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Dear Friends and Colleagues,

This edition of Dispute Resolution Update features recent mediation-related court decisions, as well as news describing dispute resolution initiatives in this country and throughout the world. The information has been summarized by Keith L. Seat, a respected mediator and Editor of the International Academy of Mediator's newsletter.

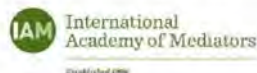
ADR LLC partners Larry Rute and Patrick Nichols will be participating in continuing legal education and academic presentations during the months of October and November:

- Wednesday, October 16, 2013, **Successful Commercial Mediation Best Practices**, with Larry Rute at the Crawford County Bar Association Luncheon.
- Friday, October 25, 2013, **Successful Mediation Techniques** with Larry Rute at the Western District of Missouri, Mediation and Assessment CLE.
- Thursday, November 7, 2013, **Advanced Dispute Resolution Techniques** with Larry Rute at Washburn University School of Law.
- Friday, November 8, 2013, **Ethical Issues in Negotiation**, with Patrick Nichols, Washburn School of Law
- Friday, November 15, 2013, **Arbitration 101** with Larry Rute and John Phillips at the Kansas Bar Association, Alternative Dispute Resolution CLE.

If you would be interested in receiving more information on any of the above events, please contact us at info@adrmediate.com.



**Distinguished Fellows
of the International Academy of Mediators**



2008-2014 Super Lawyers

**Larry Rute, Licensed to Practice in
Kansas & Missouri**

MEDIATION QUOTE:

"The usual understanding in the literature is that the purpose [of empowerment in mediation] is to empower the parties. The data suggests otherwise: it is the mediator who is empowered by the parties' empowerment. The mediator sees her ability to reach a resolution of the dispute to be dependent on the parties' confidence and trust in her. She creates trust and confidence through their empowerment. It is this trust and confidence that empowers the mediator to do what is necessary to achieve resolution."

- Debbie De Girolamo, *The Fugitive Identity of Mediation: Negotiations, Shift Changes and Allusionary Action* (Routledge 2013) at 148

Featured Distinguished Panel Members of Associates in Dispute Resolution.

Hon. Timothy E. Brazil

In April 2011, Judge Brazil retired as Chief Judge of the 31st Judicial District, where he served for 22 years. While serving as Chief Judge, he handled civil, criminal and domestic dockets and regularly served as mediator/settlement judge for other courts in southeast Kansas. Following graduation from Washburn Law School in 1975, Judge Brazil served as an attorney for the Kansas Insurance Department until 1978 when he joined the law firm of Henshall and Pennington in Chanute, Kansas, becoming a partner in 1980. While in general practice he emphasized worker's compensation, personal injury and civil litigation.



Professional Activities:

Judge Brazil has been a member of the Kansas Bar Association since 1975, and served on the Bench/Bar and Ethics Committees as well as the Southeast Kansas representation on the Board of Governors from 1984 to 1990. He was a member of the Kansas Association of District Judges, and served on the Kansas Supreme Court Access to Justice Committee until his retirement from the bench.

Education:

J.D., Washburn School of Law, 1975

Mediation and Arbitration Services Offered

Judge Tim Brazil is available to assist you with mediation and arbitration services in commercial law, employment law, insurance law, medical/legal malpractice, tort and personal injury law and complex family law matters.

Hon. J. Patrick Brazil



He recently retired as Chief Judge of the Kansas Court of Appeals after almost 29 years as a Kansas judge, Judge Brazil was appointed as a District Judge in the Thirteenth Judicial District in 1972, where he served until his appointment to the Kansas Court of Appeals in 1985. He was appointed Chief Judge of the Court in 1995 and served as Chief until his retirement in January 2001. He has continued to serve the Supreme Court and Court of Appeals as a Senior Judge. Since his graduation from Washburn University School of Law in 1962, he has been involved in a wide variety of legal matters and litigation, first as a lawyer in Pratt and Eureka, Kansas, then as a trial and appellate judge.

Professional Activities

He is past president of the Kansas District Judges Association; the 1994 recipient of the Kansas Bar Association Outstanding Service Award; a founding member of the Kansas Continuing Legal Education Commission; past chair and continuing member of the Kansas Judicial Qualifications Commission; and past-Secretary of the National Conference of Chief Justices of Intermediate Courts of Appeal. He is also a member and past president of the Sam A. Crow Inn of Court in Topeka and a Kansas Bar Fellow.

Mediation and Arbitration Services Offered

Judge Pat Brazil is available to assist you with mediation and arbitration services in commercial transactions, employment law, insurance law, medical/legal malpractice, product liability law and tort and personal injury law.

CASES & RESOLUTIONS

New Jersey Supreme Court Enforces Oral Settlement Agreement, But Requires Signed Agreements in the Future Before Mediation Ends

Parties in a commercial dispute reached an oral agreement in mediation, but the lack of a signed settlement agreement resulted in litigation. The New Jersey Supreme Court ultimately upheld the oral agreement, but established a requirement that future mediated settlements must be written agreements signed before the mediation ends. The Court noted that the plaintiff could have avoided enforcement of the oral agreement simply by relying on the confidentiality of mediation. Instead, the plaintiff engaged substantively, responding to certified statements by the defendant and the mediator about the content of the mediation, and later expressly waived the mediation-communication privilege while deposing the mediator, before finally seeking to assert the privilege. The Court noted that the mediator - a retired judge - breached the privilege in his initial disclosures about the terms of settlement. While enforcing the oral agreement in this case since the privilege was waived, the Court stated that signed written agreements would be required in the future, which also could be satisfied by audio- or video-recorded agreements.

[Willingboro Mall, Ltd. v. 240/242 Franklin Avenue, LLC](#), No. A-62 069082 (N.J., August 15, 2013)

Use of Mediation in Class Action Settlements Helpful for Court Approval

A federal court in [Moore v. Verizon Communications Inc.](#) approved the mediated settlement of litigation against Verizon on behalf of a nationwide class of Verizon customers who had been "crammed" or billed unauthorized charges. The court noted that the parties' decision to settle was fully informed in part due to the extensive exchange of information for mediation, multiple briefings during mediation, and six full-day mediation sessions over the course of a year. The court also relied on the experience of the mediator and his support for the settlement, and concluded that there was no fraud or collusion based on the scope of the mediation and the mediator's description of the process. Further, in [Custom LED, LLC v. eBay, Inc.](#), in analyzing whether to approve the settlement of a putative class action, the court noted the fact that the parties participated in private mediation suggested that the settlement process was not collusive, but found other deficiencies that the parties needed to address prior to court approval.

[Moore v. Verizon Communications Inc.](#), No. C 09-1823 SBA (U.S.D.C. Cal., August 28, 2013), [Custom LED, LLC v. eBay, Inc.](#), No. 12-cv-00350-JST (U.S.D.C. N.D. Cal., Aug. 27, 2013)

Detroit Bankruptcy Judge Appoints and Empowers Mediator Who Adds Additional Mediators

Emphasizing the desirability of consensual agreements between Detroit and its creditors compared to a unilateral plan, the federal bankruptcy judge overseeing the massive Detroit bankruptcy appointed another federal judge as the mediator to work with Detroit and its 100,000 creditors as they seek to address \$18 billion of debt. The mediator, in turn, appointed a team of current and former federal judges from Michigan, Oregon, Colorado and Illinois, and has the authority to issue any order needed to facilitate mediation.

[Detroit Free Press](#) (July 24, 2013); [MLive](#) (August 2, 2013); [The Detroit News](#) (August 13, 2013); [The Detroit News](#) (August 16, 2013); [Bloomberg](#) (August 20, 2013)

Other Notable & High Profile Proceedings

- A federal judge ordered the NFL and the 4,200 players suing over brain injuries into mediation in July and settlement was reached in August for \$765 million, plus attorneys' fees that may push the total close to \$1 billion. [PBS/Frontline](#) (July 10, 2013); [ESPN Outside the Lines](#) (September 1, 2013); [ABC News](#) (August 30, 2013)
- An appellate court remanded a dispute over an annuity for determination of whether there had been a meeting of the minds in the mediation where the written settlement agreement did not clearly state all the terms and the insurance company provided one number for the value of the annuity during the mediation and a much larger number afterwards. [National Western Life Insurance Co. v. Dunn](#), No. 2011-CA-01515-COA (Miss. App., July 16, 2013)
- Mediation resulted in settlement under Nevada's home foreclosure mediation program, but the terms were not included in the settlement agreement, resulting in ongoing litigation. [Addington v. Bank of America, NA](#), No. 3:12-cv-00548-MMD-WGC (U.S.D.C. D. Nev., August 6, 2013)

NEWS & INITIATIVES

Use of Mediation Increasing in Technology Agreements and Disputes

A survey conducted by the World Intellectual Property Organization's (WIPO) Arbitration and Mediation Center shows increasing interest in mediation among technology professionals. The survey indicates that dispute resolution options are commonly selected based on cost and time, and that litigation is the most expensive and time-consuming. Technology litigation takes about three years and nearly \$500,000 on average, and even more time and nearly twice as much expense for litigation abroad. Arbitration is viewed as quicker, at about one year, but with costs exceeding \$400,000 per case. By contrast, mediation takes about eight months on average and costs less than \$100,000, and also encourages parties to find workable business solutions. Respondents report that their new technology agreements now include mediation clauses (often followed by other processes) as often as arbitration clauses.

[Intellectual Property Magazine](#) (July/August 20)

Ontario Reconsiders Judicial Mediation

An Ontario Bar Association task force on judicial mediation released a report recommending a separation of judicial dispute resolution from pretrial management. The two functions are currently combined at a pretrial conference, which can cause confusion since parties don't know which aspect the judge will emphasize. On the other hand, some are concerned that separating the functions will reduce efficiency and require greater resources. The task force seeks further input from stakeholders before drafting rules.

[Law Times](#) (July 22, 2013)

Mediation Programs Are Resolving Insurance Disputes from Hurricane Sandy

New Jersey's mediation program for insurance claims from Hurricane Sandy has received some 500 requests and has mediated nearly half, with settlement of just under 70 percent. The average residential settlement has been about \$114,000. But another 17,000 claims have not yet been settled in New Jersey. New York's mediation program began two months earlier than New Jersey's and has already received 2,300 requests and mediated 1,800. [Insurance Journal](#) (August 14, 2013); [The Star Ledger-NJ.com](#) (August 11, 2013)

Other Notable News Items

- Florida's Department of Consumer Services is gathering input about the state's program for mediating insurance disputes over residential property damage claims. [Property InsuranceCoverage Law Blog](#)(August 10, 2013)
- The Massachusetts Attorney General awarded an additional \$1.5 million to local consumer and mediation programs, making a total of 34 programs funded throughout the state from settlement funds. So far in fiscal 2013, the programs have mediated over 10,000 cases and obtained the return of over \$6.5 million to consumers. [The Herald News](#)(July 5, 2013)
- The Administrative Conference of the United States (ACUS) is researching the underlying causes of Freedom of Information Act (FOIA) litigation and how mediation and other forms of alternative dispute resolution might help. Over 650,000 FOIA requests were filed last year with federal agencies. [ACUS](#)(July 9, 2013)
- North Carolina has enacted legislation encouraging mediation between homeowners and their associations before litigation is filed, but some believe that mediation should have been mandatory. [StarNewsOnline](#)(July 2, 2013)
- The National Park Service hired a mediation company to facilitate two days of meeting in the Grand Valley with the public on their experiences with the park and any concerns with park policy. [Glenwood Springs Post Independent](#)(July 11, 2013)

International Mediation Developments

- A mediation process is being launched in the **U.K.** by the Post Office to resolve concerns after a faulty computer system resulted in sub-postmasters being wrongly accused of fraud and some even being sent to jail. [ComputerWorldUK](#)(August 30, 2013)
- The Legal Aid Council of **Nigeria** has set up ten new offices to train traditional and religious leaders how to mediate, with funding from the Japanese government through the World Bank. [Nigerian Tribune](#)(August 20, 2013)
- **Belarus** enacted a law on mediation, establishing a legal and organizational framework for mediation to encourage its development. [Belarusian Telegraph Agency](#)(July 23, 2013)
- The justice ministry of **Lebanon** has agreed with the World Bank's International Finance Corporation to establish court-referred mediation for commercial disputes in order to support economic growth. [AMEInfo.com](#)(July 3, 2013)
- **Armenia** is working to develop both mediation and arbitration as part of a business-enabling reforms agenda, with help from USAID and the U.S. Embassy in Armenia. [PanArmenian](#)(July 12, 2013)
- A Supreme Court justice in **Pakistan** urged new judges to use mediation and other forms of alternative dispute resolution, noting that such mechanisms are deeply rooted in Pakistani society and culture. [Pakistan Observer](#)(July 2, 2013)
- The Punjab and Haryana High Court in **India** has begun sending information about alternative dispute resolution to parties in every litigation, and judges can compel mediation. The two states currently have 28 mediation centers, and by the end of the year every district will have a mediation center. [ChandigarhTribune](#)(July 13, 2013)
- **Thailand** is establishing a medical mediator group to resolve disputes over payments for treatment involving foreigners, as part of a policy to make Thailand a medical hub. [Bangkok Post](#)(August 13, 2013)
- With the addition of the Moneylenders Association, the Restaurant Association, the Singapore Clock & Watch Trade Association and the Chiropractic Association, a total of 36 associations in **Singapore** will now use mediation as a first step in resolving consumer disputes. [Channel NewsAsia](#)(July 29, 2013)
- The government of **Hong Kong** is working to foster a mediation-friendly environment to enhance its status as an international financial and commercial center. More than 40 prominent entities signed a "Mediate First" pledge at an event organized by the Steering Committee on Mediation. [7thSpaceInteractive](#) (July 18, 2013); [South China Morning Post](#)(July 17, 2013); [Mediate First](#)
- If re-elected, the Labor government in **Australia** plans to appoint an independent mediator to deal with any deadlock in developing an industry code of conduct for farmers, processors and supermarkets. [Farmonline](#)(August 28, 2013)
- **New Zealand** is in the early stages of considering whether a debt mediation law for farmers would be helpful, similar to those in place in Australia, the U.S. and Canada. [Radio NewZealand](#)(July 11, 2013)
- The parliament of **Samoa** passed legislation without objection to establish a Mediation Council which will have nine members and work to resolve civil disputes. [Talamua Online](#)(August 6, 2013)

UPDATE ON HOME FORECLOSURE MEDIATION

Update on Home Foreclosure Mediation

- **Connecticut** has enacted legislation providing additional protections for homeowners facing foreclosure, streamlining the foreclosure mediation process and broadening the possible outcomes. Lenders are to be more responsive by having representatives with full settlement authority present during the mediation session; borrowers must provide a complete financial package to lenders at the beginning of the mediation period. Mediators are now required to file a report with the court after each mediation, indicating whether further efforts are needed or would be beneficial. [StamfordPatch](#)(August 13, 2013); [PublicAct 13-136](#)
- The board of Kane County, **Illinois** approved a proposal by the chief judge of the circuit court to establish a foreclosure mediation program. Homeowners will be sent a notice about mediation, but have the opportunity to opt out. The court will select and train mediators from the ranks of local lawyers. The cost of the program will be covered by a \$50 fee charged lenders for each foreclosure brought in the county. [KaneCounty Chronicle](#)(August 15, 2013); [Chicago Daily Herald](#)(July 27, 2013)
- The governor of **Missouri** refused to veto legislation prohibiting local laws or ordinances from dealing with real estate loans, which eliminated the mandatory foreclosure mediation provisions in both St. Louis County and the City of St. Louis. [St. Louis Beacon](#)(July 12, 2013)
- The city council of Lynn, **Massachusetts** unanimously passed an anti-foreclosure ordinance that would require lenders to participate in mediation with homeowners prior to foreclosure, and sent it to the mayor, who has not stated whether she will sign or veto the measure. If it becomes law, litigation is expected. The Massachusetts Bankers Association opposes regulations that vary city by city and urges delay until a state task force completes its foreclosure prevention study in December. [The Daily Item](#)(July 22, 2013)
- **Oregon's** newly expanded state foreclosure mediation program went into effect in early August, with a small wave of foreclosure notices issued in advance of the new requirements. The new legislation extends mediation to judicial foreclosures, which had become the norm following the 2012 foreclosure mediation legislation. Oregon banks had sought a longer implementation period, but have pledged to get the necessary forms together and train their staffs as quickly as possible. [Oregon Foreclosure Avoidance Program](#); [The Oregonian](#)(August 14, 2013); [OregonLive](#)(August 4, 2013)

WORTH NOTING

OTHER NOTEWORTHY NEWS:

IMI Expands Program to Mediation Advocates

The International Mediation Institute is expanding its focus beyond mediator certification to include mediation advocates by developing a comprehensive set of Competency Criteria of Mediation Advocates/Advisors to help parties choose suitable professional assistance for mediation. [IMI](#)(July 29, 2013)

Survey Compares Volunteer and Professional Mediators

A comprehensive survey of 1,000 volunteer mediators in the U.S. provides insightful comparisons between volunteer and professional mediators, along with extensive information on demographics, expertise and roles, motivations, institutional engagement, case types and volume, approach to mediation, satisfaction, preferences, and more. Estimates indicate there are over 30,000 volunteer mediators in the U.S. who mediate over 430,000 disputes a year. [Advancing Dispute Resolution](#); [Volunteer Mediators: The Composition, Contribution, and Consequence of ADR Altruists](#)(August 2013)

October 17 Is Conflict Resolution Day

The Association for Conflict Resolution is promoting the international celebration of Conflict Resolution Day with posters, buttons and an online store with merchandise, including tee shirts, tote bags and ceramic mugs. [Association for Conflict Resolution](#)(August 8, 2013)

Other Items of Interest

Increasing analysis and attention is being paid to how and why mediators do what they do during mediations. [Court ADR Connection](#)(July 2013) (Registration Required)

Virtual Mediation Lab, a project of ACR Hawaii, and the [National Association for Community Mediation](#) are partnering to enable community mediation centers to use online tools for providing mediation services and education. [Virtual Mediation Lab](#)(July 31, 2013); [Press Release](#)

Other Cases & Resolutions:

The NCAA has agreed with plaintiffs to enter mediation over concussion litigation that could include thousands of former NCAA athletes across multiple sports. A federal judge in Illinois granted a stay of litigation to permit time for mediation. [USA Today](#) (August 19, 2013)

A trademark dispute over the slogan "Play Hard, Pray Harder" was resolved in mediation between the All-Star right fielder for the Los Angeles Angels, Josh Hamilton, and a Texas company. [News9](#) (July 29, 2013)
Mediation was successful in federal litigation by a public airport against the U.S. Secret Service for damages to a runway from a surprise visit by President Obama in 2010. [Telegram & Gazette](#) (August 20, 2013)

Two state lawmakers are going to mediate with the county against which they brought litigation over concerns that the county is building a mini-gym rather than a respite care center as intended. [Albuquerque Journal](#) (August 31, 2013)

Former Senate Majority Leader George Mitchell was selected by the governor to mediate the Minnesota Orchestra's lengthy labor dispute, despite lack of substantial experience as a labor-management mediator. The musicians have been locked out since October 2012. A mediator's proposal to return the musicians to work while negotiations continued was reportedly accepted by the musicians, but not the board. [Star Tribune](#) (July 24, 2013); [KSTP.com](#) (August 16, 2013)

Litigation by shareholders of Massey Energy over the explosion that killed 29 workers has been stayed for six months while the parties pursue mediation. Negotiation has been under way since December 2011 and the parties now feel they need a mediator to make further progress. [West Virginia Record](#) (July 24, 2013)

A dispute between Walker County, Georgia, and its cities over how to allocate \$50 million in sales tax revenues is being mediated. Confidentiality in the mediation is possible because the Georgia Open Meetings Act makes an exception for mediation among governments. [Times Free Press](#) (July 18, 2013)

Residential Capital's junior bondholders seek additional mediation in an effort to collect interest that has accrued. One of the largest mortgage servicers and lenders in the country, ResCap filed for Chapter 11 bankruptcy in May 2012, and mediation has gotten the company almost to the point of exiting Chapter 11. [NASDAQ](#) (July 19, 2013)

Baylor University has been in mediation with its alumni association, as ordered by a federal court, over plans to demolish the alumni center to make way for a new football stadium. [Waco Tribune-Herald](#) (July 23, 2013)



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