AMERICAN BAR ASSOCIATION
Section of Dispute Resolution

JUST RESOLUTIONS ENEWS

YOUR LINK TO THE SECTION OF DISPUTE RESOLUTION

JANUARY 2011

In This Issue

CONTACTS

Editor
David Moora
moorad@staff.abanet.org

Content Editor
Gina Viola Brown
browng@staff.abanet.org

Newsletter Production
RaShonda Rosier
rosierr@staff.abanet.org

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.

Looking for Archived Newsletters?
Click here

GREETINGS FROM THE CHAIR

In February the ABA will hold its **Mid-Year meeting** in Atlanta, and our Section will hold a number of events that should interest readers. On February 11 at the downtown Hyatt Regency, we will put on three interesting CLE programs: on Analytical Mediation, Arbitration Agreements, and the College of Commercial Arbitration Protocols for Expeditious, Cost-Effective Arbitration. For a full description, click here. That afternoon the Section will hold a reception at the JAMS office at 1201 West Peachtree St., Suite 2650, beginning at 5:30; all members of the ABA Section of Dispute Resolution are invited. Many of the officers and Council members of the ABA Section, from all across the country, will be in attendance. If you plan to attend please click here to RSVP.

At our **Council meeting** on Saturday February 12th, we will explore some of the continuing activities of our Arbitration Committee, including a compilation of best practices guides, an annotation of the Code of Ethics for Commercial Arbitrators, and a draft report to inform the Consumer Financial Protection Bureau established under the Dodd Frank Act as to the various factors that should be considered in preparing its report on arbitration and consumers in the financial sector. We will also devote a substantial portion of our meeting to a discussion of how our Section might contribute the skills and experiences of our members towards producing a more civil and rational dialogue in modern American politics and government. This entire meeting is open to the public. It will begin at 9 am at the Hyatt and last until about 2 pm. If you plan to attend please send an email to our Director, David Moora, at david.moora@americanbar.org.

On February 24-26, the ABA Section of Dispute Resolution will put on the **Sixth Annual Arbitration Training Institute** at the Biltmore in Los Angeles. With an experienced faculty and breakout sessions the Institute provides a great opportunity for both arbitrators and counsel to learn a lot in a very short time about every aspect of arbitration law and practice. http://www.abanet.org/dispute/arbinstitute/2011/home.html.

The Section also delivers monthly telephone/web-based CLE programs, the next one scheduled for February 8, on the future of "mandatory" arbitration, including implications of Dodd-Frank and the Arbitration Fairness Act. click here

Finally, I would like to invite each and every reader to the ABA DR Section's biggest event of the year, the **Thirteenth Annual Spring Conference** in Denver, April 13-16. These conferences typically attract about 1000 ADR professionals from literally all over the world (including lawyers who represent parties in mediations and arbitration). With over 100 CLE programs, committee meetings, receptions, and so forth, the learning and networking opportunities are staggering. Please join us.

R. Wayne Thorpe
Section Chair
Office: 404-588-0900
Email: wthorpe@jamsadr.com

WORDS MATTER IN MEDIATION…AND POLITICS

By Bruce E. Meyerson

The shootings in Tucson, Arizona, hit home for me in many ways. My wife and I have always been strong supporters of Representative Gabrielle Giffords; we held the Phoenix kickoff for her first campaign at our home. John Roll was a respected federal judge, a valued professional colleague, and like me, served previously on the Arizona Court of Appeals. I would like to share my thoughts, however, not about what happened, but why what happened should remind us that the "polarized discourse," all too common in this country, is damaging our democracy. For reasons I explain, the Section of Dispute Resolution and its members should be in the vanguard of those calling for and helping to create needed change.

The debate over whether the hateful political climate did, or did not, contribute to this senseless tragedy misses the point. Whether it did, or didn't, it is unquestionably true that the toxic political atmosphere in our country is interfering with our capacity to solve the pressing problems before us.

As professionals involved in conflict resolution, we know well how words are important in fostering communication and understanding different points of view. We know that personal attacks and hateful speech, never contribute to an atmosphere of cooperation and conciliation. Problem solving, which we do every day as neutrals, is never made easier when those in dispute attack the motives, integrity, or character of others. Christopher Moore in his classic text, The Mediation Process, made this point quite succinctly: "Unproductive communication can lead to a breakdown of interaction between the parties or the inability to start negotiations at all."

So it should not be surprising that "unproductive communication" in the world of politics has brought us to the point of impasse on so many challenges facing the country. This unproductive communication has reached new heights when weapons and guns are injected into the political dialogue. Commercials with weapons, reference to "Second Amendment remedies," or websites which put the cross hairs of a rifle on "targeted" congressional districts, do not promote problem solving and respect for other points of view. Political rhetoric, as well, has gone over the top.

A recent panel discussion at Emory University on civility in American politics was summed up this way: "The panelists expressed dismay that productive discourse on important but divisive political issues often devolves into even more polarizing diatribe when public voices incite tension without encouraging reflection and unity." Jim Leach, a respected former member of Congress, and now the Chair of the National Endowment for the Humanities, wrote recently: "Words matter. Stirring anger and playing on the irrational fears of citizens inflames hate. When coupled with character assassination, polarizing rhetoric can exacerbate intolerance, perhaps impelling violence."

The Section of Dispute Resolution has something very special to offer in this environment. Our activities, programs and efforts all are directed at building agreements, resolving conflict, and healing wounds. For example, our acclaimed Words Work program teaches young people how to use communication skills to avoid and resolve conflict in their daily lives, build self-confidence and develop relationship skills. The program recognizes that "skillful communication can turn information into power, and conflict into opportunities—opportunities for greater understanding, more meaningful solutions and a stronger sense of community." Perhaps the program should be offered in the halls of Congress!

I think we can do more. I invite my colleagues to share with our Section Council ideas on how the Section can contribute positively to making our national dialogue constructive,

not contentious, positive, not polemic, and helpful, not hateful. As President Obama said at the memorial service in Tucson, "only a civil and more honest discourse can help us face up to the challenges of our nation." As professionals involved in conflict resolution we can, and we must, bring our special skills to this critical endeavor.

The Section Council will be discussing these issues at the next Council Meeting on February 12th in Atlanta. To submit your thoughts online, click here.

Bruce E. Meyerson is a mediator, arbitrator, and trainer in Phoenix, Arizona. He is the Section of Dispute Resolution's Long Range Planning Officer.

ADR CASE MANAGEMENT TOOLS

By Tonya Johnson

ADR case management software can transform a mediation practice but the supply is often limited. Consequently some organizations develop customized applications while others adapt to standard case management tools. Following are several case management applications developed specifically for ADR practitioners that can help private and community mediation organizations as well as solo or small practice mediators leverage technology to increase efficiency.

* **ADR Case Manager** is a web-based or hosted program developed by mediator Jim Melamed, CEO of Mediate.com, an online community for alternative and online dispute resolution. ADR Case Manager was made freely available September 10, 2010 for the remainder of 2010. According to the website, beginning January 2011, there will be a fee depending on the number of staff utilizing the system. For individual practitioners, this fee will not exceed $29/mo. Enterprise systems (for unlimited staff and cases) will be $199/mo. The National Association for Community Mediation (NAFCM) has endorsed ADR Case Manager and sets forth its reasons for doing so in this article. Additionally, the ABA Section of Dispute Resolution recognized mediate.com as the institutional recipient of The 2010 American Bar Association Lawyer as Problem Solver Award.

* **Entellitrak Alternative Dispute Resolution** (ADR) Edition by MicroPact offers a suite of products designed specifically for government agencies and mid-to-large companies. Entellitrak was developed in Java and is platform and database independent. It allows users to define and manage their own data fields, terminology, and workflow agencies providing the ability to configure Entellitrak according to their individual needs. Clients include the US Department of Interior (DOI). To arrange a demo or for more information call (703) 709-6110.

* Developed in 1995, **interMediate** software for PC or Mac is a comprehensive system for managing any type of mediation services. It is a case management system that edits letters and documents within case files; and manages mediator teams and relationships with case referring bodies, including courts. It's an integrated system, usually used as a shared network database. Non-Profit pricing for interMediate with a license and monthly subscription to run on your in-house system begins at $200 for a single user and $65 per month. The single user hosted version is $78 monthly. Pricing for commercial users is also available on a licensed or hosted basis. All pricing includes technical support for the product along with a licensed copy of the FileMaker Pro relational database for each user. InterMediate was developed in 1995 by founder Colin MacGregor. Building on years of success in the UK, Resolute Systems entered the US market in 2009. Mediator Tammy Lenski, Ed.D, reviewed this application in June 2009.

* **System for Management of ADR Casework** (SMAC) by QPQ Technologies was developed in 2010 by founder and registered mediator Jackson Hughes, JD, MBA. SMAC is a Windows based Case Management Tool developed in MS Access. SMAC works as either an introductory system for new ADR offices or as the basis for a full, multi-office (networked) and multi-district ADR office. SMAC also tracks neutral/mediator performance. According to Mr. Hughes, SMAC is currently in use as the primary system at DeKalb Dispute Resolution Center, and is scheduled to be deployed at the Georgia 6th District ADR Program. They are also in the process of licensing the product to the Georgia Office of Dispute Resolution potentially for use at all court-connected ADR programs in the state of Georgia. For more information including client references and product pricing, contact Jackson Hughes at rjh@qpq.com.

Tonya Johnson is a research specialist with the ABA Legal Technology Resource Center.

RECENT ARBITRATION & MEDIATION CASES OF NOTE

By Lisa Pex Shevlin

Arbitration Case Summaries

Goldman Sachs Execution & Clearing, L.P. v. The Official Unsecured Creditors' Committee of Bayou Group, LLC (2010 WL 4877847 (S.D.N.Y.))
United States District Court, S.D. New York
Petitioner Goldman Sachs seeks to vacate an arbitral award claiming the panel had manifestly disregarded the law. The arbitral panel had entered an award, in the amount of $20,580,514.52, in favor of the respondents finding that Goldman Sachs had failed to diligently investigate funds and was jointly and severally liable for the fraudulent transfers of Bayou Funds. The Court considered the following three factors to determine whether the arbitrators had manifestly disregarded the law: 1) whether the alleged law was clearly ignored, 2) whether the law was improperly applied, and 3) whether the arbitrators knew of the law and chose to disregard it. The Court found that the arbitrators had applied the law correctly, and reflected on Goldman Sachs' position by stating they had "voluntarily chosen to avail itself of this wondrous alternative to the rule of reason, [and now] must suffer the consequences."

In re Chevron Corp. (2010 WL 4880378 (D.Md.))
United States District Court, Maryland
Chevron Corporation filed a petition for ex parte application to conduct discovery on two individuals for use in an international arbitration against the Republic of Ecuador. Chevron alleges that these individuals and the government of Ecuador have engaged in corruption and improper collusion relating to the amount of assessed damages at 122 oil production sites in Ecuador. Since the arbitration was initiated under the U.S. – Ecuador Bilateral Investment Treaty and is operating under UNCITRAL rules, the Court found that Chevron met the requirements to compel discovery under 18 U.S.C. § 1782. The Court held the statute relating to foreign or international tribunals also applied to international arbitration proceedings, and granted Chevron's petition.

Simmons Family Properties, LLLP v. Shelton (2010 WL 4835609 (Ga.App.))
Court of Appeals of Georgia
Two of the three shareholders to DDE Properties, LLC filed a petition to dissolve the company claiming they were not able to reach a quorum to do so on their own. The trial court granted the dissolution and dismissed Simmons' petition to stay the proceeding and compel arbitration. An arbitral clause within the company's operating agreement required any requests for dissolution to be determined by an arbitrator. The Court of

Appeals found that the question of arbitrability "is undeniably an issue for judicial determination," reasoning the request for dissolution arose out of a state statute and did not relate to the operating agreement.

State of Connecticut v. AFSCME (2010 WL 4909957 (Conn.App.))
Appellate Court of Connecticut
AFSCME, union representing a corrections officer, appealed from a trail court order claiming they had improperly vacated an arbitration award on the ground that it violated public policy. The issue presented in arbitration was whether the dismissal of the corrections officer was for just cause. The arbitrator found that it was not, and issued an award which included a suspension for inappropriate behavior without pay. "The public policy exception applies only when the award is clearly illegal or clearly violative of a strong public policy." The State contended that there was a well defined public policy against sexual harassment in the workplace that is evidenced by state statutes and within the corrections department. The Court found the State had met its' burden and affirmed the order to vacate the award.

NYKCool A.B. v. Pacific Fruit, Inc. and Kelso Enterprises, Ltd. (2010 WL 4812975 (S.D.N.Y.))
United States District Court, S.D. New York
NYKCool, a maritime transport company, entered into contracts with Pacific Fruit and Kelso Enterprises to ship bananas and other cargo from Ecuador to California and Japan. When the contracts were terminated, NYKCool commenced arbitration to recover for unpaid freight charges. The panel held that although a final agreement had not been reached between the parties for the period of time where charges had accumulated, it did not stop the parties from performing on their agreements. The panel awarded NYKCool the unpaid freight charges. Pacific and Kelso appealed the award, claiming it was in manifest disregard of the law and could not be confirmed because it was not final. The Court found that the arbitrator's written decision had addressed the law which Pacific and Kelso asserted to have been disregarded. The Court also concluded the award was final even though it had not specifically allocated the amount each party was required to pay to NYKCool.

Mediation Case Summaries

Cassel v. The Superior Court of Los Angeles County (2011 WL 102710 (Cal.))
Supreme Court of California
Cassel sued his attorneys for malpractice, breach of fiduciary duty, fraud, and breach of contract arising primarily out of representation during mediation with another party. In order to advance these claims, Cassel sought to introduce evidence of the attorney's behavior towards him surrounding and during the mediation. The Trial Court did not permit the information to be disclosed by citing the California Evidence Code §1119, which reads in part: "all communications, negotiations, or settlement discussions by and between participants in the course of a mediation…shall remain confidential." The Court of Appeals reversed by reasoning that the statute was not intended to protect attorneys from malpractice claims. The Supreme Court reversed the Court of Appeals by finding, absent an explicit waiver of confidentiality, the plain language of the statute did not intend to create room for "judicially crafted exceptions." The Court said that the legislature had not intended to allow courts to balance the importance of confidentiality against Cassel's need for the materials since they had not included a "good cause" limitation in the statute. Therefore, in order to encourage candid discussions for successful mediations, the roles of the participants are unimportant and all communications pertaining to the mediation shall remain confidential.

Adsit v. Wal-Mart Stores, Inc. (2010 WL 4903617 (N.Y.A.D. 3 Dept.))
Supreme Court, Appellate Division, Third Department, New York
Adsit brought a claim for personal injury after she was struck in the spine by a Wal-Mart employee's metal rod in their store. The parties pursued mediation where they reached a

settlement agreement. After the mediation, Adsit informed her counsel that she no longer wished to accept the settlement claiming she was not of clear mind during the discussions. In order to prevail, the burden of proof rested upon Adsit to show that her "mind was so affected as to render her wholly and absolutely incompetent to comprehend and understand the nature of the transaction..." The Court affirmed the settlement agreement, and found that Adsit was of clear mind after it heard testimony from the mediator and Adsit's counsel stating they believed she understood the nature and consequences of the agreement since she had actively engaged in the discussions.

DeMatthews v. The Hartford Insurance Co. (2010 WL 4671006 (C.A.3 (N.J.)))
United States Court of Appeal, Third Circuit
This case arose after The Hartford Insurance Company terminated DeMatthews' long term disability benefits. The matter was referred to mediation wherein the parties reached a settlement agreement. DeMatthews agreed to drop his claim in court after the mediation, but refused to sign the settlement agreement. At the hearing to enforce the agreement, DeMatthews was represented by new counsel and decided it was in his interest to sign the agreement. Over a year later DeMatthews moved to reopen his case and to set the settlement agreement, aside claiming he was pressured to settle and was under the influence of multiple medications during the hearing. The District Court found that DeMatthews had understood and voluntarily agreed to the terms of the settlement, and found he had presented no extraordinary circumstances to reopen the case after the statute of limitations had lapsed. The Court of Appeals affirmed the judgment of the District Court.

Lisa Pex Shevlin is a third year law student at The Pennsylvania State University, Dickinson School of Law. She is also pursuing a joint master's degree in International Affairs, and is the Secretary for the International Law Society.

COMMITTEE SPOTLIGHT

The ABA Dispute Resolution Section's International Committee is pleased to invite you to attend its next half-day workshop that will take place on April 13, 2011 in Denver, Colorado, on the eve of the Section of Dispute Resolution's 13th Annual Spring Conference. Attached please find a copy of the agenda for this event.

We are fortunate to be joined for this event by the Honorable Judge Machteld Pel (ret), who will be giving a presentation of her pioneering work in the Netherlands on access to ADR from the Dutch courts, and in particular diagnostic tools established and used today by the Dutch judiciary with great success to systematically identify and diagnose appropriate cases for resolution by mediation or conciliation.

In addition to Judge Pel's workshop, we will be joined for this meeting by our colleagues from the DRS' Ethics and Arbitration Committees to explore such issues as ADR process designs, combining ADR proceedings and if/when/how it may be possible/appropriate for ADR neutrals to "swap hats" (e.g., from mediation to arbitration or vice-versa) in cross-border or cross-cultural disputes.

We will also hold our traditional "around the world in 60 minutes" session to be able to hear about new developments in ADR across the globe.

As usual, we also look forward to receiving your views and feedback on the International Committee's programs and initiatives, and welcome any contributions or ideas you may have to bring.

Please RSVP by clicking here or by cutting and pasting the following URL into your browser https://abanet.qualtrics.com/SE/?SID=SV_87fA6jUgBs61F0o. The final agenda and all further details will be sent out by email so please be sure to include your email address when you RSVP.

We look forward to seeing you all in Denver and encourage you to attend our meeting, which is free of charge to all ABA members who will be attending the Dispute Resolution Section's 13th Annual Spring Conference. This year the Conference will include more than 90 concurrent programs presented by experts from across the globe. The programs will cover many aspects of mediation, arbitration, and negotiation. They should appeal to neutrals, advocates, teachers/scholars, court and private administrators, and many others. For more information please visit the conference webpage.

ETHICS CORNER: TO BULLY OR NOT TO BULLY

By Chanda Roby

Give us your thoughts on the following ethical dilemma.

You are an ombuds officer for your state's department of education. Your job consists of, among other things, determining if there is any merit to claims filed with the department of education. Bullying is a hot issue now, and every school district in your state has been mandated to incorporate its own bullying policy into its current discipline plan by the department of education. Recently you received a complaint initiated by a parent who wants to take action against a school district because his daughter, whose name is Chanel, was being teased by a classmate who called her more than once, "Number 5," referring to the perfume of the same name. This name calling resulted in laughs from the student in question and several classmates nearby who overheard. When Chanel reported this incident to her teacher, the teacher talked to the boy, but according to Chanel, nothing else was done. During an interview with the father, he informed you that he has been seeing the reports of students committing suicide and crimes because they were teased by peers and has been, as he admits, "worked up" by these reports. The father says he always vowed that he would not sit by idly if he knew one of his children was being bullied.

You have checked the discipline policy for the school district in question, and it specifically states that "students who feel they are the victim of bullying or harassing behavior should tell the nearest school official immediately after the incident occurs, and that school official shall take action immediately after the report." The school district's policy clearly says the victimized student's teacher, in such incidents, should call a meeting between all student parties involved, witnesses, and parents and failure by anyone to adhere to any part of the school district policy is considered a violation of the policy. Additionally, the policy says victims who fail to immediately report bullying or harassing behavior they experience waive the ability to claim negligence on the part of the school to resolve the behavior in any future complaints regarding the incident. All school officials, students, and parents are asked to sign a form stating they have read/understand and agree to the policy. Chanel says she told her teacher that same day, "Camden was picking on me. He called me Number 5, and everyone laughed. My name is not Number 5. It is Chanel."

Among the things you discover from your interviews with the students: 1-These events between Chanel and Camden happened two days ago. 2-It is currently January, and school will be out in May. 3-Chanel has not had any problems with Camden before or since the incident. 4-The two fifth-graders have been in school together since Kindergarten. 5-Both students are average in behavior but very good academically, when compared to their peers.

After interviewing the teacher, you realize she was following evidence-based conflict resolution practices you suggested to the school when you were a practicing education law attorney. At that time, last year, you gave a few workshops to school officials at the school in question about simple alternative discipline methods they could use to reduce office referrals in various situations. Moreover, the firm you worked for gave money to the school district in question for winning a contest where each competing school district developed and submitted a conflict resolution plan for their district, and you were a judge for the contest. The contest rules did not require school districts to follow their proposed plans as a condition for entering or winning the contest. This contest was in no way endorsed by your state's department of education.

If the school district is found to be in violation of its policy as a result of the teacher's actions, state and federal laws, agencies, and implications could come into play. Furthermore, the teacher stands to be reprimanded, which in the worst case scenario, could result in her being fired.

Is there any merit to the parent's complaint that the school district's bullying policy was violated in this situation based on your above findings? Would you recommend the state department of education initiate action against the school district based on your findings? As an extension of a state agency, what message could your opinion in this situation send to local and federal agencies, school officials, parents, and students about similar situations? What other, if any, possible concerns would you have as the ombuds officer in this case?

To answer these questions and then see how others have answered, go to:
https://abanet.qualtrics.com/SE/?SID=SV_3fW6gR4fq9SD9DS

UPCOMING ADR EVENTS

Mediators Beyond Borders will be holding its **4th Annual Congress** in Los Angeles on March 4-6, 2011. For more information go to http://www.mediatorsbeyondborders.org

The **Association of Family and Conciliation Courts' (AFCC) 48th Annual Conference** will be held at the Hilton Orlando Bonnet Creek Resort, June 1-4, 2011. The conference, titled Research, Policy and Practice in Family Courts: What's Gender Got to do with it? will explore the challenges that gender issues bring to the family law arena. For more information go to http://www.afccnet.org/conferences/afcc_conferences.asp

MEMBER NEWS

Professor **Paula M. Young** won the Distinguished Mediator Award given by the Virginia Mediation Network (VMN) at its Fall 2010 Annual Fall Training Conference held at Wintergreen Resort, Virginia. She was the first recipient of this award, which VMN plans to present annually. It recognizes a prominent member of the mediation community in Virginia who demonstrates personal and professional commitment to advancing peaceful conflict resolution.

University of Oregon law professor **Michael Moffitt** has been appointed Dean of the University of Oregon School of Law, following a nationwide search to fill the position. His appointment will take effect in July 2011.

CALENDAR OF EVENTS

ABA Midyear Meeting - Section of Dispute Resolution Programs
February 11 - 12, 2011
Hyatt Regency Atlanta
Atlanta, GA
For more information, click here
Download the brochure, click here

Arbitration Training Institute
February 23 - 26, 2011
Millennium Biltmore Hotel
Los Angeles, CA
For more information, click here
Register online, click here

13th Annual Spring Conference
April 13 - 16, 2011
Sheraton Downtown
Denver, CO
For more information, click here
Download the brochure, click here
Download the registration form, click here
Register online, click here

TELECONFERENCES

Mandatory Arbitration: A Conversation About the Implications of Dodd-Frank and the Arbitration Fairness Act
February 8, 2011
12:00 - 1:15 PM Eastern Time
Download the registration form, click here
Register online, click here

The Arbitration Clause Says What?
February 11, 2011
2:00 - 3:30pm Eastern Time
Download the registration form, click here
Register online, click here

Protocols for Expeditious, Cost-Effective Commercial Arbitration from the National Summit on Business-to-Business Arbitration
February 11, 2011
3:45 - 5:15pm Eastern Time
Download the registration form, click here
Register online, click here

To purchase the materials and recordings from past teleconferences, click here.

Get Involved, Join a Committee

Are you looking for opportunities to network with your peers? Do you want tips on how to improve and market your practice? Would you like to contribute to the development of ADR policy? The Section has over 30 committees that focus on interest areas – from practice development, arbitration, mediation and international ADR, to construction, ethics and healthcare. **Join a committee TODAY!! click here**.