



ARIZONA ADR FORUM

THE CHAIR'S COLUMN

ALEXIS PHEIFFER



ALEXIS PHEIFFER

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 alexispfeiffer.com.

On behalf of our Section Executive Council, welcome to the 2023-24 ADR Section. Thank you for joining us! I look forward to serving as your Chair this year, and I'm excited to share my ideas with each of you.

The ADR Section exists to “promote the awareness and use of dispute resolution methods other than litigation,” among legal, business, and professional communities as well as with the general public. This purpose sounds simple, but in practice, it's a bit more difficult. Many of us practice alone or in small groups, and our work can be isolating. We are busy, sometimes mediating and arbitrating in addition to our “day jobs.” Whether serving as advocates or neutrals, arbitration and mediation days are long and intense. We market and network and seek balance between our personal and professional selves. And, the geographic area we work in is enormous, which separates us further.

Our Section has a strong tradition of providing excellent education to members and shaping the legislation and rules that impact our profession. This year, I'd like to add community to our list of strengths. How can we increase ADR awareness and use in the communities where we live and work? How can we learn more from, and better support, one another? How can we be more inclusive? Strengthening our ADR community will take time, but in 2023-24 I believe we can:

- ▶ Continue providing excellent ADR education to our members and the Arizona legal community at-large;

- ▶ Build bonds between Section members via Section social events;
- ▶ Increase Section membership and participation in Section committees/events; and
- ▶ Use our existing community relationships to raise ADR awareness.

Meanwhile, each of us can take small steps that strengthen our community and make our Section an even more valuable resource, such as:

- ▶ Recommending arbitration or mediation
- ▶ Telling someone outside the legal community about ADR
- ▶ Joining a Section committee
- ▶ Attending a Section program
- ▶ Adding new names to our lists of go-to neutrals
- ▶ Meeting another ADR professional for lunch and encouraging them to join our Section.

I encourage each of you to engage with and promote our community, and I hope to meet many of you at a Section event soon.

Alexis Pfeiffer
Chair – ADR Section

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.



Paraphrasing American author Ann Leckie, “small actions, cumulatively over time or in great numbers, steer the course of events in ways too chaotic or subtle to trace. A single word may direct a person’s fate and ultimately the fates of those around her.” This well describes the potential benefits of our impacts as mediators, arbitrators, facilitators, peacemakers, and dispute resolution pundits. Our efforts assist quarrelling parties to solve disputes, heal divisions, and move on from disagreements so they can direct their best energies toward more productive and fulfilling endeavors. Over time and in great numbers, these efforts produce more effective, accessible, and kind dispute resolution processes and steer us toward a more just, if still imperfect, society.

The ADR Section contributes to these efforts by making available to our dispute resolution colleagues mature and experienced guidance on effective dispute resolution approaches, tools, and practices. In the past year, our programs have ranged from a historical tour of the dispute resolution principles of Abraham Lincoln to practical tools that can transform the tensions and emotions of people in controversy from fear and weakness into self-confidence and autonomy. We have examined ADR in Real Estate matters and Intellectual Property disputes, explored interviewing techniques that can help motivate people to pursue interests over mere positions, and examined how mediation participants can help mediators to better assist them in their efforts to resolve their controversies. Our Bar Convention game shows even brought some humor to the learning process.

It has been my distinct pleasure and honor to hold the position of Chair of the ADR Section over the last year. But appreciation for our programs should be directed to the Executive Council, its members, and the Bar Staff who have collectively and cumulatively steered our programing and progress. I would both bore you and slight any number of Council and Section members by listing individuals whose work and words have meaningfully contributed to the Section’s programing this year. Those of you who have attended our programs know who they are. Please thank them, as I do, and give special support to Alexis Pheiffer, who steps into the Chair role for the coming year.

Lee Blackman
Lee Blackman

OUTGOING CHAIR'S MESSAGE

LEE BLACKMAN





EDITOR

Congratulations to the ADR Section team members who put on our fun and insightful CLE presentations at the Bar Convention. And a special shout out to Steve Kramer, author of this issue's article on high school mock mediation. Steve was named the Arizona Bar Foundation's June Volunteer of the Month for his work with Mock Trial and Mock Mediation.



STEVE KRAMER

EDITOR'S MESSAGE

DENNY ESFORD



If YOU would like to submit an article for publication, our next deadline for article ideas is September 15th. The draft article is due to me by October 13th.



Denny Esford
Denny Esford



Expedited Hearings, Consolidated Claims, and Med-Arb *New Solutions to Old Problems?*

During the pandemic, dispute resolution responded like the rest of the economy and much of the workforce – it moved online. Although online is not always appropriate, it works well for many types of hearings. Online hearings allowed for greater efficiency in mediation and arbitration by increasing witness availability and eliminating travel times. The pandemic also increased parties' use of expedited and consolidated claims arbitration procedures and mediation–arbitration processes.

Expedited and Consolidated Claims Arbitration

Expedited and Consolidated Claims Arbitration is as the name suggests – an abbreviated process, sometimes separate from the formal and arbitration process and occasionally part of the agreement. Some grievances lend themselves to expedited processes because there are few facts in dispute, a straightforward issue, and few witnesses. Expedited and consolidated arbitration can involve whatever aspects of arbitration on which the parties agree: specific grievances such as Overtime, Bid, Attendance, and minor discipline; an abbreviated selection of a neutral or a panel of neutrals; limitations on time, witnesses, exhibits, and opening/closing statements;





BRIAN CLAUSS is a member of the National Academy of Arbitrators and has served on numerous arbitration and mediation rosters and panels since 2004. Brian was also part of a team that developed the new ADR Concentration at the University of Arizona Rogers School of Law.



EMILY HALL is a licensed attorney and maintains a dispute resolution practice in Alaska, British Columbia and the West Coast and Midwest regions of the United States.



In addition to a negotiated expedited procedure, procedures can develop ad hoc or organically. The common elements are usually a significant backlog of grievances and advocates with a professional working relationship. For example, your authors have been involved in developing new, expedited processes when: pandemic changes to excused absence and leave policies generated a significant number of backpay grievances; changes to FMLA leave eligibility generated many unexcused-absence grievances; discipline under a CBA moved from a statutory scheme to arbitration thereby transforming hundreds of disciplinary matters into grievances; and when changes to the labor-management relationship resulted in multiple grievances.

The savings and increased efficiency of consolidated claims and/or expedited procedures can be significant. For example, parties who agreed to a recent expedited grievance docket estimated that cost savings in arbitrator fees to exceed \$200,000 from the cost of the matters separately being heard in arbitration. The advocates saved weeks of preparation for dozens of separate hearings in favor of expedited and consolidated hearings over three days. The advocates received short-form awards in days, not months, after the hearing.

Mediation-Arbitration

Arbitration is a process that provides a decision in which one party is a winner and one is a loser. Mediation allows for a deeper understanding of underlying issues through guided discussion towards the goal of reaching a solution. Med-Arb combines the mediation process and the arbitration process to reach a solution when possible or a decision when necessary. Just as there is no universal Expedited Arbitration process, there is no universal approach to Med-Arb. Med-Arb is a process developed by the parties and the parties dictate the rules and procedure.

Med-Arb is gaining popularity in labor-management disputes for obvious reasons beyond the standard “saves time and money.” Med-Arb streamlines the process for dispute resolution. Workplace disputes can affect efficiency, employee income, morale, and productivity. Workplace disputes involve parties that have a continuing workplace relationship and resolving disputes successfully is critical to maintaining that relationship. Med-Arb is used to increase efficiency of dispute resolution with a faster process, but it also allows a deeper inquiry into the dispute, permitting a multifaceted solution rather than a binary Right/Wrong approach.

Two common approaches to the Med-Arb process:

- 1) **MEDIATION ARBITRATION:** The parties mediate and, if no settlement is reached on all issues, the parties proceed to arbitration on open issues. There are many variations on this approach. The neutral party that presides over the mediation may be the same person who hears the dispute in arbitration – but may not. The process may have organically originated or may have rigid, negotiated rules. There may be an opt-out provision. The arbitrator may issue a decision based upon what was heard in mediation or conduct a separate arbitration hearing.
- 2) **ARBITRATION MEDIATION:** The parties arbitrate the dispute and proceed to a mediation following the hearing – sometimes the mediation is in lieu of a closing argument. Like Med-Arb, there are variations to this approach. The arbitrator may also be the mediator, but may not. A party may opt-out of the mediation in favor of an arbitration decision. The arbitrator hearing the matter in mediation may use an evaluative mediation approach during discussions. There are endless variables to the parties’ agreed procedure in Arb-Med.

no court reporters; no written briefs; and bench decisions.

The number of hearings heard in a day can also be increased. It is common for expedited hearings to include many hearings in a single day – thereby addressing backlog, cost, and efficiency.

Form and timing of the arbitrator’s award can also be considered. For example, an agreement provision that provides for expedited hearings concluded in one day:

Both parties shall waive their rights to submission of any briefs and stenographic recordings. The arbitration proceedings must be continuous to a conclusion. The arbitrator must render a bench decision within twenty-four (24) hours following the close of the hearing followed by a written decision within seven (7) calendar days of the close of the hearing.



Expedited Hearings, Consolidated Claims, and Med-Arb New Solutions to Old Problems?

Parties can develop variations on the Med-Arb models. The common element is that the parties agree to submit the dispute to the Med-Arb process, agree upon the process, and agree on the neutral or method of selecting the neutral. An added benefit to Med-Arb is the finality of resolution. If mediation is unsuccessful in the Med-Arb process, a decision issues and that decision is an enforceable arbitration decision.

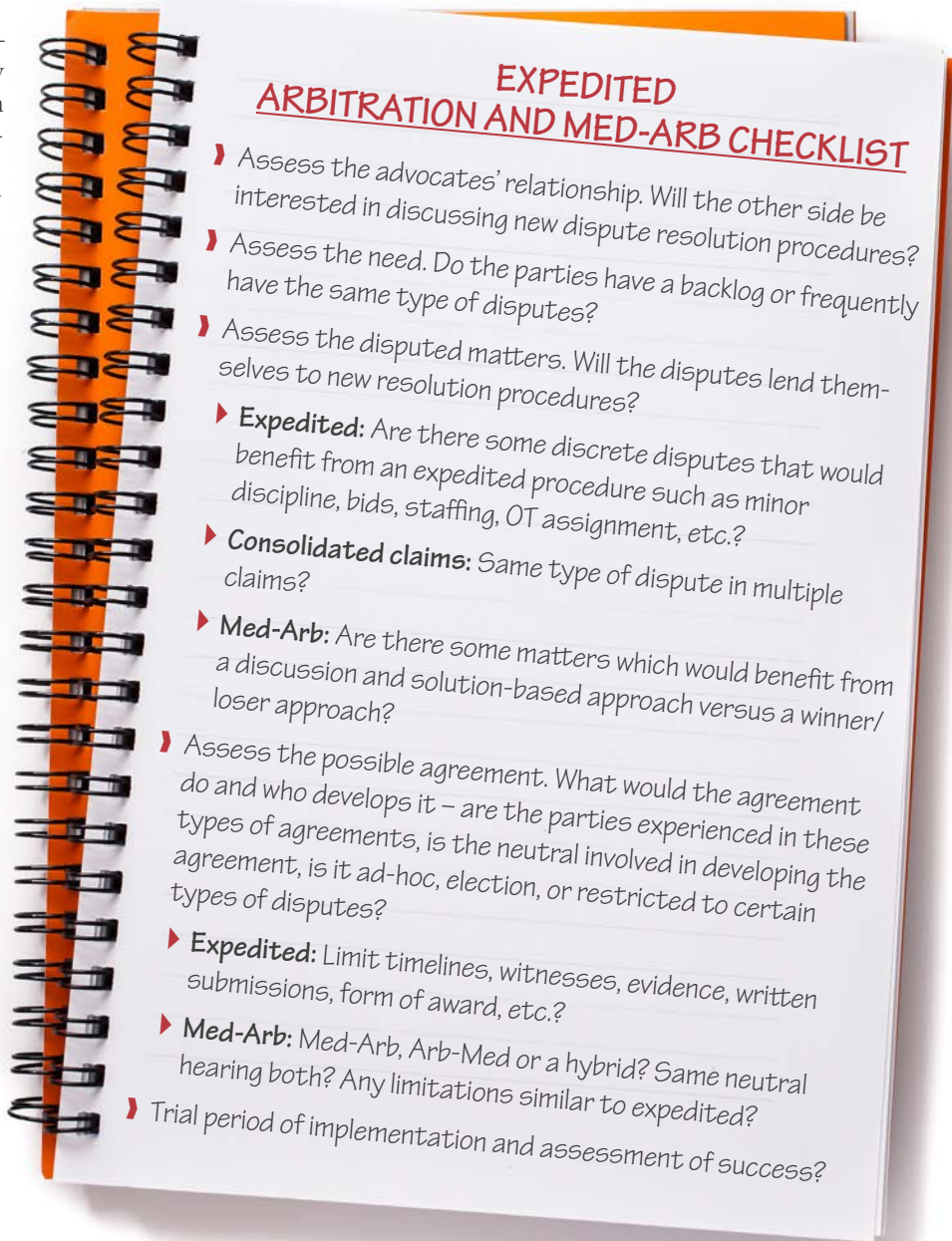
Med-Arb Experience

Med-Arb in the United States is growing in popularity. Currently, Med-Arb is mostly practiced by seasoned neutrals with expertise in both mediation and arbitration. Mediation training and certification programs are available from various providers. Arbitration training is available from a variety of providers in some law schools or graduate programs, domestic and international organizations, the non-profit American Arbitration Association, and the Federal Mediation and Conciliation Service's "Becoming a Labor Arbitrator" course. However, Med-Arb training and certification is not available in the United States but is available in Canada. Canadian dispute resolution has been using Med-Arb for a variety of disputes, including labor management, employment, consumer, commercial, construction, and family law.

Med-Arb in the United States is growing in popularity. Currently, Med-Arb is mostly practiced by seasoned neutrals with expertise in both mediation and arbitration. Of note, experience suggests that vesting the neutral with the authority to decide in arbitration the open issues remaining after mediation results in more settlements in the mediation phase. Knowing the dispute will ultimately be decided in arbitration is a strong motivation for the parties to resolve the dispute through solutions-based mediation, and not answer-based arbitration.

A successful Expedited Procedure or Med-Arb Agreement starts with a discussion between advocates. Many parties involve an experienced neutral in the discussion and development of the Med-Arb Agreement. Whether an expedited or med-arb procedure, the agreement minimally should include: a memorialized provision on procedure and methodology; a provision on discovery, a provision addressing what evidence the neutral can consider in the arbitration decision; a provision that includes the involved issues or disputes; the selection, role, and authority of the neutral; a provision addressing timelines for proceeding from mediation to arbitration or arbitration to mediation, and whether an opt-out provision is needed.

Expedited, Consolidated Claim, and Med-Arb procedures continue to grow in popularity and may be right for some of your disputes. [ADR](#)



EXPEDITED ARBITRATION AND MED-ARB CHECKLIST

- ▶ Assess the advocates' relationship. Will the other side be interested in discussing new dispute resolution procedures?
- ▶ Assess the need. Do the parties have a backlog or frequently have the same type of disputes?
- ▶ Assess the disputed matters. Will the disputes lend themselves to new resolution procedures?
 - ▶ **Expedited:** Are there some discrete disputes that would benefit from an expedited procedure such as minor discipline, bids, staffing, OT assignment, etc.?
 - ▶ **Consolidated claims:** Same type of dispute in multiple claims?
 - ▶ **Med-Arb:** Are there some matters which would benefit from a discussion and solution-based approach versus a winner/loser approach?
- ▶ Assess the possible agreement. What would the agreement do and who develops it - are the parties experienced in these types of agreements, is the neutral involved in developing the agreement, is it ad-hoc, election, or restricted to certain types of disputes?
 - ▶ **Expedited:** Limit timelines, witnesses, evidence, written submissions, form of award, etc.?
 - ▶ **Med-Arb:** Med-Arb, Arb-Med or a hybrid? Same neutral hearing both? Any limitations similar to expedited?
- ▶ Trial period of implementation and assessment of success?

Self-Determination in Mediation – The Art and Science of Mirrors and Lights

REVIEW

A Book Review by Lee Blackman

Dan Simon and Tara West • Authors | Rowman & Littlefield • Publishers (August 23, 2022)

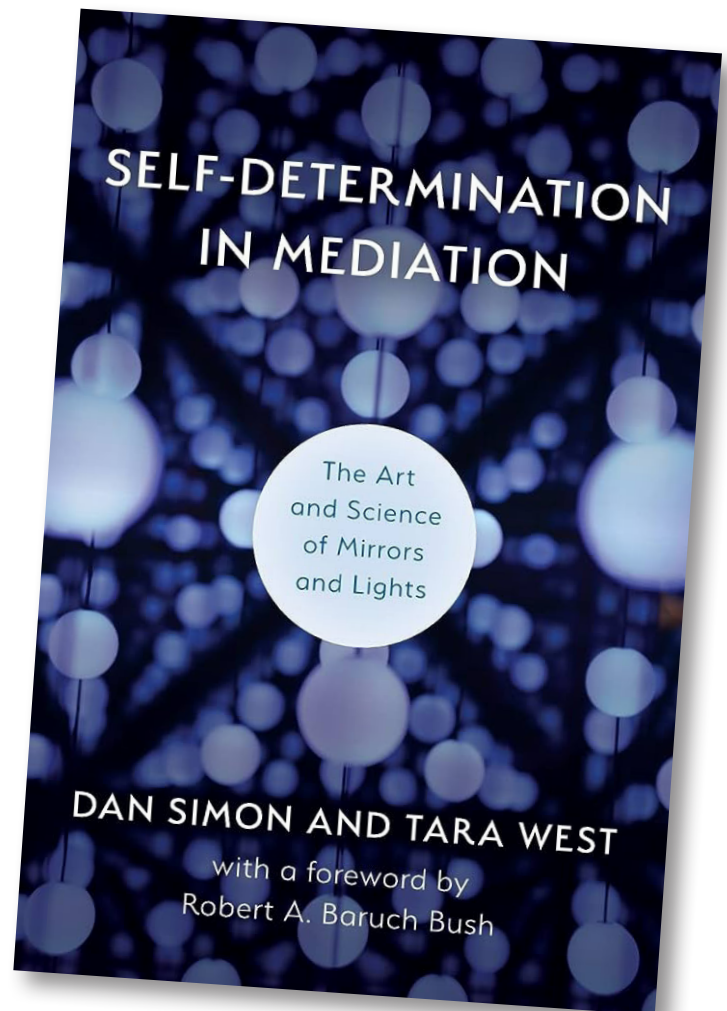
Most mediators are also lawyers and judges. By training we are experts in legal advocacy, fact-finding, statutory and case analysis, and negotiation. We guide people in conflict through a neutral evaluation of the costs, risks and probable benefits of resolving their dispute using judges, juries, or arbitrators. Our success is measured by how many matters we have settled. We tell each other that “I settled this matter” and ask our mediator friends “did you settle that matter?”

In *The Last Jedi*, Luke Skywalker asks Rey “What do you know about the Force?” She replies, “It’s a power that Jedi have that lets them control people and ... make things float.” Luke dryly responds, “Impressive. Every word in that sentence was wrong.” And for a great many more mediations than we might like to admit, every word in my second paragraph was wrong – at least in spirit.


In *Self-Determination in Mediation – The Art and Science of Mirrors and Lights*, Dan Simon and Tara West explain how wrong it can be to think our mediation skills are like Rey’s earliest view of The Force. How liberating and empowering it could be to elevate *party* self-determination over a mediator’s otherwise sound evaluation and sagely guidance. Simon and West demonstrate why and how mediators can accomplish much more using “Mirrors and Lights” instead of overt guardrails and the tools of influence and evaluation that are mainstays in many mediation training programs.

Simon and West’s book is both a carefully end-noted tour of current and emerging research on how people in conflict find, by their own searches, the most satisfying and effective resolutions of their disputes, and a “taught by example” review of successful and sometimes unsuccessful mediations:

- › where the most effective tools emerge only after the abandonment of mediator control and influence;
- › where the most effective question is “how do you want to proceed”;
- › where the most glaring mediator interventions are carefully non-judgmental reflections and summaries of what the parties have said and how they have said it; and



- › where mediators spend the most energy listening to and supporting the parties, while restraining themselves from their inherent disposition to nudge influence, and guide the parties toward a mediator-conceived resolution.

Self-Determination in Mediation – The Art and Science of Mirrors and Lights is an illuminating read, well worth the time of mediators and other problem solvers for whom controlling people and making things float in mediation is not enough. 

Arizona Foundation for LEGAL SERVICES & EDUCATION

THE ARIZONA BAR FOUNDATION

Arizona Bar Foundation Sponsors Arizona's 2023 High School Mock Mediation State Tournament



On April 28, students from four Arizona high schools met at the Florence Community Library to compete in Arizona's State High School Mock Mediation Tournament. The competition, sponsored by The Arizona Bar Foundation, tested the mediation and negotiation skills of 3-person teams, comprised of a mediator, a representative and a party.

These competitions were conceived by the founder and long-serving president of the American Mock Trial Association, Dick Calkins, who initiated the 2022 National High School Mediation Competition. Calkins daughter, Katie Calkins-Keyes, M.A., E.D., brought Arizona its first high school mock mediation competition in 2022. Ms. Calkins-Keyes is active in both high school and college mediation programs.

Unlike Mock Trial, the teams received the general case facts about a month ahead of the tournament. They did not get to see the confidential facts for each case until the day of the competition. The fact sheets are only 2-3 pages in length. Parties and their representatives also receive "confidential" facts known only to one side, and not known to the mediators. The representatives and parties decide how to use their "confidential" facts, and whether to share them with the mediator or with their opponents.

In each competition, mediators from opposing teams worked together as co-mediators to assist the parties to reach negotiated agreements. Mediators were evaluated on such skills as how effectively they explained their roles and the mediation process, principles, and benefits; how well they set the tone and helped make the parties comfortable; how well they maintained neutrality, impartiality and confidentiality; how well they established rapport and trust; the timing and effectiveness of their conferences and caucuses; how well they addressed the sharing of confidential information. Were they patient, positive, persistent and professional? Did they employ active listening techniques? Did they come up with creative



settlement possibilities? Did they deal appropriately with ethical or cultural issues? How well did they cooperate or collaborate with their co-mediator?

Client-Representative pairs were evaluated on skills that included their preparation, organization and persuasiveness; how well they presented the facts and law of the case and their goals for the mediation; their negotiation skills and strategies; How effectively did they use and work with the mediator? Did they effectively gather and share information? Were they able to establish an atmosphere of positive cooperation/collaboration without sacrificing their goals and interests? Were they flexible and receptive to the needs of the other party? Did they present a realistic evaluation of their case? Did the representative and client communicate effectively with each other? Did they effectively use the mediation session to further the client's goals? Did they demonstrate effective negotiation skills and strategies?

These skills used by Mediators are quite different from those developed in mock trial, but they have been proven useful in resolving conflict. The students learn valuable life skills, and the competition enables students to employ those skills in a broad range of conflict scenarios, including disputes among their peers.

I served as a judge in the April 28 tournament, as well as the first National High School Mock Mediation tournament, held in November 2022. Unlike the Arizona tournament, which was held in-person, the 2022 National Tournament was conducted virtually. The Arizona students were well-prepared. It was interesting to observe students compete in a setting where a major goal is to help one's adversary get what they want. While the mediations all resulted in settlement, the amounts and terms of settlements varied considerably.



The State champion was a team from Tanque Verde High School (Tucson), and the runner up was a team from Xavier College Preparatory High School Xavier College Prep (Phoenix).

Student Comments included:

"Cooperative negotiations are actually really easy when you get in the swing of things."

"I learned the process and values of mediation and how they can help resolve otherwise difficult disputes in a way that can benefit both parties."

"I learned how to mediate."

"I learned how to work around disputes in a formal and understanding manner."

Judge Comments included:

"I teach mediation and other ADR courses at a law school, and this was a great opportunity for me to see how well this would work with high school students."

"It is always inspiring (and reassuring) to see the next generation take these steps."

The State Bar Foundation will conduct training for attorneys, mediators and educators interested in teaching, coaching or judging in the 2023-2024 school year. If you are interested in coaching or judging, check for updates on the Bar Foundation's "Law for Kids" website, <https://lawforkids.org/get-involved/contests>. A free training program entitled *Introduction to Mock Mediation* will be held on August 31, 2023 from 9 am to 4 pm. For details and to sign up, go to: <https://lawforkids.org/academies-free-for-everyone>. Space is limited, so sign up soon. 