

Probate ADR Conference

December 10-11, 2015

Arizona Supreme Court
Administrative Office of the Courts
Education Services Division

and

Maricopa County Superior Court
Probate Court Administration



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Probate Mediation Training Manual

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FACULTY INFORMATION

Program Faculty

Shannon Arriola is a founding member of the Maricopa County Association of Family Mediators and one of the few original non-attorney mediators to participate in early probate ADR cases within the Arizona court system. She has been in private practice as a mediator, family counselor and trainer for over twenty years. With a background crisscrossing business, law, psychology and systems design, Shannon aligns her passion for creating sustainable working relationships and communication strategies to the most difficult environments, from families to board rooms.

In the past five years, Shannon has taken her practice back to issues facing families and the roles of caregivers and decision makers in relational dynamics. She is focusing strongly in coaching and consulting in areas including ageism, end of life preparation, and redefining familial relationships during and after the loss of loved ones. Shannon is an avid hiker, traveler and motorcyclist novice. And yes, she always wears a helmet.

Lauren Garner is a partner with the law firm of Jaburg Wilk, P.C. She was admitted to the Florida Bar in May, 1982 and to the Arizona Bar in May, 1999. Her practice emphasizes probate and trust litigation and mediation as well as guardianships and conservatorships. Lauren is a Judge Pro Tem for Maricopa County Superior Court in the Probate and Mental Health Division. Lauren is a Fellow of the American College of Trust and Estate Council (ACTEC). She is a member of the Executive Council of the Probate and Trust Section of the State Bar of Arizona (2006 to present) (Chair 2008-2009), and a former member of both the Executive Council for the Elder Law, Mental Health and Special Needs Planning Section of the State Bar of Arizona (2011 to present) and of the Estate Planning and Probate Section of the Maricopa County Bar Association (2005-2007) (Chair 2007). Lauren was certified as a mediator in Florida and serves as a mediator and settlement judge for the Maricopa Superior Court Probate Division. Before moving to Arizona, Lauren practiced law for 17 years in Miami, Florida in the areas of probate/guardianship, commercial litigation and mediation. She received her B.A. in 1979 from Smith College and her J.D. in 1981 from the University of Florida College of Law. She is a frequent speaker on probate and trust litigation topics, including mediation and ways to avoid probate and trust litigation.

Art Hinshaw is a Clinical Professor of Law at the Sandra Day O'Connor College of Law at Arizona State University and serves as the Director of the Lodestar Dispute Resolution Program. His research and teaching interests lie in the field of dispute resolution, primarily mediation and negotiation. His research bridges dispute resolution theory and practice, and his teaching responsibilities include the Lodestar Mediation Clinic and Negotiation among other dispute resolution courses.

Professor Hinshaw is active in the dispute resolution community having served on several academic and professional committees at the state and national levels. Currently, he serves as a member of the ABA's Standing Committee on Mediator Ethical Guidance. Additionally, he is a Senior Fellow at the Center for the Study of Dispute Resolution at the University Of Missouri School Of Law and is a contributor to *Indisputably*, a blog devoted to dispute resolution. Outside of the dispute resolution realm, Professor Hinshaw is a member of the Arizona Commission on Judicial Conduct.

Professor Hinshaw joined the College of Law faculty after teaching at the University of Missouri School of Law and at the Washington University School of Law in St. Louis. Before his academic career, he practiced law in Kansas City, Missouri.

Stephen J.P. Kupiszewski was born in Lake Wales, Florida. He came to Arizona in 1981 as an All-American on a swimming scholarship to Arizona State University and was team captain for the 1984-85 season. Also during the 1984-85 school year, Stephen was president of the Volunteers for Youth program, serving underprivileged children in the Phoenix area. He graduated with a B.S. in 1986. Like his father, he attended Cumberland School of Law at Samford University in Birmingham, Alabama graduating in December of 1989. After a brief solo practice, Stephen became an Assistant Attorney General in 1991 working in the Protective services section of the Office under Grant Woods. In 1997 he joined Tielborg, Sanders & Parks working on medical malpractice and insurance defense cases. Stephen returned to Juvenile Court with the Legal Defender's office in Dec. of 1998, focusing his practice and representing parents on severance and dependency cases against the state of Arizona.

Steve was appointed to the superior court bench as a Commissioner and began his career as a judicial officer on August 3, 2001. Through the rotation process, Stephen has presided over Criminal, Family, Probate, Juvenile, Mental Health, Tax and Civil calendars. He has retired from his last rotation on a blended calendar serving Probate and Family Court cases on March 29, 2013. After two long days in retirement, Steve opened his Law practice with his wife Jennifer and new law partner, Emily Kile. Steve focuses primarily on Mediation and Litigation services in probate, civil and family court cases.

Rick Pate, a graduate of Indiana University (BS 1969, MBA 1972, J.D. 1975), worked for 32½ years with Eli Lilly and Company, Indianapolis, Indiana. He served as Human Resource Attorney (1976-1979), General Counsel, Elizabeth Arden, Inc. (1979-1982), Assistant General Counsel, Eli Lilly International Corporation (1982-1985), Manager of Corporate Communications (1985-1988), Manager of Corporate Tax (1988-1996) and Director of Global Tax (1996-2008) Mr. Pate was an instructor for the New Manager Program, Waste Terminator Productivity Program, Crucial Conversations Program, and Business Partner Program.

Mr. Pate was Adjunct Faculty at the Kelly School of Business, Indiana University teaching undergraduate and MBA International Business Courses (2006-2008). He has lectured on International Business Transactions at the Indiana University at Indianapolis Law School, and he currently is Adjunct Faculty at the ASU Law School teaching the Lodestar Mediation Clinic.

Mr. Pate volunteers his time as a Pro Tem Judge for the Maricopa County Justice Court. He also was President of the Indianapolis Legal Aid Society (1984-1990) and served on the Board of Child Advocates Inc. (1990-1993) and Pleasant Run Children's Home (1992-1998) in Indianapolis, Indiana. Mr. Pate was also President of the Arizona Association For Conflict Resolution (2011-2012)

Kristine Reich has over two decades of experience working with families and children experiencing difficult transitional life events. Out of a deep appreciation for holistic, solution-focused practice, she opened *Restorative Law and Mediation* in December 2014.

Kristine's multi-disciplinary approach to practice is influenced by her legal education received from Sandra Day O'Connor College of Law at Arizona State University ('08), and Masters in Social work at Arizona State University (ASU) ('93). Kristine has practiced family law since 2011, has worked as an adjunct professor or in legal education since 2008, and was a child welfare social worker and therapist for fifteen (15) years prior to law school. Kristine is formerly the statewide Director of Training for what is now the Child Welfare Training Institute at the Arizona Department of Child Safety and the Director of Adoptions for Aid to Adoption of Special Kids (AASK).

Kristine has been coaching the Sandra Day O'Connor College of Law mediation team for the American Bar Association (ABA) Representation in Mediation Competition since 2009. Kristine is the only national champion of this competition ('06) that has coached five (5) subsequent national competition teams and two (2) national champion teams ('12 and '14).

Kristine's best days in the profession are being witness to the transformative process of those that start in despair, and go on to create joyful futures.

Pamela Willson, PhD, ABPP, is an Arizona Licensed Clinical Psychologist, and nationally board certified in Clinical Neuropsychology with the American Board of Professional Psychology /American Academy of Clinical Neuropsychology. She is co-founder and owner of InteGer Behavioral Health, P.A., and is a member the International Neuropsychological Society, American Psychological Association (Division 40, Neuropsychology and Div. 56, Trauma Psychology), International Society for Traumatic Stress Studies, and several other professional organizations.

In her private practice, Dr. Willson consults with individuals, physicians, attorneys, and insurers, and regularly serves as an expert witness in probate and civil matters. She's lived and worked in the Phoenix area for over two decades, specializing in neuropsychological, behavioral and personality evaluations of people from 18 to over 100 years of age, and has provided education and training to organizations around the state. Other areas of professional focus include adult PTSD, adult ADHD, behavioral neuroscience, the human mirror neuron system, ADR in probate settings, and assessing civil competencies.

Lauri Yablick, Ph.D., M.S.C.P. has been practicing as a licensed psychologist in Arizona since 1991, and in New Mexico since 2009. She completed her graduate studies at Washington University in St. Louis, Missouri, with an emphasis in geriatrics, and has a Master's degree in clinical psychopharmacology through Fairleigh Dickinson University in 2011. Her current practice includes outpatient adult and geriatric neuropsychological evaluation, as well as program development and behavioral consultation in skilled nursing facilities.

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Probate Alternative Dispute Resolution Conference
December 10-11, 2015
Sheraton Crescent Hotel * Phoenix, Arizona

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MEDIATION MATERIALS

OPENING STATEMENT CHECKLIST

- 1. Introductions**
 - Introduce Self
 - Find out what others want to be called. (Note: Typically mixed – formal & informal)

- 2. Preview Statement**

- 3. Explain Mediation Process**
 - Informal
 - Opportunity to create mutually acceptable agreement

- 4. Describe How Process Will Work**
 - What will happen
 - How long
 - Caucus

- 5. Explain Role of Mediator**
 - Facilitator
 - No authority to decide: controls process not substance
 - Draft or write up agreement
 - Disclaimer about being a lawyer, law student, or other professional

- 6. Discuss Confidentiality**
 - Exceptions: Threats of harm, threats to the public, ongoing commission of a crime

- 7. Review Agreement to Mediate Form**

- 8. Ground Rules**
 - Respect
 - One person at a time

- 9. Questions & Answers**

IMPORTANT PARAGRAPHS TO INCLUDE IN YOUR MEDIATION FEE AGREEMENT

1. Division of mediator fees and when you expect to get your retainer and your hourly rate.
2. Due dates for pre-mediation briefs and the mediation date. I also put in what is to be in a pre- settlement memorandum. Description of the issues in the lawsuit, the evidence each party will be able to present to the court, summary of settlement negotiations between the parties, a projection of the outcome at trial, non-traditional settlements that may be considered (piece of property or heirloom), or other helpful information.
3. Tell them you are going to review all materials presented and then what you want them to present. My list usually includes: any source documents relevant to the dispute, wills, trusts, POA's, business entity information, property lists.
4. Try and have the parties agree on documents to be submitted so you get a relevant document only once.
5. Explanation of the mediation process.
6. Describe the location and the services your office has available. Things like telephones available, computer or internet access, audio/visual equipment.
7. What your authority is as a mediator and what it is not. You may hold joint meetings and separate caucuses, terminate the process if not productive, advise you are not practicing law or giving legal advice and cannot force a resolution.
8. Insure that the mediating parties have authority to enter into settlements.
9. Reserve the right to exclude any non-party that you believe is disruptive to the process.
10. Confidentiality paragraph indicating that the process is privileged and not subject to discovery.
11. Exception to confidentiality of the threat of physical violence.
12. Waiver of any conflicts (prior judicial experience).
13. Cancellation policy.

AGREEMENT TO MEDIATE

This Agreement to Mediate is entered into among the following parties:

A, B, and C, individually as beneficiaries and as Co-Trustees of the XYZ Family Trust

D, individually as beneficiary of the XYZ Family Trust.

1. Mediation – The parties agree to mediate the claims and controversies that are the subject of the pending dispute between them arising out the Maricopa County PB _____, In Re XYZ Family Trust and the related assignments and other documents.
2. Date, Time and Place of Mediation – The mediation will take place on _____, _____, 20____ at _____ a.m./p.m. at the law office of _____.
3. Authority of the Mediator – The Mediator does not have authority to impose a settlement on the parties. The mediator ma conduct joint and separate sessions with the parties and may make oral and written recommendations for settlement. The mediator is authorized to end the mediation when, in their judgement, further efforts at mediation would not contribute to a resolution of the dispute. The mediator is not acting as a lawyer or practicing law while serving as a mediator and the parties acknowledge that no attorney-client relationship exists between the mediator and any of them.
4. Mediator – The mediator is _____. The mediator’s fee is \$_____/hour. The fees and any reasonable expenses incurred by the mediator in connection with the mediation shall be paid by _____. The retainer of \$_____ shall be paid by _____, to be applied to the final billing.
5. Privacy – The mediation sessions will be private. Only the mediator, the parties or persons authorized by the parties and the mediator may attend mediation sessions. There will be no stenographic, recorded or digital records of the mediation process.
6. Authority – Each party not present represent that any representative attending the mediation has full authority to negotiate on his or her behalf and to settle all claims and controversies without further notice or approval.
7. Confidentiality – The parties agree that all statements made during the course of the mediation (and written statement prepared for the mediation) are confidential settlement discussions (or documents), are made without prejudice to any party’s legal position and are inadmissible for the

EXAMPLE 2

EXAMPLE 2

any purpose in any legal or administrative proceeding. Any information disclosed to the mediator by a party, or by a representative or a party, or by a witness on behalf of a party, is confidential. The mediator will not disclose any confidential information during the mediation without the consent of the party providing the confidential information. The parties agree that they will not seek to compel the mediator to disclose any such confidential information in any legal or administrative proceeding or otherwise. The parties further agree that they will not introduce into evidence any confidential information disclosed in violation of this Agreement, nor will they introduce into evidence, or use for any purpose, any written or oral statements of the mediator. Any party violating this Agreement will pay all costs and expenses, including reasonable attorney’s fees, of the mediator and other parties incurred in opposing the efforts to compel confidential information from the mediator.

- 8. Limitation of Liability – Neither the mediator nor the mediator’s law firm is liable to any party for any act or omission in connection with the mediation of this matter.
- 9. Conflicts – The mediator has disclosed any conflicts they may have, and the parties have waived any conflicts disclosed.
- 10. Termination of Mediation – The mediation may be terminated (a) by the execution of a settlement agreement by the parties; (b) by notice of the mediator that further efforts at mediation would not prove useful; or (c) by notice of the any party that the mediation is terminated.
- 11. The parties understand that any partial or global settlement that they may reach in the mediation will be drafted in a mediation memorandum to be signed by the parties. Any agreement that is reached will be binding on the parties as an enforceable contract.

Dated: _____, 20_____

Mediator

PARTIES

APPROVED AND AGREED TO BY LEGAL COUNSEL:

A
[repeat as necessary]

By: _____

APPROVED AND AGREED TO BY LEGAL COUNSEL

B

By: _____

Settlement Agreement Checklist

- Reference
E.g., Estate of John Doe, Deceased (PB2012-000000)

- Parties
 - List all parties and, where appropriate, capacities
E.g., Jane Doe, individually and as Trustee
 - Specify those who have authority to bind other interested parties

- Date

- Recitals (optional)
Brief description of facts, nature of dispute and pleadings filed

- Settlement Terms
 - Payment of money: clarify amount, method of payment, recipient
 - Signing documents: clarify who prepares and who signs
 - Other acts
 - Contingencies
 - Deadlines: state the dates by which compliance is required
 - Issues not resolved by agreement or documents still to be drafted

- Assets at Issue (as applicable)
 - Real property, tangible personal property, cash, securities, intangible property (e.g., contract rights, property settlement agreements), business interests, retirement/pension funds, death benefits, insurance
 - Inventory? Specify who prepares, methods (list, videotape, photographs), deadline date
 - Appraisals? Specify method of choosing appraiser, qualifications, who pays, deadline date
 - Accounting? Specify period of time, format, supporting documents, who prepares, payment, deadline date
 - Distribution and payment: Specify method, who pays for shipping and packing personal property, who prepares transfer documents, deadline dates
 - Tax consequences? Specify nature, who is responsible for tax reporting and payment, deadline dates

- Care Issues (as applicable)
 - Evaluations? Specify testing already done, medical records review, cognitive assessment, functional assessment, other assessment, method of choosing evaluator, qualifications, who pays, deadline date
 - Medical treatment, medications, mental health issues

- Placement? Residential v. facility, in fiduciary's home, other
 - Who is being appointed, in what capacity, designated successors
 - Scope of authority, allocation between co-fiduciaries, restrictions
 - Reporting: Nature and extent of report, to whom, how often, by what method
 - Caregiving: By fiduciary, by family, by third parties, monitoring, payment for services (including withholding, FICA, workman's comp, etc.)
 - Visitation issues
 - Emergencies
 - End of life care, DNR's, withholding nutrition & water, healthcare POA, mental health care POA, medical directives (living wills), surrogates
 - Fiduciary fees, reimbursement of expenses, recordkeeping
- Attorney Fees
- Specify whether each party pays own fees or one party pays part or all of another party's fees
 - State amount, method of payment and deadline date
- Releases of Liability / Indemnifications (Hold Harmless)
- Explicitly include or exclude
 - Liability, damages or costs, or both
 - Describe scope of coverage (arising out of)
 - Clarify date or act upon which release/indemnity takes effect (E.g., by signing this agreement, the parties mutually release each other and their respective agents and representatives from all past, present and future claims, liabilities and damages arising out of the administration of the subject probate estate and trusts, whether known or unknown. This mutual release will automatically take effect immediately/ upon court approval/immediately upon final distribution of assets from the estate and trusts.)
- Confidentiality
- Post-Settlement Issues
- Handling funds held in reserve
 - Handling disputes over compliance or interpretation of settlement agreement, including allocation of expenses
 - Further assurances and execution of necessary documents
 - Claw backs for tax or creditor problems
- Court Approval: Required or not?
- Include Rule 80(d) language (Judges or Judges Pro Tem ONLY)
 - Acknowledgement of assumption of risk of not knowing the true facts to ensure agreement is not voidable because of mistake
 - Dismissal of pleadings, with or without prejudice, deadline date
- Signature of all parties, attorneys, mediator, settlement judge

Memorandum of Understanding

This Memorandum of Understanding is the result of discussion between _____ and _____ through mediation. As a result of the mediation sessions, _____ and _____ voluntarily agree to enter into and agree to abide by the terms of this Memorandum of Understanding on this ____ day of _____.

[if all parties agree to do something]

As part of this Memorandum of Understanding _____ and _____ agree to

[specifics for the parties]

As part of this Memorandum of Understanding _____ agrees as follows:

As part of this Memorandum of Understanding _____ agrees as follows:

By signing this agreement, the undersigned agree to abide by the terms of this Memorandum of Understanding.

As part of this Memorandum of Understanding _____ agrees as follows:

Signature (date) Signature (date)

JUDICIAL BRANCH OF ARIZONA
IN MARICOPA COUNTY
ALTERNATIVE DISPUTE RESOLUTION

Smith,)	
)	[Case Number]
Plaintiff,)	
)	FULL SETTLEMENT
vs.)	
)	
Jones,)	Judge Pro Tem Marlene Appel
)	
Defendant.)	
_____)	

Attending this conference are Smith and Jones, individually and as Co-Trustees and beneficiaries of the Smith/Jones Family Revocable Trust; Smith’s attorney White, and Jones’ attorney Brown.

The parties completed the settlement conference and reach a full settlement which shall be a binding agreement pursuant to Rule 80(d), Arizona Rules of Civil Procedure.

1. Smith shall pay the sum of \$_____ to Jones, one-half to be paid by December 31, ____; the second half to be paid by January 15, ____; both payments to be by cashier’s checks payable to Jones.

2. Smith hereby conveys to Jones all of her legal and equitable interest in the [asset] located at _____.

3. In consideration of the \$_____ payment and the [asset], Jones hereby conveys all of her legal and equitable interests in the following real properties to Smith:

- a. [Legal description and street address].
- b. [Legal description and street address].

4. Smith agrees to be responsible for refinancing the existing liens and encumbrances that are assessed against the three above-listed properties, and to be responsible for payment of all costs incurred in the refinancing. Smith will be the only person liable on the new loans.

5. Smith and Jones agree to cooperate in complying the terms of this agreement and shall promptly executive all documents necessary to accomplish this agreed-upon terms.

6. Upon compliance with the settlement terms, Smith shall file and obtain a dismissal of the pending civil suite with prejudice.

EXAMPLE 2

EXAMPLE 2

7. Smith and Jones will be responsible for their respective attorney's fees and cost.

8. By signing this agreement, Smith and Jones mutually release each other and their respective attorneys, agents, and representatives from all past, present and future claims, liabilities, actions, losses and damages arising out of or in any way related to the ownership of the real properties and the administration of the trust, whether known or unknown. This mutual release will automatically take effect upon transfer of the assets, the refinancing of the existing liens and encumbrances and the payment of the cash portion of the settlement.

9. This agreement shall inure to the benefit of and be binding upon Smith and Jones in all their capacities and their respective heirs, representatives, successors and assigns.

10. The court shall retain continuing jurisdiction over this matter to resolve any dispute or litigation relating to or arising out of this agreement.

DATED:

SMITH

JONES

White
Attorney for Plaintiff

Brown
Attorney for Defendant

Judge Pro Tem Marlene Appel

SETTLEMENT AGREEMENT AND MUTUAL RELEASE

1. It is intent of this Agreement to produce a fair and equitable result and to elect a complete and final settlement of all outstanding disputes between the parties.
2. The Settlement Agreement and Mutual Release (Agreement) is entered into on _____ by, and between, _____ with his/her attorney, _____ (Plaintiff) and _____ his/her attorney, _____ (Defendant). Plaintiff and Defendant are hereinafter collectively referred to as "The Parties" or individually as "Party."
3. This agreement arises from the Parties dispute primarily regarding _____.
4. Plaintiff initiated a Lawsuit against Defendant in the Superior Court of Arizona in Maricopa County in cause number PB _____ under Arizona law.
5. The litigation sought monetary damages and attorney's fees.
6. The mediator who helped us reach these agreements did not act as out attorneys or agents, and is not responsible in any way for the substance of this agreement. The parties further acknowledge that the mediator Stephen J.P. Kupiszewski was a judicial officer and to the extent, if any, that any conflict exists, that conflict is waived.
7. We have been independently advised by counsel of our own choosing regarding the advisability of entering into the settlement.
8. No one has threatened or coerced either party into entering this agreement and neither party is acting under any duress.

NOW, THEREFORE, for and in consideration of the above recitals, the mutual promises, covenants, and undertaking set forth below, and good and valuable consideration, the receipt and sufficiency of which are hereby acknowledged, and intending to be legally bound, the Parties agree as follows:

- A. **Consideration.** The Defendant will pay _____.
- B. **Attorney's fees.** Both parties will be responsible for their own attorney's fees and all costs associated with this action, including any fees for fiduciary time.
- C. **Withdraw of the Petition.** The Plaintiff will withdraw the Petition/Complaint.
- D. **Mutual Release.** Upon execution of this Agreement by all Parties and payment of the Settlement Amount and Attorney's Fee Amount, Plaintiff and Defendant respectively, on behalf of their officers, agents, employees, representatives, attorneys, heirs, beneficiaries, successors,

- E. predecessors, and assign, do hereby remise, release, and forever discharge each other from and all manner of actions and causes of actions, complaints, claims, counterclaims, suits, debts, liens, appeals, obligations, and demands whatever, of any kind of nature, whether known or unknown, which each party has, or may have had, from the beginning of time, arising out of or related in any manner to the facts alleged in the litigation, and any and all claims, counterclaims, and demands that were asserted in the litigation.
- F. **Integrated Agreement.** The Parties acknowledge and agree that this Agreement is the entire agreement among them, and that there are not written or oral terms, agreements, representations, or understandings other than those contained in this Agreement. No course of prior dealing between the Parties, no Usage of trade, and no parol or extrinsic evidence of any nature shall be used or be relevant to supplement, explain, or modify any term herein. The Parties further acknowledge that this Agreement supersedes and substitutes all prior agreements between them.
- G. **Compromise.** This Agreement constitutes a compromise settlement of disputed claims, the liability for which is expressly denied. Nothing in the Agreement constitutes, or shall be construed as, an admission of liability by any party.
- H. **Full Authority.** Each party represents that it has the power to release all claims and discharge all liability as set forth in the Agreement.
- I. **Modification.** No waiver, modification or amendment of this Agreement shall be valid unless in writing duly signed by all parties.
- J. **Governing Law.** This Agreement shall be construed in accordance with the Laws of Arizona.
- K. **Confidentiality.** The terms and conditions of this Agreement are confidential between the parties and shall not be disclosed to anyone else, except as many be necessary to effectuate its terms. Any disclosure in violation of this section shall be deemed a material breach of this Agreement.

IN WITNESS WHEREOF, The Parties hereto have executed this Agreement effective on May 3, 2013 pursuant to Rule 80(D) of the Arizona Rules of Civil Procedure. This agreement is binding on the parties upon execution.

IT IS SO AGREED.

Plaintiff

Defendant

Attorney for Plaintiff

Attorney for Defendant

MODEL STANDARDS OF CONDUCT FOR MEDIATORS

AMERICAN ARBITRATION ASSOCIATION

(ADOPTED SEPTEMBER 8, 2005)

AMERICAN BAR ASSOCIATION

(APPROVED BY THE ABA HOUSE OF DELEGATES AUGUST 9, 2005)

ASSOCIATION FOR CONFLICT RESOLUTION

(ADOPTED AUGUST 22, 2005)

SEPTEMBER 2005

The *Model Standards of Conduct for Mediators* was prepared in 1994 by the American Arbitration Association, the American Bar Association's Section of Dispute Resolution, and the Association for Conflict Resolution¹. A joint committee consisting of representatives from the same successor organizations revised the Model Standards in 2005.² Both the original 1994 version and the 2005 revision have been approved by each participating organization.³

Preamble

Mediation is used to resolve a broad range of conflicts within a variety of settings. These Standards are designed to serve as fundamental ethical guidelines for persons mediating in all practice contexts. They serve three primary goals: to guide the conduct of mediators; to inform the mediating parties; and to promote public confidence in mediation as a process for resolving disputes.

Mediation is a process in which an impartial third party facilitates communication and negotiation and promotes voluntary decision making by the parties to the dispute.

Mediation serves various purposes, including providing the opportunity for parties to define and clarify issues, understand different perspectives, identify interests, explore and assess possible solutions, and reach mutually satisfactory agreements, when desired.

Note on Construction

These Standards are to be read and construed in their entirety. There is no priority significance attached to the sequence in which the Standards appear.

The use of the term “shall” in a Standard indicates that the mediator must follow the practice described. The use of the term “should” indicates that the practice described in the standard is highly desirable, but not required, and is to be departed from only for very strong reasons and requires careful use of judgment and discretion.

The use of the term “mediator” is understood to be inclusive so that it applies to co-mediator models.

These Standards do not include specific temporal parameters when referencing a mediation, and therefore, do not define the exact beginning or ending of a mediation.

Various aspects of a mediation, including some matters covered by these Standards, may also be affected by applicable law, court rules, regulations, other applicable professional rules, mediation rules to which the parties have agreed and other agreements of the parties. These sources may create conflicts with, and may take precedence over, these Standards. However, a mediator should make every effort to comply with the spirit and intent of these Standards in resolving such conflicts. This effort should include honoring all remaining Standards not in conflict with these other sources.

These Standards, unless and until adopted by a court or other regulatory authority do not have the force of law. Nonetheless, the fact that these Standards have been adopted by the respective sponsoring entities, should alert mediators to the fact that the Standards might be viewed as establishing a standard of care for mediators.

STANDARD I. SELF-DETERMINATION

- A.** A mediator shall conduct a mediation based on the principle of party self-determination. Self-determination is the act of coming to a voluntary, uncoerced decision in which each party makes free and informed choices as to process and outcome. Parties may exercise self-determination at any stage of a mediation, including mediator selection, process design, participation in or withdrawal from the process, and outcomes.
1. Although party self-determination for process design is a fundamental principle of mediation practice, a mediator may need to balance such party self-determination with a mediator's duty to conduct a quality process in accordance with these Standards.
 2. A mediator cannot personally ensure that each party has made free and informed choices to reach particular decisions, but, where appropriate, a mediator should make the parties aware of the importance of consulting other professionals to help them make informed choices.
- B.** A mediator shall not undermine party self-determination by any party for reasons such as higher settlement rates, egos, increased fees, or outside pressures from court personnel, program administrators, provider organizations, the media or others.

STANDARD II. IMPARTIALITY

- A.** A mediator shall decline a mediation if the mediator cannot conduct it in an impartial manner. Impartiality means freedom from favoritism, bias or prejudice.
- B.** A mediator shall conduct a mediation in an impartial manner and avoid conduct that gives the appearance of partiality.
1. A mediator should not act with partiality or prejudice based on any participant's personal characteristics, background, values and beliefs, or performance at a mediation, or any other reason.
 2. A mediator should neither give nor accept a gift, favor, loan or other item of value that raises a question as to the mediator's actual or perceived impartiality. A mediator may accept or give de minimis gifts or incidental items or services that are provided to facilitate a mediation or respect cultural norms so long as such practices do not raise questions as to a mediator's actual or perceived impartiality.
- C.** If at any time a mediator is unable to conduct a mediation in an impartial manner, the mediator shall withdraw.

STANDARD III. CONFLICTS OF INTEREST

- A.** A mediator shall avoid a conflict of interest or the appearance of a conflict of interest during and after a mediation. A conflict of interest can arise from involvement by a mediator with the subject matter of the dispute or from any relationship between a mediator and any mediation participant, whether past or present, personal or professional, that reasonably raises a question of a mediator's impartiality.
- B.** A mediator shall make a reasonable inquiry to determine whether there are any facts that a reasonable individual would consider likely to create a potential or actual conflict of interest for a mediator. A mediator's actions necessary to accomplish a reasonable inquiry into potential conflicts of interest may vary based on practice context.
- C.** A mediator shall disclose, as soon as practicable, all actual and potential conflicts of interest that are reasonably known to the mediator and could reasonably be seen as raising a question about the mediator's impartiality. After disclosure, if all parties agree, the mediator may proceed with the mediation.
- D.** If a mediator learns any fact after accepting a mediation that raises a question with respect to that mediator's service creating a potential or actual conflict of interest, the mediator shall disclose it as quickly as practicable. After disclosure, if all parties agree, the mediator may proceed with the mediation.
- E.** If a mediator's conflict of interest might reasonably be viewed as undermining the integrity of the mediation, a mediator shall withdraw from or decline to proceed with the mediation regardless of the expressed desire or agreement of the parties to the contrary.
- F.** Subsequent to a mediation, a mediator shall not establish another relationship with any of the participants in any matter that would raise questions about the integrity of the mediation. When a mediator develops personal or professional relationships with parties, other individuals or organizations following a mediation in which they were involved, the mediator should consider factors such as time elapsed following the mediation, the nature of the relationships established, and services offered when determining whether the relationships might create a perceived or actual conflict of interest.

STANDARD IV. COMPETENCE

- A.** A mediator shall mediate only when the mediator has the necessary competence to satisfy the reasonable expectations of the parties.
1. Any person may be selected as a mediator, provided that the parties are satisfied with the mediator's competence and qualifications. Training, experience in mediation, skills, cultural understandings and other qualities are often necessary for mediator competence. A person who offers to serve as a mediator creates the expectation that the person is competent to mediate effectively.
 2. A mediator should attend educational programs and related activities to maintain and enhance the mediator's knowledge and skills related to mediation.
 3. A mediator should have available for the parties' information relevant to the mediator's training, education, experience and approach to conducting a mediation.
- B.** If a mediator, during the course of a mediation determines that the mediator cannot conduct the mediation competently, the mediator shall discuss that determination with the parties as soon as is practicable and take appropriate steps to address the situation, including, but not limited to, withdrawing or requesting appropriate assistance.
- C.** If a mediator's ability to conduct a mediation is impaired by drugs, alcohol, medication or otherwise, the mediator shall not conduct the mediation.

STANDARD V. CONFIDENTIALITY

- A.** A mediator shall maintain the confidentiality of all information obtained by the mediator in mediation, unless otherwise agreed to by the parties or required by applicable law.
1. If the parties to a mediation agree that the mediator may disclose information obtained during the mediation, the mediator may do so.
 2. A mediator should not communicate to any non-participant information about how the parties acted in the mediation. A mediator may report, if required, whether parties appeared at a scheduled mediation and whether or not the parties reached a resolution.
 3. If a mediator participates in teaching, research or evaluation of mediation, the mediator should protect the anonymity of the parties and abide by their reasonable expectations regarding confidentiality.

- B.** A mediator who meets with any persons in private session during a mediation shall not convey directly or indirectly to any other person, any information that was obtained during that private session without the consent of the disclosing person.
- C.** A mediator shall promote understanding among the parties of the extent to which the parties will maintain confidentiality of information they obtain in a mediation.
- D.** Depending on the circumstance of a mediation, the parties may have varying expectations regarding confidentiality that a mediator should address. The parties may make their own rules with respect to confidentiality, or the accepted practice of an individual mediator or institution may dictate a particular set of expectations.

STANDARD VI. QUALITY OF THE PROCESS

- A.** A mediator shall conduct a mediation in accordance with these Standards and in a manner that promotes diligence, timeliness, safety, presence of the appropriate participants, party participation, procedural fairness, party competency and mutual respect among all participants.
 - 1. A mediator should agree to mediate only when the mediator is prepared to commit the attention essential to an effective mediation.
 - 2. A mediator should only accept cases when the mediator can satisfy the reasonable expectation of the parties concerning the timing of a mediation.
 - 3. The presence or absence of persons at a mediation depends on the agreement of the parties and the mediator. The parties and mediator may agree that others may be excluded from particular sessions or from all sessions.
 - 4. A mediator should promote honesty and candor between and among all participants, and a mediator shall not knowingly misrepresent any material fact or circumstance in the course of a mediation.
 - 5. The role of a mediator differs substantially from other professional roles. Mixing the role of a mediator and the role of another profession is problematic and thus, a mediator should distinguish between the roles. A mediator may provide information that the mediator is qualified by training or experience to provide, only if the mediator can do so consistent with these Standards.
 - 6. A mediator shall not conduct a dispute resolution procedure other than mediation but label it mediation in an effort to gain the protection of rules, statutes, or other governing authorities pertaining to mediation.

7. A mediator may recommend, when appropriate, that parties consider resolving their dispute through arbitration, counseling, neutral evaluation or other processes.
 8. A mediator shall not undertake an additional dispute resolution role in the same matter without the consent of the parties. Before providing such service, a mediator shall inform the parties of the implications of the change in process and obtain their consent to the change. A mediator who undertakes such role assumes different duties and responsibilities that may be governed by other standards.
 9. If a mediation is being used to further criminal conduct, a mediator should take appropriate steps including, if necessary, postponing, withdrawing from or terminating the mediation.
 10. If a party appears to have difficulty comprehending the process, issues, or settlement options, or difficulty participating in a mediation, the mediator should explore the circumstances and potential accommodations, modifications or adjustments that would make possible the party's capacity to comprehend, participate and exercise self-determination.
- B.** If a mediator is made aware of domestic abuse or violence among the parties, the mediator shall take appropriate steps including, if necessary, postponing, withdrawing from or terminating the mediation.
- C.** If a mediator believes that participant conduct, including that of the mediator, jeopardizes conducting a mediation consistent with these Standards, a mediator shall take appropriate steps including, if necessary, postponing, withdrawing from or terminating the mediation.

STANDARD VII. ADVERTISING AND SOLICITATION

- A.** A mediator shall be truthful and not misleading when advertising, soliciting or otherwise communicating the mediator's qualifications, experience, services and fees.
1. A mediator should not include any promises as to outcome in communications, including business cards, stationery, or computer-based communications.
 2. A mediator should only claim to meet the mediator qualifications of a governmental entity or private organization if that entity or organization has a recognized procedure for qualifying mediators and it grants such status to the mediator.
- B.** A mediator shall not solicit in a manner that gives an appearance of partiality for or against a party or otherwise undermines the integrity of the process.

- C. A mediator shall not communicate to others, in promotional materials or through other forms of communication, the names of persons served without their permission.

STANDARD VIII. FEES AND OTHER CHARGES

- A. A mediator shall provide each party or each party's representative true and complete information about mediation fees, expenses and any other actual or potential charges that may be incurred in connection with a mediation.
 - 1. If a mediator charges fees, the mediator should develop them in light of all relevant factors, including the type and complexity of the matter, the qualifications of the mediator, the time required and the rates customary for such mediation services.
 - 2. A mediator's fee arrangement should be in writing unless the parties request otherwise.
- B. A mediator shall not charge fees in a manner that impairs a mediator's impartiality.
 - 1. A mediator should not enter into a fee agreement which is contingent upon the result of the mediation or amount of the settlement.
 - 2. While a mediator may accept unequal fee payments from the parties, a mediator should not allow such a fee arrangement to adversely impact the mediator's ability to conduct a mediation in an impartial manner.

STANDARD IX. ADVANCEMENT OF MEDIATION PRACTICE

- A. A mediator should act in a manner that advances the practice of mediation. A mediator promotes this Standard by engaging in some or all of the following:
 - 1. Fostering diversity within the field of mediation.
 - 2. Striving to make mediation accessible to those who elect to use it, including providing services at a reduced rate or on a pro bono basis as appropriate.
 - 3. Participating in research when given the opportunity, including obtaining participant feedback when appropriate.
 - 4. Participating in outreach and education efforts to assist the public in developing an improved understanding of, and appreciation for, mediation.
 - 5. Assisting newer mediators through training, mentoring and networking.
- B. A mediator should demonstrate respect for differing points of view within the field, seek to learn from other mediators and work together with other mediators to improve the

profession and better serve people in conflict.

¹The Association for Conflict Resolution is a merged organization of the Academy of Family Mediators, the Conflict Resolution Education Network and the Society of Professionals in Dispute Resolution (SPIDR). SPIDR was the third participating organization in the development of the 1994 Standards.

² *Reporter's Notes, which are not part of these Standards and therefore have not been specifically approved by any of the organizations, provide commentary regarding these revisions.*

³*The 2005 version of the Model Standards were approved by the American Bar Association's House of Delegates on August 9, 2005, the Board of the Association of Conflict Resolution on August 22, 2005 and the Executive Committee of the American Arbitration Association on September 8, 2005.*

Judicial Branch of
Arizona in Maricopa
County

Alternative Dispute Resolution (ADR)

Probate Settlement Conference Training Manual

ELECTRONIC COPY AVAILABLE ON

<http://www.superiorcourt.maricopa.gov/SuperiorCourt/AlternativeDisputeResolution/>

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(PREPARED & COMPILED BY MEL DAILEY, ADR PROGRAM COORDINATOR) CURRENT AS OF: 4/23/2014

**LAW AND
CASE
REFERENCES**

A.R.S. § 12-2238. Mediation; privileged communications; exceptions; liability; definitions

- A. Before or after the filing of a complaint, mediation may occur pursuant to law, a court order or a voluntary decision of the parties.
- B. The mediation process is confidential. Communications made, materials created for or used and acts occurring during a mediation are confidential and may not be discovered or admitted into evidence unless one of the following exceptions is met:
 - 1. All of the parties to the mediation agree to the disclosure.
 - 2. The communication, material or act is relevant to a claim or defense made by a party to the mediation against the mediator or the mediation program arising out of a breach of a legal obligation owed by the mediator to the party.
 - 3. The disclosure is required by statute.
 - 4. The disclosure is necessary to enforce an agreement to mediate.
- C. Except pursuant to subsection B, paragraph 2, 3 or 4, a mediator is not subject to service of process or a subpoena to produce evidence or to testify regarding any evidence or occurrence relating to the mediation proceedings. Evidence that exists independently of the mediation even if the evidence is used in connection with the mediation is subject to service of process or subpoena.
- D. Notwithstanding subsection B, when necessary to enforce or obtain approval of an agreement that is reached by the parties in a mediation, the terms of an agreement that is evidenced by a record that is signed by the parties are not confidential. The agreement may be introduced in any proceeding to obtain court approval of the agreement, where required by law, or to enforce the agreement. If a party requests that all or a portion of the agreement remain confidential, the agreement may be disclosed to the court under seal with a request to issue appropriate orders to protect the confidentiality of the agreement, as permitted by law.
- E. Notwithstanding subsection B, threatened or actual violence that occurs during a mediation is not a privileged communication. The mediator may inform the parties that threatened or actual violence is not privileged and may be disclosed.
- F. A mediator is not subject to civil liability except for those acts or omissions that

involve intentional misconduct or reckless disregard of a substantial risk of a significant injury to the rights of others.

G. For the purposes of this section:

1. "Mediation" means a process in which parties who are involved in a dispute enter into one or more private settlement discussions outside of a formal court proceeding with a neutral third party to try to resolve the dispute.
2. "Record" means information that is inscribed on a tangible medium or that is stored in an electronic or other medium and that is retrievable in a perceivable form.
3. "Sign" means to execute or adopt a tangible symbol with the present intent to authenticate a record or to attach or logically associate an electronic symbol, sound or process to or with a record with the present intent to authenticate a record.

- (a) **Rule 80. General provisions**
- (a) **Conduct in Trial.** Trials shall be conducted in an orderly, courteous and dignified manner. Arguments and remarks shall be addressed to the court, except that by permission of the court counsel may make proper inquiries or ask questions of opposing counsel.
- (b) **Exclusion of Minors From Trial.** When an action or proceeding of a scandalous or obscene nature is to be tried, the court or referee may exclude from the courtroom minors whose presence is not necessary as parties or witnesses.
- (c) **[Deleted June 27, 1991, effective July 7, 1992].**
- (d) **Agreement or Consent of Counsel or Parties.** No agreement or consent between parties or attorneys in any manner is binding if disputed, unless it is in writing, or made orally in open court, and entered in the minutes
- (e) **[Deleted May 1, 1989, effective July 1, 1989]**
- (f) **[Deleted September 16, 2008, effective January 1, 2009]**
- (g) **Officer of Court or Attorney as Surety.** No officer or attorney of the court shall be accepted as surety upon an undertaking or bond in a judicial action or proceeding.
- (h) **Lost Records Method of Supplying; Substitution of Copies, Hearing if Correctness Denied.**
1. When the records and papers of an action or proceeding, or part thereof, are lost or destroyed either before or after the trial or hearing, they may be supplied by either party on motion addressed to the court on three days' notice to an adverse party. The motion shall be signed and verified, and shall state the loss or destruction of the records or papers, and shall be accompanied by certified copies of the originals, if obtainable, and if not, then copies duplicating the originals as nearly as possible

2. If the adverse party admits the correctness of the copies and the court is satisfied that they are copies in substance of the original, the court shall order the copies substituted for the originals. If their correctness is denied, or if the court finds them not correct, it shall hear evidence and correct copies shall be made under the direction of the judge. The substituted copies shall be filed with the clerk and shall constitute a part of the record in the action or proceeding and shall have the force and effect of the originals.

(i) **Unsworn Declarations Under Penalty of Perjury.** Wherever, under any of these rules, or under any rule, regulation, order, or requirement made pursuant to these rules, any matter is required or permitted to be supported, evidenced, established, or proved by the sworn written declaration, verification, certificate, statement, oath, or affidavit of the person making the same (other than a deposition, or an oath of office, or an oath required to be taken before a specified official other than a notary public), such matter may, with like force and effect, be supported, evidenced, established, or proved by the unsworn written declaration, certificate, verification, or statement, subscribed by such persons as true under penalty of perjury, and dated, in substantially the following form:

“I declare (or certify, verify or state) under penalty of perjury that the forgoing is true and correct. Executed on (date).

(Signature)”

IN THE
ARIZONA COURT OF APPEALS
DIVISION ONE

KAREN GRUBAUGH, a single woman, *Petitioner*,

v.

THE HONORABLE JAMES T. BLOMO, Judge of the SUPERIOR COURT
OF THE STATE OF ARIZONA, in and for the County of MARICOPA,
Respondent Judge,

ANDREA C. LAWRENCE and JOHN DOE LAWRENCE, wife and
husband; HALLIER & LAWRENCE, P.L.C. d/b/a HALLIER LAW FIRM,
a public limited company; ABC CORPORATIONS I-X; BLACK and
WHITE PARTNERSHIPS AND/OR SOLE PROPRIETORSHIPS I-X;
JOHN
DOES I-X and JANE DOES I-X, *Real Parties in Interest*.

No. 1 CA-SA 15-0012
FILED 9-22-2015

Petition for Special Action from the Superior Court in Maricopa County No.
CV 2013-007431
The Honorable James T. Blomo, Judge

II. JURISDICTION ACCEPTED, RELIEF GRANTED IN PART

COUNSEL

Sternberg & Singer Ltd., Phoenix By Melvin Sternberg

And

Law Office of Paul M. Briggs PLLC, Phoenix By Paul M. Briggs
Co-Counsel for Petitioner

III. OPINION

Presiding Judge John C. Gemmill delivered the opinion of the Court, in which Judge Donn Kessler and Judge Kenton Jones joined.

GEMMILL, Judge:

¶1 Plaintiff/petitioner Karen Grubaugh brought this legal malpractice action against her former attorneys, defendants/real parties in interest Andrea Lawrence and the Hallier Law Firm (collectively “Lawrence”), seeking damages for allegedly substandard legal advice given to Grubaugh during a family court mediation. Grubaugh challenges the superior court’s ruling that the Arizona mediation process privilege created by Arizona Revised Statutes (“A.R.S.”) section 12-2238(B) has been waived or is otherwise inapplicable. We accept special action jurisdiction and grant relief as described herein. Any communications between or among Grubaugh, her attorney, or the mediator, as a part of the mediation process, are privileged under § 12-2238(B). Based on the statute and the record before us, that privilege has not been waived. Because these communications are neither discoverable nor admissible, the superior court is directed to dismiss any claims in the complaint dependent upon such communications.

¶2 Grubaugh alleges that Lawrence’s representation of Grubaugh in marital dissolution proceedings fell below the applicable standard of care. Grubaugh’s malpractice claim is premised, in part, on the distribution of certain business assets. Agreement regarding the method of distribution, and the handling of the tax liability resulting therefrom, was reached during a family court mediation involving Grubaugh, her ex-husband, their attorneys, and the neutral mediator. Before formal discovery began in this matter, Lawrence asked the superior court to order that the A.R.S. § 12-2238(B) mediation privilege was waived as a result of Grubaugh’s allegations of malpractice. Lawrence seeks to utilize as evidence communications between herself and Grubaugh, occurring during and after mediation, which led to Grubaugh’s ultimate acceptance

GRUBAUGH v. HON BLOMO/LAWRENCE, et al.
Opinion of the Court

of the dissolution agreement. In the alternative, Lawrence moved to strike Grubaugh's allegations relating to the mediation if the court held the pertinent communications are protected as confidential.

¶3 The superior court granted Lawrence's motion in part, concluding the mediation privilege was waived as to all communications, including demonstrative evidence, between the mediator and the parties and between Lawrence and Grubaugh. The court reasoned in part that the privilege was not applicable in this instance because the statute did not contemplate the precise issue presented. The court then ruled that Lawrence's alternative motion to strike was moot.

¶4 Grubaugh filed this special action challenging the court's order. Because this is a matter involving privilege and imminent disclosure of potentially privileged information, remedy by appeal is inadequate and we therefore accept special action jurisdiction. See *Roman Catholic Diocese of Phoenix v. Superior Court ex rel. Cnty. of Maricopa*, 204 Ariz. 225, 227, ¶ 2, 62 P.3d 970, 972 (App. 2003); *Ariz. Bd. of Med. Exam'rs v. Superior Court*, 186 Ariz. 360, 361, 922 P.2d 924, 925 (App. 1996).

IV. ARIZONA'S STATUTORY MEDIATION PROCESS PRIVILEGE

¶5 Arizona's mediation process privilege is created by A.R.S. section 12-2238(B):

The mediation process is confidential. Communications made, materials created for or used and acts occurring during a mediation are confidential and may not be discovered or admitted into evidence unless one of the following exceptions is met:

1. All of the parties to the mediation agree to the disclosure.
2. The communication, material or act is relevant to a claim or defense made by a party to the mediation against the mediator or the mediation program arising out of a breach of a legal obligation owed by the mediator to the party.
3. The disclosure is required by statute.

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4. The disclosure is necessary to enforce an agreement to mediate.

Subsection (C) of § 12-2238 provides further protection for a mediator against being forced to testify or produce evidence in response to service of process or subpoena:

Except pursuant to subsection B, paragraph 2, 3 or 4, a mediator is not subject to service of process or a subpoena to produce evidence or to testify regarding any evidence or occurrence relating to the mediation proceedings. Evidence that exists independently of the mediation even if the evidence is used in connection with the mediation is subject to service of process or subpoena.

- ¶6 When interpreting a statute, we look to the plain meaning of the language as the most reliable indicator of legislative intent and meaning. *New Sun Bus. Park, LLC v. Yuma Cnty.*, 221 Ariz. 43, 46, ¶ 12, 209 P.3d 179, 182 (App. 2009); see also *Maycock v. Asilomar Dev. Inc.*, 207 Ariz. 495, 500, ¶ 24, 88 P.3d 565, 570 (App. 2004). When the statute’s language is “clear and unequivocal, it is determinative of the statute’s construction.” *Janson v. Christensen*, 167 Ariz. 470, 471, 808 P.2d 1222, 1223 (1991). This court will apply the clear language of a statute unless such an application will lead to absurd or impossible results. *City of Phoenix v. Harnish*, 214 Ariz. 158, 161, ¶ 11, 150 P.3d 245, 248 (App. 2006).
- ¶7 The mediation process privilege was not waived when Grubaugh filed a malpractice action against her attorney because none of the four specific statutory exceptions in A.R.S. § 12-2238(B) is applicable. The statute’s language is plain, clear, and unequivocal: The privileged communications “are confidential and may not be discovered or admitted into evidence *unless one of the following exceptions is met.*” A.R.S. § 12-2238(B) (emphasis added). It provides for a broad screen of protection that renders confidential all communications, including those between an attorney and her client, made as part of the mediation process. Further, of the four exceptions listed in the statute, none excludes attorney-client communications from mediation confidentiality. The legislature could have exempted attorney-client communications from the mediation process privilege, but it did not do so. Cf. Fla. Stat. § 44.405(4)(a)(4) (West 2004) (specifically exempting from the mediation privilege those communications “[o]ffered to report, prove, or disprove professional malpractice occurring during the mediation”).

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- ¶8 Our construction of this wide-reaching statute is confirmed by complementary rules of court referencing it. Arizona’s Rules of Family Law Procedure emphasize that “all communications” in the context of the mediation are confidential and § 12-2238 is applicable: “Mediation conferences shall be held in private, and *all communications, verbal or written, shall be confidential*. . . . Unless specifically stated otherwise in these rules, the provisions of A.R.S. § 12-2238 shall apply to any mediation conference held in conformance with this rule.” Ariz. R. Fam. L. P. 67(A) (emphasis added). Similarly, the Maricopa County Local Rules further express that the only exceptions to mediation confidentiality are found in § 12-2238(B): “Mediation proceedings shall be held in private, and *all communications, verbal or written, shall be confidential except as provided in A.R.S. § 12-2238(B)*.” Ariz. Local R. Prac. Super. Ct. (Maricopa) 6.5(b)(1) (emphasis added).
- ¶9 The history of the mediation process privilege further supports its application in this case. From 1991 to 1993, mediation confidentiality was codified in A.R.S. § 12-134. The current statute was created by an amendment in 1993. The 1991 statute differed significantly from the current version by expressly limiting confidentiality to “communications made *during a mediation*.” A.R.S. § 12-134 (West 1993) (Emphasis added.) In contrast, the current statute states that the “mediation process” is confidential. When the legislature alters the language of an existing statute, we generally presume it intended to change the existing law. *State v. Bridgeforth*, 156 Ariz. 60, 63, 750 P.2d 3, 6 (1988). Therefore, by casting a wider net of protection over mediation-related communications, acts, and materials, the legislature altered the statute by increasing its reach.
- ¶10 In holding that the mediation process privilege had been waived, the superior court reasoned that the situation at hand was analogous to one in which a party impliedly waives the attorney-client privilege. The mediation process privilege, however, differs from the attorney-client privilege, which may be impliedly waived. See *Church of Jesus Christ of Latter-Day Saints v. Superior Court in & for Maricopa Cnty.*, 159 Ariz. 24, 29, 764 P.2d 759, 764 (App. 1988); see also *State Farm Mut. Auto. Ins. Co. v. Lee*, 199 Ariz. 52, 56–57, ¶¶ 10–11, 13 P.3d 1169, 1173–74 (2000). The attorney-client privilege originated at common law and was subsequently codified by the Arizona legislature. At common law, the privilege was impliedly waived when a litigant’s “course of conduct [was] inconsistent with the observance of the privilege.” *Bain v. Superior Court in & for Maricopa Cnty.*, 148 Ariz. 331, 334, 714 P.2d 824, 827 (1986).

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¶11 Consistent with the common law, the codified attorney-client privilege includes a broad waiver provision: “A person who offers himself as a witness and voluntarily testifies with reference to the communications . . . thereby consents to the examination of such attorney, physician or surgeon.” A.R.S. § 12-2236. Moreover, there is no indication that the legislature, when codifying the attorney-client privilege, intended to abrogate the common law implied waiver of the privilege. *See Church of Jesus Christ of Latter-Day Saints*, 159 Ariz. at 29, 764 P.2d at 764 (holding that A.R.S. § 12-2236 does not abrogate common law forms of waiver); *Carrow Co. v. Lusby*, 167 Ariz. 18, 21, 804 P.2d 747, 750 (1990) (“[A]bsent a manifestation of legislative intent to repeal a common law rule, we will construe statutes as consistent with the common law”); *see also Wyatt v. Wehmueller*, 167 Ariz. 281, 284, 806 P.2d 870, 873 (1991) (explaining that if the common law is to be “changed, supplemented, or abrogated by statute,” such a change must be express or a necessary implication of the statutory language).

¶12 In contrast to the attorney-client privilege, Arizona’s mediation process privilege has no common law origin. It was created entirely by the legislature. Therefore, this court must rely upon the language of the statute to determine its meaning. Unlike waiver of the attorney-client privilege under the statute and common law, the statutory waiver provisions of the mediation process privilege are specific and exclusive:

The mediation process is confidential. Communications made, materials created for or used and acts occurring during a mediation are confidential and may not be discovered or admitted into evidence unless one of the following exceptions is met.

A.R.S. § 12-2238(B). By expressly shielding the entire mediation process, other than when an exception provided by the statute applies, § 12-2238(B) “occup[ies] the entire field” of methods by which the mediation process privilege might be waived. The statute therefore leaves no room for an implied waiver under these circumstances. *Cf. Church of Jesus Christ of Latter-Day Saints*, 159 Ariz. at 29, 764 P.2d at 764 (explaining that attorney-client privilege statute allows room for implied waiver under the common law).

¶13 The parties do not contend that the communications at issue here come within any of the four exceptions specifically delineated within

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A.R.S. §12-2238(B). In finding an implied waiver, the superior court reasoned in part that the statute “did not contemplate the exact issue” presented by this case. But we cannot reach the same conclusion in light of the language of the statute, which does not allow us to infer the existence of an implied waiver. *See Morgan v. Carillon Inv., Inc.*, 207 Ariz. 547, 552, ¶ 24, 88 P.3d 1159, 1164 (App. 2004) (explaining that even though the legislature did not include a specific provision that would have been beneficial, the court will not “interpret” the statutes “to add such a provision”), *aff’d*, 210 Ariz. 187, 109 P.3d 82 (2005). The privilege is therefore applicable.

¶14 Additionally, a plain-language application of the statute in this case does not produce an absurd result, but is supported by sound policy. *See State v. Williams*, 209 Ariz. 228, 237, ¶ 38, 99 P.3d 43, 52 (App. 2004) (examining a rule’s policy implications in deciding whether its application would lead to absurd results) *See also State v. Estrada*, 201 Ariz. 247, 251, ¶ 17, 34 P.3d 356, 360 (2001) (explaining that a result is “absurd” when “it is so irrational, unnatural, or inconvenient that it cannot be supposed to have been within the intention of persons with ordinary intelligence and discretion” (internal quotation omitted)). By protecting *all* materials created, acts occurring, and communications made as a part of the mediation process, A.R.S. § 12-2238 establishes a robust policy of confidentiality of the mediation process that is consistent with Arizona’s “strong public policy” of encouraging settlement rather than litigation. *See Miller v. Kelly*, 212 Ariz. 283, 287, ¶ 12, 130 P.3d 982, 986 (App. 2006). The statute encourages candor with the mediator throughout the mediation proceedings by alleviating parties’ fears that what they disclose in mediation may be used against them in the future. *Id.* The statute similarly encourages candor between attorney and client in the mediation process.

¶15 Another reason confidentiality should be enforced here is that Grubaugh is not the only holder of the privilege. The privilege is also held by Grubaugh’s former husband, the other party to the mediation. *See* A.R.S. § 12-2238(B)(1).¹ The former husband is not a party to this malpractice action and the parties before us do not claim he has waived the mediation process privilege. It is incumbent upon courts to consider and generally protect a privilege held by a non-party privilege-holder. *See Tucson Medical Center Inc. v. Rowles*, 21 Ariz. App. 424, 429, 520 P.2d 518, 523 (App. 1974). The former husband has equal rights under the statute to the confidentiality of the mediation

¹ The mediator may also be a holder of the privilege, but we need not reach that issue in this opinion.

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process. Although the superior court did rule that the privilege was not waived as to communications between the mediator and the former husband, waiving the privilege as to one party to the mediation may have the practical effect of waiving the privilege as to all. In order to protect the rights of the absent party, the privilege must be enforced.

¶16 Accordingly, we hold that the mediation process privilege applies in this case and renders confidential all materials created, acts occurring, and communications made as a part of the mediation process, in accordance with A.R.S. § 12-2238(B).

¶17 In her reply, Grubaugh identifies several classifications of the communications at issue, asserting that some are covered by the mediation process privilege while others are not. [Reply at 2] Rather than this court undertaking to identify precisely the application of the mediation process privilege to specific communications, it is more appropriate to allow the superior court to determine, in the first instance, which of the communications, materials, or acts are privileged under A.R.S. § 12-2238(B) as part of the mediation process and which are not confidential under the statute.

V. DISPOSITION OF MEDIATION-PRIVILEGED CLAIMS

¶18 In light of our determination that the mediation process privilege has not been waived, it is necessary to address Lawrence's alternative argument. Lawrence cites *Cassel v. Superior Court*, 244 P.3d 1080 (Cal. 2011), for the proposition that claims involving confidential mediation-related communications should be stricken from the complaint. In *Cassel*, a client brought a malpractice action against his former attorneys, claiming they coerced him into accepting an improvident settlement agreement during the course of a pretrial mediation. 244 P.3d at 1085. The client alleged the attorneys misrepresented pertinent facts about the terms of the settlement, harassed him during the mediation, and made false claims that they would negotiate an additional "side deal" to compensate for deficits in the mediated settlement. *Id.* The court explained that absent an absurd result or implication of due process rights, California's mediation privilege statute "preclud[ed] judicially crafted exceptions" to allow an implied waiver of their express technical requirements.² *Id.* at 1088. It held

² In pertinent part, the California statute provides:

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that all communications, including attorney-client communications, were confidential and undiscoverable if made “for the purpose of, in the course of, or pursuant to, [the] mediation.” *Id.* at 1097. Accordingly, it granted the attorneys’ motion in limine to exclude all evidence related to these communications, *id.*, even if that meant the former client would be unable to prevail in his malpractice action, *id.* at 1094 (refusing to create an exception to statute even when the “equities appeared to favor” it); *see also Alfieri v. Solomon*, 329 P.3d 26, 31 (Or. Ct. App. 2014), *review granted*, 356 Or. 516 (explaining that a trial court “did not err in striking the allegations that disclosed the terms of [a mediated] settlement agreement” because there was no “valid exception to the confidentiality rules” governing the agreement).

¶19 We agree with the reasoning of the California Supreme Court. Application of the mediation process privilege in this case requires that Grubaugh’s allegations dependent upon privileged information be stricken from the complaint. To hold otherwise would allow a plaintiff to proceed

(a) No evidence of anything said or any admission made for the purpose of, in the course of, or pursuant to, a mediation or a mediation consultation is admissible or subject to discovery, and disclosure of the evidence shall not be compelled, in any arbitration, administrative adjudication, civil action, or other noncriminal proceeding in which, pursuant to law, testimony can be compelled to be given.

(b) No writing . . . prepared for the purpose of, in the course of, or pursuant to, a mediation or a mediation consultation, is admissible or subject to discovery, and disclosure of the writing shall not be compelled, in any arbitration, administrative adjudication, civil action, or other noncriminal proceeding in which, pursuant to law, testimony can be compelled to be given.

(c) All communications, negotiations, or settlement discussions by and between participants in the course of a mediation or a mediation consultation shall remain confidential.

Cal. Evid. Code § 1119 (West 1997).

with a claim, largely upon the strength of confidential communications, while denying the defendant the ability to fully discover and present evidence crucial to the defense of that claim. *Cassel*, 244 P.3d at 1096. A privilege should not be invoked in a way that unfairly prevents one party from defending against a claim of another. See *Elia v. Pifer*, 194 Ariz. 74, 82, ¶ 40, 977 P.2d 796, 804 (App. 1998). As already noted, the legislature could have, but did not, create an exception to this privilege for attorney-client communications and legal malpractice claims. Striking from the complaint any claim founded upon confidential communications during the mediation process is the logical and necessary consequence of applying the plain language of this statutory privilege.

VI. CONCLUSION

¶20 Arizona's mediation process privilege promotes a strong policy of confidentiality for the mediation process. The Arizona Legislature specified the exceptions to the application of the privilege and left no room for implied common-law waiver. The privilege applies under the facts of this dispute. We therefore vacate the order of the superior court that declared the privilege inapplicable. We also direct the superior court to determine which communications are privileged and confidential under A.R.S. § 12-2238 and to strike from the complaint and ensuing litigation any allegation or evidence dependent upon such privileged communications.



Ruth A. Willingham · Clerk of the Court
FILED : ama

Wilcox v. Arpaio, 753 F.3d 872 (2014)

14 Cal. Daily Op. Serv. 6029, 2014 Daily Journal D.A.R. 6938

753 F.3d 872
United States Court of Appeals,
Ninth Circuit.

Mary Rose WILCOX, wife; Earl
Wilcox, husband, Plaintiffs–Appellees,

v.

Joseph M. ARPAIO; Ava Arpaio; Andrew P. Thomas;
Anne Thomas; Lisa Aubuchon; Peter R. Pestalozzi;
David Hendershott; Anna Hendershott, Defendants,
and

Maricopa County, a governmental
entity, Defendant–Appellant.

No. 12–16418. | Argued and Submitted
March 11, 2014. | Filed June 2, 2014.

Synopsis

Background: In consolidated cases, members of county board of supervisors, county staff, and judges of county's courts brought actions against certain present and former members of county sheriff's office and county attorney's office, alleging that officials wrongfully investigated, prosecuted, and harassed plaintiffs in retaliation for plaintiffs' opposition to the actions of defendants. County supervisor and her husband moved to enforce settlement agreement and to stay discovery obligations. The United States District Court for the District of Arizona, *Neil V. Wake, J.*, 872 F.Supp.2d 900, granted the motion to enforce, and county appealed.

Holdings: The Court of Appeals, *Tashima*, Circuit Judge, held that:

[1] federal, not state, privilege law governed the admissibility of evidence in support of the determination of whether the parties reached an enforceable settlement agreement;

[2] county waived any argument that the contested evidence should be privileged under federal law;

[3] the district court did not clearly err in finding that county authorized county manager to settle plaintiffs' claims; and

[4] the district court did not clearly err in finding that the parties intended the “further approvals” sentence in mediator's e-mail to refer only to compliance with Arizona statute governing claims against counties presented by members of boards of supervisors.

Affirmed.

Attorneys and Law Firms

*873 Jeffrey S. Leonard (argued), James W. Armstrong, and Helen R. Holden, Sacks Tierney P.A., Scottsdale, AZ, for Defendant–Appellant.

Colin F. Campbell (argued) and Kathleen Brody O'Meara, Osborn Maledon, P.A., Phoenix, AZ, for Plaintiffs–Appellees.

Appeal from the United States District Court for the District of Arizona, *Neil V. Wake*, District Judge, Presiding. DC No. 2:11 cv–0473 NVW.

*874 Before: JEROME FARRIS, STEPHEN REINHARDT, and A. WALLACE TASHIMA, Circuit Judges.

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OPINION

TASHIMA, Circuit Judge:

We are asked to decide whether federal or state privilege law governs the admissibility of evidence of an alleged settlement reached during mediation of federal and state law claims. We conclude that federal privilege law governs, but that the County waived any available privilege; therefore, we affirm the district court's enforcement of the settlement agreement reached in mediation.

I.

Plaintiffs Mary Rose Wilcox, a Maricopa County Supervisor, and Earl Wilcox, her husband, filed suit against Maricopa County (the “County”) and certain present and former County

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14 Cal. Daily Op. Serv. 6029, 2014 Daily Journal D.A.R. 6938 officials. Plaintiffs alleged that these officials wrongfully investigated, prosecuted, and harassed Plaintiffs in retaliation for Plaintiffs' opposition to the actions of the County Sheriff, County Attorney, and their deputies. Plaintiffs pleaded federal claims under 42 U.S.C. § 1983 and supplemental state law claims.

Plaintiffs were not the only ones to file suit. Many other claimants, including other County Supervisors, pursued similar claims against the County. County advisors predicted that a hundred or more people might pursue such claims, potentially costing the County millions of dollars. County advisors also warned that these claims might create conflicts of interest for County Supervisors, who were both fiscal stewards for the County and actual or potential claimants against the County.

Concerned about the propriety, cost, and pace of litigation, the County adopted a resolution directing County Manager David Smith to establish an alternative dispute resolution program to resolve these claims. The resolution "directed and authorized [Smith] to take all actions necessary to ... adjudicate the claims included in the alternative dispute resolution process," including by "entering into binding arbitration/mediation agreements with claimants" and "entering into contracts as needed." Smith, in turn, appointed mediator Christopher Skelly, a retired judge, to help resolve these claims. Through Judge Skelly, Smith settled multiple claims.

Plaintiffs assert that their claims were among those that were settled. They alleged that the County agreed to a \$975,000 settlement, and filed a motion to enforce the alleged settlement. In support of their motion to enforce, Plaintiffs submitted an e-mail from Judge Skelly to Plaintiffs' counsel, dated April 9, 2012, stating that Skelly wrote to confirm a settlement in the amount of \$975,000. Plaintiffs also submitted e-mails from Judge Skelly to counsel for two other claimants, also dated April 9, 2012. These e-mails were identical to Skelly's e-mail to Plaintiffs' counsel in every material respect (except for the identity of counsel and claimants, and the respective settlement amounts), except one: The e-mail to Plaintiffs' counsel included the sentence "This settlement is subject to any further approvals deemed necessary by the parties." Judge Skelly's e-mails to the other claimants did not include this sentence. Plaintiffs also submitted e-mails from Plaintiffs' counsel and from counsel for the other claimants, accepting the terms of settlement.

The district court set an evidentiary hearing on Plaintiffs' motion to enforce, and ordered the County to produce Smith and Judge Skelly for the hearing. Judge Skelly, however, did not appear and only Smith appeared as a witness. At the hearing, Smith testified that the two other *875 April 9 e-mails sent by Skelly to claimants' counsel resulted in settlements paid to those claimants in accordance with the e-mails, in the amounts of \$500,000 each. He further testified that he believed that he had authority to settle Plaintiffs' claims; that he had authorized Judge Skelly to communicate the County's \$975,000 settlement offer to Plaintiffs' counsel; that he was aware that Judge Skelly in fact communicated the offer; that he understood the "further approvals" sentence in Skelly's e-mail to Plaintiffs' counsel to refer only to possible compliance with Ariz.Rev.Stat. § 11-626;¹ and that he believed that a binding settlement was entered into, subject only to the "further approvals" sentence. Plaintiffs' counsel testified that he, too, believed that the "further approvals" sentence referred only to compliance with § 11-626. The County then explicitly took the position "for the record, on behalf of Maricopa County ... that [§ 11-626] does not apply."

At the close of the hearing, the district court found Smith had the authority to settle Plaintiffs' claims without further action: it discredited the two affidavits to the contrary submitted by the County and, instead, found Smith's testimony "credible in every respect." The district court also found that the "further approvals" sentence referred only to compliance with § 11-626, but that no further approvals were necessary, because of the County's concession that § 11-626 did not apply. It therefore granted Plaintiffs' motion to enforce the settlement agreement. See *Donahoe v. Arpaio*, 872 F.Supp.2d 900 (D.Ariz.2012).

The County now appeals. It contends that Smith's testimony and the April 9 e-mails were privileged under Arizona's mediation privilege, and thus inadmissible in the district court. The County further contends that, even if this evidence was admissible, the district court abused its discretion in enforcing the settlement agreement.

II.

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The district court had subject matter jurisdiction under 28 U.S.C. §§ 1331, 1367(a). We have appellate jurisdiction under 28 U.S.C. § 1291.

III.

[1] [2] “We review de novo the ruling of a district court on the scope of a privilege.” *United States v. Chase*, 340 F.3d 978, 981 (9th Cir.2003) (en banc). “We also review de novo the question of when state law applies to proceedings in federal court.” *Zamani v. Carnes*, 491 F.3d 990, 994 (9th Cir.2007).

[3] [4] [5] “We review a district court’s decision regarding the enforceability of a settlement agreement for an abuse of discretion.” *Maynard v. City of San Jose*, 37 F.3d 1396, 1401 (9th Cir.1994). We will reverse only if the district court based its decision “ ‘on an error of law or clearly erroneous findings of fact.’ ” *Id.* (quoting *United States v. Oregon*, 913 F.2d 576, 580 (9th Cir.1990)). Under Arizona law, a district court’s interpretation of an ambiguous agreement is a finding of fact, see *Leo Eisenberg & Co. v. Payson*, 162 Ariz. 529, 785 P.2d 49, 51–52 (1989), as is its determination that a disputed agency relationship exists, see *Salvation Army v. Bryson*, 229 Ariz. 204, 273 P.3d 656, 663 (Ariz.Ct.App.2012). We review such findings of fact for *876 clear error. See *Smith v. Salish Kootenai Coll.*, 434 F.3d 1127, 1130 (9th Cir.2006) (en banc).

IV.

[6] [7] The parties rightly agree that state contract law governs whether they reached an enforceable agreement settling the federal and state law claims alleged in Plaintiffs’ complaint. See *Botefur v. City of Eagle Point, Or.*, 7 F.3d 152, 156 (9th Cir.1993) (recognizing that “a settlement agreement is governed by principles of state contract law ... even where a federal cause of action is ‘settled’ ”). They dispute, however, whether state or federal privilege law governs the admissibility of evidence in support of that determination. The County contends that state privilege law governs because state contract law determines whether the parties reached an enforceable settlement agreement. Plaintiffs contend that federal privilege law governs because

any settlement agreement concerns both Plaintiffs’ federal and state law claims.

Under Federal Rule of Evidence 501, federal common law generally governs claims of privilege. “But in a civil case, state law governs privilege *regarding a claim or defense* for which state law supplies the rule of decision.” Fed.R.Evid. 501 (emphasis added). Here, as noted, Plaintiffs allege both federal and state law claims in their complaint. The contested evidence (Smith’s testimony and the April 9 e-mails) concerns all of these claims for relief-federal and state law claims alike. Where, as here, the same evidence relates to both federal and state law claims, “we are not bound by Arizona law” on privilege.² *Agster v. Maricopa Cnty.*, 422 F.3d 836, 839 (9th Cir.2005). Rather, federal privilege law governs.³ *Id.*; *Religious Tech. Ctr. v. Wollersheim*, 971 F.2d 364, 367 n. 10 (9th Cir.1992) (per curiam); see *Facebook, Inc. v. Pac. Nw. Software, Inc.*, 640 F.3d 1034, 1041, 1038 (9th Cir.2011) (applying state contract law to determine *877 whether in mediation the parties reached an enforceable settlement of plaintiffs’ federal and state law claims, but applying federal privilege law to determine what evidence from mediation was admissible in support of that determination).

[8] We further conclude that the County waived any argument that the contested evidence should be privileged under federal law. See *Babasa v. LensCrafters, Inc.*, 498 F.3d 972, 975 n. 1 (9th Cir.2007). Before the district court, the County specifically distinguished its position from cases in which a party urged the court to recognize a federal mediation privilege, and disavowed any intent to urge the same. In its opening brief on appeal, the County again assumed that Arizona privilege law governed, and failed to argue that the evidence admitted should be privileged under federal law. We thus need not determine whether a mediation privilege should be recognized under federal common law and, if so, the scope of such a privilege. See *id.* (finding no need to “consider whether a federal mediation privilege exists”).

The district court did not err in admitting and considering the allegedly privileged documents and testimony.

V.

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[9] A district court “may enforce only *complete* settlement agreements.” *Callie*, 829 F.2d at 890. The County argues that even when Smith’s testimony and the April 9 e-mails are considered, the district court abused its discretion in enforcing an incomplete settlement agreement, and clearly erred in finding that the parties had a meeting of the minds and that Smith had the authority to settle Plaintiffs’ claims through Judge Skelly. We disagree.

[10] [11] The district court did not clearly err in finding that the County authorized Smith to settle Plaintiffs’ claims. The district court’s finding was based on the text and purposes of the resolution, Smith’s testimony, and the County’s reliance on Smith to settle other claimants’ claims with essentially identical e-mails. Likewise, the district court’s finding that Smith authorized Judge Skelly to convey the County’s settlement offer to Plaintiffs’ counsel was based on Smith’s testimony, Judge Skelly’s actions, and the County’s course of performance. The district court’s finding was far from clearly erroneous.

[12] Nor did the district court clearly err in finding that the parties intended the “further approvals” sentence to refer only to compliance with *Ariz.Rev.Stat. § 11–626*. Smith testified that he understood the “further approvals” sentence to refer only to possible compliance with *§ 11–626*, and

the district court found Smith’s testimony “credible in every respect.” Plaintiffs’ counsel testified that he, too, understood the “further approvals” sentence to refer only to *§ 11–626*. There was thus ample support for the district court’s finding that the parties understood the “further approvals” sentence (the only sentence that differentiated Skelly’s e-mail to Plaintiffs’ counsel from his e-mails to other claimants’ counsel) to refer only to *§ 11–626*.

Having made these findings of fact, which are amply supported by the record, the district court did not err in concluding that compliance with *§ 11–626* was unnecessary because the County conceded that *§ 11–626* did not apply. The district court did not abuse its discretion in enforcing the settlement agreement.

For the reasons set forth above, the judgment of the district court is

AFFIRMED.

Parallel Citations

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Footnotes

1 *Ariz.Rev.Stat. § 11–626* states: “A claim against the county presented by a member of the board of supervisors shall be verified as other claims, and shall bear the written approval of at least one member of the board other than the claimant, and of the county treasurer.”

2 Even if Arizona privilege law applied to the evidence at issue here—which it does not—we agree with the district court’s conclusion (although on a different basis) that the contested evidence would still be admissible. *See Donahoe*, 872 F.Supp.2d at 909–11 (analyzing issue under state law).

Arizona’s mediation privilege statute, *Ariz.Rev.Stat. § 12–2238*, protects “[c]ommunications made ... during a mediation.” The statute specifically provides, however, that the privilege does not apply to “the terms of an agreement that is evidenced by a record that is signed by the parties.” *Ariz.Rev.Stat. § 12–2238(D)*.

The statute’s exception fits this case exactly. Here, Judge Skelly e-mailed Plaintiffs’ counsel on behalf of the County, as authorized by Smith, offering to settle, and Plaintiffs’ counsel e-mailed back accepting the offer. These e-mails constituted facial evidence of “an agreement that is evidenced by a record that is signed by the parties.” *Id.* Upon receipt of this evidence, the district court had an obligation to consider all relevant evidence to determine whether the parties reached an agreement within the meaning of *§ 12–2238(D)*. *See Taylor v. State Farm Mut. Auto. Ins. Co.*, 175 Ariz. 148, 854 P.2d 1134, 1139–41 (1993); *Firchau v. Barringer Crater Co.*, 86 Ariz. 215, 344 P.2d 486, 490 (1959) (determining “whether there had been a meeting of the minds” based “on all of the evidence submitted”); *see also Callie v. Near*, 829 F.2d 888, 890 (9th Cir.1987) (“Where material facts concerning the *existence* or *terms* of an agreement to settle are in dispute, ... the district court abuse[s] its discretion by not conducting an evidentiary hearing.”).

Mospan, Tara 8/5/2014
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Wilcox v. Arpaio, 753 F.3d 872 (2014)

14 Cal. Daily Op. Serv. 6029, 2014 Daily Journal D.A.R. 6938

Thus, both the e-mails themselves (as facial evidence of an agreement under § 12-2238(D)) and Smith's testimony (as evidence of whether a § 12-2238(D) agreement was in fact reached) fall clearly within the exception from the mediation privilege under § 12-2238(D).

3 We do not decide whether, in federal question cases, state or federal privilege law governs the admissibility of evidence that relates exclusively to state law claims.

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SUPREME COURT OF ARIZONA

En Banc

In re the ESTATE OF MARY A.) Arizona Supreme Court
RILEY, aka MARY AGNES RILEY, aka) No. CV-12-0007-PR
MARY AGNES REILLY.)
) Court of Appeals
) Division Two
) No. 2 CA-CV 10-0149
)
) Pima County
) Superior Court
) No. P26266
)
) **O P I N I O N**

Appeal from the Superior Court in Pima County
The Honorable Charles V. Harrington, Judge
REMANDED

Opinion of the Court of Appeals, Division Two
228 Ariz. 382, 266 P.3d 1078 (App. 2011)
VACATED

JONATHAN W. REICH, P.C. Tucson
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B E R C H, Chief Justice

¶1 We granted review to decide whether A.R.S. § 14-3952(1) requires beneficiaries of an estate to unanimously approve a settlement agreement. We hold that the statute requires all beneficiaries to execute the agreement if it affects beneficial interests in the estate and the settling parties seek court approval pursuant to A.R.S. § 14-3951.

I. FACTS AND PROCEDURAL HISTORY

¶2 Mary A. Riley ("Decedent") died in 1996, leaving her estate to her thirteen children and appointing her two oldest, Joseph Riley and Mary Benge, as co-personal representatives. The family settled the estate's distribution scheme in 1997 through a Family Compromise Agreement that divided the estate among the thirteen children. Nine years later, in March 2006, Joseph and Mary filed a petition to distribute and close the estate. The petition included an accounting of the amounts they had spent administering the estate.

¶3 One of Decedent's other children, R. J. Riley, objected to the accounting. He asserted that Joseph and Mary had breached their fiduciary duties, and he sought the appointment of a successor personal representative ("PR"). Joseph and Mary resigned, and the probate court appointed John Barkley as the new PR. The court ordered Joseph and Mary to file another accounting. After reviewing it, Barkley objected, citing the

"lack of supporting documentation and inaccuracies apparent on the face of the document." The court scheduled a hearing on the PR's objection.

¶4 While awaiting the hearing, Barkley settled the estate's claims against Joseph and Mary.¹ The settlement agreement required Joseph to pay \$15,000 and disclaim his interest in the estate; Mary was to pay \$50,000, but retain her interest in the estate. In exchange, the estate agreed to release all claims against Joseph and Mary relating to their activities as co-PRs. The agreement also required the "parties signatory [t]hereto" to present the agreement to the probate judge for approval under A.R.S. §§ 14-3951 and -3952. Although only Barkley, Joseph, and Mary had signed the agreement, it provided that "[t]his Agreement shall bind and inure to the benefit of the heirs, assignees and distribute[e]s of the Parties." Their goal was to prevent further litigation stemming from Joseph and Mary's administration of the estate.

¶5 Nine of Decedent's thirteen children (the "Objectors"), none of whom had executed the agreement, objected to the settlement. Nonetheless, after an evidentiary hearing, the probate court approved the agreement, finding that it settled a good faith dispute and its terms were reasonable.

¹ The agreement also resolved the estate's claims against Kathryn Riley. That settlement is not at issue here.

¶16 The Objectors appealed. The court of appeals sua sponte ordered the parties to brief whether the agreement was "void for failing to be executed by all the necessary parties under § 14-3952(1)." *In re Estate of Riley*, 228 Ariz. 382, 384 ¶ 5, 266 P.3d 1078, 1080 (App. 2011).

¶17 Following oral argument, the court concluded that the statute required all estate beneficiaries to sign the settlement agreement. *Id.* at 386 ¶ 10, 266 P.3d at 1082. The court voided the agreement because not all beneficiaries had signed it. *Id.* at 384-86

¶¶ 6-10, 266 P.3d at 1080-82.

¶18 We granted Barkley's petition for review because this case presents an important issue of first impression. We have jurisdiction under Article 6, Section 5(3) of the Arizona Constitution and A.R.S. § 12-120.24.

II. DISCUSSION

¶19 We review statutory interpretation issues de novo. *Duncan v. Scottsdale Med. Imaging, Ltd.*, 205 Ariz. 306, 308 ¶ 2, 70 P.3d 435, 437 (2003). Because the probate statutes have not materially changed during the pendency of this action, we cite the current version of each.

¶10 A.R.S. § 14-3952 sets forth a procedure for securing court approval of a compromise of disputed interests in the estate. It imposes the following requirements:

1. The terms of the compromise shall be set forth in an agreement in writing which shall be executed by all competent persons . . . having beneficial interests or having claims which will or may be affected by the compromise.

. . . .
3. After notice to all interested persons . . . , if [the court] finds that the contest or controversy is in good faith and that the effect of the agreement upon the interests of persons . . . is just and reasonable, [the court] shall make an order approving the agreement Upon the making of the order and the execution of the agreement, all further disposition of the estate is in accordance with the terms of the agreement.

A.R.S. § 14-3952. If these statutory procedures are satisfied and the court formally approves the agreement, A.R.S. § 14-3951 provides that the compromise "is binding on all the parties thereto including those unborn, unascertained or who could not be located." Sections 14-3951 and -3952 thus act together to permit parties to resolve estate controversies with finality.

¶11 Sections 14-3951 and -3952 mirror §§ 3-1101 and -1102 of the 1969 Uniform Probate Code, see 1973 Ariz. Sess. Laws, ch. 75, § 4 (1st Reg. Sess.), which, in turn, were based on §§ 93 and 94 of the 1946 Model Probate Code. See Unif. Probate Code § 3-1102 cmt. (1969). Sections 14-3951 and -3952 allow parties to enter into settlement agreements that, upon court approval, bind all interested parties, even if interested parties are not competent or available to enter into the agreement. See A.R.S. § 14-3951; Unif. Probate Code § 3-1102 cmt. (stating that "[t]his section and the one preceding it outline a procedure"

for "resolving controversy concerning the estate"); see also *In re Estate of Ward*, 200 Ariz. 113, 116 ¶ 12, 23 P.3d 108, 111 (App. 2001) (providing that "[§] 14-3952 authorizes the probate court to approve a compromise under [§] 14-3951 only if" the procedures in § 14-3952 are met); accord *Matter of Estate of Hedstrom*, 472 N.W.2d 454, 456 (N.D. 1991) (to same effect).

¶12 The parties disagree whether § 14-3952(1) requires all beneficiaries to execute the agreement at issue. Barkley contends that §§ 14-3951 and -3952 distinguish disputes over the administration of the estate from "disputes over the structure and distribution of the estate." He concedes that the statutes "clearly require[] all the beneficiaries to agree to modify the structure or distribution scheme." He argues, however, that the statutes do not require all beneficiaries to execute a compromise if it merely resolves a dispute over the administration of the estate. For such an agreement, Barkley asserts, the statutes require only those directly involved in the controversy to execute the agreement. He maintains that the agreement here settled merely an administrative dispute – the estate's claims against its former co-PRs – and thus required signatures only from him, Joseph, and Mary.

¶13 Barkley mischaracterizes the agreement, however. In it, Joseph disclaimed his interest in the estate, which altered the distribution scheme by dividing the estate among twelve

beneficiaries instead of the thirteen who took under the 1997 Family Compromise Agreement. The agreement thus affected the "beneficial interests" of the remaining twelve beneficiaries, and § 14-3952(1) therefore required all of the beneficiaries to execute the agreement before the court could properly approve it under the statute.² See *In re Estate of Sullivan*, 724 N.W.2d 532, 535 (Minn. Ct. App. 2006) (holding that an agreement that altered the distribution scheme required the signatures of all those with a beneficial interest); cf. *Matter of Estate of Outen*, 336 S.E.2d 436, 436-37 (N.C. Ct. App. 1985) (noting that an agreement adding a beneficiary affected the distribution scheme). Thus, because only Barkley, Joseph, and Mary signed the agreement, the probate court's approval under § 14-3952 was invalid to make the agreement binding on those who did not sign it.

¶14 Barkley contends that the settlement did not affect the distribution scheme because "[n]one of the other twelve beneficiaries . . . had their one-thirteenth distributive share

² Because the agreement here affected all of the devisees' beneficial interests, we need not decide whether § 14-3952(1) always requires the beneficiaries to unanimously agree or whether it requires only the *affected* beneficiaries to unanimously agree. Compare S.C. Code Ann. § 62-3-1102 cmt. (interpreting nearly identical statute to mean that only those whose beneficial interests will be affected must execute the agreement), with *In re Estate of Sullivan*, 724 N.W.2d 532, 535 (Minn. Ct. App. 2006) (reading nearly identical statute to require execution by every person with a beneficial interest).

diminished in any way." But § 14-3952(1) does not distinguish based on whether a beneficial interest is positively or adversely affected. To adopt such a position would require us to add words to the statute that are not there.³

¶15 Barkley argues that requiring all beneficiaries to sign compromises like the one at issue here would impede resolution of disputes, add expense, and delay estate administration. We agree. But nothing in this opinion or the statutory probate scheme requires Barkley to use §§ 14-3951 and -3952 to compromise disputes. The probate statutes allow a beneficiary to disclaim his interest without court approval, see A.R.S. § 14-10005, and permit the PR to settle a variety of claims without court approval, see, e.g., A.R.S. § 14- 3715(17), (27); A.R.S. § 14-3813. If in doubt about how to proceed, the PR also "may invoke the jurisdiction of the court . . . to resolve questions concerning the estate or its administration." A.R.S. § 14- 3704; see also, e.g., §§ 14-3105, - 3401, -3414 (authorizing proceedings to resolve a variety of issues).

¶16 Here, however, Barkley sought court approval to bind all beneficiaries and insulate the settlement from further challenge - and himself from potential future liability as PR -

³ The Objectors argue that the losses caused by Joseph and Mary exceeded the settlement amount, and, therefore, despite Joseph's relinquishment of his interest in the estate under the settlement, the Objectors' interests were adversely affected.

by invoking §§ 14-3951 and -3952. Although nothing precludes attempting such a course of action, it requires compliance with § 14- 3952's procedures, including, in this case, obtaining the signatures of "all competent persons . . . having beneficial interests."

¶17 The failure to secure the signatures of all beneficiaries did not, however, make the agreement void for all purposes, as the court of appeals concluded. See *Riley*, 228 Ariz. at 384-85 ¶ 6 & n.2, 266 P.3d at 1080-81 & n.2. Rather, the failure to comply with § 14- 3952 simply means that the probate court's approval was not effective to make the agreement binding on all beneficiaries. See *In re Estate of Grimm*, 784 P.2d 1238, 1242-43 (Utah Ct. App. 1989) (discussing statutes nearly identical to Arizona's and stating that they "merely outline[] the procedures for securing court approval"; they "do[] not invalidate an otherwise valid compromise agreement between the parties prior to court approval").

III. CONCLUSION

¶18 For the reasons set forth above, we vacate the opinion of the court of appeals and remand to the superior court for further proceedings consistent with this opinion.

Rebecca White Berch, Chief
Justice

CONCURRING:

Scott Bales, Vice Chief Justice

A. John Pelander, Justice

Robert M. Brutinel, Justice

Peter J. Cahill, Judge*

* Pursuant to Article 6, Section 3 of the Arizona Constitution, the Honorable Peter J. Cahill, Presiding Judge of the Superior Court in Gila County, was designated to sit in this matter.

(mere existence of contract does not justify fees award where contract only “peripherally involved in a cause of action”); *In re Larry’s Apartment, L.L.C.*, 249 F.3d 832, 836 (9th Cir.2001) (where contract “merely somewhere within the factual background,” fees under § 12-341.01(A) not awardable).¹¹ Accordingly, we deny MCA’s attorney fees request. But, as the prevailing party on appeal, MCA is entitled to a cost award upon compliance with Rule 21. See A.R.S. § 12-341; *Assyia v. State Farm Mut. Auto. Ins. Co.*, 229 Ariz. 216, ¶ 32, 273 P.3d 668, 675 (App.2012) (cost award mandatory in favor of successful party).

Disposition

¶ 21 For all of the foregoing reasons, the trial court’s order requiring MCA to disgorge \$118,185.93 in fees is vacated.



236 Ariz. 498

In re the SHAHEEN TRUST u/a
1/12/1994, as Restated
7/21/2000.

No. 2 CA-CV 2014-0109.

Court of Appeals of Arizona,
Division 2.

Jan. 16, 2015.

Background: Beneficiaries filed petition alleging multiple breach of trust claims. Trustee counter-petitioned for an award declaring beneficiaries’ interests in the trust forfeited under trust’s no-contest provision. The Superior Court, Pima County, No. PB20090213, Kyle Bryson, J., denied beneficiaries’ claims and trustee’s request to apply forfeiture provision of trust. Trustee appealed.

Holdings: The Court of Appeals, Eckertstrom, C.J., held that:

¹¹ We are not asked to decide and express no opinion as to whether a fees award pursuant to

- (1) as a matter of apparent first impression, when a single petition alleges multiple challenges to a will or trust, and the challenges are brought in contravention of a no-contest provision, probable cause must exist as to each challenge, and
- (2) beneficiaries’ claim that trustee was required to make yearly, rather than monthly, distributions to herself was not supported by probable cause.

Reversed in part and remanded.

1. Appeal and Error ⇔756

Statement that appellant was appealing from a judgment of the Superior Court in her opening brief was sufficient to satisfy rule requiring appellant to indicate the basis of the appellate court’s jurisdiction. 17B A.R.S. Civil Appellate Proc.Rules, Rule 13(a)(3).

2. Appeal and Error ⇔893(1)

Whether an in terrorem or no-contest clause in a trust is enforceable is an issue of law, which the Court of Appeals reviews de novo.

3. Courts ⇔89

Courts will apply the Restatement (Second) of Property in the absence of contrary authority.

4. Trusts ⇔140(2)

Wills ⇔651

Although no-contest provisions in wills are governed by statute, and no-contest provisions in trusts are governed by the Restatement (Second) of Property, the standard for evaluating the enforceability of such clauses does not differ between wills and trusts. A.R.S. § 14-2517; Restatement (Second) of Property § 9.1.

5. Trusts ⇔140(2)

No-contest provision in trust would be invalid if petitioners alleging breach of trust had probable cause to bring petition. Restatement (Second) of Property § 9.1.

§ 12-341.01 may be available in a receivership action.

6. Appeal and Error \S 893(1)

Whether probable cause existed for petition alleging breach of trust is ultimately a question of law, which the Court of Appeals reviews de novo.

7. Trusts \S 140(2)**Wills** \S 651

When a single petition alleges multiple challenges to a will or trust, and the challenges are brought in contravention of a no-contest provision, probable cause must exist as to each challenge. Restatement (Second) of Property \S 9.1.

8. Trusts \S 140(2)**Wills** \S 651

“Probable cause,” as required to support challenges to a donative transfer under a will or trust, is defined as the existence, at the time of the initiation of the proceeding, of evidence which would lead a reasonable person, properly informed and advised, to conclude that there is a substantial likelihood that the contest or attack will be successful. Restatement (Second) of Property \S 9.1.

See publication Words and Phrases for other judicial constructions and definitions.

9. Trusts \S 140(2)**Wills** \S 651

Subjective belief that claims are likely to succeed, while required for probable cause to support challenges to a donative transfer under a will or trust, is not sufficient; the petitioner’s subjective belief must be objectively reasonable. Restatement (Second) of Property \S 9.1.

10. Trusts \S 140(2)

Beneficiaries’ claim that trustee was required to make yearly, rather than monthly, distributions to herself in petition alleging breach of trust was not supported by probable cause, requiring enforcement of trust’s no-contest provision, absent supportive language in the trust document, legal authority, or other credible evidence that the claim was objectively reasonable. Restatement (Second) of Property \S 9.1.

1. Because the Robertses have not appealed the trial court’s denial of their claims, we do not address their arguments challenging that ruling.

Munger Chadwick, P.L.C. By Thomas A. Denker, Tucson, Counsel for Appellant Twinkle Shaheen.

Catherine Roberts, Jacksonville, FL, George Roberts, Dunnellon, FL, In Propria Personae.

Chief Judge ECKERSTROM authored the opinion of the Court, in which Judge ESPINOSA and Judge KELLY concurred.

OPINION

ECKERSTROM, Chief Judge.

¶ 1 Twinkle Shaheen appeals from the trial court’s judgment refusing to apply a forfeiture provision of the Shaheen Trust against Catherine “Pearl” Roberts and her son, George Roberts (collectively “the Robertses”), after they alleged breach of trust against Shaheen. For the following reasons, we reverse in part and remand.

Factual and Procedural Background

[1] ¶ 2 The Shaheen Trust was established in 1994, with Shaheen as the trustee. The trust included a no-contest provision, stating:

If any beneficiary under this Trust, in any manner, directly or indirectly, contests or attacks the validity of either Settlor’s Will, this Trust or any disposition under either, by filing suit against . . . Trustee . . . then any share or interest given to that beneficiary under the provisions of this Trust is hereby revoked and shall be disposed of in the same manner as if that contesting beneficiary and all descendants of that beneficiary had predeceased the Surviving Settlor.

The Robertses, both beneficiaries of the trust, filed a petition alleging multiple claims of breach of trust. Shaheen filed a counter-petition seeking an award of fees and forfeiture of beneficial interest. The trial court denied all of the Robertses’ claims.¹ The

See Ariz. R. Civ.App. P. 13 bar committee note (“Absent a cross-appeal, the appellate court may not alter the lower court’s judgment in a manner

court awarded Shaheen her costs and attorney fees, but denied her request to declare the Robertses' interests in the trust forfeited. Shaheen challenges the latter ruling on appeal. We have jurisdiction pursuant to A.R.S. §§ 12-120.21(A)(1) and 12-2101(A)(1).²

Forfeiture of Interest

[2] ¶ 3 The trial court found that “the Petition in this case is an attack on the validity of a disposition under the Trust in violation of [the no-contest] provision,” but also found the forfeiture of interest provision unenforceable under *In re Estate of Shumway*, 198 Ariz. 323, 9 P.3d 1062 (2000). Whether an *in terrorem* or no-contest clause is enforceable is an issue of law, which we review de novo. *In re Estate of Stewart*, 230 Ariz. 480, ¶ 13, 286 P.3d 1089, 1093 (App. 2012).

¶ 4 Shaheen contends that, because A.R.S. § 14-2517 refers only to wills, and not to trusts, no-contest provisions in trusts are valid and enforceable regardless of whether probable cause existed to bring a challenge. The trial court, in relying on *Shumway*, noted that case involved a will, not a trust. 198 Ariz. 323, ¶ 1, 9 P.3d at 1063-64. Nevertheless, the court stated there was “no reason to apply a different standard in the context of other donative transfers.” But *Shumway*, which invalidated no-contest provisions of wills in cases where probable cause existed to bring the challenge, interpreted and applied § 14-2517. 198 Ariz. 323, ¶ 1, 9 P.3d at 1063-64. And in *Stewart*, this court concluded § 14-2517 applies only to wills, and not to trusts. 230 Ariz. 480, n. 4, 286 P.3d at 1093 n. 4.

¶ 5 Because § 14-2517 does not apply to trusts, there is no statutory authority concerning the question of whether a no-contest

favorable to the appellee.”); *Engel v. Landman*, 221 Ariz. 504, ¶ 17, 212 P.3d 842, 847 (App. 2009).

2. The Robertses argue that we should dismiss this case because Shaheen failed to comply with Rule 13(a)(3), Ariz. R. Civ.App. P., which requires an opening brief to “indicat[e] briefly the basis of the appellate court’s jurisdiction.” Although Shaheen did not specifically cite §§ 12-120.21 and 12-2101, she explained that she was

provision in a trust is enforceable when probable cause existed to bring a challenge. And because *Shumway* applied and interpreted § 14-2517, it is likewise inapplicable.

[3-5] ¶ 6 Arizona courts will apply the Restatement in the absence of contrary authority, *In re Herbst*, 206 Ariz. 214, ¶ 17, 76 P.3d 888, 891 (App.2003), and, as the trial court noted, the Restatement (Second) of Property (Donative Transfers) § 9.1 cmt. 1 (1983) suggests treating no-contest provisions in wills and trusts the same. Although *Stewart* concluded that § 14-2517 does not apply to trusts, it did not conclude that no-contest provisions in trusts are enforceable without regard to probable cause; indeed, it suggested exactly the opposite. 230 Ariz. 480, ¶ 1, n. 4, 286 P.3d at 1091, 1093 n. 4. In short, although no-contest provisions in wills are governed by statute, and no-contest provisions in trusts are governed by the Restatement, the standard for evaluating the enforceability of such clauses does not differ between wills and trusts. Accordingly, we find the trial court did not err in applying *Shumway* and concluding that the no-contest provision would be invalid if the Robertses had probable cause to bring their petition.

Probable Cause

[6] ¶ 7 Shaheen next claims the trial court erred in finding the Robertses had probable cause to bring the petition. We defer to a trial court’s determination of the factual basis underlying a claim; however, whether probable cause existed in a particular case is ultimately a question of law, which we review de novo. *Shumway*, 198 Ariz. 323, ¶ 9, 9 P.3d at 1065. Shaheen suggests that, to avoid forfeiture, there must have been probable cause for each of the Robertses’ nine claims. We agree.

[7] ¶ 8 We have found no authority governing this issue. But, for the following

appealing from a judgment of the superior court, which we believe is sufficient. See *Associated Aviation Underwriters v. Wood*, 209 Ariz. 137, ¶ 147, 98 P.3d 572, 614 (App.2004) (noting disfavor of hypertechnical arguments and preference for disposing of cases on merits); see also *Ghadimi v. Soraya*, 230 Ariz. 621, ¶ 7, 285 P.3d 969, 970 (App.2012) (court of appeals has “independent duty to examine whether we have jurisdiction over matters on appeal”).

reasons, we conclude that when a single petition alleges multiple challenges to a will or trust, and the challenges are brought in contravention of a no-contest provision, probable cause must exist as to each challenge.

¶ 9 The text of the Restatement explains that no-contest clauses are enforceable unless probable cause supports a “contest.” Restatement § 9.1. Black’s Law Dictionary defines the verb “contest” as “[t]o litigate or call into question; challenge.” 386 (10th ed.2014). When a party brings nine claims against a trustee, as the Robertses have done here, that party litigates nine different challenges, and, accordingly, contests nine separate claims. If these nine claims had been presented in nine separate petitions, there would be no question that probable cause would have to support each claim to avoid forfeiture. We see no reason for a different result merely because the claims were asserted in a single petition.

¶ 10 In enforcing no-contest clauses in the context of wills, except where probable cause exists to bring a challenge, our supreme court has balanced important public policy concerns. “Public policy reasons to support penalty clauses include preserving the transferor’s donative intent, avoiding waste of the estate in litigation, and avoiding use of a will contest to coerce a more favorable settlement to a dissatisfied beneficiary.” *Shumway*, 198 Ariz. 323, ¶ 7, 9 P.3d at 1065. Litigating nine separate claims is necessarily more costly than litigating a single claim. Clearly, if a petition asserts one claim that is supported by probable cause and eight claims that are not, that petition will result in greater expense to the trust than the litigation of a single claim. Furthermore, if probable cause for a single claim protected a party from disinheritance under a no-contest clause, that party could file a petition with one legitimate claim and any number of frivolous claims, thereby using the threat of extensive litigation to “coerce a more favorable settlement.” *Id.*

¶ 11 The public policy reasons for supporting enforcement of no-contest provisions

3. The Robertses’ petition contained “a multitude of allegations,” which the trial court “distilled into nine separate claims of breach of trust.”

must be balanced against the importance of allowing parties to prove a donative transfer is genuinely invalid. *Id.* But requiring probable cause for each challenge raised in a single petition does nothing to harm that interest. It merely ensures that parties will carefully consider each challenge they might raise before filing a petition and instituting costly litigation.

[8, 9] ¶ 12 Because we conclude probable cause must support each individual challenge brought to a donative transfer, if any of the Robertses’ claims was not supported by probable cause, the trial court erred in refusing to declare their interests in the trust forfeited. Probable cause, in this context, is defined as “the existence, at the time of the initiation of the proceeding, of evidence which would lead a reasonable person, properly informed and advised, to conclude that there is a substantial likelihood that the contest or attack will be successful.” *Id.* ¶ 12, quoting Restatement § 9.1 cmt. j (emphasis in *Shumway*). Subjective belief that the claims are likely to succeed, while required, is not sufficient; the petitioner’s subjective belief must be objectively reasonable. *Id.* ¶ 13; cf. *Bradshaw v. State Farm Mut. Auto. Ins. Co.*, 157 Ariz. 411, 417, 758 P.2d 1313, 1319 (1988) (discussing analogous test for malicious prosecution).

[10] ¶ 13 One of the claims brought by the Robertses was that Shaheen was required to make yearly, rather than monthly, distributions to herself.³ The trial court found that the claim had no merit, noting the “trust instrument itself does not provide for such a requirement.” The court further found that the Robertses had not cited any legal authority or presented any credible evidence to support the position. The court stated that the Robertses “had a reasonable subjective belief in the likelihood of the validity of their claims, based on the information they had at the time they filed the petition,” but did not explain what that information was. Nor did the court explain how that information made their claim reasonable despite the absence of supportive language in

They have not contested on appeal the court’s characterization of their claims.

IN RE SHAHEEN TRUST

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Cite as 341 P.3d 1169 (Ariz.App. Div. 2 2015)

the trust document, legal authority, or other credible evidence. The Robertses have not pointed to, nor have we found, anything in the record that would show this claim was objectively reasonable. We therefore must conclude the court erred when it found the Robertses' claims were supported by probable cause and refused to enforce the forfeiture provision of the Shaheen Trust against them.

contest provision of the Shaheen Trust is reversed. We remand this case to the trial court for entry of an order of forfeiture against the Robertses.



Disposition

¶ 14 For the foregoing reasons, the portion of the judgment declining to enforce the no-

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MAR 15 2013
ARIZONA COMMISSION ON
JUDICIAL CONDUCT

**STATE OF ARIZONA
COMMISSION ON JUDICIAL CONDUCT**

Inquiry concerning)
)
Judge Carmine Cornello) Case No. 12-177
Superior Court)
Pima County) **AMENDED**
State of Arizona) **STIPULATED RESOLUTION**
)
Respondent)

COME NOW Judge Carmine Cornello, Respondent, through his attorney John Tully, and Jennifer Perkins, Disciplinary Counsel for the Commission on Judicial Conduct (Commission), and hereby submit the following proposed resolution of this case pursuant to Rule 30 of the Commission Rules.

JURISDICTION

1. The Commission has jurisdiction over these matters pursuant to Article 6.1 of the Arizona Constitution.
2. Respondent has served as a superior court judge in Pima County since May 2002 and was serving in this capacity at all times relevant to the allegations contained herein.
3. As a superior court judge, Respondent is and has been subject to the Code of Judicial Conduct (Code) as set forth in Supreme Court Rule 81.

4. Respondent acknowledges that this stipulated resolution and sanction is grounded in and authorized by Article 6.1, paragraph 4, of the Arizona Constitution, which forbids conducts that is “prejudicial to the administration of justice that brings the judicial office into disrepute.”

BACKGROUND

5. The parties believe it is appropriate to provide a broad description of the relevant circumstances in order to fully explain the stipulated resolution of this matter.

6. This case arises out of two separate complaints which have been consolidated by stipulation into a single Amended Statement of Charges. These complaints arose out of separation settlement conferences at which Respondent presided as the settlement judge.

7. Respondent has served with distinction as the presiding judges for Pima County’s Alternative Dispute Resolution program for many years. In that capacity, he has aided in the settlement of many cases. He presides over as many as 7-80 settlement conferences per year. As an illustration, the Pima County Bar Association gave Respondent an award in June 2010 for his “extraordinary services to the bench and bar” for his efforts at settlement conferences.

8. Because of Respondent’s abilities as a settlement judges, judges and attorneys in Pima County frequently request his assistance in settling the most difficult and contentious litigations. For the same reasons, judges and attorneys from other counties will sometimes request that Respondent preside over such settlement conferences in cases venued in counties other than Pima County.

9. Settlement conferences are different in many respects from most court proceedings. Most proceedings (including trials, motions, and evidentiary hearings) are subject to formal and clear rules of procedures that govern the timing, scope, and nature of communications between the court, counsel, and litigants. Additionally, the judge’s goal in such proceedings typically is to become familiar with the legal, factual, and/or procedural information necessary to decide an issue and to enter an impartial decision or ruling. Settlement conferences, on the other hand, are more akin to private mediations: they are conducted off the record and usually involve “free form” conversations between the court, counsel, and/or litigants. These conversations are typically conducted *ex parte* and in a setting with few, if any formal procedural rules governing these communications. Unlike most court proceedings, a settlement judge’s role

is not to ultimately decide one or more issues at a settlement conference, but, instead to facilitate the parties in resolving their dispute.

10. In light of the function of a settlement conference/mediation, and the role a settlement judges/mediator, individuals serving in such a capacity have adopted a wide variety of styles to achieve the goal of bringing the parties together. No one style is recognized as superior. For example, some settlement judges/mediators use a soft-spoken style; other are more forceful. Respondent's approach as a settlement judges is occasionally forceful. Such an approach may be particularly well-suited to the settlement of cases involving the most difficult issues and/or contentious litigants and attorneys. However, a forceful approach can also be problematic when carried out in a manner that runs afoul of ethical requirements. This includes the requirement that "a judge shall be patient, dignified, and courteous to litigants ... lawyers ... and others with whom the judge deals in an official capacity." (Code, Rule 2.8(B)) Respondent acknowledges that he has at times run afoul of this requirement due to his forceful style.

11. With regard to the first of the two underlying cases referenced above in paragraph 5, Respondent was the settlement judge at three settlement conferences in a complex matter involving allegations of toxic exposure to mold. The plaintiff was a young adult who was nineteen years old at the time of the final settlement conference. Her parents were also present at the settlement conference along with numerous attorneys representing both sides. Disciplinary Counsel and Respondent have not yet fully developed the factual record in this matter, but Respondent concedes that he made one or more improper or inappropriate statements to one of the attorneys representing the plaintiff, and engaged in a strong worded discussion concerning the proposed confidentiality of the settlement with that attorney, causing the plaintiff to cry on one occasion.

12. The second underlying case was a lawsuit in Cochise County Superior Court involving the sale of family property in which Respondent was asked by the trial judge to preside at a settlement conference. The parties met with Respondent at a settlement conference and engaged in hearings before him on five occasions: May 5, 2011; June 15, 2011; January 19, 2012; March 9, 2013; and March 14, 2012. During the settlement conference, Respondent displayed an improper demeanor, made inappropriate statements, and behaved in what could reasonably be viewed as a coercive manner.

13. The Respondent acknowledges that his conduct at these settlement conferences was not always patient, dignified, and courteous as required by the Code. Respondent also acknowledges that while he did not intend to coerce any parties into a settlement, his conduct could have been perceived as coercive. The Respondent acknowledges the wrongful nature of his conduct and that he has come to this conclusion too slowly. Respondent sincerely desires to modify his behavior so as to avoid any possible recurrent of such conduct.

MUTUAL CONSIDERATION

14. Respondent admits the factual background set forth above in paragraphs 4 through 13. He further concedes that these facts could support a finding of judicial misconduct should this matter proceed to a formal hearing. Specifically, Respondent admits that he failed to maintain patience, dignity, and courtesy with litigants who appeared before him in settlement conferences, as described above, and that his demeanor could have reasonably led some litigants to feel pressured into entering a settlement, in violation of Rules 1.2 and 2.8 of the Code of Judicial Conduct.

15. Respondent also acknowledges that he has previously received an informal reprimand and a formal censure for somewhat similar misconduct, and that the Commission has received other complaints alleging improper demeanor or coercive conduct by Respondent during settlement conferences. Respondent agrees that his prior disciplinary history and the Commission's general commitment to progressive discipline could result in a suspension should this matter proceed to a formal hearing.

16. The parties agree, however, that the following mitigating factors, coupled with Respondent's commitment to alter certain aspects of his settlement conference conduct, indicate that a formal public censure as described herein is the appropriate sanction in this matter.

a. Respondent's past service to the bench and bar with distinction and effectiveness as described in paragraphs 7 and 8 above.

b. The inherent nature and context of a settlement conference is distinguished from the atmosphere in a courtroom when a judge sits on the bench as described above in paragraph 9. Thus, although Respondent's conduct occurred while he was serving in his official capacity, it occurred during a context that is generally more akin to off-bench circumstances.

c. Respondent acknowledges the wrongful nature of his conduct and hereby manifests his desire to reform his conduct.

17. The parties agree that Respondent's misconduct in the underlying cases warrants a sanction. As explained in paragraph 9 above, the parties agree that a formal public censure and the additional provisions set forth below are the appropriate sanctions.

18. For six months, beginning the first of the month following the Supreme Court's issuance of the censure in this matter, Respondent will have one or more mentors who will mentor him at least 25% of the settlement conferences Respondent conducts during that time frame. The Presiding Member of the Hearing Panel appointed in this matter will appoint the mentor or mentors, taking into account input from both Disciplinary Counsel and Respondent. The Respondent will be responsible for any costs associated with the mentors.

19. Respondent's mentors will report to the Commission in writing after each such settlement conference regarding their mentoring and Respondent's handling of settlement conferences.

20. During the 18 months following the conclusion of this matter, Respondent will attend at least one educational training course related to appropriate judicial demeanor, to be proposed by the Disciplinary Counsel and approved by the Chairman of the Commission. Respondent agrees to provide reasonable evidence of the timely completion of this condition to Disciplinary Counsel.

21. If Respondent fails to meet the conditions set forth above in paragraphs 18, 19 and or/20 above, he agrees that a summary suspension of 45 days without pay shall be imposed. In this regard, the following procedures shall apply. If Disciplinary Counsel concludes that grounds exist to proceed under this provision, Disciplinary Counsel shall so notify Respondent. Such grounds may exist for one of two reasons: (a) Disciplinary Counsel receives a report from a mentor indicating that Respondent has failed to correct his problematic conduct or (b) Respondent fails to provide Disciplinary Counsel with satisfactory evidence of the completion of the course(s) addressed in paragraph 13 above. Respondent shall be given a reasonable opportunity to respond. In the event that Disciplinary Counsel continues to believe thereafter that grounds to proceed under this provision still exist, Disciplinary Counsel shall provide all relevant information to the Commission which shall then determine whether such a suspension should be recommended to the Supreme Court for imposition.

22. Any subsequent complaints filed against Respondent shall proceed according to the procedures set forth in the Commission Rules.

OTHER TERMS AND CONDITIONS

23. This agreement, if accepted by the hearing panel, fully resolves all issues raised in the amended Statement of Charges and may be used as evidence in later proceedings in accordance with the Commission's Rules. If the hearing panel does not accept this agreement as a full resolution, then the admissions made by Respondent are withdrawn, and the matter will be set for hearing without use of this agreement.

24. Respondent waives his right to file a Response to the Statement of Charges, pursuant to Commission Rule 25(a).

25. Pursuant to Commission Rule 28(a), both parties waive their right to appeal the charges at issue in this matter, including the appeal procedures set out in Commission Rule 29.

26. Both parties agree not to make any statements to the press that are contrary to the terms of this agreement.

27. Both parties will pay their own costs and attorney's fees associated with this case.

28. Respondent clearly understands the terms and conditions of this agreement, has reviewed it with his attorneys, and fully agrees with its terms.

29. This agreement constitutes the complete understanding between the parties.

SUBMITTED this 15th day of March, 2013.

s/Carmine Cornello

Hon. Carmine Cornello
Respondent

March 15, 2013

Date Signed

s/ Jennifer Perkins

Jennifer Perkins
Disciplinary Counsel

March 15, 2013

Date Signed

SUPREME COURT OF ARIZONA

In the Matter of) Arizona Supreme Court
) No. R-15-0018
RULES 31, 34, 38, 39 & 42,)
RULES OF THE SUPREME COURT)
) FILED 08/27/2015
)
)
)
)
)
)

**ORDER
AMENDING RULES 31, 34, 38, 39, AND 42, AND PROMULGATING RULE 40,
RULES OF THE ARIZONA SUPREME COURT**

A petition having been filed proposing to amend Rules 31, 34, 38, 39, and 42, Rules of the Arizona Supreme Court, and comments having been received, upon consideration,

IT IS ORDERED that Rules 31, 34, 38, 39, and 42, Rules of the Arizona Supreme Court, be amended, and Rule 40, Rules of the Arizona Supreme Court, be promulgated, in accordance with the attachment hereto, effective January 1, 2016.

IT IS FURTHER ORDERED that consideration of the proposed amendments to ER 1.6 is continued.

With respect to the proposed amendments to ER 1.10(d) and related Comments, refer to the order in R-13-0046.

DATED this 27th day of August, 2015.

SCOTT BALES
Chief Justice

TO:

Rule 28 Distribution
Hon. Ann A. Scott Timmer
Hon. Daniel A Washburn
Denise M Blommel
Kathy McCormick
Hon. Janet E Barton
Elizabeth B Ortiz
Gary Krcmarik
Scott M Drucker
Susan Pickard
C Steven McMurry
Kenneth Mann
Hon. Sarah R Simmons
Hon. Kathleen A Quigley
Hon. Jeffrey T Bergin
John R Lopez IV
John A Furlong
Hon. David L Mackey
E Hardy Smith
D Greg Sakall
Lee D Stein
Mark Brnovich
Hon. Karl C Eppich
Art Hinshaw
Hon. Kathleen A Quigley
Mark D Wilson
Mark C Faull
Joshua Halversen
Mark I Harrison
Keith A Swisher
Jerome Allan Landau
David C. Tierney
Richard B Murphy
Hon. Lawrence Winthrop

ATTACHMENT*

RULES OF THE ARIZONA SUPREME COURT

RULE 31. REGULATION OF THE PRACTICE OF LAW

(a) Supreme Court Jurisdiction Over the Practice of Law

1. [No change in text.]

2. *Definitions.*

A – C. [No change in text.]

D. “Mediator” means an impartial individual who is appointed by a court or government entity or engaged by disputants through written agreement, ~~signed by all disputants,~~ to mediate a dispute. Serving as a mediator is not the practice of law.

E. [No change in text.]

(b) – (c) [No change in text.]

(d) Exemptions. Notwithstanding the provisions of section (b), but subject to the limitations of section (c) unless otherwise stated:

1. – 24. [No change in text.]

25. Nothing in these rules shall prohibit a mediator as defined in these rules from ~~facilitating a mediation between parties,~~ preparing a written mediation agreement, or filing such agreement with the appropriate court, provided that:

(A) the mediator is employed, appointed or referred by a court or government entity and is serving as a mediator at the direction of the court or government entity; or

(B) the mediator is participating without compensation in a non-profit mediation program, a community-based organization, or a professional association.

In all other cases, a mediator who is not an active member of the state bar and who prepares or provides legal documents for the parties without the supervision of an attorney must be certified

* Changes or additions in rule text are indicated by underscoring and deletions from text are indicated by ~~strikeouts~~.

as a legal document preparer in compliance with the Arizona Code of Judicial Administration, Part 7, Chapter 2, Section 7-208.

26. – 31. [No change in text.]

RULE 34. APPLICATION FOR ADMISSION

(a) [No change in text.]

(b) Applicant Requirements and Qualifications.

1. No applicant will be recommended for admission to the practice of law in Arizona by the Committee on Character and Fitness unless the Committee is satisfied that:

A. – C. [No change in text.]

D. the applicant is a graduate with a juris doctor from a law school provisionally or fully approved by the American Bar Association at the time of graduation or the applicant is a graduate with a juris doctor and has been actively engaged in the practice of law in some other state or states for at least ~~five~~ three of the last ~~seven~~ five years prior to filing an application for admission to practice in Arizona; and

E. – F. [No change in text.]

2. An applicant may be allowed to sit for the Arizona uniform bar examination prior to the award of a juris doctor degree if the applicant:

A. – E. [No change in text.]

F. provides by the deadline to the Committee on Character and Fitness, on a form provided by the Committee, an affidavit attested to by the applicant and the law school that they meet the above criteria. The law school's decision whether to certify that the student meets the criteria is final and shall not be subject to review by the Committee or the Court.

No applicant shall be recommended to practice law until graduation or satisfaction of all requirements for graduation, and completion of all requirements for admission to the practice of law under these rules. If an applicant under this subsection has not graduated with a juris doctor within one hundred twenty (120) days of the first day of early exam administration, all parts of the Arizona uniform bar examination, including the score, are void and the applicant's examination scores shall not be disclose for any purpose. Scores may not be released until such time as satisfactory proof of award of juris doctor, as determined by the Court, is provided to the Committee. An early examination which is voided shall count as an an examination attempt under Rule 35(c)(1).

[Remainder of section F remains unchanged.]

3. [No change in text.]

(c) – (e) [No change in text.]

(f) Admission on Motion.

1. An applicant who meets the requirements of (A) through (H) of this paragraph (f)(1) may, upon motion, be admitted to the practice of law in this jurisdiction.

The applicant shall:

A. either (i) have been admitted by bar examination to practice law in another jurisdiction allowing for admission of Arizona lawyers on a basis equivalent to this rule, or (ii) have been admitted by bar examination to practice law in another jurisdiction that does not allow for admission of Arizona lawyers on a basis equivalent to this rule ~~one or more states, territories, or the District of Columbia,~~ and thereafter have been ~~were~~ admitted to and engaged in the active practice of law in another jurisdiction allowing admission of Arizona lawyers on a basis equivalent to this rule for ~~five~~ three of the ~~seven~~ five years immediately preceding the date upon which the application is filed; ÷

B. [No change in text.]

C. have been primarily engaged in the active practice of law in one or more states, territories, or the District of Columbia for ~~five~~ three of the ~~seven~~ five years immediately preceding the date upon which the application is filed;

D – H. [No change in text.]

2. [No change in text.]

3. For purposes of this rule, the active practice of law shall not include work that, as undertaken, constituted the unauthorized practice of law in the jurisdiction in which it was performed or in the jurisdiction in which the clients receiving the unauthorized services were located. The “active practice of law” is further defined to require that at all times in the durational period the applicant has held a law license in “active” status. ÷

~~A. held a law license in “active” status;~~

~~B. spent one thousand (1,000) hours or more per year engaged in the practice of law, for each of the required five years in the durational period; and~~

~~C. derived at least fifty percent (50%) of non-investment income from the practice of law.~~

4 – 5. [No change in text.]

(g) – (n) [No change in text.]

RULE 38. SPECIAL EXCEPTIONS TO STANDARD EXAMINATIONS AND AD- MISSION PROCESS

(a) Admission Pro Hac Vice. In-house Counsel

~~1. *Eligibility.* An attorney who is not a member of the State Bar of Arizona, but is currently a member in good standing of the bar of another state or eligible to practice before the highest court in any state, territory or insular possession of the United States (hereinafter called a nonresident attorney) and who is of good moral character and is familiar with the ethics, professionalism and practices of the legal profession in the State of Arizona, may appear as counsel pro hac vice in a particular case before any state or local court, board or administrative agency in the State of Arizona upon compliance with this rule. However, no person is eligible to appear as counsel pursuant to this rule if that person (a) is a resident of the State of Arizona, or (b) is regularly employed in the State of Arizona, or (c) is regularly engaged in substantial business, professional, or other activities in the State of Arizona.~~

~~2. *Association of Local Counsel.* No nonresident attorney may appear pro hac vice before any court, board or administrative agency of this state unless the nonresident attorney has associated in that cause an attorney who is a member in good standing of the State Bar of Arizona (hereinafter called local counsel). The name of local counsel shall appear on all notices, orders, pleadings, and other documents filed in the cause. Local counsel may be required to personally appear and participate in pretrial conferences, hearings, trials, or other proceedings conducted before the court, board, or administrative agency when the court, board, or administrative agency deems such appearance and participation appropriate. Local counsel associating with a nonresident attorney in a particular cause shall accept joint responsibility with the nonresident attorney to the client, to opposing parties and counsel, and to court, board, or administrative agency in that particular cause.~~

~~3. *Procedure for Applying.* Appearance pro hac vice in a cause is subject to the discretion and approval of the court, board, or administrative agency where such cause is pending. A nonresident attorney desiring to appear pro hac vice under this rule shall comply with the procedures set forth herein for each matter where pro hac vice status is requested. For good cause shown, a court, board, or administrative agency may permit a nonresident attorney to appear pro hac vice on a temporary basis prior to the completion by the nonresident attorney of the application procedures set forth herein. At the time such temporary admission is granted, the court, board, or administrative agency shall specify a time period for the nonresident attorney to complete the application procedures, and any temporary pro hac vice admission shall be revoked~~

~~in the event of subsequent failure by the nonresident attorney to so complete the application procedures.~~

~~A. *Verified Application to State Bar of Arizona.* In order to appear as counsel in any matter pending before a court, board, or administrative agency in the State of Arizona, a nonresident attorney shall file with the State Bar of Arizona an original and one copy of a verified application together with a certificate from the state bar or from the clerk of the highest admitting court of each state, territory or insular possession of the United States in which the nonresident attorney has been admitted to practice law certifying the nonresident attorney's date of admission to such jurisdiction and the current status of the nonresident attorney's membership or eligibility to practice therein and a non-refundable application fee equal to the current dues paid by active members of the State Bar of Arizona for the calendar year in which such application is filed; provided that not more than one application fee may be required per nonresident attorney for consolidated or related matters regardless of how many applications are made in the consolidated or related proceedings by the nonresident attorney; and further provided that the requirement of an application fee shall be waived i) for Judge Advocate General's Corps' military attorneys practicing before the Military Trial Court of the State of Arizona or the Arizona Court of Military Appeals and ii) to permit pro bono representation of an indigent client or clients. An attorney seeking a fee waiver to provide pro bono representation of an indigent client or clients shall include in the application a verification that all clients represented in the action are indigent and that no attorney fee shall be paid by the client. "Indigent" is defined as those individuals whose gross income is at or below 125% of the federal poverty guidelines, as calculated in conformity with the eligibility requirements for Legal Services Corporation grantees, currently codified at 45. C.F.R. Section 1611.~~

~~Fifteen percent of the non-refundable application fee paid pursuant to this section shall be deposited into a civil legal services fund to be distributed by the Arizona Foundation for Legal Services and Education entirely to approved legal services organizations, as that term is defined in subparagraph (f) of this rule.~~

~~B. *Notice of Receipt by State Bar of Complete Application.* Upon receipt of the verified application and fee from the nonresident attorney as described above, the State Bar of Arizona shall issue to local counsel a Notice of Receipt of Complete Application which states: (1) whether the nonresident attorney has previously made any application or motion pursuant to this rule within the preceding three years; (2) the date of any such application or motion; and (3) whether the application or motion was granted or denied by the court or administrative agency. The State Bar of Arizona Notice shall include as exhibits: (1) the original verified application and (2) the original certificate(s) of good standing. Copies of verified applications, certificates of good standing and orders granting, denying or revoking applications to appear pro hac vice shall be retained by the State Bar of Arizona for three (3) years.~~

~~C. *Motion to Associate Counsel Pro Hac Vice.* Local counsel shall file a motion to associate counsel pro hac vice with the court, board, or administrative agency where the cause is pending, together with proof of service on all parties in accordance with Arizona Rules of Civil~~

~~Procedure. The motion to associate counsel pro hac vice shall include as exhibits: (1) the original verified application; (2) the original certificates of good standing; and (3) the State Bar of Arizona Notice. The motion to associate counsel pro hac vice shall also be accompanied by a proposed order granting or denying the motion. A copy of each order granting or denying the motion as entered by the court, board, or administrative agency shall be mailed by local counsel to the State Bar of Arizona.~~

~~D. *Entry of Order.* The order granting or denying the motion to associate counsel pro hac vice shall be entered by the court, board, or administrative agency no later than 20 days (exclusive of weekends and holidays) after the filing of such motion. A nonresident attorney shall make no appearance in a cause until the court, board, or administrative agency where the cause is pending enters the order granting the motion to associate counsel pro hac vice. The order granting pro hac vice status shall be valid for a period of one year from the date of entry, and shall be renewed for subsequent one-year periods upon compliance with renewal procedures as specified herein.~~

~~4. *Verified Application.* The verified application required by this rule shall be on a form approved by the Board of Governors of the State Bar of Arizona and available at the clerk of the court, board, or administrative agency where such cause is pending and shall state:~~

~~A. the title of the case or cause, court, board, or agency and docket number in which the nonresident attorney will be seeking to appear pro hac vice, and whether this case or cause is a related or consolidated matter for which the nonresident attorney has previously applied to appear pro hac vice;~~

~~B. the nonresident attorney's residence and office address;~~

~~C. the court(s) to which the nonresident attorney has been admitted to practice and the date(s) of such admission;~~

~~D. that the nonresident attorney is a member in good standing of such court(s);~~

~~E. that the nonresident attorney is not currently disbarred or suspended in any court;~~

~~F. whether the nonresident attorney is currently subject to any pending disciplinary proceeding by any court, agency or organization authorized to discipline attorneys at law, and if so pending, the application shall specify the jurisdiction, the nature of the matter under investigation and the name and address of the disciplinary authority investigating the matter;~~

~~G. whether the nonresident attorney has ever been disciplined by any court, agency, or organization authorized to discipline attorneys at law;~~

~~H. the court, board, or administrative agency, title of cause and docket number in which the nonresident attorney has filed an application to appear as counsel under this rule in this state in the preceding three years, the date of each application, and whether it was granted;~~

~~I. the name, address and telephone number of local counsel;~~

~~J. the name of each party in the cause and the name and address of counsel of record who is appearing for each party;~~

~~K. that the nonresident attorney certifies that he or she shall be subject to the jurisdiction of the courts and agencies of the State of Arizona and to the State Bar of Arizona with respect to the law of this state governing the conduct of attorneys to the same extent as an active member of the State Bar of Arizona, as provided in Rule 46(b), Rules of the Supreme Court;~~

~~L. that the nonresident will review and comply with appropriate rules of procedure as required in the underlying cause; and~~

~~M. that the nonresident attorney understands and shall comply with the standards of professional conduct required of members of the State Bar of Arizona.~~

~~5. *Discretion.* The granting or denial of a motion to associate counsel pro hac vice pursuant to this rule by the court, board, or administrative agency is discretionary. The court, board, or administrative agency may revoke the authority of a nonresident attorney to make continued appearances pursuant to this rule. Absent special circumstances, repeated appearances by any person pursuant to this rule may be the cause for denial of the motion to associate counsel pro hac vice. Such special circumstances may include, but are not limited to, the following:~~

~~A. a showing that the cause involves a complex area of law in which the nonresident attorney possesses a special expertise, or~~

~~B. a lack of local counsel with expertise in the area of law involved in the cause.~~

~~6. *Transfer.* The nonresident attorney shall be deemed admitted in the event venue in such action is transferred to another county or court or is appealed; provided, however, that the court having jurisdiction over such transferred or appealed cause may revoke the authority of the nonresident attorney to appear pro hac vice.~~

~~7. *Continuing Duties to Advise of Changes in Status.* A nonresident attorney admitted pro hac vice shall have the continuing obligation during the period of such admission to promptly advise the State Bar of Arizona of a disposition made of pending charges or the institution of any new disciplinary proceedings or investigations. The State Bar of Arizona shall then advise any court, board, or administrative agency where the nonresident attorney has been admitted pro hac vice of any such information. A nonresident attorney shall promptly advise the State Bar of Arizona~~

~~if permission to appear pro hac vice pursuant to this rule is revoked by any court, board, or administrative agency.~~

~~8. *Renewal of Application.* On or before each anniversary date of the filing of the verified application with the State Bar of Arizona, local counsel must certify to the State Bar of Arizona whether (a) the nonresident attorney continues to act as counsel in the cause; or (b) such cause has been adjudicated to a final conclusion or is otherwise concluded. Any nonresident attorney who continues to act as counsel in the cause shall remit to the State Bar of Arizona on or before each anniversary date a fee equal to the current dues paid by active members of the State Bar of Arizona for the calendar year in which such renewal is sought, unless the nonresident attorney is waived under paragraph (a)(3)(A) of this rule as a Judge Advocate General's Corps' military attorney or as an attorney providing pro bono representation of an indigent client.~~

~~Fifteen percent of the non-refundable application fee paid pursuant to this section shall be deposited into a civil legal services fund administered by the Arizona Foundation for Legal Services and Education, to be distributed to and used exclusively for approved legal services organizations, as that term is defined in subparagraph (f) of this rule.~~

~~9. *Failure to Renew.* Any nonresident attorney who continues to appear pro hac vice in a cause and fails to pay the renewal fees set forth in paragraph (a)(8) of this rule shall be suspended from appearance in any cause upon the expiration of a period of thirty days from the anniversary date. The executive director of the State Bar of Arizona shall notify the nonresident attorney and local counsel of the suspension and shall file a certified copy of the notice with the court, board or administrative agency where the cause is filed. The nonresident attorney may be reinstated upon the payment of fees set forth in paragraph (a)(8) of this rule and a \$50 late penalty. Upon payment of all accrued fees and late penalty, the executive director shall reinstate the nonresident attorney and shall certify such reinstatement to the court, board, or administrative agency where the cause is filed.~~

~~10. *Annual Reporting.* The State Bar of Arizona shall prepare an annual report which shall list: (a) all applications filed pursuant to this rule during the preceding twelve months; (b) the names of all applicants; and (c) whether the application was granted or denied. The report shall be available for inspection at the offices of the State Bar of Arizona, and shall be provided to the Supreme Court.~~

~~11. *Disciplinary Jurisdiction of the State Bar of Arizona.* As provided in Rule 46(b), Rules of the Supreme Court, a nonresident attorney admitted pro hac vice pursuant to these rules shall be subject to the jurisdiction of the courts and agencies of the State of Arizona and to the State Bar of Arizona with respect to the laws and rules of this state governing the conduct and discipline of attorneys to the same extent as an active member of the State Bar of Arizona.~~

1. – 2. [No change in text.]

3. An applicant for a Registration Certificate shall:

A. file with the State Bar of Arizona its form of verified application for an Arizona Certificate of Registration of In-House Counsel;

B. attach to the verified application ~~furnish to the State Bar of Arizona~~ a certificate from the state bar or from the clerk of the highest admitting court of each state, territory, or insular possession of the United States, or foreign jurisdiction, in which the applicant has been admitted to practice law certifying the current status of the applicant's membership or eligibility to practice therein;

C. [No change in text.]

D. pay an application fee in an amount established by the Supreme Court ~~equal to seventy-five percent (75%) of the current dues paid by active members of the State Bar of Arizona for the calendar year in which such application is filed;~~ and

E. [No change in text.]

4. [No change in text.]

5. On or before February 1 of each year, in-house counsel registered pursuant to the provisions of this rule, who continues to be employed as in-house counsel within the State of Arizona, shall renew the Registration Certificate, ~~in the manner prescribed by the Board of Governors of the State Bar of Arizona for that purpose,~~ and pay a renewal fee set by the Supreme Court. ~~in an amount equal to seventy-five percent (75%) of the current dues paid by active members of the State Bar of Arizona for that calendar year.~~

6. Upon a determination by the State Bar of Arizona that the applicant has complied with the requirements of subpart (3) of this rule, the State Bar shall issue to the applicant a Registration Certificate. The State Bar shall promptly notify any applicant if it determines that an application fails to comply with the requirements of subpart (3) of this rule, and the applicant shall have thirty (30) days from the date of such notice in which to cure any deficiency. If the applicant fails to cure such deficiency within that thirty (30) day period, the application shall be deemed denied.

7. [No change in text.]

8. If there is a change in circumstances, and an attorney holding a current Registration Certificate becomes ineligible for such Certificate, the attorney shall notify the State Bar of Arizona of such change in writing within thirty (30) days. An attorney registered pursuant to this rule who has become employed by a different eligible entity, but continues to meet all the requirements of this rule, may apply for the issuance of an amended Registration Certificate to reflect that change.

9. Except as provided in this rule, the holder of a valid and current Registration Certificate shall be entitled to the benefits and responsibilities of active members of the State Bar of Arizona, and shall be subject to the jurisdiction of the courts and agencies of the State of Arizona and to the State Bar of Arizona with respect to the laws and rules of this state governing the conduct and discipline of attorneys to the same extent as an active member of the State Bar. A Registration Certificate shall not authorize the registrant to provide legal services to any person or entity ~~other than~~ except when providing legal services to the one for which the registrant serves as in-house counsel, or its parents, subsidiaries or affiliates, or when providing legal services under Rule 38(e). ~~or to engage in activities for which admission pro hac vice is required under Rule 38(a) of these rules.~~ A lawyer that has been issued a Registration Certificate under this rule shall satisfy the continuing legal education requirements, if any, of at least one of the other state(s) or jurisdiction(s) in which that lawyer is admitted to practice. If not subject to mandatory continuing legal education requirement in the other state(s) or jurisdiction(s), the registrant shall comply with Arizona's continuing legal education requirements. On or before September 15 of each calendar year, every registered in-house counsel shall file an affidavit demonstrating full compliance with this rule.

~~10. Notwithstanding the provisions of subpart (9) of this rule, the holder of a Registration Certificate may participate in the provision of legal services to individuals unable to pay for such services under the circumstances contemplated by, and in accordance with the requirements of, Rule 38(e) of these rules.~~

10. In providing legal services to the lawyer's employer, A lawyer who that has been issued a Registration Certificate under this rule may also secure admission *pro hac vice* in Arizona to provide the services authorized in the preceding paragraph by complying with the requirements of Rule 398(a) of these rules. A lawyer who has been issued a Registration Certificate under this rule may provide services under Rule 38(e) without securing admission *pro hac vice*.

11. A lawyer who has been issued a Registration Certificate under this rule shall satisfy the continuing legal education requirements, if any, of at least one of the other state(s) or jurisdiction(s) in which that lawyer is admitted to practice. If not subject to mandatory continuing legal education requirement in the other state(s) or jurisdiction(s), the lawyer shall comply with Arizona's continuing legal education requirements. On or before September 15 of each calendar year, every registered in-house counsel shall file an affidavit demonstrating full compliance with this rule.

~~12.~~ [No change in text.]

~~13.~~ [No change in text.]

14. An applicant may petition the Arizona Supreme Court for a waiver of any of the requirements for registration under this rule.

~~13. An applicant may petition the Board of Governors for a waiver of any of the requirements for registration under this rule.~~

(b) Foreign Legal Consultant.

1. – 2. [No change in text.]

3. *Documents Required in Support of Application.* The following must accompany every application:

A. an application fee as established by the Ssupreme Court;

B. – E. [No change in text.]

4. – 10. [No change in text.]

(c) – (d) [No change in text.]

(e) Authorization to Practice Law for Attorneys Volunteering with Approved Legal Services Organizations.

1. – 2. [No change in text.]

3. *Certification.* An attorney who seeks authorization to practice law under this rule shall file with the clerk of the Supreme Court of Arizona an application including:

A. – B. [No change in text.]

C. a sworn statement signed by the applicant that he or she:

i. – iii. [No change in text.]

~~iv.~~ iv. has successfully completed the course on Arizona law described in Rule 34(j).

The applicant shall send a copy of the application to the Chief Bar Counsel for the State Bar of Arizona, which shall file any objection to such application with the clerk of the Supreme Court within ten (10) days after the date of receipt of such application. An attorney is not allowed to practice law under this rule until the applicant has been authorized to do so by order of the Supreme Court of Arizona. The clerk of the Supreme Court shall send a copy of the order authorizing the practice of law to the State Bar of Arizona.

4. – 7. [No change in text.]

(f) Authorization to Practice Law for Attorneys Working for Approved Legal Services Organization.

An attorney who has been admitted to practice law in any other jurisdiction for at least two years and who is employed part-time or full-time by an approved legal services organization in this State that provides legal assistance to indigents in civil matters, free of charge, may be admitted to practice before all courts of this State, subject to the following:

1. [No change in text.]

2. *Application and Authorization.* An attorney who seeks authorization to practice law under this rule shall file with the clerk of the Supreme Court of Arizona an application including:

A. – B. [No change in text.]

C. a sworn statement signed by the applicant that he or she:

i. has read and is familiar with the Rules of the Supreme Court ~~and any applicable statutes of the State of Arizona relative to the conduct of lawyers,~~ and will abide by the provisions thereof;

ii. – iv. [No change in text.]

~~The applicant~~ ~~A copy of the application shall send a copy of the application be sent by the attorney to the Chief Bar Counsel of the State Bar of Arizona, who shall file any objection to such application with the clerk of the Supreme Court within ten days after the date of receipt of such application. An attorney is not allowed to practice law under this rule until the applicant has been authorized to do so by order of the Supreme Court. The clerk of the Supreme Court shall send a~~ A copy of the order authorizing the practice of law ~~shall be sent by the clerk of the Court to the Chief Bar Counsel of the State Bar of Arizona.~~

3. *Expiration of Authorization.* Authorization to practice law under this section shall ~~remain in effect from the date of the order authorizing the applicant to practice law in the State of Arizona until such time as~~ expire if the applicant ceases no longer to works for an approved legal services organization. If the applicant ceases employment with the approved legal services organization, an authorized representative of the organization shall, within ten (10) days of the date of termination of employment, file a notification of the termination with the clerk of the Court and the Chief Bar Counsel of the State Bar of Arizona, specifying the date of termination of employment. If the applicant leaves the approved legal services organization in order to work for another approved legal services organization, a notification of new employment shall be filed with the clerk of the Court and the State Bar of Arizona.

4. *Limitation of Activities.* An attorney authorized to practice under this rule shall not perform any legal services within the State of Arizona except for clients of the approved legal services

organization by which the attorney is employed. The attorney shall not accept any compensation for such services except such salary as may be provided to him or her by the organization. ~~Part-time employment is permitted under this rule.~~ A Rule 38(f) attorney may not provide services for compensation other than compensation from the legal services organization with which the attorney is employed.

5. [No change in text.]

6. *Continuing Legal Education.* An attorney authorized to practice under this paragraph (f) must comply with the Mandatory Continuing Legal Education (MCLE) requirements of Rule 45.

7. [No change in text.]

(g) Authorization to Practice Law for Attorneys Employed by Indigent Defense Offices.

An attorney who has been admitted to the active practice of law in any other jurisdiction for at least two years, and who is employed full time by a state or county funded indigent defense office located in a county with a population less than 500,000, may be admitted to practice before all courts of this State, for the limited purpose of providing representation to appointed clients of such office, as provided in this paragraph (h).

1. [No change in text.]

2. *Approval of Funded Indigent Defense Office.*

A. To obtain approval of the Supreme Court the office shall file a petition with the clerk of the Court containing the following:

i. – ii. [No change in text.]

iii. a certification that the office complies with ethical workload limits, ~~American Bar Association Formal Ethics Opinion 06-441 (2006), American Council of Chief Defenders/National Legal Aid and Defender Association Ethics Opinion 03-01 (April 2003), and Arizona Bar Ethics Opinion 90-10,~~ such certification to include an affirmation that the office has a means of reviewing caseload/workload of assigned attorneys;

iv. – viii. [No change in text.]

The office shall send a A copy of the petition for approval ~~shall be sent by the office to~~ to the Chief Bar Counsel of State Bar of Arizona, who shall file any comment ~~to the state bar desires to file respecting~~ such petition with the clerk of the Court within ten days after the date of receipt of such petition. A funded indigent defense office is not approved until an order confirming such approval is entered by the Court. The clerk shall send a A copy of the order

approving the funded indigent defense office under this rule shall be sent by the clerk of the Court to the Chief Bar Counsel of the State Bar of Arizona.

3. – 8. [No change in text.]

(h) In-house Counsel

~~1. As used in this rule, “in house counsel” shall refer to an attorney who is employed within the State of Arizona as in house counsel or a related position for a for-profit or a non-profit corporation, association, or other organizational entity, which can include its parents, subsidiaries and/or affiliates, the business of which is lawful and is other than the practice of law or the provision of legal services.~~

~~2. A lawyer who is not a member of the State Bar of Arizona, but who holds a juris doctor degree from a law school approved by the Council of the Section of Legal Education and Admissions to the Bar of the American Bar Association and is currently a member in good standing of the bar of another state or the District of Columbia, or eligible to practice before the highest court in any state, territory or insular possession of the United States, and who is employed within the State of Arizona as in house counsel, as hereinabove defined, may apply for an Arizona Certificate of Registration of In-House Counsel (“Registration Certificate”). A lawyer employed as in house counsel who is admitted to practice in a jurisdiction outside of the United States, in accordance with the standards and requirements generally applicable to the practice of law in that jurisdiction, may also apply for a Registration Certificate.~~

~~3. An applicant for a Registration Certificate shall:~~

~~A. file with the State Bar of Arizona its form of verified application for an Arizona Certificate of Registration of In-House Counsel;~~

~~B. furnish to the State Bar of Arizona a certificate from the state bar or from the clerk of the highest admitting court of each state, territory, or insular possession of the United States, or foreign jurisdiction, in which the applicant has been admitted to practice law certifying the current status of the applicant's membership or eligibility to practice therein;~~

~~C. certify that the applicant has read and is familiar with the Arizona Rules of Professional Conduct;~~

~~D. pay an application fee in an amount equal to seventy five percent (75%) of the current dues paid by active members of the State Bar of Arizona for the calendar year in which such application is filed; and~~

~~E. submit evidence that the applicant has successfully completed the course on Arizona law described in Rule 34(j).~~

~~4. An attorney who is employed by an eligible organization as in house counsel on the effective date of this rule shall apply for a Registration Certificate within one hundred and eighty (180) days of that effective date. From and after the effective date of this rule, any attorney who commences employment by an eligible organization as in house counsel shall apply for a Registration Certificate within ninety (90) days of the date of commencement of employment.~~

~~5. On or before February 1 of each year, in house counsel registered pursuant to the provisions of this rule, who continues to be employed as in house counsel within the State of Arizona, shall renew the Registration Certificate, in the manner prescribed by the Board of Governors of the State Bar of Arizona for that purpose, and pay a renewal fee in an amount equal to seventy five percent (75%) of the current dues paid by active members of the State Bar of Arizona for that calendar year.~~

~~6. Upon a determination by the State Bar of Arizona that the applicant has complied with the requirements of subpart (3) of this rule, the State Bar shall issue to the applicant a Registration Certificate. The State Bar shall promptly notify any applicant if it determines that an application fails to comply with the requirements of subpart (3) of this rule, and the applicant shall have thirty (30) days from the date of such notice in which to cure any deficiency. If the applicant fails to cure such deficiency within that thirty (30) day period, the application shall be deemed denied.~~

~~7. Each lawyer issued a Registration Certificate shall report to the State Bar of Arizona, within thirty (30) days, any change in bar membership status in any jurisdiction of the United States or in any foreign jurisdiction where the applicant has been admitted to the practice of law, or the imposition of any disciplinary sanction by any federal or state court or agency before which the applicant has been admitted to practice, or in any state in which the lawyer has rendered legal services while temporarily authorized under any rule or by admission pro hac vice.~~

~~8. If there is a change in circumstances, and an attorney holding a current Registration Certificate becomes ineligible for such Certificate, the attorney shall notify the State Bar of Arizona of such change in writing within thirty (30) days. An attorney registered pursuant to this rule who has become employed by a different eligible entity, but continues to meet all the requirements of this rule, may apply for the issuance of an amended Registration Certificate to reflect that change.~~

~~9. Except as provided in this rule, the holder of a valid and current Registration Certificate shall be entitled to the benefits and responsibilities of active members of the State Bar of Arizona, and shall be subject to the jurisdiction of the courts and agencies of the State of Arizona and to the State Bar of Arizona with respect to the laws and rules of this state governing the conduct and discipline of attorneys to the same extent as an active member of the State Bar. A Registration Certificate shall not authorize the registrant to provide legal services to any person or entity other than the one for which the registrant serves as in house counsel, or its parents, subsidiaries or affiliates, or to engage in activities for which admission pro hac vice is required under Rule 38(a) of these rules. A lawyer that has been issued a Registration Certificate under this rule shall~~

~~satisfy the continuing legal education requirements, if any, of at least one of the other state(s) or jurisdiction(s) in which that lawyer is admitted to practice. If not subject to mandatory continuing legal education requirement in the other state(s) or jurisdiction(s), the registrant shall comply with Arizona's continuing legal education requirements. On or before September 15 of each calendar year, every registered in house counsel shall file an affidavit demonstrating full compliance with this rule.~~

~~10. Notwithstanding the provisions of subpart (9) of this rule, the holder of a Registration Certificate may participate in the provision of legal services to individuals unable to pay for such services under the circumstances contemplated by, and in accordance with the requirements of, Rule 38(e) of these rules. A lawyer that has been issued a Registration Certificate under this rule may also secure admission pro hac vice in Arizona by complying with the requirements of Rule 38(a) of these rules.~~

~~11. A lawyer's authority to practice as in house counsel under a Registration Certificate issued pursuant to this rule shall be suspended when the lawyer is suspended or disbarred for disciplinary reasons in any jurisdiction of the United States, or by any federal court or agency, or by any foreign nation before which that lawyer has been admitted to practice.~~

~~12. A lawyer serving as in house counsel in Arizona who fails to register pursuant to the provisions of this rule shall be ineligible for admission pro hac vice in Arizona, and may be referred by the State Bar of Arizona to the Bar admission and/or disciplinary regulatory authority in any jurisdiction in which that lawyer has been admitted to practice of law.~~

~~13. An applicant may petition the Board of Governors for a waiver of any of the requirements for registration under this rule.~~

(h) Practice Pending Admission on Motion

1. An applicant who meets the requirements of paragraph (f) of Rule 34 and whose application for admission on motion has been filed and deemed complete by the Committee on Character and Fitness may provide legal services in Arizona through an office or other place for the regular practice of law in Arizona for no more than 365 days, provided that the applicant:

A. does not cease to be a member in good standing in every jurisdiction, foreign or domestic, wherever admitted to practice law;

B. does not become subject to lawyer discipline or the subject of a disciplinary matter in any other jurisdiction;

C. has never been denied admission on character and fitness grounds in any jurisdiction;

D. reasonably expects to fulfill all of Arizona's requirements for admission on motion;

E. associates with and is supervised by an attorney who is admitted to practice law in Arizona, and discloses in his or her application for admission on motion the name, address, and membership status of that attorney;

F. provides with his application for admission on motion a signed verification from the Arizona attorney certifying the applicant's association with and supervision by that attorney;

G. includes in all written communications with the public and clients the following language: "Arizona practice temporarily authorized pending admission under Ariz. R. Sup. Ct. 38(h). Supervision by [name of Arizona attorney], a member of the State Bar of Arizona"; and

H. pays the annual assessment to the Client Protection Fund.

2. Until the applicant's application for admission on motion is granted, the applicant may not appear before a court of record or tribunal in Arizona that requires pro hac vice admission unless the applicant is granted such admission pursuant to Rule 39.

3. The applicant must immediately notify that Committee on Character and Fitness if the applicant becomes subject to a disciplinary or disability investigation, complaint, or sanctions in any other jurisdiction at any time during the 365 days of practice authorized by this rule. The Committee on Character and Fitness shall take into account such information in determining whether to grant the attorney's application for admission to practice law in Arizona.

4. Any attorney practicing under this rule shall be subject to the Rules of Professional Conduct and the Rules of the Supreme Court regarding attorney discipline in the State of Arizona.

5. The authority given an applicant to practice law pending admission pursuant to this rule shall terminate immediately if:

A. the applicant withdraws the application for admission by motion, or the application is denied;

B. the applicant fails to remain in compliance with paragraph (h)(1) of this rule;

C. the applicant is disbarred, suspended, or placed on disability inactive status in any other jurisdiction in which the applicant is licensed to practice law; or

D. the applicant fails to comply with the notification requirements of paragraph (h)(3) of this rule.

6. Upon the termination of authority to practice law pursuant to this rule, the applicant shall:

A. immediately cease practicing law in Arizona;

B. notify in writing all clients in pending matters, and opposing counsel and co-counsel in pending litigation, of the termination of the applicant's authority to practice law in Arizona; and

C. take all other necessary steps to protect the interests of the applicant's clients.

(i) Military Spouse Temporary Admission.

1. *Requirements.* An attorney who is not a member of the State Bar of Arizona applicant who meets the requirements of (A) through (N) of this paragraph (i)(1) ("Applicant") may, upon ~~motion~~verified application, be admitted to the temporary practice of law in this jurisdiction. The Applicant shall:

A. – N. [No change in text.]

O. at the time of submitting the verified application, pay an application fee set by the Supreme Court.

2. *Duration and Renewal.*

A. [No change in text.]

B. An attorney admitted under this rule may annually renew a temporary admission upon:

i. [No change in text.]

ii. paying an \$300 application fee.

3. *Continuing Legal Education.* No later than six months following the attorney's temporary admission, the attorney shall certify to the Supreme Court completion of at least fifteen hours of continuing legal education on Arizona practice, procedure, and ethics. The attorney shall also comply with Rule 45 and on or before September 15 of each year certify completion of at least fifteen (15) hours of such continuing legal education during each year for which a temporary admission is renewed.

4. – 6. [No change in text.]

~~7. *Record.* The State Bar of Arizona shall maintain a current record of all attorneys temporarily admitted under this provision and shall promptly provide such record upon request.~~

RULE 39. PROVISION OF LEGAL SERVICES FOLLOWING DETERMINATION OF MAJOR DISASTER ADMISSION PRO HAC VICE

~~(a) Determination of existence of major disaster. Solely for purposes of this Rule, this Court shall determine when an emergency affecting the justice system, as a result of a natural or other major disaster, has occurred in:~~

~~(1) the State of Arizona and whether the emergency caused by the major disaster affects the entirety or only part of the State, or~~

~~(2) another jurisdiction but only after such a determination and its geographical scope have been made by the highest court of that jurisdiction. The authority to engage in the temporary practice of law in this jurisdiction pursuant to paragraph (c) of this Rule shall extend only to lawyers who principally practice in the geographical area of such other jurisdiction determined to have suffered a major disaster causing an emergency affecting the justice system and the provision of legal services.~~

~~(b) Temporary practice in this jurisdiction following major disaster. Following the determination of an emergency affecting the justice system in the State of Arizona pursuant to paragraph (a) of this Rule, or a determination that persons displaced by a major disaster in another jurisdiction and residing in Arizona are in need of pro bono service and the assistance of lawyers from outside Arizona is required to help provide such assistance, a lawyer authorized to practice law in another United States jurisdiction, and not disbarred, suspended from practice or otherwise restricted from practice in any jurisdiction, may provide legal services in Arizona on a temporary basis. Such legal services must be provided on a pro bono basis without compensation, expectation of compensation or other direct or indirect pecuniary gain to the lawyer. The provision of such legal services shall be supervised by a lawyer assigned and supervised through an established not for profit bar association, pro bono program or legal services organization or through such other organization(s) specifically designated by this Court.~~

~~(c) Temporary practice in this jurisdiction following major disaster in another jurisdiction. Following the determination of a major disaster in another United States jurisdiction, a lawyer who is authorized to practice law and who principally practices in that affected jurisdiction, and who is not disbarred, suspended from practice or otherwise restricted from practice in any jurisdiction, may provide legal services in this jurisdiction on a temporary basis. Those legal services must arise out of and be reasonably related to that lawyer's practice of law in that affected jurisdiction, or area of such other jurisdiction, where the major disaster occurred.~~

~~(d) Duration of authority for temporary practice. The authority to practice law in the State of Arizona granted by paragraph (b) of this Rule shall end when this Court determines that the conditions caused by the major disaster in the State of Arizona have ended, except that a lawyer then representing clients in Arizona pursuant to paragraph (b) is authorized to continue the provision of legal services for such time as is reasonably necessary to complete the representation. The lawyer shall not, however, thereafter accept new clients. The authority to practice law in the State of Arizona granted by paragraph (c) of this Rule shall end sixty (60) days after this Court declares that the conditions caused by the major disaster in the affected jurisdiction have ended.~~

~~(e) Court appearances. The authority granted by this Rule does not include authority to appear in court or before any other tribunal except:~~

~~(1) pursuant to the provisions of Rule 38(a) of these Rules for securing admission pro hac vice and, if such authority is granted, any fees for securing such admission shall be waived; or~~

~~(2) if this Court, in any determination made under paragraph (a) of this Rule, grants blanket permission to appear in all designated courts and other tribunals in this jurisdiction to lawyers providing legal services pursuant to paragraph (b). If such an authorization is included in such determination, any fees for securing admission pro hac vice shall be waived.~~

~~(f) Disciplinary authority and registration requirement. Lawyers providing legal services in the State of Arizona pursuant to paragraphs (b) or (c) are subject to this Court's disciplinary authority and the Arizona Rules of Professional Conduct, as provided in Rule ER 8.5 of those Rules. Lawyers providing legal services in the State of Arizona under paragraphs (b) or (c) shall, within thirty (30) days from the commencement of the provision of legal services, file a registration statement with the Clerk of this Court. The registration statement shall be in a form prescribed by this Court. Any lawyer who provides legal services pursuant to, and in accordance with, the provisions of this Rule shall not be considered to be engaged in the unauthorized practice of law in the State of Arizona.~~

~~(g) Notification to clients. Lawyers authorized to practice law in another United States jurisdiction who provide legal services pursuant to this Rule shall inform clients in this jurisdiction of the jurisdiction in which they are authorized to practice law, any limits or restrictions on that authorization, and that they are not authorized to practice law in the State of Arizona except as permitted by this Rule. They shall not state or imply that they are otherwise authorized to practice law in the State of Arizona.~~

[Comments deleted.]

a. Eligibility. An attorney who is not a member of the State Bar of Arizona but is currently a member in good standing of the bar of another state and eligible to practice before the highest court in any state, territory or insular possession of the United States (hereinafter called a non-member attorney) and who is of good moral character and is familiar with the ethics, professionalism and practices of the legal profession in the State of Arizona, may appear as counsel pro hac vice in a particular case before any state or local court, board or administrative agency in the State of Arizona upon compliance with this rule. However, except for non-members authorized pursuant to Rule 38(a)(10), no person is eligible to appear as counsel pursuant to this rule if that person (a) is a resident of the State of Arizona, or (b) is regularly employed in the State of Arizona, or (c) is regularly engaged in substantial business, professional, or other activities in the State of Arizona.

b. Association of Local Counsel. No non-member attorney may appear pro hac vice before any court, board or administrative agency of this state unless the non-member attorney has associated in that cause an attorney who is a member in good standing of the State Bar of Arizona (hereinafter called local counsel). The name of local counsel shall appear on all notices, orders, pleadings, and other documents filed in the cause. Local counsel may be required to personally appear and participate in pretrial conferences, hearings, trials, or other proceedings conducted before the court, board, or administrative agency when the court, board, or administrative agency deems such appearance and participation appropriate. Local counsel associating with a non-member attorney in a particular cause shall accept joint responsibility with the non-member attorney to the client, to opposing parties and counsel, and to court, board, or administrative agency in that particular cause.

c. Procedure for Applying. Appearance pro hac vice in a cause is subject to the discretion and approval of the court, board, or administrative agency where such cause is pending. A non-member attorney desiring to appear pro hac vice under this rule shall comply with the procedures set forth herein for each matter where pro hac vice status is requested. For good cause shown, a court, board, or administrative agency may permit a non-member attorney to appear pro hac vice on a temporary basis prior to the completion by the non-member attorney of the application procedures set forth herein. At the time such temporary admission is granted, the court, board, or administrative agency shall specify a time period for the non-member attorney to complete the application procedures, and any temporary pro hac vice admission shall be revoked in the event of subsequent failure by the non-member attorney to so complete the application procedures.

1. Verified Application to State Bar of Arizona. In order to appear as counsel in any matter pending before a court, board, or administrative agency in the State of Arizona, a non-member attorney shall:

A. File with the State Bar of Arizona an original and one copy of a verified application together with a certificate from the state bar or from the clerk of the highest admitting court of each state, territory or insular possession of the United States in which the non-member attorney has been admitted to practice law certifying the non-member attorney's date of admission to such jurisdiction and the current status of the non-member attorney's membership or eligibility to practice therein; and

B. Pay a non-refundable application fee equal to the current dues paid by active members of the State Bar of Arizona for the calendar year in which such application is filed plus an additional assessment set by the Arizona Supreme Court for the Client Protection Fund, with the following exceptions:

i. Not more than one application fee may be required per non-member attorney for consolidated or related matters regardless of how many applications are made in the consolidated or related proceedings by the non-member attorney.

ii. The an application fee shall be waived (1) for Judge Advocate General's Corps' military attorneys practicing before the Military Trial Court of the State of Arizona or the Arizona Court of Military Appeals and (2) to permit pro bono representation of an indigent client or clients. An attorney seeking a fee waiver to provide pro bono representation of an indigent client or clients shall include in the application a verification that all clients represented in the action are indigent and that no attorney fee shall be paid by the client. "Indigent" is defined as those individuals whose gross income is at or below 125% of the federal poverty guidelines, as calculated in conformity with the eligibility requirements for Legal Services Corporation grantees, currently codified at 45 C.F.R. Section 1611.

2. Notice of Receipt by State Bar of Complete Application. Upon receipt of the verified application and fee from the non-member attorney as described above, the State Bar of Arizona shall issue to local counsel a Notice of Receipt of Complete Application that states: (1) whether the non-member attorney has previously made any application or motion pursuant to this rule within the preceding three years; (2) the date of any such application or motion; and (3) whether the application or motion was granted or denied by the court or administrative agency. The State Bar of Arizona Notice shall include as exhibits: (1) the original verified application and (2) the original certificate(s) of good standing. The State Bar shall retain copies of verified applications, certificates of good standing and orders granting, denying or revoking applications to appear pro hac vice for three (3) years.

3. Motion to Associate Counsel Pro Hac Vice. Local counsel shall file a motion to associate counsel pro hac vice with the court, board, or administrative agency where the cause is pending, together with proof of service on all parties in accordance with Arizona Rules of Civil Procedure. The motion to associate counsel pro hac vice shall include as exhibits: (1) the original verified application; (2) the original certificates of good standing; and (3) the State Bar of Arizona Notice. The motion to associate counsel pro hac vice shall also be accompanied by a proposed order granting or denying the motion. Local counsel shall mail a copy of each order granting or denying the motion as entered by the court, board, or administrative agency to the State Bar of Arizona.

4. Entry of Order. The order granting or denying the motion to associate counsel pro hac vice shall be entered by the court, board, or administrative agency no later than 20 days (exclusive of weekends and holidays) after the filing of such motion. A non-member attorney shall make no appearance in a cause until the court, board, or administrative agency where the cause is pending enters the order granting the motion to associate counsel pro hac vice. The order granting pro hac vice status shall be valid for a period of one year from the date of entry, and shall be renewed for subsequent one year periods upon compliance with renewal procedures as specified herein.

d. Verified Application. The verified application required by this rule shall be on a form approved by the Arizona Supreme Court and available at the clerk of the court, board, or administrative agency where such cause is pending and shall state:

1. the title of the case or cause, court, board, or agency and docket number in which the non-member attorney will be seeking to appear pro hac vice, and whether this case or cause is a related or consolidated matter for which the non-member attorney has previously applied to appear pro hac vice;
2. the non-member attorney's residence and office address;
3. the jurisdictions to which the non-member attorney is admitted to practice and the date(s) of such admission;
4. whether the non-member attorney is an active member in good standing of such jurisdictions;
5. that the non-member attorney is not currently disbarred or suspended in any court;
6. whether the non-member attorney is currently subject to any pending disciplinary proceeding by any court, agency or organization authorized to discipline attorneys at law, and if so pending, the application shall specify the jurisdiction, the nature of the matter under investigation and the name and address of the disciplinary authority investigating the matter;
7. whether the non-member attorney has ever been disciplined by any court, agency, or organization authorized to discipline attorneys at law;
8. the court, board, or administrative agency, title of cause and docket number in which the non-member attorney has filed an application to appear as counsel under this rule in this state in the preceding three years, the date of each application, and whether it was granted;
9. the name, address and telephone number of local counsel;
10. the name of each party in the cause and the name and address of counsel of record who is appearing for each party;
11. that the non-member attorney acknowledges that he or she shall be subject to the jurisdiction of the courts and agencies of the State of Arizona and to the State Bar of Arizona with respect to the law of this state governing the conduct of attorneys to the same extent as an active member of the State Bar of Arizona, as provided in Rule 46(b), Rules of the Supreme Court;
12. that the non-member attorney will review and comply with appropriate rules of procedure as required in the underlying cause; and
13. that the non-member attorney understands and shall comply with the standards of professional conduct required of members of the State Bar of Arizona.

e. *Discretion.* The granting or denial of a motion to associate counsel pro hac vice pursuant to this rule by the court, board, or administrative agency is discretionary. The court, board, or administrative agency may revoke the authority of a non-member attorney to make continued appearances pursuant to this rule. Absent special circumstances, repeated appearances by any person pursuant to this rule may be the cause for denial of the motion to associate counsel pro hac vice. Such special circumstances may include, but are not limited to, the following:

1. a showing that the cause involves a complex area of law in which the non-member attorney possesses a special expertise, or

2. a lack of local counsel with expertise in the area of law involved in the cause.

f. *Transfer.* The non-member attorney shall be deemed admitted in the event venue in such action is transferred to another county or court or is appealed; provided, however, that the court having jurisdiction over such transferred or appealed cause may revoke the authority of the non-member attorney to appear pro hac vice.

g. *Continuing Duties to Advise of Changes in Status.* A non-member attorney admitted pro hac vice shall have the continuing obligation during the period of such admission to promptly advise the State Bar of Arizona of a disposition made of pending charges or the institution of any new disciplinary proceedings or investigations. The State Bar of Arizona shall then advise any court, board, or administrative agency where the non-member attorney has been admitted pro hac vice of any such information. A non-member attorney shall promptly advise the State Bar of Arizona if permission to appear pro hac vice pursuant to this rule is revoked by any court, board, or administrative agency.

h. *Renewal of Application.* On or before each anniversary date of the filing of the verified application with the State Bar of Arizona, local counsel must certify to the State Bar of Arizona whether (a) the non-member attorney continues to act as counsel in the cause; or (b) such cause has been adjudicated to a final conclusion or is otherwise concluded. Any non-member attorney who continues to act as counsel in the cause shall remit to the State Bar of Arizona on or before each anniversary date an assessment set by the Arizona Supreme Court for the Client Protection Fund and a fee equal to the current dues paid by active members of the State Bar of Arizona for the calendar year in which such renewal is sought, unless the non-member attorney is waived under paragraph (c)(1)(B)(ii) of this rule as a Judge Advocate General's Corps' military attorney or as an attorney providing pro bono representation of an indigent client.

i. *Failure to Renew.* Any non-member attorney who continues to appear pro hac vice in a cause and fails to pay the renewal fees set forth in paragraph (h) of this rule shall be suspended from appearance in any cause upon the expiration of a period of thirty days from the anniversary date. The executive director of the State Bar of Arizona shall notify the non-member attorney and local counsel of the suspension and shall file a certified copy of the notice with the court, board or administrative agency where the cause is filed. The non-member attorney may be reinstated upon the payment of fees set forth in paragraph (h) of this rule and a \$50 late penalty. Upon

payment of all accrued fees and late penalty, the executive director shall reinstate the non-member attorney and shall certify such reinstatement to the court, board, or administrative agency where the cause is filed.

j. *Annual Reporting.* The State Bar of Arizona shall prepare an annual report which shall list: (a) all applications filed pursuant to this rule during the preceding twelve months; (b) the names of all applicants; and (c) whether the application was granted or denied. The report shall be available for inspection at the offices of the State Bar of Arizona, and shall be provided to the Supreme Court.

k. *Disciplinary Jurisdiction of the State Bar of Arizona.* As provided in Rule 46(b), Rules of the Supreme Court, a non-member attorney admitted pro hac vice pursuant to these rules shall be subject to the jurisdiction of the courts and agencies of the State of Arizona and to the State Bar of Arizona with respect to the laws and rules of this state governing the conduct and discipline of attorneys to the same extent as an active member of the State Bar of Arizona.

l. *Disposition of Fees.* Fifteen percent of the application fees paid pursuant to this rule shall be deposited into a civil legal services fund to be distributed by the Arizona Foundation for Legal Services and Education entirely to approved legal services organizations, as that term is defined in Rule 38(e) and (f).

RULE 40. PROVISION OF LEGAL SERVICES FOLLOWING DETERMINATION OF MAJOR DISASTER

(a) Determination of existence of major disaster. Solely for purposes of this Rule, this Court shall determine when an emergency affecting the justice system, as a result of a natural or other major disaster, has occurred in:

(1) the State of Arizona and whether the emergency caused by the major disaster affects the entirety or only part of the State, or

(2) another jurisdiction but only after such a determination and its geographical scope have been made by the highest court of that jurisdiction.

(b) Temporary practice in this jurisdiction following major disaster. Following the determination of an emergency affecting the justice system in the State of Arizona pursuant to paragraph (a) of this Rule, or a determination that persons displaced by a major disaster in another jurisdiction and residing in Arizona are in need of pro bono service and the assistance of lawyers from outside Arizona is required to help provide such assistance, a lawyer authorized to practice law in another United States jurisdiction, and not disbarred, suspended from practice or otherwise restricted from practice in any jurisdiction, may provide legal services in Arizona on a temporary basis. Such legal services must be provided on a pro bono basis without compensation, expectation of compensation or other direct or indirect pecuniary gain to the

lawyer. The provision of such legal services shall be supervised by a lawyer assigned and supervised through an established not-for-profit bar association, pro bono program or legal services organization or through such other organization(s) specifically designated by this Court.

(c) Duration of authority for temporary practice. The authority to practice law in the State of Arizona granted by paragraph (b) of this Rule shall end when this Court determines that the conditions caused by the major disaster in the State of Arizona have ended, except that a lawyer then representing clients in Arizona pursuant to paragraph (b) is authorized to continue the provision of legal services for such time as is reasonably necessary to complete the representation. The lawyer shall not, however, thereafter accept new clients.

(d) Court appearances. The authority granted by this Rule does not include authority to appear in court or before any other tribunal except:

(1) pursuant to the provisions of Rule 39 of these Rules for securing admission pro hac vice and, if such authority is granted, any fees for securing such admission shall be waived: or

(2) if this Court, in any determination made under paragraph (a) of this Rule, grants blanket permission to appear in all designated courts and other tribunals in this jurisdiction to lawyers providing legal services pursuant to paragraph (b). If such an authorization is included in such determination, any fees for securing admission pro hac vice shall be waived.

(e) Disciplinary authority and registration requirement. Lawyers providing legal services in the State of Arizona pursuant to paragraph (b) are subject to this Court's disciplinary authority and the Arizona Rules of Professional Conduct, as provided in Rule ER 8.5 of those Rules. Lawyers providing legal services in the State of Arizona under paragraph (b) shall, within thirty (30) days from the commencement of the provision of legal services, file a registration statement with the Clerk of this Court. The registration statement shall be in a form prescribed by this Court. Any lawyer who provides legal services pursuant to, and in accordance with, the provisions of this Rule shall not be considered to be engaged in the unauthorized practice of law in the State of Arizona.

(f) Notification to clients. Lawyers authorized to practice law in another United States jurisdiction who provide legal services pursuant to this Rule shall inform clients in this jurisdiction of the jurisdiction in which they are authorized to practice law, any limits or restrictions on that authorization, and that they are not authorized to practice law in the State of Arizona except as permitted by this Rule. They shall not state or imply that they are otherwise authorized to practice law in the State of Arizona.

Comment

[1] A major disaster in this or another jurisdiction may cause an emergency affecting the justice system with respect to the provision of legal services for a sustained period of time, interfering with the ability of lawyers admitted and practicing in the affected jurisdiction to

continue to represent clients until the disaster has ended. Lawyers in an unaffected jurisdiction may be willing to serve residents of the affected jurisdiction who have unmet legal services needs as a result of the disaster or, through circumstances independent of the disaster, whose legal services needs are temporarily unmet because of the disruption of the practices of local lawyers. Lawyers from unaffected jurisdictions may offer to provide these legal services either by traveling to the affected jurisdiction or from their own offices, or both, provided the legal services are provided on a pro bono basis through an authorized not-for-profit entity or such other organization(s) specifically designated by this Court. A major disaster includes, for example, a hurricane, earthquake, flood, wildfire, tornado, public health emergency or an event caused by terrorists or acts of war.

[2] Under paragraph (a)(1), this Court shall determine whether a major disaster causing an emergency affecting the justice system has occurred in the State of Arizona, or in a part of the State, for purposes of triggering paragraph (b) of this Rule. The Court may, for example, determine that the entirety of the State has suffered a disruption in the provision of legal services or that only certain areas have suffered such an event. The authority granted by paragraph (b) shall extend only to lawyers authorized to practice law and not disbarred, suspended from practice or otherwise restricted from practice in any other manner in any other jurisdiction.

[3] Paragraph (b) permits lawyers authorized to practice law in an unaffected jurisdiction, and not disbarred, suspended from practice or otherwise restricted from practicing law in any other manner in any other jurisdiction, to provide pro bono legal services to residents of the State of Arizona following determination of an emergency caused by a major disaster has occurred notwithstanding that they are not otherwise authorized to practice law in Arizona. Other restrictions on a lawyer's license to practice law that would prohibit that lawyer from providing legal services pursuant to this Rule include, but are not limited to, probation, inactive status, disability inactive status or a non-disciplinary administrative suspension for failure to complete continuing legal education or other requirements. Lawyers on probation may be subject to monitoring and specific limitations on their practices. Lawyers on inactive status, despite being characterized in many jurisdictions as being "in good standing," and lawyers on disability inactive status are not permitted to practice law. Public protection warrants exclusion of those lawyers from the authority to provide legal services as defined in this Rule. Lawyers permitted to provide legal services pursuant to this Rule must do so without fee or compensation, or expectation thereof. Their service must be provided through an established not-for-profit organization that is authorized to provide legal services either in its own name or that provides representation of clients through employed or cooperating lawyers, as defined in Rule 38 of these Rules. Alternatively, this Court may instead designate other specific organization(s) through which these legal services may be rendered. Under paragraph (b), an emeritus lawyer from another United States jurisdiction may provide pro bono legal services on a temporary basis in this jurisdiction provided that the emeritus lawyer is authorized to provide pro bono legal services pursuant to that jurisdiction's emeritus or pro bono practice rule. Lawyers may also be authorized to provide legal services in this jurisdiction on a temporary basis under the provisions of Rule ER 5.5(c) of the Arizona Rules of Professional Conduct.

[4] Emergency conditions created by major disasters end, and when they do, the authority created by paragraph (b) also ends with appropriate notice to enable lawyers to plan and complete pending legal matters. Under paragraph (c), this Court determines when those conditions end only for purposes of this Rule. The authority granted under paragraph (b) shall end upon such determination except that lawyers assisting residents of Arizona under paragraph (b) may continue to do so for such longer period as is reasonably necessary to complete the representation.

[5] Paragraph (b) does not authorize lawyers to appear in the courts or before other tribunals in this jurisdiction. Court appearances are governed by the provisions of Rule 39 of this Court's Rules concerning admission pro hac vice. This Court may, in a determination made under paragraph (d)(2), include authorization for lawyers who provide legal services in this jurisdiction under paragraph (b) to appear in all or designated courts or other tribunals in this jurisdiction without need for such pro hac vice admission. If such an authorization is included, any fees for securing admission pro hac vice shall be waived. A lawyer who has appeared in the courts of this jurisdiction pursuant to paragraph (d) may continue to appear in any such matter notwithstanding a declaration under paragraph (c) that the conditions created by the major disaster have ended. Furthermore, withdrawal from a court appearance is subject to the provisions of Rule ER 1.16 of the Arizona Rules of Professional Conduct.

[6] Authorization to practice law as a foreign legal consultant or in-house counsel in a United States jurisdiction offers lawyers a limited scope of permitted practice and may therefore restrict that person's ability to provide legal services under this Rule.

[7] The ABA National Lawyer Regulatory Data Bank is available to help determine whether any lawyer seeking to practice in this jurisdiction pursuant to paragraph (b) of this Rule is disbarred, suspended from practice or otherwise subject to a public disciplinary sanction that would restrict that lawyer's ability to practice law in any other jurisdiction.

RULE 42. ARIZONA RULES OF PROFESSIONAL CONDUCT

....

ER 1.0 Terminology

....

Comment

[8] This definition applies to situations where screening of a personally disqualified lawyer is permitted to remove imputation of a conflict of interest under ERs 1.10, 1.11, 1.12 or 1.18.

ER 1.5. Fees

(a)-(d) [No change in text.]

(e) A division of a fee between lawyers who are not in the same firm may be made only if:

(1) the division is in proportion to the services performed by each lawyer or each lawyer receiving any portion of the fee assumes joint responsibility for the representation;

(2) the client agrees, in a writing signed by the client, to the participation of all the lawyers involved and the division of the fees and responsibilities between the lawyers; and

(3) the total fee is reasonable.

....

Comment [2003 amendment]

....

Division of Fee

[8] A division of fee is a single billing to a client covering the fee of two or more lawyers who are not in the same firm. A division of fee facilitates association of more than one lawyer in a matter in which neither alone could serve the client as well, and most often is used when the fee is contingent and the division is between a referring lawyer and a trial specialist. Paragraph (e) permits the lawyers to divide a fee by agreement between the participating lawyers if the division is in proportion to the services performed by each lawyer or all lawyers assume joint responsibility for the representation and the client agrees, in a writing signed by the client, to the arrangement. A lawyer should only refer a matter to a lawyer who the referring lawyer reasonably believes is competent to handle the matter and any division of responsibility among lawyers working jointly on a matter should be reasonable in light of the client's need that the entire representation be competently and diligently completed. See ERs 1.1, 1.3. If the referring lawyer knows that the lawyer to whom the matter was referred has engaged in a violation of these Rules, the referring lawyer should take appropriate steps to protect the interests of the client. Except as permitted by this Rule, referral fees are prohibited by ER 7.2(b).

ER 1.10. Imputation of Conflicts of Interest: General Rule

(a) [No change in text.]

(b) When a lawyer has terminated an association with a firm, the firm is not prohibited from thereafter representing a person with interests materially adverse to those of a client represented by the formerly associated lawyer and not currently represented by the firm, unless:

(1) [No change in text.]

(2) any lawyer remaining in the firm has information protected by ERs 1.6 and 1.9(c) that is material to the matter. If the only such information is contained in documents or electronically stored information maintained by the firm, and the firm adopts screening procedures that are reasonably adequate to prevent access to such documents or electronically stored information by the remaining lawyers, those remaining lawyers will not be considered to have protected information within the meaning of this Rule.

(c) [No change in text.]

(d) [See Order in R-13-0046.]

(e) [No change in text.]

....

Comment [2003 and 2016 amendment]

....

Principles of Imputed Disqualification

....

[5] ER 1.10(b) operates to permit a law firm, under certain circumstances, to represent a person with interests directly adverse to those of a client represented by a lawyer who formerly was associated with the firm. The Rule applies regardless of when the formerly associated lawyer represented the client. However, the law firm may not represent a person with interests adverse to those of a present client of the firm, which would violate ER 1.7. Moreover, the firm may not represent the person where the matter is the same or substantially related to that in which the formerly associated lawyer represented the client and any other lawyer currently in the firm has material information protected by ERs 1.6 and 1.9(c). For purposes of determining whether any current lawyer in the firm has such material information, information maintained by a firm in the form of documents, including electronically stored information, will not be imputed to the remaining lawyers if the firm adopts screening procedures that are reasonably adequate under the circumstances to prevent the remaining lawyers from accessing such information. In determining whether screening procedures are reasonably adequate, factors

to be considered include whether technology is available and has been implemented to restrict lawyer access to electronically stored information maintained by the firm and whether adequate notice is provided to lawyers in the firm regarding the screening procedures. Further guidance is provided in ER 1.0, comments [8] – [10]. In addition, the firm should consider whether its lawyers have access to internal electronic databases that utilize research memoranda or other work product from past client representations, to ensure that any protected information is removed from such databases or that access is appropriately restricted.

[6] – [8] [No change in text.]

[Proposed Comments [9]-[12], see Order in R-13-0046.]

ER 1.13. Organization as Client

(a)-(g) [No change in text.]

Comment [2004 amendment]

....

Government Agency

[9] [No change in text.]

[10] A government lawyer may have an obligation to render advice to a government entity and constituents of a government entity. Normally, the government entity, rather than an individual constituent, is the client. Some government lawyers may also be elected officials or the employees of elected officials who have statutory obligations to take formal action against individual constituents under certain circumstances. The government lawyer, therefore, must clearly identify the client and disclose to the individual constituents any limitations that are imposed on the lawyer's other legal obligations. See ER 1.2(c) and related comments. Further, where a conflict arises between a constituent and the government entity the lawyer represents or between constituents of the same government entity, the lawyer must make the identity of the client clear to the constituents and determine which constituent has authority to act for the government entity in each instance.

[Re-number subsequent comments.]

ER 3.4 Fairness to Opposing Party and Counsel

A lawyer shall not:

(a)-(f) [No change in text.]

Comment [2003 amendment]

....

[2] Documents and other items of evidence are often essential to establish a claim or defense. Subject to evidentiary privileges, the right of an opposing party, including the government, to obtain evidence through discovery or subpoena is an important procedural right. The exercise of that right can be frustrated if relevant material is altered, concealed or destroyed. Applicable law in many jurisdictions makes it an offense to destroy material for purpose of impairing its availability in a pending proceeding or one whose commencement can be foreseen. Falsifying evidence is also generally a criminal offense. Paragraph (a) applies to evidentiary material generally, including electronically stored information~~computerized information~~. Applicable law may permit a lawyer to take temporary possession of physical evidence of client crimes for the purpose of conducting a limited examination that will not alter or destroy material characteristics of the evidence. In such a case, applicable law may require the lawyer to turn the evidence over to the police or other prosecuting authority, depending on the circumstances.

ER 3.5. Impartiality and Decorum of the Tribunal

A lawyer shall not:

(a)-(d) [No change in text.]

Comment [2003 rule]

....

[6] At times, a government entity is required to act in a “quasi-judicial” capacity as part of an administrative process. In that capacity, it may act as the decision-maker in contested proceedings or hear appeals from the determinations of another officer, body or agency of the same government. A government lawyer may be called upon to advise the tribunal after another lawyer in the same office has advised the other government constituent about the matter, or while another attorney from the same office appears before the tribunal. Advice given by the lawyer to the tribunal does not constitute impermissible ex parte contact, provided that reasonable measures are taken to ensure the fairness of the administrative process, such as using different attorneys to advise and represent the two constituents and screening those lawyers from one another or strictly limiting the lawyer’s advice to the tribunal to procedural matters. In no event can the same lawyer both provide advice to the tribunal and appear before it in the same matter, even if the advice is limited to procedural advice.

ER 5.5. Unauthorized Practice of Law; Multijurisdictional Practice of Law

(a) [No change in text.]

(b) ~~Except as authorized by these Rules or other law, A~~ lawyer who is not admitted to practice in ~~this jurisdiction~~ Arizona shall not:

(1) ~~except as authorized by these Rules or other law, establish an office or other systematic and continuous presence in this jurisdiction~~engage in the regular practice of Arizona law for the ~~practice of law; or~~

(2) hold out to the public or otherwise represent that the lawyer is admitted to practice Arizona law in this jurisdiction.

(c) A lawyer admitted in another United States jurisdiction, and not disbarred or suspended from practice in any jurisdiction, may provide legal services on a temporary basis in ~~this jurisdiction~~ Arizona that involve Arizona law and which:

(1) are undertaken in association with a lawyer who is admitted to practice in ~~this jurisdiction~~ Arizona and who actively participates in the matter.

(2) are in or reasonably related to a pending or potential proceeding before a tribunal in ~~this~~ Arizona or another jurisdiction, if the lawyer, or a person the lawyer is assisting, is authorized by law or order to appear in such proceeding or reasonably expects to be so authorized;

(3) are in or reasonably related to a pending or potential arbitration, mediation, or other alternative dispute resolution proceeding in ~~this~~ Arizona or another jurisdiction, if the services arise out of or are reasonably related to the lawyer's practice in a jurisdiction in which the lawyer is admitted to practice and are not services for which the forum requires pro hac vice admission; or

(4) are not within paragraphs (c)(2) or (c)(3) and arise out of or are reasonably related to the lawyer's practice in a jurisdiction in which the lawyer is admitted to practice.

(d) A lawyer admitted in another United States jurisdiction, or a lawyer admitted in a jurisdiction outside the United States, not disbarred or suspended from practice in any jurisdiction, may provide legal services in ~~this jurisdiction~~ Arizona that exclusively involve as authorized by federal law, the law of another ~~or other law of this jurisdiction, or tribal law.~~

(e) A lawyer admitted in another United States jurisdiction, or a lawyer admitted in a jurisdiction outside the United States, not disbarred or suspended from practice in any jurisdiction, and registered pursuant to Rule 38~~(h)~~(a) of these rules, may provide legal services in ~~this jurisdiction~~Arizona that are provided to the lawyer's employer or its organizational affiliates and are not services for which ~~the forum requires pro hac vice admission~~ is required.

(fe) Any attorney who engages in the authorized multijurisdictional practice of law in the ~~State of~~ Arizona under this rule must advise the lawyer's client that the lawyer is not admitted to practice in Arizona, and must obtain the client's informed consent to such representation.

(gf) Attorneys not admitted to practice in the ~~State of~~ Arizona, who are admitted to practice law in any other jurisdiction in the United States and who appear in any court of record or before any administrative hearing officer in the ~~State of~~ Arizona, must also comply with Rules of the Supreme Court of Arizona governing *pro hac vice* admission. See Rule 39.

(hg) Any attorney who engages in the multijurisdictional practice of law in the ~~State of~~ Arizona, whether authorized in accordance with these Rules or not, shall be subject to the Rules of Professional Conduct and the Rules of the Supreme Court regarding attorney discipline in the ~~State of~~ Arizona.

Comment

[1] Paragraph (a) applies to the unauthorized practice of law by a lawyer, whether through the lawyer's direct action or by the lawyer assisting another person. The definition of the practice of law is established by law and varies from one jurisdiction to another. For Arizona's definition, see Rule 31(a)(2)(A). Whatever the definition, limiting the practice of law to members of the bar protects the public against rendition of legal services by unqualified persons. Paragraph (ba) does not prohibit a lawyer from employing the services of paraprofessionals and delegating functions to them, so long as the lawyer supervises the delegated work and retains responsibility for their work. See ER 5.3. Likewise, it does not prohibit lawyers from providing professional advice and instruction to nonlawyers whose employment requires knowledge of law, for example, claims adjusters, employees of financial or commercial institutions, social workers, accountants and persons employed in government agencies. In addition, a lawyer may counsel nonlawyers who wish to proceed pro se.

[2] Other than as authorized by these Rules or other law or this Rule, a lawyer who is not admitted to practice in Arizona violates paragraph (b)(1) if the lawyer engages in the regular practice of Arizona law in Arizona. A ~~lawyer who is not admitted to practice in Arizona~~ member of the State Bar of Arizona violates paragraph (b)(2) if the lawyer fails to state ~~may comply with paragraph (b)(2) by stating~~ in any advertisement or communication that targets or specifically offers legal services to Arizona residents that: (1) the ~~non-member lawyer~~ is not licensed to practice ~~Arizona law the Supreme Court of Arizona; or~~ and (2) the ~~non-member's lawyer's practice is limited to federal legal matters, such as immigration law, or tribal legal matters, or the law of another jurisdiction. (for example, a non-member may state his or her practice is limited to immigration matters).~~ See ERs 7.1(a) and 7.5(b).

[3] There are occasions in which a lawyer admitted to practice in another United States jurisdiction, and not disbarred or suspended from practice in any jurisdiction, may provide legal services on a temporary basis in Arizona that involve Arizona law under circumstances that do not create an unreasonable risk to the interests of their clients, the public

or the courts. Paragraph (c) identifies four such circumstances. The fact that conduct is not so identified does not imply that the conduct is or is not authorized.

[4] There is no single test to determine whether a lawyer's provision of legal services involving Arizona law are provided on a "temporary basis" in Arizona, and may therefore be permissible under paragraph (c). Services may be "temporary" even though the lawyer provides legal services in Arizona that involve Arizona law on a recurring basis, or for an extended period of time, as when the lawyer is representing a client in a single lengthy negotiation or litigation.

[Note: First sentence of comment [1] added effective 1/1/15.]

MEDIATION SKILLS

COMMENTARY

Mediator Orientations, Strategies and Techniques

By Leonard L. Riskin

Almost every conversation about "mediation" suffers from ambiguity. People have disparate visions of what mediation is or should be. Yet we lack a comprehensive system for describing these visions. This causes confusion when people try to choose between mediation and another process or grapple with how to train, evaluate, regulate, or select mediators.

I propose a system for classifying mediator orientations. Such a system can help parties select a mediator and deal with the thorny issue of whether the mediator should have subject-matter expertise. The classification system starts with two principal questions: 1. Does the mediator tend to define problems narrowly or broadly? 2. Does the mediator think she should evaluate—make assessments or predictions or proposals for agreements—or facilitate the parties' negotiation without evaluating?

The answers reflect the mediator's beliefs about the nature and scope of mediation and her assumptions about the parties' expectations.

Problem Definition

Mediators with a narrow focus assume that the parties have come to them for help in solving a technical problem. The parties have defined this problem in advance through the positions they have asserted in negotiations or pleadings. Often it involves a question such as, "Who pays how much to whom?" or "Who can use such-and-such property?" As framed, these questions rest on "win-lose" (or "distributive") assumptions. In other words, the participants must divide a limited resource; whatever one

gains, the other must lose.

The likely court outcome—along with uncertainty, delay and expense—drives much of the mediation process. Parties, seeking a compromise, will bargain adversarially, emphasizing positions over interests.

A mediator who starts with a broad orientation, on the other hand, assumes that the parties can benefit if the mediation goes beyond the narrow issues that normally define legal disputes. Important interests often lie beneath the positions that the participants assert. Accordingly, the mediator should help the participants understand and fulfill those interests—at least if they wish to do so.

The Mediator's Role

The evaluative mediator assumes that the participants want and need the mediator to provide some direction as

to the appropriate grounds for settlement—based on law, industry practice or technology. She also assumes that the mediator is qualified to give such direction by virtue of her experience, training and objectivity.

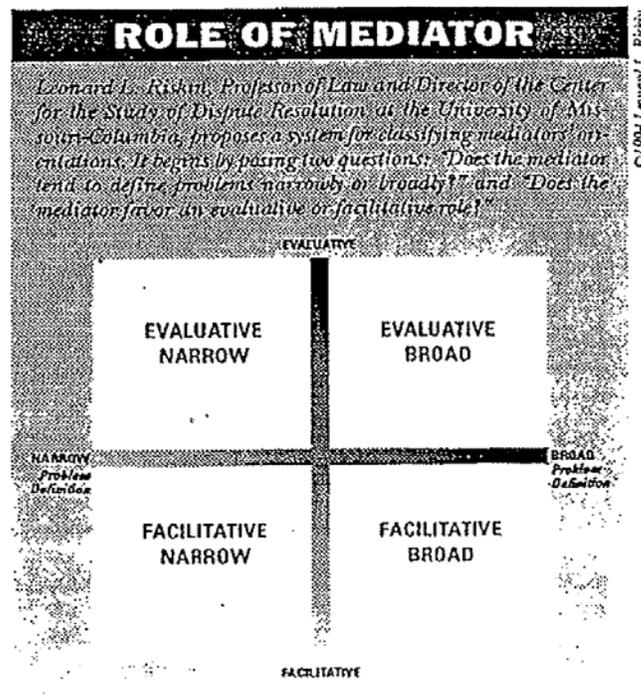
The facilitative mediator assumes the parties are intelligent, able to work with their counterparts, and capable of understanding their situations better than either their lawyers or the mediator. So the parties may develop better solutions than any that the

mediator might create. For these reasons, the facilitative mediator assumes that his principal mission is to enhance and clarify communications between the parties in order to help them decide what to do.

The facilitative mediator believes it is inappropriate for the mediator to give his opinion, for at least two reasons. First, such opinions might impair the appearance of impartiality and thereby interfere with the mediator's ability to function. Second, the mediator might not know enough—about the details of the case or the relevant law, practices or technology—to give an informed opinion.

Each of the two principal questions—Does the mediator tend toward a narrow or broad focus? and Does the mediator favor an evaluative or facilitative role?—yield responses that fall

(continued on following page)



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(continued from previous page)

along a continuum. Thus, a mediator's orientation will be more or less broad and more or less evaluative (see sidebar on page 111).

Strategies and Techniques Of Each Orientation

Each orientation derives from assumptions or beliefs about the mediator's role and about the appropriate focus of a mediation. A mediator employs strategies—plans—to conduct the mediation. And he uses techniques—particular moves or behaviors—to effectuate those strategies. Here are selected strategies and techniques that typify each mediation orientation.

Evaluative-Narrow

The principal strategy of the evaluative-narrow mediator is to help the parties understand the strengths and weaknesses of their positions and the likely outcome at trial. To accomplish this, the evaluative-narrow mediator typically will first carefully study relevant documents, such as pleadings, depositions, reports and mediation briefs. Then, in the mediation, she employs evaluative techniques, such as the following, which are listed from most to least evaluative:

- Urge parties to settle or to accept a particular settlement proposal or range.
- Propose position-based compromise agreements.

- Predict court (or administrative agency) dispositions.
- Try to persuade parties to accept mediator's assessments.
- Directly assess the strengths and weaknesses of each side's case (usually in private caucuses) and perhaps try to persuade the parties to accept the mediator's analysis.

Facilitative-Narrow

Like the evaluative-narrow, the facilitative-narrow mediator plans to help the participants become "realistic" about their litigation situations. But he employs different techniques. He does not use his own assessments, predictions or proposals. Nor does he apply pressure. Moreover, he probably will not request or study relevant documents, such as pleadings, depositions, reports, or mediation briefs. Instead, because he believes that the burden of decision should rest with the parties, the facilitative-narrow mediator might ask questions—generally in private caucuses—to help the participants understand both sides' legal positions and the consequences of non-settlement. Also in private caucuses, he helps each side assess proposals in light of the alternatives.

Here are examples of the types of questions the facilitative-narrow mediator might ask:

- What are the strengths and weakness of your case? Of the other side's case?
- What are the best, worst, and most

likely outcomes of litigation? How did you make these assessments? Have you thought about [other issues]?

- How long will it take to get to trial? How long will the trial last?
- What will be the associated costs—in money, emotions, or reputation?

Evaluative-Broad

The evaluative-broad mediator also helps the parties understand their circumstances and options. However, she has a different notion of what this requires. So she emphasizes the parties' interests over their positions and proposes solutions designed to accommodate these interests. In addition, because the evaluative-broad mediator constructs the agreement, she emphasizes her own understanding of the circumstances at least as much as the parties'.

Like the evaluative-narrow mediator, the evaluative-broad mediator is likely to request and study relevant documents, such as pleadings, depositions, and mediation briefs. In addition, she tries to uncover the parties' underlying interests by such methods as:

- Explaining that the goal of mediation can include addressing underlying interests.
- Encouraging the real parties, or knowledgeable representatives (with settlement authority) of corporations or other organizations to attend and participate in the mediation. For instance, the mediator might invite such

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individuals to make remarks after the lawyers present their opening statements, and she might include them in most settlement discussions.

- Asking about the participants' situations, plans, needs and interests.
- Speculating about underlying interests and asking for confirmation.

The evaluative-broad mediator also provides predictions, assessments and recommendations. But she emphasizes options that address underlying interests, rather than those that propose only compromise on narrow issues. In the mediation of a contract dispute between two corporations, for instance, while the facilitative-narrow mediator might propose a strictly monetary settlement, the evaluative-broad mediator might suggest new ways for the firms to collaborate (perhaps in addition to a monetary settlement).

Facilitative-Broad

The facilitative-broad mediator seeks to help the parties define, understand and resolve the problems they wish to address. She encourages them to consider underlying interests rather than positions and helps them generate and assess proposals designed to accommodate those interests. Specifically, she might:

- Encourage the parties to discuss underlying interests in joint sessions. To bring out such interests, she might use techniques such as those employed by the evaluative-broad mediator.
- Encourage and help the parties to develop their own proposals (jointly or

alone) that would respond to underlying interests of both sides.

The facilitative-broad mediator does not provide assessments, predictions or proposals. However, to help the participants better understand their legal situations, she will likely allow the parties to present and discuss their legal arguments. In addition, she might ask questions such as those listed for the facilitative-narrow mediator and focus discussion on underlying interests.

In a broad mediation, however, legal argument generally occupies a lesser position than it does in a narrow one. And because he emphasizes the participants' role in defining the problems and in developing and evaluating proposals, the facilitative-broad mediator does not need to fully under-

stand the legal posture of the case. Accordingly, he is less likely to request or study litigation documents, technical reports or mediation briefs.

However, the facilitative-broad mediator must be able to quickly grasp the legal and substantive issues and to respond to the dynamics of the situation. He needs to help the parties realistically evaluate proposals to determine whether they address the parties' underlying interests.

Mediator Techniques

Mediators usually have a predominant orientation, whether they know it or not, that is based on a combination of their personalities, experiences, education, and training. Thus, many retired

(continued on following page)

MEDIATOR TECHNIQUES

The following grid shows the principal techniques associated with each mediator orientation, arranged vertically with the most evaluative at the top and the most facilitative at the bottom. The horizontal axis shows the scope of problems to be addressed, from the narrowest issues to the broadest interests.

	EVALUATIVE					
	Litigation Issues	Other Disputable Issues	Business (Substantial) Issues	Business Interests	Personal Interests	Social Interests
NARROW Problem Definition	Urges/pushes parties to accept narrow (position-based) settlement Develops and proposes narrow (position-based) settlement Predicts court outcomes Assesses strengths and weaknesses of legal claims			Urges/pushes parties to accept broad (interest-based) settlement Develops and proposes broad (interest-based) settlement Predicts impact (on interests) of not settling Probes parties' interests		
	Helps parties evaluate proposals Helps parties develop narrow (position-based) proposals Asks parties about consequences of not settling Asks about likely court outcomes Asks about strengths and weaknesses of legal claims			Helps parties evaluate proposals Helps parties develop broad (interest-based) proposals Helps parties develop options Helps parties understand issues and interests Focuses discussion on underlying interests (business, personal, societal)		BROAD Problem Definition
	FACILITATIVE					

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(continued from previous page)

judges, when they mediate, tend toward an evaluative-narrow orientation.

Yet mediators do not always behave consistently with the predominant orientations they express. Some mediators lack a clear grasp of the essence of their own expressed orientation. It is also common for mediators to employ a strategy generally associated with an orientation other than their own. This might help them carry out a strategy associated with their predominant orientation. For example, a prominent facilitative-broad mediator who often conducts sessions with parties only—not their lawyers—routinely predicts judicial outcomes. But he also emphasizes the principles underlying the relevant rules of law. He then encourages the parties to develop a resolution that makes sense for them and meets their own sense of fairness; in essence, he evaluates in order to free the parties from the potentially narrowing effects of law.

In addition, many mediators will depart from their orientations to respond to the dynamics of the situation. A prominent evaluative-broad mediator, for instance, typically learns as much as he can about the case and the parties' circumstances and then develops a proposal, which he tries to persuade the parties to accept. If they do not accept the proposal, he becomes more facilitative.

Another example: an evaluative-narrow mediator may explore underlying interests (a technique normally associated with the broad orientations) after her accustomed narrow focus results in a deadlock. And a facilitative-broad mediator might use a mildly evaluative tactic as a last resort. For instance, he might toss out a figure that he thinks the parties might be willing to agree upon, while stating that the figure does not represent his prediction of what would happen in court.

Speaking generally, broad mediators, especially facilitative ones, are more willing and able to narrow the focus of a dispute than are narrow mediators willing and able to broaden their focus. Again speaking generally, evaluative mediators are more willing to facilitate than facilitative mediators

are to evaluate. However, many evaluative mediators lack facilitation skills.

Many effective mediators are versatile and can move from quadrant to quadrant (and within a quadrant), as the dynamics of the situation dictate, to help parties settle disputes.

Using the Grid to Select a Mediator

The grid should help disputants determine what kind of mediation they wish to undertake and what sort of mediator to seek. Here are some general points to keep in mind.

The parties' informed expectations about the problems to be addressed and what they need from a mediation should govern their mediator-selection process.

It is difficult, though, to develop informed expectations before the mediation starts. A party's strong belief that he wishes and needs only to address a distributive (win-lose) issue, for example, would incline him toward selecting a narrow mediator. An additional belief that he will need direction or some pressure, would suggest that he should lean toward an evaluative-narrow mediator.

Still, I would caution parties against feeling very confident in their initial assessments. Often the litigation process encourages a narrow perspective on the dispute. If litigation-oriented lawyers are selecting the mediator, they may be inclined toward a litigation-like outcome, which is best provided by an evaluative-narrow mediator (a category in which retired-judge mediators are heavily represented). Unless the lawyers are sophisticated about mediation, however, they might see only the virtues of this approach—its simplicity and efficiency—and not its potential drawbacks.

Such drawbacks include the risk that the evaluative-narrow approach could foreclose a creative, interest-based agreement. Similarly, a party originally inclined toward dealing collaboratively with underlying interests may learn during the mediation that the other side insists on a narrow approach and needs guidance from the mediator in order to reach resolution. For all these reasons, it may be wise to select a me-

diator whose background and experience make her versatile.

Subject-Matter Expertise

In selecting a mediator, what is the relevance of "subject-matter expertise?" The term could mean substantial understanding of either the law, customary practices, or technology associated with the dispute. In a patent infringement lawsuit, for instance, a mediator with subject-matter expertise could be familiar with the patent law or litigation, practices in the industry, or the relevant technology—or with all three of these areas.

The need for subject-matter expertise typically increases to the extent that the parties seek evaluations—assessments, predictions or proposals—from the mediator. The kind of subject-matter expertise needed depends on the kind of evaluation or direction the parties seek. If they want a prediction about what would happen in court, they need a mediator with a strong background in related litigation. If they want suggestions about how to structure future business relations, perhaps the mediator should understand the relevant industries. If they want to propose new government regulations (as in a regulatory negotiation), they might wish to retain a mediator who understands administrative law and procedure.

In contrast, to the extent that the parties feel capable of understanding their circumstances and developing potential solutions—singly, jointly or with assistance from outside experts—they might prefer a mediator with great skill in the mediation process, even if she lacks subject-matter expertise. In such circumstances, the mediator need only have a rough understanding of the relevant law, customs and technology. In fact, too much subject-matter expertise could incline some mediators toward a more evaluative role, and could thereby interfere with developing creative solutions. ■

The author invites written comments about his work concerning mediator orientation and behavior. Fax them to him at: 314/882-3343. To submit comments for publication in Alternatives, fax a duplicate to the editor at: 212/949-8859.

Frenkel & Stark, *The Practice of Mediation*, 2nd Ed. 2013

■ **§9.5.4 PERSUASION THROUGH DOUBT: PROVIDING FEEDBACK AND EVALUATION**

As we discussed in Chapter 2, even the most able and experienced negotiators often come to the mediation table with excessive optimism about their claims. A skilled mediator—the only person in the room with a disinterested perspective—can dampen that overconfidence by exposing the negotiators to honest feedback. Doing so can be viewed as a direct way of conditioning the negotiators to moderate their positions. As stated in Chapter 3, we view properly conducted evaluation as a valuable, often welcomed and sometimes justice-enhancing form of persuasion.

Evaluation Defined. Most law-trained mediators equate evaluation with assessing the *legal* strengths of the parties' positions. However, even in the narrowest legal matters, mediator evaluation is potentially far broader than that. It can include feedback on the practicality, wisdom, fairness and, in rare cases, morality of a party's proposals or positions. While much evaluation focuses on comparing a party's position to some external standard, mediators also provide evaluative feedback when they point out tensions between a party's actions, statements or positions and their own professed standards or ideals.⁵⁸ In this chapter, we focus our discussion primarily on legal evaluation in legal disputes. However, for the most part, the considerations that govern legal evaluations are applicable to all forms of doubt-based persuasion.

Because raising doubt by means of evaluation is a potentially confrontational intervention, we list it last in our "progression."⁵⁹ But if a party's overconfidence and refusal to discuss interests is threatening to cripple the mediation, the mediator may have to resort to this approach earlier. However, even within this most mediator-driven type of persuasion lies a "softer to harder" range of choices.

Gradations of Legal Evaluation. In roughly ascending order of apparent directiveness, legal evaluation includes:⁶⁰

- **Asking parties to discuss the strengths and weaknesses of their case.** (*"Of all of the claims (defenses) you have, which do you see as the strongest? The weakest? What are the problems, if any, with your claim of fraud? What percentage chance do you see of its being rejected? What is your worst case scenario?"*)

58. STARK & FRENKEL, *supra* note 12, at 55-60.

59. This is parallel to the approach to information expansion we presented in Chapter 7, in which probing for doubt comes after probing for empathy and interests.

60. See generally JAMES H. STARK, *The Ethics of Mediation Evaluation*, 38 S. TEX. L. REV. 769, 774 (1997); M. SHAW, *Evaluation Continuum*, Prepared for Meeting of CPR Ethics Commission, May 6-7, 1996 (on file with James Stark).

- Questioning parties about elements of their case, evidentiary problems, etc. (*“What evidence do you have to support your claim of inadequate security? Do you have any case law support for your claim for compensatory damages for lost tuition?”*)
- Asking one party to respond to another party’s legal arguments. (*“Defense counsel argues that the break-in was not reasonably foreseeable because the town has a low crime rate and there had never been a previous break-in at his building. How do you respond to that?”*)
- Providing legal information without applying it to the facts of the case. This is often directed at parties who are representing themselves: (*“As the plaintiff in this case, you have to persuade the jury that the defendant’s negligence caused you harm by a preponderance of evidence. What this means is. . . .”*)
- Making a prediction about an *evidentiary* or *procedural* question by applying the law to the facts. (*“My opinion is that the court will exclude that letter, because it is hearsay.” “Anything’s possible of course, but I don’t think it’s likely that the judge will grant your motion for a continuance based on the facts you present.”*)
- Making a prediction about a *substantive* element of the case by applying the law to the facts. (*“My sense is that the judge will allow the plaintiff to present the jury with the question of whether the duty of reasonable care was breached. It seems to me that, as the defendant, you have significant risk on that issue.”*)
- Making a prediction about possible or probable court outcomes. (*“If this case gets to a jury, and I think it will, I see the most likely jury award as being in the range of \$50,000 to \$75,000.”*)
- Proposing or recommending a specific settlement based on analysis of the law and the facts. (*“It’s your decision of course. But if you want my opinion, I think you should accept their \$60,000 offer.”*)

As you can see, the first three types of evaluation are doubt-raising (and thus self-persuading) *questions* of a kind already discussed in Chapter 7. In the others, the mediator provides increasingly direct and comprehensive feedback to the parties by means of declarative statements.

Note that a mediator evaluation — in legal matters as well as other settings — need not be so technical or specific in its predictions as to require substantive expertise as a foundation. In its most elementary form, the evaluation can simply involve the mediator getting the parties to acknowledge reality: There is risk in uncertainty. Unless a disputant feels that the other side’s perspective is *wholly* unworthy of credit or sympathy, even the most headstrong disputant must concede (at least to himself) that the favorable outcome he envisions cannot be ensured.

On the other hand, empirical research on persuasion suggests that the more specific and detailed a statement or appeal is — the more it rests on explicit supporting data and trustworthy sources — the more likely it will be given credence by

the recipient.⁶¹ This may suggest the value of industry knowledge as an ingredient of effective evaluation.⁶²

The Challenges of Legal Evaluation. It is hard to do legal evaluation properly and well. First, because it depends on imparting information designed to shake a party's confidence, its "bad news" aspect is often greeted by considerable push back or even anger. Second, if improperly done, evaluation creates the risk that the mediator will be perceived as non-neutral. Third, because of this risk, more directive forms of evaluation tend to be provided in caucus, a setting that presents the potential for questionable mediator conduct. Fourth, even the most experienced subject matter experts must concede that any prediction of court outcomes—especially when lacking the full adversary presentation of a trial—is far from a science.

It is also difficult to provide universal generalizations about how a mediator should provide legal evaluation, because cases and litigants vary so greatly. How intelligent the parties are, whether they are represented by counsel and whether they have had previous encounters with the court system will all affect how explicit an evaluation needs to be in order to be understood. How emotionally entrenched the parties are in their positions, how much they trust the mediator and how invested they are in the mediation process may dictate how direct the mediator should be in her approach. The substantive content of the evaluation itself also matters: An evaluation that strongly favors one side needs to be handled with considerably greater tact than an evaluation that points out substantial risks and problems on both sides of the case.

Providing Effective and Proper Evaluation: Concrete Suggestions. Nonetheless, here is a list of concrete legal evaluation suggestions based on the literature on persuasion, the writings of other mediation scholars⁶³ and our own experience:

- **Evaluate only when necessary.** Provide legal evaluation only in a "merits" dispute, when the parties are stuck because they have different predictions of who will prevail or what the specific outcome will be at trial if the case doesn't settle. If the principal barrier to settlement is something else (poor communication, personal hostility, reactive devaluation, etc.), don't evaluate until efforts to address those impediments have been exhausted. Any evaluation still needed at that point may become easier for the parties to accept.

A related point: the later the evaluation, the better. The longer you wait, the more you will learn about the dispute. The more you know about the dispute, the more informed your evaluation will be. The more informed your evaluation, the more credible it will appear to the disputants, who, when all is said and done, must decide whether it has value to them. And by waiting, the parties may surprise you and reach a

61. DANIEL O'KEEFE, *Justification Explicitness and Persuasive Effect: A Meta-Analytic Review of the Effects of Varying Support Articulation in Persuasive Messages*, 35 ARGUMENT. & ADVOC. 61, 68-69 (1998) (Meta-analysis: 23 investigations, 5,358 participants).

62. STARK & FRENKEL, *supra* note 12, at 45-46.

63. See, e.g., MARJORIE CORMAN AARON, *Evaluation in Mediation*, in DWIGHT GOLANN, *Mediating Legal Disputes: Effective Strategies for Lawyers and Mediators* 267-305 (1996).

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resolution based on other considerations, before you ever get around to having to make a direct evaluation.

- **If possible, evaluate in caucus.** While it is possible to provide direct feedback in joint session, the caucus setting provides two major advantages. First, the parties will fight your evaluation less if it's given privately rather than in front of a hostile adversary, because there is less potential for loss of face. Second, it is easier to tailor your message, by making it simpler or more complex as needed, or softening it by starting with statements expressing empathy. If you do give feedback in joint session, be sure to ask hard questions of, and point out weaknesses to, *both* sides to maintain the appearance of impartiality.
- **Ask permission.** If you want to give the parties explicit feedback about the strength of their case, it is helpful to ask if they are open to hearing your views. If a party declines, is that the end of the matter? You might feel that you should respect their choice; ultimately it's their case. Besides, you may think, if they don't even want to hear your opinions, what chance is there that they will be persuaded by them? But sometimes a "no"—especially an adamant one—may betray a sensitivity to having a weak case and a desire to avoid exposing it. When this happens, you can choose to accept the decision or try to engage the party in a dialogue about their apparent lack of interest in what may be new and helpful information or at least another perspective to consider.
- **Be transparent and explicitly evenhanded.** How do you react when a doctor simply performs a procedure with no advance explanation? When it comes to more direct forms of evaluation, most disputants will be more open to listening to the mediator's message if she explains what she is about to do and her purpose in doing it. Even more appreciated—especially by those who still wish to "punish" the opponent—may be the knowledge that the other side will receive the same evaluative treatment. Such preparatory explanations can protect against the appearance that the mediator has lost her neutrality. Here is an example of this technique in action, from the *Resnick* mediation: **Video Clip 9.5F**



- **If using questions to sow doubt, avoid leading, rhetorical questions.** Many mediators prefer to provide doubt-based feedback by asking questions rather than making statements, in order to appear non-directive, avoid making predictions or being seen as imparting advice. Questions—provided they appear to stem from real curiosity and an interest in the response—have the potential to engage disputants in the process of reassessing their positions. Using questions in giving feedback must be done carefully, however. If a mediator has a clear point she wishes to make, some persuasion research would caution against asking questions instead of using direct statements to do so. Narrow, suggestive, skeptical, "statement-like" questions ("Do you *really* think that you can prove [X]?"") can have the effect of focusing a recipient's attention on the motives of the speaker instead of the message and being perceived as pressuring.⁶⁴ Depending

64. See STARK & FRENKEL, *supra* note 12, at 33-39 (summarizing research).

on the context (e.g., requests for explanations or justifications immediately following a party's strong assertions, posing multiple questions on the same topic) even well-intentioned, ostensibly neutral questions can be perceived this way.



If you were Bob Fitzgerald in the excerpt that follows, how would you react to the mediator's efforts to get you to examine your position? **Video Clip 9.G.**

- **Use stories, analogies and metaphors.** People tend to understand and accept information more readily when it is conveyed in stories, metaphors and analogies. These devices can be used to make difficult messages simpler and more digestible. They are also a form of self-persuasion: In contrast to a lecture, which may cause the listener to defend against an obvious message, a story, metaphor or analogy conveys the same point more indirectly and subtly, requiring listeners to stop in their tracks and use their mental faculties to ponder the message's meaning and apply it to themselves.⁶⁵

Thus, instead of predicting that *"the judge will probably find against you because the delays were caused by your taking on too many jobs at one time,"* a mediator might say to the contractor in *Wilson*: *"Even the best juggler has trouble keeping too many torches in the air; if one drops, he can get burned."* Or, in an effort to persuade the same contractor to consider one approach for resolving the *Wilson* dispute, he might draw an analogy to the loyalty-preserving practice that airlines follow when they run into problems selling more tickets than there are seats on given flights. For example: *"Some friends of ours got bumped last month from a flight to Orlando because the airline overbooked it. As I understand it, that's most airlines' regular practice. But not only did the airline put our friends on the next flight out the following morning, they paid for their hotel and gave them a voucher for a free trip anywhere in the continental U.S. in the next year."*

- **Provide balanced evaluations.** Research suggests that two-sided refutational statements—arguments that present both sides of an issue while suggesting why one side may be more persuasive than the other—are generally more effective forms of persuasion than one-sided statements.⁶⁶ By acknowledging that there is more than one side to any question faced or decision to be made, and by helping an interviewee weigh the pros and cons

65. On the use of such figures of speech in mediation, see MICHAEL BENJAMIN & HOWARD H. IRVING, *Therapeutic Family Mediation: Helping Families Resolve Conflict* 66 (2002).

66. See DANIEL O'KEEFE, *How to Handle Opposing Arguments in Persuasive Messages: A Meta-Analytic Review of the Effects of One-Sided and Two-Sided Messages*, 22 *COMMUNICATION YEARBOOK* 209-249 (1999), listing studies; MIKE ALLEN, *Comparing the Persuasive Effectiveness of One- and Two-Sided Messages*, in MIKE ALLEN & RAYMOND PREISS, *Persuasion: Advances Through Meta-Analysis* 96 (1996).

On a related point, recent survey research suggests that attorney consumers of mediation value honesty and integrity in their choice of neutrals and resent those who only emphasize case weaknesses in order to produce movement. (Quoting one respondent, for example: *"I've had mediators come in and say to both sides that their case stinks. No credibility there."*) See GOLDBERG & SHAW, *supra* note 23, at 407, 410.

of those different points of view, with input as to which is more likely to prevail, the persuader appears forthright, helpful and fair.⁶⁷

For example, in the *Resnick* case, there was conflicting evidence about how the burglar got into the building. A balanced, two-sided and non-exaggerated evaluation with the defendant might have sounded something like this: “*You are quite right, Mr. Stevens, that there is no direct evidence of how the burglar got into the building. That could be a real problem for the plaintiff in proving his case. But the circumstantial evidence—the unlocked window on the stairwell and the broken glass indicating forced entry there—is, I fear, a real problem for you. I worry that the judge will let this issue go to the jury and, if the jury hears this evidence, that you face a serious risk of losing on that issue.*”

Here’s a related point: If you think the party’s case has both strengths and weaknesses, mention the strengths first. Say, “*For what it’s worth, I think your claim for emotional distress damages here is quite strong, because your psychologist appears to be a very credible witness. I do have concerns, however, about the viability of your claim for lost tuition expenses.*” Providing good news first softens up your audience for any bad news to follow and furthers the goal of appearing fair and objective. Trying to settle a dispute by “beating up” each party with only negatives is an invitation to resistance.

- **When delivering bad news, externalize your predictions.** Rather than expressing a pessimistic assessment as your own view of what will happen (which might be read as your view of what *ought* to happen), blame the decision maker and commiserate. For example: “*Unfortunately, I think that the judge will probably not admit this letter into evidence. I think she’ll rule that it’s inadmissible hearsay.*”
- **Don’t evaluate unless you know what you’re talking about.** Although this should go without saying, many neutrals will — out of a desire to produce movement — venture into opinion areas in which they are guessing more than professing. If the main reason to evaluate in mediation is to help parties make more informed decisions, assessments ought to be grounded and accurate. If you are asked a substantive, procedural or evidentiary question to which you don’t know the answer or are not sure and the question is crucial to a party’s ability to decide on an important concession, try to make arrangements to obtain an answer by adjourning the mediation to do further research or by referring the question to a knowledgeable outside source.
- **Explain fully and don’t pull your punches.** However, if you *are* confident of your predictions and believe that the risks facing one or more parties are so substantial that a direct evaluative statement would be useful, don’t

67. This generalization must be qualified to take into account the fact that individuals have widely differing capacities to weigh and analyze complex arguments. Persons of average or greater intelligence are in general hard to persuade, but more likely to be persuaded by two-sided arguments. Less intelligent people are in general easier to persuade, but persuasive messages directed at them must be simpler to be understood. SIMONS, *supra* note 8, at 15-16, 37-38. Therefore, you must tailor your arguments to your audience.

undermine the effort by hedging unduly or giving a half-baked answer. Remember that direct language and explicit arguments and conclusions are persuasive.⁶⁸ Moreover, persuasion research into the use of fear to change behavior suggests that, instead of overwhelming or shutting down recipients' ability to process a message, an appeal that makes clear the seriousness and likelihood of a threat is far more likely to trigger a search for a solution than one that fails to do so.⁶⁹

It is also important to take the time to explain the rationale for your predictions fully so that the parties can understand and, hopefully, accept them. (Recall: reasons persuade.) In a legal matter, a full explanation of a mediator's prediction would include the rule on which it is based, why the disputed facts would call for applying this rule in this instance and, if the rule itself is questioned or resented, the reason or policy behind the rule. The credibility of the evaluation may be further enhanced by citing authoritative sources.⁷⁰ Equally important, a complete explanation of legal norms and their likely application to the situation can appeal to a disputant's sense of the fairness of the outcome that is predicted.

- Provide assurance that concessions will be productive. Even where an evaluative message has reached its target, it may not have persuasive effect unless the recipient thinks that a change in position will be efficacious. In a tough negotiation, parties who think the other side will not be receptive to a change in stance may resist making a next offer. In such situations, an evaluation is not likely to have an effect unless it includes some assurance from the mediator (perhaps gleaned from caucus discussions with the other side) that the contemplated move is likely to produce progress, if not end the conflict.⁷¹
- In rare situations, confront. Certain rare circumstances warrant bluntness. When a party is taking a stance or making a decision based on offensive views or patently wrong reasoning, the mediator ought to deal with such ideas carefully but directly, in caucus. ("Mr. Jenkins, you seem to have a conviction that people like Ms. Johnson can be refused the opportunity to rent units in your building, solely on the basis of their race. Where did you get that view from? . . . I see. Well, this is a society where each person is entitled to hold opinions as they wish. But I have to tell you that your views are incompatible with how the law regards housing opportunity and, based on my experience, I can assure you they will not prevail at the hearing. Moreover, if you persist in that stance, and given her reaction, I will have no recourse but to terminate the mediation.")

68. DANIEL O'KEEFE, *Justification Explicitness and Persuasive Effect: A Meta-Analytic Review of the Effects of Varying Support Articulation in Persuasive Messages*, 35 ARGUMENT. & ADVOC. 61 (1998) (23 investigations, 5,358 participants); DANIEL O'KEEFE, *Standpoint Explicitness and Persuasive Effect: A Meta-Analytic Review of the Effects of Varying Conclusion Articulation in Persuasive Messages*, 34 ARGUMENT. & ADVOC. 1 (1997) (32 investigations, 13,754 participants).

69. KIM WITTE & MIKE ALLEN, *A Meta-Analysis of Fear Appeals: Implications for Effective Public Health Campaigns*, 27 HEALTH ED. & BEHAV. 591 (2000).

70. WILLIAM L. BENOIT, *Forewarning and Persuasion*, in ALLEN & PREISS, *supra* note 38, at 149.

71. STARK & FRENKEL, *supra* note 12, at 53-54.

**FIDUCIARY/
AGING
MATERIALS**

FUNCTIONAL LEVELS OF DEMENTIA

Functional Levels of Dementia	Mild (MMSE 20-27, CDR 0.5-1)	Moderate (MMSE 19-11, CDR 1.5-2.5)	Severe (MMSE <10, CDR 3)
Memory and Orientation	Frequent forgetfulness of new information initially, and trouble keeping track of the date – may seem “inefficient” or inconsistently forgetful. Progresses to pervasive difficulty learning and remembering even important new information or events, and poor/spotty recall of details of well-known/old/personal information. Memory loss increasingly interferes with independence in everyday activities such as taking pills, feeding pets, paying bills.	Great difficulty learning and retaining new information; well-learned material may be inconsistently recalled and details may be fading or confused, e.g., forgets name of alma mater, major health conditions, whether relatives are living or dead. Can’t keep track of time, and may think it is some other period of their life; gradually loses details of place and personal history.	Only fragments of old memories remain; may recognize very familiar people, but not places
Reasoning and Judgement	Insight and self-awareness slip early in most types of dementia, affecting judgement. Difficulty thinking through alternatives or projecting outcomes of complex decisions or unfamiliar situations occurs fairly early and over time, even simple problems become difficulty – but without insight, the person doesn’t realize the decisions are bad.	Severe difficulty making informed medical, safety, and complex personal decision. Unable to logically problem-solve even slightly complex everyday situations.	No ability to problem-solve.
Behavior	Loss of motivation and poor initiative are common in most types of dementia. People may have generally diminished interest or reduced pleasure from once-loved activities, or may focus quite obsessively on a few areas of interest. Follow-through and the ability to complete multi-step tasks is seriously impaired.	A high proportion of dementia patients – Alzheimer’s and frontal especially – become increasingly restless in an aimless way. They may rummage through closets or drawers at all hours, or walk from one end of their residence to the other endlessly, as if unable to sit or lie down. This is a “normal” aspect of progressive dementia that should be accommodated if possible.	Simple activities and music may still briefly hold attention, but patients basically have very little goal-directed behavior.

FUNCTIONAL LEVELS OF DEMENTIA

Functional Levels of Dementia	Mild (MMSE 20-27, CDR 0.5-1)	Moderate (MMSE 19-11, CDR 1.5-2.5)	Severe (MMSE <10, CDR 3)
Communication	Mild word-finding problems may be noticed very early, followed by increasingly vague, non-specific communication – names and details are missing. Verbal knowledge networks begin to break down in both Alzheimer’s and front dementia. Repetitive questions or “cliché” statements become increasingly prevalent, as the “depth” of communication suffers. People may sound normal in brief, superficial conversations, but are unable to independently direct or sustain an involved discussion or conversation.	Communication becomes impoverished, with absent or incorrect content words. The ability to read, or to write coherently or legibly, becomes gradually more difficult. In frontal dementia, language may be far more severely affected than memory, leading to near-mutism in the moderated stages,	Overhead phrases may remain, or expletives, but the ability to converse is extremely limited. Eventually only repetitive babbling and few primitive phrases remain.
Relationships	Basic public social judgement is often well-maintained. Empathy is often lost along with insight. Mistrust of loved ones due to paranoid suspicions or misinterpretation of motives is very common and may lead to dementia patients switching alliance to people who seem “safe” or interested and supportive.	Superficial social presence may be preserved, but reduced self-censoring, complete loss of empathy, and impaired situational awareness decimate higher-level social abilities and social discernment. Patients are easily overwhelmed and confused or upset in busy social settings.	Unable to participate in normal social activities, ingrained social “niceties” (shaking a proffered hand, “Hello/Goodbye”) often remain but without context.

FUNCTIONAL LEVELS OF DEMENTIA

Functional Levels of Dementia	Mild (MMSE 20-27, CDR 0.5-1)	Moderate (MMSE 19-11, CDR 1.5-2.5)	Severe (MMSE <10, CDR 3)
Community	Patients have increasing difficulty participating in responsible or self-directed roles – jobs, volunteering, attending church services, roles in clubs or organization, etc. Driving or using public transportation can become problematic early on, and are unsafe as the mild stage progresses. Hobbies and intellectual interests become simpler and are eventually dropped. Depending on social skills, the person may seem “normal” on casual interaction.	The person is not able to function independently or usefully in responsible roles although may maintain peripheral engagement (e.g. church, clubs). May still go out to small public or family events with supervision.	No meaningful role in responsible activities; rarely attends public events or large family affairs and if so, requires 1:1 supervision.
Financial and Home	Patients become very susceptible to scams and influence. Ability to manage routine finances goes from bothersome to very difficult, e.g. paying bills, online or ATM banking, etc. Complex finances, taxes, insurance paperwork become unmanageable over progression of mild dementia. Upkeep of the home, especially maintenance slips; laundry, dishes, and similar repetitive duties may pile up or be done poorly. Pet care gradually becomes unacceptable.	Patients are highly susceptible to exploitation and fraud. Even simple financial transactions like paying correctly or counting change when shopping or filling out a check are increasingly difficult. Home upkeep and cleanliness are severely impaired.	Only the most routinized “make-work” chores are possible, like folding towels.
Personal Care	Personal cleanliness goes from normal to mildly reduced; may forget to change clothes for several days, and may bathe less and less frequently. Small details of grooming often slide, such as toenails, tooth brushing. Occasional bladder incontinence may occur due to illness or unfamiliar settings.	Prompting/reminders or active assistance may be necessary to encourage to hygiene and grooming. Many dementia patients show an actual fear of running water in showers and tubs, insisting on only an occasional sponge bath. Bladder incontinence due to confusion becomes more likely.	Requires total help of guidance with all aspects of personal care.

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Functional Levels of Dementia	Mild (MMSE 20-27, CDR 0.5-1)	Moderate (MMSE 19-11, CDR 1.5-2.5)	Severe (MMSE <10, CDR 3)
Psychiatric	Anxiety, irritability, and suspiciousness are common, transient or fixed irrational ideas and delusions (usually paranoid) are fairly common. Early depression often gives way to apathy. In frontal dementia, manic mood swings, sociopathy, and obsessive-compulsive behavior are common, parkinsonian dementias often show striking hallucinations and paranoid irritability or severe depression.	At this stage, dementia patients tend to be apathetic or anxious, any combative or agitated behavior is usually due to discomfort or fear. Delusions and hallucinations are common.	Patients are so disorganized and often unable to communicate well enough to discern psychiatric symptoms other than basic emotional reactions.
Health	Appetite may increase, decrease, or certain foods may be preferred or avoided as sense of smell and taste change. Sleep becomes shallower and less restful, although a somewhat normal day-night cycle is usually still present. Sundowning, or time-sensitive increased confusion and agitation, may emerge, although it can happen at any time of day.	Pacing does burn calories, and getting moderately-advanced patients to eat “normal” meals is very difficult, so weight loss and dehydration are real concerns. Reversal or complete disruption or normal sleep cycles is very common over time, which is exhausting to caregivers.	Nutrition and hydration become constant problems for caregivers, as dementia patients may be incapable of seeking out edible food or water. Sleep cycle is usually extremely disorganized and sleep is not restful.

NOTES

**CERTIFICATE
OF
ATTENDANCE**

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Sponsor:	<i>Arizona Supreme Court Administrative Office of the Courts Education Services Division</i>
Course Title:	<i>Probate ADR Conference</i>
Course Location:	<i>Sheraton Crescent Hotel Phoenix, Arizona</i>
Course Date(s):	<i>December 10-11, 2015</i>
Total Credit Hours:	<i>11.75</i>

This program satisfies ACJA §1-302 requirements for completion of Ethics, Arizona Court System, and Working and Communicating with Others

Dated 11th day of December, 2015

Jill W. Brund

Sponsor's Signature

CERTIFICATION OF PARTICIPANT

I, _____, certify I attended
_____ hours of the 2015 Probate ADR Conference.

Date _____

Participant's Signature

Please return to your local organization or training coordinator

