ARIZONA ADR FORUM

WINTER 2022/23

CONTENTS

chair's column

GREG GILLIS

This is my final President's Column for the *Arizona ADR Forum* Newsletter. In fact, by the time you are reading this, I will be the immediate past chair; Lee Blackman will be your new Section chair. The Section is in good hands with Lee. He has been a devoted section member and he and I worked closely together this past year to ensure a continuity of direction and focus for the ADR Section for the future.

Diversity, equity and inclusion was a section goal this past year and, despite Covid, positive steps were taken towards the goal.

This newsletter now has as a regular contributor, Elena Nethers, the State Bar's Director of Diversity, Equity and Inclusion. This past year, several of our CLE seminars had a DEI focus.

- Probate Mediations – getting to a signed Agreement (All but one panelist was female)
- Mediating Social Justice
- Ending Forced Arbitration of Sexual Harassment Claims

Our bar year ended with what I hope is an annual event — an ADR Happy Hour and networking event with members of affinity bar associations, including the Arizona Collaborative Bar Association, the Arizona Asian American Bar Association, and other diverse members of the State Bar of Arizona. The event was a concrete step towards increasing interactions between the ADR Section and diverse attorneys, with the hope of increasing the diversity of both the ADR Section and Arizona's Neutrals. In a time when many are focused on what divides us, our section chose to focus on how we are all united as attorneys with different, but valuable, backgrounds and perspectives.

I want to extend a special note of gratitude to both the Executive Council of the ADR Section and the almost daily assistance of the State Bar Staff. It has been my honor and privilege to serve as chair of the ADR Section during this past year.

I started my President's column with the story of the little boy throwing beached starfishes back into the sea. He wasn't trying to save all the starfishes, but was at least saving each one he tossed back into the sea. I hope the actions of the ADR Section made a difference to at least one section member as we try to become a more inclusive section. Live your life making a difference in the lives of those around you so that you may have the rewards of a life well lived.

Greg Gillis
Chair – ADR Section

GREG GILLIS is a member of the American Arbitration Association's Construction and Commercial Panel of Neutrals and the National Academy of Distinguished Neutrals. He practices construction law, commercial litigation and alternative dispute resolution with the Scottsdale firm of Sacks Tierney P.A.

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.

PLAINTIFFS' SUCCESS RATES IN ARBITRATION CONTINUE TO DECLINE

LITIGANTS AND MEDIATORS OUGHT TO KNOW

BY ABE MELAMED, ESQ.

There is no doubt that there is a prevailing view that arbitration is less favorable for plaintiffs, particularly in employment cases, than it is for defendants/employers. It is no surprise then that one of the most significant plaintiff-friendly changes to the law in the last decade came on February 10, 2022, when Congress passed *H.R.4445 – Ending Forced Arbitration of Sexual Assault and Sexual Harassment Act of 2021*.[1] President Biden signed the Bill into law on March 3, 2022.[2] The new law amends the Federal Arbitration Act ("FAA") to provide all victims of sexual harassment or sexual assault the choice of whether to proceed in court, even if he or she had previously signed an arbitration agreement.[3] The law nullifies and voids those arbitration agreements, but it applies only to disputes that arise or accrue after the date of enactment. This new law has gained renewed media attention, and the envy of those who argue that arbitrations are significantly less favorable for plaintiffs than defendants. New statistics on the success rate of plaintiffs in arbitrations support this position. Plaintiffs should know their chances of success in arbitration, and mediators should as well, because these statistics will play a significant role in helping parties understand their best alternative to a negotiated agreement ("BATNA"). We will explore both past statistics, as well as these new statistics, in detail below.

As someone who litigated cases on behalf of both plaintiffs and defendants prior to shifting to practicing as a mediator exclusively, I can say there are few things a plaintiff's attorney dreads more than being presented with an iron-clad arbitration agreement as they prepare to file suit. Defendants love to undercut a plaintiff's valuation with an arbitration agreement. They know that plaintiffs lose leverage because the matter will not be public, and they will have limited discovery. They know the arbitrator will be a single rational jurist as opposed to an unpredictable jury and they know even if the plaintiff prevails the award of an arbitrator will be significantly less than what a jury might award. But most critically, they know that the statistics of plaintiffs prevailing in arbitration are very low. Similarly, they know that the claim will be individual, and not a class-action, because most arbitration agreements include class-action waivers.

Despite this, there are still practical reasons for defendants to settle aside from a standard risk of liability analysis. In particular, the added cost of administering an arbitration, which is often contractually the responsibility of the defendant, can be significant. Moreover, the general cost of defense, the possibility of an award of plaintiff's attorney's fees even with a small damages award and the cost of business disruption, should motivate defendants to settle. Indeed, because of the significant cost of administering arbitrations, some employers have abandoned mandatory arbitration clauses altogether.[4] But, ultimately, defendants/employers know that their likelihood of success in arbitration is high, and plaintiff's must take this into account in assessing the value of their cases. Likewise, mediators should highlight this element of BATNA in mediation.

ABE MELAMED is a mediator, practicing in Arizona, New York and California. Abe specializes in employment, commercial, and consumer class-action disputes. Prior to shifting to mediation, Abe spent many years representing plaintiffs in state and federal courts, including the Second Circuit, Ninth Circuit and U.S. Supreme Court, as well as many years counseling businesses on employment, commercial and consumer issues. As a result, Abe has a balanced perspective and an appreciation for mediation, which influences his neutral mediation style. Abe is known for his ability to grasp complex legal issues, recall voluminous records, and adapt his mediation style to different personalities by blending the facilitative and evaluative methods of mediation. You can learn more about Abe's practice, as well as book a mediation directly on Abe's website, **www.melamedmediation.com**.

So, just how abysmal are the rates of success for plaintiffs in arbitration? A 2014 study of plaintiff's success in arbitration in employment cases, conducted by Professor Alexander J. S. Colvin,[5] and Professor Mark D. Gough,[6] found that plaintiffs prevailed in arbitration approximately **19.1%** of the time. The study also found that the mean and median awards were $135,316 and $48,670, respectively. Combining the rate of success with the award amounts, the study found that the **expected value** of an employment discrimination case was just **$25,929**.[7]

However, a 2021 study from the American Association for Justice ("AAFJ") found the plaintiffs' odds of success in arbitration to be even *lower*. The AAFJ analyzed cases that closed at both the American Arbitration Association ("AAA") as well as Judicial Arbitration and Mediation Services ("JAMS") between 2016 and 2020. The study found that in 2020 the win rate for plaintiffs in arbitration was only **4.1%**, a dip from the five-year average of **5.3%**. The study further found that in employment cases, plaintiffs only prevailed in **1.6%** of cases.[8] While it is possible that those statistics are slightly skewed by dismissed mass arbitrations, which appear to be larger numbers of defense verdicts but are really one class action, it is likely that plaintiffs still face a maximum win rate of **10%** or less in arbitrations. This is a significant decrease from the 2014 Colvin & Gough study, and significantly less than the likelihood of success a plaintiff has if they are in court and before a jury, which is closer to between **35%** and **50%**.[9]

Ultimately, plaintiffs should know that their likelihood of success in arbitration is very low, and significantly lower than it would be if they were in court. Plaintiffs, and by extension their counsel, should take that under consideration when assigning a value to a case whose resolution is tied to an arbitration agreement. They must expect that settlements will reflect the harsh reality of arbitration. Similarly, mediators should be prepared to speak openly to plaintiffs about valuations that do not take this reality into consideration, so that they can best help them understand their BATNA. At the same time, mediators should impress upon defendants the value of resolution, including the significant cost of administering the arbitration, general costs of defense, the possibility of being liable for plaintiff's attorney's fees, and the cost of business disruption. Keeping the above perspective in mind, mediators can best help parties resolve their disputes, by providing astute guidance on the alternatives to a negotiated resolution. ADR

endnotes

1. H.R.4445, available at www.congress.gov/bill/117th-congress/house-bill/4445/text.
2. www.c-span.org/video/?518367-1/president-biden-signs-bill-ending-forced-arbitration-sexual-assault-harassment-claims.
3. H.R.4445, *supra* at FN 2.
4. Forced Arbitration in a Pandemic: Corporations Double Down, American Association for Justice, available at www.justice.org/resources/research/forced-arbitration-in-a-pandemic.
5. The Martin F. Scheinman Professor of Conflict Resolution at the ILR School, Cornell University.
6. Assistant Professor of Labor Studies and Employment Relations at The Pennsylvania State University.
7. Individual Employment Rights Arbitration in the United States: Actors and Outcomes, Colvin & Gough, ILR Review, 68(5), October 2015, pp. 1019–1042, available at https://ecommons.cornell.edu/bitstream/handle/1813/75684/Colvin67_Individual_employment_rights_arbitration.pdf?sequence=1&isAllowed=y.
8. Forced Arbitration in a Pandemic, *supra* at FN 5.
9. A 2016 study by Columbia Law School professor and mediator/arbitrator, Vivian Berger, examined plaintiff verdicts in federal courts in New York. The study found that Plaintiffs prevailed in approximately 30% to 35% of cases. http://vberger-mediator.com/mediation/winners-losers.pdf. An older study by the Bureau of Justice Statistics in 2005, found that plaintiffs prevailed approximately 56% of the time. www.bjs.gov/index.cfm/dataonline/index.cfm?ty=tp&tid=451.

I'VE BEEN READING

BY MICHELE M. FEENEY

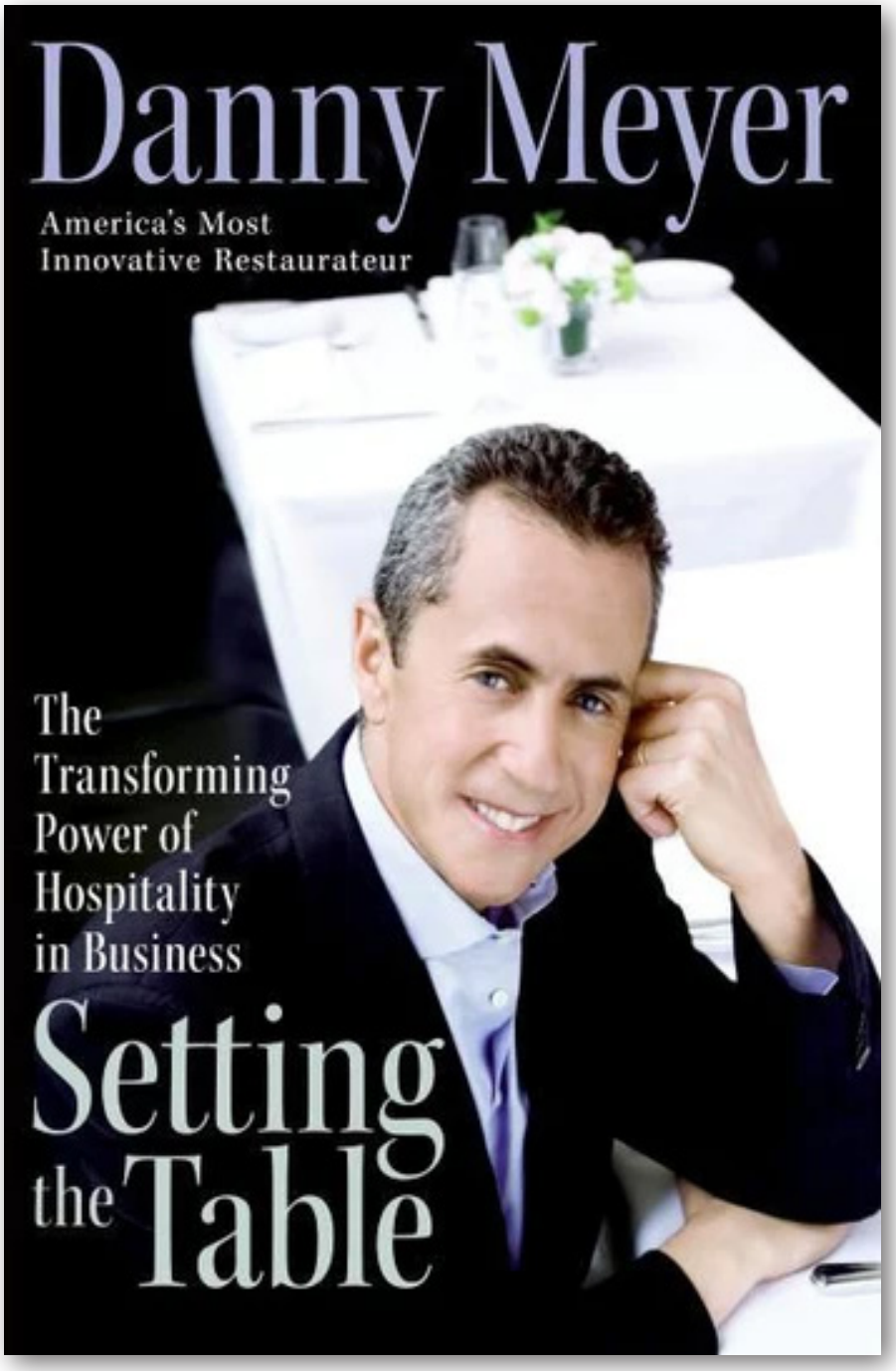
I first read Danny Meyer's book *Setting the Table: The Transforming Power of Hospitality in Business* shortly after it was published in 2006.[1] Meyer's theme is that the principles he applied to develop successful restaurants, such as Union Street Café, apply to most business meetings and relationships. Meyer states:

> Hospitality is the foundation of my business philosophy. Virtually nothing else is as important as how one is made to feel in any business transaction. Hospitality exists when you believe the other person is on your side. The converse is just as true. Hospitality is present when something happens *for* you. It is absent when something happens *to* you. Those two simple prepositions—for and to—express it all. [P11]

Back in 2006, in the early years of my ADR practice, I found the concepts helpful in conducting mediations. Plus, by conveying the impression one is the "host" of the mediation, one has subtly and kindly communicated that she is the pilot of the experience.

During COVID, Zoom afforded many new opportunities, the best of which may be the real-time, on-screen participation of high-level decision-makers in remote locations. (I hope to never again hear the phrase, "participate by phone.") Using Zoom, a technology I didn't associate with mediation before 2020, became intuitive, nearly as automatic as driving a car.

However, my ability to work in three dimensions rusted. Getting back to the reality of in-person professional relationships required more than full-height professional clothing. This is why I re-read the Meyer book, which I remembered as stressing the quality of participant's experience as a prime component of conducting business.



1. Meyer, Danny. *Setting the Table: The Transforming Power of Hospitality in Business.* HarperCollins, 2006.

Meyer's most important tips, as applied to my mediation practice, are:

The Pre-Mediation Conference Call: Very early in my practice, perhaps in about 2002 or 2003, an experienced medical malpractice lawyer, Mike Valder, kindly agreed to have lunch with me and share his likes and dislikes of mediators. He expressed frustration about a case that didn't settle because of obstacles that would have gone away had the mediator and counsel met a week or two before the mediation. Since that conversation, I have tried to hold that call every time, at least a week before the mediation. The few I've missed, I've regretted. Not only do we discuss the particulars of the case and potential obstacles, I am able to discern the quality of the relationship between counsel and their interest in settlement. Most importantly, I can set the tone for the mediation, or, as Meyer would say, "set the table." It is surprising how many things just "fall into place," as Meyer experienced with his Union Street Café', with thorough and timely preparation.

How People Feel: Meyer is a believer that "[b]usiness, like life, is all about how you make people feel. It's that simple and that hard." [p3] On Zoom, our ability to make people feel comfortable is blunted. There is no opportunity to ask if the room temperature is comfortable, whether someone might like coffee or water, or provide a lunch or snack. There is little opportunity to engage in light conversation that might relax a nervous participant. Now, as requests for in-person ADR tick up, we must remember all the social graces that made it more likely to accomplish a settlement or resolution that clients feel was *for* their benefit.

A Service Profession: I recently taught a class about mediation to a group of law students preparing for their first simulated mediation.

One student asked, "What do you try to get a case settled when people are stubborn?"

I answered, "About one thousand things. And eventually something works, you just don't know which thing it's going to be."

I have found this to be true, especially in the most difficult cases. It is not unlike the choreography required to execute a five-star dining experience, something a restauranteur could never do on Zoom. Similarly, it is very difficult to intuit everything a mediator should appreciate about a case and the parties on Zoom—sort of like playing the piano with gloves on.

Shared Ownership: The most successful mediations, in my opinion, are those in which all parties, while not necessarily happy with the result, have a sense of shared ownership.

Meyer states:

> Shared ownership develops when guests talk about a restaurant as if it's theirs. They can't wait to share it with friends, and when they're really sharing, beyond the culinary experience, is the experience of feeling important and loved. That sense of affiliation builds trust and a sense of being accepted and appreciated, invariably leading to repeat business, a necessity for any company's long-term survival. [p78]

Appreciating Context: Meyer states, "Context is everything. What has guided me most as an entrepreneur is the confluence of passion and opportunity (and sometimes serendipity) that leads to the right context for the right ideas and the right time in the right place and for the right value." [p99] When connected to individuals in mediation, it is possible to land on the right idea, at the right time, for the right value. But, that sense of connection is key.

In recent months, I have gone back to in-person mediations, now at least 50% of the time. Candidly, in person mediations are exhausting compared to Zoom mediations. I know, however, this is because an in-person mediation involves a broader engagement of my senses and a higher investment of energy and engagement with participants, especially parties. There is nothing quite like showing up.

Meyer's book is a quick read and a fresh look at the ADR experience, especially now that we are (hopefully) back to a 360° experience. Re-reading the book helped me to remember how important the quality of participant's physical experience can be, and how management of that experience, together with the increased ability to perceive needs and priorities, can enhance my ability to resolve a case in a positive manner. ADR

Mediating a DCS (Department of Children's Services) Case

BY GERIC L. TIPSWORD, ESQ. | CREDENTIALED MEDIATOR

Alternative Dispute Resolution (ADR) has come a long way in the past 30 years from its beginning as an idea that was proposed to the courts. ADR can help people resolve problems without the need to tear each other down, to a mandatory step in getting to temporary orders as well as final orders. It wasn't so long ago that mediation in a Termination of Parental Rights case was unheard of. Generally, these cases went one of three directions: parents completed their services as outlined by DCS (Department of Children's Services) and the children came home, DCS did not believe the parents had reached a sufficient place for the children to be returned, or the parents just did not do what was necessary to have their children returned. Just as in non-DCS cases, litigation in these cases is expensive and can consume a lot of the Court's time. As an attorney and mediator whose practice focus is DCS cases, I have seen an increase in mediations for those situations in which DCS did not believe the parents had reached a sufficient place for the children to be returned.

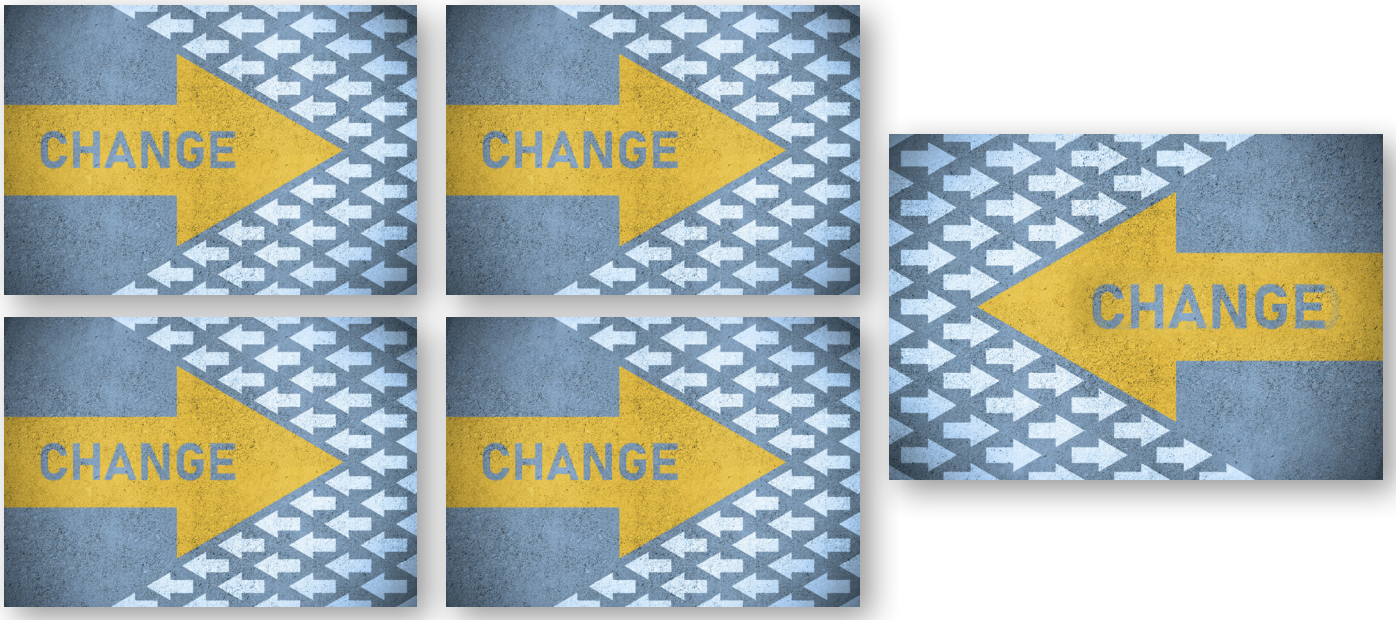
The Courts are beginning to realize that DCS can be very opinionated as to whether a parent has successfully reached a place in their lives where they can provide a safe and stable environment for their children. DCS' opinion of what a safe and stable environment should be is often much different than how it can be defined at final trial. Parents in these cases feel ganged up on, since from the beginning of the case, most times, they are being evaluated by a DCS caseworker, an attorney for the child, court ordered evaluators, as well as the Court.

Mediation in Termination cases is helping to put families back together through creativity and communication. Additionally, lower income earning parents are truly benefitting from mediation in these cases. When I mediate these cases I emphasize my **3-Cs** to make the mediation experience the best it can be. They are: ***Confidentiality***, which allows the parents and other parties to speak as openly as possible to reach some middle ground. Up to this point the parents have had to be guarded with what they say fearing that it will be used against them. Confidentiality assuages that fear and allows them to have more confidence in the negotiations. ***Control***, which keeps the parties engaged in the process. As soon as any party says there will not be an agreement nor can they be more flexible, they lose control. The case is transferred out of the hands of the parties and all control is given to the attorneys and to the person who knows them the least, the Judge. Finally, ***Creativity*** allows the parties to come up with a plan and orders that can assist the children's transition from DCS back to the parents. Up to this point the parents have not seen much creativity, as during the case the parents are told what to do and how to do it and even when to do it.

The Parties are the leading actors in this process. The most important supporting actor in this process is the attorney for the parent. These attorneys must know the law and must not be afraid to take their case to trial. However, I have seen this process derailed and atrocious agreements reached because of the failure of supporting actors in these mediations. I have seen everything from an attorney allowing their client to sign agreements that would be their worst-case scenario at trial to an attorney allowing the parent to reach an agreement that cannot be enforced in the future.

When it is running on all cylinders, the mediation process is a finely tuned machine and there is cause for celebrations. Most times when DCS is in mediation based solely on their opinion, an agreement is reached that helps the children be reunited with the parents or at the very least with family members and the parents having defined access to the children. An agreement in mediation begins the rebuilding of the family and the healing process. In the end, a successful mediation means no one goes to court and continues the process of tearing down these parents, based upon an arbitrary opinion, to get what they want. As the legal community continues to explore the reach and effectiveness of ADR, it is realizing the application of Alternative Dispute Resolution is limitless.

GERIC TIPSWORD was born and raised in Phoenix, Arizona and is of Mexican descent. He is married to Heather, has three children and three grandchildren. Geric is a Combat Veteran and served in the US Army for 11 years. Geric has been practicing family law since 2007 and has been mediating since 2011. Geric is licensed in Arizona and Texas. Geric is a credentialed mediator through the Texas Mediator Credentialing Association.



Changes to AAA Commercial Rules

BY RICHARD MAHRLE

Effective September 1, 2022, the AAA Commercial Rules have been amended. The changes fall into three different categories:

1. **Authorizing what arbitrators have already been doing**
2. **Improving the Expedited Procedures**
3. **Process changes**

(1) What arbitrators have already been doing

The COVID pandemic required that we all become adept at Zoom, Microsoft Teams, or whatever web-based platform you use. To accommodate the needs of the parties, AAA liberally interpreted the rules to allow arbitrators to use technology to facilitate the hearing process. The use of video conferences has now been expressly provided for in the rules.

Rule R-21, which is renumbered R-22, deals with the preliminary hearing. R22(a) adds a provision that in addition to conducting the preliminary hearing in person or by phone, it can also be conducted by video conference.

Former Rule R-24, now R-25, addresses the date, time, and place of the hearing. The revised rule specifies that the method for conducting the hearing can include video, audio, or other electronic means "when appropriate."

Rule R-33, which was R-32, also adds to subpart (c) listing video conferencing and internet communications as allowable during the evidentiary hearing.

Expedited Procedure E-7 is also updated to authorize the use of video conferencing.

(2) Improving the Expedited Procedures

The amended rule increases the upper limit for use of the Expedited Procedures from $75,000 to $100,000. Amended Rule R-1(b).

Expedited Procedure E-5 now prohibits any motion practice in expedited matters absent arbitrator permission based on good cause shown.

New E-5 also limits discovery other than the exchange of exhibits, except as allowed by the arbitrator. Allowing additional discovery may result in the removal of the case from the Expedited Procedures.

Expedited Procedures are now excluded from the emergency measures provisions of old Rule R-38, now R-39.

RICHARD K. MAHRLE, after more than 42 years as a commercial trial attorney, has started the process of transitioning his practice to service as an arbitrator and mediator.

He has been on the employment, construction, and commercial panels for the American Arbitration Association for more than 15 years, serving as both an arbitrator and mediator. He is also a panel member for FINRA. Rick is a member of the National Academy of Distinguished Neutrals and currently serves as a judge pro tem for the Maricopa County Superior Court.

(3) Process changes

The bulk of the amendments are what I would call process changes, and there are a lot. Several of these changes are significant, while others—not so much.

For cases to be considered for the Large, Complex Case Procedures, the starting point is $1,000,000; up from $500,000. Rule R-1(c).

Rule R-2 has been rearranged and expanded. This is the rule that was entitled "AAA Delegation of Duties." It is now "AAA, Delegation of Duties, Conduct of Parties, Administrative Review Council."

What used to be Rule R-2 is now split into Rule R-2(a) and (b).

Rule R-2(c) has been added requiring the parties and their counsel to conduct themselves in accordance with the AAA's Standards of Conduct for Parties and Representatives.

Also added is R-2(d), which applies primarily to Large, Complex matters. It assigns to the Administrative Review Council certain administrative actions such as the appointment or removal of an Arbitrator, decisions on hearing locale, and whether a party has met the administrative requirements to file an arbitration.

New Rule R-8 deals with consolidation and joinder. The new rule is very detailed and sets forth comprehensive procedures to be followed. This may be the most significant addition to the Commercial Rules.

When a consolidation request is made, AAA may either direct the arbitrator in the first filed case to rule on the same, or appoint a consolidation arbitrator to make that decision. R8(a)(vi) provides a list of factors that should be taken into account when deciding whether to consolidate. Those are:

- ***a)*** *the terms and compatibility of the agreements to arbitrate,*
- ***b)*** *applicable law,*
- ***c)*** *the timeliness of the request to consolidate and the progress already made in the arbitrations,*
- ***d)*** *whether the arbitrations raise common issues of law and/or fact, and*
- ***e)*** *whether consolidation of the arbitration would serve the interests of justice and efficiency.*

Joinder is handled under new R-8(b) and is similar to Rule R-7 of the Construction Rules. However, Commercial R-8(b) does not mandate that a separate arbitrator must be appointed to rule of the joinder issue.

A subsection (c) is also added. It addresses what happens when there is joinder or consolidation. It deals with whether previously appointed arbitrators stay on, the process for filling vacancies, and allocation, and where appropriate, reapportionment of arbitrator compensation. These decisions are placed in the hands of the arbitrator.

R-9(d) gives AAA administrative authority related to joinder and consolidation.

Former Rule R-33 dealt with dispositive motions in a general way. It has been renumbered as R-34 and expanded. In addition to the prior language of the rule which is carried over as R-34(a), the arbitrator is also required to consider the time and cost associated with the briefing and disposition of the motion. R-34(b). The arbitrator is also allowed to assess fees and expenses as part of the decision on dispositive motions.

The Emergency Measures of Protection Rule, now Rule R-39, allows the emergency arbitrator to consider whether the request was made in good faith when deciding how to allocate costs.

Another codification (if that is the right word to use for rules) is new Rule 45 which confirms the confidential aspects of arbitration and expressly allows arbitrators to issue orders concerning the confidentiality of arbitration proceedings and related matters such as protecting trade secrets.

I find this new rule particularly interesting because I have handled several arbitrations where both parties have attached rulings from other arbitrators on the same legal issue I was being asked to decide. I even became aware that one of my awards had been submitted in parallel court proceedings. I found this disconcerting. An order requiring confidentiality for these rulings might have been helpful.

This next change is not exactly earth shattering, but renumbered Rule R-48 addressing Form of Award allows electronic signatures.

Renumbered R-52, however, I think is an invitation for mischief. It allows parties to request the arbitrator to "interpret" the award. Former Rule R-50 allowed a party to request that clerical or computational errors to be corrected. The rule, as amended, still says the arbitrator is not empowered to re-determine the merits, but there can be a fine line between interpret and re-determine. We shall see how this works out.

A new preliminary hearing procedure, P-2(vi), recommends a discussion of cyber security and privacy issues at the preliminary hearing.

Also adding to the preliminary hearing checklist is disclosures about third-party funding.

Odds and Ends

There are only a few other changes of interest.

Renumbered Rule R-40 extends the deadline to close the hearing for up to seven days after receipt of post-hearing submissions. This is to allow the arbitrator to determine if more submissions are needed before the clock starts to run on completing the Award.

Former Rule R-57(a), renumbered as R-59(a), is intended to provide clarification of options for non-payment by a party. It adds that the non-paying party may be precluded from filing any motions.

I wish AAA had done more with this rule. It irks me no end when a Respondent, who may owe money to the Claimant, refuses to pay its deposits in the hope that the arbitration will be suspended. Justice delayed can be justice denied. I have taken a principled stand that even if a Respondent has not paid, I will go forward with the arbitration even if my fee will be cut in half. The Rule does allow the arbitrator to limit the non-paying party's participation, but subpart (b) states that a party cannot be precluded from defending a claim or counterclaim. That can be a delicate balance. Some type of default award penalty might be more effective.

Conclusion

AAA has done a commendable job in updated the Commercial Rules. We have to hope that there are positive changes in their application.