ARIZONA ADR FORUM

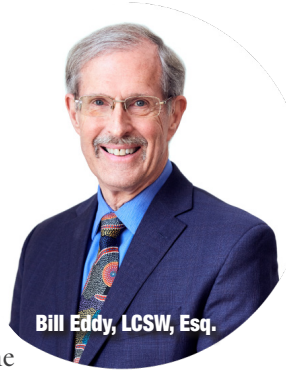
SPRING 2021

CONTENTS

FROM THE CHAIR

ALONA M. GOTTFRIED

The pandemic and the resulting tremendous loss of life have led people to question their priorities. Those in the midst of conflict may now be more open to exploring the question: is the conflict worth the resulting loss of time and enjoyment of life? As Benjamin Franklin espoused: "Lost time is never found again." We in the ADR community can feel good about offering a swifter, less expensive, and overall superior option for resolving conflict. After all, one cannot avoid strife, but one can choose how to address it.



Bill Eddy, LCSW, Esq.

The mediators and litigators among us have a wonderful opportunity to sharpen skills. On April 28, 2021 from 9:00 a.m. to 12:15 p.m., the ADR and the Employment & Labor Law sections of the Bar, along with AZCLE, will present: ***High Conflict Mediation: Dealing with High Conflict Personalities.*** Bill Eddy, LCSW, Esq. from the High Conflict Institute will present this engaging and necessary seminar. Mr. Eddy is a highly acclaimed speaker and expert on this topic. The presentation will be followed by a round-table discussion about high conflict mediation. To learn more and register, you can CLICK HERE

HIGH CONFLICT INSTITUTE
the missing peace

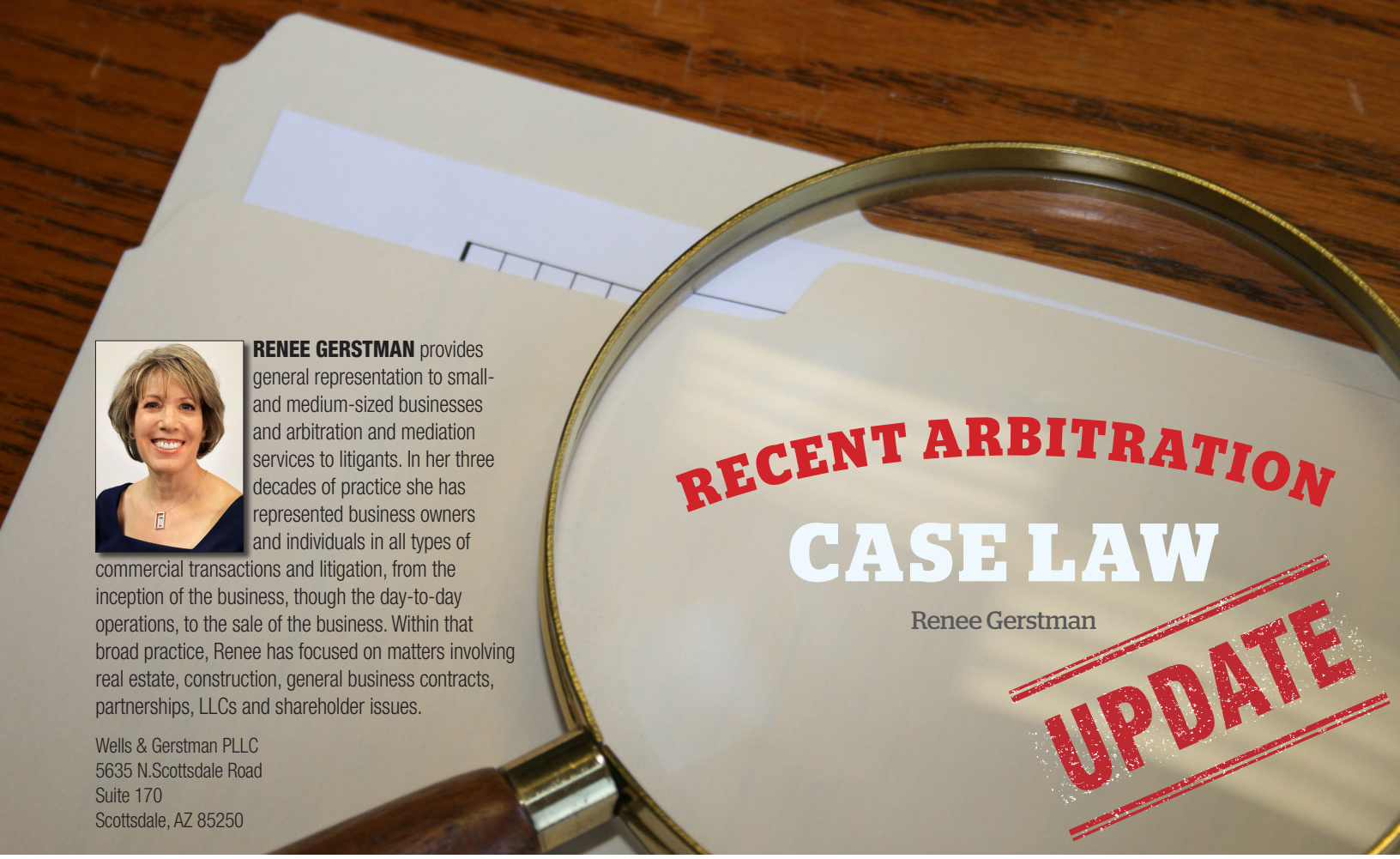
As always, please feel free to reach out to me with any ideas, questions, or comments.

— Alona M. Gottfried, ADR Section Chair
Alona@SGLawAZ.com | 480-998-1500

STATE BAR OF ARIZONA

EDITOR | JEREMY M. GOODMAN

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



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

Wells & Gerstman PLLC
5635 N.Scottsdale Road
Suite 170
Scottsdale, AZ 85250

Schiager v. Landmark Land Management
1 CA-CV 20-0226, Court of Appeals Div. 1, March 9, 2021

In this Memorandum Decision the Court of Appeals addressed the trial court's award of mediator expenses as taxable costs. The losing party objected to the inclusion of the award of mediator fees because the mediator's letter to counsel stated, "unless the parties direct me otherwise, I will send a statement representing a pro rata portion of the total to counsel for each of the parties at the conclusion of the hearing." The Court of Appeals held that the mediator expenses were properly award as taxable costs under A.R.S.§ 12-332 (A) because the parties did not specify how those expenses would be allocated at the conclusion of the dispute if not resolved through mediation.

A couple of practice points based on this case.

For advocates: Address the allocation of mediation fees with the mediator and opposing counsel in any pre-mediation conference and document that agreement in your mediation agreement or mediator's letter.

For mediators: Review your standard letter to determine how, if at all, the allocation of mediation fees is addressed. If it is not addressed in your form letter consider adding a clause that states "the provisions in this letter regarding the payment of mediator fees does not constitute an agreement regarding allocation of mediator fees at the conclusion of the litigation or arbitration." This will call the issue to their attention and they can either request that that letter be modified or enter into an independent agreement addressing the issue.

Singh Roofing, LLC v. Shadowood Condominium Association
1 CA-CV20-0320, 1-28-21

The losing party in an arbitration appealed the trial court's affirmation of an arbitration award on the ground that the arbitrator exceeded his authority, that the arbitrator exhibited manifest disregard of the law and that the arbitrator exhibited evident impartiality.

The Court of Appeals, in this memorandum decision, rejected the losing party's limited interpretation of the arbitration clause and held that the arbitration clause was applicable to all disputes arising out of the contract and not just those arising out of the interpretation or performance of the contract. The Court of Appeals also rejected the losing party's argument that the arbitrator exceeded his powers by incorrectly applying a rule of civil procedure, noting that the Court will not review an arbitrator's legal conclusions.

The Court of Appeals declined to apply the doctrine of manifest disregard in an arbitration case governed by the

Singh Roofing, LLC v. Shadowood Condominium Association
1 CA-CV20-0320, 1-28-21

Arizona Uniform Arbitration Act as neither the AZ-RUAA or Arizona case law permits manifest disregard of the law as a basis for setting aside an arbitration award.

The losing party alleged that the arbitrator's decision to amend the successful party's pleading evidenced a departure from his neutral role. The trial court rejected the argument as no evidence of bias was presented nor was there any suggestion that the arbitrator failed to disclose a conflict of interest, a close relationship with the successful party or an interest in the outcome. Rather, the trial court found the challenge to be to the arbitrator's decision itself. The Court of Appeals agreed and rejected this challenge to the arbitration award.

The Spaulding, LLC v. Miller
1 CA-CV20-0046, 12-22-2020)

Respondents, the losing party in an arbitration, challenged confirmation of the award by the superior court contending that the arbitrator lacked subject matter jurisdiction. The Court of Appeals affirmed confirmation of the award and held that arbitrators do not have or need subject matter jurisdiction to hear and decide disputes. Unlike the courts that are authorized to hear and decide disputes within the scope of their constitutional or legislative authority; arbitrators derive their authority to hear and decide disputes from the mutual assent of the parties as set forth in a valid arbitration agreement.

At issue was whether the claim asserted by the Claimant were class derivative actions which by statute required a demand prior to bringing an action. The court did not address the nature of the claim asserted because it concluded that the concept of subject matter jurisdiction is not applicable in the context of determining a private arbitrator's authority under an arbitration agreement.