in more work this year than Leslie Berkoff. Leslie created and built the Section's Law School Mediation Tournament, which once again was a highly successful event with 14 law schools participating in the competition hosted by Davis Polk (thanks to Dan Kolb). Many thanks to Leslie for her ongoing leadership and willingness to carry this forward, and to the Mediation and Executive Committee members that participated as judges.

The Arbitration Committee, led by co-chairs Loretta Gastwirth and William Crosby, had a busy and highly productive year, including a well-received program exploring the many issues that arise in arbitration related to non-party discovery. Once again, the highly regarded and well-attended Comprehensive Commercial Arbitration training program that Charlie Moxley, Edna Sussman and Lea Haber Kuck produce was a big success.

The Section enhanced its focus on diversity, equity and inclusion this year. The Diversity and Inclusion Committee, under the inspired leadership of Iyana Titus and Steve Marshall, undertook many initiatives, including revamping and implementing a highly successful mentorship program for neutrals of diverse backgrounds, running a number of diversity-focused programs and contributing to the establishment of the New York Diversity Equity and Inclusion Neutral Directory. Both Iyana and Steve will be stepping down this year after several years of dedicated service. The Section is deeply appreciative of their work in taking on many initiatives and highlighting the importance of diversity and inclusion to the Section. They will be missed. We are delighted that Alfreida Kenny and Mary Austin will be the new co-chairs of the Diversity and Inclusion Committee, and I have no doubt that they will continue to grow engagement, provide great programming, and push the Section forward in recognizing the importance of diversity, equity, and inclusion.

As Chair, I intend to continue the great work that the Diversity Committee and Ross have done, and also hope to accelerate our efforts to address what continues to be an unacceptable lack of diversity in ADR, particularly with respect to people of color. I believe we need to challenge ourselves to do more. For example, are we doing all that we can to ensure that people of color are not only being included, but highlighted, in our initiatives?

One of the most exciting new programs addressing matters of diversity was the development of a new Diversity Series, inspired by Ross Kartez, a series of programs directed at growing relationships with and highlighting diverse practitioners. First, Quentin Williams (“Q”), interviewed by Ross, shared his insights and drove a highly interactive event. This event was followed by a networking evening at Jasmines Caribbean Cuisine, which drew rave review from all attendees who enjoyed the program, the drinks, and a wonderful buffet dinner. Many thanks to Deborah Reperowitz and Jill Pilgrim who were instrumental in organizing the event and the substantive program.

The Section has added several new committees that have grown and gained significant momentum. The Sports ADR Committee, led by Jill Pilgrim and Alex Bachuwa, has put on some wonderful programs, including “Hot Topics in Sports and Olympic Arbitration,” and has been incredibly effective in keeping members informed of events in the fast moving and exciting world of sports law.

The newly formed Insurance Disputes Committee, led by Diana Shafter Gliedman and Mark Bunim, held a live and lively event (also offered virtually) on issues in insurance arbitration that was well-attended. Attendees enjoyed both the interesting exchange of views from both the insurer and policyholder sides, as well as the delightful cocktails and snacks graciously hosted by Jeff Zaino and the AAA following the presentation. It was reminiscent of pre-COVID days.

The Commercial Lending Disputes Committee, led by Debra Reperowitz and Jeffrey Wurst, held a highly successful bankruptcy mediation event and promises to do some exciting programs in the coming year.

Leslie Berkoff will be stepping down as co-chair of the Ethics Committee and Randy Tesser will be joining David Singer as the committee chairs. The committee held a highly informative and timely program on ethical issues that arise in virtual mediations and arbitrations.

Diane Rosen and Richard Janvey are stepping down as co-chairs of the Negotiation Committee after putting on some interesting and well-received programs over the last several years, and Courtney Chicvak and Paul Radvany will be assuming the co-chair roles. We look forward to some exciting programs from that committee in the months ahead.

Marilyn Genoa and Susan Salazar have been extraordinary co-chairs of the Membership Committee. They’ve demonstrated a laser focus on promoting the Section, through collaborating with other committees, and highlighting the benefits of membership. Marilyn and Susan also initiated a wonderful series of presentations on the “Habits of Highly

Effective Dispute Resolvers,” in partnership with other committees, We also owe a debt of gratitude to them in bringing the membership directory to fruition and our appreciation to Joan Hogarth and those who worked on the framework of the directory.

The New Practitioners Committee will be combined with the CLE and Education Committee and will be focused on ADR and education-related matters as well as attracting and supporting law students and new practitioners in the ADR community. The co-chairs will be Jackie Nolan-Haley, Mansi Karol and Richard Janvey.

We are greatly appreciative of the service of Judge Ariel Belen and Mark Bunim in chairing the Legislative Committee over the last several years. They both will be stepping down, and the committee will be chaired by Erica Levine Powers and Lorraine Mandel. We look forward to the initiatives that the Legislative Committee will be undertaking.

The Securities Disputes Committee, under the leadership of Christine Lazaro and Howard Fischer, has become one of the Section’s leading committees. It continues to increase engagement through excellent programing, regular meetings, and great guest speakers.

Our International Dispute Resolution Committee will have two new co-chairs, Mia Levi and Salmon Ravala, who will be joining Mohamed Sweify. We thank Rekha Rangachari for her leadership on this committee over the last several years.

Our committee with the longest name, Mediation of Wills, Trusts, Estates, Guardianship and Elderly Disputes, will have two new co-chairs, Kera Reed and Amy Hsu, and we look forward to the programing and initiatives they will be taking on. We owe a debt of appreciation to Leona Beane and Alfreida Kenny, who will be stepping down as co-chairs after years of dedicated service.

The Section’s Health Care Committee will likewise have new co-chairs. We thank Joan Hogarth and Andrew Garbarino for their prior service and welcome Katherine Benesch and Judge John DiBlasi as the new committee co-chairs and look forward to the activities of this committee.

The Section will continue to have a meaningful voice at the NYSBA, with our very own Simeon Baum sitting on the NYSBA’s Executive Committee and M. Salman Ravala and Ross Kartez on the House of Delegates.

I want to extend special thanks to all the past Chairs for their support and encouragement, and to all our Section officers. I am indeed fortunate to have as my Chair-Elect Jeffrey Anderson who, I have no doubt, will be an invaluable partner going forward. Likewise, I am delighted that Jill Pilgrim,

who has already contributed so much to the Section, will be Vice-Chair, and we will have the benefit of her wisdom and vast experience. The Section is indeed fortunate that Deborah Reperowitz (Treasurer) and Even Spielfogel (Secretary) will stay on in their current roles. Deborah's financial acumen and Evan's lightning fast and accurate minutes add great value to the team. I also want to extend special thanks to our Section liaison, Catherine Carl, and our CLE program manager, Simone Smith, for the vast array of work they do to sup-

port our active and demanding Section. Catherine has left to take on an exciting new role and Simone's role has expanded to include both CLE and Section liaison.

Finally, I want to emphasize that I welcome ideas from everyone in the Section. Please feel free to reach out to me or any of the Section officers. I look forward to working with you all towards making this a wonderful and productive year for our Section.

**Noah Hanft**



## Dispute Resolution Section

### Events & Activities

For decades, volunteers have been developing and presenting seminars, preparing rich collections of written materials and raising the bar for legal practice in New York. We're happy to provide continuing education programming and events for our Section members, and hope you will join us as we continue to add more to our schedule.

Visit **NYSBA.ORG/DISPUTE** and click on "Upcoming Events" tab for more info.



### *Take a look at what's coming up next...*

**Commercial Litigation Academy 2022**  
November 3-4, 2022 | 9:00 a.m. – 5:00 p.m.  
16.0 MCLE Credits | Virtual

**Taking The Lead: Excellence In The Courtroom**  
November 10, 2022 | 5:30 p.m. – 8:00 p.m.  
1.0 MCLE Credit | In-Person

**NYSBA.ORG | 800.582.2452 | MRC@NYSBA.ORG**



# Message From the Co-Editors-in-Chief



**Sherman Kahn**



**Edna Sussman**



**Laura A. Kaster**

We have started a new Section year with a new leader, Noah Hanft, who is well-known to the ADR community, not just in New York, but nationally. The Section has been fortunate to attract leaders in the field who are dedicated advocates of ADR, and who consistently promote new best practices in arbitration and mediation and support, mentor, and train new entrants to the field. Many of the prior chairs continue to make outsize contributions. The Section hosts the Commercial Arbitration Training, the creation of two former chairs, Charlie Moxley and Edna Sussman, with many other former chairs serving on panels throughout the three days jammed with rich learnings. Simeon Baum, our founding chair, is the force behind the Section's 40-hour mediation training that has only been improved during the pandemic. The Co-Editors-in-Chief of this journal are all former chairs and so are many committee chairs, board members, and program contributors. Our Section also has many contributing members who year after year add to work that makes this a rich place to be. Please continue to participate and become even more active in all the varied programs we sponsor. We welcome Noah and all of you who contribute to our community.

In every issue of this journal, we aim to provide insight into the developing questions and concerns in ADR and provide practice points for you. Elayne Greenberg's column raises ethical challenges—here, whether zoom may contribute to implicit bias. Kathleen Scanlon notes the ethical symbiosis between the candid advice requirements of Rule 2.1 of the ABA Model Rules of Professional Responsibility and appellate mediation. Our case summaries by Al Feliu keep you up to date on court interventions and complications. Laura Kaster comments on the Supreme Court's change of

tune on the so-called policy favoring arbitration. We try to keep our articles focused for practitioners and neutrals. We welcome your comments on our approach and your suggestions for topics.

Steven Bierman writes on new developments related to enforcing mediation settlements and reminds us that a final document may not be produced following the signing of terms of agreement.

We have two technology focused articles. Patricia Gallo-way discusses special problems facing an arbitration panel in first of a kind technology disputes. Artem Barsukov provides technology tips for arbitration advocates.

Ed Lozowicki writes on the important topic of rules and decisional law governing the enforcement of interim orders in arbitration—and how the arbitrator's label is treated.

Our immediate past chair, Ross Kartez, has contributed a book review of a massive work by Robert L. Haig, *Commercial Litigation in New York State Courts* (5th edition), which has valuable sections on ADR.

We also have an article about the important loss of a member of our ADR community, Chuck Newman. Simeon Baum reminds us of his profound influence on many of us. The Section has created an honor to be awarded in his name that we hope to give to someone who personifies the highest values of our field, as Chuck did.

In this issue, we also have an important piece on diversity. Our Section is laser-focused on improving the diversity in ADR to improve outcomes, participants' feeling of shared experience, and basic equity in the field. Progress is slow but

our efforts must not lag. Our article on diversity initiatives in New York, by Robyn Weinstein and Michelle Lavrichenko, not only describes the many efforts being made but spotlights some of the mediators who are entering the field and whom we hope to hear from in many venues. Think of them for inclusion in panels and presentations. Learn more about what you can do to promote diversity.

Let us hear from you on what you have liked in these pages and what you would like to see.

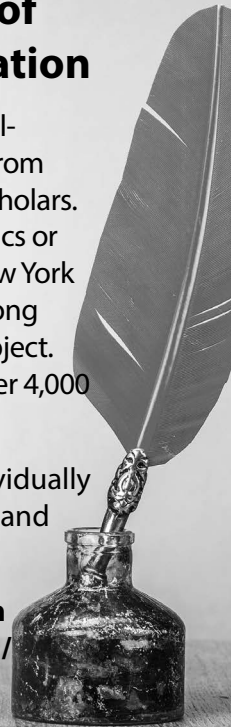
**Laura A. Kaster, Edna Sussman, Sherman Kahn**  
**Co-Editors-in-Chief**

## **Contribute to the NYSBA Journal and reach the entire membership of the state bar association**

The editors would like to see well-written and researched articles from practicing attorneys and legal scholars. They should focus on timely topics or provide historical context for New York State law and demonstrate a strong voice and a command of the subject. Please keep all submissions under 4,000 words.

All articles are also posted individually on the website for easy linking and sharing.

**Please review our submission guidelines at [www.nysba.org/JournalSubmission](http://www.nysba.org/JournalSubmission).**



## **NEW YORK STATE BAR ASSOCIATION**

# **REQUEST FOR ARTICLES**

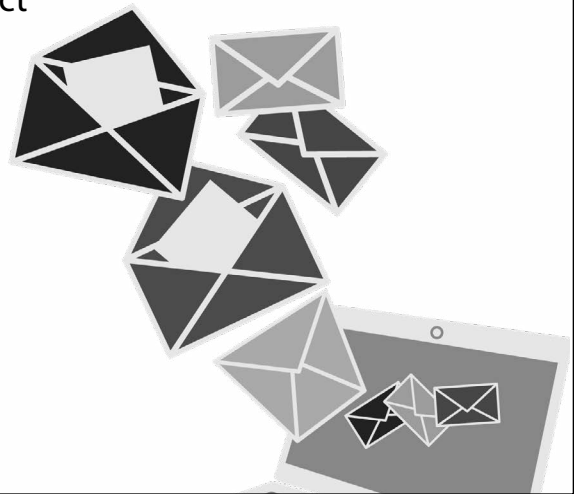
If you have written an article you would like considered for publication, or have an idea for one, please contact the Co-Editors-in-Chief:

**Sherman W. Kahn, Mauriel Kapouytian Woods LLP**  
**[skahn@mkwllp.com](mailto:skahn@mkwllp.com)**

**Edna Sussman, Sussman ADR**  
**[esussman@sussmanadr.com](mailto:esussman@sussmanadr.com)**

**Laura A. Kaster, AppropriateDispute Resolutions**  
**[laura.kaster@kasteradr.com](mailto:laura.kaster@kasteradr.com)**

*Articles should be submitted in electronic document format (pdfs are NOT acceptable), along with biographical information.*



## Zooming in on Neutrals' Implicit 'isms

Professor Elayne E. Greenberg

### The Issue—Zooming in on Neutrals' Implicit 'isms

Video conferencing, extolled for its economic and efficiency benefits, has now become an accepted option in the “new normal” of dispute resolution practice. Consequently, our professional discussions about video conferencing have advanced from sharing the mechanics of “how to” conduct an arbitration or mediation on Zoom to more nuanced explorations about the appropriate use of video conferencing.<sup>1</sup> This column contributes to this exploration by questioning how dispute resolution processes conducted via video conferencing might trigger the implicit biases of arbitrators and mediators and compromise a neutral's ethical obligation to be impartial. *When a neutral conducts their dispute resolution processes via video conferencing, how might communicating via video conferencing amplify a neutral's existing implicit biases or create new implicit biases that shape a neutral's assessment of the participants?* Colleagues, please join me in this evolving conversation.

My expanded interest in the ways video conferencing might trigger our implicit biases was piqued when prudence during the pandemic compelled me, along with the rest of the world, to shelter-in-place and conduct much of our professional, personal and entertainment connections via video conferencing. As neutrals, we all pride ourselves in neutrality and objectivity. Yet, when video conferencing, I became aware of how my assessments of the individuals participating were based on different cues than those that influence me in person. For example, I observed that many of the respected news commentators appearing on news shows via video conferencing had the book *The Power Broker* strategically displayed in their backgrounds, and I wondered whether, for different observers, the book triggered different implicit biases about the commentators. I also noted how my assessments of colleagues with whom I was virtually meeting for the first time via video conferencing were influenced depending upon their video conference background: whether their bedroom, a well-appointed office, a kitchen, a resort, or a virtual background. How were professional perceptions of colleagues either reinforced or challenged when video conferencing blurred the established personal and professional boundaries and allowed entry into their personal space? Were reactions to the merits of participants' contributions on video conferencing adversely affected if they had inadequate lighting,

participated showing only the top of their head, or engaged only on audio? Hmm. Do these cues affect our impartiality when we are serving as neutrals and if so, how?

Impartiality is the foundational ethical tenet for arbitrators<sup>2</sup> and mediators.<sup>3</sup> Yet, even the most ethical neutrals have been surprised to learn that their ethical commitment to impartiality may be unintentionally compromised by implicit biases that are contrary to their stated beliefs. After all, our implicit biases may include our mental absorption of the discriminatory messages communicated in our broader society and media. Many neutrals, as part of their professional training, may have taken implicit bias training to learn debiasing strategies that help mitigate their implicit biases when conducting in-person dispute resolution processes. However, emerging research and anecdotal reports reveal that video conferencing, as a different communication channel, may also trigger implicit biases, albeit in a different context.<sup>4</sup>

One glaring example about how context matters took place in March 2020, when the court, in response to COVID-19 health concerns, shifted those court-connected dispute resolution processes previously conducted in-person to video conferencing. Those participants who did not have computers, reliable access to broadband, and technological competence had to participate via their cell phones.<sup>5</sup> In this unfamiliar context, were different biases evoked than those that might be anticipated if the dispute resolution process took place in-person? Chief Judge Janet DiFiore had adopted a “zero tolerance” policy for discrimination and a commitment to equitable justice for all in the New York State courts and responded quickly to these concerns.<sup>6</sup> The chief judge appointed the



Elayne E. Greenberg is faculty director of the Carey Center for Dispute Resolution and professor of legal practice at St. John's Law School. She can be reached at [greenbee@stjohns.edu](mailto:greenbee@stjohns.edu). An in-depth exploration about mitigating implicit racial biases when dispute resolution processes are conducted via video conferencing, “Blinding Justice and Video Conferencing,” is scheduled to appear in the *Stetson Law Review*, Issue 52.2 (2022; forthcoming).

Honorable Edwina Mendelson to serve as deputy chief administrative judge for justice initiatives, who, with the chief judge's support, took affirmative steps to narrow this digital divide and ensure meaningful participation in dispute resolution processes for those participants who needed it.<sup>7</sup> Could this fix address unconscious reactions and implicit bias?

How might we address the other implicit biases that may be triggered when conducting dispute resolution processes via video conferencing? This discussion proceeds in three additional parts. Part Two explains how conducting dispute resolution processes via video conferencing creates different contexts than in-person dispute resolution processes that are likely to trigger a neutral's implicit biases. Part Three discusses what initial steps arbitrators and mediators who conduct dispute resolution processes via video conferencing might consider to maintain their ethical integrity and the integrity of these processes. In Part Four, the discussion concludes with thoughts on how we can build and strengthen the benefits of video conferencing in our new normal.

## Part Two: Video Conferencing Contexts

When mediators and arbitrators conduct their dispute resolution processes via video conferencing, neutrals are more susceptible to having their implicit biases emerge and compromising their objectivity. First, the cognitive overload, or Zoom fatigue, experienced on video conferencing makes neutrals more susceptible to their implicit biases. Second, the limited visual presentation of participants on video conferencing incentivizes neutrals to "fill in the gaps" with their implicit biases. This section discusses how participation via video conferencing creates different contexts for neutrals' implicit biases to emerge.

### Zoom Fatigue and Implicit Biases

Video conferencing as a communication channel allows all participants to see each other from the shoulder up. However, as neutrals try to equate this video conference "seeing" with the "in-person" seeing, neutrals experience a depletion of their cognitive resources, or Zoom fatigue.<sup>8</sup> As one illustration, neutrals make eye contact with the participants on video conferencing by looking at the camera, not directly at the parties on the screen. Many neutrals, including this author, still find looking into the camera instead of directly in the eyes of the participants counterintuitive, requiring conscious energy. A second cognitive burden is that the mediators and arbitrators observe themselves and adjust their reactions when they are participating via video conferencing. Third, we have all experienced the added energy drain of trying to discern participants who are in poor light or have uneven connections. If participating in video conferencing creates Zoom fatigue, neutrals may find they have less energy available for combating implicit biases.

## Limited Visuals, "Filling in the Gaps," and Implicit Biases

As stated above, when neutrals conduct their dispute resolution processes via video conferencing, they only see participants in square boxes from the shoulder up. Neutrals are unable to see the rest of the body and all the non-verbal communications that are out of sight. This incomplete picture of the participants creates an opportunity for neutrals to "fill in the gaps" with their implicit biases. In a variation of that scenario, when a person participates with audio only, and they appear on the screen as a black box with a number, there is an ample opportunity for the neutral to fill in the gap with implicit biases.

Another visual that might trigger a neutral's implicit biases is the background that participants are using, whether virtual or the participant's natural backgrounds.<sup>9</sup> When we are all together in a conference room, we all have the same "background." One neutral acknowledged that when a mediation participant uses a virtual background, the mediator can't help but wonder what that person is hiding. In another example, my esteemed colleague Edna Sussman reported on how affiliation and affinity might be unconscious drivers that influence an arbitrator's decision-making in the previous issue of *New York Dispute Resolution Lawyer*.<sup>10</sup> The question deserving further exploration is how cues or other visuals in a participant's background might trigger a neutral's implicit biases.

## Part Three: Maintaining the Integrity of the Process While Maintaining Your Impartiality

Impartiality is not only a foundational tenet of our ethical roles as neutrals, but it is also one of the criteria participants in dispute resolution processes consider when they assess the legitimacy of process.

One unanswered question among the many about the impact of video conferencing on implicit bias is: do those participating in our dispute resolution processes via video conferencing assess *us as impartial*? Proceduralist Tom Tyler reminds us that even when participants in dispute resolution processes receive an unfavorable outcome, they are still more likely to be satisfied with process if *inter alia* they found the neutral overseeing the process to be impartial.<sup>11</sup> Professor Donna Shestowsky reinforces the importance of learning from the process users whether they perceive the process as fair.<sup>12</sup> Given all these unanswered questions, how might a neutral who has scheduled a mediation or arbitration via video conferencing tomorrow ethically proceed?

In many ways, you've taken the first step. Awareness and acknowledgement. Hopefully, by reading this column, you will continue to heighten your sensitivity and awareness about how your implicit biases might be triggered by different cues and contexts when conducting dispute resolution processes via video conferencing. As part of that awareness

and acknowledgement, you can make sure to schedule mental breaks before and during the dispute resolution process to help avoid the cognitive depletion that will make it more likely for your implicit biases to compromise your ethical mandate of impartiality.

As part of a more reflexive practice, I welcome your insights about whether you have noted new implicit biases or have observed your pre-existing biases amplified when you have conducted your dispute resolution processes via video conferencing. What affirmative steps have you taken to mitigate these implicit biases?

## Part Four: In Conclusion

As we go forward in the new normal, neutrals and dispute resolution participants may decide, depending on the matter at hand, to meet in-person or via video conferencing. Neutrals, as part of their professional training for conducting in-person dispute resolution processes, have already become sensitized to the implicit biases that may inadvertently compromise their ethical mandate of impartiality in the in-person context. However, emerging research questions whether conducting a dispute resolution process via video conferencing may amplify a neutral's existing implicit biases or create new ones. This column expands the discussion and zooms in on how a neutral's implicit biases might be triggered when conducting dispute resolution processes via video conferencing.

Yes, video conferencing will continue to play a prominent role in the new normal because of the economic and efficiency benefits it affords neutrals and participants. This column raises questions about a little explored area that warrants more research. *How, as dispute resolution professionals, might we build on the economic and efficiency benefits of conducting dispute resolution processes via video conferencing and continue to reinforce our ethical mandate for impartiality?* Let's continue this important exploration.

## Endnotes

1. See, e.g., Harry B. Truehart, *Virtual Arbitration: A Two-Year Retrospective Survey of the Fellows of College of Commercial Arbitrators* (April 2022) at [https://www.ccarbitrators.org/wp-content/uploads/2022/04/2022\\_Virtual-Arbitration-Report-to-CCA.pdf](https://www.ccarbitrators.org/wp-content/uploads/2022/04/2022_Virtual-Arbitration-Report-to-CCA.pdf); Mark Bunim, *Insurance Mediation: Is It Time to Return to the Good Old Days?*, NYLJ (April 19, 2022), <https://www.law.com/newyorklawjournal/2022/04/19/insurance-mediation-is-it-time-to-return-to-the-good-old-days/>.
2. See, e.g., [https://www.americanbar.org/content/dam/aba/administrative/dispute\\_resolution/dispute\\_resolution/commercial\\_disputes.pdf](https://www.americanbar.org/content/dam/aba/administrative/dispute_resolution/dispute_resolution/commercial_disputes.pdf); [http://ww2.nycourts.gov/courts/comdiv/ny/ADR\\_ethicsforarbitrators.shtml#1](http://ww2.nycourts.gov/courts/comdiv/ny/ADR_ethicsforarbitrators.shtml#1) (See Standard I Impartiality).
3. See, e.g., [https://www.americanbar.org/content/dam/aba/administrative/dispute\\_resolution/dispute\\_resolution/model\\_standards\\_conduct\\_april2007.pdf](https://www.americanbar.org/content/dam/aba/administrative/dispute_resolution/dispute_resolution/model_standards_conduct_april2007.pdf) (See Standard II Impartiality); <https://www.nycourts.gov/LegacyPDFS/courts/comdiv/PDFs/NYCounty/Attachment3.pdf> (See Standard II Impartiality);
4. See, e.g., Jean R. Sternlight & Jennifer K. Robbennolt, *In-Person or Via Technology?: Drawing on Psychology to Choose and Design Dispute Resolution Process*, 71 DePaul L. Rev. at 746 (2022 forthcoming); Jyothi Marbin, MD, Y-Vonne Hutchinson, JD, & Sarah Schaeffer, MD, MPH, *Avoiding the Virtual Pitfall: Identifying & Mitigating Biases in Graduate Medical Education Videoconference Interviews*, Academic Medicine, Vol. 96, No.8, 1120 (Aug. 2021) (“... VCI's may also introduce new biases and amplify existing biases . . . .”)
5. See, e.g. Donna Erez-Navot, *Reimagining Access to Justice: Should We Shift to Virtual Mediation Programs Beyond the COVID-19 Pandemic, Especially for Small Claims?* NY Disp. Resol. Lawyer, Vol.15, No. 1, 42, (2022) (trumpeting New York courts efforts to ensure meaningful participation in small claims court).
6. Chief Judge Janet DiFiore, *Equal Justice In the New York State Courts, 2020-2021, Year In Review* at [https://www.americanbar.org/content/dam/aba/administrative/child\\_law/atj22-materials/d5/2021-equal-justice-review.pdf](https://www.americanbar.org/content/dam/aba/administrative/child_law/atj22-materials/d5/2021-equal-justice-review.pdf).
7. See, e.g., [https://nycourts.gov/LegacyPDFS/accesstojusticecommission/A2J\\_2D\\_Transcript.pdf](https://nycourts.gov/LegacyPDFS/accesstojusticecommission/A2J_2D_Transcript.pdf) (highlighting the collaborations and partnerships the court established to narrow the digital divide and provide participants who needed it the technological support needed to meaningfully participate in court hearings and court-connected dispute resolution processes conducted via video conferencing).
8. See, e.g., Noam Ebner & Elayne E. Greenberg, *Designing Binge-Worthy Courses: Pandemic Pleasures and COVID-19 Consequences*, Negot. J, 535 (2020); Jean R. Sternlight & Jennifer K. Robbennolt, *In-Person or Via Technology?: Drawing on Psychology to Choose and Design Dispute Resolution Processes* at 708, 71 DePaul L. Rev.701 ('22 forthcoming).
9. See, e.g., Elayne E. Greenberg, *Moving Your Mojo Online*, New York Disp. Resol. Lawyer, Vol. 13, No. 2 (2020) (questioning what neutrals communicate when they use a more authentic background when participating via video conferencing).
10. Edna Sussman, *Affiliation and Affinity: Unconscious Drivers of Arbitrator Decision-Making*, NY Disp. Resol. Lawyer, Vol. 15, No. 1 at 27 (2022).
11. See, e.g., Tom R. Tyler, *Procedural Justice and the Courts*, 26, 30, Court Review Vol. 44, No. 1/2: The J, of the American Judges Assoc (2007). See also, Rebecca Hollander-Blumoff & Tom Tyler, *Procedural Justice and the Rule of Law: Fostering Legitimacy in Alternative Dispute Resolution*, J. Disp. Resol. (2011).
12. See Professor Donna Shestowsky interview at *Researchers Can Help Courts Understand Whether Litigants Think the Civil Legal System Is Fair—and Why (or Why Not)*, The Pew Charitable Trusts (pewtrusts.org) on June 14, 2021.

# Summoning Chuck Newman: Brilliant Mind, Great and Warm Heart, Generous Engagement With Community

By Simeon H. Baum

An angel of the LORD appeared to him in a blazing fire out of a bush. He gazed, and there was a bush all aflame, yet the bush was not consumed.

Moses said, “I must turn aside to look at this marvelous-great sight; why doesn’t the bush burn up?”

When the LORD saw that he had turned aside to look, God called to him out of the bush: “Moses! Moses!” He answered, “Here I am.”

And He said, “Do not come closer. Remove your sandals from your feet, for the place on which you stand is holy ground.”

(Exodus 3:2 <https://h-nt.org/2020/01/19/the-burning-bush/> )

When the mind is at peace  
the world too is at peace.  
Nothing real, nothing absent.  
Not holding on to reality, not getting stuck  
in the void,  
you are neither holy nor wise, just  
an ordinary fellow who has completed his  
work.

Layman P’ang (740-808)[Stephen Mitchell, *The Enlightened Heart, An Anthology of Sacred Poetry* (Harper Perennial 1989; p. 34)].

### Meetings with Remarkable Men & Women

Since our formation as a section in 2008, several thousand of us have joined and participated in NYSBA’s Dispute Resolution Section. We gather in the Section’s Fall Meeting and again at the Annual Meeting. We participate in over 13

**Simeon H. Baum, former litigator, and president of Resolve Mediation Services, Inc. ([www.mediators.com](http://www.mediators.com)), has played a leadership role in the Bar for nearly three decades relating to ADR, including service as founding chair of the Dispute Resolution Section of the New York State Bar Association. He has served on ADR Advisory Groups to the New York Court system, including Chief Judge DiFiore’s current ADR Task Force. He teaches on the ADR faculty at Benjamin N. Cardozo School of Law. For over two decades he has trained mediators for the New York State Court’s Commercial Division and frequently speaks and writes on ADR.**

committees; engage in trainings and CLE programs; write comments and reports; and contribute to the Section’s and Bar’s governance. These are wonderful and meaningful activities—advancing the Bar, developing the dispute resolution field, serving the public, and furthering our professional development as dispute resolvers.

Yet when we stand back—or take a fresh look at what is near at hand—we can see that a true gift of Section participation is encounter, and development of friendship, with marvelous human beings who are drawn to our field. The following exemplifies this gift of friendship, and the wonder of discovering the deep value and impact of those in our midst.

Last month, members of the Dispute Resolution community joined with family and friends brought together by the untimely passing of one longstanding Section member and leader, Chuck Newman. Our Section has responded by creating an annual award in Chuck’s name and honor. We, here, highlight the life and contributions of this member of the dispute resolution community. More than listing his resume, the hope is, with a palate of pastel, to summon Chuck, the Person, in our midst.

### A Thumbnail Sketch of Chuck’s Accomplishments

Many of us reading this journal came to know Chuck through his involvement in the dispute resolution community. Well before his involvement in ADR, Chuck began his entry to law with concern for people. He was a Hayes Civil Liberties Fellow during law school, at NYU. Following law school, he was a litigator and eventual partner at Fink Weinberger, spanning business, real estate and matrimonial matters. After a stint in-house with an internet start-up, Chuck resumed his own practice with concentrations in commercial and family disputes.

In the dispute resolution world, Chuck took on a host of leadership roles. Most significantly to members of this Section, Chuck was active on our Executive Committee with leadership in the Mediation and Negotiation committees. He chaired the New York City Bar Association’s Mediation Committee and was on the Boards of the Association for Conflict Resolution and New York State Council on Divorce Mediation. He taught an EEOC mediation clinic at Columbia Law School and convened a monthly speaker’s program for CUNY’s NYC Dispute Resolution Roundtable. He served on a

number of court-annexed mediation panels and was on the SDNY's Mediator Advisory Committee. Chuck stood out as an active member of this dispute resolution community.

### **Summoning the Man Himself**

Beyond this, Chuck was a beautiful human being. He had a brilliant mind, warm heart, and was deeply engaged with his community. Chuck carried humor, wonder, and curiosity into all endeavors. He had a way of making people feel appreciated and supported. He had a kind, delighted song in his voice.

These qualities, as a human being, manifested in Chuck's extraordinary openness and his mentorship and support for others in our field.

### **Bravely Remaining Engaged**

When they grew aware of the swift resurgence of his illness, Chuck and his wife Libby did not shrink from this new aspect of reality. Honoring Chuck's deep engagement with community, they reached out and let people know what was going on. As a consequence, Chuck remained connected throughout. People responded to this connection with an outpouring of love.

### **The Burning Bush**

A story exemplifying friendship might call for a personal tale or two. Roughly a week before his passing, I had the opportunity to speak with Chuck for an hour. It was a very sincere and essential conversation. Chuck let me know that he is a Katz's pastrami Jew. He had given strict instructions to Rabbi Rothberger—a hospice chaplain whom Chuck befriended and who, despite Chuck's formal atheism, spoke at the gravesite—to make no mention of a deity.

Despite this mandate, a Biblical image comes to mind: the Burning Bush. Moses was in the desert. Suddenly he saw that an ordinary bush was aflame. It was burning but not consumed. He realized that the ordinary place was extraordinary. He was, so to speak, on holy ground, encountering transcendence. Going beyond the locked-in, humdrum, insensitive state. Transcendence of this kind can be new eyes, new relationship, giving, relating.

I remember when Chuck was first ignited by the mediation flame. We had known each other for over a dozen years, when our children were together in different schools. He was a good person, very generous in his service in school communities. Devoted to his family. He was also a rough and tumble litigator. Then, he attended a three-day training for Commercial Division mediators that Steve Hochman and I presented. After the training, Chuck invited me to lunch. He was charged with enthusiasm, having seen an entirely different way of approaching conflict, people in conflict, con-

flict in people, and conflict resolution. Chuck said he was thinking of getting more deeply into the mediation field. He wanted my opinion on how he would do.

One might have wondered. Chuck was a talker. He was a very heady, strategic, strong-minded, goal-oriented, planful guy. He was a critical thinker—in the good sense. How he would do with flow and spontaneity, with listening, receiving, just supporting, being the ocean?

Like the burning bush, two decades later, it was stunning to see how Chuck's passion developed into great leadership in the dispute resolution field. When news of Chuck's illness went out, letters poured in—thanks to the S.D.N.Y. ADR coordinator, Rebecca Price; one of our Section leaders, Carmen Rodriguez; our Section's chair, Ross Kartez; and others. The halo around Chuck became apparent. Letter after e-letter thanked Chuck for his leadership, mentorship, and mediation insights. This bush was afire.

### **Warm Recognition: The Dispute Resolution Section's Chuck Newman Award**

During our last phone call, Chuck and Libby shared with me how much these letters meant to him. He mentioned that he was proud of the kind letter Jack Himmelstein—one of the mediation field's visionaries known for the Understanding-based approach to mediation—recently sent him.

Last month, NYSBA's Dispute Resolution Section, led by Ross Kartez, voted to create an annual award in Chuck's name to be given to a person in the field who exemplifies Chuck's brilliant mind, great and warm heart, and generous engagement in the community.

### **The Heart of a Mediator**

Shifting from strong-willed, purposive brainiac, Chuck made it a hallmark in his facilitation of our commercial mediation trainings to quote Sequoia Stalder's saying that the mediator does not have to be the smartest person in the room. Rather, said Chuck, the mediator must awaken the genius in the parties. He loved the quotations from the *Tao te Ching* that we use during these trainings—particularly noting that the best leader does not direct people but learns to follow them.

Despite his avowed atheism, Chuck displayed nearly saintly qualities of giving, attention, relatedness, connecting, helping, mentoring, appreciating others—and living with love, wisdom and compassion. He supplemented these ideal qualities with deep vision that included wonder and awe. During our last call—which was a bit like *My Dinner with Andre*, that Louis Malle film featuring Wally Shawn and Andre Gregory—Chuck shared his image of ultimate significance: being on a winding road in the woods by Jackson Hole, Wyoming,

turning the bend and seeing it open up to a full, awesome vision of the Grand Tetons. Such a powerful image, not only the majesty of the Tetons but also the subtlety of what a difference it makes to take the curve, emerge from woods, and see the majesty that has been there all the time. Change in perspective, the burning bush.

Chuck loved and found ultimacy in Nature. He also deeply loved people. Rather than say a blessing over the bread, Chuck believed in blessing the bread makers. People.

Martin Buber's teaching of *I & Thou* captured Chuck's recognition of the extraordinary richness and truth that is found not in a metaphysical zone, but in relationship with the living person encountered in his or her wholeness. The person who is not a thing, not a category, not a number among numbers, not to be used. The person who is not seen in the light of the world or others, but, boundaryless—in whose light everything is understood.

Chuck was a deep humanist. He understood that the Person is a locus of Truth. Perhaps, after all, this Kabir verse would have resonated with him:

Are you looking for me?  
I am in the next seat.  
My shoulder is against yours.  
you will not find me in the stupas,  
not in Indian shrine rooms,  
nor in synagogues,  
nor in cathedrals:  
not in masses,  
nor kirtans,  
not in legs winding around your own neck,  
nor in eating nothing but vegetables.  
When you really look for me,  
you will see me instantly—  
you will find me in the tiniest house of time.  
Kabir says: Student, tell me, what is God?  
He is the breath inside the breath.

(<https://www.goodreads.com/quotes/16836-are-you-looking-for-me-i-am-in-the-next>.  
Apparently from *The Kabir Book – Forty-Four of the Ecstatic Poems of Kabir*, Robert Bly, trans.  
<https://agochar.livejournal.com/26252.html> ).

### **Music & the Mediator—Beyond Direction; Silence and Sound; Cultivating Harmonious Expression of Others**

Loving people, Nature, service in dispute resolution. Chuck also was transported by music. He was the proud holder of tickets to the Philharmonic that he inherited from his mother and aunt. At one point, when space was tem-

porarily reduced, the Philharmonic wrote to Chuck that he would retain good seats as a longstanding ticket holder since 1963. Chuck wrote back to correct the record. The tickets dated to 1946. The Philharmonic agreed to 1950 and declared him to be the longest standing ticket holder. Chuck rejected the notion that this was a compromise. Rather, it was a good and full resolution.

Chuck, as a mediator, loved to observe that the conductor of the symphony orchestra was the only person who made no sound. This was exemplified in a recent concert featuring Dudamel, the animated Venezuelan conductor on whom the Netflix show, *Mozart in the Jungle*, was based. Dudamel danced in harmonious relationship with music and orchestra. He lived the music.

### **A Vision for the Dispute Resolution Field**

During our final call, I pressed Chuck for his vision, seeking to learn of a moment of deep and transcendent wholeness. I asked Chuck whether he had ever seen it all come together. Emblematic of his love for the dispute resolution field and its members, Chuck said he imagined all of the proponents of the various orientations, strategies and styles of mediation together in a single gathering. Not unlike what happens in our Section meetings. Not unlike this moment as all of you read this reflection on Chuck.

In thinking of this image of the burning bush, and the wonder that was revealed as Chuck, we can take a moment, with Chuck's cue, to marvel at the scintillating wonder of this dispute resolution community of colleagues. Each of us is interwoven and inter-reflecting. Seen deeply, we issue staggering brilliance.

We speak, at times, of missing the forest for the trees. Yet, also, by developing generalities in order to navigate law, the business of law, and life itself, we risk missing the trees for the forest. We might ask ourselves of one another: Who is this tree—who is this person—who stands before us?

There is merit in pausing long enough really to see the wonder of this one tree. We may next then truly marvel at the staggering brilliance of this living and transcendent forest of ADR practitioners, embedded as we are in the wondrous association of NYSBA, embedded as we are—each of us—in the broader and more intricate, marvelous, life of this world.

Thank you, again, Chuck, for all you gave, for all you were, and for prompting this moment to remember you and reflect on our community.



## What's Going On?

# An Overview of Diversity, Equity, and Inclusion Dispute Resolution Initiatives in New York

By Robyn Weinstein and Michelle Lavrichenko

Leaders in the dispute resolution profession in New York State have been working to implement various fellowships, mentorship programs, scholarships, and other initiatives aimed at increasing diversity, equity, and inclusion in the field of dispute resolution. This article will provide an overview of the current ADR-related diversity, equity, and inclusion initiatives throughout New York and introduce you to five individuals participating in DEI ADR fellowships and mentorship programs across the state.

### Mentorship and Fellowship Programs

#### AAA Higginbotham Fellows Program

The AAA Higginbotham Fellows Program is a biennial program that provides emerging diverse dispute resolution professionals with a week-long intensive training program conducted at AAA's offices. The program also offers fellows access to AAA resources including mentorship, networking opportunities, advice, and opportunities to shadow AAA neutrals. The fellowship restarted in May 2022 with a four-day intensive interactive training held in the New York office. Fifteen fellows were chosen from nearly one hundred applications. Members of this year's class include: Abidisamed Awed, Alana Grice Conner, Scott W. Davis, Cherrie K. Fisher, J. Joan Hon, Crisarla Houston, Allyson Huey, Knar A. Nahikian, Olga A. Pettigrew, Kelly Ringston, Peter D. Singh, Jamian Smith, Radha Thiagarajan, Stephen Wah, and Shawntane Williams. More information about the fellowship is posted on the AAA website here: <https://www.adr.org/higginbothamfellowsprogram>

**Robyn Weinstein is the director of the Cardozo Mediation Clinic and the associate director of the Kukin Program for Conflict Resolution at Benjamin N. Cardozo School of Law. She previously served as the ADR Administrator at the United States District Court for the Eastern District of New York.**

**Michelle Lavrichenko is a second-year law student at Benjamin N. Cardozo School of Law and was a spring 2022 intern for the E.D.N.Y. ADR Department.**

#### Hear from a Fellow

**Stephen Wah,**  
Managing Associate,  
Pasich LLP

*Why did you apply for the Higginbotham Fellows Program?*

Apart from my desire to become an arbitrator and mediator, I hope to increase the number of diverse neutrals available to parties. In late 2018,

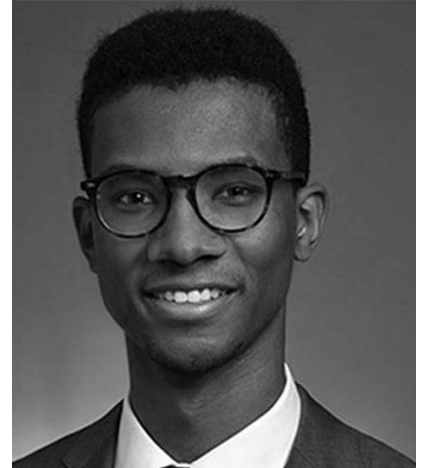
Jay-Z made a claim about the lack of diverse arbitrators available to sit on a panel for a dispute before the AAA. His comments prompted a lot of discussion about the lack of diversity in the legal field, but also in ADR. Applying for the AAA Higginbotham Fellowship felt like the next logical step in my career. I am always seeking new opportunities to learn and grow my practical skills so that I can not only become a well-rounded advocate, but also an effective neutral. This program went above and beyond my expectations.

*What do you hope to get from the fellowship experience?*

I hope to gain knowledge, mentorship, and community. It can feel very hard to “break into” the “club” that is ADR, so I hope that this program will make it easier for me to connect with others and become a member.

*Are there ways in which the fellowship is benefiting you now?*

Yes! Issa Rae once said, “Effective networking starts with the people around you, not above you.” Attending the week-long intensive training program in early May allowed me to network “across” with other people breaking into ADR. I learned so much about their respective practice areas and their approaches to problem-solving. I also gained invaluable insight as to how and what neutrals may be thinking when I am serving as an advocate for my clients.



Stephen Wah

## EDNY Mediator Incubator

In January 2022, the ADR Department for the Federal District Court for the Eastern District of New York launched its second class of the EDNY Pilot Mediator Incubator. Members of the 2022 class include attorneys Nadia



Nadia Pervez

Pervez, Nydia Shahajahan, and Matthew Weinick. The Pilot is a mediation mentorship program designed to offer practical experience to attorneys with less than fifteen years of experience who have a substantiated interest in mediating federal cases but little experience as a mediator. After successful completion of the program, candidates will be eligible for, but not guaranteed, admission to the EDNY Me-

diation Panel. The application is posted on the EDNY ADR Department website.

### Hear from a '22 Incubator Candidate

#### Nadia Pervez, Pervez & Rehman, P.C.

##### *Why did you choose to participate in the incubator?*

The program provides a unique opportunity to learn best practices as modeled by some of the most successful and experienced mediators on the EDNY panel and beyond. The mentorship opportunities provided are unmatched in that participants in the program learn from the best in a supportive and collaborative environment. I hope to apply this knowledge and experience in my own journey as a mediator.

##### *What do you hope to get from the experience?*

I hope to gain the skills and confidence to be a successful mediator and learn how to build a strong mediation practice—an eventual professional goal. As I work toward that goal, I want to work on identifying best practices and techniques based on my observations and conversations with more experienced mediators. The mediators whom I have had the opportunity to observe and interact with have been incredibly generous with their time.

##### *Are there ways in which the incubator is benefiting you now?*

In a general way, it is making me more mindful of how I listen to my clients and others, and also how and when to find solutions and foster compromise.

## JAMS Diversity Fellowship Program

In 2021, JAMS launched the Diversity Fellowship Program, beginning in the New York office as a means to develop a pipeline for diverse neutrals to obtain training, mentorship, sponsorship, and networking opportunities. The inaugural class includes three fellows: Cyrus Dugger, Genesis Fisher, and Rachel Gupta. The fellows are mentored by JAMS panelists and are provided with opportunities to shadow and co-mediate throughout the year-long fellowship. Individuals who are interested in the fellowship may reach out to Joanne Saint Louis at [jsaintlouis@jamsadr.com](mailto:jsaintlouis@jamsadr.com) for more information.

### Hear from a '21 Fellow

#### Genesis Fisher, Fisher Law Practice, P.C.

##### *Why did you choose to participate in the fellowship?*

I built a business focused on conflict resolution for the workplace and families. Essentially, all our work is pre-litigation, so there's a huge swath of traditional mediations and arbitrations that I haven't participated in and have had little exposure to. I wanted the opportunity to get trained on how to mediate traditional legal disputes and to learn by watching the best. I've also been curious about arbitration for years. Wondering: is this something I should pursue? I knew the fellowship would give me an opportunity to sit in on arbitrations and have frank discussions with neutrals about their process.



Genesis Fisher

##### *Are there ways in which the fellowship is benefiting you now?*

My fellowship is coming to a close. I had a phenomenal mentor (Robin Gise) who helped me think through career opportunities. I was able to shadow mediations and arbitrations and meet a lot of talented neutrals. I co-wrote a blog post with Shirish Gupta. I received business development advice and support from the wizard team at JAMS. Ultimately, I have a bigger, fuller picture of the field and opportunities than I did before.

*What do you want readers to know about what you do?*

My path to conflict resolution was unorthodox and my business is, too. People ask: Why workplace disputes? Sometimes we spend more time at work than we do with our families. So, when we help employees, boards or C-Suite folks in distress, the impact ripples into the rest of their team and their lives. When we offer a program, we're helping dozens of people at once. That's energizing. As the director of the Mediation Clinic at New York Law School, I tell my students that conflict is everywhere, and mediation is a life skill that can improve the lives of people around us.

### **Metropolitan Black Bar Association Mediation Academy**

In fall 2021, the Metropolitan Black Bar Association (MBBA) ADR Section, in partnership with the New York Unified State Court System, held the first MBBA Mediation Academy. The program included a 24-hour basic training, along with a 16-hour advanced training in either personal injury, matrimonial, or commercial law. Sixteen individuals were selected to participate in the program. Members of the class include: April Bowie, Beverly Tatham, Brenda Morgan, Chinnu Joseph, David James, Donna Temple, Earl Wilson, Joyce Campbell Priveterre, Junou Odige, Luwick Francois, Melissa Samuels, Paulette Haynes, Philippe Andre, Ralph Carter, Saradja Paul, Temitope Yusuf. Following the training, trainees were provided with additional support and special programs focused on developing careers as neutrals. Trainees were also asked to apply to the New York State Unified Court System's Part 146 roster.

To participate in the Academy, candidates had to be from historically underrepresented communities and have a demonstrated interest in mediation. Applicants were also required to have at least five, but preferably seven, years or more of legal or mediation experience. The application was open to the public, but members of the MBBA were given preference. Those selected to participate in the training were asked to pay a registration fee of \$100 to gain access to the training.

The Mediation Academy was created and is led by MBBA ADR Section Co-Chairs Lauren A. Jones and Jill Pilgrim.

#### **Hear from a '21 Academy Member:**

#### **Ralph Carter, Senior Counsel, Litigation & Cybersecurity, Workday**

*Why did you choose to participate in the MBBA Mediation Academy?*

We have a great need for greater diversity on our rosters of neutrals throughout the court system, as well as in private mediation organizations, so I jumped at this chance to attain

certification with an amazing group of Black lawyers.

*What do you hope to get from the experience?*

As a (now former) big law commercial litigator, I'd been involved in mediations through various court-annexed programs and private mediations. I was fortunate to work with practitioners who valued the opportunities mediation provided for cost-effective resolution. I wanted to use the training for two purposes: (1) to get a better perspective on mediation as an advocate so that I could use it effectively for my clients; and (2) in the hopes of adding mediation to my practice in the future.

*Are there ways in which the MBBA mediation training is benefiting you now?*

I've recently moved to an in-house litigation role, and the skills and perspectives gained in the basic mediation training (conducted by Elena Saporita) and the 16-hour advanced commercial mediation training (conducted by Simeon Baum) inform my approach to my new role every day.

### **New York State Bar Association Dispute Resolution Section Diversity Mentorship Program**

The NYSBA Dispute Resolution Section Mentorship Program was established to help individuals from historically underrepresented backgrounds who are new to ADR get experience in mediation or arbitration. Mentees are paired with experienced mentors and exposed to different opportunities, such as shadowing mediations or arbitrations, networking with experts in the field, and receiving guidance about career paths. Applicants must be attorneys, members of NYSBA, and demonstrate interest in dispute resolution. The mentorship program lasts for two years, and mentees and mentors are carefully paired to ensure the mentorship relationship is a success. Members of the 2021-2023 class include Tamara Bland, Stacey Cameron, and Jennifer Cook. The mentorship program is led by Stephen Marshall and Iyana Titus.



Ralph Carter



Tamara Bland

**Hear from a Mentee:**

**Tamara Bland, Director of Compliance, Claims and Litigation Management Alliance**

**NYSBA Dispute Resolution Section Diversity Mentee '21-'23**

*Why did you choose to participate in the NYSBA Dispute Resolution Mentorship Program?*

Last summer I started my journey to becoming a mediator and I quickly realized that having a mentor to help navigate this space was paramount to my growth and development as a mediator. I've attended a number of NYSBA-sponsored programs and served as a member of several sections and committees; therefore, NYSBA was the first organization that came to mind in my quest for a mentor.

*What do you hope to get from the mentorship program experience?*

A personalized space and platform to exchange ideas, receive constructive feedback, and ultimately discover the area(s) within ADR where I can focus and hone my skills.

*Are there ways in which the mentorship program is benefiting you now?*

Absolutely. Though I'm early in the process, hearing about my mentor's path to alternative dispute resolution is fascinating and has already given me several ideas and options to consider as I move forward in this space. Moreover, I now have a sounding board for the many ideas as to how I can delve into the practice of mediation.

**Other New York DEI ADR Initiatives**

Beyond mentorship programs, there are many new initiatives aimed at increasing representation and inclusion for individuals who are underrepresented in the field. In the ADR Inclusion Network, the mission is to increase the recruitment, promotion, appointment, selection, and retention of diverse neutrals. The Network maintains a website that is a repository of DEI/ADR resources, trainings, scholarships, and opportunities, and will house an ADR speaker's bureau for individuals who self-identify as diverse.

The International Institute for Conflict Prevention and Resolution (CPR) maintains a Diversity in ADR Task Force. The task force is led by Hon. Timothy K. Lewis and Hon. Shira A. Schendlin, and the mission of the group is to "devise practicable strategies to increase the participation and inclu-

sion of women, persons of color, members of the LGBTQ community, persons living with disabilities, and other underrepresented groups in mediation, arbitration and other dispute prevention and resolution processes around the world." The task force has developed a "diversity commitment" that asks members of the corporate and law firm communities to promote the selection of diverse neutrals and create accountability and transparency in measuring the commitment to selection of diverse neutrals. The task force also developed a "diversity commitment clause," which is a model arbitration clause that includes a statement that at least one member of a three-person tribunal shall be a member of a diverse group.

Local bar associations have also taken steps to implement new policies to increase diversity and inclusion. In January 2021, the New York City Bar Association ADR Committee updated the committee's speaker and co-sponsor policy to require that any program which includes three or more speakers, including the moderator, shall include at least one participant who is diverse from the other two speakers, and the committee will not sponsor any program that fails to comply with this policy. In March of 2021, the New York State Bar Association Dispute Resolution Section implemented a diversity and inclusion plan, which "prioritizes efforts to propel the inclusion of people of color in all aspects of the Section's work and throughout the dispute resolution field." The plan includes accountability and reporting mechanisms, and pledges to make efforts in the following areas: membership, leadership, programming, initiatives, and mentorship.

In January of 2022, 21 bar associations joined together to launch the New York Diversity Equity Inclusion (NY DEI) Neutral Directory as a means to increase the visibility and selection of ADR professionals from historically underrepresented communities. Members of partnering bar associations may be listed in the directory. Those who wish to be listed in the directory may do so here: <https://sites.google.com/view/ny-dei-neutral-directory/home/directory-questionnaire>.

**ADR Training Scholarships**

There are also many opportunities for individuals from underrepresented communities to obtain scholarships to attend mediation training. The New York Community Dispute Resolution Centers (CDRCs) and the Alternative Dispute Resolution (ADR) Office of the New York Unified Court System developed an initiative to eliminate cost as a barrier to accessing mediation training. Individuals who can commit to completing an apprenticeship and becoming an ongoing volunteer mediator may receive free Part 146-approved mediation training from their local CDRC. There is a list of local CDRCs available on the court's website here: <http://ww2.nycourts.gov/ip/adr/cdrc.shtml>. Individuals who wish to pursue this option must contact their local CDRC directly

to find out whether they are conducting trainings and accepting volunteers.

The New York Peace Institute offers scholarships for both the basic mediation training and the apprenticeship program. The institute considers financial need, racial, ethnic, socioeconomic, professional, sexual and gender diversity, language skills, an applicant's contribution to his/her community, and an applicant's ability to establish long-term partnerships to referral agencies on behalf of the Institute. Private mediation trainer, Elena Sapora, offers BIPOC participants \$500 off the total cost of the training, and additional discounts are available based on need.

Bar associations are another source of mediation training scholarships. The New York City Bar Association offers diversity scholarships to attend its basic and advanced mediation trainings. The scholarships are administered by the Diversity Office of the New York City Bar Association. Those interested are asked to submit a resume and an optional statement of interest. The New York State Dispute Resolution Section (DRS) also grants multiple diversity scholarships annually in an effort to encourage greater opportunities for people of color and women in the field of ADR. Each year, a maximum of five mediation training scholarships and five arbitration

training scholarships are awarded. Recipients of the scholarship also receive free one-year membership in the Section and NYSBA (if the recipient is not already a member), entitling them to discounted registration fees for Section programs and events, receipt of the Section publication, *Dispute Resolution Lawyer*, and the opportunity to join and become active in one or more of the Section's committees.

Lastly, The AAA-ICDR Foundation maintains the Diversity Scholarship Fund, which grants diverse law students and/or legal professionals up to \$2,000 of financial assistance towards participation in a degree program or fellowship in ADR or attendance at a well-recognized ADR conference. Applications for the scholarship are accepted on a rolling basis and reviewed quarterly until the allocated funds are expended. In 2021, 22 recipients were selected, and scholarships totaled nearly \$40,000 in scholarship funds.

For New York ADR professionals who wish to support efforts to increase DEI in ADR, consider becoming a mentor for one of the organizations listed above; connect next generation talent with training opportunities and scholarships; and find ways to leverage your personal network to amplify the voices and reputations of neutrals from underrepresented communities.



Lawyer Assistance  
Program

## The Lawyer Assistance Program Hotline

Provided to members seeking assistance with depression, anxiety, burnout, alcohol or drug related concerns, and other mental health issues

- Free confidential service
- Up to four free counseling sessions a year

Call 877.772.8835

[NYSBA.ORG/LAP](https://www.nysba.org/lap)

## Why First-of-a-Kind Technology Disputes in Energy and Construction Projects Are Challenging To Decide

By Dr. Patricia D Galloway

### I. Introduction

This article considers the issues raised when arbitrators are asked to decide First-of-a-Kind (FOAK) issues in the energy and construction sectors, especially when those issues arise in megaprojects which are commonly defined as projects costing over US\$ 1 billion.

As megaprojects continue to increase in number globally, so do the disputes associated with them involving FOAK issues. During the past decade, the construction and energy sectors have increasingly found themselves in the midst of disputes concerning FOAK issues resulting in claims of delay, cost overruns, performance issues, misrepresentation, and even fraud.

FOAK is often thought of as a new technology that has never been employed anywhere previously. However, FOAK is far more complex than simply a newly employed technology. FOAK may consist of many different factors, including not only FOAK technology, but also: scaled-up equipment to a FOAK size; FOAK equipment used in conjunction with commercially proven equipment; FOAK devices; FOAK materials or components; commercial systems being used in a different industry for the first time; commercialized systems and processes being integrated for the first time in a specific application; FOAK software; and/or work that is new to a performing group.

FOAK disputes are likely to increase as governments, utilities, developers, and private industry strive to advance green energy projects to meet treaties, government mandates and/or other GHG regulation and legislation. Other industries, such as mining, are also seeing an increase in FOAK disputes as demand for output increases and brownfield and greenfield projects scale up equipment, never having been employed at the size now required.

**Dr. Patricia D. Galloway is an international chartered arbitrator and president of Galloway Arbitration, Inc. ([www.gallowayarbitration.com](http://www.gallowayarbitration.com)). She has been an arbitrator since 1987 and is a member of several arbitral institution panels, including the ICC, LCIA, CIArb, ICDR, AAA and CPR. Dr. Galloway is a Fellow of the College of Commercial Arbitrators, a member of the National Academy of Distinguished Neutrals, a Fellow of CIArb, and served on the AAA Board of Directors from 2010-2020.**

In addition, FOAK technology issues are made more complex by the contracting approaches, the conditions of contract, the risk assessments and allocation of risk, the knowledge of the individual parties with respect to the FOAK aspects of the project, and/or possible government incentives that may have been attainable, but only within a specified timeframe.

The combination of technology risks, contractual risks, and execution risks that arise when FOAK issues are raised in megaprojects in the construction and energy sectors make the arbitrator's deliberation as to how to decide these disputes a challenge. This article outlines the different questions the arbitrator should consider when deciding FOAK disputes in these sectors.

### II. What You Don't Know About FOAK

FOAK lays the groundwork for advancement of beneficial technologies that may improve the quality of life. Technology can improve efficiency of operations, allow for larger outputs of product, allow cleaner use of natural resources such as coal, make the world a better place to live in by deployment of renewable and green energy projects, which provide more competitive pricing. However, because it is a FOAK project, there is no blueprint for exactly how it will unfold; there is likely no benchmark for its cost, schedule, commodity quantities, or its ultimate performance.

Further, for a true FOAK project, the personnel involved, whether the Owner, or the Contractor, will have no prior experience. Thus, when deciding FOAK disputes, the arbitrator must recognize that any new use or application of technology will include risk. The question becomes, did the parties understand the risks, how were the risks determined and quantified, and how were the risks contractually allocated between the parties?

Because of the unique nature of FOAK disputes and the unknowns inherent in these disputes, in order to best unravel the complexities of the issues, the arbitrator may wish to consider requesting the parties to address the FOAK issues in their respective Statements of Claim and Reply. Questions an arbitrator might consider having the parties address include:

- Is this a FOAK project and is the Owner a “First Mover”?
- Is this a FOAK design or system, or are there FOAK design or system aspects?
- Have any of the systems been used commercially and at the size or scale of the proposed design?
- Is there a reference plant or other reference project<sup>1</sup> from which this project has been designed and scaled?
- What are the FOAK risks that the parties considered and how were those addressed?
- Is the technology available from multiple commercial vendors?
- How does the design accommodate the needs for maintaining the system?

not unusual for the EPC contractor to be the party that holds the technology. Further, the FOAK technology may be owned by a third party which adds further complexity to the roles and responsibilities of the owner and contractor. In that case, there may be additional issues surrounding intellectual property (IP) rights and restrictions regarding what information may or may not be shared between the parties. Such IP rights may result in allegations of misrepresentation or even fraud if the Owner believes that the EPC contractor may have known information regarding the design, the risks and/or performance questions not shared with the Owner at the time of contract execution. Further, in this contracting approach, it is also not unusual for the EPC Contractor to have developed a proprietary reference plant, whether that be a pilot plant in a research lab or in a small-scale application where the details on the assumptions of scale are not shared. In addition, during the execution, there may be additional limitations regarding subcontractors and who can actually work and/or inspect

**“Given the risks of [a First-of-a-Kind technology dispute], understanding what risks were known to the parties and how and when those risks were communicated and how they were incorporated into the project planning will provide the arbitrator with information as to how those risks contributed to the issues in dispute.”**

### **III. Considerations When Reviewing the Evidence**

The starting point, as in any dispute, is the contract. It will be central to determining the roles and responsibilities of the parties; how risk was allocated between the parties; and what were the considerations for changes, delay, and cost overruns with respect to the impact on performance guarantees and the limitations on liability. This section briefly addresses each of these considerations.

#### **Roles and Responsibilities**

How the parties have decided to execute the project may be a key element in determining responsibility including understanding the expectations as to the roles and responsibilities of the parties and what information was shared between the parties under their contracting approach.

For example, under an Engineering, Procurement, and Contracting (EPC) contracting approach, in a FOAK project, it is

certain components and/or aspects of a particular plant that may contain proprietary information. Another aspect is that the EPC contractor is typically responsible for developing the project management functions, particularly cost and schedule. However, in a FOAK project, there is no benchmark and lack of a reference plant may result in reporting inaccuracies.

In contrast, in a collaboration management or alliance contract, the parties typically act as a team and share information working together to manage project risks proactively and jointly in order to achieve the common goal of effective project execution. Under this contracting approach, it is unlikely that allegations of misrepresentation or fraud can arise.

#### **Risk Allocation**

Minimizing FOAK risks is typically achieved through progressive stages of project definition including Feasibility and

Front-End Engineering Design (FEED) Studies. The FEED Studies provide further evaluation of the technology process. Operational risks and constraints are based on early deployment of new technology plants. Such studies can be enhanced with a developed reference plant which allows for subsequent detailed engineering and cost estimating on more complete and comprehensive set of basic engineering design. Such reference plants also allow for lessons learned which can be applied in the scaling up or determination of what equipment, components, or integration of systems are needed. However, there may also be technical constraints and uncertainties which often center on the performance of a process with scale-up from pilot or demonstration plants. A technical barrier looms if an advance in the technological state of the art is necessary to meet system performance goals; for example, scale-up may demand that a component perform beyond the capabilities of available equipment. The seriousness of such barriers would depend on the completeness of the development efforts, and the extent to which technology involves novel elements or applications. In addition, FEED Studies typically recommend the engineering and construction standards that are to be applied, what is to be the guaranteed plant performance based on a final design, project execution strategy and what the estimated cost of the produced product, such as electricity, will be.

Understanding how the technology risks were assessed is important to understand how such risks may have impacted performance including reliability or availability. Further, given the unknowns of FOAK, understanding what risks were known to the parties and how and when those risks were communicated and how they were incorporated into the project planning will provide the arbitrator with information as to how those risks contributed to the issues in dispute.

#### **Changes, Delay and Cost Overruns**

As with any FOAK project, change will be inevitable. Thus, what did the parties contemplate when executing the contract as to who assumed responsibility for the unknown unknowns? Part of the answer to this question is tied to the roles and responsibilities of the parties and determining who was the party ultimately responsible for the design of the project. A second part of the answer ties into the limitation on liability. Briefly, the arbitrator should first determine what constitutes a change under the contract and how any claimed change relates to a FOAK issue versus traditional changes. For example, prior risk assessments may have determined that equipment or components were commercially operating in other industry sectors and/or equipment or components were previously operating commercially but did not perform as intended either because the particular process had different design considerations or because the systems had never been integrated as designed in the particular project. As a result, changes need to be made to either the design or how the

system(s) are programmed to operate. In these situations, where both parties clearly understood the risks, assessed the risks but assigned a low probability that the risk would emerge, who bears the responsibility for the cost and time to implement the change? This may not be such a simple question without fully understanding the prior discussed considerations.

Delay determination may be further complicated if there were potential dollars flowing from deployment from any government assistance such as federal loan guarantees, direct loans, federal cost sharing, investment tax credits, production tax credits, tax exempt financing, accelerated depreciation and/or federally availability insurance. Such financial assistance is tied directly to the date of certain commercial operations. The CAPEX cost of the project may include the assumption of obtaining such incentives. Such incentives do not dictate the decision but may add to the complexity of the decision-making process as the propriety of actions taken to mitigate delay may very well hinge on whether such damages are recoverable.

The same applies to delay and cost overruns and the limitations of liability. Unless allegations of misrepresentation or fraud are evident, despite the apparent “fairness” of what could have been reasonably known to a particular party of a FOAK issue, the limitation of liability clause may dictate the decision of the arbitrator.

#### **IV. Conclusions**

FOAK disputes can add challenges to the arbitrator’s deliberation of the merits as well as the damages to be awarded. Considerations should be given to what information was known about the FOAK risks, how those risks were communicated and allocated within the contract and what contractual mechanisms were outlined as to what party would bear the responsibility should such risks emerge on the project. The more information the arbitrator can obtain from the parties in regard to the FOAK issues, the better position he or she will be in to review the evidence and render an award.

#### **Endnote**

1. A reference plant consists typically of a pilot plant, or a plant already constructed at a smaller scale, which is used in a commercial new build arrangement between an operator and a constructor to set contractual baselines (the “Contractual RP” concept).



# Enforcement of Partial Final Arbitration Awards

By Edward Lozowicki

Arbitrators are often called upon to issue decisions that dispose of some but not all the claims and defenses in a case.<sup>1</sup> These decisions may be characterized variously as Partial Final Awards or Interim Awards. Depending on how these Awards are structured unintended consequences may result. For example, arbitrators may bifurcate a case into a liability phase and a damages phase and, after hearing the first phase, issue a Partial Final Award on liability. This may be an efficient procedure in a complex case. However, the parties could file a motion to confirm or vacate the Partial Final Award. That event would create the risk of a court decision inconsistent with the Partial Final Award and would likely delay the Final Award. Such a result is neither intended nor efficient. Interim awards, or interlocutory orders, on the other hand, are not intended to be final. Some examples include preliminary injunctions; orders on consolidation or joinder; or rulings on arbitrability or jurisdiction. Here, arbitrators would not expect a motion to confirm or vacate until a Final Award is issued.

This article will appear in two parts. This part will summarize relevant authority for the arbitrator to issue Partial Final Awards. And it will consider certain key factors that courts apply to determine if a Partial Final Award is enforceable. A subsequent part will discuss Interim Awards, interlocutory orders and the arbitrator's authority to correct or modify awards.

## I. Statutes and Provider Rules

In general, the relevant statutes and provider rules recognize the authority of arbitrators to issue Partial Final Awards. The Federal Arbitration Act (FAA) provides: "An appeal may be taken from . . . an order . . . confirming or denying confirmation of an award or partial award. . ." The FAA thus recognizes that parties may file motions to confirm or vacate an award that does not resolve all the issues that are presented in the arbitration. The Revised Uniform Arbitration Act (RUAA) takes a more detailed approach:

If an arbitrator makes a pre-award ruling in favor of a party to the arbitration proceeding, the party may request the arbitrator to incorporate the ruling into an award under Section 19. A prevailing party may make a [motion] to the court for an expedited order to confirm the award under Section 22, in which case the court shall summarily decide the [motion]. The court shall issue an order to confirm the

award unless the court vacates, modifies, or corrects the award under Section 23 or 24.<sup>2</sup>

Under this provision of the RUAA the arbitrator's authority to issue a partial award subject to expedited court review appears clear. In states in which the RUAA or its predecessor, the Uniform Arbitration Act (UAA), are not in effect the authority of the arbitrator to issue reviewable partial awards is less clear. For example, the California Arbitration Act does not expressly authorize partial awards but simply states: "It [the award] shall include a determination of all the questions submitted to the arbitrators the decision of which is necessary in order to determine the controversy."<sup>3</sup> The implication of this provision is that an award that does not resolve all the claims or issues submitted is something other than a Final Award. And it may be reviewable by a court. The California Court of Appeal held that, under the California Arbitration Act, a partial award may be confirmed subject to reservation of jurisdiction by arbitrator.<sup>4</sup> The Court considered the partial award to be similar to an interlocutory judgment and necessary to determination of the remaining issues. *See* subsection E below.

On the other hand, provider rules are more explicit. For example, the American Arbitration Association (AAA) Commercial Rules provide: "In addition to a Final Award, the arbitrator may make other decisions, including interim, interlocutory, or partial rulings, orders and awards."<sup>5</sup> And in another provision the Rules state, ". . . the emergency arbitrator may enter an interim order or award granting the relief [requested] and stating the reason therefore."<sup>6</sup> Other providers have similar rules.<sup>7</sup> However, these Rules provide no guidance for the particular situations in which arbitrators should designate a decision as a "Partial Final Award" or "Interim Award." Nor do they specify the effect of denoting a decision as a "Partial Final Award." And the provider rules do not state whether a particular partial award will be subject to review by a court. An exception is the AAA Supplementary Class Arbitration Rules which expressly require a partial final award on clause construction issues and require a stay of proceedings for at least 30 days so that the parties can seek court review if the parties so choose.

Edward Lozowicki (ed@lozowickidr.com) is a full-time arbitrator with experience in construction, energy, real estate, and other commercial cases. He is a fellow of the College of Commercial Arbitrators, the Chartered Institute of Arbitrators and the Construction Lawyers Society of America.

## II. Court Review

In general, courts reviewing partial awards or rulings consider the context of the case and various factors in deciding if a given partial award or ruling is reviewable. These factors include the title of the arbitral decision; the ripeness of the decision for review; the parties' agreement; whether the award decides a separate and independent claim; and whether the award resolves all the claims and issues in the case.

### A. Title of Arbitral Decision

Entitling the ruling as an "award," while relevant as to the arbitrator's intent, is not always determinative. In one case the Seventh Circuit stated: ". . . [the] consistent use of the label 'award' [in relevant rules and treaties] when discussing final arbitral decisions does not bestow transcendental significance on the term. . . . The content of a decision—not its nomenclature—determines finality."<sup>8</sup> In that case, a party moved for an order compelling the opposing party to turn over tax records which were necessary to resolve issues concerning the break-up of a joint venture between two advertising firms. The arbitration panel determined that the party's case could not go forward in the arbitration without the records. The Seventh Circuit held that the panel's "order" compelling the turnover of tax records was final and ripe for confirmation although other claims remained to be decided by arbitrators. While the panel had not titled the decision as a "Partial Final Award" the Court treated it as such. Although the case was decided under the New York Convention,<sup>9</sup> the Court referred to other FAA cases in reaching its holding.

### B. Ripeness for Review

In *Stolt-Nielsen S.A. v. Animal Feeds Int'l Corp.* the U. S. Supreme Court analyzed an arbitration ruling on what appeared to be an interlocutory issue.<sup>10</sup> A customer of a shipping company demanded arbitration of its antitrust claims under AAA class action rules. The arbitration panel ruled that the case could go forward as a class arbitration but stayed further proceedings pending appeal. The Supreme Court held that the arbitration panel's clause construction award determining class action status was "ripe" for review. The court reasoned there was potential hardship to respondents if class arbitration proceeded. And it found the issues were fit for judicial decision as a "justiciable controversy" even though the decision was not a Final Award.<sup>11</sup> The panel's class action status award was then held in excess of the panel's powers under the FAA.

### C. Agreement of Parties

Some circuits have looked to the parties' stipulations as a factor in determining whether a partial award is reviewable. In *Hart Surgical, Inc. v. Ultracision, Inc.*, the First Circuit held that an award on liability only was a Partial Final Award

reviewable by the district court.<sup>12</sup> In that case, the parties had stipulated to bifurcation of the liability issues from the damages issues. The Court treated the liability phase as a separate proceeding resulting in a Partial Final Award: "the parties here submitted, in a discrete proceeding, all the evidence pertaining to the issue of liability. . . . Both the parties and the panel, then, understood the determination of liability to be a Final Award."<sup>13</sup> The Court considered the stipulated bifurcation of liability from damages and the phased proceedings to be an agreement by the parties that the arbitrators issue a Final Award on liability.

In contrast, the Sixth Circuit reached a different conclusion in *Savers Property Etc. v. National Union Fire Ins. Co.*<sup>14</sup> That case involved a dispute between two reinsurance companies. The arbitration panel issued an Interim Final Award on liability plus partial damages and reserved the remaining damages issues for further proceedings. However, there was no stipulation by the parties for a bifurcated proceeding. The losing party then challenged the impartiality of one of the arbitrators and obtained a preliminary injunction from the district court against further arbitration proceedings without court approval. The Sixth Circuit held that, under FAA and Michigan law, the "Interim Final Award" was not reviewable as it was an "interlocutory order." The Court explained: "Here, the arbitration panel issued an Interim Award resolving only the matter of liability; the panel retained jurisdiction to compute National Union's damages. Under these circumstances, the arbitration award was not complete [and not reviewable] because there was no Final Award."<sup>15</sup> Query: would the result have been different if the parties had formally agreed to bifurcate liability from damages as in *Hart Surgical, supra*?

### D. Separate Independent Claim

In a maritime case, the Second Circuit held that a Partial Final Award on a "separate and independent" counterclaim was reviewable and could be confirmed.<sup>16</sup> In that case, a dispute between an oil company and a shipping company, the parties' contract required immediate payment of freight charges upon delivery of a shipment of fuel oil without setoff. The oil company claimed the volume delivered was short and the fuel oil was contaminated. The shipper counterclaimed for the freight charges. After hearings the arbitration panel issued a Partial Final Award on respondent's counterclaim that was confirmed by the District Court although the oil company's claim for breach and damages had not yet been decided. The Second Circuit found that the counterclaim for freight was due without setoff pursuant to the maritime contract and summary judgment would have been granted had the case been in court. The Second Circuit summed up its rationale in these words: ". . . an award which finally and definitely disposes of a separate independent claim may be confirmed

although it does not dispose of all the claims that were submitted to arbitration.”

### E. Reservation of Jurisdiction

In a California case two shareholders/officers of a software company each owned one-half the stock of the corporation and had entered into a buy-sell agreement regarding their shares. One shareholder offered to buy out the other pursuant to the terms of the buy-sell agreement. The offeree shareholder disputed the offer and claimed breach of fiduciary duty in a subsequent arbitration. After extensive hearings the arbitrator issued a Partial Final Award finding no breach of the buy-sell agreement by the offering shareholder and authorized him to make a new buy-out offer with conditions for performance. The arbitrator retained jurisdiction to determine the remaining issues. The shareholders made competing motions to confirm and to vacate the Partial Final Award. On appeal the appellate court reasoned that the Partial Final Award was analogous to an “interlocutory judgment” and could be confirmed in like manner.<sup>17</sup> The court stated:

We therefore hold that the arbitrator’s “Partial Final Award” was entirely proper, even though there remained a number of potential and conditional issues that the arbitrator will have to address in a “Final Order” in order to give total and complete relief to O’Dowd [the offering shareholder] and to enforce Hightower’s [the offeree shareholder] rights under the Partial Final Award. This process does not offend [California Code of Civil Procedure] section 1283.4 or any other statutory provision; nor was it precluded by the terms of the Shareholders Agreement or the rules applicable to the arbitration. Indeed, as we have suggested, it was impliedly authorized by that agreement (or at least the arbitrator could reasonably conclude) and it is consistent with the “broad authority” granted by the applicable rules [AAA Commercial Rules].<sup>18</sup>

Although the statute cited, California Code of Civil Procedure § 1283.4, requires an award to resolve all questions submitted to arbitration “the decision of which is necessary in order to determine the controversy,” the court nevertheless held the Partial Final Award confirmable by analogizing it to a court’s power to issue an interlocutory judgment. Once the conditions of the new buy-sell offer were satisfied, the arbitrator could then issue a Final Award.

In contrast, the U.S. District Court for the Southern District of New York found that a reservation of jurisdiction to monitor compliance with an award was not proper because the award determined all claims submitted to the panel. “Instead, respondents concede that KX made full payment of

the damages due under the Award. All of the submitted issues were adjudicated by the Panel, either expressly or by their statement that such issues not mentioned in the decision was denied.”<sup>19</sup>

### III. Conclusion

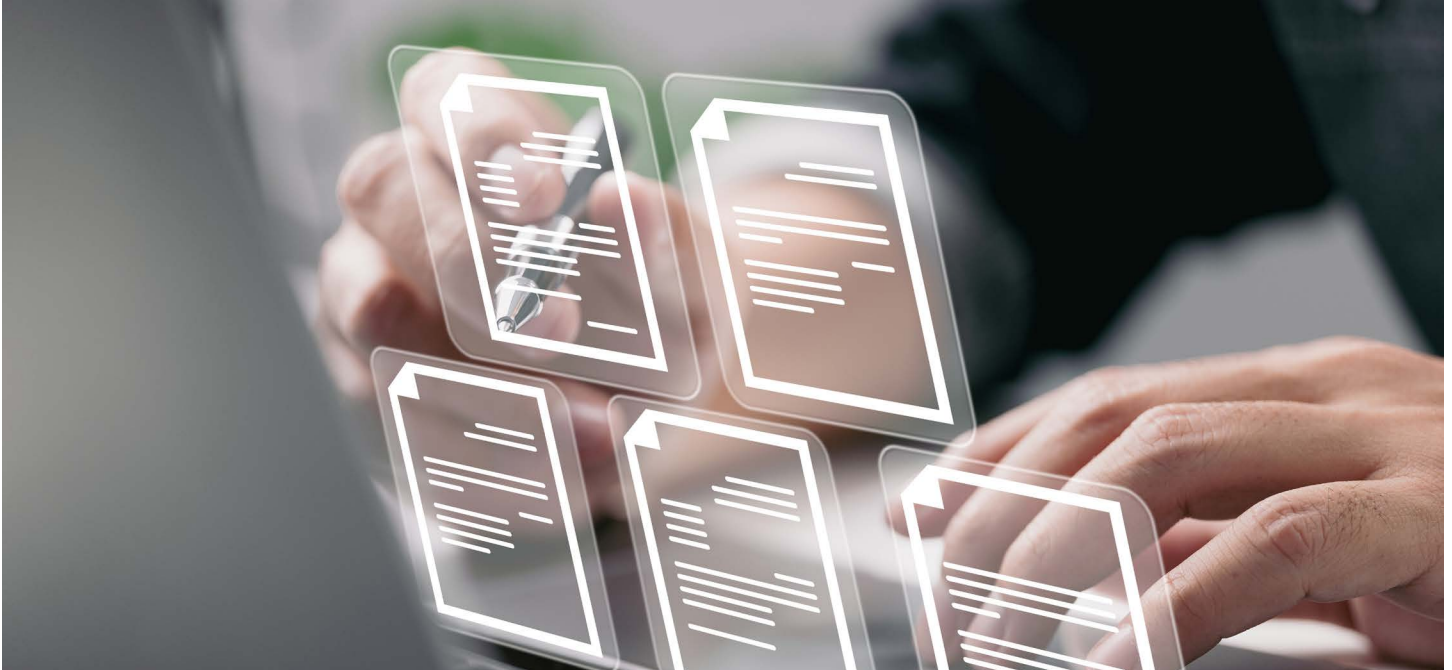
Arbitrators have the authority to issue Partial Final Awards pursuant to statute and/or provider rules. Courts may review such an award depending on: the title of the decision; the perceived ripeness of the award; whether the parties agreed to finality; and whether the award resolved a separate and independent claim. A reservation of jurisdiction may be proper if clearly specified by the arbitrator or agreed by the parties. When issuing a Partial Final Award prudent practice calls for the arbitrator to expressly reserve jurisdiction to issue a later Final Award on the remaining issues and state that such is stipulated by the parties or authorized by their agreement to arbitrate. And the arbitrator should state that the Partial Final Award does not include a resolution of all the issues submitted to the arbitration. Unless the parties agree otherwise it should also state that it is not intended to be subject to a motion to confirm or vacate.

### Endnotes

1. The original version of this article was presented to the College of Commercial Arbitrators in February 2022.
2. RUAA § 18.
3. Cal Code Civ Proc § 1283.4.
4. *See, e.g., Hightower v Superior Court*, 86 Cal. App. 4th 1415, 1440-1441 (2001).
5. AAA Commercial Rule R-47(b).
6. AAA Commercial Rule R-38(e).
7. *See, e.g., CPR Non-Administered Rule 15.1; JAMS Rule 24(d)*.
8. *Publicis Communication et al. v. True North Communications, Inc.*, 206 F.3d 725, 728 (7th Cir. 2000).
9. 9 U.S.C. § 201-208.
10. 559 U.S. 662 (2010).
11. *Id.* at 670, n. 2.
12. 244 F.3d 231 (1st Cir. 2001).
13. *Id.* at 235.
14. 748 F.3d 708 (6th Cir. 2014).
15. *Id.* at 719.
16. *Mettallgesellschaft A.G. v. M/V Capitan Constante*, 790 F.2d 280, 283 (2d Cir. 1986) *See, also, Island Creek Coal Sales Co. v. City of Gainesville*, 729 F.2d 1046, 1049 (6th Cir. 1984); *Moyer v. Van-Dye-Way Corp.*, 126 F.2d 339, 341 (3d Cir. 1942).
17. *Hightower v. Superior Court*, 86 Cal. App. 4th 1415 (2001).
18. *Id.* at 1440-41.
19. *KX Reinsurance Co. v. General Reinsurance Corp., et al.*, 2008 U.S. Dist. Lexis 92717 at 17(S.D. N.Y.)

# Lessons From the Field: Technology Solutions To Enhance Your Arbitration Advocacy Practice

By Artem N. Barsukov



As arbitration practitioners know all too well, arbitration entails what is arguably the most demanding case preparation process among the different types of dispute resolution. Parties are frequently called upon to prepare and submit hundreds of pages of argument, witness statements, and expert reports on top of hundreds, if not thousands, of documentary exhibits—and all within a matter of just a few months.

With these onerous demands, no time can be wasted. Indeed, efficiency in preparation can often be the difference between winning and losing your case. This efficiency can be greatly enhanced by strategic use of technology.

Years of practicing international commercial arbitration around the world have yielded a number of strategies and methods that make the process more efficient and productive.

What follows are my top five tips and tricks on how to improve your arbitration practice with the use of technology.

**Artem N. Barsukov, FCIArb, is a partner with Bennett Jones LLP and is a Swedish- and Russian-speaking lawyer who carries on a global arbitration practice based out of Edmonton, Alberta, Canada. He can be reached at [BarsukovA@bennett-jones.com](mailto:BarsukovA@bennett-jones.com).**

## 1. Get a Mac

This is my number one piece of advice to anyone who looks to improve their efficiency in working on complex arbitration matters. While Windows-based PCs have caught up with Apple's Macs in many areas over the years, Macs still remain superior when it comes to document review and document management.

The secret lies in Macs' native support for the PDF format, which enables them to work with PDF documents in a way that no PC can. On a PC, to view a PDF document, you have to double-click on each document, wait for a third-party app (Adobe Reader) to load, and then oftentimes scale down the document to fit on the screen. To move on to the next document, you have to repeat the whole process, and it takes an average 5-10 seconds *per document*. If you have hundreds and thousands of documents to review, these seconds quickly add up.

By contrast, on a Mac, all it takes to view a PDF document is a touch of the space bar. A feature called "Quick Look" then pops up a preview of the first page of the document, scaled up to fill the screen, with zero delay. What is more, moving on to the next document in a folder only takes a press of the down key. There is no need to close or re-open any third-party applications. The whole process happens natively in the operating system and takes only a split second.

Yet, what makes Quick Look truly special is how it works together with another signature Apple technology: the Retina display. The Retina display, available on every Mac on sale today, allows Macs to display the smallest size text with incredible sharpness. In practice, this means that, with a large enough screen (I recommend 15" and above), nearly every time you pull up a PDF with Quick Look, you are able to not only see but actually *read* the entire page, even if it is an engineering drawing packed with small-font notations.

This is a game-changer when reviewing hundreds of standardized records, looking for patterns or summarizing data as part of preparing your case. I recall one particular example where, as a first-year lawyer, I was able to work my way through thousands of PDF Work Release Notices in less than three hours to come up with a chart that conclusively rebutted a statement made by an opposing witness in the middle of a hearing. The same job on a PC would have taken days, by which point any chance to undermine the witness's credibility would have been lost.

In addition to game-changing PDF functionality, getting a Mac gives you access to a world of innovative software that is often not available on PCs and that works seamlessly with your iPhone or iPad. One example is the Ukrainian-made Documents by Readdle, widely considered to be one of the best mobile document management solutions. Things by CulturedCode can manage and organize the many action items that a busy arbitration practice produces on a daily basis.

Finally, Macs come with a host of ancillary benefits that help to enhance an arbitration practice. In addition to being portable, secure, and reliable, the latest generation of Mac laptops using the M1 chip come with unprecedented battery life. A recent upgrade to 16" MacBook Pro increased work-time without access to power from five hours to an incredible 21 hours. This may prove indispensable when working at remote locations, in airports, or on a plane.

## 2. Use Microsoft Teams

Microsoft Teams is a true hidden gem and can be a key pillar of practice. Most people think about Teams primarily as a virtual meeting tool—an alternative to WebEx and Zoom. In fact, it is so much more. Used wisely, it can be turned to a powerful project management tool that will enable you to always stay on top of multiple matters, coordinate complex deliverables, share knowledge, and effectively manage your legal team.

Below is only a small sample of built-in features in Teams that can dramatically enhance your arbitration practice.

**Teams** allows you to split your legal team into working groups, for example, separate teams for partners and associ-

ates, witness and experts, or for different types of issues in dispute. The options are endless. You can then set up the functions described below for each team, to keep your groups focused.

**Posts** allows you to trade ideas and share knowledge. This feature appears and works much like Facebook's Wall, with one key difference: posts can be organized by threads. The Posts feature, like all other Teams features, is also available in the Teams Mobile App, which makes it ideal for passing virtual notes among counsel during an arbitration hearing.

**Files** is a Dropbox-like feature that allows you to share files within your team and keep track of key documents relevant to the dispute. Hot documents identified during document review can be uploaded for review by other team members. Witnesses can use it to share new documents they discover during their own searches. You can also use Files to share drafts of submissions, witness statements, and expert reports. All of the files are stored securely in the Cloud and can be accessed from a mobile device whenever needed.

**Wiki** is a great tool for building a knowledge base for the case. As your legal team interviews witnesses, meets experts and performs document review, they can record key facts and observations in an encyclopedia-like format, for the benefit of the entire team. Keeping a centralized knowledge base will ensure consistency across the team, help avoid duplication of effort, and generally improve the efficiency of your case preparation.

**Tasks** is arguably the most innovative and powerful tool of Microsoft Teams. It allows you to organize the myriad of action items involved in an arbitration manner into vertical columns or "buckets," giving you a clean view of everything that needs to be done by task area. Individual tasks can be broken down into steps, given due dates, and assigned to one or more team members. If Teams is properly integrated into your IT environment, you will even be able to see profile pictures of your colleagues, allowing you to see what has been assigned to whom at a glance. It is a manager's dream.

Other tools that can be added to Microsoft Teams range from whiteboards, to calendars, to SharePoint nodes, and beyond. Indeed, Teams includes a type of an "App Store," allowing for endless integration possibilities.

With this much functionality, Teams might appear daunting at first. Do not let this be an obstacle between you and the efficiencies that Teams can help you realize. Explore Teams; you will be glad you did.

# “AutoCorrect’s best-kept secret is that it is not limited to correcting spelling mistakes; it can be customized to automatically replace anything with anything.”

### 3. Use Document Management Software or Customize Your View Settings

When working with documentary evidence, there is nothing more efficient than having access to thumbnail previews of all documents. Combined with the Quick Look function, which enables you to call up a full-size version of the document at the touch of the space bar, this can take your ability to rapidly review documents and zero in on key issues and evidence to a new level.

There are several ways this can be accomplished. One way is to use dedicated document management software that organizes documents much like a photo library. For example, Apple’s own iBooks allows you to import PDF documents, organize them into “Collections,” and instantly call up documents using their title.

In addition, without dedicated software, you can use Apple Finder or Windows Explorer, change the view settings to “thumbnails” mode and increase the size of thumbnails to a point where you can make out the contents of the document. You can then instantly look up documents by typing the first few characters of the filename on your keyboard. You can also use the search function to search through *both* the filenames and the document contents. Finally, if you are on a Mac, you can use Quick Look to quickly call up a full-screen preview of the document.

### 4. Use ExhibitManager for Document Referencing and Footnotes

Adding and correcting footnotes to submissions can be extremely time-consuming. Time can be substantially shortened by using ExhibitManager. It is a powerful software that integrates with Microsoft Word to automatically populate footnote references based on pre-determined rules that only have to be set once. What this means is that, with ExhibitManager, you can add, change, and remove exhibits without having to worry about re-numbering exhibits or updating footnote references. The update is done automatically at the press of a button.

While the issue of footnote references may appear trivial at a first blush, it typically happens at the final stage of preparing submissions, when every second counts against the deadline. Investing in automated exhibit management can buy you those few all-important days before the submission deadline.

### 5. Use AutoCorrect to Your Advantage

We have all had our share of frustrations with AutoCorrect. However, used wisely, it can become your best ally in helping you cut down the amount of time it takes to prepare written submissions.

AutoCorrect’s best-kept secret is that it is not limited to correcting spelling mistakes; it can be customized to automatically replace *anything* with *anything*. Simply go to your Microsoft Word settings, select “AutoCorrect,” and you will be presented with a long list of default autocorrect rules, with an option to add your own—as many as you like. For example, if I will be repeatedly referring to the “Witness Statement of John Smith dated January 1, 2022,” what I do is set up an AutoCorrect rule to replace “JS,” a shorthand, with “Witness Statement of John Smith dated January 1, 2022.” Once the rule is set up, a lengthy reference takes only two keystrokes to type. Set up a few AutoCorrect rules, and, over hundreds of pages of submissions, you will save yourself considerable amount of time.

### Conclusion

This is only a small sampling of how you can leverage technology solutions to enhance your arbitration practice. The author hopes that you will find these tips and tricks helpful, and that they will help contribute to more efficient resolution of disputes.

# Enforcing Mediated Settlement Agreements, or, When Is a Deal Really a Deal: An Analysis of *Murphy v. Institute of International Education*

By Steven M. Bierman



After a long day of mediation, *success*—the parties have reached agreement to settle their dispute. Together, counsel prepare a mediation settlement agreement incorporating material terms, and the parties, counsel and mediator sign it, understanding that a more comprehensive agreement will be prepared. Several days later, having had second thoughts, the plaintiff declares she does not wish to settle after all.

Is the mediation agreement enforceable by the defendant? Does a party’s change of heart require deference, where the more detailed settlement agreement had not yet been finalized and signed? Should it matter that plaintiff is pro se and contends that she signed the mediation agreement under duress caused by her court-appointed mediation counsel and the mediator? The U.S. Court of Appeals for the Second Circuit recently grappled with these issues in *Murphy v. Institute of International Education*,<sup>1</sup> an opinion authored by Hon. Richard J. Sullivan that is instructive for counsel, parties and mediators alike.

## The Dispute: Mediation, Settlement and Second Thoughts

In February 2019, Philana Murphy, acting pro se, sued her employer, Institute of International Education, alleging unlawful employment discrimination in violation of federal,

state and local employment laws. U.S. District Judge Andrew L. Carter Jr. referred the case to the Southern District of New York’s mediation program and appointed pro bono counsel to represent plaintiff in the mediation.<sup>2</sup>

At the conclusion of the mediation, the parties advised the mediator that they had settled the dispute. Using a partially pre-printed form, they prepared a document setting forth the case caption and titled “Mediation Agreement,” beginning with the pre-printed sentence: “IT IS HEREBY AGREED by and between the parties and/or their respective counsel that, following mediation, agreement has been reached on all issues.” Below that, the parties handwrote, “In

Steven M. Bierman is an independent mediator, arbitrator, and dispute resolution advisor, and founder of Bierman ADR. He is a fellow of the Chartered Institute of Arbitrators and accredited as a mediator by the Centre for Effective Dispute Resolution. He also serves on multiple ADR rosters, including the Mediation Panels for the U.S. District Courts for the Southern and Eastern Districts of New York and for the New York State Supreme Court (Commercial Division). Previously he was a partner at Sidley Austin, where he headed or co-headed the New York Litigation Group for 25 years and was co-leader of its global commercial litigation and disputes practice.

exchange for a discontinuance with prejudice and a general release of all claims,” defendant will furnish to plaintiff one year’s salary, two months COBRA premium contributions and regular pay and benefits through a set date. They next wrote, “A full settlement agreement w/applicable releases will follow.” The parties, counsel and mediator all signed the mediation agreement, and the district court thereafter entered an order dismissing the case.<sup>3</sup>

Following the mediation, counsel negotiated a draft of a more comprehensive settlement agreement that included the institute’s disclaimer of any liability and acknowledged its obligation to provide a neutral reference, and also included Murphy’s obligation to keep the terms confidential, to not disparage defendant, to not seek employment with defendant and to not assist anyone else in pressing claims against defendant. The draft “full agreement” also included general provisions such as contract integration and interpretation.<sup>4</sup>

Three days after she signed the mediation agreement, Murphy contacted the district court and expressed a desire to revoke it. She was told to send an email to the court, which she did three days later. Plaintiff’s email stated that she was nervous and confused during the mediation and had told her attorney that she was not comfortable signing; that her attorney advised that mediation “was the nicer portion of [her] lawsuit;” and that the mediator said that if plaintiff continued, she “would be stuck in a room filled with white men that would question every aspect of [her] life for hours.”<sup>5</sup> Murphy called her mother, who advised her not to sign, and she took 10 minutes outside the room to “clear her head.” Murphy stated that she then asked to have until Monday to think over the mediation agreement but was told “no” and that the mediation agreement included the most compensation she would ever receive. Murphy averred that she ultimately signed the mediation agreement because she “was so sad and felt [she] had no choice but to sign.”<sup>6</sup>

### The Institute Seeks To Enforce

After Murphy refused to sign the “full agreement,” the institute filed a motion to enforce the mediation agreement itself. Murphy, with new counsel, opposed. The parties agreed that whether the mediation agreement was enforceable was governed by the four-factor test set forth in 1985 by the Second Circuit in *Winston v. Mediafare Entertainment Corp.*:

- (1) whether there has been an express reservation of the right not to be bound in the absence of a writing;
- (2) whether there has been partial performance of the contract;
- (3) whether all of the terms of the alleged contract have been agreed upon; and

(4) whether the agreement at issue is the type of contract that is usually committed to writing.<sup>7</sup>

The district court referred the motion to a magistrate judge, who issued a Report & Recommendation that the mediation agreement be enforced. The district court agreed, overruling Murphy’s objections and concluding that “[c]onsidering all of the *Winston* factors, . . . the parties sufficiently indicated their intent to be bound by the signed Mediation Agreement, and, accordingly, that the Mediation Agreement is enforceable.”<sup>8</sup> The district court (as had the R&R) also rejected plaintiff’s additional argument that the mediation agreement not be enforced because she was “demeaned, disrespected and pressured during the mediation” and signed the agreement under duress.<sup>9</sup> The district court entered judgment in the institute’s favor, and Murphy appealed.

### The Second Circuit’s Framework for Analysis

In *Murphy*, the Second Circuit began by reminding, “It is well established that settlement agreements are contracts and must therefore be construed according to general principles of contract law.”<sup>10</sup> The court then looked to the framework first posited by then-District Judge Leval in 1987 in *Teachers Insurance and Annuity Assn. of America v. Tribune Co.*,<sup>11</sup> and which the Second Circuit has applied in the decades since, identifying two kinds of preliminary contracts that New York law recognizes. The first (Type I) occurs “when the parties have reached complete agreement (including the agreement to be bound) on all the issues perceived to require negotiation,” and is “preliminary only in the sense that the parties desire a more elaborate formalization of the agreement;” and the second (Type II) is one that “expresses mutual commitment to a contract on agreed major terms, while recognizing the existence of open terms that remain to be negotiated.”<sup>12</sup>

The Second Circuit noted that it previously had referred to the four-factor *Winston* test (on which the district court in *Murphy* exclusively focused) when determining whether something constitutes a Type I agreement and a modified five-factor version of that test when considering whether something is a Type II agreement.<sup>13</sup> But the court acknowledged that such factors “do not provide us with a talismanic scorecard” and, while helpful to consider, “the ultimate issue, as always, is the intent of the parties: whether the parties intended to be bound, and if so, to what extent.”<sup>14</sup>

*Murphy* presented the Second Circuit with an unusual opportunity because, unlike in *Winston*, where the key issue was whether the parties intended to be bound, in *Murphy* the court was “confronted with a written agreement that has been executed” and thus, “the question instead is what kind of agreement did the parties make.”<sup>15</sup> As the panel observed, “While we have a body of law distinguishing non-binding agreements from Type I agreements and non-binding agree-



ments from Type II agreements, we have had fewer occasions to explain how courts should distinguish between Type I and II agreements when confronted with an agreement that is clearly binding in some sense.”<sup>16</sup>

### **A ‘Paradigmatic Type I Agreement’**

With the table thus set, the court in *Murphy* focused on the text of the mediation agreement, “which is the most important consideration when determining how the parties intended to be bound.”<sup>17</sup> The court observed that, here, “the mediation agreement clearly states that ‘agreement has been reached on all issues,’ which is strong language indicating this is a Type I agreement,” no less so because the language was pre-printed; this, the court found, was in contrast to a case in which the language of the agreement merely committed the parties to “work together in accordance with the terms and conditions outlined in” the agreement, “which would be a Type II agreement to continue negotiating.”<sup>18</sup>

In addition to finding that the language of the mediation agreement was “unequivocal,” the court determined that the language “reflects that the terms included in the agreement were the material terms” and that, “[a]lthough the mediation agreement clearly contemplates a final contract that ‘would include additional boilerplate,’ that does not prevent us from finding a Type I agreement so long as the parties ‘foresaw no disputes relating to the boilerplate.’”<sup>19</sup> Indeed, the court noted, a Type I agreement, “by definition, contemplates a future formalization that will likely include some additional terms,” but “trivial open issues will not prevent the court from upholding a Type I agreement.”<sup>20</sup> While the draft “full agreement” in *Murphy* contained some terms not in the mediation agreement, including a confidentiality provision identified as material, there was no evidence to suggest that the parties considered those terms “open issues in need of negotiation at the time the parties entered into the mediation agreement, which is the proper frame of reference.”<sup>21</sup>

Notably, the court found that the “context of the district court’s mediation program further confirms that this was a Type I agreement.”<sup>22</sup> As the court recounted, “everyone in the mediation understood the executed mediation agreement to bind the parties to its terms and not merely to set a framework for future negotiation,” and the parties, their attorneys and the mediator all signed it; moreover, Murphy, by her own admission, “agonized over the mediation agreement, taking time to clear her head and call her mother before signing it, indicating that she thought the mediation agreement would bind her and conclude the litigation.”<sup>23</sup> Thus, “there can be no doubt” that the parties intended to be bound, and their anticipation of “lawyer’s embellishments” in a final formal agreement “in no way makes the mediation agreement unenforceable.”<sup>24</sup> Indeed, the court observed, “To hold otherwise would defeat the very purpose of the mediation

program and render the execution of mediation agreements a hollow and pointless exercise.”<sup>25</sup>

### **Plaintiff Did Not Sign the Mediation Agreement Under Duress**

As she had argued in the district court, Murphy also contended on appeal that, due to pressure exerted by the mediator and her attorney, the mediation agreement was voidable because she signed it under duress. The Second Circuit noted that “repudiation of an agreement on the ground that it was procured by duress requires a showing of both a wrongful threat and the effect of precluding the exercise of free will.”<sup>26</sup> The court rejected plaintiff’s argument, finding “no evidence to support the contention that Murphy’s free will was overcome” and that, to the contrary, Murphy “was given the opportunity to step outside of the room and collect herself, and she was given the opportunity to call her mother to discuss her options.”<sup>27</sup> For that matter, although her attorney and the mediator “urged her to sign the mediation agreement, no one prevented her from leaving the mediation or continuing with the litigation.”<sup>28</sup>

Moreover, the panel agreed with other courts and the Restatement (Second) of Contracts that “a party seeking to void an agreement based on duress must show that the alleged coercive behavior originated with the defendant or was known to the defendant at the time the agreement was made.”<sup>29</sup> The court observed that Murphy had not described any coercive behavior by the institute during the mediation or alleged the institute’s awareness of any such behavior; rather, insofar as Murphy was put under any pressure to sign the mediation agreement, “that pressure came from her counsel and the mediator, not the Institute or its attorneys.”<sup>30</sup>

### **Lessons for Enforceability**

In *Murphy*, the Second Circuit provided welcome guidance regarding enforceability of mediated settlement agreements and the distinction for that purpose between “Type I” and “Type II” agreements. In affirming the judgment enforcing what it determined was “a paradigmatic Type I agreement, binding with respect to its terms despite contemplating a later formalization,” the Second Circuit provided a significant guidepost for counsel, parties and mediators: “In all but the most unusual circumstances, mediation agreements that include express language indicating that the parties have reached agreement on all material terms are presumptively Type I agreements—unless the parties explicitly reserve the right not to be bound by the mediation agreement’s terms until a final agreement is drafted and signed.”<sup>31</sup>

For all participants in the process, *Murphy* underscores the importance, at the end of a long day of mediation, of memorializing the parties’ intent through clear and precise drafting

of a mediation settlement agreement embodying all material settlement terms, without explicitly stating that they will not be bound (Type I), unless it is the parties' intention not to be bound pending execution of a more formal or extensive agreement (Type II), and, if so, to so state. And, even though the district and appellate courts rejected plaintiff's alternative argument that she signed the mediation agreement under duress, the litigation serves to remind all participants of the core mediation principle of party self-determination, in practice and appearance.

**Endnotes**

1. 32 F.4th 146 (2d Cir. 2022).
2. *Id.* at 149.
3. *Id.*
4. *Id.* at 149–50.
5. *Id.* at 150.
6. *Id.*
7. *Winston v. Mediafare Entertainment Corp.*, 777 F.2d, 78–80 (2d Cir. 1985).
8. *Murphy v. Institute of International Education*, No. 19-cv-1528, 2020 WL 5658628, at \*4 (S.D.N.Y., Sept. 23, 2020).
9. *Id.*
10. *Murphy v. Institute of International Education*, 32 F.4th 146, 150 (2d Cir. 2022), quoting *Collins v. Harrison-Bode*, 303 F.3d 429, 433 (2d Cir. 2002).
11. 670 F. Supp. 491 (S.D.N.Y. 1987).
12. *Murphy*, 32 F.4th 146, 150–51 (2d Cir. 2022); see *Vacold LLC v. Cerami*, 545 F.3d 114, 124–29 (2d Cir. 2008); *Arcadian Phosphates, Inc. v. Arcadian Corp.*, 884 F.2d 69, 71–73 (2d Cir. 1989).
13. *Murphy*, 32 F.4th at 151.
14. *Id.*, quoting *Vacold*, 545 F.3d at 125.
15. *Id.*
16. *Id.*
17. *Id.* at 152.
18. *Id.*
19. *Id.*, quoting *Vacold*, 545 F.3d at 129.
20. *Id.* at 152.
21. *Id.*
22. *Id.*
23. *Id.*
24. *Id.*
25. *Id.*
26. *Id.*, quoting from *United States v. Twenty Miljam-350 IED Jammers*, 669 F.3d 78, 88 (2d Cir. 2011) (internal quotation marks omitted).
27. *Id.* at 153.
28. *Id.*
29. *Id.*, citing *Evans v. Waldorf-Astoria Corp.*, 877 F. Supp. 911, 914 (E.D.N.Y. 1993), *aff'd*, 33 F.3d 49 (2d Cir. 1994), and Restatement (Second) of Contracts, § 175 (Am. Law Inst. 1981).
30. *Id.* at 154.
31. *Id.* at 153.

**TOGETHER, we make a difference.**

When you give to The New York Bar Foundation, you help people in need of legal services throughout New York State. Through our grant program, we are able to assist with legal needs associated with domestic violence, elder abuse, homelessness, attorney wellness, disability rights, and other life changing legal matters.



**Make a difference, give today at [www.tnybf.org/donation](http://www.tnybf.org/donation)**  
**or mail a check to: The New York Bar Foundation, 1 Elk Street, Albany, NY 12207**



# A Beneficial Symbiotic Relationship: Rule 2.1 of the ABA Model Rules of Professional Responsibility and Appellate Mediation

By Kathleen M. Scanlon

Symbiosis is a scientific term describing any relationship or interaction between two dissimilar organisms. One type of symbiosis is a mutually beneficial one when each organism benefits from the other (as opposed to a non-beneficial one when one organism lives off another at the other's expense). There are many examples of mutually beneficial symbiotic relationships in nature and society. In the legal world, an analogue of a beneficial symbiotic relationship is the relationship between Rule 2.1 ("Advisor") of the ABA Model Rules of Professional Responsibility ("Rule 2.1") and appellate mediation.

## Hypothesis

An inevitable outcome of the interaction between appellate mediation (and its use of confidential caucus sessions) and Rule 2.1 is a beneficial symbiotic relationship. The primary goal of appellate mediation is an assessment of the risks and benefits of pursuing an appeal and whether it is the best alternative to a negotiated solution after a discussion of underlying interests. This goal is achieved within a confidential setting where the mediator can meet jointly with all sides as well as with each side separately in a private session, often referred to as a caucus. Now consider the principal purpose of Rule 2.1—to require lawyers to provide "candid advice" to clients, which may include non-legal considerations relevant to the client's situation. Rule 2.1 recognizes that "[a]dvice couched in narrow legal terms may be of little value to a client, especially where practical considerations, such as cost or effects on other people, are predominant." (Comment 2, Rule 2.1). The goal of appellate mediation is more readily accomplished when frank conversations occur between counsel and clients within caucus sessions while the objective of Rule 2.1 is more easily achieved within confidential caucus sessions where counsel can provide "candid advice" to their client with the support of a mediator. An appreciation of the beneficial symbiotic relationship between Rule 2.1 and appellate mediation can result in benefits for clients, lawyers and the mediation process.

## Rule 2.1—Advisor

In the sage words of Professor Roy Simon of Hofstra University School of Law, "Rule 2.1 is one of the most important provisions in the Rules of Professional Conduct, but it is often overlooked or taken for granted." (Simon's New York Rules of Professional Conduct Annotated [Dec. 2021 Up-

date]). Indeed, "advisor" may be "the most ethereal provision in the Rules." (*Id.*) The rule is powerful in its simplicity:

### Rule 2.1 Advisor

In representing a client, a lawyer shall exercise independent professional judgment and render candid advice. In rendering advice, a lawyer may refer not only to law but to other considerations such as moral, economic, social and political factors, that may be relevant to the client's situation.

Note the title of the rule—"Advisor." The title itself emphasizes a dimension of the lawyer-client relationship that is broader than advocating in front of a tribunal or opposing counsel. The rule underscores that a "client is entitled to straightforward advice expressing the lawyer's honest assessment." [Comment 1]. The Comments to the rule stress that "[p]urely technical legal advice . . . can sometimes be inadequate." [Comment 2].

## Appellate Mediation and Caucus Sessions

Appellate mediation occupies a unique space in the world of mediation. By the appellate mediation stage, a judge or jury has already decided the merits of the claim(s) set forth in the complaint. When parties participate in appellate mediation, out of the gate, the winning side (the appellee) arrives vindicated and the losing side (the appellant) comes heavily invested in correcting an alleged wrong (the initial claim(s) and now the decision of the lower court or jury).

Appellate mediation is an ideal environment to provide Rule 2.1's "candid advice" to a client—mediation is a private, confidential process that allows the mediator to meet privately with each side in caucus. The mediator is an instrument who can be used to assist counsel in providing "candid advice" in a caucus session. For example, the mediator can help the client

Kathleen M. Scanlon is the chief circuit mediator for the United States Court of Appeals for the Second Circuit's Civil Appeals Mediation Program (CAMP). Ms. Scanlon teaches a professional responsibility course that highlights alternative dispute resolution processes at Fordham University School of Law.

understand why the lawyer may be providing advice that is broader than only legal arguments. Specifically, the mediator may explain to the client that the purpose of appellate mediation is not to win a legal argument, but rather to assess different outcomes, including those that may better address the client's underlying interests. The mediator also can assure both counsel and client that any "candid advice" provided by counsel to their client in a caucus session will never be communicated to the adjudicators (the judges), to the other side or anyone outside the process because of mediation confidentiality. In other words, mediation is a safe space for lawyers to fulfil their duty as "advisor."

Appellate mediation also provides a unique opportunity for counsel to discuss with their client "moral, economic, social and political factors, that may be relevant to the client's situation" during a caucus session. A mediator who is keenly aware of Rule 2.1 might draw upon its provisions to encourage a broader conversation between counsel and client, which in turn may result in identifying previously unrecognized underlying interests. The rule encourages counsel to go beyond the four-corners of the law. This expansion of advice coincides with the goals of appellate mediation—to explore legal and non-legal interests in a private, confidential setting and thus better assess all available paths to resolution. In short, when preparing for appellate mediation, a mediator and counsel should always keep Rule 2.1 in the foreground.

### **An Appellate Mediation Hypothetical**

Consider the following hypothetical—Sam has filed a products liability and personal injury case against LawnCompany for an allegedly defective weed trimmer sold by LawnCompany. Sam alleges that he was injured while using the weed trimmer because of a defective guard rail design that sits on top of the blade. The lower court dismissed the case at the pleadings stage because of a statute of limitations defense asserted by LawnCompany (through no fault of Sam's current counsel). An appeal has been filed by Sam. The appeal has been ordered into a mediation under the auspices of a court program. The mediator is a lawyer trained in mediation.

Early on in the mediation process, the mediator speaks with each side separately in caucus sessions. Sam and his counsel inform the mediator that they want to tell their story to a jury (or at a minimum to an appellate court) because they feel strongly that something is wrong with the product and they want to protect others from injury. Sam's hand was severely cut, although after extensive treatment (thankfully) has healed with no lasting disability. In a separate caucus with LawnCompany, counsel and their client are adamant that the appeal is meritless. They believe the product is safe and do not want to encourage other lawsuits against LawnCompany. The company might be willing to offer a \$1,000

to the other side if the appeal is dismissed. They are very entrenched in this view because they believe there is absolutely no merit to any product liability claim, particularly when the statute of limitations has clearly passed—the law has spoken in their view, and that is the end of their analysis.

### **Cultivating an Atmosphere for "Candid Advice" in Caucus Sessions**

Comment 1 to Rule 2.1 frankly acknowledges that "[l]egal advice often involves unpleasant facts and alternatives that a client may be disinclined to confront." Sometimes, lawyers may hesitate to render such "candid advice" for fear of harming a client's morale, appearing not to be vigorously fighting for their client, or undermining their client's trust and confidence in the lawyer's abilities and commitment. However, Comment 1 goes on to state that a lawyer should not be deterred because the "advice will be unpalatable to the client." A mediator can greatly assist counsel to communicate such advice, as appropriate, to their client in a private caucus session through open-ended questions and dialogue.

Let's return to our hypothetical. During the initial private session with Sam and his counsel, they start out explaining to the mediator that if they get before a jury, they want to ask for a six-figure monetary award for pain and suffering. They also want the public to know about their perceived dangers of this product to avoid other injuries. After listening to them, a mediator may be able to broaden the conversation to include any appropriate "candid advice" that counsel may want to discuss with their client. With the assistance of the mediator, counsel may explain to their client the legal issues the appellate court may focus on and possible outcomes. With the aid of the mediator, the lawyer may be able to frankly discuss with their client the strength of the other side's statute of limitations defense, possible outcomes of the appeal (which includes affirmance of the dismissal), and other options. The mediator may begin to ask open-ended questions about the client's underlying interests – maybe it turns out that the client would be satisfied if he had an opportunity to explain to the company how he used the product, which may lead to modifying the product or its written instructions so others will not suffer the same fate as Sam, and payment of his out-of-pocket medical bills. The mediator can explain that such an outcome might be possible without further litigation if the other side is willing to consider it.

### **Opening Lines of Communications for "Candid Advice" in Caucus Sessions**

In the other room, LawnCompany's representative appears averse to hear anything from their lawyer, except that they will win on appeal. The mediator—by posing open-ended questions in caucus—may be able to guide the conversation into the broader zone of Rule 2.1. The mediator may be

## **“Appellate mediation can provide a firm foundation upon which a lawyer can satisfy one of the more 'ethereal' provisions in the ABA Model Rules of Professional Conduct—to provide 'candid advice' with practical and beneficial outcomes.”**

able to explain to the client that their lawyer is encouraged under the Rules of Professional Conduct to discuss non-legal considerations for the benefit of LawnCompany. To start a conversation that takes the focus off the legal merits of the appeal and may lead to a discussion of underlying interests, the mediator may ask whether any press coverage on the appeal could impact the public's view of the product. The mediator might ask (even assuming LawnCompany prevails on the appeal) whether an affirmance would remove any lingering question raised in the lawsuit about the product's safety because a dismissal on statute of limitations grounds is not the same as a victory on the merits. Could the company benefit from listening to Sam and considering whether such an accident could be avoided in the future by reviewing the product's instruction or modifying the guard rail, even if not legally required to do so?

Moreover, a mediator may assist counsel in opening a conversation with their client about LawnCompany's broader underlying interests. A mediator might ask about the value of gaining back the goodwill of this customer who was injured using a company's product, even assuming the company is not at fault, by offering to contribute to his out-of-pocket medical expenses. Perhaps Sam one day will have his own lawn service company and could be a repeat purchaser of LawnCompany's products? It may be that LawnCompany's counsel does not want to directly address these possibilities with their client for fear of looking as if they are favoring the other side, but with the aid of a mediator, a lawyer can align with the mediator to highlight these non-legal considerations for their client to consider.

### **A Mediated Resolution After “Candid Advice” Is Offered and Considered**

By raising these questions in each of the separate rooms, a mediator may be able to motivate counsel to embrace the broader role of advisor—as opposed to limiting themselves to the role of litigation advocate—and inspire their clients to engage in problem solving. The clients may begin to see that

the appeal, with its costs and risks, may not be necessary at this stage to achieve a satisfactory outcome.

In the hypothetical, the case settles with a payment of the outstanding medical bills not covered by Sam's insurance (an amount of \$15,000), an explanation by Sam of what happened when he used the weed trimmer and the company's response to how they believe Sam may have misread the instructions, which the company may change in the future, although it is not obliged to do so. Such a result may not have been possible without the aid of the mediator encouraging counsel on both sides to embrace their role of “advisor” and not confine themselves to the role of litigation “advocate.” The clients may appreciate that their lawyers did not focus solely on the legal merits of their position with a win-loss mentality, but rather engaged in a broader conversation about the implications of the appeal and alternative paths. This approach, in turn, opened mutually beneficial outcomes that may not have been available without the mediator tapping into counsels' broader role of “Advisor” under Rule 2.1.

### **Conclusion**

Appellate mediation can provide a firm foundation upon which a lawyer can satisfy one of the more “ethereal” provisions in the ABA Model Rules of Professional Conduct—to provide “candid advice” with practical and beneficial outcomes. By highlighting the beneficial symbiotic relationship between appellate mediation and Rule 2.1, a mediator may assist a lawyer embrace the role of “advisor” and, in turn, appellate mediation may become more effective for counsel and their clients.

## ***Commercial Litigation in New York State Courts (Fifth Edition): Still the Leading Resource for Commercial Litigation Advocates and ADR Practitioners***

Ed. Robert L. Haig

Reviewed by Ross J. Kartez

*Either write something worth reading or do something worth writing.* —Benjamin Franklin

Benjamin Franklin would be proud of Robert L. Haig's bountiful treatise, *Commercial Litigation in New York State Courts* (Fifth Edition). How does one take on the task of covering such a broad and momentous subject-matter like "commercial litigation in New York?" You enlist a team of leading experts to cover the topics thoroughly, in a manual-like guide that exudes a high level of authority so the reader proceeds with confidence, clarity, and charisma. While the authors are prominent New York State lawyers with many accomplishments "worth writing," Bob's invitation to contribute to this magnum opus is an honor and a privilege by itself. I have been using this treatise as a guide since I was in law school, and Bob's dedication to improving and updating *Commercial Litigation in New York State Courts* adds to my confidence that I am relying on an authority that continues to evolve with the practice of law. We owe Bob Haig a huge debt of gratitude for his commitment to improving the commercial litigation practice.

*Commercial Litigation in New York State Courts* (Fifth Edition) is massive. With 10 volumes, 13,076 pages (including 28 new chapters), and over 30,000 cited cases, this treatise continues to stay on top of important developments and relevant topics for today's New York litigator. Special kudos to the 256 principal authors, including 29 distinguished judges (e.g., Chief Judge Janet DiFiore, the late Chief Judge Judith S. Kaye, and the former Chief Judge Jonathan Lippman) and some of the best litigation attorneys to practice in New York. As an established commercial litigator myself, and a busy

neutral (i.e., mediator and arbitrator), I am pleased to report that this publication addresses settlements, negotiations, mediation, and arbitration. I am particularly impressed with the chapter on case evaluation, which continues to be an underutilized skill in today's practice. Because the overwhelming majority of lawsuits are resolved well before a jury or a judge makes a decision, it is vitally important for commercial litigators to sharpen their settlement skills (and perhaps learn when to put down their litigation weapons). I am pleased to see that this edition contains substantial resources for practitioners seeking to deepen their ADR knowledge and skills.

A section on negotiation stresses the ineffectiveness of sharp tactics at the negotiation table. There are multiple examples of situations where hard-nose litigators lost settlement opportunities because of their negative impact on the collaborative environment. Other negotiation-centered chapters compare different bargaining styles and their advantages (or disadvantages). In Chapter 41, David M. Schraver and Daniel C. Gibbons provide a "soup to nuts" manual on working through the settlement process. The advice is clear, "[c]onsider settlement early. Do not wait until three years of attorneys' fees have been expended before you carefully analyze the case. . . . Attorneys do their clients a significant disservice by not giving serious consideration to settlement prospects right from the beginning. . . ." The settlement chapter is thorough, addressing each participant's role, evaluating the other side's interests, researching the other side's litigation history, setting goals, confidentiality issues, dealing with litigation expenses and prejudgment interest, utilizing the court to promote settlement, ethical consideration, negotiation skills, drafting settlements, and even some discussion on whether to include an ADR provision in a settlement agreement.

Chapter 67, "Negotiations," provides a guide on negotiation issues, strategies and considerations. With topics like framework for success, mandatory negotiation, ethics, threats/extortion, and settlement authority, Michael J. McNamara succeeds in educating us litigators on the art of negotiation, while piquing our interest to learn more. The chapter also discusses negotiation theories, provides helpful bargain-

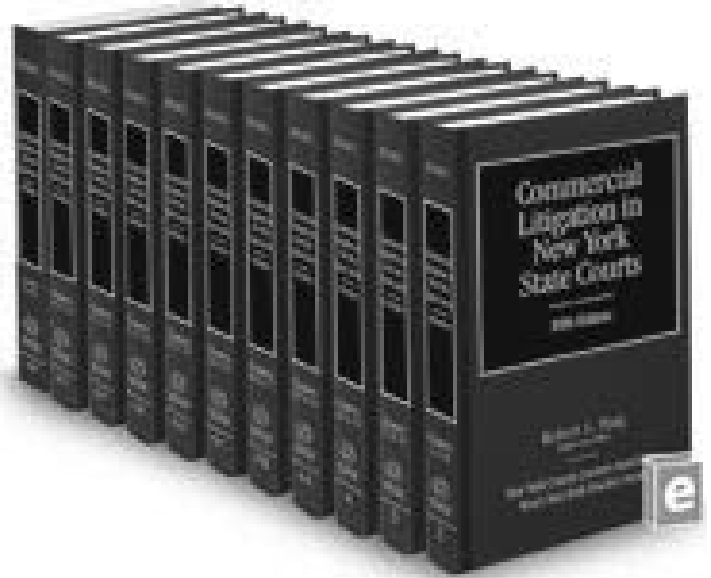
Ross J. Kartez is a litigator, mediator and arbitrator, the chair of Ruskin Moscou Faltischek's ADR practice group and is an active member of the firm's commercial litigation department. Ross is the immediate past chair of the New York State Bar Association's Dispute Resolution Section and a current co-chair of the Nassau County Bar Association's ADR Committee.

ing advice, and includes two extremely useful checklists for advocates entering into negotiation settings.

Chapter 68, “Mediation and Other Nonbinding ADR,” is an invaluable resource for practitioners seeking to navigate the ADR waters. John S. Kiernan and William H. Taft V are industry leaders with clear and comprehensive understandings of the ADR landscape. With sections devoted to defining ADR processes, timing, applicable laws and procedures, confidentiality, mediator immunity, compelling mediation, mediator selection, and resolving impasse, the authors provide a fantastic, streamlined explanation of the nonbinding ADR process with exceptional advice for practitioners. The chapter includes a comprehensive mediation checklist and helpful form clauses to be considered for pre-dispute and post-dispute mediation agreements.

Chapter 69, “Arbitration,” walks the reader through the arbitration process, including discussions on drafting arbitration agreements, compelling arbitration, challenging the arbitration agreement, arbitrator selection, disqualification, discovery, emergency arbitrators, enforcement, and vacatur. James E. Brandt, Claudia T. Salomon, and Lilia Vazova provide an excellent overview of the process and key issues to focus on. Domestic arbitration and international arbitration are like apples and oranges, and this point is not lost in this litigation-focused resource. In Chapter 70, John L. Gardiner, Jonathan L. Frank, and Lea Haber Kuck address international arbitration, with substantial focus on jurisdiction, the role of the courts, procedure in the New York County Supreme Court Commercial Division (and in other courts), enforcement, awards, vacatur, and much more.

This is a well-rounded guide for today’s commercial litigator. One piece of advice that I always stress is that case evaluation should be done at the outset and throughout a client engagement. It is all too common for mediators to discover, on cases with old index numbers, that the attorneys have failed to conduct a thorough case evaluation. *Commercial Litigation in New York State Courts* (Fifth Edition) addresses this deficiency and contains a significant chapter on case evaluation. Alan I. Raylesberg and Robert A. Schwinger provide a comprehensive guide for case evaluation at the outset and throughout the litigation process (including during settlement stages). The chapter notes, “[p]roper case evaluation is critical to determining, based on a cost-benefit analysis and other factors, whether a client should prosecute or defend a particular action, the extent to which resources should be utilized on particular litigation strategies, and whether and when to consider settlement of a case or the utilization of [ADR]. . . .” This is perhaps the *most* important role for attorneys representing clients in disputes. Many more New York litigators need to read this chapter, understand its importance, and put it to practice.



*Commercial Litigation in New York State Courts* (Fifth Edition) remains one of the most important resources for New York commercial litigators *and* ADR practitioners. I am extremely pleased to see that as the practice has evolved to become more ADR-focused, this resource has evolved as well. In 2019, Chief Judge Janet DiFiore announced the “presumptive ADR” initiative, “striv[ing] to make ADR an integral part of our court culture.”<sup>1</sup> As “presumptive ADR” continues to develop throughout New York State, I look forward to this treatise becoming more and more ADR-focused in an effort to help our businesspeople get better, quicker, and more efficient results from our legal system.

#### Endnote

1. [https://ww2.nycourts.gov/sites/default/files/document/files/2019-05/PR19\\_09\\_0.pdf](https://ww2.nycourts.gov/sites/default/files/document/files/2019-05/PR19_09_0.pdf) p. 3.

## What a Development This Is: *Morgan v. Sundance, Inc.*

By Laura A. Kaster

In a rare unanimous opinion in *Morgan v. Sundance, Inc.*,<sup>1</sup> decided May 23, 2022, the Court took a very significant turn away from a half century of its own doctrine. This surprising detour has not been widely commented upon. Most of the commentary on the case focuses—not surprisingly—on the *Morgan* holding that waiver of a contractual right to arbitration may occur by a claimant’s litigation conduct, and importantly, that there need be no showing of prejudice to the opposing party. The part of the short opinion that is in many ways more startling is the rationale that enabled the Court to reject the prejudice requirement. The Court held that the federal courts may not apply a procedural waiver rule to arbitration cases that they do not apply in other cases. The special rule was imposed by most Courts of Appeal because, and here lies the change in direction, the much repeated statement that the FAA reflects a “policy favoring arbitration” means simply that arbitration agreements must be treated the same way as all other contracts. They can neither be favored nor disfavored.

The policy favoring arbitration was never a correct reflection of the FAA 9 U.S.C. § 1-14. That Act, now almost 100 years old, was enacted to overcome judicial antipathy to arbitration reflected in common law doctrines that disfavored arbitration agreements, allowing courts to deny equitable enforcement of agreements to arbitrate, and making executory arbitration agreements revocable (the doctrines of revocability and non-enforceability). In the language of the Act itself:

A written provision in any maritime transaction or a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction, or the refusal to perform the whole or any part thereof, or an agreement in writing to submit to arbitration an existing controversy arising out of such a contract, transaction, or refusal,

*shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.*<sup>9</sup>

U.S.C. § 2 (emphasis supplied).

As Justice Kagan correctly states in *Morgan*, the Act simply made arbitration clauses equal. So how did the policy favoring arbitration become a staple of Supreme Court lore over the last 50 years or more?

The first foreshadowing of a policy favoring arbitration came in the Second Circuit ruling in *Robert Lawrence Co. v. Devonshire Fabrics, Inc.*<sup>2</sup> In that case, Judge Medina found the arbitration clause separable from the contract that contained it and stated: there is a “liberal policy of promoting arbitration both to accord with the original intention of the parties and to help ease the current congestion of court calendars.”<sup>3</sup>

In 1960, the important labor trilogy of cases were decided and made clear that the broad governing principles of labor governance, and the tradeoff of rights entailed in adopting an interrelated system of labor/management governance, meant that arbitration was indeed favored in labor disputes. But the decision in *United Steelworkers of America v. Warrior & Gulf Navigation Co.*,<sup>4</sup> explicitly recognized the important distinctions between labor and commercial arbitration:

In the commercial case, arbitration is the substitute for litigation. Here [in *Warrior & Gulf*] arbitration is the substitute for industrial strife. Since arbitration of labor disputes has quite different functions from arbitration under an ordinary commercial agreement, the hostility evinced by courts toward arbitration of commercial agreements has no place here. For arbitration of labor disputes under collective bargaining agreements is part and parcel of the collective bargaining process itself.

The collective bargaining agreement states the rights and duties of the parties. It is more than a contract; it is a generalized code to govern a myriad of cases which the draftsmen cannot wholly anticipate.

Laura A. Kaster, FCI Arb, a fellow of the College of Commercial Arbitrators, is Co-Editor-in-Chief of this journal, past Chair of the Dispute Resolution Section of NYSBA and an arbitrator and mediator for the AAA, CPR, ICDR, FINRA and the New York and New Jersey courts. She publishes and speaks widely on ADR.



. . . Within the sphere of collective bargaining, the institutional characteristics and the governmental nature of the collective-bargaining process demand a common law of the shop which implements and furnishes the context of the agreement.<sup>5</sup>

Although a commercial arbitration clause serves predominantly to implement private parties' intent rather than public policy, in *Prima Paint Corp. v. Flood & Conklin Manufacturing Co.*,<sup>6</sup> the Supreme Court adopted the *Lawrence* approach and held arbitration clauses separable from the contract that contained them, thereby favoring their enforcement and beginning a half century of conflating the policies that underlie labor arbitration with the very different policies that underlie private contractual agreements to arbitrate commercial disputes.

A host of cases have specifically repeated the Court's "liberal policy" favoring arbitration:

We have described [Section 2 of the FAA] provision as reflecting both a "liberal federal policy favoring arbitration," *Moses H. Cone, supra*, [460 U.S. 1] at 24, 103 S.Ct. 927, and the "fundamental principle that arbitration is a matter of contract," *Rent-A-Center, West, Inc. v. Jackson*, 561 U.S. 63, 67, 130 S.Ct. 2772, 2776, 177 L.Ed.2d 403 (2010). In line with these principles, courts must place arbitration agreements on an equal footing with other contracts, *Buckeye Check Cashing, Inc. v. Cardegna*, 546 U.S. 440, 443, 126 S.Ct. 1204, 163 L.Ed.2d 1038 (2006), and enforce them according to their terms, *Volt Information Sciences, Inc. v. Board of Trustees of Leland Stanford Junior Univ.*, 489 U.S. 468, 478, 109 S.Ct. 1248, 103 L.Ed.2d 488 (1989).

The final phrase of § 2, however, permits arbitration agreements to be declared unenforceable "upon such grounds as exist at law or in equity for the revocation of any contract." This saving clause permits agreements to arbitrate to be invalidated by "generally applicable contract defenses, such as fraud, duress, or unconscionability," but not by defenses that apply only to arbitration or that derive their meaning from the fact that an agreement to arbitrate is at issue. *Doctor's Associates, Inc. v. Casarotto*, 517 U.S. 681, 687, 116 S.Ct. 1652, 134 L.Ed.2d 902 (1996); see also *Perry v. Thomas*, 482

U.S. 483, 492–493, n. 9, 107 S.Ct. 2520, 96 L.Ed.2d 426 (1987).

*AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 339–40, 131 S. Ct. 1740, 1745–46 (2011)

## Conclusion

With the *Morgan* decision, there is retrenchment and a course correction regarding commercial arbitration. It will be interesting to watch whether the quite revolutionary rejection of a liberal policy favoring arbitration will have a pervasive influence on arbitration law.

## Endnotes

1. \_\_\_U.S.\_\_\_, 142 S.Ct. 1708, 2022 WL 1611788 (2022); [https://www.supremecourt.gov/opinions/21pdf/21-328\\_m6ho.pdf](https://www.supremecourt.gov/opinions/21pdf/21-328_m6ho.pdf).
2. 271 F.2d 402 (2d Cir. 1959), cert. granted, 362 U.S. 909, cert. dismissed, 364 U.S. 801 (1960).
3. 271 F.2d at 410.
4. 363 U.S. 574 (1960).
5. 363 U.S. at 579-80, quoting Cox, *Reflections Upon Labor Arbitration*, 72 Harv. L. Rev. 1482, 1499 (1959).
6. 388 U.S. 395 (1967).

# Case Summaries

By Alfred G. Feliu

## Jurisdiction Under FAA To Vacate or Confirm Award Limited

The Supreme Court ruled that a court may not “look through” a motion to confirm or vacate an award under the FAA to determine federal jurisdiction. This contrasts with the Court’s earlier ruling in *Vaden v. Discover Bank* under § 4 of the FAA where the look-through method was invoked to confer FAA jurisdiction. The distinction, the Court explained, is based on differing language in the applicable sections of the FAA. It is well established that the FAA does not confer federal jurisdiction itself. The Court explained that § 4 of the FAA addressing enforcement of arbitration agreements provides that “save for the [arbitration agreements],” the federal court would have jurisdiction indicating that a court should assume the absence of the arbitration agreement when determining whether jurisdiction is present. No such language appears in §§ 9 and 10 of the FAA relating to the confirmation and vacatur of awards. The Court reasoned that it must assume that Congress’s decision to include particular language in one provision of a statute but omit it from another section is deliberate. “We have no warrant to redline the FAA, importing Section 4’s consequential language into provisions containing nothing like it.” The Court emphasized that the “look-through rule is a highly unusual one: It locates jurisdiction not in the action actually before the court, but in another controversy neither there nor ever meant to be.” The Court also rejected the policy arguments, adopted by Justice Breyer in dissent, in favor of uniformity in the application of the FAA. In doing so, the Court explained that “Congress chose to respect the capacity of state courts to properly enforce arbitral awards. In our turn, we must respect that evident congressional choice.” *Badgerow v. Walters*, 142 S. Ct. 1310 (2022). NOTE: *Bissonnette v. Lepage Bakeries Park Street*, 33 F.4th 650 (2d Cir. 2022) (dictum from Judge Dennis Jacobs following the decision in *Badgerow* suggesting that, although it is “too early to say,” dismissal of, rather than

staying, case following the granting of a motion to compel has “ramifications.” In particular, dismissal will almost certainly require an independent jurisdictional basis upon further action in the case, while granting a stay “pursuant to Section 3 may allow parties to seek enforcement, vacatur, or modification of an award . . . or seek other assistance from the FAA . . . without need for an independent basis for federal jurisdiction,” noting that “Justice Breyer’s dissent in *Badgerow* suggests as much.”).

## Showing of Prejudice Not Required for Waiver of Arbitration

A unanimous Supreme Court ruled that a showing of prejudice is not required for finding that a party waived its right to compel arbitration. In doing so, the Court rejected the prevailing view endorsed by a majority of federal appellate courts which required a showing of prejudice as a condition for a finding of the waiver of a right to arbitration. The Court rebuked those courts of appeal for applying a rule specific to the arbitration context. The Court pointed out that “a federal court deciding whether a litigant has waived a right does not ask if its actions caused harm.” The Court rejected the appellate courts’ grounding of their reasoning on the FAA’s policy favoring arbitration. The Court emphasized that the policy favoring arbitration “does not authorize federal courts to invent special, arbitration-preferring procedural rules.” The FAA was enacted, the Court noted, to overrule the judiciary’s refusal to enforce arbitration agreements on their terms, not to make them more enforceable than other contracts. “The federal policy is about treating arbitration contracts like all others, not about fostering arbitration.” The issue to be decided in the waiver context, the Court concluded, is whether the party seeking to compel arbitration “knowingly relinquish[ed] the right to arbitrate by acting inconsistently with that right” and on that basis remanded the case to the Eighth Circuit for further proceedings. *Morgan v. Sundance, Inc.*, 142 S. Ct. 1708 (U.S. 2022). NOTE: Laura Kaster provides additional commentary on *Morgan v. Sundance* on p. 38 of this issue.

## Individual, Not Representative, PAGA Claim Arbitrable

California’s Private Attorneys General Act (PAGA) affords an aggrieved employee the opportunity to initiate actions against a former employer “on behalf of himself or herself and other current or former employees” to obtain civil penalties

Alfred G. Feliu is an arbitrator and mediator on various AAA and CPR panels. Mr. Feliu is a past chair of the NYSBA Labor and Employment Law Section and a fellow of the College of Commercial Arbitrators and the College of Labor and Employment lawyers. Mr. Feliu is the author of *ADR in Employment Law*, published by Bloomberg/BNA.

otherwise recoverable by the state's Labor & Workforce Development Agency (LWDA). The California Supreme Court in *Iskanian v. CLS Transportation* ruled that PAGA claims may not be waived and cannot be split between individual claims relating to the plaintiff and representative claims. Therefore, under *Iskanian*, class action waivers were not enforceable or arbitrable because the plaintiff was deemed to be acting in a representative capacity. The Supreme Court, in an 8 to 1 decision, ruled that the FAA preempted PAGA to the extent that it is deemed to bar the arbitration of claims particular to the plaintiff. The Court reasoned that PAGA, which allows a plaintiff to join in a representative capacity "any claims that could have been raised by the State in an enforcement proceeding," greatly expands the reach and potential impact on the defendant of the proceeding. The ability of a PAGA plaintiff under California law to join the claims of others not party to the proceeding defeats the FAA's mandate that arbitration is a matter of contract and "state law cannot condition the enforceability of an arbitration agreement on the availability of a procedural mechanism that would permit a party to expand the scope of the arbitration by introducing claims that the parties did not jointly agree to arbitrate." The joinder rule, in the Court's opinion, functions in that way by requiring the employer here to litigate both the plaintiffs' individual PAGA claim, which it bargained for", and the representative claims which the Court acknowledges was prohibited by the *Iskanian* decision:

Requiring arbitration procedures to include a joinder rule of that kind compels parties to either go along with an arbitration in which the range of issues under consideration is determined by coercion rather than consent, or else forgo arbitration altogether. Either way, the parties are coerced into giving up a right they enjoy under the FAA.

This, the Court concluded, was coercive and forced parties to opt for a judicial forum at the expense of an agreement to arbitrate. The Court, relying on the severability clause in the parties' arbitration agreement, ruled that "the FAA preempts the rule of *Iskanian* insofar as it precludes division of PAGA actions into individual and non-individual claims through an agreement to arbitrate." *Viking River Cruises v. Moriana*, 142 S. Ct. 1906 (2022).

### **U.S. Discovery Available to "Foreign Tribunals," Not for Private Arbitration**

Parties in foreign tribunals may seek discovery in U.S. courts under 28 USC § 1782. Courts disagreed as to whether non-U.S. private arbitrations constituted foreign tribunals for purposes of § 1782. A unanimous Supreme Court ruled that tribunals for purposes of § 1782 are adjudicative bodies

that exercise governmental authority and not arbitration panels in private, non-governmental matters. The Court found important inconsistencies between the FAA and § 1782. Most notably, the Court pointed out that "discovery is off the table under the FAA but broadly available under § 1782." One of the two consolidated cases here subject to the ruling involved a foreign corporation and a Lithuanian bank. The Court, focusing on the substance of the parties' agreement, acknowledged that this dispute was subject to arbitration based on an international treaty, but emphasized that the arbitration panel was ad hoc and not pre-existing. "Nothing in the treaty reflects Russia and Lithuania's intent that an ad hoc panel exercise governmental authority. For instance, the treaty does not itself create the panel; instead, it simply references the set of rules that govern the panel's formation and procedure if an investor chooses that forum." The Court added that, like in a private arbitration, the authority of the arbitration panel in this case derived from the parties' consent to arbitrate. "Russia and Lithuania each agreed in the treaty to submit to ad hoc arbitration if an investor chose it." The Court reasoned that "a body does not possess governmental authority just because nations agree in a treaty to submit to arbitration before it." The Court concluded that "neither the private commercial arbitral panel in the first case nor the ad hoc arbitration panel in the second case qualifies" as a foreign or international tribunal for purposes of § 1782. *ZF Automotive US v. AlixPartners, Ltd*, 142 S. Ct. 2078 (2022).

### **FAA Transportation Worker Exemption Applies to Airline Ramp Supervisor**

The Supreme Court ruled that the FAA transportation worker exemption applies to "any class of workers directly involved in transporting goods across state lines or international borders." In doing so, the unanimous Court rejected the employee's argument that any workers in the industry itself, whether or not they are actively engaged in moving goods in interstate commerce, are exempt. The employee here, as part of her job as an airline ramp supervisor, physically loaded and unloaded baggage and freight onto planes. The Court was persuaded that "cargo loaders exhibit the central function of a transportation worker" and are "intimately involved in the commerce (e.g., transportation) of that cargo." The Court rejected as too narrow the airline's argument that since the cargo loaders did not actually accompany the cargo across state lines, like pilots and ship crews do, they cannot be engaged in interstate commerce. At the same time, the Court rejected the employee's argument that all employees in the transportation industry are exempt. Focusing on the words of the exemption itself, the Court concluded that "Section 1's plain text suffices to show that airplane cargo loaders are exempt from the FAA's scope, and we have no warrant to elevate vague invocations of

statutory purpose over the words Congress chose.” *Southwest Airlines Co. v Saxon*, 142 S. Ct. 1783 (2022).

## Uber Must Pay Arbitration Fees for Over 31,000 Demands

Over 31,000 claims were filed with the AAA against Uber Eats alleging reverse discrimination resulting from its decision to waive delivery fees for Black-owned restaurants following the death of George Floyd. Under the AAA fee schedule, Uber would owe a \$500 filing fee, \$1,400 case management fee, and \$1,500 arbitrator fee for each demand, totaling approximately \$107 million. The AAA decided to organize the claims in five batches under California rules. Uber paid a reduced filing fee of \$4.3 million and agreed to pay a case management fee of \$667,800 for the first batch of cases but did so under protest. The AAA agreed to refund the case management fees provided under protest if that protest was upheld. Uber filed a complaint seeking declaratory judgment and injunctive relief after receiving the AAA’s next case management fee of \$10.79 million, alleging breach of contract, breach of the implied covenant of good faith and fair dealing, unjust enrichment and restitution, and unfair competition under California law. The trial court denied Uber’s motion for injunctive relief and the appellate court affirmed. The court explained that neither the application of California rules nor the AAA’s Consumer Due Process Protocol Statement of Principles requires the AAA to charge “reasonable” fees, only fees in accordance with the applicable fee schedule. To the extent reasonable fees are addressed in the Protocol they relate to ensuring that consumers receive due process. The court added that Uber was unlikely to demonstrate a likelihood of success on the merits of its good faith and fair dealing or unfair competition claims where there is no evidence that the AAA “acted with dishonesty, deceit, or unfaithfulness to duty,” or that enforcement of its fee schedule would “offend public policy, and is not immoral, unethical, oppressive, unscrupulous, or substantially injurious” to consumers. In affirming the trial court’s denial of Uber’s request for injunctive relief, the appellate court opined that while “Uber is trying to avoid paying the arbitration fees associated with 31,000 nearly identical cases, it made the business decision to preclude class, collective, or representative claims in its arbitration agreement with its consumers, and the AAA’s fees are directly attributable to that decision.” *Uber Technologies v. American Arbitration Association*, 204 A.D.3d 506 (1st Dep’t 2022).

## Settlement Terms Agreed to in Mediation Enforced

A *pro se* plaintiff sued her former employer asserting claims of discrimination. The court sent the matter to the court-annexed mediation program and assigned plaintiff a *pro bono* counsel. The parties reached an agreement and prepared a “Mediation Agreement” which stated that the parties reached an agreement on “all issues” and set forth certain key terms of the settlement including: the settlement amount; COBRA terms, and a release of claims. The parties also agreed that a “full settlement agreement with the applicable releases will follow.” The parties negotiated a full agreement that included additional terms including: a no reemployment provision; a confidentiality requirement with a liquidated damages term for any violations of confidentiality; neutral reference and non-disparagement terms, and a pledge by plaintiff not to assist anyone else in bringing claims against defendant.

Plaintiff notified the court that she wanted to revoke her agreement to the Mediation Agreement. She alleged that she was confused during the mediation; a lawyer told her that the mediation was the “nicer portion” of the lawsuit; the mediator told her that in litigation she would “be stuck in a room filled with white men that would question every aspect of [her] life for years”; she took ten minutes to “clear her head” and asked for a few additional days to consider the terms and was told that she could not have that time, and; that she signed the agreement because she felt she “had no choice.” The employer moved to enforce the Mediation Agreement and the district court granted the motion. The Second Circuit affirmed. The court noted that in this circuit preliminary agreements are viewed as either comprehensive or one in which there is a mutual commitment to the major terms with recognition that open terms remain to be negotiated. In this case, the text itself, which the court emphasized “is the most important consideration when determining how the parties intended to be bound”, states that agreement had been reached “on all issues” and that the terms that had been agreed to were “material.”

The court acknowledged that the full agreement contained terms not in the Mediation Agreement but added “there is no evidence—either in the text of the mediation agreement or the record—to suggest that those new terms were considered open issues in need of negotiation at the time the parties entered into the Mediation Agreement, which is the proper frame of reference. And a party cannot reopen a deal by proposing additional terms at a later date. Of course, [plaintiff] cannot be bound by those additional terms because she never agreed to them.” But the court concluded that plaintiff could be bound by the terms in the Mediation Agreement as it was “clear that everyone in the mediation understood the executed Mediation Agreement to bind the parties to its terms

and not merely set a framework for future negotiations.” The court noted that plaintiff admitted that she had “agonized” over the Agreement and took time “to clear her head and to call her mother before signing, indicating that she thought the mediation agreement would bind her and conclude the litigation.” The court concluded that the record established that the parties intended to be bound by the Mediation Agreement and that it was enforceable.” *Murphy v. Institute of International Education*, 32 F.4th 146 (2d Cir. 2022). NOTE: For more about this case, please see Bierman, p. 29 of this issue.

### **Evident Partiality and Manifest Disregard Claims Denied**

Connecticut law provides that arbitration awards issued more than 30 days after the proceeding concludes “shall have no legal effect.” The losing party here challenged the award, seeking to apply Connecticut law and overturn it on manifest disregard grounds. The district court rejected this argument and the Second Circuit affirmed, both courts finding that the panel or its “umpire” did not intentionally disregard applicable law. The appellate court noted that no provision in the agreement between the parties “indicates that disputes will be arbitrated pursuant to the law of the State of Connecticut, and nothing more than speculation indicates that the umpire knew he was obliged to issue an award within 30 days of the final submissions.” The court also declined to vacate the award on evident partiality grounds because the law firm of one party-appointed arbitrator and the law firm of the umpire had conducted business together prior to the arbitration and no disclosure of this connection was made. The court pointed out that the other party-appointed arbitrator was made aware of the connection and consented to the umpire continuing his role. In any event, the court focused on the fact that the two arbitrators themselves were not connected individually but “merely that their firms had had prior interactions. Such a threadbare allegation—that would not show ‘evident partiality’ even if true—does not require the district court to hold a hearing on the allegation, let alone vacate the award.” *Loch View v. Seneca Insurance Co.*, 2022 WL 1210664 (2d Cir.).

### **Inquiry Notice and Assent to Terms of Service Found**

Plaintiffs were users of defendant’s mobile payment app. The online app process, the court ruled, put the plaintiffs on inquiry notice of the service’s terms of service that contained a dispute resolution process ending in arbitration. The court found the e-mail interface “included all the hallmarks of conspicuousness that put them on inquiry notice: the underlined text signified a hyperlink to a reasonably smart phone user; the familiar warning language prompted the user to read the

hyperlinked terms; and the terms were temporally coupled with a successful registration.” Once on inquiry notice, the question became whether a “reasonably prudent smartphone user’s attention to the hyperlinked General Terms of Service” was directed to those terms. The court noted that “[h]yperlinks do not provide an incorporation-by-reference cure-all.” Nonetheless the court found here that the hyperlinked text was reasonably conspicuous and placed plaintiffs on actual notice of the terms of service. Finally, the court found assent to those terms of service based on plaintiffs’ entering sign-in codes provided to them and the fact that they were twice “provided the familiar warning language and terms of service in a clear and conspicuous way, coupled spatially and temporally with the mechanism for manifesting assent to those terms, i.e., the ‘Next’ button.” For these reasons, the court granted defendant’s motion to compel. *Thorne v. Square, Inc.*, 2022 WL 542383 (E.D.N.Y.), *appeal withdrawn*, 2022 WL 2068771 (2d Cir.). *See also Harrison v. Revel Transit*, 2022 WL 356988 (N.Y. Sup. Kings Cty.) (reasonably prudent user of on-line registration process was placed on notice of arbitration clause where assent to terms of use was on first screen viewed and “design and content of these mobile application screenshots rendered the existence of [defendant’s] agreements to be reasonably conspicuous”).

### **Evidence Lacking of Employee’s Acceptance of Agreement To Arbitrate**

The Second Circuit ruled that an employee’s sworn declaration that she did not agree to the terms of an online arbitration agreement is sufficient to defeat a motion to compel. The employer in this case produced an electronic signature affixed to the arbitration agreement and proof that the employee was onsite the day the electronic signature was entered. The court nonetheless found sufficient the employee’s declaration which related in “specific and exacting terms, and under penalty of perjury, [that] she categorically denied ever completing the electronic paperwork” or having any knowledge of or ever using the system required to provide such affirmance. The court was also not persuaded by the fact that the electronic signature was entered at the workplace, noting that the employer owned and possessed the equipment as opposed to the signature being entered from the employee’s computer at home. The employer’s claim was further undercut, according to the court, by the fact that the employer produced a paper copy of a signed arbitration agreement for a co-plaintiff but not for this plaintiff. The Second Circuit concluded that “[c]ombined, this evidence makes clear that [plaintiff] has created a triable issue of fact as to the validity of the signature on her electronic . . . arbitration agreements.” *Barrows v. Brinker Restaurant Corp.*, 36 F. 4th 45 (2d Cir. 2022).

# Section Committees and Chairs

The Dispute Resolution Section encourages members to participate in its programs and to contact the Section Officers or Committee Chairs for information.

## Arbitration

William Crosby  
The Interpublic Group of Companies, Inc.  
New York, NY  
william.crosby@interpublic.com

Loretta Gastwirth  
Meltzer, Lippe Goldstein & Breitstone LLP  
Mineola, NY  
lgastwirth@meltzerlippe.com

## ADR in the Courts

Laura A. Kaster  
Appropriate Dispute Solutions  
Princeton, NJ  
laura.kaster@kasteradr.com

Daniel F. Kolb  
Davis Polk & Wardwell  
New York, NY  
daniel.kolb@davispolk.com

## CLE and Education

Mansi Karol  
American Arbitration Association  
New York, NY  
karolm@adr.org

Richard Janvey  
Diamond McCarthy LLP  
New York, NY  
rjanvey@diamondmccarthy.com

Jacqueline Nolan-Hanley  
Fordham U. School of Law  
New York, NY  
jnolanhanley@law.fordham.edu

## Commercial Lending

Deborah A. Reperowitz  
Stradley Ronon Stevens & Young  
New York, NY  
dreperowitz@stradley.com

Jeffrey A. Wurst  
Armstrong Teasdale LLP  
New York, NY  
jwurst@atllp.com

## Diversity & Inclusion

Mary Austin  
New York, NY  
mkaustin221@gmail.com

Alfreida Kenny  
The Law Office of Alfreida B. Kenny  
New York, NY  
abkenny@abkenny.com

## Ethical Issues and Ethical Standards

David Singer  
SingerADR Neutral Services  
New York, NY  
dsinger@singeradr.com

Randall Tesser  
Tesser, Ryan & Rochman LLP  
White Plains, NY  
rtesser@tesserryan.com

## Health Care

Katherine Benesch  
Benesch & Associates LLC  
Princeton, NJ  
kb@kbeneschlaw.com

John DiBlasi  
National Arbitration and Mediation  
New York, NY  
diblajo@aol.com

## Insurance Disputes

Mark A. Bunim  
Case Closure  
New York, NY  
bunim@caseclosure.com

Dana Shafter Gliedman  
Anderson Kill  
New York, NY  
dgliedman@andersonkill.com

## International Dispute Resolution

Mohamed Fathy Metwally Sweify  
Fordham U. School of Law  
New York, NY  
msweify@fordham.edu

Mia Levi  
CPR Institute  
New York, NY  
mlevi@cpradr.org

Salmon Ravala  
Criscione Ravala LLP  
New York, NY  
sravala@lawcrt.com

## Legislation

Lorraine Mandel  
Mandel Arbitration and Mediation LLC  
New York, NY  
lmandel@rcn.com

Erica Levine Powers  
Albany, NY  
ericalevinepowersesq@gmail.com

## Mediation

Emily Altman  
Emily Altman LLC  
New York, NY  
emily.m.altman@gmail.com

Bart J. Eagle  
Scarola Zubatov Scharffzin PLLC  
New York, NY  
bje@barteaglelaw.com

Gary P. Shaffer  
Shaffer Mediation  
Brooklyn, NY  
gary@shaffermediation.com

## Mediation of Wills, Trusts, Estates, Guardianship, & Elderly Disputes

Amy Hsu  
New York, NY  
amy446hsu@gmail.com

Kera Reed  
Ruskin Moscou Faltischek PC  
Uniondale, NY  
kreed@rmfpc.com

## Membership

Marilyn Genoa  
Genoa & Associates PC  
Glen Head, NY  
mkgenoa@genoaandassociates.com

Susan E. Salazar  
CUNY School of Law  
New York, NY  
salazar@susansalazarlaw.com

## Negotiations

Courtney Chicvak  
Kings Park, NY  
chicvak.courtney@gmail.com

Paul Radvany  
Fordham U. School of Law  
New York, NY  
radvany@law.fordham.edu

## Publications

Sherman W. Kahn  
Mauriel Kapouytian Woods LLP  
New York, NY  
skahn@mkwllp.com

Laura A. Kaster  
Appropriate Dispute Resolutions  
Princeton, NJ  
laura.kaster@kasteradr.com

Edna Sussman  
SussmanADR LLC  
Scarsdale, NY  
esusman@sussmanadr.com

## Securities Disputes

Howard A. Fischer  
Moses & Singer LLP  
New York, NY  
hfischer@mosessinger.com

Christine M. Lazaro  
St. John's University School of Law  
Jamaica, NY  
lazaroc@stjohns.edu

## Sports ADR

Alex Bachuwa  
Bachuwa Law  
Houston, TX  
alex@nomadresolutions.com

Jill Pilgrim  
Pilgrim & Associates Law & Mediation LLC  
New York, NY  
jpesq@pilgrim-associates.com





NEW YORK STATE BAR ASSOCIATION  
**DISPUTE RESOLUTION SECTION**  
One Elk Street, Albany, New York 12207-1002

NON PROFIT ORG.  
U.S. POSTAGE  
**PAID**  
ALBANY, N.Y.  
PERMIT NO. 155



# *Annual* **MEETING** 2023

## **Save the Date**

**JAN. 18 - JAN. 24, 2023**

**Registration starts in October**

**Additional Details & Agendas Coming Soon!**