



2019 ADR LEGISLATIVE REVIEW

JANUARY 18, 2019 SEMINAR | WEBINAR

ADR SERVICES, INC., 915 WILSHIRE BLVD., SUITE 1900, LOS ANGELES, CA 90017





PROGRAM OVERVIEW

PART I: Introduction & Overview

- Introduction to CDCR: Charles Pereyra-Suarez, Esq., President, CDRC
- Overview of CDRC Legislative Work: Paul Dubow, Esq., Chair, Legislative Committee

PART II: Panel Presentation: 2019 ADR Laws, What's on the Horizon, & Confidentiality

- Toni Jaramilla, Esq., Principal, Toni Jaramilla, PC, Presenter
- Lois M. Kosch, Esq., Partner, Wilson Turner Kosmo, LLP, Presenter
- Phyllis W. Cheng, Esq., Neutral, ADR Services, Inc. & CDCR Board Member, Moderator



PART I

INTRODUCTION TO CDRC OVERVIEW OF CDRC LEGISLATIVE WORK



Charles Pereyra-Suarez



Paul Dubow

SPEAKERS ON PART I

➤ Introduction to CDRC

Charles Pereyra-Suarez, Esq., President
California Dispute Resolution Council

➤ Overview of CDRC Legislative Work

Paul Dubow, Esq., Secretary, CDRC
Chair of Legislative Committee





INTRODUCTION TO CALIFORNIA DISPUTE RESOLUTION COUNCIL

- Voice of ADR in California since 1992
- Advocates to uphold integrity of ADR in the community
- Full-time lobbyist in Sacramento
- Reviewed and weighed in on more than 500 bills
- Filed amicus briefs
- Provides legislative alerts and newsletters to members
- See more at www.cdrc.net



OVERVIEW OF CDRC LEGISLATIVE WORK

2010 LEGISLATIVE WORK

AB 1639 (Nava) Facilitated Mortgage Workout Program. Support as amended. Defeated in Senate.

Would have created a program in which lenders and borrowers could restructure mortgages through mediation and thus terminate foreclosure proceedings.

AB 1680 (Saldana) Civil rights: waiver of rights. Support as amended. Vetoed by Governor.

Would have provided that parties could not waive the provisions of Civil Code Section 51.7 as a condition of entering into a contract. At CDRC's request, author caused "fact sheet" to be revised regarding arbitration.

AB 2475 (Beall) Family law: complaints. Oppose. Held in Committee.

Would have directed the Judicial Council to adopt a rule of court to establish a uniform, statewide procedure for handling and responding to complaints regarding family law experts employed or appointed by the court, including mediators. Bill replaced by AB 939 (Committee on Judiciary) - Family law proceedings, which was enacted, that changed "mediators" to "child custody recommendation counselors."

SB 877 (Harman) Arbitration: legal representation. Support as amended. Chaptered.

Extended the sunset provision until January 1, 2013, from the out-of-state attorney arbitration counsel program.

Other legislative concepts discussed with legislators.



OVERVIEW OF CDRC LEGISLATIVE WORK

2011 LEGISLATIVE WORK

AB 267 (Swanson) Employment contracts – Support. Vetoed.

Would have made void and unenforceable as against public policy any provision in an employment contract that requires an employee, as a condition of obtaining or continuing employment, to use a forum other than California, or to agree to a choice of law other than California law, to resolve any dispute with an employer regarding employment-related issues.

AB 506 (Wieckowski) Local government: bankruptcy: neutral evaluation. Support as amended. Chaptered.

Prohibited a local public entity from filing under federal bankruptcy law unless the local public entity, among other options, has participated in a specified neutral evaluation process with interested parties.

AB 646 (Atkins) Local public employee organizations: impasse procedures. Support as amended. Chaptered.

Amended the Meyers-Milias-Brown Act. Authorized the employee organization, if the mediator was unable to effect settlement of the controversy within 30 days of his or her appointment, to request that the matter be submitted to a fact-finding panel.

AB 1208 (Charles Calderon) Trial courts: administration. Oppose. Died.

Would have permitted courts to use funds allocated to them by the state for any purpose, including presumably Dispute Resolution Programs Act funds.



OVERVIEW OF CDRC LEGISLATIVE WORK

2011 LEGISLATIVE WORK (continued)

SB 684 (Corbett) Workers' compensation insurance: dispute resolution: arbitration clauses. Support as amended. Chaptered.

Required an insurer that intends to use a dispute resolution or arbitration agreement to resolve disputes to disclose to the employer, contemporaneously with any written quote that offers to provide insurance coverage, that choice of law and choice of venue or forum may be a jurisdiction other than California and that these terms are negotiable between the insurer and the employer.

SB 731 (Committee on Judiciary) Civil actions. Support. Chaptered.

Section 3 of SB 731 pertained to court-connected non-binding arbitrations held pursuant to Code of Civil Procedure sections 1141.10, et seq. It amended sections 1141.20, subdivision (a), and 1141.23, so that a disappointed party to the arbitration would have 60 rather than 30 days to request a trial de novo.

Judicial Council Form ADR-100: Statement of Agreement or Non-Agreement. Support as amended. Adopted.

The Judicial Council revised the form as part of an effort to require all courts to use it and asked the ADR community to comment. CDRC supported the concept of a uniform reporting procedure, but suggested deletion of the portion of the revised form that required that, if a mediation did not take place, a mediator must report why it did not, including whether a person who was ordered to appear at the mediation did not appear.



OVERVIEW OF CDRC LEGISLATIVE WORK

2012 LEGISLATIVE WORK

AB 2025 (Gorell) Mediation Confidentiality. Support as amended. Chaptered.

In response to *Cassel v. Superior Court* (2011) 51 Cal.4th 113, required the California Law Revision Commission to study and report to the Legislature concerning the relationship under current law between mediation confidentiality and attorney malpractice and misconduct, as well as the availability and propriety of contractual waivers.

AB 1631 (Monning) Arbitration: legal representation. Co-sponsored. Chaptered.

Deleted sunset date on Code of Civil Procedure section 1282.4, which permits out of state attorneys to appear in domestic arbitrations in California under certain conditions.

AB 506 (Wieckowski) Local government: bankruptcy: neutral evaluation. Support. Chaptered.

Prohibited a local public entity from filing under federal bankruptcy law unless the local public entity has participated in a specified neutral evaluation process with interested parties.

SB 491 (Evans) Contracts: claims. Support. Died.

Would have provided that any term in a contract of adhesion purporting to waive the right to join or consolidate claims, or to bring a claim as a representative member of a class or in a private attorney general capacity shall be deemed to lack the necessary consent to waive that right, and would have been void.



OVERVIEW OF CDRC LEGISLATIVE WORK

2013 ADMINISTRATIVE AGENCY AND AMICUS BRIEF WORK

California Law Revision Committee: Mediation Confidentiality Study

CDRC continued to monitor the California Law Revision Commission study of mediation confidentiality by regularly attending and speaking at the Commission's quarterly meetings.

Amicus Letter to California Supreme Court: *Mangels Butler & Mitchell LLP* (2013) 219 Cal. App.4th 1299

CDRC filed an amicus letter to the California Supreme Court asking that it grant review of *Mount Holyoke Homes LP v. Jeffer Mangels Butler & Mitchell LLP*. There, the respondent law firm had made an Internet search and discovered that, ten year before, a partner in the respondent law firm had written a reference letter on behalf of the arbitrator. The trial court denied the petitioner's motion to vacate, but the Court of Appeal reversed. CDRC argued in its amicus letter that it was important in the Internet age for the Court to make a definitive ruling whether a party to an arbitration had a duty to make the search. The Court declined review.



OVERVIEW OF CDRC LEGISLATIVE WORK

2014 LEGISLATIVE WORK

AB 802 (Wieckowski) Private arbitration companies: disclosures. Support as amended. Chaptered.

Reintroduced from 2013 after incorporating CDRC's recommendations, required a private arbitration company to collect additional information related to a consumer arbitration case, and to provide the information in a single cumulative report. Require a private arbitration company to make the report available in a format that allows the public to search and sort the information using readily available software, and to make the report accessible on the private arbitration company's Internet Web site.

AB 2617 (Weber) Civil rights: waiver of rights. No position. Chaptered.

Amended Civil Code sections 51.7, 52 and 52.1 (the Ralph Civil Rights Act and the Banes Civil Rights Act) b, prohibiting a person from requiring a waiver of the right to pursue a civil action as a condition of entering into a contract for the provision of goods and services. Any waiver of this right would have to be knowing and voluntary and the burden of proving that the waiver was voluntary and not as a condition for the provision of goods and services would fall upon the person seeking to enforce the waiver. Although CDRC supported the bill's concept of opposing mandatory arbitration, it concluded that the bill was preempted and hence took no position. CDRC's conclusion proved to be correct when the statute created by the bill was overturned. See *Saheli v. White Memorial Medical Center* (2018) 21 Cal. App.5th 308.

SB 907 (Monning) International commercial disputes: representation and assistance. Support. Withdrawn.

Would have recast the International Commercial Arbitration and Conciliation Act (Code Civ. Proc., § 1297 et seq.) applicable to any arbitration or conciliation proceeding conducted pursuant to the statutory provisions that govern arbitration and conciliation of international commercial disputes. Would have also expressed the intent of the Legislature that those statutory provisions be broadly construed so as to promote California's interest in becoming a major center for international commercial arbitration,

CDRC continued to attend and speak at the quarterly meetings of the CLRC where the Commission's study of mediation confidentiality was discussed.



OVERVIEW OF CDRC LEGISLATIVE WORK

2015 LEGISLATIVE WORK

AB 465 (Hernandez) Contracts against public policy. Support with amendment. Vetoed.

Would have prohibited any person from requiring another person, as a condition of employment, to agree to the waiver of any legal right, penalty, forum, or procedure for any employment law violations. Would have prohibited a person from threatening, retaliating against, or discriminating against another person based on a refusal to agree to such waiver, and would have provided that any such waiver required from an employee or potential employee as a condition of employment or continued employment is unconscionable, against public policy, and unenforceable. CDRC proposed alternate language designed to avoid FAA preemption, but it was rejected by the author. CDRC discussed preemption concerns with the Governor's Office.

AB 1123 (Mayes) Dispute resolution programs: court administration. Opposed. Died.

Would have permitted a county that has established and is operating a dispute resolution program as described above to contract with the superior court of the county to transfer operation of the program to the court.

CDRC continued to monitor the CLRA's study of mediation confidentiality and attended and spoke at all of its quarterly meetings.



OVERVIEW OF CDRC LEGISLATIVE WORK

2016 LEGISLATIVE WORK

SB 1065 (Monning) Dismissal or denial of petitions to compel arbitration: appeals: Elder and Dependent Adult Civil Protection Act. Support. Chaptered.

Required the Court of Appeal, in an appeal of an order dismissing or denying a petition to compel arbitration involving a claim under the Elder and Dependent Adult Civil Protection Act in which a party has been granted a court preference, to issue its decision no later than 100 days after the notice of appeal is filed. Required the Judicial Council to adopt rules implementing this provision and shortening the time within which a party may file a notice of appeal in these cases.

SB 1078 (Jackson) Civil procedure: arbitration. Oppose. Vetoed.

Would have required, in a consumer arbitration, the disclosure of any solicitation made within the last two years by, or at the direction of, a private arbitration company to a party or lawyer for a party. Would have prohibited: solicitation of a party or lawyer for a party during the pendency of the arbitration; an arbitrator, from the time of appointment until the conclusion of the arbitration, from entertaining or accepting any offers of employment or offers of new professional relationships; in a consumer arbitration case, would have prohibited the arbitrator from entertaining or accepting any offers of employment as a dispute resolution neutral in another case from a party or lawyer for a party in the pending arbitration. CDRC met with the Governor's Office regarding its concerns.



OVERVIEW OF CDRC LEGISLATIVE WORK

2016 LEGISLATIVE WORK (continued)

SB 1241 (Wieckowsk) Employment contracts: adjudication: choice of law and forum. Support. Chaptered.

Prohibited an employer from requiring an employee who primarily resides and works in California, as a condition of employment, to agree to a provision that would require the employee to adjudicate outside of California a claim arising in California or deprive the employee of the substantive protection of California law with respect to a controversy arising in California. Made any provision of a contract that violates these prohibitions voidable, upon request of the employee, and required a dispute over a voided provision to be adjudicated in California under California law. Specified that injunctive relief is available and would authorize a court to award reasonable attorney's fees. Provided that adjudication includes litigation and arbitration for purposes of these provisions. Excepted contract with an employee who was represented by legal counsel.

CDRC representatives continued to attend and speak at the quarterly meetings of the CLRC in connection with its study of mediation confidentiality.



OVERVIEW OF CDRC LEGISLATIVE WORK

2017 LEGISLATIVE WORK

SB 217 (Wieckowski) Evidence: admissibility. Support. Chaptered.

Provided that declarations disclosing assets that are required by Family Code section 2105 would be admissible at trial even if they were also prepared for the purpose of, in the course of, or pursuant to, a mediation or mediation consultation. Declared the intent of the Legislature that the bill codify the holding of *Lappe v. Superior Court* (2015) 232 Cal. App.4th 774.

SB 33 (Dodd) Arbitration agreements. Support. Chaptered.

Provided that arbitration would be denied in instances in which a state or federally chartered depository institution is seeking to apply a written agreement to arbitrate, contained in a contract consented to by a respondent consumer, to a purported contractual relationship with that consumer that was created by the petitioner fraudulently without the consumer's consent and by unlawfully using the consumer's personal identifying information.



OVERVIEW OF CDRC LEGISLATIVE WORK

2018 LEGISLATIVE WORK

SB 766 (Monning) International commercial arbitration: representation. Support. Chaptered.

Permitted an individual who is not admitted to practice law in California but who is a member in good standing of a recognized legal profession in the United States or a foreign jurisdiction and is subject to effective regulation and discipline by a duly constituted professional body or public authority to provide legal services in an international commercial arbitration or related proceeding. Subjected such arbitrators to the disciplinary jurisdiction of the State Bar, and directed the State Bar to annually report to the Supreme Court regarding the number and nature of any complaints that it has received against these attorneys and any actions it has taken in response to these complaints.

SB 954 (Wieckowski) Mediation: confidentiality: disclosure. Support. Chaptered.

Except in the case of a class or representative action, required an attorney representing a person participating in a mediation or a mediation consultation to provide his or her client, as soon as reasonably possible before the client agrees to participate in the mediation or mediation consultation, with a printed disclosure containing the confidentiality restrictions related to mediation, and to obtain a printed acknowledgment signed by that client stating that he or she has read and understands the confidentiality restrictions. If an attorney is retained after an individual agrees to participate in a mediation or mediation consultation, required the attorney to comply with the printed disclosure and acknowledgment requirements as soon as reasonably possible after being retained. Specified language that would be deemed compliant with the printed disclosure and acknowledgment requirements. Failure of an attorney to comply with these disclosure requirements does not invalidate an agreement prepared in the course of, or pursuant to, a mediation. A communication, document, or writing related to an attorney's compliance with the disclosure requirements is not confidential and may be used in an attorney disciplinary proceeding if the communication, document, or writing does not disclose anything said or done or any admission made in the course of the mediation.



OVERVIEW OF CDRC LEGISLATIVE WORK

2018 LEGISLATIVE WORK (continued)

AB 3080 (Gonzalez Fletcher) Employment discrimination: enforcement. Oppose. Vetoed.

The bill had two parts. The first part would have prohibited a person from, as a condition of employment, continued employment, the receipt of any employment-related benefit, or as a condition of entering into a contractual agreement, prohibiting an applicant for employment, employee, or independent contractor from disclosing to any person an instance of sexual harassment that the employee or independent contractor suffers, witnesses, or discovers in the workplace or in the performance of the contract, or otherwise opposing any lawful practice, or from exercising any right or obligation or participating in any investigation or proceeding with respect to unlawful harassment or discrimination. CDRC had no objection to this part of the bill.

The second part would have prohibited Would have also prohibit an employer from requiring any applicant for employment or any employee to waive any right, forum, or procedure for a violation of any provision of the California Fair Employment and Housing Act (FEHA) or other specific statutes governing employment, as a condition of employment, continued employment, the receipt of any employment-related benefit, or as a condition of entering into a contractual agreement. It also would have also prohibited an employer from threatening, retaliating or discriminating against, or terminating any applicant for employment or any employee because of the refusal to consent to the waiver of any right, forum, or procedure for a violation of specific statutes governing employment. Although CDRC opposes mandatory arbitration, it concluded that this part was preempted and thus it had to oppose the bill.



PART II

Panel Presentation:

2019 ADR Laws, What's on the Horizon, and Confidentiality



SPEAKERS ON PART II

- New 2019 ADR laws
- What's on the horizon
- New Rules of Professional Conduct



Toni Jaramilla, Esq,



Lois M. Kosch, Esq,

Toni Jaramilla, Esq., Principal
Toni Jaramilla, PC, Presenter

Lois M. Kosch, Esq., Partner
Wilson Turner Kosmo, LLP, Presenter

Phyllis W. Cheng, Esq., Neutral
ADR Services, Inc. & CDCR Board Member Moderator



Phyllis Cheng, Esq,





NEW 2019 ADR LAWS

AB 3109 (Mark Stone) Contracts: waiver of right of petition or free speech. Added 1670.11 to the Civil Code

Cannot Waive Testimony

- Makes a provision in a contract or settlement agreement void and unenforceable if it waives a party's right to testify in an administrative, legislative, or judicial proceeding concerning alleged criminal conduct or sexual harassment.



NEW 2019 ADR LAWS

SB 766 (Monning) International commercial arbitration: representation. Added sections 1297.185-1297.189 to the Code of Civil Procedure.

International Commercial Arbitration Arrives in California

- Permits an individual, who is not admitted to practice law in California but who is a member in good standing of a recognized legal profession in the United States or a foreign jurisdiction and is subject to effective regulation and discipline by a duly constituted professional body or public authority, to provide legal services in an international commercial arbitration or related proceeding.
- Subjects such arbitrators to the disciplinary jurisdiction of the State Bar.
- Directs the State Bar to annually report to the Supreme Court regarding the number and nature of any complaints that it has received against these attorneys and any actions it has taken in response to these complaints.



NEW 2019 ADR LAWS

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SB 820 (Leyva) Settlement agreements: confidentiality. Added section 1001 to the Code of Civil Procedure.

No Secret Settlements: Sex Discrimination, Harassment or Assault

- Prohibits a provision in a settlement agreement that prevents the disclosure of factual information relating to certain claims of sexual assault, sexual harassment, or harassment or discrimination based on sex, that are filed in a civil or administrative action.
- Allows a provision that shields the identity of the claimant and all facts that could lead to the discovery of his or her identity, including pleadings filed in court to be included within a settlement agreement upon the request of the claimant.
- However, this provision does not apply if a government agency or public official is a party to the settlement agreement. Otherwise, a provision within a settlement agreement that prevents the disclosure of factual information related to the action that is entered into on or after January 1, 2019, is void as a matter of law and against public policy.



NEW 2019 ADR LAWS

SB 954 (Wieckowski) Mediation: confidentiality: disclosure.

Mediation Confidentiality: Written Disclosure

- Except in the case of a class or representative action, requires an attorney representing a person participating in a mediation or a mediation consultation to provide his or her client, as soon as reasonably possible before the client agrees to participate in the mediation or mediation consultation, with a printed disclosure containing the confidentiality restrictions related to mediation, and to obtain a printed acknowledgment signed by that client stating that he or she has read and understands the confidentiality restrictions.
- If an attorney is retained after an individual agrees to participate in a mediation or mediation consultation, required the attorney to comply with the printed disclosure and acknowledgment requirements as soon as reasonably possible after being retained. Specified language that would be deemed compliant with the printed disclosure and acknowledgment requirements.
- Failure of an attorney to comply with these disclosure requirements does not invalidate an agreement prepared in the course of, or pursuant to, a mediation.
- A communication, document, or writing related to an attorney's compliance with the disclosure requirements is not confidential and may be used in an attorney disciplinary proceeding if the communication, document, or writing does not disclose anything said or done or any admission made in the course of the mediation.



NEW 2019 ADR LAWS: SB 954 DISCLOSURE

Mediation Disclosure Notification and Acknowledgment

To promote communication in mediation, California law generally makes mediation a confidential process. California’s mediation confidentiality laws are laid out in Sections 703.5 and 1115 to 1129, inclusive, of the Evidence Code. Those laws establish the confidentiality of mediation and limit the disclosure, admissibility, and a court’s consideration of communications, writings, and conduct in connection with a mediation. In general, those laws mean the following:

- All communications, negotiations, or settlement offers in the course of a mediation must remain confidential.
- Statements made and writings prepared in connection with a mediation are not admissible or subject to discovery or compelled disclosure in noncriminal proceedings.
- A mediator’s report, opinion, recommendation, or finding about what occurred in a mediation may not be submitted to or considered by a court or another adjudicative body.
- A mediator cannot testify in any subsequent civil proceeding about any communication or conduct occurring at, or in connection with, a mediation.

This means that all communications between you and your attorney made in preparation for a mediation, or during a mediation, are confidential and cannot be disclosed or used (except in extremely limited circumstances), even if you later decide to sue your attorney for malpractice because of something that happens during the mediation.

I, _____ [Name of Client], understand that, unless all participants agree otherwise, no oral or written communication made during a mediation, or in preparation for a mediation, including communications between me and my attorney, can be used as evidence in any subsequent noncriminal legal action including an action against my attorney for malpractice or an ethical violation.

NOTE: This disclosure and signed acknowledgment does not limit your attorney’s potential liability to you for professional malpractice, or prevent you from (1) reporting any professional misconduct by your attorney to the State Bar of California or (2) cooperating with any disciplinary investigation or criminal prosecution of your attorney.



LEGISLATION ON THE HORIZON

AB 51 (Gonzalez), return of AB 3080 (Gonzalez Fletcher) Employment discrimination: enforcement. Vetoed by former Governor Jerry Brown. Governor Gavin Newsom?

No Forced Arbitration

- Would prohibit a person from conditioning employment, the receipt of any employment-related benefit or as a condition of entering into a contractual agreement, on an employee or applicant waiving any right, forum, or procedure for a violation of any provision the California Fair Employment and Housing Act or the Labor Code.
- Would prohibit a person from threatening, retaliating, or discriminating against any applicant or employee because of their refusal to agree to such a waiver.
- Would also make it unlawful for employers to prohibit workers from disclosing an instance of sexual harassment, opposing an unlawful practice, or participating in any investigation relating to harassment or discrimination.

ARBITRATION STATISTICS

**Table 1: Summary of Arbitrations in California at the
Four Major Arbitration Companies, 2012-2016**

| Data Characteristic | Arbitration Company | | | | Total Across ACs |
|---|---------------------|-------|-------|-------|---------------------|
| | AAA | ADR | JAMS | JW | |
| Total Number of Arbitrations | 5,892 | 2,373 | 764 | 1,953 | 10,982 |
| Number of Employment-Related California Arbitrations | 3,065 | 853 | 434 | 221 | 4,573 |
| Employment-Related California Arbitrations as a Percentage of the Total | 52.0% | 35.9% | 56.8% | 11.3% | 41.6% |

SOURCE: AN ANALYSIS OF CALIFORNIA ARBITRATION DATA, REPORT BY BRIAN KRIEGLER, PH.D. AND MELISSA DANIEL, Econ ONE Research, Inc., October 4, 2018



RECENT ADR CASE LAW

Henry Schein, Inc. v. Archer & White Sales, Inc. (US 17–1272 1/8/19)

Arbitrators control what is to be arbitrated

Background: In this antitrust action to compel arbitration, the relevant contract between the parties provided for arbitration of any dispute arising under or related to the agreement, except for, among other things, actions seeking injunctive relief. Invoking the Federal Arbitration Act, the issue was whether the dispute was not subject to arbitration because its complaint in part sought injunctive relief.

Holding: the US Supreme Court held that:

1. the “wholly groundless” exception to arbitrability is inconsistent with the Federal Arbitration Act and this Court’s precedent. Under the Act, arbitration is a matter of contract, and courts must enforce arbitration contracts according to their terms. *Rent-A-Center, West, Inc. v. Jackson*, 561 U. S. 63, 67.
2. parties to such a contract may agree to have an arbitrator decide not only the merits of a particular dispute, but also “ ‘gateway’ questions of ‘arbitrability.’ ”
3. That conclusion follows also from the Supreme Court’s precedent. *See AT&T Technologies, Inc. v. Communications Workers*, 475 U. S. 643, 649– 650.



RECENT ADR CASE LAW

Epic Systems Corp. v. Lewis (2018) 138 S.Ct. 1612

Arbitration agreements requiring individual arbitration enforceable under the FAA

Background: In several cases, an employer and employee entered into a contract providing for individualized arbitration proceedings to resolve employment disputes between the parties. Each employee nonetheless sought to litigate Fair Labor Standards Act and related state law claims through class or collective actions in federal court.

Holding: the US Supreme Court held that:

1. Federal Arbitration Act's (FAA) saving clause did not provide a basis for refusing to enforce arbitration agreements waiving collective action procedures for claims under the FLSA and class action procedures for claims under state law;
3. provision of National Labor Relations Act (NLRA), which guarantees to workers the right to engage in concerted activities for the purpose of collective bargaining or other mutual aid or protection, does not reflect a clearly expressed and manifest congressional intention to displace the FAA and to outlaw class and collective action waivers, abrogating *National Labor Relations Board v. Alternative Entertainment, Inc.*, 858 F.3d 393; and
5. Supreme Court would not accord *Chevron* deference to National Labor Relations Board's (NLRB) interpretation of federal statutes as outlawing class and collective action waivers by employees.



RECENT ADR CASE LAW

Honeycutt v. JPMorgan Chase Bank, N.A. (2018) 25 Cal.App.5th 909

Failure by arbitrator to disclose potential conflicts on other cases violates ethical standards

Background: After arbitration of dispute between employee and employer resulted in arbitration award in favor of employer, employee filed petition to vacate arbitration award, and employer filed petition to confirm it. The Superior Court entered judgment confirming award. Employee appealed.

Holding: The Court of Appeal held that:

1. arbitrator violated ethics standard requiring disclosure of arbitrator's acceptance of offers to serve as neutral in other cases involving same parties or attorneys;
2. disclosure letters sent to parties were insufficient to satisfy arbitrator's disclosure obligation; and

3. arbitrator's failure to disclose service in other pending arbitrations involving counsel for employer

1 requiring disclosure of matters that could cause a person to reasonably doubt ar

to be impartial, thus requiring vacatur of arbitration award.



RECENT ADR CASE LAW

Benaroya v. Willis (2018) 23 Cal.App.5th 462

Arbitrator cannot compel non-signatories to arbitrate under alter ego theory

Background: Following arbitration of breach of contract claims involving funds held in escrow for movie actor, movie production company and its principal filed petition to vacate arbitration award in favor of actor and lender or to correct it and remove principal as a party. The Superior Court confirmed the award and entered judgment for actor and lender, and production company and principal appealed.

Holding: The Court of Appeal held that:

1. arbitrator lacked authority to determine that principal, who was not a signatory to arbitration agreement, could nevertheless be compelled to arbitrate under theory of alter ego liability, and
2. error could not be harmless error.



RECENT ADR CASE LAW

Moss Bros. Toy, Inc. v. Ruiz (2018) 27 Cal.App.5th 424

Sufficient evidence of electronic signature to arbitration agreement is by preponderance of the evidence

Background: Employer brought action against former employee, alleging breach of arbitration agreements based on employee's filing of lawsuit for employment-related claims. Employee moved to strike under law prohibiting strategic lawsuits against public participation (anti-SLAPP law). The Superior Court granted motion. Employer appealed.

Holding: Among other things, the Court of Appeal held that:

1. employer's entire complaint was based on employee's exercise of protected right of petition.
2. employer had failed to present sufficient evidence to meet its burden of showing by a preponderance of the evidence that the employee was the person who electronically signed the relevant arbitration agreement; and
3. joint employer had unreasonably delayed in applying to intervene, and there was no excuse for the delay.



RECENT ADR CASE LAW

Ramos v. Superior Court of San Francisco County (2018) 28 Cal.App.5th 1042 **Unconscionable clauses render arbitration agreement unenforceable**

Background: Attorney filed petition for writ of mandate, seeking to compel the Superior Court, San Francisco, No. CGC-17-561025, John Stewart, J., to vacate its order granting law firm's motion to compel arbitration of attorney's claims for sex discrimination, retaliation, wrongful termination, and violation of the Equal Pay Act.

Holding: The Court of Appeal held that:

1. arbitration provision required arbitration of any dispute or controversy “arising under or related to” partnership or partnership agreement, not any dispute or controversy between parties;
2. attorney's claims “related to” partnership or partnership agreement, and thus fell within scope of arbitration provision;
3. arbitration agreement satisfied requirement that it provide for neutral arbitrators;
4. arbitration clause impermissibly prevented attorney from obtaining remedies available under her statutory claims, and thus that provision was unenforceable;
5. arbitration agreement's lack of express language providing for discovery did not render agreement unconscionable, and thus unenforceable;
6. arbitration agreement's confidentiality clause was substantively unconscionable;
7. arbitration agreement's forum selection clause was not substantively unconscionable;
8. unconscionable clause restricting panel's ability to provide remedies could not be severed, and thus arbitration agreement was void as matter of law.



CASE PENDING BEFORE CALIFORNIA SUPREME COURT

OTO, L.L.C. v. Kho, 14 Cal.App.5th 691 (2017), review granted, 225 Cal. Rptr. 3d 796 (2017); S244630/A147564

Affordability and accessibility of arbitration remedy

1. Was the arbitration remedy at issue in this case sufficiently “affordable and accessible” within the meaning of *Sonic-Calabasas A, Inc. v. Moreno* (2013) 57 Cal.4th 1109 to require the company’s employees to forego the right to an administrative *Berman* hearing on wage claims?
2. Did the employer waive its right to bypass the *Berman* hearing by waiting until the morning of that hearing, serving a demand for arbitration, and refusing to participate in the hearing?



CERT GRANTED BEFORE U.S. SUPREME COURT

Frank v. Gaos (US 17-961), *In re Google Referrer Header Privacy*

Litigation (9th Cir. 2017) 869 F.3d 737

“Cy pres” class-action settlements

Issue: Whether, or in what circumstances, a cy pres award of class action proceeds that provides no direct relief to class members supports class certification and comports with the requirement that a settlement binding class members must be “fair, reasonable, and



CERT GRANTED BEFORE U.S. SUPREME COURT

Lamps Plus Inc. v. Varela (US 17-988), *Varela v. Lamps Plus, Inc.* (9th Cir. 2017) 701 Fed.Appx. 670

FAA versus state-law interpretation of arbitration agreement

Issue: Whether the Federal Arbitration Act forecloses a state-law interpretation of an arbitration agreement that would authorize class arbitration based solely on general

 commonly used in arbitration agreements.
CALIFORNIA DISPUTE RESOLUTION COUNCIL
YOUR VOICE FOR ADR IN SACRAMENTO

NEW RULES OF PROFESSIONAL CONDUCT

(a) A lawyer shall not, without informed written consent* from each client and compliance with paragraph (d), represent a client if the representation is directly adverse to another client in the same or a separate matter.

(c) Even when a significant risk requiring a lawyer to comply with paragraph (b) is not present, a lawyer shall not represent a client without written* disclosure of the relationship to the client and compliance with paragraph (d) where: (1) the lawyer has, or knows* that another lawyer in the lawyer's firm* has, a legal, business, financial, professional, or personal relationship with or responsibility to a party or witness in the same matter; or (2) the lawyer knows* or reasonably should know* that another party's lawyer is a spouse, parent, child, or sibling of the lawyer, lives with the lawyer, is a client of the lawyer or another lawyer in the lawyer's firm,* or has an intimate personal relationship with the lawyer.

(e) For purposes of this rule “matter” includes any judicial or other proceeding, application, request for a ruling or other determination, contract, transaction, or other dispute involving a party, or any motion, hearing, conference, or other proceeding, arrest, or other deliberation, decision, or action that is focused on the interests of specific persons,* or a discrete and identifiable

Rule 1.12 Former Judge, Arbitrator, Mediator or Other Third-Party Neutral

NEW RULES OF PROFESSIONAL CONDUCT

(a) Except as stated in paragraph (d), a lawyer shall not represent anyone in connection with a matter in which the lawyer participated personally and substantially as a judge or other adjudicative officer, judicial staff attorney or law clerk to such a person* or as an arbitrator, mediator, or other third-party neutral, unless all parties to the proceeding give informed written consent.*

(b) A lawyer shall not seek employment from any person* who is involved as a party or as lawyer for a party, or with a law firm* for a party, in a matter in which the lawyer is participating personally and substantially as a judge or other adjudicative officer or as an arbitrator, mediator, or other third party neutral. A lawyer serving as a judicial staff attorney or law clerk to a judge or other adjudicative officer may seek employment from a party, or with a lawyer or a law firm* for a party, in a matter in which the staff attorney or clerk is participating personally and substantially, but only with the approval of the court.

(c) If a lawyer is prohibited from representation by paragraph (a), other lawyers in a firm* with which that lawyer is associated may knowingly* undertake or continue representation in the matter only if: (1) the prohibition does not arise from the lawyer's service as a mediator or settlement judge; (2) the prohibited lawyer is timely screened* from any participation in the matter and is apportioned no part of the fee therefrom; and (3) written* notice is promptly given to the parties and any appropriate tribunal* to enable them to ascertain compliance with the provisions of this rule.

(d) An arbitrator selected as a partisan of a party in a multimember arbitration panel is not prohibited from subsequently representing that party.



NEW RULES OF PROFESSIONAL CONDUCT

Rule 2.4 Lawyer as Third-Party Neutral

(a) A lawyer serves as a third-party neutral when the lawyer assists two or more persons* who are not clients of the lawyer to reach a resolution of a dispute, or other matter, that has arisen between them. Service as a third-party neutral may include service as an arbitrator, a mediator or in such other capacity as will enable the lawyer to assist the parties to resolve the matter.

(b) A lawyer serving as a third-party neutral shall inform unrepresented parties that the lawyer is not representing them. When the lawyer knows* or reasonably should know* that a party does not understand the lawyer's role in the matter, the lawyer shall explain the difference between the lawyer's role as a third-party neutral and a lawyer's role as one who represents a client.



NEW RULES OF PROFESSIONAL CONDUCT

Rule 2.4.1 Lawyer as Temporary Judge, Referee, or Court-Appointed Arbitrator

A lawyer who is serving as a temporary judge, referee, or court-appointed arbitrator, and is subject to canon 6D of the California Code of Judicial Ethics, shall comply with the terms of that canon.

Comment

[1] This rule is intended to permit the State Bar to discipline lawyers who violate applicable portions of the California Code of Judicial Ethics while acting in a judicial capacity pursuant to an order or appointment by a court.

[2] This rule is not intended to apply to a lawyer serving as a third-party neutral in a mediation or a settlement conference, or as a neutral arbitrator pursuant to an arbitration agreement. (See rule 2.4.)



NEW RULES OF PROFESSIONAL CONDUCT

Rule 8.4.1 Prohibited Discrimination, Harassment and Retaliation

(a) In representing a client, or in terminating or refusing to accept the representation of any client, a lawyer shall not: (1) unlawfully harass or unlawfully discriminate against persons* on the basis of any protected characteristic; or (2) unlawfully retaliate against persons.*

(b) In relation to a law firm's operations, a lawyer shall not: (1) on the basis of any protected characteristic, (i) unlawfully discriminate or knowingly* permit unlawful discrimination; (ii) unlawfully harass or knowingly* permit the unlawful harassment of an employee, an applicant, an unpaid intern or volunteer, or a person* providing services pursuant to a contract; or (iii) unlawfully refuse to hire or employ a person*, or refuse to select a person* for a training program leading to employment, or bar or discharge a person* from employment or from a training program leading to employment, or discriminate against a person* in compensation or in terms, conditions, or privileges of employment; or (2) unlawfully retaliate against persons.*

(c) For purposes of this rule: (1) "protected characteristic" means race, religious creed, color, national origin, ancestry, physical disability, mental disability, medical condition, genetic information, marital status, sex, gender, gender identity, gender expression, sexual orientation, age, military and veteran status, or other category of discrimination prohibited by applicable law, whether the category is actual or perceived; (2) "knowingly permit" means to fail to advocate corrective action where the lawyer knows* of a discriminatory policy or practice that results in the unlawful discrimination or harassment prohibited by paragraph (b); (3) "unlawfully" and "unlawful" shall be determined by reference to applicable state and federal statutes and decisions making unlawful discrimination or harassment in employment and in offering goods and services to the public; and (4) "retaliate" means to take adverse action against a person* because that person* has (i) opposed, or (ii) pursued, participated in, or assisted any action alleging, any conduct prohibited by paragraphs (a)(1) or (b)(1) of this rule.



NEW RULES OF PROFESSIONAL CONDUCT

Rule 8.4.1 Prohibited Discrimination, Harassment and Retaliation (continued)

(d) A lawyer who is the subject of a State Bar investigation or State Bar Court proceeding alleging a violation of this rule shall promptly notify the State Bar of any criminal, civil, or administrative action premised, whether in whole or part, on the same conduct that is the subject of the State Bar investigation or State Bar Court proceeding.

(e) Upon being issued a notice of a disciplinary charge under this rule, a lawyer shall: (1) if the notice is of a disciplinary charge under paragraph (a) of this rule, provide a copy of the notice to the California Department of Fair Employment and Housing and the United States Department of Justice, Coordination and Review Section; or (2) if the notice is of a disciplinary charge under paragraph (b) of this rule, provide a copy of the notice to the California Department of Fair Employment and Housing and the United States Equal Employment Opportunity Commission.

(f) This rule shall not preclude a lawyer from: (1) representing a client alleged to have engaged in unlawful discrimination, harassment, or retaliation; (2) declining or withdrawing from a representation as required or permitted by rule 1.16; or (3) providing advice and engaging in advocacy as otherwise required or permitted by these rules and the State Bar Act.



QUESTIONS

Participants are invited to submit questions to presenters on any of the topics covered in the presentation.

PART I: Introduction & Overview

- Introduction to CDCR: Charles Pereyra-Suarez, Esq., President, CDCR
- Overview of CDCR Legislative Work: Paul Dubow, Esq., Chair, Legislative Committee

PART II: Panel Presentation: 2019 ADR Laws, What's on the Horizon, & Confidentiality

- Toni Jaramilla, Esq., Principal, Toni Jaramilla, PC, Presenter
- Lois M. Kosch, Esq., Partner, Wilson Turner Kosmo, LLP, Presenter
- Phyllis W. Cheng, Esq., Neutral, ADR Services, Inc. & CDCR Board Member, Moderator



THANK YOU FOR YOUR PARTICIPATION

MCLE CREDITS WILL BE E-MAILED ON OR BEFORE FEBRUARY 1, 2019

