ARIZONA ADR FORUM

SUMMER 2018

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STATE BAR OF ARIZONA

EDITOR | THOM COPE

We welcome comments about this newsletter and invite you to suggest topics or submit an article for consideration. Email the Editor, Thom Cope at tcope@mcrazlaw.com

FROM THE CHAIR

MAUREEN BEYERS

Many of the members of the ADR Section of the State Bar of Arizona are solo practitioners or members of small firms where managing overhead and keeping costs down is a daily task. One of the great benefits of ADR Section membership is the value you receive from the low-cost CLE the Section provides. Here is a run-down of the CLE programs offered this SBA year and the associated costs to ADR Section members:

October 24, 2017	Breaking Impasse (1 hour)	$15.00
November 14, 2017	Employment Arbitration (1 hour)	$15.00
February 13, 2018	Implicit Bias (2 hours)	$15.00
March 13, 2018	Emotional Intelligence & Decision Making (1 hour)	$10.00
April 18, 2018	ADR Ethics (2 hours) (webcast by the SBA CLE Dept)	$79.00

If you attended all these programs, you would have spent only $134.00, satisfied all your ethics credits and more than half of your total CLE hours for the year. Can you get fries with that? Yes, you can! Most of the programs included breakfast and one included a happy hour. Special thanks to Executive Council member Alona Gottfried for her hard work coordinating these programs.

With the creation of the new Business Outreach and Consumer Outreach Committees, your ADR Section will soon be providing benefits to our community as well. Please stay tuned as these committees take off next year under the leadership of incoming Chair Robb Itkin.

STATE BAR OF ARIZONA
cle
continuing legal education

Find the current CLE calendar and a link to our OnDemand Library @
WWW.AZBAR.ORG/CLE

— Maureen Beyers
ADR Section Chair

Maureen Beyers practices complex commercial litigation and arbitration. Licensed in Arizona since 1996 and New York since 1988, Maureen practices in state and federal court representing clients in wide assortment of contract and business tort disputes across many industries.

save the date: thursday, june 28, 2018 (8:45am–Noon)

The State Bar of Arizona ADR Section is presenting a morning seminar at this year's State Bar of Arizona Annual Convention. The seminar is entitled, **Negotiation on the Front Lines: Tools, Tips & Tricks.** This interactive morning session will demonstrate negotiation approaches, skills and techniques. (**see T-18 below**). Please join us for this engaging seminar. 3 CLE Ethics Credit hours are available upon completion.

save the date: thursday, june 28, 2018 (2:00pm–5:15pm)

The State Bar of Arizona ADR Section is also presenting an afternoon seminar at this year's Convention. The seminar entitled, **ADR Talks,** (**see T-26 below**). Please join us for this highly informative seminar. 3 CLE Ethics Credit hours are available upon completion.

THURSDAY MORNING, JUNE 28

SEMINARS

T-18 THURSDAY 8:45 A.M. – NOON

Negotiation on the Front Lines:
Tools, Tips & Tricks

PRESIDENT'S AWARD

In an interactive program, Creighton University Professors Jacqueline Font-Guzmán and Kathy Gonzales present and demonstrate negotiation approaches, skills and techniques that can help negotiators adroitly navigate to the heart of a conflict. This seminar allows participants to practice and test these tools and skills with other participants, responding to prepared negotiation scenarios and fact patterns.

The presenters' rich and varied experiences include ADR work with courts in Puerto Rico and Trinidad and Tobago; resolving disputes concerning health care, end of life decisions, and cross-cultural issues; engaging marginalized individuals in productive dispute resolution discussions; and using ADR to resolve law enforcement and penal system disputes. This program offers tools and perspectives that will assist both young lawyers and experienced negotiators in approaching conflict and resolving disputes.

What You'll Learn:
1. How to remain collaborative in a competitive environment to the benefit of your client – how to be collaborative without being a sucker
2. How to recognize and respond to the power dynamics that complicate our ability to negotiate effectively
3. How observable and hidden personality traits can have an impact at the bargaining table, and recognizing and dealing with those traits in ourselves and our counterparts and adversaries

Presented by: Alternative Dispute Resolution Section
Chair: Steven P. Kramer, Law Office of Steven P. Kramer
Faculty: Jacqueline N. Font-Guzmán, MHA, JD, Ph.D.
Kathy A. M. Gonzales, LLM, Ph.D., Creighton University School of Law

3 CLE ETHICS CREDIT HOURS

THURSDAY AFTERNOON, JUNE 28

SEMINARS

T-26 THURSDAY 2:00 P.M. – 5:15 P.M

ADR Talks

A diverse and highly respected panel of mediators and arbitrators present nine "Talks," limited to 15 minutes each, addressing important aspects of alternative dispute resolution. The speakers selected topics they feel strongly about, and that they believe lawyers need to hear. Topics presented include:
- The history of mediation in Arizona
- The best (and worst) times to mediate
- Tools for preparing counsel and clients for mediation
- Managing divergent expectations
- Avoiding and overcoming impasse
- Navigating complex arbitrations
- Do's and Don'ts in drafting arbitration clauses
- How to avoid, deal with, and resolve fee disputes using the State Bar Fee Arbitration Program
- ADR and the judiciary

Following the "Talks" the speakers will sit as a panel and answer questions submitted by the audience.

What You'll Learn:
1. How to more effectively prepare for and participate in the mediation process
2. Tips for drafting better arbitration clauses, and for participating in complex arbitrations and attorneys' fee arbitrations
3. The history of mediation in Arizona, and how the judiciary views arbitration and mediation

Presented by: Alternative Dispute Resolution Section
Chair: Steven P. Kramer, Law Office of Steven P. Kramer
Moderator: Thom K. Cope, Mesch Clark & Rothschild PC
Faculty: Lawrence H. Fleischman, The Fleischman Law Firm PC
Sherman D. Fogel, Sherman Fogel PA, Conflict Management & Dispute Resolution
Steven M. Guttell, Steven M. Guttell, PLC
Patrick Irvine, Fennemore Craig PC
Jerome Allan Landau, Jerome Allan Landau PC
Amy Lieberman, Insight Employment Mediation, LLC
Christopher M. Skelly, Skelly Muchmore & Oberbillig, LLC
Lance K. Tanaka, American Arbitration Association
David C. Tierney, Sacks Tierney PA

3 CLE ETHICS CREDIT HOURS

WHEN THE MEDIATOR BECOMES THE ARBITRATOR

BY RENEE GERSTMAN

A common clause in a mediation term sheet can convert a mediator into an arbitrator. Agreement resolving the dispute is reached at mediation. Before leaving the mediation, the parties document the essential terms and understandings in writing in a Memorandum of Understanding (MOU) or term sheet. The MOU or term sheet provides that the parties will draft and negotiate the terms of the formal and final settlement agreement. Anticipating disputes over the language of the settlement agreement, the parties agree to submit any disputes regarding the language and terms of the settlement agreement to the mediator for resolution. Use of such language can convert the mediator into an arbitrator with authority to enter a final binding award.

In *Eastwick v. Cate Street Capital Inc*, (2017 ME 2016), the parties could not agree on the terms of the releases and final terms to be included in the settlement agreement. Because the MOU provided that "*any disputes that may arise during the drafing and execution of the settlement shall be submitted to [the mediator] for review and resolution*" the parties reconvened with the mediator to address those issues. Prior to the reconvened meeting, Eastwick's counsel sent a proposed order with findings of fact and conclusions of law. At the reconvened meeting that parties discussed their differences regardng the terms of the settlement agreement. After the reconvened meeting, the mediator signed Eastwick's proposed order over Cate Street's objection. The proposed order contained a provision that it was enforceable as an arbitration award.

Eastwick submitted the order signed by the mediator to the trial court for confirmation as an arbitration award and issuance of judgment thereon. Cate Street contended that it only authorized the mediator to facilitate negotiation of the final terms and language of the settlement agreement and did not agree to the mediator acting as arbitrator and entering a final and binding award.

The trial court rejected Cate Street's arguments, confirmed the award and entered judgment thereon. The Maine Supreme Judicial Court affirmed the trial court and held that by incorporating language stating that "any disputes that may arise during the drafing and execution of the settlement shall be submitted to [the mediator] for review and resolution" the parties granted the mediator the authority to resolve any disputes in drafting and execution of the settlement agreement as arbitrator. The court focusing on the language of the MOU noted that the MOU resolved the parties dispute such that the only issues remaining were disputes that arose in the drafting or execution of a final settlement agreement and that the purpose of the MOU was to bring finality to the dispute.

The lesson from the *Eastwick* decision is that parties and counsel should pay careful attention to any language in the settlement term sheet or MOU that addresses the mediator's resolution of disputes over settlement agreement terms. Broad language authorizing the mediator to resolve any disputes may grant the mediator authority to render a final and binding award and not just render a decision on the language to be incorporated into the settlement agreement.

For parties, having the mediator become the final arbiter of the terms of the settlement agreement can be advantageous. It eliminates gamesmanship in drafting and negotiating the settlement agreement and saves costs and fees of otherwise having to go into court to enforce an MOU or term sheet. On the other hand, parties should consider whether information or positions asserted during the mediation might bias the mediator and render it inappropriate for the mediator to later serve as arbitrator. Assuming the parties agree that the mediator should be the final arbiter of the language of the settlement agreement, the parties should specity the limits of the mediator's authority as arbitrator. That is, can she issue an award on the claims asserted in the underlying dispute or is her role as arbitrator limited to determining what language and provisions are in the final settlement agreement and ordering the parties to execute a specific settlement agreement.

Neutrals should give thought to whether under the circumstances they can fairly transition to the role of arbitrator. In accepting this new responsibility, neutrals should also confirm their prior disclosures and make any disclosures that may be necessary. If the mediator is called upon to act as arbitrator over the terms and language of the settlement agreement, they should clarify with the parties the extent of the authority granted and make sure that the process for rendering such a decision provides for each party to present their position prior to rendering a decision. ADR

BY ANDREW B. TURK

A LAWYER'S CHECKLIST FOR A SUCCESSFUL MEDIATION

Mediation is now a well-accepted part of the legal landscape. Many contracts require mediation before litigation can be instituted and many judges require parties to a lawsuit to participate in a settlement conference or private mediation before trial. Yet, despite the importance of mediation, many clients arrive at mediation ill-prepared and with only the most basic concept of what is to occur. Lack of preparation can frustrate the basic purpose of mediation, which is to reduce costs, eliminate extraneous issues, and foster resolution of disputes.

Use of this simple mediation checklist can help increase the likelihood of a meaningful mediation.

1. Learn about your mediator. Mediators have different styles. It is a good idea to know in advance if the mediator can be expected to play devil's advocate, push hard on the perceived weaknesses of your case, or quickly drill down to dollars at issue with little regard for legal or factual issues. If you enter the mediation with a good understanding of the mediator's style, your communications will go more smoothly and you will be better able to guide the mediator to the issues that are of greatest concern to your client.

2. Review your mediation memo. Be sure to review your memorandum with your client shortly before the mediation occurs to make sure positions on the issues have not changed. If material changes have occurred in the time since the mediation memorandum was provided, be prepared to address any changes with the mediator at the outset of the mediation.

3. Review your Opponent's Memo. I recommend that clients review the opposing party's memorandum if it is available. This eliminates surprise and allows the client to enter the mediation process with full knowledge of the other party's position. If the opposing party's memorandum is insulting or inflammatory, reading the memorandum beforehand allows your client time outside the mediation to get over any hurt feelings or anger, allowing you both to better focus on the matters at hand during mediation.

4. Make sure you have the necessary documents/evidence with you. While parties should avoid burying the mediator in irrelevant materials it is important that the mediator be supplied with whatever is necessary for her to understand the case and conduct an effective mediation. If there are documents that may become relevant, take copies of them with you to the mediation.

5. Have a game plan. In mediation, you and your client will be communicating directly with the mediator. Before the mediation, talk with your client about what you want him or her to address with the mediator. Find out if there are any issues that the client specifically wants to handle. Be prepared to step back and remain quiet when your client is the more appropriate advocate. By taking the time to discuss your respective roles, both you and your client will be more effective.

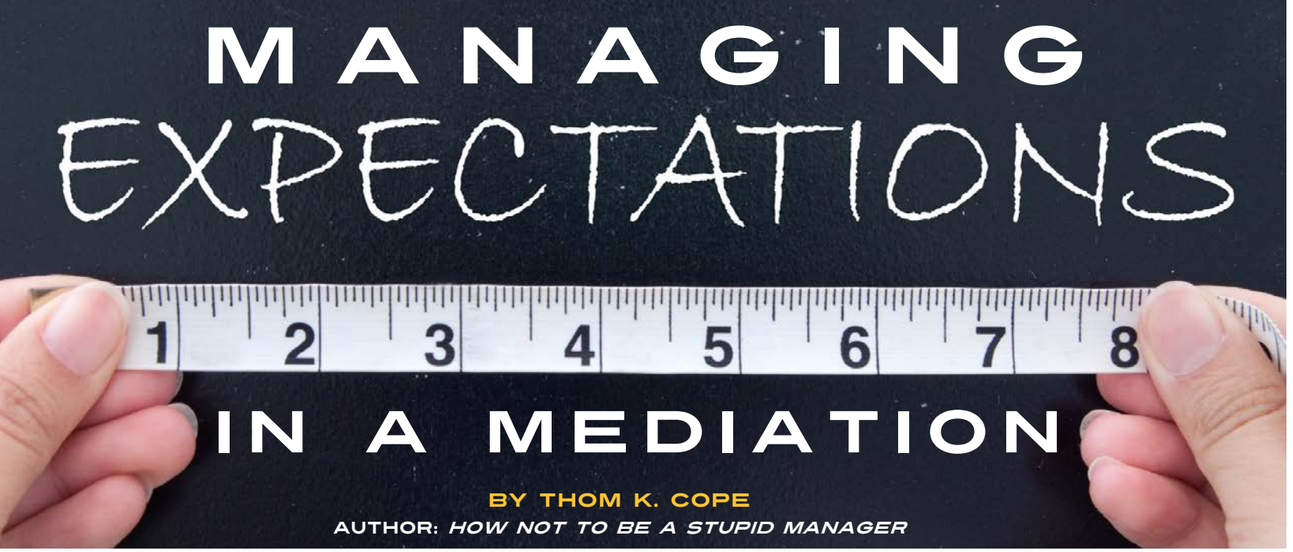
6. Be willing to jettison your game plan. A skillful mediator will work to address issues and problems with creative solutions. While it is unlikely you will want to abandon your end goal, it is important not to be so tightly bound to any plan or position that you foil the mediator's attempts to bridge the parties' differences. Flexibility is important.

It is not possible to cover all aspects of mediation briefly. Nonetheless, use of this simple "checklist" can help ensure that your mediation is, if not successful, at least worthwhile.

ANDREW TURK is a Senior Attorney at the law firm of Clark Hill, PLC.

He has been providing assistance to clients with business and other litigation needs for more than 20 years. Mr. Turk has also served as a volunteer settlement judge, mediator and arbitrator for almost 15 years and is a member of the American Arbitration Association's commercial mediation and arbtration panels.

He is a co-author of the chapter on Mandatory Alternative Dispute Resolution in the *Arizona Litigation Guide*, published by the Maricopa County Bar Association. Mr. Turk is also an adjunct professor at the Sandra Day O'Connor College of Law at Arizona State University where he teaches Civil Pretrial Procedure.



Whether you represent a party or are the mediator in mediation, you must manage expectations. Plaintiffs want a lot; defendants want to pay nothing. In a recent employment mediation, the plaintiff's demand was $500,000. The defense response? $5000. Puffery begets posturing! A wise ADR expert once told me that a good settlement is one where one party thinks they didn't get enough and the other thinks they paid too much. This is great theory, but takes some doing to convince the parties to accept it, because parties think win/lose or at least win/win.

In full disclosure, I am not an advocate of transformative mediation. I believe in evaluative mediation as long as it isn't taken to an extreme. Obviously we let the parties ultimately come to their own resolution, but isn't it sometimes helpful to get the mediator's perspective? Since I only practice employment law, I expect a mediator to have some subject matter knowledge about damage caps under Title VII and the burden of proof in an employment case for instance. Conversely, I have no knowledge of our domestic relations laws and wouldn't attempt to mediate such a dispute. More power to those of you who can jump into any subject matter.

Regardless of your expertise or position in the mediation, expectations have to be managed. The plaintiff seeing an offer by her attorney for $500,000 needs to know that this is (1) posturing, (2) is about 50% more than the case is worth or (3) told that is the number and we shouldn't budge from it. In any case, the client understands the value of the matter before going into the mediation. Defendants never want to pay. Period. After all, the employee's termination was just and "righteous." So why pay anything? You have all faced that dynamic in your various roles. So what to do?

First an honest assessment of liability and potential damages is extremely important. If your client is making $15/hr for 20 hours a week, don't tell me the back pay could reach $100,000. If your client seeks emotional distress damages but hasn't had a minute of counseling and no physical manifestations, don't try to sell me the $150,000 emotional distress claim. If your client knows they didn't take effective remedial action to stop sex harassment, don't try to convince me, there is no liability.

An experienced mediator can cut to the chase pretty quickly and narrow the issues. Is there potential for liability and large damages? Has the plaintiff properly mitigated their damages? Are multiple parties involved? In order to manage the expectations of both sides, candor to the mediator and with your client is essential. You have to have the courage to inform your client (and mediators, this is your job) of the harsh realities of litigation, and potential outcomes. Each party to the litigation has a stake, and each party's representatives and the mediator need to understand the limit of each side's case. Anyone who tells me this is a 9 out of 10 win case, hasn't tried many cases. The evaluative mediator can make a strong impression on a party as to the realities and pitfalls of the case. But the mediator cannot do this alone. Counsel must absolutely be honest with their client when they hear a fact that turns the case in a bad way for that party. A final employment example: In a retaliation case for whistle blowing, is it important for the employer to have known, prior to termination that the employee did in fact file a complaint? I hope collectively we can agree that before someone can retaliate, they need to know something that precipitated the retaliation. If you find out in a mediation that the employer had no knowledge of any complaint, would you advise your client that the earlier assessment of liability may be off, and expectations need to be tempered?

So it all boils down to a candid assessment by counsel and lightening up on the posturing. The more you posture and get away from your interests, the harder it will be to manage expectations. Mediators, your candor is crucial as well. Telling a crying plaintiff that their case has diminished in value isn't easy. But in truth, it needs to be done when it is a fact. And conversely, if facts come out that takes the smug look off the HR Director's face, so be it. Managing expectations isn't always easy, but it can be done with an honest assessment and candor all around.

THOM COPE is partner in the Tucson Law firm of Mesch Clark Rothschild and limits his practice representing primarily employers in Labor and Employment issues. He is a Fellow of the College of Labor and Employment Lawyers.

As always, this edition could not have been possible without the sterling efforts of section members responding to my call for articles. Thanks to all of you who contributed to the success of this newsletter. Again I encourage everyone with an idea for an article to contact me at any time. Or if you have published somewhere else, we can re-publish it for the benefit of our section members.

Also, there would be not be a newsletter without the assistance of the State Bar staff. Thanks to them as well.

I hope everyone is having a terrific new year! Be Well.

Thom Cope