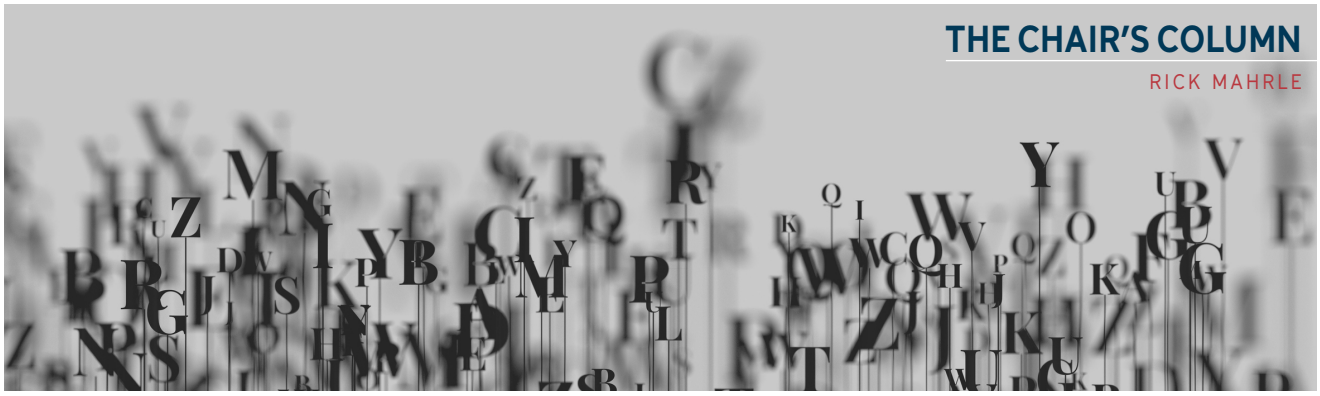
MIDSUMMER 2024

ARIZONA ADR FORUM



THE CHAIR'S COLUMN

RICK MAHRLE

I have the honor of taking on the role of Chairman for the State Bar's Alternative Dispute Resolution Section for the 2024-2025 bar year.

As my first official act, I want to thank Alexis Pheiffer, our outgoing section chair, for her outstanding leadership this past year. She took great strides in advancing the goals of the ADR Section with both grace and persistence. But just what are the goals for the section? Why do we even exist? There are a number of responses to those questions.

First and foremost is the advancement and promotion of arbitration and mediation as a highly desirable alternative to litigation in the Court system. As a trial attorney for more than 45 years, I fully understand the costs, time, pitfalls, and unpredictability of going to Court. This is not to say that Courts do not have an important role to play in civil litigation. Disputes on the cutting edge of the law, or with little or faulty precedent, and cases that advance important social policies, protect individual rights, and deal with public policy issues belong in Court. However, the vast majority of disputes do not fit into those categories. Getting those disputes out of the Court system to be resolved through mediation or arbitration provide the Courts with more resources to deal with cases that belong in Court.

Within our section's Executive Council, we have debated whether the section should take the "A" out of ADR. While some people still view mediation and arbitration as "Alternative" dispute resolution avenues, both are clearly in the mainstream of how parties resolve disputes, whether they start as litigated disputes, or go directly to mediation/arbitration. We are keeping "Alternative" in the name for now, primarily to create a distinction from Court, but if you have suggestions for changing the section name, let us know.

The other major role for the section is presenting first class CLE. The section's CLE programs, which qualify for ethics credit, have two purposes. One is to assist all members of the bar to better understand various aspects of ADR, including drafting better arbitration provisions, getting the most out of mediation, and effective arbitration techniques. We also produce programs for what I would call making mediators and arbitrators better at their craft. Look for both types of CLE opportunities coming your way. If you have some specific topics you would like to see covered in our CLE programs, please let me know.

I look forward to serving as section chair for the coming year and working closely with our outstanding Executive Counsel to promote better ADR for everyone.

Rick Mahrle

Chair – ADR Section

RICK MAHRLE brings more than 45 years of trial experience to his transition as a full-time mediator and arbitrator. He has conducted more than 200 mediations and arbitrations through the American Arbitration Association in construction, commercial, and employment matters. Rick also is an arbitrator for FINRA, a mediator for federal government entities, and a hearing officer for the State Personnel Board. Rick has served on the Executive Counsel for the ADR Section of the State Bar of Arizona and chaired the Section's CLE presentations at the State Bar Convention. Rick received his J.D. from ASU in 1977 and has been a litigation partner at Gammage & Burnham since shortly after the firm's founding in 1983.

EDITOR | DENNY ESFORD

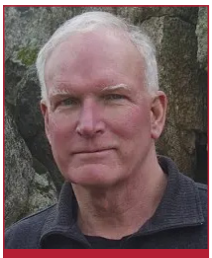
We welcome comments about this newsletter and invite you to suggest topics or submit an article for consideration.
Contact the Editor, Denny Esford at **denny@windycitytrialgroup.com**.

STATE BAR OF ARIZONA

OUTGOING CHAIR'S MESSAGE

ALEXIS PHEIFFER

Dear ADR Section Members, welcome to the 2024-25 Bar year and my final column for the ADR Section newsletter. I am grateful for the opportunity to serve as Section Chair last year. I move into the Past Chair role knowing the Section is in great hands with this year's leadership team, led by Chair Rick Mahrle. I'm excited to see where 2024-25 takes us.



DOUG NOLL

PROF. JOE BERRIMAN

As you start making plans for Fall 2024, I encourage you to mark your calendars for our October 1, 2024 mediation advocacy CLE, featuring Doug Noll and Prof. Joe Berriman. This 3-hour, virtual program will feature presentations from Mr. Noll, an award-winning mediator, speaker, and author, and Professor Berriman followed by an interactive final presentation. Mr. Noll will focus on the role of emotions in mediation while Professor Berriman will teach us how the same skills used by FBI hostage negotiators can be used by litigators in mediation. Whether you are an advocate or a neutral, you are sure to leave this program with new tips and tricks for your next mediation. The October mediation advocacy program is a joint venture between the ADR Section and the State Bar CLE division. While all State Bar members are invited to attend, our Section members will receive a special discount. Watch for registration and more information in August 2024.

We are hard at work on an Arbitration Advocacy program for early 2025 and look forward to sharing more details about this program with you in the coming months.

As always, I encourage each of you to get involved with our Section. Start by contributing a topic idea to the newsletter or volunteering to write an article, either on a topic of your own or one submitted by another Section member. Come to Section CLEs and social events, and consider volunteering for a committee. New members and ideas are always welcome.

Alexis Pheiffer

Outgoing Chair – ADR Section

EDITOR'S MESSAGE

DENNY ESFORD

Smith v. Sprizzirri: Just as "shall" means "shall," "stay" means "stay."

This pronouncement by the U.S. Supreme Court provides clarity for companies that choose arbitration to resolve contractual disputes. There are two infrequent results from the May 16, 2024 U.S. Supreme Court ruling in *Smith v. Spizzirri*, 22-1218: a decision involving the Federal Arbitration Act (FAA) and a unanimous decision of the Court.

Section 3 of the FAA provides, in relevant part, that a court "***shall*** on application of one of the parties ***stay*** the trial of the action until such arbitration has been had in accordance with the terms of the agreement ..." (emphasis added).

Respondents tried to argue that 'stay' "means only that the court must stop parallel in-court litigation, which a court may achieve by dismissing without retaining jurisdiction."

In addition to noting some related problems with accepting Respondent's argument, SCOTUS held that "[w]hen a district court finds that a lawsuit involves an arbitrable dispute, and a party requests a stay pending arbitration, §3 of the FAA compels the court to stay the proceeding."

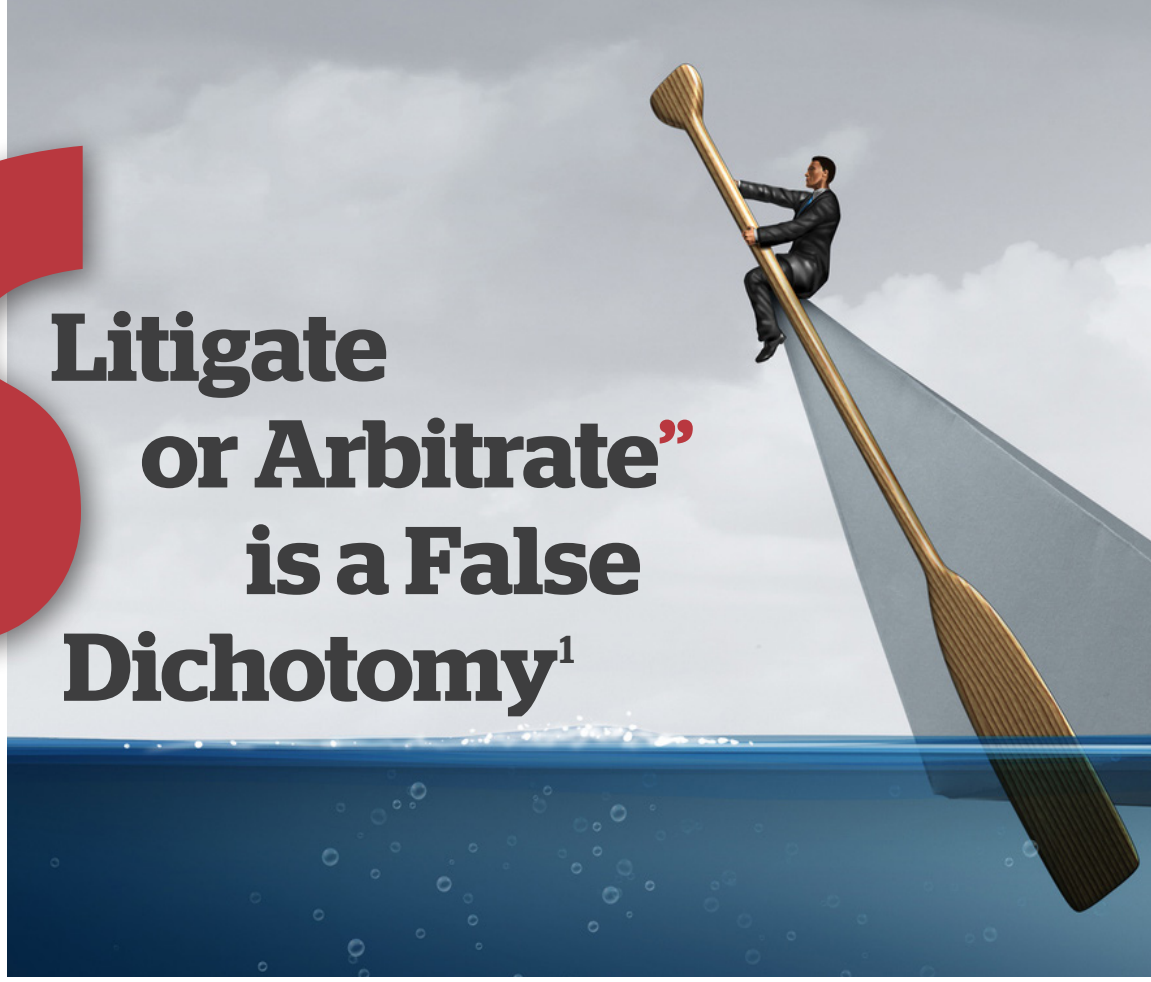
Arizona Attorneys Represented Smith.

A more complete discussion of this case is in the works for the upcoming ADR Issue of *Arizona Attorney Magazine* in November. Arizona's own Nick Enoch of Lubin & Enoch, and member of our ADR Section Executive Counsel, was lead counsel for Smith.

Denny Esford

Editor – ADR Section Newsletter

"Litigate or Arbitrate" is a False Dichotomy[1]



BY SHANE MULROONEY

SHANE MULROONEY co-founded New Era ADR, where he is currently the General Counsel. Before that, he was Vice President and Head of Legal at Home Chef, a leading U.S. meal kit delivery company. He began his legal career in the Kirkland & Ellis LLP corporate tax group.

In-house counsel who bring open minds to managing their companies' dispute resolution processes can save their clients considerable time and money. Too often, I've heard lawyers wonder during contract drafting whether they should designate courts or arbitrators to referee legal fights with vendors, customers, employees, or other business partners. Fortunately, the answer isn't one or the other.

For existential problems, my experience shows that courts often are the best deciders. These are "bet-the-company" matters over, for example, critical intellectual property or huge sums of cash. Courts allow parties as many motions and as much discovery as the rules permit, followed by appeals. No legal stone goes unturned.

Lesser matters can be resolved more efficiently through alternative dispute resolution (ADR), usually *arbitration*. In-house counsel must remember that since contracts determine these designations, they can tailor the terms so that major disputes go to court and routine claims go to ADR. Reviewing contracts, whether after starting a new in-house position or engaging in the healthy habit of document maintenance, is an opportunity to make these critical choices that could limit the pain in upcoming, inevitable legal disputes.

Arbitration Fallacies

Although courts vary by jurisdiction, arbitration providers can differ more broadly. Counsel should assess them carefully to see if they meet their needs. They also should be aware of the truth behind some fallacies about *arbitration*.

A common perception about arbitration is that it can be just as onerous as court litigation, weighed down with protracted discovery and endless motion practice — all at a higher cost because parties pay hourly fees to the arbitrator or, even more expensive, a panel of arbitrators.

While it is true that some arbitration processes are nearly identical to courts, with the only difference being that the dispute remains private, this is not always the case. Because arbitration is *contractual by nature*, parties can generally agree to whatever rules they want to make the process more efficient (subject to a few limitations). Arbitration forums likewise vary significantly in their willingness and ability to provide different, and at times streamlined, procedures. This is a reason counsel should assess providers before designating one as their go-to forum for a particular contract.

Similarly, while arbitration providers are paid fees from parties, counsel should research forums that have alternative arrangements to hourly fees. Some providers may be willing to engage in a flat fee system or even default to one that works better for a company and its business partners.

One of the underestimated benefits of contractual arbitration is that when parties agree to an arbitration forum or define a set of rules that address and conclude a dispute with expediency and pragmatism, relationships between the parties are far more likely to withstand the process. This helps a company, its vendors, customers, and business partners by limiting distractions and clearing the way to resume doing business together.

"Split the Baby"

Another mistaken belief about arbitrators is that they tend to just "split the baby" to avoid making tough decisions about which side in a case is right. The argument is that arbitrators are accountable to the companies that pay their fees, so they don't want to lose business by ruling against their customers.

First, most arbitrators and judges I know do their best to be fair and make legally correct decisions.

Secondly, arbitration is evolving from primarily localized businesses to a much grander, more diverse, and more sophisticated industry, employing video conferencing platforms and other technology to engage parties around the country and worldwide. This means they are under far less perceived pressure to keep everybody around them happy, and they do their jobs and make decisions effectively.

Arbitrators on Repeat

I've heard of lawyers complaining that they land before the same arbitrators too often. This could happen depending on the size of an arbitration provider's bench or where arbitrator selection provided by a forum is a black box. Again, in-house counsel and their business partners can research alternative forums that offer a broader range of arbitrators with differing backgrounds and experiences.

Further, insisting on a process that allows the parties to choose an arbitrator for a particular matter from a slate of several possible neutrals, with each party ranking and striking a specific number until a consensus candidate is found, ensures optionality and fairness.

To be sure, we can't always pick our battles. Lawsuits can come from anywhere. But when drafting contracts — including with vendors, customers, employees, and business partners — parties can at least pick their battlefields. ADR

1. Editor's Note: This article was originally published in *Today's General Counsel* on April 23, 2024 and is re-published here with permission.