Welcome to the Mediation Committee’s Fall 2018 e-Newsletter!

The ABA Section of Dispute Resolution’s Mediation Committee is excited to share this Fall e-Newsletter. The Committee Co-Chairs are happy to report that the Mediation Committee has expanded to over 500 members, the largest committee in the Section.

We are looking for contributors to assist in the quarterly production of this newsletter. So, do you have some ideas on how to connect? Want to know what’s going on with the Committee and its members? Looking to improve your practice? All of this and more is available by being involved with the Mediation Committee. Step up and come aboard. Just write to us to let us know that you want to be involved! And don’t forget to check out our webpage for the latest in Committee news!

Mediation Committee Co-Chairs, Mark LeHockey and Joe Esposito

Newsletter Chair, Mansi Karol

RECENT ARTICLES / REPORTS

Toward a Definition of Success in Mediation: A Work in Progress, By Ava J. Abramowitz, ABA Dispute Resolution Magazine, Summer 2018 (pp. 23-28)

Ava Abramowitz, one of the Mediation Committee’s former co-chairs, has written a thought-provoking article on how to define and measure success in the mediation process. Does one size fit all? Does success require resolution at the first instance of any mediation, or can progress toward a settlement be defined as success? Does the measurement vary, depending upon the type or size of case? If you haven’t received a hard copy of the Summer 2018 magazine, sign in through your membership in the Dispute Resolution Magazine. Ava gives us all much needed prompts to rethink how we measure our work.

Mediation is Risky Business: Research Tells Us Where Mediators and Advocates Disagree
By Sam Imperati, JD and Devin Howington, PhD ICMRESOLUTIONS, Portland, OR

Mediators work in the intersection of logic and emotion. Our craft combines art, science, and ethics. We often rely more on the “art” than the “science.” Research can provide insights that help check our assumptions about how our “art” should be practiced within our ethical
framework. How much room do our ethics give us to change our behavior to match the desires of the parties, and should we?

We believe research can enlighten mediators on what the parties want and expect from them. What really matters to everyone else in the room? These questions guided a pilot study into mediator behaviors, and what advocates think about those interventions. We asked mediators about their actions, and we asked advocates from the same pool about their preferences for those behaviors. We used advocates in this study as a proxy for parties, and all questions were worded to ask about general preferences in their typical mediations. The survey was sent to the ADR and Litigation sections of the Oregon and Washington State Bar Associations. In all, 125 people responded to the survey (79 mediators and 49 advocates).

The study results revealed several differences, and a few points of agreement, between mediators and advocates. Both prefer a mediation styles that is between Evaluative and Facilitative (mediators 43% and advocates 45.7%). Interestingly, 17.4% of advocates were unsure of the differences between the approaches. What does this say about the mediator’s obligations of Full Disclosure and Informed Consent?

When it came to the quantum of process and subject matter knowledge, 56% of the mediators say they should have “expertise” in both, while 35% of advocates believe that is needed. Rather, 48% of advocates want the mediator to have process “expertise” and subject matter “familiarity.” Does this mean that advocates are less interested in mediators predicting the likely outcome than they are in having us be process guides?

When it came to mediator behavior during the session, the results were mixed. One of the largest differences in opinion was the use of joint sessions. Mediators were typically open to using joint sessions, with 58.3% of mediators reporting they either occasionally, frequently, or always used them. 41.8% reported they rarely or never used them. Advocates, however, overwhelmingly fell in the “never” and “rarely” categories when asked about their preference for joint sessions (78.2%). Future surveys will ask why that is the case.

Some mediators and advocates agreed that mediator proposals were an appropriate tool, but mediators (31.7%) were more likely than advocates (13.1%) to disagree or strongly disagree with their use. If the matter didn’t settle, advocates wanted mediators to offer an opinion about the likely outcome of the case either “frequently” (37%) or “occasionally” (28%), whereas mediators were most likely to say they “rarely” (34.2%) or “never” (25.3%) provided an opinion.

Some additional results follow.

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<th>Topic</th>
<th>Results</th>
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<td>1) Sharing Information at Mediators Discretion:</td>
<td>60% of mediators don’t agree while 43% of advocates agree</td>
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2) Mediators pointing out mistakes of law: Agree? 52% of advocates want this done but 14% of mediators do it.

3) Mediators should emphasize weaknesses and diminish strengths: Agree? 59% of advocates agree compared to 39% of mediators.

Perhaps the most interesting difference came from examining client satisfaction. Almost all mediators thought clients were typically either “satisfied” or “very satisfied” (97.5%), whereas only 60.9% of advocates said their clients were typically “satisfied.” No advocate reported their clients typically being “very satisfied.” This difference should alarm mediators and should prompt us to reflect on our effectiveness. It may be that advocates feel more pessimistic about mediation than the parties did; a question for future research.

Once the picture becomes clearer, we may find that what advocates and parties want is at odds with our ethical standards. For example, advocates want more mediator opinions and more mediator proposals than mediators typically say they offer. To what extent can mediators provide proposals and opinions and still be Impartial? Is obtaining Informed Consent from the parties sufficient to overcome that obstacle? If we do offer opinions, do parties understand the difference between opinions and legal advice? The data will tell us what parties and their advocates want, but adapting to those wants must always include a close look at the ethical implications.

Related articles: www.mediate.com/icm/pg23.cfm. Please contact us for a survey in your area. SamImperati@ICMresolutions.com


The work done before a mediation session takes place is as important—sometimes more so—than anything accomplished at the actual mediation. Time spent in advance to thoroughly calibrate strengths, weaknesses, and tradeoffs as well as in pre-calls with the mediator is key to everyone coming to the table with reasonable expectations. Why? As it turns out, our brains are hardwired to overweight the good news and underweight the bad when it comes to supporting our preconceived notions and preferences. Individuals do it; so do groups and organizations. The brain science proves all that.

This article explains how clients and counsel fool ourselves in assessing our prospect in litigation and comparing them against the alternatives, and recommends a series of steps to set the stage for a successful mediation.
CALL FOR AUTHORS FOR JUST RESOLUTIONS MEDIATION EDITION MARCH 2019, PROPOSALS DUE SEPTEMBER 14, 2018.

Interested in writing about the future of mediation? The Mediation Committee is putting together the March 2019 edition of the Dispute Resolution Section’s Just Resolutions Newsletter and now welcomes submissions addressing the topic New Frontiers in Mediation.

Please be advised we have broadened the scope of the March issue beyond our previous announcement and also extended submission dates.

We are looking for articles about new and developing aspects of mediation practice as we explore the future of our field, including:

1. where regulation of the practice is or should be going (certification and/or regulation at the state and federal level, including both qualification requirements and ethics), current trends in mediation regulation and mediator certification, particularly with implications for multijurisdictional practice, or opinion pieces on current issues such as reciprocity, national and/or international standards, etc.;
2. newer and innovative areas of mediation practice, such as restorative justice, online dispute resolution (ODR), and others; and
3. developments in mediation process/training/theory.

Please send your short (5-10 sentence) proposal to Judith Starr at Starr.Judith@pbgc.gov, Susan Guthrie at susan@lajollamediation.com, and Doug Witten at DWitten@innovativeADR.com by September 14, 2018 and you will receive a response by October 5, 2018. We anticipate complete articles will be required by November 30, 2018.

If you have an existing article, please send a short (5-10 sentence) treatment to the above addresses; please do not send the full article as your proposal. Articles that have previously been published are welcome and it is the author’s responsibility to obtain copyright clearance and to edit it to meet Just Resolutions length requirements (see below).

Information regarding article requirements:

- Subject: New Frontiers in Mediation.
- Length: Approximately 750 words and not more than 1000 words.
- Dates:
  - Proposal September 14.
  - First draft due November 30.
  - Edits and responses completed during December
  - Authors and editors confer regarding whether authors need to update articles for changes in circumstances, new statutory or decisional law, etc. by January 11, 2019.
MEET OUR COMMITTEE MEMBERS

Andrea Johnson

1. Who are you, where are you located, and what is next for you after graduation?

I am an aspiring attorney and mission-driven business enthusiast. I currently live in Baltimore, Maryland and am in my final year at The George Washington University Law School (GW Law) in Washington, DC. Following graduation, I will be joining Miles & Stockbridge P.C. as an associate working with businesses of all sizes and structures. As a transactional lawyer, I will be analyzing business deals and taking proactive steps to keep organizations out of the courtroom wherever necessary.

2. How did you become involved with Mediation?

I took several psychology classes during my undergraduate studies at Virginia Tech, and in law school naturally gravitated toward the intersection of conflict resolution and law. At GW Law, I studied under Ava Abramowitz, the former ABA Mediation Committee Chair, and our discussions about alternative dispute resolution and mediation skills drew me in. Mediation used in commercial business disputes involving intellectual property or securities is particularly intriguing to me, and often very helpful for clients.

3. How are you currently involved with the ABA’s Mediation Committee?

I now serve as the Co-Chair of the ABA Mediation Committee’s Subcommittee for Law Students and Young Lawyers. We publish quarterly articles, and in April I attended the Spring
2018 meeting for the ABA’s Dispute Resolution Section on behalf of the group. The substantive conversations I had with people from all over the U.S. made the experience truly rewarding, and I am grateful to GW Law for selecting me at their Bronze Sponsorship recipient so I could also attend on behalf of my school.

4. Favorite activities when you are not working?

My favorite activities generally involve time spent with my family. I also really enjoy hiking and outdoor activities, playing chess, traveling, sports, and volunteering as a mentor in my community. I am a huge fan of performance arts and enjoy live spoken word poetry.

5. Favorite movies and books?

"The Pursuit of Happyness" and "The Shawshank Redemption" are at the top of my list for best movies. However, I have seen “Love & Basketball” at least 70 times since it was released in 2000 (no exaggeration) and it never gets old. For books, anything by Brene Brown, Malcolm Gladwell, and Mark Batterson are fast favorites of mine.

6. What do you hope to get out of participating in the Committee?

During my 2017-2018 year of service with the Committee, I have learned more than I could have anticipated from working with the leadership team. My personal leadership style has developed, which I hope continues. I also hope the creativity in our sub-Committee helps us reach new practitioners interested in cultivating successful mediation strategies early in their careers. We have been thinking outside of the box this year with our educational webinars and content, and we look forward to executing.
Susan E. Guthrie

Where are you located and what do you do?

I have lived in La Jolla, California for the past two years after living in Fairfield County, Connecticut for 25 years after law school. However big changes are ahead, and we are relocating to Chicago, Illinois in September. I am an attorney licensed in California and Connecticut and I currently provide online family law mediation services to clients in both states. As an ODR provider, I also train other mediators and professionals on integrating an online platform into their existing practice and recently launched Breaking Free: A Modern Divorce Podcast on iTunes.

How did you become involved with mediation?

It may be a familiar refrain, but I am a recovering litigator. I handled complex and high net worth family law cases in Connecticut for the first 20 years of my practice and grew increasingly disillusioned with the result of the contentious process for my clients and their families. A colleague and friend urged me to look into mediation and I quickly found that the process provides a much better outcome in almost all cases. It is the best of both worlds because I can utilize my experience and knowledge gained in my years of litigation but can assist my clients to resolve their issues cooperatively and respectfully.
How are you currently involved in the ABA’s Mediation Committee?

I recently joined the Dispute Resolution Section and will now be co-chairing the Mediation Committee's *Just Resolutions Online Magazine*. The Dispute Resolution Section’s issue is earmarked for March of 2019. We are currently seeking proposals for articles for the issue. If you are interested and would like more information, please feel free to reach out to me. I am also on the Planning Committee for the 2018 Advance Mediation & Advocacy Skills Training Institute to be held in Chicago on October 18-19. I attended the Institute last year when it was held in Malibu, CA at Pepperdine University and I am thrilled and honored to be involved in the planning of this event this year.

Care to share any memorable mediation story -- really good or really not?

Well, I do love a happy ending and recently had a case that had become quite emotional and contentious. The parties had resolved all their issues in mediation in a very cooperative and amicable manner. It had been a poster child type of case for divorce mediation. Then, post-dissolution, something happened, and they were at each other’s throats over an issue that had arisen in the division of the assets under the agreement. The Husband was convinced that the Wife was asking for more than she was supposed to receive, and the Wife was convinced he was cheating her. Both had retained litigation counsel and were prepared to fight this out in court but grudgingly agreed to return to mediation for one last effort. They came in and after a few go rounds where they each struggled to state their position and to understand the rather complicated fact pattern, it soon became clear that they were each asking for exactly the same outcome. When I managed to help them both to see this clearly, they were so relieved that they both started crying. They walked out of the mediation room arm in arm and will hopefully be able to move forward and co-parent their son together going forward.

Favorite activities when you are not working?

I have loved being near the beach and enjoying the beauty of Southern California on walks and hikes for the past two years. As we move on to Chicago, I am looking forward to exploring the music and theater events the city is famous for. I am also a big fan of SoulCycle and will be visiting the four studios around Chicago soon which should help with all the eating I think I will be doing in the city’s many wonderful restaurants.

Favorite movie, music or play?

I know this is not an original answer, but we were recently able to see Hamilton when it was touring here in San Diego and it really was an amazing experience.

What do you hope to get out of participating in the Committee (besides recommendations for movies, music and plays)?
I hope to meet and get to know many of our colleagues in all the different areas of the alternative dispute world and especially to meet those who are in my new hometown of Chicago. I am also looking forward to continuing to work with the Committee to bring opportunities and plan events that will enhance our skills and move us forward in our profession. I would also appreciate any recommendations for movies, music and plays!

IN-HOUSE COUNSEL PROFILE: Jared Issacsohn, Skyline Construction

Interview conducted by Lisa Jaye, Mediation Committee Member

Skyline Construction, one of the top commercial general contractors in the San Francisco Bay Area. Skyline is an employee-owned company, founded in 1996, whose core business is tenant improvement construction for its technology (Pandora), law (Perkins Coie), and financial (ValueAct Capital) clients. In addition, Skyline builds mission critical data centers, complex infrastructure projects, and ground up construction. Skyline’s in-house legal counsel, Jared Issacsohn, provided the following responses to our mediation questionnaire:

What do you and your counsel look for when selecting a mediator?

Industry Experience: a mediator who is familiar with the construction industry and tenant improvement work. Credibility: we do our research and ask around. Non-objectionable: someone who is easy to agree on.

What aspects of the mediation process are most effective in your cases?

Having an objective resource to bridge the gap between the parties’ positions. The speed of the process and relative affordability, as compared to arbitration or litigation.

Which of your company’s cases are the best candidates for mediation?

All of them! As a general contractor, we always push to include mandatory mediation clause in our contracts. Our average project is approximately twelve weeks and we work under strict deadlines, so if a dispute arises all parties involved typically want a fast and amicable resolution.

What qualities do you most admire in a mediator?

Endurance, neutrality, and creativity.

What qualities do you look for in your outside counsel during mediation?

We look for an experienced litigator, who will act as an zealous advocate. We value a strong track record of success and alignment with our business goals.
What advice would you give counsel so that they may effectively represent their clients during mediation?

Know the facts backwards and forewords. Anticipate the other side’s position and objectives. Prepare your client for the process and potential outcomes.

What advice would you give mediators?

Be candid about your style and background when you are being considered. Foresee issues that might arise when the parties get close to a settlement (e.g., confidentiality and non-disparagement agreements) and raise them early in the process.

CALL FOR VOLUNTEERS FOR SUB-COMMITTEE’S

If you are interested in becoming more active in the Mediation Committee, we would love for you to volunteer to help on one of our subcommittees. Please contact Mark LeHocky at mark@marklehocky.com and Joe Esposito at jesposito@hunton.com to let us know your interests.

MEDIATION PROGRAMS AND MATERIALS

ABA Mediation Week will be held during the week of October 14 - 20, 2018. The theme for this year’s ABA Mediation Week is “Mediation, Civil Discourse, and ABA 2011 Resolution 108.” Mediation Week is a wonderful opportunity for your mediation-related groups and organizations to arrange an event focusing on this timely topic. To that end, the ABA has created a “mediation toolkit” with various resources that you can use to design an event. The toolkit, and further information about Mediation Week, can be found at https://www.americanbar.org/groups/dispute_resolution/events_cle/mediation_week.html. Our goal for this year is to increase the number of Mediation Week programs and events put on by our members, and we encourage you to share your experiences with us!

New Mediation Webinar Series #1 of 6 -- Advanced Negotiation Strategies in Mediation: “Sales,” “Packaging,” and “Pacing” to Achieve the Best Outcome: September 12, 2018: 1:00--2:15 pm Eastern

Speakers: Earlene Bagett-Hayes, Mark LeHocky, and Robert Daisley
Moderator: Jeffrey R Jury

If you feel that mediations have become routine and ritualized, please join us for an “idea session” to consider different approaches to negotiations within, and surrounding, the mediation process. Our webinar unites viewpoints of advocates, mediators and former general counsel, designed to build better processes for negotiation and mediation. The panel will challenge...
traditional notions, offering new ideas to motivate your negotiation counterpart within a sensible framework, delivered with optimal timing.

Earlene Baggett-Hayes, Rob Daisley, Mark LeHocky and Jeff Jury bring a variety of backgrounds and perspectives that span the spectrum of claim and transaction negotiations and mediation. We want you to leave this webinar thinking about motivating, rather than persuading; framing, rather than presenting; and being confident, rather than uncertain, about timing.

For details and registration, go to: https://shop.americanbar.org/ebus/ABAEvetsCalendar/EventDetails.aspx?productId=334368456

For a list of other upcoming Mediation Webinars, go to: https://shop.americanbar.org/ebus/ABAEvetsCalendar/EventDetails.aspx?productId=334368456

**ABA Mediation Week**

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**16th Annual Advanced Mediation & Advocacy Skills Institute October 25-26, 2018 in Chicago**

The Sections highly acclaimed interactive two-day skills institute is being held at the ABA Headquarters in Chicago on October 25 and 26. Registration is now open. Whether you are a litigator, community resource, consumer of mediation services or a mediator, this program will enhance your skills and knowledge. Over the course of this two-day event attendees will have multiple opportunities to discuss trends and practices with the presenters and engage in small group discussions with other attendees and skilled facilitators.

The institute format is highly interactive and will overview the various ethical canons and constructs of ADR. It will also explore pervasive challenges, emerging trend and strategic advocacy considerations arising in mediation practice today. Through presentation and analysis of case simulations, experienced practitioner faculty will: 1) present and demonstrate key advocacy concepts, 2) stimulate questions and discussion and 3) offer practical insights and techniques for managing unique challenges arising in the strategic and ethical dimensions of
mediation for advocates, parties and principals alike. Check out the Agenda on the Section of Dispute Resolution home page. Space is limited, so register today.

Have a wonderful fall and stay tuned for our next e-newsletter.

Mansi Karol

Fellow, Kukin Program of Conflict Resolution, Benjamin N. Cardozo School of Law (Summer 2017)
LL.M. Benjamin N. Cardozo School of Law, 2017
LL.M. Queen Mary University of London 2011
LL.B. Bangalore University, India 2010