



ARIZONA ADR FORUM

SUMMER 2021

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chair's column
GREG GILLIS

SAVE ONE

*Whatever you do won't be enough;
I heard them say: Try anyway.*

Excerpt From *A Promised Land* by Barack Obama

This quote reminded me of the story about the little boy throwing star fishes on the beach back into the sea. An old man asked the boy what he was doing because he couldn't possibly save all the beached starfishes. The boy responded "maybe not, but I can save this one".

Maybe we should all try to "save just one". We are lawyers. Our profession is to right wrongs. Don't let yourself become jaded by years of practice. Consciously choose to save one. Speak up when you see or hear injustice. The Bible tells us: to "do justly and to love mercy". (Micah 6:8) Similar advice is found in other religious texts. It seems across religious faiths our combined goal, especially as lawyers, is to seek justice.



The ADR Section, like the State Bar in general, is focusing on how we can seek to better understand each other. In future columns you will read how your Executive Council is trying to seek justice, diversity, equity and inclusion for our Section as we strive for common ground.

Please feel free to contact me with any of your stories, thoughts, ideas or comments at greg.gillis@sackstierney.com. I am willing to listen and try to understand. After all, isn't that what makes us all better lawyers and neutrals?

It may not be easy and we may not always agree about how to do it, but let's have those difficult discussions. Let's try to "save one" or many this year!

Greg Gillis Chair – ADR Section



EDITOR | JEREMY M. GOODMAN

We welcome comments about this newsletter and invite you to suggest topics or submit an article for consideration. Email the Editor, Jeremy M. Goodman at jeremy@goodmanlawpllc.com.

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I'VE BEEN READING¹

BY MICHELE M. FEENEY

When I started law school, in 1980, my law school class was almost thirty percent female.

The firm I joined after graduation, however, was all male. Later, when I became a partner, I was the first female partner. Then, the first pregnant lawyer/partner, and so on. When I left the litigation practice in 2000 to start an ADR practice, I was in the minority again. The ADR field seemed dominated by retired judges, mostly male, and mostly white (like me).

I remember my first professional work outfit—a little man-styled navy suit with padded shoulders. The suit had a skirt in place of pants. I had a few floppy silk bow ties I alternated—they were my stand-ins for the guys' traditional ties. I carried a squared-off cordovan-colored leather briefcase, which I had specifically requested as my law school graduation gift. The suit and briefcase were metaphors for my new identity, unfamiliar and somewhat uncomfortable. But, other than being mystified that the dry cleaners charged twice as much to launder and press my cotton-shirts-with-darts as they did my husband's button-downs, I don't recall objecting to any of it.

Not for almost forty years.

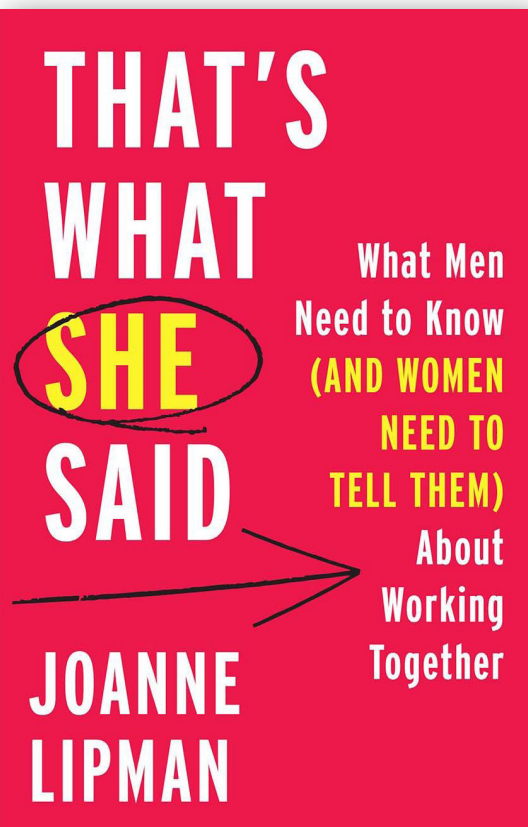
I have always just wanted to succeed. I was happy to borrow whatever skills I could assimilate from my male counterparts, never once considering that perhaps I had uniquely female skills (if there are such things) that would enhance my litigation or ADR skills.

My reading this summer is themed to untangle the mystery above—to what extent are my skills comparable to the skills all lawyers, regardless of gender, require? More interesting, to what extent are the gifts my sisters and I bring to the ADR profession valuable in their own right?

The most provocative books on my desk this summer, related to these queries, are, *That's What She Said: What Men and Women Need to Know about Working Together*, by Joanne Lipman, *Think Again*, by Adam Grant (especially Chapter Five, entitled "Dances with Foes: How to Win Debates and Influence People"), and *Brave, Not Perfect*, by Reshma Saujani.

Considered together, the three books form an arc; Lipman defines the sometimes disappointing landscape we still face, Grant endorses a new approach to negotiation, and Saujani encourages us to forge ahead. (Saujani's message is especially encouraging to me; I love my ADR practice.)

Lipman calls out the behaviors that cripple women in the work force, even the high heels—not kidding—along with the other time-consuming and expensive grooming that is over-valued in female versus male employees. She talks about female's pleasing behaviors—wording statements as questions, or allowing one's voice to "uptick" at the end of a thought to make even statements sound like questions. She provides data to support the premise that women have a very difficult time owning their fair share of the real estate in a dialogue, at least until they outnumber the males in the group. (In a mixed group, research shows women talk far less than their male counterparts.) She discusses the bumpy path to respect for women, both with men and other women. She provides data to show women are less likely to ask for a raise, leaving employers more vulnerable to competitors who offer a fair salary to a valued female



employee. She concludes with the premise that just because men, especially white men, have never had to think or talk about gender much before doesn't mean it isn't an important topic today.

Oh, and Lipman also believes that diversity training doesn't work. She argues the capsule-style meetings are resented and soon forgotten. Instead, she favors a more granular approach—careful analysis of how many times law school professors call on female students versus males; whether women in a mixed-group meeting fare better if they agree ahead of time to vocally support one another's ideas; and, do we all account for our own everyday behaviors in the work place, such as recommending female peers for arbitration panels as often as we recommend males, or at least a respectful percentage of the time.

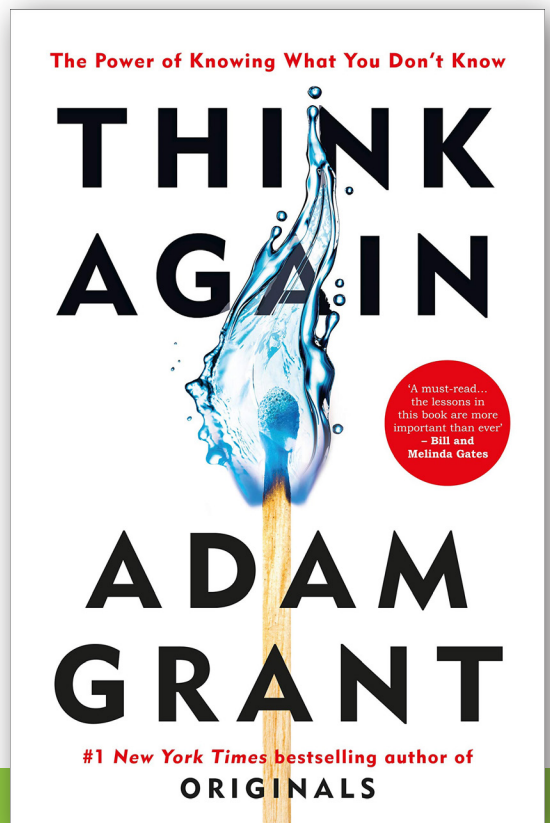
One likes to think this focus is no longer necessary; I like to think that over the course of my almost forty-year career, things have changed. Then, as recently as last week, I called a law firm and the person answering the phone, after I'd given my name, the name of the lawyer I was calling, and the case name, asked, "Who are you with?" This is code for, "Who is your boss?" I (sweetly) responded, "I'm the mediator." There is no benefit to "schooling" the person answering the phone. Still, I wish that firm leadership would ask that employees at all levels refrain from guessing the role of a person based on the tone/timbre of voice. In that moment, last week, I felt nothing had changed—it was like the old days, when I was often asked whether I was the court reporter when I announced myself before a deposition. Then, it was my appearance that led to assumptions about my role.

Based on my camaraderie with other female ADR practitioners, I expect that we could all come up with our own question/variation of this kind of story (the proper term may be microaggression). Some of the questions I have heard are: (1) why is it that male ADR professionals do not routinely self-assess to make sure their arbitration panels include some diverse candidates, including female candidates? (2) Is there an unspoken bias that older, male attorneys, often associated with large firms with long established networks, are better suited to high dollar or complex matters, and, if so, why? and (3) Are clients applying their internal diversity policies to the selection of ADR professionals?

The Adam Grant book covers many topics, and well, but the one chapter of particular interest to me, and my ADR peers, is the one about negotiation. Grant asks us to "Think Again" about the most productive styles of negotiation. Grant describes an interesting experiment between two debaters (which I will not describe in detail for fear of spoiling the surprise in the chapter), then concludes:

When trying to persuade people, we frequently take an adversarial approach. Instead of opening their minds, we effectively shut them down or rile them up. They play defense by putting up a shield, play offense by preaching their perspectives and prosecuting ours, or play politics by telling us what we want to hear without changing what they actually think (Grant, 102).

Grant then terms the negotiators who use the style above as "logic bullies." He likens them to preachers and prosecutors. He recommends, instead, focusing on agreeing with opponents whenever possible—it's disarming. He recommends



I'VE BEEN READING

focusing only on one's most important points. In other words, not batting at everything. He says, "[a] weak argument usually dilutes a strong one...The more reasons we put on the table, the easier it is for people to disregard the shakiest one...[then] easily dismiss our entire case" (Grant, 105). He further recommends that negotiators avoid going into offense or defense mode. Finally, he recommends that negotiators frame a good percentage of their points as questions, rather than statements. A suggested form is, "So you don't see any merit in this proposal [your opponent's point of view] at all?" Based on research, Grant observes that high levels of humility and curiosity in negotiators correlate with better outcomes.

Speaking only for myself, Grant's points ring true. I am not sure whether it's the chicken or the egg—either the strategies he recommends were always part of my DNA, or they are the strategies I (and perhaps other women) have adopted to persist in the professional arena, or both. Grant's points were good reminders, but the points seemed obvious, at least to me. The points affirmed my current style, the one that became my norm as that little blue suit become less and less relevant.

The Saujani book is an encouraging one, with more of a path forward than the other two books in navigating the differences in the way men and women approach the workplace. Saujani encourages women to abandon the desire for perfection and pleasing in favor of creativity and confidence. She calls out the desire of "good girls" to find a recipe for advancement and follow it to the teaspoon—there is no recipe for brave women, she asserts. Particularly in the world of ADR, her advice is helpful. In mediation, I have found one must try many strategies to finally find the most effective path forward. Often, success has to do with persistence as much as substance. In arbitration, even on a panel, there is no decision-maker other than oneself. Even

more generally, being a good lawyer is about taking a position, developing a strategy, and persisting—not skills common to the timid among us.

On a personal level, Saujani's book reminded me of when I decided to start my ADR practice in 2000. That summer, I read a book called *The Price of Motherhood: Why the Most Important Job in the World is Still the Least Valued*, by Ann Crittenden. I knew full-time litigation was not an option for me at that point but realized motherhood was not my full-time vocation either. ADR was the only option I could think of that would allow me to use my toolbox, and manage my life, including my large family. When I started the practice, I felt both terrified and audacious. Why would anyone hire me? (Leave aside that I'd been litigating for almost twenty years, had attended many mediations, and had taken the appropriate courses.) Then, when I decided ten years later to leave a firm environment to go out on my own, I was apprehensive again. How would I manage without the infrastructure and support of a large firm?

Early on in my career, the phone call earlier this week, or being mistaken for a court reporter, would have rattled me. My knowledge that I was capable, even gifted in my own unique ways, was not secure. Happily, I eased into and built a practice that fit my skills and that I came to love; I developed more confidence over time.

Saujani would argue that more girls and women need to be encouraged to make decisions similar to mine, specifically to develop their own practices and even forge out on their own, with less heartburn and less self-doubt—in other words, to be brave, not perfect. Saujani would probably have encouraged me to take more risks earlier, with less experience, pointing to the confidence my male counterparts, even those demonstrably less qualified, exhibit in undertaking and accepting challenges. She certainly would encourage me to self-correct whenever a casual comment or mistaken impression undermined my sense of competence. ^{ADR}

¹ Maria Shriver, one of my favorite public figures, authored a book titled, *I've Been Thinking: Reflections, Prayers and Meditations for a Meaningful Life*. Being an avid reader, I borrowed and revised Maria's title for this article.



gender pronouns

BY ELENA NETHERS, DIRECTOR OF DIVERSITY, EQUITY AND INCLUSION, STATE BAR OF ARIZONA



By now I think most of us have seen pronouns in people's email signatures and social media bios. It's not uncommon but it's far from widespread. I include pronouns in my email signature and I've noticed more pronouns popping up in emails that I receive.


I've never been questioned about my gender identity. Everyone I interact with knows what my pronouns are. So why do I have pronouns in my email signature?

Adding my pronouns helps normalize discussions on how we and others like to be referred to. Not every transgender or nonbinary person feels comfortable enough to start sharing gender pronouns, especially if there aren't many others who do. By adding my pronouns, I'm helping to normalize pronoun sharing.

There's also a practical side. You can't assume someone's gender by their name or just by looking at them. In an email it's unclear if Alex, Jaime and Sam identify as male, female or another gender. Knowing and using someone's pronouns is a positive way to support trans

and non-binary individuals.

In the US today, there are an estimated 1.4 million transgender Americans, and one in three adults (ages 18-29) know someone who uses gender-neutral pronouns. About four-in-ten Americans (42%) say forms or online profiles should include options other than "man" and "woman" for people who don't identify as either. These demographic trends show the need for identifying pronouns is likely to increase.

Adding a pronoun line is a relatively minor tweak and an easy way to send a message of inclusion. It can also help make clients, colleagues and employees with diverse gender identities and gender expressions more comfortable in identifying their pronouns to you. 

DID YOU KNOW?

About one-in-five (18%) of Americans say they personally know someone who prefers a pronoun other than "he" or "she".

One third (32%) of Gen Z'ers know someone who prefers that others use a gender-neutral pronoun when referring to them.

Overall, six-in-ten Americans (60%) say they have heard at least a little about people referring that others use gender neutral pronouns.

Source: *Pew Research*

www.pewresearch.org/fact-tank/2019/09/05/gender-neutral-pronouns

www.pewresearch.org/fact-tank/2019/12/18/gender-options-on-forms-or-online-profiles

PRONOUNS

There are many different sets of gender pronouns someone might use. The three traditional ones remain the most common:

He/him/his: used for someone who says they identify as male or masculine.

She/her/hers: used for someone who says they identify as female or feminine.

They/them/theirs: used for someone who doesn't identify with female nor male pronouns. These pronouns are generally regarded as gender-neutral and are used in the singular form.

Helpful chart of pronouns:

www.diversitycenterneo.org/about-us/pronouns

These are not preferred pronouns. They just are their pronouns.



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Elena earned her B.A. from Newcomb College of Tulane University and her J.D. from Washington University in St. Louis.

THERE IS NO DOUBT - WE ARE LIVING IN TURBULENT TIMES. A PERSISTENT QUESTION IS THE DIVERSITY AND INCLUSIVENESS OF OUR SOCIETY. THIS HOTLY DEBATED TOPIC IS BEING DISCUSSED IN ALL CORNERS OF OUR COUNTRY AND THE LEGAL PROFESSION IS NO EXCEPTION.

More recently, the legal community has been under the microscope as diversity within firms becomes a priority. As a result, law firms are working to embrace people of all colors, genders and sexual orientations. A great example of this is the Mansfield Rule, an initiative developed by the Diversity Lab, an incubator focused on diversity and inclusion issues in the legal industry, which sets a goal for firms to actively consider diverse candidates for at least 30% of open leadership and governance roles.

Not only is a focus on diversity the “right thing” to do, but it also creates a competitive advantage. More diverse firms are able to capture more large clients, who are increasingly sensitive to the diversity of their outside counsel. Correspondingly, retaining more diverse firms allows those clients to realize their own business goals and leverage diverse perspectives on their legal matters.

A similar advantage can be gained by improving the diversity within the alternative dispute resolution (ADR) field, as this has become an increasingly popular avenue for resolving business disputes. Corporate law departments have an opportunity to consider the diversity of ADR providers in order to further extend the merits and benefits of diversity, which they have already acknowledged through numerous studies. Within the past year, a high profile dispute involving a celebrity put a

spotlight on the value, including risk mitigation, of considering diversity in ADR.

The ADR community has responded positively to this increased focus, as more and more providers are working to improve the diversity of their slate of arbitrators and mediators. While progress has been made, much more needs to be done across the industry and throughout the legal profession - as well as in the corporate world.

ADR CAN PLAY A CRUCIAL ROLE IN CSR

Many companies are placing a greater emphasis on corporate social responsibility (CSR) out of a desire to become better corporate citizens and to meet the demands of increasingly vocal customers. These CSR efforts are reaching out across the supply chain to include vendors, suppliers and all manner of business partners. The diversity of outside counsel is certainly an area where corporations are looking to advance their CSR objectives.

ADR represents an opportunity to take that focus one step further. By utilizing a diverse list of mediators and arbitrators, law firms have an opportunity to demonstrate their commitment to their clients’ CSR principles, which in turn strengthens the value they bring to the relationship. Another invaluable tool is an inclusion rider. Last year, JAMS introduced its inclusion rider, which encourages parties to consider

diversity when choosing an arbitrator or panel of arbitrators. It contains language that parties can include in their arbitration contract that will request administering institutions to include a fair representation of diverse candidates on the list of potential arbitrator appointees.

Law firms can recommend an inclusion rider to corporate clients to further bolster diversity and inclusion programs as part of a larger CSR strategy. "It's important to note that the lawyers who are drafting arbitration contracts, as well as the litigators and clients, all play a role in who ultimately gets selected for cases," explained Kimberly Taylor, Senior Vice President, Chief Legal and Operating Officer for JAMS. "These are the folks who have an opportunity to help ensure diversity in the ADR process. By incorporating an inclusion rider, they can further the important goal of having a diverse slate of arbitrators that fully reflect the client community."

THE TIME TO DO MORE IS NOW

JAMS takes pride in being one of the first ADR providers to take the Equal Representation in Arbitration Pledge. This pledge seeks to increase the number of women appointed as arbitrators, with the ultimate goal of full parity. JAMS sponsors and partners with diverse national bar associations such as the National LGBT Bar Association, National Asian Pacific American Bar Association, National Bar Association, Hispanic National Bar Association, and National Association of Women Lawyers, as well as numerous diverse local bar associations. We have an active, cross-functional Diversity Committee who meets regularly to discuss goals, implement strategies that accelerate progress, and increase diversity and inclusion across JAMS and throughout the ADR industry.

Nearly everyone understands the importance of diversity in the legal industry, but it is only

through collective actions that real change will occur. It's time for all stakeholders to take bold steps to make diversity and inclusion a priority. We know we can do more and we are continuing to focus on this important area of our business. We encourage the rest of the legal community to do the same. But real change needs to be systemic.

"We've made progress on the road toward inclusivity and diversity in the legal profession, but we still have quite a ways to go," concluded Chris Poole, President and CEO for JAMS. "Cultural change is never easy, but so long as all stakeholders in the process embrace the importance of diversity in the industry and work together to encourage qualified individuals from the judiciary and law firms to enter into the ADR field where they can then be selected as a neutral, I think we can achieve our objectives."

Clearly, greater diversity in the legal profession is needed. This is not a strictly altruistic call to action. Diversity is also good for business. It helps to advance firms' corporate goals, foster a positive working environment, ensure diverse perspectives and strengthen the values that are the bedrock of our profession. The time to do more is now.



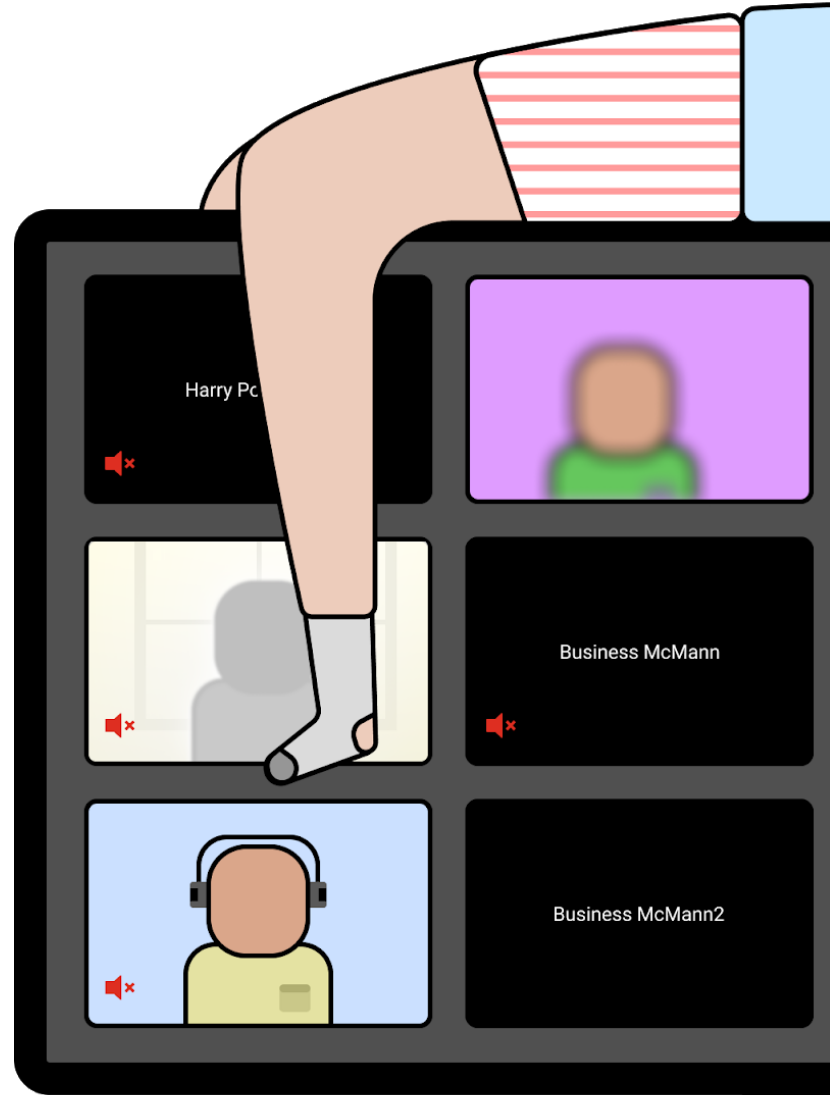
MARK SMALLS

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Mark Smalls oversees marketing and communications strategy globally and provides leadership to the managers tasked with business development responsibilities. His extensive marketing background includes advertising, branding, market research, public relations, website development and online marketing. Smalls also currently chairs the JAMS Diversity Committee and serves on the JAMS Foundation board. The JAMS Foundation is the largest and most long-standing private funder of conflict prevention and dispute resolution initiatives in the U.S. and around the world.

IMPLICIT COMMUNICATION AND ZOOM FATIGUE:

Zoom as a Cool Medium and Some
Techniques to Make it a Warmer, Less
Taxing, and More Effective ADR Tool

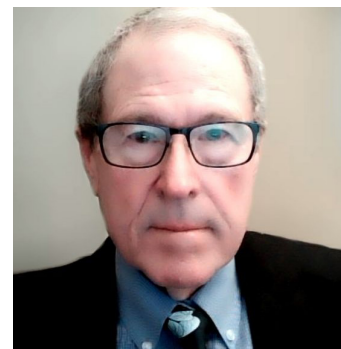
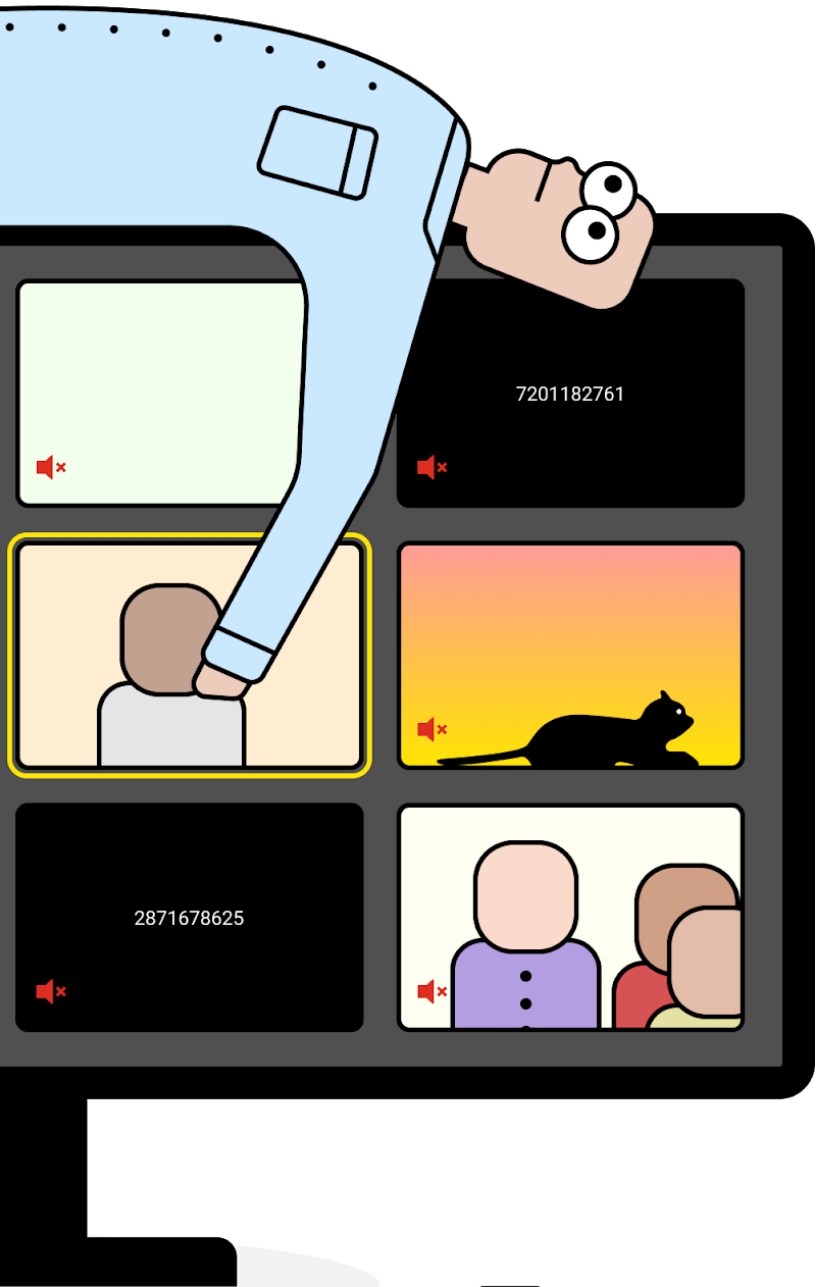


BY LEE L. BLACKMAN



“Zoom Fatigue” is more than being tired of using Zoom. It’s more than not getting out. It’s a function of several related issues, and it’s especially prevalent when using Zoom for alternative dispute resolution sessions. And within ADR, Zoom fatigue has its worst impact in mediations.

Central to the discussion of Zoom effectiveness and Zoom Fatigue is the role of implicit messages – facial expressions, postures, movements, gestures, voice tone, and other nonverbal context – in successfully communicating emotions, attitudes, and trustworthiness. The importance of silent messages in videoconference mediations and arbitrations, the added energy required to decode such messages in the Zoom context, and strategies to minimize fatigue and optimize videoconference ADR are the focus of this paper.



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Before becoming a mediator, Mr. Blackman was a litigation partner at McDermott, Will & Emery. He is a member of the State Bar of Arizona’s Alternative Dispute Section Executive Council, a vice-chair of the Angeles County Bar Association’s Attorney Client Mediation and Arbitration Service, and a member of several mediation panels. He received his J.D. from the University of Southern California, where he was a member of the *Southern California Law Review*.



BACKGROUND

Many of us are familiar with what has been called the “Uneven Triad of Communication”. The concept is particularly attributed to research and writings of Albert Mehrabian dealing with nonverbal communication – sometimes called implicit communication. *Silent Messages: Implicit Communication of Emotions and Attitudes*, Wadsworth Pub Co; 2nd edition (June 1, 1980). (<https://amzn.to/3xr0JOo>).

Nonverbal or implicit communication refers to the collection of ways we

signal and emphasize our meaning, attitudes, sincerity, confidence, and trustworthiness (intentionally or unintentionally) through body movements, facial expressions, eye gaze, postures, and gestures; through appearance; through audible but not verbal signals, including volume, tone, inflection, pitch, breathing, and sighs; and through visual images and artifacts, including backgrounds, objects in view, and extrinsic sounds.

Long before the days of videoconferences, Mehrabian concluded that *in communicating emotions, attitudes, and credibility or trustworthiness, 93% of our message comes from nonverbal or implied signals*. Albert Mehrabian, “*Silent Messages*” – *A Primer of Nonverbal Communication (Body Language) for the General Audience*. (www.kaaj.com/psych/smorder.html). This means that in mediations and arbitrations – where attitude, intent, emotions, credibility, and persuasiveness are essential components of persuasion and effective participation – it is not so much words, but the context, that must be deciphered.

continued ➤



In understanding the impact of Zoom on the effectiveness of communication in mediations and arbitrations using Zoom, also consider the nature of the medium.

Some of us remember Marshall McLuhan, a Canadian philosopher, who became a popular icon of media and culture for his exploration of the connection between media and messages. His book, *Understanding Media: The Extensions of Man* (1964) (<https://amzn.to/3AfLLwI>), posits the view that the media we use profoundly influence our communication. There are, he contended, “hot” and “cool” media.

Hot Media clearly and engagingly supply all of the inputs needed for full understanding of the messages being communicated: words are spoken clearly, including nuances of volume, tone, timber, and emotion; visual engagement includes clear images, full motion, and shades of color; audio and video context (body language, breathing and sighs, facial expressions,



gestures, leanings in or out, tics, and tells) is also present; symbols and simplifications (graphs, charts, captioning where necessary, memes, and the like are also planned and effectively used. Think of a dark theater, a large clear screen, a story

told in chronological order leading to an image of a huge white shark, a serviceable fishing boat, and a shocked police chief muttering: “You’re gonna need a bigger boat.”

Cool Media, on the other hand, require extra effort to capture meaning. The effort comes from filling in blanks and reconciling ambiguity and distraction inherent in a less than “hot” medium. McLuhan considered television a cool medium because the images (especially in the 1960s and 70s) were small and fuzzy, and the environment was distracting and intensity-draining (the room was full of other things inviting interest and the viewer could easily walk away or tune out). Pixilation of images also required the mind to supply the data missing between picture elements. Simply stated, the viewer has to work much harder to envision what the reality would look and sound like than was the case with a motion picture. Television had, and even today must, rely more on the viewer to render the images and emotions that are not altogether present.

Zoom, of course, is a lot more like television than a motion picture. But it’s also a lot cooler than TV. Consider all of the ways Zoom is a made more challenging: poor image quality, bad backlighting, distracting virtual or actual backgrounds, small screens, external distractions (pets, ambulances, weedwhackers), digital audio with drops and gaps, latency, inattention to speaking into the microphone, misplaced microphones, failures to enunciate, speaking sotto voce, screen sharing of unreadably small images, the technical problems that regularly arise, the delay and distraction caused by inexperienced users, etcetera, etcetera, etcetera.

When it comes to silent messages, there are a host of added limitations on sensing and processing nonverbal messages – like figuring out the meaning of eye movements; interpreting the absence of eye contact; coping with the sense that you are being scrutinized intensely by others; hearing inflection, tone, and pitch; and inferring off-camera body language and gestures that are incompletely visible. These are the kinds of matters that cause stress and fatigue that we are aware of. But the effort to decode the meaning and implications of silent messages is only partially a matter of conscious processing.

THE IMPORTANCE AND BURDENS OF SUBCONSCIOUS PROCESSING

Not surprisingly, much of the processing we do to discern intent and emotion from nonverbal context occurs on an unconscious level using methods and processors that humans have evolved over eons of communication experience. Natalie Wolchover, on *LiveScience*, demonstrates that “your brain is a code-cracking machine.” Consider the following passages:

For emaxlpe, it deson’t mtttaer in waht
oredr the lttters in a wrod aepapr, the
olny iprmoatnt tihng is taht the frist and
lsat ltteer are in the rghit poale. The rset
can be a toatl mses and you can stll
raed it wouthit pobelrm.

SIMIL4RLY, YOUR MIND IS R34DING
7HIS 4U7OM47IC4LLY WIFHOU7
3V3N 7HINKING 4BOU7 I7.

Ms. Wolchover notes that “passages like these have been bouncing around the internet for years. But how do we read them so easily? And what do our incredibly low standards for what’s legible say about the way our brains work?” *Breaking the Code: Why Yuor Barin Can Raed This*. (<https://bit.ly/3lBJ9VI>).

The answer is “subconscious processing” based on context, which allows interpretation, interpolation, extrapolation, implication, inference, induction, deduction, and experience (and there is undoubtedly more) to supply missing information. And all of this can be accomplished with blinding speed without much conscious attention.

continued ➤

Fatigue Factor 1: Excessive “Cognitive Load”

This background leads us to a major factor in Zoom fatigue identified by Professor Jeremy Bailenson: “Cognitive Load.” Dr. Bailenson is founding director of the [Stanford Virtual Human Interaction Lab](http://vhil.stanford.edu/) (vhil.stanford.edu/). He examined possible causes of Zoom Fatigue in the journal *Technology, Mind, and Behavior*. “Nonverbal overload: A theoretical argument for the causes of Zoom Fatigue” (<https://bit.ly/37onAja>).

In the best circumstances there is a lot of processing going on before an individual “understands” a message. And by “best of circumstances,” I refer to in-person communications where the communicator speaks clearly, the environment has limited distractions, and the listener has full access to all of the implicit messaging. Even in the best of circumstances, processing is not effort free. And when we expend energy, consciously or unconsciously, we get fatigued. The Zoom world, of course, does not provide nearly the “best circumstances” for communication.

So, Zoom sessions are inherently more draining. The stress and energy, conscious and unconscious, required to participate in Zoom sessions is especially amplified in mediations and arbitrations because demonstrating and evaluating conviction and trustworthiness, and developing personal connections, are core objectives of the participants in such proceedings. Simply stated, the interplay of Zoom’s “cool” medium, poor user skills, diminished context, and the critical importance of demonstrating and evaluating attitudes and sincerity in mediations and arbitrations, leads to excessive “cognitive load”. Which compromises effective communication and leads to serious Zoom fatigue. We will discuss tools to mitigate these matters in a bit, but let’s first identify additional important factors that compromise ADR sessions using Zoom.

Fatigue Factor 2: Intense Close-Up Eye Contact (Eye Glaze at a Close Distance)

One feature of Zoom that is both positive and negative is the ability to focus intently and for extended periods on the “front-on” view of the faces and eyes of other participants. This

“pseudo intimacy” violates a number of interpersonal distance norms reserved for close relationships. This sort of unconscious norm violation is magnified in “Speaker View”, where an individual’s face fills the monitor. Similarly, the perception that others are examining you triggers – to one degree or another – the sort of performance anxiety that is stressful for many people. Think of standing in a crowded subway car and being forced to look directly into the face of an adjacent rider (for an extended period). Now multiply that by all the faces on the Zoom screen.

The eye-contact impressions in Zoom also send out ambiguous and misleading signals. A person may seem to be focusing on one part of their screen, suggesting a close connection to another participant. But who that participant is cannot



be inferred because the order of participants on one person’s screen is going to be different from everyone else’s order. Focusing on a particular part of the screen may also be a product of reading emails or calendar items (or just looking at oneself). So, while our subconscious is interpreting eye movements based on in-person experience, something else entirely is likely to be going on, misleading us and setting the unconscious processors to the task of sorting out the ambiguity.

Fatigue Issue 3: Focus on Self-Examination (The All Day Mirror)

Bailenson notes that aside from dance studio instructors who work in rooms full of mirrors (and maybe news readers), few people can spend more time looking at themselves than Zoom participants, who can view themselves nonstop to assess their appearance and the nonverbal signals they may be sending during a Zoom session. Many of us have discovered our unconscious and micro-expressions using Zoom (and discovered why we are such poor poker players).

But studies find that this sort of self-evaluation can be stressful. As Professor Bailenson puts it:

The effect of seeing oneself in a mirror has been studied for decades, starting with the pioneering work of Duval and Wicklund (1972) demonstrating that people are more likely to evaluate themselves when seeing a mirror image (see Gonzales & Hancock, 201, for a review). While this can lead to more prosocial behavior, the self-evaluation can be stressful.



Dr. Bailenson's conclusion is that "it is likely that a constant 'mirror' on Zoom causes self-evaluation and negative affect." See also [Monsters in the Mirror: No Really, Literal Monsters](#), by Maclean Stanley (*Psychology Today*, August 2, 2014) (<https://bit.ly/3s95TxL>).

Fatigue Issue 4: Reduction in Physical Mobility

Videoconference sessions require us to stay centered in the frame of our cameras. And almost always seated. This obviously stifles movement. As Bailenson notes:

During face-to-face meetings people move. They pace, stand up, and stretch, doodle on a notepad, get up to use a chalkboard, even walk over to the water cooler to refill their glass. There are a number of studies showing that locomotion and other movements cause better performance in meetings. For example, people who are walking, even when it is indoors, come up with more creative ideas than people who are sitting (Oppezzo & Schwartz, 2014)... . [C]hildren who are required to gesture with their hands while learning math showed more learning retention compared to a control group (Cook et al., 2008). While Zoom doesn't technically prevent one from using gestures during the speech, being forced to sit in view of the camera certainly tampers down movement.

Other research also shows that people perform better cognitively when they can and do move. In [Teaching with the Brain in Mind, 2nd Edition](#) (Association for Supervision and Curriculum Development, 2005) (<https://bit.ly/37o6BgM>), Eric Jensen teaches that "movement can be an effective cognitive strategy to (1) strengthen learning, (2) improve memory and retrieval, and (3) enhance learner motivation and morale."

The absence of movement therefore makes for a more challenging communications environment and is another contributor to Zoom fatigue.

STRATEGIES TO FIGHT COGNITIVE OVERLOAD

So how do we reduce Zoom fatigue resulting from the conscious and unconscious processing and the extra effort required when using Zoom? The answer is to use the best available technology, minimize distractions, maximize the Zoom skills of the participants, and encourage simple compensations to supply more visual engagement and more nonverbal cues that help us decipher meaning, intent, emotion, and credibility. This requires preparation ahead as well as coaching, monitoring, and constant feedback during Zoom sessions. The focus here is on mediation, where mediators can be more intrusive and facilitative. But some of the strategies discussed here and in the following sections are applicable or can be adapted to arbitrations.

Pre-Session Technology Items: From a technical perspective, it is essential that each participant in the Zoom session – arbitration or mediation – have the basic tools needed for effective Zoom participation. A computer with a relatively recent processor, a stable platform for the computer/camera/microphone), larger (preferably multiple) monitors, a strong internet con-

nection, a competent camera and microphone, and, for hosts, the most current version of the videoconference software that is correctly configured to allow the host to screenshare and control screensharing by participants, to use breakout rooms, and to use (where appropriate) other features pertinent to the meeting (like views, chat, gestures, and the like). To assure this level of technical preparation by hosts, the best tool is experience. For the most part, lawyers, mediators, and arbitrators have, or have access to, the technical tools, but a test session is recommended. For witnesses, clients, and third parties, test sessions are almost always strongly recommended so that novices can be exposed to these issues and each participant's technology can be tested.

Pre-Session Human Factors Issues: There is no substitute for experience. It should be required for all participants to demonstrate facility with each skill they are likely to be called upon to use in a Zoom session: connecting, muting/unmuting, video on and off, gallery view/speaker view, speaking into the microphone, avoiding distracting backgrounds (virtual or otherwise), moving to breakout rooms and back to the main room, and screen sharing (including recommendations for engaging uses). Collaboration tools like whiteboards are also powerful tools for securing engagement and avoiding distraction. Do not assume that participants will be able to participate effectively in a mediation or arbitration using Zoom simply because they have successfully attended webinars or watched many videoconference sessions.

Participants can also be prepared and encouraged to supply more nonverbal cues to compensate for the inherent loss of context in the Zoom environment. Moderators (mediators and arbitrators) may, ahead of the "live session", suggest that participants practice looking more directly into their cameras when they speak or are being spoken to directly (to increase the appearance of direct eye contact and to provide more nonverbal context). Moderators, especially mediators, may also suggest greater use of hand gestures (on-screen) for emphasis; encourage more leaning in or out to suggest agreement or disagreement; and ask participants to emphasize

continued ➤

body motion and voice modulation, be aware of enunciation, consider repetition of important points, move the camera farther away, and the like.

In-Session Coaching, Monitoring, Feedback, and Breaks: For technology issues, the host of the session (or a technical assistant) must constantly monitor each participant's participation and give clarifying (in arbitration) or supportive (in mediation) feedback and advice to help participants with technical challenges and (if appropriate) to assist them to deliver more complete information and context.

Addressing nonverbal communication deficits in Zoom, moderators may provide immediate feedback when meaning becomes muddled by microphone or voice issues, when a speaker moves out of the picture or gestures off screen, or otherwise interrupts the delivery of other nonverbal cues. The moderator should also be attentive to volume drops, digital dropouts, and other factors that delete parts of the messages being delivered. Moderators should also practice what they preach.

Finally, schedule breaks from the processing of nonverbal cues that present themselves in other people's videos by scheduling timeouts and by allowing periods when participants can turn off their video, turn off their monitors, turn away from the screen, and enjoy "audio-only" moments.

STRATEGIES TO MITIGATE STRESS AND ANXIETY FROM CONTINUOUS CLOSE EYE CONTACT

First try (and recommend) taking Zoom out of the full screen option and reduce the size of the Zoom window within the desktop, minimizing the sizes of the faces confronting the viewer.

While gallery view is a preferred option, consider recommending switching between gallery and speaker view periodically (just for variety and to deal with eye strain). As discussed later, make greater use of screen sharing, both because it changes the picture and, if planned effectively, is more engaging and allows participants a break from close-up eye contact. Audio-only breaks are another strategy.

STRATEGIES TO MITIGATE NEGATIVE EFFECTS FROM CONSTANT SELF-EVALUATION

Moderators should consider advising participants to spend a few minutes at the outset of Zoom sessions to orient themselves in the frame, check their lighting and background, make necessary changes, and then turn off the features that allow participants to see themselves. (Turn off/uncheck "See myself as the active speaker while speaking" in Zoom's settings and, during a session, turn on "Hide Self View" by right clicking your image in gallery view and clicking "Hide Self View".)



In addition, the host should monitor and give feedback to avoid self-examination. And do audio-only and movement breaks.

STRATEGIES TO ENCOURAGE MOVEMENT

This part isn't rocket science. You can incorporate movement in your Zoom sessions. Encourage people to change the aim of their cameras from time to time and then move to the new alignment. Take breaks at least hourly for food, drink, air, or to walk down the hall. Encourage the use of airplane movement exercises like neck and shoulder rolls and arm and leg stretches. See *In-Flight Exercises That Aren't Totally Embarrassing*, by Christine Sarkis, *IN-FLIGHT EXPERIENCE*, June 17, 2013 (<https://bit.ly/2VBi2yX>). And encourage the use of physical cues, like leaning in and out for emphasis.



OTHER STRATEGIES TO MAKE ZOOM MORE ENGAGING, MITIGATE DISTRACTION, AND REDUCE FATIGUE

It almost goes without saying that passively watching people talk – in a Zoom session or in a classroom – can be boring. And boring requires lots of energy to remain attentive. So Zoom sessions should be planned and executed to maximize interest and engagement. USE MORE VISUALS, even if they are just pertinent documents. Where possible, don't just discuss documents during witness testimony, present the words in edited form from original documents. In mediation, illustrate concepts with images. In mediation, try collaborating using the whiteboard or a screenshared text document. According to Susan Guthrie, a leading expert in online mediation, our brains process visuals 60,000 times faster than text. We have evolved our visual processing because 90% of information transmitted to our brains is visual.

So, here's a summary of engagement-increasing and fatigue-reducing strategies especially pertinent to mediations and arbitrations (some are duplicative of the discussion above):

- 🎧 Get the technical glitches sorted out early.
- 🎧 Get the lighting right (from the front, and avoid glare).
- 🎧 Get everyone's name on screen at the start.
- 🎧 Look at the webcam when you speak, not at yourself (and turn yourself off).
- 🎧 Encourage some small talk when possible (and in breaks).
- 🎧 Prefer Gallery View (without your own image), but switch back and forth to Speaker View when appropriate.
- 🎧 Share screens when possible, but not purely for effect. Summarize points where appropriate using the Whiteboard or a shared text document.

- 🎧 If documents need to be read by participants, briefly capture the full document page, but enlarge pertinent sections and use highlighting. Don't show your desktop. For argument or to summarize, use a few plain words to focus attention. Save materials that should be read in detail for separate handouts.
- 🎧 Hosts need to discourage any inessential multitasking. Encourage participants to return their focus when it seems to wander by suggesting breaks or asking questions requiring participants to return their attention to the session.
- 🎧 Minimize interruptions.
- 🎧 Establish an outline of the session with built-in breaks. And make the timing of breaks and topic changes clear at the outset. Include pauses and guideposts that signal progression through the schedule of events.
- 🎧 Reduce onscreen stimuli (moderate virtual backgrounds). Try the blurring feature in the virtual background settings.
- 🎧 Encourage questions and interaction. Prefer verbal questions with video instead of Chat.
- 🎧 Where possible, either don't use Zoom or use Zoom for further sessions after the first meeting.

CONCLUSION

Most mediators recognize that preparation is an important tool to avoid impasse before it occurs. Similarly, with Zoom fatigue, much stress, distraction, disinterest, and lethargy can be minimized by preparation and in-session coaching. The goal is to allow participants to send and receive more silent messages, to reduce distractions, to avoid the stress of looking in the mirror excessively, to avoid feeling continuously scrutinized, and to avoid the stress of feeling physically confined. Zoom will never provide the context and focus that can come from in-person exchanges. But you can make it better if you are more mindful and proactive.¹

ENDNOTE

1. For additional resources, see *How to Combat Zoom Fatigue*, by Liz Fosslien and Molly West Duffy, HARVARD BUSINESS REVIEW, April 29, 2020 (hbr.org/2020/04/how-to-combat-zoom-fatigue); *20 Scientific Tips to Beat Zoom Fatigue, According to Your Personality*, by Vanessa Van Edwards, Science of People (www.scienceofpeople.com/zoom-fatigue/); *12 Tips That Actually Help with Zoom Fatigue*, by Kendall Walters, Vidyard (www.vidyard.com/blog/zoom-fatigue-tips/); *Zoom Exhaustion is Real. Here Are Six Ways to Find Balance and Stay Connected*, by Steve Hickman, Psy.D., Mindful, April 6, 2020 (<https://bit.ly/3CkeW3p>).