

RWT Chair Report
November 13, 2010 Council Meeting
Ft. Lauderdale, FL.

I. Introduction: Our People. An organization like ours is only as good as its people, and I want to share with you a few observations about Our People – our staff, members and volunteer leadership.

Only a few days after I became the Section Chair, our director resigned (no cause and effect I have been assured!) Fortunately, there were two silver linings in that very stormy looking cloud: **Gina Brown and David Moora**. Within a few days, the ABA asked Gina, and she agreed, to serve as our Acting Director (while “telecommuting” from home in Golden, CO)—probably only because no one had told her of the item deeply buried in the job description that said, “the new Section Chair is a bit anxious about this turn of events; you will probably have to talk to him at least two or three times every day for a few weeks.” But she did that and all the other tasks associated with being our Acting Director, and she did it all with her usual good cheer, wisdom, and energy. I am very grateful to Gina for her contributions as Acting Director.

I am also very excited that David Moora was offered and accepted the position of Director. Most of you know David, who has worked with the section for almost four years as a staff attorney. In that role he has worked with many of you on various projects. In doing so he has managed sometimes cranky and ornery members and leaders with the combined skills of a UN diplomat and pre-school teacher—exactly the peculiar combination of skills sometimes required to manage our members. David is hard working, smart, enthusiastic and a lot of other things that will assist him (and us) greatly in his future efforts as our new director. I know that David is as excited as the rest of us about his new role.

While we are on this “people” issue, I also want to tell you a few things about the volunteer leaders and members of this organization. First, no one as Chair could ever imagine having a more energetic and enthusiastic **Section Chair-Elect** than **Debbie Masucci**. She is a great friend of many years—a willing co-conspirator in most of my crimes (and on a few occasions a fierce adversary when she disagrees). She also has taken on direct oversight of a number of our projects and activities so that they will have two years of chair-level attention—most notably publications, pro bono, and diversity. Our entire Executive Committee of ten members includes a collegial bunch of experienced leaders in the Section from a wide range of practice experiences. We meet by phone two to four times per month and frequently by email, and we met for several hours in person in September at the ABA Section Officers’ Conference annual meeting in Chicago.

The chance to dig into the Section's many activities, to get to know many of its active members and leaders, and to help dozens of eager members find various positions of responsibility in the Section has been truly a once in a lifetime opportunity that I will forever cherish. In doing this I have learned that this Section is blessed with a vast depth of talent and experience among its leaders and membership. All of our Section Chairs are presented with the genuinely intimidating challenge of harnessing that capacity. Frankly, that capacity is so immense that all of us who have the privilege to chair the Section will inevitably fail to meet that challenge fully.

II. Our Projects: A. Promote Mediation and Arbitration, Improve Quality, Understand User Expectations. B. Tend to the Section's Business and Governance Issues.

Now I want to turn from Our People to Our Projects and tell you some ideas I have about what we should be doing in the coming year—and for years thereafter for that matter. These ideas are centered around two basic themes, generally as follows: A. Promote Mediation and Arbitration, Improve Quality, Understand User Expectations. B. Tend to the Section's Business and Governance Issues. There is nothing especially novel or grand in either theme. Rather I am simply suggesting we focus some of our attentions on a few ideas that are actually very fundamental to the well being of our Section and its members

First a bit of context: our Section is the world's largest ADR professional organization with approximately 18,000 members; we annually put on the world's biggest and best ADR conference typically attracting 1000 or more attendees and with about 100 substantive programs; we are composed of several thousand lawyers AND many hundreds of non-lawyer ADR professionals, not to overlook some ten thousand student members; and, we have become one of the largest sections in the world's largest lawyer professional organization. The Section enjoys great stature in the ADR world which has developed over its less than two decades of existence. We have been engaged in drafting, negotiating, and other aspects of almost all existing model or uniform statutes or rules in the ADR field. We sometimes use a motto, "when we listen, others talk."¹ Both clever and true. But it is also true, in the Dispute Resolution field, that "when we talk, others listen," and we should remind ourselves of that from time to time.

With that framework in mind, I believe that our Section has a duty, to our members, to the legal profession, and to the public, to promote the informed use of ADR processes in appropriate situations, AND to promote the improvement of the quality of practice by neutrals, counsel and parties in ADR processes including especially mediation and arbitration. An important key (though not necessarily dispositive) to defining quality in mediation and arbitration is understanding what parties and their counsel expect from these processes. I anticipate that many of our substantive activities, both in the coming year, and I hope for years to come, will be

¹ Then we learned that a guy in Chicago trademarked the phrase and we no longer use it.

undertaken in fulfillment of these fundamental responsibilities -- to promote use of mediation and arbitration, to improve the quality of these processes, and to better our understanding of parties' expectations in their use of the processes.

Second, our Section has achieved phenomenal success as measured by any imaginable metric including such obvious examples as membership growth and financial profitability and stability. Our success has been at least as great when measured by the stature our Section has attained in the ADR community, both in the US and globally. Nonetheless, while we have achieved unforeseen success by any measuring stick, we will benefit from taking a deep breath and having a deliberate, careful and focused look at our approaches to some of the key "business" and "governance" issues which have enabled our past success and which will permit our future continued success. These efforts will focus on a wide range of issues related to membership, diversity, CLE, publications, website and other electronic media, sponsorships, long range planning, and future leadership planning through our Nominating Committee. These types of efforts take some time and they take some energy, and I hope that we will devote that time and energy to these tasks in the coming year; these efforts will be important investments in our future.

The following paragraphs are a few particular thoughts on both of the broad themes described in this report. Though somewhat lengthy they do not present a comprehensive listing of what we are doing in the Section. However incredible it may seem, we are actually doing far, far more than is reported here. Rather, the following is merely an effort to identify some examples of the kinds of activities that address the two broad themes I have mentioned, with some special focus on activities which will be the subject of discussion at the upcoming Council meeting. There are many other tremendous centers of activity in the Section which will be the subject of future reports and Council meetings.

III. Promote Mediation and Arbitration, Improve Quality, Understand User Expectations.

We will devote significant attention this year to activities related to promoting mediation and arbitration, improving quality of mediation and arbitration, and enhancing our understanding of what parties and their counsel want from the processes.

A. National Mediation Month. In October, the Section conducted a program called National Mediation Month, composed of several important parts.

<http://www.abanet.org/dispute/mediationmonth.html>. It was intended most basically to promote mediation to a wide variety of constituencies including judges, lawyers, parties, and students. Our Mediation Committee, chaired by Geetha Ravindra and Inga Watkins, and staffed by David Moora, assembled and posted on the website a substantive and comprehensive "toolkit" of materials that could be used by state and local bar groups to promote use of mediation in their communities, they convinced a variety of state and local bar groups to sponsor National

Mediation Month celebratory events in their local communities, and then they collaborated with these groups in the production of events in nine cities across the country: Atlanta, the Bahamas, Honolulu, Columbia, MO., Missoula, MT., Nashville, Richmond, San Francisco and Washington, D.C. These events served to promote mediation and improvement of mediation quality in a variety of ways.

I personally attended four of the events in Atlanta, Missoula, Columbia, and Washington. In Columbia, I observed and spoke briefly in a terrific symposium on ADR and the Rule of Law, organized by Richard Reuben, the chair of the Section's Public Policy Committee and a member of the Magazine Editorial Board. In Missoula I participated in a Roundtable discussion of appellate mediation for law students, which included Montana Supreme Court Justice Bill Leahart. In Washington I had the chance to introduce our speaker Ken Feinberg to an assemblage of about 75 lawyers, mediators and students; Ken provided some poignant reminders that every mediation case involves real people with real problems, often the most important matters going on in the lives of the mediation participants. The Honolulu events featured a full day educational program focused on the progress made in applying mediation to public issues. In Richmond, Mark Rubin, former senior advisor to Governor Tim Kaine, shared lessons learned from his use of mediation in legislative matters. In Tennessee Chief Justice Connie Clark joined attorneys from across the state to celebrate mediation at a reception

We termed this the "inaugural" National Mediation Month, and with the continued good work of our Mediation Committee, we expect this event to grow in size and stature in the years to come. We will set out in the coming year to secure broader ABA endorsement for this program, and hopefully thereafter appropriate resolutions and proclamations from national and state executive, legislative and judicial branches, as well as state and local bar organizations.

B. Other Mediation Projects. In 2008, the Section's Task Force on Improving Mediation Quality delivered a report concerning mediation quality in civil cases (in which parties are represented by counsel).

<http://www.abanet.org/dispute/documents/FinalTaskForceMediation.pdf>.

We are well along in the planning process for a half-day program at the ABA mid-year meeting in Atlanta about **Analytical Mediation**; this is a phrase coined in the Task Force Report. The term describes a form of mediation practice, which is practiced by many mediators in the civil mediation context, desired by many parties and counsel as reflected in our Task Force focus groups and questionnaires, and not necessarily consistent with traditional notions of either facilitative or evaluative styles. Former Section Chair John Bickerman will lead the program. I hope that this program will be a part of a continuing exploration by the Section of mediation from two important perspectives: 1. We should continue to explore the delivery of mediation services from the viewpoint of the types of services the public wants; in a process that views self-determination as one of the most important values we can do no less. 2. We could have

interesting debates about the propriety of evaluative and facilitative styles until most of us are far too feeble to care anymore, but there are mediators willing to engage parties and counsel in analytical techniques and there are parties and counsel who want that service – so, let’s talk about how best to deliver that service consistent with the highest possible quality.

At our **council meeting on November 13**, we will have an opportunity to have a discussion of other ways our Section can work to promote mediation, to improve on mediation quality, and to better our understanding of what parties and counsel want from these processes. Among the particular topics we hope to discuss are future development of National Mediation Month; possibly conducting focus groups and questionnaires aimed at family law practitioners (using the Mediation Quality Task Force as a rough guide for an approach); and, possibly offering 40-hour basic mediation training as a Section CLE function.

Our **Eighth Annual Advanced Mediation and Advocacy Skills Institute**, chaired by Bruce Meyerson since inception, has been and will continue to be an important foundational program in pursuit of these goals, providing important educational opportunities to both mediators and counsel and equally important financial returns for the Section. This year’s program promises to be as successful as past ones. http://www.abanet.org/dispute/docs/2010_med_brochure.pdf.

Our **Ethics Committee** (Marnie Huff and Susan Exon, Co-chairs) and our **Standing Committee on Mediator Ethical Guidance** (Nancy Lesser, Michael Lewis, Co-chairs) both continue to contribute immensely to the enhancement of quality practice in mediation (for historical and admittedly somewhat arbitrary reasons these committees focus only on mediation ethics issues; the Arbitration Committee is responsible for arbitration ethics):

- The Ethics Committee coordinated production of the fall issue of *Dispute Resolution Magazine* (Frank Sander, chair of editorial board; Chip Stewart, editor) which is devoted to ethics issues.
- The Ethics Committee (through the leadership of sub-committee chair Tim Hedeem) has developed and will continue to enhance a very important contribution to the field of mediation ethics with its **National Clearinghouse for Mediator Ethics Opinions**. <http://www.abanet.org/dispute/clearinghouse.html>.
- The The Standing Committee on Mediator Ethical Guidance is providing written opinions on mediation ethics issues presented to it, based upon interpretations of the American Bar Association Model Standards of Conduct for Mediators (2005); the committee’s opinions are available at <http://www.abanet.org/dch/committee.cfm?com=DR018600>.

C. Projects aimed at Promoting and Improving Quality in Arbitration. The Arbitration Committee has planned a number of important projects for this year. The Committee is working

on a number of projects that will improve quality in practice. In particular, they have made great strides towards annotating the Code of Ethics for Commercial Arbitrators. I hope that a Council meeting later this year will focus on some of our arbitration activities.

I also want to call your attention to another important project – not really ours but one we have enthusiastically supported -- aimed directly at improving the quality of arbitration practice from the perspective of users. The College of Commercial Arbitrators has produced a report known as the **PROTOCOLS FOR EXPEDITIOUS, COST-EFFECTIVE COMMERCIAL ARBITRATION: Key Action Steps for Business Users, Counsel, Arbitrators & Arbitration Provider Institutions**. A link to the Protocols can be found on our website at www.abanet.org/dispute, and a copy is found in our Council book. I strongly urge you to read it. The Protocols are the product of a process in which CCA obtained extensive input from house counsel, outside counsel, arbitrators and providers relating to concerns that commercial arbitration was becoming too costly and unresponsive to needs of users. Our Section was one of several sponsors of the “Summit” in October, 2009, in Washington, D.C., at which about 200 individuals spent a day providing the drafters input on these problems and potential solutions. We are also supporting the distribution and implementation of the Protocols in various ways, and we will hear a brief report by Ruth Glick on the Protocols at our November Council meeting. Ruth is our Section’s newly chosen Secretary and a member of CCA’s Protocol Implementation Committee.

Also in the arbitration arena, we are studying two important potential new programs. Our **Sixth Annual Arbitration Training Institute**, originally founded by former Section Chair Richard Chernick, and chaired this year by Section Vice Chair John Phillips and Arbitration Committee Vice Chair Zee Claiborne, will take place in Los Angeles February 24 to 26, 2011. The continued success of that program has led us to consider a possible **Construction Arbitration Training Institute**, modeled on the content of the Arbitration Institute (time and place to be determined, but possibly September/October, 2011 in the East or Southeast); Phil Bruner, a Vice Chair of our Construction Committee and Christie Underwood, a Co-chair of our Construction Committee and a member of our Standing Committee on CLE, have agreed to serve as Co-chairs of the new program. Both the Arbitration Training Institute and the anticipated Construction Arbitration Institute are directed at both arbitrators and counsel. The particular need to address educational opportunities at advocates has also led to another possible program in the planning stages, a one-day **“Arbitration Boot Camp,”** aimed mainly at counsel representing clients in arbitrations; former Section Chair Larry Mills has agreed to lead this effort (again, time and place to be determined, but possibly in June in the Midwest). (Both newly proposed arbitration programs will require some further vetting as to time, place, content, and finances with our CLE Committee; stay tuned.)

IV. Business and Governance Issues. The Section’s “business” and “governance” issues are often less exciting than the program and policy stuff, but they are no less important. If we don’t pay adequate attention to them, then candidly, we don’t get to do the fun stuff.

We have been blessed with important leadership from our current and past **Membership** Chairs Mickey Katz and Phil Cutler, and Debbie and I have recently appointed Marnie Huff (a new Member-at Large of our Council) as Vice Chair of the Membership Committee. Until recently, the Membership Chair has operated typically without benefit of a committee, and we have also appointed several members to the Membership Committee, who have important perspectives as past and present Section leaders: Phil Cottone, Assistant Budget Officer, Phil Cutler, former Membership Chair, John Lande, former Council Member, and Gail Nugent, former Associates Committee Chair and Liason to Council. This group has been actively meeting in recent months and evaluating a variety of membership initiatives; they have already undertaken a concerted effort to recruit academics, who form a particularly active and important segment of our Section. We will ask some of our most active committees to designate liaisons to Membership so that Membership and those other committees can better coordinate their activities. We sent out a very short “survey” to our leadership a couple weeks ago looking for some ideas about membership initiatives, and in our Council meeting we will devote an hour to an update on our basic facts about membership plus an extended facilitated discussion of those issues.

A critical element of our Membership plans is **Diversity**. As we planned the upcoming Council meeting we found that our attention to the subject likely would not be adequate, and we decided to try a new approach to our quarterly meetings in order to ensure that we could devote sufficient time and attention to this important issue. On the late afternoon of the Friday before our Saturday Council meeting we will have a 90 minute meeting with Council members so that Debbie can provide a full report on our recent Diversity activities and then lead a discussion of those and other initiatives; she will then report on that meeting at the full Council meeting on Saturday.

We will also devote a portion of our Council meeting to a discussion with the Phils (Armstrong, Budget Officer, and Cottone, Assistant Budget Officer) about **sponsorship issues**. Most of the Section’s sponsorship funds come from contributions to the Section Spring Conference -- we received over \$80,000 last year from 50 sponsors ranging from \$250 to \$15,000 each. These funds are crucial to the Section’s financial well-being, and Debbie, the Phils, and I hope to start a careful, deliberate and constructive conversation within the Section about how we might improve upon both the variety of our sponsors and the level of sponsor contributions.

Our **CLE** chairs, Roger Deitz and John Sherrill have complained to the officers, politely but insistently, that they had no clearly defined mission. Their complaints were well taken; some confusion had developed over the years as most of our major CLE events inevitably developed their individual event committees and the role of the CLE committee became somewhat obscured. The officers discussed this issue at a meeting during the Section Officers’ Conference

in Chicago in September, followed by several email exchanges. We have asked the CLE committee to take responsibility for the following items:

- Review all proposals for new CLE events, and make recommendation to EC and Council as appropriate. (This should include the possible Construction Arbitration Institute, Arbitration Boot Camp, and forty hour basic mediation programs.)
- Develop new strategies for delivery of CLE. Review new technologies. Proposals to EC and Council as appropriate.
- Review Section financial arrangements with ABA CLE Center (during final quarter of 2010.) The ABA CLE Center has reinvented itself and promises to be more user friendly to Sections using it.
- Provide section position in concert with Director on requests for co-sponsorship of CLE events.

(So, in sum: Review all proposed new CLE, invent new CLE, and figure out if the ABA CLE Center can do anything to help us. And, oh, by the way can you get all this done before Christmas?)

We are also putting more emphasis on telephone and probably eventually web-based CLE events. In the very recent past Edna Sussman and John Phillips developed a framework for our Section's delivery of these types of programs, and Mike Timpane and Joan Sterns Johnson are the new Chairs of the **Teleconference Committee**. Since this past summer we have held at least one teleconference per month, and sometimes two. Mike and Joan, with the assistance of staff, committee chairs, and motivated members have recruited great speakers and topics.

Our **Spring Conference in Denver in April** will be a vitally important core Section function <http://www.abanet.org/dispute/conference/2011/home.html>, (Cindy Savage and Dave Aemmer, Co-Chairs; Art Hinshaw, Joan Grafstein, Christi Coats, Joanna Jacobs, Vice Chairs/Program Chairs.) Other core CLE offerings will include the Arbitration and Mediation Institutes (discussed elsewhere in the report), along with our programming at the ABA Annual Meeting in Toronto in August, 2011 (Erin Gleason Alvarez and Cliff Hendler, Co-Chairs.) I hope that one of our Council meetings during my term will focus extensively on reports to and inputs from Council on our CLE projects.

The “**big ABA**” (where they periodically insist that we not call it the “big ABA”) is **reinventing** its **website**, and by its own explicit admission, only about ten years too late. ABA President Steve Zach has made this project a major initiative for his Presidency, and it is anticipated that the new site will “go live” in February. The “architecture” of the revised site will be more oriented to subject matter than ABA organization, and we will have an opportunity to work on the substance of our Section pages to enhance users’ ability to find value on our Section pages.

Several members have agreed to work with David Moora on this project: Vik Kapoor, Rick Miles, and Nancy Welsh, all current Council members, and Hal Gray who recently successfully revised a website for the Georgia Bar DR Committee; we will work this project into our committee structure as we see how the project develops. In addition, the staff is making internal inquiries about possibly establishing **web-based mediator/arbitrator rosters** as a member benefit and possibly utilizing some of the so-called **social media** for various Section functions.

Debbie is working with our Standing Committee on **Publications** (Daniel Bowling, chair) to find ways to enhance revenues from book publishing. Conversations with leaders in other sections suggest that this may be an opportunity with multiple dimensions: to educate members of our many constituencies by publishing a larger number and variety of books; to provide more book publishing outlets for members and others in the field; and, to make money to support other less financially rewarding Section projects. The Phils will take a look, in concert with our **Magazine Board**, at ways to address the substantial costs associated with printing our excellent magazine -- without adversely affecting the quality of this wonderful publication.

Our **Long Range Planning** Committee has been repopulated under Bruce Meyerson's continuing leadership. It has been tasked to review how we are doing on achieving our plans; to evaluate a mission statement and other long range planning issues related to membership; and to produce a membership survey intended to find out what our members like and don't like about our offerings. The new members are: Jim Alfini, Phil Armstrong, Jill Gross, Tim Hedeem, Mickey Katz, Diana Mercer, Larry Mills, Inga Watkins.

Debbie and I have appointed a **Nominating Committee** somewhat earlier than usual, so that they can be evaluating the Section's needs and possible candidates to fill those needs for a longer period of time. Debbie will chair the Committee, whose members will include Ruth Glick, Pam Enslin, Susan Yates, Dwight Golann, Ty Holt, Larry Rute, John Barkett.

Following the Council meeting in November I will meet with some interested stakeholders in the Council to discuss expanding our efforts to **coordinate** more of our activities **with State and Local Bars** including possibly holding a second annual meeting with those groups at our Spring Conference in Denver. This activity has possible implications for Membership, Mediation Month, the Mediation Institute and other CLE offerings, and a wide variety of other Section activities.

V. Law firms and corporate counsel. There is one group of initiatives that falls into both the substantive and membership categories. We have talked some from time to time about educating advocates and drawing them into our Section as members, two related but not necessarily identical goals. Behind me we have three folks in line to chair our Section who include two in-house lawyers and an outside lawyer in a big law firm (Debbie Masucci, John Phillips, and Phil

Armstrong.) Those three individuals have tremendous credibility in the **law firm and corporate counsel communities**. And, hoping to take advantage of that opportunity I have worked with both Debbie and Phil Armstrong to identify some additional leadership in our Corporate Counsel Committee (Stephanie Shamosh, Terry Trantina, and Jennifer Victor, Co-Chairs) and our Advocates Committee (Gary Kaplan, Judith Korchin, James Schurz (also a new Council member), Co-Chairs, and Shelby Grubbs, Vice Chair). Phil will serve as Council liaison and group bird dog for both committees. To some degree the two groups may work together. Their joint or similar goals will be to develop programs, projects, activities, etc. that will interest folks within the constituencies they represent, with an eye wide open to attracting those constituencies as members; perhaps, think “dotted line” responsibilities to Mickey Katz and Marnie Huff and the Membership Committee (and, we will ask both groups to appoint liaisons to our Membership Committee.) Both of these committees are positioned to help us gain better insight into how our in-house and outside counsel constituencies perceive the quality of practice on both arbitration and mediation. We will all look forward to hearing of the plans they develop at a later Council meeting.

VI. Here are a few closing thoughts on the member and leader capacity I referred to above. I want to find more and better ways to tap that capacity. I hope that all who read this will help me however you can. Here are a few ideas of mine:

- Debbie and I have tried to expand the “**leadership**” of the Section in somewhat formal ways by appointing co-chairs, vice chairs, sub-committee chairs, standing committee members and even whole committees, where before there were none. We should probably do some more of this (and we should also take a critical look at possibly terminating a few committees whose pulse has apparently expired.) Also, we had a large number of nominees for Section offices last spring, many inevitably disappointed in attaining their immediate goal. We contacted every single one of them by phone, and I believe without exception, found them a spot doing something of interest in the Section; some of those individuals have taken on very important leadership roles in the Section. We have taken all these actions related to leadership in the Section with a view both towards engaging Section members and providing succession paths in leadership within committees and to our Council and officer positions.
- We have also approached leadership issues with explicit attention to appointing leaders who are **diverse** by race, ethnicity, gender, disability, and also by geography, age, practice area, and so forth. We hope we have made significant steps in these endeavors, although we fully recognize the imperfections of those steps. I hope that our meeting on Friday, Nov. 12 will lead to further improvement in this important area.

- We hope to **engage the “leadership” of the Section more** fully and frequently about matters of interest in the Section. In October Debbie, Marnie Huff, David, and Gina an led a training webinar for leaders (especially new ones) in the Section, and forty individuals attended. At an upcoming Council meeting Pam Enslin will lead a report and discussion on how the Section relates to the “big ABA.” In anticipation of the upcoming Council meeting we sent a short survey to everyone in leadership about membership issues; I expect us to engage in this sort of communication more often and more effectively. We also need to find a way to get more Section leaders and members to attend and participate in our quarterly Council meetings.
- At Debbie’s urging the officers will begin to discuss at our Executive Committee meeting on November 13 a review of some of our **less active committees** in order to ensure that both we and they have a good understanding of expectations about those groups.
- We intend to “tweak” the **content of Council meetings**; in short: fuller discussion of certain highlighted topics with written reports on the rest. Other, non-highlighted topics may be no less important, but we can fully discuss only a limited number of topics at any given meeting, and limited discussion on many topics sometimes just deserves them all. I hope that our extended discussions of mediation quality, membership and diversity on Nov. 12 and 13 will provide useful examples of this approach. And I encourage anyone who reads this to think about and suggest subjects for future Council discussions.