What’s Next?  

As I am writing this I estimate that my tenure as Chair will end in about 22.15 days—roughly. I will be succeeded most ably by Chair-Elect Debbie Masucci, who has already discovered that the position will consume all the time and energy one can devote to it, sometimes 10 and 12 hours a day for some stretches. So, “what’s next” seems like a pretty good question to ponder.

I have been actively engaged in the Section since at least 1997, and by the way I have attended every single one of our thirteen Spring Conferences—who else among you has done that? I can’t realistically imagine that I would just walk off and quit, and, in fact, I look forward to continuing in several projects:

- The civility and civil public discourse initiative including our sections’ proposed resolution that will come before the ABA House in August;
- Programs that promote use of mediation and enhancement of mediation quality, like ABA Mediation Week, October 16 to 22, 2011, a mediation promotional public service announcement (PSA), and a mediation educational video aimed at parties to mediations; and,
- A new collaborative initiative with the ABA Health Law Section intended to provide education among health care lawyers and other professionals on mediation, arbitration, conflict management, etc.

Literally hundreds of readers of this newsletter are involved in these or other Section projects. If you are not one of them, email Debbie Masucci [Debbie.masucci@chartisinsurance.com] or Section Director David Moora [david.moora@americanbar.com] and find out how to get engaged.

I also look forward to getting more fully engaged in my private practice as a mediator and arbitrator with JAMS. I left a pretty decent gig as a litigation partner at Alston & Bird in June, 1998, and with the passage of time I enjoy mediating and arbitrating more than ever. Most of us who mediate have experienced the great rush that comes when, through some combination of experience, skill, intuition, and blind luck, we can assist parties in resolving difficult legal, personal, or business conflicts. Those of us who have the chance to make a living at this should remember to be thankful every day for the opportunity we have. As one way to express those thanks, I am increasingly mindful that most of us can afford to devote more time and energy to providing mediation services to those whose economic circumstances will not allow them to pay the usual charges for our services. I acted on that impulse in the last few days in volunteering to mediate a case involving a non-paying Legal Aid client. I urge all of our readers to consider how they can contribute to the public in similar ways.

And, finally, I intend, plain and simple, to “Go Fishing.” I discovered recently I had not fished in my former frequent haunts of the southern Appalachians more than a tiny handful of times in recent years (assisted in this discovery by my 200+ page Fishing Journal). I immediately set out to rectify the situation, recently fishing in the upper Chattooga and the Tuckasegee in North Carolina and on the Tennessee side of the Great Smoky Mountain N.P., all “on the way” to a two-day mediation in east Tennessee. I share with many other southern flyfishers an admittedly somewhat odd fascination with catching small brook trout in streams in the GSMNP; their ancestors have lived in the Appalachians since the Ice Age. As I write this I am leaving in a couple days to head out to our family cabin in West Yellowstone to fish some of the great trout streams of the Yellowstone area including the Madison and Henry’s Fork of the Snake.

So, that’s “What’s Next” for me. What’s Next for you?

R. Wayne Thorpe  
Section Chair  
Email: wthorpe@jamsadr.com
Section Submits Resolution to ABA House of Delegates: Urging Lawyers to Set a High Standard for Civil Discourse

The current lack of civility in political and public discourse prompted the Section to submit Resolution 108 for adoption at the ABA House of Delegates meeting August 8-9, 2011. Lawyers play an important role in shaping public debate in the advice to those who seek their counsel, as elected officials and other officers of government, and as leaders in their communities. Lawyers therefore have a special opportunity to help steer public discourse to a more civil direction. The recommendation expresses the Association’s support for the principle of civility as a foundation for democracy and the rule of law and that lawyers should set a high standard for civil discourse. The recommendation is composed of four parts: a statement of the principle of civility, a call to action for the legal profession, an appeal to those who work with government and the political process, and an authorization for ABA participation in the development of legal standards and practices that promote civil public discourse. Read the full Resolution.

The Resolution has significant support. Thus far the following entities have agreed to co-sponsor the resolution.

- Antitrust Law Section
- General Practice, Solo and Small Firms Division
- Indiana Bar Association
- Judges Advocates Association
- Section of Legal Education and Admission to the Bar
- Section of Real Property, Trust and Estate Law
- Section of Science and Technology Law
- Section of State and Local Government Law
- San Diego Bar Association

NEW MEMBER RESOURCE

New Update to the Bibliography of Recent Scholarship on ADR

A new version of the Bibliography of ADR Scholarship has been posted to the Section’s web site. This new version includes articles and books from January June 2011. Click Here to view this great resource.

ETHICS CORNER

Ethical Dilemma
Submitted by: Daniel Yamshon

Unfortunately, due to summer holidays we will be running the answers to June’s dilemma in September. However, if you missed June's dilemma we are continuing to take comments.
A federal agency issued a specialty policy of insurance not available on the open market. After the premiums were paid and the policy delivered, the agency modified the terms of the insurance contract, publishing them in the Federal Register but not serving direct notice on the insured. The published notice also gave policyholders the right to cancel their policies within thirty days with pro-rata refunds based on the remaining policy period.

After suffering a loss covered by the original contract, the insured filed a claim for insurance coverage. The agency denied the claim as the modifications published in the Federal Register clearly stated the type of loss suffered by the insured would no longer be covered.

The insured filed a claim which proceeded to arbitration. The insured/claimant’s theory was the right to rely on the original contract that was issued and paid for in advance. The respondent agency’s defense was that an insurer has the right to modify a policy and publication in the Federal Register provides notice as a matter of law. There was no unfairness as the agency would have paid for the loss if it had occurred prior to the notice being published and the insured/claimant had the right to cancel the contract with a pro rata refund.

Just before closing arguments, the arbitrator muttered, “Hmm, there could be some due process issues here.” Respondent’s counsel replied, “Yes, there could be, yes there are.”

As counsel did not raise the due process issues, should the arbitrator:

A. Ignore them?
B. Ask the parties to brief them?
C. Rely on his own research and expertise and consider them in the award if they are applicable?

To answer these questions, click here:

ARTICLES OF INTEREST

Summer Issue of Dispute Resolution Magazine

Don’t miss the summer issue of Dispute Resolution Magazine. One article, Mediation in a Litigation Culture, the Surprising Growth of Mediation in New York, written by Rick Weil, explores the results of a survey of 485 litigators which was sponsored by the state and city bar associations. The article explains that there is an increasing trend for acceptance of mediation because of its efficiency, it allows the litigator to be a problem solver, and allows an increase in what factors that can be considered when resolving a matter. This issue will be great summer reading so look for it in your mailbox soon.

RECENT CASE UPDATES

Fifth Circuit Remands Arbitration for Non-disclosure

In Robert C. Karlseng, et al. v. H. Jonathan Cooke, decided June 28, 2011, the court had to decide how much of a relationship is too much when it comes to disclosure by a potential arbitrator. The case involved a partnership dispute that was submitted to JAMS for arbitration. The parties chose Robert Faulkner, a retired federal magistrate judge, as the sole arbitrator. Faulkner disclosed that he had served as an arbitrator for another case represented by Cooke’s counsel, but answered “no” for all other questions on the disclosure form. After a five-day arbitration hearing, Faulkner awarded Cooke $22 million and $6 million in attorney’s
fees. Karlsen’s attorneys argued that Faulkner displayed evidence of partiality. The trial judge confirmed the arbitration award. Appellants filed an appeal in district court on the same grounds. The 5th Circuit found there was a relationship between Faulkner and counsel for Cooke, Brett Johnson, which had been ongoing from 1994. The court reversed citing evidence of this relationship included expensive dinners, a Mavericks basketball game, emails, and several years of Christmas baskets.

Class Arbitration Upheld for Sterling Jewelers Women Workers

In Jock et. al v. Sterling Jewelers Inc. a group of women sued their employer, Sterling Jewelers, for sex discrimination under Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e et seq. The women sought arbitration under a program called “RESOLVE” as agreed upon in their employment contracts. The women then sought a class action in these arbitration proceedings. The arbitrator held that neither the employment agreement, nor the arbitration clause denied this possibility and thus that a class arbitration was acceptable. Sterling Jewelers challenged this in District court since the employment contracts were silent on the issue of class arbitration.

The district court reversed and remanded the decision based on the Supreme Court’s ruling in the case Stolt-Nielsen, S.A. v. AnimalFeeds International Corp., saying that the arbitrator exceeded her powers in allowing for collective arbitration, since the agreement did not affirmatively allow for such. On July 1, 2011, the Second Circuit court of appeals held that an arbitrator is acting within her authority to come to a decision on an issue, in this case whether class-arbitration is available, even if she decided the issue in a way with which the district court disagrees.

Fensterstock v. Education Finance Partners Remanded in Light of AT&T Mobility LLC v. Concepcion

In 2010 the Second Circuit affirmed a Southern District of New York holding which denied Education Finance Partners’ motion to compel arbitration because it contained a waiver of class-action and class-arbitration which was held to be unconscionable. On June 30, 2011, the Supreme Court has remanded this decision in light of its decision in AT&T Mobility LLC v. Concepcion.

2011 James Boskey ADR Writing Competition

Judges are currently considering entries for the 2011 James Boskey ADR Writing Competition. Look for the winner to be announced in the near future.

The James Boskey ADR Writing Competition is named in memory of James B. Boskey, an intellectual, humanitarian, Seton Hall University law professor, and mediator. The purpose of the competition is to create greater interest in the field of dispute resolution among all law students of the nation, particularly the Law Student Division of the American Bar Association. Learn More

The John Marshall Law School Offers New LLM in Trial Advocacy & Alternative Dispute Resolution

To read the Press Release Click Here
October 16-22 2011 ABA Mediation Week News and Events

Delaware House of Representatives Passes Resolution Declaring October 16-22 “Mediation Week”

On June 30, 2011, Delaware State Representative Melanie L. George, Esq. sponsored a resolution proclaiming October 16-22, 2011 as “Mediation Week” in the State of Delaware. The Delaware House of Representatives immediately considered and passed the resolution. Many thanks to Section member Michael P. Migliore, Chair of the ADR Section of the Delaware State Bar Association, for assisting with the resolution. You can see the resolution here.

ABA Mediation Week, is an annual project of the ABA Section of Dispute Resolution, to be held the week of October 16, 2011, to promote mediation and related forms of collaborative problem solving and to educate parties, lawyers, and the general public about these processes. This year’s ABA Mediation Week will focus on a theme of civility and civil public discourse. Our hope is that cooperating partners in state, local, and international bar groups, law schools and mediation groups will conduct educational events in cities around the world. To view The Mediation Week Toolkit developed to assist coordinators with talking points and pre-developed materials/presentations click here.

In addition to the Toolkit, we have drafted a letter you may use to reach out to organization to generate interest in holding a Mediation Week Event. The letter is located here.

For more information on hosting a Mediation Week event, sample letters, proclamations, or for other inquiries contact Matthew Conger at matthew.conger@americanbar.org

Intellectual Property Committee

The ABA Section of Dispute Resolution and the ABA Intellectual Property Law Section jointly commented on the recent Trademark Trial and Appeal Board’s request for comments relating to settlement activities. To see the Sections’ comments to the Board’s requests Click Here

Diversity Committee

The Section’s Diversity Committee has added new articles and links to the Diversity Committee web site. The articles include materials from the 2011 Spring Conference presentation on “How Diversity and Culture Add to Resolution,” the Michigan Bar Report on Diversity in ADR, as well as links to a brochure on diversity in ADR from the Supplier Diversity Review, CPR Diversity Resources, Access ADR, and much more. Click here to go directly to the Diversity Committee Web Site.

Are You Taking Advantage of Your ABA Membership

Did you know that as an ABA Member you have access to the entire ABA Membership Directory? Whether you are seeking a mentor in your field of practice, geographic area, or looking to locate other ABA members in your city, your membership gives you the ability to search the ABA Membership Directory. You can search by name, geographic area, or ABA committee. Click Here to access the ABA Membership Directory. You must log on to the ABA web site in order to access the directory!
Join a Dispute Resolution Committee

Interested in meeting practitioners with years of experience and thriving practices? Want to get involved with interesting and substantive work? Or, just want to learn more about a ADR area of interest?

Join a Dispute Resolution Committee. Our Committees offer the chance to get involved in monitoring and encouraging the development of ADR in specific subject areas; they provide a community for section members who are interested in the subject area; committees help develop CLE/training programs to assist members and formally liaise with other ABA entities that have a shared subject matter focus. Subject Matter Committees and Process Committees are open to the Section's student membership free!

See a list of the Committees here:

9th Annual Mediation and Advocacy Skills Institute

American Bar Association Section of Dispute Resolution

Past Participants have Said........“The faculty are excellent, and the opportunity for advocates and mediators to interact in small facilitated groups made this an exceptional and valuable program for mediators and advocates alike.”

SAVE THE DATE

November 3-4, 2011

SHERATON SUITES AT SYMPHONY HALL
SAN DIEGO, CALIFORNIA
Topics Covered Include:
Preparing for Mediation
Maximizing the Joint Opening Session
Ethical Issues
Negotiating in the Caucus Stage
Breaking Impasse
Developing Your Practice
and more!

In Cooperation With:
San Diego County Bar Association
Arizona State Bar ADR Section
California State Bar Section of Litigation
Hawaii State Bar ADR Section
Inter-American Bar Association-International Arbitration Law Committee
Nevada State Bar ADR Section/Oregon State Bar ADR Section
The U.S. – Mexico Bar Association

TO REGISTER AND FOR MORE INFORMATION VISIT: click here

Attendees will receive:
12.0 hours of MCLE credit, including 1.0 hour of ethics credit, have been requested in 60-minute states. 14.4 hours of MCLE credit, including 1.2 hours of ethics credit, have been requested in 50-minute states.

Environment and Natural Resources Committee Meeting
Via conference call
July 21, 2011 at 3 pm Eastern
Visit the Environment and Natural Resources Committee web site for more information

Collaborative Law Committee Meeting
Via Conference Call
July 26, 2011 at 5:00 pm Eastern
Visit the Collaborative Law Committee web site for more information

IF YOU ARE NOT REGISTERED FOR ANNUAL MEETING THERE IS STILL TIME TO REGISTER AND ATTEND THE SECTION'S PROGRAMS !!!!!!!!!!!!!!!!!!!!!

CLICK HERE

August 4-7
Dispute Resolution Section Programs at the ABA Annual Meeting
Renaissance Toronto Downtown Hotel
Toronto, Ontario, Canada
Schedule at a Glance:

<table>
<thead>
<tr>
<th>TIME</th>
<th>THURSDAY, AUG 4, 2011</th>
<th>LOCATION</th>
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<tbody>
<tr>
<td>8:30am - 10:00am</td>
<td>How Decision Trees Can Help your Right-Brain Clients Arrive at Successful Conclusions</td>
<td>Metro Toronto Convention Centre</td>
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<tr>
<td>Time</td>
<td>Event</td>
<td>Sponsorations</td>
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<tr>
<td>2:00pm – 3:30pm</td>
<td>Dial I for Infringement, The Anatomy of an IP Dispute</td>
<td>Co-Sponsor: Section of Intellectual Property Law</td>
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<td>2:00pm – 3:30pm</td>
<td>The Art and War of Mediation: The Top Ten Effective Tools and Ethical Concerns You and Your Client Better Consider Before Entering the Mediation</td>
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<tr>
<td>3:45pm – 5:15pm</td>
<td>Resolving Construction Disputes in Canada and the U.S. – Looking Back, Looking Forward</td>
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<td><strong>FRIDAY, AUGUST 5, 2011</strong></td>
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<tr>
<td>8:30am – 10:00am</td>
<td>Psychology &amp; the Computer: Their Effective Use in Mediation of Complex cases</td>
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<tr>
<td>8:30am – 10:00am</td>
<td>Take the High Road: Mastering Top Ethical Challenges Facing ADR Advocates and Neutrals</td>
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<tr>
<td>8:30am – 10:00am</td>
<td>Secrets, Lawsuits and Mediation: US and Canadian Alternatives to FOIA Litigation</td>
<td>Primary Sponsor: Section of Administrative Law and Regulatory Practice</td>
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<tr>
<td>10:30am – 12:00pm</td>
<td>“Implicit Bias” and the Myth of Equal Justice</td>
<td>Primary Sponsor: Section of Litigation</td>
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<tr>
<td>10:30am – 12:00pm</td>
<td>9/11 – A Decade Later, and A World Apart</td>
<td>Primary Sponsor: Section of International Law</td>
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<tr>
<td>10:30am – 12:30pm</td>
<td>If You Were In My Shoes: Corporate Social Responsibility and Community Rights</td>
<td>Primary Sponsor: Business Law Section</td>
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<td>2:00pm – 3:30pm</td>
<td>Canada v. U.S. – Advocacy in International Arbitration – Different Cultural and Procedural Approaches</td>
<td>Co-Sponsor: Section of International Law</td>
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<td>2:00pm – 3:30pm</td>
<td>Making Money Talk</td>
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<td>2:00pm – 3:30pm</td>
<td>Cloud Computing Demystified!! Is It A Revolution or an Evolution??</td>
<td>Primary Sponsor: Section of Science &amp; Technology Law</td>
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<td>3:45pm – 5:15pm</td>
<td>New Hybrid Approaches to Transactions, Dispute Prevention &amp; Resolution: Ethical Considerations in Shaping ADR Processes to Fit the Problem and the People in Deals and Disputes</td>
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<td>3:45pm – 5:15pm</td>
<td>How Arbitrators Think and What You and They Can Do About it: A Journey Into the Minds of Arbitrators</td>
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<td>5:30pm – 10:00pm</td>
<td>Section Reception and Dinner</td>
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<td><strong>SATURDAY, AUGUST 6, 2011</strong></td>
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<td>7:30am – 8:30am</td>
<td>Executive Committee Meeting</td>
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<td>8:00am – 9:00am</td>
<td>Council Breakfast</td>
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<td>8:00am – 9:00am</td>
<td>Ethics Committee Meeting</td>
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<tr>
<td>9:00am – 2:00pm</td>
<td>Council Meeting</td>
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<td>2:00pm – 2:30pm</td>
<td>Annual Meeting of the Members and Council Elections</td>
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<td>3:00pm – 5:00pm</td>
<td>Long Range Planning Committee Meeting</td>
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<td><strong>SUNDAY, AUGUST 7, 2011</strong></td>
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<tr>
<td>8:30am – 10:00am</td>
<td>Arbitration Case Law Update Joint Program with Labor and Employment Law Section</td>
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For more information and to register [click here](#):
August 16, 2011

CLE programs in collaboration with Tennessee Bar Association
feature author John Lande

Two webcast CLE programs featuring Prof. John Lande as the main speaker are available through the Tennessee Bar Association (TBA). Additional presenters at the webcasts are Tennessee Court of Appeals Judge Richard H. Dinkins and Section of Dispute Resolution Council member Margaret M. Huff.

The ABA Section of Dispute Resolution is supporting these programs. CLE is being requested from the following states only: Alabama, Georgia, Mississippi and Tennessee. If you are not able to log on at the scheduled times, you may purchase the webcast online at a later date by logging on to the TBA website.

If you sign up for one or both of the CLE programs you will have the option to purchase Lande’s book, Lawyering with Planned Early Negotiation (ABA Publications 2011) at a 20% discount. Visit www.ababooks.org or E-mail: orders@staff.abanet.org to purchase the book. At the end of the CLE programs, participants will be given a code to receive a 20% discount.

August 16, 2011 at noon-1 pm Central Time
Lawyering with Planned Early Negotiation
How You Can Get Good Results for Clients and Make Money

Register:
Description: This session will provide an overview of techniques to arrange and conduct a “planned early negotiation” process. This includes identifying the key issues and parties’ interests and developing a good working relationship with opposing counsel. Get more in-depth information on this topic by registering for the session titled “Advanced Techniques for Lawyer with Planned Early Negotiation.”
Cost: $45.00

August 16, 2011 at 1:30-2:30 pm Central Time
Advanced Techniques for Lawyer with Planned Early Negotiation

Register:
Description: This session will cover specialized techniques to make “planned early negotiation” as successful as possible. This includes developing billing arrangements promoting satisfying negotiation, engaging other professionals, dealing with problems in negotiation, and ethical issues.
Cost: $45.00

September 12, 2011
Deadline for DC 2012 Spring Conference Proposals
Click here.

September 13, 2011
Forgiveness & Mediation: What Mediators Can Learn About the Benefits of Forgiveness
Begins: Sep 13, 2011 12:00 PM (ET)
Ends: Sep 13, 2011 01:15 PM (ET)
Register Online
Mail/Fax
October 16-22, 2011
ABA Mediation Week
To see The Mediation Week Toolkit developed to assist coordinators with talking points and pre-developed materials/presentations click here. For more information on hosting a Mediation Week event contact Matthew Conger at matthew.conger@americanbar.org

November 3-4, 2011
9th Annual Advanced Mediation & Advocacy Skills Institute
Sheraton Suites at Symphony Hall
San Diego, CA

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SUBMISSIONS

Submission Guidelines for Just Resolutions
Interested in submitting an article for a future edition of Just Resolutions?

Click here to read the Newsletter submission guidelines.

Just Resolutions is published monthly except for in the months of April and August.

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