ARIZONA
ADR
FORUM

LATE WINTER 2022

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chair's column

GREG GILLIS

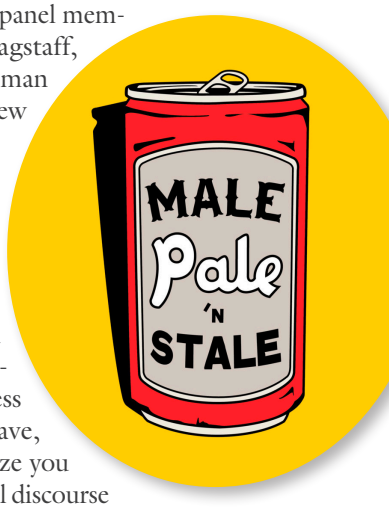
STALE, PALE AND MALE

When I first started practicing law in Phoenix in 1987, I would frequently hear "you can't be a lawyer, you look too young!". The intervening decades, plus gray hair, has kept me from hearing that comment for longer than I care to remember. However, a few years ago at a construction conference, I was speaking with a couple of younger female attorney attendees. During that conversation was the first time I heard the phrase: "**stale, pale and male**". It was not directed at me, but it certainly fit. I was not offended (other than I don't think I am *THAT* old) but it was a time when I felt part of a group which was not being identified in a positive light. In reflecting on this event, I realized there are many for whom this is a fact of life – every---single---day.

As neutrals we are necessarily "**Stale**" in the sense we have practiced law for a while, tried cases and gained enough experience to be considered credible ADR practitioners. Stale should not mean we are unwilling to learn or change.

Pale is a reference to being white. Again, for those of who fit this identity, we are all better served by increasing the number of ADR Section Members who are persons of color. At the planning retreat your Executive Committee brainstormed ideas to make the Section more diverse and inclusive. We are in the planning stages of seminars and events with affinity bar associations and other sections to increase interaction between the ADR Section and those who have traditionally not been involved with ADR.

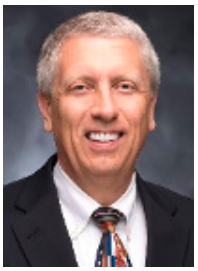
Male. A few years ago, at the State Bar Convention, most of the ADR panel members met the stale, pale and male description. The Bar and your ADR Section is committed to achieving quality panels comprised of diverse panel members for all CLE events, including the Bar Convention. In fact, our first CLE webinar this year, ***Probate Mediation – Getting to a Signed Settlement***, was organized by Executive Committee Member, Beth Jo Zeitzer. Lauren Garner served as moderator with panel members Eliza Read from Flagstaff, the Honorable Amy Kalman and retired Judge Andrew Klein both from Phoenix.



It is up to all of us to raise the next generation of neutrals. Start mentoring someone you know who you think might make a great neutral. Look for opportunities to increase your own awareness about biases you may have, even if you don't yet realize you have them. Encourage civil discourse on these and other sensitive topics. Use your legal training to deescalate conversations so people feel their point of view is heard and understood.

Join me this year as we strive to become a Section committed to diversity, equity, and inclusion. So the next time I am referred to as stale, pale and male, "I can say I am, but I am doing something to make sure the next generation of neutrals are not".

Greg Gillis
Chair – ADR Section



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STATE BAR OF ARIZONA

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We welcome comments about this newsletter and invite you to suggest topics or submit an article for consideration.
Email the Editor, Jeremy M. Goodman at jeremy@goodmanlawpllc.com.

PURPOSE OF MEDIATION

BY JEROME ALLAN LANDAU

The purpose of Mediation is for parties to be facilitated to creating an agreement resolving all, or some of the issues of their dispute. The agreement must be acceptable to all parties except that in a multi-party mediation, when there are more than two parties, it is possible for some, yet not all of the parties to reach separate agreement on one or more of the issues at conflict.

Any agreement is reached through an interactive process in which the parties identify common areas of conflict, and also individual areas where one "feels a conflict" that is not recognized as such by the other(s).

Any resolution must be reasonably "workable" and agreeable. As such, and to avoid future conflict about the seemingly "resolved" area of conflict, the agreement should be specific in all aspects (including "what ifs")

The mediation process facilitates and encourages positive communication between the parties and is aimed to minimize the stress and antagonism that may accompany litigation in court. This same stress and antagonism usually enters the mediation door with the parties, yet the skilled Mediator is equipped with tools that aid in reducing these challenges.

A basic awareness is nurtured with

JEROME ALLAN LANDAU combines his 40 years representing commercial, business, transactional, real estate and construction clients in U.S. and international venues with his more than 35 years mediating and arbitrating related matters throughout the U.S. He is a AAA multi-panel Mediator and Arbitrator; member of the International Mediation Institute (the Hague), the National Academy of Distinguished Neutrals and other ADR Administrators; was a twice invited Presenter at the United Nations, and presents training workshops for ADR professionals. Jerome has served as Chair of the State Bar of Arizona's ADR Section.

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the parties that they are far better equipped to resolve their own situation and future than any Judge, Court Commissioner or attorneys.

Each party must ensure that a "decision maker" for that party is present throughout all aspects of the mediation process, including the hearing. This is someone with full authority to resolve the issues and enter into a Memorandum of Agreement on behalf of a party.

ROLE OF THE MEDIATOR

The role of the Mediator is to facilitate this communication and problem solving process. The Mediator serves as a Neutral who should not judge either of the parties or impose his decisions upon the parties. The Mediator will facilitate the process by aiding the parties to explore alternative, and sometimes creative options; however, the decisions made are those of the parties, not the Mediator.

The Mediator is responsible for the structure of the session and the direction of the resolution process. This is why the Mediator's engendering and earning the "trust" of each party is crucial.

Even if the Mediator is an attorney, in the Mediation setting the Mediator does ***not*** serve as a legal counselor for either of the parties; nor should any party expect the Mediator to do so. This does not mean that the Mediator cannot express an opinion, under the proper circumstances, or even express the Mediator's prior experience in a "similar" circumstance. It does mean that the Mediator is not giving legal advice to a party – even if the party is unrepresented.

CONFIDENTIALITY

All information and records created during the Mediation process are confidential. The Mediation Agreement should require all parties to agree that the Mediator will keep all such information as confidential, unless there is a mutual consent to disclose information to a designated third party. Release of information to designated third parties must be accompanied by a written release of information form, signed by all parties and counsel to the Mediation.

The parties agree not to use any information disclosed in the Mediation process against the other party if either terminate the Mediation process and pursue litigation or arbitration. Each party, and counsel, should agree not to call the Mediator to testify in court, arbitration or any court or other procedure; and not to subpoena the Mediator or any documents regarding any communications that developed as a part of the Mediation process.

The mediation agreement should include provision that any party to the mediation would be responsible for the Mediator's attorney fees and costs if that party endeavors to subpoena the Mediator or the Mediation records.

Many mediation agreements include provision that at the conclusion of the Mediation process, the mediator will return to the parties any documents that party has provided to the Mediator, and the Mediator will destroy the Mediator's case notes.

COMMUNICATION GUIDELINES AND GROUND RULES:

A positive and non-adversarial environment is conducive to the mediation process of problem solving and construction of a resolution and agreement. Therefore, the parties should agree to follow general guidelines regarding behavior and communication throughout the mediation process:

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- Each party will have an opportunity to express their thoughts and feelings without interruption.
- All parties will treat each other with respect and maturity; we are adults.
- Verbal abuse such as name calling, put-downs, or shouting will be avoided at all costs.
- The parties are responsible for the decisions made, not the Mediator.
- The parties will listen to the concerns of each other with an open mind.
- The parties will stay in the room until the Mediator agrees to end the session or allows a break.
- The parties agree that the Mediator will not take personal sides for either party and that a party will not attempt to prejudice the Mediator by making confidential disclosures to the Mediator.
- Parties and the Mediator will work collaboratively to identify agreement.
- "Caucus" or "Shuttle Negotiation" (when the Mediator meets separately with a party) is fundamental to the Mediation process and the length of time the Mediator may spend with one party does not indicate the Mediator's favoring of that party.
- Counsel's presence and participation can be of great value to the mediation process and is not a time for counsel to "show-off" counsel's litigative and combative skills. The Mediator should explain this to the participants so that they are not disappointed when their counsel "participates" in the process instead of causing dissension.
- Phone Mediation or consultation will only be used when the Mediator determines that face-to-face interactions are not feasible. Parties acknowledge that phone Mediation represents a special case that does not allow for the best level of communication.
- Phone Mediations will be scheduled when other third parties are not present to overhear conversations.

AGREEMENT

None of the agreements reached in Mediation are binding until a formal written Memorandum has been signed by both parties. The Mediator reserves the right to postpone or cancel the Mediation if it is determined that there is a significant impairment to the process.

SEE THE FULL STORY AT:

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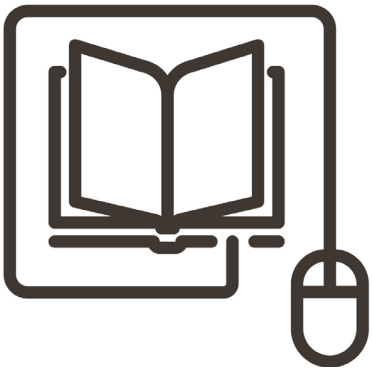

The Mediator as Facilitator of Solution

BY JEROME ALLAN LANDAU

Parties in a commercial mediation often recognize that it is in their financial best "self interest" to maintain business relations in spite of their dispute. Choosing mediation is the most sensible and non-antagonistic method they can use to resolve their conflict and also continue a working business relationship. This article is for professional Mediators, and for attorneys whose clients may elect to resolve their conflicts through the Mediation process.

Mediation is an attractive and efficient process for resolving disputes amongst business professionals because it permits them to personally participate in the decision making process, in opposition to surrendering one's power and control into the hands of a third-party arbitrator or judge.

A professional Mediator has many "tools" in the tool-box of Mediation Processes. Throughout my service as a Mediator of commercial disputes I often use a facilitation model called the Technology of Participation ("TOP") Focused Conversation Model. This model was developed by the Institute of Cultural Affairs, a private, non-profit organization specializing in organizational development and problem solving. The TOP Conversation Model works with four "categories": objective, reflective, interpretive and decisional. These categories function as guideposts through which the Mediator (or facilitator) can draw the parties from superficial, subjective, anger-tinged remarks towards an environment that empowers objective, in-depth, creative responses and "inspired ideas" for solutions to the conflict.

The Mediator begins by asking the parties to objectively review the facts of their history together; including those facts "appearing" to underlie the dispute.

This is followed by leading the parties to subjectively reflect upon their emotional reactions and thoughts related to their history and the present dispute.

This is then followed by their interpretation of their own emotional reactions and thoughts; including their consideration of the meaning, value and significance of such reactions.

The fourth step is dependent upon the earlier three whereby it is anticipated that through the first three each party has had a shift in perception of the dispute and is open to creatively moving towards overcoming that which previously would have been an impasse or block to solution. This is done through securing each party's cooperation and "response to creating a solution", rather than that party falling-back on its previous "reaction" to the existing situation.

Throughout the Conversation Model, the Mediator moves to inspire a sense of joint effort and mutual reliance in accomplishing an agreed-upon goal.

This model permits the Mediator to lead, rather than "herding" participants from the usual positions of distrust, anger and frustration to an environment where agreement can be reached within a new set of values. The model also endeavors to help participants reframe their own emotional predispositions.

Historically parties often arrive at a mediation "dragging the luggage" of their own perspectives, prejudgments, fears and survival considerations wrapped in the robes of their personal human qualities, aspirations, egos and foibles.

The timing of the steps in the Conversation Model assists the Mediator, as Facilitator, to more skillfully lead the individuals beyond themselves into a joint effort at solution – a balance and harmony which all ultimately seek, whether or not they are aware of this human inner impulse.

This is also an ideal tool for situations where there is a desire to avoid moving the parties into separate caucuses.

The Objective Step permits the Mediator to ask questions that lead participants to express specific objective facts concerning the subject of the misunderstanding between them The Mediator encourages participants to present the facts without embellishment, fervor or expression of emotions and to express a willingness to be open-minded throughout the process. The Mediator might ask participants to answer questions such as "What

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were the actual steps taken to arrive at the financials?" or "What effect did the shipment's failure actually have on the production process?"

Throughout the process, we are both subtly and not-so-subtly reminding participants that they each come with a personal belief about the facts underlying the situation and that although these positions might seem quite different, all participants can still be speaking what is true for them. Participants are encouraged to "leave their pre-judgments at the door" along with their expectations and prejudices. To reduce the frustration of not being permitted to "get it all out" at the beginning: the parties are reminded that they will be given the opportunity to be subjective and to reflect upon the matter with a wider perspective at a later step, but in this step the participants are seeking to maintain objectivity.

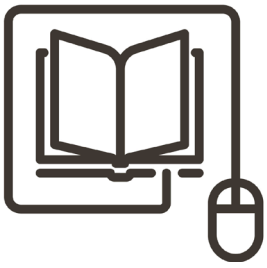
The objective step encourages people to work as a team to achieve a solution for common challenges, which at present are viewed through their differing points of view. Here is where a skillful Mediator can inspire a spirit of unity for addressing the issues together and redefining "winning" as a "group" goal. The Mediator leads the participants to a resolution of the issues and, at the same time, empowers them to recognize the mutuality of their relationship and its financial and economic benefit to both.

The Reflective Step involves asking participants to reflect on their thoughts and feelings about the dispute. There are often strong, unspoken emotions that need to be explored and resolved before a final resolution can be achieved Mediator interventions during this phase of the process might include questions such as "How did you feel when this occurred?" or "What was the reaction from your staff when this was announced?" By hearing the answers to these questions, both participants are able to better understand the impact that the dispute is having on the other person. Business persons can: if properly led, sense the feeling of 'walking in the other's footsteps.'

The Interpretive Step encourages participants to reconsider the dispute in light of new information that they have heard from the other side. During this phase, the Mediator might ask questions such as "How would your employer evaluate the impact upon your firm's bottom line?" or "What problems did your staff experience as a result of this dispute?" Antagonistic parties often overemphasize the impact of an event, become defensive when they are challenged, and then go on the offensive in order to protect themselves. But after progressing through the first two steps of the ToP Model: we often find that disingenuous negative energies begin to dissolve and that people are better able to understand and empathize with the other. Reality begins to set in, answers become more realistic, and with that comes a more respective leniency in demands for solution.

The Decisional Step occurs when participants are ready to resolve the dispute. They have acknowledged that neither will obtain everything he/she may have wanted and that compromise is necessary for a successful resolution. Representatives at a commercial mediation often come with instructions from their boss about what they should say and do. The Mediator needs to inspire participants to think out of the box and beyond their initial positions or instructions from their employers. If the employer has given the participant the authority to make a final decision, then the Mediator must help that participant feel empowered to do so as thinking professional. During this final phase, the Mediator might ask What could we do that would give a sense of completion to this situation? or What would you be willing to do to help John bring something back to his boss and fellow employees as a solution to this problem? This tatter question encourages a joint review and outline that has them working' together for the answer.

I have implemented the I.C.A. Conversation Model in my own professional practice as well as my interactive workshop training for conflict resolution professionals. I have found that this model generates ownership, creates clear goals, opens lines of communication, broadens perspectives and motivates people to adapt to their changing environment while still honoring their respective needs to 'return home,' report and explain. These qualities are all attractive signposts along the Mediators path toward solving problems. Properly facilitated, the process decreases adversarial animosity, increases opportunities for the parties to understand better the other's challenges, and inspires participants to join together to find solutions. I trust that you will also find this model to be beneficial to your professional ADR practice.



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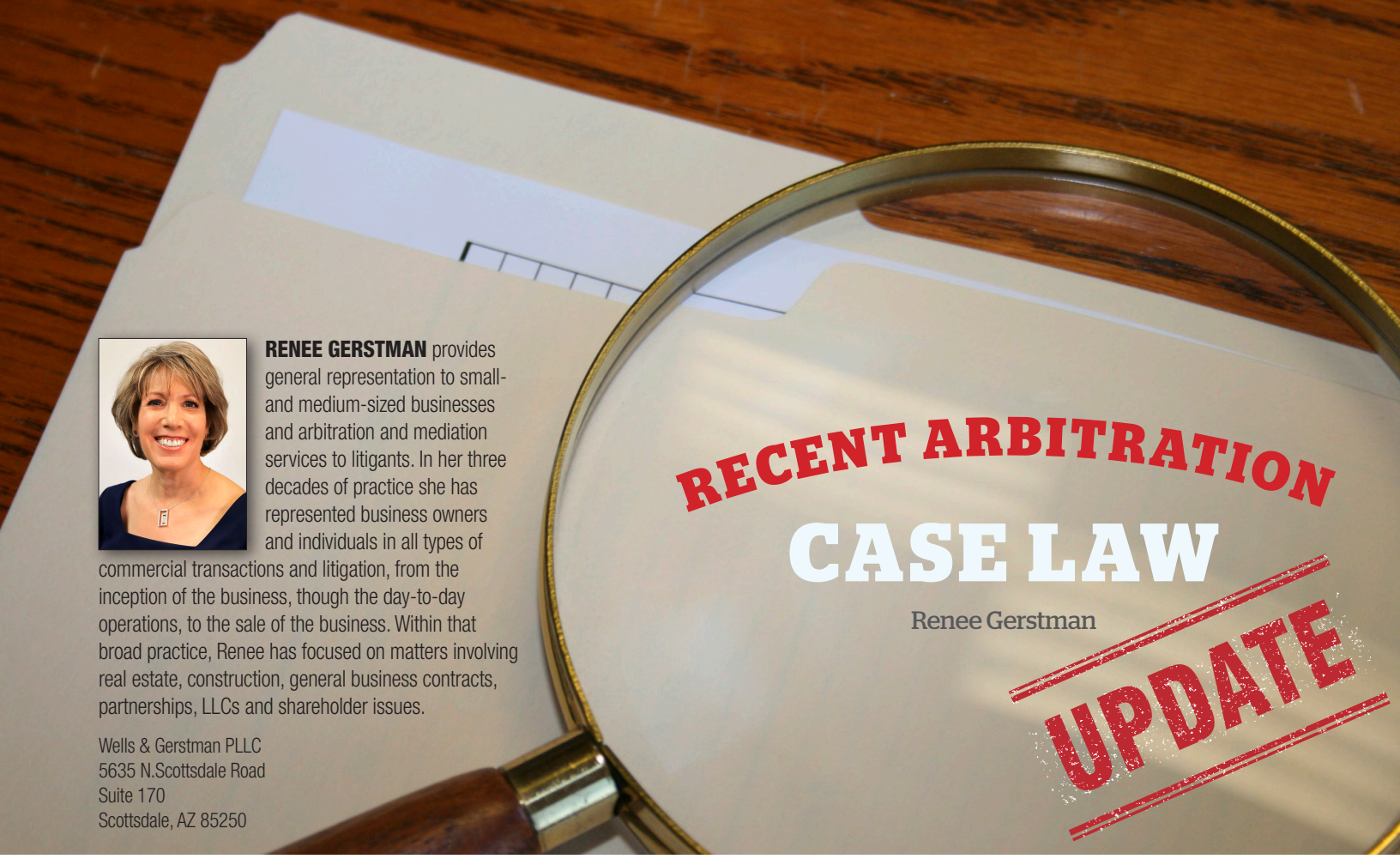

RECENT ARBITRATION CASE LAW UPDATE

Renee Gerstman

RENEE GERSTMAN provides general representation to small- and medium-sized businesses and arbitration and mediation services to litigants. In her three decades of practice she has represented business owners and individuals in all types of commercial transactions and litigation, from the inception of the business, though the day-to-day operations, to the sale of the business. Within that broad practice, Renee has focused on matters involving real estate, construction, general business contracts, partnerships, LLCs and shareholder issues.

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Lawyer's Fee Agreement is Relevant to Determining a Plaintiff's Ability to Bear Arbitration Costs

Rizzio v. Surpass Senior Living LLC, No. CV-20-0058-PR (Filed August 17, 2021)

Last year the Arizona Supreme Court accepted a petition for review to determine whether a plaintiff's fee agreement with her attorney can be considered in assessing her ability to financially bear the costs of arbitration. On August 17, 2021, the Arizona Supreme Court held that a plaintiff's fee agreement with her attorney is relevant to determining the ability of the plaintiff to arbitrate her claims. This is especially true where the fee agreement provides that the attorney will advance the costs of arbitration. Under the Court's analysis, the question of substantively unconscionability is a question of fact that is dependent on the unique circumstances of each case, one of which is whether counsel for plaintiff has agreed to advance the costs of arbitration.

The Court adopted the framework set forth in *Clark v. Renaissance W., LLC*, 232 Ariz. 510 (App. 2013) for evaluating whether the financial costs of arbitration prohibit a claimant from effectively vindicating their rights such that the arbitration provision is substantively unconscionable. The *Clark* framework requires a plaintiff to: (i) establish the costs of arbitration with reasonable certainty; (ii) make a specific, individualized showing that they are unable to bear the financial costs of arbitration; and (iii) whether the arbitration agreement permits a party to waive or reduce costs because of financial hardship.

Although the issue in *Rizzio* was the attorney's advancement of the costs of arbitration, the Court held that in analyzing a plaintiff's access to arbitration, plaintiff's access to funds, regardless of the source, would fall within the fact-based inquiry of the Plaintiff's ability to bear the costs of arbitration. Rather than focus on who pays the costs associated with arbitrating a claim, the Court focused on "whether the costs can be met such that the plaintiff can effectively vindicate her rights."

The Court rejected the concern raised that consideration of the fee agreement arrangement would have chilling effect on prospective litigants who cannot afford to advance arbitration costs as lawyers may not be willing to have such term in its fee agreements if that term would impact the substantive unconscionability analysis. The Court rejected this argument explaining that its conclusion was not establishing a *per se* rule that "a fee agreement advancing costs precludes a determination that an arbitration provision is substantively unconscionable." Rather, the existence of and terms of the fee agreement are one relevant factor to be considered.

Applying the framework from *Clark* to the facts of this case, the Court found that the record before it was speculative and did not support a finding of substantive unconscionability. Rizzio did not provide evidence of the total costs of arbitration or the amounts that Rizzio would incur if she prevailed, or not, and there was insufficient information on Rizzio's financial position and assets to support a finding of substantive unconscionability.

continued

Practice Point:

Plaintiffs' counsel should look at their fee agreements and see if the terms of those agreements might impact the fact-based analysis of whether a plaintiff can effectively vindicate their claim.

Plaintiffs' counsel cannot simply rely on the statement that their client lacks resources to effectively vindicate their claims to support substantive unconscionability. Rather, plaintiffs will have to provide non-speculative information regarding the costs and fees they will incur to arbitrate their claims and provide specific information regarding their financial position and assets to support their claim that they could not afford to arbitrate their claims and therefore the arbitration provision is substantively unconscionable.

When Parties Grant Settlement Judge Authority to Resolve Disputes Over the Terms and Implementation of a Settlement Agreement *Wheeler v. Davis,* 1 CA-CV 20-0146 (Filed 8-24-2021) (Ariz. Ct. App. Div 1) (Memorandum Decision – Not for Publication)

This case addresses the inclusion of language in a written settlement entered into under Rule 80(d) Ariz. R. Civ. P. after a settlement conference with a settlement judge. The settlement agreement required the parties to submit any disagreements over the "terms of implementation" of the settlement agreement to the settlement judgment for binding resolution.

Shortly after settlement, one of the parties alleged it had been breached and asked the settlement judge to resolve the dispute in accordance with the settlement agreement. The settlement judge moved the court to reopen the case "for the limited purpose of a further hearing to resolve dispute regarding implementation of the settlement." The court granted that motion and directed the settlement judge to "conduct a hearing to resolve disputes regarding implementation of the terms of the settlement agreement" and that the "settlement judge's resolution would be binding on the parties pursuant to the settlement agreement."

The breaching party objected to the jurisdiction of the settlement judge to render a binding resolution, which objection was rejected by the settlement judge. After the hearing the settlement judge issue a report and recommendation to the court. The court adopted the report and recommendation as a formal order.

On appeal, the breaching party argued that he did not agree to have the settlement judge render a binding resolution over the settlement agreement and that the settlement judge could not on his own seek to reopen the case to serve as a decision maker.

The Court of Appeals rejected the first argument based on the express language of the settlement agreement wherein the parties agreed "to submit any disagreement" over the settlement agreement's "terms or implementation" to the settlement judge "for binding resolution."

The Court of Appeals relied on Rule 60 Ariz. R. Civ. P. in finding no error with reopening of the case and held that the superior court's actions were within its broad equitable powers and extensive discretion to grant relief under Rule 60 when appropriate to accomplish justice.

Practice Point:

Words matter. If you want to go to court to enforce a settlement agreement, do not provide language that authorizes the settlement judge or mediator to render a binding resolution of any disputes relating to the "terms and implementation" of the settlement agreement. If you do intend to have the mediator or settlement judge render a binding resolution detail the mechanism for submission of the dispute to the mediator now arbitrator. Such provision should include how the dispute is submitted to the arbitrator, allocation of costs and fees to the arbitrator, whether the arbitration process is on documents only, limited in time frame, applicable arbitration act and substantive law to be applied and all other matters that should be included in an agreement to arbitrate.

Division II of the Arizona Court of Appeals in *Major v. Coleman*, 2CA-CV2020-0081(App. Div. II May 5, 2021) addressed the issue of whether a superior court has the authority to issue an order retaining jurisdiction for the purposes of enforcement of a settlement agreement so that the parties do not need to file a new lawsuit to enforce a settlement agreement. The court held that the superior court may, in its discretion, retain jurisdiction to enforce a settlement agreement upon the stipulation of the parties set forth in a settlement agreement. The superior court does not have to agree to retain jurisdiction, but it is erroneous to conclude that it is prohibited to doing so under Arizona law.