

ARIZONA ADR FORUM

THE CHAIR'S COLUMN

ALEXIS PHEIFFER



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is an experienced mediator, facilitator, and investigator based in Phoenix, Arizona. She is an AAA Affiliate and MC3 certified mediator, focusing on resolution of employment and personal injury disputes. Alexis' creative and party-focused approach to dispute resolution draws on more than 20 years of employment law and litigation experience, both in private practice and in-house. She has served on the Executive Council for the ADR Section of the State Bar of Arizona since 2020, previously holding the roles of CLE Subcommittee Chair and Section Vice-Chair. Alexis received her Certificate in Dispute Resolution from Pepperdine University's Straus Institute for Dispute Resolution, her J.D. from the University of Minnesota at Law School, and her A.B. in Psychology from Georgetown University. Learn more about Alexis and her approach to dispute resolution at alexispheiffer.com.

“Nobody makes a greater mistake than [they] who did nothing because [they] could only do a little.” This quote, from 18th Century Irish statesman Edward Burke, speaks to me on a number of levels.

In particular, and as we enter a season of reflection and gratitude, Burke's quote reminded me how much we, as State Bar and ADR Section members, owe the individuals who dedicate their time – in any amount – to our Section. Each of us contributes at a different level, and all of our contributions together, both large and small, add value.

First, thank you to our Executive Council, committee chairs, and committee members, all of whom are volunteers. These individuals give their time and talents generously to create the CLEs and State Bar Convention programs we all enjoy. Our volunteers also monitor legislative developments and court rule changes with an eye to protecting our ADR practices and produce our quarterly newsletters. Others serve as coaches and judges for various mediation competitions and ADR events statewide.

Second, I am grateful to our partners at the State Bar and particularly to Mona Fontes, our Section liaison, for helping our Council with a wide variety of administrative needs. Mona's steady presence keeps us on task and helps our meetings and events run smoothly. We also work closely with the State Bar's CLE, publications, and Bar Convention teams. Thanks to all of these partners for their contributions.

Last but not least, thanks to each of you for joining and supporting our Section. While the 2023-24 Bar year is well underway, it's never too late to get more involved. No amount of time is too little, and no idea is too small. We value new ideas and perspectives, and we rely on our membership to share feedback about topics and activities of interest as well as areas where our Section could offer more support. If you are willing to share your time, talents, and/or ideas, consider some of the following:

- ▶ Attend a Section CLE or networking event.
- ▶ Committee membership is open to all Section members.

Feel free to contact a Committee chair (listed below) for more information.

- ▶ Do you have an idea for a newsletter article? Send your idea to our newsletter team, and let us know if you'd like to write the article yourself or if you are passing along the idea.
- ▶ Is there a topic you'd like to see covered at an upcoming CLE? Share the topic with our CLE Committee. If you're interested in speaking, let us know that too.
- ▶ Planning for the 2024 State Bar Convention is already underway, and it takes a strong team of planners and speakers to put on this event. We'd love to have you involved.
- ▶ If you are interested in a greater commitment, speak with any Executive Council member about serving on the Council in either a voting or non-voting capacity.
- ▶ Finally, if you're already an Executive Council member and are ready for an officer role in 2024-25, contact our Section Vice Chair, Rick Mahrle. 2024-25 officers will be selected in early Spring 2024 by the Section's Nominating Committee, and their terms will begin at the State Bar Convention in June 2024.

In the end, our Section is what we make of it, and we are better when more of us take an active role. We look forward to hearing your ideas, big and small, and to working together to strengthen the State Bar's ADR Section community.

Alexis Pheiffer
Chair – ADR Section

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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.



EDITOR

This edition is chock full of great information from applying Artificial Intelligence to ADR to Arizona rule changes you need to know, to an ADR volunteer opportunity from our newest University of Arizona Liaison. Feedback on each issue is always welcome—the goal is to inform and keep you abreast of the latest news in ADR. If you have an idea or want to author an article, just drop me an email to start the process.

Denny Esford
Denny Esford

EDITOR'S MESSAGE

DENNY ESFORD



Arizona Rule Changes for Neutrals: Advance FEEES and IOLTA DEPOSITS

BY MARK E. LASSITER



MARK E. LASSITER is an *AV Preeminent*[®] Arizona attorney in his fortieth year of practicing law in the areas of business, real estate, construction, and Alternative Dispute Resolution (“ADR”). He is a Fellow in the *College of Commercial Arbitrators*, a Member of the *National Academy of Distinguished Neutrals*, and a *Southwest Super Lawyer*[®] in the area of ADR.

He has been a commercial arbitrator for over 31 years with the *International Centre for Dispute Resolution* and the *American Arbitration Association*, serving on its Commercial, Construction, Large and Complex Case, and Emergency Relief panels in hundreds of arbitration matters. He also arbitrates *ad hoc* arbitration matters and serves as a mediator on the mediation panels of the AAA and the NADN.

Ten years ago, on September 10, 2013, I was a panelist at an ADR Section CLE at the offices of the State Bar of Arizona on the subject of **ETHICAL PERILS AND PITFALLS FOR ARIZONA ADR NEUTRALS**, which was attended by about 80 Arizona lawyers – all of whom were arbitrators, mediators or other “neutrals.”

One of the topics covered was a reminder that lawyers acting as “neutrals” (e.g., arbitrators, mediators, special masters, receivers, etc.) were prohibited from keeping money deposited with them by “non-client,” third persons for their ADR work in their IOLTA Trust Account – on pain of disbarment or discipline. When co-panelist and then State Bar Ethics Counsel, Pat Sallen, reminded attendees of this, there was an audible gasp from the audience, as this rule came as a tremendous surprise to most of those in attendance. Upon audience interrogation, Pat reminded attendees that a lawyer acting as a “neutral” is not acting on behalf of any “client,” and (generally) only a *client’s funds* can go into a lawyer’s IOLTA Trust Account.

Effective January 1, 2024, Arizona ADR lawyer neutrals will avoid disbarment or discipline if they put funds collected for their ADR or expert work into their IOLTA Trust Accounts. The new rule changes were adopted by the Arizona Supreme Court on August 24, 2023 in response to the [R-23-0006 Petition to Amend ERs 1.15 and 2.4 and Rule 43, Ariz. R. Sup. Ct.](#) (the “Petition”), which was prepared and filed by ethics attorney Pat Sallen at the behest of the Arizona Bar Foundation (after I suggested the rule change to Kevin Ruegg, its

CEO/Executive Director). Nineteen Arizona attorneys from the Executive Counsel of the ADR Section of the State Bar of Arizona also supported and endorsed the Petition, as did other attorneys and interested persons. Their names and comments in support of the Petition are accessible at the above URL link.

The Petition’s rule changes affect the Ethics Rules found in [Rule 42, Ariz. R. Sup. Ct., Rules of Professional Conduct](#), including the addition of [new Rule 1.5 \(g\)](#), which provides:

(g) A lawyer who serves as a third-party neutral or as an expert witness may hold funds related to that service that have been paid in advance as provided for in this rule.

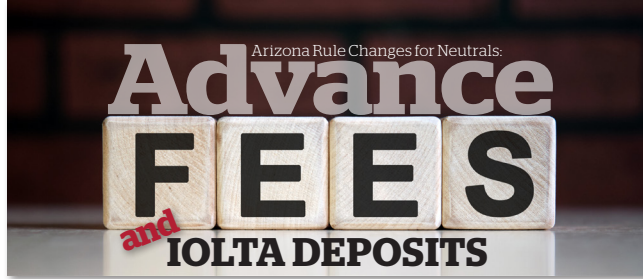
The new comment to new ER 1.5 (g) provides:

Comment [2024 Amendment]

Paragraph (g) permits a lawyer who serves as a third-party neutral or as an expert witness to hold funds related to that service that have been paid in advance in the lawyer’s client trust account. If the lawyer serving as a third-party neutral or an expert witness chooses to deposit such funds into a client trust account, all requirements related to client trust accounts apply to those funds.

The rule change also includes the addition of [new Rule 2.4\(c\)](#), which provides:

(c) A lawyer serving as a third-party neutral may choose to hold advance fees related to service as a third-party neutral in the lawyer’s client trust account in compliance with ER 1.15 and Rule 43.




Finally, the rule change also adds the following, underlined language to Rule 43, relating to “Trust Accounts:”

Rule 43. Trust Accounts

(a) Duty to Deposit Client Funds and Funds Belonging to Third Persons; Deposit of Funds Belonging to the Lawyer or Legal Paraprofessional. *Funds belonging in whole or in part to a client or third person in connection with a representation shall be kept separate and apart from the lawyer’s or legal paraprofessional’s personal and business accounts. All such funds shall be deposited into one or more trust accounts that are labeled as such. A lawyer serving as a third-party neutral or as an expert witness may treat funds belonging in whole or in part to a third person in connection with that service in accordance with this rule. The location of the trust*

account shall be controlled by the provisions of ER 1.15(a). No trust account required by this rule may have overdraft protection. No funds belonging to the lawyer, legal paraprofessional, or firm shall be deposited into a trust account established pursuant to this rule except as follows: [(1)-(4) No change]

Importantly, the new rule changes allowing for a lawyer ADR neutral to deposit funds into the lawyer’s IOLTA Trust Account are **optional**, not required. However, it seems advisable for lawyer ADR neutrals to avail themselves of this opportunity. Interest earned on IOLTA Trust Account funds inures to the benefit of the excellent public interest work of the [Arizona Bar Foundation](#), and use of the IOLTA Trust Account protects ADR customers of lawyer ADR neutrals from the claims of general unsecured creditors of lawyer ADR neutrals. The final Supreme Court Order granting the Petition is accessible [HERE](#). 



Rule 80(a) Settlement Agreements

BY LEE BLACKMAN



LEE BLACKMAN

mediates commercial, contract, real estate, civil rights, attorney-client, environmental, trademark, copyright, unfair competition, insurance, employment, and personal injury disputes.

A recent amendment to Arizona Civil Procedure Rule 80(a) adds a new option to efficiently document enforceable mediated settlements without need of a signed settlement agreement and without compromising Arizona's strong mediation confidentiality privilege.

Many settlements of pending litigation and other judicial matters occur in mediations conducted either with the assistance of a judicial officer at court or in video-conference proceedings conducted by a mediator using any of a broad array of remote conference technologies like Zoom, Teams, and Skype. A convenient way to document such settlements is to memorialize the settlement terms either before a certified reporter or in an audio or video recording, the latter being a standard capability of the remote conferencing technologies now in widespread use.

Former Arizona Rule of Civil Procedure 80(a), however, provided that “no agreement or consent between parties or attorneys in a matter is binding, unless: (1) it was in writing or (2) it is made orally in open court and entered in the minutes.”

In order to make the documentation of settlements more efficient, Pima County Superior Court Judge Sakal proposed that the Supreme Court approve an amendment to Rule 80(a) that would dispense with the requirement that settlements between parties in court matters be either in writing or entered in the court's minutes if the settlement “is made before a mediator or a judicial officer and is memorialized either before a court reporter or in an audio or video recording.”

As applies to mediated settlement agreements, however, Arizona's strict mediation confidentiality privilege provides an exception to confidentiality only (1) if all of the parties to the mediation agree to the disclosure [A.R.S. § 12-2238 B(1)] or (2) where disclosure is both “necessary to enforce or obtain approval of the settlement” and the mediated settlement “is evidenced by a record that is signed by the parties” [A.R.S. § 12-2238 D].

Because of the conflict between the proposed amendment to Rule 80(a) and the strict rules of mediation confidentiality established by A.R.S. § 12-2238, the ADR Section Chair proposed to the State Bar Rules Review Committee some alternative revisions to the proposed language of the amendment that would assure that the confidentiality goals of the statute would be preserved while still allowing a more efficient option for documenting settlements occurring as a result of a mediation.

This recommendation included a revision of the proposed amendment to Rule 80(a) that, in the case of a mediated settlement, “the parties must either sign a written record of the settlement or declare, on the record, that the terms of the settlement may be disclosed, as necessary, to gain court approval of the agreement or to enforce the agreement.”

After the State Bar adopted this suggestion in its comments to the Supreme Court and Judge Sakal submitted a Reply agreeing with the proposed minor revisions of his proposed amendment, the Supreme Court Ordered that Rule 80(a) of the Rules of Civil Procedure is amended so that mediated settlements memorialized before a reporter or in an audio or video record are enforceable as long as the parties express their agreement



Rule 80(a) Settlement Agreements

to disclosure as necessary to enforce or obtain approval of the agreement.

As technology has evolved, so have the ways that mediations are conducted. Our judicial procedures have now also evolved to provide a way to document and enforce mediated settlements that preserves mediation confidentiality while also eliminating the burden of preparing and signing transcripts of settlements memorialized in a certified transcript or by an audio or video recording.

But mediators and judicial officers who use video or audio recordings, or certified reporters, to memorialize settlement agreements should alert the parties that they must either sign a record of the settlement terms or declare, when they recite the terms of the settlement for the record,

*that the terms of their agreement may be disclosed, as necessary, to gain court approval of the agreement or to enforce the agreement.*¹ 

ENDNOTES

1. The language of Rule 80(a) of the Rules of Civil Procedure now reads as follows:

(a) Agreement or Consent of Counsel or Parties. If disputed, no agreement or consent between parties or attorneys in any matter is binding, unless:

- (1) it is in writing; or
- (2) it is made orally in open court and entered in the minutes; or
- (3) it is made before a mediator or judicial officer, is memorialized either before a certified reporter or in an audio or video recording, and, in the case of a mediated agreement, the parties state that the terms of the agreement may be disclosed, as necessary, to gain court approval of the agreement or to enforce the agreement.

Collegiate Mediation Tournament to Make its Debut in Arizona

On December 1–3, 2023 the University of Arizona Mediation Team will hold its 1st Annual Arizona International Mediation Tournament (AIMT). Teams of three from both undergraduate and law schools from across the world will collaborate competitively to learn about the art of mediation and compete for awards. Each team member is required to assume the role mediator, advocate and client at least once during four rounds of competition.

As a mock trial veteran in high school, I was intrigued with the idea of learning more about mediation and signed up for training in order to judge Arizona’s first high school mediation tournament in April 2022, pitting teams from Empire and Tanque Verde high schools. These teams themselves were fresh off Arizona mock trial competitions. The event was led by Arizona educator Kathie Calkins Keys. If the name Calkins sounds familiar, it’s because Kathie’s father, Richard “Dick” Calkins, founded the American Mock Trial Association. Dick has since promoted mediation, conducts mediation training for attorneys and others, and is past President of the International Academy of Dispute Resolution (INADR).



ROSIE EZGUR is a junior at the University of Arizona, majoring in Law, the one of the few undergraduate programs of its kind in the nation. Ms. Ezgur recently accepted an appointment to serve as U of A college liaison and a non-voting member of the Executive Counsel of the ADR Section of the State Bar of Arizona.

After watching the Arizona high schoolers perform at their first in-person mediation competition, I was impressed at how well these young adults adapted to every conflict thrown their way. I am a student in UofA’s undergrad Law program. The tournament inspired me to create a club at the University of Arizona – the Arizona Mediation Team. Our goal is to educate students (interested in law or otherwise) on the benefits of mediation, not only to resolve litigation conflicts but to use those mediation skills to proactively address and resolve everyday conflicts in their own lives and those experienced by family and friends.

AIMT is currently recruiting attorneys, mediators and judges to help judge the competition. If you would like to learn more about the tournament and the Arizona Mediation Team, information is avail-

able at www.arizonamediation.org and www.inadr.org. Interested in speaking to students about mediation at team meetings, or donating to the Arizona Mediation Team? Contact us at azmockmediation@gmail.com or reach out to the me directly at rezgur@arizona.edu.

AIMT Schedule of Events 2023
 University of Arizona Main Campus, Tucson, Arizona

Friday, December 1st, 2023		
Time (MST/AZ)	Event	Location
7:00PM - 8:00PM	Opening Ceremonies	Zoom

Saturday, December 2nd, 2023		
Time (MST/AZ)	Event	Location
9:00AM - 10:00AM	Confidential Facts Released Judge Training	Social Sciences Building
10:00AM - 11:00AM	Round 1	Social Sciences Building
12:00PM - 2:00PM	Lunch	At your discretion
2:00PM - 3:00PM	Confidential Facts Released Judge Training	Social Sciences Building
3:00PM - 4:00PM	Round 2	Social Sciences Building

Sunday, December 3rd, 2023		
Time (MST/AZ)	Event	Location
9:00AM - 10:00AM	Confidential Facts Released Judge Training	Social Sciences Building
10:00AM - 11:00AM	Round 3	Social Sciences Building
12:00PM - 2:00PM	Lunch	At your discretion
2:00PM - 3:00PM	Confidential Facts Released Judge Training	Social Sciences Building
3:00PM - 4:00PM	Final Round	Social Sciences Building
5:00PM - 6:00PM	Closing Ceremonies Awards Dinner	Social Sciences Building