Message From the Chair

Trust is a cornerstone of the success of alternative dispute resolution. Trust in arbitration is derived from arbitrators providing full disclosure of any conflicts before appointment and that they make rational decisions free of bias based on the evidence provided by the parties. Trust in mediation is derived from confidence that the mediator’s skills and talent will help the parties achieve resolution of their dispute.

Core to trust is the ethical codes followed by arbitrators and mediators. The Section of Dispute Resolution has been in the forefront developing policies to bolster ethical standards to be followed by dispute resolution professionals. The Section also provides you, our members, with tools and guidance to ensure that you are aware of updates to the ethical codes and that you benefit from knowing about pitfalls that some of your fellow dispute resolvers faced.

In this issue of Just Resolutions E-news you will read about the activities of the Section’s Ethics Committee. There is a listing of ethics resources in numerous contexts that are available to you. We thank Marnie Huff for providing this information. Should mediation confidentiality be conditioned on mediator qualifications? Dan Dozier and David Batson will give you the view from Maryland. Mel Rubins provides an ethical dilemma in a family case, but the same issue might arise in the dissolution of a business partnership. Finally, the On Line Dispute Resolution Committee is advertising Cyberweek Activities for the Fall of 2012. Although the Cyberweek activities are directed to students, even the most mature of us should become involved.

I hope you enjoy this issue.

Deborah Masucci
Section Chair
drchair@gmail.com

Overview of Ethics Committee

By Susan Nauss Exon & Michael G. Harrison, Co-Chairs

The Ethics Committee is very active, with members from across the United States and several countries. We are delighted to provide substantive articles for this issue of the Section’s e-newsletter.

The goal of the Ethics Committee is to serve the public, Section members and all dispute resolution (DR) professionals by providing resources and education on DR ethics issues. To that end, Committee members

Ethics in Online Dispute Resolution: Cyberweek Activities for Fall Semester 2012

By Susan Nauss Exon

For the past three years, the Ethics Committee has actively participated in Cyberweek by offering a contest to dispute resolution students. The Committee prepares an ethical dilemma involving an online dispute and solicits written solutions by students. Last year over 70 students responded and the winner received $100. Her winning essay was published in the Section’s e-newsletter.

The Ethics Committee will continue its participation again this year. Here’s how members of the Dispute Resolution Section can get involved. If you are a law professor or other professor of dispute resolution, consider referring to Cyberweek in your fall semester syllabus. Last year, I offered my mediation students extra credit if they prepared and submitted a written response to the ethical dilemma that was posed. Other schools required their students to engage in some of the discussion threads that take place during Cyberweek.

Here is suggested language that you may use in your syllabus for courses such as mediation, negotiation, ADR, etc.:

“Cyberweek is a week-long Internet-based forum in which scholars and practitioners engage in wonderful dialogue about many issues involving online dispute resolution. Cyberweek 2012 is tentatively scheduled for the week of October 28 to November 2, and is managed through the Werner Institute at Creighton University. As part of Cyberweek, the Ethics Committee of the Section of Dispute Resolution is sponsoring a contest. An ethical dilemma involving an online dispute will be posed during cyberweek and students are encouraged to write a response to the dilemma. The winner will receive a $100 prize and the winning solution will be published in the Section of Dispute Resolution’s e-newsletter. This written response will count _ % of the total course grade.

The Ethics Committee encourages all professors to refer to Cyberweek in your syllabi as you prepare to teach next fall. If you have any questions, feel free to contact Susan Nauss Exon, Ethics Committee Co-Chair, at snexon@laverne.edu.

Committee Activities

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
regularly present ethics CLE sessions at the Section’s annual conference and occasionally at the ABA Annual and Mid-Year Meetings. Every other month, the Committee posts an ethical dilemma in the Section’s e-newsletter. A model answer to the dilemma is posted during alternate months of the e-newsletter. This month’s dilemma deals with a family law matter.

As shown by Marnie Huff’s article in this issue of the e-newsletter, the Committee provides a wealth of information on the Section’s website. Most notably, it hosts the National Clearinghouse for Mediator Ethics Opinions, which includes over 300 mediation ethics opinions from 43 states. You can find specific ethical opinions in the database by searching by state and/or by topic relating to the individual standards set forth in the Model Standards of Conduct for Mediators (2005).

In this issue, you also will notice that the Committee has been actively promoting ethics in an Online Dispute Resolution (ODR) setting during Cyberweek for the past few years. Check out the Cyberweek article to see how you and students can get involved this year. The Committee also maintains a wonderfully collaborative relationship with the International Committee and other committees.

The Committee meets approximately five to six times a year by conference call and in person. The committee welcomes new members. Please join the drethics listserv on the Committee’s website. We hope to engage in several dialogues about controversial and cutting edge ethical issues on the listserv in the coming months.

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Mediator Ethics Advisory Opinions
ABA Section of Dispute Resolution’s Committee on Mediator Ethical Guidance provides advisory responses to requests for ethical guidance, based on Model Standards of Conduct for Mediators (2005).

- scope currently limited to consideration of ethical issues pertaining to mediation
- opinions are indexed and included in National Clearinghouse database described above
- submit your ethics inquiry (Committee may accept an inquiry from an ABA member, an individual who is not an ABA member, an organization, or may consider an issue on its own initiative)

Model Standards of Conduct for Mediators

- Model Standards of Conduct for Mediators (2005)

Reporter’s Notes (2005)

Settlement Negotiations

Ethical Guidelines for Settlement Negotiations (ABA Section of Litigation 2002)

ABA Model Rules and Standards Relevant to ADR – Attorney Advocates and Neutrals

The ABA Model Rules of Professional Conduct include:

- Rule 1.12 - Former Judge, Arbitrator, Mediator Or Other Third-Party Neutral (re: conflicts of interest)
- Comment 5 to Rule 2.1 ("...when a matter is likely to involve litigation, it may be necessary under Rule 1.4 to inform the client of forms of dispute resolution that might constitute reasonable alternatives to litigation.")
- Rule 2.4 – Lawyer Serving as Third Party Neutral
- Rule 3.3 Candor Toward the Tribunal (Note: arbitrators in binding arbitrations are included in definition of tribunal – see Rule 1.0(m))
- Rule 4.1 – Truthfulness in Statements to Others

Online Dispute Resolution (ODR) Ethics

- ABA Section of Dispute Resolution has participated in a collaborative project on online dispute resolution ethics during Cyberweek 2009, 2010 and 2011
- “ABA panel on ODR Ethics and Online Mediation” has online discussion threads on 5 Ethics and ODR topics (impartiality, cost & fees, confidentiality, establishing & enforcing ethics in ODR, ethical dilemmas associated with platform/system design) at 2009 Cyberweek
- 2010 Cyberweek discussions and ABA essay contest
- 2011 Cyberweek – ABA essay contest

Additional Online ADR Ethics Resources from ABA Section of Dispute Resolution

- Committee on Ethics (this committee’s focus is mediation ethics)
- Dispute Resolution Ethics Resources web page includes links to:
  - some of the information described above
  - ethical dilemma columns published in Section’s e-newsletter Just Resolutions
- Fall 2010 issue of Dispute Resolution Magazine – entire issue devoted to mediation ethics – click here for magazine archives available to Section members.
- Arbitration Committee (this committee addresses arbitration ethics)

ABA Links to other ethics and professional responsibility web pages includes links to state by state legal ethics resources.

CAVEAT. The ABA continues to improve its website, including updated links to website content. If you cannot find a resource listed on any of the web pages described in this article, try the online Search function at the Section of Dispute Resolution home page (search box at top right of screen).

Margaret M. (“Marnie”) Huff is an independent mediator and arbitrator. She serves on the ABA Section of Dispute Resolution Council and chairs its Membership Committee. She is a member and past Chair of the Section’s Ethics Committee.

Should Mediation Confidentiality Be Conditioned on Mediator Qualifications?

By Daniel Preston Dozier and David C. Batson

Experience in the State of Maryland highlights the risks of mixing the desire to protect the confidentiality of mediation communications with efforts to ensure mediator competence. Recently the Maryland mediation community engaged in a set of stakeholder meetings to develop a Mediator Confidentiality statute for consideration by the state legislature. There has been widespread recognition of
the need for statutory protection of confidential mediation communications within the Maryland legal and mediation communities. Mediators in Maryland have been subpoenaed to testify numerous times; however, to the knowledge of the authors, no subpoenas have been upheld by appellate court decisions because parties in all cases settled before decisions were issued. Read More.

Ethical Dilemma – “One Small Problem…”

By Mel Rubin

This is a family mediation case. The husband and wife have filed for divorce. There are considerable assets and two minor children involved. The mediator has held a pre-mediation phone conversation with each party’s attorneys. On the day of the mediation the mediator convenes the parties and ushers in the wife and her attorney, as well as the husband and his attorney. As they are walking in, the husband's attorney turns to the mediator with whom he has had prior cases, and says “Mel, this is an easy one, there is only one small problem.” (Small as in the size of Yankee Stadium!).

The parties sit down to begin their joint session, at which point the mediator inquires as to what is the small problem. The husband’s attorney turns to the mediator and announces that the husband has a pending first-degree murder trial set in approximately two months. The husband’s attorney states that the husband is completely innocent. No pre-warning has been given to the mediator, however, the wife and the wife’s counsel are well aware of the murder charges. The alleged murder was work-related.

Questions:

What should the mediator do?
How should the mediation be conducted, if it goes forward?
What potential ethical issues and concerns arise with the mediator?
What potential ethical issues and concerns arise for the mediation process?
How does a pending criminal prosecution affect a mediation?
What if the criminal prosecution is for a federal crime?

To answer these questions and see how others have answered, go to the online form.