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New York Dispute Resolution Lawyer

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

Dispute Resolution Section

Events & Activities

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May 14, 2024 | 12:30 p.m. – 1:30 p.m.
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June 6, 2024 | 6:00 p.m. – 7:00 p.m.
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June 11, 2024 | 12:30 p.m. – 1:30 p.m.
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Message From the Chair

Jeffrey K. Anderson

As the first person to serve as "Upstate Chair," it continues to be a privilege to serve as Chair of the Dispute Resolution Section. I could not do so without the tremendous support of Chair-Elect Jill Pilgrim and Vice Chair Bill Crosby. Equally important are the never-ending contributions of Secretary Erica Levine Powers, Treasurer Deborah Reperowitz and our tireless Section Liaison, Simone Smith. My heartfelt gratitude goes out to each of them. Thanks also in advance to Loretta Gastwirth, who will succeed Bill Crosby as Vice Chair.

I announced my goals as Chair to consist of three initiatives. The first was to bring more "upstaters" into the many committees and activities of the Section. I have held virtual meetings with members from several upstate counties who have shared ideas and discussed how, through greater collaboration, the Section could benefit from cross pollination of programming and events with our downstate membership. I am encouraged by the enthusiasm of the people involved in this project and will continue to expand its work.

Second, to continue the fine efforts of past Chairs, I have worked to support enhancement of diversity in our Section's membership, programs, and events. On October 18, the Diversity and Inclusion Committee, chaired by Mary Austin and Alfreida Kenney, held its second annual gala at the American Museum of the American Indian. Judge Laura Taylor Swain, Chief Judge of the United States District Court for the Southern District, delivered a remarkable keynote address. Additionally, the Mediation Mentorship Subcommittee of the Mediation Committee, co-chaired by Erica Levine Powers and Lorraine Mandel, has continued to pair experienced mediators with newer practitioners of diverse backgrounds, to provide advice and encourage "shadowing" to promote skill development. The publicizing of diverse ADR practitioners and inclusivity programs through our journal, *New York Dispute Resolution Lawyer*, are additional examples of the Section's commitment to diversity and inclusion.

My third initiative has been to formalize the Section's relationship with our state's fifteen law schools, to encourage and welcome graduates interested in careers in dispute resolution into our Section, with the additional goal of increasing the presence of diverse dispute resolution practitioners. With the support of the Continuing Legal Education Committee, this connection has been established with key members of faculty in dispute resolution in the state's law schools.

Being immersed in the day-to-day workings of the Section has enabled me to fully recognize the never-ending, selfless commitment of the people who carry out its important mission. They devote their time, energy, and experience to chairing the committees and working groups that conceive, plan and bring to our members the high-quality programs and events which bring national recognition to our Section in the field of dispute resolution. These programs provide valuable training for new mediators and arbitrators and promote the critical goal of increasing diversity in the field. There are so many events and people involved in making this happen that I am sure to be remiss in expressing gratitude to some; and ask forgiveness for those who I fail to include.

Elizabeth Shampnoi joined Bart Eagle and Gary Shaffer this year as Co-Chairs of the Mediation Committee. Informative monthly meetings generate frequent programs of interest to members. In addition, the popular monthly "Mediator Roundtable" series, hosted by Chris McDonald and Carmen Rodriguez, presents topics of interest by experienced practitioners.

Marilyn Genoa and Susan Salazar, Co-Chairs of the Membership Committee, host the "Habits of Highly Effective Dispute Resolvers" series, highlighting leaders in the dispute resolution field. The Technology Committee, one of the Section's newest committees, through the hard work of Deborah Reperowitz and Paul Gupta, holds well attended meetings. Last October, the committee co-sponsored "Technology Impacts Us All," in which they gave highly acclaimed presentations.

The list goes on. This year, once again, thanks to the boundless energy of Leslie Berkoff, with the able assists of Chris McDonald, Bart Eagle and Michael Starr, the two-day Dispute Resolution Section's law school Mediation Tournament took place, with a record number of law schools and teams participating. Simeon Baum once again organized and ran the highly regarded commercial mediation program this past fall. The three-day basic training in October was followed by two-day advanced instruction in November. Many thanks to Simeon and Program Chair Evan Spelfogel; with special appreciation to Steve Hochman for his years of work as co-faculty with Simeon.

Recognition is also overdue to the fine work and programs emanating from the following: the Domestic Arbitration Committee (Co-Chairs Loretta Gastwirth and Bill Crosby); Dispute Prevention Committee (Co-Chairs Myrna Barakat Friedman and Erin Gleason Alvarez); Healthcare Committee (Co-Chairs Marilyn Genoa and Jess Bunshaft); International Dispute Resolution Committee (Co-Chairs Mohamed Sweify and Chris Fladgate); Liaisons Committee (Chair Jennifer Lupo); Trusts and Estates Committee (Co-Chairs Amy Hsu and Kera Reed); and the Insurance Disputes Committee (Co-Chairs Dana Shafter Gliedman and Mark Bunim).

On January 16, the Dispute Resolution Section held its program in Manhattan, as a part of the NYSBA Annual Meeting. A fine keynote address was delivered by Deborah Enix-Ross, immediate past Chair of the American Bar Association.

Bart Eagle and I had the honor to present the second annual Chuck Newman Award to Noah Hanft, immediate past Section Chair. Noah joins Dr. Maria Volpe, who received the inaugural award at the last annual meeting. Each stand with the late Chuck Newman, recognized as having exemplified:

> The devotion to the profession, brilliance of mind, generosity of heart, community-oriented, selfless, compassionate, a mentor to many and a teacher to all.

The Section voted on and approved the 2024-5 slate of officers, thanks to the work of the Nominating Committee, Co-Chaired by Theo Cheng, Ross Kartez, Simeon Baum, and Noah Hanft. I was fortunate to be a part of the committee's work. Jill Pilgrim will become Chair in June and Bill Crosby will serve as Chair-Elect. Loretta Gastwirth will be Vice Chair. Erica Levine Powers will extend her service for another term as Secretary, as will Deborah Reperowitz as Treasurer. My heartfelt thanks to each of them for their devotion and fine work. The Section greatly benefits from their service.

On April 16, the Section's Virtual Meeting was held, in which seasoned practitioners provided practical "real world" guidance to practitioners and elicited audience feedback about mediation, arbitration, dispute prevention and collaborative law practice. Thanks to each of the members who worked on this highly successful program.

We should never lose sight of the outstanding work of Co-Editors Laura Kaster, Edna Sussman and Sherman Kahn, who year after year publish the Section's highly respected journal: *New York Dispute Resolution Lawyer.* They work tirelessly to bring articles on timely issues and topics of interest to our membership, and well beyond.

On May 16 and 17, the Spring Meeting was held in Albany, the first time a major Section meeting took place north of Manhattan. New York Court of Appeals Chief Judge Rowan Wilson delivered the keynote address at the opening reception on the 16th, followed by outstanding presentations of topics of interest by three panels of speakers the following day. Thanks goes to Jill Pilgrim for her enthusiastic support of this event.

I have been honored to serve as Chair this year and privileged to work with so many of the highly talented, energetic professionals who selflessly give their time to advance the mission of this Section. The enormous energy and participation is inspiring. It is because of the enthusiasm and generosity of all of the many Section members and leaders that we are a formidable presence in the New York State Bar Association and that we are shaping the path and future of dispute resolution.

Jeffrey K. Anderson

Message From the Co-Editors in Chief

Sherman Kahn

Edna Sussman

Laura A. Kaster

The ADR world has struggled to attain modest improvements in diversity and inclusion. Our Section and this journal have made a point of noting that although the courts do not adequately reflect the communities they serve, we are far behind them. Importantly, the ADR providers and our Section have made serious efforts to improve the landscape. Now the U.S. Supreme Court has put another roadblock on the path to diversity in *Students for Fair Admissions, Inc. v. President & Fellows of Harvard College* and *Students for Fair Admissions, Inc. v. University of North Carolina*. Part of our mission as lawyers and dispute resolvers is to honor and promote the rule of law. We must nevertheless double down on our commitment to basic fairness, equality of opportunity, and the need for representation. We must find lawful ways to make real and meaningful change.

Even in privately contracted ADR and especially in court-annexed ADR, we serve as an adjunct to the judicial system. The members of the varied communities seeking to resolve issues deserve to see themselves represented in the pool of neutrals who help them. As an example, how can it be appropriate that after more than 30 years of women attending law school in equal numbers to men, women remain underrepresented in our field? The representation issue is worse for other groups, but this example demonstrates that identifying the "pipeline" as the problem in many cases is just an excuse and diversion. There are many highly talented neutrals who are not selected simply because it is more comfortable to choose a "usual suspect."

Part of our mission and our work involves creative thinking about potential solutions to difficult problems. We know that abandoning the field of battle is not the best choice if a creative solution is possible. Let us join issue, put the wisdom of crowds to work, and use our collective genius to find a way to double down on expanding the field to include those who have been excluded, promoting basic fairness, better results and better decisions. The Supreme Court cannot and does not limit your personal ability to mentor and sponsor others. If every member of this Section made a conscious effort to promote another neutral's advancement, we could together make a real difference.

In this issue, we have an excellent analysis of the S*tudents for Fair Admissions* prohibiting considerations of race in college admissions and its already outsized impact on the legal world by Ellen Waldman and Robyn Weinstein. We also have a personal article on the impact of a single mentoring program in our field on those who have participated: "We Believe in Supporting Diversity," by Scott L. Evans, Jiyun Cameron Lee, and Lisa D. Love.

We are fortunate to have, as always, Elayne Greenberg's column on ethics, discussing in this issue a consumer and employment opt-in approach to arbitration, and the need for informed consent.

Also on the domestic front, we examine the consequences of inadvertent disclosures in arbitration: John S. Siffert and Angela Zhu examine "The Lurking Risk in Arbitration of Stipulating That Privileged Documents Produced in Discovery Can Be Deemed Inadvertent and Presumptively Clawed Back."

We look at international ADR practice in "State-Sponsored Mediation Around the World: Does It Support the Parties' Interests and the Reception of Mediation?" by Jonathan Rodrigues.

With respect to the future of our field, we have some new insights on our use of websites and other technology: "Resolving Disputes Online? Ensure Your Services Are Disability Accessible" by David Allen Larson. We also have a case note by one of our Editorial Board members, Julie Hopkins, discussing recent Canadian case law on weighing credibility when a disputant seeks the use of a translator.

Our domestic case notes are provided by our inimitable Al Feliu, also a member of our Editorial Board.

We have three important books reviewed in this issue that look to our collective past and to the future: Leonard L. Riskin, *Managing Conflict Mindfully: Don't Believe Everything You Think* (West Publishing 2023), reviewed by one of our Board of Editors, Jackie Nolan-Haley; *The Technological Competence of Arbitrators*, Katia Fach Gómez, reviewed by Matthew Burke; and last but not least, *Professional Judgment for Lawyers*, Randall Kiser (Edward Elgar Publishing 2023), by Laura A. Kaster one of our Co-Editors in Chief.

We hope this issue introduces you to something new you would like to pursue and keeps you engaged in the constant learning required in our field.

Laura A. Kaster
Sherman Kahn
Edna Sussman

Deciding To Arbitrate *After* Consumer Disputes Arise

By Elayne E. Greenberg

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The Context

On September 13, 2023, non-profit organizations and consumer law professors submitted a petition urging the Consumer Financial Protection Bureau (CFB) to allow consumers to decide whether to arbitrate their consumer disputes *after* the dispute arises.[1] This is one more attempt by concerned consumer activists to end the practice that forces consumers to agree at the time of purchase to arbitrate consumer disputes that may arise in the future with a specified arbitration provider such as the American Arbitration Association (AAA),[2] but before the consumer has given their *meaningful informed consent to arbitration.* Moving the consumer's decision whether to arbitrate after a dispute arises, as opposed to at the time of contract formation, is only a first step toward ensuring a consumer's meaningful informed consent to arbitration. More is needed to ensure that consent is informed and meaningful. In this column, I suggest additional affirmative design modifications for lawyers and consumer arbitration providers like the AAA to consider to promote consumers' meaningful informed consent when consumers are deciding whether to arbitrate.

Empirical research on consumers' awareness of "forced arbitration," reinforces that consumers are often not even aware of the arbitration clause when they purchase an item.[3] Moreover, even those consumers who are aware of the arbitration clauses still erroneously believe that no court will enforce such an onerous clause. Rather, they are confident that their justice fantasies will immunize them against court action that enforces arbitration clauses and obscures their consumer's rights.[4] As one illustration, in 2015, this author along with her esteemed colleagues Jeff Sovern, Paul F. Kirgis and Yuxian Liu published their research on 668 consumers' understanding of the ramifications of forced arbitration clauses in their consumer contract.[5] Many participants in the study believed that access to court was a fundamental right that cannot be overridden by a contract clause. "You always have a right to pursue legal action when someone has wronged you, it is not up to one part or another to determine whether or not they will take away that right." "Doesn't matter to them what the contract says, why should it matter to me . . ."[6]

Eight years later, in 2023, Professor Roseanna Sommers tested 1075 consumers about their awareness and knowledge of those consumer contracts they had signed with arbitration contracts.[7] The results were compared with the Sovern study conducted in 2015, and the Sommers' study results were similar. Noteworthy for this discussion, study participants still held on to the justice fantasy study participants voiced in the 2015 Sovern—study participants still believed they would be able to sue in court even if they agreed to the forced arbitration provision in the sample consumer contract.[8]

Additional design modifications should be considered to ensure consumer meaningful informed consent about whether to arbitrate or litigate consumer disputes. Simply moving the decision to provide consent from the time of contract formation to the time a dispute arises does not alone ensure that the consent provided is meaningful and informed.

Designing an Improved Decision-Making Process

At the point of decision-making, the party's attorney or the program's attorney are ethically mandated to educate the party about their viable legal options in a way the consumer finds comprehensible.[9] Specifically, the American Bar Association Model Rule of Professional Conduct 1.2(a) states in relevant part " . . . a lawyer shall abide by a client's decisions concerning the objectives of representation and . . . shall consult with the client as to the means by which they are to be pursued."[10] Model Rule1.4 (b) provides that " a lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation."[11]

An attorney's recitation of the applicable ethical codes is just a beginning, and not enough for most parties to provide their meaningful informed consent. In her study of litigants from three state courts in Utah, California, and Oregon, Donna Shestowsky reported the inadequacy of attorneys' mere recitation of the applicable ethical codes to help a client make a meaningful informed decision about whether to arbitrate.[12] In her study, she found that represented litigants were not more likely to correctly report whether their court offered arbitration than non-represented litigants.[13] Why?

Researcher Roselle Wissler questions whether an attorney's experience and comfort with ADR influences the degree to which they provide their clients adequate information to give their meaningful informed consent to arbitrate.[14]

As part of a lawyer's ethical obligation to provide meaningful and informed consent about arbitration, lawyers and ADR providers like the American Arbitration Association that provides consumer arbitrations should tailor the information and presentations to the individualized informational needs and processing style of the client. The design of any program should also accommodate the diverse informational needs and processing styles of consumers who might be affected by consumer arbitration. The population of consumers with consumer disputes are a heterogeneous group: business savvy vs. unsophisticated; speakers of different native tongues; visual vs. auditory learners; experience with court vs. arbitration, preference for in-person interaction vs. Zoom. What are the different remedies, time, cost, and appealability for each process? Who is the decision-maker, and how does the decision-maker get selected? In addition to the baseline information, some parties have found it helpful to have the information in writing. Others find that a video of an arbitration from beginning to end provides a realistic overview of arbitration and how it differs from litigation.

And Beyond . . .

The focus of this column has been on helping consumers achieve meaningful informed consent when deciding whether to arbitrate their consumer disputes. Yet, the lack of meaningful informed consent has justice implications in other Alternative Dispute Resolution arenas beyond consumer disputes. Parties are different, from inexperienced to sophisticated, with attorneys and without, all with different justice expectations, some realistic, others fantasy land. As ADR providers such as AAA, JAMS, and CPR are proliferating and fast becoming the appropriate way to resolve disputes, the ethical integrity of the ADR provider's program is measured, in large part, by the parties' meaningful informed consent and self-determination. The responsibility to ensure meaningful informed consent is borne by the program designer, administrator, lawyer, neutral, and the parties themselves. And, meaningful informed consent should be in the forefront of program design ab initio and throughout the program's use.

Endnotes

1. https://www.regulations.gov/document/CFPB-2023-0047-0001; *See, Law Profs, Business Groups Spar Over Proposed Consumer Arbitration Ban at* https://www.reuters.com/legal/transactional/column-law-profs-business-groups-spar-over-proposed-consumer-arbitration-ban-2023-11-15/.
2. *See, e.g.* American Arbitration Association at https://adr.org/sites/default/files/Consumer%20Rules.pdf.
3. *See, e.g.* Jeff Sovern, Elayne E. Greenberg, Paul F. Kirgis, & Yuxiang Liu, '*Whimsy Little Contracts' with Unexpected Consequences: An Empirical Analysis of Consumer Understanding of Arbitration Agreements, Social Science Research Network,* 75 Md. L. Rev. 1(2015), Roseanna Sommers, *What Do Consumers Understand About Predispute Arbitration Agreements? An Empirical Investigation* (July 25, 2023). https://ssrn.com/abstract=4521064 or http://dx.doi.org/10.2139/ssrn.4521064.
4. *Id.*
5. Sovern et al. at 70.
6. *Id.* at 70.
7. Roseanna Sommers, *What Do Consumers Understand About Predispute Arbitration Agreements? An Empirical Investigation* (July 25, 2023). https://ssrn.com/abstract=4521064 or http://dx.doi.org/10.2139/ssrn.4521064.
8. *Id.* at 21.
9. Donna Shestowsky, *When Ignorance Is Not Bliss: An Empirical Study of Litigants' Awareness of Court-Sponsored Alternative Dispute Resolution Programs,* Harvard Negotiation Law Review, volume 22 (Spring 2017); Elayne E. Greenberg, … *Because 'Yes' Actually Means 'No': A Personalized Prescriptive to Reactualize Informed Consent in Dispute Resolution,* 102 Marq. L. Rev. 197 (2018).
10. ABA Model Rules of Professional Conduct Rule 1.2(a).
11. *Id.* at Rule 1.4 (b).
12. Donna Shestowsky, *When Ignorance Is Not Bliss: An Empirical Study of Litigants' Awareness of Court-Sponsored Alternative Dispute Resolution Programs,* Harvard Negotiation Law Review, volume 22 (Spring 2017),
13. *Id.* at 217.
14. *Id.* at 221.

The Lurking Risk in Arbitrations of Stipulating That Privileged Documents Produced in Discovery Can Be Deemed Inadvertent and Presumptively Clawed Back

By John S. Siffert and Angela Zhu

Sophisticated litigators have come to rely on court-ordered stipulations that allow them to claw back otherwise privileged materials that were inadvertently produced. There are cogent reasons why counsel in arbitrations should enter similar stipulations that create the presumption that privileged materials were produced inadvertently. While highlighting the benefits of such a stipulation, this article also exposes the lurking risks that are present when the stipulation is entered in an arbitration, and not "so ordered" by a federal judge.

The Problem

Arbitration is now favored by many as a method of resolving commercial disputes quickly, inexpensively, and confidentially.[1] Courts have upheld the exclusivity of arbitration when the parties enter valid arbitration agreements, even if the disputes are complex and involve megabytes of documents.[2] Arbitration panels accustomed to traditional, big-case litigation usually allow the parties to engage in discovery that contemplates the exchange of documents and sometimes deposition of witnesses; however, arbitrators also are mindful that the cost of unbridled discovery can thwart the goal of achieving an award quickly and inexpensively. Consequently, arbitrators often urge the parties to find practical solutions to sticky discovery problems.

One of those sticky problems arises when there are privileged documents that are relevant to the issues but conducting a privilege review prior to production will cause delay and increase costs. The federal courts adopted a rule that makes it possible to bypass these problems in civil cases. Rule 502(d) of the Federal Rules of Evidence allows the parties to obtain a federal court order eliminating the burden of proving whether the production of privileged documents was inadvertent, allowing the producing party the presumptive right to claw back those privileged materials.[3]

The advantages of Rule 502(d) in civil cases are especially attractive because the Rule provides that documents that are clawed back may not be used at the trial or by anyone else in any federal or state court—at least not on the basis of their production (inadvertent or not) in the pending litigation. In the absence of an order pursuant to Rule 502(d), inadvertent disclosures of privileged materials are governed by Rule 502(b), which imposes a burden of proof on the producing party to show it has satisfied the conditions to claw materials back.[4]

Commentators and practitioners have urged lawyers to obtain so-ordered Rule 502(d) stipulations whenever possible, because the advantages cannot be overstated. First, Rule 502(d) orders extend protection beyond the pending litigation, which a simple stipulation between the parties does not. Second, a court order removes, or at least significantly reduces, the cost and burden to establish that privileged materials should be returned.[5] Third, a so-ordered Rule 502(d) stipulation provides greater certainty that the parties' assertions of privilege will be respected and permits them to engage in discovery with greater comfort that the production of privileged materials will be presumed to have been inadvertent and not to constitute a waiver of the privilege.[6]

Applying Rule 502(d) to Arbitrations

Arbitration counsel have the same incentive to enter stipulations that provide Rule 502(d) protections, so that they can take advantage of the presumption that the disclosure of privileged materials was inadvertent and that reasonable steps were taken to protect the privilege.

But there is a rub. Arbitration provides no method for the parties to obtain a federal court order that would give a Rule 502(d) stipulation its full effect beyond the arbitration. Under Rule 502(f), absent a federal court order, a stipulation between the parties "is binding only on the parties to the agreement."[7]

Rule 502(d) is very clear: Orders must be entered by "[a] federal court" in connection with "litigation pending before the court." A Rule 502(d) order signed by an arbitrator will not provide the same protection as an order signed by a federal judge. A stipulation "so-ordered" by an arbitrator presumably would operate solely as an agreement that binds the parties and is enforceable only in the current arbitration.

The Lurking Risk

This means that there are real dangers lurking if a Rule 502(d) stipulation is adopted in an arbitration. First, if a claimant or respondent sought a court order from a federal

judge endorsing a Rule 502(d) stipulation, the parties would lose one of the essential benefits of arbitrating: confidentiality. Court proceedings are not secret, and there is growing resistance by courts to sealing parties' agreements, motions to confirm awards, or court orders.[8] Seeking a court order could therefore lose the privacy afforded by arbitration that publicly filed litigation does not.

Second, there is no basis to believe that absent a federal court order, an arbitral agreement would bind third parties. Rule 502(d) itself requires a federal court order to afford its full protection. An order from a state judge or arbitrator would not establish Rule 502(d) protections. That means the producing party would be at risk that its privileged documents could be used in another proceeding—even by a party to the arbitration.

Third, there is also no reason to believe that the arbitral confidentiality agreement would be binding in federal or state litigation.[9]

Clark County v. Jacobs Facilities, Inc.,[10] illustrates the risk that there could be extensive litigation over waiver where parties to an arbitration agreed to a 502(d)-like stipulation without a court order. Jacobs Facilities, Inc. ("Jacobs") discovered that it had produced a privileged document in arbitration in response to a subpoena. Jacobs was a signatory to an agreement between the parties that the production of privileged documents would be deemed "an inadvertent and unintentional disclosure," and that "the parties would not take the position any applicable privilege was waived."[11] Jacobs invoked the stipulation and clawed back the privileged document.[12] Clark County, the claimant in the arbitration, commenced a separate lawsuit against Jacobs, arguing that privilege over the document had been waived by virtue of prior production in the arbitration.[13] After extensive briefing[14] concerning the complex procedural and factual background in which the parties addressed the Rule 502(b) factors,[15] the court held that the privilege had not been waived.

The outcome of the *Clark County* case was ultimately that there was no waiver, but it is a cautionary tale worth noting. Absent a federal court order, an agreement in arbitration that the parties will deem any privileged documents to have been inadvertently produced affords little protection against a full-scale discovery dispute over whether the documents may be clawed back and who will bear the burden of proving or disproving inadvertence and whether reasonable care was taken.

Concluding Thoughts

Arbitration counsel should proceed with open eyes before producing documents pursuant to a stipulation that privileged documents will be presumed to have been inadvertently produced. There are risks that the full protections of Rule 502(d) will not be enjoyed even if the stipulation is so-ordered by the arbitration panel. Until a federal court so-orders a Rule 502(d) stipulation, the producing party risks bearing the costly burden of establishing that privileged documents should be returned.

"The clawback provision for privileged documents in Rule 502(d) is very clear: Orders must be entered by '[a] federal court' in connection with 'litigation pending before the court.' The Rule does not apply to arbitrations."

We offer no prescription on how to extend full Rule 502(d) protections to arbitrations other than to look to the Rules Committee to consider whether the public policy favoring arbitration embodied by the Federal Arbitration Act warrants recommending that Congress consider modifying Rule 502(d).[16]

The best alternative to protect arbitration confidences, for the present, is for the parties to draft a confidentiality agreement that would be enforceable as to the signatories. Counsel would be well served to incorporate confidentiality provisions from applicable administrative agencies or courts and to complement them as needed, and to have the parties execute the final agreement. The nature and scope of confidentiality should spell out the information to be shared by the parties and arbitrators during the course of the arbitration (e.g., documents and oral presentations), and include the participants at the arbitration, including the parties and witnesses—all of whom should sign the confidentiality stipulation. The parties also should provide that the arbitrators' statements and files will be protected as confidential.[17] Finally, parties should include a provision that the parties and arbitrators will destroy documents within 60 days of completion of the arbitration and agree that they will confirm that the confidential documents were destroyed.

The thoughts expressed herein are the authors' alone and do not reflect the opinion of the Judicial Advisory Committee on Evidence Rules on which John S. Siffert sits as a member.

John S. Siffert, a founding partner at Lankler Siffert & Wohl LLP, is a Fellow of the Chartered Institute of Arbitrators (CIArb). A CIArb Accredited Mediator, he is an adjunct professor at NYU Law School, co-author of *Sand Modern Federal Jury Instructions* (Matthew Bender), and a Fellow and former Regent of the American College of Trial Lawyers.

Angela Zhu, an associate at Lankler Siffert & Wohl LLP, represents clients in civil and criminal matters, and in alternative dispute resolution.

Endnotes

1. *Arbitration vs. Litigation: The Differences*, Thomson Reuters, Oct. 4, 2022, https://legal.thomsonreuters.com/blog/arbitration-vs-litigation-the-differences/.
2. *Rent-A-Ctr., W., Inc. v. Jackson*, 561 U.S. 63 (2010).
3. Rule 502(d) provides: "A federal court may order that the [attorney-client] privilege or [work product] protection is not waived by disclosure connected with the litigation pending before the court—in which event the disclosure is also not a waiver in any other federal or state proceeding."
4. Under Rule 502(b), the party asserting privilege has the burden to show "(1) the disclosure is inadvertent; (2) the holder of the privilege or protection took reasonable steps to prevent disclosure; and (3) the holder promptly took reasonable steps to rectify the error, including (if applicable) following Federal Rule of Civil Procedure 26(b)(5)(B)."
5. The opposing party may still assert a challenge as to whether the documents, in fact, are privileged, but a robust Rule 502(d) order will mean that the opposing party will have no basis to challenge inadvertence, the reasonableness of steps taken to prevent disclosure, or the reasonableness of steps taken to rectify the error. *See* The Sedona Conference, *Commentary on the Effective Use of Federal Rule of Evidence 502(d) Orders*, 23 Sedona Conf. J. 1, 54–55 (Aug. 2022) (Appendix A: Model Rule 502(d) Order). The efficacy of 502(d) orders has consistently been urged at Sedona Conference by Philip J. Favro and the Honorable Andrew J. Peck.
6. Attorneys must nonetheless bear in mind ethical duties to prevent the disclosure of privileged materials—as well as ethical duties upon receipt of privileged materials—which vary by jurisdiction. The Sedona Conference, *Commentary on the Effective Use of Federal Rule of Evidence 502(d) Orders*, 23 Sedona Conf. J. 1, 40–42 (Aug. 2022).
7. Federal Rule of Evidence 502(f) provides: "An agreement on the effect of disclosure in a federal proceeding is binding only on the parties to the agreement, unless it is incorporated into a court order."
8. *See, e.g.*, *Bristol-Meyers Squibb Co. v. Novartis Pharma AG*, No. 22 Misc. 124, 2022 WL 1443319 (S.D.N.Y. May 6, 2022) (holding that petitioner had not overcome its burden to show that sealing the motion to confirm the award was essential to preserve higher values, because "[c]onfidentiality agreements alone are not an adequate basis for sealing"). *Id.* at *1.

   Courts have also found that confidentiality agreements may not prevent a third party from seeking disclosure of an arbitral award, as that third party may not be bound by any agreement to which it is not a party. *See, e.g.*, *Gotham Holdings, LP v. Health Grades, Inc.*, 580 F.3d 664 (7th Cir. 2009) (affirming district court decision to enforce subpoena seeking confidential arbitration award from a non-party to arbitration award); *Pennsylvania Nat'l Mut. Cas. Ins. Grp. v. New England Reinsurance Corp.*, 840 F. App'x 688 (3d Cir. 2020) (after reinsured filed arbitration award under seal and sought to reduce award to judgment, third-party reinsurer that was not subject to the arbitration proceeding successfully moved to intervene and unseal the award).

   Some courts have found that confidentiality agreements are unenforceable on public policy grounds, because they are unconscionable. *See, e.g.*, *Ting v. AT&T*, 319 F.3d 1126, 1152 (9th Cir. 2003). *But see*, *Biller v. S-H OpCo Greenwich Bay Manor, LLC*, 961 F.3d 502, 518–19 (1st Cir. 2020); *Chandler v. Int'l Bus. Machines Corp.*, No. 21-cv-6319, 2022 WL 2473340, at *7 (S.D.N.Y. 2022).
9. The Sedona Conference, *Commentary on the Effective Use of Federal Rule of Evidence 502(d) Orders*, 23 Sedona Conf. J. 1, 42 (Aug. 2022).
10. No. 2:10-CV-00194-LRH, 2012 WL 4609427 (D. Nev. Oct. 1, 2012).
11. *Id.* at *6, *12. In reliance on these provisions, Jacobs did not conduct a privilege review prior to production in the arbitration. *Id.* at *6. Indeed, reducing the costs of privilege review is one of the primary purposes of Rule 502(d).
12. *Id.* at *4.
13. *Id.* at *6–7. The document had also been produced in a second arbitration and multiple times in the pending litigation. The producing party explained that the production in a second arbitration was made by another party without its knowledge, and that production in the pending litigation was the result of typos in privilege headers and incorrect indexing of documents—a good reminder to make sure privilege headers are accurate. *Id.* at *4.
14. The parties filed a status report, supplemental briefing, and multiple affidavits and exhibits detailing years-old facts about the circumstances of each instance of production of the privileged document. *Id.* at *3,*12. The court's opinion, dedicated solely to this privilege dispute, was 19 pages long.
15. Those factors, as noted earlier, are: "(1) the disclosure is inadvertent; (2) the holder of the privilege or protection took reasonable steps to prevent disclosure; and (3) the holder promptly took reasonable steps to rectify the error, including (if applicable) following Federal Rule of Civil Procedure 26(b)(5)(B)." Rule 502(b).
16. Unlike rules adopted by the Judicial Conference that become effective unless Congress objects, Rule 502 was enacted by Congress pursuant to 28 U.S.C. § 2074(b), because it affected an evidentiary privilege. Accordingly, an affirmative action by Congress would be required for Rule 502 to be modified.
17. These are among the proposed best practices for arbitration confidentiality protections currently under consideration by a subcommittee of the New York City Bar Association that is chaired by Myrna Barakat Friedman and comprised of representatives of the ADR, Arbitration, Litigation and International Commercial Disputes Committees.

SVAMC Draft Guidelines on Using AI in Arbitration: A Focus on the Selection of Arbitrators and Arbitrators' Use of AI

By Elizabeth Chan, Marta García Bel and Benjamin Malek

I. Introduction

On November 30, 2022, ChatGPT, OpenAI's text-generating artificial intelligence (AI) chatbot, was launched to the public. Since then, other institutions have released their own AI tools. More than 92% of Fortune 500 companies reportedly use these daily.[1] This new development of AI, called Generative AI, has impacted all sectors, including the legal profession.[2]

The past year has witnessed unprecedented changes with the integration of cutting-edge AI tools, including creating bespoke tools designed for litigation and arbitration. In litigation, courts are already grappling with the challenges posed by this new technology, from lawyers citing non-existent precedents derived from AI tools to judges requiring counsel to certify the accuracy of submissions prepared using Generative AI and disclosing the use of these tools.[3]

In arbitration, the Silicon Valley Arbitration and Mediation Center (SVAMC) has issued Draft Guidelines on Using AI in Arbitration ("Guidelines"), which we describe in Part II. In Parts III and IV, respectively, we focus on two hot topics relating to arbitrators: their selection and, separately, their use of AI in arbitration.

II. The SVAMC Draft Guidelines on Using AI in Arbitration

The SVAMC, an institution focused on fostering practical dispute resolution in the technology sector, established an AI Task Force in 2023 to produce a set of guidelines for the appropriate use of AI in arbitration proceedings.[4] The Drafting Subcommittee ("Subcommittee") published a first draft of the Guidelines for public consultation on August 30, 2023.[5]

The Guidelines offer a set of best practices for using AI in arbitration for all involved in the arbitration process. They seek to address both current and future applications of AI from a principled framework while also bearing in mind that the technology will continue to evolve. The Guidelines operate on the premise that AI is, and will be, beneficial to arbitration, with appropriate guardrails.

The Guidelines, therefore, do not aim to regulate AI or its applications in arbitration proceedings. Instead, it distills some best practices and fundamental principles, trying to ensure the responsible and practical use of AI in arbitration. One of the goals of the Guidelines is to foster a global understanding and application of AI within the arbitration landscape.

The Guidelines are organized into four chapters, covering:

(i) preliminary provisions, which contain definitions and set out the Guidelines' scope;

(ii) general principles applying to all participants in an arbitration;

(iii) provisions related to the use of AI by parties and their counsel; and

(iv) provisions on the use of AI by arbitrators.

The consultation draft further includes a commentary on each Guideline and a list of illustrative, real-life examples of what would qualify as "compliant" or "non-compliant" uses of AI under each Guideline.

Additionally, the Guidelines include a model clause providing that the Guidelines shall serve as the "reference framework" for using AI in the proceedings. Parties, arbitral tribunals or institutions can adopt the Guidelines in any arbitration, domestic or international by incorporating the model clause into an arbitration clause, arbitration rules or procedural order.

The Subcommittee debated aspects of the Guidelines during the drafting process, from defining AI to disclosing the use of specific AI tools in an arbitration. These topics have generated further discussion within the arbitration community in the context of public consultation on the Guidelines.

We now focus on the impact of AI on arbitrators in two aspects: the arbitrator selection process (Part III) and the fulfilment of the arbitrator's personal mandate (Part IV).

III. AI Tool To Select Arbitrators

A. The Diversity Risks of Using AI Tools To Identify Potential Arbitrators

Guideline 1 ("Understanding the Uses, Limitations and Risks of AI Applications") aims to raise awareness about the limitations and risks of AI tools which include, amongst others, the risk that AI tools exhibit biases and blind spots resulting from limitations in the underlying datasets and corresponding training protocols. This risk should be carefully

considered if AI tools are used in the process of selecting arbitrators.

As of the date of this article, the existing tools that assist parties and counsel in selecting and appointing arbitrators[6] provide collated data and information on the arbitrators' profiles to the parties, but the parties still must analyze the data to select an arbitrator.[7] With the rise of Generative AI and Large Language Models (LLMs), many anticipate that independent AI models will soon exist, trained by already collected data, which can recommend an arbitrator based on criteria specified by the user of the AI.

Of course, humans are not free of biases. As Dr Cartwright-Finch explains in her report, "The Usual Suspects: Decision-Making in Arbitrator Selection,"these biases play a significant role in humans making arbitrator selections.[8] These biases include, for example, in-group favoritism, affinity bias, recency bias, stereotypes, halo effect and horns effect, and outgroup homogeneity.[9]

Dr Cartwright-Finch explains that "any arbitration lawyer involved in selecting an arbitrator will want to make their decision solely based on who they deem to be the best person for the case."[10] However, "this articulation of the decision process unintentionally discounts . . . that we are sometimes wrong about who we conclude is 'best'—because cognitive biases invariably color our initial evaluations of candidates."[11] Moreover, even if it is one of the most important decisions of a case, the selection process remains based on subjective techniques (web searches, reputation, and word of mouth).

Some have suggested that the use of AI may be the cure for human biases. Interestingly, a Pew Center survey suggests that while the American public has mixed views on using AI tools in screening/hiring applicants for jobs, some consider that AI systems would be "better than humans at treating all applicants the same and that AI would improve problems of racial bias and unfair treatment in hiring if it were used more."[12]

However, AI does not eliminate the existing biases, and there is a risk that it exacerbates them. For example, the UK's Solicitors Regulation Authority has reported that[13] biases in using AI tools have already resulted in unfair or incorrect outcomes. According to the Authority, this has included, for example, denying applications from minority ethnic mortgage borrowers, not because of any current risk in those applications but because the data used to train the system was based on historical, racially biased decisions.

While the Guidelines anticipate that AI tools will streamline the process of selecting arbitrators, they encourage parties, counsels, and arbitral institutions to be aware that similar biases may occur when the underrepresentation of certain groups of individuals in past arbitrations are carried over to the training data used by the AI tool to make assessments. Therefore, when using AI tools, parties should strive to identify a diverse pool of arbitrators through fair means, as they have been doing in the past years.[14]

B. Mitigation of Diversity Risks When Using AI Tools To Identify Potential Arbitrators

Arbitration users may implement some steps to mitigate these risks. For example, they may use AI tools and applications that incorporate explainable AI features. This allows them to understand how the selection or assessment algorithm works and the biases underlying the AI tool's output. They could also use AI tools that control for biases and regularly audit their databases.

Some jurisdictions (such as New York) already require AI algorithms to be independently audited by a third party for "algorithmic bias" in certain circumstances. The audit's purpose is to look for "biases related to a selected category of people in the algorithm's output," focusing on "identify[ing] groups of people that could be harmed by the results an algorithm produces."[15]

Interestingly, Dr Tanielian Fadel has explained that AI tools can be "diversity-friendly . . . provided that they are built based on appropriate data and algorithms."[16] As some AI experts have explained, diversity is an objective that can be modelled, and therefore, arbitration users can customize the algorithm to factor diversity into the tool actively.[17]

In any event, arbitration users should be aware of these risks and use their judgement to evaluate the output of AI tools from a diversity standpoint when selecting arbitrators to ensure that the diversity among arbitrators continues to increase to reflect the diversity of the user community.

IV. AI and the Arbitrator's Mandate

A key element of due process in arbitration is the arbitrator's personal mandate, which implies arbitrators personally carry out their decision-making responsibilities. However, in the last decade, arbitration users have often complained about lengthy and costly proceedings.[18]

While AI can increase efficiency, many are concerned about letting it "interfere excessively with the adjudication process," which could potentially undermine due process and the integrity of the proceedings.[19] Guideline 6 addresses this tension, providing that arbitrators may use AI in certain circumstances, but that they should not use it in a manner that delegates any part of their mandate, particularly the arbitrator's decision-making function, to any AI tool.

Although it expresses a basic principle, Guideline 6 has garnered attention in the consultation process, as it is not always easy to draw the line between which part of the arbi-

trator's mandate can be delegated to AI and which cannot. The Guidelines propose in their Annex showcasing compliant and non-compliant uses of AI, that arbitrators would not be delegating their decision-making mandate if they used AI tools to create a first draft of the procedural history of a case, or to generate timelines of key facts, and then double-check the accuracy of the output and make the appropriate edits. On another hand, the Guidelines propose that the decision-making functions that arbitrators should not delegate include the decision itself and the reasoning that supports the award, which the arbitrator should establish.

While some have argued that arbitrators can use AI to research and summarize law and process and analyze parties' submissions, others consider there to be a heightened risk when delegating factual analysis to an AI tool, especially when the facts are decisive. Indeed, a note from the Permanent Representatives Committee (Part 1) to the Council of the European Union (EU)[20] has classified "AI systems intended to be used by a judicial authority or on their behalf to interpret facts or the law and to apply the law to a concrete set of facts" as being "high risk."[21] Thus, the appropriateness of using AI tools to perform some decision-making tasks may turn on whether the arbitrator is relying on the AI tool in place of their own judgment.

Many like to compare the use of AI tools by arbitrators to the use of tribunal secretaries, considering that AI can be complicated by the fact that the manner in which some AI tools function can be difficult to explain and the lack of technical ways to monitor or challenge the output produced by AI.

Indeed, as a recent survey shows, there is a genuine concern, particularly from arbitration counsel, that arbitrators will start using advanced AI tools without understanding them.[22] Therefore, many propose a higher level of outside scrutiny and policing on how arbitrators use AI tools, imposing a duty of mandatory, affirmative disclosure when arbitrators use AI tools for any purpose in an arbitration.

Conversely, others suggest relying on the principle of party autonomy, pointing out that parties could choose from different alternatives:

(i) they may agree that the arbitrator may not use AI at all;

(ii) they may agree to limit the use of AI only for limited purposes;

(iii) they may agree that the arbitrator can use AI to assist them in addressing and making some technical determinations, similar to expert determinations; or

(iv) they could delegate part of the mandate entirely AI (for example, a subset of issues, such as document production or damages) and leave the final decision on the merits to the arbitrator.

The possibilities at this stage are many, but if arbitrators want to glean all the benefits from AI, they need to be aware of the risks inherent to the use of AI, understand how these tools work and, most importantly, train and learn how to use such tools effectively and safely.

V. Conclusion

As AI tools become increasingly powerful and popular, the Guidelines propose best practices on using AI in arbitration, as well as some basic principles to help participants in arbitration proceedings use AI tools ethically and responsibly. The Guidelines grapple with the impact that AI is having and will increasingly have on this field as the technology evolves, raising awareness of the potential limitations and risks of AI, which may impact arbitration proceedings.

In this article, we have focused on two aspects concerning arbitrators, which we anticipate will be impacted by AI. We acknowledge that the use of AI in arbitration is still at a preliminary stage. For this reason, after a public consultation process, the SVAMC expects to release in March 2024 a final draft of the Guidelines, which will incorporate the feedback received by the arbitral community and a commentary by some arbitral institutions. While it remains to be seen how arbitration users and arbitral institutions will address the challenges posed by the use of AI by counsel, arbitrators and experts, we anticipate that the Guidelines will be a good starting point for future developments and discussion.

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4. The Guidelines were drafted by an eight-member Drafting Subcommittee of the SVAMC AI Task Force, led by Benjamin I. Malek, and composed of Elizabeth Chan, Sofia Klot, Dmitri Evseev, Marta Garcia Bel, Orlando F. Cabrera C., Soham Panchamiya, and Duncan Pickard.
5. The first draft of the Guidelines can be accessed here: https://thearbitration.org/wp-content/uploads/2023/08/SVAMC-AI-Guidelines-CONSULTATION-DRAFT-31-August-2023-1.pdf.
6. For example, arbitrator panels of arbitral institutions, Arbitrator Intelligence, ABA Women in Dispute Resolution Directory, ArbitralWomen Directory, ASA Profiles, Delos Arbitrator Database, Energy Arbitrators List, Equal Representation in Arbitration Pledge Female Arbitrator Search Tool, Global Arbitration Review Arbitrator Resource Tool, ICCA Membership Directory, Industry Rankings (Chambers & Partners, Legal 500 etc), International Arbitration Institute Directory, Jus Mundi Directory of Arbitrators, Rising Arbitrators' Initiative, Mute-Off Thursdays' List of Female Arbitrators.
7. For example, Arbitrator Intelligence is a tool that provides parties collated data and feedback on arbitrators. The reports generated by Arbitrator Intelligence include information on key aspects of an arbitrator's past cases, such as rulings on document production, the duration of the proceedings, the arbitrator's questions during hearings, and their reasoning in the final award. Similarly, some databases (such as Jus Mundi's Conflict Checker) analyze a broad database of arbitrators, counsel, experts and tribunal secretaries, and identify existing and past relationships among them, in order to identify and prevent potential conflicts of interest from arising.
8. Dr. Ula Cartwright-Finch, *The Usual Suspects: Decision-Making in Arbitrator Selection,* October 2023. Accessible here: https://www.cortexcapital.org/_files/ugd/4ebf15_1758d4ae0bd24547aefcc3e6e8fa30e3.pdf
9. *Id.* at 7
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19. *Id. See also AI in IA—The Rise of Machine Learning*, BLCP International Arbitration Survey 2023, November 9, 2023, p. 23. 74% of respondents agreed or strongly agreed that arbitrators should not use AI tools to formulate or draft adjudicatory elements of an award. https://www.bclplaw.com/a/web/tUW2SW6fjHrpXVrA7AfWkS/102932-arbitration-survey-2023-report_v10.pdfv.
20. The Permanent Representatives Committee is composed of the head or deputy head of mission from the EU Member States in Brussels. Its role it to prepare the agenda for the ministerial Council of the EU meetings. The Council of the EU is one of the two legislative bodies of the EU, made up of EU government ministers, and together with the EU Parliament amends and adopts EU laws.
21. Note from the Permanent Representatives Committee (1) to the Council of the European Union, Proposal for a Regulation of the European Parliament and of the Council laying down harmonized rules on artificial intelligence (Artificial Intelligence Act) and amending certain Union legislative acts—General approach, November 25, 2022, p. 201, https://data.consilium.europa.eu/doc/document/ST-14954-2022-INIT/en/pdf.
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Resolving Disputes Online? Ensure Your Services Are Disability Accessible

By David Allen Larson

Dispute resolution professionals have increasingly relied on technology to promote and provide services in recent years. COVID-19 accelerated the adoption and reliance on communication technologies like Zoom and Teams, which have been professional lifesavers for many. Although everyone experienced a learning curve, some dispute resolution providers and participants—and especially some persons with disabilities (PWDs)—found the transition more difficult, and sometimes impossible. This brief discussion will explain the need to make our online services accessible to PWDs, identify obstacles commonly encountered by PWDs, and suggest ways to overcome these obstacles. Although much of the following article will focus on website design, please keep in mind that all digital interactions must be accessible including, for example, e-mail messages.

To what degree should we be concerned about digital accessibility for persons with disabilities? Whenever anyone's access to essential services such as the justice system is diminished or denied we should be concerned. And many may be surprised how many people will be excluded when online services are not accessible for PWDs. In March 2023, the World Health Organization reported that 16% of the world's population (1.3 billion persons, or 1 in every 6 of us) have a disability.[1]

Although many may hope that dispute resolution will return to the primarily in-person model that preceded the pandemic, that is wishful thinking. Some services that were offered only online during the pandemic may rarely, and perhaps never, be available again in person. Although this is certainly beneficial for some, PWDs, persons with limited financial resources, and individuals living in rural locations are at risk of being excluded from the "new normal" digital world if care is not taken to make certain that new reality is accessible.

There are at least three reasons why individuals or entities operating online should make their websites accessible to PWDs. The first-mentioned might be considered altruistic, while the other two primarily benefit the service provider or website host.

First and foremost, accessibility is a human right. The United Nations Convention on the Rights of Persons with Disabilities promotes, protects and ensures the full and equal enjoyment of all human rights and fundamental freedoms by all persons with disabilities, as well as promoting respect for their inherent dignity.[2] Article 9 declares that "States Parties shall promote access for PWDs to new information and communications technologies and systems, including the internet."[3] Article 13 explains that "States Parties shall ensure effective access to justice for persons with disabilities on an equal basis with others, including through the provision of procedural and age-appropriate accommodations."[4]

Second, recognize that universal design (i.e., making online services accessible to all potential users) is good business. Universal design requires equitable use, flexibility in use, simple and intuitive use, perceptible information, tolerance for error, low physical effort, and size and space for approach and use (regardless of users' body size, posture, and mobility).[5] These seven principles have obvious relevance for persons with disabilities. Importantly, adopting universal design will increase your user satisfaction as well as expand your user population beyond persons with disabilities. Video with captions will help anyone who operates in a noisy environment, for example. And people with limited bandwidth will appreciate well-designed, uncluttered websites. Companies without accessible websites are estimated to be losing $6.9 billion a year to competitors whose sites are accessible.[6]

Third, online services that are not accessible for PWDs may give rise to claims, and potential liability, under Title II of the Americans with Disabilities Act (Public Services) or Title III (Public Accommodations and Commercial Services).[7] The question of legal liability under the ADA demands its own law review article. For our purposes, note that a private provider who is sued under ADA Title III is not liable for compensatory damages. Successful plaintiffs can, however, recover attorney fees, and as explained below, this has encouraged controversial litigation. Additionally, a minority of states do allow compensatory damages as well as attorneys' fees.[8]

Currently some prospective plaintiffs are surveying the internet and testing websites for accessibility. If they find arguable federal or state law disability accessibility violations, they demand a settlement. Because the only possible ADA money damages for private service providers is attorney fees, the apparent goal of some plaintiffs is to receive a quick settlement from a defendant who determines the settlement demand would cost it less than it would to defend an ADA case.

Plaintiffs filed more than 4,000 ADA-based lawsuits against websites and apps in 2021 and 2022.[9] New York has become a hotbed with 312 ADA federal court lawsuits filed in October 2023 against websites, mobile apps and video content.[10] Designing your website to be disability accessible from the outset may be your best protection from these claims.

There are numerous simple modifications that will increase digital accessibility for persons with disabilities. But before we begin that more specific discussion, the author has one recommendation that assuredly will increase accessibility and a second recommendation that will protect party autonomy while we are making changes to improve accessibility.

The first recommendation is easy to accomplish but often overlooked. When trying to determine whether your online services are accessible for persons with disabilities, use human testers. You already may know PWDs who are willing to test your website to determine whether it truly is accessible. If not, you can contact local or national disability organizations such as the National Federation for the Blind and ask whether someone from their organization would be willing to test your website. Disability and support organizations are very interested in ensuring digital resources are accessible and will work with you to improve accessibility, often at no cost. It can provide credibility for your representations that your services are accessible, and it also may also lead to other previously unrealized collaborative opportunities.

Second, when offering dispute resolution services online, recognize and respect PWD's autonomy and ability to make their own choices about whether they are able to use the system. Someone could have challenges reading text or seeing images on a computer or smartphone, for example, but may have a spouse or friend who can help them when it comes to online interactions. Or they may use assistive technologies like a screen reader that makes it possible for them to interact effectively online. Dispute resolution practitioners need to offer parties a confidential, voluntary opportunity to disclose disability limitations, and should allow the individual to decide whether they are able and want to use your online services.

A more technical (and perhaps challenging) way that dispute resolution service providers can improve accessibility of their online services is to follow the Web Content Accessibility Guidelines (WCAG).[11] The Guidelines are not, however, what one might call an "easy read." Yet it is important to understand that they represent a shared international standard establishing success criteria that can eliminate many of the barriers that PWDs face interacting with a website or other digital technology. To make the substantive content more understandable, significant summary material is available.[12] In the authoring organization's own words: "WCAG is primarily used by web content developers (authors, designers), web authoring tool developers and web accessibility evaluation tool developers. However, understanding and conforming to the WCAG standards has become a necessity for any business or organization operating a website. If your website is not accessible, you risk legal retribution."[13]

The Guidelines have evolved over time. WCAG 1.0, which had 14 guidelines and three increasingly demanding compliance levels (identified as A, AA, AAA), was released in May 1999. Regarding the compliance levels, A represents bare or minimum conformance and may not meet legal requirements, AA is mid-range, and AAA is the highest (which may not be achievable for all content). WCAG 2.0 was published in December 2008, introduced the idea that there are four general requirements for disability accessibility (digital material must be perceivable, operable, understandable, and robust), and further developed the three A, AA, and AAA compliance levels. WCAG 2.1 was published in June 2018 and introduced requirements directed specifically at mobile devices or tablets. It also announced 17 new success criteria. WCAG 2.2 was released October 5, 2023, with nine additional success criteria.[14] Subsequent versions do not replace previous versions but instead provide additional guidelines.

Examples of WCAG success criteria that are easily achievable include: providing descriptive alternative text (ALT text) for images, allowing online text to be magnified without disrupting page design, ensuring that information entry forms and tasks do not have fixed time limits for completion that may not accommodate PWDs who may need more time, designing web pages so that components like headers and footers consistently appear in the same location on all pages, permitting users to navigate with the keyboard rather than only with a mouse, and testing to make certain that screen readers can navigate the site.[15] Helpful checklists are available to determine whether your online content satisfies WCAG criteria.[16]

Although the WCAG Guidelines are not legal requirements, courts and legislatures have adopted them as the appropriate legal standard. For instance, the United States Department of Justice (DOJ) is revising its ADA Title II disability accessibility technical standards for state and local governmental entities. It proposed a private accessibility standard for web access, which is the Web Content Accessibility Guidelines (WCAG) 2.1 Level AA and comments were due October 3, 2023.[17]

This author recommends best practices that include appointing a dedicated digital accessibility coordinator, including accessibility requirements in all of your technology contracts and even your requests for proposals (RFPs), placing an easy to find accessibility information link on every webpage, not relying only on color for website navigation, continuously

training staff, using human testers and consulting organizations (for instance WAVE, Accessibleweb, UsableNet, WebAIM, AudioEye, and accessiBe), make accessibility part of job descriptions and evaluations, and review relevant legislation. Dispute resolution solution providers and practitioners should also become familiar with online dispute resolution standards and guidelines promulgated by the National Center for Technology and Dispute Resolution/International Council for Online Dispute Resolution[18] and the American Bar Association.[19]

Online dispute resolvers can improve their digital accessibility by becoming familiar with the WCAG and its supporting documents, using human testers and contacting available consulting organizations, reviewing compliance checklists that are available for free online, and following best practices. By doing so we can achieve equity and inclusion goals, increase access to justice, and expand our businesses.

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Where Do We Go from Here? Dispute Resolution DEI Initiatives Post-SFFA

By Ellen Waldman and Robyn Weinstein

In recent years dispute resolution service providers, professional associations, and court-annexed ADR programs have launched initiatives to increase diversity, equity, and inclusion (DEI) among dispute resolution practitioners. These programs seek to recruit, train, and support members of historically underrepresented communities in the mediation and arbitration fields and provide them with the necessary training and experience to excel. These initiatives have proffered various definitions for "diversity" or "historically underrepresented" however, most fellowship and mentorship programs were designed to benefit applicants who identify as Black, indigenous, or as a person of color (BIPOC), a member of the LGBTQ+ community, a person with disabilities, or women, all of whom are underrepresented in the dispute resolution field.[1]

In June of 2023 the Supreme Court issued a landmark decision on two cases, *Students for Fair Admissions, Inc. v. President & Fellows of Harvard College* and *Students for Fair Admissions, Inc. v. University of North Carolina* ("the SFFA decision"), which held that the universities' race-conscious admissions systems violated the Equal Protection clause of the Fourteenth Amendment. In previous affirmative action decisions such as *Bakke* (1978), *Grutter* (2003), and *Fisher* (2013) the Court held that obtaining the educational benefits that flow from a racially diverse student body was a compelling governmental interest and that the use of race as a factor in higher-education admissions was constitutionally permissible.[2] However, in the SFFA decision, the Court changed course. Reviewing the Court's fractured precedent, Roberts noted that to survive constitutional muster, race-based classification systems in the educational context must: (1) comply with strict scrutiny; (2) eschew racial stereotyping or avoid unduly harming non-minority applicants; (3) have a definite termination point. According to the majority, Harvard and UNC's admission procedures failed all three.

Training a critical eye on the universities' goals for considering race in their selection process—which included: (1) "training future leaders in the public and private sectors"; (2) preparing graduates to "adapt to an increasingly pluralistic society"; (3) "better educating its students through diversity"; and (4) "producing new knowledge stemming from diverse outlooks,"[3] Roberts determined they were unmeasurable and overbroad and thus "not sufficiently coherent for purposes of strict scrutiny." Additionally, the Court found that the Harvard and UNC admissions programs failed to "articulate a meaningful connection between the means they employ and the goals they pursue."[4] The Court labeled the racial categories used by the admissions program such as "Asian" or "Hispanic" to be overbroad and imprecise and determined that their use led to illegitimate stereotypes. Lastly, the Court, citing *Grutter,* said that the admissions practices were unconstitutional because they "used race as a negative" for non-minority applicants and had "no logical endpoint."[5]

Although the Court did bar academic institutions from treating a student's membership in a particular racial or ethnic group as conferring advantage in the admissions process, it did not prohibit universities from considering how an applicant's life is affected by race, either through discrimination or other means.[6] The Court was clear, however, that race alone cannot be the determinative factor, and that a student must be "treated based on his or her experiences as an individual— not on the basis of race."[7]

While the SFFA decisions apply only to admissions for academic institutions, conservative activists bent on eliminating race as a factor in the employment arena have begun to target Big Law DEI fellowship programs.[8] This article will briefly discuss these legal challenges and offer considerations post-SFFA that may be relevant to those implementing dispute resolution DEI fellowship and mentorship programs.

Threats and Suits Against Law Firms

In a fusillade of litigation, begun barely two months after the Supreme Court handed down its decision in SFFA, the American Alliance for Equal Rights (AAER), helmed by Edward Blum, the major force behind the plaintiffs in the *Students for Fair Admission* case, took aim at the 1L fellowships offered by Perkins Coie, Morrison Foerster and Winston Strawn. The suits, brought in federal district courts in Texas and Florida, alleged that the fellowships' selection criteria excluded straight, white men, and thus had been "racially discriminating against future lawyers for decades."[9] Citing the SSFA's oft-repeated tag line that "eliminating racial dis-

crimination means eliminating all of it," AAER's legal papers claim that the firms' programs violate 42 U.S.C. § 1981, a Reconstruction era statue passed to help newly freed slaves enter historically segregated markets. In an ironically ahistoric reading of 1981's requirement that "[a]ll persons . . . have the same right . . . to make and enforce contracts . . . to the full and equal benefit of all laws . . . as is enjoyed by white citizens," AAER argues that the 1866 law requires courts to shutter programs meant to usher people of color into jobs and positions of wealth and power from which they remain disproportionately excluded. The suits against Perkins and Morrisson served as the basis for a wave of letters threatening similar litigation sent to other notable firms, including Fox Rothschild, Susman Godfrey, Adams and Reese, and Hunton Andrews Kurth.

Although law firm responses have varied, AAER's campaign has been largely successful in pressuring firms to change their fellowship program's eligibility criteria and application procedures. In response to actual or threatened litigation, the singled-out firms removed references to race, ethnicity or membership in historically disadvantaged groups. The firms replaced those criteria with other requirements, including: demonstrated commitment to DEI principles, ability to bring a different perspective or voice to the firm, or evidence of resilience and ability to overcome hardships and barriers.

Perkins Coie modified the selection criteria for its Diversity and Inclusion Fellowship Program, eliminating an earlier requirement that applicants be members of minority or underrepresented groups, and affirming that the Fellowships for first- or second-year law students are open to "all students in good standing . . . regardless of race, color, religion, sex, age, national origin, veteran status, sexual orientation, gender identity/gender expressions, disability status, or any other identity."[10] Morrisson and Forster's program, originally available to law students who could claim membership in groups historically underrepresented in the legal profession, including students of color, students who identify as LGBTQ and students with disabilities, was changed to invite applications from all students with a "demonstrated commitment to promoting diversity, inclusion and accessibility," as well as "the ability to bring a diverse perspective to the firm as a result of . . . adaptability, cultural fluency, resilience and life experiences."[11] Both Perkins Coie and MoFo stipulated at the time that the suits against them were dropped that their programs would not ask or require applicants to identify their race and would not revert to using race or underrepresentation in the legal profession as a criterion for future iterations of their programs.

Winston Strawn erased earlier selection criteria that mandated students be "members of disadvantaged and/or historically underrepresented groups in the legal profession."[12] Currently, Winston asks for applicants to possess a record of excellent academic achievement and show "demonstrated commitment to promoting the Firm's values of diversity, equity and inclusion within the community during college, law school or otherwise."[13] Additionally, the firm seeks students who "bring a unique perspective to the Firm based on an applicant's experiences as an individual, including the challenges overcome, skills built, or lessons learned that have shaped the applicant's identity."[14] In similar fashion, Fox Rothschild removed any mention of race from its program description, explaining instead that fellowships would be awarded based on "academic achievement, demonstrated leadership . . . entrepreneurial ambition and a commitment to diversity and inclusion efforts in the legal community." Hunton Andrews Kurth similarly modified its eligibility criteria, scrubbing earlier requirements that students be Black, Hispanic, Native American or a member of another racial or ethnic group, LGBTQ, a veteran or a person with a disability. Current requirements focus on a student's demonstrated "commitment to championing and advancing diversity, equity and inclusion in their personal, academic and professional pursuits." In Susman and Godfrey's 2022 flyer seeking applications for its summer diversity program for 1L's, the firm explicitly encouraged "women, racial minorities, LGBTQ students, and anyone from a group that is underrepresented in the legal profession" to apply. This year's description on the firm website states that the fellowship is open to first-year students who "have overcome personal or systemic hardships or disadvantages, including experiences of those who self-identify as members of groups underrepresented in today's legal profession."[15] Adams Reese simply decided to discontinue its 1L diversity program, which reserved two spots in the summer associate class for minority law students or those who came from underrepresented groups.[16]

The Applicability of 42 USC § 1981 to Law Firm 1L and 2L DEI Programs

It seems clear that 42 USC § 1981, which bars private employers from discriminating on the basis of race in their employment contracts, applies to law firm diversity fellowships. These fellowships incentivize first- and second-year students to commit to work at the offering firm by promising robust weekly salaries, attractive stipends, individualized mentoring and training, particularized exposure to choice firm clients, and access to networking opportunities not available to other summer associates generally. The goal is to induce the student to spend their summer working at the firm, with the hope that if the student meets the firm's standards, the initial summer relationship could be extended into longer term employment. Indeed, most of the fellowship stipend payments resemble signing bonuses, enriching students who agree to spend a second summer or accept a post-graduate position

as a full-time employee. The diversity fellowship recipients receive stipends that range from $15,000 to $50,000 on top of their standard summer associate salary and are designed to encourage continued involvement with the firm from the first summer to the second summer, and on to full-time employment as an associate.[17] Whether dispute resolution DEI programs offered by courts, professional organizations or private providers are similarly vulnerable to challenge under § 1981 remains an open question.

Existing DEI DR Fellowships

Three groups in the dispute resolution community are primarily responsible for the fellowship and mentoring opportunities that exist for diverse individuals seeking entry into the field: private dispute resolution service providers, professional organizations such as the American Bar Association and municipal and state affiliates, and court-annexed dispute resolution programs.

The majority of fellowships hosted by private commercial dispute resolution providers are unpaid, require a commitment to participate for a fixed period of time (often one or two years), and offer fellows access to trainings, mentorship, organizational resources, shadowing opportunities, invitations to conferences and other networking events, and sometimes access to paid opportunities. Some of the fellowships cover expenses for participation in the fellowships, while others ask that fellows pay their own costs associated with participation in the program. These fellowships are often advertised as pathways to join the hosting organization's roster. There is also one organization that has created a DEI initiative designed to encourage law students from diverse backgrounds to learn about dispute resolution and offers a stipend to cover travel costs to the event.

Local and national bar associations such as the ABA and NYSBA also offer DEI dispute resolution mentorship programs that are similarly uncompensated. These programs are usually administered by volunteer committees nested within the dispute resolution section of each organization. Some of these mentorship programs were specifically designed to increase opportunities for people from historically underrepresented groups while other fellowships are broader in their recruitment language. The benefits of these fellowships vary but, in addition to the mentoring and networking opportunities discussed above, some trade association fellowships offer waiver of section membership fees, free attendance and/or speaking roles at conferences, and other professional opportunities intended to improve career outcomes.

Professionals who oversee court-annexed ADR programs have also implemented initiatives to increase the number of individuals from historically underrepresented groups on the court's roster of neutrals. These programs can offer expedited admission to the roster, training, co-mediation opportunities, mentoring, and exposure to attorneys who select neutrals for their cases.

Recommendations for DEI DR Fellowship and Mentorship Programs Moving Forward

Even though legal distinctions can be drawn between the defendant academic institutions in SFFA and the private organizations implementing DEI DR initiatives, it is prudent for organizations implementing these programs to follow legal trends and avoid selecting participants solely on the basis of race or other protected characteristics. Instead, programs may want to follow the example of law firm DEI fellowships, which now include considerations of an applicant's unique life experience, commitment to promoting diversity and inclusion in either a personal or professional capacity, and/or ability to lend a diverse perspective to the organization. Organizations offering fellowships and similar mentorship opportunities should review selection criteria and consider updating language that limits the applicant pool to "historically underrepresented," "disadvantaged," or "minority groups."[18]

It is also important to have clear language demonstrating the objectives and rationale behind any existing DEI initiatives. In the SFFA decisions, one of the reasons that the Court decided in favor of the plaintiffs is that the universities failed to "articulate a meaningful connection between the means they employ and the goals they pursue." Organizations that offer DEI specific fellowships should have clear language that states the objectives of the program and be prepared to demonstrate how the admissions process relates to the goals of the program. Fellowship program organizers should also ensure that anyone involved in the selection process understands the objectives of the program, and the means by which selection is made.

Although the challenges to the law firm fellowships were filed under § 1981, organizations should also anticipate potential challenges arising under Title VII of the Civil Rights Act.[19] The New York State Bar Association Task Force on Advancing Diversity issued a Report and Recommendation that suggests corporate employers offering DEI fellowships conduct a review of the relevant state and federal employment discrimination laws and EEOC regulations to ensure their programs are in compliance.[20] The report also indicates that following the SFFA decisions there may be an increase in requests for EEOC investigations of DEI practices and policies, to which organizations should be prepared to respond.[21] Importantly, the NYSBA task force encourages employers to continue to move forward with DEI efforts, as the risks of retreating or backtracking on existing DEI policies are still greater than any risk posed by reverse discrimination lawsuits.[22]

DEI fellowship program language should be explicit as to the nature of the contractual and/or employment relationship with fellows.[23] The challenges to the law firms were made under § 1981, which bars racial discrimination in private and public contracts. For the most part, dispute resolution organizations that offer fellowships do not pay their participants; however, there are financial benefits conferred through dispute resolution fellowships that could be viewed as consideration for the purposes of a contract. Further, regardless of the amount of the stipend or financial benefits conferred, a question of employment status can arise depending on a variety of factors, including the primary purpose of the fellowship, the level of supervision or autonomy accorded the fellow, and the degree to which the work the fellow completes inures to the benefit of the individual fellow or the organization. Regardless of whether organizations provide financial support or offer partial or full employment to the fellows, DEI fellowship programs should clearly define the nature of the relationship with participants and avoid using race or other protected category as the exclusive criteria for admission.

The suggestion to update admissions criteria should in no way chill efforts by dispute resolution organizations to retain and support individuals from underrepresented groups within their organizations. The SFFA decisions do not impact the rights of employers to recruit and/or retain employees from diverse backgrounds. Thus, organizations should continue to actively recruit candidates from historically underrepresented communities for fellowship and mentorship programs. Initiatives such as the Mansfield Rule[24] and the Ray Corollary Initiative,[25] which ask participating organizations to consider a percentage of candidates from underrepresented ethnic and racial groups prior to making hiring decisions, remain unaffected by the SFFA decisions. One caveat, however, is that organizations should look to the laws of their local jurisdictions for any restrictions regarding training and language associated with diversity, equity, and inclusion initiatives. For example, Florida's recently enacted "Stop WOKE Act"[26] would bar alternative dispute resolution organizations from any mandatory trainings that include specific concepts stemming from critical race theory, including discussions that could make trainees feel "guilt " or "anguish" for acts committed in the past by other members of the same race, color, sex, or national origin."[27] The law was challenged by several private employers and is subject to a temporary injunction pending a decision by the Eleventh Circuit.[28] As a result, the law for private employers regarding discussions around diversity and inclusion remains unsettled.[29]

Conclusion

Post SFFA, dispute resolution organizations with programs designed to increase diversity, equity, and inclusion should continue to implement programming in line with these values. The SFFA decision only applies to academic institutions, and current challenges to law firm DEI initiatives have not yet changed the way existing laws are applied to other institutions. However, those overseeing DEI fellowship and mentorship programs in non-academic settings should not limit the applicant pool to membership in a particular race or historically under-represented groups. Rather, DEI fellowship and mentorship programs should be open to all, but may include criteria such as an applicant's commitment to the concepts of diversity and inclusion in their personal and professional lives, as well as the role that race may have played in their individual lived experience.

Unpaid fellowships are unlikely to become a major target for conservative advocacy groups, but the more a scholarship program begins to resemble a lucrative on-ramp to a valuable employment relationship, the more likely a program is to attract the unwelcome attention of groups like the AALI.

What appears clear is that recruitment efforts in diverse communities can and should continue to accelerate. Just as universities have been urged to form relationships with high schools in diverse communities and companies have been advised to increase their presence at historically black college, dispute resolution trade groups, organizations and providers must continue to deepen their ties with affinity groups at the university and law school levels and beyond. Additionally, the dispute resolution community must continue to educate users as to the availability of the next generation of more diverse neutrals, eager to make their mark.

As a raft of research studies reveal, diversity can make us smarter,[30] more innovative,[31] and even more profitable.[32] That principle holds when nominating an arbitration slate, constructing a mediation roster, or populating a panel for the next dispute resolution conference. While the SFFA decision was not the Supreme Court precedent diversity champions were hoping for, it is not an impenetrable barrier to positive change. Efforts to diversify the ADR field should and will continue.

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We Believe in Supporting Diversity

By Scott L. Evans, Jiyun Cameron Lee, and Lisa D. Love

As arbitral institutions and other ADR organizations continue to evaluate the extent of their commitment to advancing diversity and inclusion in the dispute resolution profession, the authors share their personal insights and perspectives about the importance and meaning of focused mentoring and inclusion.

In the summer of 2022, the authors were selected to participate in the inaugural Associates Program of the College of Commercial Arbitrators (CCA). The goal of the Associates Program is to share the CCA Fellows' high standards for professional and ethical conduct and innovative best practices with arbitrators from diverse backgrounds. In October 2022, the three associates began their journeys at CCA's annual meeting in Scottsdale, Arizona. Despite their geographical and cultural differences, they developed positive and supportive relationships and bonded as "classmates." Reflected below are their unique perspectives on the impact of focused mentoring and inclusion on their quest to become respected and successful arbitrators.

The Need for Increased Diversity Among Arbitrators

During our time as arbitrators, our collective experience confirms the obvious: diverse arbitrators are substantially underrepresented. Statistics reported by arbitral institutions indicate that arbitrators are underwhelmingly diverse.[1] The lack of diversity among arbitrators reflects the legal profession at large. According to the American Bar Association's National Lawyer Population Survey, the legal profession remained 62% male and 81% white in 2022.[2] Because the arbitrator selection process relies heavily on professional connections, it is not surprising that achieving arbitrator diversity remains a challenge. Nevertheless, as Love asserts, diversity advances business and moral imperatives.

As arbitration continues to be recognized as a flexible and cost-effective process for resolving disputes, participants engaged in arbitral proceedings are increasingly recognizing the importance of diverse arbitrators and panels. Diversity of experience and perspective improves the decision-making process. As businesses and disputants become more diverse, offering the option to select diverse arbitrators will increase the parties' overall confidence in arbitral systems and outcomes.

Increasing the ranks of diverse arbitrators is thus paramount. Focused mentoring and inclusion can have an outsized impact on increasing diversity because of the way arbitrators are chosen.

The Importance of Mentoring

According to Lee, mentoring happens every day: "For my parents, who moved to the United States at the age of 45, their mentors were other Korean immigrants who passed on their knowledge of small business ownership. For my colleague, who was born and raised in San Francisco, his mentors included a family friend who happened to be a federal district court judge. For me in my professional life, the most influential mentors were those lawyers in my firm who gave me opportunities at the beginning of my career. We find mentors within our own micro-communities, and within those communities, it is a normal and widely accepted part of life."

For Love, mentoring started at a very young age, as she worked as a child in the office of her grandfather, who was a sole practitioner. Over the years, as she has been on her journey to be recognized as a highly qualified, accomplished and sought-after dispute resolution professional, she has continued to rely on the formal and informal advice and guidance received from dispute resolution professionals who have achieved success in the ADR field. "On my journey, I have benefited substantially from formal mentoring programs established to foster diversity in the profession. I have also greatly benefitted from informal encounters with highly regarded ADR professionals willing to provide advice or information or extend a courtesy to support diversity efforts. Many of these encounters have been in focused programmatic mentoring structures and many have been in very brief, single or limited and sometimes random encounters at networking events or social events. Both formal mentorships and informal associations are important and should be recognized for the essential role each has in the development and success of diverse neutrals."

The Impact of Focused Mentoring

Evans agreed that mentorship happens at every phase of life, consciously or unconsciously. "Parents, coaches, and teachers are our earliest mentors." Professional growth, however, involves focused mentoring: "The sooner you figure that out, the sooner you can embark on the pathway to success."

Evans continued, "In a professional organization, such as the CCA, focused mentoring is not merely a formality but a dynamic relationship between the mentor and the associate that boosts the associates toward their goals." The focused mentoring given by the CCA involves intense training in group settings and personalized guidance from an assigned mentor that is tailored to the associate's unique aspirations, challenges, and skill set.

Love agreed and stated that "having started my dispute resolution career in a fellowship program designed to expand the ranks of diverse ADR professionals and as a current CCA Associate, I have a profound understanding and appreciation of the role that formalized mentoring programs have on improving diversity and inclusion in the ADR field. I am also fortunate to be one of many experienced neutrals with JAMS, which has been on the forefront of promoting DE&I in the legal industry for many years."

For Lee, the goal of programs like the CCA's Associates Program is to expand the model of mentorship beyond the boundaries of our micro-communities. "These programs are impactful because they are intentionally structured to provide focused mentoring. For example, the program provides the associates with the opportunity to attend the college's annual meeting. At the meetings, we are given the opportunity to learn about recent developments in the law and to participate in lively debates about arbitrator ethics. We have a chance to hear different points of view on numerous topics, such as whether (or under what circumstances) arbitrators may offer their views of a case's merits to assist in the parties' settlement. Outside the annual meetings, we have been offered opportunities to speak on panels and meet regularly as a group to learn about arbitration best practices from some of the leading practitioners. We are encouraged to join committees, to speak and write on arbitral topics, and to meet individually with our mentors to get their insights and encouragement as we figure out how to expand our practice as arbitrators."

Love added that by participating in these formal programs, "I have been provided education, training, goal-setting strategies, accountability partners, and constructive criticism. I have been afforded a pathway to build my reputation and career as a commercial arbitrator and mediator. I have also developed meaningful and lasting relationships with highly respected arbitrators. In addition, there have been mutual opportunities to share thoughts, insights, and perspectives. As a result, formal mentoring programs have been essential to my continuing development and will continue to play an essential and significant role in diversifying the profession."

Role of Informal Mentors

Love reminded that "although formal mentoring programs are essential from an institutional level and while the benefits of focused mentoring cannot be overemphasized, transparency requires the acknowledgement of the role that informal mentorships and sponsorships have played in my development as a commercial arbitrator. These informal mentors can play significant roles to advance the careers of diverse professionals by providing speaking, teaching, and shadowing opportunities; recommending party appointments and chair appointments; and offering invitations to join committees, clubs, and events, and participate in social activities with other ADR professionals."

Recognizing the impact that informal mentoring can have in diversity and inclusion efforts is important to encourage arbitrators who may not be able to commit to participate in a structured program. Everyone can commit to being inclusive in their thoughts and actions by "thinking out of the box" to offer opportunities to diverse practitioners.

Evans echoes Love's sentiments regarding informal mentors. "I actually have more informal mentors than formal ones and both are equally important. My informal mentors have

also provided speaking opportunities, referred clients, made introductions, and given invaluable advice."

Meaning and Impact of Inclusion

Any mentoring, whether formal or informal, requires inclusion. For Lee, inclusion means creating an environment where it is possible to build relationships of mutual trust. "The Associates Program has been impactful because it has been inclusive. Many people within the CCA—including the CCA's leadership, the leaders of the Diversity Committee, our mentors, and everyone else who have been involved in developing and presenting educational programs—have devoted countless hours to offering focused mentoring to the associates. But through their focused mentoring, they have also demonstrated their commitment to inclusion."

Lee admitted that until she participated in the CCA Associates program, she never thought too deeply about what inclusion meant beyond its obvious definition. However, having participated in the Associates Program, "I now realize that true inclusion involves being able to form relationships of trust. Trust involves the ability to have meaningful conversations with another person. Perhaps the two of us have nothing in common in terms of our race, gender, upbringing, or even legal training and experience. But if we approach each other with curiosity, we might discover a shared interest or life experience. That shared interest might be our mutual interest in arbitration, but it can also involve a myriad other things, from music to sports to current events. To be clear, inclusion does not mean that I will (or need to) form trusted relationships with everyone in the organization. But it does mean I am in an environment where I can and have developed such relationships. For any mentoring program to be mutually beneficial, we need to be able to trust each other."

Evans is of the strong belief that inclusion goes hand in hand with diversity, creating an environment where everyone feels a sense of belonging. It involves creating policies, practices, and a culture that values and respects the uniqueness of each individual. In an inclusive environment, individuals are not just diverse in appearance; they are actively involved, engaged, and empowered. "The CCA's Associates Program has been the epitome of inclusiveness. The Fellows of the CCA have made every effort to make the Associates comfortable, to share best practices, and to allow the Associates to participate in the day-to-day business of the CCA."

Love adds, in the words of Verna Meyers, "Diversity is being invited to the party; inclusion is being asked to dance." Both are important.

From Mentoring and Inclusion to Sponsorship

Evans believes that while mentoring necessarily guides from within, sponsorship is the external force that pushes careers to new heights. "The CCA has excelled with mentorship and inclusion and is well on its way towards sponsorship! They have already begun using their influence within the universe of ADR to create opportunities and visibility for the Associates. Thankfully, they are keenly aware that sponsorship is a key driver of career progression."

Love speaks for all of the inaugural CCA Associates class when stating, "on this arbitration journey, we have been the beneficiaries of both formal and informal efforts to address the challenge of diversity and inclusion. We have benefited from the efforts of those who are dedicated to focused mentoring programs, as well as from the kindness of relative strangers. Both have added to our development and success and have had a profound, compounding impact on our careers."

The importance of focused mentoring, sponsorship, and inclusion in a professional organization cannot be overstated. Together, these elements create a holistic framework that nurtures talent, propels careers, and fosters a sense of belonging. As the College of Commercial Arbitrators and other ADR institutions continue to innovate, we hope that each will continue to recognize and embrace the interconnectedness of these pillars.

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1. For instance, demographic data collected by AAA in 2020 showed that 78% were men and 88% were white. *See* https://www.adr.org/sites/default/files/document_repository/ArbitratorDemographicData_01132020.pdf.
2. https://www.americanbar.org/content/dam/aba/administrative/market_research/2022-national-lawyer-population-survey.pdf.

State-Sponsored Mediation Around the World: Does It Support the Parties' Interests and the Reception of Mediation?

By Jonathan Rodrigues

Drawing inspiration from Elizabeth Thornberg's writing,[1] it may be posited that the wonders of a mediation process—privacy, party autonomy, voluntariness, neutrality—are remedies for the horrors of litigation. Any compromise on these key features by courts and governments who may sponsor mediation programs raises questions about the purpose of the sponsoring entity and the advancement of mediation.

Mediation is one among many alternatives to the traditional court system, and, as mediation has evolved into an integral part of the legal system, used to resolve, both, civil[2] and public law matters involving the state in many jurisdictions, it provides a window into governmental influence on state-sponsored Alternative Dispute Resolution (ADR).

When promoted and mandated by courts, government agencies, corporations and disputants must know what to expect from mediation.[3] Critics argue that uninformed citizens, participating in a court-referred mediation involving the government, may not realize that a solution proposed in mediation may be rejected and that they can still have "recourse to sovereign judicial power as the dispute-solving entity."[4]

Court-referred or court-annexed mediation, which is state sponsored, has grown popular in many jurisdictions across the globe, and the styles, skills, and professional ethics that apply are influenced by the needs and expectations of legal professionals who dominate court-connected mediation.[5] In many mandatory family and civil mediations geared toward reducing court congestion, mediation programs have evolved largely to reflect the needs and preferences of judges and attorneys.[6]

Globally, state-funded ADR has had mixed reception with regard to its implementation and acceptance by the varying local public. The German Civil Procedure Rules initially required judges to offer disputants the opportunity to settle at a 'Gütevehandlung' (conciliation hearing), which was conducted by the same judge, who would also hear and adjudicate the case, if not settled. But, as Judge Pia Mahlstedt explains, the German Mediation Act restored neutrality to the process by having judges refer cases to an alternate 'Güterichter' or Conciliator.[7] With judges acting as sole mediators in the French system, critics have suggested referral of court cases to professional mediators,[8] not connected to the courtroom, to ensure neutrality, develop trust, and incentivise more litigants to mediate in administrative and state-involved disputes.

The effective ombudsmen services in the Netherlands has substantially reduced the use of their courts to resolve administrative disputes, and mandatory court mediation has worked successfully ". . . in employment disputes between government employers and their civil servants."[9] In Norway, the Disputes Act clearly defines the 'neutral' role of the courts in mediation related to administrative cases, and safeguards the "party autonomy" feature of mediation by stating that ". . . the court shall not present proposals for a solution or advice or express points of view that may weaken the impartiality of the court."[10]

The global trend of governments embracing mediation for their own disputes does not necessarily reflect a consistent pattern. While the Australian government has made a commitment to promoting and engaging in ADR processes when it is itself a party to a dispute;[11] in another continent, the recent legislation on Mediation in India has conveniently steered clear of mandatory mediation, and effectively discouraged mediation, in general, for disputes involving the government in India.[12]

Back in Europe, nations tussle with the idea of compulsive ADR, with the Romanian Civil Procedure Code amended in 2010 to introduce mandatory conciliation and mediation, for all civil cases.[13] Elsewhere, in Slovenia, the Alternative Legal Dispute Resolution Act directs Slovenian courts to offer mediation as a quasi-compulsory procedure with as an opt-out model, allowing room for parties to exercise their voluntary decision to not participate.[14]

In some jurisdictions across the globe, people are forced to participate to claim their court costs.[15] In England, contradictory precedents establish that no party can be forced to mediate,[16] but a party could be penalised for ignoring an offer to mediate,[17] and courts can stay proceedings and refer parties to mediation.[18]

Besides the courts, government agencies have also introduced in-built ADR mechanisms to resolve disputes. The USPS (United States Postal Service) mediation program titled "Resolve Employment Disputes, Reach Equitable Solutions Swiftly" (REDRESS), which was initiated in 1994 as part of its settlement of a racial discrimination class action,[19] is an example of how the mediation scheme was designed to suit the needs of the sponsor, but also carefully crafted to appeal to the aggrieved citizens.

The USPS made the program voluntary for its employees, but mandatory for their own supervisors and management,[20] thus aiming to erase formal Equal Employment Opportunity (EEO) complaints. To avoid being labeled as a "trap for coerced settlements," the USPS adopted a model of mediation that specifically excluded mediator evaluation. This, in a way, it assured neutrality.

Use of state-funded mediation services "*. . .* poses the risk of invisibility and important community interests and tenuous rights hard won 'could fade from the public agenda'," [21] and thus could ruin an opportunity for correctional change.

Generally, if nine out of 10 parties (both public bodies and private citizens) report a high level of satisfaction,[22] the state would argue—should their personal justice be substituted for the need for public trial?

Since 2001, the UK government has pushed towards ADR for administrative justice, especially in terms of special education needs (SEN) mediation, where local authorities were to implement independent mediation schemes to resolve disputes between parents and those authorities. However, this idea of "party empowerment" without legal advice led to many parents skipping mediation services for fear of being overpowered by institutions that were socially, legally and financially superior,[23] and, even if they tried mediation, may have arguably accepted offers which underestimates the strengths of their legal positions.

Even as 51% of the SEN cases were settled, only one-third of the parents said they would use mediation again.[24] The lack of counseling and an enforcement authority, in addition to the confidential nature of the mediation process leaving parents feeling helpless and duped, after thinking they had contributed and crafted a mutually agreed-upon resolution, only to be let down by the school failing to implement the settlement.[25]

In conclusion, court-connected mediation has the potential to educate and empower citizens to participate, but it can also be a limitation—and muzzle the progress of democracy.[26] If mediation is practised and promoted in a way that can level the playing field, state-funded mediation will cement its credibility in civil society. Much needs to be done in terms of identification of eligible matters for mediation, empanelment of trained and certified neutrals who adhere to an ethical code, quality control of mediation services and independent auditing of the administration of these neutral services. Ultimately, the prospect of privatised and self-determined 'justice' through mediation is far better than delayed or no justice at all.

Jonathan Rodrigues is a mediator operating in the UK and India. He is the founder of The PACT, a mediation education firm in India, and serves as an editorial consultant with Mediate.com. He currently leads the People and Culture Association (PCA) in London.

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You Must Read This—But You Won't Like Everything It Says!

Professional Judgment for Lawyers by Randall Kiser

Book Review by Laura A. Kaster

Books Reviewed:

***Professional Judgement for Lawyers* by Randall Kiser (Edgar Elger, 2023)**

***Managing Conflict Mindfully: Don't Believe Everything You Think* by Leonard L. Riskin (West, 2023)**

***The Technological Competence of Arbitrators: A Comparative and International Legal Study* by Katia Fach Gómez (Springer, 2023)**

For over fifteen years, Randall Kiser has been challenging lawyer decision-making and risk assessment. His seminal work studying settlement rejections demonstrated an unexpectedly high rate of "decision error" which resulted far too often in either plaintiffs' recoveries at trial lower than the settlement offered or significantly greater payouts by defendants at trial after they rejected settlement.[1]

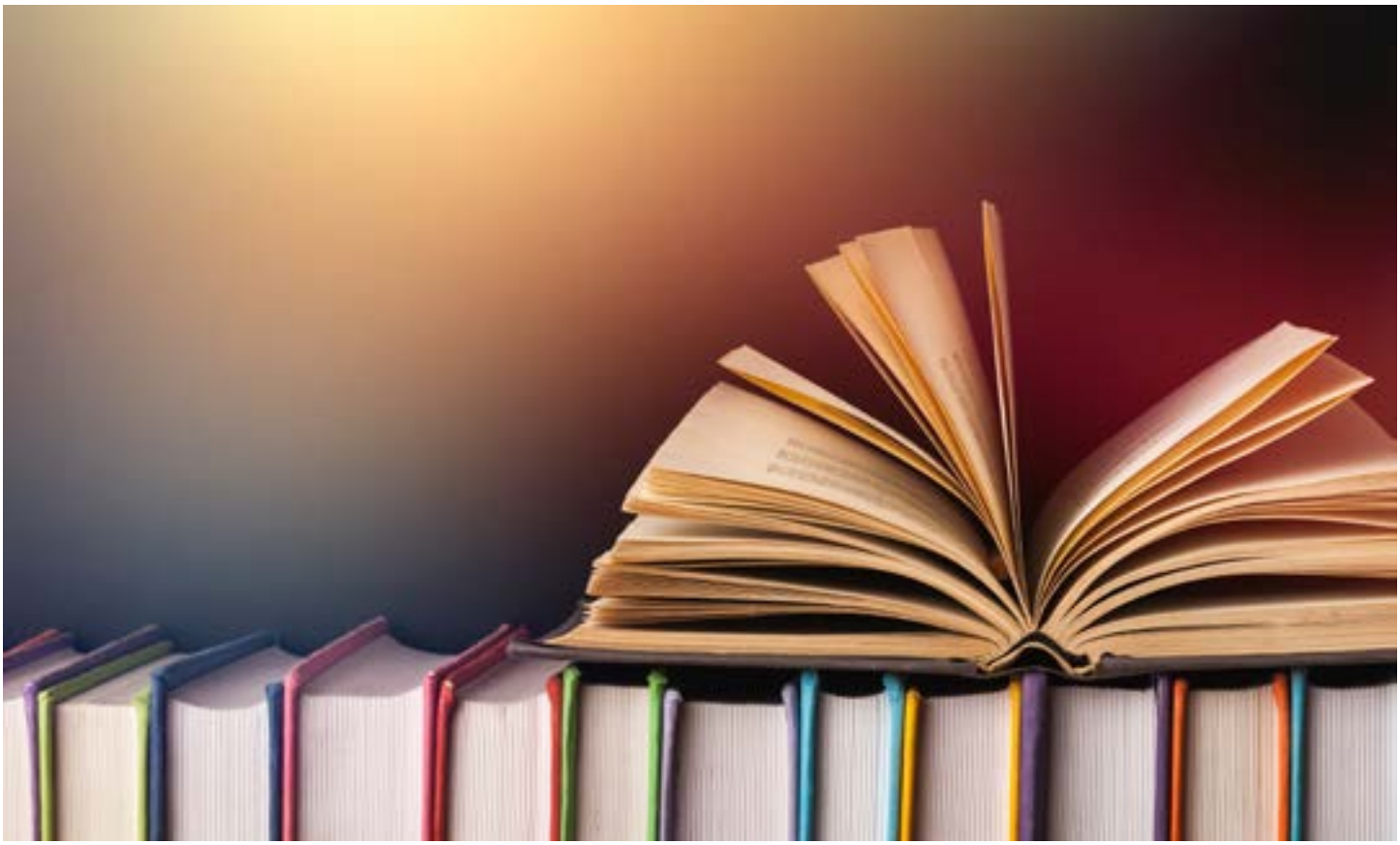
Kiser's book, *Beyond Right and Wrong* (Springer 2010), showed us more granular examples of those who have developed techniques for better prediction.[2] Now, in *Professional Judgment for Lawyers* (Edward Elgar Publishing, 2023), Kiser challenges our assumptions about legal training itself.[3] He asks, why do we believe we are trained in analysis and judgment when we fail to ground our thinking in known science or in scientific method, or even evaluation of decisions previously made? Why has legal training remained fundamentally unexamined since Langdell introduced the case method in the nineteenth century? How can we continue to ignore not just decision science but psychology and brain science? Why have we no real training in risk assessment? Despite our obligation to provide our best judgment to our clients, why have we not developed techniques for improving that judgment or advancing to wisdom?

> For a profession that reveres and promotes procedures, it is peculiar that law has neither established nor followed specific procedures for analyzing facts, selecting arguments, or validating conclusions. Legal analysis and reasoning remain largely idiosyncratic, extemporaneous, and opaque processes more dependent on the unique challenges of specific disputes and transactions than overarching principles that advance decision-making quality.[4]

This book is a must for arbitrators, mediators, and advocates and educators in ADR where risk assessment (a kind of forecasting) is a key element of the project. Kiser not only explains the underlying gaps in legal training and self-development and the pernicious influences of a variety of cognitive biases that taint lawyer and judicial decisions but also gives specific guidance for self- assessment and improvement. Chapter 8 on "Insight, Hindsight, and Foresight" is invaluable in helping to explain the project of forecasting. Although most attorneys may class prediction as a dark science outside their professional purview, in fact it is key to counseling clients in negotiations and settlements, including during mediation. Limited ability to see the weight of evidence that supports an opponent or to counter the attorney and client rosy view of their own case inhibits the constant iterative process needed to improve prediction. As Kiser states:

> Effective forecasting is a process of synthesizing multiple sources of information, developing forecasts, and then testing and trying to disprove your own forecasts with new data. This process is stymied when we are strongly attached to our own opinions and view our opinions as extensions of ourselves.[5]

One of Kiser's many recommendations is that we abandon vague verbiage, such as success is "probable," and assign numerical values to our predictions, values that we constantly update on the basis of new information. The truth is that to the client a 60% chance of success may be much closer to 50/50 than the lawyer perceives and is likely to lead to quite a different discussion regarding settlement. In any case, assigning probabilistic words reduces misunderstandings and employing ranges rather than a single number (a range that decreases with improved information) improves focus on what information is needed to improve insight. In this regard, the use of AI may become significant, and the lawyer needs to



understand how and why in order to be a proficient counselor. Most of all, Kiser recommends that we consider the opposite. Put yourself in your opponent's shoes or as Daniel Kahneman recommends, do a premortem, imagine you have lost and assess the reasons for that loss.

The book is well-organized with a summary of points made at the end of each chapter followed by a rich listing of resources. There is a separate section on arbitrator decision making and one on mediator decision making. According to studies cited by Kiser, arbitrators do not perform better than judges and lawyers and suffer equally from unconscious bias. Mediators' control over information and communication presents special problems for Kiser. But his primary concern is that the lack of diversity in the ADR field undermines ADR's role as a substitute for judicial process; he notes statistically significant differences in the median awards given by male and female arbitrators in employment cases, and the much lower participation and selection of female arbitrators in those disputes.

The project of becoming a true professional is arduous. It begins with a commitment to achieving expertise and for dispute resolvers and counselors, it demands self-development in assessing risk and predicting outcomes. Kiser's book is a tremendous contribution to us all.

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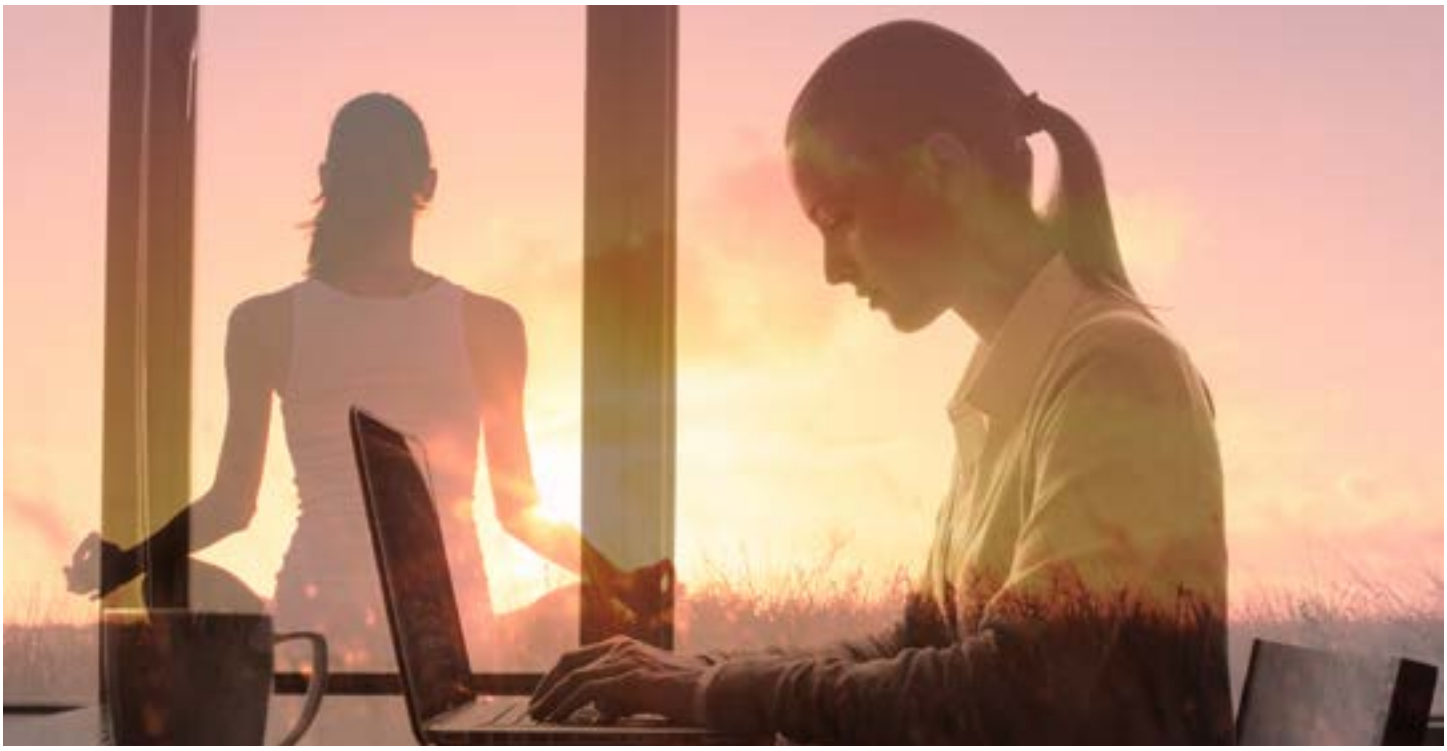
Managing Conflict Mindfully: Don't Believe Everything You Think by Leonard L. Riskin

Book Review by Jackie Nolan-Haley



Yet another book on negotiation and conflict resolution? Is there anything new to say? Thankfully, the answer is yes. *Managing Conflict Mindfully: Don't Believe Everything You Think* by Professor Len Riskin (West Publishing 2023) offers a novel framework for managing conflict that integrates three seemingly disparate practices—negotiation, mindfulness, and internal family systems.

Riskin, a prolific author, is no stranger to the ADR world. He is a Visiting Professor of Law and Distinguished Senior Fellow at the Center on Negotiation, Mediation, and Restorative Justice at Northwestern University Pritzker School of Law and the Chesterfield Smith Professor of Law Emeritus at the University of Florida Levin College of Law. Riskin is well known for his description of the "lawyer's standard philosophical map" in his article *Mediation and Lawyers* (1982) and for identifying and theorizing facilitative and evaluative mediation approaches in what has become known as the "Riskin Grid."[1]

Managing Conflict Mindfully describes what Riskin labels a "three domains" approach to negotiation—negotiation, mindfulness and internal family systems (IFS). Each domain has its own theory and practice. Each can help parties understand and address conflict and increase their ability to act "with wisdom, compassion, and kindness toward themselves and others."[2] Riskin's basic thesis is that if these three domains are used and integrated appropriately, they could improve our ability to prudently manage conflict and problematic situations. He encourages readers to practice using these three domains either alone or in combination and he offers case studies and exercises to further understanding.

For some practitioners, this book will be welcomed as a concise review and summary of mainstream negotiation literature. But there is so much more here. The section on negotiation integrates and builds on the work of other negotiation scholars in *Getting to Yes*[3] (positions and interests), *Beyond Reason: Using Emotions as You Negotiate*[4] (core concerns of appreciation, affiliation, autonomy, status and role) and *Difficult Conversations: How To Discuss What Matters Most* [5](recognize that each difficult conversation really consists of three conversations—what happened, emotions, and identity.)

There are multiple connections between positions, interests and core concerns. However, Riskin recognizes, based on

his own experience and that of students and colleagues, it is not always easy to employ the core concerns when negotiating. He identifies five obstacles in this regard: habitual ways of thinking, excessively self-centered perspectives, inadequate management of emotions, insufficient social skills, and inadequate management of awareness and focus.

How should we deal with these vulnerabilities in the core concern model? Riskin provides a response to this question in his discussion of the second domain in his framework, mindfulness, illustrating how the negotiator can improve performance and overcome these five obstacles or at least reduce their influence. Riskin was a leader in promoting mindfulness in the legal profession.[6] While many readers may be familiar with negotiation theory and practice, there is less awareness of mindfulness, which Riskin tells us can be cultivated through meditation. He offers us many benefits of mindfulness practice, including helping people get rid of bad habits, reducing the bias associated with fast thinking, developing "emotional intelligence," and cultivating nonjudgmental awareness. He offers specific guidance on practicing mindfulness with meditation exercises: walking mediation, lovingkindness meditation and open awareness mediation. What should you do when you don't believe some of the thoughts that come into your mind while meditating? Consider them "just thoughts" and let them be, he advises.[7]

Following the discussion of negotiation and mindfulness, Riskin moves to an analysis of internal family systems. This third domain, in my view, presents the most challenging aspect of the book. IFS, developed by the family therapist Richard C. Schwartz, offers a set of tools and language to work with internal and external conflict related process and behaviors.[8] Riskin explains that the IFS model of the mind contains two main types of components: "Parts" of which there are many and a "Self" of which there is just one. The self and the parts are considered an internal family system. They interact as a system similar to the way that human beings do in a group or family.[9] IFS offers a theory that can help answer complicated questions such as: "Who or what is in conflict with whom or what? Who or what is negotiating, mediating or adjudicating?"[10] Riskin explains how IFS, combined with negotiation skills, can help navigate difficult situations.

Given the primacy of conflict in our domestic and international settings, there can never be enough thinking about, and practicing ways, of managing conflict. Towards this end, *Managing Conflict Mindfully* adds admirably to the conflict resolution canon. Practitioners and academics alike will benefit from its wisdom and might even be inspired to try incorporating Riskin's framework in their conflict practice and teaching. Beyond the domain of practice and teaching, anyone who finds themselves in conflict's grip will likely benefit from the insights in this book.

"While many readers may be familiar with negotiation theory and practice, there is less awareness of mindfulness, which Riskin tells us can be cultivated through meditation. He offers us many benefits of mindfulness practice, including helping people get rid of bad habits, reducing the bias associated with fast thinking, developing 'emotional intelligence,' and cultivating nonjudgmental awareness."

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The Technological Competence of Arbitrators: A Comparative and International Legal Study by Katia Fach Gómez

By R. Matthew Burke

In 2018, a survey by Queen Mary University of London and White & Case found that 64 percent of arbitration professional respondents had *never* used a virtual hearing room.[1] By 2021, the numbers flipped—72 percent of respondents reported using a virtual hearing room "sometimes," "frequently," or "always."[2] This change will surprise few in practice over the last several years. Whether surprising or not, it is indicative of a fundamental shift in the conduct of arbitration.

In *The Technological Competence of Arbitrators* (Springer, 2023), Katia Fach Gómez argues that, considering the growth of technology in the practice of law, "lawyers with Luddite tendencies can no longer be considered competent." Rather, arbitrators and attorneys must be "T-shaped," combining deep legal expertise with professional working knowledge across a range of legal technology and data security issues. The book makes its argument in five chapters, each structured around a core question concerning technological competence: What is it? Why is it relevant? Who needs it? Where is it regulated? And when is it required? Examining these questions, Fach Gómez has produced an impressive work of scholarship that synthesizes institutional rules, commentary, and arbitral and judicial decisions into a practical and thought-provoking guide on the technological competencies necessary in arbitration.

What is technological competence? The book's "starting point" is to distinguish between "basic" and "premium" levels of technological competence. "Basic" competence requires the ability to resolve issues related to cybersecurity, data protection, ESI, and remote communication that often arise in a proceeding. "Premium" competence, on the other hand, is closer to expertise. Although "premium" competence is not generally required, it may be necessary to resolve some aspect of a particular dispute. For those starting out in arbitration careers, Fach Gómez suggests that achieving "premium" technological competence can be a competitive edge in obtaining nominations.

Why is technological competence relevant? Because the potential benefits and harms of technology to the practice of arbitration—and law broadly—make technological competence indispensable. By automating routine tasks or allowing face-to-face meetings without travel, technology produces obvious efficiency benefits. In arbitration, the book argues, technology may increase diversity in the pool of arbitrators by increasing access to underrepresented regions or facilitating access by arbitrators and parties with physical disabilities.

Conversely, the book suggests, the advance of new technologies like AI may entail "sacrificing—or at least putting a strain on—legal principles such as due process and transparency." What is going on behind the scenes in an AI tool may not be well-understood. The Silicon Valley Arbitration and Mediation Center recently propounded draft guidelines requiring arbitration participants using AI to "make reasonable efforts to understand each AI tool's relevant limitations, biases, and risks."[3] Consistent with these lines of thought, Fach Gómez argues that incorporating new technologies into arbitration requires a "critical spirit and restraint" to which technological competence is indispensable.

Who must be technologically competent? The "who" chapter focuses on legal assistants and non-legal professionals working under the direction of arbitrators. A principal justification for arbitrators employing legal assistants is to ensure "arbitration proceedings are effective," which requires, the book argues, the "use of new technologies." Going further, if a legal assistant must use technology to be effective, Fach Gómez questions "whether legal assistants really need to be human." Indeed, "the time may come when tribunal secretaries are considered an unnecessary expense or even outdated."

Technology may one day make legal assistants unnecessary, but it has made non-legal IT professionals essential. For example, remote hearings are commonly outsourced to third-party providers, and recent surveys report satisfaction with these services.[4] Employing IT professionals does not give arbitrators a pass to ignore technological issues, however. Arbitrators "must supervise technological tasks performed by non-legal professionals," which requires that arbitrators themselves possess at least basic technological competence.

Where is technological competence regulated? A growing number of institutional rules regulate it expressly, and other institutional rules, national arbitration acts, and rules of ethics regulate it impliedly. Fach Gómez's scholarship is extensive here, examining an array of rules that grant the arbitrator the express power to oversee the use of technology in the proceedings, set a point in the proceedings when the parties and the tribunal must discuss technological issues, or outline

"Fach Gómez's book is an essential acknowledgement that arbitration is now done by technological means and, by necessary implication, that it is the duty of arbitrators and practitioners to be competent in those means. "

specific technologies or technological issues to be addressed by arbitrators and the parties.

Broad grants of procedural power may regulate the use of technology impliedly. For example, Article 22.2 of the 2021 ICC Rules provides, "after consulting the parties, the arbitral tribunal shall adopt such procedural measures as it considers appropriate."[5] As an extension of the authority to determine "procedural measures," the provision authorizes arbitrators to determine the use of technology in the proceeding. Effective exercise of this authority requires technological competence.

Concerning codes of ethics for arbitrators, the book points out that "the actual ethics texts in the commercial arbitration context do not expressly affirm that arbitrators have a duty of technological competence."[6] Nevertheless, Fach Gómez persuasively argues that the duty can be derived from the "classic duties" of an arbitrator, "ability, diligence, availability, qualifications and lifelong training." Given that the duty of technological competence is not yet explicit in the ethical rules, the book "aims . . . to spark a debate among arbitration stakeholders on the suitability of incorporating an arbitrator duty of technological competence into texts concerning ethics."

When do arbitrators need to be technologically competent? Technological competence is relevant to every phase of the arbitration. Arbitrators may require that the procedural order addresses the use of technology throughout the proceedings. And an arbitrator who does not have the competence to understand the basics of e-discovery, data protection, or AI may be unable to resolve disputes on these issues between the parties. The book analyzes these and similar technological challenges that arise throughout the proceeding, from e-filing through remote hearings to data security and data privacy. Fach Gómez's analysis doubles as a guide for the practitioner in assessing and planning for technological challenges in current or anticipated arbitrations.

Technology is a fixture of the legal industry and in arbitration. Fach Gómez's book is an essential acknowledgement that arbitration is now done by technological means and, by necessary implication, that it is the duty of arbitrators and practitioners to be competent in those means.

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Endnotes

1. Queen Mary University of London and White & Case, *2021 International Arbitration Survey: Adapting Arbitration to a Changing World*, at 21 (2021), *available at* https://arbitration.qmul.ac.uk/media/arbitration/docs/LON0320037-QMUL-International-Arbitration-Survey-2021_19_WEB.pdf.
2. *Id.*
3. Silicon Valley Arbitration and Mediation Center, *Draft Guidelines on the Use of Artificial Intelligence in Arbitration,* at 6 (Aug. 31, 2023), *available at* https://thearbitration.org/wp-content/uploads/2023/08/SVAMC-AI-Guidelines-CONSULTATION-DRAFT-31-August-2023-1.pdf.
4. ICC, *Leveraging Technology for Fair, Effective and Efficient International Arbitration Proceeding,* at 44 (2022), *available at* https://iccwbo.org/wp-content/uploads/sites/3/2022/02/icc-arbitration-and-adr-commission-report-on-leveraging-technology-for-fair-effective-and-efficient-international-arbitration-proceedings.pdf.
5. Rules of Arbitration of the International Chamber of Commerce, Art. 22(2) (2021), *available at* https://iccwbo.org/wp-content/uploads/sites/3/2020/12/icc-2021-arbitration-rules-2014-mediation-rules-english-version.pdf.
6. The Silicon Valley Arbitration and Mediation Center's *Draft Guidelines, see supra* note 4, were published after Fach Gómez's book was submitted for publication.

Case Comment

Campbell v. The Bloom Group, 2023 BCCA 84

By Julie Hopkins and Sarah Hanks

Advice for arbitrators on making credibility findings based on a witness request for interpretive assistance or other accommodation

Fairness requires that parties both understand and be understood in proceedings that affect them. This is a fundamental principle of natural justice.[1]

In Canada, the Canadian Charter of Rights and Freedoms provides for the right to use an interpreter where a party or witness "is deaf" or does not understand or speak the language of the proceedings.[2] This right applies not only to criminal proceedings but also to civil and administrative ones. The resulting rules and requirements vary by context.[3] While the United States' Constitution lacks a similar provision that expressly guarantees the right to interpretive assistance, American courts have inferred one.[4]

In civil and administrative proceedings, the case law in Canada is consistent. Generally, a request for use of an interpreter should not be denied unless there is evidence–the request was not made in good faith.[5] At the same time, case law recognizes that the right to an interpreter is not absolute and that a balancing must occur between the interests of procedural fairness and the potential for misuse of interpreters by witnesses to alleviate the rigors of cross examination.[6]

Cases concerning negative credibility findings resulting from requests for the use of interpreters not made in good faith are limited. However, what cases there are support the principle that such findings should not be made in the absence of evidence of a lack of good faith.[7] The case law appears to be much the same in the United States on this point.[8]

However, in *Campbell v. The Bloom Group*, 2023 BCCA 84, the British Columbia Court of Appeal cautioned decision-makers about making credibility findings against witnesses asking for unnecessary accommodations even where there is an evidentiary basis to do so.

In this case, the British Columbia Court of Appeal dismissed the Appellant's appeal of an Order denying her petition for judicial review of a decision of a Residential Tenancy Branch Arbitrator. The Arbitrator had denied the Appellant's application to cancel a Notice to End Tenancy issued by the Respondent landlord. At the outset of the hearing before the Arbitrator, the Appellant sought an adjournment on the basis that, among other things, she had a hearing disability that impacted her ability to participate in the hearing. The hearing was being held by teleconference. In dismissing the adjournment application, the Arbitrator expressed skepticism for several reasons about the truthfulness of the Appellant's submissions and noted in his decision on the merits that the Appellant's "credibility was already in doubt from the outset."

On appeal, the Appellant argued, among other things, that it was unfair for a person's request for an accommodation due to disability to be used in an assessment of that person's credibility even if the requested accommodation was ultimately found unnecessary.

The Court of Appeal began its analysis by stating that the foundation of procedural fairness is the principle of *audi alteram partem*: to hear the other side, or let the other side be heard. This principle includes not only the right to be heard, but the right to an unbiased decision-maker.

It noted that these rights are concerned with procedures, not outcomes, and that a decision can be set aside for procedural unfairness only if it resulted in actual prejudice to the right to be heard. That was found not to be the result in this case.

The Court stated that a litigant who asserts a physical disability is not insulated from having that assertion challenged or tested by another party. Nor is the decision-maker prevented from addressing and ruling on the challenge. In this case, whether the claimed disability was advanced in good faith was in issue and the Arbitrator did not act unfairly in arriving at his conclusion.

The Court then observed at paragraph 52:

> [52] I believe, however, that judges and other adjudicators should, depending on the circumstances, be cautious about allowing an adverse credibility finding to be influenced by a request for a disability-related accommodation. Some such determinations may be or may appear to be tainted by assumptions or generalizations about the types of accommodations individuals with diverse disabilities do and do not need to comfortably participate in the legal process.

The Court referenced the Supreme Court of Canada decision in *R v. R.D.S.,* [1997] 3 S.C.R. 484. That case concerned a judge's comments about race and in particular her statement that police officers overact when dealing with non-white people and whether that statement tainted her credibility findings against the police officer in that case. The Supreme Court stated:

> [130] When making findings of credibility it is obviously preferable for a judge to avoid making any comment that might suggest that the determination of credibility is based on generalizations rather than on the specific demonstrations of truthfulness or untrustworthiness that have come from the particular witness during the trial. It is true that judges do not have to remain passive, or to divest themselves of all their experience which assists them in their judicial fact finding. . . . Yet judges have wide authority and their public utterances are closely scrutinized. Neither the parties nor the informed and reasonable observer should be led to believe by the comments of the judge that decisions are indeed being made based on generalizations.

The British Columbia Court of Appeal noted that in this case it was unnecessary for the Arbitrator to have expressed scepticism about the Appellant's submission that she required an adjournment due to her hearing impairment. This was because the Arbitrator had concluded there were multiple other bases upon which to disbelieve the Appellant's evidence on the substantive issues. The Court stated "[n]either the parties nor the informed and reasonable observer should be led to believe that decisions are indeed being made based on generalizations."

The Appellant, in argument, analogized the situation to a witness request to use an interpreter. The British Columbia Court of Appeal agreed and stated at paragraph 56:

> . . . . For most litigants a courtroom is an unknown and daunting environment. For many non-English speaking witnesses, an interpreter may not be 'necessary' but may nevertheless provide a level of comfort. So too, for example, a person with a hearing impairment may require some accommodation to abate the concern that their impairment will interfere with their ability to respond to questions or otherwise participate in the process. In both cases, decision-makers should be wary about impugning, or appearing to impugn, the credibility of the person on the basis of the accommodation sought.

This case offers a reminder to arbitrators, and all decision-makers, that the risk of the appearance of bias can arise in many forms, including where an arbitrator's findings might have the appearance of being based on stereotypical generalizations. As a result, care and discretion is called for when making negative credibility findings based on requests for an interpreter or other forms of witness accommodation even where there is evidence that the request was not made in good faith. This is particularly true where there may be alternative basis to reach the same result. The advice? Just because you can, doesn't mean you should.

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Endnotes

1. For example, see: *R. v. Tran*, 1994 CanLII 56 (SCC), [1994] 2 SCR 951 ("*R. v Tran*") at para 38.
2. Section 14 provides as follows:

   "A party or witness in any proceedings who does not understand or speak the language in which the proceedings are conducted or who is deaf has the right to the assistance of an interpreter."
3. *R v. Tran* at paras 38-53.
4. *R v. Tran* at paras 13 and 24.
5. *Anand v. Anand*, 2016 ABCA 23 at paras. 18–20; *Jahanian v. Jahanian*, 2021 BCSC 1890 at para. 53; *Ai Kang Yi Yuan Enterprises Corp. v. 1098586 B.C. Ltd.*, 2022 BCSC 1416; *R. v . Tran*, [1994] 2 S.C.R. 951.
6. *Mee Hoi Bros. Company Ltd. v. Borving Investments (Canada) Ltd.*, 2014 BCSC 1710 at paras. 13 – 21.
7. *Kim v. Khaw*, 2014 BCSC 2221; para. 104.
8. See e.g., *Rocha-Guzmán v. D.C. Dep't of Empl. Servs.*, 170 A.3d 170 (D.C. 2017); *Cerwick v. Tyson Fresh Meats, Inc.* 927 N.W. 2d 691 (Iowa 2019); *Mekhoukh v. Ashcroft,* 358 F. 3d 118 (1st Cir. 2004).

Case Summaries

By Al Feliu

Litigation Stayed Pending Appeal of Denial of Motion To Compel

The Supreme Court, resolving a question that had divided the courts of appeal, ruled that litigation must be stayed pending an interlocutory appeal of the denial of a motion to compel. Prior to this decision, six circuit courts imposed an automatic stay while three left the question to the discretion of the district judge. In an exception to the general rule that appeals may only be taken from a final judgment, the FAA permits immediate interlocutory appeals where a motion to compel is denied. The majority in this five-four decision concluded that while a matter is appealed, as was the case here, the district court is divested of its control over the case. "If the district court could move forward with pre-trial and trial proceedings while the appeal on arbitrability was ongoing, then many of the asserted benefits of arbitration (efficiency, less expense, less intrusive discovery, and the like) would be irretrievably lost—even if the court of appeals later concluded that the case actually had belonged in arbitration all along." The majority saw potential coercion if a party that had bargained for arbitration was required to proceed through discovery and trial while awaiting determination of its motion to compel. Further, the majority opined, from "the Judiciary's institutional perspective, moreover, allowing a case to proceed simultaneously in a district court and the court of appeals creates the possibility that the district court will waste scarce judicial resources—which could be devoted to other pressing criminal or civil matters—on a dispute that will ultimately head to arbitration in any event." The majority viewed this as the "worst possible outcome" and concluded that an automatic stay was required while the question of arbitrability was being decided on appeal. *Coinbase, Inc v. Bielski*, 599 U.S. 736 (2023).

RICO May Be Invoked To Enforce Foreign Arbitration Award

Smagin, who resides in Russia, obtained an arbitration award of over $84,000,000 against a joint venturer who resides in California. A California district court affirmed the award and post-judgment orders to enforce the award. Smagin brought a civil RICO suit, alleging, with good cause, that the joint venturer was hiding assets to avoid creditors, including Smagin. In particular, the suit alleged that the joint venturer in conjunction with others engaged in a pattern of wire fraud and other predicate racketeering acts, including witness tampering and obstruction of justice. The question for the United States Supreme Court was whether Smagin suffered a "domestic injury" in United States sufficient to invoke RICO. The majority, applying a contextual approach, emphasized that Smagin obtained "a judgment in California because that is where [the joint venturer] lives, and thus where Smagin hoped to collect. The rights that the California judgment provides to Smagin exists only as in California, including the right to obtain post-judgment discovery, the right to seize assets in California, and the right to seek other appropriate relief from the California District Court." The alleged RICO scheme, the majority explained, thwarted and undercut the orders of the California District Court and Smagin's efforts to enforce rights. "On the Court's contextual approach, those allegations suffice to state a domestic injury in this suit." *Yegiazaryan v. Smagin*, 599 U.S. 533 (2023).

EFAA Applies Even if Claim Not Styled as Sexual Harassment

Plaintiff alleged that she faced sex-based animus from defendant dance company's executive director. This included criticism for bringing her child to work while not criticizing men, including plaintiff's husband, for doing the same and for reaching across her body for a phone while she was pumping milk while at her desk, even though open phones were available elsewhere. Plaintiff's complaint alleged gender, caregiver, and familial status discrimination but did not identify the offensive acts as specifically sexual harassment. The dance company moved to compel arbitration. The question for the court was whether the End Forced Arbitration Act, which bars the arbitration of sexual harassment disputes, applies. The court, applying the lenient standard for stating sexual harassment claims under the New York City Human Rights Law, concluded that it did and denied the motion to compel. The court emphasized that EFAA defines sexual harassment broadly as relating to conduct that, as alleged, constitutes sexual harassment. The court acknowledged that some of the allegations were conclusory and could not be given weight but concluded that other factual allegations plausibly stated unwanted gender-based conduct. *Delo v. Paul Taylor Dance Foundation*, 2023 WL 4883337 (S.D.N.Y.).

Wage Claims Not Barred by EFAA

The End Forced Arbitration Act prohibits the arbitration of claims related to sex harassment and assault. The question raised here was whether claims of wage and hour violations that apply to all employees working at defendant restaurant are similarly barred if those claims are coupled with a sexual harassment claim. The court ruled that sexual orientation harassment claims brought under the New York State and New York City Human Rights Laws were covered by EFAA and could not be arbitrated. However, the court concluded that plaintiff's wage and hour claims were not covered by EFAA and granted defendant's motion to compel specifically with respect to those claims. The court emphasized that EFAA applies only to claims that "relate to" sexual harassment and sexual assault. The court pointed out that while the sexual orientation discrimination and harassment claims applied specifically to plaintiff, the wage and hour claims apply to all employees working at the restaurant. "Since Plaintiff's wage and hour claims under the FLSA and the [New York Labor Law] do not relate in any way to the sexual harassment dispute, they must be arbitrated." *Mera v. SA Hospitality Group*, 2023 WL 3791712 (S.D.N.Y.).

MLB Decision-Making Committee Ruled Impartial

The Baltimore Orioles and the Washington Nationals had a dispute over broadcasting rights. Major League Baseball (MLB) has a Revenue Sharing Definitions Committee (RSDC) established for these kinds of disputes. The RSDC consists of representatives from three major baseball league teams with rotating membership. The RSDC's determination is final and binding. The parties attempted to negotiate a settlement of the dispute in 2013 and the MLB advanced $25,000,000 in an effort to facilitate resolution. Negotiations failed and the dispute was heard and decided by the RSDC. That ruling, however, was vacated on evident partiality grounds because the Proskauer law firm represented both the MLB and the Nationals. The dispute was returned to the RSDC in accordance with a settlement agreement but with different team representatives and with new counsel. The RSDC issued a second ruling, which was again challenged. The award was confirmed, and the New York Court of Appeals affirmed. The Court rejected the claim that the $25,000,000 advance by the MLB demonstrated that the RSDC was biased, finding "no evidence that MLB or [the commissioner of baseball] had any undisclosed influence on the panel members beyond that which the parties had bargained for in the settlement agreement." The Court reasoned that the Federal Arbitration Act's purpose was furthered by having the RSDC rule on the issue "ensuring that arbitration contracts are enforced according to their terms." The Court made clear that the "parties also specifically agreed to arbitrate before the RSDC because it possessed specialized knowledge concerning the complex telecast rights valuations at issue here and an understanding of the ramifications of its decision. The parties agreed to an industry insider-controlled process with a full understanding of the commissioner's involvement." *TCR Sports Broadcasting v. WN Partner, LLC*, 40 N.Y.3d 71 (N.Y. 2023).

Request To Unseal Confidential Arbitration Documents Denied

Counsel to a group of IBM employees filed an action challenging the dismissal of their claims and arbitration on timeliness grounds. Counsel then filed an early summary judgment motion, which contained confidential documents, submitted under seal, obtained in arbitration proceedings for other IBM employee clients of this counsel. Plaintiffs moved to unseal those documents, and IBM objected and moved to keep those documents under seal. The district court granted IBM's application, and the Second Circuit affirmed. The court acknowledged that the presumption of public access attaches to court filings. Here, however, the court determined that that presumption was weak, in part, because the plaintiffs' underlying claim relating to timeliness was rejected. "Protecting this confidentiality interest is particularly important when the stated objective of Plaintiffs' motion to unseal is to circumvent the Confidentiality Provision to assist plaintiffs in other proceedings -- including Plaintiffs' counsel's other clients." The court weighed the competing interest between public access to court filed documents and the FAA's "strong policy protecting the confidentiality of arbitral proceedings." The court pointed out "allowing unsealing under such circumstances would create a legal loophole allowing parties to evade confidentiality agreements simply by attaching documents to court filings." The court concluded that the district court correctly ruled that the confidential documents must remain sealed. *In re: IBM Arbitration Agreement Litigation*, 76 F.4th 74 (2d Cir. 2023).

Court Can Appoint Arbitrator Where Lapse in Appointment Process Occurs

The parties here each appointed an arbitrator for a three-person panel, but the two selected arbitrators could not agree on an umpire for the panel. One party moved under Section 5 of the FAA to have the court appoint the umpire. In agreeing to do so, the court noted that "the party arbitrators have failed to agree on an umpire despite exchanging a half dozen names." The court pointed out that under Section 5 a court could appoint an arbitrator where there is a "lapse in the naming of an arbitrator." The court noted that a lapse can occur even where, as here, the arbitrators are still exchanging names of possible umpires. Each party presented to the court three names of possible arbitrators for the court to consider. "While the FAA limits courts' authority to examine the qualifications of an umpire once he or she is selected, the Second Circuit has expressly held that Section 5 of the FAA grants courts the authority to examine candidates' qualifications in exercising their authority to appoint an umpire." The court selected a former federal judge with significant experience with the issues raised by the parties and who was based in the jurisdiction which, the court noted, reduced the costs to the parties. *Certain Underwriters at Lloyd's London v. The Falls of Inverrary Condominiums*, 2023 WL 2784513 (S.D.N.Y.).

Discovery Related to FAA Transportation Exemption Ordered

Uber drivers brought a class action and Uber moved to compel arbitration. Uber asserted that the FAA Transportation Exemption applied to them and sought discovery in support of their position. The district court ruled that based solely on the face of the complaint the Transportation Exemption did not apply. The Second Circuit reversed, holding that the pleading did not "provide a sufficient factual record on which to evaluate the applicability" of the Transposition Exemption. The court ordered that limited discovery be permitted and offered the following nonexclusive list of topics in which discovery may be warranted: "Uber's policies regarding interstate trips; the potential penalties and costs of declining interstate trips; Uber's revenue from interstate trips; the average number of interstate trips Uber drivers take over various time periods (such as a week, a month, or a year); the median number of interstate trips for Uber drivers over various time periods; what percentage of Uber drivers take interstate trips over various time periods; how often Uber drivers decline interstate trips; and any other relevant information." For these reasons, the court remanded the case back to the district court to allow for a limited discovery prescribed. *Aleksanian v. Uber Technologies, Inc.*, 2023 WL 7537627 (2d Cir.).

Piggyback Rule Allowing Untimely Discrimination Claims Does Not Apply in Arbitration

A group of former IBM employees failed to file their age discrimination claims in arbitration in a timely fashion, and all those claims were dismissed. These plaintiffs sued, alleging that the arbitration timeliness requirement was unenforceable because it did not incorporate the court-created "piggyback" rule, also known as the single-filing rule, which allows subsequent charging parties before the EEOC to submit otherwise untimely claims by joining a pending related matter that was timely filed. The district court rejected application of the piggyback rule in arbitration, and the Second Circuit affirmed. The court emphasized that the piggyback rule was court-created and is not jurisdictional. Rather, it is an exception to the filing requirements of an administrative agency, here the EEOC. The court added that "in any event, the piggybacking rule is not a substantive right under the ADEA." For these reasons, the court concluded that IBM's timeliness requirements in its dispute resolution process were enforceable, and the district court's dismissal of the action was affirmed. *In re: IBM Arbitration Agreement Litigation*, 76 F.4th 74 (2d Cir. 2023).

'Infinite' Arbitration Clause Rejected

Broad arbitration provisions that require any claims between the parties to be arbitrated, even those without any nexus to the agreement containing the arbitration clause, have been recently styled as "infinite arbitration clauses." The court here refused to enforce such an arbitration clause with respect to claims with no nexus to the web platform whose terms of service contained the arbitration provision. In particular, the defendants here are the online ordering platforms Grubhub, Uber Eats, and Postmates who are accused of antitrust violations by prohibiting restaurants from charging prices lower than those charged to the defendants. The court emphasized that the defendants were invoking their arbitration provision for claims not related to use of their platforms, that is, interactions between restaurants and non-parties. The court reasoned that New York contract law would not allow interpretations that are "absurd, commercially unreasonable or contrary to the reasonable expectation of the parties." Alternatively, the court found that "it would be unconscionable to enforce defendants' arbitration clauses with respect to claims untethered to defendants' respective terms of use." The court concluded that "as a matter of either contract formation or unconscionability, the Court holds that defendants' arbitration clauses do not apply to plaintiffs' claims to the extent that they lack any nexus to the underlying contracts—i.e., to the extent they are not brought by plaintiffs in their capacities as a current or former user of defendants' platforms." *Davitashvili v. Grubhub*, 2023 WL 2537777 (S.D.N.Y.).

Arbitration Based on Website Terms of Use Rejected

Plaintiffs brought a class action under the Sherman Act alleging that Grubhub, Uber Eats, and Postmates unlawfully fixed prices for restaurant meals by precluding those restaurants from charging lower prices to others. Defendants' motion to compel arbitration based on provisions in their respective terms of use on their apps was denied by the district court. The court found that in each case the defendants failed to provide inquiry notice to the user or failed to provide sufficient evidence of assent to the terms of use. For example, the court found that Uber "failed to provide sufficient information about what its app or web page looked like when the Platform Plaintiffs initially signed up or at any other relevant time." Similarly, the court rejected Grubhub's claim that its webpage constituted a clickwrap agreement. In doing so, the court noted that Grubhub's checkout page "does not require users to check a box or take any affirmative action indicating that they have assented to, let alone read, the Grubhub terms of use." Rather, the user was notified that by placing an order it was agreeing to the terms of use, which the court concluded did not constitute a clickwrap agreement which is generally favored in these circumstances. Finally, the court rejected Grubhub's claim that the plaintiffs agreed to the terms of service because it failed to produce any evidence that the e-mail notice was sent to or opened by plaintiffs, or that plaintiffs assented to any prior agreement with an arbitration provision. For all these reasons, the court concluded that defendants failed to demonstrate that an agreement to arbitrate was entered into by plaintiffs. *Davitashvili v. Grubhub*, 2023 WL 2537777 (S.D.N.Y.).

Arbitrator To Decide Admissibility of Evidence Precluded in Court

A court ruled that defendant's dashcam video of a car accident could not be entered into evidence in court. The parties agreed to arbitrate the dispute, and the arbitrator let the parties know that he was prepared to view the dashcam video but, as that issue was in dispute, would give parties the opportunity to seek judicial relief if so inclined. Plaintiff moved in court for appointment of a new arbitrator and for preclusion in arbitration of the video evidence. The court agreed to order that a new arbitrator be appointed but declined to preclude the video evidence. The court criticized the arbitrator as having "relinquished his responsibility to rule on the admissibility of the evidence." The court noted that while the arbitrator was sensitive to the fact that introduction of the video was in contention, "oftentimes such evidentiary disputes do arise in arbitration. The arbitrator should not have avoided making a determination" and "punting" on the evidentiary issue. In the court's view, this "contravened how arbitration is intended to work—to serve as a forum for expeditiously resolving disputes in a more informal process." The court noted that "if either party wished to pursue the matter in court, review of the arbitrator's decision could have taken place in a post-arbitration" court proceeding to vacate the award. The court concluded that the application seeking preclusion of the video evidence constituted an improper attempt to file an "in limine motion to determine what evidence an arbitrator may consider." As defendant consented to proceed with a new arbitrator, the court ordered the case back to arbitration with a new arbitrator who "shall determine whether or not to admit and consider the subject dashcam video and audio recordings and, if they are admitted, said arbitrator shall determine their probative value." *Graci v Chen,* 77 Misc.3d 1236(A) (N.Y. Sup. Ct. 2023).

Presumption of Arbitrability Limited

The Second Circuit took the opportunity in this case to "clarify the law of this Circuit regarding disputes about the interpretation of arbitration clauses in collective bargaining agreements." The underlying question in this case was whether a dispute related to retired union members was arbitrable. The court pointed out that the Supreme Court cautioned that

to "presume that a dispute is arbitrable because an arbitration clause is framed broadly runs the risk of requiring parties to arbitrate disputes they did not consent to arbitrate." Here, even though the retired employees were not members of the bargaining unit, the court made clear that an employer, as here, can contractually agree to include retirees within the collective bargaining agreement. The court concluded that the collective bargaining agreement's grievance and arbitration provision unambiguously covered the retirees' grievance in this case. The court took the opportunity, however, to point out that while the district court reached the correct result, its approach was faulty. "Rather than finding the Agreement's arbitration clause is ambiguous in scope before applying the presumption of arbitrability, the district court started by characterizing the arbitration clause itself and held that the presumption of arbitrability applied, without determining whether the Agreement covered the parties' dispute." Instead, the Second Circuit emphasized that general contract principles must be applied, and courts should determine first "whether, under ordinary principles of contract interpretation, a particular dispute is covered by the language to which the parties agreed." Once that is established, the presumption of arbitrability may be applied as a "court's last, rather than first, resort." *Local Union 97 v. Niagara Mohawk Power Corp.*, 67 F.4th 107 (2d Cir. 2023).

Meeting of Minds Lacking for Settlement Purposes in E-Mail Exchange

The party in the Surrogate's Court proceeding reached a tentative settlement in a court-ordered mediation. Petitioner sent an e-mail "to follow up [on] the settlement reached at mediation," noting the settlement amount of $515,000, and outlining the settlement terms as well as promising to prepare a draft settlement agreement. Respondent answered by asking that the "timing of payment" be left open. A week later petitioner's counsel forwarded the draft settlement agreement to which respondent's counsel replied that the client could not settle on the proposed terms because it would have enormous tax consequences for her. Petitioner moved to enforce the settlement terms, but the court rejected the application. The court emphasized that to be enforceable, a stipulation of settlement of a pending litigation must include a written agreement subscribed to by the parties. The court explained that to the extent that petitioner "asserts that the initial e-mail set out an overview of the material terms to which the parties agreed during the ADR session, we note that such verbal out-of-court agreements are insufficient to form the basis for a stipulation of settlement." The court made clear that silence did not necessarily constitute assent. "Indeed, the record is devoid of any indication that the wife's counsel assented to the terms outlined in the initial e-mail or in the subsequent draft settlement agreement." As there was no meeting of the minds the court concluded no settlement had been reached by the parties. *In the Matter of Estate of James Eckert*, 217 A.D.3d 1151 (N.Y. App. Div. 2023*), leave to appeal dismissed*, 40 N.Y.3d 1024 (2023).

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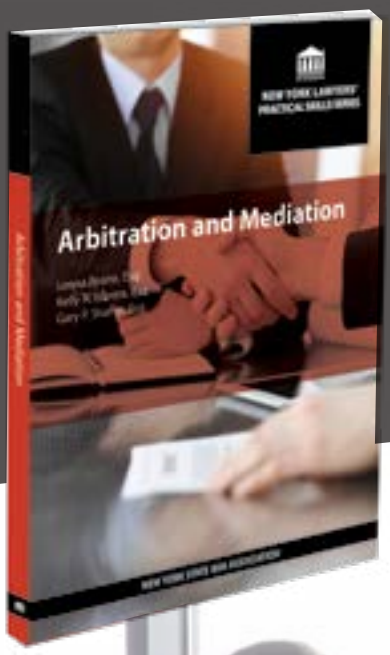

This practice guide examines the two most common forms of alternative dispute resolution. *Arbitration and Mediation* resolves the misconception that these two procedures are interchangeable by discussing their differences and providing examples of both procedures.

Complete with valuable practice pointers, sample arbitration forms and appendices, this practice guide also includes a set of Downloadable Forms.

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