We are coming to the close of the year and I am sure everyone is excited to celebrate the holidays. The Section of Dispute Resolution had a very successful 2011 and we want to make sure our achievements continue in 2012. As you close out the year I ask that you remember some important events and activities for the Section.

First, the strength of our Section depends on the involvement and commitment of our many committees. Retention of our members is directly linked to our ability to engage members in meaningful committee work. Committees have an opportunity to publicize their work by contributing to the Section’s E newsletter and delivering teleconferences. Either mechanism is also an opportunity for members to contribute to their professional and personal development as well as increase their competency and skills. Committee chairs should contact Matthew Conger as soon as possible at matthew.conger@americanbar.org to select a month to highlight your Committee’s work in the New Year and to determine the requirements for delivering a teleconference.

Second, our Spring Conference is scheduled for April 18 to 21 in Washington DC. Registration is open. You can see the conference schedule and other information by going to http://ambar.org/dr2012. This is the most important event of the year for the Section. We bring dispute resolvers together from all over the world to network and learn from each other. You are encouraged to register as early as possible so you can take advantage of the early bird rates.

Third, not only is the Spring Conference the most important conference to attend, but it is our major non-dues fundraising activity. We are seeking sponsorships at all levels and ask that you consider sponsoring the conference or encouraging an individual or organization to sponsor the event. The sponsorship opportunities can be found here.

Kimberlee Kovach was honored by the International Academy of Mediators (IAM) with its prestigious Lifetime Achievement Award for her exceptional contributions to advancing alternative dispute resolution personally throughout her career and inspiring others to do the same. IAM President and Distinguished Fellow, Howard Vogel, presented the award at the recent biannual IAM conference in Austin, Texas.

On December 6th, at their monthly meeting, the Arbitration Committee held a masterful presentation by Kathie Roberts of JAMS in NY on authority to issue subpoenas and the issues raised by territorial limitations. Members learned about such issues as whether you can issue a pre-hearing subpoena under the FAA. If not, can you get around it? How? What are the territorial limits on subpoenas issued in arbitration? Does state law matter? How? Members learned about these and other issues and asked excellent questions during the Q&A period.

Generously, Ms. Roberts shared an article she wrote on the subject: Restrictions on Obtaining Testimony and Documents from Non-Parties Under The Federal Arbitration Act. Recent interpretations of the Federal Arbitration Act (FAA) impose significant restrictions on the ability of litigants to obtain testimony and documents from non-parties in arbitrations governed by the FAA. These include restrictions on the ability to obtain documents and testimony prior to the arbitration.
Finally, I want to take a moment to acknowledge the work of the Section’s staff. We would not be able to achieve all of our goals without their dedication and commitment to make it happen. I wish all of you the best for this holiday season and a happy, profitable, and healthy New Year.

Deborah Masucci  
Vice President  
Office of Dispute Resolution  
Chartis  
Contact

### Highlights from the 9th Annual Mediation & Advocacy Skills Institute

*by Lisa Pex Shelvin J.D., M.I.A & ADR Enthusiast*

The ABA Section of Dispute Resolution recently hosted the Ninth Annual Advanced Mediation and Advocacy Skills Institute on November 3rd and 4th in San Diego, California. Attendees came from 22 states, the District of Columbia, and U.S. territories (Puerto Rico, Virgin Islands), Mexico and Canada. An informal survey revealed that a significant number of the attendees practices focused on mediation, but others involved litigation (commercial, business, environmental, corporate), arbitration (domestic, civil, court annexed), medical malpractice, disability and elder law and plaintiff class actions. Of the attendees, 58 percent worked primarily as lawyers/advocates and 23 percent as neutrals. The remaining percent included judges, a CEO and a CPA. In years of experience, 33 percent had less than 5 years experience in mediation, including one person who had recently started a practice. Thirteen percent had 6-10 years of experience, while 54 percent had been mediating for more than 10 years.

In addition to the lovely San Diego climate, participants were welcomed by the Skills Institute with the perfect mix of panels, small group discussions, guest speakers, and open forums. The two days were designed to cover the mediation process from the beginning to end, and engage the participants throughout (not dissimilar to the goal of an actual mediation). Bruce Meyerson, a member of the Council, served as the Chair of the Institute.

The panel and small group discussions of the first day began with *Preparing for Mediation.* The panelists suggested preparation techniques, such as making sure to have contact with the mediator prior to the mediation and having the right parties present during the mediation. Panelist Philip Armstrong, former Senior Counsel for Georgia-Pacific LLC, recommended that advocates “resist the idea that there’s a bottom line” and to leave some room to wiggle during the mediation.

The first day continued with *The Joint Opening Session in Mediation,* which discussed the question of whether to have opening statements and the dynamics involved when parties (clients) communicate to one another. Additionally, there were two open forums sprinkled into the Skills Institute during the first day that discussed *Developing and Marking a Dispute Resolution Practice and Common Ethical Issues Faced By Mediators and Advocates.* Both forums allowed the participants to gain insight on how to develop their own practice and learn from techniques that have been successful for other participants. For example, Amy Lieberman, Executive Director of Insight Employment Mediation LLC, proposed the following three R’s in how to develop one’s own practice: Results, Reputation, and Relationships.

As with the gradual progression of mediation, the second day began with a panel and small group discussions on *Negotiating in the Caucus Stage of Mediation.* Panelist Eleanor Barr, Mediator for ADR Services, Inc., noted several reasons for using caucuses such as, “the ability to have open discussions of all the issues” which helps the mediator learn about the clients’ interests and/or underlying needs. It was also agreed between the panelists that caucuses were another way in which mediators could develop rapport with the advocates and clients.

The final panel and small group discussion was on *Breaking Impasse in Mediation.* Panelists and Small Group leaders discussed ways of avoiding impasse and tips for difficult situations. Panelist Hon. Thomas Ashworth III (Ret.), suggested that an impasse may sometimes be thought of in the alternative in that “you don’t have to get the sides too close to get the parties to realize they’re not that far a part.” The second day also included a presentation by Professor Hal Abramson entitled *A Framework for Representing Clients and How it Affects Mediators.* The presentation described a unique way of looking at the mediation process for both the mediator and the advocate.

With participants ranging from advocates new to mediation to non-attorney mediators hearing, and territorial limitations on the reach of arbitral subpoenas for pre-hearing testimony and/or documents and for appearance at the arbitration hearing itself. [See the full article here.]

### SAVE THE DATE EVENTS

**Earn a year's worth of CLE in April 2012 at the 14th Annual Spring Conference | April 18-21, 2012 | Hyatt Regency Washington on Capitol Hill | Washington, DC**

### SPONSORSHIP OPPORTUNITIES STILL AVAILABLE FOR THIS EVENT

**7th Annual Advanced Arbitration Training Institute**  
*June 21-23, 2012*  
*DoubleTree by Hilton Philadelphia*  
*Philadelphia, PA*

### Section Calendar of Events

**Successfully Navigating Arbitration Through Hearing and Award**  
*January 10, 2012 12:00 pm – 1:15 pm ET*  
*Register Now*

**2012 ABA Midyear Meeting**  
*February 3-4, 2012*  
*New Orleans, LA*

**Section Midyear Council Meeting**  
*February 4, 2012*
to seasoned former judges, all of those in attendance were able to walk away with new skills and a deepened appreciation for mediation. The collaborative learning environment also allowed participants to share experiences and techniques openly, which left many with new tips to use in their next mediation. For those who were not able to attend this year, do not fret - the Advanced Mediation and Advocacy Skills Institute is already making preparations for next year in Boston!

Preparing for Mediation: Checklist for Mediators in Pre-Mediation Conferences by Pamela Enslen and Phillip M. Armstrong

It is critical to give notice and obtain the consent of all parties and counsel that the pre-mediation conferencing process can be used. If one or more parties object to the procedure, it will be the mediator’s call whether to proceed with those who are in agreement. The request and the consent should be in writing with the advice that said pre-mediation conferencing will… see the full checklist here.

Preparing for Mediation: Effective Representation of Clients by Bruce E. Meyerson

Despite the growing use of mediation, there is uncertainty on the part of many attorneys concerning how to prepare for a mediation and equally important, how to prepare their client for mediation. Often, the lack of appropriate preparation and understanding about the process contributes to the failure of the mediation. The purpose of this article is to review the issues to be addressed by an attorney and her client in order to prepare effectively for the mediation process... see the full article here.

Breaking Impasse in Mediation: Breaking Impasse with Bracketing by Eleanor Oths Barr

Consider this scenario: Plaintiff makes an opening demand of $800,000, defendant counters at $20,000, and the negotiation stalls because each believes the other made an unreasonable opening offer. The negotiation has barely begun, yet the parties are already at an impasse. This is a perfect time… see the full article here.

Ethics -- Attorney Negotiation Ethics: An Empirical Assessment by Art Hinshaw and Jess K. Alberts

The code of ethical conduct for lawyers -- the American Bar Association’s Model Rules of Professional Conduct (the “Model Rules”) -- legitimizes a certain amount of dissembling and misdirection in the negotiation realm, only prohibiting legal negotiations from making fraudulent misrepresentations about material matters. To determine if attorneys are meeting this low standard... see the full article here.

Ethics for Lawyers Representing Clients in Mediations by John A. Sherrill

Today, a progressively larger percentage of the activity in civil dispute resolution occurs through mediation, and it is now the preferred method of alternative dispute resolution (ADR) for business disputes. In addition to offering potential cost savings, mediation is consensual, with the mediator acting as a neutral facilitator, and thus offers the possibility of maintaining long-term business relationships between disputants... see the full article here.

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Should You Negotiate By E-Mail? Insights Learned From Behavioral Science

February 14, 2012
12:00 pm – 1:15 pm ET

Register Now

Mediation Confidentiality

March 13, 2012
12:00 pm – 1:15 pm ET

Register Now

“Please Don’t Kill the Umpire”

Arbitration in Baseball

April 5, 2012
12:00 pm – 1:15 pm ET

Register Now

Section Spring Council Meeting

April 18, 2012
Hyatt Regency Washington on Capitol Hill
Washington, DC

14th Annual Spring Conference

April 18-24, 2012
Hyatt Regency Washington on Capitol Hill
Washington, DC

Civil Discourse in Mediation

May 8, 2012
12:00 pm – 1:15 pm ET

Register Now

7th Annual Advanced Arbitration Training Institute

June 21-23, 2012
DoubleTree by Hilton Philadelphia
Philadelphia, PA

2012 ABA Annual Meeting

August 2-4, 2012
Chicago, IL

Section Council Meeting and Elections

August 4, 2012
Chicago, IL

Other ADR Events

Virginia Mediation Network

2012 Spring Conference

March 17-18, 2012
Richmond, Virginia

CALL FOR SPEAKERS
To submit proposals and for more information contact Paula Young and Jennifer Phillips, Conference Co-Chairs: pyoung@aslf.com; JPMediation@gmail.com

Register Now

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Alternatives to Existing Processes for Rule-making and Policy-making
by Joan Stearns Johnsen

On November 18, 2011, the Dispute Resolution Section of the ABA and the Government Law Center of Albany Law School presented a program to an invited audience of leaders in New York State and Local government as well as in the field of ADR. The Program was aimed at exploring alternatives to existing rule making and policy making. The backdrop for the discussion was the pending rulemaking on Marcellus Shale. The discussion centered on whether the existing rulemaking approach was satisfactory and whether it might be supplemented with approaches based on ADR techniques. The Panel which was introduced by Dean Patricia Salkin included The Hon. Bruce Meyerson (ret.), Professor Philip Harter, Professor John Nolon, and Daniel Ruzow. Professor Joan Stearns Johnsen moderated the discussion.

The Panel first outlined their personal successful experiences using varying alternative approaches to policy making and rule making. Bruce Meyerson spoke about Civil Discourse and the successful facilitations in Arizona. This process involved small groups led by a facilitator who assisted the citizen groups in discussing their disparate views on divisive controversial policy issues. Reporters kept records of the exchange to inform and educate the Regulators and improve the tone and bring understanding to the community.

Professor Harter described the Collaborative Government process referred to as Negotiated Rulemaking. In this process, Regulators included the stakeholders in a negotiation over the appropriate regulations. Professor Harter observed remarkable outcomes from this process. Stakeholders expressed a higher degree of satisfaction with the resulting regulations. Significantly, the regulations tended to be even more stringent than what had initially been sought.

Dan Ruzow described a facilitated process. Mr. Ruzow participated in two successful negotiations of complex, contested, land use disputes. In both instances a neutral Facilitator convened the Stakeholders and the Regulators into what was essentially a mediation. The Parties to the negotiation developed trust and rapport with the Facilitator and one another. With tremendous savings of time and money, the Parties fashioned creative solutions that would never have been available through litigation.

Professor Nolon described the benefits to the Regulators as well as to the Stakeholders of utilizing a collaborative, creative approach to resolving land use and environmental issues. He explored various techniques which produced successful negotiations “above the regulations.” Professor Nolon discussed the innovative work of the Land Use Leadership Alliance (LULA) at the Pace University School of Law Kheel Center.

An audience discussion followed the formal presentations regarding the experiences with regard to the Marcellus Shale rulemaking. There was little satisfaction with the existing process. Among the concerns expressed was frustration that all parties in interest did not have a “seat at the table.” There was a sense that those who pursuant to existing rulemaking procedures were given an opportunity to be heard, did not believe that anyone was actually listening. It was important to all that the information disseminated regarding the impact of the regulations should be complete, accurate, and readily available. Most importantly, the participants in the program favored bringing a tone of civility and mutual respect into the process.

There appears to be a need to augment the existing regulatory process in order to satisfy all of the above stated interests. Next steps should explore how to assist the participants in fashioning creative processes drawing on the examples presented to address the instant issues.