

DELAWARE STATE BAR ASSOCIATION

CONTINUING LEGAL EDUCATION

Solo / Small Firms and ADR Conference 2024

May 17, 2024, 10:30AM – 4:30PM

Live at the Wilmington Blue Rocks Stadium



Seminar Materials



**Sponsored by the Alternative Dispute Resolution Section and the Small
Firms & Solo Practitioners Section of the Delaware State Bar
Association**

**5.5 Hours of CLE Credit including 3.5 Hours of Enhanced Ethics Credit for
Delaware and Pennsylvania Attorneys**

Visit www.dsba.org/cle or all the DSBA CLE seminar policies. Please note that the attached materials are supplied by the speakers and presenters and are current as of the date of this posting.

DELAWARE STATE BAR ASSOCIATION

10:00 a.m. – 10:30 a.m.
Registration and Breakfast

10:30 a.m. – 11:30 a.m.

Panel 1
The Law Office, ADR and Related Ethical Issues

David A. White, Esquire
Office of Disciplinary Counsel

Bayard J. Snyder, Esquire
Snyder & Associates, P.A

Jessica L. Tyler, Esquire
Office of Disciplinary Counsel

Bernard G. Conaway, Esquire
Conaway Legal LLC

11:30 a.m. – 12:30 p.m.

Panel 2
Lunch and Learn
A Solo/Small Firm's Guide to AI Powered Efficiency and Automation

Kate Bell
Clio – Cloud Based Legal Technology

Visit www.dsba.org/cle or all the DSBA CLE seminar policies. Please note that the attached materials are supplied by the speakers and presenters and are current as of the date of this posting.

12:30 p.m. – 1:30 p.m.

Panel 3

Understanding the Mediator's Toolbox and Using it to Resolve Your Tough Case

Speakers:

Laura Forsythe Browning, Esquire
Browning ADR, LLC

Bernard G. Conaway, Esquire
Conaway Legal LLC

Kevin Fasic, Esquire
Offit Kurman P.A.

Richmond L. Williams, Esquire
Manko, Gold, Katcher & Fox LLP

1:30 p.m. – 2:30 p.m.

Panel 4

New Norms for Today's Lawyer

Speakers:

David Thomas Crumplar, Esquire
Jacobs & Crumplar, P.A.

Jimmy Chong, Esquire
Chong Law Firm, P.A.

Bernard G. Conaway, Esquire
Conaway Legal LLC

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DELAWARE STATE BAR ASSOCIATION

2:30 p.m. – 2:45 p.m.

Break

2:45 p.m. – 3:30 p.m.

Panel 5

Don't Forget About the Corporate Transparency Act Requirements!

Adam Hiller, Esquire

Hiller Law, LLC

3:30 p.m. – 4:30 p.m.

Panel 6

Crafting Ironclad Arbitration Awards: Strategies to Prevent Vacatur and Ensure Enforcement

Brian M. Gottesman, Esquire

Gabell Beaver LLC

Suzanne Hill Holly, Esquire

Gabell Beaver LLC

Eric W. Wiechmann

Wiechmann ADR

4:30 p.m. – 4:45 p.m.

Presentation of the Kimmel-Thynge Award

4:45 p.m. – 5:45 p.m.

Happy Hour with complimentary refreshments and food

5:45 p.m.

Stadium Gates Open to the Public

6:35 p.m.

Game Starts – Go Blue Rocks!

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Panel 1

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Conaway Legal LLC

David A. White
Chief Disciplinary Counsel, Office of Disciplinary Counsel,
Delaware Supreme Court

Mr. White is a frequent speaker/moderator in the areas of legal ethics and Alternative Dispute Resolution. In March 2021, the Delaware Supreme Court appointed Mr. White Chief Disciplinary Counsel of the Office of Disciplinary Counsel (“ODC”), and Arm of the Court.

The ODC, which functions as an educational and professional resource for members of the Delaware bar, receives, evaluates, investigates, and when necessary, prosecutes complaints of lawyer misconduct and the unauthorized practice of law. The Office also recommends sanctions for attorney misconduct to the Board on Professional Responsibility and the Court.

Previously, Mr. White was in private practice and was the office managing partner in the Wilmington, Delaware office of McCarter & English, LLP. There, he was a member of the firm’s business litigation, products liability, and bankruptcy practice groups. A substantial portion of his practice was devoted to ADR and representing lenders in the areas of commercial loan workouts, commercial litigation, commercial real estate, and related bankruptcy issues.

Mr. White was a Superior Court Commissioner from 2001-2008 and for several years he taught a civil litigation course for the University of Delaware, Division of Professional and Continuing Studies, where he was awarded Excellence in Teaching awards in 2007 and 2008.

Mr. White has served on the Executive Committee of the Delaware State Bar Association for many years and he is also an Honorary/Volunteer member of the Professional Guidance Committee.

Education:

Widener University School of Law, J.D 1986

University of Delaware, B.A. 1982

JESSICA L. TYLER

Jessica Tyler is currently Deputy Disciplinary Counsel for the Supreme Court of the State of Delaware. Prior to that appointment, Ms. Tyler spent 10 years in private practice where she represented individuals and businesses in the defense of civil litigation involving automobile accidents, premises liability, general liability, and products liability. Prior to private practice, Ms. Tyler served as a judicial law clerk for Judges Buckworth and Conner in the Family Court of the State of Delaware. She previously was a member of the Delaware Civil Clinic where she worked with Delaware Volunteer Legal Services to assist clients with obtaining Protection from Abuse Orders and custody of their children. Ms. Tyler also interned with the Camden County Prosecutor's Office and the Pennsylvania Attorney General's Office, Bureau of Consumer Protection. Ms. Tyler is a graduate of Arcadia University and Delaware Law School.

BERNARD G. CONAWAY is the founding member of Conaway-Legal LLC. Over the course of his 33-year career he's served as a law clerk to former Clarence Taylor, of the Superior Court of Delaware, served for 10 years on the Superior Court of Delaware as a Special Master in Complex Litigation, and been a partner in very large and small boutique law firms.

His practice focuses on ADR, commercial bankruptcy, practice before the Delaware Court of Chancery, and complex civil litigation. Mr. Conaway has been involved in every facet of complex civil litigation serving a lead and local counsel, as Special Master, as a mediator and party selected arbitrator.

Since 1994, Mr. Conaway served as an arbitrator and mediator. Since then, he has successfully mediated thousands of cases, including hundreds of large complex, multi-party, multi-level commercial contract, insurance, construction, bankruptcy, environmental, labor, and commercial cases. He has mediated law firm break-ups, intra-company disputes, mass torts, governance and financial disputes between alternate entity members. Mr. Conaway has served for over sixteen years as a mentor in the Delaware Superior Court's mediation training program. He formerly served as adjunct instructor at the National Judicial College in Reno, Nevada teaching civil mediation.

Mr. Conaway volunteers his time to a number of boards and committees. Over the past eighteen years he has served on numerous board and committees including the Widener University School of Law Alumni Association (board member), the York College of Pennsylvania Collegiate Counsel (board member), St. Thomas More Society of the Archdiocese of Wilmington (past president), Caesar Rodney Rotary Club (member), Colin J. Seitz Bankruptcy Inn of Court (barrister) Wilmington, Richard S. Rodney Inn of Court (Executive Committee) Wilmington, and Superior Court Committee on Complex Litigation (member). He serves as a volunteer attorney *Guardian Ad Litem* for Delaware children and has continuously done so since 2003.

Contact information: Bernard G. Conaway, Esquire
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Panel 2

A Solo/Small Firm's Guide to AI Powered Efficiency and Automation

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Clio – Cloud Based Legal Technology

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Manko, Gold, Katcher & Fox LLP



LAURA FORSYTHE BROWNING, ESQ.:

Ms. Browning is the principal owner of Browning ADR, LLC located in Henderson, Texas. Browning ADR, LLC, an Alternative Dispute Resolution (“ADR”) Firm located in Texas that is dedicated solely to providing premier mediation and arbitration services to clients throughout Texas and Delaware. Ms. Browning serves as a full-time mediator and arbitrator.

EDUCATION/ADMISSIONS: Ms. Browning received her J.D. from South Texas College of Law in 2003, and her B.A. from Louisiana State University in 2000. She is a licensed attorney in Delaware (2004) and Texas (2008).

LEGAL WORK: Prior to her ADR practice, she practiced as an associate attorney with the law firm of Grady & Hampton, LLC (2003-2007), in Dover, Delaware. In private practice, her work focused on employment law, civil rights, personal injury, and family law matters. Later, she served as a Deputy Attorney General with the Department of Justice for the State of Delaware in the Criminal Division in Sussex County (2010-2013). Her practice included prosecuting misdemeanor crimes, felony insurance fraud cases, cyber-crimes, financial embezzlements, and DUI. As an adjunct professor, Ms. Browning taught property law and legal research at Wesley College in Dover, Delaware from (2006-2007).

ADR WORK: In 2014, her spouse, who served in the United States Air Force as a pilot, was stationed at Laughlin Air Force Base in Del Rio, Texas. Shortly after arriving in Del Rio, Ms. Browning saw a need for mediation in the area. In 2015, after she completed the University of Houston Law Center-Mediation Program, she began mediating cases along the border counties in West Texas. Since 2016, Ms. Browning has completed over 200 hours of advanced mediator & arbitration training. Today via Zoom, Ms. Browning mediates cases throughout the entire State of Texas from Houston to Abilene. She also arbitrates medical billing disputes as a panelist for the Texas Department of Insurance and arbitrates property tax cases as appointed by the State of Texas Comptroller. Since 2021, she has arbitrated over 600 Texas medical billing cases and over 25 medical healthcare billing cases in Virginia.

MEMBERSHIPS: Ms. Browning is a current member of the Association of Attorney Mediators, the ADR Section of State Bar of Texas, the ADR Section of the Delaware State Bar Association (Section Chair 2021 to 2022), the American Bar Association-ADR Section (member with both the ABA mediation committee and ABA Women in Dispute Resolution Committee). In 2020, she reached the status of credentialed mediator with the Texas Mediator Credentialing Association.

Since the Pandemic, Ms. Browning’s mediation practice is conducted *only* via the Zoom platform. Ms. Browning primarily only mediates cases in which parties are represented by counsel. In 2020, she completed the Delaware Superior Court Mediator Training and the Delaware Family Court Mediation Training. In 2022, she completed the DSBA Superior Court training for commercial arbitrators.

CONTACT INFO: **BROWNING ADR, LLC**
 BROWNINGMEDIATION@OUTLOOK.COM
 P.O. BOX 2046
 HENDERSON, TEXAS 75653



PRACTICE FOCUS

Kevin Fasic is the Managing Principal of Offit Kurman's Wilmington office. With over 25 years of legal experience in employment and construction law, Kevin's practice is primarily management-based and includes discrimination claims, wage and hour issues, Davis Bacon/ Prevailing Wage claims, employment agreements (including restrictive covenant issues and severance agreements), hiring and firing guidance, unemployment claims, mechanics' lien claims, general construction disputes and legislative affairs. As a former investigator for the Delaware Department of Labor, Kevin's experience informs his approach as he appears before various administrative boards, agencies and private dispute resolution forums.

Additionally, Kevin has extensive experience practicing before all of Delaware's state and federal trial and appellate courts. He is also certified by the Delaware Superior Court as both a Mediator and an Arbitrator that can serve in either capacity for labor and employment and construction law disputes.

With a growing reputation as an engaging legal thought leader, Kevin frequently speaks on employment and construction law topics for various professional and trade organizations. He also publishes articles for these organizations on various employment law topics and recent developments in the law.

Kevin is also active in legislative affairs for various business groups and trade associations and a frequent advocate for their interests before the Delaware General Assembly and other legislative forums.

RECOGNITIONS

- Top Lawyer – Labor and Employment Law and Construction Law, Delaware Today
- Associate/Supplier Member of the Year, Associated Builders and Contractors – Delaware Chapter, 2014

EDUCATION

- Widener University School of Law, J.D.
- Lehigh University, B.A.

ADMISSIONS

- Delaware
- New Jersey
- Pennsylvania
- United States District Court for the District of Delaware
- United States District Court for the District of New Jersey
- United States District Court for the Eastern District of Pennsylvania
- United States Court of Appeals for the Third Circuit
- United States Supreme Court

G. KEVIN FASIC

Managing Principal,
Wilmington

PRACTICE AREAS

- Alternative Dispute Resolution
- Construction Law
- Labor and Employment Law
- Restrictive Covenants and Trade Secret Protection

PROFESSIONAL AFFILIATIONS

- Delaware State Bar Association, Labor and Employment Section, 1997-Present, Chair 2003-2004, Secretary 2002-2003
- Delaware State Chamber of Commerce, Employer Advocacy and Education Committee, 2000-Present, Co-Chair, 2003-2013
- Associated Builders and Contractors – Delaware Chapter Legislative & Legal Affairs Committee, 2007- Present
- Delaware State Chamber of Commerce, Board of Managers – Small Business Alliance, 2008-Present, Co-Chair 2016-2017
- Delaware State Chamber of Commerce, Board of Governors, 2014-Present
- Delaware State Chamber of Commerce, Joint Military Affairs Committee, 2015-Present, Chair 2020-2021
- Delaware State Bar Association,

Alternative Dispute Resolution
Section, 2018-Present

- New Castle County Chamber of
Commerce, Government Affairs
Committee, 2018-Present
- Delaware Contractor’s Association
(AGC Affiliate), Government
Affairs Committee, 2020-Present
- Associated Builders and
Contractors, National Legislative
Committee, 2014-2020
- Associated Builders and
Contractors – Delaware Chapter,
Board of Directors, 2009-2014





Richmond L. Williams, Esq:

Mr. Williams is Senior Counsel at Manko, Gold, Katcher, Fox LLP, an environmental, energy, litigation, safety and land use law firm. His practice areas include ADR Services, Corporate and Commercial Transactions, Site Development and Brownfields Redevelopment and Superfund and Site Remediation.

Prior to joining Manko Gold, Mr. Williams served as in-house counsel for a major specialty chemicals company for more than three decades. His practice included real estate and corporate transactions, corporate governance, commercial matters, defense of environmental enforcement actions and regulatory counseling. He has extensive experience negotiating complex environmental transactions as well as resolving complex environmental and commercial claims. He acted as an advocate in many ADR proceedings, including contractually mandated and court ordered ADR.

Mr. Williams is a certified Superior Court Mediator.



The background of the slide is a close-up photograph of a wooden surface with a prominent, wavy grain pattern. The wood is a warm, golden-brown color. A dark blue-grey rectangular area is overlaid on the right side of the image, containing the text.

Understanding the Mediator's Toolbox

...and using it to resolve your next tough case.

By:

Laura Forsythe Browning, Esq.

Bernard G. Conaway, Esq.

Richmond Williams, Esq.

G. Kevin Fasic, Esq.

Presenters



LAURA FORSYTHE BROWNING,
ESQ.

Browning ADR LLC



BERNARD G. CONAWAY,
ESQ.

Conaway Legal LLC



G. KEVIN FASIC, ESQ.

Offit Kurman



RICHMOND WILLIAMS, ESQ.

Manko Gold Katcher Fox



Introduction

We will discuss the tools that a mediator brings to resolve a case and how to apply these different tools in some of the most difficult cases.



What is Mediation

Mediation is the:

- 1) process in which
- 2) an impartial third party (the mediator)
- 3) facilitates communication and negotiations and
- 4) promotes voluntary decision making by the parties of the dispute.

(ABA Model Standards of Conduct for Mediators, Preamble)

Facilitated Negotiation

Helps Deescalate Tensions

Helps participants

- Identify relevant issues

- Clarify issues

- Address relevant issues

Facilitates communications among participants

Helps find common ground



Facilitative v. Evaluative

- What kind of mediation does your client need?
- Do the parties want to continue a relationship or just looking for a number?
- A mediator may use different tools depending on the mediation.

Facilitative:

A facilitative mediator guides the parties' conversation and discussion of issues that are important to them, without providing an opinion or judgment regarding the merit of the claims or the likely judicial outcome. The mediator can assist the parties in assessing the strengths and weaknesses of their case. The mediator will not tell the parties what to do or suggest a particular outcome

Facilitative Mediation

Evaluative

Evaluative mediation is generally understood to be a process which may include an assessment by the mediator of the strengths and weaknesses of the parties' cases and a prediction of the likely outcome of the case.

Evaluative Mediation

Selecting a Mediator

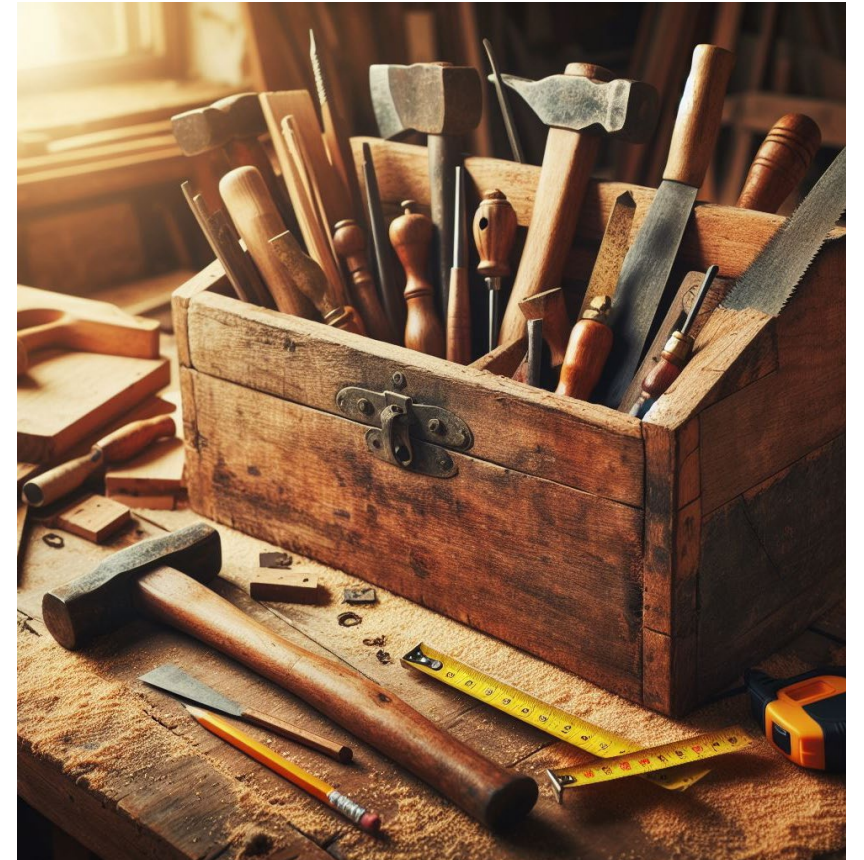


Issues Preventing Settlement

- 1) Unrealistic expectations creating a gap between the parties' settlement terms – this can be about the nature of the matter, the process, potential outcomes
- 2) Lack of Information
- 3) Lack of perspective/experience/necessary skills (covers both issue identification and identification and evaluation of possible solutions)
- 4) Emotional issues
- 5) Communication styles
- 6) Negotiation styles
- 7) Relationship/lack of relationship

The Toolbox

- Reality Testing
- Managing Emotion/Venting
- Mediator's Proposal
- Visual Aids/Flow Charting/Bracketing/AI
- Timeouts
- Patience/Positivity/Perseverance
- Neutrality
- Information
- Creativity
- Impasse



SO YOU WANT TO GO TO TRIAL...



LET'S TALK ABOUT THAT



Reality Testing

- Evidence: How will certain evidence be perceived by a jury or judge? Is evidence admissible?
- Testimony: Is the client ready and/or willing to testify?
- What is a win/acceptable outcome for the client?
- Can the outcome they want be achieved at trial?
- How much money/time are they willing to spend to get that win?
- Do they understand the process ahead?

Tell the other side
I'm going to trial!!!

Mediator



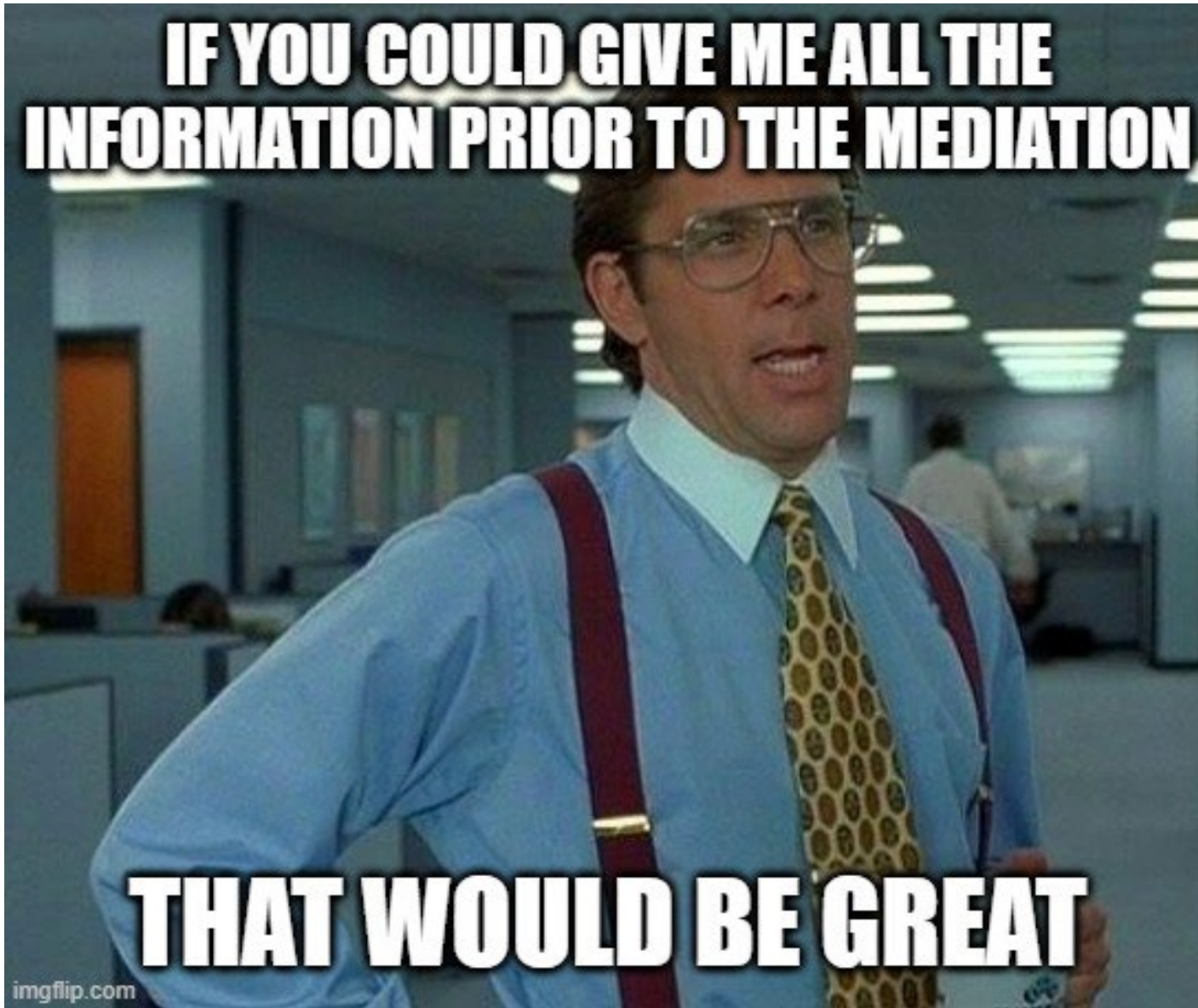
Venting

Managing Emotions

- Listening and Acknowledgment
- Venting
- Maintaining and Expressing Neutrality



**IF YOU COULD GIVE ME ALL THE
INFORMATION PRIOR TO THE MEDIATION**



Information

Information

- What information has been/should be provided to mediator prior to the mediation?
- Should discovery be provided to mediator?
- Pre-mediation teleconference.
 1. What is this Mediator's process?
 2. What are the client's goals/personalities?
 3. Are there information gaps that are going to preclude to getting it done?

Bracketing/Charting/Visual Aids

Example: Using color codes for negotiations

Offer: 3rd Wife to Husband Time: 2:13

Date:

1. **Divorce:** Cruelty. No Fault.
2. **Conservatorship:** SMC/PC
 - a. Appoint Mother Sole Managing Conservator of the children with all the exclusive rights and duties of a parent SMC. Agreed.
 - b. Father appointed Possessory Conservator. (Will still have right to information of everything per Texas Family Code.) Agreed, but will maintain all rights and duties as provided for under the Texas Family Code.
 - c. Both parties prohibited from using any form of physical discipline with the children (No corporal punishment). Agree.
 - d. Father shall abstain from the consumption of alcohol or any controlled substance within the twelve hours before and during the period of access to the children. Agree, but must be mutual. *Mother Agrees.*
1. **Visitation:** Modified Possession Schedule for Father.
 - a. Public Exchanges: All exchanges at McDonalds where it currently is.
 - b. Mother no longer want to be a part of the exchange. Can her mother make the exchange? *Mother's mother will make the exchanges at McDonalds.*
 - c. Father's Father shall be the person through whom messages are relayed while the protective order is in effect, (order expires on Dec. 1, 2020). Upon the expiration of the protective order, both parents must download Our Family Wizard within 7 days and parties will only communicate via Our Family Wizard. Our Family Wizard now. The parents do not want to be part of the communication process. Both parties are obligated to update Family Wizard with 7 days of events that either parent required to notify other parent, such as, but not limited to Doctor Visits, School Functions, Extracurricular Activities, and pertain school assignments. *Agreed.*

		Plaintiff	Risk Adjusted	Defendant	Risk Adjusted
Legal Issues	Misrepresentation	60%	70% average	25%	32.5%
	Mutual Mistake	80%		40%	
Damages	Repair of Foundation	\$75K		\$25K	
	Rental	\$15K		\$7K	
	Cosmetic Damage	\$15K		\$6K	
	Meals	\$6K		\$3K	
	Lost Income	\$25K		\$25K	
		\$136K	\$95	(\$66K)	(\$21)
Litigation Cost	Attorneys' fees	\$100K		\$100K	
	Experts	\$50K		\$50K	
		(\$150K)	(\$150K)	(\$150)	(\$150)
		(\$14K)	(\$55)	(\$216)	(\$171)

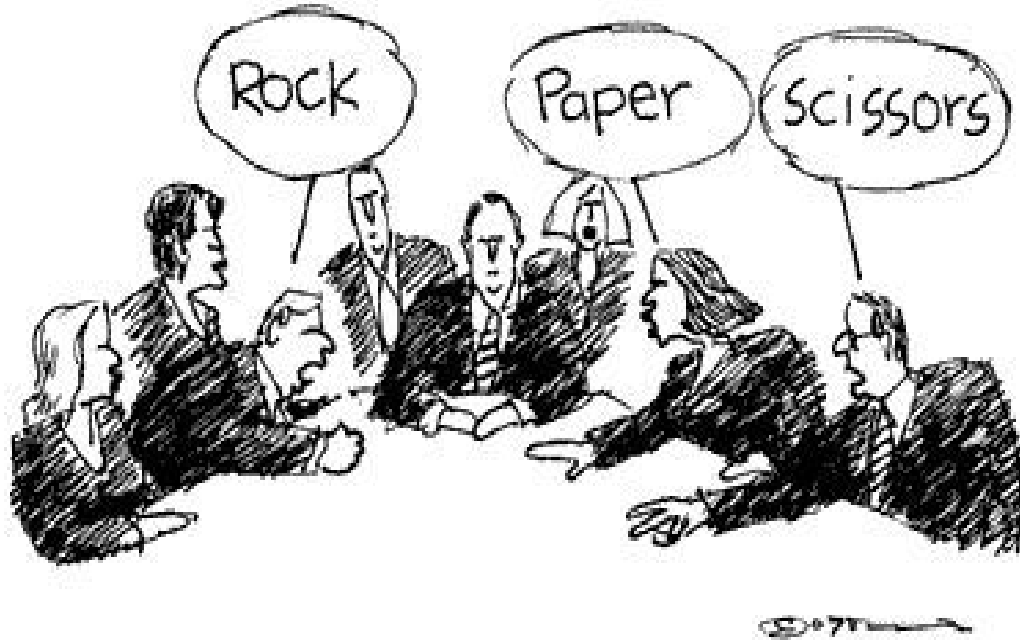
AI & Ethical Considerations



Neutrality

Probably the most important tool a mediator has is neutrality. It allows the mediator to gain the trust of the parties and assist the mediator in facilitating a settlement.





Jameson, the mediator, uses his last remaining negotiating tool in an effort to break the stalemate.

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The Tool of Last Resort

Mediator's Proposal

A mediator's proposal is a settlement proposal that the mediator makes to all parties, and each party is requested to accept or reject it, on the exact terms proposed, in a confidential communication to the mediator. It calls for either an unconditional “yes” or “no” response, without modification, and the mediator is not permitted to disclose the responses that he or she receives unless both responses are “yes.” Thus, if one party says “yes” and the other party says “no,” the one who said “yes” will not be prejudiced if settlement negotiations (or subsequent mediations) occur at a later stage of the litigation.

Credited: A Mediator's Proposal – Whether, When, and How It Should Be Used - Mediate.com by Stephen A. Hochman, 2016

MEDIATION SCENARIOS

A DECISION IS NEEDED

Family Law Cases: A custody case. One parent is moving out of state making weekly overnight visits impossible. Both parties are great parents and neither parent wants to give up time with the child. This is common in federal/military base communities.

Tools: Creativity & Reality Testing

1. **Creativity**—Can we add more visitation time during breaks from school? Can the moving parent pay for travel? Schedule more videochat time? Can the moving parent limit time of move to assure the other parent?
2. **Reality Testing**—Are you willing to lose at trial? Discuss possibility of longer visitation times? Why do you think you will be successful at trial? How will a trial impact your child and relationship with the other parent (Applies to any custody case)?

A DECISION IS NEEDED

Commercial Cases:

- 1) Valuation Issue
- 2) Witness Credibility—Issues of he said/she said.
- 3) What is legal issue and how does it impact the outcome.

Tools:

1. Reality Testing
2. Evaluative Mediator or Expert in Field
3. Mediator's Proposal

REPUTATION AT STAKE

A party has a vested interest to preserve its reputation and is of the conviction that a favorable ruling is the only way to preserve that reputation. The integrity of their reputation holds precedence over any financial compensation paid to the other party.

Tools:

1. **Creativity:** Can a nondisclosure or public statement provide the same as a decision?
 2. **Reality Testing:** What happens to reputation if they have a bad day in court?
 3. **Venting/Patience:** Allowing the party to vent about the situation.
 4. **Information:** Is there information that this party does not know and needs to be relayed?
-

THE BULLY

The Bully....we all know them...we all have cases with them, and sometimes they are even the client (with unrealistic expectations).

Tools:

1. Neutrality
2. Patience/Positivity/ Preseverance
3. Reality Testing
4. Venting
5. Mediator's Proposal
6. Call their Bluff

THE GAMBLER

Wants to see how it plays out and can afford to do so.

Tools:

1. Information: How deep are the pockets...really? How committed the legal staff?
2. Patience/Positivity/ Perseverance:
3. Reality Testing

THE IMPASSE

The glass has been broken and the impasse called. Suddenly parties move/realign, and the case may open to settlement. (i.e. The Parking Lot Settlement)

Note: Some parties/attorneys will let the bill increase and will not move until they know the mediation is over. Suddenly the last offer is “something we may work with.”

NOT TODAY...MAYBE LATER

When the mediator recognizes that parties are not ready to settle, a mediator may assist in other ways to aid the parties through the litigation process.

Address why the case is not settling that day:

- 1) **Discovery**—Can you help with a discovery exchange or schedule?
- 2) **Valuation needed** (Company, Real Estate, Stock, Injury)—Can you get the parties to agree on expert or date/cost of reports.
- 3) **Missing Party or Stakeholder**—How do we schedule them for a reconvene?
- 4) **Reconvene Date**—Parties just aren't “there” yet, but can we schedule a reconvene?

Ethically Speaking.....

WHAT DID YOU SAY?!



Contact Us



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ESQ.



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RICHMOND WILLIAMS, ESQ.



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Panel 4

New Norms for Today's Lawyer

Speakers:

David Thomas Crumplar, Esquire
Jacobs & Crumplar, P.A.

Jimmy Chong, Esquire
Chong Law Firm, P.A.

Bernard G. Conaway, Esquire
Conaway Legal LLC

Jimmy is the founder and owner of the Chong Law Firm, P.A. with offices in Wilmington, DE, Lansdale, PA and Philadelphia, PA. He is licensed to practice law in state courts in DE, PA and NJ and federal courts in DE, Eastern District of PA and Washington D.C. His practice concentrates on Plaintiff Personal Injury cases but he has handled criminal, contract, estate and patent infringement legal issues throughout his career.

He is certified as a Mediator and Arbitrator by the Superior Court of New Castle County, Chair of the Small Firm and Solo Section of the Delaware State Bar Association, Hearing Committee Member of the Pennsylvania Supreme Court's Disciplinary Board, Member of the Delaware Trial Lawyers Association, Delegate for Zone 9 of the Pennsylvania Bar Association's House of Delegates, and volunteers as a Mediator for Philadelphia's Eviction Diversion Program.

He was elected to his township's Board of Supervisors in 2023 for a six year term, and he is on the Workforce Development Board of Directors for Montgomery County, PA. He is also on the Board of Directors for the Montgomery County Community College Foundation, Korean American Association of Greater Philadelphia, Sparking the Dream Initiative, Coalition for Racial Equity and Social Justice, and the Montgomery Bar Association.

Jimmy was born and raised in Delaware and is a first generation college graduate. He is also the first and only attorney in his family. He earned a B.S. in Business Management and B.A. in Economics from Bucknell University, a Juris Doctorate from Delaware Law School and Estate Planning Certificate through the LLM Graduate Tax Program at Temple University Beasley School of Law. He is the son of immigrants and is married with three children.

Panel 5

Don't Forget About the Corporate Transparency Act Requirements!

Adam Hiller, Esquire
Hiller Law, LLC

Adam Hiller, Esquire
Hiller Law LLC

Adam has been a commercial bankruptcy lawyer for the entirety of his career dating back to 1998. He earned his B.A. with honors from Claremont McKenna College and his J.D. from the University of Maryland School of Law (n/k/a Maryland Carey Law) in 1997. Adam began his legal career as a law clerk to the Honorable E. Stephen Derby, a judge (now on senior status) for the United States Bankruptcy Court for the District of Maryland, and he has focused his practice on bankruptcy and insolvency matters throughout his career. Mr. Hiller has been a member of numerous legal organizations, including the American Bankruptcy Institute, the Delaware State Bar Association (including its Small Firms and Solo Practitioners Section), the Delaware Bankruptcy American Inn of Court, and the Bankruptcy Bar Association of Maryland. Adam has been a solo practitioner since 2019, with an office in Wilmington.

Over the years Adam has been involved in presentations for DSBA on many occasions, including presenting at Fundamentals of Civil Litigation and moderating a panel on the ethics of attorney fee agreements. He is also regularly involved in creating and directing video CLE and other presentations for the Delaware Bankruptcy American Inn of Court.

In addition to his legal work, Adam is an active participant in Profundo Bono, a self-declared elite theatrical group of actors, musicians, dancers, and one puppeteer (Adam)—composed entirely of Delaware judges, lawyers, and legal professionals—that produces musical comedy theater to raise funds to support the groups who provide legal services to the impoverished of Delaware.

Panel 6

Crafting Ironclad Arbitration Awards: Strategies to Prevent Vacatur and Ensure Enforcement

=====

Speakers:

Brian M. Gottesman, Esquire
Gabell Beaver LLC

Suzanne Hill Holly, Esquire
Gabell Beaver LLC

Eric W. Wiechmann
Wiechmann ADR

CRAFTING IRONCLAD ARBITRATION AWARDS:

STRATEGIES TO PREVENT VACATUR AND ENSURE
ENFORCEMENT

Grounds for Vacatur

- Statutory grounds: The Federal Arbitration Act, and the Delaware Uniform Arbitration Act
- Additional grounds

The Federal Arbitration Act, 9 U.S.C. § 10

- Where the award was procured by corruption, fraud, or undue means
- Where there was evident partiality or corruption in the arbitrators, or either of them
- Where the arbitrators were guilty of misconduct in refusing to postpone the hearing, upon sufficient cause shown, or in refusing to hear evidence pertinent and material to the controversy; or of any other misbehavior by which the rights of any party have been prejudiced.
- Where the arbitrators exceeded their powers, or so imperfectly executed them that a mutual, final, and definite award upon the subject matter submitted was not made.

The Delaware Uniform Arbitration Act, 10 Del. C. § 5714

- The award was procured by corruption, fraud or other undue means;
- There was evident partiality by an arbitrator appointed as a neutral except where the award was by confession, or corruption in any of the arbitrators or misconduct prejudicing the rights of any party;
- The arbitrators exceeded their powers, or so imperfectly executed them that a final and definite award upon the subject matter submitted was not made;
- The arbitrators refused to postpone the hearing upon sufficient cause being shown therefor, or refused to hear evidence material to the controversy, or otherwise so conducted the hearing, contrary to the provisions of § 5706 of this title, or failed to follow the procedures set forth in this chapter, so as to prejudice substantially the rights of a party, unless the party applying to vacate the award continued with the arbitration with notice of the defect and without objection; or
- There was no valid arbitration agreement, or the agreement to arbitrate had not been complied with, or the arbitrated claim was barred by limitation and the party applying to vacate the award did not participate in the arbitration hearing without raising the objection.

Statutory Grounds for Vacatur

- Does the FAA or DUAA apply?
- The FAA applies to actions to vacate or enforce arbitration awards unless the contract agreeing to arbitration explicitly states that the DUAA is to apply. 10 Del. C. § 5702(c).
- See also *Erving v. ABG Intermediate Holdings 2, LLC*, 2022 Del. Ch. LEXIS 339, 6 (Del. Ch. Sept. 6, 2022)

Award procured by corruption, fraud, or undue means

- Challenger on the basis of fraud must show: (1) there is clear and convincing evidence that there was fraud at the arbitration; (2) the fraud was not discoverable with reasonable diligence before or during the arbitration; and (3) the fraud was materially related to an issue in the arbitration.
- *France v. Bernstein*, 43 F.4th 367, 378 (3d Cir. 2022) (finding that test was met when party lied about the existence of documents and other crucial facts at arbitration hearing, challenging party issued but did not enforce third party subpoenas to discover the evidence a party stated did not exist, and the perjured testimony was relevant to the arbitrator's findings).
- *Int'l Bhd. of Teamsters, Local 519 v. UPS*, 335 F.3d 497 (6th Cir. 2003) (finding that materiality was met with respect to testimony from an investigator of the workplace altercation that led to the complainant's discharge and was a central factual issue at arbitration).

Evident partiality or corruption in the arbitrators

- Challenger must show that the arbitrator failed to disclose a substantial relationship that a reasonable person would conclude was suggestive of bias.

Evident partiality or corruption in the arbitrators

- *Beebe Med. Ctr. V. Insight Health Servs. Corp.*, 751 A.2d 426, 434-35 (Del. Ch. Nov. 4, 1999) (vacating an arbitration award because one arbitrator was represented in a separate matter by an attorney appearing on behalf of a party in the arbitration).
- *Del. Transit Corp. v. Amalgamated Transit Union Local 842*, 34 A.3d 1064, 1072 (Del. 2011) (citations omitted) (arbitrator's undisclosed life experience does not constitute a substantial relationship that a reasonable person would conclude was suggestive of bias.)
- *Affordable Care, L.L.C. v. McIntyre*, 2023 U.S. App. LEXIS 12837, *3-6 (5th Cir. May 24, 2023) (arbitrator and attorney's connections with Duke University School of Law were not substantial relationship that a reasonable person would conclude was suggestive of bias).
- *Goldmann Sachs Trust Co. v. J.P. Morgan Sec., LLC*, 2024 U.S. App. LEXIS 2707, *1-3 (refusing to vacate on grounds of evident partiality when arbitrator's lawsuit against a party's new employer was trivial and irrelevant to the proceedings).
- *Commonwealth Coatings Corp. v. Continental Casualty Co.*, 393 U.S. 145 (1968) (arbitrator's periodic retention as an engineering consultant for one party was a substantial relationship that a reasonable person would conclude was suggestive of bias)
- *Applied Indus. Materials Corp. v. Ovalar Makine Ticaret Ve Sanayi, A.S.*, 492 F.3d 132 (2d Cir. 2007) (when an arbitrator knows of a potential conflict, a failure to either investigate or disclose an intention not to investigate is indicative of evident partiality).
- *Morelite Constr. Corp. v. New York City Dist. Council Carpenters Ben. Funds*, 748 F.2d 79 (2d Cir. 1984) (Father-son relationship between an arbitrator and an officer of one party is substantial relationship that a reasonable person would conclude was suggestive of bias).

Misconduct in refusing to postpone the hearing, upon sufficient cause shown, or in refusing to hear evidence pertinent and material to the controversy; or of any other misbehavior by which the rights of any party have been prejudiced

- **Refusal to postpone hearing:** Challenger must show that the “misconduct” affected its rights to the extent that it was deprived of a fair hearing.
- *E. Atl. States Reg'l Council of Carpenters v. Sage Constr. Sols., LLC*, 2024 U.S. Dist. LEXIS 38631 (D.N.J. Mar. 5, 2024) (denying request to vacate when party seeking vacatur sought to delay the arbitration hearing and that request was refused by the arbitrator).
- *Goldman Sachs Trust Co., N.A. v. J.P. Morgan Sec., LLC*, 2024 U.S. App. LEXIS 2707, *17-19 (11th Cir. Feb. 6, 2024) (party seeking to vacate arbitration must show that there was no reasonable basis for denial of postponement and the denial prejudiced the rights of the parties and denied them a fair hearing).

Misconduct in refusing to postpone the hearing, upon sufficient cause shown, or in refusing to hear evidence pertinent and material to the controversy; or of any other misbehavior by which the rights of any party have been prejudiced

- **Refusal to hear evidence:** Challenger must show that the exclusion of evidence rendered the proceedings fundamentally unfair.
- *LJL 33rd St. Assocs., LLC v. Pitcairn Props.*, 725 F.3d 184, 193-95 (2d Cir. 2013) (holding that an arbitrator's exclusion of four exhibits as hearsay did not render proceedings fundamentally unfair in part because the party seeking to introduce it could have called witnesses or presented first-hand testimony, and arbitrators have substantial discretion to admit or exclude evidence).
- *Lindsey v. Travelers Commer. Ins. Co.*, 2023 U.S. App. LEXIS 32911, *2 (9th Cir. Dec. 13, 2023) (affirming vacatur on the grounds that arbitrator first denied discovery of a particular type of evidence, but then relied on the lack of that evidence in granting summary judgment).

Arbitrators
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- **Exceeded authority:** A challenger must show that the arbitrator in some way exceeded the scope of authority.
- **What is the scope of the arbitrator's authority?**
 - Defined in the arbitration agreement.
 - Issues of procedural arbitrability (e.g., condition precedent to arbitration has been satisfied) are for the arbitrator to decide.
 - Issues of substantive arbitrability (*i.e.*, issues over scope of arbitration provision and whether it applies to a dispute) are for the courts to decide unless there is clear and unmistakable evidence that the parties intended otherwise. Clear and unmistakable evidence can be found where a contract explicitly states that substantive arbitrability issues are to be decided by the arbitrator, or, in the absence of such a specific statement, when (1) the contract generally refers all disputes to arbitration; and (2) the contract refers to a set of rules that would empower arbitrators to decide arbitrability.
- *Willie Gary Ltd. Liab. Co. v. James & Jackson Ltd. Liab. Co.*, 906 A.2d 76, 80-81 (Del. Ch. 2006) (clear and unmistakable evidence test was not met when the contract provided for a party to obtain injunctive relief and specific performance in the courts for certain disputes).
- *ORIX LF, LP v. InsCap Asset Mgmt., LLC*, 2010 Del. Ch. LEXIS 70, at *23 (Del. Ch. Apr. 13, 2010) (clear and unmistakable evidence standard was met when contract stated that “any dispute” arising out of it was subject to arbitration and incorporated the AAA rules).

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- **Manifest Disregard for Law:** To show manifest disregard for the law, a challenger must show that the arbitrator (1) knew of the relevant legal principle; (2) appreciated that this principle controlled the outcome of the disputed issue; and (3) nonetheless willfully flouted the governing law by refusing to apply it.
- *Auto Equity Loans of Del., LLC v. Baird*, 232 A.3d 1293, 2020 Del. LEXIS 194, *8 (Del. 2020).
- *Huntington Way Assocs., LLC v. RRI Assocs. LLC*, 2023 Del. Ch. LEXIS 157 (Del. Ch. June 30, 2023) (vacatur not appropriate where record supported tribunal's findings and tribunal did not flout the law or the contract at issue).
- *Polychain Capital LP v. Pantera Venture Fund II LP*, 2022 Del. Ch. LEXIS 161, *9 (Del. Ch. July 6, 2022) (vacatur not appropriate when arbitrator based decisions in the law, including when deciding to draft a reasoned award in accordance with JAMS standards).
- *Oxford Health Plans LLC v. Sutter*, 569 U.S. 564, 568 (2013) (affirming Third Circuit's holding that so long as an arbitrator makes a good faith attempt to interpret a contract, even serious errors of law or fact will not subject the award to vacatur).
- *Travelers Ins. Co. v. Nationwide Mut. Ins. Co.*, 886 A.2d 46 (Del Ch. 2005) (under DUAA, an arbitrator's decision in direct contravention to the correct result under a statute was sufficient to amount to manifest disregard for the law).

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- **Finality/Definiteness:** A challenger must show that the arbitration award leaves open the resolution of some issues, or does not provide a sufficiently definite statement of the decision.
- *MHP Mgmt., LLC v. DTR MHP Mgmt., LLC*, No. 2020-0365-LWW, 2022 Del. Ch. LEXIS 141 (Del. Ch. June 21, 2022) (A final arbitration award must "evidence[] the arbitrators' intention to resolve all claims submitted in the demand for arbitration and . . . resolve them definitively enough so that the rights and obligations of the two parties, with respect to the issues submitted, do not stand in need of further adjudication.”).
- *Ruggiero v. State Farm Mut. Auto. Ins. Co.*, 1999 Del. Ch. LEXIS 146 (Del. Ch. June 3, 1999) (arbitrators exceeded the scope of their authority when they amended an otherwise final arbitration decision after a party submitted new authority).

Avoiding
vacatur begins
when an
arbitrator is
first being
selected, and
ends when the
award is
submitted.

- Disclosures
- Prehearing conferences
- The hearing
- Drafting the award

Disclosures

- An arbitrator must take disclosure requirement seriously.
- Arbitrators often have applicable ethical and procedural rules through the administrator of the arbitration.
 - AAA Commercial Arbitration Rules and Mediation Procedures, R-18:
 - The Code of Ethics for Arbitrators in Commercial Disputes, Canon II
- The disclosure requirements are ongoing.
- It is best to overdisclose.

Disclosures

- The Code of Ethics for Arbitrators in Commercial Disputes Canon II:
 - any known direct or indirect financial or personal interest in the outcome of the arbitration;
 - any known existing or past financial, business, professional or personal relationships which might reasonably affect impartiality or lack of independence in the eyes of any of the parties. For example, prospective arbitrators should disclose any such relationships which they personally have with any party or its lawyer, with any co-arbitrator, or with any individual whom they have been told will be a witness. They should also disclose any such relationships involving their families or household members or their current employers, partners, or professional or business associates that can be ascertained by reasonable efforts;
 - the nature and extent of any prior knowledge they may have of the dispute; and
 - any other matters, relationships, or interests which they are obligated to disclose by the agreement of the parties, the rules or practices of an institution, or applicable law regulating arbitrator disclosure.
- AAA states that arbitrators must “make a reasonable effort” to inform themselves of such interests or relationships.
- International Bar Association guidelines:
 - A “close family relationship” – “spouse, sibling, child, parent or life partner, in addition to any family member with whom a close relationship exists.”
 - A “close friendship” between an arbitrator and counsel for a party must be disclosed but is not necessarily disqualifying.

Prehearing considerations

- Scope of arbitration
 - What does the applicable arbitration agreement say?
 - Do all disputes need to be submitted to the arbitrator, or only certain disputes? This may limit the scope of the arbitrator's power.
 - Will the parties agree to a limited/unlimited scope?
- Discovery planning
- Solidifying the claims and counterclaims, as well as the nature of the remedies claimed
- Clarifying the type of award the parties expect
- Liberality in granting extensions/postponements
- Balancing efficiency and fairness in discovery disputes
- Interim status conference
- Motion practice

Hearing

- Ensure fairness
- Clarify issues along the way if they arise
- Arbitrator questions
- Live versus remote
- Damages
- Effective note-taking

Drafting the award

- Engage in a meaningful and thorough deliberative process
 - Identify the issues, questions, and/or claims the parties want decided.
 - Review the evidence for each issue, question or claim.
 - Determine the quality of the evidence.
 - Determine the credibility of the evidence.
 - Determine the weight of the evidence.
 - Make a decision on each issue, question, or claim based on the analysis of the evidence.
 - Draft the award.
- Determine whether there are confidentiality concerns

Drafting the award

- Draft the form of award that the parties request.
- AAA identifies four types of awards: simple, itemized, reasoned, and award with findings of fact and conclusions of law.
- ABA identifies three types of arbitration awards: standard, reasoned, and findings of fact and conclusions of law.
- Standard/Itemized award
 - Concise written financial breakdown of any monetary award and/or a line item disposition of each non-monetary claim or counterclaim.
 - Typically does not provide any insight into how the arbitrator viewed the evidence, arguments and other presentations.
- Reasoned award
 - Explanation of the basis for the award.
 - Typically includes (1) an opening, (2) a summary of issues, questions, claims and defenses, (3) a statement of facts, (4) a discussion, analysis and application of relevant facts and law if necessary, and (5) a disposition of the issues, questions, claims and defenses.
- Findings of Fact and Conclusions of Law
 - Most detailed award type.
 - Arbitrator provides detailed discussion of the factual disputes and the manner of his or her resolution of them, as well as the legal principles applicable to the legal disputes.'

Issuing the award

- Timing
- Motions for clarification, correction of clerical errors



Questions?