

ASSOCIATION OF BUSINESS TRIAL LAWYERS

abt1
REPORT

LOS ANGELES

FALL 2020



ALTERNATIVE DISPUTE RESOLUTION

INTRODUCTION



**Hon. Debre Katz
Weintraub (Ret.)**

The COVID-19 health crisis has required trial courts to balance parties’ due process rights in civil proceedings against the obligation to ensure the health and safety of litigants, attorneys, court staff, judicial officers, jurors, and others appearing in courtrooms. This balancing caused the Los Angeles Superior Court to close most of the civil courtrooms for several months in 2020. Civil trials were not held for much of the year, and most civil jury trials will not commence before January of 2021. The result has been a significant

backlog of cases that must be tried.

The optimists among us might say that this public health crisis has provided an opportunity to improve civil court operations. A realist might say that these difficult times require us to proceed with caution and deliberate steps. Both would agree that one must proceed with knowledge and creativity in the continued representation of clients in resolving their disputes.

For litigators, the question remains, “How to best represent your client?” Let me suggest that we step back and take a fresh look at alternative dispute resolution options to resolve ongoing civil cases.

Before the COVID-19 pandemic, we knew that one should consider and discuss ADR with one’s client, as well as with opposing counsel. We have long been aware of the benefits of ADR—certainty of result, shortened time to that result, reduced cost, increased control of the parties over the process, and increased privacy for the parties.

ADR’s benefits are now more valuable than ever. COVID-19’s impact on civil court operations means increased delay in the start date of jury trials and corresponding increased costs. Whether you are an optimist or a realist, ADR is at least as important as before the pandemic, and probably a lot more important.

This issue of the ABTL Report examines alternative dispute resolution in this pandemic time. Articles focus on various procedural alternatives—remote mediation, the Los Angeles Superior Court’s settlement programs, arbitration and judicial references—along with Code of Civil Procedure Section 664.6 and the use of electronic signatures.

We hope this issue will help you in evaluating ways to escape the backlog.

Hon. Debre Katz Weintraub (Ret.) is a past Supervising Judge of the Civil Courts of the Los Angeles Superior Court and sat as a Settlement Judge for the Court. She also served as Chair of the ADR subcommittee of the Judicial Council’s Civil and Small Claims Advisory Committee, and until her recent retirement from the bench was a member of ABTL-LA’s Judicial Advisory Council.

Editors’ Note: This ADR-focused issue of the ABTL Report was Judge Weintraub’s idea, well before we knew how relevant COVID-19 would make the subject. We thank her for her idea and her encouragement.

ASSOCIATION OF BUSINESS TRIAL LAWYERS

abtl REPORT

8502 E. Chapman Avenue, Suite 443
Orange, California 92869
(323) 988-3428 · Fax: (714) 602-2505
Email: abtl@abtl.org · www.abtl.org

OFFICERS

- Valerie M. Goo
President
- Susan K. Leader
Vice President
- Manuel F. Cachán
Treasurer
- Kevin R. Boyle
Secretary

BOARD OF GOVERNORS

- | | |
|----------------------------|------------------------------|
| Howard K. Alperin | Jennifer L. Meeker |
| Keri E. Borders | Robert W. Mockler |
| Hon. Stephanie M. Bowick | Douglas R. Painter |
| Hon. Kevin C. Brazile | John F. Querio |
| Celeste M. Brecht | Wendy J. Ray |
| Stephen A. Broome | Rick L. Richmond |
| Andre J. Cronthall | Hon. Lawrence P. Riff |
| Joseph Duffy | Daniel A. Rozansky |
| Michael J. Duvall | Dylan Ruga |
| Steven N. Feldman | James C. Rutten |
| T. John Fitzgibbons | Paul B. Salvaty |
| Jeanne A. Fugate | Hon. Suzanne H. Segal (Ret.) |
| Lorenzo E. Gasparetti | Aalok Sharma |
| Emilio G. Gonzalez | Steven G. Sklaver |
| Jordan D. Grotzinger | Matthew E. Sloan |
| Hon. William F. Highberger | Alice Chen Smith |
| Hon. Brian M. Hoffstadt | Suzelle M. Smith |
| Hon. Amy D. Hogue | Jessica L. Stebbins Bina |
| Brian C. Horne | Tony Tootell |
| Perlette Michèle Jura | Diana M. Torres |
| Gregory S. Kornman | Alan Van Gelder |
| Hon. Ruth Kwan | Hon. Hernán D. Vera |
| Jason Linder | Robert L. Wallan |
| David R. Lira | Hon. Patrick J. Walsh |
| Amy R. Lucas | Daniel L. Warshaw |
| Hon. Dalila C. Lyons | Jason C. Wright |
| Michael L. Mallow | Jack S. Yeh |
| Robin Meadow | Thomas A. Zaccaro |

JUDICIAL ADVISORY COUNCIL

- | | |
|--------------------------|----------------------|
| Hon. Daniel J. Buckley | Hon. Ann I. Jones |
| Hon. Brian S. Currey | Hon. Maren E. Nelson |
| Hon. Lee Smalley-Edmon | Hon. Alka Sagar |
| Hon. Samantha P. Jessner | Hon. Paul J. Watford |
- Hon. John Shephard Wiley, Jr.

YOUNG LAWYERS DIVISION

- Andrew J. Holmer, YLD Chair
- Jonathan P. Slowik, YLD Vice Chair

EXECUTIVE DIRECTOR

- Linda A. Sampson

ABTL REPORT EDITORS

- Robin Meadow
- John F. Querio

VIRTUAL MEDIATION - LESSONS LEARNED FROM A PANDEMIC



*Hon. Suzanne H. Segal
(Ret.)*

While we endure the challenges of the COVID-19 pandemic, many ask, “How will this experience change our world?” Commentators speculate that broad acceptance of remote work will remain universal. Virtual meetings, depositions, and hearings are now more comfortable and familiar for lawyers and judges. But what about virtual mediation?



Mark Loeterman, Esq.

The pandemic did not abate the need for mediation—if anything, it created a greater demand. Even those lawyers who initially resisted virtual mediation eventually acquiesced, as government orders and safety concerns prevented in-person mediations from going forward. This article discusses lessons learned

from months of virtual mediation and proposes that virtual mediation, at least as an option for parties who want it, is here to stay.

When the world went virtual in March 2020, some lawyers embraced virtual mediation with enthusiasm. Others were skeptical. One hesitation might have been rooted in the fear that virtual mediation is too difficult or cumbersome for the technologically challenged. Fortunately, thanks to Zoom and similar technologies, this fear has proven unwarranted. Zoom created a simple, user-friendly interface for even the most tech-challenged individuals. Mediation providers also provided easy-to-use Zoom guides and extra IT support. And when problems inevitably arose, such as compromised bandwidth or internet failure, patience and creative planning enabled the parties to work through the problem and continue the mediation.

We have also worked with clients who were unfamiliar with Zoom or who lacked access to a device. We learned to address this problem through additional pre-mediation preparation with the client or by having the client in a room with counsel, albeit in a socially distanced and safe manner.

Parties have expressed concerns about the security issues, particularly after press coverage of “Zoom bombing” events where uninvited parties crashed a Zoom meeting. Fortunately, Zoom has added significant security protocols, including password requirements, “waiting rooms”, and host control of admission to the mediation. Zoom has an option of multi-factor authentication for parties that seek even greater security protection. Parties and mediators should use the latest version of Zoom software to take advantage of security upgrades. (While other platforms are available and may have more desirable features, Zoom’s advantage lies in its widespread use and familiarity. These decrease the chance that technical problems will interfere with a mediation.)

Parties have also expressed concerns about confidentiality—for example, does the use of a virtual format create a risk that mediation discussions could be recorded? We are unaware of any evidence of an increase in secret recordings of mediations since the pandemic began—and it’s not as though secret recordings weren’t possible before. Furthermore, California law prohibits the admission of any such recording in civil proceedings, so the value of such a recording would be extremely limited. California Evidence Code Section 1119 prohibits the admission of any statement or writing made “for the purpose of a mediation.” (*Cassel v. Superior Court* (2011) 51 Cal.4th 113, 117.) Even statements made outside the presence of the mediator are excluded. (*Eisendrath v. Superior Court* (2003) 109 Cal.App.4th 351, 358.) Zoom allows a host to disable the recording feature, and when that is done a recording could only be created through use of a phone or similar device—which, again, could happen during an in-person mediation as well. If parties are genuinely concerned about confidentiality issues, they should consider a pre-mediation agreement that expressly addresses confidentiality. Courts have upheld such agreements. (*Facebook, Inc. v. Pacific Northwest Software, Inc.* (9th Cir. 2011) 640 F.3d 1034, 1040-1041 [confidentiality agreement precluded admission of statements made during mediation].)

Many lawyers have expressed the view that virtual mediation simply does not work as well as in-person mediation. This view is consistent with traditional mediation training, including ours. Traditional mediation training teaches that having the decisionmaker physically present is critical to the success of the mediation. As one lawyer commented when objecting to the virtual mediation format, “you gotta have skin in the game”—a decisionmaker must be physically present to fully appreciate

Continued on Page 4

Virtual Mediation...continued from Page 3

the mediation experience. Parties want a mediator to “twist the other side’s arm,” and some lawyers believe that this cannot happen virtually. That’s what *we* thought, too, at the outset of the pandemic

However, the success rate of virtual mediation has undermined this view—it’s essentially the same as in-person mediations. How is that possible? Perhaps the assumption of “physical presence” as the critical factor oversimplified what is truly essential for a successful mediation. The critical factor may not be so much physical presence as a strong, sincere commitment to the mediation process, regardless of whether that process is virtual or in-person. We have seen success in virtual mediations even when parties started the mediation doubting that they could settle, where participants on all sides were nevertheless genuinely committed to seeking resolution. After all, nothing forces parties to stay in the room, regardless of whether the room is real or virtual—they can walk out of an in-person mediation or turn off their computers. The critical factor to success is how deeply parties wish to resolve their dispute.

It is possible that some of the other benefits of virtual mediation are contributing to the high success rate. Virtual mediations are easier to convene and travel costs are eliminated, making it easier for decisionmakers in distant locations to participate. When the mediator is working with another party, lawyers and clients can work in their offices and be productive on other matters during the inevitable downtime, making for a more efficient workday. Parties and lawyers may be more comfortable participating from their home offices. Personal relationships can be improved by seeing parties in a more relaxed setting, such as with family photos next to them or with their pets wandering into the room.

We have also learned some virtual mediation “best practices” for increasing the likelihood of success. Among these are (1) extensive pre-mediation preparation and information-sharing with client and mediator; (2) a practice session with the client to review technology, lighting, sound, etc.; (3) an exchange of documents electronically in advance of the mediation with mediator and opponent; (4) the use of pre-mediation agreements regarding security, confidentiality, participation details, and other critical factors.

But we cannot lose sight of how the pandemic has highlighted this fact: We desperately need our courts. Without rulings on critical motions, deadlines to create pressure points in litigation,

or the threat of an ultimate ruling from judge or jury, parties may lack motivation to engage in meaningful settlement discussions. The mediator can try to persuade parties of the advantages of settlement, but functioning courts clearly assist the parties in focusing on the benefits of a voluntary resolution.

John Adams supposedly said that “every problem is an opportunity in disguise.” In the midst of these difficult times, we have learned that technology, combined with preparation and commitment, provides the opportunity for successful virtual mediation. We believe that the benefits of virtual mediation are substantial enough that they will persist long after the pandemic recedes. We hope to take the lessons learned from these challenging times and continue to expand our ability to resolve disputes by using the virtual option.

Hon. Suzanne H. Segal (Ret.) is a mediator, arbitrator, Special Master and Discovery Referee at Signature Resolution. She served as a Magistrate Judge in the Central District for 18 years, including 4 years as Chief Magistrate Judge.

Mark Loeterman, Esq. is a mediator at Signature Resolution.

**The 2021
Membership Drive
Has Begun.**

**RENEW
TODAY!**

*To establish
Your 2021 Membership,
Visit Us Online at
www.abtl.org*

THE LOS ANGELES SUPERIOR COURT'S MANDATORY SETTLEMENT CONFERENCE PROGRAM IN THE TIME OF THE PANDEMIC



Hon. Zaven V. Sinanian

The COVID-19 pandemic has affected every aspect of every courthouse operation in the United States and probably the world. Here in Los Angeles, Superior Court operations were largely suspended in March 2020, including the Mandatory Settlement Conference program. As we slowly resumed

our court services, we were also able to restart the MSC program by conducting remote conferences. Counsel have come to realize that it is almost an imperative to try to resolve their cases via private mediation or court-ordered settlement conferences to avoid trial delays.

Prior to the pandemic, only about 5% of civil cases ended up in trial. The vast majority of civil cases will continue to settle before trial. Most cases will settle by direct negotiations and a smaller number after successful dispositive motions. The cases that end up in private mediation will generally settle. Of those cases that will not or cannot settle via direct negotiations or private mediation, many will end up in court-ordered settlement conferences.

As it has done for many years, the court's MSC program assists individuals and businesses who have limited funds or are unable or unwilling to resolve their disputes through direct negotiations or private mediation. It is often the last stop before trial, when the uncertainty of outcome and rising costs of litigation may begin to overwhelm the litigants. The pandemic, however, has changed the way we conduct settlement conferences, because we can no longer meet in conference rooms at the courthouse but instead must hear our cases via videoconferencing platforms.

The loss in intimacy is difficult to replace. Prior to the pandemic, settlement conference participants sat in a small conference room to ensure privacy and confidentiality. In such settings, cases settled because of human interactions, sometimes beyond our control. The relationships that

developed in private conference rooms, where litigants engaged in discussions with a sitting judge about sensitive issues, were crucial to facilitating resolution of disputes.

I firmly believe good rapport with litigants helps persuade them to view the settlement process as a better alternative to a trial. A few years ago, I settled a wrongful death case involving a teenager who died in an apartment fire. The parents of the child, recent immigrants from a developing country, needed a neutral who not only empathized with their loss but also could be trusted to explain in a calm and caring way the potential outcome of continued litigation. Having immigrated myself to America as a teenager with my family, I was able to make a unique connection with the family, which played a large role in building trust and confidence. It was critical to have experienced attorneys and a knowledgeable insurance adjuster who valued my thoughts on how to navigate the settlement conference. The parents were relieved when they were finally able to reach an agreement with the defendants. With tears in their eyes, they thanked me for helping them achieve closure. This result would not have been possible without the cooperation of counsel and the sound risk assessment of the insurance adjuster, with whom I had developed a professional relationship over the years. Most importantly, the entire conference happened in small, confined rooms, where privacy and confidentiality were protected.

Has the pandemic eliminated this kind of effective interaction? It has certainly changed the physical form and structure of settlement negotiations, both in the context of private mediations and court-ordered settlement conferences. But we are adapting to the new world of remote settlement conferences conducted via video conferencing platforms.

And I must admit, it is working well.

The participants do not have to travel long distances and risk contracting the virus. They don't have to fight traffic and pay exorbitant parking fees. They can be in a room with their counsel, if they choose to, or appear solo from a more comfortable location. The litigants are placed in separate "breakout rooms" to allow private discussions. In the typical two-party case, I like to create additional rooms—one for my chambers, where I will place myself when the parties need to confer, and another where

Continued on Page 6

Mandatory Settlement Conference Program...continued from Page 5

the lawyers can meet privately. We do, however, miss the small talk that used to occur at the start of an in-person session, which can sometimes ease tensions: On video, after my introductory remarks about the process, we dive right into the factual and/or legal issues.

Especially with the restrictions imposed by the pandemic, lawyers must be fully invested in the MSC process to enable them to find creative ways to resolve disputes. Acting more as a counselor than as an advocate, a lawyer has to prepare the client for the kind of compromises that may have to be made to achieve closure at a settlement conference. Lawyers must treat the MSC as the last station before trial and prepare as though they are entering the trial phase. The MSC may be their last chance to avoid the risks and disappointments inherent in a trial. Lawyers must spend time with their clients to educate them about the process of negotiation and the objectives that can be achieved at a settlement conference. The potential disruptions that will affect businesses, which can sometimes lead to closures or bankruptcy, will require more effort to ensure an early settlement of a dispute. At the settlement conference, I try to emphasize to the parties not only what they might lose by proceeding to trial, but more importantly what they will gain by agreeing to resolve their dispute on their own negotiated terms.

One of the positive outcomes of the complicated future we now face will be learning to work together in ways that manage risk better and promote dialogue earlier in the litigation process. Civility, always expected before, will become even more critical for lawyers to be able to achieve the goals of their clients. The changes resulting from the pandemic will require a more accurate understanding of the needs and interests of the litigants.

As settlement judges of the MSC program, we have adjusted to the new reality and are here to help litigants resolve their disputes. Given the anticipated delays in jury trials, the settlement judges are taking on a greater responsibility of mediating disputes and repairing broken relationships. Here are some pointers for counsel:

- Parties who choose to engage in private mediation should do so prior to using our services.
- We prefer that you have a trial date set before you

meet with us. Ideally, the MSC should happen 30 to 60 days prior to trial. The parties are more motivated to settle a case when trial dates are looming.

- There will undoubtedly be exceptions where cases will need early intervention, such as where there is a depletion of funds or where increasing litigation costs and attorney's fees, threaten to result in the demise of the company.

- Counsel must cooperate and collaborate to make the MSC a worthwhile engagement. I have always stressed to lawyers that it doesn't advance the goal of settlement when lawyers are angry, unreasonable and belligerent.

- Counsel may communicate jointly with the MSC judges prior to the videoconference to determine what the best framework is to improve the chance of success.

- The five-page settlement statements should provide a brief outline of the law/facts and a discussion of the prior settlement negotiations. The statements must be served on the opposing side to educate them about the issues to be discussed at the settlement conference.

- Preparatory meetings and settlement statements will save time and provide critical insight to the MSC judge, who will then be in a better position to persuade the parties to move in the right direction.

Undoubtedly, vaccines will bring back some normalcy to human life. But they will not guarantee the resumption of in-person sessions in the immediate future. It will take time to vaccinate large population sectors and to feel safe again, and we may encounter new challenges from persons who decline to receive the vaccination.

In the time of the pandemic, we must work together to come up with creative solutions to enable us to achieve timely resolution of legal disputes.

Hon. Zaven V. Sinanian is the Supervising Judge of the Los Angeles Superior Court's Judicial Mandatory Settlement Conference program.

“IT’S A WRAP”: USING CODE OF CIVIL PROCEDURE SECTION 664.6 TO BOLSTER YOUR SETTLEMENT

“Discourage litigation. Persuade your neighbors to compromise whenever you can. Point out to them how the nominal winner is often a real loser—in fees, expenses, and waste of time. As a peacemaker the lawyer has a superior opportunity of being a good man. There will still be business enough.”

— Abraham Lincoln



Philip Cook

Your client has agreed to compromise and settle the case. Given the effort and expense required to litigate to a point where settlement is reached, the last thing your client wants to hear is that more litigation will be required if the other party fails to perform their side of the settlement agreement—whether you amend your pleadings to add a breach of contract cause of action or file a new lawsuit. California Code of Civil Procedure section 664.6 provides an alternative, summary procedure to enforce the settlement agreement and have judgment entered on its terms. (See *Hernandez v. Board of Education* (2004) 126 Cal.App.4th 1161, 1175-1176.) Section 664.6 provides as follows:

If parties to pending litigation stipulate, in a writing signed by the parties outside the presence of the court or orally before the court, for settlement of the case, or part thereof, the court, upon motion, may enter judgment pursuant to the terms of the settlement. If requested by the parties, the court may retain jurisdiction over the parties to enforce the settlement until performance in full of the terms of the settlement.

A court considering a motion under section 664.6 must determine whether the parties have entered into a valid and binding settlement. (*Hines v. Lukes* (2008) 167 Cal. App.4th 1174, 1182.) However, “[a]lthough a judge hearing a section 664.6 motion may receive evidence, determine disputed facts, and enter the terms of a settlement agreement as a judgment [citations], nothing in section 664.6 authorizes

a judge to *create* the material terms of a settlement, as opposed to deciding what terms *the parties themselves* have previously agreed upon.” (*Machado v. Myers* (2019) 39 Cal. App.5th 779, 790, original italics.)

What is required for enforcement under section 664.6?

Although courts deciding motions to enforce settlements under section 664.6 initially focused on the strong public policy in favor of settling litigation and liberal enforcement of settlement agreements (e.g., *Casa de Valley View Owner’s Assn. v. Stevenson* (1985) 167 Cal.App.3d 1182, 1190 [relying upon the “public policy of this state” which “supports pretrial settlement of lawsuits and enforcement of judicially supervised settlements” to affirm judgment entered pursuant to section 664.6]), more recent cases emphasize the importance of compliance with the statute’s requirements and whether settlement agreements are binding and enforceable. A few of the more important requirements, with some practical suggestions for counsel, are discussed below.

- ***For now, the parties themselves must sign the settlement agreement.*** In *Levy v. Superior Court* (1995) 10 Cal.4th 578, the California Supreme Court considered whether a court could enter judgment under section 664.6 where a written stipulation to settle had been signed by a litigant’s attorney but not by the litigant personally. Because section 664.6 expressly “requires the ‘parties’ to stipulate in writing . . . that they have settled the case[.]” the Court concluded that “the term ‘parties’ as used in section 664.6

Continued on Page 8

It's A Wrap...continued from Page 7

. . . means the litigants themselves, and does not include their attorneys of record.” (*Id.* at pp. 585-586.) Traditional agency analysis has been rejected as a means of satisfying the party signature requirement of section 664.6. (See *Gauss v. GAF Corp.* (2002) 103 Cal.App.4th 1110, 1119; *Murphy v. Padilla* (1996) 42 Cal.App.4th 707, 716.)

However, the Legislature recently changed that. On September 29, 2020, Governor Newsom signed Assembly Bill No. 2723 (2019-2020 Reg. Sess.) § 1, amending section 664.6 to provide that a written settlement agreement may also be signed by an attorney who represents a party, or, if the party is an insurer, by an agent who is authorized in writing by the insurer to sign on the insurer’s behalf. The amendment takes effect on January 1, 2021; until then, for a written settlement agreement to be enforceable under section 664.6, the parties must sign it.

- ***A settlement must contain all material terms, even if you contemplate a more formal settlement agreement.*** As a general proposition, a settlement agreement, like any other contract, cannot be enforced if the parties fail to agree on a material term or if a material term is not reasonably certain. (See Civ. Code, § 3390, subd. (e).) What constitutes a “material term” of any specific settlement agreement will vary from case to case. (*Weddington Productions, Inc. v. Flick* (1998) 60 Cal.App.4th 793, 813, citing 1 Williston on Contracts (4th ed. 1990) § 4:28, pp. 602-605 [analyzing circumstances in which “minor matters” in elaborate contracts are left for future agreement and analyzing requirements for inclusion of all material terms in order to give rise to an enforceable contract].) You should consider preparing a draft agreement that includes all material settlement terms and bringing it to the mediation.

Even where the parties contemplate and express an intent to enter into a more formal agreement to document their settlement, an initial settlement agreement or term sheet can itself be the basis of a motion to enter judgment enforcing the settlement under Code of Civil Procedure section 664.6, as long as it: (i) reflects an intent to be bound, and (ii)

includes all material terms of the settlement. (See, e.g., *Blix Street Records, Inc. v. Cassidy* (2010) 191 Cal.App.4th 39, 48 [“When parties intend that an agreement be binding, the fact that a more formal agreement must be prepared and executed does not alter the validity of the agreement”].) And to avoid having an agreement deemed unenforceable because of mediation confidentiality imposed by Evidence Code section 1119 (e.g., *Simmons v. Ghaderi* (2008) 44 Cal.4th 570, 578-582), you should include a statement like the following in order to have the agreement qualify for a statutory exception to confidentiality (Evid. Code, § 1123, subds. (a) & (b)): “This agreement is intended by the parties to be admissible and subject to disclosure, and to be binding and enforceable.”

Where future performance is contemplated, how do you ensure the trial court will keep jurisdiction to enforce the settlement agreement under section 664.6?

Where a settlement agreement states that it may be enforced under section 664.6, the court may retain jurisdiction and, in the event of a breach, enforce the agreement by entering it as a judgment. However, as the court in *Mesa RHF Partners, L.P. v. City of Los Angeles* (2019) 33 Cal.App.5th 913, 917 (*Mesa*) makes clear, the statute includes certain requirements you must follow if you want the court to retain jurisdiction.

- ***The parties must stipulate that the court will retain jurisdiction before dismissal.*** In *Sayta v. Chu* (2017) 17 Cal.App.5th 960, 963, the parties resolved their dispute in a confidential settlement agreement, and the litigation was dismissed on that basis. Ten months later, after one of the parties breached the agreement, the nonbreaching party filed a motion to enforce the agreement under section 664.6. (*Ibid.*) On appeal from the trial court’s ruling on the motion, the Court of Appeal noted that although the settlement expressly provided that the parties would ask the trial court to retain jurisdiction to enforce the settlement under section 664.6, neither party did so. (*Id.* at pp. 964-965.) As a result, “the court lost subject matter jurisdiction when the parties filed a voluntary dismissal of the entire cause. Since subject matter jurisdiction cannot be conferred by consent, waiver,

Continued on Page 9

It's A Wrap...continued from Page 8

or estoppel, the court cannot ‘retain’ jurisdiction it has lost.’” (*Id.* at p. 966, quoting *Viejo Bancorp, Inc. v. Wood* (1989) 217 Cal.App.3d 200, 206-207.)

- **You must follow the statute.** In *Mesa*, the parties agreed in their settlements that the “‘Court shall retain jurisdiction pursuant to Code of Civil Procedure section 664.6 to enforce the terms of the Settlement Agreement.’” (*Mesa, supra*, 33 Cal.App.5th at pp. 915-916.) Plaintiffs’ counsel filed requests for dismissal and inserted in the dismissals that the “‘Court shall retain jurisdiction to enforce settlement per C.C.P. § 664.6.’” (*Id.* at p. 916.) The clerk entered the dismissals “‘as requested.’” (*Ibid.*)

When the plaintiffs tried to enforce the settlements by filing motions under section 664.6 years later, the Court of Appeal held that the trial court lost jurisdiction to enforce the settlements because *the parties* did not sign the requests for retention of jurisdiction, as required by section 664.6. Where parties strictly comply with section 664.6, the court can retain jurisdiction to enforce a settlement, even after an action has been dismissed. (*Wackeen v. Malis* (2002) 97 Cal.App.4th 429, 439 [“We construe the second sentence of section 664.6 to mean, and we so hold, that even though a settlement may call for a case to be dismissed, or the plaintiff may dismiss the suit of its own accord, the court may nevertheless retain jurisdiction to enforce the terms of the settlement, until such time as all of its terms have been performed by the parties, *if the parties have requested this specific retention of jurisdiction,*” original italics].)

The *Mesa* court offered two ways that parties could invoke section 664.6: (i) where the settlement agreement is not confidential, file a stipulation and proposed order attaching a copy of the settlement agreement (which presumably is *signed by the parties*), requesting that the trial court retain jurisdiction under section 664.6; or (ii) where the settlement agreement is confidential (or you would rather not file it publicly), file a stipulation and proposed order *signed by the parties* noting the settlement and requesting that the trial court retain jurisdiction under section 664.6.

(See *Mesa, supra*, 33 Cal.App.5th at p. 918.) Another option might simply be to have all of the parties sign the Request for Dismissal form, requesting that the trial court retain jurisdiction under section 664.6.

Assembly Bill No. 2723 does not appear to change the *Mesa* rule, as the statute allows continuing jurisdiction to enforce the settlement where “requested by the parties” while the statutory amendment adding subdivisions (b) through (d) to section 664.6 appear to affect only the statute’s requirement of “a writing signed by the parties.” Without case law clarifying this issue, the safest approach will be to continue to follow *Mesa*.

A Few Practical Suggestions

When settling pending litigation, do not leave your client exposed to further litigation in the event another party fails to perform its obligations under a settlement agreement. **First**, include an enforcement clause allowing access to section 664.6’s summary procedure for entry of judgment on the terms of the agreement if it is breached. **Second**, make sure all of the parties to the settlement sign the agreement, including officers for corporate litigants. **Third**, expressly state in the settlement agreement the parties’ intent that it be admissible and subject to disclosure, as well as binding and enforceable, even where you are contemplating a more formal agreement. **Fourth**, make sure the settlement agreement includes all necessary material terms. **Finally**, if future performance is to take place after dismissal, ensure that the court retains jurisdiction to supervise such performance by submitting a request in writing to the court before dismissal, signed by all of the settling parties.

Philip Cook is a principal at The Cook Law Firm and Cook Mediation in Los Angeles. He is a Past President of the Los Angeles Chapter of the ABTL (2012-2013).

WHAT TO EXPECT WHEN YOU ARE IN A MANDATORY FEE ARBITRATION



T. John Fitzgibbons

When an attorney's fee dispute arises in California, a client may demand arbitration under the Mandatory Fee Arbitration Act (the Act) (Bus. & Prof. Code, § 6200 et seq.). The goal of the Act was to provide a cost-effective way to resolve attorney's fee disputes and "to eliminate a disparity in bargaining power between attorneys and clients attempting to resolve disputes about attorney's fees." (*Doritz v. Noe* (2020) 49 Cal.App.5th 458, 467.) This article briefly summarizes the procedural aspects of these arbitrations and provides an overview of the criteria that an arbitrator will apply to decide the fee dispute.

Procedural Basics

The Act empowers the State Bar to establish and administer a system for fee arbitrations. (Bus. & Prof. Code, § 6200, subd. (a).) The State Bar has adopted rules that govern these arbitrations. (Rules Proc. of State Bar, rule 3.500 et seq., <http://www.calbar.ca.gov/Portals/0/documents/rules/Rules_Title3_Div4-Ch2-Fee-Arb.pdf> [as of Dec. 15, 2020].) In most California counties, local bar associations have programs that conduct the arbitration; the programs are listed on the State Bar's website. (See Approved Programs, State Bar of California, <<http://www.calbar.ca.gov/Attorneys/Attorney-Regulation/Mandatory-Fee-Arbitration/Approved-Programs>> [as of Dec. 15, 2020].) In the counties that lack State Bar-approved programs, or if one of the parties "explains in a declaration why the party cannot obtain a fair hearing before the local bar association," the State Bar may conduct the arbitration. (Rules Proc. of State Bar, rule 3.505(B)(2).)

Unless the fee agreement requires arbitration, the client gets to decide whether to go to arbitration. If the client requests fee arbitration, it is mandatory for the attorney. (Bus. & Prof. Code, § 6200, subd. (c).) When a lawyer sues for unpaid fees, the lawyer must advise the client in writing that the client has the right to request arbitration under the Mandatory Fee Arbitration Program. (See *id.*, § 6201, subd. (a).) If the client requests arbitration within 30 days of that notice, the lawsuit is automatically stayed and the matter moves to arbitration. (*Id.*, § 6201, subd. (c).) If the client instead commences a civil lawsuit or private

arbitration against the lawyer, that act waives the client's right to mandatory fee arbitration. (*Id.*, § 6201, subd. (d); *Fagelbaum & Heller LLP v. Smylie* (2009) 174 Cal.App.4th 1351, 1362.)

This is a one-way street by design. If the attorney requests arbitration without an arbitration provision in the fee agreement, the client may decline and insist that the dispute be resolved in court. (Bus. & Prof. Code, § 6200, subd. (c).) If the lawyer wants to guarantee binding arbitration, the lawyer must include a private arbitration provision in the written fee agreement. But though private arbitration provisions do not run afoul of the Act, a client can compel a lawyer to participate in a mandatory fee arbitration over the fee dispute before the private arbitration takes place. (*Schatz v. Allen Matkins Leck Gamble & Mallory LLP* (2009) 45 Cal.4th 557, 562.)

The arbitration's scope is limited: the arbitrator may decide only the fee dispute. The arbitrator lacks power to do any more than that. Most important, a fee arbitration may not be used to adjudicate a client's malpractice damages claim. (Bus. & Prof. Code, § 6200, subd. (b)(2).) Allegations of malpractice and professional misconduct are admissible only insofar as they are relevant to the reasonableness of the lawyer's fee. (*Id.*, § 6203, subd. (a).) Though it is not required to support allegations of malpractice, the parties may present expert testimony on the standard of care. (Committee on Mandatory Fee Arbitration, State Bar, Arbitration Advisory No. 2012-03 (July 17, 2012) (hereafter Arbitration Advisory No. 2012-03).) But an arbitrator may not award malpractice damages, whether asserted as an affirmative claim or as an offset against the lawyer's fee claim. (Bus. & Prof. Code, § 6203, subd. (a).)

Unless the parties agree to binding arbitration in writing before the arbitration, the result will be nonbinding. Either party may request a trial de novo within 30 days after notice of the arbitration award is served. (Bus. & Prof. Code, § 6204, subsd. (a)-(c).) This is a strict deadline: a recent case held that the deadline isn't extended for service by mail. (See *Soni v. SimpleLayers, Inc.* (2019) 42 Cal.App.5th 1071, 1077.)

If a court action is already pending, the notice must be filed in that action. (Bus. & Prof. Code, § 6204, subd. (b).) If no action is pending, the dissatisfied party must file suit. (*Id.*, § 6204, subd. (c).) Requesting trial de novo has some risks: unless the party seeking the trial obtains a result more favorable than the arbitration award, the court has discretion

Continued on Page 11

Mandatory Fee Arbitration...continued from Page 10

to award reasonable attorney's fees and costs to the other party. (*Id.*, § 6204, subd. (d).)

The arbitrator's findings do not have preclusive effect in a later malpractice case between the parties. (See Bus. & Prof. Code, § 6204, subd. (e); *Liska v. The Arns Law Firm* (2004) 117 Cal.App.4th 275, 283-287.) That is true even if the parties agree to binding arbitration under the Act. The award will cover only the fee dispute; it will be inadmissible in a malpractice case. (In contrast, an award issued after a private arbitration will have preclusive effect and is subject to review on limited grounds, just like other arbitration awards.)

Arbitrators are discouraged from serving as mediators in the cases they hear. The parties are prohibited from engaging in ex parte communications with an arbitrator while the arbitration proceeds. (Rules Proc. of State Bar, rule 3.538.) If the parties want to mediate, they should go to a separate mediation. The same bar association providers that conduct mandatory fee arbitrations often also offer separate mediation programs.

Some other basics: when an arbitration commences, the arbitration provider will assign a sole arbitrator or a three-arbitrator panel, depending on the amount in dispute. (Rules Proc. of State Bar, rule 3.536(A).) Regardless of any provisions in the fee agreement, the arbitration award cannot include attorney's fees for the preparation for or appearance at the arbitration hearing. (Bus. & Prof. Code, § 6203, subd. (a).) If the fee amount has been court-ordered or set by statute (as in family law, bankruptcy, or probate matters), the mandatory fee arbitration program may not be used. (*Id.*, § 6200, subd. (b)(3).) And if the dispute is over fees for *Cum* counsel, the Act doesn't apply. (Civ. Code, § 2860, subd. (c); *National Union Fire Ins. Co. v. Stites Prof. Law Corp.* (1991) 235 Cal.App.3d 1718, 1727-28.)

Criteria for the Arbitrator's Fee Decision

The State Bar's Committee on Mandatory Fee Arbitration has published advisories on various topics to guide arbitrators. They are available on the State Bar's website. (See Arbitration Advisories, State Bar of California, <<http://www.calbar.ca.gov/Attorneys/Attorney-Regulation/Mandatory-Fee-Arbitration/Arbitration-Advisories>> [as of Dec. 15, 2020].) In determining a reasonable fee for the attorney's services, the Committee has instructed arbitrators to consider these four questions:

- Was there a written fee agreement?
- What was the reasonable value of the attorney's services?
- How much time did the attorney spend on the matter?
- Did any misconduct or incompetency by the attorney affect the value of the services?

The first of these questions can present thorny contract issues. Even when there's a written fee agreement, clients often argue that the agreement is invalid or unenforceable. The arguments range from the typical bases for avoiding a contract (e.g., fraud, duress, undue influence, and the like) to arguments that the agreement violates the statutes governing written fee agreements. (Bus. & Prof. Code, § 6147 [contingency fee agreements]; *id.*, § 6148 [hourly fee agreements].) If the client persuades the arbitrator that the fee agreement is invalid or unenforceable, its hourly rate or contingency fee provisions will not be enforced, and the attorney may recover only under quantum meruit principles.

The second and third questions overlap because the reasonable value of services often depends on the amount of time worked. Usually the arbitrator will evaluate time records and bills that show the attorney's hourly rate and the number of hours billed for each task. In what is essentially a lodestar analysis, the arbitration award will derive from multiplying a reasonable hourly rate by the reasonable number of hours worked.

The attorney should be prepared to prove each half of that equation. Regarding the hourly rate, the arbitrator will evaluate whether the attorney's rate is reasonable compared to the rates charged by attorneys performing similar work in the community. (Committee on Mandatory Fee Arbitration, State Bar, Arbitration Advisory No. 1998-03 (June 23, 1998).) The arbitrator will consider evidence of peer attorneys' hourly rates.

Evaluating the number of hours worked is a more time-consuming task. The Committee has devoted entire advisories to the topic. (See, e.g., Committee on Mandatory Fee Arbitration, State Bar, Arbitration Advisory No. 2016-02 (Mar. 25, 2016) (hereafter Arbitration Advisory No. 2016-02).) The Committee directs arbitrators to do these four things: (1) "Evaluate the process by which the bill was prepared and the specificity of the time entries"; (2) "Evaluate the staffing used on the matter"; (3) "Evaluate the

Continued on Page 12

Mandatory Fee Arbitration...continued from Page 11

work performed against the time billed”; and (4) “Look for certain patterns in the descriptions of the work performed, including the time entries.” (*Id.* at p. 1.) The Committee has also identified the following indicia of bill padding:

- Time entries prepared long after the work was performed. Though it may be cliché to say that the best practice is to prepare time entries contemporaneously, some clichés are true. The closer the time entries are recorded to when the hours were worked, the more likely an arbitrator will find the entries to be accurate. (*Id.* at pp. 2-3.)

- Time entries prepared by someone other than the professional who performed the services. Procedures that call for staff to record a certain minimum amount of time to be billed for specific tasks (for example, the initial review of correspondence) are likely to be questioned, absent evidence of a contractually agreed upon minimum charge. So are a billing partner’s decisions to increase the time entered by other professionals as part of a review of pre-bills. (*Id.* at pp. 2-3.)

- Time entries that lack specificity. The Committee has concluded that lawyers who enter their time personally into billing software generally describe their tasks with more detail—and more accuracy—than those who handwrite their time entries for input by staff. (*Id.* at p. 4.)

- Excessive or inappropriate staffing. An arbitrator may consider whether multiple lawyers were needed at various case events, like court appearances and depositions. An arbitrator also may consider whether a task could have been performed by someone who billed at a lower rate. (*Id.* at p. 5.)

- Excessive time spent on major tasks. An arbitrator may group the time entries to determine how much time was spent on particular tasks. Task and activity codes can help the arbitrator. Then, using his or her experience and judgment, the arbitrator should consider whether the time spent was reasonable, given the quality of the work product. Similarly, the volume of documents in a case is relevant to determining the reasonableness of the time spent on document production tasks. (*Id.* at pp. 6-7.)

High minimum increments, round numbers, and

generalized descriptions. The Committee directs arbitrators to be suspicious about high incremental charges (for example, a 0.25 hour minimum increment) and large whole number time entries (unless the event was an “inherently extended activity,” like trial, deposition, or mediation). The Committee also tells arbitrators to be skeptical about large amounts of time billed with vague, standardized descriptions. The quintessential example in the advisory is “review documents produced by opposition: 7.5 hours.” (*Id.* at p. 8.)

- Block billing. The Committee has opined that block billing may increase time by 10-30% and tells arbitrators they may cut that percentage of hours worked from an award. Though arbitrators do not always follow a mechanical approach, they have discretion to do so, or at the very least to require that the attorney provide additional evidence to support the accuracy of block billed entries. That evidence should include testimony about billing practices and the specific entries. It also should include documentation about the specific work done. (*Id.* at p. 9.)

- Recycled work. It is unethical to bill a client more than the actual time spent on a matter. (ABA Com. on Prof. Ethics, opn. No. 93-379 (1993).) If a lawyer can reuse a brief, an agreement, or other standard document from a previous matter, that efficiency should be passed on to the client. (Arbitration Advisory No. 2016-02, *supra*, at pp. 13-14.)

- False entries. If the client can prove that an entry is demonstrably false, the arbitrator likely will view with skepticism the attorney’s other entries. (*Id.* at p. 10.)

These factors overlap with those provided in the Rules of Professional Conduct. There is an important difference, however. The Rules of Professional Conduct speak in terms of an “unconscionable” fee, which is unsurprisingly prohibited. (Rules Prof. Conduct, rule 1.5.) Though an unconscionable fee is per se unreasonable, the client need not show unconscionability to prevail in a fee arbitration. The standard a fee arbitrator applies is lower: a fee need not be unconscionable to be unreasonable.

Though malpractice cannot be asserted as an affirmative claim or offset, allegations of malpractice can nevertheless find their way into a fee arbitration. Suppose that the attorney missed a deadline for responding to discovery (through no

Continued on Page 13

Mandatory Fee Arbitration...continued from Page 12

fault of the client) and then spent time seeking relief from waiver of objections. Or suppose that the attorney did not advise the client to settle earlier, and the client incurred additional fees litigating a case that should have been resolved. Most dramatically, suppose that the attorney missed the statute of limitations, and the client's claim was lost. Facts like those likely would lead an arbitrator to conclude that the client did not receive reasonable value for what was billed or paid. (Arbitration Advisory No. 2012-03, *supra*.) If a malpractice claim were filed, it would proceed in another forum. But in the fee arbitration, the client could get relief from the attorney's efforts to collect the fee.

Takeaways

Fee disputes most often arise when there has been a breakdown in the attorney-client relationship. They can arise when a lawyer allows a client to fall far behind on paying fees. They also can arise when a client feels that the lawyer neglected the matter, didn't communicate, or didn't achieve the promised result. Fee disputes often involve the theme that the lawyer abandoned the client.

There are at least three takeaways for attorneys:

Mandatory fee arbitrations are for pure attorney's fees disputes. If the client brings an affirmative malpractice claim (as often happens when a lawyer pursues a fee claim), the arbitrator cannot decide the malpractice claim.

Unless the parties agree that the award will be binding, either side can obtain trial de novo of the arbitrator's fee award. Because of that, a binding arbitration outside the Mandatory Fee Arbitration Act, in which malpractice claims can also be addressed, is often a more efficient option for fully resolving a dispute.

Billing practices are critically important. Following best practices will pay dividends in a fee arbitration.

T. John Fitzgibbons is a principal at Robie & Matthai in Los Angeles.

ASSOCIATION OF BUSINESS TRIAL LAWYERS

abtl REPORT

47TH ANNUAL SEMINAR

EVOLUTION OF BUSINESS LITIGATION: ADAPTING & OVERCOMING

OCTOBER 20-24, 2021

**MAUNA LANI | AUBERGE RESORTS
BIG ISLAND, HAWAII**

Run of House \$325

Ocean View Deluxe \$375

Ocean Front \$575

No Resort Fee | Complimentary Self Parking

www.abtl.org/annualseminar

THE DISAPPEARING “INK” SIGNATURE



David M. Axelrad

Ink signatures have always had significance—student athletes sign college letters of intent; newly married couples sign marriage licenses; testators and their witnesses sign wills. The COVID-19 pandemic, however, has increased the need for and the desirability of completing transactions without the need for personal contact. Fortunately, California has adopted the Uniform Electronic Transactions Act (UETA), permitting parties to enter into binding transactions by electronic means, using electronic records and electronic signatures (e-signatures) instead of physical documents and “wet” signatures. (Civ. Code, § 1633.1 et seq.; further statutory citations are to the Civil Code.) And the pandemic has yielded some other alternatives.



Garen Bostanian



Jessica M. Leano

The UETA

California’s UETA, largely comprising language from the National Conference of Commissioners on Uniform State Laws, was enacted to facilitate and implement guidelines for “electronic commerce” in response to the growing use of “computer[s] and other electronic media.” (Sen. Rules Com., Off. of Sen. Floor

Analyses, Analysis of Sen. Bill No. 820 (1999-2000 Reg. Sess.))

Although there are many exceptions and limitations (see § 1633.3, subd. (b); Cal. Code Regs., tit. 2, § 22001), the UETA can apply broadly to many everyday transactions.

Under the UETA, if a law requires a “writing,” an electronic record satisfies this requirement. (§ 1633.7, subd. (c).) The UETA does not specify the types of technology that can be used to create a valid “electronic record.” (§ 1633.2, subd. (g).) A “record” is simply “information that is inscribed on a tangible medium or that is stored in an electronic or other medium and is retrievable in perceivable form.” (§ 1633.2, subd. (m).) An *electronic* record is “a record created, generated, sent, communicated, received, or stored by electronic means.” (§ 1633.2, subd. (g).) Email,

fax, and online systems have been identified as the types of technology that create electronic records. (See, e.g., Directions for Use to CACI No. 380 (2020), p. 210 [“there would seem to be little doubt that e-mail and fax meet the definition” of an electronic record]; *Rickards v. United Parcel Service, Inc.* (2012) 206 Cal.App.4th 1523, 1529 [Department of Fair Employment and Housing’s “automated system for online complaints” was sufficient to create an electronic record].)

The UETA also allows the use of an e-signature to comply with “a law [that] requires a signature.” (Civ. Code, § 1633.7, subd. (d); see *Ruiz v. Moss Bros. Auto Group, Inc.* (2014) 232 Cal.App.4th 836, 843 [“(A)n electronic signature has the same legal effect as a handwritten signature” under the UETA].) An e-signature is “an electronic sound, symbol, or process attached to . . . an electronic record and executed or adopted by a person with the intent to sign.” (Civ. Code, § 1633.2, subd. (h).) In some instances, “a printed name or some other symbol” can be a valid e-signature. (*J.B.B. Investment Partners, Ltd. v. Fair* (2014) 232 Cal.App.4th 974, 988 (*J.B.B.*) [collecting cases from other jurisdictions].) Parties need not use e-signature software like Adobe Sign or DocuSign to comply with the UETA. (See *ibid.* [“Courts in other jurisdictions that have adopted a version of UETA have concluded that names typed at the end of e-mails *can* be electronic signatures,” original italics].) *Who* signs the agreement also determines whether an e-signature is valid under the UETA. (See *Coleman v. Sagar* (Cal. Ct. App., Oct. 9, 2018, B283005) 2018 WL 4871142, at pp. *3-*4 [nonpub. opn.] [electronic settlement transaction was not enforceable even though the parties’ attorneys had signed the agreement, because plaintiff had not signed].) (Note that while *Coleman* and other unpublished opinions cited in this article can provide useful background, they “must not be cited or relied on by a court or a party” in any California court. (Cal. Rules of Court, rule 8.1115(a).)

Although the standards for an electronic record and an e-signature are flexible, the proponent of a transaction under the UETA must show that the parties “agreed to conduct the transaction by electronic means.” (Civ. Code, § 1633.5, subd. (b).) A showing of an agreement is mandatory for the UETA to apply. (*J.B.B., supra*, 232 Cal.App.4th at p. 988 [“UETA applies, however, only when the parties consent to conduct the transaction by electronic means”].) Parties do not need to execute a formalized agreement; an agreement to conduct an electronic transaction can be established “from the context and surrounding circumstances, including the parties’ conduct.” (Civ. Code, § 1633.5, subd. (b).) The standards for showing an agreement are flexible, and “[t]he

Continued on Page 15

The Disappearing “Ink” Signature...continued from Page 14

most likely jury issue is whether the parties agreed to rely on electronic records to finalize their agreement.” (Directions for Use to CACI No. 380, *supra*, p. 210.)

Let’s consider, as an example, entering into a settlement agreement by electronic means. Code of Civil Procedure section 664.6 enables courts to enter a binding, final judgment pursuant to a settlement agreement captured in writing and signed by all of the parties to the litigation. (See *Levy v. Superior Court* (1995) 10 Cal.4th 578, 586.) As discussed above, where a law—here, section 664.6—requires a writing and signatures, an electronic record and e-signatures that comply with the UETA can satisfy that law. (Civ. Code, § 1633.7, subs. (c) & (d).)

In *J.B.B.*, the Court of Appeal addressed whether a typed name at the end of an email was a valid e-signature under the UETA enabling the trial court to grant a section 664.6 motion. There, plaintiffs’ attorney emailed a settlement offer to one of the defendants in an effort to end a fraud dispute. (*J.B.B.*, *supra*, 232 Cal.App.4th at p. 978.) Defendant then emailed a response from his cell phone that included the words “I agree” and his printed name at the bottom of the message, but also expressed defendant’s belief that “the facts [would] not in any way support the theory in [plaintiff’s settlement offer] e-mail.” (*Id.* at p. 979.) Plaintiffs’ attorneys responded that they were unsure whether defendant was in fact rejecting or accepting the settlement offer. (*Ibid.*) Despite their uncertainty, plaintiffs filed a section 664.6 motion to enforce the settlement agreement. (*Id.* at p. 980.) The trial court granted the motion, finding that defendant had accepted the settlement offer with his emailed response. (*Id.* at pp. 982-983.)

The Court of Appeal reversed, finding that defendant had not electronically signed the settlement agreement. (*J.B.B.*, *supra*, 232 Cal.App.4th at pp. 990, 994.) Although the parties had agreed to use electronic means—namely, emails and text messages—to discuss the settlement offer, the court concluded this was only an agreement to negotiate the terms electronically. (*Id.* at p. 989.) The emailed settlement offer contained no language about entering into a “final settlement” by electronic means, and plaintiffs offered no other evidence supporting such a finding. (*Ibid.*) Even though defendant admitted in deposition that he “deliberately” typed his name into the email, this was not sufficient to demonstrate defendant’s intent to enter into the settlement or “formalize an electronic transaction.” (*Id.* at pp. 989, 992-993.) (In a later opinion, in which the Court of Appeal revisited the facts of this case, the court reemphasized its prior holding that “the settlement agreement was not enforceable under section 664.6 because [defendant’s] typed name” at the end of

an email “did not constitute an electronic signature.” (*J.B.B. Investment Partners Ltd. v. Fair* (2019) 37 Cal.App.5th 1, 13).)

Like *J.B.B.*, the following cases—some not published, and therefore not citable—illustrate the importance of an agreement to conduct a transaction by electronic means for the UETA to apply.

In a recent unpublished opinion, the Court of Appeal addressed whether a voicemail can create an agreement to conduct an electronic transaction. (*Dilonell v. Chandler* (Cal. Ct. App., Oct. 24, 2018, B282634) 2018 WL 5275217 (*Dilonell*) [nonpub. opn.]) A property owner hired a real estate services company to manage the property and later discussed selling it with the company’s agent. (*Id.* at p. *1.) After fielding several offers, the agent asked the owner to approve a time-sensitive offer without review. (*Id.* at pp. *1-*2.) The agent said she would sign the owner’s name on the offer for her, and the owner “reluctantly agreed,” thinking she would otherwise lose the sale. (*Ibid.*) To effect the transaction, the agent told the owner to leave her a voicemail authorizing her to sign on her behalf. (*Ibid.*) The owner left the voicemail but then refused to sell, leading the buyer to argue that the voicemail from the owner to the agent created an agreement to purchase and sell the property under the UETA. (*Id.* at pp. *2-*3.) The court rejected this argument, finding the UETA did not apply because there was no evidence the buyer and seller agreed to conduct a transaction for the sale of real estate “by electronic means.” (*Id.* at p. *5.) The voicemail from the seller to the agent showed only the seller’s intent to start the sale process, not an intent to create “an intentional ‘electronic signature’” on a real estate sale contract. (*Id.* at p. *6.)

A federal district court interpreting California law and the UETA found a valid agreement between an employer and employee to enter into an arbitration agreement through electronic means. (*Rosas v. Macy’s Inc.* (C.D.Cal., Aug. 24, 2012, No. CV-11-7318 PSG(PLAx)) 2012 WL 3656274, at p. *6 (*Rosas*) [nonpub. opn.]) The “express language” of the arbitration form indicated that “the parties agreed to contract electronically.” (*Ibid.*) Moreover, the arbitration form “was presented in the context of a series of forms with legal import,” including IRS and direct deposit forms, which would “reasonably suggest[]” to the employees that the forms would be in some way binding. (*Ibid.*) Finally, the employees had to enter information like their “social security number, month and day of birth and zip code” in order to complete the forms, which also indicated the forms had legal significance. (*Id.* at pp. *2, *6.)

Continued on Page 16

The Disappearing “Ink” Signature...continued from Page 15

Contrast *Rosas* with the unpublished—and therefore not citable—California Court of Appeal opinion in *Gilgar v. Public Storage* (Cal. Ct. App., Feb. 20, 2019, B288270) 2019 WL 698052 (*Gilgar*) [nonpub. opn.]. In *Gilgar*, an employer moved to compel arbitration of an employment dispute, contending a former employee had signed an arbitration agreement by checking an “I agree” box as part of the employer’s new hire forms. (*Id.* at p. *1.) The court found the employee “had not consented to contract electronically under the UETA.” (*Id.* at p. *6.) The other materials presented to the employee with the arbitration agreement “were largely required notices that were informational in nature, and would not reasonably have put her on notice that by clicking ‘I agree,’ she had formed an enforceable contract” to arbitrate any claims. (*Ibid.*) Unlike in *Rosas*, where the employees had to enter personal identifying information in order to complete the forms, the employee here had not “exercised any discretion in selecting or declining her options, or interacted with the software in a way that would suggest an understanding of what she agreed to.” (*Ibid.*)

These cases illustrate the importance of entering into an initial, separate agreement to conduct an electronic transaction for the UETA to apply. Although an agreement to enter into an electronic transaction can be established contextually, parties conducting important electronic transactions like settlement agreements can take steps to ensure enforceability, e.g., requiring parties to consent to providing an e-signature before allowing access to an online form, implementing authentication requirements, or opening a separate line of communications whereby the parties explicitly agree to enter into the transaction by digital means. (See Civ. Code, § 1633.5, subd. (b) [“an agreement to conduct a transaction by electronic means may not be contained in a standard form contract that is not an electronic record,” but parties may use “a separate and optional agreement” with the primary purpose of “authoriz(ing) a transaction to be conducted by electronic means”].)

Other Approaches

Use of electronic signatures has also been adopted in emergency court rules enacted in response to the COVID-19 pandemic. (See Cal. Rules of Court, emergency rule 8(c)(2) [ex parte requests relating to temporary restraining or protective orders may be “filed using an electronic signature by a party or a party’s attorney”].) Nonetheless, the use of electronic signatures is not universal. For example, estate planning documents, to be valid, “must [be] sign[ed] in front of a notary or two witnesses who are not involved in [the] estate.” (California Courts,

Emergency Court Actions and COVID-19 (Coronavirus), Estate Planning (2020) Judicial Council of Cal. <<https://www.courts.ca.gov/43589.htm>> [as of December 15, 2020].)

California does not currently permit remote notarizations, but one can use remote notaries from other states if their own laws permit it. (See *Notary Frequently Asked Questions, COVID-19 Questions*, Cal. Secretary of State <<https://www.sos.ca.gov/notary/faqs/>> [as of December 15, 2020] [California notaries cannot perform remote online notarizations, but “California continues to recognize notarial acts performed outside of California if it is taken in accordance with the law of the place where the acknowledgment is made. (California Civil Code 1189(b))”]; see Civ. Code, § 1189, subd. (b) [“Any certificate of acknowledgment taken in another place shall be sufficient in this state if it is taken in accordance with the laws of the place where the acknowledgment is made”].) There is pending legislation to permit remote online notarization in California, but its progress has been slow. (See Sen. Bill No. 1322 (2019-2020 Reg. Sess.); see also Vaz, *Obtaining Signatures on Documents in the Time of COVID-19* (2020) Cox, Castle, Nicholson LLP <<https://bit.ly/2CwBKma>> [as of December 15, 2020]; Oh & Fonté, *Using Electronic Signatures in the Age of COVID-19* (Mar. 26, 2020) Hunton Andrews Kurth <<https://bit.ly/318fTvI>> [as of December 15, 2020] [explaining how remote online notarization works].)

COVID-19 has also resulted in the temporary modification of California regulations relating to digital signatures. The list of “Acceptable Certification Authorities” in California Code of Regulations, title 2, section 22003, subdivision (a)(6), has been deleted and replaced with a list of three acceptable third-party certification programs. (Compare Cal. Code Regs., tit. 2, § 22000 et seq. with *Digital Signatures (Emergency Regulations)* (2020) Cal. Secretary of State <<https://bit.ly/2V8FWPq>> [as of December 15, 2020].)

The ability to use electronic signatures will likely increase during and after the COVID-19 pandemic. It is important to understand the statutes and evolving rules in order to make the most effective use of this technological advantage in the new and constantly changing legal landscape.

Garen Bostanian is an appellate fellow at *Horvitz & Levy LLP* and *David M. Axelrad* is a partner at the firm.

Jessica M. Leano, formerly a *Horvitz & Levy* appellate fellow, is a law clerk for the United States District Court, Central District of California.

ESCAPING THE COVID-19 BACKLOG: ARBITRATION



Phillip Shaverdian



Jeremy Rosen

In response to the COVID-19 pandemic, trial courts across California are implementing a variety of measures to curtail public activity within courthouses. The result has been a virtual standstill in civil litigation and a substantial backlog of cases ready for trial. Once the courts do reopen in some fashion, the backlog of criminal trials will take priority over the backlog of civil trials. See Kevin C. Brazile, *When Will Civil Litigation Return to Normal?*, DAILY J. (Apr. 21, 2020), <<https://www.dailyjournal.com/articles/357292-when-will-civil-litigation-return-to-normal>> last visited December 15, 2020. These criminal matters will consume much of the courts' resources for many months after reopening,

increasing the backlog of civil cases. This backlog will be especially magnified in courts like the Los Angeles Superior Court and the District Court for the Central District of California, which already had large backlogs prior to the pandemic. Moreover, even when courts do reopen, there will be numerous logistical challenges to conducting jury trials given the need for continued social distancing. Early predictions that most civil trials scheduled for 2020 would be rescheduled for 2021 have proven correct. See Rob Shwarts & Diana Fassbender, *Civil Jury Trials and COVID-19: How Civil Litigants Can Reach Resolution in the Wake of a Global Pandemic*, LAW.COM (Apr. 22, 2020), <<https://www.law.com/therecorder/2020/04/22/civil-jury-trials-and-covid-19-how-civil-litigants-can-reach-resolution-in-the-wake-of-a-global-pandemic/>> last visited December 15, 2020. Indeed, the November 2020 surge has only complicated matters. See, e.g., Los Angeles Supreme Court Order filed November 23, 2020, <http://www.lacourt.org/newsmedia/uploads/14202011231739220_NR_GO_FINAL-withOrder.pdf> last visited December 15, 2020.

Given these significant impediments to getting civil cases to trial and the potential difficulties in conducting any jury trials, litigants should consider options that would allow their cases to be heard sooner. This article focuses on

arbitration—but with particular safeguards in place.

Arbitration with Safeguards

Arbitration is an appealing alternative method to resolve disputes and offers benefits such as speed, efficiency, affordability, and informality. The speed and efficiency benefits of arbitration are especially significant during times that the court system is suffering from additional burdens and delays in holding civil trials.

Agreeing to arbitrate in the middle of a case provides opportunities that counsel do not have when the arbitration is dictated, as it often is, by a brief form clause in a transactional document drafted by transactional lawyers. Seizing these opportunities requires knowing the limits of arbitration and, if appropriate, contracting around them.

For example, an arbitration award cannot be overturned merely because the arbitrator commits legal error. Under the Federal Arbitration Act (“FAA”) and California Arbitration Act (“CAA”), courts can vacate an arbitration award only if it (1) was procured by corruption, fraud, or undue means; (2) was issued by corrupt arbitrators; (3) was affected by prejudicial misconduct on the part of the arbitrators; or (4) exceeded the arbitrators' powers. 9 U.S.C. § 10(a) (2018); Cal. Civ. Proc. Code § 1286.2(a)(1)-(4). The deference to the arbitrator's decision is so strong that the Ninth Circuit affirmed an award in an insurance bad faith action even where the award vastly exceeded the policy value and was “shocking or unsupported by the record.” *Lagstein v. Certain Underwriters at Lloyd's, London*, 607 F.3d 634, 640-41 (9th Cir. 2010). In California courts, an award that on its face exceeds the statutory limit for noneconomic losses may also be confirmed even though it is plainly wrong as a matter of law. See *Nogueiro v. Kaiser Found. Hosps.*, 203 Cal. App. 1192, 1196 (1988).

But at least in California, you *can* get appellate review if you build it into the arbitration agreement. In *Cable Connection, Inc. v. DIRECTV, Inc.*, the California Supreme Court, applying the CAA, gave effect to the parties' agreement that “[t]he arbitrators shall not have the power to commit errors of law or legal reasoning, and the award may be vacated or corrected on appeal to a court of competent jurisdiction for any such error.” 44 Cal. 4th 1334, 1340 (2008). In order for parties “to take themselves out of the general rule that the merits of the award are not subject to judicial review,” the court held, “the parties must clearly

Continued on Page 18

Backlog: Arbitration..continued from Page 17

agree that legal errors are an excess of arbitral authority that is reviewable by the courts.” *Id.* at 1361. The arbitration agreement in *Cable Connection* expressly deprived the arbitrators of the power to commit legal error and provided for judicial review of any such error. *Id.* While the court did not decide whether one or the other of these clauses would alone be sufficient to invoke an expanded scope of review, it did hold that the general rule of limited review is displaced by the agreement when the “parties constrain the arbitrators’ authority by requiring a dispute to be decided according to the rule of law, and make plain their intention that the award is reviewable for legal error.” *Id.* at 1355; see also *Harshad & Nasir Corp. v. Global Sign Systems, Inc.*, 14 Cal. App. 5th 523, 293-94 (2017) (holding that the parties “unambiguously require[d] the arbitrator to act in conformity with rules of law” by requiring the arbitrator to “apply California law as though he were obligated by applicable statutes and precedents and case law” and also “plainly expressed their intention that the merits of the award be subject to review” by providing that “the decision of the [a]rbitrator . . . shall be reviewed on appeal to the trial court and thereafter to the appellate courts”); cf. *Gravillis v. Coldwell Banker Residential Brokerage Co.*, 182 Cal. App. 4th 503, 518 (2010) (concluding that “the parties in this case did not agree to an expanded scope of review by merely requiring the arbitrator to render an award in accordance with California substantive law”).

In addition to ensuring the *availability* of judicial review, your agreement should account for the fact that that an adequate record is indispensable to *meaningful* review. Although the CAA gives parties the right to have a certified shorthand reporter transcribe any proceeding, Cal. Civ. Proc. Code § 1282.5, it would be better to agree to this in advance to avoid any possible dispute or oversight. And it wouldn’t hurt to provide for some means of ensuring the completeness of the record of pleadings and exhibits, since, unlike courts, neutral providers won’t do that for you.

For cases subject to the FAA, the United States Supreme Court has held that parties cannot consent to judicial review for legal error. See *Hall Street Assocs., L.L.C. v. Mattel, Inc.*, 552 U.S. 576, 585-86 (2008). In those situations, parties would have to consider whether the other benefits of arbitration outweigh the risk of a legal error by the arbitrator that is not reviewable in court. However, “contracting parties may agree that the FAA will not govern their arbitration even

if the contract involves interstate commerce.” *Mastick v. TD Ameritrade, Inc.*, 209 Cal. App. 4th 1258, 1263 (2012). If the parties agree that California law governs the contract, the CAA applies. *Volt Info. Scis., Inc. v. Bd. of Tr. of Leland Stanford Junior Univ.*, 489 U.S. 468, 470 (1989); *Cronus Invs., Inc. v. Concierge Servs.*, 35 Cal. 4th 376, 387 (2005).

Additionally, for cases under the FAA, the federal courts of appeals are divided as to whether the arbitrator’s manifest disregard of the law remains a basis for vacating an arbitration award in federal court. An arbitrator manifestly disregards the law where it is “clear from the record that the arbitrator [] recognized the applicable law and then ignored it.” *Comedy Club, Inc. v. Improv West Assocs.*, 553 F.3d 1277, 1290 (9th Cir. 2009). The Second and Ninth Circuits have held that an arbitrator exceeds his or her powers under the FAA where the award he or she issues is completely irrational or exhibits a manifest disregard of the law. See, e.g., *Stolt-Nielsen SA v. AnimalFeeds Int’l Corp.*, 548 F.3d 85, 95 (2d Cir. 2008), *rev’d on other grounds*, 559 U.S. 662 (2010); *Kyocera Corp. v. Prudential-Bache Trade Servs., Inc.*, 341 F.3d 987, 997 (9th Cir. 2003); see also *Affinity Fin. Corp. v. AARP Fin., Inc.*, 468 F. App’x 4, 5 (D.C. Cir. 2012) (“[a]ssuming without deciding that the ‘manifest disregard of the law’ standard still exists” but finding that the standard was not met). The Fifth and Eighth Circuits have abandoned this concept. See, e.g., *Med. Shoppe Int’l, Inc. v. Turner Invs., Inc.*, 614 F.3d 485, 489 (8th Cir. 2010) (holding that “an arbitral award may be vacated only for the reasons enumerated in the FAA”); *Citigroup Glob. Mkts., Inc. v. Bacon*, 562 F.3d 349, 355 (5th Cir. 2009) (holding that “to the extent that manifest disregard of the law constitutes a nonstatutory ground for vacatur, it is no longer a basis for vacating awards under the FAA”). While California courts applying the CAA also do not recognize the concept, see *Comerica Bank v. Howsam*, 208 Cal. App. 4th 790, 830 (holding that “defendants may not raise the issue of whether the award was secured in manifest disregard of the law”), California courts have adopted and applied this “manifest disregard” standard where the parties chose the FAA to govern the procedural aspects of their arbitration. See, e.g., *Countrywide Fin. Corp. v. Bundy*, 187 Cal. App. 4th 234, 253-54 (2010) (applying manifest disregard of law standard to determine whether arbitration award should be vacated).

Under both the FAA and CAA, parties should be aware of their ability to expand the scope of the arbitrator’s power to compel discovery from third parties. In *Aixtron, Inc.*

Continued on Page 19

Backlog: Arbitration..continued from Page 18

v. Veeco Instruments Inc., 52 Cal. App. 5th 360, 369-70 (2020)—a breach of confidentiality dispute between an employee and former employer—the arbitrator granted the former employer’s motion to compel discovery from a third party, the competitor that hired the employee. The Court of Appeal reversed and held that an arbitrator does not have the authority to issue a discovery subpoena to a third party under either the FAA or CAA. *Id.* The court agreed with federal case law indicating that there is no right to pre-hearing discovery under the FAA. *Id.* There was also no right under Code of Civil Procedure section 1282.61—the statute governing the issuance of subpoenas—“since the parties to the arbitration did not provide for full discovery rights in their arbitration agreement.” *Id.*

Litigants who decide to proceed with arbitration should also be aware of their ability to delegate to the arbitrator the question of whether a particular dispute is arbitrable. For example, what if, after signing the arbitration agreement, one of the parties raises an entirely new claim or defense? The agreement should make the parties’ decision on this point clear. It is indispensable to study the neutral provider’s rules, which are typically treated as part of the parties’ agreement. Courts regularly refer to such rules to resolve disputes over whether the arbitration is empowered to decide arbitrability. In California, courts have found that an arbitration agreement clearly and unmistakably delegated the arbitrability issue to the arbitrator where the arbitration agreement incorporated an American Arbitration Association (“AAA”) rule that gave the arbitrator “the power to rule on his or her own jurisdiction, including any objections with respect to the existence, scope or validity of the arbitration agreement.” *Rodriguez v. Am. Techs., Inc.*, 136 Cal. App. 4th 1110, 1123 (2006) (emphasis omitted). The Ninth Circuit has also found an enforceable delegation of arbitrability in similar circumstances. *See Portland Gen. Elec. Co. v. Liberty Mut. Ins. Co.*, 862 F.3d 981, 985 (9th Cir. 2017) (finding that incorporating an International Chamber of Commerce rule that allows the arbitrator to decide the scope of the arbitration agreement “makes clear that the arbitrators are vested with the authority to determine questions of arbitrability”); *Brennan v. Opus Bank*, 796 F.3d 1125, 1130 (9th Cir. 2015) (holding that “incorporation of the AAA rules constitutes clear and unmistakable evidence that contracting parties agreed to arbitrate arbitrability”); *Oracle Am., Inc. v. Myriad Grp. A.G.*, 724 F.3d 1069, 1072-75 (9th Cir. 2013) (holding that incorporating United

Nations Commission on International Trade Law rules, which give the arbitrator the authority to decide its own jurisdiction, constitutes clear and unmistakable evidence that the parties intended to delegate questions of arbitrability to the arbitrator).

Courts defer to neutral providers’ rules on other subjects, too—and to the arbitrator’s interpretation of the rules. *E.g.*, *Greenspan v. LADT, LLC*, 185 Cal. App. 4th 1413, 1449-56 (2010) (deferring to arbitrator’s interpretation of provider’s rules on timeliness of award). Parties should study the rules carefully, and ensure that their agreement clarifies ambiguities or eliminates rules they do not want to have govern their arbitration. *See id.* at 502 (“by agreeing to arbitration under the auspices of JAMS, LADT did not become hostage to JAMS Rules. As stated in Rule 2: ‘The Parties may agree on any procedures . . . in lieu of these Rules that are consistent with the applicable law and JAMS policies’” (original ellipsis)).

Conclusion

No one knows exactly what our court system will look like in the coming months and years or how much of an impact COVID-19 will continue to have on the ability of trial courts to set civil cases for jury trials. One thing is certain though: civil litigants in state and federal court should be prepared to endure long delays before their cases can be tried to a jury. Litigants wishing to avoid such delays should therefore consider tailored arbitration as an option to short-circuit the backlog of civil cases and secure a quicker disposition of their disputes. In addition, in California courts parties can use a private reference under Code of Civil Procedure section 638 to try their case before a retired judge. *See Escaping the COVID-19 Backlog: Judicial Reference* in this issue.

Phillip Shaverdian is an appellate fellow at Horvitz & Levy LLP and *Jeremy Rosen* is a partner at the firm.

TURNING THE TABLES: USING PUBLIC POLICY AGAINST ARBITRATION



Jeffrey E. Raskin

Countless published cases invoke California's public policy in favor of arbitration to justify everything from expansive interpretation of arbitration agreements to the extremely narrow scope of judicial review of arbitration awards. Less well-known are two doctrines that allow parties to use public policy against arbitration, either to avoid arbitration altogether or to empower courts to review awards for errors of fact or law.

These twin public-policy doctrines are powerful tools to escape arbitration's grip. But each doctrine is governed by its own set of rules, and each is so rarely addressed in published opinions that it is easy for counsel and courts to get tripped up. This is all the more true because different rules apply depending on whether the California Arbitration Act or the Federal Arbitration Act governs the analysis. In fact, just a couple of years ago, the California Supreme Court again clarified the distinction between the two doctrines—a distinction that the Court had made plain in the early 1990s. (*Sheppard, Mullin, Richter & Hampton, LLP v. J-M Manufacturing Co., Inc.* (2018) 6 Cal.5th 59, 73-80 (*Sheppard Mullin*).

Arbitration Awards That Violate Legislative Expressions of Public Policy.

The first doctrine is known as the "public policy exception" to the general rule of limited judicial review of arbitration awards. *Moncharsh v. Heily & Blase* (1992) 3 Cal.4th 1 (*Moncharsh*) held that awards are generally not reviewable for errors of fact or law, but also recognized that "there may be some limited and exceptional circumstances" justifying judicial review, such as when "granting finality to the arbitrator's decision would be inconsistent with the protection of a party's *statutory* rights" or a "clear" and "*explicit* legislative expression of public policy." (*Id.* at p. 32, italics added.)

The requirement that the public policy be found in a legislative enactment is key. Because the Legislature has expressed a strong public policy in favor of the finality of arbitration awards, it takes a countervailing legislative expression of public policy to justify judicial review for factual

and legal errors.

Cases involving public policy and statutory rights can be divided into two easily describable categories and a more debatable catch-all category:

1. The California Supreme Court has applied the exception and allowed judicial review for errors of fact or law where the arbitrator violated a statutory right or legislatively-expressed public policy that impacts the "propriety of the arbitration itself." (*SingerLewak LLP v. Gantman* (2015) 241 Cal.App.4th 610, 676-677.) For instance:

- The Supreme Court vacated an arbitration award that ordered a school district to comply with collectively bargained terms for the discharge of probationary teachers because the award conflicted with a statute (a) excluding these issues from the scope of collective bargaining and (b) giving school districts the right to discharge probationary teachers without cause or due process. The Court held that the Legislature expressed a public policy that probationary-teacher discipline "not be subject to arbitration." (*Board of Education v. Round Valley Teachers Assn.* (1996) 13 Cal.4th 269, 277.)

- *Aguilar v. Lerner* (2004) 32 Cal.4th 974, 979, 982-983 similarly applied the public policy exception in holding that the Mandatory Fee Arbitration Act conflicts with enforcement of an award that the parties agreed would be binding (although it found that the client had waived his rights under the statute).

2. The California Supreme Court has held that the public policy exception applies where granting finality to the arbitrator's error would bar the plaintiff from receiving a hearing on the merits of an unwaivable statutory claim. In *Pearson Dental Supplies, Inc. v. Superior Court* (2010) 48 Cal.4th 665, 669, 680, the Court held that the arbitrator "clearly erred" in determining that a Fair Employment and Housing Act claim was time-barred and that public policy required a hearing on the merits. The Court characterized the arbitrator's error as affecting the "procedural framework under which the parties agreed the arbitration was to be conducted." (*Id.* at pp. 679-680.)

3. California Courts of Appeal have occasionally applied the public policy exception to cases in which the arbitrator erroneously applied the substantive law governing the claim. A few examples demonstrate both the breadth of this catch-

Continued on Page 21

Turning The Tables..continued from Page 20

all category of cases and the robustness of judicial review to protect express legislative public policies:

- In *Ahdout v. Hekmatjah* (2013) 213 Cal.App.4th 21, 28, arbitrators found that the defendant had not acted as a general contractor and therefore was not required to disgorge profits under California’s contractor licensing statutes. Rather than deferring to the arbitral determination, the Court of Appeal held that the trial court must “independently consider” the issue to vindicate the licensing law’s public policy of protecting the public from incompetent and dishonest contractors and discouraging unlicensed contractors from charging for their services. (*Id.* at pp. 39-40.) The appellate court directed the trial court to make its de novo determination based on “all of the admissible evidence submitted to [the court] regardless of whether that evidence was before the arbitrator.” (*Ibid.*)

- In *Brown v. TGS Management Company, LLC* (2020) 57 Cal.App.5th 303, the Court of Appeal vacated an award denying a declaratory relief claim that presented a facial challenge to an employment agreement’s confidentiality provision. The court held that the provision was so broad that it violated the public policy—expressed in Business and Professions Code section 16600—against restraints on competition. (*Id.* at p. 307.) In considering that legal issue de novo, the Court of Appeal rejected the arbitrator’s alternative conclusions that the claim was (1) nonjusticiable as unripe and (2) barred by the unclean hands defense. (*Id.* at pp. 313-319.)

- The Court of Appeal took a somewhat more deferential approach in *City of Palo Alto v. Service Employees Internat. Union* (1999) 77 Cal.App.4th 327 (*City of Palo Alto*). The court recognized that various statutes, taken together, express a public policy requiring employers to take reasonable steps to provide a safe workplace. (*Id.* at pp. 334-337.) However, the court also acknowledged that that public policy is not so broad as to prohibit reinstatement when an employee makes a threat that he does not actually intend to carry out. (*Id.* at p. 337.) Deferring to the arbitrator’s conclusion that the employee did not pose an actual risk, the court thus refused to vacate the award. (*Id.* at pp. 337-338.) The court explained that a “different result might well obtain if the arbitrator had found, or there was uncontroverted evidence” that the employee’s threats were genuine “or if the arbitrator failed to reach that substantive question.” (*Ibid.*)

Courts will vacate an arbitration award that reinstates an employee if reinstatement necessarily entails violation of an existing court injunction that bars the employee from the workplace. (*City of Palo Alto, supra*, 77 Cal.App.4th at pp. 338-340.) This is because California’s contempt laws constitute a clear legislative expression of public policy in favor of obedience to court orders. (*Ibid.*)

In an arbitration against a state entity, the arbitrator awarded the plaintiff attorney’s fees in such high amounts that the court deemed the award to be an “[in]appropriate” gift of public funds, thus violating the public policy against such gifts as expressed in the California Constitution. (*Jordan v. California Dept. of Motor Vehicles* (2002) 100 Cal.App.4th 431, 452.)

Arbitration Clauses Contained In Contracts That Are Entirely Illegal For Violation Of Public Policy.

The second of California’s two public policy doctrines is fundamentally different. It does not focus on errors in the arbitration award. Rather, it questions whether *the arbitration agreement itself* is illegal for violation of public policy. This analysis looks beyond legislative expressions of public policy and can include any applicable body of law invalidating the contract at issue.

Illegal arbitration agreements. Under California law, courts—not arbitrators—determine whether an arbitration agreement is void for violation of public policy. (See *Sheppard Mullin, supra*, 6 Cal.5th at pp. 74-77.) If the arbitration agreement is illegal and thus unenforceable, a party “may avoid arbitration altogether,” and the trial court should deny a motion to compel arbitration. (*Moncharsh, supra*, 3 Cal.4th at p. 29.) Similarly, when the arbitration agreement is illegal and unenforceable, the arbitrator lacks the power to decide anything at all, so any award—right or wrong—must be vacated.

Entirely illegal agreements containing arbitration clauses. The same is true when an *entirely illegal* contract includes an arbitration clause, even if the arbitration clause is unobjectionable standing alone. If an otherwise enforceable arbitration clause is “contained in an [entirely] illegal contract,” the arbitration agreement falls along with the rest of the contract. (*Sheppard Mullin, supra*, 6 Cal.5th at pp. 74-76; see *Moncharsh, supra*, 3 Cal.4th at p. 29.) This issue is also reserved for the courts based on the “evidence presented to the trial court, and any preliminary determination of legality by

Continued on Page 23

Turning The Tables..continued from Page 22

the arbitrator . . . should not be held to be binding upon the trial court.” (*Sheppard Mullin*, at p. 75.)

This rule has a limited reach: Courts decide *only* challenges to the legality of the *entire* contract. If a party challenges the legality of only *a provision* of the contract, the arbitrator determines that illegality issue subject to ordinary rules for judicial review of arbitration awards. (*Sheppard Mullin*, *supra*, 6 Cal.5th at pp. 75-77; *Moncharsh*, *supra*, 3 Cal.4th at pp. 30-33.)

Scope of public policy review. When considering whether a contract is entirely illegal, the analysis goes far beyond a search for a *legislative* expression of public policy. Rather, the contract “may be found contrary to public policy even if the Legislature has not yet spoken to the issue.” (*Sheppard Mullin*, *supra*, 6 Cal.5th at p. 73; see *id.* at pp. 77-80.) Sources of public policy rendering contracts or arbitration clauses illegal can include administrative regulations and common law. In other words, California law requires the same broad public policy analysis that courts would ordinarily employ in deciding whether a contract is void for violation of public policy outside the arbitration context—no “different, more restrictive rule” applies just because arbitrability is at issue. (*Id.* at pp. 74-75.)

For instance, in *Sheppard Mullin*, the Supreme Court held that a law firm’s engagement agreement violated the public policy against undertaking a representation without disclosing an existing conflict of interest. (*Sheppard Mullin*, *supra*, 6 Cal.5th at pp. 80-81.) That violation went to the heart of the attorney-client relationship that was the subject of the agreement and thus, rendered the agreement entirely illegal. (*Id.* at pp. 86-87.) The law firm argued that this did not suffice to vacate the arbitration award because the public policy was expressed in the Rules of Professional Conduct—not any legislative expression of public policy. (*Id.* at p. 73.) The Court rejected that argument, explaining that the limitations on the “public policy exception” do not apply when courts consider the more fundamental arbitrability question about the entire illegality of the contract that contains the arbitration clause. (*Id.* at pp. 77-79.)

The Federal Approach.

Critical differences, however, apply when the case is governed by federal arbitration law.

The Public Policy Exception. Like California law, federal law recognizes that an award exceeds the arbitrator’s powers if it violates “ ‘explicit,’ ‘well defined,’ and ‘dominant’ ” public policies. (*Eastern Associated Coal Corp. v. United Mine Workers of America*, *Dist. 17* (2000) 531 U.S. 57, 62-63 [121 S.Ct. 462, 148 L.Ed.2d 354].) But it need not be a legislative expression of public policy. Instead, federal law requires that the public policy be ascertained by reference to “positive law,” which includes not just statutes, but also regulations, codes, and judicial decisions that interpret those enacted laws. (*Ibid.*; see *Southern Regional Council of Carpenters v. Drywall Dynamics, Inc.* (9th Cir. 2016) 823 F.3d 524, 534, fn. 2; *Virginia Mason Hosp. v. Washington State Nurses Ass’n* (9th Cir. 2007) 511 F.3d 908, 916-917 [analyzing asserted conflict with public policy found in state and federal regulations].) This still confines the possible sources of public policy warranting heightened judicial review of arbitration awards; courts cannot look to “general considerations of supposed public interests.” (*Eastern Associated Coal Corp.*, at p. 63.) But it is broader than California’s public policy exception.

Entire Contract Illegality. Under federal law, the only threshold issue the court is allowed to decide in lieu of the arbitrator is a public-policy challenge specifically to the legality of the *arbitration clause* itself—not to the agreement as a whole. (*Rent-A-Center, West, Inc. v. Jackson* (2010) 561 U.S. 63, 70-71 [130 S.Ct. 2772, 2778, 177 L.Ed.2d 403].) Unlike California law, the Federal Arbitration Act treats public-policy challenges to the entire agreement containing an arbitration clause as a question for the arbitrator. (E.g., *Phillips v. Sprint PCS* (2012) 209 Cal.App.4th 758, 774 [applying federal law]; see *Sheppard Mullin*, *supra*, 6 Cal.5th at pp. 71, 72, fn. 2 [California law is “unlike federal law” in this regard; case involved only application of California law].) In that circumstance, the court (either a federal court or a California court) merely severs and enforces the arbitration clause and sends the illegality dispute regarding the entire contract to the arbitrator. The consequence: Like any other arbitral determination of an arbitrable issue, under federal law the arbitrator’s determination is not ordinarily reviewable for errors of fact or law.

Jeffrey E. Raskin is a partner at Greines, Martin, Stein & Richland LLP in Los Angeles. He represented J-M Manufacturing Co. in the California Supreme Court in *Sheppard, Mullin, Richter & Hampton, LLP v. J-M Manufacturing Co.*

ESCAPING THE COVID-19 BACKLOG: JUDICIAL REFERENCES



Robin Meadow

As we wait for in-court trials to recommence in the wake of the COVID-19 pandemic, speedier alternatives begin to look more and more attractive, especially for civil litigants in cases that have no calendar preference or other urgency.

Those who are prepared to waive a jury—but are not prepared to risk the uncertainties of arbitration (see *Escaping the COVID-19 Backlog: Arbitration in*

this issue (*Arbitration*))—should consider a judicial reference. In essence, this is a bench trial governed by the Code of Civil Procedure and Rules of Court, with full rights of appeal—but conducted by a privately-retained referee whom the parties can choose. While this procedure contains several traps for the unwary, at least some of its uncertainties have recently been resolved in *Michael S. Yu, A Law Corp. v. Superior Court of Los Angeles County* (2020) 56 Cal. App.5th 636 (*Yu*), discussed below. As with agreements to send a pending lawsuit to arbitration (see *Arbitration*), alert counsel can avoid problems that can arise when parties must rely on form clauses in pre-dispute transactional documents.

This article recommends ways to frame the reference proceeding that will help ensure smooth transitions back to the superior court and, if necessary, to the Court of Appeal. The time to address these points is at the outset, when neither side knows who will prevail or who may end up appealing. This uncertainty promotes cooperation, for which there may be much less incentive after the referee's decision.

Basics

The key statute is Code of Civil Procedure section 638:

A referee may be appointed upon the agreement of the parties filed with the clerk, or judge, or entered in the minutes, or upon the motion of a party to a written contract or lease that provides that any controversy arising therefrom shall be heard by a referee if the court finds a reference agreement exists between the parties:

(a) To hear and determine any or all of the issues in an action or proceeding, whether of fact or of law, and to report a statement of decision.

(b) To ascertain a fact necessary to enable the court to determine an action or proceeding.

This article concerns subdivision (a), under which the referee functions as an all-purpose judge until rendition of a decision. There

are some exceptions: Motions to seal records or to file a complaint in intervention must be filed with the court in the first instance. (See Cal. Rules of Court, rule 3.932; further undesignated rule citations are to the California Rules of Court.) Otherwise, the referee's decision "must stand as the decision of the court, and upon filing of the statement of decision with the clerk of the court, judgment may be entered thereon in the same manner as if the action had been tried by the court." (Code Civ. Proc., § 644, subd. (a); further undesignated code citations are to the Code of Civil Procedure.)

Some general points to be aware of:

- References are governed by rules 2.400 and 3.900 et seq. and, in Los Angeles, by Superior Court of Los Angeles County (LASC), Local Rules, rules 2.24 and 3.9.
- Although referees are almost always retired judges, the statute doesn't require judicial experience. (See §§ 641, 642 [grounds of objection]; rule 3.903 ["If the proposed referee is a former judicial officer, he or she must be an active or an inactive member of the State Bar"].)
- Unlike the confidentiality of an arbitration or a mediation, a judicial reference must be open to the public, and a person must be designated for public contact. (Rule 3.931(b)(1) ["In each case in which he or she is appointed, a referee must file a statement that provides the name, telephone number, e-mail address, and mailing address of a person who may be contacted to obtain information about the date, time, location, and general nature of all hearings scheduled in matters pending before the referee that would be open to the public if held before a judge"]; LASC, Local Rules, rule 2.24(b) ["The stipulation for appointment of temporary judge or agreement for a reference must set forth the name and telephone number of a person for any member of the public to contact in order to attend a proceeding that would be open to the public if held in a courthouse. A notice containing such name and address shall be posted by the clerk as required by California Rules of Court, rules 2.831 and 3.900 et seq."].)
- Agreeing to use the judicial reference procedure, even in a pre-dispute agreement, waives the right to a jury trial. (*O'Donoghue v. Superior Court* (2013) 219 Cal.App.4th 245, 256; see *Grafton Partners v. Superior Court* (2005) 36 Cal.4th 944 [pre-dispute jury waivers with respect to ordinary trials are unenforceable].)
- The trial court has discretion to refuse to appoint a referee despite the parties' agreement. (*Tarrant Bell Property, LLC v. Superior Court* (2011) 51 Cal.4th 538, 545.)

Pre-Trial and Trial

Because the referee effectively serves as a trial judge, pre-trial and trial proceedings closely resemble what would happen in court, except that—like arbitrations and mediations—the parties have far more control over scheduling and communications, and the proceedings

Continued on Page 25

Judicial References...continued from Page 23

can be less formal.

But parties must be alert to the risks of informality. In particular, they must ensure that the informality doesn't come at the price of an inadequate record on appeal. Since neither side knows who will win or who will appeal, this is a joint responsibility that both sides should be motivated to implement.

The easiest starting point is rules 3.930-3.932, "Rules Applicable to References Under Code of Civil Procedure Section 638 or 639."

Filings. The Rules of Court require that "[a]ll original documents in a case pending before a temporary judge or referee must be filed with the clerk in the same manner as would be required if the case were being heard by a judge, including filing within any time limits specified by law and paying any required fees." (Rule 2.400(b)(1); see rule 3.930 [requiring compliance with rule 2.400 in judicial reference proceedings]; LASC, Local Rules, rule 2.24(l).) And the referee "must keep all exhibits and deliver them, properly marked, to the clerk at the conclusion of the proceedings, unless the parties file, and the court approves, a written stipulation providing for a different disposition of the exhibits." (Rule 2.400(c)(2).) Rule 2.400 has multiple other requirements for filings, including provisions for public access.

The referee's orders present a special situation. No Rule of Court expressly requires the referee to file orders with the court. And while one would think that "original documents" includes "orders," LASC, Local Rules, rule 2.24(l) arguably draws a distinction. Titled "Filing of Original Papers and Orders," it states: "*All original papers* must be filed with the court, and all applicable fees paid, within the same time and in the same manner as would be required if the court were trying the case. *Signed orders of the temporary judge* must be presented for filing to the clerk in Department 1, or Department 2 for Family Law cases, of the Stanley Mosk Courthouse." (*Ibid.*, italics added.) Arguably, the second sentence is merely a separate direction to temporary judges (not referees) about where to file their orders, but the language could certainly be clearer.

In any case, the reality is that parties and referees do not always file documents as the rules require, and may not even be aware of the requirements. The result is that when the case moves back to court, even cooperative counsel must resort to cumbersome and time-consuming workarounds—such as lengthy compendia of unfiled documents, and correspondence with the referee in the hope that he has maintained and can belatedly file his orders—to put everything before the court for purposes of getting judgment entered and pursuing an appeal. With uncooperative counsel, there can be extensive motion practice to accomplish that result, which may require resolving disputes about the contents of the actual record.

Counsel should not expect help from the referee's neutral-provider organization, if any. They often have little infrastructure for maintaining filings, and little motive to expend staff time doing so.

The easiest solution is to follow the Rules of Court from the outset; to insist that the referee and/or neutral provider do so, too; to specifically require the referee to file all orders with the court; and to follow up to ensure compliance. The parties' reference agreement and the court order should explicitly cite and require compliance with the relevant rules of court and local rules, or even quote them.

Court reporter. Just as in court, there should be a court reporter at every hearing, regardless of topic or length. With so much happening remotely by video, it's easy to forget this simple rule. The parties' agreement should reflect that all proceedings will be reported, and counsel should agree on a mechanism to make this happen.

A distinct problem exists when the court reporter must prepare the record on appeal, because there is no statute or rule of court that creates any interface between the reference's private court reporter and the superior court clerk. In court, private reporters must agree to adhere to the protocols that govern court-employed reporters, and while record preparation can be bumpy, at least the court clerk is nominally in charge of it. One solution to this problem is to include language in the original reference order to the effect that each private reporter must sign a similar document and that the court clerk must accept transcripts prepared by the private reporters. Another workaround in the Second District Court of Appeal is to take advantage of that court's local rule permitting counsel to file a certified copy of the reporter's transcript directly with the Court of Appeal. To do this, one should use the Second District's form for designating the record on appeal (available at <https://www.courts.ca.gov/documents/app-003-2DCA.pdf>) checking box A.4. on the third page:

4. A certified transcript under rule 8.130(b)(3).
(To be lodged directly with the Court of Appeal, Second Appellate District.)

Regardless of how the reporter's transcript gets filed, it must comply with the format requirements of rule 8.144 (indexes, pagination, etc.). The private reporting firm should receive instructions on these requirements at the outset of the reference proceeding so the reporters can comply with them as soon as they start generating transcripts.

Exhibits. As noted earlier, absent a court-approved stipulation, exhibits must be transmitted to the court. But particularly with remote trials, paper exhibits will be rare. And in any case, it's been many years since trial courts routinely retained exhibits.

A complete set of exhibits is just as important to an appeal as the reporter's transcript. Parties should agree in advance how to handle exhibit identification, admission/exclusion of exhibits, and exhibit preservation. Ideally, at the conclusion of evidence, the parties, with the referee's assistance and an appropriate order, will compile a set of exhibits and file them with the court, where they will be readily accessible for post-reference proceedings in the trial court and on appeal.

Emails. The relative informality of a reference proceeding—

Continued on Page 25

Judicial References...continued from Page 24

which, especially when administered by a neutral provider, operates much like an arbitration or mediation in terms of communication among counsel, the neutral and the neutral provider—means that email communications are likely to be far more common than in regular court proceedings. But that doesn't make it any less important to ensure that they become part of the record of the proceeding. Certainly any email to or from the referee should be treated as an official record of the court, no less than any other kind of communication between the court and parties. The importance of a particular statement by counsel or the referee may not become evident until well into the case. And unlike courts, which have a central email system that is presumably part of the court's permanent records, a neutral provider—much less an individual neutral—generally undertakes no record-keeping obligation at all.

The parties should therefore agree to use some mechanism to compile all emails involving the referee or provider at the end of the case. The compilation can then be filed with the court.

The Statement of Decision

The trial before a referee culminates in a statement of decision that the referee “report[s]” to the court. (Code Civ. Proc., § 638, subd. (a).) The statute doesn't make clear whether the referee must follow the normal statement of decision process, but *Yu*, citing a treatise, suggests this possibility. (*Yu, supra*, 56 Cal.App.5th at p. 647, fn. 5.) Counsel should treat the process as one would in court, since there are serious waiver risks. And counsel should act immediately: Once the referee files the statement of decision with the court, the game is over. (*Ibid.* [“Objections are made to the referee before the decision is filed because once a general referee files a decision with the trial court, the decision ‘must stand as the decision of the court’ (§ 644, subd. (a), italics added) and is ‘conclusive’ (*Lewis v. Grunberg* (1928) 205 Cal. 158, 162)].) For more information about the statement of decision process, see Segal & Meadow, *Statements of Decision: Your*

Chance to Tell and Preserve the Story, ABTL Report: Los Angeles (Winter 2019) and Segal & Meadow, *Statements of Decision Part Deux*, ABTL Report: Los Angeles (Winter 2020).

Back in the Trial Court

Regardless of how the statement of decision gets finalized before the referee, the next stop is the trial court. Theoretically, the trial court could enter judgment on its own as soon as the referee files the statement of decision, but typically the prevailing party makes a motion for entry of judgment. (See LASC, Local Rules, rule 3.9(c) [requiring the prevailing party to make such a motion].)

Yu, supra, 56 Cal.App.5th 636 resolved some uncertainties in this process. In *Yu*, after the referee submitted his decision to the trial court but before the trial court entered judgment, the losing party moved the trial court to set aside the decision, arguing that the referee had made erroneous conclusions of law based on the facts he found. (*Yu, supra*, 56 Cal.App.5th at p. 643.) In response, the prevailing party argued that the trial court must first enter judgment and that any new trial or retrial must take place before the same referee. (*Ibid.*) The trial court found errors in the referee's conclusions of law, but was uncertain about the proper sequence of events—judgment first, followed by new trial motion, or new trial motion first? Concluding that either approach would yield the same result, the trial court ruled that “‘based upon the record at this time, it is the clear intent of this Court to not adopt the Referee's findings and awards in all respects, and to simply order a new trial on all issues.’” (*Ibid.*, italics omitted.) The court then ordered that the new trial would be conducted before it, not the referee. (*Ibid.*)

The prevailing party filed a writ petition challenging this procedure. After a detailed examination of the history of the reference procedure, the Court of Appeal made three important holdings. *First*, because under section 643 the referee's decision “‘must stand as the

Continued on Page 26

Want to Get Published?
Looking to Contribute an Article?
The ABTL Report is always looking for articles
geared toward business trial lawyers.
If you are interested, please contact one of the co-editors,

Robin Meadow
rmeadow@gmsr.com

John F. Querio
jquerio@horvitzlevy.com

Judicial References...continued from Page 25

decision of the court,” the trial court was required to enter judgment immediately and had no discretion to do otherwise. (*Yu, supra*, 56 Cal.App.5th at p. 646, italics omitted.) *Second*, the trial court had the power by way of a motion for new trial to set aside the judgment entered on the referee’s report for legal error—though it must defer to the referee’s factual findings. (*Id.* at p. 654.) *Third*, the trial court—not the referee—was the proper forum for the new trial. (*Id.* at pp. 654-655.)

This last point is particularly important because the Court of Appeal based its holding on the parties’ reference agreement: “Under the parties’ agreement here, the referee’s powers were exhausted when he filed his decisions with the trial court. Real parties sought a new trial by the court, effectively objecting to the reference. In the absence of mutual consent for a new reference, therefore, the trial court properly ruled that the new trial be conducted before the court.” (*Yu, supra*, 56 Cal.App.5th at p. 655.) Presumably, the parties could agree in advance, with the court’s approval, to refer post-judgment matters—even including a new trial after an appellate reversal—to the same referee, or at least to some unnamed referee rather than the court. But since only the winning party would typically want the same referee, advance agreement to do this could prove unwise.

Other post-trial matters raise similar issues. For example, how are costs and attorney’s fees to be decided? Motions to award fees and to tax costs are typically filed after entry of judgment—long after “the referee’s powers were exhausted” if the statement of decision has already been reported to the trial court. Yet the referee is in the best position to rule on fees and costs motions, and even the losing party might prefer a knowledgeable decisionmaker over a stranger to the case. (See *Long Beach City Employers Ass’n v. City of Long Beach* (1981) 120 Cal.App.3d 950, 961 [suggesting a greater evidentiary burden when these motions are presented to a judge who didn’t try the case].) Here, too, the reference agreement can dictate in advance that the referee will decide these issues, either by way of rulings made before submission of a statement of decision to the court or by an agreed reference to the same referee after entry of judgment.



The availability of a prompt trial before an agreed judge with a full right of appeal can be an attractive alternative to waiting in the growing backlog of COVID-delayed superior court cases. But counsel should look before they leap by paying close attention to the proposed agreement’s details.

Robin Meadow is a partner at *Greines, Martin, Stein & Richland LLP*.

IN MEMORIAM

HARVEY I. SAFERSTEIN



(1943 - 2020)

It is with sadness that we inform you of the passing of former ABTL President (1990-1991), and long-time member, Harvey Saferstein, on November 19th.

We want to recognize and thank him for his years of service and dedication to the organization.

He will be missed.

THANK YOU
TO OUR
SPONSORS



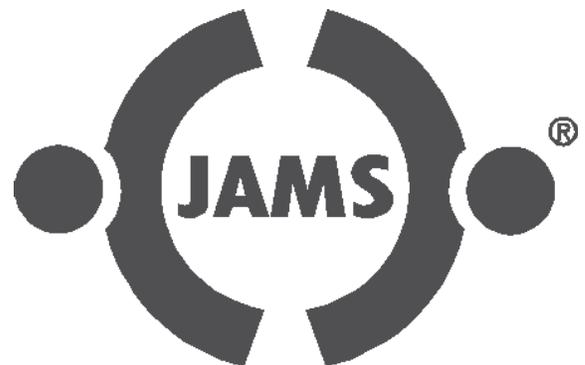
Your Partner in Resolution



Results Beyond DisputeSM

SIGNATURE

RESOLUTION



abt1
REPORT

8502 E. CHAPMAN AVENUE
SUITE 443
ORANGE, CA 92869

PRSRT STD
U.S. POSTAGE
PAID
LOS ANGELES, CA
PERMIT NO. 32623

Hon. Debre Katz Weintraub (Ret.) is a past Supervising Judge of the Civil Courts of the Los Angeles Superior Court and sat as a Settlement Judge for the Court.

Hon. Suzanne H. Segal (Ret.), is a mediator, arbitrator, Special Master and Discovery Referee at Signature Resolution.

Mark Loeterman, Esq. is a mediator at Signature Resolution.

Hon. Zaven V. Sinanian is the Supervising Judge of the Los Angeles Superior Court's Judicial Mandatory Settlement Conference program.

Philip Cook is a principal at The Cook Law Firm and Cook Mediation in Los Angeles.

T. John Fitzgibbons is a principal at Robie & Matthai in Los Angeles.

Garen Bostanian is an appellate fellow at Horvitz & Levy LLP and David M. Axelrad is a partner at the firm.

Jessica M. Leano, formerly a Horvitz & Levy appellate fellow, is a law clerk for the United States District Court, Central District of California.

Phillip Shaverdian is an appellate fellow at Horvitz & Levy llp and Jeremy Rosen is a partner at the firm.

Robin Meadow is a partner at Greines, Martin, Stein & Richland LLP and is a co-editor of the ABTL Report.