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Mediation and Arbitration News

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THE MEDIATION CORNER

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Recently, I've had occasion to listen and learn from some very talented professional mediators. Thought I'd share some suggestions and ideas with you.

In June, the Center for Alternative Dispute Resolution and the Mediation Center of the Pacific presented Lee Jay Berman, a nationally renowned commercial mediator to share ideas for the mediation and management strong emotional dynamics. Here are some takeaways and strategies that he shared with mediators when working with parties in the grip of anger, fear and grief.

1. To connect with participants, be human, curious, interested and concerned.
2. Recognize the strong emotion, acknowledge its presence and

If there's a way to do it better…find it. Thomas Edison

The mystic bond of humanity makes all people one.

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existence, empathize and normalize the feeling.

3. Sunshine, embrace and acknowledge the hurt and anger.
4. Recognize that when persons are in the grips of pain, fear and anger, they must first feel safe before they can address and consider reason, logic and the possibilities for resolution. On this point, he gives the following assurance to the person: "Noone is going to make you do anything you don't want to do today."

Lee Jay Berman suggested a simple three step process for engaging in discussions. First, identify the fear, emotion or grief. Acknowledge its existence and ask:

1. "You seem really (hurt, angry, mad, upset…) about this."
2. "What about this upsets you so much?"
3. "But specifically, what about this upsets you so much?"

With these questions, the mediator is searching for what is personal to the person. While Lee Jay Berman referred to this as his three step process, I actually heard a fourth step. He followed up with a statement like "You must have a good

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By Robert Bergman

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By John Lande

NCSC and AAA® Launch AI-Enhanced Court Diversion Platform
By Jim Melamed

"Purposeful Expectations"
By Harold Coleman

Helpful Quotes

"Most people do not listen with the intent to understand; they listen with the intent to reply."
-Stephen R. Covey

"A good settlement is better than a good lawsuit."
-Abraham Lincoln

"Speak when you are angry—and you'll make the best speech you'll ever regret."
-Ambrose Bierce

reason for feeling… Help me understand….”

If you try these suggestions with clients, parties or your significant other, try to make it natural and comfortable. Let me know how it works for you.

I asked Lee Jay Berman about the challenges presented by having so much of our mediation practice being conducted over virtual platforms such as Zoom. I miss the in-person opportunity for a friendly handshake, supportive touch, the sharing of food or treats and the ability to observe full body language, responses and reactions. He seemed rather unconcerned. Virtual platforms such as Zoom are a potent, practical and convenient reality. He shared some specific things that he does to take advantage of what Zoom allows you to do.

1. Put the speaker on full-screen. That way you can observe more closely the head, face and upper body responses. You can look for micro-expressions in the smiles, eyebrows and wrinkles around the eyes and mouth. In some ways, you can actually more closely observe the person’s reactions.
2. Speak in shorter moments. Let people talk more.
3. Ask more questions. Keep the person engaged.

4. Regulate your voice to be more interesting and engaging. Use more body language. Don't be a static image on screen. Speak more with your hands and body.
5. If you use a true background, it allows you to be personal and personable. You can talk about family, mementos, personal and potential mutual interests,
6. Be open, personable and honest.

THE ARBITRATION CORNER

The status of manifest disregard as a ground for vacatur of arbitration awards.

Under the Federal Arbitration Act (FAA), federal circuit courts are split as to the viability of manifest disregard as a ground for seeking vacatur of an arbitration award. Four circuits (fifth, seventh, eighth and 11th) have ruled that it is not. Four circuits (second, fourth, sixth and ninth) have ruled that manifest disregard is a viable ground for seeking vacatur as a "judicial gloss". The Ninth Circuit case citation is *Comedy Club, Inc. v. Improv W. Associates*, 553 F. 3d. 1277, 1290 (Ninth Circuit 2009), cert. denied, 558 U.S. 824 (2009). Four circuits (first, third, 10th and District of Columbia) have not explicitly ruled on the issue.

The split amongst circuits presents an issue that needs to be addressed by the Supreme

Court but there appears to be no present inclination to do so. The American Bar Association presented a very nice summary of the circuit court split with a nice chart and citations of cases in each of the circuits. However, because of the ABA copyright restriction, I am not able to provide you a copy here. If you have a question regarding a particular circuit, please contact me and I can share with you some additional information.

Injured non-signator spectator of sporting event compelled to arbitrate.

A spectator at an NFL Miami Dolphins game suffered injuries as a result of a fight that broke out during the game. She was an invited guest at the game. Her mother had obtained gift tickets from her employer. After filing a civil action for negligence, the injured spectator was compelled to arbitration despite the contention that she had not agreed to arbitration. The Florida Appellate Ct. in *Miami Dolphins, Ltd. v. Engwiller*, __So. 3d __, 2025 WL 1064381 ruled that when her mother accessed the internet site to accept the gift tickets, the internet site displayed a notice with a "sign in" button which sets forth terms of use in a hyperlinked, bold and contrasting colored ink that presented terms which disclosed a mandatory arbitration provision, the mother's acceptance of the tickets included acceptance of the terms of use on her behalf and on behalf of her invited guests.

The mother was thus the plaintiff's agent in the matter. The injured daughter was therefore bound as a non-signatory to the arbitration provisions contained in the internet terms of use.

Ninth Circuit limits consumer class-action mass arbitration.

In a significant decision for businesses who are attempting to revise their consumer arbitration clauses to address the prospect of mass arbitration, the Ninth Circuit affirmed the district court's denial of Live Nation and Ticketmaster's motion to compel arbitration, based largely on the content of the mass arbitration provisions of their arbitration agreement. *Heckman v. Live Nation Ent., Inc.,* – F.4th –, 2024 WL 4586971 (9th Cir. Oct. 28, 2024). The court concluded that the "dense, convoluted and internally contradictory" arbitration rules cross referenced in Ticketmaster's arbitration provision, along with other elements of the provision, rendered it unenforceable. The court also held, on an alternate basis, that the Federal Arbitration Act (FAA) did not even apply to the mass arbitration procedure at issue because it is "not arbitration as envisioned by the FAA."

Plaintiffs brought a putative class action alleging that Live Nation and Ticketmaster engaged in anticompetitive practices. Plaintiffs' ticket purchase agreements included Ticketmaster's Terms of Use. The terms provided that any claim must be

decided by an arbitrator at New Era ADR. The Defendants moved to compel arbitration, but the district court denied the motion on the grounds that the arbitration clause is unconscionable and unenforceable.

The Ninth Circuit affirmed. The court found several features of the mass arbitration protocols to be "novel and unusual." These included the following:

- New Era "will always unilaterally decide" which cases will be grouped together, or "batched."
- While plaintiffs may be able to participate in the selection of the arbitrator, "the neutral may be replaced at New Era's sole discretion."
- Bellwether cases are selected, and an arbitrator's decision in a bellwether case becomes "precedent" in batched cases. Because proceedings are confidential, however, bellwether decisions are binding on non-bellwether plaintiffs "who had no chance to participate in the arbitration and who are ignorant of the decision until it is invoked against them."
- There are limits on evidence and briefing, no right to discovery, and no requirement that the arbitrator hold a hearing.

- Plaintiffs can attempt to be removed from the batch after the bellwether cases are decided. But they do not have access to the bellwether record so "will struggle to differentiate their cases from the bellwethers."

The Ninth Circuit first examined the delegation clause, which provided that the arbitrator had the authority to decide the validity of the arbitration agreement. Because of the features described above, the court found that "New Era's Rules provide to defendants many of the protections and advantages of a class action, but provide to non-bellwether plaintiffs virtually none of its protections and advantages." These included, for example, the procedure through which non-bellwether plaintiffs have "no notice of the bellwether cases and no opportunity to be heard in those cases," and the briefing limits that "border on the absurd." The court criticized other features of New Era's rules, including a procedure that the court found functionally only permits a defendant to appeal. For these reasons, the court held the delegation clause was unconscionable.

The court then concluded that the arbitration agreement as a whole was unconscionable for the same reasons. New Era's rules described above, the court found, make it "impossible for plaintiffs to present their claims on equal footing to Live Nation." The court also refused to sever the

New Era rules from the arbitration clause as a whole on the ground that "Defendants engaged in a systematic effort to impose arbitration . . . as an inferior forum."

The court rejected the Defendants' argument that the application of California's unconscionability law is preempted by the FAA. Application of California law here, the court held, "relies on generally applicable principles that neither disfavor arbitration nor interfere with the objectives of the FAA."

Finally, the court held "on an alternate and independent ground" that "the FAA simply does not apply to and protect the mass arbitration model" described above. In passing the FAA, Congress understood arbitration "to be a fair and efficient alternative to bilateral judicial proceedings." But New Era's arbitration procedure, the court found, "is not arbitration as envisioned by the FAA in 1925." The court therefore found the FAA did not apply and applied the California state-law rule from *Discover Bank v. Superior Court, 36 Cal. 4th 148* (2005), which makes class-action waivers unenforceable in most consumer disputes.

Companies who face the prospect of mass arbitration should be mindful of Heckman when crafting arbitration clauses. The "novel and unusual procedures" that the court criticized increase the likelihood that a court will find an arbitration clause

unenforceable, but many arbitration clauses with mass arbitration terms may be distinguishable from those before the Ninth Circuit in Heckman. For example, the court explained that the rules at issue "differ[ed] significantly from the rules of traditional arbitration fora such as" JAMS and AAA.

From the Blog of Covington & Burling LLP - Dillon Grimm and Kathryn Cahoy

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Featured Articles

Slowing Down: How Dubai Taught Me About Implicit Bias in Mediation

By Julie Cobalt

Before moving to Dubai, I thought I understood cultural competence. As a conflict-resolution professional, I trained others in neutrality, active listening, and navigating cross-cultural dynamics. I mediated emotionally charged disputes and facilitated sensitive conversations. I believed my practice was inclusive, respectful, and unbiased. But Dubai challenged me, not overtly, but subtly, through rhythms I hadn't previously experienced.

Responsible Realism About Artificial Intelligence: How AI is Shaping Legal and Dispute Resolution Practice, Education & Scholarship

By John Lande

This article synthesizes the views of legal scholars examining how generative

artificial intelligence (AI) is affecting legal and dispute resolution practice, education, and scholarship. They share a perspective of responsible realism – recognizing both the promise and the perils of AI. It is already reshaping how lawyers, neutrals, educators, students, and scholars work – and its influence will only grow.

Mediation in 2025: Overcoming Awkwardness and Embracing Receptiveness

By John Potter

In a recent mediation course, we took some time to consider the evolution of mediation. Have some aspects of the taxonomy of mediation skills changed? Should mediation skills simply be contemplated a bit more deeply? We did an assignment in the course that proved illuminating. Each student took a specific mediation scenario they might be familiar with or at least interested in exploring.

The Case For and Against "Big Data" – Why Big Data and AI Won't Replace Dispute Resolution Professionals

By Olaf Heggemann

This article by Olof Heggemann argues that "Big Data" and AI will not replace dispute resolution professionals due to the inherent complexities of legal disputes. Heggemann explains that while advanced legal databases have existed for years, and even with the advent of generative AI, subjective human judgment remains crucial because

legal outcomes are rarely clear-cut and databases struggle to account for nuances like post-judgment recovery, settlements, or the strategic intent of parties. The author provides a detailed thought experiment to illustrate how filtering for "wins" or "losses" in a database is insufficient as true outcomes are often ambiguous and cases that go to judgment are not representative of all disputes.

The Distinctions Between Couples Mediation and Couples Therapy

By Dr. Nadia Delshad

As the fields of couples mediation and couples therapy continue to evolve, there is an increasing overlap between the two. While both professions aim to support couples in navigating relationship challenges, their core objectives, methods, and ethical responsibilities differ significantly..

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Edited by Dr. Clare Fowler and Jim Melamed.