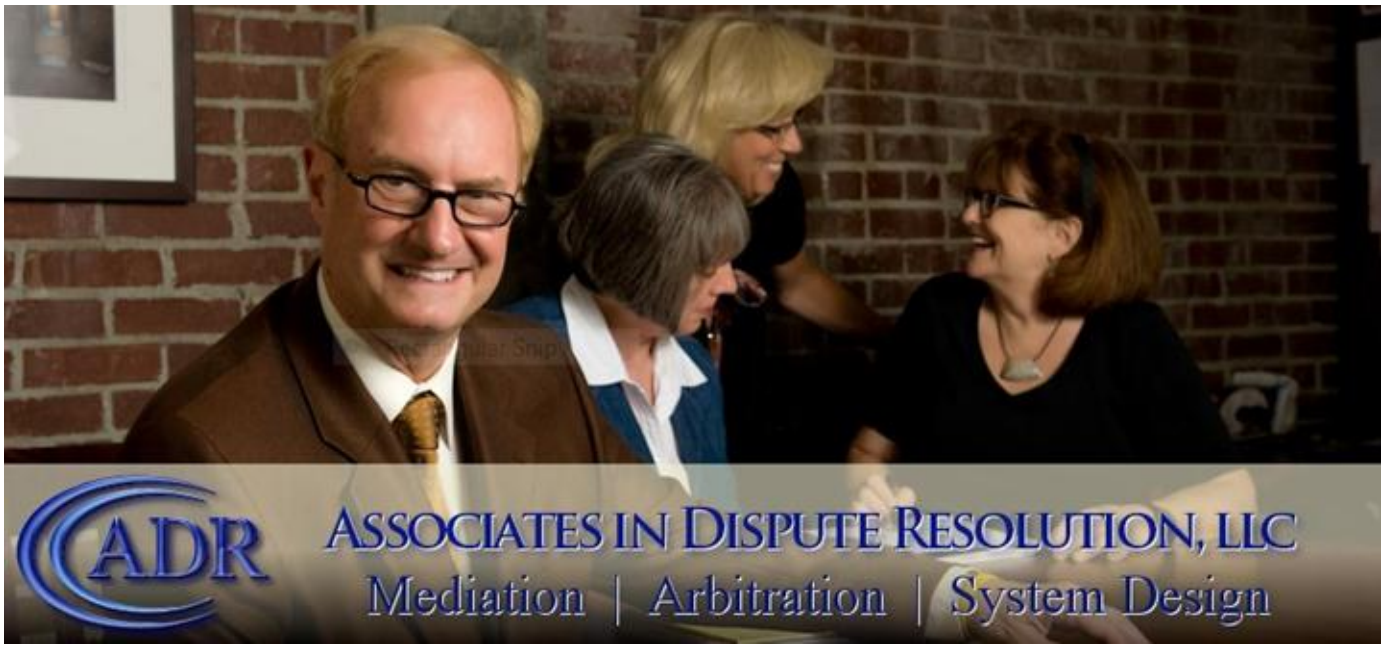
Dispute Resolution News Update

February 2013



IN THIS NEWSLETTER:

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.

Kansas Court of Appeals Approves Pilot Mediation Project

In January 2013, the Kansas Court of Appeals announced that over the next several months it will be conducting a pilot project to explore settlement of selected cases currently on file before the Kansas Court of Appeals. The Pilot Project has been developed by the Court of Appeals Appellate Mediation Committee in response to recommendations found in the Report of the Kansas Supreme Court's Blue Ribbon Commission. This Pilot Project is an attempt to resolve conflicts without incurring additional expense and delays.

The Pilot Project will start with 20 mediation cases. These cases will be conducted by volunteer lawyer mediators as part of their *pro bono* commitment. Any future extension of the Pilot Project would be on a fee-for-service basis. The Mediation Committee will ask the parties, lawyers, and mediators their opinion of the process before reporting to the full Court of Appeals with a recommendation to proceed with a fee-for-service appellate mediation program in Kansas. Anyone seeking to assist with this project are asked to contact Art Thompson, Office of Judicial Administration, 301 S.W. 10th Avenue,

Topeka, Kansas 66612. Art can be reached by telephone at (785)291-3748 or via e-mail: thomspon@kscourts.org.

Advisory Council on Dispute Resolution Undertakes Pilot Project in Several Kansas Judicial Districts

The Advisory Council on Dispute Resolution is currently providing direct assistance to several Kansas Judicial Districts in developing new dispute resolution processes. These dispute resolution processes under consideration include: Mandatory Civil Mediation, Felony Mediation, Mandatory Domestic Mediation, Domestic Early Neutral Settlement Conferences, Domestic Mediation Sliding Scale and Parenting Coordination.

Kansas Judicial Districts receiving staff support from the Advisory Council include the 3rd Judicial District(Shawnee County), 6th Judicial District (Bourbon, Linn and Miami Counties), 7th Judicial District (Douglas County), 10th Judicial District (Johnson County), 18th Judicial District (Sedgwick County), 21st Judicial District (Clay and Riley Counties), 28th Judicial District (Ottawa and Saline Counties) and 29th Judicial District (Wyandotte County). The Council will give special consideration on how to serve military cases when service members come in contact with civil courts. Those seeking additional information regarding these programs should contact Larry Rute (Chair) at larry@adrmediate.comor Art Thompson, Office of Judicial Administration, thompson@kscourts.org.

MEDIATION QUOTE:

"Mediation is usually a by-product of failure - parties often turn to it because they have been unable to resolve their differences alone.... [M]ediation may establish trust and strengthen a relationship or help terminate a relationship in a manner that minimizes costs and psychological harm. Mediation also comes with an ancient pedigree. Its Confucian, biblical and aboriginal origins centre on forgiveness, reconciliation and community."

- Hon. George W. Adams, Q.C., *Mediating Justice: Legal Dispute Negotiations*, 2nd Ed. (CCH Canadian Limited 2011) at 180

CASES & RESOLUTIONS

Indiana Court Creates Exception to Mediation Confidentiality

An Indiana appellate court established a potentially large exception to mediation confidentiality by focusing on the reference in the Indiana Alternative Dispute Resolution rule to Indiana Rule of Evidence 408 on offers to compromise, which permits evidence relating to compromises to be admitted for other purposes. On that basis, the appellate court permitted use of mediation communications in court to determine whether a mediated settlement agreement should be modified due to mistake. While the issue arose in a family law matter, the analysis is not limited to such cases. The court stated that its holding is consistent with the Uniform Mediation Act which provides an exception if the need for the evidence substantially outweighs the interest in mediation confidentiality. After reviewing the mediation communications, however, the court found there had been no mistake in the agreement. The case is on appeal to the Indiana Supreme Court.

Horner v. Carter, No. 34A02-1111-DR-1029 (Ind. App., June 13, 2012); Just Court ADR (December 4, 2012)

U.K. Court Does Not Penalize Refusal to Mediate Due to Frequent Offers to Negotiate

While unreasonably rejecting mediation in the U.K. can result in the successful litigant not being awarded its costs (including attorneys' fees), the Technology and Construction Court concluded that the defendant's rejection of mediation in ADS Aerospace Ltd. v. EMS Global Tracking Ltd. was reasonable. The court recognized the many benefits of mediation, but was persuaded by the facts that the defendant had repeatedly sought to engage in direct negotiations which the claimant continually refused, mediation was only sought by the claimant shortly before trial, the offers exchanged revealed a huge gap in the parties' positions, the claimant's decision-maker would not have accepted a nuisance offer based on his trial demeanor, and the defendant reasonably believed it had a watertight case. As a result, the court ordered a partial payment of costs of £525,000 while total costs were being calculated.

ADS Aerospace Ltd. v. EMS Global Tracking Ltd., [October 24, 2012] EWHC 2904 (TCC).

Heads of Agreement Settlement in Mediation Results in More Litigation

Mediation over the sale of a super yacht marina resulted in a settlement written up in a "heads of agreement" that was to be followed by a more formal document. However, the final agreement was not completed before one party withdrew from negotiations and the other sued to enforce. The trial judge found the heads of agreement binding and ordered specific performance, including terms that were in drafts of the incomplete formal agreement. The appellate court agreed that the heads of agreement was binding, because one term referred to its "binding nature," despite arguments that it should be void for uncertainty or incompleteness. However, the appellate court concluded that there had not been any further binding agreements on particular clauses in the later drafting, so the agreement to be enforced was merely the terms in the heads of agreement plus mechanical provisions to implement it.

Malago Pty Ltd. v. AW Ellis Engineering Pty Ltd., [2012] NSWCA 227; International Law Office (November 6, 2012)

NEWS & INITIATIVES

Mediation Alternative to Massachusetts Tax Appeals

The Massachusetts Department of Revenue (DOR) is beginning a pilot mediation program for protests over assessments, which is modeled in part on an IRS mediation program. DOR appeals officers will act as mediators once they are trained, although taxpayers can bring in professional mediators at their own expense. The pilot program requires a minimum of $1 million in dispute and has a four-month deadline for mediation. Without mediation, an internal appeal generally takes a year and may be followed by an even longer and more expensive appeal to the state Appellate Tax Board. Tax lawyers support the idea of mediation and are generally optimistic about the new program as they wait to see how it unfolds in practice. DOR's goal is to expand the mediation program to be able to address 35 cases at a time.
Boston Business Journal (November 5, 2012)

Domain Name Consultant Offering Dispute Resolution Services

Following ICANN's announcement of a drawing process for assigning priorities to all new gTLD (generic Top Level Domain) applications, domain name consultant RightOfTheDot launched a mediation service and private auction for settling claims between applicants for the same new gTLDs. Mediation requires agreement of all parties and is encouraged as the optimal way of resolving conflicting claims to avoid the time and cost of relying on an auction.
The Sacramento Bee (November 2, 2012); RightOfTheDot.com

Maryland Updates Rules for Court-Referred Mediation

The Maryland Court of Appeals has revised its rules for court- referred mediation, making numerous amendments to Title 17 which took effect on January 1. These include changes in the court's process for designating mediation and requires the maximum number of hours of required participation to be stated, along with an hourly rate that cannot be increased by the mediator even when the parties wish to mediate beyond the hours required; changes in the process for parties to alter the referral to mediation; changes in the timing of mediators' continuing mediation-related education; and clarification in committee notes that mediators may "record" points of agreement but should not be "authoring" agreements.
Maryland Revised Title 17 (November 1, 2012)

Mediation Needed for White Collar Crime

White collar crime is increasing rapidly, to £1.5 billion annually in the U.K. alone, heightening the need for mediation to resolve challenging situations. Mediation would provide for greater flexibility in addressing white collar crime, especially in complex cases and where there is significant ambiguity about what occurred. Encouraging the parties to have frank discussions may avoid protracted legal battles trying to find unknowable answers about right and wrong. Mediation would also reduce pressure on the court system, allow more options during plea bargaining, and reserve only the most serious cases for judicial attention. Moreover, from the company perspective, mediation can help mitigate risks of future recurrence, can apply corrective measures, and in serious cases can help ensure business continuity.
Mediation World (December 13, 2012)

Other International Mediation Developments

- Mediation and/or conciliation are used in employment disputes in key jurisdictions around the world, including **China**, **France**, **Germany**, **South Africa**, **Spain**, the **U.K.** and the **U.S.**
JD Supra (December 5, 2012)

- A specialized neutral venue for mediation and other forms of dispute resolution, the Dublin Dispute Resolution Centre, has been opened by the Bar Council and the Chartered Institute

of Arbitrators to address the local growth of alternative dispute resolution and the development of **Ireland** as an international venue for ADR. Irish Times (November 6, 2012).

- A new Mediation and Complaints-Handling Institution in **Denmark** will offer mediation services when Danish multinational enterprises (defined very broadly) are unable to resolve complaints relating to OECD Guidelines directly with complainants. Association of Corporate Counsel (November 22, 2012)

- Beginning January 10, all parties in pending or future litigation in **Romania** must demonstrate to the court that they have attended a free informational meeting on the benefits of mediation or face a fine. Association of Corporate Counsel (November 15, 2012)

- **Belarus** continues to work on mediation legislation that would involve a special commission within the Ministry of Justice. Bel Teleradio Company (November 16, 2012)

- A Mediation and Conciliation Centre has been established in Durban, **South Africa**, by the Durban Chamber of Commerce and Industry, offering the services of nationally and internationally accredited neutrals. East Coast Radio (November 6, 2012)

- The Securities and Exchange Commission of **Pakistan** is turning to mediation to resolve disputes involving regulated companies and has signed a memorandum of understanding with the Karachi Centre for Dispute Resolution. The SECP is seeking to make mediation mandatory prior to litigation under the laws it administers, as well as encouraging use of mediation clauses in agreements by companies. The International News (November 16, 2012); Business Recorder (November 16, 2012)

- The Mediation Center established last summer at the Lahore Chamber of Commerce and Industry to resolve business and commercial disputes in Lahore, **Pakistan**, has begun operations. The News (December 16, 2012)

- The Chief Justice of **India** emphasized the need for mediation to help people and to address the huge litigation explosion. In the first nine months of 2012, some 278,000 cases were referred to over 400 mediation centers across the country. The Hindu (November 11, 2012)

- Organizations that address medical negligence in **Malaysia** are encouraging patients to use mediation for resolving claims in order to obtain better outcomes much more quickly. The Star (December 16, 2012)

- The government of **Australia** has funded a new website to promote Australian mediators and arbitrators in the resolution of international commercial disputes. Asia Pulse (November 3, 2012) (Subscription Required); www.icdr.gov.au

- The pros and cons of sitting judges acting as mediators is being discussed in **Australia**, following recent changes in Victoria which now permit supreme court judges to mediate. Lawyers Weekly (December 11, 2012)

UPDATE ON HOME FORECLOSURE MEDIATION

Update on Home Foreclosure Mediation

- **Oregon** was prepared for large numbers of mortgage foreclosure mediations after legislation took effect in mid- July 2012, but has had only one homeowner go through mediation in the first four months. The state's mediation program applies only to non-judicial foreclosures, which nearly came to a complete stop following the new mediation requirements and an

unrelated appellate court ruling on lenders' recording practices. By contrast, the number of judicial foreclosures has more than tripled and an additional surge of foreclosure cases may be coming. Efforts are under way to obtain legislative solutions, including changes to the foreclosure mediation program to clarify notification requirements and define at-risk homeowners, along with more controversial proposals, such as expanding the mediation program to cover judicial as well as non-judicial foreclosures. Oregon Live (December 22, 2012); The Oregonian (November 19, 2012); Loan Safe (November 15, 2012)

- The new St. Louis (**Missouri**) County ordinance requiring lenders to offer mediation to homeowners facing foreclosure has been upheld by a local court against challenges from banks. The court determined that the ordinance was within the police power of the county, that the $350 mediation fee required from lenders was not a tax, and that there is no conflict with state law or preemption. The ordinance requires that written notice of a homeowner's right to request mediation be given within 20 days and good faith participation by the lender if the homeowner decides to mediate. After the decision, a county counselor stated that similar ordinances might be enacted across the state, including one under development in St. Louis City. Missouri Banks Assoc. v. St. Louis County, Missouri, No. 12SL-CC03659 (Mo. Cir. Ct., November 14, 2012); St. Louis Public Radio (November 14, 2012)

- The **Nevada** Supreme Court amended the rules of the state's foreclosure mediation program, effective January 1, to make mediators subject to codes of conduct, enhance the process for exchanging documents, and incorporate numerous other changes. Nevada Bar (December 14, 2012); Nevada Supreme Court Order (December 6, 2012)

- **Connecticut** strongly objected to a Federal Housing Finance Agency proposal to increase guarantee fees for Connecticut mortgages, as well as those in New York, New Jersey, Illinois and Florida, due to allegedly imposing excessive foreclosing costs on Fannie Mae and Freddie Mac by extending the timeline for foreclosure through legal protections, including mediation. Connecticut set out the extensive benefits from mediation, which it calculates to be about $42.6 million in savings per year for foreclosing owners from the 82% of mediations in which both parties end up better off, compared with the FHFA's claim of $14.9 million in excessive costs by focusing only on the 18% of mediations that eventually ended in foreclosure. Equities (November 13, 2012)

- The **New Jersey** legislature is considering a bill to codify the state's Foreclosure Mediation Program in order to make permanent the approach developed by the state judiciary in 2009. Foreclosure filing fees and fines would continue to fund the program on an ongoing basis. JD Supra (November 7, 2012)

- **Washington state** homeowners facing foreclosure have the right to mediation under state legislation that took effect in July 2012, but fewer than 10% of those eligible have sought mediation under the program. One law firm is offering public seminars to teach homeowners about foreclosure options, including mediation, and notes that a great number of clients are obtaining modified loans and dramatic reductions in monthly loan payments. Digital Journal (December 19, 2012).

- While the rate of home foreclosures is slowing nationwide, significant improvements in **Washington, D.C.** are being attributed to the availability of home foreclosure mediation as well as general improvements in the market. Washington Examiner (November 22, 2012)

CASES WORTH NOTING

Third Time Is Charm for Mediation of NHL Dispute

A Federal Mediation and Conciliation Service (FMCS) mediator has succeeded in helping resolve the National Hockey League dispute, with an agreement in principle between the league and union announced on January 6 that is expected to salvage the rest of the season. The NHL lockout began in mid-September, but the parties did not turn to mediation until late November when FMCS mediators were involved in two days of negotiations before suspending their efforts. In early December, the NHL Players Association requested that the mediators return, but they were not immediately available because of the port strike. [FMCS mediators helped avert a longshoremen's strike that could have crippled cargo movement at 15 ports. Sun Sentinel (December 28, 2012)] The league agreed to further mediation, but meetings with the mediators were limited in mid-December. Finally, the mediator got things moving with 13 hours of shuttling between the parties on January 4, and then reached agreement in an intense, 16 hour session through the night on January 5 and 6. SBNation (December 6, 2012); Courier Journal (December 24, 2012); Washington Post (January 6, 2013)

Extreme Restorative Justice

A remarkable story of forgiveness and the unprecedented use of restorative justice in a murder case was featured in a lengthy article in the New York Times Magazine. The murder of a young woman by her boyfriend occurred in the Panhandle region of Florida, known for law-and-order, but resulted in the young woman's parents seeking to forgive the boyfriend. Once they heard about restorative justice from a prison chaplain, the parents of both young people were interested in pursuing the deeper understanding, explanations and healing that can come from restorative justice, even though there was no way for the perpetrator to make things right. The parents brought in an expert
from California who guided the process, which involved a community
conference attended by both sets of parents, the perpetrator, a victims' advocate, lawyers and a priest. The process also included the prosecuting attorney, who began the session by stating the charges and summarizing the police reports, followed by lengthy, uninterrupted statements by the victim's parents, the perpetrator who explained in painful detail what had occurred, and his parents. In structuring the process, one goal was to seek diversion from the traditional criminal justice path. Such restorative-justice diversion occurs in several other places in the country, but was unknown in Florida. The parties agreed to use the pre-plea conference for the restorative justice community conference, at which - after everyone's statements - the victim's mother and father ended up suggesting a sentence of 5-15 or 10-
15 years, the perpetrator's parents concurred, and the perpetrator declined to suggest a term. The prosecuting attorney, aware of the likelihood of community concern, conducted additional inquiries before offering a plea bargain of 20 years on the charge of first degree murder, which if proven at trial would normally result in a mandatory life sentence. New York Times (January 4, 2013)

New Twists in Online Dispute Resolution

A new website, eQuibbly.com, seeks to bring the power of crowdsourcing to alternative dispute resolution with a free process where individuals can each write up their side of a dispute (the latest posting: "My neighbor keeps staring when I'm tanning in my bikini"), including their proposed solutions, and then the public can weigh in with comments and votes, which may be persuasive but are in no way binding. Each side is invited to use social media to encourage their friends to engage and cast votes. For more serious disputes, the parties can use private baseball-style arbitration - either binding or non-binding - or mediation, relying on arbitrators and mediators listed on the site or other neutrals chosen by the parties.

By contrast, a second new website, Gripevine.com, invites consumers to post complaints at no cost about companies with which they have interacted and are dissatisfied, with the expectation that positive publicity from resolving the complaints - and negative publicity from failing to do so - will encourage action by the companies. If companies do not respond quickly, consumers may ask their social media friends to provide support. The Guardian, University of California, San Diego (November 19, 2012); The Star (December 16, 2012); eQuibbly.com; Gripevine.com

Even New York Times Confuses Mediation and Arbitration

Despite ever growing use of mediation in the U.S. and around the world, basic confusion

continues over the difference between mediation and arbitration. But when the New York Times got it wrong in an article about arbitration last summer that included a headline stating that a mediator had taken action, consternation resulted among some. A professor wrote an article about the resulting furor on a dispute resolution listserv she administers, along with a clarifying op-ed piece for the New York Times, which it chose not to publish. City Universityof New York (December 19, 2012); Alt Newsletter (November 9, 2012); New York Times Article

BOOK REVIEW

Hon. George W. Adams, Q.C., *Mediating Justice: Legal Dispute Negotiations,* 2nd Ed. (CCH Canadian Limited (2011)

Book review by Jan Frankel Schau (ADR Services, fshau@shau@shaumediation.com)

It is rare and welcome to find a retired judge transformed into an intuitive, committed student and teacher of all things related to the art of mediation. Judge George Adams has written a second edition of *Mediating Justice* which is both thought provoking and practical.

Judge Adams is one of Canada's most experienced mediators, a former law professor, agency head and superior court judge. For that reason, it is particularly interesting to learn that entire areas of the law, such as motor vehicle accidents, have been removed from the courts and are now in the exclusive province of ADR.

Perhaps it takes a bird's eye view to make observations about the differences between, for example, dispute settlement negotiations, which are backward looking and distributive in nature, and deal- making negotiation, which looks optimistically toward the creation of wealth out of a future relationship or transaction. Astutely, Judge Adams notes that a settlement does not require a passing of judgment upon the parties and their conduct by some superior moral authority. Mediation, he points out, stresses the mutual interests underlying the legal claims and rational problem-solving, whereas the needs and wishes of the parties are not even relevant to a judge's decision.

Still, Judge Adams acknowledges that "trials and settlements cannot exist without each other. What ultimately propels legal dispute negotiation is the possibility of a trial occurring." Though "trials are imperfect" and carry "inherent uncertainties," it is "these realities that make bargaining a sensible way to resolve legal disputes." (P. 22.)

I enjoyed Judge Adams' ability to rise above the fray to dissect the nature of conflict and its resolution in the chapter entitled "Negotiation." There, he points out that the raw exercise of power or domination will seldom resolve conflict in the long run. Paradoxically, he goes on to observe, control is a function of cooperation of others. That is, in order to control a particular outcome, the only real means is to listen to the other stakeholders and integrate their ideas into the solution. Once you get their "buy in" or cooperation, you no longer need to heavily invest in enforcement to achieve control. You will own the outcome through cooperation. (Imagine the implications of this theoretical construct in our international relations and diplomatic efforts worldwide.)

The chapter on Negotiation also recognizes the complexity of conflict, noting that negotiation is often fast-paced, requiring immediate and sometimes irrevocable decisions, unlike trial, which is typically conducted under a recognized set of rules and customs. Still, he sees that the pressure of time produces urgency which tends to compress the settlement range towards a finite solution.

As a scientist might theorize, Judge Adams sees conflict as a succession of stages, beginning in latent form, becoming manifest, escalating and only then de-escalating. The sequence, he posits,

leads to a kind of enlightenment within the parties, as they appreciate their mutual need to bring the conflict to an end. It is only after this insight that the malevolent cycle of escalating conflict can be broken.

Judge Adams discusses "positional bargaining" in the context of a model which is characterized by a lack of candor, encouraging bluff and even misrepresentation. To a California lawyer who is consistently aware of the slippery slope of ethical negotiations, this acknowledgement was at once reassuring and alarming. He also points out that the ultimatum in a negotiation, a more coercive tactic than the misrepresentation, is an oft-misused and misunderstood move. That is, although many parties believe that firmness in negotiation will achieve better outcomes, the opposite is more often true: firmness will lengthen the negotiation and increase the risk that the parties fail to reach an agreement.

The book is written as a textbook, and indeed could be the subject of a full semester at a fine university in a master's degree program. Yet, it is practical and even enlightening for the practitioner, as well as anyone else who seeks to negotiate.

Not content to rely on anecdotes, practice or other academic's research, Judge Adams has brought together his own wisdom, theories, experience and heart in looking at the complicated relationship between "mediating" and "justice" in ways that are highly readable, understandable and profound.

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Lawrence, Kansas

5200 Bob Billings Pkwy., Suite 302, Lawrence, Kansas 66549

Dispute Resolution News Update
Editor: Larry Rute, larry@adrmediate.com
Assistant: Dawn Dawson, dawn@adrmediate.com

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