MEDIATION TIPS AND ARBITRATION BITS

By Alan R Berkowitz

Alan R. Berkowitz is a mediator with Judicate West, specializing in individual and class action cases. He has resolved hundreds of cases involving all types of employment matters, including wage and hour class actions and PAGA claims, many of which resulted in seven-to-eight-figure settlements. Before retiring from the practice of law to become a full-time mediator, he was a partner with Bingham McCutchen, managing partner with Schachter Kristoff Orenstein and Berkowitz, and Regional Attorney at the NLRB, Region 32. He has tried over 50 cases in state and federal courts and administrative agencies on behalf of both defendants and plaintiffs.

MEDIATION BRIEFS REDUX

In the November 2020 issue of the *Law Review,* this column urged parties to exchange mediation briefs to maximize the chances of a successful mediation outcome. This column addresses the form and content of mediation briefs in individual labor and employment cases from this mediator's point of view.

In many, but certainly not all, individual cases the parties extensively argue the facts and law with respect to liability but pay little attention to damages—the key issue that will drive the settlement negotiations. For example, lost wages and benefits form the basis of most special damage claims and are often straightforward and uncontroversial. But not always. Entitlement to bonuses, stock options, commissions, and deferred compensation are "big ticket" damages that can be complicated and are commonly contested. If these damages are part of a case, they should be addressed by both the plaintiff and the defense in their mediation briefs, particularly in cases that are early in discovery, before both sides have a common understanding of the facts. Legal and factual issues related to the plaintiff's entitlement to compensation for loss of these benefits can best be argued in the briefs. Setting up these issues in the briefs allows the parties to educate themselves on the relevant facts and law. Introducing the discussion for the first time at the mediation may find one of the parties unprepared to respond or relying on misinformation.

Emotional distress damages frequently form the basis for a large portion of a plaintiff's settlement demand, yet often scant attention is paid to the factual basis for the claim. Supportive medical records are rarely produced and defendant's request for medical records or demands for an independent medical/mental examination are regularly resisted. Too frequently,

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emotional distress damages are responsible for substantial gaps in the parties' settlement positions. It is respectfully submitted that a plaintiff intending to insist on high tens of thousands, to hundreds of thousand dollars in emotional distress damages, show in factual detail in its mediation brief why they will likely be awarded substantial compensatory damages by a jury. And conversely, defendant should set forth its arguments as to why high emotional distress damages are unlikely.

The important question of mitigation is often treated as an afterthought. If it is a serious issue in a particular case, it should receive serious attention in the mediation briefs. If not, it is not likely to have much sway in the settlement negotiations. Factual and legal issues abound with respect to interim employment. How long can a plaintiff hold out for comparable interim employment, and when must they lower their expectations and seek lesser employment? Under what circumstances does the loss of a replacement job re-start the backpay clock? Can a plaintiff satisfy their mitigation obligation by trying to start a business in which they make little or no money, particularly when comparable employment opportunities are available? Obviously, these issues are not present in many cases, nor are they all the potential mitigation issues that may arise. But when they are, they should be adequately briefed to have any traction in the mediation.

Finally, mediations are not summary judgment proceedings. Factual statements in a mediation brief should be true, but it is not necessary to attach hundreds of pages of transcripts, exhibits, or pleadings to the briefs to support every fact asserted. Be judicious. State the facts that you believe the evidence supports. On key matters, quote from a deposition or document when appropriate and be prepared to produce the actual evidence if and when necessary. Contested factual and legal issues will quickly become clear and at that point supporting testimony and documents can be produced. Of course, key documents and testimony can certainly strengthen an argument in a brief and can be used to great effect when used sparingly and strategically. In sum, spare a tree when you can. Make your "brief" brief and persuasive.

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ARBITRATION / FINRA

Laver v. Credit Suisse Sec. (USA), LLC, 976 F.3d 841 (9th Cir. 2020)

Christopher Laver worked as a financial advisor at Credit Suisse Securities, USA (CSSU) until his termination as a result of a merger. He brought a putative class action alleging that he and other similarly situated employees

were owed deferred compensation. CSSU moved to dismiss based on an arbitration clause and class action waiver in an Employee Dispute Resolution Program (EDRP). The U.S. District Court granted the motion. On appeal, the Ninth Circuit Court of Appeals affirmed the district court's ruling.

The court rejected Laver's argument that the rules of the Financial Industry Regulatory Authority (FINRA), of which CSSU was a member, barred CSSU from compelling arbitration. The EDRP contained a provision compelling arbitration of all employment disputes and a separate provision waiving the right to act as a class representative or a member of a class in any action against CSSU. FINRA Rule 13204(a) provides that class action claims may not be arbitrated.

The key holding of the court is that class action waivers and agreements to arbitrate are conceptually different, even though contained in the same agreement. A class action waiver is a promise to forgo a procedural right to pursue class claims, whereas an agreement to arbitrate is a promise to have a dispute heard in a forum other than court. FINRA Rule 13204 applies only to the arbitration provision by prohibiting class action arbitrations.

The court pointed out that CSSU was not seeking to arbitrate the class action brought by Laver, which would be prohibited by the FINRA rule. To the contrary, CSSU moved to dismiss the class action based on the class action waiver and to compel arbitration of Laver's individual claim. The court rejected Laver's contention that where a class waiver is included in an arbitration agreement the FINRA rule's prohibition on enforcing class action arbitration also bars CSSU from enforcing the class action waiver.

The court also rejected Laver's second argument, that FINRA Rule 13204 bars a class action waiver regardless of whether it appears in an arbitration agreement. To prevail, Laver must show that the FINRA rule has the force of a "congressional command" that overrides the Federal Arbitration Act's (FAA) 9 U.S.C. § 9 requirement that arbitration agreements must be enforced as written. The court analyzed this contention under the U.S. Supreme Court's rationale in *EPIC Sys. Corp. v. Lewis*.[1] *Epic* held that "a party seeking to suggest that two statutes cannot be harmonized, and that one displaces the other, bears the heavy burden of showing 'a clearly expressed congressional intention that such result should follow.'"[2] The court held that even assuming Rule 13204 qualifies as a congressional command, it does not bar class waivers such that it displaces the FAA's instruction that arbitration agreements must be enforced according to their terms. The FINRA rule does not prohibit or even mention class waivers. Thus, the rule does not present a clear prohibition on class waivers which would be contrary to the EDRP. Therefore, FINRA Rule 13204 does not

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invalidate the EDRP class action waiver and accordingly does not interfere with the FAA's instruction to enforce arbitration agreements according to their terms.

In sum, the court held that the FINRA rule did not invalidate the EDRP's class waiver. Laver is therefore left with only his individual claim, which he must arbitrate.

ARBITRATION / PAGA

Provost v. YourMechanic, Inc., 55 Cal. App. 5th 982 (2020)

Jonathan Provost brought a representative action under the Private Attorneys General Act of 2004 (PAGA), alleging various Labor Code violations by YourMechanic (the Company). The complaint, on behalf of Provost and other "aggrieved employees," sought civil penalties under PAGA for failure to pay wages in a timely manner, overtime, failure to pay for all hours worked, minimum wage violations, failure to provide accurate wage statements, and failure to reimburse business expenses. Significantly, the complaint further alleged that YourMechanic willfully misclassified Provost and other "aggrieved employees" as independent contractors.

YourMechanic moved to compel arbitration under the terms of a pre-dispute arbitration agreement that Provost had signed. The arbitration agreement contained a class action and representative action waiver. The Company made two primary arguments in support of its motion to compel arbitration. First, it argued that whether Provost had standing to bring a PAGA action as an "aggrieved employee" within the meaning of Labor Code § 2699(c) was a threshold question to a PAGA suit that had to be determined in arbitration. Second, YourMechanic argued that the California Supreme Court's decision in *Iskanian v. CLS Transp. Los Angeles, LLC,*[3] which held that PAGA actions are not subject to mandatory arbitration, has been implicitly overruled by the recent United States Supreme Court decision in *Epic Systems Corp. v. Lewis*.[4] The court of appeal rejected both of the Company's arguments.

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Initially, the court reviewed the now well-established principle that a PAGA claim is "fundamentally a law enforcement action designed to protect the public interest"[5] and not a dispute between an employer and employee arising out of their contractual relationship. The court then held that a PAGA action "cannot be split into an arbitrable 'individual claim' and a nonarbitrable representative claim," citing *Williams v. Superior Court*.[6] Further, the court noted that other courts have followed *Williams* in

deciding that PAGA actions are not divisible into separate arbitrable individual claims and nonarbitrable representative components in order to determine whether a plaintiff is an "aggrieved employee." *See Perez v. U-Haul Co. of Cal.*[7]

In its analysis of this case, the court found that the recent California Supreme Court decision in *Kim v. Reins Int'l Cal., Inc.*[8] compelled a similar result. In Kim, the supreme court held that the plaintiff remained an "aggrieved employee" with standing to sue under PAGA despite settling his individual claims for Labor Code violations. The *Kim* court also cited *Perez* with approval for the proposition that standing in PAGA cases is not dependent on the maintenance of an individual action, because there is no claim for individual relief. Indeed, in this regard the court noted that in the instant case, Provost's misclassification claim could only be brought as a PAGA action, because there is no private right of action to pursue this Labor Code violation.

In sum, the court of appeal concluded, "It would defy logic to require Provost to arbitrate the issue of whether he was an independent contractor or employee . . . when he and others similarly situated to him are only able to obtain any relief under this statute in a nonarbitrable PAGA action."

Finally, the court reaffirmed its analysis and decision in *Correia v. NB Baker Elec., Inc.,*[9] that *Epic Systems Corp. v. Lewis* did not overrule *Iskanian*. In this regard, the court noted that the California Supreme Court had reaffirmed *Iskanian* in several cases since *Epic* was decided.

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Notes:

[1.] 138 S. Ct. 1612 (2018).

[2.] *Id.* at 1624.

[3.] 59 Cal. 4th 348 (2014).

[4.] 138 S. Ct. 1612 (2018).

[5.] *Iskanian,* 59 Cal. 4th at 387.

[6.] 237 Cal. App. 4th 642 (2015).

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[7.] 3 Cal. App. 5th 408 (2016).

[8.] 9 Cal. 5th 73 (2020).

[9.] 32 Cal. App. 5th 602 (2019).

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