SPRING 2023

ARIZONA ADR FORUM

THE CHAIR'S COLUMN

LEE BLACKMAN

Welcome to the Spring Issue of the ADR Section Newsletter – the *Arizona ADR Forum*. Thank you for your membership in the Section and for your participation in our CLE and other events.

Aside from our ongoing education programs, the ADR Section's next major event is this year's State Bar Convention, during which we will present two half-day sessions on Thursday, June 15th. The morning session will be led by Thomas Stipanowich, Esq., Director of the Straus Institute for Dispute Resolution at Pepperdine School of Law, and Stephanie Blondel, Esq., one of the Straus Institutes leading Professors.

THOMAS STIPANOWICH

STEPHANIE BLONDEL

The subject is *"Lessons from the Life and Career of Abraham Lincoln for Today's Problem-Solvers and Resolvers of Conflict."* This engaging program will combine historical scenarios with modern insights on the psychology of conflict and communication, drawing on episodes from Lincoln's remarkable life and career as the touchstone for thoughtful and thought-provoking discussions and interactive exercises for today's advocates and dispute resolution professionals. This program will be historically fascinating and surprisingly relevant to our conflict resolution efforts as advocates and neutrals.

The afternoon session will be an enjoyable survey of critical principles, practices, rules, terms, and approaches to both mediation and arbitration. The method for this survey of the skills will be several gameshows like those we already know and love. We'll explore mediation and arbitration tools and rules through a *Jeopardy* game. We'll examine ethical principles through "What Would You Do" scenarios. And we'll play a version of *Wait… Wait, Don't Tell Me* focused on strange and challenging scenarios "ripped from the (maybe hard to find headlines)."

The Bar Convention this year should be a great way to fill your CLE Scorecard. Please join us!

Lee Blackman

Chair – ADR Section

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

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.

STATE BAR OF ARIZONA

EDITOR'S MESSAGE

DENNY ESFORD

I am this year's editor of *Arizona ADR Forum*. Many thanks to prior Editor Jeremy Goodman for his hard work and help with my transition. Starting with the Summer 2023 issue, you will see our editorial plans for the fiscal year, giving our regular contributors and would-be authors a heads-up on what subjects we plan to cover. If you have a great topic idea—and want to write about it—just shoot me an email. We can always make adjustments for valuable content. And if you see me at the Bar Convention, feel free to flag me down! I would enjoy meeting you and learn about your ADR practice. In the meantime, you can check out my ADR background at EsfordADR.com.

Denny Esford

Denny Esford

THE SPEAK OUT ACT

BY KATYA LANCERO AND GREG GILLIS

On December 7, 2022, President Biden signed into law the Speak Out Act.[1] This new federal statute declares that non-disclosure and non-disparagement clauses are unenforceable if adopted before an allegation of sexual assault or harassment has arisen and the clauses are employed to prohibit individuals from speaking out regarding such alleged misconduct.

These kinds of clauses have been incorporated into contracts, including employment contracts, and have been used to prevent individuals who claim to have been subjected to sexual assault or harassment from disclosing their claims publicly. The Speak Out Act effectively prevents employers and other contracting parties from inoculating themselves against public allegations of sexual misconduct.

In crafting this Act, Congress states that the law will increase transparency, hold employers and other contracting parties accountable for misconduct involving sexual harassment and/or assault, and therefore make workplaces safer and more productive for everyone.

Some states – not including Arizona – have enacted similar, but more protective laws. The Speak Out Act does not supersede those laws.

Enacted several months after President Biden signed into law the Ending Forced Arbitration of Sexual Assault and Sexual Harassment Act in March 2022, this new proscription is a second step toward greater disclosure, and greater discouragement, of sexual misconduct by perpetrators.

The Act does not bar confidentiality agreements entered as a part of settlement efforts, including mediations, after the alleged misconduct has occurred. Nor are confidentiality and non-disparagement provisions barred in agreements settling claims of sexual misconduct.

In conclusion, employers and other contracting parties in Arizona should consider expressly carving out sexual harassment and sexual assault claims from non-disclosure and non-disparagement clauses contained in employment agreements, arbitration agreements, and other confidentiality agreements where these agreements are prepared before disputes covered by the Speak Out Act have arisen. Mediators, arbitrators, and parties should also be mindful of the terms of the Speak Out Act in drafting post-dispute agreements to arbitrate and/or mediate because the confidentiality language of those agreements will either confirm or take away the benefits, or detriments, that result from baring the disclosure of allegations of misconduct covered by the Act.

1. 42 U.S.C. § 19401, *et seq.*

KATYA LANCERO practices in employment and labor law, Katya also represents and advises tribes, tribal enterprises, and companies operating on Indian reservations.

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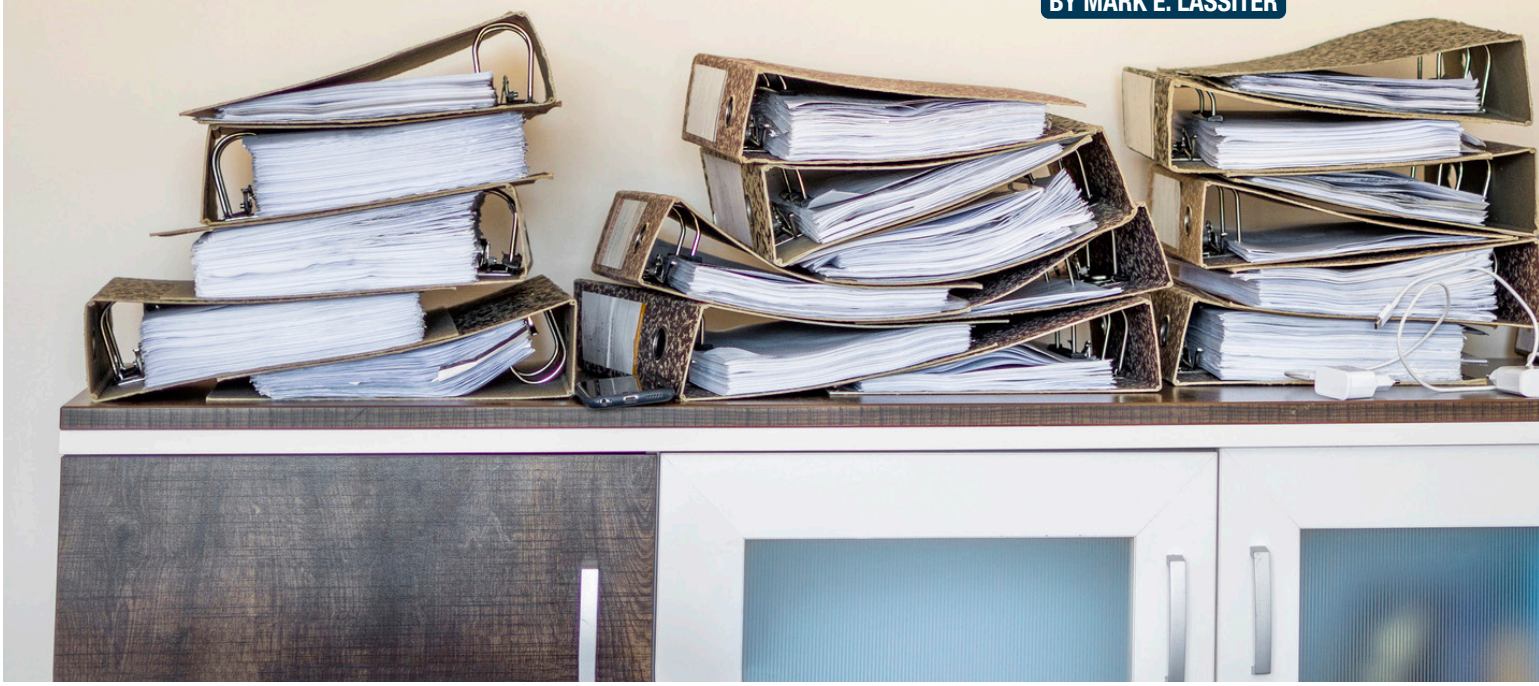
A Proposed Protocol for the Identification and Admission of Arbitration Hearing Exhibits in Voluminous Document Cases

BY MARK E. LASSITER



This article addresses the problems of dealing with voluminous arbitration hearing exhibits – usually in large and complex cases. In arbitrations involving only a few exhibits, it sometimes makes sense to simply admit all proposed or jointly proposed exhibits en masse into evidence before or at the beginning of an arbitration hearing. However, in complex construction or commercial arbitration cases, the *en masse* admission of all of the exhibits into evidence may be ill-advised for some of the reasons discussed in this article.

Parties to an arbitration proceeding and their counsel often fail to appreciate the impact that their designated arbitration hearing exhibits can have on the cost, expense and fairness of the arbitration hearing. Section 10(a)(3) of the Federal Arbitration Act provides that it is grounds for vacatur of an arbitration award "*where the arbitrators were guilty of misconduct … in refusing to hear evidence pertinent and material to the controversy.*" (Emphasis added.) Assuming that "*to hear evidence*" also means "*to read documentary evidence,*" this can be problematic. If a party's identified arbitration hearing exhibit is admitted into evidence, whether en masse or otherwise, then an arbitrator can reasonably assume that the party considered the exhibit "*pertinent and material to the controversy.*" If so, then this suggests that the arbitrator has a ***duty*** to read all of it in deliberating about the award. But in voluminous exhibit cases many admitted exhibits are never mentioned or discussed during evidence presentation or closing argument.

Lawyers sometimes make indiscriminate, unorganized en masse designations and/or admissions of voluminous arbitration hearing exhibits to avoid the expense to their clients of a careful vetting of their relevance and admissibility. But doing so may unwittingly but drastically increase the cost of the arbitrators' fees to the parties because the arbitrator's price tag for reading all of the exhibits may be "sticker shock" for all concerned. But the arbitrator may not have a choice because failing to read all of the documents might be grounds for a vacatur motion by the unsatisfied parties.

The en masse admission of voluminous arbitration hearing exhibits is also problematic because particular exhibits (1) may not be referenced or discussed by any witness or counsel at all during the arbitration hearing; (2) may have been designated solely for possible or contingent cross-examination, impeachment, rebuttal, or spontaneous explanation or elaboration of a witness's testimony, but then is not used for that purpose; (3) may be relevant in part, when the rest of the document is not; and (4) may become irrelevant or unnecessary for an arbitrator's consideration because other evidence or stipulations presented at the hearing render the exhibit's original purpose irrelevant.

The proposed Protocol that follows seeks to strike a balance between the parties' reasonable expectations and desires that arbitration be less formal than litigation while also satisfying the requirements of due process that parties reasonably expect from the arbitration process itself. It seeks to avoid unnecessary expense to

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the parties occasioned by an arbitrator's review of unnecessary, cumulative, redundant, or irrelevant exhibits designated by the parties or their counsel or because the exhibits are not relevant in their entirety. It also seeks to identify and address the designation of voluminous arbitration hearing exhibits sufficiently in advance of the arbitration hearing so that the parties' counsel can (1) manage expectations about the cost and expense of arbitration, (2) adequately prepare for the arbitration, and (3) avoid getting sandbagged by the surreptitious concealment of important evidentiary documents buried in an opponent's mass production of voluminous arbitration hearing exhibits.

Following is a suggested protocol for addressing arbitration hearing exhibits in cases involving voluminous exhibits. I do not offer it as the "be all or end all" of this subject, but rather as a possible solution to the problems discussed above, and as a point of departure for the Fellows' further consideration of this important topic. I welcome your constructive comments and suggestions to it.

By stipulation of the parties and order of the arbitrator(s), the following additional rules are adopted for the parties' pre-marking, identification, designation, and introduction of exhibits into evidence at any arbitration hearing:

1) *Immediately following the Final Pre-Hearing Preliminary Hearing with the arbitrator(s) in this matter, the parties shall promptly and jointly meet and confer to create a Joint Arbitration Hearing Exhibit List (the "Exhibit List") in this matter in the form of that shown in the Appendix to this Supplement. The Exhibit List shall: (1) include a numbered index with document descriptions, (2) identify exhibits that any party deems critical in its case, and (3) eliminate duplicate hearing exhibits filed by the parties. The lead Claimant shall promptly serve the Exhibit List on all parties when and as revised and updated. The parties shall follow the same process in the event the Exhibit List is revised at any time before the close of the hearing.*
2) *Any document identified in the Exhibit List **is not** automatically admitted. It shall be admitted only if the party moves to admit the document and there is no sustained objection to its admission and:*
   a) *A party clearly and conspicuously requests in the Exhibit List that the arbitrator(s) read the exhibit in whole or in part. If a party requests that only part of an exhibit is required to be read by the arbitrator(s), then such party shall designate such part on the Exhibit List. The arbitrator(s) shall be obliged to read the exhibit or portions of the exhibit so designated. In all other cases the arbitrator(s) shall be obliged to read the entire exhibit – irrespective of whether such portions are the subject of witness authentication or testimony during the arbitration hearing.*
   b) *A document on the Exhibit List shall also be admitted if a party or its counsel references or discusses the exhibit during the arbitration hearing and in so doing identifies it by its pre-marked exhibit number. Any such exhibit so identified, referenced or discussed is deemed admitted if there is no sustained objection to it, provided, however, that if a party only references a portion of the exhibit's text from a particular page, paragraph or section of the exhibit, then only that particular page, paragraph or section of the exhibit so referenced or discussed shall be deemed offered into evidence, unless counsel for any party requests otherwise.*
   c) *If a party wants the arbitrator(s) to review a deposition or other transcript of witness testimony as evidence, then the party shall provide the arbitrator(s) and opposing parties with a copy of the same in an OCR-enabled Portable Document Format ("*.PDF"), with the relevant portions to be read by the arbitrator(s) highlighted in yellow, in which case the arbitrator(s) need only read and analyze the parts so identified. Any identified portions of any such deposition transcript, and any exhibits referenced in them, shall also be deemed admitted, unless any objection to the same is sustained by the arbitrator(s).*
3) *If an exhibit not otherwise admitted in evidence in whole or in part as indicated above is identified and listed on the Parties' Joint Arbitration Hearing Exhibit List, but is not actually referenced or discussed by any person during the arbitration hearing, then the arbitrator(s) need not read all or any part of it.*
4) *At the conclusion of each day's arbitration hearing, the parties or their counsel may send the arbitrator(s) and all other parties a daily designation of those exhibits or parts thereof that were actually referenced or discussed by any person during that day's arbitration hearing.* ADR

BEST CYBER SECURITY PRACTICES FOR ADR NEUTRALS

BY ROBERT F. COPPLE

Digital technology is so embedded in the legal profession that most of us would not know how to do our jobs without the benefit of email, access to digital libraries, digital court filings, the transfer and storage of digital documents and remote meeting services. With the expansion of the digital world, the number of contact points increases, thus providing more opportunities for malicious actors to hack into personal and confidential information.

In order to address new cyber security and privacy threats, state supreme courts and bar associations continue to expand the interpretation of lawyer codes of ethics, based on the ABA Model Rules of Professional Conduct, to include duties to protect client information. As a result, the duties of a lawyer to his client now include technical duties relating to competence, confidentiality and communication.

But here's the twist. Alternative dispute neutrals are not necessarily covered by the ABA Model Rules or the state codes of ethics. The traditional ethical duties are between the lawyer and client. The parties to an arbitration or mediation are not the neutral's clients. Therefore, the neutral's ethical responsibilities have to arise from some other source, such as ADR provider, ADR contracts between the parties or the common law of negligence and professional liability.

Many ADR providers have taken up the challenge. Both American Arbitration Association and the CPR International Institute for Conflict Prevention & Resolution require their neutrals to take cyber security classes. Based on whatever set of rules, it is safe to say that a neutral who mishandles party information will risk some type of liability, whether professional, personal or loss of reputation.

The following is a list of cyber security actions neutrals can take to protect party information.

01 SOMETHING IS BETTER THAN NOTHING

Effective cyber security involves layers of protection. If you work in a multi-person office and have an IT consultant or an inhouse "IT guy," discuss what protections are already in place and what additional measures you should employ. If, like me, you are solo and working out of your home, it might not be a bad idea to spend some time with a consultant to help you figure out and deploy the type of security best for your practice and the protection of party information.

02 LIMIT THE FLOW OF PERSONAL AND CONFIDENTIAL INFORMATION

Early in the proceedings, talk to the parties about cyber security. Suggest that they limit the disclosure of personal and confidential information to only what is needed for case evaluation and decision making. Accordingly, recommend that the parties redact unnecessary personal and confidential information from documents prior to disclosure. If there is highly confidential information that needs to be produced, have them transfer it to you as an encrypted email or from a secure drop box. And there is the old fashion method of paper copies and the mail.

03 WHO'S IN CHARGE?

If you are in a multiple person office, designate someone, whether a lawyer, paralegal or secretary, as your cyber security czar responsible for keeping your systems up to date and enforcing the rules. We all know how organizational behavior works. If no one is given explicit responsibility for cyber

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security, nothing will get done. Likewise, putting too many people in charge inevitably results in nobody taking full responsibility.

04 TRAINING

See to it that everyone in your office who touches a computer has some level of cyber security training and understands the rules you have established for your office. The state bar associations offer no shortage of classes on cyber security.

05 SOFTWARE SOLUTIONS

Make sure you have firewall and antivirus software in place and running correctly. Operating systems such as Microsoft and Apple will have some of these protections already built into the programs. Learn how to use them and adjust them to your needs. However, do not run more than one antivirus program. They may conflict with each other. Also, make sure that you promptly and regularly install updates and patches to keep the hackers at bay. This is an ongoing responsibility.

06 HARDWARE SOLUTIONS

Hardware solutions can get more creative and expensive. Ideally, you should separate your professional digital life from your personal digital life. That means having a dedicated computer and phone for each to reduce the number of potential hacker contact points so that your Facebook friend doesn't inadvertently infect your professional files with malware. This is known as "Bring Your Own Device" (BYOD). Having two systems also allows you to log out and pull the plug on your professional system when not in use, reducing the potential for invasion. In the alternative, consider the use of a separate external hard drive that can be turned off when not in use. Or use verifiably secure cloud storage.

07 PASSWORD MANAGEMENT

Keep your passwords fresh and effective. Passwords should be somewhat complex and changed periodically. Password management software can help. Oh, "password" and "1111" don't count.

08 PRACTICE EMAIL SKEPTICISM

By far, the number one way hackers invade systems is through the human factor. Scrutinize email before clicking on any attachment. If an email looks "funny," it probably is a phishing attempt. If, with no other identifiers, the email begins with "contract attached" or "invoice attached" or "payment attached," it's most likely phishing. Look at the sender's email address. Does it make sense? Is your name in the body of the email (Hi Bob)? If not, be skeptical. Does the odd email come from a trusted source, but doesn't seem quite right? If not, the email account may have been hacked to send out phishing emails to everyone on your contact list. In such a case, independently verify the source by texting, calling or separately emailing your contact.

09 VIDEO CONFERENCING

The world has changed and video conferencing is now very much a part of the practice of law, particularly for ADR neutrals. The video conferencing providers, such as Zoom, are constantly upgrading their cyber security. Just do your research and make sure you are comfortable with the provider's cyber protection.

10 OTHER POTENTIAL CONTACT POINTS

Consultants and vendors have the potential to infect your systems. Ask them about their own cyber security protocols and make sure they are adequate before you give them access to your systems.

11 DUMP OLD FILES

There is no good reason to retain files from past ADR proceedings. Purge them, particularly those containing personal and confidential information. Remember, the parties are not your clients. Therefore, presumably, state ethics codes requiring retention of files for a set period of years are not your responsibility. That's for the parties' lawyers to do. Remember, if you don't have it, it can't be hacked.

It is clear that cyber security is now a neutral's duty. This may seem daunting. However, with a little diligence and a little advice, it is quite doable. But remember, if you want to beat the bad guys, cyber security is an ongoing responsibility. ADR