



Associates in Dispute Resolution, LLC

Mediation | Arbitration | System Design

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Dispute Resolution Update

August, 2008

IN THIS ISSUE:

- New KC Office Location
- Upcoming Training Events
- Recent Arbitration Case Decisions
- Recent Mediation Cases & Resolutions
- Dispute Resolution News & initiatives

Dear Friends and Colleagues:

We are proud to announce that ADR is hosting its first Kansas City area dispute resolution seminar on Friday, October 24, 2008. The program will provide five (5) hours of CLE credit, including one (1) hour of professional responsibility. The program *Emerging Strategies for Managing Business and Workplace Conflict* will focus on:

- Hot topics in employment law;
- Intellectual property;
- Preparing for EEOC mediation;
- Dispute resolution design systems, and
- Mediation/negotiation professional responsibility issues.

The seminar will be held at the Kansas City Marriott Country Club Plaza and lunch is provided. For more information, see the agenda and other registration information in this newsletter.

The arbitration of employment discrimination claims processed under some employer-generated Internal Dispute Resolution programs has recently become the subject of state courts of appeals decisions in California and Missouri. These decisions have been summarized below by Larry Rute.

This issue also features recent mediation decisions and dispute resolution news and initiatives gathered from around the country and around the world. This information has been summarized by Keith L. Seat, a respected mediator and Editor of the International Academy of Mediators monthly newsletter.

Larry R. Rute

Patrick R. Nichols



Larry and Patrick are Fellows of the

We have recently changed our Kansas City office location to the Livestock Exchange Building located in the historic Kansas City Stockyards area. This new office offers easy access and a neutral location for mediation, arbitration and other dispute resolution services. Our new Kansas City office address is:

Associates in Dispute Resolution LLC
1600 Genessee St., Suite 838, Kansas City, MO 64102
(816)531-1001 — (816)531-1221 (fax)

Please visit the ADR web site at www.adrmediate.com which provides additional information regarding services, office locations and panel members.



ASSOCIATES IN DISPUTE RESOLUTION, LLC
KANSAS CITY SEMINAR

Friday

October 24, 2008

Location: Kansas City Marriott Country Club Plaza
4435 Main Street, Kansas City, MO 64111

5.0 CLE Hours
includes
1.0 Ethics Hours
for Kansas and
Missouri

***Emerging Strategies for Managing
Business and Workplace Conflict***

Associates in Dispute Resolution, LLC, is hosting a seminar on Friday, October 24, 2008 which will offer an advanced training designed to enhance the skills of attorneys, business professionals and experienced mediators.

The program will be held at the Kansas City Marriott, Country Club Plaza, at 4435 Main Street, Kansas City, Missouri.

Agenda

October 24, 2008

8:15 a.m. to 8:50 a.m.	Registration
8:50 a.m. to 9:00 a.m.	Introductions
9:00 a.m. to 9:50 a.m.	Ethical Considerations in Negotiations: Rights, Responsibilities, and Limitations under the Kansas and Missouri Ethical Standards (Patrick Nichols)
9:50 a.m. to 10:40 a.m.	Preparation and Planning for EEOC Mediation (Michelle Minor and Larry Rute)
10:40 a.m. to 11:00 a.m.	BREAK
11:00 a.m. to 11:50 a.m.	Intellectual Property Mediation (Arthur Chaykin)
11:50 a.m. to 1:00 p.m.	LUNCH
1:00 p.m. to 1:50 p.m.	Scope and Design of Corporate Dispute Resolution Systems (Michelle Minor and Larry Rute)
1:50 p.m. to 2:40 p.m.	Hot Topics in Employment Law (Elinor Schroeder, Professor KU School of Law)
2:45 p.m.	Questions, closing thoughts and adjournment

[Click Here for Registration Forms and Information](#)





Listen to presenters explain how mediation can save you time and money. Find out about your options for choosing a mediator and the choices available when submitting a request for mediation. Learn how successful mediation can be when both sides are willing to participate in good faith toward a cohesive settlement.

34th Annual Workers Compensation Seminars

September 8-9, 2008.....Overland Park Marriott

September 23-24, 2008.... Hilton Wichita Airport Executive Conference Center



*Not just ANY Workers Compensation Seminar . . .
the smart choice for trusted information!*

ENDORSED BY:
Kansas Hospital Association
Kansas Self-Insurers Association

Patrick Nichols of our firm is presenting at both of these seminars. Mr. Nichols has an extensive practice background in this area. He created and authored the well-known publication *Kansas Workers Compensation Review* from 1994 through 2001 and was an active participant in the successful legislative mediation that resulted in agreed amendments to the Act in 2002.

*Please visit our Web site for updates
and links to our Sponsors' sites:*



[http://www.dol.ks.gov/wc/
html/wc_events_DBR.html](http://www.dol.ks.gov/wc/html/wc_events_DBR.html)



California Court of Appeals Finds Insufficient Evidence to Support Valid Internal Dispute Resolution Agreement to Arbitrate Employee's Racial Discrimination Claim.

The California appellate court affirmed a trial court's order denying the employer's Motion to Compel Arbitration. *Metters v. Ralph's Grocery Co., et al.* The Court of Appeal's decision supports the general rule that a failure to read a written agreement before signing it is an insufficient basis for permitting that party to avoid an arbitration agreement contained in the contract. The Court emphasized, however, that there is an exception to the general rule when the writing does not appear to be a contract and the terms are not called to the attention of the recipient. The Court found that an undisclosed term cannot create a contract to arbitrate. The Court noted that the trial court below found that the grocery store's Dispute Form did not look like a contract and did not alert the claimant that he was agreeing to binding arbitration. The appellate court also found that the agreement to arbitrate was not contained in an employment contract but in a form on which employees must submit grievances. As a result, the context of this form did not alert the employee that he was agreeing to anything, including arbitration. In particular, the court noted that the dispute form did not contain a clear bold face heading referencing the arbitration clause. [Editor's note: The Missouri Arbitration Act requires: "Each contract subject to the provisions of [this act] shall include adjacent to, or above, the space provided for signatures, a statement, in 10 point capital letters which reads substantially as follows: THIS CONTRACT CONTAINS A BINDING ARBITRATION PROVISION WHICH MAY BE ENFORCED BY THE PARTIES." §435.460, R.S. Mo.

[For more information, see *Metters v. Ralph's Grocery Co.*, 161 Cal. App. 4th 696 (Cal. App. 2008).]

Missouri Court of Appeals (Western District) Rejects Mandatory Arbitration Provision Under Hallmark's Dispute Resolution Program.

The Missouri Court of Appeals, Western District, recently held that "no one can be compelled to arbitrate without having agreed pursuant to an enforceable contract to submit claims to arbitration in lieu of litigation." *Morrow v. Hallmark Cards, Inc.* The Court found that the dispute resolution program developed by Hallmark Cards required an employee to give up his/her right of access to the courts for employment-related claims and providing arbitration as an exclusive means of resolution of those claims, was not a legally enforceable contract. The Court found that Hallmark had offered no legal consideration to its employees to give up their right to access to the courts despite the employees' employment-at-will status. The Appellate Court also found that Hallmark's Dispute Resolution Program violated "mutuality" provisions because Hallmark reserved the right, at its sole discretion, to modify or revoke the provisions of the program. The Court emphasized that neither the employer nor the employee had signed an express arbitration clause agreeing to submit claims to arbitration. The court stated: "Here, in contracts, the employee was not expected to express agreement, but was expected simply to acquiesce to the new requirement in order to keep working...the distinction between terms and conditions of employment on one hand, and legally enforceable contracts on the other, is critical for this case." The Court further noted that there can be an enforceable contract to arbitrate claims entered into between employer and employee. Nonetheless, the program that Hallmark attempted to impose on the at-will employment relationship could not be found to be a "contract to arbitrate" under Missouri law as it was presented strictly as a term and condition of employment. Finally, the court found that the dispute resolution program lacked any other form of legal consideration for the employee to give up a right of access to the courts.

For more information, see *Morrow v. Hallmark Cards, Inc.*, No. WD 67440.



California Court Tells Insurers with Potential Coverage to Attend Mediation in Person

Noting the benefits of appellate mediation and the desirability of participants attending in person, a California appellate court warned insurers in [Campagnone v. Enjoyable Pools & Spas](#) that even the potential of coverage requires a representative with full settlement authority to attend court-ordered appellate mediations in person, unless excused in writing by the mediator. Further, the court warned parties and counsel that they may also face sanctions if they fail to notify insurers with potential coverage about appellate mediations. The court noted that California's strict mediation confidentiality provisions prevent mediators from disclosing whether anyone fails to attend, but that an aggrieved party may do so in seeking sanctions from the court. The court withheld sanctions in this case only because no previous opinion had spelled out these requirements, even though the insurer was only liable for amounts in excess of \$3 million and the judgment in the trial court was \$2.4 million.

[Campagnone v. Enjoyable Pools & Spas](#), No. C055050 (Cal. App.3d Dist., May 30, 2008).

California Court Penalizes Lack of Mediation Attempt with Absent Party

A California appellate court overturned a lower court and denied attorneys' fees because the prevailing party did not attempt mediation prior to filing suit, as required by the standard California residential purchase agreement. Even though defendant had moved away, and plaintiff did offer mediation when defendant was found by an investigator to serve the complaint, the court ruled that plaintiff should have hired its investigator prior to filing suit, in order to seek pre-suit mediation as required by the form agreement. The court emphasized the importance of mediation in order to avoid results like the outcome of this case, in which plaintiff spent more than \$113,000 in attorneys' fees to recover a \$13,000 judgment.

[Lange v. Schilling](#), No. C 055471 (Cal. App. 3d Dist., May 28, 2008).

Mediation Clause Enforced, Despite Maneuvering over Judicial Forum Selection

The contract between a U.S. licensee and an Australian licensor provided for disputes to be resolved through mediation in Sydney and, if necessary, litigation in New South Wales. But when a dispute arose, the U.S. company quickly filed suit in the U.S. and the Australian court later stayed its case pending the U.S. proceedings. However, the Australian court required the parties to comply with the mediation provision in their contract and proceed with mediation in Sydney, noting that if they had difficulties choosing a mediator the court would do so.

[Armcel Pty Ltd. v. Smurfit Stone Container Corp.](#), [2008] FCA 592 (Australian Fed. Ct., May 2, 2008); [Mondaq Bus. Briefing](#) (May 27, 2008) (Subscription Required).

Subpoena of Mediator Upheld on Appeal in New York

A New York appellate court affirmed the appellate division's upholding of a subpoena of a mediator in *Hauzinger v. Hauzinger*, stating that one party signed a waiver releasing the mediator from maintaining confidentiality and the other party waived confidentiality by seeking disclosure from the mediator. The mediator was not allowed to assert a qualified privilege, since the privilege was waived by the parties, but the court expressly did not rule on the applicable state statute.

Hauzinger v. Hauzinger, [43 A.D.3d 1289](#), [842 N.Y.S.2d 646](#) (NY App. 4th, Sept. 28, 2007), *aff'd*, [2008 NY Slip Op. 05781](#) (NY Ct. App., June 26, 2008).

Extensive Water Rights Mediation Resolving Decades-Old Dispute

Over 60 representatives of conservation groups, power producers, federal agencies, ranchers, boaters and downstream communities reached a tentative settlement of water issues in Colorado's Upper Gunnison Basin, which have been in contention for decades and in litigation for the last seven years. The mediation lasted nine months and the representatives still must obtain final approval from principals and final decision-makers. The proposed settlement will resume annual peak flows in the springtime from upstream dams to return the Gunnison River to a more natural condition, even though that leaves less water for hydropower during high demand periods in July and August. Final settlement is sought by September in order to avoid a lengthy and contentious trial.

[GunnisonTimes.com](#) (Colorado) (June 12, 2008).



Alaska State Senator Proposes Mediation over Pipeline In an effort to avoid a difficult decision over an exclusive license and \$500 million incentive for a natural gas pipeline from the North Slope to Alberta, an Alaska state senator has proposed mediation among interested parties in order to provide a pause and an opportunity for creative alternatives to emerge. The senator stated she would ask senate and house leaders to hire a professional mediator. The state revenue commissioner and others oppose mediation and seek an up or down vote on the license.

[Anchorage Daily News](#) (June 19, 2008).

Telecom Companies Seek Further Extension for Mediation AT&T Nevada and Sprint were ordered by the Nevada Public Utilities Commission to mediate and try to resolve a dispute over interconnection agreement terms based on FCC merger terms. The parties were required to report to the PUC by July 1 on their mediation progress, but are seeking an extension until September 1 to permit further time for mediation.

[TR's State NewsWire](#) (June 24, 2008) (Subscription Required).

DISPUTE RESOLUTION NEWS & INITIATIVES

Final Rules of Civilian Board of Contract Appeals Cover ADR The Civilian Board of Contract Appeals (which resulted from the 2007 consolidation of numerous contract appeals boards) published final rules to clarify procedures for alternative dispute resolution, among other things. The Board encourages ADR even on matters not before it, noting that mediation is most often used, but many other processes are available. The rules permit a panel judge to act as an ADR neutral and then (if ADR has not been fully successful) to resume work as a judge, if desired by the parties. The parties are to enter an ADR agreement specifying the neutral, the type of ADR desired, scope of related discovery and timing and location of ADR. However, use of ADR does not toll any statutes of limitation.

[Wileyrein.com](#) (May 14, 2008); [Explanation of Final Rule](#) (May 12, 2008); [48 C.F.R. 6101.54](#) (Subscription Required).

Michigan Law Establishes Mediation of Property Tax Disputes New Michigan legislation authorizes the Michigan Tax Tribunal to mediate appeals of agency decisions, if the parties agree to mediation and select a certified mediator. The Tribunal will establish a process for creating a roster of certified mediators, who must have five years of tax experience in the previous seven years. The Tribunal may charge mediators an annual certification fee, as well as charging parties a fee for mediation. Mediators must disclose their rates and experience to parties, and report the results of mediations to the Tribunal.

[Michigan H. 4433](#) (Enacted May 8, 2008).

Connecticut Enacts Foreclosure Mediation Program in Mortgage Relief Bill On June 18, Connecticut enacted wide-ranging mortgage relief and industry reform legislation, which included a foreclosure mediation program. The law requires lenders to tell delinquent borrowers about the mediation program when seeking foreclosure. If the borrower chooses mediation, lenders are required to participate, which could delay foreclosure by 60 days or longer.

[Hartford Courant](#) (June 20, 2008).

Iowa Reactivates Flood Claim Mediation Program

Iowa's Insurance Commissioner met with insurers to reactivate a flood claim mediation service in response to extensive flooding since May that resulted in 42 counties being declared disaster areas. While full details on implementation will be available soon, the Iowa Insurance Division plans to provide mediators under contract for consumers and insurers with settlement disputes. The Iowa flood mediation service was first begun after mammoth floods in 1993. State officials believe the damage from the current flood is even greater, calling it a 500-year event.

[NU Online News Service](#) (June 20, 2008) (Subscription Required).



Kentucky Mediating Serious Criminal Cases

Felony criminal cases are being mediated regularly in a pilot program of Kentucky courts, despite opposition from prosecutors. Prosecutors are used to negotiating plea arrangements without outside assistance and chafe at confidentiality restrictions which prevent use in court of any admissions in mediation. However, state judges are pleased with the mediation program, which is reducing both court and prison congestion, while achieving outcomes that satisfy victims and their families without the burden of lengthy trials.

[Kentucky Post \(May 26, 2008\).](#)

Caseload of Oklahoma Supreme Court Reduced by Mediation

The total number of cases handled by the Oklahoma Supreme Court is down 28% from 1999 to 2006, with the number of written opinions dropping from 250 a year in 2000 to only 99 in 2006. The Chief Justice attributes the decline to mediation, as well as legislative reforms and the rising cost of litigation.

[Insurance Journal \(June 10, 2008\).](#)

Virginia County's Mediation Swap Receives Achievement Award

In order to efficiently satisfy new requirements by the Equal Employment Opportunity Commission for a firewall between mediation and charge investigations, the Human Rights Commissions in a Virginia county and city began offering mediation services to the other Commission, avoiding overlap without the cost of establishing stand-alone mediation programs in each group. The achievement award for the innovative program was given by the National Association of Counties.

[Inside NoVA \(June 22, 2008\).](#)

Compensation Under Consideration for Philadelphia Judges Pro Tem

A proposal by the Philadelphia Bar Association to require parties to pay judges pro tempore (JPT) in the Commerce Program for mediations and settlement conferences that exceed three hours is being seriously considered by the Philadelphia Common Pleas Court. Under the proposal, all parties must consent to continuing beyond three free hours before incurring charges which the proposal sets at \$300 per hour. The proposal may help parties who would prefer the court's mandatory settlement conference to be a true mediation, and raise the number of parties that find JPTs helpful, which a 2005 study found was only 39%. Currently, 110 JPTs volunteer their time. Proponents note that California, Florida and New Jersey already provide compensation for JPTs.

[The Legal Intelligencer \(Philadelphia\) \(June 9, 2008\) \(Subscription Required\).](#)

Mediation Gaining in Employment Disputes as Arbitration Declines

Employers are increasingly turning from arbitration in employment disputes, due to the increased costs of discovery, potential for rogue outcomes that cannot be appealed, and uncertainty over whether mandatory arbitration provisions will be upheld. With overtime litigation continuing to increase around the country, many defense lawyers are encouraging clients to turn to mediation instead of arbitration. Wage-and-hour litigation increased over 200% between 2001 and 2007 and overtime lawsuits have displaced employment discrimination as the most common form of employment litigation.

[The National Law Journal \(June 9, 2008\) \(Subscription Required\).](#)



Disclosure and Apology for Medical Errors Reduce Claims Medical providers are increasingly offering earnest apologies and full disclosure of mistakes to their patients, along with fair compensation, in an effort to resolve matters promptly and avoid contentious medical malpractice litigation. Medical centers report that claims and lawsuits drop substantially when such practices are followed, and that overall costs are significantly reduced even while more patients are compensated. The American Medical Association, the American Hospital Association and other medical groups now encourage disclosure. Further, 34 states now prevent use in litigation of apologies for medical errors.

[New York Times.com](#) (May 18, 2008).

Other International Mediation Developments

Mediation's hidden benefits useful to minimize both financial and non-financial burdens of **U.K.** employment disputes, [HRZone.co.uk](#) (May 22, 2008); [TrainingZone.co.uk](#) (June 12, 2008); [Abeceder](#) (July 2, 2008)

U.K. Law Commission proposes mediation for housing disputes, based on "triage plus" system, [Liverpool Daily Post](#) (May 20, 2008)

Australia simplifies bidding for government legal work and requires agencies to use more alternative dispute resolution, [The Australian](#) (May 23, 2008)

Prime minister's department in **Malaysia** looking at expanding mediation to deal with overloaded court dockets, [New Straits Times](#) (May 9, 2008)

Malaysia encouraging use of mediation, among other judicial reforms, and plans to soon draft a Mediation Act, [Malaysia Star](#) (June 18, 2008)

Olympic Council of **Malaysia** now includes alternative dispute resolution in its constitution and encourages national sports associations to seek mediation of disputes, [OCM News](#) (June 30, 2008)

Peer mediation in **Guam** important for mental health of young people, [Pacific Daily News](#) (May 11, 2008)

After long reliance solely on arbitration in **Vietnam**, newest arbitration organization also offers mediation, [Thanh Nien Daily](#) (Ho Chi Minh City) (May 23, 2008)

U.S. college seeks to provide culturally appropriate mediation training in **China**, [Boston.com](#) (May 29, 2008)

Uzbekistan and United Nations Development *Programme* are organizing seminars around country on business arbitration and mediation, [Journal of Turkish Weekly](#) (June 19, 2008)

Groundbreaking decision by the High Court for the **Indian** states of Punjab and Haryana allows mandatory mediation order despite objection of parties, [The Statesman Kolkata, India](#) (May 26, 2008)

World Bank providing funds to International Centre of Alternative Dispute Resolution in **India** to train mediators to settle commercial disputes, [Press Trust of India](#) (June 30, 2008)

Karachi Centre for Dispute Resolution holds six-day mediation workshop for judges, **Pakistan Press International** (June 30, 2008) (Subscription Required)

Abu Dhabi seeking to establish world-class commercial court with specialized mediation capabilities, [AME Info](#) (United Arab Emirates) (June 30, 2008)

Thirty-one Ethiopian judges and registrars receive three-day mediation training; Federal Supreme Court of **Ethiopia** agrees to send 80 cases to mediation, [Allafrica.com](#) (May 23, 2008)

Debt mediation company launched to help heavily indebted **South African** consumers recover from debt load, [Business Day](#) (June 14, 2008) (Subscription Required)

Trinidad and Tobago's Social Development Minister promotes mediation as consistent with traditional dispute resolution by council of elders; launches youth art exhibit on mediation to be shown throughout country, [Trinidad & Tobago Express](#) (May 26, 2008)





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