



# CCA Fellows' Newsletter

----- Volume 10, Issue 1 -----

February 2024

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## A MESSAGE FROM THE PRESIDENT

By BARBARA A. REEVES

Here are three quotes from our website.

*As the world's most prestigious alternative dispute resolution professional organization, CCA both defines and promotes the highest standards of arbitrator ethics, standards of conduct, and best practices in alternative dispute resolution.*

*The Fellows of CCA are the elite within the profession. They have the professional training, judgment, and years of experience to undertake the most complex and difficult commercial arbitration assignments.*

*The Fellows of CCA meet and communicate regularly with a view toward sharing professional experiences and ideas about commercial arbitration.*

These quotes promise the users of arbitration that the CCA provides the assurance that its Fellows have the highest qualifications, expertise, experience, and that the Fellows interact with each other about their profession and elevate the standard of arbitration practice. The opportunity for arbitrators from different parts of the country to meet and interact, make new friendships, and discuss issues relating to commercial arbitration arising in the various parts of the country where the Fellows were practicing, is an important virtue of the College.

The annual gatherings of the College offer cutting-edge programming and an opportunity to learn from one

another. Programs address significant developments in commercial arbitration, the future changes in arbitration, and evolving roles for arbitrators, for consideration and discussion by the Fellows.

To that end, the Bylaws provide that a Fellow must commit to attend the Annual Meetings of Fellows and to take an active role in the College's activities, including by serving on one or more of its committees. Failure to attend at least one Annual Meeting of Fellows every three years is a ground for termination of membership in the College. The Annual Meetings are where we implement the College's promise that our Fellows have ongoing training in the issues facing the field of commercial arbitration, as well as the exchange of knowledge among arbitrators from throughout the United States and abroad.

The leadership of the College takes these commitments seriously. This year we received an unusually large number of requests for exemption from Fellows who had missed three meetings and did not want their membership to be terminated. Recognizing that Covid changed the way many feel about travel and in-person meetings, the Executive Committee granted exemptions to those who asked.

The Annual Meetings are integral to our goals of fellowship and learning from one another. Attendance should be a high priority for Fellows. Going forward, I ask you to respect the commitment you made when you joined the College to attend our annual gatherings. You'll be glad you did. ◆

# CALIFORNIA INTERNATIONAL ARBITRATION WEEK

By DANA WELCH

CCA is a sponsor of the Third Annual California International Arbitration Week, which will take place in San Francisco from March 11-14, 2024. Speakers will converge for the week from all over the United States, and from China, Japan, Korea, and Germany. Topics range from the thorny issue of disclosure in international arbitration (which features **Barbara Reeves, Gary Benton, Larry Schaner, and Dana Welch**), to arbitrating entertainment, sports, and fashion industry disputes, to arbitration in Japan and China, to the use of AI in ADR.

The week is cosponsored by California Arbitration and the California Lawyers Association. Other CCA speakers include **Laura Abrahamson, Jeff Benz, Richard Chernick, Cedric Chao, Harold Coleman, Ruth Glick, Sally Harpole, Reg Holmes, and Rich Silberberg.**

**Dana Welch** is the co-chair of the event and the current president of California Arbitration. You can find more information about the week and register here: <https://calawyers.org/2024-california-international-arbitration-week/schedule/>. ♦

## IN MEMORIAM

### GERALD AKSEN (1930-2024)



Gerry Aksen, the second president and one of the co-founders of CCA, died on January 29 at the age of 93. Gerry was a leading figure in the field of arbitration in the United States and around the world. He began his arbitration career when he joined the American Arbitration Association, not long after a brief stint in private practice and graduation from NYU Law School. He spent nineteen years with the AAA, serving as general counsel and assistant to the president. After leaving the AAA, he joined the New York office of Reid & Priest as partner in charge of international arbitration. He served as an arbitrator in over 300 cases in 24 countries.

Gerry's many contributions to the field of arbitration included taking part in the creation of Chapter 2 of the FAA and advising the State Department in developing a procedure for the resolution of East-West business disputes, an endeavor which ultimately provided for arbitration in Stockholm under UNCITRAL rules with the Stockholm Chamber of Commerce as the appointing authority. He taught classes in both international and commercial arbitration as an adjunct professor of law at NYU Law School for 30 years and his course on international arbitration was the first such course in any U.S. law school.

During his career, Gerry served as vice chair of the ICC, council member of the ICC Institute of World Business Law, vice president of the London Court of International Arbitration, member of the AAA Board of Directors, member of the ABA House of Delegates, chair of the ABA Section of International Law and Practice, and chair of the Arbitration Committee of the Bar Association of the City of New York. In 2005, he was the recipient of the ABA Dispute Resolution Section's D'Alemberte/Raven Award, the section's highest honor. He also was the recipient of CPR's James F. Henry Award for distinguished and sustained contributions to the field of ADR.

After Gerry's death, many Fellows published comments about him, recalling his mentorship, his generosity, and his ever-present smile. Rich Chernick perhaps best described Gerry's personality when he wrote "one of the high points of my career was chairing a panel with Gerry as a wing [where] every order that I proposed was met by Gerry with a 'good job, Rich,' whether it was or not".

Gerry is survived by his daughter Lisa, stepdaughter Adrienne, three grandchildren, four great grandchildren, and a brother.

## WILLIAM A. DREIER (1938-2024)



**Bill Dreier**, who retired from the College two years ago, died on February 2 at the age of 86. Bill was a graduate of MIT and Columbia Law School, where he was a Harlan Fiske Scholar. After a judicial clerkship, he practiced law in Elizabeth, New Jersey. While he was in his 20s, he was elected to the City Council in Plainfield, New Jersey and later served as the city's corporation counsel. At the age of 35, he was appointed to the Union County District Court and rose to become a presiding judge of the Appellate Division of the Superior Court of New Jersey. As an appellate judge, he authored 380 decisions that were published in the Court's official reports.

Bill was one of the leading experts in products liability in New Jersey. His book on New Jersey Products Liability and Toxic Torts Law is still the leading text on the subject. In 2008, the NJSBA's Products Liability Section instituted the William A. Dreier Annual Award for Excellence in Products Liability Law and made him the first recipient. His Chancery Practice Book and New Jersey Arbitration Handbook, the latter co-authored with **Bob Bartkus**, have become the standard New Jersey references in their field.

After Bill retired from the bench in 1998, he focused his practice on ADR. Among his numerous cases were a Madoff feeder-fund liability case and a matter involving legal fees for the legal fees arising from the settlement of a lawsuit over the founding of Facebook. In recognition of his efforts the NJSBA Dispute Resolution Section named him as the Professor James B. Bosky ADR Practitioner of the Year in 2010. He also was the first recipient of the New Jersey Law Journal's Lifetime Achievement Award for contributions to the legal profession, the New Jersey State Bar Foundation's Medal of Honor, and the Somerset County Bar Association's Career Professional Service Award. He was named Plainfield's Outstanding Citizen in 1972.

Bill is survived by his wife Sandra, children Susan and David, and five grandchildren. ♦

## THE TECHNOLOGY CORNER

By *MARK HELEY*

Take a look at the Damages in International Arbitration App.

"There is an app for that!" -- Sound familiar? That phrase has been around for some time. The phrase reportedly originated from early advertisements for the Apple iPhone 3 intended to reflect the broad range of uses for the phone. That phrase continues to ring true today. In case you were curious (as I was), the Apple App store, as of the third quarter of 2022, included over 1.6 million apps. That number, however, paled in comparison to the Google Play platform which hosted over 3.5 million apps at that same time. Given this proliferation of apps, it is probably safe to say you could find an app for almost anything. However, until January of this year I was not aware of apps related to the damages in international arbitration. That changed in January when I attended a webinar presented by CCA Fellows **Kathleen Paisley** and **Mark Kantor** on the Damages in International Arbitration (DIA) App.

Quantification of damages remains an essential component in virtually all arbitrations. In many cases, the presentation and quantification of damages emerges as the issue of greatest relevance to the parties. Assessment of these damage claims typically requires detailed analysis of both facts and law. In such cases referring to the quantification of damages as a "complex process" could be an understatement.

The wide variation in approaches to the presentation of evidence and quantification of damages has historically raised concerns for parties, advocates, and arbitrators. The DIA is intended to be a tool that parties, advocates, experts and arbitrators can use to help address concerns about the quantification of damages in international arbitration and domestic arbitration.

The DIA is the culmination of 5 years work by the International Council for Commercial Arbitration (ICCA) and the American Society of International Law (ASIL) Task Force on Damages in International Arbitration. The ICCA-ASIL formed the Task Force to promote consistency and rigor in the approach to damages in international arbitration. The Task Force convened a panel of leading legal and economic experts from various jurisdictions across the globe. That panel sought to raise awareness and practical understanding of damages issues by all involved in the arbitration process, improve the quality of damage awards and to the extent possible, create or allow for more uniformity in the determination of damages.

The DIA provides a structured path that parties, advocates, experts and arbitrators can apply to damage issues in an arbitration. The DIA App presents the user with a list of topics intended to provide a broad road map for analysis and determination of the damage issues. The linked topics provide guidance broadly divided into procedural issues, legal issues, and quantitative issues for consideration. The legal heading includes subsections on common law, civil law and international law.

The DIA is not a calculation tool. You do not enter inputs and receive a damages number. Instead, the DIA provides brief, practical summaries of the identified topics, coupled with checklists for consideration by the parties, advocates, experts and arbitrators. Each module within the DIA contains separate parts. Each part consists of “buttons” that identify topics for consideration and, when selected, provide content relating to the specified topic. Pressing a button will reveal a brief written summary discussing the topic and key considerations followed by a checklist of relevant considerations or issues to consider when addressing the topic. The DIA also contains a search function allowing searches by key word for articles or content addressing a particular issue.

The Task Force spent thousands of hours creating, reviewing and refining content within the DIA. The effort is apparent on review of the DIA. The utility of the DIA may vary, depending on your practice. I found the checklists to be quite useful, but each user will find value in different sections, contents, or features of the DIA. The DIA includes a wealth of information. While not everyone might find the same value from the App, the DIA provides information worthy of consideration by parties, advocates, experts and arbitrators dealing with damage quantification or analysis. You can access the App at no cost at <https://icca-asil-damages.com>. ♦

## THE NEXT NATIONAL SUMMIT

By JOHN BOYCE

In October 2009 the College sponsored a National Summit on Business-to-Business Arbitration. As explained in the forward to the Summit’s publication (the “Green Book”) two insights motivated us:

- (1) lengthy, costly arbitration resulted from inefficient interaction of business users, in-house attorneys, the institutions that provide arbitration services, outside counsel and arbitrators; and
- (2) stakeholders must collaborate in identifying and achieving desired efficiencies and economies in arbitration.

In preparation for the 2009 Summit, the College appointed separate task forces consisting of in-house corporate counsel, outside counsel, and arbitrators, each of which convened prior to the Summit and presented its respective report at the Summit.

The Summit took place in Washington, D.C for one day. It was scheduled in conjunction with the College’s annual meeting. Approximately 180 people attended and represented the gamut of corporate users, advocates, arbitrators, providers, legislators, and judges. The Summit’s abiding accomplishment is the “Protocols for Expedious, Cost-Effective Commercial Arbitration” found in the Green Book.

In January 2020, the Board approved the formation of a committee to consider the possibility of another Summit. **John Barkett** and **Tom Hanrahan** are co-chairs of the committee. The members are **Theo Chang**, **Faith Hochberg**, **John Holsinger**, **Nancy Lesser**, **Rich Silberberg**, and me. **Barbara Reeves** is an ex-officio member. After deliberation and delays arising from the pandemic, the Board, in the spring of 2022 approved the planning for another Summit in 2025, the centenary of the FAA.

The 2025 Summit Committee has been meeting monthly. We have scheduled Summit II for Thursday, June 5, 2025, at American University in Washington, D.C. While details are still being developed, the Committee wants to have a structure similar to the 2009 Summit by appointing various task forces that will present reports.

The current plan is to limit attendance to not more than 250 people. There will be institutional sponsors and a mix of invitations to members of the arbitration community. Registration will be on a first-come, first-serve basis. One of Summit II's goals is to supplement the existing Protocols, as necessary.

As we mentioned in our November 30, 2023, list-serve email, we need your help, particularly those of you who are currently or recently in law firms. We need the names of your attorney contacts, both in-house and outside, who could assist in helping to form the task forces, and otherwise contribute to the effort. Keep the following criteria in mind as you consider prospects:

- 1) attorneys associated with industries where privacy, confidentiality, and “controlled fights” are important.
- 2) attorneys whose clients would benefit from arbitration.
- 3) house counsel associated with businesses that need arbitration, and
- 4) attorneys who may have a negative view of arbitration, even though our focus will be on attorneys who favor arbitration.

Please forward your ideas to me, and I will bring them up with the Summit Committee in its monthly meetings. We welcome your suggestions. ♦

## DEPOSITING PARTY FUNDS IN A TRUST ACCOUNT MAY BE AN ETHICAL VIOLATION

By *MARK LASSITER*

Ten years ago, I was a panelist at an ADR Section CLE at the offices of the State Bar of Arizona on the subject of *ETHICAL PERILS AND PITFALLS FOR ARIZONA ADR NEUTRALS*, which was attended by about 80 Arizona lawyers - all of whom were arbitrators, mediators or other “neutrals.” One of the topics covered was a reminder that lawyers acting as “neutrals” (e.g., arbitrators, mediators, special masters, receivers, etc.) were prohibited from keeping money deposited with them by “non-client” third persons for their work as an ADR “neutral” in their IOLTA Trust Account – on pain of disbarment or discipline. When panelist and then State Bar Ethics Counsel, Pat Sallen, reminded attendees of this, there was an audible gasp from the audience, as this rule came as a tremendous surprise to most of those in attendance. Upon audience interrogation, Pat reminded attendees that only a client's funds can go into a lawyer's IOLTA Trust Account.

The problem no longer exists in Arizona. Following a recommendation that I made to Kevin Ruegg, the CEO and Executive Director of the Arizona Bar Foundation, Pat Sallen filed a petition to the Arizona Supreme Court seeking a rule change that would allow Arizona ADR lawyer neutrals to avoid disbarment or discipline when they put funds collected for their ADR or expert work into their IOLTA Trust Accounts. The new rule changes were adopted by the Arizona Supreme Court on August 24, 2023, and were effective

as of January 1. Nineteen Arizona attorneys from the Executive Council of the ADR Section of the Arizona State Bar also supported and endorsed the petition, as did other attorneys and interested persons.

The petition's rule changes affect the Ethics Rules found in Rule 42, Ariz. R. Sup. Ct. Rules of Professional Conduct, including the addition of new Rule 1.5 (g), which provides:

*(g) A lawyer who serves as a third-party neutral or as an expert witness may hold funds related to that service that have been paid in advance as provided for in this rule.*

The new comment to new ER 1.5 (g) provides:

*Paragraph (g) permits a lawyer who serves as a third-party neutral or as an expert witness to hold funds related to that service that have been paid in advance in the lawyer's client trust account. If the lawyer serving as a third-party neutral or an expert witness chooses to deposit such funds into a client trust account, all requirements related to client trust accounts apply to those funds.*

The rule change also includes the addition of new Rule 2.4(c), which provides:

*(c) A lawyer serving as a third-party neutral may choose to hold advance fees related to service as a third-party neutral in the lawyer's client trust account in compliance with ER 1.15 and Rule 43.*

Finally, a sentence was added to Rule 43 (the general rule covering trust accounts) which states: "A lawyer serving as a third-party neutral or as an expert witness may treat funds belonging in whole or in part to a third person in connection with that service in accordance with this rule."

Importantly, the new rule changes allowing for a lawyer ADR neutral to deposit funds into the lawyer's IOLTA Trust Account are optional, not required. However, it seems advisable for lawyer ADR neutrals to avail themselves of this opportunity. In Arizona, interest earned on IOLTA Trust Account funds inures to the benefit of the excellent public interest work of the Arizona Bar Foundation. Furthermore, use of the IOLTA Trust Account protects ADR customers of lawyer ADR neutrals from the claims of general unsecured creditors of lawyer ADR neutrals.

Does your state have a rule concerning trust account deposits that is similar to the former Arizona rule? If so, I strongly urge you to contact the appropriate people at your State Bar and recommend a change. ♦

## THE CCA MENTORSHIP PROGRAM

By PENN PAYNE

The CCA Associates Mentorship Program provides two years of in-depth mentorship to selected arbitrators from diverse backgrounds who have a strong commitment to the development of a high quality and successful commercial arbitration practice and who have five or fewer years of commercial arbitration experience. The program is chaired by **Gene Commander** and **Ty Holt**.

The overall goal of the program is to assist talented commercial arbitrators from diverse backgrounds to "jump-start" their arbitration practices through specialized and sophisticated commercial arbitration training, coupled with support and advice for the development of their individual practices.

Each associate has two or three mentors. The mentors are Fellows of the College and highly experienced commercial arbitrators. They provide the one-on-one mentorship that is essential to the success of the program. Additionally, each associate participates in bi-monthly small group training and coaching sessions, staffed by a group of nationally respected CCA Fellows who contribute their professional time to share their many years of experiences with the associates. Finally, any of the Fellows in the College are available on an ongoing basis to consult with any associate on an individual and impromptu basis via

telephone, virtual calls or any other communication vehicle on any subject that relates to the practice of commercial arbitration.

The program, created in 2021, now has seven associates, who have been selected for the program on a nationally competitive basis.

The three associates in the inaugural class of 2022-24 are:

**Scott Evans.** Scott is a shareholder in the Denver office of Buchalter P.C. and a member of the firm's litigation group. For more than 28 years, Scott has litigated and arbitrated complex matters in various sectors, including financial advisement services, white-collar crime, cannabis/hemp, and real estate. In addition, Scott conducts internal corporate fraud and governmental agency investigations, calling on his experience as a federal investigator with the Defense Investigative Service, a division of the Department of Defense. Scott is a member of the AAA commercial and employment law panels and a member of the Academy of Court Appointed Neutrals. He can be reached at <https://www.buchalter.com/attorneys/scott-l-evans>.

**Jiyun Cameron Lee.** Jiyun heads the litigation department at Folger Levin LLP in San Francisco and specializes in complex commercial disputes involving breach of contract, fraud, breach of fiduciary duty, trade secret misappropriation, class actions, and employment litigation. She began her legal career at Morrison & Foerster in San Francisco, where she spent part of her tenure in Tokyo working on the IBM/Fujitsu arbitration. Jiyun was a Higginbotham Fellow and joined AAA's commercial, employment, and consumer panels in 2020. In December 2023, she was the moderator for a CCA webinar on Ethical Issues in Commercial Arbitration. She can be reached at <https://www.folgerlevin.com/attorney/jiyun-cameron-lee>.

**Lisa Love.** Lisa is co-managing partner of Love and Long, LLP in New York and an arbitrator and mediator with JAMS. Lisa has almost 40 years of experience as a commercial transactions attorney in sophisticated transactions, including M&A, construction, energy, infrastructure and real estate development, public and corporate finance, licensing, and technology transfers. Having represented parties on many sides of complex transactions, Lisa uses her experience to provide perspective and inform her decision making as an arbitrator and her conciliatory efforts as a mediator. She can be reached at <https://www.loveandlonglaw.com/our-team-3-2-2/lisa-d-love/>.

The four associates in the class of 2023-25 are:

**Rachel Gupta.** Rachel is a full-time independent mediator and arbitrator with Gupta Dispute Resolution in New York. She specializes in complex commercial, securities, financial, insurance, and employment matters. She is an arbitrator for the AAA (commercial, employment, and consumer panels), CPR, and FINRA. Immediately prior to becoming a neutral, Rachel spent almost a decade as in-house counsel responsible for managing and resolving high-profile and high-stakes complex commercial litigation, including multi-billion-dollar litigation relating to residential mortgage-backed securities. She can be reached at [www.guptaresolutions.com](http://www.guptaresolutions.com).

**Diana Kruze.** Diana Kruze has been a full-time arbitrator and mediator with ADR by Diana in San Francisco since 2020, focusing on business, intellectual property, technology, and health care cases. She is on the AAA's technology, large complex commercial, health care, & life sciences panels. Prior to becoming a neutral, Diana was a litigation partner at Morrison & Foerster, where she tried and settled complex disputes in everything from patent cases to adoption disputes. She was then appointed as a full-time judicial officer with the California Superior Court, where she presided over civil cases, the restraining order calendar, and discovery matters. She can be reached at [www.adrbydiana.com](http://www.adrbydiana.com).

**Tina Patterson.** Tina is the founder and principal of Jade Solutions LLC in Germantown, Maryland, and has more than 20 years' experience providing alternative dispute resolution and community engagement services. She has specific experience in software development and information technology, intellectual

property, and government contracting. Tina also works with businesses that want to provide goods or services to the federal government, especially for agencies within the Department of Defense and intelligence communities. Tina serves on the panel of neutrals for the AAA, FINRA, CPR, and the DC Bar Attorney Client Arbitration Board. She has co-authored a forthcoming paper on developing an online dispute resolution system to mitigate land use disputes that will be featured in Urban Lawyer Journal. She can be reached at <https://www.jadeitesolutions.com>

**Jo Colbert Stanley.** Jo is a Florida Supreme Court qualified arbitrator with Stanley Legal Services LLC in Fort Lauderdale and has been a public arbitrator with FINRA since 2019, where she is currently serving as chair on multiple cases. She is a Fellow of the Chartered Institute of Arbitrators (CIArb) and obtained a Diploma in International Maritime Arbitration, conferred by CIArb. She is the current Chair of the Federal Bar Association ADR Section. Her academic background, which includes an LL.M. in ADR and current enrollment in Nova Southeastern University's Ph.D. program for Conflict Analysis & Resolution, complements her practical experience. She can be reached at <https://lawstanley.com/jo-colbert-stanley/>

The CCA Associates Program provides each associate with the opportunity to attend the CCA's annual meeting, participate in committees and attend CCA webinars that may not otherwise be open to the public, as well as all public webinars. In July 2023, the CCA board of directors approved extension of the program for an additional two years, through 2027. ♦



*Left To Right: Lisa Love, Scott Evans, Gene Commander, Jo Stanley, Diana Kruze, Tina Patterson*

## TRAVEL BY THE FELLOWS



**Tina Patterson** visited Hanoi between October 3 and 11. On a day trip, she visited Ninh Binh, a small city in the Red River delta of northern Viet Nam. The highlight of that visit was a boat ride on the Ngo Dong River. The guide was a woman who directed the boat with her feet. The ride was for two hours, and they rode around the karst cliffs and grottos of Tam Coc and visited three natural caves—Hang Ca, Hang Hai, and Hang Ba. ♦



## THE CCA BAG MOVES ON



The CCA bag and **David Singer**, one of its regular companions, enjoyed a recent trip to Oporto, Portugal. We understand that the port wine was terrific! ♦

## THE PUBLIC POLICY COMMITTEE

By **JOHN BOYCE**, CHAIR

The Public Policy Committee's mission is to recommend that the CCA board take positions with respect to developments in arbitration at the state or federal level.

More specifically, as set forth in the preface to its mission statement:

The Public Policy Committee's mission is to initiate and/or consider recommending to the CCA Board that the CCA take public positions with respect to developments in U.S. courts or Congress insofar as they relate to alternative dispute resolution, either by filing amicus briefs, comment letters or otherwise.

Protecting the efficacy and integrity of the process is at the heart of the CCA's overall mission.

Each member of the committee actively monitors legislation in his or her respective jurisdictions. We have scheduled meetings every three months but, given our small committee, we are nimble and meet more frequently, as needed.

We have a collaborative relationship with the AAA to share information regarding legislative, regulatory, and case law developments that may have impact on commercial arbitration. **Pierre Paret**, the AAA's vice-president of governmental affairs is a member of our committee. Our other members are **Mark Bunim**, **James Carter**, **Deborah Coleman**, **Paul Dubow**, **Mark Kantor**, **Jim Madison**, **Steve Skulnik**, **Eric Van Ginkel**, and **Steve Yusem**. I am the committee chair.

Unfortunately, we do not have the resources to monitor fifty states, thirteen federal courts of appeal and the Supreme Court. Thus, we depend on all of the Fellows to bring matters to our attention because they are more in touch with legislative and case law developments in their respective states than we are. We look for issues that go to the heart of arbitration policy or procedure.

What have we done? Given the divided Congress, arbitration policy at the federal level has been quiet. Nonetheless we have: 1) filed comments to the New Jersey Supreme Court Advisory Committee relative to its study of arbitration clauses in fee agreements (no response); 2) wrote letters to the New York Times and Forbes challenging articles critical of arbitration (no response); 3) commented on a California bill that negatively affected mediation confidentiality (**Paul Dubow** organized a coalition that induced the bill's author to withdraw the bill although he may reintroduce it in 2024); 4) helped pass a bill in Texas confirming the application of statutes of limitations in arbitration; and, 5) declined to support an *amicus curie* brief for certiorari of a Texas Supreme Court case to the U.S. Supreme Court (certiorari was denied). In addition, we prevailed upon the National Conference of Commissioners on Uniform State Laws to add to its home page the CCA's endorsement of the Revised Uniform Arbitration Act. ♦

# COACHING BY MESSAGE IS NOT ACCEPTABLE IN ON-LINE ARBITRATION

By DAVID ALLGEYER

When I am going to conduct an online arbitration, I send out guidelines in advance. A few of the guidelines are directed to coaching or scripting the witness's testimony. Among other things, I instruct that no one is allowed to communicate with the witness in any form – electronic or otherwise – while the witness is testifying.

I have sometimes wondered whether it's overkill to even mention that coaching is not allowed. That's really ethics 101 – no cheating, right? Lawyers and their clients must understand they can't just use a messaging app to coach a witness, right?

Maybe not. A case in point would be *Nuvasive, Inc. v. Absolute Medical LLC*, 71 F. 4th 861 (2023).

In that matter, Absolute sued Nuvasive for breach of contract and Nuvasive's motion to compel arbitration was granted. During the hearing, the owner of Absolute sent messages to one of its sales representatives, coaching him on how to answer questions.

The sales rep was testifying by video from Orlando. The owner was observing by video – and texting the sales rep– from his counsel's office in Atlanta. The arbitration panel found Nuvasive was liable for breach of contract, but that Absolute had not proven damages.

Nuvasive did not learn about the coaching until after the three-month statutory deadline to move to vacate the award had passed. Nevertheless, Nuvasive moved to vacate the award, and the district court equitably tolled the time to bring the motion because of Absolute's failure to reveal the coaching. The court then did a side-by-side comparison of the text messages and the sales rep's contemporaneous testimony. It found "three specific instances during [the sales rep's] testimony that establishe[d] by clear and convincing evidence that his testimony was indeed being guided by the [owner's] messages." The court then found the award was procured by "corruption, fraud, or undue means" and vacated the award under 9 U.S.C. § 10(a)(1). It further refused to send the matter back to arbitration and

instead opted to try the contract claims with claims that had not been referred to arbitration.

Absolute appealed to the Eleventh Circuit. But it got nowhere. The court first rejected a claim that the motion was too late. Equitable tolling was in order because of Absolute's failure to timely reveal evidence of the text messages. Next, the court rejected Absolute's "no harm, no foul" argument. Although the coaching didn't affect damages, it was enough that the fraud was materially related to an issue in the arbitration. Nuvasive didn't need to prove it would have won on damages absent the coaching.

Finally, the Eleventh Circuit found the trial was well within its discretion not to return the case

for further arbitration after vacating the award. The defendant's misconduct, which also included destroying documents along with the coaching, justified the trial court's maintaining control of the entire case after vacating the award.



We can take at least three things away from this case, I think.

First, some people will cheat and coach witnesses during online hearings. So, watch out. My online guidelines will continue to prohibit communicating by any means with witnesses while testifying. And counsel should emphasize this with their clients to be sure it doesn't happen.

Second, if a party gets caught coaching, things will not go well. The deadline for moving to vacate the award can be extended. And once this sort of cheating is shown, the award will get thrown out even if the cheating doesn't help the cheater that much. In this case, the trial court and appellate court had absolutely no patience for cheating and readily labeled it fraud and corruption.

Third, a court has discretion not to send a case back to arbitration if cheating in arbitration is shown. The court can – and in this case did – take charge to make sure the cheater plays by the rules. ♦

# IMPORTANT CHANGES IN THE NEW 2022 AAA COMMERCIAL RULES

*Ingeuneal Gray, Vice President of the American Arbitration Association, was kind enough to sit down with Tony DiLeo to talk about the new AAA rules published in September 2022. The material below is an excerpt from an article in the Louisiana State Bar Journal.*

*Tony:* What is the main focus of the amendments and updates?

*Ms. Gray:* The September 2022 AAA Commercial Rules include new and revised provisions focusing on process improvements including advancements in technology, speed and economy, and security and privacy. The new Rules also include updates to reinforce an arbitrator's authority to control discovery and motion practice.

*Tony:* Can you describe what is new with regard to the Expedited and Large Complex case track that is described in Rule R-1?

*Ms. Gray:* Rule R-1 Increases the dollar threshold for the application of the Expedited and Large, Complex Case Procedures. In Rule R-1(b) the Expedited Procedures apply to a case where neither the claim, nor the counterclaim, exceeds \$100,000, exclusive of interest, attorneys' fees, and arbitration fees and costs. This amount is up from \$75,000. Rule R-1(c), the Large Complex Case procedures, applies to all cases in which the claim or counterclaim is at least \$1,000,000, which is up from the previous \$500,000 threshold. It is also important note that although the AAA Commercial Rules address the procedures to follow for the various amounts in dispute, the parties may, by agreement, apply the Expedited Procedures, the Procedures for Large, Complex Commercial Disputes, or the Procedures for the Resolution of Disputes through Document Submission to any dispute.

*Tony:* I understand that the AAA's Standards of Conduct have been incorporated into the new Rules. Is that correct?

*Ms. Gray:* Yes. Rule R-2(c) now incorporates the AAA's Standards of Conduct directly into the Rules and clarifies the AAA's authority to decline administration of a case or caseload. The Rule clarifies the AAA's expectations of civility and professionalism of all arbitration and mediation participants. The language of R 2(c) is: "The AAA requires that parties and their representatives conduct themselves in accordance with the AAA's Standards of Conduct for Parties and Representatives when utilizing the AAA's services."

*Tony:* New Rule R-2 (d) describes the Administrative Review Council. What exactly is the Administrative Review Council and what is it for?

*Ms. Gray:* The Administrative Review Council is an AAA committee. Rule R-2(d) specifies the Council as the AAA's decision-making authority for certain administrative issues on cases under the Large, Complex Case Procedures. For cases proceeding under the Procedures for Large, Complex Commercial Disputes, and for other cases where AAA, based on its sole discretion, deems it appropriate, the AAA may act through its Administrative Review Council to determine challenges to the appointment or continuing service of an arbitrator; make an initial determination as to the locale of the arbitration, subject to the power of the arbitrator to make a final determination; and decide whether a party has met the administrative requirements to file an arbitration contained in these Rules. The Council's Review Standards and Overview and Guidelines are available at the AAA website.

*Tony:* Can you tell us about this new rule for the consolidation of commercial arbitrations or the joinder of additional parties in commercial disputes?

*Ms. Gray:* The procedures for joinder and consolidation are in the AAA construction rules and the ICDR rules and it was time for us to add joinder and consolidation procedures to the commercial rules. The new Rule R-8 *explicitly* allows a party to file a request to consolidate two or more existing arbitrations into a single proceeding *or* to request the joinder of additional parties to an ongoing arbitration. Under this new Rule, the AAA can appoint a separate consolidation arbitrator for the limited purpose of deciding the consolidation request, and the Rule lays out factors the consolidation arbitrator must consider when making such a determination. In terms of joinder, the new Rule provides that the appointed consolidation arbitrator will make the determination, or, if an arbitrator has not yet been appointed in the case, the AAA may appoint an arbitrator for the sole purpose of deciding the joinder request. The rule 1) permits the consolidation of existing arbitrations or the joinder of additional parties to a single arbitration; 2) allows for a separate consolidation arbitrator or the arbitrator from the first filed case to decide, at the AAA's discretion; and 3) provides guidance to the arbitrator in making a decision to consolidate. It is also important to note the requesting party must meet all the AAA's filing requirements for any party to be joined.

*Tony:* There are several updates reflecting the advancements in technology. Can you describe a few that are now codified in this rule?

*Ms. Gray:* The Rules were revised to provide the arbitrator with the authority to conduct hearings by video conference or other electronic means. The amended rules include Rules R-22, R-25, R-33 and Expedited Procedure E-7. While the AAA has interpreted the previous Rules to allow the arbitrator to order the use of technology to facilitate hearing attendance, the new Rules specifically provide for this authority. They now specifically authorize the arbitrator to allow some or all testimony or evidence to be presented through a means other than in-person presentation, including video, audio, or other electronic means. In addition, the amended rules have also added cybersecurity, privacy, and data protection to the list of subjects we recommend that parties and arbitrators address at the preliminary hearing. The AAA also drafted the Best Practices Guide for Maintaining Cybersecurity and Privacy and Cybersecurity Checklist as well as virtual hearing guidelines to help ensure security and privacy.

*Tony:* Can you explain the update in R-29, the rule on stenographic records, that includes a broader definition of transcription?

*Ms. Gray:* The rule recognizes the technological advances in the area of hearing recordings, and a change in terminology from stenographic record to transcription. While the previous rule referred to a stenographic record, the updated rule allows for *any* form of transcribed record, such as AI-transcription or other forms of electronic or digital transcription.

*Tony:* Can you elaborate on the changes concerning the Emergency Measures of Protection now in R-39, and formerly in R-38?

*Ms. Gray:* The Expedited Procedures are now excluded from the revised rule 39, which allows the emergency arbitrator to consider whether the request for emergency relief was made in good faith when deciding cost allocation. The new rule also clarifies when the "1 business day" timeframe to appoint an arbitrator begins.

*Tony:* Why was it necessary to provide arbitrators with the authority to interpret awards, now included in R-52?

*Ms. Gray:* Under the previous Rule R-50, a party could request the arbitrator to correct any clerical, typographical or computational errors in the award. But, under the new rule, Rule R-52, a party may also request the arbitrator to interpret the award. This change is in response to the increase in the requests we are receiving for reasoned awards. As it was under the previous rule, the arbitrator is still *not* empowered to re-determine the merits of any claim that has already been decided.

*Tony:* Why did the AAA increase the threshold for three arbitrators?

*Ms. Gray:* A panel of three arbitrators increases time for case resolution and that panel costs can be five times greater than a case with a single arbitrator. Therefore, to keep the process cost efficient, the AAA increased the minimum amount in disputes for three arbitrators. Absent guidance from the parties' arbitration clause or agreement of the parties regarding the number of arbitrators, Rule L-2(a) raises the minimum claim/counterclaim amount for a panel of three arbitrators from \$1 million to at least \$3 million. Claims and counterclaims are evaluated separately. The aggregate amount of claims is not considered.

*Tony:* To what cases will these rules be applied?

*Ms. Gray:* The September 2022 rules will be applied to any arbitration filed on or after September 1, 2022, or any case where the parties agree jointly to have them apply.

*Tony:* Where can Fellows learn more about these rules?

*Ms. Gray:* A summary of the rules prepared by AAA can be found at the AAA website. It's <https://go.adr.org/2022-commercial-rules-update> and look for "Rules update, AAA commercial arbitration rules." ♦

## NEWS FROM THE FELLOWS

♦ **Alan Kanter** has started a new business under the name of Kanter & Associates P.C., located in Birmingham, Michigan, which will supply law, arbitration, and mediation services notwithstanding those who exclaimed that he was too old to go into a new business.

♦ Although he is contemplating his next phase, **Tom Stipanowich** is still teaching full time in the law faculty at Pepperdine Law School. In October, he was honored to receive the university's Howard A. White Award for excellence in teaching. Last semester, he taught Contracts to first year law students. This semester, he once again will be teaching Arbitration Practice, along with a new seminar entitled *Lincoln, Law and Leadership*. The course will look at many different aspects of Abraham Lincoln's career, which is also his current writing project. He will be teaching the course with Professor Ed Larson, who won a Pulitzer Prize for history earlier in his career.

♦ For over the past ten years, **Jim Madison** and **Paul Dubow** have presented webinars on ADR developments in California to various bar groups. They continue to do so, with presentations to The Mediation Society of San Francisco in December and the Bar Association of San Francisco and Sacramento County Bar Association that are scheduled for the first quarter of 2024.

♦ **Stew Cogan** was named a Washington super lawyer in the ADR category for the 25<sup>th</sup> consecutive year. He was also listed as one of the top 100 lawyers in Washington for the 14<sup>th</sup> time. Stew is a Fellow of the Chartered Institute of Arbitrators and a Distinguished Fellow and former president of the American College of Civil Trial Mediators. He has been designated as a master mediator by the American Arbitration Association and is listed by Best Lawyers in both the mediation and arbitration categories.

♦ **Hon. Shira Scheindlin** has joined Boies Schiller Flexner in New York as of counsel.

♦ **Mark Shank** has been chosen as the chief scorer for the International Waterski and Wakeboard Federation Open, Junior, and Junior 23 world barefoot water ski championships which will be held on Lake Myrtle in Auburndale, Florida in the week beginning on October 5, 2024.

♦ **Neal Eiseman** was once again selected as a top lawyer for 2023 1) in the New York metropolitan area by Super Lawyer; 2) in the areas of mediation, arbitration, and construction by Best Lawyers; 3) as Band 1 Construction Mediator by Chambers; and 4) by the AAA for its Master Mediation Panel.

♦ **Jonathan Fitch** has begun his term as CEO of the Silicon Valley Arbitration and Mediation Center.

◆ **Patricia Galloway** will be speaking at the AAA Construction Conference at the Biltmore Hotel in Miami on March 21.

◆ **Rich Silberberg** moderated a faculty panel at the AAA-ICDR Americas Conference in Mexico City entitled *International Mediation and Other Forms of ADR in the Americas-Developments and Challenges* in September, and served on the faculty for another webinar sponsored by the AAA entitled *The Power of ADR: Resolving Hospitality Disputes* in October.

◆ **Edna Sussman** published an article titled *Adding Strings to our Bow: Two Arbitration Proposals* in a special issue of *Arbitration International* in honor of **Rusty Park**, a chapter titled *Unconscious Impediments to Settlement and the Proactive Arbitrator* in *Reflections on International Arbitration, Essays in Honor of Professor George Bermann*, and a chapter with **Sherman Kahn** titled *Ethics in International Arbitration: Guidance for Parties and Arbitrators* in *Soft Law in International Arbitration*. She participated in several speaking engagements over the last few months, including CCA's own webinar on ethics in arbitration with **Richard Ziegler** and **Myra Selby**. **Edna** led the ICDR Symposium for newly admitted ICDR panelists with **Jim Carter** and spoke at sessions on dispositive motions during Paris Arbitration Week, on US-German post termination M&A disputes during New York Arbitration Week, on facilitating settlements in arbitration hosted by ICC YAAF, and with **Richard Mattiaccio** and **Grant Hanessian** on panel deliberations hosted by CPR. She judged the debate at GAR LIVE NY on artificial intelligence and in November, she co-chaired the annual Fordham International Arbitration and Mediation Conference as part of New York Arbitration Week.

◆ In May, **Gail Andler** will be honored as the Children's Champion by the Court Appointed Special Advocates at their annual gala. She will also be speaking at the Class Action Law Forum on Mass Torts in San Diego this month; speaking at Epiq's Mass and Class Symposium in Fort Lauderdale in March on allocation models; speaking at the Academy of Court Appointed Neutrals on hot topics in March; and speaking at the California Society of Healthcare Lawyers spring meeting in Lake Tahoe in May.

◆ **David Evans** is speaking at the ABA Health Law Emerging Issues Conference in New Orleans that will run from April 3 to 6. The presentation is entitled *AI is Disrupting Healthcare Dispute Resolution! Are You Ready?* He is also speaking at the ABA Dispute Resolution Section annual meeting in San Diego that runs from April 10 to 13. The presentation is entitled *How Arbitrators, Mediators and Advocates Can Use Generative AI Effectively*.

◆ **Les Schiefelbein** conducted the sixth annual Schiefelbein Global Dispute Resolution Conference on January 11 at the Sandra Day O'Connor College of Law at Arizona State University in Phoenix. There were 523 conference registrants from 42 countries. The speakers and panelists provided insights into the future of arbitration in 2050, crisis negotiations, developing a career in international arbitration, and resolving entertainment and supply chain disputes. The keynote speaker was Kevin Kim of Peter & Kim in Seoul, who discussed bridging language and cultural barriers in international dispute resolution. In June 2025, the conference will move to an international site in Geneva.



From left: Les Schiefelbein, Dean Stacy Leeds of the Sandra Day O'Connor Law School and Art Hinshaw, Faculty Director of The Lodestar Dispute Resolution Center.

◆ **Jeffrey Benz** attended Hong Kong Arbitration Week in October where he spoke for the Beijing Arbitration Commission on the subject of Chinese sports dispute resolution. He also created the hypothetical and prepared the judging and logistics for the Sports Law Arbitration Moot 2024 (SLAM!) finals which will be held in Lausanne later this year.

## NEWS ABOUT THE FELLOWS

◆ **Richard Mattiaccio** organized and was co-director of a two half-day CLE Webinar on international arbitration sponsored by ICDR, Fordham Law School, and the CCA, styled *International Commercial Arbitration Law and Practice: A Deep Dive for American Litigators and in-House Counsel*. Fellows were well represented on the faculty. **Paul Klaas** delivered a lecture on legal framework and sources of authority. **George Bermann** and Richard engaged in a conversation about the pre-award authority of the courts, arbitrability, and who decides. **Grant Hanessian** lectured on practical differences in the arbitration rules selected with a focus on the AAA/IDR International Rules and some differences in practice under ICC and UNCITRAL rules. The first day ended with a cross examination simulation that featured Grant illustrating effective international cross style and Richard portraying the almost-all's-fair-in-cross-examination American arbitrator. On the second day, **Larry Schaner** lectured on ethics.

◆ On March 13, **Rich Silberberg** and **Neal Eiseman** will be the featured speakers at an ABA webinar entitled *Debunking Misconceptions: The Upsides of Commercial Arbitration*. The presentation is based upon their article of the same name that was published in the ABA Litigation Journal and the Dispute Resolution Journal.

◆ **Stephen Strick** will be opening an office in Singapore this year as an addition to his New York practice and will speak on *A Closer Look at AAA-ICDR Arbitration* on the first day of Delhi International Arbitration Weekend. The event runs from March 5 through March 10. Stephen has also been appointed to the Silicon Valley Arbitration and Mediation Center's 2024 Tech List, which is a highly acclaimed peer-vetted list comprising exceptionally qualified domestic and international arbitrators who have particular skills and expertise in the tech sector.



✉ If you have a newsworthy item, recent presentation or new publication to share with CCA Fellows, please send it to Newsletter Editor Paul J. Dubow at [pdubow2398@aol.com](mailto:pdubow2398@aol.com).