**Message From the Chair**

**Expanding Mediation into New Territory (in Terrorem and Otherwise)**

Section Chair Deborah Masucci has invited Section leaders to write guest columns. This month John Phillips, Section Chair-Elect, writes about healthcare dispute resolution and other opportunities for Section members.

The Dispute Resolution Section has played a major role in popularizing mediation as a dispute resolution alternative throughout the United States in many areas of the law. The Mediation Committee has made great strides in gaining national attention with Mediation Day events and the Advanced Mediation Training Institute, now in its 10th year, has been hailed as one of the premiere training programs for advancing the skills of mediators in the country. Now the Section is looking to advance the use of mediation in anticipated areas of growth such as healthcare as well as abroad.

The healthcare sector of our economy has been and is expected to be one of the fastest growing areas of the American economy. With the aging of the “Baby Boomers” and the likelihood of some form of Obamacare impacting the healthcare industry, it is expected that there will be increased conflict, in which the parties would benefit from mediation or systems of conflict resolution that avoid having to resort to the courts. This initiative was a focus of our Section’s immediate Past Chair, Wayne Thorpe, when he and other Section officers met recently with representatives from the Health Law Section of the ABA to discuss how the Sections might work together to promote the use of mediation in healthcare controversies, educate healthcare lawyers on the benefits of mediation, and give opportunities to Dispute Resolution Section members in resolving the growing healthcare disputes in America.

Out of those meetings opportunities have arisen for members of the Dispute Resolution Section to present and lead discussion groups at the Annual Health Law Section Conference in February in San Diego, California. Also, several members of the Health Law Section agreed to be on panels at our Section’s Annual Spring Conference and the Health Law Section of the ABA as well as from the Dispute Resolution Section with the mission to continue to develop joint programs and consider the possibility of stand-alone programs by the combined Sections that would focus on dispute resolution in healthcare.

Another outreach of the Dispute Resolution Section is evidenced by the tremendous interest inspired by the International Committee, Co-Chaired by Jeremy Lack and Manon Schonewille. The last couple of years, the Committee has had increasing numbers of persons from abroad attending the International Committee meeting at the Spring Conference, which has vastly expanded under their leadership. This year, the International Committee hosted a full-day ancillary program on Saturday at the Spring Conference in Washington D.C., which had a variety of substantive programs as well as its organizational committee meeting report.

The international influence of western-style mediation cannot be underestimated. Several European countries, including Italy, have recently been adopting laws requiring mediation before proceeding to litigation in the court system. However, there is a fair amount of controversy over the efficacy of such a system. However, there is a fair amount of controversy over the efficacy of such a possibility of stand-alone programs by the combined Sections that would focus on dispute resolution in healthcare.

**Section Awards Honor Leaders in the Field**

At the Section of Dispute Resolution Awards Luncheon on April 20th, the Section presented awards to individuals who have made significant impacts in different areas of the field. Former Section Chair David Hoffman presented Lawyer as Problem Solver Awards to Harry R. Tindall and Kenneth R. Feinberg. Deborah Masucci presented the D’Alemberte Raven Award to Linda Singer and Michael Lewis. Section of Dispute Resolution ADR in Law Schools co-chairs Mariana Hernandez Crespo and Brian Pappas presented the National Representation in Mediation Competition championship trophy to Jo-Ann Handy and Andrew High, students at Sandra Day O’Connor School of Law at Arizona State University. Jay Folberg, Executive Director of the JAMS Foundation, presented the Warren Knight Award to Julia Roig on behalf of Partners for Democratic Change.

Several of the award presenters and recipients provided their remarks to the Section. Click on the links below to read their remarks.

- Remarks by Deborah Masucci, Section Chair
- Remarks by Harry Tindall, recipient of the Lawyer as Problem Solver Award
- Remarks by Jay Folberg, Executive Director of the JAMS Foundation
- Remarks by Julia Roig, Executive Director of Partners for Democratic-Change

**Committee Activities**

**International Committee**

Looking at all forms of dispute resolution worldwide

The International Committee organized a full day workshop on April 21 on the last day of the Dispute Resolution Section’s annual Spring Meeting focusing on Appropriate Dispute Resolution (ADR) techniques for complex international and cross-cultural cases. More than 100 people stayed on for this event and participated actively throughout the day. Following a presentation of various projects organized by International Committee project leaders, new preparation techniques from around the world were briefly presented by a panel of international experts, using a medical tourism case study involving a US patient who went to India for a kidney transplant as a basis for reflection and discussion of these techniques. People sat in tables and compared and contrasted thoughts resulting from each technique. During the final session of the IC’s workshop on April 21st 2012, organizers tried to capture some feedback and global impressions from the day. Visit the [International Committee’s web site](#) for the feedback and further information.

**Legal Education, ADR and Problem Solving (LEAPS) Project**

The Legal Education, ADR and Problem Solving (LEAPS) had a great session at the ABA Legal Educators’ Colloquium on April 21st. The LEAPS website is available for professors as they plan courses for the 2012-2013 academic year. The materials are available to help law school instructors incorporate some instruction in practical problem-solving in various courses. Many of the ideas...
citizens of countries with widely diverse histories in dispute resolution. In an effort to bring greater understanding between dispute resolution leaders in Pacific-rim countries, the Section is making plans to have an Asia-Pacific Mediation Leadership Conference in Hong Kong in 2013. A new law school building is just being completed at Hong Kong University and their conference center has been booked to host the Conference for October 31, November 1, and November 2, 2013. More information will become available as plans are developed. It is hoped that the Conference will be the next step in fostering better understanding to improve and expand dispute resolution alternatives when problems develop between businesses or citizens of countries with widely diverse histories in dispute resolution.

John R. Phillips
Section Chair-Elect
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Leading Through Change: The Role of Healthcare Attorneys in Navigating Conflict
By Ellen Waldman

On March 23, 2010, President Obama signed into law the Patient Protection and Affordable Care Act (ACA), a 2,700 page piece of legislation encompassing a wide range of far-reaching reforms. Within the hour, 13 state attorneys general had filed suit, arguing that the ACA was unconstitutional. Ultimately, more than half the states in the nation, as well as a number of private parties, would pose legal objections to the ACA’s mandatory coverage requirement. Just two years to the day of enactment, the Supreme Court considered these challenges in oral argument that left observers deeply uncertain as to whether the legislation would survive, and if so, in what form.

In some sense, the embattled Act supplies an apt metaphor for our healthcare system generally. The system is expensive, unwieldy and, compared to other developed nations’ methods, ineffective at delivering high-quality care to those in need. Clinicians and consumers alike are frustrated by these inefficiencies, but reform remains elusive. Meanwhile, flux and uncertainty form the substrate within which clinicians and their attorneys operate.

In an effort to help healthcare attorneys adapt to this challenging environment, the Health Law Section of the ABA, led by health care law and negotiation professor Charity Scott and conflict resolution specialists Deb Gerardi, Dale Hetzler and Beth Schermer, in concert with the Dispute Resolution section, organized a workshop this past February at the Health Law Section’s Annual Meeting entitled “Leading Through Change: The Role of Attorneys in Supporting and Guiding System Change through the Management of Conflict.” The four hour workshop was structured differently than most. The first half consisted of traditional panel presentations on cutting-edge efforts to manage conflict in a wide variety of contexts, including medical error, resource-sharing in physician-owned practice groups and interne- cine staff disputes. Attendees were invited to fill out the Thomas Killman Conflict Assessment Test and consider how their default reactions as avoiders, accommodators, compromisers or competitors affect the ways they respond to conflict on the job.

The second half of the program consisted of facilitated small-group discussions addressing the following sets of questions: 1) How has your role changed in the past year or two with regard to your healthcare clients? 2) What do you see emerging as challenges for your clients faced in cutting-edge efforts to manage conflict in a wide variety of contexts, including medical error, resource-sharing in physician-owned practice groups and interne- cine staff disputes? 3) Have you found that working with diverse groups has helped to foster an understanding of the role of legal, ethical and regulatory frameworks for healthcare delivery in the United States? 4) How does the threat of litigation (or regulatory consequences) impact the way in which parties come to the table? 5) What do you do to decrease the fear levels associated with perceived risk? 6) What comes up as the most difficult aspect of working with clients who are experiencing a high level of chronic level of conflict? 7) Thinking about your dominant conflict styles, how do these manifest when you are in a conflict situation? 8) What one thing would you identify as your “stretch goal” for improving your own capacity to engage in conflict more effectively?

The results were interesting. Attendees noted that changes in reimbursement structures, namely efforts to introduce “value billing” and “outcome-based” assessments were creating new pressures for health care entities. Additional pressures identified included consolidation in the industry and the need for new partnerships among stakeholders with very different interests. Attendees spoke at length of the different mindsets that attorneys and physicians bring to the same problem and of the challenges of building trust in the midst of such “culture clash.” Groups commented that clinical staff feel ill-equipped to deal with the linguistic and cultural heterogeneity that diverse populations present and that the rushed, crisis-oriented atmosphere of the intensive care unit does not lend itself to good conflict management practices.

would require little or no additional time for instructors or students. For example, when discussing selected cases in doctrinal courses, faculty can frame questions in the context of client interviews, counseling, or negotiation between lawyers instead of appellate arguments. The LEAPS project has also assembled panels of consultants in eight subject areas to provide advice and materials specific to those subjects. These include: civil procedure, clinics, contracts, criminal law, family law, labor and employment law, professional responsibility, and torts. The website has a lot of useful information about teaching techniques generally, curriculum models, and links to other resources. If this sounds interesting to you, please take a look at the website -- http://leaps.uoregon.edu/.

ADR in Law Schools Committee

Enjoy Writing? Want a chance to help Law Students? Get involved in the Representation in Mediation Competition!

Have you heard of the law school Representation in Mediation competition? It is hosted by the ABA - Section of Dispute Resolution and open to all law school students at ABA approved schools. It is a very unique competition for law school students to learn how to best utilize the mediation process to represent their clients.

Each round of the competition involves two teams comprised of two law students “competing” against each other. One member of the team plays the role of attorney and the other member plays the role of the client. The competition is designed for students to demonstrate their strengths in advocating for a client in mediation. Strategies the judges will be looking for include: allocation of time spent between attorney and client, ability to react to mediator style, effectively advocate for client in a problem-solving manner.

We are seeking writers to help draft simulations for these regional and national competitions. We will need 3 simulations for the regional rounds (held early spring of each year) and 4 simulations for the national round (held in April, in conjunction with the Section’s spring conference).

If you are interested, please contact Matthew Conger matthew.conger@americanbar.org for more information, drafting guidelines and sample simulations.

Information about the competition is available on the competition website at: http://www.abanet.org/dispute/mediationcomp.html

Law Student Corner

Winners of the 2011-2012 Representation in Mediation Competition Announced

Sandra Day O’Connor School of Law at Arizona State University won the 13th Annual National Representation in Mediation Competition. The National Competition was held in conjunction with the ABA Section of Dispute Resolution Annual Conference in Washington, DC. The teams from ArizonaState and South Texas College of Law advanced to the Championship Round where ArizonaState students Jo-Ann Handy and Andrew High prevailed. Congratulations to the students! To see the official press release click here.

Law Student James Boskey ADR Writing Competition Deadline is June 15th

The Competition is sponsored by The ABA Section of Dispute Resolution in memory of James B. Boskey, an intellectual, humanitarian, Seton Hall University law professor, and mediator. The purpose of the competition is to promote greater interest in and understanding of the field of dispute resolution and collaborative decision-making among law students.

Prize: $1000 to the Competition winner

The essay may address any aspect of dispute resolution practice, theory or research that the contestant chooses. Visit the Section’s Awards and Competitions web site for more information, forms, and procedures. Entries for the competition must be submitted by June 15, 2012.

Publication of the Month

Stories Mediators Tell is a collection of inspirational stories shared by experts in the field who want others to

Get involved in the Representation in Mediation Competition!
Surprisingly, given the health-care environment’s reputation as a tough arena for dispute resolution practitioners to break into, a number of attendees noted that they help their clients best when they are able to bring classic relationship-building, communication-enhancing techniques into their work. One healthcare attorney said that “taking a mediation training and acquiring those skills was the best thing I did for my legal career.” Another said that his downfall in any negotiation was to “fail to deeply listen to the other parties.” Other attendees said that their greatest challenge was to learn how to communicate “without being the obstacle in the room.”

Feedback on the session was positive and plans are afoot to build on expressions of interest for more programs devoted to managing conflict in the healthcare setting. Much remains uncertain regarding the future of healthcare financing and delivery in this country. What is not in doubt is the continued acceleration of change and conflict. The health care and dispute resolution sections of the ABA look forward to working jointly to help practitioners surf these tides and help attorneys help their clients survive in unsettled waters.

Ellen Waldman founded and directs the Thomas Jefferson School of Law Mediation Program, where she is also a full-time faculty member. She has published more than 25 articles on numerous dispute resolution topics and has recently edited a book entitled Mediation Ethics: Cases and Commentaries. She is a member of the American Bar Association Dispute Resolution Section Committee on Ethics, co-chair of the Section’s Committee on Health Care.

Effective Use of Mediation and Arbitration in Health Care Disputes

By R. Wayne Thorpe

Various dynamics at play in the health care industry are likely to contribute to disputes uniquely suited for resolution through mediation and arbitration. If the Patient Protection and Affordable Care Act (PPACA) survives attacks in the courts, continued consolidation and reorganization among health care industry participants will likely occur. Moreover, Congress has significantly enhanced the federal government’s ability to pursue fraud claims, and the U.S. Department of Justice (DOJ) is devoting substantial attention to investigations and prosecution of criminal and civil cases involving alleged health care fraud.

There are many types of significant disputes in the health care industry. Read More

Ethical Dilemma – "Process Advice" Discussion

By John Lande

In the Ethical Dilemma published earlier in the Spring, John Lande posed a hypothetical about a lawyer representing the wife in a divorce. For a discussion of the possible processes the wife could use, please follow this link.

Upcoming Teleconference

The Past Year in Arbitration

June 12, 2012

12:00 PM - 1:30 PM Eastern Time

This program will focus on the most important arbitration issues of the last year. Panelists will discuss the United States Supreme Court rulings on arbitration issues, as well as notable federal and state court decisions. Join us for an in-depth conversation on the hottest issues in the field of arbitration, including class action and arbitrability issues. The panel will also discuss pending legislation and administrative actions that would have an affect on arbitration law and practice. Attend this program and get up to speed on current events affecting the field of arbitration.

Moderator:

Kristen Blankley, University of Nebraska Law College, Lincoln, NE

Speakers:
Price:
$75 – ABA Section of Dispute Resolution members
$130 – ABA members
$150 – General/Non-members
$50 – DR Section members in Public Interest or Government Service
$99 – Non-members in Public Interest or Government Service

Registration: Register online or fill out and return the registration form.
Registration Deadline – June 12, 2012

CLE Information: The ABA will seek 1.5 hours of CLE credit in 60-minute-hour states and 1.8 hours of CLE credit in 50-minute-hour states in states accrediting ABA live webinars and teleconferences.*

NY-licensed attorneys: This non-transitional CLE program has been approved for experienced NY-licensed attorneys in accordance with the requirements of the New York State CLE Board for 1.5 for 90-minute program New York CLE credits.

*States currently not accrediting ABA live webinars and teleconferences: IN, KS, NE, NJ, OH, PA.