

Dispute Resolution Section Chair
Rona Shamoon, Esq.
New York City

Program Chair
Marc J. Goldstein, Esq.
New York City

NYSBA Dispute Resolution Section Erie County Bar Association Monroe County Bar Association

Effective Arbitration & Mediation Advocacy – The Do's and Don'ts

Friday, February 15, 2013

Hotel @ The Lafayette
391 Washington Street
Buffalo, NY 14203



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Friday, February 15, 2013

A day-long international symposium with a keynote luncheon address by the Hon. William M. Skretny, Chief Judge of the U.S. District Court for the Western District of New York presented by the New York State Bar Association Dispute Resolution Section, the Bar Association of Erie County and the Monroe County Bar Association in collaboration with the, ICC Canada, the Toronto Commercial Arbitration Society, and Arbitration Place.

Program Faculty

Edward S. Bloomberg, Esq., Partner, Phillips Lytle LLP

Laurent Debrun, Esq., Partner, Kaufman Laramée, LLP Montreal

Marc J. Goldstein, Esq., Principal, Marc J. Goldstein Litigation & Arbitration Chambers, New York

Krista Gottlieb, Esq., Partner, Mattar, D'Agostino & Gottlieb, LLP, Buffalo

Richard F. Griffin, Esq., Counsel, Kavinoky Cook, LLP, Buffalo

Kathleen J. Kelly, Esq., Principal, Kelly ADR, Toronto

Barry Leon, Esq., Partner, Perley-Robertson, Hill & McDougall LLP; Chair, ICC Canada, Ottawa

Richard A. Johnston, Esq., Partner, WilmerHale, Boston

Thomas B. Metzloff, Esq., Professor of Law, Duke University School of Law, Durham NC

Randolph C. Oppenheimer, Esq., Partner, Damon Morey LLP, Buffalo

Sharon M. Porcellio, Esq., Partner, Ward Greenberg Heller & Reidy, Rochester

Rona G. Shamoon, Esq., Chair, Dispute Resolution Section, NYSBA, Skadden Arps, New York

Sheldon K. Smith, Esq., Partner, Nixon Peabody LLP, Buffalo/Rochester

Steven R. Sugarman, Esq., Director of the Mediation Clinic, SUNY Buffalo Law School, Partner, Pustatier, Sherman, Abbott & Sugarman

Lawrence J. Vilardo, Esq., Partner, Connors & Vilardo, LLP, Buffalo

Agenda

8:30-9:00 a.m. Registration and Buffet Breakfast

9:00-9:30 a.m. Welcoming Remarks

Rona G. Shamoon, Esq., Chair, Dispute Resolution Section, NYSBA; Skadden Arps, New York
Barry Leon, Esq., Chair, ICC Canada; Perley-Robertson, Hill & McDougall LLP Ottawa

MORNING ARBITRATION PROGRAM

9:30 – 10:20 a.m. Drafting the Arbitration Clause — Advance Planning for Faster, Smarter, Cheaper Arbitration

- 'Multi-Tier' Dispute Resolution Clauses
- Picking an Institution/Appointing Authority
- Pros-Cons of Party-Appointed Arbitrators
- "Judicializing" Arbitration With Courtroom Procedure

Faculty: Krista Gottlieb, Esq., Richard F. Griffin, Esq., Richard A. Johnston, Esq., Barry Leon, Esq., Rona G. Shamoon, Esq.

10:20 – 11:10 a.m. Arbitration Fast-Track: Effective Advocacy for a Faster Process

This session explores strategies for getting provisional and final relief with minimum delay from courts, arbitrators, and emergency arbitrators.

- Interim Relief from Courts and Arbitrators
- Emergency Arbitrators — An Effective Innovation?
- Effective Oral and Written Advocacy: Finding the Right Voice
- Cross Examination and Expert Evidence

Faculty: Edward S. Bloomberg, Esq., Laurent Debrun, Esq., Randolph C. Oppenheimer, Esq., Sharon M. Porcellio, Esq., Sheldon K. Smith, Esq., Lawrence J. Vilardo, Esq.

11:10 – 11:30 a.m. Break

- 11:30 – 12:20 p.m. Counsel Ethics in Arbitration: Fresh Views on Perennial Problems**
Arbitration rules and statutes offer little guidance about counsel behavior in an arbitration, or the panel's power to regulate it. What is the right course for the ethical advocate?"
- Use Of Counsel-To-Counsel Communications
 - Social And Professional Contact With The Arbitrator During The Case
 - Counsel and Arbitrator Disqualification Motions
 - Guerilla Tactics + Arbitrator Control
 - Conflicting Ethical Rules Between The Parties' and/or Counsels' Jurisdictions

Faculty: **Marc J. Goldstein, Esq., Richard F. Griffin, Esq., Kathleen J. Kelly, Esq., Thomas B. Metzloff, Esq., Sharon M. Porcellio, Esq.**

12:30 – 1:30 p.m. Buffet Lunch

Lunch Speaker: **Hon. William M. Skretny**, Chief Judge, United States District Court for the Western District of New York

AFTERNOON MEDIATION PROGRAM

The New Art of Mediation Advocacy: Winning the Case through Diplomacy

Strategies for solving complicated commercial disputes in non-adversarial ADR, using a mock mediation of the National Hockey League labor dispute as a vehicle for demonstration and discussion.

1:40-2:30 p.m. Setting the Stage for Effective Mediation

- Choosing Ground Rules and the Mediator
- Warming to the Task of "Compelled" Mediation
- Defining and Prioritizing Objectives
- Preparing an Effective Mediation Brief
- Presenting Complex Business Data
- Ex Parte vs Shared Submissions

Faculty: **Laurent Debrun, Esq., Krista Gottlieb, Esq., Richard A. Johnston, Esq., Barry Leon, Esq., Lawrence J. Vilardo, Esq.**

2:30-3:20 p.m. Advocating For and Against Collective Interests

- Picking the Right Client Representatives and Defining Their Roles
- Opportunities For Direct Negotiations: When Should The Mediator Step Aside?
- Politics And Psychology Of "Group" Clients
- Effective Use of the Mediator: Do Duties of Candor Limit Strategies?

Faculty: **Kathleen J. Kelly, Esq., Randolph C. Oppenheimer, Esq., Sharon M. Porcellio, Esq., Sheldon K. Smith, Esq., Steven R. Sugarman, Esq.**

3:20-3:35 p.m. Break

3:35 - 4:25 p.m. Making and Closing the Deal: Understanding the Mediator's Role

- Mediator's Role in Crafting the Deal
- Mediator's Role in Advocating for Deal Approval
- Mediator's Ongoing Role as Dispute Resolver Under the Deal Terms

Faculty: **Krista Gottlieb, Esq., Richard F. Griffin, Esq., Barry Leon, Esq., Thomas B. Metzloff, Esq., Steven R. Sugarman, Esq.**

4:25-5:00 p.m. Question & Answer

Biographies



Edward S. Bloomberg, Esq., Partner, Phillips Lytle LLP

Edward S. Bloomberg is a litigator with Phillips Lytle LLP. With nearly 40 years of experience, Mr. Bloomberg regularly arbitrates and mediates commercial disputes. He has significant, recent experience in efforts by adversaries to derail contracts requiring arbitration, including motions to vacate arbitration awards.

Mr. Bloomberg earned his J.D., cum laude, from Harvard Law School. As a Partner with Phillips Lytle, he has served as both a Chair and a member of the firm's Governing Committee. Mr. Bloomberg is a member of the New York State Bar Association, American Bar Association and the Bar Association of Erie County. He is recognized by The Best Lawyers in America® in the area of Commercial Litigation. Mr. Bloomberg recently authored a review of the third edition of Commercial Litigation in New York State Courts.



Laurent Debrun, Esq., Partner, Kaufman Laramée, LLP Montreal

McGill University (1982) B.A. (Political Science / Economics). University of Ottawa (1989), J.D. Magna Cum Laude. Montreal University (1990), J.D. (Civil Law). Member of the Quebec Bar since 1991.

Laurent Debrun specializes in civil and commercial litigation, domestic and international arbitration and intellectual property.

Laurent has been in charge of important files related to domestic and international commercial conflicts, insurance claims, aircraft litigation, manufacturers' liability concerning industrial and consumer products, product recalls, class actions, investors' rights and cross-border patent and trademark litigation. Laurent was involved in several international and national arbitrations concerning joint ventures, shareholder disputes, termination of distribution agreements and construction contracts (FIDIC and ad hoc).

He has also given a series of lectures on various topics such as manufacturer liability for medical equipment or the valuation of shares. In November 2004, Laurent was part of an international advocacy group in connection with the UN International Criminal Tribunal for Rwanda in Tanzania. Laurent taught International commercial arbitration at the Faculty of law of the University of Ottawa and he has written several articles and a regular blog (www.edilex.com) on product liability, arbitration, intellectual property, patents and competition law in addition to giving lectures on business valuation, the liability of professionals in the pharmaceutical industry and related topics.

Laurent received in 2007 the BV rating from Martindale-Hubbell Peer Review for excellence in professional ability and adherence to professional standards of conduct and ethics. Member of the Chartered Institute of Arbitrators.



Marc J. Goldstein, Esq., Principal, Marc J. Goldstein Litigation & Arbitration Chambers, New York

Marc J. Goldstein is admitted to practice in New York State and to the bars of the United States District Courts for the Southern and Eastern District of New York, and the U.S. Courts of Appeals for the Second and Third Circuits. He is a graduate of the *University of Virginia School of Law*, Class of 1980, where he was a member of the *Virginia Law Review*; and he was graduated *magna cum laude* from the *University of Pennsylvania* with a Bachelor of Arts degree in 1976. Before forming the Marc J. Goldstein Law Offices and Arbitration Chambers, Mr. Goldstein practiced for more than two decades with a prominent international law firm in its headquarters office in New York.

Complex litigation is an important element of Mr. Goldstein's practice. He has been trial counsel or co-counsel in more than 100 federal and state court litigations and domestic arbitrations in the United States, including securities, antitrust, copyright, entertainment, bankruptcy, commercial banking, real estate, employment and insurance matters.

International commercial arbitration is also an important component of Mr. Goldstein's practice, as it has been since the early 1990s. Mr. Goldstein acts as an advocate in such cases and also as an arbitrator. He is on the international arbitrator rosters of the American Arbitration Association, International Chamber of Commerce Court of Arbitration, and the World Intellectual Property Organization, and is a member of many professional associations and committees in the international arbitration and international legal practice communities. He has lectured and published frequently in the international arbitration field. Mr. Goldstein was raised in Kenmore and Amherst, New York and is a graduate of Amherst Central High School.



Krista Gottlieb, Esq., Partner, Mattar, D'Agostino & Gottlieb, LLP, Buffalo

Krista Gottlieb has been an attorney and an "issue resolver" for over 33 years. Since moving from New York City to Buffalo in 1986, she has been with the firm of Mattar, D'Agostino & Gottlieb, LLP. A partner since 1990 she has hands on experience in the management of business and employees. For the past 18 years Ms. Gottlieb has become a "formal" neutral as an arbitrator and, most frequently, as a mediator. She continues as an advocate, litigator and negotiator for a general business, corporate, employment, discrimination and commercial, including cross border mediations. Ms. Gottlieb was involved with the creation and implementation of the Mediation and ADR programs now available in the US District Court for the Western District of New York and the NYS 8th Judicial District. She serves on those and numerous other panels.



Richard F. Griffin, Esq., Counsel, Kavinoky Cook, LLP, Buffalo

Mr. Griffin, for over 45 years, has practiced in general litigation and trials, mainly in the areas of personal injury, commercial and business, and public interest matters. He currently devotes most of his practice to serving as a mediator, arbitrator, or settlement counsel.

Best Lawyers in America, from its initial publication in 1983, has listed Mr. Griffin in the fields of personal injury and commercial litigation; and, in the category of Alternative Dispute Resolution, since 2006 when Best Lawyers added this category. New York Super Lawyers, in the 2009 Upstate Edition, featured an interview with Mr. Griffin about his mediation practice.

Mr. Griffin is a member of the Mediation and Arbitration Panels of the American Arbitration Association, the Special Mediation Panel of the U.S. District Court for the Western District of New York, and the Mediation and Arbitration Panels of the Supreme Court, State of New York, Erie County. He co-founded the Alliance for Dispute Resolution and designed an ADR course as an adjunct professor for SUNY Buffalo Law School where he regularly lectures on mediation and arbitration.



Kathleen J. Kelly, Esq., Principal, Kelly ADR, Toronto

ARBITRATOR, MEDIATOR, LAWYER

For over thirty years Kathleen has served as an arbitrator, mediator, and facilitator in disputes of varying complexity and subject matter. Her practice today is almost exclusively third party neutral work. Memberships include: the Law Societies of Upper Canada and British Columbia; International Bar Association; American Bar Association; Canadian Bar Association; Advocates' Society; ADR Institute of Ontario; Toronto Commercial Arbitration Society; Dispute Resolution Panel, Agreement on Internal Trade; Arbitration and Mediation Panels, Sport Dispute Resolution Centre of Canada. She is a past member (six years) of the Health Professions Appeal and Review Board, and is currently a Vice-Chair of the Workplace Safety and Insurance Appeal Tribunal, and a Member of the Central Regional Council of the Mutual Fund Dealers Association (MFDA). Kathleen provides Pro-Bono Counsel services in the areas of lawyers discipline and special education matters for children. As counsel she has represented clients before administrative tribunals and all levels of courts. Kathleen is a published author and Recipient of the Ontario Bar Association 2003 Award of Excellence in ADR. She offers ADR services through Kelly ADR [Kelly International Settlement Services Inc.] and as a member of ADR Chambers. Contact: kellyadr@rogers.com



Barry Leon, Esq., Partner, Perley-Robertson, Hill & McDougall LLP; Chair, ICC Canada, Ottawa

Barry Leon, Partner and Head of the International Arbitration Group at Perley-Robertson, Hill & McDougall LLP/s.r.l., has more than 30 years of experience as counsel. He is Chair of ICC Canada. While Barry primarily acts as counsel, he also serves as an international and domestic arbitrator and mediator, including with the International Centre for Dispute Resolution, Arbitration Place and ADR Chambers, and on ICC arbitrations. He is a Fellow of The Chartered Institute of Arbitrators (FCIArb) and an International Mediation Institute (IMI) Certified Mediator.

Barry has received numerous professional recognitions in international arbitration and other areas including from *Global Arbitration Review's GAR 100*; *Chambers Global: The International Who's Who of Commercial Arbitration*; *Lexpert/American Lawyer's Guide to the Leading 500 Lawyers in Canada*; *PLC Which Lawyer?*; *The Best Lawyers in Canada*; *Canadian Legal Lexpert Directory*; *Guide to the World's Leading Experts in Commercial Arbitration*; and *a Guide to the Leading US/Canada Cross-Border Litigation Lawyers in Canada*.

Richard A. Johnston, Esq., Partner, WilmerHale, Boston



Richard Johnston is a partner in the Boston, MA office of WilmerHale, an international law firm with six offices in the United States and offices in three European countries and China. Rich specializes in arbitration and litigation of business disputes, both domestic and international. He has tried and arbitrated cases in many U.S. jurisdictions and foreign countries. His clients have included venture capital firms, pharmaceutical companies, medical device manufacturers, internet retailers and international distribution companies. He also is involved in multiple projects in Africa, including economic development, land rights and school construction. In addition to representing clients, Rich has served as an arbitrator and mediator. He is a member of the Commission of the International Chamber of Commerce Court of Arbitration. He also is a teaching fellow at the Legal Services Center

at Harvard Law School.

Rich graduated from Amherst High School, Cornell University and Harvard Law School. During college and for a year between college and law school he worked as a reporter at *The Buffalo News*.



Thomas B. Metzloff, Esq., Professor of Law, Duke University School of Law, Durham NC

Professor Metzloff is a native of Buffalo, N.Y. He earned his BA from Yale College in 1976 and his JD from Harvard Law School in 1979. He began his professional career with a judicial clerkship on the 5th U.S. Circuit Court of Appeals in New Orleans, followed by a clerkship with the Supreme Court of the United States. He then practiced with a private firm in Atlanta doing civil litigation matters before accepting a position at Duke Law School in 1985. He teaches civil procedure, ethics, and dispute resolution, as well as a specialized course on the American legal system for international LLM students. He has taught that course regularly at Duke's Geneva and Hong Kong summer institutes as well as at Tsinghua University in Beijing. He served as the Law School's senior associate dean for academic affairs from 1998-2001, and currently serves as a member of the executive committee of Duke University's Academic Council.

Professor Metzloff is also director of the Voices of American Law project. The goal of the project is interview the parties, attorneys, experts, and judges who were involved in the development of important Supreme Court cases dealing with key constitutional values (such as the First

Amendment, privacy rights, property rights). The interviews are then used to create detailed documentaries that are being widely used in law schools and other educational settings to study Constitutional rights and values.

Professor Metzloff's also has conducted extensive research on the litigation system as it relates to medical malpractice disputes. For example, he conducted a major empirical study of court-ordered mediation in medical malpractice cases funded by the Robert Wood Johnson Foundation. Professor Metzloff is active in a number of professional activities. He has served as an advisory member to the North Carolina State Bar Ethics Committee, and also served on the North Carolina Supreme Court's Dispute Resolution Committee.



Randolph C. Oppenheimer, Esq., Partner, Damon Morey LLP, Buffalo

Randolph C. Oppenheimer is a Partner at Damon Morey LLP, where he is Chair of the Labor and Employment Department. His practice focuses on Labor and Employment, Commercial Litigation and Intellectual Property Litigation. He has represented clients before state and federal agencies and courts for more than thirty years.

Mr. Oppenheimer is a member of the Panel of Mediators appointed by the United States District Court for the Western District of New York. Mr. Oppenheimer also is a certified commercial mediator for the New York State Supreme Court – Eighth Judicial District (which includes Erie, Allegany, Cattaraugus, Genesee, Niagara, Orleans and Wyoming counties).

He is a member of the Bar Association of Erie County, the New York State Bar Association, and the American Bar Association. Mr. Oppenheimer also is a member of the Society of Human Resource Managers, the Buffalo Niagara Human Resources Association, and the Labor and Employment Research Association.

A frequent lecturer, Mr. Oppenheimer has made presentations and conducted trainings on litigation avoidance and labor law issues for bar associations, employers, community groups, trade associations and schools. Additionally, he has authored dozens of articles on a variety of litigation and labor and employment related topics.



Sharon M. Porcellio, Esq., Partner, Ward Greenberg Heller & Reidy, Rochester

Ms. Porcellio concentrates her practice on the prosecution and defense of complex commercial litigation for businesses, professionals and public entities and officials in all courts and administrative tribunals in New York. She has litigated and counseled organizations and individuals in matters relating to business acquisitions, trade secrets, unfair competition, civil rights and contract disputes. Ms. Porcellio also regularly represents businesses and institutions on labor and employment matters. She handles delicate internal investigations and routinely assists employers with regulatory compliance, risk management, employment agreements, employee manuals, restrictive covenants, agreements not to compete, hiring, termination, separation, discriminatory practice claims, record retention, electronic communications and health and safety issues. She successfully has defended employers against alleged employment law violations before the U.S. Equal Employment Opportunity Commission, the New York State Division of Human Rights and the state and federal courts in New York.

From her more than 25 years of experience, Ms. Porcellio has developed a practical and businesslike perspective to her practice. She works closely with her clients to truly understand their objectives and concerns. She uses creative, expeditious and cost-effective strategies to satisfy those objectives. This client-first approach yielded a positive, value-added result in her representation of developers facing a class action during the construction phase of a multi-purpose arena in Buffalo. Recognizing that time was of the essence, she worked diligently to bring about a swift resolution of the litigation that paved the way for the arena to be completed before the commencement of the National Hockey League season. She also obtained a multi-million dollar judgment for another developer by working with the opposing counsel and submitting a joint set of stipulated facts upon which the Court could render a favorable decision without a protracted and expensive trial.



Rona G. Shamoan, Esq., Chair, Dispute Resolution Section, NYSBA, Skadden Arps, New York

Rona G. Shamoan is a litigator at Skadden, Arps, Slate, Meagher & Flom LLP and a member of Skadden's International Arbitration Group. She has served as an advocate for parties in international and domestic commercial arbitrations and mediations and has negotiated and drafted numerous dispute resolution provisions in domestic and international contracts. Her publications include "Top Ten Mistakes To Avoid When Drafting Dispute Resolution Provisions," *Dispute Resolution Journal*, May/July 2012; "Limiting and Expanding by Contract Court Review of Arbitral Awards," *Mealey's International Arbitration Report*, March 2006; "Absence of Consent Trumps Arbitral Economy: Consolidation of Arbitration Under U.S. Law," *The American Review of International Arbitration*, 2001 Vol. 12 No. 3-4 (2003); and "A Dangerous Expansion of 'Manifest Disregard,'" *ADR Currents*, Vol. 3, No. 4 – December 1998. Ms. Shamoan graduated summa cum laude from Pace University School of Law in 1993, where she served as Research and Writing Editor of the *Pace Law Review* and was the recipient of the Faculty Award for Academic Excellence. She has served on a number of advisory committees for various dispute resolution organizations including the National Advisory Committee on Large, Complex, Commercial Cases of the American Arbitration Association and the Arbitration and Program Committees of the CPR International Institute for Dispute Resolution, and has given numerous workshops on drafting dispute resolution clauses. In 2009, Ms. Shamoan was a recipient of the Cornerstone Award from the Lawyer's Alliance for her outstanding pro-bono service. Ms. Shamoan is currently Chair of the Dispute Resolution Section of the New York State Bar Association and was formerly chair of the Section's CLE Committee.

