

# ***ADR IN LABOR & EMPLOYMENT LAW***

## ***Committee Newsletter***

Summer 1999

**American Bar Association**

**Section of Labor & Employment Law**

### ***Hope To See You In Atlanta!***

The ABA Annual Meeting in Atlanta is loaded with programs relevant to our practices. The Annual Meeting as a whole runs from August 5-11. The Section of Labor and Employment Law, based at the Ritz-Carlton Atlanta, convenes from August 7-11. Members of our Committee have developed several presentations for the upcoming meeting. They are as follows:

#### ***Basic ADR in Employment Law***

Sunday, August 8

3:30-6:00 p.m., Congress Room, Third Floor

This program will introduce advocates to the basics of alternative dispute resolution with an emphasis on mediation and arbitration. The program will include an explanation of ADR alternatives, the "Due Process Protocol" adopted by the ABA, tips for drafting ADR provisions and the essentials of advocacy in ADR - with reference throughout to both union and non-union workplaces. The moderator for this presentation is Charles Kohler and the speakers will be James Adler, Sara Adler and Evan Fray-Witzer.

#### ***ADR in Labor and Employment Law Committee Program: Recurring Evidentiary Issues in Employment and Discrimination Cases***

Monday, August 9

7:30-9:30 a.m., Plaza Ballroom I, Second Floor

This will be a role-playing program, with a lawyer representing a claimant, a lawyer representing respondent and an arbitrator to make rulings. This presentation will examine the most common issues that arise in most cases, present both sides and explore how and why the neutral makes his or her rulings. The participants in this presentation are Joseph Garrison, Alfred Feliu, Wayne Outten and Weyman Johnson, Jr. Following this presentation will be the committee business meeting.

#### ***Discipline & Discharge***

Tuesday, August 10

2:00-3:30 p.m., Plaza Ballroom, Second Floor

A review of arbitration, NLRB and court decisions dealing with workplace discipline. A panel of experienced union, and plaintiff attorneys and a neutral

*Continued on Page 3*

### ***Mediating Employment Disputes***

#### ***Fall Training Co-Sponsored By Labor & Employment Law Section***

The Alliance for Education in Dispute Resolution (the Alliance), in conjunction with the National Academy of Arbitrators and Cornell University, will be offering a five-day training opportunity that will focus on mediating employment disputes. The training is scheduled for October 18-22 and will be held in Montreal, immediately following the NAA Fall Meeting. The training program is designed specifically for experienced labor arbitrators.

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**Mediating Employment Disputes - cont. from page 1**

The Alliance, headed by the Cornell Institute on Conflict Resolution of the Cornell University School of Industrial and Labor Relations, is a national network of universities and professional organizations working together to make high-quality dispute resolution training available throughout the country. The participating educational institutions include, along with Cornell, University of California at Los Angeles, University of Illinois, Georgia State University Usery Center, Ohio State University College of Law, and Willamette University College of Law.

Professional organizations that have joined the Alliance include, along with our Section, NAA, IRRA, FMCS, and SPIDR, as well as the EEOC. Alliance members are working together to present a nationally acceptable training program of the highest caliber to be offered throughout the country that will address both the process of mediation and the substance of employment law. Sara Adler, a past neutral co-chair of our Committee, is representing the Section of Labor and Employment on the Alliance, along with Richard Seymour, a plaintiffs' attorney in Washington DC, and Barry Hartstein, a management attorney in Chicago.

The Montreal program will serve two broad purposes: 1) to bring labor arbitrators up-to-date on the complex body of substantive law and procedural considerations that apply whenever statutory issues come into play in arbitrations and mediations; and 2) to provide formal training in the processes of mediation, with an emphasis on how the mediation of employment disputes differs from grievance mediation and interest mediation. The training will provide essential grounding in the fundamental principles of confidentiality, interest identification, self-determination, and ethical considerations. The training will be useful even for experienced mediators. Participants will receive a certificate of completion from the Alliance, the NAA, and Cornell University, and will be listed by the Alliance as trained employment mediators.

For more information on the Montreal training or other Alliance activities, contact:

Chris Colosi, Program Coordinator  
Cornell Institute on Conflict Resolution  
(607) 255-1124 (phone)  
cbc7@cornell.edu

**An Unscientific Sampling Of****Web Sites of Relevant  
To Our Practices**

- ✓ [www.abanet.org/labor](http://www.abanet.org/labor)
- ✓ [www.nlr.gov](http://www.nlr.gov)
- ✓ [www.eeoc.gov](http://www.eeoc.gov)
- ✓ [www.fmcs.gov](http://www.fmcs.gov)
- ✓ [www.dol.gov](http://www.dol.gov)
- ✓ [www.law.cornell.edu](http://www.law.cornell.edu)
- ✓ [www.adr.org](http://www.adr.org)
- ✓ [www.naarb.org](http://www.naarb.org)
- ✓ [www.findlaw.org](http://www.findlaw.org)
- ✓ [www.lib.berkeley.edu/IIRL](http://www.lib.berkeley.edu/IIRL)
- ✓ [www.osha.gov](http://www.osha.gov)
- ✓ [www.nmb.gov](http://www.nmb.gov)
- ✓ [www.spidr.org](http://www.spidr.org)
- ✓ [www.mediate.com](http://www.mediate.com)
- ✓ [www.igc.org/igc.conflictnet](http://www.igc.org/igc.conflictnet)
- ✓ [www.igc.org/igc/labornet](http://www.igc.org/igc/labornet)
- ✓ [www.aflcio.org/unions](http://www.aflcio.org/unions)
- ✓ [www.unionweb.org](http://www.unionweb.org)
- ✓ [www.stats.bls.gov](http://www.stats.bls.gov)
- ✓ [www.igc.apc.org/laborquotes](http://www.igc.apc.org/laborquotes)
- ✓ [www.members.aol.com/Altdisres](http://www.members.aol.com/Altdisres)

**Check them out!**

**Plan Now For Mexico!**

Save the date! The 2000 Midwinter Meeting of the Committee will take place February 13-16 at the Marriott CasaMagna Resort in Puerto Vallarta, Mexico. This meeting promises to have an outstanding combination of hot topics and cool margaritas.

Plans are also being finalized for our 2001 Midwinter Meeting. Negotiations are in process for a venue in the Florida Keys. We will keep you posted as the details of this program become available.

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***Hope to See You in Atlanta - cont. from page 1***

will focus on the difficult issues that continue to arise in the workplace. The moderator for this presentation will be Susan Grody Ruben and the speakers will be Norman Brand, David Cook, Randolph Freking and Edwin Hopson.

***Gilmer Update***

Wednesday, August 11

9:00-10:30 a.m., Salon III-IV, Ballroom Level

In this review of the past year's developments on pre-dispute arbitration procedures a panel of arbitrators, plaintiff and management attorneys will review the major developments in mandatory arbitration over the past year assessing the impact on both public and private sector arbitration outside the collective bargaining context. This review will be moderated by David Cathcart and the panel will include Joseph Garrison, Judith Sadler and John Sands.

***Statutory Claims Under Collective Bargaining Agreements: Where do we go from here?***

Wednesday, August 11

10:45 a.m.-12 p.m., Salon III-IV, Ballroom Level

A discussion of the effect of the Supreme Court's decision in *Wright v. Universal Maritime Services* on parties to collective bargaining agreements. A panel of arbitrators, union and management attorneys will consider what parties should or should not do in negotiating and administering arbitration provisions that implicate rights under Title VII, the ADA and other anti-discrimination statutes. The panel for this program will include Carl Yaller, Jacquelin Drucker, A. McArthur Irvin and moderated by Connye Harper.

Other Sections also are making presentations that are relevant to our practices. Just a sampling of these include:

**Government and Public Sector Lawyers Division****Ethical Considerations in Public Sector Law**

Center Thursday, August 5, 2:00 p.m.

Georgia World Congress Center

**General Practice, Solo & Small Firm Section****Getting From the In-Box to the Closed Filed Box — Ongoing Client & Case Management**

Thursday, August 5, 3:45 p.m.

Georgia World Congress Center

**Section of Administrative Law and Regulatory Practice****The Ombudsman: Another Way to Advance Justice**

Friday, August 6, 2:00 p.m.

Georgia World Congress Center

**Torts & Insurance Practice Section****Hot Topics in Health and Disability Insurance Litigation**

Saturday, August 7, 9:00 a.m.

Marriott Marquis

**Fraud in the Executive Suite:****Internal Investigation, Employment Law Ramifications and Fidelity Coverage**

Sunday, August 8, 2:00 p.m.

Marriott Marquis

**Section of Dispute Resolution****Incorporating DR into Your Litigation Practice: Effective and Ethical Mediation Advocacy**

Saturday, August 7, 9:30 a.m.

Georgia World Congress Center

**What if *Brown v. Board of Education* had been Mediated - Does Mediation Cut Off Minority Access to the Courts?**

Saturday, August 7, 2:00 p.m.

Georgia World Congress Center

**Hot Topics and Current Trends in Mediation**

Sunday, August 8, 9:15 a.m.

Omni Hotel

**Uniform Acts: Mediation and Arbitration**

Monday, August 9, 2:00 p.m.

Georgia World Congress Center

**Drafting and Counseling Corporate Clients Regarding ADR Programs and Clauses**

Monday, August 9, 2:30 p.m.

Hilton and Towers

- If you haven't registered yet for Atlanta and would like to do so, call 847/940-2124.

## *A Review Of Longboat Key*

One hundred members and their guests enjoyed balmy weather, blue gulf water, pink shells, and oh yes, a slew of terrific presentations at the Committee's 1999 Midwinter Meeting. Held February 7-10 at The Colony Beach & Tennis Resort in Longboat Key, Florida, the Meeting was a great success. Kudos to the Meeting Chairs -- Larry Casazza, Patti Bittel, Don Cohen and Joe Garrison. Their hard work resulted in a superb program.

One highlight was a panel on "Labor, ADR and Negotiation Issues in Major League Baseball." Tom Roberts, with his years of baseball arbitration experience, graciously moderated the informative session with speakers Don Fehr (Executive Director and General Counsel, Major League Baseball Players Association) and Bob Manfred (Executive Vice President, Labor Relations, Major League Baseball Office of the Commissioner). One enterprising member brought a baseball for the speakers to sign.

Sara Adler, David Lipsky, and Arnie Zack presented a panel on "Developments in Mediation Training." These three neutrals, all of whom have been intensely involved in training efforts, described the new Alliance for training, which is described on page 1 of the Newsletter.

Lamont Stallworth and Larry Rute spoke in favor of a National Employment Dispute Resolution Act. Lively responses to the proposal were set forth by a panel of Burt Kainen, Lynne Hicks, and Jon Rosen.

George Roumell gave a scholarly, as well as practical, presentation on "Handbook Arbitration — Is It Due Process?" Let's just say the answer is — "sometimes."

Wayne Outten thoughtfully reflected on his trip to the U.K. and Scotland in his "Report on English and Scottish ADR of Employment Disputes — Is There a Lesson for Us?" The trip, organized by NELA, visited labor courts and tribunals, and met with judges and advocates.

R. Paul Richard, Senior Advisor to EEOC Commissioner Miller, gave us the inside scoop at the EEOC, with an emphasis on "Mediation in the EEOC." Paul explained the national roll-out of the external mediator program. Jim Adler and Rick Seymour gave their valuable four cents in response to Paul's remarks.

George Nicolau, Ed Hopson, Max Zimny, and Cathy Ventrell-Monsees gave us a thorough update on "The *Duffield*, *Wright*, and *Kidder-Peabody* Decisions — Where Are/Where Should the Courts Be Going Regarding Judicial Enforcement of Arbitration of Statutory Employment Claims?" Some day, this issue will be all worked out. Mitchell Kraus continued on this theme, with his presentation "Should Unions Negotiate/Arbitrate Statutory Claims?" (His answer: "yes, under certain circumstances.") Knowledgeable responses were provided by the panel of Tony Oliver and Ted High.

Eileen Hoffman reported on the FMCS. See the report on the FMCS Institute on p. 5 of the Newsletter. Rick Reilly reported on AAA, including a summary of the proceedings at the Neutrals Retreat. Ken May reported from BNA regarding "Publication of Arbitration Awards." The key to seeing your name in lights? Send in the award in printable format, e.g., redact individual names.

Henry Stewart, Charlie Werner, and Mark Irvings gave a detailed report on Mandatory Mediation Under Collective Bargaining Agreements. Mark and Henry described the success of an unusual model used in a Massachusetts community college district.

Kevin McCarthy, Leonard Page, and Barbara Humphrey discussed "Drug Testing Issues in Arbitration," a topic that probably will never go away. Their updates and perspectives were useful and broad-based.

John Sands skillfully moderated a panel made up of Kevin Conlon, Bill Earnest, and Joe Garrison on "The Arbitration Setting and The Tension Between Due Process, Expedited Proceedings, "Winning," and Ongoing Cooperative Relationships." Kevin, Bill, and Joe were cooperative, spoke expeditiously, and exhibited no tension. No one won.

Of course, in addition to these many fine presentations, members and guests enjoyed a cocktail party poolside and an island dinner party on the beach. Thanks and congratulations to ABA's Sheri Mead for superbly coordinating the Meeting and looking after our every need.

Come join us in Mexico in 2000 — you'll be glad you did!

## *A Big Thank You To Oliver Transue!*

Our Committee owes an enormous thank you to Ollie Transue, our devoted Newsletter Editor for the past three years. Ollie, a dedicated member of the Committee, has performed an important service for all of us. He's kept us up-to-date on case law, Committee activities, member news, ADR training

opportunities, the Due Process Protocol, other proposed uniform rules, and in general, brought a sense of community to our Committee.

We thank Ollie so very much for his important contributions to our Committee. May he go from strength to strength!

## *FMCS Institute*

FMCS is offering a variety of seminars of interest to our members:

Labor Arbitration Training  
July 19-23, 1999  
Omni Shoreham Hotel, Washington, D.C.

A 40-hour course geared toward labor-management practitioners with substantial experience in labor and employment who wish to become labor arbitrators. The training will fulfill some of the requirements for entry to the FMCS Arbitration Roster, and can enhance the skills of current Roster members. As a follow-up to the training, NAA members have agreed to mentor participants who reside in their region, by reviewing their awards and discussing their initial cases as arbitrators.

The curriculum for the course is:

- The Law of Arbitration
- Basic Arbitration Practice, including scheduling and pre-hearing procedures
- Conduct of the Arbitration Hearing, including issues framing, witnesses and records
- Evidence in Arbitration
- Award and Opinion Writing
- Arbitrator Ethics
- FMCS Arbitration Policies and Procedures
- Building an Arbitration Practice
- Perspectives on Arbitration from labor and management advocates

Faculty for the seminar includes some of our own esteemed Committee members:

- |                     |                        |
|---------------------|------------------------|
| • Sara Adler, NAA   | • Eileen Hoffman, FMCS |
| • Tom Angelo, NAA   | • Lynn Sylvester, FMCS |
| • Homer LaRue, NAA  | • David Weinberg, FMCS |
| • Dennis Nolan, NAA |                        |

Cost for the seminar is \$1200.

- Interest-Based Problem Solving and Negotiation  
August 31-September 2  
The Madison Hotel, Washington, D.C.

A three-day course focusing on negotiation, problem solving, grievance handling, and interest-based collective bargaining. The course will present best practice concepts, as well as models and techniques to create opportunities for mutually beneficial results. The training will be highly interactive, applying best practice skills to real-life scenarios.

The curriculum for the course is:

- Understanding the underlying elements and forces that govern negotiations and problem solving
- Learning how to prepare for negotiations and problem solving
- Negotiation skills, strategies, and techniques
- Dealing with different personalities and their impact on the process
- Avoiding or overcoming impasses
- Interest-based negotiation models

Faculty for the course is:

- Jeanne Frank, FMCS
- Lou Manchise, FMCS

Cost for the seminar is \$720.

- EEO Mediation Skills  
September 7-10, 1999  
Omni Shoreham Hotel, Washington, D.C.

A 3-1/2 day course integrating theory and practice. The EEO Mediation Training will focus on developing a conceptual understanding of the process, enhancing the participant's skills

in facilitating difficult conversations, creative problem solving, negotiation, and communication. The course will be highly interactive, with the majority of time spent in specially designed role-plays that reflect both formal and informal EEO complaint environments.

The curriculum for the course is:

- Understanding negotiation
- Introduction to mediation fundamentals
- Tools and techniques of mediation
- Interpersonal dynamics in the EEO mediation process
- The impact of culture on the mediation setting
- Mediation simulations
- Ethical considerations in mediation
- Overview of EEO legal and practice considerations

Faculty for the seminar is:

- Denise McKenney, FMCS
- Lynn Sylvester, FMCS

Cost for the seminar is \$840.

- Applications for FMCS Institute seminars are available from:

Ms. Mery Skolochenko  
The FMCS Institute  
2100 K Street, NW  
Washington, D.C. 20427  
(202) 606-FMCS (3627) (phone)  
(202) 606-3679 (fax)

## *From the Editor*

Our new Newsletter Editor is Susan Grody Ruben, an arbitrator and mediator in Cleveland. In an attempt to fill Ollie's moccasins, Susan encourages you to contribute to the newsletter. Case developments, training opportunities, member news, whatever it is you have to share, please send it in!

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## *Subcommittee Sign-Up*

As you are aware, the Committee has recently reorganized the subcommittees to better reflect the goals of the Committee and niches in our profession.

This is your opportunity to get involved. Be sure to complete the sign-up form on page 7 of this newsletter and return it to the Section Office.

**Section of Labor & Employment Law**  
**ADR in Labor & Employment Law**  
**SUBCOMMITTEE SIGN-UP**

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I would like to be a member of the following subcommittee(s):